

IN THE DISTRICT COURT  
OF THE FIFTEENTH JUDICIAL DISTRICT  
OF THE STATE OF MONTANA  
IN AND FOR THE COUNTY OF ROOSEVELT

BARRY ALLAN BEACH,

Petitioner,

-vs-

STATE OF MONTANA,

Respondent.

Case No.: 1068-C  
December 7, 2011

APPEARANCES:

For the Petitioner:

PETER A. CAMIEL  
Attorney at Law  
710 Cherry St.  
Seattle, WA 98104

TERRANCE L. TOAVS  
Attorney at Law  
429 2<sup>nd</sup> Ave. South  
Wolf Point, MT 59201

For the Respondent:

BRANT LIGHT  
TAMMY K. PLUBELL  
Assistant Attorney General  
215 N. Sanders, 3<sup>rd</sup> Floor  
P.O. Box 201401  
Helena, MT 59620-1401

PROCEEDINGS

1 CLERK: All rise.

2 COURT: All right. Good morning everyone.

3 ATTORNEYS: Good morning Your Honor.

4 COURT: Mr. Light, Ms. Plubell can you hear me?

5 MR. LIGHT: Yes Your Honor.

6 COURT: All right. Who is that esteemed person that you have with you?

7 MR. LIGHT: Mark Mattioli Your Honor.

8 COURT: I recognized you Mr. Mattioli. Good morning to you. All right.

9  
10 First and foremost, we have a large group of people here today. I expect absolute  
11 decorum from you. This is a very important legal proceeding. This is not some  
12 entertainment venue. There will be no statements, no comments, no declarations;  
13 nothing. If I hear anything I am gonna have the deputies remove you immediately.  
14  
15

16 All right. Second, the Court set this fairly expeditiously. The State had  
17 some concerns about that, rightfully so. And, they were not given the full rule, the  
18 time allowed under the rules to object to this proceeding. However, I think there  
19 are two parts to this. Number one, whether there is an objection to even having the  
20 hearing; number two, whether bail should be granted. I am gonna deem that to be  
21 an objection to whether bail should be granted and the Court has received the  
22 State's response with regard to that. But, whether we are gonna have the hearing  
23  
24  
25

1 or not I think is well within the discretion of this Court and any sort of problem  
2 with that particular District Court rule is a mountain out of a mole hill.

3 In addition, the Court received no motion for delay of hearing to give the  
4 State more time. As a courtesy to the State because the notice was relatively short,  
5 it allowed the State to appear by video.  
6

7 All right. We have some procedural things we have to deal with first. The  
8 State has filed a Motion for Stay of Proceedings. It actually hasn't been filed yet,  
9 but I am gonna deem it to be filed and so the Court can consider it at this time. I  
10 have to deal first with that stay because essentially, the motion seeks to stay this  
11 proceeding entirely. The State has gone to pretty far limits in this Court's view. It  
12 has filed with the Montana Supreme Court, a notice to them, that they intend to  
13 file, you know, an immediate appeal of anything I do. In other words, this Court is  
14 sort of just a little bump along the road in this proceeding. I take a little bit of  
15 umbrage with that, but that is their right under the rules.  
16  
17

18 With regard to the stay there are, the State, very candidly and appropriately  
19 informed the Court that they could not find any case law with regard to how to  
20 approach this stay and, you know, how to analyze it from the Court's perspective.  
21 So, they provided the Court a U.S. Supreme Court case with four factors. I think  
22 that that is pretty relevant. The Court is gonna adopt that for purposes of today's  
23 consideration. We will look at those four elements. I will start with the State  
24  
25

1 because it is their motion and the State has filed a brief with regard to this. I would  
2 just say Mr. Light, Ms. Plubell, the Court can consider those arguments presented  
3 in your written document. If you would like to make additional argument orally,  
4 the Court would hear that. How do you want to proceed?  
5

6 MS. PLUBELL: Your Honor, in addition to what we have presented in our  
7 brief, the State additionally would point out that in the District Court's order there  
8 is no reversal on this conviction. Moreover, under that, number one, the language  
9 that is expressed on appeal; the State continues to argue that the Court did not have  
10 the ability to do that without considering the constitutional claims first. Right now,  
11 Mr. Beach still stands convicted of a deliberate homicide and this Court is poised  
12 to set bail or release him on his own recognizance. And, no where in the Court's  
13 order, of approximately thirty pages, did it actually reverse his conviction.  
14  
15

16 COURT: Well that is an interesting argument. No where in the case law did  
17 it talk about this Court having the authority to actually do that. All it talked about  
18 was the authority for this Court to either declare him absolutely innocent to release  
19 him, declare him absolutely innocent and grant him a new trial. All right. Any  
20 other argument; any other concerns?  
21

22 MS. PLUBELL: Well, yes Your Honor. Just to follow up on that. It's the  
23 Court's position that this Court did not have authority to file an action against them  
24 and grant a new trial and it certainly didn't have authority to do that without  
25

1 considering all the evidence it felt that was presented at trial. Even if this Court  
2 were considering this as a Motion for New Trial under *Clark*, strictly under *Clark*,  
3 which of course it is not and the burden is much, much greater when you have to  
4 meet a fundamental miscarriage of justice. If you look at *Clark*, you would still  
5 have to consider, when you are making that fifth factor analysis, the evidence that  
6 was presented at trial. And, the State's position with that is fully lacking in this  
7 case.  
8

9           Excuse me Your Honor. I would also; the State would just point out that a  
10 procedure under the new rule, and this isn't meant to be disrespectful to the Court  
11 but, this is provided for under Rule 22 of the Rules of Appellate Procedure. And,  
12 that is that we first must file our Motion for Stay with this Court, which is what we  
13 have done. This Court also must promptly enter a written order including findings  
14 of fact, conclusions of law and supporting rationale and immediately file that with  
15 the Montana Supreme Court. And, we do, under Rule 22, have an opportunity to  
16 appeal that issue. Therefore, the State asserts that it makes sense if the Court is not  
17 going to grant the State's Stay of Appeal rule, that it at least grant the State's; give  
18 the opportunity for us to appeal to the Montana Supreme Court. If I can do that,  
19 then we can; at least it would give us until the end of the week. If its not gonna do  
20 that then we request that the Court at least give us until the end of the day. I think  
21 we all appreciate what is at stake here and nothing that we have done is meant to  
22  
23  
24  
25

1 be disrespectful to this Court, but we do have rights to proceed under the Rules of  
2 Appellate Procedure.

3 COURT: Well, I didn't disagree with those rights, but it is just the process  
4 you used, sort of giving everybody notice that no matter what happens you, you  
5 know, this Court; you are going upstairs. I mean, you even informed the Supreme  
6 Court we are gonna be coming at you even before this Court had a chance to rule.  
7 All right. Any other argument or presentation that the State would like to make  
8 with regard to the four factors presented in that case that you provided to the  
9 Court?  
10  
11

12 MS. PLUBELL: Your Honor, and this came from the brief which was  
13 somewhat quickly written is under the first factor and this is included in the case of  
14 *Hilton vs. Baunskill*; the showing of success on the merits. You can also include  
15 the likelihood of success at new trial. One of the cases state, it is important to  
16 point out, is that while under *Schlepp* this Court could consider evidence with  
17 questionable admissibility and it did so. Some of that evidence or testimony would  
18 clearly not be admissible at trial. Moreover, it is imperative to keep in mind that  
19 Beach gave a voluntary, knowing, compelling and accurate confession which he  
20 has never denied making and which has been upheld by every Court that has ever  
21 reviewed it. That plays into that factor one. Also, with respect to factor two,  
22 indicates the *Hilton v. Braunkill* as well, at page seven hundred seventy-seven  
23  
24  
25

1 (777). One of the things the Supreme Court talks about is that the State's interest  
2 in continuing with a sentence and custody of a person who has been sentenced  
3 pending final determination is strongest when the portion of the sentence  
4 remaining is lengthy. That is definitely the case in this instance.  
5

6 COURT: Say that; would you say that last statement again? There was just  
7 a slight cut out and I missed pronunciation of a word.

8 MS. PLUBELL: Sure.

9 COURT: And it confused me.  
10

11 MS. PLUBELL: Sure Your Honor. In the instance where the State has a  
12 compelling interest in maintaining the incarceration of someone who is convicted,  
13 and in the instance where the remaining term of that incarceration is lengthy, the  
14 State's position is stronger. And Your Honor, that language supporting that is at  
15 page seven hundred seventy-seven (777) of *Hilton vs. Braunskill*; the United States  
16 Supreme Court case that we are discussing.  
17

18 COURT: Any other comments or representations with regard to the four  
19 factors?  
20

21 MS. PLUBELL: Your Honor, we will rely on the arguments we made in our  
22 brief.  
23

24 COURT: Okay. All right. Mr. Camiel?

25 MR. CAMIEL: Good morning Your Honor.

1 COURT: Good morning.

2 MR. CAMIEL: Your Honor, we received the State's Motion for Stay in a  
3 round-about way yesterday. We haven't actually been served with it, but we have  
4 reviewed it and we are prepared to respond.  
5

6 And, let me start with the; I guess, let me start with the comments that the  
7 State made this morning outside of their pleading. And, the first comment that  
8 they addressed was that the Court didn't reverse Mr. Beach's conviction. Now,  
9 what was before the Court was a Motion for Post Conviction Relief. And, implicit  
10 in the Court's ordering of a new trial, you can't have a new trial if you are still  
11 convicted. Double jeopardy would prevent that. So, implicit and inherent in the  
12 Court's decision granting Mr. Beach a new trial is a reversal of the convictions.  
13 So, our position is that as Mr. Beach sits here right now, and unless and until the  
14 Supreme Court overrules this Court's decision, Mr. Beach is no longer convicted.  
15 He is charged, but not convicted. And, the Court didn't need to use the word  
16 reversal in its order. By granting a new trial, that is exactly what the Court did, in  
17 our view.  
18  
19  
20

21 COURT: Well, and isn't that; doesn't that comport with *Schlepp* where they  
22 never used the word reversal.  
23

24 MR. CAMIEL: That's right.  
25



1 COURT: They said they got through the gateway; they have the right to a  
2 new trial.

3 MR. CAMIEL: That's right. And, you don't have a new trial if you are  
4 convicted.

5 COURT: The same thing happened in *Pope* if I remember right. They  
6 never used the word reversal.

7 MR. CAMIEL: I agree. The State also argues that the Court doesn't have  
8 the authority to grant a new trial. But, the post conviction statutes give the Court  
9 that authority. That is the whole reason we went through this whole exercise of  
10 presenting new evidence. If the end result was not a new trial, there is no reason to  
11 go through this. And so, I disagree with the State's characterization of the effect of  
12 what the Court did.

