IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0425

JAY DONALD WITKOWSKI,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Seventeenth Judicial District Court,
Valley County, The Honorable Yvonne Laird, Presiding

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PETITIONER AND APPELLANT
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3. Whether the sentence imposed by the court and the denial of postconviction counsel denied Witkowski due process.

STATEMENT OF THE CASE

While Appellant Jay Donald Witkowski was incarcerated in the Valley County Detention Center (VCDC) on a pending homicide charge, he and a codefendant restrained a guard and attempted to escape. As a result, Witkowski was charged in Valley County Cause No. DC 17-35 with attempted escape, aggravated kidnapping, criminal mischief, unlawful restraint, and disorderly conduct. (Doc. 4.)

Witkowski entered into a plea agreement in which he agreed to plead guilty to aggravated kidnapping, and the State agreed to dismiss the remaining charges and to recommend a 40-year sentence to be served consecutively to Witkowski's sentence for homicide. (Doc. 19.)

The district court sentenced Witkowski to 40 years in prison, to be served consecutively to his sentence for homicide that the district court had recently imposed in a separate case. (D.C. Doc. 32, available at Appellee's App. A.)

Witkowski petitioned for postconviction relief. (Doc. 45, available at Appellee's App. B.) The district court denied his petition without conducting a hearing on his claims or appointing him counsel. (Doc. 49, available at Appellee's App. C.) He appeals the denial of his petition.

STATEMENT OF THE FACTS

I. The offense

While Witkowski was incarcerated in the VCDC for his pending homicide charge in Cause No. DC 17-05, he and another inmate attempted to escape. (Doc. 1.) To do so, Witkowski's codefendant pinned a guard's arms to her side. (*Id*. at 2.) Witkowski told her they did not want to hurt her, but they wanted her keys. (*Id*.) She indicated that the keys were in her pocket, and Witkowski took them from her pocket. (*Id*.) Witkowski and his codefendant ran to the cell pod door, opened it, and then closed it and locked it behind them. (*Id*.) The guard was able to activate an intercom button to inform the dispatcher what had occurred, and the dispatcher remotely unlocked the door, allowing the guard to exit. (*Id*.)

The guard heard Witkowski and his codefendant in the kitchen. She discovered that they had locked the door and barricaded the door with a refrigerator. (*Id*.) She went down the hall and was able to see the inmates through a window in the kitchen. (*Id*.) She saw them try to use the keys they had taken from her to open the exterior access door. (*Id*.) She knew that they did not have a key that would allow them to open that door. (*Id*.)

Officers were able to unlock the kitchen door, shift the refrigerator, and enter the kitchen. (*Id*. at 3.) Witkowski and his codefendant were then arrested. (*Id*.)

II. Criminal proceedings

As a result of his conduct, Witkowski was charged in Cause No. DC 17-35 with attempted escape, aggravated kidnapping, criminal mischief, unlawful restraint, and disorderly conduct. (Doc. 4.) He pled guilty to aggravated kidnapping pursuant to a plea agreement in which the State agreed to dismiss the remaining charges and to recommend a 40-year sentence to be served consecutively to his homicide sentence. (Doc. 19.) At the change of plea hearing, Witkowski indicated that he was not under the influence, he was not suffering from any condition which interfered with his ability to understand, he had enough time to meet with his counsel, he was satisfied with the availability of his counsel, he

had no complaints about counsel, and he understood the rights he was waiving by pleading guilty. (Doc. 20.5 at 1-2.) He also indicated that he was not threatened or pressured to plead guilty and his plea was knowingly, intelligently, and voluntarily given. (*Id*. at 2.) The district court accepted the plea after finding that Witkowski's guilty plea and factual basis were entered knowingly, intelligently, and voluntarily. (*Id*.)

Before sentencing, a probation officer filed a letter updating the presentence investigation report that had been prepared for Witkowski's sentencing for homicide. (Doc. 24.) The letter included Witkowski's explanation of the reason for the offense, which stated, "I was overwhelmed with my situation and not properly medicated and let myself make a stupid decision resulting in the current charge." (*Id*. at 1.) The letter also included a victim impact statement, stating that the guard who had been restrained stated that she had been psychologically injured because she had disturbing thoughts about what might have happened. (*Id*. at 2.)

