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MONTANA FIFTEENTH JUDICIAL DISTRICT COURT,
ROOSEVELT COUNTY

STATE OF MONTANA, Plaintiff and Respondent, v. BARRY ALLEN BEACH, Defendant and Petitioner.	)	Cause No. 1068-C **MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS BARRY ALLEN BEACH'S PETITION FOR POSTCONVICTION RELIEF**

The Attorney General of the State of Montana, on behalf of Respondent, State of Montana, submits the following Memorandum in Support of Respondent's Motion to Dismiss Barry Allan Beach's Petition for Postconviction Relief.

INTRODUCTION

The procedural history surrounding Beach's case is epochal, involving proceedings in the Montana Supreme Court, federal district court, the Ninth Circuit Court of Appeals and the Montana Board of Pardons and Parole (the Board). Many of the postconviction claims he now raises in this Court were previously raised in one form or the other in the Montana Supreme Court, Federal Courts, and most recently before the Board during his clemency proceeding. As demonstrated below, the Montana Supreme Court, the Federal Courts and the Board have unifiedly rejected Beach's claims, including his claim that he is actually innocent of the Nees homicide. As the procedural

history below reflects, Beach has been afforded every avenue to prove he should not be held accountable for the brutal murder of Kim Nees, and Beach has soundly failed at every juncture.

PROCEDURAL HISTORY

On May 3, 1983, the State charged Beach with Deliberate Homicide for the death of Kim Nees in Poplar, Montana. State v. Beach, 217 Mont. 132, 705 P.2d 94, 100 (1985). Beach confessed to killing Nees on January 7, 1983, while in custody on an unrelated charge in Monroe, Louisiana. Beach, 705 P.2d at 99; Confession attached as Ex. 1. After Beach confessed, Sergeant Jay Via from Ouchita Parish Sheriff's Office in Monroe, Louisiana, telephoned Roosevelt County Sheriff Dean Mahlum and informed Mahlum of the confession. (Tr. of telephone conversation, attached as Ex. 2.) During that same telephone call, Beach also spoke to Mahlum. (Ex. 2 at 3-4.) Beach told Mahlum that he did not want his mother to know about his confession until he talked to her and that "she'll take it pretty hard." (Ex. 2 at 3.) When Mahlum later asked Beach if there was anything else he could do for him, Beach answered: "Until I get there you know. We'll sit down and discuss it when I get there. Just let me phone mom, but at the same time I'd like to have you there. Me and mom both put our trust in you." (Ex. 2 at 3.)

On January 11, 1983, in the presence of Paul Kidd, Beach's Louisiana counsel, Beach again admitted to killing Nees. Beach, 705 P.2d at 141.

Kidd did not represent Beach at his trial. Beach hired attorney Charles (Timer) Moses who represented Beach at his trial, and on direct appeal. After fighting his extradition to Montana and losing, Beach moved to suppress his confessions in state district court.

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On February 24, 1984, the district court conducted a suppression hearing.[1] At the hearing, the Louisiana officers provided extensive testimony regarding the events leading up to Beach's confession, the confession itself and the events after Beach's confession. The officers were also subject to a vigorous cross-examination from Beach's counsel, Timer Moses. (Tr. at 122-65 (Calhoun), 166-245 (Via), 264-69 (Medaries), 270-75 (Cummings), 276-80 (Via), and 281-82 (Calhoun).)

On the other hand, Beach offered very limited testimony at the suppression hearing. (Tr. at 246-63.) Attorney Moses advised the district court that he was going to ask Beach certain limited questions. (Tr. at 249.) Beach was only willing to answer those limited questions. (Tr. at 249.) On cross-examination, Beach refused to answer a number of the prosecutor's questions. For example, Beach refused to answer any questions regarding State's Ex. 1 (Beach's January 7, 1983 Miranda waiver) and State's Ex. 2 (Beach's January 7, 1983 statement and confession). (Tr. at 154-55, 157, 250-51.) Beach even refused to answer the prosecutor's questions regarding an exhibit Beach's counsel introduced at the hearing. (Tr. at 251.)

Beach claimed that he gave his January 7 confession because Louisiana Officer Alfred Calhoun said he would see Beach fry in the electric chair in Louisiana. (Tr. at 249, 255.) According to Beach, Calhoun made this threat both within and outside Officer Via's presence. (Tr. at 259-60.) Beach felt he had to get out of Calhoun's grasp and he was afraid of the Louisiana judicial system. (Tr. at 256.) Beach believed if he got back to Montana, he could straighten things out. Id.

Despite the fact that he wanted to get out of "Calhoun's grasp" and his fear of the Louisiana judicial system, Beach fought extradition to Montana. When asked why he did

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[1] The State has filed a copy of the suppression hearing transcript, and Beach's trial transcript with the District Court, and will refer to both the suppression hearing and trial transcripts as "Tr."

not waive extradition, Beach answered: "Because the extradition papers were improper." (Tr. at 256.)

The prosecutor asked Beach why, if Calhoun had threatened him as he claimed, he said in his tape-recorded statement that no promises or threats were made against him. (Tr. at 263.) Beach replied: "Too confusing." (Tr. at 263.) The prosecutor then asked Beach why he stated at the end of that statement that there were no promises or threats, and Beach answered: "The same." Id.

Calhoun denied threatening Beach with the electric chair, and Via denied hearing it. Beach, 705 P.2d at 99; (Tr. at 276, 281-82.)

The district court did not believe Beach's claim that he was threatened. On June 29, 1984, the district court issued an order denying Beach's motion to suppress his confessions, finding there was no police misconduct and stating "the voluntariness of the statements was obvious." (Order attached as Ex. 3.)

On April 13, 1984, a jury found Beach guilty of Deliberate Homicide. The district court sentenced Beach to prison for 100 years and ordered him ineligible for parole. Beach, 705 P.2d at 100.

Beach appealed, raising a number of issues, including a challenge to the district court's denial of his motion to suppress his confession. Beach, 705 P.2d at 100. The Montana Supreme Court affirmed Beach's conviction and sentence on July 25, 1985. The Montana Supreme Court noted that in his January 7, 1983 confession, Beach "described in detail facts, not known by the general public, concerning the murder of Kimberly Nees." Beach, 705 P.2d at 99. In addressing the voluntariness of Beach's confession, the Montana Supreme Court found that Beach received 10 Miranda warnings between January 4 and January 11, and 8 of those advisements and waivers were directly related to questioning regarding the Nees homicide. Beach, 705 P.2d at 106. The Court further found: "There was no evidence adduced that the defendant possessed less than average intelligence, or that by reason of mental impairment he was incapable of

understanding Miranda warnings." Beach, 705 P.2d at 106. The Court noted that the Louisiana law enforcement officers who had heard Beach's confession, Via and Calhoun, had testified that Beach appeared calm, coherent and free from the influence of intoxicants during any of the interviews. Beach, 705 P.2d at 106.

Additionally, the Court found:

> The questioning sessions were not long, arduous, or designed to take advantage of the defendant's situation or fatigue. Via and Calhoun testified that no promises of benefit or threats of harm were made to the defendant. Particularly, defendant's allegation, disputed by Calhoun and Via, concerning Calhoun's "fry" comment was obviously not credited by the District Court.

Beach, 705 P.2d at 106. The Montana Supreme Court concluded that the district court did not err when it found that Beach's statements were voluntarily given. Beach, 705 P.2d at 107.

On August 7, 1985, Beach filed a petition for rehearing. On August 20, 1985, Beach filed a motion to supplement and add to his petition for rehearing. Beach sought to supplement his petition with an Affidavit from Attorney Paul Kidd, in which Kidd would state that Beach did not confess to the Montana murder in his presence in Louisiana. (Mot. attached as Ex. 4.) On August 27, 1985, the Montana Supreme Court denied Beach's motion for additional time to supplement his petition for rehearing and the petition itself. (Order attached as Ex. 5.)

On May 18, 1992, Beach filed a federal Petition for Writ of Habeas Corpus, alleging a number of grounds for relief. The federal district court stayed the habeas corpus proceeding pending Beach's exhaustion of his claims in state court.

Approximately two years later, on October 30, 1995, Beach filed a petition for postconviction relief in the Montana Supreme Court, and a memorandum in support of his petition. (Pet. and Memo, attached as Exs. 6, 7.); Beach v. Day, 275 Mont. 370, 913 P.2d

622 (1996).[2] As the Montana Supreme Court noted, Beach filed his postconviction petition 11 years after his conviction and 10 years after the Montana Supreme Court affirmed his conviction on direct appeal. Beach raised claims regarding his confession and ineffective assistance of counsel. Beach, 913 P.2d at 623. Beach's ineffective assistance of counsel claims in his 1995 postconviction petition are similar to the ineffective assistance of counsel claims he raises in his present postconviction petition.

Regarding the ineffective assistance of counsel claims set forth in his 1995 postconviction petition, Beach specifically claimed his counsel Timer Moses was ineffective because he failed to: (1) subpoena certain essential witnesses (Attorney Paul Kidd) to testify at the suppression hearing and trial; (2) cross-examine prosecution witnesses on the discrepancies between the facts set forth in his confession and the evidence found at the scene and discovered by subsequent investigation; (3) move for a mistrial or raise the issue on appeal when the prosecution, after asserting in its opening statement that there was physical evidence connecting Beach with the homicide, acknowledged that the "evidence" was inadmissible; (4) move for a mistrial or raise the issue on appeal when the prosecution misstated the evidence and engaged in egregious prosecutorial misconduct in its closing argument by asserting that there was evidence that connected Beach with the offense that the prosecution was precluded from introducing because of legal technicalities. (Exs. 6, 7); Beach, 913 P.2d at 623.

The Montana Supreme Court denied Beach postconviction relief, holding that Beach's confession claims in his petition were identical to the ones he previously raised in his 1985 direct appeal and, therefore, those claims were barred by the doctrine of res judicata. The Court found that Beach had raised an additional claim that his confession

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[2] Attorney Wendy Holton represented Beach in the federal habeas corpus proceedings, and in the Montana Supreme Court postconviction proceeding.

was false. The Court held that Beach's false confession claim was barred by the doctrine of res judicata and Mont. Code Ann. § 46-21-105(2), because Beach could have raised the claim in his 1985 direct appeal. Beach, 913 P.2d at 624.

The Montana Supreme Court further concluded that Beach's ineffective assistance of counsel claims, as well as his claims regarding his confession, were barred by the five-year time bar set forth in Mont. Code Ann. § 46-21-102 (1995). Beach, 913 P.2d at 624-25.

In his current postconviction petition, Beach argues in part that the affidavit of attorney Paul Kidd shows he is actually innocent and, therefore, excuses his untimely petition. Beach made a similar argument in his 1995 postconviction petition regarding Kidd's affidavit. The Montana Supreme rejected it, stating:

> Here, Beach offers no "new evidence" which has come to light since his appeal was completed, much less since the running of the five years within which he was required by statute to file his petition for postconviction relief. Most of his ineffective assistance claims are record-based and Beach makes no showing that they could not have been raised during the § 46-21-102, MCA, time constraint.
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> This is equally true of the specific claim argued in Beach's memorandum in support of his petition that his counsel was deficient in not having Beach's Louisiana attorney, Paul Henry Kidd, testify concerning his and Beach's meeting with authorities in Louisiana on January 11, 1983. This claim relates to one of the confession issues raised and addressed in *Beach I,* and to this Court's reliance therein--in determining that Beach's confessions were voluntary--on the second confession, made in his Louisiana attorney's presence. *Beach,* 705 P.2d at 104. Beach now offers Mr. Kidd's affidavit stating that Beach made no such confession in his presence on that date.
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> The record is clear, however, that this affidavit is not new evidence which could not have been discovered during the five-year period within which Beach's petition for postconviction relief was required to be filed under § 46-21-102, MCA. Indeed, during the pendency of Beach's petition for rehearing after issuance of our opinion in *Beach I,* Beach's counsel moved this Court for additional time to supplement his petition for rehearing. The basis of the motion was that counsel had been contacted by Mr. Kidd after Mr. Kidd read this Court's opinion, and counsel desired to obtain Mr. Kidd's affidavit to the effect that Beach did not confess to the Montana murder in his presence at any time, in Louisiana or elsewhere. Thus, the motion for additional time to supplement the petition for rehearing, dated August 19, 1985, clearly establishes that this information was known and available to Beach from that date forward and could have been included in a timely petition for postconviction relief pursuant to § 46-21-102, MCA. On that basis, this information cannot constitute "new

> evidence" for purposes of avoiding the statutory five-year time limit pursuant to *Perry.*

Beach, 913 P.2d at 624-25.

After the Montana Supreme Court denied Beach's Postconviction Petition, the federal district court lifted the stay on Beach's federal habeas corpus proceedings. On August 6, 1997, Federal Magistrate Judge Richard Anderson issued Findings and Recommendations, and recommended the dismissal of Beach's Federal Habeas Corpus Petition. (Find. & Recomms., Beach v. Mahoney, attached as Ex. 8.) Regarding Beach's claim that his confession was coerced, Magistrate Judge Anderson found that the totality of the circumstances surrounding Beach's confession do not support a finding of involuntariness. (Ex. 8 at 23.)

In his federal habeas proceedings, Beach alleged his counsel, Timer Moses, provided ineffective assistance because he failed to cross-examine witnesses on discrepancies in the evidence; subpoena essential witnesses; and object to the prosecution's misstatements of the evidence during closing arguments. (Ex. 8 at 2.) Magistrate Judge Anderson recognized that in Beach's 1995 postconviction proceeding, the Montana Supreme Court had held that Beach's ineffective assistance of counsel claims were procedurally barred by the five-year time bar. (Ex. 8 at 24-25.) Despite the procedural time bar, Beach asked Magistrate Judge Anderson to address his procedurally-defaulted claims under the fundamental miscarriage of justice exception as set forth in Schlup v. Delo, 513 U.S. 298 (1995). (Ex. 8 at 26.) Magistrate Judge Anderson declined to do so because Beach failed to show that he was "actually innocent" of the homicide. (Ex. 8 at 30-40.)