13 The other thing that the Court just, excuse me, that counsel just mentioned,  
14 was that the Court didn't consider the evidence that was presented at trial. The  
15 primary evidence presented at trial was the confession. And ,this Court indicated  
16 specifically that it considered the confession and in fact, that was one of the  
17 primary reasons that this Court cited in its decision for not finding Mr. Beach  
18 actually innocent and releasing him without a new trial.

19 COURT: Absolutely.  
20  
21  
22  
23  
24  
25

1 MR. CAMIEL: So, the Court reviewed the confession. This has always  
2 been a false confession case. The confession has been argued in every pleading  
3 that either side has presented in the prehearing; in the petition, the prehearing  
4 briefs, in the post hearing briefs attached to the State's brief and so, to somehow  
5 argue that the Court didn't consider the evidence that was presented at trial, I think,  
6 is an inaccurate statement.  
7

8 The argument ... Let me go, let me go to the four factors. And, I think the  
9 place to start; and we don't disagree with the Court using those four factors. We  
10 think that is appropriate, but there is something that is missing from the State's  
11 brief when they talk about the federal rule that is discussed in the *Hilton* case,  
12 Federal Rule of Appellate Procedure 23(c) and (d). And, what they omit from their  
13 argument is the primary focus of that rule, is that there is a presumption of relief  
14 when a court grants a *habeas* petition in favor of a defendant, a presumption of  
15 release. And, that is what *Hilton* talks about and that is in the interpretation of this  
16 rule. The rule creates a presumption of release from custody when the State  
17 appeals the grant of a *writ of habeas corpus*. And, the granting of a post  
18 conviction petition is the equivalent of a grant of *habeas corpus*. And so, we  
19 would emphasize that aspect of the rule and that aspect of the *Hilton* case as the  
20 Court goes about considering the bail argument that we will get to, I think, later  
21 this morning and the Motion for Stay.  
22  
23  
24  
25

1 Now going to the four factors themselves, the first factor is whether the stay  
2 applicant has made a strong showing that he is likely to succeed on the merits.  
3 And, we submit to the Court that the State, who has the burden because there is a  
4 presumption against the stay, that they have not made such a strong showing. And,  
5 first of all, just as an aside, when the State files a notice of appeal of this Court's  
6 order, there is really no need for a stay because there can't be a new trial until the  
7 Supreme Court addresses this Court's order. So, there is no need for a stay as to  
8 that part of this Court's order. It is really only as to the bail argument. This Court  
9 doesn't have the authority to convene a trial until the Supreme Court decides the  
10 State's appeal.  
11  
12

13 COURT: Correct.

14 MR. CAMIEL: With regard to the arguments that the State has presented  
15 about the likelihood of success on appeal ...  
16

17 COURT: Just give me one minute please.

18 MR. CAMIEL: Sure.

19 COURT: Mr. Camiel, just please give me an opportunity here.  
20

21 MR. CAMIEL: Sure.

22 COURT: Mr. Light, Ms. Plubell and Mr. Mattioli, I understand you want to  
23 switch to another sort of venue where you are located for a better opportunity for  
24 yourself, is that correct?  
25

1 MR. LIGHT: If I could just talk to my staff for one second Your Honor.

2 COURT: Yes.

3 MR. LIGHT: Yes Your Honor. We moved into this very small room where  
4 we can't even hardly stand up. I believe they have got the conference now hooked  
5 up to you and if we could move there it might be a little easier for us to be part of  
6 this hearing Your Honor.  
7

8 COURT: Well, is the reason for the move that you don't have room for  
9 spectators?  
10

11 MR. LIGHT: Well, no. We are all just gathered real close here Your Honor  
12 and we hardly have any room on this table to put our notes. But, that is fine Your  
13 Honor. We can proceed here if you want to proceed. We are fine with it.  
14

15 COURT: I just want you to know that there are folks here who are not  
16 allowed in because of our capacity.  
17

18 MR. LIGHT: That is fine Your Honor.

19 COURT: So we are facing sort of a similar issue.

20 MR. LIGHT: We can proceed Your Honor.

21 COURT: All right. The request is denied. I am sorry Mr. Camiel, but it  
22 was important. Thank you Phyllis.  
23

24 MR. CAMIEL: Thank you Your Honor. Your Honor, the State makes three  
25 arguments in support of their position that there is a likelihood of success on

1 appeal. The first argument that they make is that the Court didn't, and they use a  
2 word, 'meaningfully' consider the evidence. And, I think if you read what they  
3 actually put in their motion; what they are really saying is the Court incorrectly  
4 weighed the evidence. And, if that is the issue that they are raising on appeal, the  
5 standard of review on appeal of a trial court's weighing of the evidence is  
6 extremely deferential to the trial court. I think it would be an abusive discretion  
7 standard and so the burden that the State would have to overcome to be successful  
8 is extremely high. The Court's findings of fact, the Court's findings with regard to  
9 credibility, will be entitled to great deference on appeal.  
10  
11

12         The second issue that they raise is that the Court, they take issue with the  
13 Court's finding that some witnesses testimony was compelling or credible and  
14 what that amounts to is an objection to the way the Court weighed the evidence.  
15 And again, the standard of review on appeal for a trial court's discretion in what  
16 weight to give evidence that is presented at an evidentiary hearing is extremely  
17 deferential to the trial court. And, it would be an abuse of discretion standard.  
18  
19

20         And finally, they take issue with the Court saying that Mr. Beach, at a new  
21 trial, would have the right to present evidence that goes to his constitutional  
22 innocence. Every defendant has that right. That is the right to argue that the  
23 charge has not been proven beyond a reasonable doubt. It has nothing to do with  
24 presenting constitutional claims such as ineffective assistance of counsel to a jury.  
25

1 That wouldn't be what happens at a new trial. But, at a new trial Mr. Beach would  
2 have the right not only to challenge the State's evidence and argue reasonable  
3 doubt, but also in pretrial proceedings he would have the right to challenge the  
4 admissibility of evidence and challenge things that may have happened at the first  
5 trial that we now say are errors so they are not repeated at a new trial.  
6

7 So, on balance, I would submit the State's burden in terms of showing a  
8 strong, showing of likelihood of success on appeal, they haven't met the burden.  
9 They can't meet the burden and they won't meet the burden in the Supreme Court  
10 because of the type of issues that they are raising. They have not raised, in their  
11 brief, any kind of challenge that the Court applied the wrong test. They don't even  
12 mention Clark in their Motion for Stay. They have not argued that somehow the  
13 Court misapplied the Clark test. And, that is the test that the Supreme Court gave  
14 to this Court and asked this Court to apply to the evidence that was presented.  
15  
16

17 The other thing I think the Court needs to consider is what would success on  
18 appeal really mean. Under the State's argument, if they are successful on appeal,  
19 Mr. Beach's post conviction petition isn't denied or dismissed. We are back in this  
20 Court for the second phase of the proceedings to deal with the constitutional claims  
21 and to have the second phase of the evidentiary hearing that this Court found was  
22 not necessary due to the compelling nature of the evidence that was presented. So,  
23 success on appeal does not mean a dismissal of the petition.  
24  
25

1 Now, the second of the four factors that are presented in the *Hilton* case is  
2 whether the applicant will be irreparably injured by a stay. And, in their brief, the  
3 State talks about the difficulty in putting on a new trial. Well, that's not gonna  
4 happen while an appeal is pending. So, there is no cost or expense that the State is  
5 gonna incur in that regard. The only thing the State has to do is write a brief to the  
6 Supreme Court. Mr. Beach's release on bail causes no injury to the State because  
7 this Court can craft conditions of release that will assure Mr. Beach's appearance  
8 and assure that he is not a danger to the community. And, there is no other danger  
9 or injury that the State has pointed to if Mr. Beach is released while the appeal is  
10 pending.  
11  
12

13 The fact that if the State is successful, Mr. Beach may have to go into  
14 custody isn't injury to Mr. Beach; excuse me, to the State. If anything the injury is  
15 to Mr. Beach if he has to stay in custody pending an appeal. Now, this Court  
16 found in its analysis that we presented clear, unconvincing evidence a jury could  
17 find that Barry Beach is actually innocent based on this Court's review of the new  
18 evidence and consideration of the evidence that presented at trial.  
19  
20

21 The harm is keeping somebody in prison where a Court has made a finding  
22 that there is clear and convincing evidence that a jury could find that he is  
23 innocent. That is where the harm lies. And so, the harm would go to Mr. Beach if  
24 he is kept in custody. There is no harm to the State.  
25

1           The third factor is whether the issuance of the stay will substantially injure  
2 some other interested party. And, I don't understand the State in its pleading to  
3 have pointed out how any other party would be injured by Mr. Beach being out on  
4 bail.

5  
6           And finally, there is the public interest factor. And, I suppose this can be  
7 baited, but I would suggest that the strongest public interest is in making sure that  
8 the criminal justice system doesn't keep an innocent person locked up in prison.  
9 And, Mr. Beach is no longer convicted. Under this Court's order, he stands  
10 charged. And, somebody who is charged has a constitutional right and a statutory  
11 right under Montana law, but also under the United States Constitutional, to be  
12 bailed. This is not a capital case and therefore he is entitled to bail. The public  
13 interest lies in a person who is not convicted being allowed reasonable conditions  
14 of bail. The public interest lies in not keeping somebody who is innocent of a  
15 crime or who a court found may well be innocent, locked up while an appeal is  
16 pending. I would remind the Court that the first time this case went up on appeal,  
17 the Supreme Court took about fourteen months before a decision was issued. The  
18 issues that are going back in front of the Court are equally complicated and it may  
19 take sometime for the Supreme Court to rule. And, what the State wants is for this  
20 Court to keep Mr. Beach locked up during that period of time. Now, Mr. Beach  
21 has been in custody almost thirty years. I believe that the public interest is in  
22  
23  
24  
25



1 having him out pending the appeal because if the State loses on appeal then Mr.  
2 Beach would have spent whatever period of time that appeal is pending, in  
3 custody, when that was not necessary and it was harmful to him and I think  
4 harmful to the public.

