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COUNSEL FOR RESPONDENT

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 23-0688

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RAYMOND HOLMES,

Petitioner,

v.

JAMES SALMONSEN, Warden,  
Montana State Prison,

Respondent.

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**STATE'S RESPONSE TO PETITION  
FOR WRIT OF HABEAS CORPUS**

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In compliance with this Court's order dated December 5, 2023, the Attorney General's Office, on behalf of the State of Montana (State), responds to Petitioner Raymond Arlyn Holmes' (Holmes) Petition for Writ of Habeas Corpus alleging he

is illegally confined because of the judgment in Yellowstone County Cause No. DC-2022-0513. The State submits, and incorporates by reference, relevant documents from that cause number, and Mineral County Cause Nos. DC-1987-546, DC-2015-14, and DC-2015-47.<sup>1</sup>

### **RELEVANT PROCEDURAL HISTORY**

#### **I. Mineral County Cause Nos. DC-1987-546, DC-2015-14, and DC-2015-47**

On October 21, 1987, Holmes pled guilty to two counts of burglary in Mineral County Cause No. DC-1987-546. (Judgment (DC-1987-546 Doc. 12), attached as Ex. 1.) The district court deferred imposition of sentence for a period of three years upon numerous terms and conditions. (*Id.*) Holmes subsequently absconded from probation, and the State filed a petition for revocation of his deferred sentence with an attached report of violation on February 19, 1988. (Pet. for Revocation of Deferred Sentence and attached Report of Violation (DC-1987-546 Doc. 15), attached as Exs. 2 and 3, respectively.)

On March 9, 2015, the State charged Holmes in Mineral County with 37 counts of Violation of an Order for Protection in Cause No. DC-2015-14.

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<sup>1</sup> The State requests that this Court take judicial notice of the documents attached to the State's response pursuant to Mont. R. Evid. 201(b)(2), 201(d), and 202(b)(6).

(Information (DC-2015-14 Doc. 6), attached as Ex. 4.) On July 22, 2015, the State charged Holmes with one count of bail jumping in DC-2015-47. (Information (DC-2015-47 Doc. 5), attached as Ex. 5.)

On August 8, 2015, Holmes entered into a plea agreement to resolve all three Mineral County matters. (Plea Agreement (DC-2015-47 Doc. 9), attached as Ex. 6.) The agreement called for Holmes to plead guilty to counts 1 through 16 in Cause No. DC-2015-14 and the bail jumping charge in Cause No. DC-2015-47. (*Id.*) In exchange, the State agreed to dismiss counts 17 through 37 in Cause No. DC-2015-14. (*Id.*) The State also agreed not to seek to sentence Holmes as a persistent felony offender. (*Id.*)

As part of the global resolution, Holmes agreed that the district court should revoke his suspended sentence in Cause No. DC-1987-546 and sentence him to Montana State Prison (MSP) for ten years. (*Id.*) Further, the parties agreed that the ten-year sentence should run concurrently with the sentence in Cause No. DC-2015-14. (*Id.*) The parties agreed that in Cause No. DC-2015-14, the district court should sentence Holmes to MSP for two years each, to run consecutively to each other, but concurrently with the ten-year sentence in Cause No. DC-1987-546.<sup>2</sup> (*Id.* at 2.) The parties also agreed that for counts 7 through 16 the court

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<sup>2</sup> Count 1 was a misdemeanor Violation of an Order of Protection. (Ex. 6 at 2.)

should sentence Holmes to MSP for two years, to run consecutively to each other and concurrently with the sentence in DC-1987-546. (*Id.*)

For the bail jumping charge in Cause No. DC-2015-47, the parties agreed that the district court should sentence Holmes to prison for 10 years, and further agreed that this sentence should run *consecutively* to the sentences in Cause Nos. DC-2015-14 and DC-1987-546. (*Id.* at 2.) The net sentence of Holmes' three Mineral County cases was 40 years to MSP, with all but 20 years and 50 days suspended. (*Id.* at 2.)

## **II. Yellowstone County Cause No. DC-2022-0513**

On November 15, 2022, Holmes entered into a plea agreement with the State for charges pending in Yellowstone County. (Acknowledgment and Waiver of Rights by Plea of Guilty and Plea Agreement (DC-2022-0513 Doc. 20), attached as Ex. 7.) Holmes agreed to plead guilty to one count of Strangulation of a Partner or Family Member, first offense, a felony. (*Id.* at 5.) In exchange for his plea of guilty, the State agreed to recommend a five-year sentence to the Department of Corrections (DOC), with all but two years suspended. (*Id.*) The parties agreed this sentence should run concurrently with Mineral County Cause No. DC-2015-14, and with another Yellowstone County Cause No. CR-21-0955. (*Id.*) The agreement did not reference Mineral County Cause No. DC-2015-47, which the district court

had already ordered to run consecutively to the sentence in Cause No. DC-2015-14 pursuant to the Mineral County plea agreement. The plea agreement was not binding on the district court. (Ex. 7 at 3, ¶ 20, 5.)