As part of his fundamental miscarriage of justice exception claim, Beach argued that the facts in his confession do not match the physical evidence at the crime scene. Magistrate Judge Anderson rejected Beach's argument. (Ex. 8 at 35.) Under his fundamental miscarriage of justice exception claim, Beach also argued that the prosecutor

misled the jury and committed prosecutorial misconduct. Magistrate Judge Anderson found Beach's arguments unpersuasive.[3] (Ex. 8 at 37-38.) In addition, Beach presented Kidd's affidavit in support of his claim that he was actually innocent. Magistrate Judge Anderson found Kidd's testimony insufficient to meet the standard of actual innocence under Schlup. (Ex. 8 at 36-37.)

Federal District Court Judge Jack Shanstrom reviewed Magistrate Judge Anderson's findings and recommendations and, on March 31, 1998, Judge Shanstrom denied Beach's federal habeas corpus petition. (3/13/98 Order in Beach v. Mahoney, attached as Ex. 9.) Judge Shanstrom concluded that Beach voluntarily confessed to killing Kim Nees. (Ex. 9 at 3-9.)

Judge Shanstrom noted that Beach's ineffective assistance of counsel claims were procedurally barred and refused to apply the fundamental miscarriage of justice exception in order to hear those procedurally-defaulted claims. Judge Shanstrom explained: "A fundamental miscarriage of justice occurs when a constitutional error has probably resulted in the conviction of one who is actually innocent of the crime." (Ex. 9 at 9, citing Schlup v. Delo, 115 S. Ct. 851, 867 (1995).) Judge Shanstrom concluded: "Petitioner [Beach] has come forward with no new evidence under Schlup to warrant a finding of actual innocence in support of the fundamental miscarriage of justice exception [to] the procedural bar doctrine." (Ex. 9 at 16.)

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[3] In his present postconviction memorandum, Beach again alleges prosecutorial misconduct, and asserts his counsel provided ineffective assistance by failing to object to the prosecutor's alleged misstatements. (Memo. at 12-17.) In his memorandum, Beach also asserts counsel provided ineffective assistance because counsel failed to highlight for the jury that the facts in the confession were inconsistent with the evidence found at the crime scene. (Memo. at 18-23.)

Judge Shanstrom found that Kidd's statements in his affidavit regarding Beach's second confession did not demonstrate that Beach was actually innocent of the Nees homicide. Judge Shanstrom stated:

> Given the court's finding with respect to the voluntariness of [Beach's] first confession, the fact that the first confession was tape recorded and [Beach] does not deny making it, the affidavit of Paul Kidd does not warrant a finding that it is more likely than not that no reasonable juror would have convicted [Beach] in light of the affidavit which calls into question [Beach's] alleged second confession.

(Ex. 9 at 12.)

Judge Shanstrom also dismissed Beach's argument that he was actually innocent of the homicide because the prosecutor deliberately misled the jury into believing Beach's confession matched the evidence at the crime scene, stating in part that "the confession does match the evidence in many respects." (Ex. 9 at 15.)

Beach appealed the federal district court's denial of his Habeas Corpus Petition to the Ninth Circuit Court of Appeals and, on August 30, 1999, the Ninth Circuit affirmed the federal district court's decision in denying Beach habeas corpus relief. (Beach v. McCormick, No. 98-35957, attached as Ex. 10.) Regarding the voluntariness of Beach's confession, the Ninth Circuit held that the totality of the circumstances indicate the confession was not coerced. (Ex. 10 at 5.) Regarding Beach's procedurally-barred ineffectiveness of counsel claims, and Beach's request to apply the fundamental miscarriage of justice exception to address those procedurally-defaulted claims, the Ninth Circuit held: "We agree with the district court that Beach has not made a sufficient threshold showing of factual innocence to allow habeas review of his procedurally defaulted claims." (Ex. 10 at 8.) The Ninth Circuit rejected Beach's argument that Kidd's affidavit demonstrated his innocence, stating in part: "This evidence would only go to undermine the credibility of the officers relative to Beach's alleged confession on January 11th and does not affect the taped confession made on January 7th." (Ex. 10 at 8.)

Five years later, on January 26, 2005, Beach filed a petition for DNA testing of some of the physical evidence collected from the 1979 homicide of Kim Nees. The State and the Roosevelt County Sheriff's Department made an exhaustive search for the evidence, including a search with Centurion Ministries of the entire evidence locker in the Roosevelt County Sheriff's Department, but was unable to find most of the physical evidence that Beach sought for DNA testing. Since the Nees homicide occurred in 1979, and Beach was convicted in 1984, it is understandable that the physical evidence cannot be found.

During the Nees homicide investigation, law enforcement found a blood stained towel on a fence a block away from the Nees' home. Law enforcement collected the towel even though it was not at the crime scene by the Poplar river and had no apparent connection to the crime. The blood stains from the towel were retained by the State Crime Lab. The State did not object to the DNA testing of the blood stains from the towel, even though the State believes the relevancy of the towel is highly questionable. DNA testing on the towel confirmed the initial testing done by the State Crime Lab that the blood on the towel did not belong to Kim Nees or Beach. (Reliagene Rep. attached as Ex. 11.) The DNA testing revealed the blood stains on the towel "were consistent with each other and with a single unknown male profile." (Ex. 11.)

In 2005, Beach filed an application for executive clemency with the Board, requesting that the Board remove the parole restriction from his sentence. On November 20, 2005, the Board denied Beach's clemency application, stating in part:

> In the Board's opinion, you have not satisfactorily proven your innocence of the crime or submitted newly discovered *evidence* showing complete justification or non-guilt. Additionally, you have not satisfactorily proven that further incarceration would be grossly unfair and the Board is unable to identify sufficient extraordinary mitigating or extenuating circumstances.

(Order, attached as Ex. 12.)

On August 10, 2006, with the assistance of Centurion Ministries and counsel, Beach bypassed the Board, and submitted an Application for Clemency, Pardon or

Commutation with Governor Brian Schweitzer. (Applic. without attachments, attached as Ex. 13.) The Application was later referred to the Board for consideration.

In his clemency application, as he did in his Montana Supreme Court postconviction proceeding and his federal habeas corpus proceeding, Beach argued that his confession was false because the facts he provided in his January 7, 1983 confession were inconsistent with evidence found at the crime scene. (Applic. at 7-12.) In his present postconviction memorandum, Beach makes a similar claim, albeit as part of his ineffective assistance of counsel claim. (Memo. at 17-23.)

Despite that fact that the state district court, Montana Supreme Court, federal district court, and the Ninth Circuit all concluded that his confession was voluntarily given, Beach also argued to the Board that his confession was not only false, but was also coerced. (Ex. 13 at 7.)

In addition to attacking his confession, Beach argued to the Board that the State failed to disclose an interview of Orrie Burshia by former Roosevelt County Sheriff Don Carpenter, in which Burshia discusses the alleged conversation she had with Mike Longtree regarding Nees's murder and Longtree's statement that he had witnessed the homicide. (Ex. 13 at 7.) In his current postconviction memorandum, Beach raises a similar claim. (Memo. at 18.)

In his clemency application, Beach also argued that the prosecutor committed prosecutorial misconduct during the 1984 trial. (Ex. 13 at 12-17.) Beach includes a similar claim of prosecutorial misconduct in his current postconviction memorandum filed with this Court. (Memo. at 12-17.)

In his application and in his later response, Beach argued that new evidence showed he was innocent and that Nees was killed by a group of women. (Ex. 13 at 1, 20,

34; Beach's Resp. at 1-7, attached as Ex. 14.)[4] The "so called" new evidence of Beach's innocence included statements from Jack D. Atkinson, Judy Greyhawk, Vonnie Brown, Carl Four Star, Janice White Eagle-Johnson, Richard Holen, and Dunn O'Connor. (Ex. 14 at 1-7.)

In his clemency application, Beach asserted as a result of the procedural time bar the Montana courts can no longer consider the merits of his claims. (Ex. 13 at 23, 25.) Beach maintained that the clemency proceeding was the last opportunity for him to obtain relief from his conviction.

The State filed with the Board a 95-page response to Beach's application for clemency, along with 57 exhibits and the district court suppression hearing and trial transcript. (State's Resp. in Opposition attached as Ex. 15.)[5] Regarding Beach's claim that his confession was false, the State demonstrated point by point how the aspects of his confession were corroborated through other witnesses and the evidence at the crime scene. (Ex. 15 at 40-54.)

On June 14-16, 2007, the Board held a clemency hearing on the issue of whether new evidence of Beach's innocence existed which warranted the Board recommending a pardon for Beach. The Board's 3-day hearing on actual innocence was unprecedented in Montana. On August 1, 2007, the Board held a hearing on whether Beach's original sentence was fair and whether he was entitled to commutation of his sentence.

Prior to the Board's June hearing, the State conducted tape recorded interviews of a number of people Beach and Centurion Ministries claimed had information regarding the Nees homicide, including all of the women Beach publicly accused of killing Nees. (April 23, 2007 and May 29, 2007 letters to Craig Thomas, Executive Director of the

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[4] The exhibits Beach filed with his response are not included in Ex. 13.
[5] The State's 57 exhibits filed with its response are not included in Ex. 15.

Board of Pardons and Parole, attached as Exs., 16, 17.) The State submitted transcribed copies of the interviews as well as copies of the tapes of each interview to the Board for its review. (Exs. 16, 17.)[6] The women all denied any involvement in the Nees homicide and talked of feeling harassed by Beach and Centurion Ministries.

Prior to the hearing, the State submitted to the Board numerous documents from the district court file regarding Beach's attempt to suppress his confession, the briefing from his direct appeal in the Montana Supreme Court, the briefing from his 1995 postconviction proceeding in the Montana Supreme Court, the briefing and orders from Beach's federal habeas corpus proceeding in federal district court, and the briefing from Beach's federal habeas corpus appeal to the Ninth Circuit, as well as the Ninth Circuit's memorandum opinion denying Beach habeas relief. (March 16, 2007 letter to Craig Thomas, attached as Ex. 18.)

In preparation for the hearing, the Board also afforded the parties the opportunity to request subpoenas for witnesses. Beach took advantage of the opportunity and had the Board issue a number of subpoenas. The Board made it clear that it did not intend to admit hearsay at the hearing if either Beach or the State had not properly subpoenaed witnesses to avoid hearsay testimony. At the three-day clemency hearing, Beach called a number of witnesses, and he also testified.[7] In his current Postconviction Petition and Memorandum, Beach cites to testimony of his witnesses from his clemency hearing as "new evidence" that he did not kill Nees.

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[6] If the District Court, as part of these postconviction proceedings, would like to review those interviews, the State would be happy to provide the District Court with copies of the interviews, as well as any of the documents submitted to the Board of Pardons and Parole as part of Beach's clemency proceedings.

[7] In support of his postconviction petition, Beach has attached only portions of the clemency hearing transcript. The State has submitted a copy of the entire transcript from the June 13-15, 2007 clemency hearing for the District Court's review.

On August 20, 2007, the Board of Pardons and Parole issued its lengthy written decision denying Beach's request for clemency and commutation of his sentence. (Decision attached as Ex. 19.) The Board noted that the parties were given wide latitude in presenting evidence at the hearing, including hearsay, double hearsay, and triple hearsay testimony, that would not have been admissible in a court of law. (Ex. 19 at 6.)

The Board explained that upon initially reading Beach's application and the files submitted by Centurion Ministries at face value, it was alarmed that an innocent man might be wrongly imprisoned. (Ex. 19 at 16-17.) However, their initial view changed after the Board had time to study and review the entire record. The Board explained:

> However, upon what then followed, an exhaustive inquiry and study, before, during and after the hearing, the facts simply did not unfurl as they were alleged and characterized in the Centurion Ministries claims. The multiple eye witnesses, the allegations of physical evidence of the "real killer" being ignored by law enforcement-either crooked or inept-did not materialize. We have great sympathy for those who read only the Centurion Ministries allegations and became alarmed, because that was our experience; but those allegations were not demonstrated as true even with the very wide latitude afforded Centurion Ministries-the facts simply have not been demonstrated to be as representatives for Mr. Beach have alleged. Mr. Beach's culpability has been contested vigorously and eloquently, but we have found that contest to be lacking in substance.

(Ex. 19 at 17.)

The Board found Mr. Kidd's testimony in direct conflict with all the law enforcement testimony and records, and found his testimony not credible. (Ex. 19 at 11.) The Board also found Beach's claims that his confession was "false" and that the information he provided during his confession was fed to him by law enforcement during their questioning to be unbelievable. (Ex. 19 at 7-8, 11.) The Board noted that the crime scene corroborated Beach's statements in his confession. (Ex. 19 at 7-8.) In addition, the Board found the Louisiana officers' testimony regarding the events surrounding Beach's confession more credible than the testimony of Beach. The Board stated:

> From Louisiana, Detectives Via, Medaries and by way of MetNet, Sgt. Calhoun, each of whom had testified at the suppression hearing and had testified again at the trial--and were obviously viewed as credible by both Judge Sorte and, separately, by the jury, --all returned to testify. It is our

> opinion, too, that the testimony of the detectives was more credible than that of Mr. Beach in every respect. In order to believe Mr. Beach's testimony, we would have to believe every single one of the law enforcement officers was steadfast in lying at the time the confession was taken, through the suppression hearing, through another trip to Montana for the trial, and even now when most have changed careers and one faces a life-threatening health crisis.