5  
6 In conclusion Your Honor, the State has the burden of proof. It is a heavy  
7 burden because this Court has to find a substantial likelihood of success by the  
8 State in the appeal and the grounds that they have set forth are all grounds that  
9 would involve a very deferential standard of review. They can't challenge this  
10 Court's findings with regard to credibility without a much greater showing than  
11 they have made here. They can't challenge this Court's weighing of the evidence  
12 or determining what weight to give the evidence without a far greater showing that  
13 they have made today. For all of these reasons, we would ask that you deny the  
14 Motion for Stay and allow us to argue appropriate bail.

15  
16  
17 COURT: Well, I think it would be fair to the State here in terms of due  
18 process, to allow you to respond if you wish.

19  
20 MS. PLUBELL: Thank you Your Honor. There are several things that I  
21 feel that are necessary to respond to Your Honor. Number one, with respect to  
22 *Pope* and *Schlepp*, the difference in those cases Your Honor is the way that the  
23 evidence that the Court considered was used was to navigate through the gateway  
24 of the time bar and give those prisoners the opportunity to litigate their  
25

1 constitutional claims. In *Pope* the State conceded that there was constitutional  
2 error occurred at trial. In this case, we have never conceded that any such error has  
3 occurred nor has Mr. Beach proved that any such has occurred, nor has any Court  
4 who has ever looked at this case concluded that constitutional error occurred at  
5 trial.  
6

7 COURT: Well, I want to interrupt there because; *Pope* is an interesting  
8 case. And, *Pope* didn't just deal with the constitutional error issue, it bifurcated  
9 these things and that's the basis on which this Court ruled was that bifurcation and  
10 you're only addressing one horn of that. And, I don't think that that is really  
11 looking at the appropriate application of *Pope* to this case.  
12

13 MS. PLUBELL: Your Honor, the position of the State, and one of the issues  
14 the State intends to raise on appeal, is that the bifurcation referred to in *Pope*, the  
15 second part wasn't necessary. It didn't have to go back to the district court and  
16 litigate the constitutional claim because the State conceded. The State conceded  
17 that there was error at trial. What the State focused on in *Pope* is that he didn't  
18 meet his initial burden to get through the gateway.  
19  
20

21 COURT: Yeah I ...

22 MS. PLUBELL: But, once he got through the gateway, the State said yes,  
23 there was instructional error that occurred at trial.  
24

25 COURT: I ...

1 MS. PLUBELL: That's why it wasn't necessary to go back for a hearing on  
2 the post-conviction petition Your Honor. And, we understand that we disagree on  
3 that. I also need to point out that I was not attempting to mislead the Court about  
4 Rule Twenty-three (23) of the Federal Rules.

5  
6 COURT: I assign no onus there. You know, you don't have to worry about  
7 that.

8 MS. PLUBELL: Thank you Your Honor. But, I do need to point out that  
9 we don't have anything equivalent to that in Montana for when a court grants post  
10 conviction relief. We have the rule under the appellate procedure to stay a  
11 proceeding. And I also ...

12  
13 COURT: I just want to add one thing before you move on. I agree with you  
14 about *Pope* in the sense that that is the dilemma; is how do you interpret that case  
15 and then how does it apply? I certainly was well aware that that was the key  
16 appealable issue and addressed it as carefully as I possibly could, recognizing that  
17 that, you know, that the State would very likely disagree with the Court's  
18 interpretation, but I stand by that order. I believe that that case shows that you can  
19 approach this two ways; through the absolute innocence gateway or the procedural  
20 innocence gateway, and you don't have to do both.  
21  
22  
23  
24  
25

1 MS. PLUBELL: But procedural innocence is based upon claims of  
2 constitutional error and there is no, no proof in this case that any constitutional  
3 error occurred at trial.

4 COURT: Agreed. Oh, speaking of which; one of the things that the State  
5 sets forth in its argument here is that for some reason, you know, I intimated that  
6 the State wasn't ready to proceed or something. That is not what the Court said in  
7 that order. The Court was actually showing great deference to the State because  
8 the State said to the Court, we're not ready, you know, we don't have the witnesses  
9 we would want to do. And the Court said, I understand, you know, it would not be  
10 fair to the State to proceed on a procedural innocence hearing when you haven't  
11 had the opportunity to get Mr. Racicot and other folks in here to testify. So, that  
12 was a very inappropriate comment in that brief about what the Court was trying to  
13 do in showing deference to the State.  
14  
15  
16

17 MS. PLUBELL: My apologies Your Honor. We misinterpreted what the  
18 Court meant there. But, also what causes confusion is that there hasn't ever been  
19 any proof of constitutional error.  
20

21 COURT: I agree. But, that is the whole basis of my order; is that there is a  
22 two-pronged, two gates, two separate gates and the one gate we never considered  
23 because the State needed and had the right to have an opportunity to present things.  
24  
25

1 We just didn't do that. And so I analyzed this entirely on one gate, one gateway  
2 set forth in *Schlepp* and that was the absolute innocence gateway.

3 MS. PLUBELL: I understand your Honor, but in *Schlepp*, what the Court  
4 clearly holds is that that allows you to litigate the merits of your constitutional  
5 claims. And, the other thing that *Schlepp* holds and I believe that this Court  
6 disagrees with the State because on page twenty-two (22) of the Order, this Court  
7 actually says that it's appropriate to proceed; to evaluate the miscarriage of justice  
8 exception based solely on Beach's actual innocence evidence. So, I disagree with  
9 Mr. Camiel's characterization that this Court carefully and methodically  
10 considered all the evidence of guilt that was presented at trial Your Honor.  
11

12 I know there was a reference to the confession, but I don't know that there  
13 was any sort of analysis about how the trial transcript supports the validity of that  
14 confession. Moreover, I disagree with Mr. Camiel's characterization that we can  
15 only appeal credibility findings because when you are making a finding about  
16 okay, this credibility and about how believable they are, it is imperative in that  
17 process that you consider what they are saying in light of what the physical  
18 evidence shows. And that is what the State intends to appeal.  
19  
20  
21

22 COURT: I am as fascinated as you to see what the Supreme Court will do  
23 with this because it was a very challenging area of law. Now, any other comment  
24 or argument about the other factors?  
25

1 MS. PLUBELL: No Your Honor.

2 COURT: One more shot Mr. Camiel.

3 MR. CAMIEL: Your Honor, the State argued that there was no equivalent  
4 in Montana of this Federal Rule of Appellate Procedure Twenty-three (23). But,  
5 there is Montana statute 46-9-102 that says all persons shall be bailable before  
6 conviction except when death is possible; punishment for the offense charged and  
7 the proof is evident or the presumption great that the person is guilty of the offense  
8 charged. Given this Court's finding, we believe that Montana law is even stronger  
9 than the federal rule in a presumption that Mr. Beach is bailable.  
10  
11

12 With regard to the State going back to the confession, which they  
13 consistently do, is really gonna be the point of a new trial. Our argument has  
14 always been that the confession is really made up of three different types of  
15 statements. There are statements that are attributed to Mr. Beach that are accurate,  
16 but were public knowledge. There are statements that are in the confession that are  
17 clearly inaccurate; clearly don't comport with the evidence, and then there is a  
18 third category where you can't tell, you don't know. But, this Court did consider  
19 the confession and that was the State's evidence at trial. There was no forensic  
20 evidence. There were no eye witnesses. There were no confessions to non-law  
21 enforcement people. There was nothing else. And, that is why the Court pointed  
22 out the confession as the reason that it didn't find Mr. Beach absolutely innocent  
23  
24  
25

1 and release him with no new trial. So that at a new trial, Mr. Beach's new  
2 evidence could be presented and the confession would be presented and a new  
3 jury, following its instructions, would then consider that evidence and this Court  
4 found by clear and convincing evidence that that new jury could find that he is  
5 actually innocent and that is why the State's likelihood of success on appeal is slim  
6 and why we believe the Motion for Stay should be denied.

8 COURT: A little bit of new argument was presented there so I would give  
9 the State an opportunity if you wish.

11 MS. PLUBELL: I appreciate that Your Honor, but I think we will just stand  
12 on what we have argued and submit it to the Court. Thank you.

13 COURT: All right. The rules of appellate procedure provide that this Court  
14 must, let me find the language here, promptly enter a written order. I am certainly  
15 aware of the considerations at stake in this case and I intend to be very prompt.  
16 Part of the way I can do that is I am gonna take a brief recess, consider some of  
17 these arguments, pull my thoughts together, probably write them down a bit and  
18 then that way when I am done I will have my own reference to proceed to an Order  
19 that the Supreme Court wants to see. So, we will take a brief recess. I would say  
20 ten minutes thereabouts.

23 (RECESS)

24 CLERK: All rise.

1 COURT: Please be seated. Well that took longer. Us English majors, you  
2 know, we got to get every word right and I can't do that. It is impossible on such  
3 short time, but I am gonna walk through a few items here.

4 First of all, it is important to note that by necessity, the Court has to mix  
5 apples and oranges, which is to say that we have here before us a Motion for Stay,  
6 but the Motion for Stay is to stay a bail hearing and so those two tend to mix  
7 together and become one in the same in many ways.

8  
9 The second matter is that the Supreme Court in its rules of appellate  
10 procedure, as I mentioned earlier, provide that the district court must promptly  
11 enter a written order on the motion. So, I am gonna issue an oral order today, but it  
12 will be followed by a written order and I believe that the Supreme Court will show  
13 the respect to the district court to wait for this court's written order because I have  
14 to flush this out. The rule provides that I make findings of fact and conclusions of  
15 law, citations to authority and things like that. I obviously can't do all that today in  
16 the short time available to me. So, I believe that they will wait until I can submit  
17 my written order until they will deal with the State's clear intent to bounce this  
18 upstairs right away.