A presentence investigation (PSI) detailed Holmes' criminal history, including the conviction and ten-year sentence to MSP in Mineral County Cause No. DC-2015-47. (PSI (DC-2015-47 Doc. 12), attached as Ex. 8 (confidential).)

On January 10, 2023, Holmes appeared in the district court for sentencing. (Judgment (DC-2022-0513 Doc. 27), attached as Ex. 9.) The district court sentenced Holmes to the DOC for five years, with three years suspended. (*Id.*) The court ordered this sentence to run concurrently with the sentence in Mineral County Cause No. DC-2015-14. (*Id.*) Consistent with the plea agreement, the district court's judgment did not mention the ten-year sentence for the bail jumping conviction in Cause No. DC-2015-47. (*Id.*) Holmes agreed to this sentence, and the record demonstrates counsel represented him throughout the proceedings. In the written plea agreement, Holmes specifically acknowledged:

This Agreement encompasses all of the understandings of the parties. No other promises have been made to me other than those specified in this Agreement.

(Ex. 7 at 4, ¶ 33.) He also acknowledged that:

**the Judge is not bound by any recommendations and can impose any sentence up to the maximum penalties for the above-listed offense(s). I understand I will not be allowed to withdraw my plea in the event the Judge rejects this Agreement. I understand that if**

**the Court rejects the sentencing recommendation, I could be sentenced to the maximum punishments allowed by the applicable laws.**

(*Id.* at 3, ¶ 18; emphasis in the original.)

On September 18, 2023, 231 days after the district court filed its written judgment, Holmes filed a motion in Yellowstone County to modify his sentence. (Motion [to Modify] Sentence (DC-2022-0513 Doc. 28), attached as Ex. 10.) In the motion, Holmes claimed, “My plea bargain and judgment was to have my Yellowstone judgment to run concurrently to my Mineral County sentence.” (*Id.* at 1.) Holmes stated, “I need the court to fix this as this was the ruling to have Cause No. DC-22-0513 run concurrently to Mineral County [and] right now it does not.” (*Id.* at 2.) A new judge assumed jurisdiction of this matter later the same day. (Notice of Assumption of Jurisdiction (DC-2022-0513 Doc. 29), attached as Ex. 11.) However, that is the last entry in the district court record for the Yellowstone County case.

On November 27, 2023, Holmes filed a petition for a Writ of Habeas Corpus, alleging that, pursuant to his Yellowstone County plea agreement, his Yellowstone County sentence should have run concurrently to all the Mineral County sentences, including the ten-year sentence for bail jumping in DC-2015-47.

## **ARGUMENT**

**Holmes has failed to prove he is entitled to habeas corpus relief.**

### **I. Introduction**

Montana Code Annotated § 46-22-101(1) allows a person who is incarcerated or restrained of liberty to apply for a “writ of habeas corpus to inquire into the cause of imprisonment or restraint and, if illegal, to be delivered from the imprisonment or restraint.” The fundamental purpose of habeas corpus is to remedy “illegal” restraints or imprisonments (*e.g.*, a sentence that exceeds statutory or constitutional limits). *Lott v. State*, 2006 MT 279, 334 Mont. 270, 150 P.3d 337. But the writ of habeas corpus “is not available to attack the validity of the conviction or sentence of a person who has been adjudged guilty of an offense in a court of record and has exhausted the remedy of appeal.” Mont. Code Ann. § 46-22-101(2). It is Holmes’ burden to convince this Court that it should issue a writ. *Strizich v. O’Fallon*, 364 Mont. 549, ¶ 8, 286 P.3d 247 (2012).

### **II. Holmes’ writ is procedurally barred.**

#### **A. Holmes did not object in district court and did not have grounds to object.**

If Holmes believed the State did not comply with the terms of the Yellowstone County plea agreement, or he misapprehended what the plea agreement provided for in terms of sentencing, the time for him to raise that issue

was at the sentencing hearing in the district court. As this Court has stated, “It is perhaps our most fundamental rule of appellate review that, with rare exception, we will not consider an issue or claim that was not properly preserved for appeal.” *State v. Norman*, 2010 MT 253, ¶ 16, 358 Mont. 252, 244 P.3d 737. This is because “it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider.” *State v. West*, 2008 MT 338, ¶ 16, 346 Mont. 244, 194 P.3d 683 (internal quotations and citations omitted). Likewise, this Court has stated, “We reiterate that as a general rule, we will not review issues on appeal if the party raising the issue did not object below.” *State v. Hamilton*, 2018 MT 253, ¶ 34, 393 Mont. 102, 428 P.3d 849 (citing *State v. Lewis*, 2012 MT 157, ¶ 27, 365 Mont. 431, 282 P.3d 679).