Witkowski's counsel appeared at the sentencing hearing through two-way video, and Witkowski waived his right to have his counsel personally present. (Doc. 31.5.)[1] During the sentencing hearing, Witkowski stated that he knew his actions were wrong and that he felt terrible about it. (*Id*. at 2.) His counsel asked

[1]Witkowski has not provided a transcript of the sentencing hearing, so the only information comes from the detailed minute entry provided by the court clerk. (Doc. 31.5.)

the court to impose a five-year sentence concurrent to his other sentence so that he would have the opportunity to obtain parole and pay restitution to the victims. (*Id*.) His counsel explained that he had provided letters of apology and was remorseful for his actions. (*Id*.) His counsel argued that the guard did not appear to be too intimidated by Witkowski, and she was released from the room within seconds. (*Id*.) His counsel stated that Witkowski's action was only to take the keys from the guard's pocket and that he told her he did not want to hurt her. (*Id*.)

The court imposed a 40-year sentence to be served consecutive to Witkowski's sentence for homicide. (*Id*.; Appellee's App. A.) The court imposed $11,275 in restitution, which was supported by an affidavit listing items in the kitchen that needed to be replaced. (Doc. 24, attached Aff.) The court explained that it had

> considered the arguments regarding [the guard] not showing fear and your fear. The corrections officer's ability to behave in a professional manner does not lessen your culpability or excuse your behavior. The trauma you have caused her is going to be ongoing and significant as long as she continues in her chosen career. You have repeatedly shown this court that you do not behave within the standards set by the community. When you feel frustrated, you lash out and you[ ] hurt people and you only consider yourself.

(Doc. 31.5. at 2.) The court found that imposing the sentences consecutively was commensurate to the offenses Witkowski had committed. (*Id*.)

The court issued a written judgment February 22, 2018. (Appellee's App. A.)

Witkowski filed a petition for an out-of-time appeal on October 30, 2020. *State v. Witkowski*, DA 20-0528. This Court denied his petition, noting that in 2018 he had filed a motion for an out-of-time appeal in his homicide case, but he waited another two years to file his motion in this case. *State v. Witkowski*, DA 20-0528, Order (Mont. Sup. Ct. Nov. 10, 2020).

III. Postconviction proceedings

On February 12, 2021, nearly three years after the written judgment was issued, Witkowski filed a petition for postconviction relief. (Doc. 45.) In claim one, Witkowski argued that Judge Laird was biased against him and "had her mind made up before it even started." (*Id*. at 4.) He argued that she unfairly imposed a 40-year sentence when "my participation was minimal," "[n]o one was hurt," and "the guard was able to push the button to get out of the cell block." (*Id*.) He also complained that Judge Laird "did not even look interested in what my attorney had to say [during the sentencing hearing], as she looked through papers, not even paying attention." (*Id*.) Witkowski asserted that Judge Laird did not consider his state of mind, his attorney in his homicide case was not working for him, and he was not consistently given his medications in jail. (*Id*. at 4-5.)

In claim two, Witkowski alleged that his counsel was ineffective because counsel never brought up mitigating factors, such as his state of mind and that he

was not being given his medication. (*Id*. at 4.) He argued that his attorney "seemed to give up" when the judge would not listen to his arguments. *(Id*.) He argued that his attorney should have investigated and looked at every witness involved, that his counsel never questioned anyone or offered any defense, and that his counsel never showed a photo of a person matching one of the guys from a Dodge pickup and never had the video from the train enhanced, which appears to be an argument about his counsel in his homicide case. (*Id*. at 5.) Witkowski claimed his homicide case was connected to his escape case because the circumstances of his pending homicide case were responsible for his attempted escape. (*Id*.)

In Witkowski's third claim, he argued that there was misconduct in the sheriff's department because the lead investigating officer, Luke Strommen, was subsequently convicted of felony sexual offenses. (*Id*. at 6.) He alleged that Strommen questioned him for hours and tried to trick him into confessing. (*Id*.)

Witkowski filed an affidavit in which he stated that Judge Laird had "judicial bias, unfair conduct in homicide case." (Doc. 47.) He again argued that the court did not consider mitigating factors when sentencing him in this case. (*Id*.) Witkowski also attached an unsworn letter in which he elaborated on his claims. (*Id*., attached letter.)