(Ex. 19 at 11-12.) The Board recognized that over time Beach has given conflicting stories regarding the confession, and found that "Mr. Beach's conflicting stories of how the confession came about and why it should be ignored only serve ever-more-deeply to call Mr. Beach's credibility with regard to his denials into question rather than undermining the reliability of the confession provided to the detectives." (Ex. 19 at 12-13.) The Board also noted: "[Beach] has never denied making the confession; he just eventually, years after the fact, said that he did not remember making it and presented a variety of conflicting and noncompelling explanations." (Ex. 19 at 15.)

The Board rejected Beach's claims of prosecutorial misconduct. (Ex. 19 at 13-16), finding that its review of the trial transcript did not support Beach's claims of prosecutorial misconduct. (Ex. 19 at 15.) The Board also rejected Beach's claims that Timer Moses provided him with inadequate assistance, finding no evidence to support Beach's claim in the trial transcript. The Board emphasized Mr. Moses' ability, and the strategic decisions each defense attorney must make during a trial. The Board stated:

> Mr. Moses, in the 1980's, was an able defense attorney with a national reputation. In every criminal trial, an attorney must make a myriad judgments on when and why to object and make a record and when to let certain matters pass in order not to offend or frustrate the jury; refraining from making certain of the ever-present and inescapable array of possible objections show not inadequacy but strategy--and multiple tribunals in this case have reviewed the transcript and judged it sufficient. Mr. Racicot was a fine and principled prosecutor, handling for many years, some of the most rigorous prosecutions in the State of Montana. Mr. Beach's trial was no less than a battle of titans.

(Ex. 19 at 15-16.)

In concluding that Beach was not entitled to recommendation for a pardon or commutation, the Board emphasized the extensive review given to Beach's case, the prior

judicial proceedings provided to Beach, and Beach's inability to present the necessary proof of his innocence.

> We may never be able to quell the rumors in Roosevelt County or to satisfy those who shout that justice has never been done here; we have worked hard and have come to the conclusion that justice was done almost three decades ago now. For purposes of the Parole Board, this matter has drawn to a close. This is not a DNA case, and it is almost impossible to envision a situation in which actual new evidence of the sort the statute requires could possibly be uncovered under these facts and circumstances. No further clemency hearing will be conducted, however, upon arguments that the whole story has never been told or nobody has ever heard Mr. Beach's side of the story as this one was. We heard the whole story; we heard Mr. Beach until he was finished. We read the whole file, considered the whole arguments of both sides and required that further interviews and examinations be conducted even though nearly three decades had elapsed since the time of Kimberly Nees' brutal murder . . . .
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> This is our justice system; Mr. Beach has been the recipient of its fullest protections. A day ultimately comes when matters are deemed settled; from our perspective, if never before, at last today is that day.
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> We are convinced, to the best of our abilities at discernment, that Mr. Beach was properly convicted and that each of the appellate stages through which he has progressed over the years also came to the correct decision. No proof of innocence, or newly discovered evidence of non-guilt or justification has been presented. Short of such a presentation, this unprecedented clemency hearing will not be repeated; from our prospective and the best of our combined ability, we have laid this matter to rest.

(Ex. 19 at 19-20.)

In the search for yet another forum to hear his claims, Beach has now filed his second postconviction petition with this Court approximately 24 years after his conviction. In his memorandum in support of his postconviction petition, Beach sets forth the following postconviction claims: (1) a motion for new trial based on "newly discovered" evidence; (2) the Roosevelt County Sheriff's Department violated Mont. Code Ann. § 46-15-322; (3) prosecutorial misconduct; and (4) ineffective assistance of his counsel Timer Moses.

STATEMENT OF FACTS

Since the pertinent issue in front of this Court is whether Beach's petition for postconviction relief is procedurally barred, a recitation of the facts of Beach's murder of

Nees and his confession is unnecessary. If the Court would like to review those facts, the facts surrounding Beach's deliberate homicide conviction can be found in pages 1-26 of the State's response to Beach's clemency application. (Ex. 15 at 1-26.)

ARGUMENT

I. BEACH IS PROCEDURALLY BARRED FROM SEEKING POSTCONVICTION RELIEF.

A. Beach's Analysis Regarding the Time Limitation For the Filing of His Petition Is Incorrect and His Petition Is Time Barred by Mont. Code Ann. § 46-21-102 (1995).

Beach argues that his postconviction petition is not time barred by the one-year time limitation for filing a petition set forth in Mont. Code Ann. § 46-21-102(1) (2007) because the exception for "newly discovered evidence" in Mont. Code Ann. § 46-21-102(2) is applicable in his case. Mont. Code Ann. § 46-21-102(2) provides:

> A claim that alleges the existence of newly discovered evidence that, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted, may be raised in a petition filed within 1 year of the date on which the conviction becomes final or the date on which the petitioner discovers, or reasonably should have discovered, the existence of the evidence, whichever is later.

Beach claims that since his petition is based on evidence which he discovered on and after January 19, 2007, the newly-discovered evidence exception under Mont. Code Ann. § 46-21-102 applies and his petition is timely.[8] Beach's claim that his petition is timely is incorrect because the version of Mont. Code Ann. § 46-21-102 that he relies on, including the statutory exception for newly-discovered evidence, is inapplicable in this case.

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[8] Beach's claim that "new evidence" was discovered within one year is strained at best since Centurion Ministries and Beach knew of the "information" much earlier and just did not get around to doing anything with it until January 2007.

The pre-1997 version of Mont. Code Ann. § 46-21-102, provided that a petition for postconviction relief "may be filed at any time within five years of the date of the conviction." The pre-1997 version of Mont. Code Ann. § 46-21-102 contains no statutory exception to the five year time bar for "newly discovered evidence."

In 1997, the Legislature amended the postconviction statutes, including the time period for filing a postconviction petition under Mont. Code Ann. § 46-21-102.[9] 1997 Mont. Laws, ch. 378 § 4, attached as App. A. The Legislature changed the time period for filing a petition from five years to one year. 1997 Mont. Laws, ch. 378 § 4; Sanchez v. State, 2004 MT 9, ¶ 9, 319 Mont. 226, 86 P.3d 1; Morrison v. Mahoney, 2002 MT 21, ¶ 11, 308 Mont. 196, 41 P.3d 320. The "newly discovered evidence" exception in subsection (2) of Mont. Code Ann § 46-21-102 that Beach relies on to support his claim that his petition has been timely filed was also a 1997 amendment to the statute. 1997 Mont. Laws, ch. 378, § 4.

When the 1997 Legislature amended Mont. Code Ann. § 46-21-102, the Legislature specified that the amendments applied only to those convictions which became final either after the statute's effective date of April 24, 1997, or during the 12

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[9] Montana Code Annotate § 46-21-102 has not been changed since 1997 amendments went into effect, and it provides:

> (1) Except as provided in subsection (2), a petition for the relief referred to in 46-21-101 may be filed at any time within 1 year of the date that the conviction becomes final. A conviction becomes final for purposes of this chapter when:
>
> (a) the time for appeal to the Montana supreme court expires;
>
> (b) if an appeal is taken to the Montana supreme court, the time for petitioning the United States supreme court for review expires; or
>
> (c) if review is sought in the United States supreme court, on the date that that court issues its final order in the case.
>
> (2) A claim that alleges the existence of newly discovered evidence that, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted, may be raised in a petition filed within 1 year of the date on which the conviction becomes final or the date on which the petitioner discovers, or reasonably should have discovered, the existence of the evidence, whichever is later.

months prior to April 24, 1997. 1997 Mont. Laws, ch. 378, §§ 9(1), 10; Morrison, ¶ 11; State v. Nichols, 1999 MT 212, ¶ 19, 295 Mont. 489, 986 P.2d 1093 overruled in part on other grounds by State v. Whitehorn, 2002 MT 54, ¶ 3, 309 Mont. 63, 50 P.3d 121; Hawkins v. Mahoney, 1999 MT 82, ¶ 10, 294 Mont. 124, 979 P.2d 697.

In Beach's case, the district court entered its written sentence on May 11, 1984. Accordingly, Beach's conviction did not become final one year prior to April 24, 1997 and, thus, the current version of Mont. Code Ann § 46-21-102, including the "newly discovered evidence" exception set forth in subsection (2) of the statute, is inapplicable. Beach's postconviction petition is subject to the five-year time period set forth in the pre-1997 version of Mont. Code Ann. § 46-21-102.

In order to have timely filed his postconviction petition, Beach would have had to file his petition within five years of the district court's May 11, 1984 written sentence. Since Beach filed his petition on January 18, 2008, his petition is barred by the five-year time bar set forth in the pre-1997 version of Mont. Code Ann. § 46-21-102. Beach's reliance on the "new discovered evidence" exception, set forth in subsection (2), as means of preserving his untimely postconviction claims, is misplaced because that exception is inapplicable in his case. 1997 Mont. Laws, ch. 378, §§ 4, 9(1); Morrison, ¶ 11; Hawkins, ¶ 10.

The Montana Supreme Court has previously ruled that Beach's 1995 postconviction petition was untimely and barred by the five year-time limitation set forth in Mont. Code Ann. § 46-21-102. Beach, 913 P.2d at 624. In his 1995 petition, Beach essentially raised the same ineffective assistance of counsel claims he is asserting in his present petition. In light of the fact that the Montana Supreme Court has already determined that his 1995 petition was untimely, Beach's current petition, filed on January 18, 2008, is clearly untimely and barred by Mont. Code Ann. § 46-21-102.

As part of his postconviction petition, Beach has moved for a new trial based on newly-discovered evidence under the five-part test set forth in State v. Clark, 2005 MT

330, 330 Mont. 8, 125 P.3d 1099. Beach correctly notes that in Crosby v. State, 2006 MT 155, ¶ 20, 332 Mont. 460, 139 P.3d 832, the Montana Supreme Court has extended the five-part test in Clark to postconviction relief cases. (Beach's Memo. at 5.) However, before the Court in Crosby addressed the merits of petitioner's motion for a new trial claim, the Court addressed the State's argument that the petitioner's petition, including his underlying claim of a motion for a new trial claim was untimely and barred by the one-year time limitation for set forth in the current version of Mont. Code Ann. § 46-21-102. Crosby, ¶¶ 14-15. The Montana Supreme Court concluded that the petition was not time barred because the petitioner's motion for a new trial claim fell under the "newly discovered evidence" exception set forth in Mont. Code Ann. § 46-21-102(2). Crosby, ¶ 15.

Here, as previously explained, the "newly discovered evidence" exception in Mont. Code Ann. § 46-21-102(2) is inapplicable and, thus, Beach's motion for new trial is time barred like the rest of his postconviction claims.

The time period under Mont. Code Ann. § 46-21-102 for filing a postconviction petition is a jurisdictional limit on litigation. Sanchez, ¶ 9; State v. Rosales, 2000 MT 89, ¶ 7, 299 Mont. 226, 999 P.2d 313; State v. Redcrow, 1999 MT 95, ¶ 34, 294 Mont. 252, 980 P.2d 622. The failure of Beach to file his postconviction petition within five years of his 1984 conviction leaves this Court without jurisdiction to address his postconviction claims. Sanchez, ¶ 9.

B. Beach Cannot Meet the Clear Miscarriage of Justice Exception.

Pursuant to Montana Supreme Court case law, a waiver of the jurisdictional time bar under Mont. Code Ann. § 46-21-102 may be justified, and the court may review the merits of untimely postconviction claims, upon a postconviction petitioner's showing of a clear miscarriage of justice. Sanchez, ¶ 10; Rosales, ¶ 7; Redcrow, ¶¶ 33-34. In defining its miscarriage of justice exception, the Montana Supreme Court has applied the definition of the fundamental miscarriage of justice exception the United States Supreme

Court has crafted for procedurally defaulted federal habeas corpus claims. Redcrow, ¶¶ 33-34, 37, citing Schlup v. Delo, 513 U.S. 298 (1995); see also State v. Pope, 2003 MT 330, ¶¶ 58-68, 318 Mont. 383, 80 P.3d 1232, citing Schlup.

Under the federal fundamental miscarriage of justice exception, federal courts conducting habeas review will excuse a procedurally defaulted claim and address the underlying merits of the claim, where the petitioner shows that "'a constitutional violation has resulted in the conviction of one who is actually innocent." Schlup, 513 U.S. at 321, 327, quoting Murray v. Carrier, 477 U.S. 478, 496. Schlup further stated: "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." Schlup, 513 U.S. at 327. Actual innocence "does not merely require a showing that reasonable doubt exists in light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." Schlup, 513 U.S. at 329.

The fundamental miscarriage of justice exception is extremely rare and limited to extraordinary cases. Schlup, 513 U.S. at 324; see also Calderon v. Thompson, 523 U.S. 538, 559 (1998). The fundamental miscarriage of justice exception is concerned with actual or factual innocence, not legal innocence. Thompson, 523 U.S. at 559, citing Sawyer v. Whitley, 505 U.S. 333, 339 (1992); Bousley v. United States, 523 U.S. 614, 624 (1998) (stating that actual innocence, means factual innocence, not mere legal insufficiency.") As the Montana Supreme Court explained: "'To be credible,' a claim of actual innocence must be based on reliable evidence not presented at trial." Thompson, 523 U.S. at 559, citing Schlup, 513 U.S. at 324.

In his Petition and Memorandum, Beach claims new evidence shows that he did not kill Nees. What started as Beach's clemency theory that a "pack" of angry young women beat Nees to death, primarily based on upon Calvin Lester's admittedly untruthful account that he witnessed the murder, has now disintegrated into a focused attack on Atkinson and Maude. Beach, despite being given every opportunity to do so, has offered nothing more

than speculation, hearsay, rumor and innuendo to support his accusations against Atkinson and Maude.