Holmes does not and cannot allege that the Yellowstone County sentence is illegal because it does not exceed the statutory parameters. Because Holmes did not object to the sentence when it was imposed, he waived further review of the issue. Additionally, Holmes had no basis to object to the sentence the Yellowstone County District Court imposed because the sentence was in accordance with the plea agreement, and, even if it was not in accordance with the plea agreement, Holmes was fully aware that the district court was not bound by the plea agreement and could impose any lawful sentence, even if it was not the sentence the parties agreed upon in the plea agreement.



**B. Holmes did not appeal the sentence in his Yellowstone County case.**

In criminal cases, “An appeal from a judgment entered pursuant to section 46-18-116 must be taken within 60 days after entry of the judgment from which the appeal is taken.” M. R. App. P. 4(5)(b)(i). As this Court has stated, “A petition for a writ of habeas corpus is not available to attack the validity of a sentence of a person . . . who has been adjudged guilty of an offense in a court of record and exhausted his remedy of appeal. Section 46-22-101(2), MCA. A consequence of exhausting the remedy of appeal by either filing an appeal *or failing to do so* is that the procedural bar in 46-22-101(2), MCA, precludes raising the claim in a petition for habeas corpus.” *Ommundson v. Green*, 364 Mont. 549, ¶ 4, 286 P.3d 247 (2012) (emphasis added) (citing *Lott v. State*, 2006 MT 279, ¶¶ 18-19, 334 Mont. 270, 150 P.3d 337).

“Section 46-22-101(2), MCA, provides that ‘the writ of habeas corpus is not available to attack the validity of the conviction or sentence of a person who has been adjudged guilty of an offense in a court of record and has exhausted the remedy of appeal.’ Wilcock pled guilty and did not appeal, thereby exhausting his remedy of a direct appeal.” *Wilcock v. State*, 362 Mont. 544, \*4-5, 272 P.3d 125 (2011) (citing *Lott*, ¶ 19).

Holmes pled guilty and did not appeal his sentence, thereby exhausting his remedy of a direct appeal. Holmes has waived the ability to contest his sentence

through a writ of habeas corpus. Even so, the record does not support Holmes' assertion that, pursuant to the Yellowstone County plea agreement, Holmes believed his Yellowstone County sentence would run concurrently to his sentence in Mineral County Cause No. DC-2015-47.

**III. There is nothing in the record to support Holmes' assertion that the Yellowstone County plea agreement provided that the sentence in Yellowstone County Cause No. DC-2022-0513 was intended to run concurrently with the sentence in Mineral County Cause No. DC-2015-47.**

Even if this Court were to address Holmes' assertion that he is illegally imprisoned, there is no evidence to support Holmes' claim that his Yellowstone County plea agreement contemplated the Yellowstone County sentence would run concurrently with the sentence in Mineral County Cause No. DC-2015-47. Separate sentences for two or more offenses must run consecutively unless the court orders otherwise. Mont. Code Ann. § 46-18-401(4).

The burden is on Holmes to “sustain the allegations of his petition, to make out a prima facie case, to prove the facts or establish ground entitling him to relief, to overcome the presumption of validity and regularity of proceeding, and to show the invalidity of the judgment or sentence which he attacks.” *Keech v. Kirkegard*, 364 Mont. 550, ¶ 8, 286 P.3d 248 (2012) (quoting *In re Hart*, 178 Mont. 235,

249-50, 583 P.2d 411, 419 (1978)). As set forth below, the record does not support Holmes' claim but instead contradicts it.

**A. The plea agreement**

The plea agreement in Yellowstone County Cause No. DC-2022-0513 identified Mineral County Cause DC-2015-14, and Yellowstone County Justice Court Cause No. CR-21-0955 as the only sentences that would run concurrently with Yellowstone County Cause No. DC-2022-0513. (Ex. 7 at 5.) The district court ordered that these sentences were to run concurrently, which is statutorily required to avoid consecutive sentences. Mont. Code Ann. § 46-18-401(4). As this Court has stated in applying the plain language of this statute, “The [court] imposed a lawful sentence when it did not mention how the sentence would run because, pursuant to statute, the sentence upon revocation must run consecutively.” *Keech v. Bragg*, 412 Mont. 551, \*5, 531 P.3d 543 (2023).

Further, as part of the Yellowstone County plea agreement, Holmes acknowledged:

This Agreement encompasses all of the understandings of the parties. No other promises have been made to me other than those specified in this Agreement.

(Ex. 7 at 4, ¶ 33.) Holmes' plea agreement did not mention the sentence in Mineral County Cause No. DC-2015-47, even though the parties were aware that it existed.