19  
20 All right. Now, with regard to the four factors. As the Court previously  
21 stated it will adopt those factors from *Hilton v. Brownskill* finding those to be  
22 appropriate and relevant to the matters before us. The Court will adopt for  
23  
24  
25



1 purposes of today's consideration Rule 8(a) Federal Rules of Appellate Procedure  
2 only in the sense that it provides some good guidance for the Court because  
3 Montana doesn't, at least based on the State's research and the Court hasn't had  
4 time to do any, there just isn't much here about this kind of consideration. So,  
5 taking those four factors likelihood of success the State has argued that the Court  
6 did not articulate a specific term of art called reversal of conviction. What this  
7 Court did was determine that the absolute innocence gateway was opened just  
8 sufficient that Mr. Beach could walk through it to a new trial. The Court found,  
9 based on consideration of *Schlepp* and *Pope*, that that was a very appropriate  
10 determination. The absence of these terms of art does not nullify this Court's  
11 intent or analysis in its order.

12  
13  
14  
15 Number two: The State argues the Court did not consider evidence from  
16 trial. There is two perspectives on this. Number one was that even required in the  
17 kind of absolute terms that the State has stated it is this Court's memory that such  
18 absolutes were not required in *Schlepp*, but that is why this is gonna become a  
19 written because I have to take a look. But, at the present time this Court is going to  
20 stand by its previous considerations that it did not need to consider the evidence  
21 from trial to the extent of going through every last item and comparing it to what it  
22 heard at this trial because at this evidentiary hearing almost all of these witnesses  
23 weren't at the original trial. They were independent folks, as the president said,  
24  
25

1 they had no dog in the fight. And so, to compare them to anything at trial is just an  
2 absurdity.

3         Number two: The Court did consider the confession which was a significant  
4 major issue at trial and, it was that confession, as well as some testimony from the  
5 evidence here; in other words, cross referencing the two, that the Court said it did  
6 not find that Mr. Beach could actually walk free.  
7

8         Next, the State argues that the statements at the hearing were not as reliable  
9 and compelling as DNA evidence. They used the floodgate of litigation argument  
10 that if the Court were to go this route that we would open up, you know, all kinds  
11 of appeals or petitions or whatever. And, it is true that justice must be very  
12 considerate of its own consequences. But on the other hand, this Court should not  
13 be worrying so much about other defendants and what actions they may or may not  
14 take when there is the overriding compelling nature of the testimony this Court did  
15 hear. DNA evidence is not a deity of the law. If the law cannot consider human  
16 beings testifying in Court as substantial and relevant and reliable as science, then  
17 there is something wrong with the law. The nightmare tears of that woman are just  
18 as compelling as anything you can get from a printout of your DNA cells.  
19  
20  
21

22         Next, this has to do with the claims, the State's contention with the claims of  
23 constitutional error. It is a bit of a mixed bag here. The Court is a little confused  
24 about whether the State actually wanted to go to hearing on the constitutional  
25

1 claims or whether they didn't. But nevertheless, the Court has already addressed  
2 that matter. The Court sees this is a; in its Order, as a process that involves two  
3 gateways. Now I am gonna be just as curious as everybody to see what the  
4 Supreme Court does with this. I mean, it is a very challenging area of law. But,  
5 based on this Court's effort and analysis, there are two gateways and the Court  
6 need only consider one of them at a time. And, the Court did and found; because it  
7 was giving consideration to the State to not jump into a procedural gateway  
8 hearing because they rightfully so weren't ready. Then the Court said, well, can he  
9 walk through the absolute innocence gateway or do we have to have a procedural  
10 innocence gateway hearing. The Court said and found and determined and  
11 analyzed and said, 'no way'. The absolute innocence gateway has opened up. We  
12 don't need a procedural innocence hearing.

13  
14  
15  
16 Number... next, the Court agrees with Mr. Camiel that there is a differential  
17 standard of review and that will go some ways towards arguing against the State  
18 being able to win on appeal. Time will tell. 46-9-102 is the statute dealing with  
19 bail and again, as I said, this is a little bit of apples and oranges, but nevertheless  
20 the right; their ability to win on appeal any order about this stay would implicate  
21 46-9-102 and the Court believes that the right to bail is a sacred constitutional  
22 right.  
23  
24  
25

1 Next, whether reversal by the Montana Supreme Court of this Court's order  
2 regarding the absolute innocence process or gateway, what happens then. Well, I  
3 think Mr. Camiel is absolutely on target. I would suspect, I could be wrong; but  
4 the Supreme Court will send it back and say Judge you ding-a-ling, you should  
5 have had a procedural innocence hearing in the first place. Now you gotta go do it.  
6 But, that militates against them winning on appeal. In fact, the Court will likely, or  
7 possibly, send it back for another hearing on the procedural matters because Mr.  
8 Beach would have a right to that. It is just that the Court didn't need to go there in  
9 the first place, but if it gets reversed on what it saw in the absolute innocence  
10 gateway analysis, he has got a right to the procedural innocence gateway analysis.  
11  
12

13 Factor two; irreparable injury to the State. This is a tough one. The State  
14 argues its compelling interest is to maintain incarceration when a lengthy term of  
15 sentence is yet to be served. It is a little hard for the Court to see how there is  
16 irreparable injury to the State by someone being released on bail. It is society that  
17 would be injured supposedly. It is society that would stand at risk supposedly and  
18 that can only be determined at a bail hearing. When we find out what conditions  
19 are suggested or necessary or needed; what has Mr. Beach arranged for himself;  
20 what kind of protections are there for society. There is no irreparable harm to the  
21 State in his being or in this stay, being denied. It is really to the society as a whole  
22 and we can't determine that in a stay proceeding.  
23  
24  
25

1           The other injury alleged is that he has been incarcerated and his  
2 imprisonment has been affirmed by appeals; by golly that is the way it ought to be.  
3 This Court has determined rightly or wrongly that he deserves a new trial. If  
4 anything, there is injury to Mr. Beach.

5  
6           Factor number three: injury to Mr. Beach. This is the most interesting of  
7 them all. The State argues that Mr. Beach might have to go back to prison. Well,  
8 that is true. But, you know, don't you think that that is his decision. That is his to  
9 decide whether he would be injured by that process or not; not for the State to  
10 presume that somehow he is going to be so injured by possibly having to go back  
11 to prison. Now, I want to stop here because some of the language that I am using  
12 presupposes I am gonna release this guy. And, I have not got there yet. But, like I  
13 say this is apples and oranges. I kind of have to deal with this as I go along  
14 because that is what the stay is all about. But, I have not made any decision on  
15 that. That is yet to be determined.

16  
17           Factor four: public interest. This is the one that fascinates the Court the  
18 most and really is probably the most compelling of the factors. What is the public  
19 interest here? The public interest was determined by the Montana Supreme Court  
20 to be for this Court to hold a hearing and for this Court to hear new evidence and  
21 for this Court to determine and to write an opinion about whether that new  
22 evidence satisfied this gateway analysis stuff which I am sure bores you all to  
23  
24  
25

1 tears. But, it is incredibly important because that is the lynch pin of the whole  
2 legal process that we are undertaking here. But, that was the public interest; was  
3 for the Court to do that. And the Court did it. And, the Court found that some of  
4 these people with no dog in the fight were so compelling that any reasonable juror,  
5 properly instructed, just one, you only need one of twelve; reasonable person  
6 properly instructed would have heard that evidence and said, well, wait a minute  
7 we can't find this guilty. Now I didn't determine that he is innocent. That is for a  
8 jury to decide. I didn't determine anything except that the jury should hear this  
9 kind of evidence and it is for them to decide. Is it that compelling to them as it was  
10 to me? The public interest is to allow Mr. Beach a trial. I will stand by that order  
11 and we will see what happens to it. The Motion for Stay is denied. Well, it's  
12 noon. I have a hearing this afternoon. It is two files thick. I think what I will do  
13 because of the public interest, I am just gonna vacate that. We will reconvene here  
14 at 1:30. We will take up the process of a bail hearing and we will proceed from  
15 there. We are recessed.

16  
17  
18  
19  
20 (RECESS)

21 CLERK: All rise.

22 COURT: Please be seated. Good afternoon folks. Can you hear me from  
23 the State?

24 MR. LIGHT: Yes Your Honor.  
25

1 MS. PLUBELL: Yes Your Honor.

2 COURT: Good. You know ladies and gentleman, this morning in the  
3 hubbala of trying to get all the electronics working, I forgot something quite  
4 important and that is I would like to ask us please to take a moment of silence  
5 today for the historic recognition of Peal Harbor and the incredible consequences  
6 and principles that sort of evolved out of that. So, if you would please just join me  
7 for a second of silence. All right. Thank you.  
8

9 Okay. Who is gonna take the lead? Mr. Toavs.  
10

11 MR. TOAVS: Thank you Your Honor. As a preliminary matter Your  
12 Honor, Mr. Beach is prepared to call two witnesses: Mr. Ziegler is prepared to  
13 testify and in addition we have Dan Gengler prepared to testify on the issue of bail.  
14 Prior to today, yesterday I believe, in the e-mail I received from the Attorney  
15 General's office a list of proposed conditions of bail and, I guess, the first thing we  
16 would like to do is seek Your Honor's guidance in terms of how much time do we  
17 have for the hearing. And, I guess we are unsure at this point whether or not, now  
18 that the issue of stay is resolved, the Attorney General has a position on bail.  
19  
20

21 COURT: Well I will let them speak for themselves. Mr. Light?

22 MR. LIGHT: Well, obviously we have a position on bail Your Honor. We  
23 oppose, in looking at the defendants bail motion, we oppose a release on his own  
24  
25

1 recognizance and believe that the Court, if the Court is gonna grant bail, it should  
2 be a fixed amount Your Honor.

