

FILED

March 24 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 10-0056

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STATE OF MONTANA

ORDER

BARRY ALLAN BEACH,

Petitioner,

v.

MONTANA FIFTEENTH JUDICIAL DISTRICT
COURT, ROOSEVELT COUNTY, and THE
HONORABLE DAVID CYBULSKI, Presiding,

Respondent.

Petitioner Barry Allan Beach (Beach) has filed a Petition for Writ of Supervisory Control over his petition for postconviction relief now pending in the Fifteenth Judicial District Court, Roosevelt County. Beach asks this Court to exercise our power of supervisory control to reverse the District Court's denial of his motion for substitution of district judge.

Article VII, Section 2(2), of the Montana Constitution gives this Court general supervisory control over all other courts. This Court may supervise, on a case-by-case basis, another court by way of writ of supervisory control. Supervisory control constitutes an extraordinary remedy that should be exercised in "extraordinary circumstances." *Miller v. Eighteenth Jud. Dist. Court*, 2007 MT 149, ¶ 16, 337 Mont. 488, 162 P.3d 121. Extraordinary circumstances include urgency or emergency factors that make the normal appeal process inadequate, when the case involves purely legal questions, and when one or more of the following circumstances exist: 1) the other court is proceeding under a mistake of law and is causing a gross injustice; or 2) constitutional issues of state-wide importance are involved; or 3) the other court has granted or denied a motion for substitution of a judge in a criminal case. M. R. App. P. 14(3).

Beach's petition presents a purely legal question that meets these criteria. The District Court denied Beach's motion on the basis that this Court's decision in *Harris v. State*, 2003 MT 258, 317 Mont. 496, 77 P.3d 272, prevents a petitioner from substituting a judge in a postconviction proceeding. Section 46-21-101(1), MCA, requires a petition for

postconviction relief to be filed in “the court that imposed the sentence.” As noted in our decision in *Jordan v. State*, 2007 MT 165, 338 Mont. 113, 162 P.3d 863, the statute’s plain language provides no guidance as to which judge must preside over the postconviction proceeding once a petitioner has filed a petition in the proper court. *Jordan*, ¶ 9.

Beach filed his petition in the proper court--the Fifteenth Judicial District Court--the court that sentenced him. As pointed out by Beach, the Honorable James Sorte presided over Beach’s original trial and sentence. Judge Sorte has long passed and no longer is available to consider Beach’s petition for postconviction relief. Nothing in § 46-21-101(1), MCA, prevents Beach from seeking to substitute a district judge following remittance from this Court under these circumstances. Accordingly,

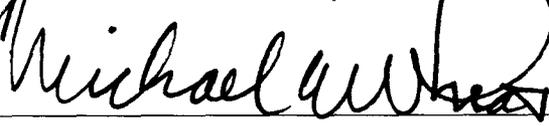
IT IS HEREBY ORDERED THAT:

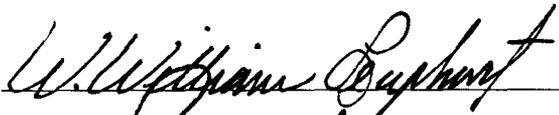
1. Beach’s Petition for Supervisory Control is GRANTED.
2. The Order of the District Court in Roosevelt County Cause No. 1068-C, *State v. Beach*, dated January 12, 2010, is VACATED.
3. We remand this matter to the District Court for the sole purpose of calling in a new judge pursuant to § 3-1-804(6), MCA, to preside over Beach’s postconviction petition.

The Clerk of Court shall mail a copy of this Order to the Hon. David Cybulski and to all counsel of record.

DATED this 24th day of March 2010.









Justices

Justice Jim Rice would deny the petition.