A review of the "new evidence" that Beach offers this Court is not reliable nor is it compelling of either Beach's innocence or someone else's guilt. Accordingly, as the Montana Supreme Court did with Beach's first postconviction petition, this Court should find Beach's current postconviction petition barred by the five-year time bar in Mont. Code Ann. § 46-21-102.

1. Beach's Lawful Confession Precludes Any Claim of Actual Innocence Under the Fundamental Miscarriage Exception.

There is no way for this Court to apply the fundamental miscarriage of justice exception unless this Court disregards Beach's confession. The State District Court, the Montana Supreme Court, the Federal Magistrate Judge and the Federal District Court, the Ninth Circuit Court of Appeals and the Montana Parole Board, have all upheld the validity of Beach's confession. Beach, himself, must finally recognize the futility of this claim since he does not specifically allege his confession was involuntary and/or false in his Petition or Memorandum. Yet, Beach somehow expects this Court to ignore his valid, detailed confession because that is the only way the Court could ever get to the point of applying the fundamental miscarriage of justice exception to forgive the procedural bars precluding Beach's present petition.

In the Introduction section of his Memorandum, in a less than subtle effort to get this Court to revisit the issue of his confession without specifically asking the Court to do so, Beach sets forth statistics regarding proven false confessions in DNA exoneration cases. (Beach Memo. at 2-3.) While Beach cites to articles his own expert, Richard Leo, authored, he does not quote from Richard Leo's testimony at the clemency hearing. Perhaps Beach found Leo's testimony more damaging than helpful, because his case never was and never will be a DNA exoneration case--a point that was not lost on the Board, when it observed: "This is not a DNA case, and it is almost impossible to envision a

situation in which actual new evidence of the sort the statute requires could possibly be uncovered under these facts and circumstances." (Ex. 19 at 19.) In fact, Beach's own expert, Richard Leo, had to admit there was no way, in Beach's case, to prove with certainty his confession to be false. (Clemency Transcript [Clem. Tr.] at 47-52, 54.)

Yet, Beach tries to make his case into a DNA case by arguing that if, after all these years, the pubic hair found on Nees's sweater, that was never admitted at trial, was available for DNA testing, testing would demonstrate it was not his. As the Board observed, however, this hardly establishes Beach's actual innocence. The Board stated:

> but certainly there is no evidence regarding the hair which would point the finger of responsibility for this murder anywhere other than at Mr. Beach himself. The fact that the hair and certain other evidence was disposed of after trial is not sign of some great conspiracy to cover up a fact that Mr. Beach is innocent of the murder of Kimberly Nees.

(Ex. 19 at 14.)

Beach also claims that the facts he disclosed in his confession only matched the crime scene to the extent the facts he admitted were matters of pubic knowledge, and in all other respects, his confession actually contradicted physical evidence from the crime scene. He attempts to argue that his trial counsel did not effectively argue this issue before the jury. This is neither an accurate portrayal of the evidence presented at trial nor is it in any way "new" evidence. In 1984, the jury decided that Beach's confession was corroborated by the nature of the crime, the crime scene itself, and Beach's lack of an alibi.

The State has discussed this matter in detail in its Response to Beach's Clemency Application. (Ex. 15 at 39-54.) Marc Racicot addressed this issue in his closing argument to the jury at Beach's trial (Tr. at 894-99, 938-39), and also testified at the clemency hearing about the physical evidence from the crime scene, which corroborated the details Beach gave in his confession. (Clem. Tr. at 790-800.) As the Board so aptly stated in its Order denying Beach relief from his conviction:

> As to the crime scene, much was argued by Centurion Ministries about there being "no evidence" connecting Mr. Beach to the crime scene. That is simply not true. Mr. Beach was connected in a host of ways, through his confession--he gave a statement which provided explanations not previously understood by investigators, and even at odds with what their theory was, but consistently in keeping with the actual physical evidence. This is evidence, at least as compelling as fingerprints could possibly have been. Except for the color of clothing Kimberly Nees wore, nothing from the confession conflicted with the actual crime scene. Several things were explained by the confession that had never been explained before; and, even more compellingly, several of the explanations were in conflict with the law enforcement officers' theory of the case but completely in keeping with the actual physical evidence from the crime scene--belying the theory that officers so successfully led Mr. Beach through his confession as to create a false confession. It is apparent to us that it would have been impossible to create so detailed and so correct a false confession in any event; but the validity of that observation is underscored brightly by the facts that Mr. Beach knew and explained much which the officers had not been able to piece together.

(Ex. 19 at 6-7.)

Beach attempts to circumvent the problem that his confession has repeatedly been upheld, however, by directing this Court to State v. Pope, 2003 MT 330, 318 Mont. 383, 80 P.3d 1232, a case in which the Montana Supreme Court actually applied the fundamental miscarriage of justice exception. The facts of Pope, however, are easily distinguishable from the facts in Beach's case. In Pope, after the district court refused to accept the terms of a plea agreement, a jury convicted Pope of sexual intercourse without consent and kidnapping for crimes that were alleged to have occurred on November 29, 1993. Pope, ¶¶ 1, 4, 11.

In Pope, Pope and his friend Plumley met up with two young woman, A.J. and M.J., while they were out partying. Id., ¶ 7. At trial, A.J. testified that she fell asleep in a vehicle that Pope was driving. She awoke to M.J.'s plea for Plumley to stop. When she turned around, Plumley was on top of M.J. with his pants down. She attempted to stop Plumley and asked Pope to stop the car, but Pope began assaulting her and forced her to perform oral sex on him. A.J. testified that she retaliated and burned Pope's face with the vehicle's dashboard cigarette lighter. Pope got angry and told A.J. to take off her pants, but she jumped out of the vehicle instead. Id., ¶ 12.

M.J. testified that when she was in the back seat with Plumley, he forced her to perform oral sex on him and then forced her to have sex with him. M.J. also testified that she witnessed Pope force A.J. to perform oral sex, although she did not hear what was said in the front seat. M.J. was not certain if Pope was in the back seat with her at any time and could not recall if the two of them engaged in intercourse. Id., ¶ 13. At trial, Julie Long, a forensic serologist, attributed various semen samples taken from M.J.'s rape kit to Pope through blood typing but acknowledged that the DNA tests performed by Cellmark Diagnostics on M.J.'s underwear were not yet completed. The report submitted at trial, however, did not indicate the presence of Pope's DNA in M.J.'s vaginal swab or on the underwear. Id., ¶¶ 14-16.

Pope did not testify at trial, but the defense theory was that the encounter with both women was consensual and both women lacked reliability. The defense focused on inconsistencies in the women's personal accounts of the evening as well as throughout the prosecution and the level of their intoxication. Id., ¶ 18. The jury was instructed that it could convict Pope of sexual intercourse without consent if Pope subjected M.J. and/or A.J. to sexual intercourse without consent. Id., ¶ 19.

The jury found Pope guilty on June 29, 1994, and the district court imposed sentence on July 25, 1994. Id., ¶ 20. On September 8, 1999, Pope filed a pro se petition for postconviction relief in which he alleged that the State presented inaccurate and confusing DNA evidence which was calculated to produce a wrongful conviction. Pope also alleged that defense counsel's failure to object to the DNA evidence presented was evidence of ineffective assistance. Id., ¶ 24.

The State argued that Pope's claims were both time-barred and procedurally-barred, because he failed to raise the claims on direct appeal. Id., ¶ 25. The district court denied the petition without a hearing. Id., ¶ 26. On appeal, the Montana Supreme Court appointed counsel for Pope, and after counsel procured the DNA report, which indicated that none of the DNA present on M.J.'s underwear matched Pope, the Montana Supreme

Court reversed the district court's denial of the petition and remanded for a full hearing on the merits of the petition. Id., ¶¶ 27-29.

At the district court hearing, a DNA expert who reviewed the complete DNA test results and Long's trial testimony, offered his opinion on how the new DNA data impacted Long's testimony and the blood type testing presented at Pope's trial. The expert explained that Pope's DNA was not present, and the only DNA present was that of Plumley, M.J. and a third unknown source. The expert hypothesized that the presence of type A blood detected by Long and attributed to Pope was actually that of the unknown third DNA source since Pope's DNA was not present. Id., ¶ 30.

The district court concluded that Pope's postconviction claims were untimely and barred by Mont. Code Ann. § 46-21-102. This jurisdictional bar could only be overcome by a clear miscarriage of justice. The district court concluded that the DNA evidence was not newly discovered, and it did not establish that Pope did not commit the crime. Id. ¶¶ 34-35. On appeal, the Montana Supreme Court observed that Pope's case was complicated by the jury being improperly instructed since it could convict Pope of sexual intercourse without consent of either M.J. or A.J., and there is no way of telling after the fact if the jury convicted him of raping M.J. or A.J. Id. ¶ 66. The Montana Supreme Court concluded that the completed DNA report, which was not presented at trial, tends to contradict the State's evidence that Pope had sexual intercourse with M.J. The Montana Supreme Court observed that other than Long's blood type testimony presented at trial, which was subsequently contradicted by completed DNA testing, there was little evidence presented from which a reasonable juror could find that Pope had intercourse with M.J. In fact, at trial, M.J. testified she could not recall whether Pope had sex with her. Further, A.J. could not testify that Pope had intercourse with M.J. because she was not in the car when the alleged act took place. Id. ¶ 61.

In sum, Pope represents a unique case wherein completed DNA testing cast serious doubt upon whether Pope raped M.J., and as a result of an improper jury

instruction, there was no way to know if the jury found Pope guilty of raping M.J. or A.J. Unlike Beach, Pope did not give a detailed confession to law enforcement. Pope offers Beach no escape from the procedural bars precluding his present petition, and this Court should reject his argument that it can use Pope to reconsider matters that the Montana Supreme Court and the federal courts have previously concluded to be procedurally barred. A recap of some of Beach's accusations only serves to highlight why this Court should conclude that Beach's postconviction petition is barred.

For example, Beach has persistently attacked the reputation of all of the law enforcement officers involved in his case and continues to do so in his current petition. He has accused the Louisiana officers of every thing from drugging his milk shake to elicit a confession, to making a homosexual advance at him during his interrogation. Interestingly enough, however, Beach did not disclose these "horrors" until relatively recently, in a statement to his expert Richard Leo given in 2002. (Ex. 19 at 11-12; Leo's 9/19/02 interview of Beach attached as App. B to Ex. 19.) Further, even some of Beach's disclosures to Leo conflicted with his own testimony at the clemency hearing. (Ex. 19 at 12.) At Beach's clemency hearing, the Board heard from each of the law enforcement officers, Richard Leo and Beach. It was the Board's opinion that the testimony of the Louisiana detectives was more credible than that of Beach "in every respect." (Ex. 19 at 12.)

Beach has also attacked a group of women who lived in Poplar at the time of the Nees homicide claiming that it was a wild gang of jealous girls who killed Nees. As the Board, observed, however:

> it would have been most unusual for them [gang of girls] to inflict all of the wounds only on the top portion of the body. In a gang attack it is much more typical for wounds to be inflicted all over the body as the assailants join in the aggression.

(Ex. 19 at 9.) Further, there was no physical evidence to connect Maude or Atkinson to the crime scene, and neither of these women ever gave a detailed confession to law enforcement. In fact, in 1998, apparently at Beach's behest, the FBI compared the

fingerprints and palms prints of Dotty Sue Knees, a/k/a Sissy Atkinson, Maude Kirn (Maude Greyhawk), and Joanne Jackson to latent lifts from the Nees truck and the beer cans at the crime scene. After doing so, the FBI did not identify any more of the 11 unidentified fingerprints and 4 unidentified palm prints. (FBI Doc. and Rep, attached as Ex. 20.)

As Beach's personal attacks on people like Greyhawk, Atkinson and law enforcement officers with commendable, stellar careers demonstrates, Beach and his supporters will stop at nothing to gain Beach's freedom. This is best demonstrated by the testimony Beach presented from his sister at the clemency hearing, which Beach used to overcome the obstacle that he had no alibi at the time of the homicide.

For the first time ever, Beach's sister, Barb Selinda, testified at the Clemency Hearing that she saw Beach at home asleep in his bed around 12:30 or 1 a.m., on June 16, 1979, just prior to the estimated time of Nees's death. (Clem Tr. at 626-29.) Selinda further testified, for the first time ever, there is no way that Beach could have left the house the night of the murder without her hearing him leave. (Clem. Tr. at 628-29, 886.) Selinda claims that she shared this information with every one of Beach's attorneys, of whom there were many, but none of the attorneys ever allowed her to formally give her alibi statement--not even Beach's current attorney. (Clem. Tr. at 646-51.)[10]

Notably, Beach does not so much as mention in his current petition the alibi testimony Selinda provided at the clemency hearing. Perhaps Beach has recognized that providing an alibi for the first time 28 years after a homicide lacks a ring of truth. The Board was not persuaded by Selinda's testimony and in its Order stated:

> The sister of Mr. Beach, now alibi witness some three decades later, after not only the trial in which she says that Mr. Moses would not allow her to testify, but the various intervening legal efforts at freeing Mr. Beach at which new evidence could have been introduced, simply renders noncompelling the testimony. She is a sweet sister who clearly and

[10] Beach never even mentioned his sister's alibi as a means of showing his innocence in his pro se 1994 and 2005 clemency applications filed with the Board.

> understandably wants to see her brother freed; her testimony is in conflict with the testimony of the mother who did testify at trial and was present throughout but did not testify at this hearing.

(Ex. 19 at 13.)