3 MR. TOAVS: Is that the only issue then that Your Honor wants me to  
4 address then, is the amount?  
5

6 COURT: Well Mr. Light, I don't want to presuppose on your position here.  
7 Is the issue then the quantity?

8 MR. LIGHT: Well, obviously in any type of bail hearing, it is the amount of  
9 bail that is probably in dispute and of course the reason I sent those list of  
10 conditions. Those are the standard conditions that are set forth and the Court can  
11 choose from and at the appropriate time we will be making recommendations for  
12 conditions as well Your Honor.  
13

14 COURT: Okay. All right.

15 MR. TOAVS: With that Your Honor the defendant calls Ziggy Ziegler.

16 COURT: Mr. Ziegler, if you come up here in front of the clerk please.  
17

18 CLERK: Do you solemnly swear the statements you are about to make in  
19 the matter now before the Court will be the truth, the whole truth, and nothing but  
20 the truth so help you God?  
21

22 MR. ZIEGLER: I do. Good afternoon Judge.

23 COURT: Good afternoon.  
24  
25



1 MR. TOAVS: Mr. Ziegler, would you please state your name and spell your  
2 last name for the Court.

3 MR. ZIEGLER: James A. "Ziggy" Ziegler. Z-i-e-g-l-e-r.

4 MR. TOAVS: And Mr. Ziegler, are you acquainted with Barry Beach?

5 MR. ZIEGLER: I am.

6 MR. TOAVS: How do you know Barry?

7 MR. ZIEGLER: I met Barry in October of 1984 at the Religious Activity  
8 Center in Montana State Prison. I have been part of a prison ministry group that  
9 puts on these seminar weekends at the prison and I have been going there since  
10 1978. And Barry, along with thirty or thirty-five other inmates had signed up to be  
11 a part of that particular retreat weekend that we were having in October of 1984.  
12

13 MR. TOAVS: And, do you live in Billings?

14 MR. ZIEGLER: Pardon me?

15 MR. TOAVS: Where do you live?

16 MR. ZIEGLER: I live in Billings, Montana. I have been a Billings resident  
17 for thirty-seven years.  
18

19 MR. TOAVS: And, do you and your wife run a business in Billings?

20 MR. ZIEGLER: Yes.

21 MR. TOAVS: What business is that?

22 MR. ZIEGLER: It is Stella's Kitchen and Bakery in Billings.  
23  
24  
25

1 MR. TOAVS: How long have you done that?

2 MR. ZIEGLER: Pardon me?

3 MR. TOAVS: How long have you had your business in Billings?

4 MR. ZIEGLER: My wife has had it since 1978, but I left her for about  
5  
6 sixteen years and I was Yellowstone County Commissioner and now she gave me  
7 my job back.

8 MR. TOAVS: And so I take it from that, you served as a commissioner for  
9  
10 Yellowstone County?

11 MR. ZIEGLER: Pardon me?

12 MR. TOAVS: You served as a Yellowstone County commissioner?

13 MR. ZIEGLER: Yes sir. Sixteen years.

14 MR. TOAVS: From what period of years were those?

15 MR. ZIEGLER: From Eighty-five, ('85), eighty-six ('86), and my last year  
16  
17 was 2003, December of 2003.

18 MR. TOAVS: And, during this time, in addition to doing the business and  
19  
20 being active with the county commissioners there, you were involved in a ministry  
21 where you met Barry?

22 MR. ZIEGLER: Yes.

23 MR. TOAVS: How often did you have contact with Barry then after you  
24  
25 met him back in the eighties?

1 MR. ZIEGLER: Well, our prison fellowship goes to the prison every second  
2 Sunday of the month for a follow up on those fellows that have made the retreat  
3 weekend. So, in a particular year I probably seen Barry at least eight or ten more  
4 times during the year when he comes to those follow-up meetings that we have on  
5 that second Sunday of the month.  
6

7 MR. TOAVS: And, have you been doing this continuously since October of  
8 1984?  
9

10 MR. ZIEGLER: Yes I have.

11 MR. TOAVS: What; is there anything in your life Mr. Ziegler that  
12 motivated you to become involved with the prison ministry?  
13

14 MR. ZIEGLER: Well, I guess God is, is the way I put it. I am the victim of  
15 a violent crime. My father was murdered in Los Angeles in the neighborhood that  
16 I grew up in as a child. And, excuse me, I took my mother to the hearing and the  
17 inquest and through all that procedure and I always said it is only because of my  
18 faith, my family and my friends that I was able to forgive those two that took my  
19 father's life away from me. And then somehow, some years after that, I was asked  
20 to go to Montana State Prison to be a team member to put on these retreat  
21 programs and so I started in 1978 and I have been going ever since.  
22

23 MR. TOAVS: At your business in Billings Mr. Ziegler, do you have  
24 employees?  
25

1 MR. ZIEGLER: Yes. We have thirty. Presently we have thirty-eight  
2 employees.

3 MR. TOAVS: Do you ever employ people who have been in trouble with  
4 the law or are on probation or parole?  
5

6 MR. ZIEGLER: Yes. Over the years we have and at present, of our thirty-  
7 eight employees, fifteen of our employees, men and women, are either at a halfway  
8 house and prerelease center on parole or they have made parole and are still  
9 working for us.  
10

11 MR. TOAVS: And, how long have you been involved in providing  
12 employment opportunities to folks who are on probation or parole?  
13

14 MR. ZIEGLER: Probably as long as I have been going to prison. Or a good  
15 number of years; at least thirty-some years.

16 MR. TOAVS: And, during the course of your experience in this regard,  
17 have you developed relationships with the probation and parole office there in  
18 Billings?  
19

20 MR. ZIEGLER: Yes. I am on the Board of Directors for the Alternatives  
21 pre-release center in Billings. And, one of the directors with me is the gentleman  
22 who is the head of probation and parole for the State, Mr. John Williams.  
23  
24  
25

1 MR. TOAVS: And, as part of your being an employer for people who are  
2 on probation and parole, do you have knowledge of the probation officers that are  
3 supervising your employees there?

4 MR. ZIEGLER: Yes. I have a list of all the probation officers by my desk  
5 and when one of my employees might be needing a little assistance in one way or  
6 another I just have to call that parole officer.

8 COURT: Just a little assistance.

9 MR. ZIEGLER: Just a little Judge.

10 MR. TOAVS: Now Mr. Ziegler, as I understand it, you have come forward  
11 and offered to provide Barry with a place to live and potential employment should  
12 he be admitted to bail and able to make bail.

13 MR. ZIEGLER: Yes. We have a home outside of Billings on acreage and it  
14 is suitable to a nice quiet place. The animals roam. We have deer and wild turkeys  
15 and everything. It is a quite serene place and we have had other guests at our  
16 house. And, my wife and I would be honored to offer our home to have Barry  
17 come live with us.

18 MR. TOAVS: How well have you gotten to know Barry since you first met  
19 him back in October of 1984?

20 MR. ZIEGLER: Well, I would say very well considering the circumstances  
21 that where he is and where I am at. But, every time I get to see Barry he always  
22  
23  
24  
25

1 greets me warmly with a hug and the first thing he always asks me is how I am  
2 doing and, I think, in retrospect, I should be asking him how he is doing. But, I  
3 have seen him grow in his faith over the years. We have cried together and we  
4 have laughed together and tried to support each other mutually.

5  
6 MR. TOAVS: Based on your knowledge of Mr. Beach, do you have an  
7 opinion of his character when it comes to issues like responsibility? I mean, in  
8 terms of how his character would relate to his ability to be successful following  
9 conditions of bail?

10  
11 MR. ZIEGLER: Well, it is interesting because part of our prison ministry as  
12 we have follow up, we have people; in fact, some of the prison ministry people are  
13 here in the audience and we tell these inmates and these people when they are  
14 coming out on parole to come to our communities to look us up and we will  
15 certainly do all we can to help them find employment, help them find a church,  
16 help them find a place to live; whatever we can do to help them become good  
17 citizens back in our community. And I would certainly; and I expect to do that  
18 with Barry if he is released to come live with us.

19  
20  
21 MR. TOAVS: Have you seen Barry do, or hear him say anything over the  
22 years that would give you any concern about his ability to successfully follow  
23 conditions or release?

24  
25 MR. ZIEGLER: No I haven't.

1 MR. TOAVS: Have you, during the course of your relationship with Barry,  
2 gotten a sense for Barry's physical and mental capabilities?

3 MR. ZIEGLER: Well, I think he is quite a character at times considering the  
4 situation that he is in. I think he is a very competent person. We have had some  
5 very lengthy discussions; philosophical, biblical, religiously, and I think he is on  
6 top of the plateau in those levels.  
7

8 MR. TOAVS: Certainly you would agree with me to the best of your  
9 knowledge, Barry doesn't have any physical or mental limitations?  
10

11 MR. ZIEGLER: Correct.

12 MR. TOAVS: Does Barry have any family ties to the Billings, Montana  
13 area?  
14

15 MR. ZIEGLER: Not that I know of other than his family, some miles away  
16 in the next little town, but not in Billings.

17 MR. TOAVS: Are you referring to Barry's mother Roberta?  
18

19 MR. ZIEGLER: Yes.

20 MR. TOAVS: And where does she live?

21 MR. ZIEGLER: She lives in Laurel, Montana, which is about fifteen miles  
22 west of Billings.  
23

24 MR. TOAVS: Now, what is the proposal that you have in terms of helping  
25 Barry find employment opportunities?

1 MR. ZIEGLER: Well, I am gonna visit with Barry to find out what he likes  
2 to do and what he doesn't like to do. But, the first thing we are gonna do is when  
3 we get him home and get him settled in I am gonna take him down to our business,  
4 restaurant and I am gonna see if there is some opportunities there right off the bat  
5 that we can put him to work at least get him started. I would like to see him have  
6 some time at our house just to reflect and get back into what he sees he has been  
7 missing for all these years and then move slowly along into some employment  
8 opportunities. And, if there is nothing I can I can give him, full-time employment  
9 with me at our place, there is opportunities and people I know that I would like him  
10 to visit with and I will make that available.  
11  
12

13 MR. TOAVS: Have you planned sir, to devote follow-up time to Barry  
14 personally?  
15

16 MR. ZIEGLER: You bet.

17 MR. TOAVS: Describe for the benefit of the Court what your plan is in that  
18 respect?  
19

20 MR. ZIEGLER: Pardon me?

21 MR. TOAVS: Describe for the benefit of the Court what your plan is.

22 MR. ZIEGLER: Well, my wife and I leave sometimes pretty early in the  
23 morning to go to work and get our chores done and then we see how our day goes  
24 and then sometimes our afternoons are free. I would like to bring Barry in because  
25



1 it is about an eight mile ride from our house to the business and I would like to  
2 take him around our community. I would like to see what things are like in  
3 Yellowstone County. We have a little cabin up in the mountains in Red Lodge,  
4 about sixty or seventy miles away. We could easily ride up there if the snow isn't  
5 too deep and spend some time. But, I would like to spend some real quality time  
6 with him and just see how he is progressing day by day.  
7

8 MR. TOAVS: If you were requested to report any problems with Barry as  
9 part of conditions of release, are you willing to do that?  
10

11 MR. ZIEGLER: Immediately.

12 MR. TOAVS: Do you believe that Barry poses any kind of danger to the  
13 community?  
14

15 MR. ZIEGLER: Pardon me?

16 MR. TOAVS: Do you believe that Barry poses any kind of danger to the  
17 community?  
18

19 MR. ZIEGLER: I do not.

20 MR. TOAVS: Why?

21 MR. ZIEGLER: I don't believe; I am sorry if I answered that the other way.  
22 I don't believe he is a threat to our community. I have been asked that question. I  
23 wouldn't be inviting him into my home and want to be a part of my life if I did.  
24  
25

1 MR. TOAVS: Have you ever seen for example; have you ever seen Barry in  
2 a bad mood or an angry state any time when you have been communicating with  
3 him?