The court issued an order denying Witkowski's petition without requesting a response from the State or conducting a hearing. (Appellee's App. C.) Although Witkowski filed his postconviction petition after the time for filing had expired, the court declined to dismiss on that ground because this Court has required a court to allow the petitioner to present their position before a petition is denied as time-barred. (*Id*. at 3.) Instead, the court dismissed the petition because Witkowski failed to meet the statutory pleading requirements. (*Id*. at 7.) The court noted that "while Witkowski made several allegations relating to his claims, he neglected to: a) clearly set forth the alleged violations; or b) provide affidavits (other than his own self-serving affidavit), records, or other evidence to support his allegations." (*Id*. at 4.) The court reviewed each of Witkowski's claims and concluded that none of them met the pleading standards. (*Id*. at 5-7.)

SUMMARY OF THE ARGUMENT

The district court correctly dismissed Witkowski's postconviction petition without ordering a response from the State because he failed to provide any evidentiary support for his claims or set out specific allegations that would require an evidentiary hearing. Instead, he speculated that the court was biased against him, without providing any support for the claim. Similarly, Witkowski complained about his counsel, but he failed to cite to any evidence in the record to

support his claims. Even if his unsupported factual allegations were true, his vague allegations failed to establish a prima facie claim that his counsel was deficient or that he was prejudiced by counsel's performance. Finally, Witkowski argued that an officer's separate sexual offenses established misconduct, but he failed to demonstrate that there was any misconduct involved in the investigation of his case. Because none of his claims met the demanding pleading standards for postconviction, the court properly dismissed his petition.

Witkowski appears to be raising a separate argument challenging his sentence, which is barred because it could have been raised on direct appeal and because it was not raised in his postconviction petition. Moreover, he received a legal sentence that he agreed in the plea agreement that the State could recommend.

Finally, the district court did not err in denying Witkowski counsel because he was not entitled to counsel when a hearing was not required and exceptional circumstances requiring the appointment of counsel did not exist.

ARGUMENT

I. Standard of review

This Court reviews a district court's denial of a petition for postconviction relief to determine whether the court's findings of fact are clearly erroneous and

whether its conclusions of law are correct. *Heath v. State*, 2009 MT 7, ¶ 13, 348 Mont. 361, 202 P.3d 118. Discretionary rulings made by the district court in a postconviction relief proceeding, including rulings on whether to hold an evidentiary hearing, are reviewed for an abuse of discretion. *Heath*, ¶ 13. Mixed questions of law and fact presented by ineffective assistance of counsel claims are reviewed de novo. *Id.* A postconviction petitioner bears a heavy burden in seeking to overturn a district court's denial of postconviction relief based on ineffective assistance of counsel claims. *Baca v. State*, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948.

This Court reviews a district court's decision on a claim that the State breached a plea agreement for an abuse of discretion. *State v. Rahn*, 2008 MT 201, ¶ 8, 344 Mont. 110, 187 P.3d 622. To the extent the district court's ruling is based on the interpretation of a statute, however, this Court's review is *de novo*. *State v. Kelm*, 2013 MT 115, ¶ 18, 370 Mont. 61, 300 P.3d 687.

II. Witkowski's petition for postconviction relief is time-barred.

While the district court did not rely on the time-bar to dismiss Witkowski's petition, his petition is time-barred. A person seeking postconviction relief under Mont. Code Ann. § 46-21-102(1) must file a petition within one year of the date that the conviction becomes final. If a petitioner does not appeal, the conviction is final

when the time for appeal to the Montana Supreme Court expires. Mont. Code Ann. § 46-21-102(1)(a). In criminal cases, an appeal must be taken within 60 days after the entry of the final judgment. Mont. R. App. P. 4(5)(i); *State v. Garner*, 2014 MT 312, ¶ 23, 377 Mont. 173, 339 P.3d 1. If a petitioner appeals to the Montana Supreme Court but does not petition the United States Supreme Court for a writ of certiorari, the conviction becomes final when the time for petitioning the United States Supreme Court for review expires. Mont. Code Ann. § 46-21-102(1)(b). An appeal to the United States Supreme Court must be taken within 90 days after the entry of this Court's opinion. U.S. Sup. Ct. R. 13(1), (3); *Raugust v. State*, 2003 MT 367, ¶ 15, 319 Mont. 97, 82 P.3d 890. The time-bar established in Mont. Code Ann. § 46-21-102 "constitutes a rigid, categorical time prescription that governs post-conviction petitions." *Davis v. State*, 2008 MT 226, ¶ 23, 334 Mont. 300, 187 P.3d 654.