The Board described Beach's confession to be "compellingly self-authenticating" and further elaborated:

> It seems that Mr. Beach's conflicting stories of how the confession came about and why it should be ignored only serve ever-more-deeply to call Mr. Beach's credibility with regard to his denials into question rather than undermining the reliability of the confession provided to the detectives. Ultimately, his statement to detectives that he had gone home after the murder and tried to convince himself that he did not do it, chilling as it is, provides what seems to this Board the likeliest explanation of what he is doing still.

(Ex. 19 at 12-13.) Beach confessed to brutally murdering Nees. Every court in the land that has considered the legitimacy of Beach's confession has soundly upheld it. Beach's compelling confession to Nees's murder precludes a finding of actual innocence. To hold otherwise, would itself be a fundamental miscarriage of justice.

2. Hearsay Statements Attributable to Maude Greyhawk Are Not Admissible Under Mont. R. Evid. 804(b)(3) and Even Assuming Admissibility the Alleged Statements Do Not Establish Beach's Actual Innocence.

a. <u>Admissibility of the alleged statements</u>

At page 5 of his Memorandum in Support of Petition for Post Conviction Relief (Beach Memorandum), Beach argues that any of his "newly discovered evidence," which amount to hearsay statements implicating others in the Nees homicide, would be admissible at a hearing or trial pursuant to Mont. R. Evid. 804(b)(3). Montana Rule of Evidence 804 provides an exception to the hearsay rule when the declarant is unavailable. Rule 804 specifically defines unavailability to include when the declarant:

> (a)(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

The following is an exception to the hearsay rule when the declarant is unavailable:

> Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. **A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.**

(Mont. R. Evid. 804(b)(3), emphasis added.)

With little attention to existing case law regarding admissibility of evidence under Mont. R. Evid. 804(b)(3), Beach concludes in summary and incorrect fashion that any hearsay statement attributed to Maude upon which he wishes to rely would ultimately be deemed admissible as a statement against interest. He further asserts that the necessary "corroborating circumstances" are present because, according to him, Maude made incriminating statements to multiple individuals on various occasions. (Beach Memo. at 7.) Beach's test for admissibility of hearsay statements is not only lenient but is premised upon the theory that Maude actually confessed to each of these persons and that his parade of witnesses testifying about hearsay is presumptively reliable.

The Montana Supreme Court has made it clear that in order for a declarant to be unavailable under Mont. R. Evid. 804(a)(5), the proponent of the hearsay statement must make "more than a half-hearted effort" of procuring the declarant's attendance. State v. Diaz, 2006 MT 303, ¶ 20, 334 Mont. 479, 148 P.3d 628. In State v. Widenhofer, 286 Mont. 341, 950 P.2d 1383 (1997), the State attempted to introduce a hearsay statement uttered by an alleged unavailable witness and purported to be a statement against interest. Widenhofer was convicted of driving under the influence of alcohol. At trial, the district court allowed the investigating officer to testify that Widenhofer's passenger, who was not present for the trial, told him Widenhofer was driving the vehicle when the two wrecked. Id., 950 P.2d at 1388. The Court concluded that the State's act

of issuing a subpoena for the passenger the night before it expected him to testify at trial was only a "minimal" effort to procure the witness's attendance and was insufficient to make the witness unavailable for purpose of Mont. R. Evid. 804(a)(5). Id., 950 P.2d at 1390.

The burden of demonstrating unavailability falls squarely upon the proponent of the hearsay statement. State v. Osborne, 1999 MT 149, ¶ 21, 295 Mont. 54, 982 P.2d 1045; United States v. Vasquez-Ramirez, 629 F.2d 1295, 1297 (9th Cir. 1980). Thus, before any hearsay statement would be admissible as a statement against interest, Beach would have to prove that the declarant was indeed "unavailable." While the Montana Supreme Court has had limited opportunities to address the issue of "unavailability," the Ninth Circuit Court of Appeals has repeatedly addressed this issue. The burden is not viewed lightly. For example, in United States v. Vasquez-Ramirez, the Ninth Circuit concluded that after alien witnesses were returned to Mexico they were not "unavailable, since the government conceded it had effectively subpoenaed other alien witnesses." Vasquez-Ramirez, 629 F.2d at 1297. Further, in United States v. Pena-Gutierrez, 222 F.3d 1080 (9th Cir. 2000), the court concluded that a deported witness was not unavailable when the government had the witness's address in Mexico and asserted no basis for believing that the witness would not respond to a request to return to the United States. Pena-Gutierrez, 222 F.3d at 1088.

At the clemency hearing, the Board expressed its displeasure with Beach's efforts at effectively subpoenaing Maude for the hearing. Beach was well aware that Maude lived in Colorado. While Maude received a subpoena for the clemency hearing, Beach had done nothing to make travel arrangements or pay her expenses to travel to the hearing. It was not until the Board took Beach to task that he made a last minute effort to get a cashier's check to Maude, which she did not receive until the Friday before the hearing. (Clem. Tr. at 375-76, 459.) Beach's efforts would not have passed muster in a court of law, but the Board was committed to making certain that Beach had every

opportunity to "tell his story" and, with the State's concurrence, allowed him to present hearsay statements through Judy Greyhawk and Ron Kemp. (Clem. Tr. at 463.) Notably, the Board issued a subpoena at the request of Beach's counsel for Janice White Eagle Johnson. Beach however did not even call Janice White Eagle as a witness for the clemency hearing but now relies upon her written statement to support an actual innocence claim.

Beach now asks this Court to assume that if he were granted a court hearing, Maude would be unavailable. This only demonstrates what a stretch Beach is making when he claims there is reliable newly-discovered evidence of his innocence. He is building his claim of innocence on the backs of Maude and Atkinson, and he is using hearsay statements to do it. Even if Beach could overcome this hurdle, however, he still could not prove corroborating circumstances clearly indicating the trustworthiness of Maude's alleged statements to Janice White Eagle, Ron Kemp and Judy Greyhawk.

A proponent of a hearsay statement, such as Beach now relies upon, must do more than provide circumstances that tend to indicate the trustworthiness of the statement, but rather, the circumstances must **clearly** indicate it. United States v. Satterfield, 572 F.2d 687, 693 (9th Cir. 1978.) Beach, however, merely asks this Court to presume the trustworthiness of the alleged statements. The Montana Supreme Court has previously observed that the circumstantial guarantees of trustworthiness are a matter for the trial court to decide in the first instance. It will uphold that determination absent an abuse of discretion. Hobbs v. Pacific Hide and Fur Depot, 236 Mont. 503, 513, 771 P.2d 125, 131 (1988).

In State v. La Pier, 208 Mont. 106, 676 P.2d 210 (1984), the Montana Supreme Court upheld the district court's conclusion that the defendant's proposed hearsay statement lacked a circumstantial guarantee of trustworthiness. In La Pier, the declarant in question was from Canada and apparently deemed unavailable. The declarant apparently had witnessed the burglary attempt of which La Pier was convicted. A

statement the declarant gave to a police officer might have been helpful to La Pier at trial. Id., 676 P.2d at 211.

Similarly, in State v. Powers, 233 Mont. 54, 758 P.2d 761 (1988), the defendant argued on appeal that the district court erred when it refused to allow a defense witness to testify as to hearsay statements of an unavailable accomplice. Id., 758 P.2d at 761. The Montana Supreme Court affirmed the lower court's conclusion that there were no corroborating circumstances offered clearly indicating the trustworthiness of the statement. Id., 758 P.2d at 763.

By way of comparison, in State v. McCord, 251 Mont. 317, 825 P.2d 194 (1992), the Montana Supreme Court listed the extensive corroborating circumstances that established a guarantee of trustworthiness of the hearsay statement at issue. The declarant in McCord was a friend of the homicide victim who clearly had been implicated in the victim's death and most likely would have been charged had he not died in a car accident. The corroborating circumstances included that: the victim was found dead in the family home with no sign of forced entrance; the fatal wound was consistent with being inflicted by a weapon owned by the victim and kept in the family safe; the defendant and the deceased declarant had access to the home and the safe; the defendant, the victim's wife, and the deceased declarant were having an affair; the deceased declarant had been living in the victim's home, and the victim had recently informed him he would have to move out; and the deceased declarant knew that the victim was about to find out about the bleak financial situation that he and the defendant were attempting to hide from him. The Montana Supreme Court also observed that the two witnesses to the hearsay statements had no motive to testify falsely. Id., 825 P.2d at 198.

In his memorandum, Beach makes a passing reference to State v. Castle, 285 Mont. 363, 948 P.2d 688 (1997), as authority to support his theory that Maude's alleged statements would clearly be admissible. Castle, however, was not addressing the admissibility of self-inculpatory statements, but rather, was addressing an accomplice's

statements to law enforcement officers that implicated not only the accomplice but also Castle. The accomplice was unavailable at trial. The Montana Supreme Court concluded:

> In this case, Cassell's statements wherein he confessed to beating and stabbing the victim fall squarely into the exception [Rule 804(3)(b)] because they tend to subject him to criminal liability. However, in other parts of his statement, Cassell shifts the blame to appellant by implying that it was appellant and not he who actually killed the victim. Specifically, he states Formo [the victim] was still alive when they dumped the body in the dumpster and it was appellant who volunteered to "take the . . .rap" by cutting the victim's throat and ensuring the victim was dead. These statements are classic examples of inadmissible hearsay. They lack any indicia of trustworthiness.

Castle, 285 Mont. at 373, 948 P.2d at 694. In Castle, the Montana Supreme Court disallowed the hearsay statements even though the declarant made the statements to law enforcement officers. In the instant case, Maude never made incriminating statements to any law enforcement officer.

Beach is asking this Court to make a number of assumptions. Assuming this Court somehow concluded that Beach was entitled to a hearing, and assuming that he could adequately demonstrate that Maude was unavailable to testify at the hearing, he still could not prove that the circumstances surrounding Maude's alleged statements to Janice White Eagle, Ron Kemp and Judy Greyhawk clearly indicated guarantees of trustworthiness. Finally, as set forth below, even if Beach could overcome this obstacle, and even if this Court were to take the alleged statements at face value, the statements do not demonstrate Beach's actual innocence.

b. <u>The alleged statements do not demonstrate actual innocence</u>.

(1) Janice White Eagle

Janice White Eagle worked with Maude at Fort Peck Indian Health Services (IHS). In her written statement, no doubt drafted by Centurion Ministries, White Eagle explains that several years ago Centurion Ministries' investigators came to the IHS building to talk with Maude. According to White Eagle, at this unspecified date and

time, Maude told her they were investigating the Kim Nees murder and she did not want to talk with them. When White Eagle asked Maude why, she allegedly responded: "My car was down there, the girls had my car." (See Beach's Ex. 12.)

Beach offers no specifics of when this alleged statement occurred. He also expects this Court to review the alleged statement as a confession. Even assuming Maude made this exact statement, it does not implicate her, or Atkinson, in the Nees murder. All the alleged statement establishes is there were girls riding around in Maude's car the evening of Nees's murder. The statement does nothing to cast doubt on Beach's confession or his guilt. What it does confirm are facts that Maude admitted right after Nees's murder--she was driving around town with some other girls the night Nees was murdered. (FBI Investigative Rep. dated 7/10/79 attached as Ex. 21.)[11] This information has always been available to Beach, and he was free to use it however he chose at trial. Finally, Maude no doubt had very good reasons, that had nothing to do with a guilty mind, for not wanting to talk with Centurion Ministries' investigators. Maybe she was just plain tired of being harassed by those who clearly hoped to pin a murder on her. After all, Maude has suffered public ridicule as a result of Beach's and his supporters' unfounded allegations against her.

(2) Ron Kemp

Ron Kemp is presently the Roosevelt County Undersheriff. (Clem. Tr. at 374.) In February 2004, Kemp worked as a criminal investigator for the Roosevelt County Attorney, Fred Hoffman. (Clem. Tr. at 571.) At the time, Centurion Ministries was conducting its own investigation into the Nees homicide. Hoffman cooperated with Centurion Ministries, and instructed Kemp to interview people Centurion Ministries identified, in part, because he did not wish to be accused of participating in some

[11] Maude is identified in the report as Maude Clark rather than Maude Greyhawk.

conspiracy to cover up information. (Clem. Tr. at 583-84.) One such person Centurion Ministries identified was Calvin Lester. Kemp interviewed Lester who claimed to be an eyewitness to the homicide and claimed Maude was at the scene of the murder. (Clem. Tr. at 583.) Consequently, Centurion Ministries requested, and Hoffman instructed Kemp, to interview Maude and confront her with this information. It was not Kemp's idea to interview Maude. (Clem. Tr. at 583-84.)

In February 2004, Rich Hepburn, a Centurion Ministries' investigator, gave Kemp a ride to Poplar where Maude lived, although Kemp went to Maude's house alone. (Clem. Tr. at 572.) As Kemp walked up the sidewalk to Maude's home, she was just leaving. Kemp introduced himself and told Maude he would like to speak with her about the Kim Nees case. Kemp had not previously met Maude. (Clem. Tr. at 573, 585.) Maude did not display any noteworthy reaction to Kemp's request and asked when they could meet. (Clem. Tr. at 573.) She further explained that she was dividing her time between Poplar and Denver, Colorado, and only intended to be in Poplar for a few days. Consequently, they scheduled a meeting for the next day. (Clem. Tr. at 573-74.)

Maude appeared for the meeting the next day as scheduled. (Clem. Tr. at 574.) Kemp asked Maude: "How come everybody in town says you were involved in this [Nees homicide] if you weren't?" (Clem. Tr. at 575-76.) Maude responded there were a lot of people in Poplar who did not like her. Kemp then told Maude that he had an eyewitness to the murder who could place her there. He further elaborated that he could not imagine why that person would place her at the murder scene if she was not there because the "eyewitness" had nothing against her. (Clem. Tr. at 576.)

