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COUNSEL FOR RESPONDENT

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 20-0325

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LANCE GERALD DEINES,

Petitioner,

v.

LYNN GUYER,  
Warden of the Montana State Prison,

Respondent.

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**ATTORNEY GENERAL'S RESPONSE TO PETITION FOR  
A WRIT OF HABEAS CORPUS**

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In compliance with this Court's July 7, 2020 Order, the Attorney General's Office responds to the Petition for Writ of Habeas Corpus (Petition) filed by Lance Gerald Deines (Petitioner), challenging his sentence in the Seventh Judicial District Court.

The State, without conceding that resentencing is not an appropriate remedy, does not object to Deines' request that the matter be remanded to the district court with instructions to strike the 25-year sentence imposed for Count II.

## **STATEMENT OF THE CASE AND PROCEDURAL HISTORY<sup>1</sup>**

In November 2000, Steve Berry (Berry) and two of his friends took a safe from Lance Gerald Deines' residence that contained drugs, money, and collector baseball cards. Deines learned about Berry's involvement and some of his friends brought Berry to Deines' house on November 25, 2000. While questioning Berry about his involvement in the burglary, Deines put a 9mm handgun in Berry's face and asked where the stolen items were. When Berry denied knowing what Deines was talking about, Deines instructed his friend, Chad Downs (Downs), to hit Berry.

After Downs struck Berry in the leg with a baseball bat, Berry admitted he was involved in the theft, and Deines and his friends drove to several locations with Berry trying to recover the items. Eventually, the group took Berry to a remote location where one person "roughed" Berry up and Deines fired his 9mm into the air and then pointed it at Berry. Berry begged Deines not to shoot him. After Berry assured Deines he would return his stuff, Berry was returned home.

On December 30, 2000, after learning Berry was at a local motel, Deines drove to the motel with Downs. Deines punched Berry in the mouth when Berry refused to leave with him. Downs struck Berry in the knee. Berry asked where

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<sup>1</sup>Unless otherwise noted, the following facts were obtained from Document No. 13 (Motion and Affidavit for Leave to File an Information) filed in District Court Cause No. 01-003. (Attached as App. 1.)

they were going, and Deines replied it did not matter. Deines and Downs retrieved a paint ball gun from Deines' house and then drove to a remote location outside of town. Deines first shot Berry with the paint ball gun. Then he instructed Berry to kneel and told him his life was over. Berry got up and begged for his life. Deines shot him in the face and then shot him five times in the head. Deines covered the body with boards and they left.

The next day, Deines demanded Downs help him destroy Berry's body. The two took Berry to a ravine where they set his body on fire using gasoline. As they drove back to town, Deines dismantled the 9mm and threw the pieces into a creek and a sink hole along the road. The pair returned the next day and further burned Berry's remains.

Berry's mother reported her son was missing on January 2, 2001. (App. 2.) The investigation led to information about the burglary of Deines' residence and detectives spoke to witnesses at the hotel room and interviewed Deines and his associates. (*Id.*) Two of Deines' friends relayed what happened when Deines confronted Berry in late November. (*Id.*) Deines' roommate eventually disclosed that Deines told him that he killed Berry. (*Id.*)

Deines was ultimately charged with: Count I, Aggravated Kidnapping for the events of November 30, 2000; Count II, Aggravated Kidnapping for the events of December 30, 2000; Count III, Deliberate Homicide or, in the alternative,

Count IV, Deliberate Homicide (felony murder with Count II as the underlying felony); Count V, Tampering with Physical Evidence; Count VI, Tampering with Physical Evidence; and Count VII, Tampering with Physical Evidence. (App. 3.)

On September 5, 2002, Deines entered guilty pleas to Counts I, II, and IV, pursuant to a plea agreement. (Apps. 4, 5.) Deines admitted that: he and three others held Berry against his will and subjected him to physical violence in retaliation for taking his safe; he and Downs took Berry to an isolated place and Deines shot him with a paintball gun to get him to pay Deines back for the money he stole; and that “during the continuing commission of the aggravated kidnapping described in Count II and to which I am pleading guilty, I, along with others, caused the death of Steve Berry who died as a result of multiple gunshot wounds to the head.” (App. 4.)

Deines was sentenced on October 23, 2002, in accordance with the plea agreement as follows: for Count I, a 25-year term of incarceration at the Montana State Prison (MSP); for Count II, a consecutive term of 25 years at MSP; and for Count IV, a consecutive sentence of 100 years at MSP. (App. 6.) The court further ordered that the last 30 years were suspended. (*Id.*)

Pursuant to Mont. Code Ann. § 46-22-101, Petitioner seeks an order from this Court remanding the case to the district court for an order striking his 25-year

sentence for Count II, pursuant to this Court’s July 30, 2019 decision in *Kills on Top v. Guyer*, Case No. OP 18-0656 (held, sentence for both aggravated kidnapping and deliberate homicide (felony murder) was facially invalid because convictions for both offenses violated federal and state double jeopardy constitutional protections since the aggravated kidnapping offense was a lesser included offense of the homicide).