Because Witkowski did not file a timely appeal and his petition for an out-of-time appeal was never granted, his conviction became final when his time for appealing expired 60 days after the written judgment was issued. The judgment was issued on February 22, 2018, so his conviction became final on April 23, 2018. Witkowski had one year from that date to file his postconviction petition. He did not file until February 12, 2021, 22 months after his time for filing had expired.

The district court did not dismiss the petition as untimely because this Court has stated that a court must give a party an opportunity to respond before dismissing a petition as time-barred. (Appellee's App. C at 3 (citing *Davis*, ¶ 24).) It is unnecessary for this Court to address the time-bar on appeal, but the State raises the argument to preserve this defense.

III. The district court did not abuse its discretion when it dismissed Witkowski's petition because he failed to meet the pleading standards for any of his claims.

In his petition, Witkowski raised claims of judicial bias, ineffective assistance of counsel, and sheriff's department misconduct. All of the claims failed to meet the pleading standards because they relied on conclusory allegations and lacked evidentiary support. Accordingly, the court properly dismissed the petition without requiring a response from the State or conducting a hearing.

A. Pleading standards

The postconviction statutes are demanding in their pleading requirements. *Ellenburg v. Chase*, 2004 MT 66, ¶ 12, 320 Mont. 315, 87 P.3d 473. A petition for postconviction relief must "identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts." Mont. Code Ann. § 46-21-104(1)(c). The petition must also "be accompanied by a supporting memorandum, including

appropriate arguments and citations and discussion of authorities." Mont. Code Ann. § 46-21-104(2); *Ellenburg*, ¶ 12.

A district court may dismiss a petition for postconviction relief without holding an evidentiary hearing if the petition fails to satisfy the procedural threshold set forth in Mont. Code Ann. § 46-21-104(1)(c). *Hamilton v. State*, 2010 MT 25, ¶ 10, 355 Mont. 133, 226 P.3d 588. Additionally, a district court may dismiss a petition for postconviction relief without ordering a response if the petition, files, and records "conclusively show that the petitioner is not entitled to relief." Mont. Code Ann. § 46-21-201(1)(a). Alternatively, the court may order a response and, after reviewing the response, "dismiss the petition as a matter of law for failure to state a claim for relief or may proceed to determine the issue." Mont. Code Ann. § 46-21-201(1)(a); *Hamilton*, ¶ 12.

B. Claim one: judicial bias

The district court did not abuse its discretion when it denied Witkowski's judicial bias claim because the claim was based on speculation and was not supported by any evidence that Judge Laird was biased against Witkowski.

To begin with, it was unnecessary for the district court to even review this claim because Witkowski waived it by failing to object during the sentencing hearing. *See State v. LaField*, 2017 MT 312, 390 Mont. 1, 407 P.3d 682. Witkowski's claims of bias are based on the judge's statements and conduct during

the sentencing hearing. (*See* Appellee's App. B at 4-5.) In *LaField*, this Court declined to consider similar claims raised on direct appeal because the defendant failed to object at trial. *LaField*, ¶ 18. This Court explained that it had "made it clear that where a defendant does not object at trial to the remarks and conduct of the trial judge, the issue will not be considered upon appeal." *Id*. Witkowski has failed to obtain a transcript of the sentencing hearing to support his claims, but it appears from the minute entry that Witkowski did not object to the court's statements or conduct during the sentencing hearing. He thus waived the judicial bias claim that he raised in his petition.

Even if this Court reviews the judicial bias claim, the Court should conclude that the district court correctly denied the claim because Witkowski failed to meet the pleading standards. Because Witkowski does not allege that the judge had any reason outside of the proceeding to be biased against him, he appears to be raising a claim that the judge was actually biased against him. *See Buntion v. Quarterman*, 524 F.3d 664, 672-73 (5th Cir. 2008) (distinguishing between claims of "presumptive bias" and actual bias); *Crater v. Galaza*, 491 F.3d 1119, 1130-32 (9th Cir. 2007) (distinguishing between the "appearance of bias" and actual bias).

Judges must remain impartial. *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016); *LaField*, ¶ 18. But a judge's unfavorable opinion of a defendant that is based on the evidence presented in a case does not demonstrate actual bias.

Liteky v. United States, 510 U.S. 540, 555-56 (1994). The Supreme Court has explained that

> opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Id. at 555 (emphasis in original).