Kemp described his meeting with Maude as a "typical interview." (Clem. Tr. at 577.) She denied any involvement in the homicide. Maude consistently reported her activities the evening of the Nees' homicide as she had back in 1979. Kemp then told Maude: "Well, that still doesn't explain to me why this particular individual would say you were there and that they saw you if you weren't there." (Clem. Tr. at 578.) The idea

of an eyewitness placing her at the murder scene understandably upset Maude. She then stated that she had smoked a lot of pot and drank a lot of alcohol that night. She asked Kemp if he thought it was somehow possible that she could have been there but because of drug and alcohol use she had blacked out and could not remember it. He responded that he did not think that was possible. (Clem. Tr. at 578.) Maude only came up with this theory to respond to Kemp's repeated reports that he had an eyewitness who could place her at the murder scene. (Clem. Tr. at 587.)

Maude told Kemp that she and Nees had always gotten along well and were good friends. She further elaborated that she has always believed that there was someone else in addition to Beach involved in Nees's murder. Maude theorized that someone lured Nees down to the train bridge because she just could not imagine her going to the train bridge alone with Beach. (Clem. Tr. at 578-79.) At the conclusion of the interview, Maude agreed to take a polygraph. (Clem. Tr. at 581.)

After Kemp interviewed Maude, however, Lester, the purported eyewitness, declined to take an FBI polygraph that Kemp arranged and recanted his statement that he was an eyewitness to Nees's murder to FBI Agent Stacey Smiedala. (Clem. Tr. at 586; Depo. of FBI Agent Stacey Smiedala attached as Ex. 22.)[12] Kemp further explained that prior to his interview of Lester, someone from Centurion Ministries had interviewed him. Kemp subsequently reviewed Lester's signed statement to Centurion Ministries and concluded there were differences between the statement Lester gave Centurion Ministries and the statement Lester gave him. (Clem. Tr. at 587-88.)

Kemp acknowledged that when he interviewed Maude in February 2004, he wanted her explanation for why an eyewitness would place her at the murder scene.

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[12] For complete details regarding Lester's statements and his subsequent recantation, please see the State's Response to Clemency Application, attached as Ex. 15, at 68-74, and the FBI Agent Stacey Smiedala's deposition attached as Ex. 22.

Ultimately, however, the person who placed her there recanted his statement. (Clem. Tr. at 588.) Thus, the entire purpose for Kemp to interview Maude became moot. Yet, Beach would like this Court to believe that somehow Kemp's interview of Maude demonstrates his actual innocence.

To the contrary, Kemp's interview of Maude demonstrates that Beach's claim of actual innocence is built upon nothing. Further, despite the false claim of an alleged "eyewitness" Maude **did not** confess to any involvement in Nees's murder. Rather, in response to Kemp's repeated inquiries about why someone who had no grudge against her would place her at the murder scene, Maude finally asked him if he thought it was possible that she was so strung out on alcohol and drugs that she was there and could not remember. Moreover, if Maude had confessed under these circumstances, the research and testimony of Beach's very own expert, Richard Leo, would clearly demonstrate the "confession" to be involuntary and unreliable. Of course, even with the pressure of being confronted with what later proved to be a false "eyewitness" account of the Nees murder, Maude did not confess.

(3) Judy Greyhawk

At the clemency hearing, Judy Greyhawk testified about her recollection of a telephone conversation with Maude back in February 2004. (Clem. Tr. at 557, 569.) Maude apparently called to speak with Judy's son, Mouse, but according to Judy after Maude learned Mouse was sleeping, Maude said that she knew she was going to prison for the Nees murder. Maude said some investigator was at her door and she wanted Mouse to come and get her so she could get away from the investigator. (Clem. Tr. at 558-59.) According to Judy, Maude then added that she did not kill Nees, she just lured her down to the river and then kicked her in the head a few times. (Beach's Postconviction Pet. Ex. 10; Clem. Tr. at 559.) Shortly after the alleged conversation, Judy went to the Legion Club where she shared this information with Glenna Lockman.

(Clem. Tr. at 559-60.) Centurion Ministries' reports indicate that Lockman subsequently shared this information with one of its investigators.

The State suspects that if Maude's telephone conversation with Judy Greyhawk occurred, then it occurred after Maude's interview with Kemp. It is important to remember that Maude cooperated fully with Kemp. In fact, when Kemp first approached Maude and said he wanted to talk with her about the Nees case, her demeanor did not change. She was neither panicked nor upset. Moreover, even though Maude did not have to cooperate with Kemp, she asked when they could get together and volunteered that she was only in Poplar for a short time before she intended to return to Colorado. Maude could have easily avoided an interview with Kemp by not sharing this information with him. Her actions and demeanor with Kemp hardly reflect a guilty mind.

Perhaps, in light of Kemp's disclosure of an "eyewitness," Maude did call Judy Greyhawk's home and did believe her arrest was imminent. Understandably this would be very upsetting since Maude had no idea who would place her at the murder scene when she adamantly denied being there. Perhaps in the retelling of the conversation Judy has confused some of the details. For example, Maude theorized to Kemp that she always believed someone lured Kim down to the train bridge. Perhaps Judy misunderstood what Maude told her. It seems unlikely that if Maude were going to confess to a crime she would confess to Judy when even Judy acknowledged that they were not close and did not move in the same circles. (Clem. Tr. at 557, 566.) Nonetheless, even if the phone call occurred and even if Judy has accurately remembered the two-minute conversation, the information Maude disclosed did not fit the crime scene. According to Dr. Pfaff's autopsy of Nees, Nees did not sustain any kicking injuries to her head, nor did she sustain injuries consistent with her having been beaten to death by a gang of people, since all of her injuries were to her head and neck, with the exception of defense-type injuries to her hands. (Clem. Tr. at 485-86; Tr. at 453.) Moreover, in Beach's Clemency Application, he included a report from Dr. Reay, who he

identified as his expert. Even Dr. Reay, however, did not identify any kicking injuries, but rather believed Nees's injuries were inflicted with an instrument.

3. Alleged Evidence Purportedly Implicating Sissy Atkinson and/or Maude Greyhawk Lacks Credibility and Does Not Establish Beach's Actual Innocence.

a. Richard Holen

Beach relies on a statement Richard Holen gave to Centurion Ministries in 2002, as well as Holen's testimony at Beach's clemency hearing, to support his claim that he did not kill Nees. In his 2002 statement to Centurion Ministries, Holen stated that on the night of Nees's murder he was at the Legion Club in Poplar. (See Beach's Ex. 14.) According to Holen, after the Legion Club shut down at 1:45 a.m., he "latched up" with Legion Club barmaid Gretchen Youpee.[13] Id. He clams that as he was driving west on Highway Two with Youpee, he saw Ted Nees's truck ahead of his car. There were four or five people in the truck sitting shoulder to shoulder with one of the passengers sitting on someone's lap. Holen maintains the Nees truck turned off the highway and on to a dirt road that lead to the train bridge. Id. Holen recalls that the passenger sitting in "someone's lap was wearing one of those strap caps with a sun visor for a girl." Holen added: "I can picture all of this as though it was just last night." Id.

When Holen testified at Beach's clemency hearing, he embellished his story. He testified to not only seeing Ted Nees' truck in front of him on Highway Two at approximately 2:30 a.m. or later, but actually seeing Kim Nees driving the truck and turning off the highway and onto the road leading to the train bridge. (Clem. Tr. at 321, 323-24, 333-34.) Holen added that he drove for about another half mile down the highway, turned around and headed back towards Poplar. (Clem. Tr. at 324, 345-46.) As

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[13] Youpee, the person who could confirm or deny Holen's claims, is incapacitated and in a nursing home in Wolf Point. (Clem. Tr. at 335.)

he drove back to Poplar, Holen stated that he saw the Nees truck parked down by the train bridge and a car parked next to the truck. (Clem. Tr. at 324-26, 335, 346-47.) According to Holen, the Nees truck and car were parked so the drivers' doors were next to each other, and Kim was talking to whoever was in the car. (Clem. Tr. at 325-26, 335, 345-46.) Holen cannot identify the car he claims to have seen. (Clem. Tr. at 344-45.) Other than Kim, Holen cannot identify any of the persons he claims were in or near the Nees truck.

In his statement to Centurion Ministries and his testimony at the clemency hearing, Holen asserts that a few days later, at the Conoco gas station in Poplar, he told then Poplar Police Officer Steve Greyhawk he had seen the Nees truck on the night of Kim Nees's death and described what he saw. (Beach's Ex. 14; Clem. Tr. at 327.)

In response to Holen's claim that he had talked to Officer Greyhawk, Roosevelt County Sheriff Freedom Crawford interviewed Officer Greyhawk on May 1, 2007. (Sheriff's Rep. attached as Ex. 23.) Officer Greyhawk stated that he did not have any involvement in the Nees homicide investigation and he did not remember speaking with Holen. Id. Officer Greyhawk further stated that if he had spoken to Holen he would have written the contact with Holen down in his notes. Id.

In addition, the Roosevelt County Sheriff's Office interview of Holen on June 17, 1979, the day after the Nees homicide, calls into question Holen's credibility. The Roosevelt County Sheriff's Department questioned a number of people on June 17, 1979, regarding the Nees homicide, including Holen. (Sheriff's Notes attached as Ex. 24; Clem. Tr. at 513-515, 518-20.) Officer Bob Murray interviewed Holen and took notes. Id. Officer Murray's notes reflect that Holen told Officer Murray that he left the Legion Club about 2:30 a.m., after a fight outside. Officer Murray's notes make no mention of Holen seeing the Nees truck, Kim Nees driving the truck, the truck turning off the highway to the train bridge with a number of passengers, or a car parked next to the truck in the area of the train bridge. As the Parole Board correctly recognized, if Holen had

information regarding the Nees homicide, the time to share that information with law enforcement was when Officer Murray interviewed him the day after the homicide. (Ex. 19 at 9.) The fact that Holen never did so calls into question the credibility of his 2002 statement to Centurion Ministries and his testimony at Beach's clemency hearing.

In his statement to Centurion Ministries, Holen claims that it always bothered him that Beach confessed to killing Nees all by himself because it did not fit with what he saw that night. (Beach's Ex. 14.) Despite the fact that it "always bothered" him, at the time of Beach's 1984 trial Holen never informed law enforcement about what he now says he saw. (Clem. Tr. at 337, 339.)

Holen also knows former Roosevelt County Sheriff John Grainger. Holen is married to Grainger's cousin. (Clem. Tr. at 339-40.) If Holen had such valuable information regarding the Nees homicide one would have expected him to reveal the information to Grainger. He never did so. (Clem Tr. at 440.)

A claim of "actual innocence" under the fundamental miscarriage of justice exception must be founded upon **new reliable** evidence. Schlup, 513 U.S. at 324; Calderon, 523 U.S. at 559. Holen's testimony is not reliable for the above reasons, and it does not demonstrate Beach is actually innocent or excuse Beach's failure to timely file his postconviction petition.

b. Orrie Burshia

As "new" evidence of his innocence, Beach refers to a September 1979 interview of Orrie Burshia by former Roosevelt County Sheriff Don Carpenter in which Burshia discusses the alleged conversation she had with Mike Longtree regarding Kim Nees's murder, Longtree's alleged statement that he had witnessed the murder, and Longtree's alleged disclosure that he saw Atkinson and Terra Red Dog beating Kim. (Beach's Ex. 9.) Beach claims that the State failed to disclose Burshia's statement to Beach's counsel prior to trial, and that Beach's counsel first became aware of it after he appealed to the Montana Supreme Court. (Beach's Pet. at 10.)

Burshia's statement concerning what Longtree allegedly told her about the Nees homicide is pure hearsay and inherently untrustworthy. Moreover, Burshia is dead. Her statement to Carpenter is also hearsay and cross-examination is no longer a viable tool to test her credibility. Under the fundamental miscarriage of justice exception, new evidence of actual innocence must be reliable, and because Burshia's statement is hearsay it is unreliable and insufficient to show Beach's actual innocence. Schlup, 513 U.S. at 324; Calderon, 523 U.S. at 559.

At his clemency hearing, Beach had the opportunity to call Longtree and question him regarding whether he had any knowledge of the Nees homicide, and Beach chose not to do so. (Clem. Tr. at 366-67.)[14] Beach did not call Longtree because Longtree has consistently denied ever having any knowledge of the Nees homicide. On August 21, 1979, law enforcement questioned Longtree regarding the Nees homicide, and Longtree denied seeing the homicide or having information regarding the homicide. (FBI Rep. attached as Ex. 26.) In a May 22, 2006 interview with a Roosevelt Count Attorney investigator, Longtree said he knew nothing about the homicide. (5/22/06 Roosevelt County Rep. attached as Ex. 27.)

In addition, Beach has not supported his claim that the State failed to disclose Burshia's statement to his counsel prior to trial with any evidence as required by Mont. Code Ann. § 46-21-104(1)(c). State v. Hanson, 1999 MT 226, ¶ 22, 296 Mont. 82, 988 P.2d 299. Missing from Beach's petition is a statement from his trial counsel Timer Moses that the State failed to disclose Burshia's statement. In light of Beach's failure to support his allegation with any evidence, this Court should refuse to give any credence to Beach's allegation.

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[14]The Board issued a subpoena for Longtree at the request of Beach's counsel. (Longtree Subpoena attached as Ex. 25.) Apparently, Beach's counsel never had Longtree served with the subpoena. (Clem. Tr. at 367.)

c. Dunn O'Connor

As new evidence of his innocence, Beach refers to a statement from Dunn O'Connor regarding O'Connor receiving an early morning telephone call from Sissy Atkinson in which Atkinson stated that they had found Nees's body by the train bridge. Beach previously presented O'Connor's statement to the Board and called O'Connor as a witness at his clemency hearing. (Clem. Tr. at 355-59.) As the Board correctly recognized, even if the alleged early call had been made, it "provides no evidence whatsoever that a different person than Mr. Beach murdered her." (Ex. 19 at 8.)