### **STANDARD OF REVIEW AND APPLICABLE LAW**

Montana Code Annotated § 46-22-101(1) allows a person who is imprisoned for a “writ of habeas corpus to inquire into the cause of imprisonment or restraint and, if illegal, to be delivered therefrom.” The fundamental purpose of habeas corpus is to remedy “illegal” restraints or imprisonments (*e.g.*, a sentence which exceeds statutory or constitutional limits). *Lott v. State*, 2006 MT 279, 334 Mont. 270, 150 P.3d 337; *Thorne v. Batista*, 376 Mont. 547, 347 P.3d 263 (2014), 2014 Mont. LEXIS 562, \*3-4 (“purpose of the writ is to remedy gross wrongs or miscarriages of justice where legal avenues of relief are unavailable or inadequate”). Petitioner bears the burden of demonstrating sufficient legal cause to persuade the Court to grant the writ of habeas corpus. *Miller v. District Court*, 2007 MT 58, ¶ 14, 336 Mont. 207, 154 P.3d 1186; *Thorne*, at \*3-4.

## **ARGUMENT**

**I. Since Count II constitutes the predicate felony for Deines' felony murder conviction and sentence, he may not be sentenced for both offenses.**

The State agrees that pursuant to *In Kills on Top v. Guyer*, No. OP 18-0656, 2019 Mont. LEXIS 292, Order, at \*13 (Mont. Jul. 31, 2019), Deines may not be sentenced for both Counts II and IV.

Kills on Top was convicted of robbery, aggravated kidnapping, and felony murder and sentenced to the following consecutive terms: 40 years for robbery; life in prison for felony murder; and life in prison without the possibility of parole for aggravated kidnapping. Kills on Top petitioned for habeas relief under *State v. Russell*, 2008 MT 417, 347 Mont. 301, 198 P.3d 271 (double jeopardy protections prohibit a defendant convicted of felony murder to be sentenced for both the felony murder and underlying felony). After concluding *Russell* applied retroactively, this Court held that since the aggravated kidnapping offense was the predicate offense for felony murder, Kills on Top's aggravated kidnapping sentence must be vacated.

Like *Kills on Top*, the predicate for Deines' felony murder was the second aggravated kidnapping offense. Thus, based upon *Kills on Top*, Deines' sentence for Count II must be stricken.

## II. Remedy

“If the illegal portion of a sentence ‘affects the entire sentence’ and we are unable to discern what the district court would have done if it had properly applied the law, we remand for resentencing.” *Steilman v. Michael*, 2017 MT 310, ¶ 10, 389 Mont. 512, 407 P.3d 313.

Although the State believes that striking the 25-year term for Count II will “affect[] the entire sentence” and resentencing would be an appropriate remedy, following consultations with the Dawson County Attorney, Brett Irrigoin, and Mr. Irrigoin’s consultations with Mr. Berry’s family, the State is not requesting a resentencing hearing.

## **CONCLUSION**

This matter should be remanded to the district court with instructions to strike Deines’ 25-year sentence to MSP for Count II while the remainder of Deines’ sentence remains in force.

Respectfully submitted this 1st day of February, 2021.

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By: /s/ Katie F. Schulz  
KATIE F. SCHULZ  
Assistant Attorney General

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 1,377 words, excluding certificate of service and certificate of compliance.

/s/ Katie F. Schulz  
KATIE F. SCHULZ



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**APPENDIX**

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Motion and Affidavit for Leave to File an Information (1/23/01)

Doc. 13; Cause No. DC 01-003 .....App. 1

Search Warrant Applications (1/16/01)

Docs. 1, 5; Cause No. DC 01-003 .....App. 2

Second Amended Information (1/31/02)

Doc. 180; Cause No. DC 01-003 .....App. 3

Affidavit of Lance Gerald Deines (9/5/02)

Doc. 536; Cause No. DC 01-003 .....App. 4

Plea Agreement and Waiver of Rights (09/05/02)

Doc. 537; Cause No. DC 01-003 .....App. 5

Judgment and Order of Sentence (10/23/02)

Doc. 552; Cause No. DC 01-003 .....App. 6

## **CERTIFICATE OF SERVICE**

I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Petition for Writ to the following on 02-01-2021:

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Electronically signed by Wendi Waterman on behalf of Kathryn Fey Schulz  
Dated: 02-01-2021