"*Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women . . . sometimes display." *Id*. at 555-56.

In dismissing Witkowski's judicial bias claim, the court correctly observed that Witkowski had "not provided any evidence to support his allegation of 'judicial bias, unfair conduct.'" (Appellee's App. C at 5.) The court noted that the letter Witkowski attached "is not a sworn statement, minimizes Witkowski's actions . . ., and is completely self-serving." (*Id*.) The court also noted that it had set forth the reasons for the sentence in the Judgment, where it noted that

> it had considered the statements made by the Defendant and his counsel regarding the behavior of the victim; considered Witkowski's statements regarding his hopelessness and fear; noted Witkowski's repeated failure to comply with the behavioral standards of the

> community; recognized Witkowski's inability to control his behavior when frustrated resulting in injury to others; determined Witkowski was a serious public safety risk and could not be in the community at the present time; and found Witkowski needed significant treatment and supervision before he could live in the community without being a harmful element to society.

(*Id*. at 5; *see also* Appellee's App. A at 4.)

The court noted that its reasoning, as set forth in the Judgment, "is in direct conflict with Witkowski's unsupported and self-serving assertions that the judge did not consider his state of mind, listen to the arguments of his counsel, or pay attention." (Appellee's App. C at 5-6.)

The court correctly dismissed this claim because it was unsupported by any evidence. Witkowski speculated that the court was not paying attention to him because the court was looking at documents. A judge looking down at documents does not establish that the judge was not listening or was biased. A court may listen to arguments from an attorney at the same time as it reviews documents from the case.

Nor does the length of the sentence imposed demonstrate that the court was improperly biased against him. As the court noted, it provided appropriate reasons for its sentence in the judgment. (*Id*. at 5; Appellee's App. A at 4.) The court properly considered Witkowski's behavior and the threat that he posed to society when sentencing him for aggravated kidnapping. The fact that Witkowski had

recently committed homicide and minimized his responsibility for his actions were important and legitimate considerations when imposing his sentence.

Because Witkowski did not provide any evidence to support his speculation that the court was biased against him, the district court could deny his claim under Mont. Code Ann. § 46-21-104(1)(c). Further, because Witkowski's allegations did not establish a claim of judicial bias, it was appropriate to deny this claim under Mont. Code. Ann. § 46-21-201(1)(a).

C. Claim two: ineffective assistance of counsel

1. Law applicable to claims of ineffective assistance of counsel

This Court reviews ineffective assistance of counsel claims applying the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). A postconviction petitioner has the burden to demonstrate by a preponderance of the evidence that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Baca*, ¶ 16; *Ellenburg*, ¶ 12.

A trial counsel's performance is deficient if it falls "below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances." *Whitlow v. State*, 2008 MT 140, ¶ 20, 343 Mont. 90, 183 P.3d 861. There is a strong presumption that counsel's actions were within the broad range of reasonable professional assistance. *Baca*, ¶ 17.

To establish that the defendant was prejudiced by counsel's deficient performance, a defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The likelihood of a different result must be "substantial." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). To demonstrate prejudice in a case where the defendant pleaded guilty or no contest, the defendant must demonstrate a reasonable probability that, but for counsel's errors, he would not have pleaded guilty or no contest and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Hardin v. State*, 2006 MT 272, ¶ 18, 334 Mont. 204, 146 P.3d 746.

2. None of Witkowski's IAC claims met the pleading standards.

The district court correctly concluded that Witkowski failed "to provide any evidence of deficient performance, relying instead on unsupported and fanciful allegations set out in a self-serving affidavit. Even if the Court were to accept Witkowski's allegations regarding deficient performance as truthful, Witkowski has not provided any evidence of prejudice." (Appellee's App. C at 6-7.)

Witkowski vaguely asserted that his counsel was ineffective in this case for failing to bring up the mitigating factors of his state of mind and issues with his medication. He failed to meet his burden under Mont. Code Ann. § 46-21-104(1)(c)

to allege facts and provide supporting evidence demonstrating that evidence about his state of mind or medication existed, which counsel had reason to be aware of and was deficient for failing to argue about during his sentencing hearing. Instead, his assertions are the type of conclusory allegations and self-serving statements that this Court has held are insufficient to establish a claim for postconviction relief. *See Kelly v. State*, 2013 MT 21, ¶¶ 9-11, 368 Mont. 309, 300 P.3d 120. As the court noted, Witkowski also failed to make any showing that he was prejudiced by his counsel's failure to make these arguments.