And Holmes acknowledged in the plea agreement that the district court was free to impose any sentence within statutory parameters. (*Id.* at 3, ¶ 18.)

**B. The presentence investigation**

The PSI accurately recorded the plea agreement, and summarized Holmes’ criminal history. (Ex. 8 at 2-4.) That history included the conviction and ten-year sentence in Mineral County Cause No. DC-2015-47, which the district court ordered to run consecutively to Cause No. DC-2015-14. (*Id.* at 3.) In other words, even if the parties forgot about the ten-year sentence in Mineral County Cause No. DC-2015-47 when they entered into the Yellowstone County plea agreement, by the time Holmes was sentenced, they had been given explicit notice that it existed.

**C. The judgment**

Like the PSI, the written judgment in this case accurately reflected the plea agreement and that the sentence in Yellowstone County Cause No. DC-2022-0513 would run concurrently with the sentences in Mineral County Cause No. DC-2015-14 and Yellowstone County Justice Court Cause No. CR-2021-0955. (Ex. 9.) Likewise, the judgment makes no mention of Mineral County Cause No. DC-2015-47. Therefore, as previously stated, these sentences are statutorily deemed to run consecutively. Mont. Code Ann. § 46-18-401(4).

In his Motion to Modify Sentence, Holmes asserted that the “ruling” was “to have Cause No. DC-22-0513 run concurrently to Mineral County . . . .” (Ex. 10.)

However, Holmes' motion was filed on September 28, 2023. The district court's written judgment, citing Mont. Code Ann. § 46-18-116 and filed on January 25, 2023, gave notice that:

If the written Judgment differs from the sentence the Judge pronounced orally, then the State or Defendant has only One Hundred Twenty (120) days to contest the written Judgment as set forth in § 46-18-116, MCA. If no party contests the written Judgment within One Hundred Twenty (120) days, the written Judgment is presumed correct.

(Ex. 9 at 5.)

By failing to object to his Yellowstone County sentence, and by not appealing the matter, Holmes waived the issue of whether he believed that his Yellowstone County sentence would run concurrently to his sentence in Mineral County Cause No. DC-2015-47. Further, there is no evidence in the record to indicate that any of the parties intended for that sentence to run concurrently with the Yellowstone County sentence. Finally, the plea agreement specifically provided that the district court was not bound by the parties' sentencing recommendations and was free to impose any lawful sentence.

### **CONCLUSION**

Holmes has failed to meet his burden of establishing that this Court should grant him habeas corpus relief. This Court should deny Holmes' petition because his claim is waived and procedurally barred, the court imposed a legal sentence

that is authorized by statute, which was also in accordance with the written Yellowstone County plea agreement.

Respectfully submitted this 2nd day of February, 2024.

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By: /s/ Tammy K Plubell  
TAMMY K PLUBELL  
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### **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this response 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 2,805 words, excluding caption, signatures, certificate of compliance, certificate of service, and any exhibits.

/s/ Tammy K Plubell  
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IN THE SUPREME COURT OF THE STATE OF MONTANA  
No. OP 23-0688

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v.

JAME SALMONSEN, Warden,  
Montana State Prison,

Respondent.

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**EXHIBITS**

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Judgment (DC-1987-546 Doc. 12), January 25, 1987 .....	Exhibit 1
Petition for Revocation of Deferred Sentence (DC-1987-546 Doc. 15), February 19, 1988 .....	Exhibit 2
Report of Violation (DC-1987-546 Doc. 15 attachment), February 1, 1988 .....	Exhibit 3
Information (DC-2015-14 Doc. 6), March 9, 2015.....	Exhibit 4
Information (DC-2015-47 Doc. 5), July 22, 2015 .....	Exhibit 5
Plea Agreement (DC-2015-47 Doc. 9), August 8, 2015 .....	Exhibit 6
Acknowledgment and Waiver of Rights by Plea of Guilty and Plea Agreement (DC-2022-0513 Doc. 20), November 15, 2022 .....	Exhibit 7
Presentence Investigation (DC-2015-47 Doc. 12), October 15, 2015 (confidential) .....	Exhibit 8

Judgment (DC-2022-0513 Doc. 27), January 10, 2023 .....	Exhibit 9
Motion [to Modify] Sentence (DC-2022-0513 Doc. 28), September 18, 2023 .....	Exhibit 10
Notice of Assumption of Jurisdiction (DC-2022-0513 Doc. 29), September 18, 2023 .....	Exhibit 11



## **CERTIFICATE OF SERVICE**

I, Tammy K Plubell, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Petition for Writ to the following on 02-02-2024:

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Electronically signed by Janet Sanderson on behalf of Tammy K Plubell  
Dated: 02-02-2024