4 MR. ZIEGLER: Not that I can recall.

5 MR. TOAVS: Do you believe that Barry poses a flight risk?  
6

7 MR. ZIEGLER: I do not.

8 MR. TOAVS: Why? Why?  
9

10 MR. ZIEGLER: Oh, I am sorry. Just from what I know of Barry. I think he  
11 is eager to get out after all this time that he has been away from us and become a  
12 good, productive citizen in our community or whatever he faces. And, he has got a  
13 lot of catching up to do and I don't think he would be foolish enough to, after all  
14 these opportunities that are being given him, to do anything conversely to cause  
15 him anymore troubles.  
16

17 MR. TOAVS: Now, Mr. Ziegler, you are probably aware because this case  
18 has gone on so long already, but there is a possibility that; I am sorry can you hear  
19 me okay?  
20

21 MR. ZIEGLER: Well, there is a lot of rattling. You are gonna get old some  
22 day too and can't hear. Right Judge?

23 COURT: I am afraid so. Some of us are already there.  
24

25 MR. ZIEGLER: I am sorry.

1 MR. TOAVS: I am sorry Mr. Ziegler. I just want to get your reaction to one  
2 last thing and that is, there is a possibility that if Barry is released on bail and is  
3 admitted to bail that he might be, he could be on bail for quite some time, maybe  
4 upwards toward a year or maybe even longer. Are you and your wife prepared to  
5 make that type of long term commitment?  
6

7 MR. ZIEGLER: We are.

8 MR. TOAVS: I have no further questions of Mr. Ziegler Your Honor.

9 COURT: Mr. Light would you like to ask any questions?  
10

11 MR. LIGHT: Yes Your Honor. Just a couple. Mr. Ziegler, can you give us  
12 what your current mailing address is at your residence?  
13

14 MR. ZIEGLER: I can't hear him.

15 COURT: Mailing address.

16 MR. ZIEGLER: You need my home address?  
17

18 MR. LIGHT: Please.

19 MR. ZIEGLER: 3040 Hollow Tree Road, Billings, MT 59101.

20 MR. LIGHT: Thank you. Can you hear me Mr. Ziegler?  
21

22 MR. ZIEGLER: Yes, I will try.

23 MR. LIGHT: Mr. Ziegler, is it correct that all your contact that you have  
24 had with Barry Beach, up until today, has been in a controlled situation where you  
25 are visiting him at prison?

1 MR. ZIEGLER: It has always been at the Religious Activity Center at  
2 Montana State Prison in Deer Lodge, correct.

3 MR. LIGHT: And, you were asked whether or not you would report any  
4 violations that if Mr. Beach is given some conditions of bail that if he violated  
5 those conditions that you would report it. Would you be willing to report it to the  
6 Roosevelt County Sheriff's Department?  
7

8 MR. ZIEGLER: I certainly would. I report incidences in my restaurant all  
9 the time with my employees who are on parole or under supervision. If some  
10 incidences come up, we are right away willing to try to rectify things, whatever the  
11 problem might be.  
12

13 MR. LIGHT: Sir, you indicated that you would first to look to see if Mr.  
14 Beach could possibly work at your family restaurant, is that correct?  
15

16 MR. ZIEGLER: Correct.

17 MR. LIGHT: And, if that doesn't work out, what other opportunities are  
18 there for Mr. Beach to work during this time period?  
19

20 MR. ZIEGLER: Well, there are some other businesses in town that I know  
21 that hire ex-offenders that I would certainly visit with them. But, I would certainly  
22 like to start with us and see what we can do with Barry to work him into our  
23 program there at the bakery-restaurant.  
24  
25

1 MR. LIGHT: And, if Mr. Beach was in fact, employed at your family  
2 restaurant, you indicated that that was approximately eight miles from your  
3 residence, is that correct?

4 MR. ZIEGLER: Correct.

5 MR. LIGHT: Would he have ...

6  
7 COURT: Mr. Light, his home is eight miles from the residence is that what  
8 you were saying?

9 MR. LIGHT: Well I guess my question is what is the distance between  
10 where he lives and where the restaurant is?  
11

12 COURT: Yeah that's right. I am sorry. It was eight miles.

13 MR. ZIEGLER: Just eight miles.

14 MR. LIGHT: And, would Mr. Beach have access to a vehicle to go back  
15 and forth from work to the residence?  
16

17 MR. ZIEGLER: He would.

18 MR. LIGHT: Okay. And that would be one of your vehicles?  
19

20 MR. ZIEGLER: I understand he has a vehicle, but if he does not we would  
21 make one available, correct.

22 MR. LIGHT: That is all we have. Thank you Mr. Ziegler.

23 MR. ZIEGLER: Thank you.

24  
25 COURT: Mr. Toavs any follow up?

1 MR. TOAVS: No Your Honor.

2 COURT: I need to understand from you what you believe the level of  
3 sincerity of Mr. Beach is?

4 MR. ZIEGLER: One hundred ten percent (110%) plus.

5 COURT: Fair enough. Any follow up Mr. Toavs?

6 MR. TOAVS: No Your Honor.

7 COURT: Mr. Light any follow up?

8 MR. LIGHT: No Your Honor.

9 MR. ZIEGLER: Thank you.

10 MR. TOAVS: Thank you Your Honor. The defendant calls Dan Gengler.

11 COURT: Come on up here sir right in front of the clerk please.

12 CLERK: Do you solemnly swear the statements you are about to make in  
13 the matter will be the truth, the whole truth and nothing but the truth so help you  
14 God?

15 MR. GENGLER: I do.

16 MR. TOAVS: Good afternoon Mr. Gengler. Would you please say your  
17 name and spell your last name for the benefit of the Court?

18 MR. GENGLER: Dan Gengler. G-e-n-g-l-e-r.

19 MR. TOAVS: And Dan, do you know Barry Beach?

20 MR. GENGLER: Yes I do.  
21  
22  
23  
24  
25

1 MR. TOAVS: How do you know Barry?

2 MR. GENGLER: I know Barry from the same prison ministry program that  
3 Mr. Ziegler had described.

4 MR. TOAVS: How long have you known Mr. Beach?

5 MR. GENGLER: Ten years.

6 MR. TOAVS: And, when you first met Barry Beach did you know about  
7 this case that was going on in the background?  
8

9 MR. GENGLER: I did not. I didn't hear anything about his story or his  
10 case for innocence until it was either late 2005 or 2006.  
11

12 MR. TOAVS: And, how long had you known Barry by that time?

13 MR. GENGLER: Approximately five years.

14 MR. TOAVS: How often did you get a chance to visit with Barry on the  
15 times that you would go to see him at the state prison?  
16

17 MR. GENGLER: Similar to Mr. Ziegler. I would see Barry generally about  
18 once a month and, as well, a more intensive three day program that we put on at  
19 the prison. And, I almost every time, had at least some degree of interaction with  
20 him every time I would go.  
21

22 MR. TOAVS: You mentioned a three day program. Is that just a one time  
23 thing?  
24  
25

1 MR. GENGLER: No. That is something that is conducted every year each  
2 for the high security side as well as the low security side, and inmates who attend  
3 will come back multiple times.

4 MR. TOAVS: Do you get any real one-on-one time with Barry during these,  
5 during the years when you have gone?  
6

7 MR. GENGLER: Oh absolutely, yes.

8 MR. TOAVS: Describe for the Court how significant has that been?  
9

10 MR. GENGLER: In our once-a-month programs we might get five or ten  
11 minutes together. And of course, you know, we are trying to go around and  
12 interact with other inmates as well. During the three day programs we would have  
13 a fair amount of interaction during the course of those three days, particularly in  
14 the times when Barry has been at the same table that I was assigned to. So, there  
15 might be five people at a table who are engaged in discussion during this weekend.  
16

17 MR. TOAVS: Do you believe you have developed a meaningful  
18 relationship with Barry over the last ten years?  
19

20 MR. GENGLER: Over the course of ten years, yes.

21 MR. TOAVS: Now, I understand Mr. Gengler, you are involved with Barry  
22 through the prison ministry and you are also part of a group called Montanans for  
23 Justice.  
24

25 MR. GENGLER: Yes.



1 MR. TOAVS: What is the Montanans for Justice?

2 MR. GENGLER: We formed following the board of pardons and parole  
3 decision; in reaction to that decision, I think in outrage of the decision and the lack  
4 of consideration to what we felt were the facts in this case, and so we have been  
5 advocating for Mr. Beach's innocence since approximately 2007.  
6

7 MR. TOAVS: And, since the time when you first learned that Barry was  
8 involved in this case, have you talked to him about this case?  
9

10 MR. GENGLER: Yes.

11 MR. TOAVS: And, just to follow up on the Court's question to the last  
12 witness, do you have an opinion about Barry's sincerity?  
13

14 MR. GENGLER: Yes I do.

15 MR. TOAVS: And what is that?

16 MR. GENGLER: My judgment is his authenticity as a person as far as  
17 being who he presents himself is I think, you know, among the inmates that meet,  
18 is very, very high.  
19

20 COURT: That is sort of an interesting comparison.

21 MR. GENGLER: In the standard of the people that we encounter there, I  
22 would say I trust him at a very high level.  
23  
24  
25

1 COURT: How about the standard of people like Mr. Ziegler's business; the  
2 customers that go to Mr. Ziegler's business. What about that standard of  
3 comparison?