Witkowski's claim that his counsel "seemed to give up" (Appellee's App. B at 4) is similarly deficient. Witkowski fails to establish that there were meritorious arguments that his counsel was deficient for failing to make, and that he was prejudiced as a result of his counsel's failure to make those claims. The court thus properly denied this claim.

Witkowski's remaining claims appear to challenge the actions of his counsel in his homicide case. (*See* Appellee's App. B at 5.) He fails to demonstrate that the actions of his counsel in that case are relevant to the constitutionality of his counsel in this case. He claims that he would not have attempted to escape if his counsel in his homicide case were better, but he fails to demonstrate that his

unhappiness with his counsel in the homicide case could establish a legal defense for his escape.[2]

Accordingly, the district court properly denied this claim.

D. Claim three: sheriff's department misconduct

The district court correctly denied this claim because, as the court found, "[n]o evidence has been provided to demonstrate any misconduct by the Sheriff's Department." (*See* Appellee's App. C at 7.) Witkowski claimed there was misconduct in the sheriff's department because an officer who investigated his homicide case was later convicted of a sexual offense. But Witkowski does not establish any connection between the officer's sexual offenses and Witkowski's homicide case, nor does he establish how that relates to this case. Witkowski's conclusory allegation of misconduct is insufficient to establish a claim. *See* Mont. Code Ann. § 46-21-104(1)(c); *Kelly*, ¶¶ 9-11.

Witkowski also raised vague complaints about the circumstances of his interrogation in the homicide case, but he failed to provide any evidence to support the claim. Further, he waived any argument about his interrogation when he failed

[2]This Court's opinion affirming his conviction and sentence in the homicide case also demonstrates that while Witkowski sent a letter to the court complaining about the performance of his counsel in that case, he informed the court at his change of plea hearing that he had ample time to discuss the case with his counsel and was satisfied with their advice and, when the court asked him about his complaints in his letter, he retracted many of his complaints. *State v. Witkowski*, 2021 MT 297N, ¶¶ 3-9, 407 Mont. 440, 498 P.3d 1252.

to challenge it in the trial court and pled guilty to homicide. *See State v. Stone*, 2017 MT 189, ¶ 13, 388 Mont. 239, 400 P.3d 692 (explaining that a guilty plea waives all nonjurisdictional defects and defenses). He also fails to show how that affects the constitutionality of his conviction in this case for aggravated kidnapping, to which he also pled guilty.

IV. Witkowski's claim that the court improperly imposed his sentences consecutively is procedurally barred and lacks merit.

A. This claim is procedurally barred because Witkowski could have raised the challenge to his sentence on direct appeal and because he did not raise this claim in his postconviction petition.

In Witkowski's postconviction petition, he raised claims that the court was biased against him, his counsel was ineffective, and there was misconduct in the sheriff's department. (Appellee's App. B.) In Witkowski's second claim on appeal, he appears to be raising an additional claim arguing that the court improperly imposed the sentence in this case consecutively to his sentence in his homicide case. To the extent this is a judicial bias claim, it is addressed above. To the extent it raises a claim that his sentence was improper under state law, it is procedurally barred and has been waived.

First, the claim is procedurally barred because a claim challenging the legality of a sentence could be raised on direct appeal. Record-based claims that

could have been raised on direct appeal are procedurally barred by Mont. Code Ann. § 46-21-105(2). *Chyatte v. State*, 2015 MT 343, ¶ 14, 381 Mont. 534, 362 P.3d 854. Because this claim could have been raised on appeal, it is barred in postconviction.

Second, Witkowski waived this claim by failing to raise it in his petition for postconviction relief. *See* Mont. Code Ann. § 46-21-105(1)(a) (requiring all grounds for relief to be raised in the original or amended petition for postconviction relief); *Ford v. State*, 2005 MT 151, ¶ 20, 327 Mont. 378, 114 P.3d 244. Accordingly, this claim should not be reviewed on appeal.