Moreover, O'Connor's claim of receiving a telephone call from Atkinson and his ability to remember the exact time Atkinson called 28 years later is highly suspect and hardly the reliable evidence called for by the Court in Schlup to show actual innocence under the fundamental miscarriage of justice exception. By his own admission, O'Connor was out partying and drinking hard on June 16, 1979, and then went home and went to bed drunk at approximately 3 a.m. (Beach's Ex. 7; Clem Tr. at 357, 363.) In light of the fact that O'Connor went to sleep drunk at 3 a.m., his story of rising to get the telephone two hours later, and then 28 years later remembering the exact time of the call lacks credibility.

In his January 1, 29, 2007 statement, O'Connor explained why he did not come forward earlier with this information. O'Connor stated: "I've come forward with this statement because I now realize that this crime was not discovered until almost 7:00 a.m., therefore the timing of the phone call is significant." (Beach's Ex. 7.) In his sworn testimony in front of the Board, O'Connor testified differently. O'Connor testified that it was later in **1979** that he learned that the police had discovered Nees's body at 7 a.m. (Clem. Tr. at 361.) O'Connor never went to law enforcement in 1979 to report that Atkinson seemed to know about the homicide earlier than 7 a.m. Id. One of the Board members was clearly troubled by that fact O'Connor never attempted to help Beach by contacting law enforcement and specifically asked O'Connor if there was some specific

reason why he never contacted law enforcement. O'Connor answered: "Well, sir, at that time, the young man made a confession four years later--three years later. And why I never contacted the law enforcement? I don't know why." (Clem. Tr. at 364.)

Atkinson testified that she never made a 5 a.m. call to O'Connor to tell him about Nees's body being found in the river. (Clem. Tr. at 167-68.) In light of Atkinson's testimony, and the fact that O'Connor was drunk on the morning of June 16, 1979, never contacted law enforcement, and waited 28 years to mention the alleged telephone call, O'Connor's statement and testimony hardly demonstrates Beach's actual innocence under the standard set forth in Schlup.

d. Vonnie Brown

Vonnie Brown claims that in 2004 Atkinson made some admissions to her. Brown's claims about Atkinson should be viewed with a great deal of skepticism because Brown clearly does not like Atkinson and there is "bad blood" between the two of them. (Clem. Tr. at 164, 229, 302-03.) Atkinson reported Brown to Brown's probation officer for stealing clothes belonging Atkinson and her husband. (Clem Tr. at 164, 229.) Brown stated that Atkinson's report led to her incarceration. (Clem. Tr. at 302-03, 311.) Brown also claims that Atkinson stole money from her. (Clem Tr. at 311.)

Atkinson testified that she never had a conversation with Brown in June 2004 regarding Kim Nees's murder. (Clem. Tr. at 163-65.) Atkinson acknowledged that she was using OcyContin in 2004 when Brown visited her in Great Falls. (Clem Tr. at 163-64, 228-29.) Atkinson testified that Brown was also using drugs at that time. (Clem. Tr. at 229.)

Brown, like O'Connor, never contacted law enforcement about the alleged statements made by Atkinson. (Clem. Tr. at 311.) In addition, the information that Atkinson allegedly disclosed to Brown did not fit the crime scene. Brown claimed that Atkinson had stated that they had **kicked** Kim. According to Dr. Pfaff's autopsy of Nees,

Nees did not sustain any kicking injuries to her head. (Tr. at 485-86.) The autopsy photos[15] also show that Nees did not sustain any kicking injuries.

In light of Brown's dislike for Atkinson, her failure to ever provide law enforcement with Atkinson's alleged statement, and the fact that the disclosed information regarding the kicking of Nees does not fit with the actual injuries sustained by Nees, Brown hardly provides the new reliable evidence necessary to show Beach's actual innocence under the fundamental miscarriage of justice standard set forth in Schlup.

e. Roberta Ryan

Roberta Ryan recalls that, 28 years ago, she saw Atkinson and other girls coming in and out of her bar sometime between midnight and 2 a.m. She admitted, however, that there were approximately 150 people in the bar, there was a dance also going on and she was busy. (Clem. Tr. at 265-66.) Even if Ryan's recall was correct, it provides no evidence whatsoever that someone else other than Beach killed Nees. Her testimony does not place Atkinson or anyone else at the murder scene and provides no alibi for Beach. Her testimony is a far cry from demonstrating Beach's actual innocence under the standard set forth in Schlup. Ryan's statement should not cause this Court to overlook Beach's untimely petition and address the merits of his postconviction claims.

f. Paul Kidd's October 23, 1995 Affidavit

On January 7, 1983, Beach provided the Louisiana officers a tape recorded confession in which he described in detail murdering Nees. (Beach, 705 P.2d at 99; State's Ex. 1.) At Beach's 1984 suppression hearing and trial, the Louisiana officers testified that during a January 11, 1983 interview, in the presence of his Louisiana attorney Paul Kidd, Beach again admitted to killing Nees. (Tr. at 235-37, 271-72, 277,

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[15] The autopsy photos of the blows to Kim's head and neck were introduced at Beach's 1984 trial and are included in the district court file.

656-59, 746-48; Beach, 705 P.2d at 99.) In his current postconviction petition, as new evidence of his innocence, Beach lists an October 23, 1995 affidavit from Kidd, in which Kidd states that Beach never confessed to the Nees murder in his presence. (Beach's Pet. at 5; Beach's Ex. 17.)

Beach first presented Kidd's affidavit as new evidence of his innocence in his 1995 postconviction proceeding in the Montana Supreme Court, and the Montana Supreme Court rejected Beach's claim, finding that the information in Kidd's affidavit was known to Beach since August 19, 1985 and, therefore, Kidd's information could not be considered new evidence for purposes of avoiding the five-year time limit for filing a petition. Beach v. Day, 913 P.2d 624-25. In light of the Montana Supreme Court's prior postconviction ruling on Kidd's affidavit, this Court should reject Beach's claim that Kidd's affidavit is new evidence of his innocence.

In his federal habeas corpus proceedings Beach also argued that Kidd's affidavit demonstrated his actual innocence. In reviewing Beach's request to apply the fundamental miscarriage of justice exception to his procedurally defaulted ineffective assistance of counsel claims, both the federal district court and the Ninth Circuit concluded that Kidd's affidavit did not show Beach's actual innocence under Schlup and would only go to undermine the credibility of the officers as to what occurred on January 11, 1983. (Ex. 9 at 11-12; Ex. 10 at 8.) Regarding Kidd's affidavit, the Ninth Circuit stated in part:

> This evidence would only go to undermine the credibility of the officers relative to Beach's alleged confession on January 11th and does not affect the taped confession made on January 7th. Beach cannot show that it is more likely than not that no reasonable juror would have convicted him in light of the affidavit which only calls into question the credibility of prosecution witnesses regarding Beach's alleged second confession. See Clark v. Lewis, 1 F.3d 814, 824 (9th Cir. 1993). We agree with the district court that Beach has not made a sufficient threshold showing of factual innocence to allow for habeas review of his procedurally defaulted claims.

(Ex. 10 at 8.)

Moreover, in reviewing Kidd's affidavit as "new" evidence of Beach's innocence, this Court should also consider that Kidd testified at Beach's clemency hearing. The Board had the opportunity to weigh Kidd's testimony and the conflicting testimony of the law enforcement officers. In making this credibility determination, the Board found Kidd not credible. (Ex. 19 at 11.)

In light of the prior rulings from the Montana Supreme Court, the federal district court and Ninth Circuit, this Court should reject Beach's claim that Kidd's affidavit presents new evidence of his actual innocence.

g. Carl Four Star

As further "new" evidence of his innocence and justification for this Court overlooking his untimely petition, Beach relies on a statement Carl Four Star gave to Centurion Ministries. (Beach's Pet. at 8; Beach's Ex.5 .) Four Star claimed that while working a shift for A & S Tribal Industries (A & S) in the "spring of 1984 after the Barry Beach trial was over and Beach had been convicted,"[16] he overheard a conversation between Atkinson and William Stubby Balbinot. (Beach's Ex. 5.) Four Star claimed that he was 20 feet away from Atkinson and Balbinot when he overheard Atkinson tell Balbinot that "they got the wrong man" in response to Balbinot's comments regarding Beach. Id. Four Star also claimed Atkinson said that she was there with Maude, Rose and another girl whose name Four Star cannot recall. According to Four Star, Atkinson said: "It was a perfect crime, we got away with murder." Id. Atkinson then supposedly walked over towards Four Star, and while looking at him, said "got away with a capital crime." Id.

[16] The jury found Beach guilty on April 13, 1984, and the district court sentenced Beach on May 11, 1984. Beach, 705 P.2d at 100.

Beach attached Four Star's statement to his February 15, 2007 clemency application response. As part of the clemency proceeding, the State conducted a tape recorded interview of Four Star on March 21, 2007, and later submitted the interview to the Board. (Interview of Four Star attached as Ex. 28.) The State also provided a copy of the interview to Beach's counsel. During the interview, Four Star stated that he first provided Centurion Ministries with the information in his statement in approximately 2001. (Ex. 28 at 29.) Four Star explained that he dictated the information to Beach's attorney who then typed up the statement. Four Star read a hard copy of the statement and signed it. (Ex. 28 at 13.) Four Star stated that he agreed 100 percent with the contents of his February 8, 2007 statement. (Ex. 28 at 29.)

During his March 2007 interview, Four Star added details that were not found in his statement--details which call into question Four Star's credibility. According to Four Star, he had overheard Atkinson tell Balbinot that they caught the wrong guy and that Atkinson, Maude **Greyhawk**, Rose and another person whose name Four Star cannot recall were involved. (Ex. 28 at 15, 19.) In his earlier statement he gave to Beach's attorney, he only mentioned "Maude" as one of the accomplices. Interestingly enough, during the clemency hearing, Four Star testified that he overheard Atkinson tell Balbinot that Atkinson, Rose and "a person by the name of Maude" were responsible for Nees's murder. (Clem. Tr. at 526-27.)

Four Star also added other parts to his story in his interview with the State that were not in his statement given to Beach's attorney. For example, according to Four Star, Atkinson stated that the women were at the park, and they had dragged Nees out. They first pushed Nees around, but then started hitting her, and they took turns hitting and kicking her. (Ex. 28 at 16, 19.) Four Star recalled Atkinson mentioning she or somebody grabbed something and they were hitting her with it, but he did not know what it was. (Ex. 28 at 19.)

Four Star's claim that he had overheard Atkinson tell Balbinot that she and the other two women took turns hitting and kicking Nees is not by supported by Dr. Pfaff's autopsy. According to Dr. Pfaff's autopsy report of Nees, Nees did not sustain any kicking type injuries to her head. If Nees had been hit and kicked to death by a group of women one would expect to find injuries up and down her body. (Clem. Tr. at 485-86.) Nees's wounds were confined to her head, neck and shoulders, with defense type injuries to her hands. (Tr. at 453; see also autopsy photos in district court file.) As the Board correctly recognized, Nees's injuries do not reflect that she was killed by a group of women. (Ex. 19 at 9.)

In his tape-recorded interview with the State, Four Star stated he was working with Hoss Red Eagle when he overheard Atkinson and Balbinot's conversation. (Ex. 28 at 22, 23.) Even though Four Star and Red Eagle were working at the same table, Four Star thought that Red Eagle did not hear anything. Four Star stated that at the time, he said to Red Eagle: "Did you hear that?" and Red Eagle replied: "What, what, what." (Ex. 28 at 27-28.)

Regarding the industrial noise at A & S when he allegedly overheard Atkinson and Balbinot's conversation, Four Star stated there was some noise in his work areas, but it was pretty quiet. (Ex. 28 at 14.) At Beach's clemency hearing, Four Star testified that Atkinson and Balbinot were 15 to 20 feet away from him when he overheard their conversation. (Clem. Tr. at 551.) Four Star testified that he was not eavesdropping on their conversation. (Clem. Tr. at 526.) Four Star was able to listen to their conversation because, according to Four Star, it was quiet in his work area. He even described it as so quiet you could hear a pin drop. (Clem. Tr. at 524-26.)

After interviewing Four Star, the State obtained work records of Red Eagle and Balbinot from A & S. The State also conducted a tape-recorded interview of Lawrence "Hoss" Red Eagle approximately five hours after the interview of Four Star. The State submitted the Red Eagle interview and the A & S work records to the Board as part of

Beach's clemency proceeding, and also provided Beach's counsel with a copy of the employment records and interview. (State's Ex. 16.) The employment records and Red Eagle's interview conflict with Four Star's version of the events.

In his tape-recorded interview, Red Eagle stated that he started working for A & S in 1985. (Red Eagle's Interview at 3-4, attached as Ex. 29.) Red Eagle's statement is corroborated by his A & S employment records, which provides that Red Eagle began working for A & S on January 7, 1985. (A & S employment records attached as Ex. 30.) Accordingly, since Red Eagle first started working with A & S in 1985, Red Eagle could not have been working next to Four Star in the Spring of 1984, when Four Star allegedly overheard Atkinson's conversation with Balbinot.

In addition, according to the A & S employment records for Balbinot, Balbinot first started working for A & S on August 28, 1984. (Ex. 30.) Accordingly, Four Star could not have overheard a conversation between Atkinson and Balbinot in the Spring of 1984, as he claims in his written statement.

Atkinson testified that she worked at A & S with Four Star, but she never talked to Four Star about the Nees homicide. (Clem. Tr. at 157-58, 161.) She also testified that she never told Four Star that Beach was innocent and she had gotten away with a "capital crime." (Clem. Tr. at 227-28.)