4 MR. GENGLER: I think I would also consider a very high level of trust  
5 there with that standard as well.  
6

7 MR. TOAVS: Now Dan, you have a day job too in addition to your work.

8 MR. GENGLER: Yes sir.

9 MR. TOAVS: And what is your employment?  
10

11 MR. GENGLER: I am the Chief Actuary at the Montana State Fund.

12 MR. TOAVS: And where do you reside?

13 MR. GENGLER: In Helena, Montana.

14 MR. TOAVS: How long have you been employed by the State Fund?  
15

16 MR. GENGLER: Sixteen 6 years.

17 MR. TOAVS: And as ... Now, as part of the probation and parole clemency  
18 hearing, I understand that you presented some testimony during that proceeding.  
19

20 MR. GENGLER: Yes.

21 MR. TOAVS: And, the focus of the testimony had to do with your opinion  
22 that Barry would be a suitable candidate for parole at that time.  
23

24 MR. GENGLER: Yes.  
25

1 MR. TOAVS: And, do you believe that Barry is a suitable candidate to be  
2 admitted on conditions of release on bail?

3 MR. GENGLER: Yes I do.

4 MR. TOAVS: Why is that? What are the reasons why you believe that  
5 Barry is a good candidate for that?  
6

7 MR. GENGLER: You know, the ten years that I have known him, I have  
8 seen nothing but a positive, constructive attitude, you know, particularly given his  
9 situation and the ordeal that he has been through. He has never shown any attitude,  
10 habits of thought, demeanor, behavior, that has ever given me any cause for  
11 concern that he would not be a law abiding and responsible and accountable  
12 outside of prison.  
13

14 MR. TOAVS: Do you believe that Barry Beach presents any kind of danger  
15 to the community?  
16

17 MR. GENGLER: I do not.

18 MR. TOAVS: Why not?  
19

20 MR. GENGLER: Well, first of all, my assessment of Mr. Beach is colored  
21 by the fact that I think he is innocent of any crime. So, as far as I know he has  
22 never ever committed any act of violence or anything of that nature.  
23  
24  
25

1 MR. TOAVS: Well, in addition to that, is there anything about Barry, as  
2 you know him over the last ten years, that makes you believe that he is not a  
3 danger to the community?

4 MR. GENGLER: The fact that he has dealt with the situation that he has  
5 been in with absolutely no bitterness, no resentment; faced it with a very positive  
6 attitude.  
7

8 MR. TOAVS: And what about this. Do you believe that Barry presents any  
9 kind of flight risk?  
10

11 MR. GENGLER: I don't.

12 MR. TOAVS: Can you explain why you don't believe he is any kind of  
13 flight risk or help the Court understand why you don't believe that?  
14

15 MR. GENGLER: Well, first of all, given everything he has been through, I  
16 think he has got every reason in the world to show up for trial to clear his name. I  
17 know I, and every other member of Montanans for Justice will be there that  
18 morning to get him out of bed to make sure he is on time. You know, we have put  
19 five to six years of blood, sweat and tears into this thing as well as substantial  
20 financial commitment, so we have great interest in seeing this thing through with  
21 him.  
22

23 MR. TOAVS: Now Mr. Gengler, you have been involved with the prison  
24 ministry now for a long time. Is it just every month or every year you are sticking  
25

1 your neck out and putting your reputation on the line for somebody who is asking,  
2 I would like to be paroled, or I would like to be out on bail?

3 MR. GENGLER: I think all of us are pretty hesitant to do that. Do you  
4 mean as far as like writing a letter to a board of pardons and parole for an inmate;  
5 something of that nature?  
6

7 MR. TOAVS: Right. In other words, I want to give the Judge a sense of, is  
8 this something that you are advocating for prisoners to be released on a frequent  
9 basis?  
10

11 MR. GENGLER: No. No.

12 MR. TOAVS: Describe for the Judge what is special. Let me strike that  
13 question and ask a better one and back up. How often do you do this kind of thing  
14 or make this kind of request where you vouch for somebody's character who's  
15 incarcerated?  
16

17 MR. GENGLER: For me personally, this is the only time.

18 MR. TOAVS: And what about this case made you drive down here to be at  
19 this hearing today Mr. Gengler?  
20

21 MR. GENGLER: Our belief that Barry is innocent of this crime and the fact  
22 that it helps that he has been someone who has been just very remarkable in how  
23 he has dealt with it; his attitude and just being very positive, very faithful, very  
24 hopeful about it. It has been an inspiration to us.  
25

1 MR. TOAVS: Do you believe that Barry has the physical and mental ability  
2 to be successful in a community based setting?

3 MR. GENGLER: Yes.

4 MR. TOAVS: And what ... Do you have any particular experience with  
5 Barry during the time when you have known him that leads you to believe that?  
6

7 MR. GENGLER: You know I find him extremely personable. Genuinely  
8 interested in people. He asked me about me and my family whenever I see him.  
9 You know and I also would say that I was very impressed by the fact that I knew  
10 him for five years and never knew anything about this story in terms of his  
11 innocence. He never pushed his hard luck story on people because it wasn't  
12 relevant to you know what we were doing and you know why we were there.  
13

14 MR. TOAVS: Did you notice any leadership qualities in Barry during the  
15 time of your dealings with him at the Montana State Prison?  
16

17 MR. GENGLER: We consider him a very strong leader supporting the  
18 program that we are conducting there at the Montana State Prison. I mean, he has  
19 been responsible for bringing other inmates, encouraging their participation. There  
20 is actually a couple of people here in this courtroom who Barry had a major  
21 influence on while they were there in prison with him. He has been a positive  
22 influence on other inmates.  
23  
24  
25

1 MR. TOAVS: Do you have any doubt in your mind as you sit here today  
2 that Barry is capable of following conditions of bond or bail on release in a  
3 community setting?

4 MR. GENGLER: I am very confident of his ability to do that.

5  
6 MR. TOAVS: I have no further questions Your Honor.

7 COURT: Mr. Light?

8 MR. LIGHT: Just a couple questions. Mr. Gengler, it was raised on direct  
9 examination that you appeared, or prepared to appear, before the parole board that  
10 you believed that Mr. Beach was suitable for parole, is that correct?  
11

12 MR. GENGLER: Yes.

13 MR. LIGHT: And, you are aware that if Mr. Beach, who was an inmate on  
14 a homicide conviction, would have been paroled he would have been subject to  
15 some very strict conditions, isn't that true?  
16

17 MR. GENGLER: I don't have direct knowledge of what conditions those  
18 would have been, but okay.  
19

20 MR. LIGHT: You would have assumed that he would have been on strict  
21 conditions though correct?

22 MR. GENGLER: Under parole, yes.  
23  
24  
25

1 MR. LIGHT: Okay. And, if in fact the Judge releases Mr. Beach on bail  
2 today, he will be under some, you agree that he should be under some strict  
3 conditions as well, would that be correct?

4 MR. GENGLER: What sort of conditions; specifically what sort of  
5 conditions would you be talking about?  
6

7 MR. LIGHT: Well, let's start with this. Do you believe that he should be  
8 under any conditions if released on bond?  
9

10 MR. GENGLER: I think it would be reasonable for him to be under  
11 conditions similar to someone else being charged with that kind of a crime.

12 MR. LIGHT: Okay. So, if there is such a thing as standard conditions for a  
13 person being released on a homicide, you would agree that Mr. Beach should be  
14 subject to those conditions, would that be correct?  
15

16 MR. GENGLER: That strikes me as being appropriate.

17 MR. LIGHT: Okay. And, if in fact, you are aware that Mr. Beach had  
18 violated the conditions that this Court might set, would you be willing to advise the  
19 State or to advise the sheriff's office that, in fact, he has violated his conditions of  
20 bond?  
21

22 MR. GENGLER: Absolutely.

23 MR. LIGHT: That is all we have. Thank you Your Honor.  
24

25 COURT: Any follow up Mr. Toavs?



1 MR. TOAVS: No Your Honor. Subject to; we do have Barry's mother who  
2 is available to testify that Barry is indigent, but I don't know if that is a contested  
3 issue that warrants the Court's time to testify.

4 COURT: Anything else for Mr. Gengler?

5 MR. TOAVS: No, nothing for him.

6 COURT: Thank you.

7 MR. GENGLER: Thank you.

8 COURT: Mr. Light, one of the issues raised by Mr. Toavs is whether the  
9 State contests the financial condition of Mr. Beach. Do you wish to have; to  
10 contest that?  
11  
12

13 MR. LIGHT: Your Honor, if counsel for the defense indicates that it is their  
14 belief that he is indigent, then the State does not have any problem with that.  
15

16 COURT: I understand that to be a representation. Is that correct Mr. Toavs?

17 MR. TOAVS: Yes Your Honor.

18 COURT: All right. The Court will accept that representation. Anything  
19 further?  
20

21 MR. TOAVS: No Your Honor.

22 COURT: Does the State wish to call any witnesses?

23 MR. LIGHT: No witnesses Your Honor.

24 COURT: All right. Let's hear some argument then. Mr. Toavs?  
25

1 MR. TOAVS: Thank you your Honor. Without unduly duplicating what  
2 Your Honor heard this morning under the factors set out under the Montana Code  
3 in section 46-9-109(2), Your Honor is to consider a list of factors and take into  
4 consideration all of the available evidence to determine whether to admit the  
5 defendant to bail and if so, what conditions could he fashion to secure the  
6 continued appearance in the case and to protect the community during pretrial  
7 release.  
8

9 Your Honor, I believe it also is the position of the Montana Supreme Court  
10 that if there are conditions that can be fashioned, the Judge should fashion such  
11 conditions as opposed to denying bail. Mr. Beach doesn't have extensive financial  
12 means. He is indigent and has not had the opportunity over the past, almost thirty  
13 years, to acquire a significant means to post bond. So, we have recommended in  
14 our motion Your Honor, that you consider his release on his own recognizance.  
15 However, we understand that the State opposes that recommendation and although  
16 we haven't heard a recommended figure from the State Fifty thousand dollars  
17 (\$50,000.00) ...  
18  
19  
20

21 COURT: What did you say?

22 MR. TOAVS: The amount of Fifty thousand dollars (\$50,000.000) bail,  
23 Your Honor, should be more than sufficient in combination with conditions to  
24  
25

1 secure Mr. Beach's continued presence at trial and compliance with terms of  
2 release.