B. The district court legally imposed a 40-year sentence consecutive to Witkowski's sentence for homicide.

If this claim is reviewed on the merits, it should be denied. Witkowski pled guilty to aggravated kidnapping. (Docs. 19, 20.5.) The plea agreement informed Witkowski that the offense was punishable by a sentence of up to 100 years in prison. (Doc. 19 at 1.) The plea agreement provided that the State would recommend a 40-year sentence, to run consecutively to Witkowski's sentence in the homicide case, which is the sentence the court imposed. (*Id*. at 4; Appellee's App A at 4-5.) In exchange, the State agreed to dismiss all counts other than aggravated kidnapping. (Doc. 19.) By entering into a plea agreement that allowed the State to recommend the sentence that he ultimately received, he waived his

current claim that the court should not have imposed that sentence. *See Stone*, ¶ 13 (noting that defendants waive nonjurisdictional defects when they plead guilty).

Further, the sentence imposed is well within the range that the district court could legally impose. Under Mont. Code Ann. § 45-5-303(2), the court could impose a sentence for aggravated kidnapping of not less than 2 years or more than 100 years. Witkowski's 40-year sentence is well within that range and was thus legal. Also, the court stated in its reasons for its sentence that it considered Witkowski's statements regarding his hopelessness and fear, demonstrating that, contrary to Witkowski's claim, the court considered his state of mind. (Appellee's App. A at 4.)

Witkowski argues that the court should have imposed his sentence in this case concurrent to his sentence for homicide. But Mont. Code Ann. § 46-18-401(1) establishes a default for sentences to run consecutively when a person serving a term of commitment is sentenced for another offense. Further, it would have been unreasonable for the court not to have imposed the sentences consecutively because Witkowski committed aggravated kidnapping long after he committed homicide. If the court had imposed the sentences concurrently, Witkowski's sentence for aggravated kidnapping would have merged with his sentence for homicide, and he would have received no punishment for committing a severe offense. Witkowski seems to believe that sentences should be imposed concurrently if there is any

factual connection, but there is no authority to support that claim and no law required the court to impose his sentences concurrently. The court properly exercised its discretion when it imposed his sentence in this case consecutively to his sentence for homicide.

V. The court did not deny Witkowski due process when it imposed a sentence within the legal range and declined to appoint postconviction counsel.

A. Witkowski's sentence does not violate due process.

Like the sentencing claim discussed above, this claim is procedurally barred because it could have been raised on direct appeal and is waived because it was not raised in his postconviction petition. Further, there is no merit to the claim. Witkowski has failed to provide any support for his assertion that his sentence violated due process. He was informed of the potential range of punishment, and he entered into a plea agreement that allowed the State to request the sentence that was ultimately imposed. (Docs. 19, 20.5.) He was sentenced following a hearing at which he had the opportunity to challenge evidence presented against him and to present his case for a lesser sentence. As such, he was afforded due process.

B. The court's failure to appoint counsel did not violate due process.

Witkowski was not statutorily entitled to the appointment of counsel in his postconviction proceeding. A court is required to appoint counsel if "a hearing is

required or if the interests of justice require." Mont. Code Ann. § 46-21-201(2). The court correctly concluded that a hearing was not required, so the court was not required to appoint Witkowski counsel under that prong of the statute.

The interests of justice also did not require the court to appoint counsel. A court may appoint counsel "in the interests of justice . . . only when extraordinary circumstances exist." Mont. Code Ann. § 46-8-104(2). "'[E]xtraordinary circumstances' includes those in which the petitioner or appellant does not have access to legal materials or has a physical or mental condition or limitation that prevents the petitioner or appellant from reading or writing in English." Mont. Code Ann. § 46-8-104(3). Witkowski did not demonstrate that extraordinary circumstances required the court to appoint him counsel. He filed his petition in English, demonstrating his ability to read and write in English. Witkowski filed an indigency questionnaire (Doc. 48), but he did not demonstrate any extraordinary circumstances that would entitle him to counsel. Instead, his petition demonstrated that he did not have any meritorious claims requiring a hearing, and the court appropriately denied the petition without appointing Witkowski counsel. *See State v. Peck*, 263 Mont. 1, 4, 865 P.2d 304, 306 (1993).

Witkowski was also not entitled to the appointment of counsel under the United States or Montana Constitutions. The Supreme Court has explained that postconviction petitioners do not have a right to counsel. *Coleman v. Thompson*,

501 U.S. 722, 752 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings.").

CONCLUSION

The court's denial of Witkowski's petition for postconviction relief should be affirmed.

Respectfully submitted this 16th day of November, 2022.

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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 5,923 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

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CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 11-17-2022:

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