In contrast to Four Star's recollection of the quiet work environment at A & S, Atkinson testified that it was very noisy at A & S due to the machinery. (Clem. Tr. at 160, 227.) Atkinson also testified that there were big fans running at A & S for ventilation. (Clem. Tr. at 227-28.) She stated that because of the noise, earplugs were available for people who wanted them. (Clem. Tr. at 227.)

Red Eagle's statement corroborated Atkinson's testimony regarding the extreme noise level at A & S. Red Eagle stated that when he worked side by side with Four Star at A & S, Atkinson was working approximately 20 feet away from them. (Ex. 29 at 8.) Red Eagle stated their work area was busy and noisy, with machines and big ventilation

fans going all the time. (Ex. 29 at 6-8, 14-15, 17.) He also acknowledged that there were noisy forklifts moving through the work areas "24-7." (Ex. 29 at 18.) Red Eagle explained that because of the noise, quite a few people wore earmuffs or plugs. Red Eagle had no hearing problems when he started working with A & S in 1985, but he suffered some hearing loss as a result of working there. (Ex. 29 at 7, 13-14.)

Red Eagle stated that he could not have overheard Atkinson if she were having a normal conversation with somebody in her work area. (Ex. 29 at 11.) Regarding the chances of his overhearing Atkinson having a conversation with someone 20 feet away, Red Eagle stated: "You'd have to be listening really good because I, I didn't hardly hear anybody around us unless I was talking right to 'em." (Ex. 29 at 12.) Red Eagle explained that if he had wanted to get Atkinson's attention for her to do something he would have had to yell at her. (Ex. 29 at 10.)

At the clemency hearing, Sergeant Richie McDonald of the Roosevelt County Sheriff's Department testified that he had also worked at A & S. (Clem. Tr. at 954-63.) Sergeant McDonald, like Atkinson and Red Eagle, testified that the noise level was very loud because of the machinery, ventilation fans, and the constant quota work of the workers. (Clem. Tr. at 954-62.) When asked if any part of A & S was quiet, he replied: "Maybe the administrative offices." (Clem. Tr. at 956.) Sergeant McDonald worked in a different area of A & S than Four Star and did not work at A & S with Four Star, but he was familiar with Four Star's work area. (Clem Tr. at 957, 959.) When Sergeant McDonald was asked if he agreed with Four Star's testimony that it was so quiet in Four Star's work area he could hear a pin drop, Sergeant McDonald answered: "I would say he was lying." (Clem. Tr. at 957.)

Like the A & S work records, the extreme noise levels at A & S make it impossible for Four Star to have overheard a conversation between Atkinson and Balbinot in the Spring of 1984 as he claimed. Four Star's statement given to Beach's counsel, especially in light of Four Star's subsequent embellishments, hardly provides the

reliable evidence to support a claim of actual innocence under the fundamental miscarriage of justice exception.

h. Jack D. Atkinson

As evidence of his innocence and in support of his claim that Nees was killed by a gang of women, Beach directs the Court to the statement from Jack D. ("J.D.") Atkinson. (Beach's Ex. 1.) J.D. is the brother of Sissy Atkinson. J.D. described his relationship with Sissy as a "caring brother-sister relationship." J.D. claims that Sissy has spoken to him several times about Nees's murder. According to J.D., the last time he spoke to Sissy about the murder was in 2003 or 2004 at Sissy's apartment in Great Falls. Id. J.D. claims that Sissy told him that she was there when Nees was murdered, along with Maude Greyhawk, Joanne Jackson, and Jordis Ferguson. Id. J.D. then states that Sissy said a fight broke out and one of the girls had a wrench in her hand and chased Nees around the pickup truck. Id. Sissy apparently did not tell J.D. whether she "was one of Kim's killers," but J.D. knows that Sissy "knows what occurred and who the killers are." Id. J.D. states that Sissy also mentioned Caleb Gorneau and Eddie Van Dover being there, and that "other people" have told him "that they heard Caleb and Eddie helped move the body and put it into the river." Id. J.D. adds that Sissy told him that "Barry is an innocent man" and that "she feels sorry for Barry because he is in prison for something he didn't do." Id.

J.D., and his account of his sister confiding in him about the Nees murder, is not credible for a number of reasons. J.D. sustained a traumatic brain injury when he was hit by a train in 1996. (Clem. Tr. at 171, 229-30, 246-47, 283, 297.) J.D. admitted at the clemency hearing that he had some problems with his memory. (Clem. Tr. at 295.) J.D. has good and bad memory days. (Clem. Tr. at 284.) When asked if he was clearly remembering the names of the girls that Sissy gave him, J.D. stated: "Well, pretty much, because I--you know, I mean I have a problem." (Clem. Tr. at 295.) In addition to suffering a brain injury that affects his memory, J.D. also suffers from posttraumatic

stress disorder. (Clem. Tr. at 286.) J.D.'s brain injury and his problems with his memory as a result of his brain injury call into question his story regarding Sissy's involvement in the Nees homicide.

In addition, the account of the murder that Sissy allegedly disclosed to J.D. does not fit the evidence at the crime scene. J.D. stated that Sissy told him they were partying down off Highway 2 near the river, somehow a fight broke out and one of the girls, with a wrench in her hand, started to chase Nees around the truck. (Beach's Ex. 1; Clem. Tr. at 296-97.) The evidence from the crime scene demonstrates that Nees's killer first attacked her inside the truck. (Tr. at 562-63.)

J.D., like others Beach has presented in his petition, never went to law enforcement with the story he allegedly heard from Sissy. If, as he claims in his statement, there is no question in his mind that Sissy knows who killed Nees, then why did he wait three years to tell anyone? When he did come forward, instead of telling law enforcement he first told someone from Centurion Ministries. (Clem. Tr. at 287.) J.D. also gave his account to Centurion Ministries about Sissy and the Nees homicide after being in prison with Beach. (Clem. Tr. at 288-90.)

At the clemency hearing, Sissy testified that she did not kill Nees, did not participate in her murder, and other than the fact that Beach confessed to killing Nees, she had no knowledge about Nees's murder. (Clem. Tr. at 231.) She further testified that she never told J.D. that she was down at the park when Nees was killed, that she saw a girl chasing Nees with a wrench and that Maude and other girls were involved. (Clem. Tr. at 170, 174.)

In addition, Sissy testified that J.D.'s claim in his statement that they had a close loving relationship was not true. (Clem. Tr. at 230.) Sissy was afraid of J.D. because he physically abused her. (Clem. Tr. at 230-31.) During one of the incidents of abuse, J.D. beat Sissy over the head with a brick. (Clem. Tr. at 231.) J.D. did not remember beating Sissy with a brick, but their brother Bobby confirmed that J.D. did so. (Clem. Tr. at

246-47.) Bobby also testified that he believes that Sissy is telling the truth and she had nothing to do with the Nees murder. (Clem. Tr. at 249.)

J.D. is hardly the loving caring brother that he claims to be and clearly not someone Sissy would confide in. J.D. does not accurately remember what kind of relationship he had with his own sister. Perhaps there are other matters he is not clearly recalling.

J.D.'s statement simply is not sufficient to show Beach's actual innocence. A claim of actual innocence under the fundamental miscarriage of justice exception must be based on reliable new evidence. As the State has shown, J.D. is not credible and his statement is unreliable.

C. Beach's Postconviction Claim of Prosecutorial Misconduct Is Procedurally Barred by Mont. Code Ann. § 46-21-105(2) Because He Could Have Reasonably Raised That Claim in His 1985 Direct Appeal and He Failed to Do So.

Montana Code Annotated § 46-21-105(2) (1995) [17] does not allow petitioners to present postconviction claims that could reasonably have been raised on direct appeal. See DeShields v. State, 2006 MT 58, ¶ 15, 331 Mont. 329, 132 P.3d 540. The purpose of this requirement is to preserve postconviction relief as an opportunity to explore only those issues that are not properly considered on direct appeal. Postconviction relief is not intended as a substitute for a direct appeal. In re Manula, 263 Mont. 166, 169, 866 P.2d 1127, 1129 (1993); accord DeShields, ¶ 15. In addition, the Montana Supreme Court has held that the procedural bar in Mont. Code Ann. § 46-21-105(2) applies to issues which were not properly preserved at the trial level for direct appeal. State v. Baker, 272 Mont.

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[17] Montana Code Annotated § 46-21-105(2) was amended by the Legislature in 1997. Those amendments in chapter 378, like the one-year time limitation for filing a petition, are inapplicable in Beach's case. See 1997 Mont. Laws ch. 378, §§ 5, 9, 10, attached as App. A.

273, 901 P.2d 54, 58 (1995); State v. Gorder, 243 Mont. 333, 335, 792 P.2d 370, 371 (1990).

In pages 12-15 of his postconviction memorandum, Beach complains the prosecutor committed misconduct when the prosecutor discussed the hair evidence, a bloodstained towel, and a bloody palm print. Beach's prosecutorial misconduct claims could reasonably have been raised in his direct appeal. Accordingly, Beach's prosecutorial misconduct claims are procedurally barred by Mont. Code Ann. § 46-21-105(2).

This Court should apply the procedural bar set forth in Mont. Code Ann. § 46-21-105(2) unless Beach can demonstrate a fundamental miscarriage of justice. Baker, 901 P.2d at 59. As previously explained, Beach has failed to do so and, therefore, this Court should apply the procedural bar and refuse to address his prosecutorial misconduct claim.

D. Beach's Prosecutorial Misconduct Claim and His claim That the Sheriff's Office Failed to Disclose Evidence Prior to Trial Are Procedurally Barred by Mont. Code Ann. § 46-21-105(1) Because Beach Could Reasonably Have Raised Those Claims in His 1995 Postconviction Petition.

This is Beach's second postconviction petition. Beach filed his first postconviction in the Montana Supreme Court in 1995. Montana Code Annotated § 46-21-105(1) (1995)[18] limits the grounds that can be raised in a successive petition. See Hawkins, ¶¶ 16-19. Montana Code Annotated § 46-21-105(1) (1995) provides:

> All grounds for relief claimed by a petitioner under 46-21-101 must be raised in the original or amended petition. The original petition may be amended only once. At the request of the state or on its own motion, the court shall set a deadline for the filing of the amended petition. If a hearing will be held, the deadline must be reasonably in advance of the hearing but may not be less than 30 days prior to the date of the hearing. **Those grounds for relief not**

[18] The current postconviction statute's prohibition against successive petitions is set forth in Mont. Code Ann. § 46-21-105(2). That provision was added to the statute by the Legislature in 1997 and is inapplicable in Beach's case. See 1997 Mont. Laws ch. 378, §§ 5, 9, 10, attached as App. A.

> **raised in the original or amended petition are waived unless the court on hearing a subsequent petition finds grounds for relief that could not reasonably have been raised in the original or amended petition.**

(Emphasis added.)

Beach claims that the Roosevelt County Sheriff's Office failed to disclose Sheriff Carpenter's interview of Orrie Burshia prior to trial could reasonably have been raised in Beach's 1995 postconviction petition. Beach admits that his attorney became aware of Burshia's statement after he appealed his conviction to the Montana Supreme Court. (Pet. at 10.) In addition, there is no question that Beach had a copy of Burshia's statement because he attached a copy of Burshia's statement to his 1994 application for clemency. Accordingly, Beach has waived postconviction review of his claim regarding Burshia's interview and this Court should find it procedurally barred by Mont. Code Ann. § 46-21-105(2).

As previously explained, Beach could reasonably have raised his present prosecutorial misconduct claims in his 1985 direct appeal. If this Court finds otherwise, it certainly would have been reasonable for Beach to raise those claims in his 1995 postconviction petition. Beach's prosecutorial misconduct claims are based on the 1984 trial transcripts and FBI reports that Beach had in his possession prior to his 1984 trial. Beach's prosecutorial misconduct claims are procedurally barred by Mont. Code Ann. § 46-21-105(1).

CONCLUSION

Beach had five years from the date of his conviction to file his petition. He clearly has failed to do so. Like his first postconviction petition, his current petition is untimely and barred by Mont. Code Ann. § 46-21-102 (1995). In addition, Beach's prosecutorial misconduct claims are procedurally barred by Mont. Code Ann. § 46-21-105(2), because Beach could have reasonably raised them in his direct appeal. Furthermore, Beach's prosecutorial misconduct claims and his claim that the sheriff's office failed to disclose the Burshia interview are procedurally barred because they could have been raised in his first postconviction petition in 1995.

This Court should refuse to apply the fundamental miscarriage of justice exception to the five-year time bar and the procedural bar set forth in Mont. Code Ann. § 46-21-105(2). The "new evidence" that Beach presents of his innocence simply fails to show his actual innocence under the fundamental miscarriage of justice exception.

This Court should reject Beach's call for an evidentiary hearing. In light of the fact that Beach's petition is time-barred and procedurally-barred, there is no need for this Court to conduct an evidentiary hearing. The record in Beach's case is complete. Beach has had a trial, direct appeal, postconviction review in 1995, a federal habeas review and three different clemency reviews. The Montana Board of Pardons conducted a three-day evidentiary hearing this past June where Beach was given every opportunity to prove his innocence, and he failed to do so. Enough is enough. In the words of the Montana Board of Pardons: "This is our justice system; Mr. Beach has been recipient of its fullest protections. A day ultimately comes when matters are deemed settled . . . ." (Ex. 19 at 19-20.) Surely, that day has arrived.

The State respectfully requests that this Court grant the State's motion to dismiss. If the Court denies the State's motion and chooses to address the underlying merits of Beach's case, the State requests the opportunity to respond to the merits of those claims.

Respectfully submitted this _____ day of March, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Memorandum in Support of Respondent's Motion to Dismiss Barry Allen Beach's Petition for Postconviction Relief to be mailed to:

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