3         In terms of the proposed conditions that Mr. Light provided yesterday, we  
4 don't object to, and in fact are prepared to stipulate to many of those conditions  
5 Your Honor. They are numbered, and for the record Your Honor, Mr. Beach has  
6 no objection to those conditions one through three. However, number four which  
7 refers to staying in school, we don't believe applies in this case. Nor do we believe  
8 that number five applies in this case. There is no evidence that Mr. Beach has any  
9 sort of chemical dependency problems. He has been incarcerated for a long time.  
10 We agree that number six is appropriate Your Honor, relating to alcohol and illegal  
11 drugs. We agree that number seven would be appropriate if it is modified  
12 however, to allow Mr. Beach to enter an establishment where alcohol is served for  
13 the sole purpose of eating a meal. Many places in Montana offer food and the  
14 alcoholic beverages are optional. We also believe that the exception that this  
15 condition should be modified such that Mr. Beach would be allowed to enter such  
16 establishments for the purpose of employment. We agree with number eight with  
17 the insertion of the Ziegler's address. Number nine we agree with. We also agree  
18 with number ten. We believe number eleven is appropriate and that the blank there  
19 on number eleven should be modified to specify that Mr. Beach not associate with  
20 any nonfamily witness in this case. We have no objection to numbers twelve,  
21  
22  
23  
24  
25

1 thirteen, fifteen and sixteen. With respect to the curfew Your Honor, we would  
2 leave that to the sound discretion of the Court. We don't believe that the  
3 circumstances of this case implicate a curfew but we don't have strenuous  
4 objection to number fourteen. Number seventeen is, in terms of my experience  
5 Your Honor, a little unusual. I suppose if you ordered the Department of Probation  
6 and Parole to supervise Barry Beach while he is released on bond they would do  
7 that. I have no reason to think that they wouldn't. But the combination of  
8 proposed conditions number seventeen and eighteen, we believe is excessive.  
9  
10 And, number eighteen is objectionable primarily due to the expense of that. The  
11 electronic monitoring is a good program, but it is expensive. So, we believe that  
12 seventeen or eighteen, but not both and preferably number seventeen Your Honor.  
13  
14 And then finally, we have no objection to number nineteen. Thank you.  
15

16 COURT: Mr. Light?

17 MR. LIGHT: Your Honor, I am also gonna refer the Court to section 46-9-  
18 109(2) which outlines the factors that the Court should take into account when  
19 determining if a bail is even required. And of course, number a is the nature of the  
20 offense. Clearly this is a deliberate homicide, the most serious of all crimes. Kim  
21 Nees, the high school honor student was in fact murdered. Included in subsection  
22 (a) is whether the offense involved the use of force or violence. Kim Nees was  
23 brutally attacked suffering numerous wounds to the head from blunt force trauma.  
24  
25

1 The nature of the offense as outlined in the statute calls for a sufficient bail and in  
2 my belief not a release on his own recognizance.

3         The second factor through the statute is the weight of the evidence against  
4 the defendant. And, as it has been indicated this defendant was convicted back in  
5 1984 and, as Mr. Camiel noted, the strongest part of the evidence against the  
6 defendant was his confession. In fact, this Court has stated today as it did in its  
7 Order that it considered the defendant's confession when determining if he was to  
8 walk free through the innocence gateway. So, I submit to the Court that the  
9 defendant's confession to killing Kim Nees is just as vital in determining the  
10 amount of bail. Now, I understand the defendant alleges that his confession was  
11 coerced and is false. And, both parties will certainly argue about the confession if,  
12 in fact, this matter is litigated. But, at this time as the Court is reviewing the  
13 weight of the evidence against the defendant to determine the amount of bail, that  
14 confession is evidence. And, it is evidence of this defendant's guilt. So, I am not  
15 gonna go through the entire confession, but I would just like to read one small  
16 quote that I think would be important for the Court in making this difficult and  
17 important decision on the amount of bail. After the defendant outlined that he had  
18 struck Kim. At one point he is asked by the officers. Okay, what happened next?  
19 And the defendant responded and I quote, "she quit moving so I got up". "I stood  
20 up and looked at her and took a couple of steps back and looked at her and then  
21  
22  
23  
24  
25

1 walked back over to where she was laying at and I reached down checking for her  
2 pulse and it was very weak one. And, when it stopped I stood up again and said,  
3 ‘Oh my God, what have I done’. And I took a minute to think and I realized I had  
4 killed her”. What makes this case unique Your Honor is that this confession that  
5 we have all agreed is gonna be the center part of this trial has been reviewed by  
6 many, many courts. The Montana Supreme Court, when they affirmed the  
7 defendant’s conviction in July of 1985, found his confession was voluntary. And,  
8 they affirmed the denial of the suppression. The defendant filed *habeas corpus*  
9 relief in Federal Court arguing that this confession was illegally obtained and the  
10 Federal District Court of Montana denied the petition. In 1999 the US Court of  
11 Appeals of the 9<sup>th</sup> Circuit affirmed the denial of the defendant’s request finding and  
12 I quote “the totality of the circumstances indicate the confession was not coerced.”  
13 Therefore Your Honor, every Court that has had a duty to review and examine the  
14 defendant’s confession has found it to be voluntary and not coerced. This  
15 defendant who is before you today requesting bail, confessed to the violent murder  
16 of Kim Nees and therefore I believe a fixed amount of bail is in fact required.

17  
18  
19  
20  
21 Now, section 46-9-301; it outlines the factors for the Court to consider in  
22 setting the amount of bail. It says, of course, the amount of bail needs to be  
23 sufficient to insure the defendant’s presence; to insure that he complies with all the  
24 conditions. Now, we have heard from two witnesses that they do not believe that  
25

1 he is a risk of flight. I would just point out Your Honor that this is a defendant  
2 who has been incarcerated for I believe approximately twenty-nine years. And, the  
3 State has now appealed the Order for New Trial. If this defendant is released,  
4 whether it be OR or whether on amount of bond and the Supreme Court agrees  
5 with the State that he is not entitled to a new trial, he will in fact, be ordered back  
6 to prison. The defendant is well aware of this. Therefore Your Honor, these are  
7 very unique circumstances and I believe under these very unique circumstances  
8 where he could be ordered back to prison after being out for twenty-nine years  
9 again, I think that shows that the bail should be sufficient to insure his presence  
10 and his compliance with conditions of bond.  
11  
12

13 Finally Your Honor under 46-9-301 again, the statute refers that the amount  
14 of bail should be commensurate with the nature of the offense. I respectfully  
15 submit that a release on his own recognizance is not commensurate with the brutal  
16 homicide of Kim Nees which this defendant has confessed to.  
17

18 Your Honor, I have been involved in approximately seventy (70) homicides  
19 over the years. I have been involved in many bail hearings on brutal homicide  
20 cases. I have requested bonds in excess of a million dollars. I have even requested  
21 no bonds when they are possible capital cases. Now, I realize and I respect that  
22 this is a case that the Court has now granted the defendant a new trial based on  
23 alleged new evidence. I also realize that this defendant has been incarcerated for  
24  
25

1 approximately twenty-nine years. In taking into consideration those two factors  
2 plus all that I have discussed Your Honor, and based on my experience I am  
3 recommending a bond of Two hundred fifty thousand dollars (\$250,000.00) with  
4 conditions Your Honor.

5  
6 And, I have provided the Court with some conditions. What I did Your  
7 Honor was provided with all the standard conditions. Obviously, there are a few of  
8 those which counsel has noted may not be appropriate in this case. I just gave the  
9 whole list for the Court to have an option. I would specifically, if I may Your  
10 Honor, ask for the following specific conditions as did counsel. I believe the  
11 condition that he obey all laws, that he contact his attorney at least once a week.  
12 that he maintain or actively seek employment, that he not possess or consume any  
13 alcoholic beverages or illicit drugs except as prescribed by a licensed physician,  
14 that he not enter any establishment where alcohol is served or gambling takes place  
15 with the exception if it is for employment purposes, obviously that he not leave the  
16 State of Montana without written permission of the Court, that he not associate  
17 with persons who use alcohol, illicit drugs, or other intoxicants, obviously that he  
18 attend all Court; probably the most important for the State Your Honor is that he  
19 avoid all contact with any alleged victim, family of the victim or any potential  
20 prosecution witness in this case whether it be by mail, phone or for a third party  
21 Your Honor. We do ask that he be ordered to reside with Mr. Ziegler at the  
22  
23  
24  
25



1 specific address that he just talked about, obviously that he not possess any  
2 firearms, destructive devices or other dangerous weapons. I would ask Your  
3 Honor that if he is to enter Roosevelt County that he needs to give forty-eight  
4 hours notice to Roosevelt County Sheriff's Department and the Attorney General's  
5 office and that is so that we can contact people who may need to know that he is, in  
6 fact, in Roosevelt County so that there is not an accidental running into somebody  
7 which may prove difficult. Now Your Honor, as far as number fourteen and  
8 number eighteen and so forth; what I would recommend Your Honor is if this  
9 Court is in fact contemplating a release on his own recognizance, again which we  
10 do not think is appropriate, then I would recommend number eighteen Your Honor,  
11 that possibly the Court should consider electronic monitoring and should consider  
12 the curfew from 10 p.m. to 7 a.m. simply because he has been released on his own  
13 recognizance. I think those are often standard conditions when you release  
14 somebody without sending them out on bail. Those are the conditions that we  
15 would ask the Court to impose Your Honor.

16  
17  
18  
19  
20 COURT: Any final follow up Mr. Toavs?

21 MR. TOAVS: Yes. Thank you Your Honor. Your Honor, as Your Honor  
22 knows, the amount of bail has to be; consider the financial means of the defendant.  
23 Mr. Beach simply does not have resources to post a Two hundred fifty thousand  
24 dollar bond (\$250,000.00 bond). I would also observe Your Honor that everyone  
25

1 keeps going around and around about this confession. And, you know, I  
2 understand that the State needs to make this argument, but we can't forget that this  
3 confession was the product of hours and hours of unrecorded interrogation of a  
4 very, very young man in another state. At the time this murder occurred Barry  
5 Beach was seventeen years old. He has been in prison for twenty-nine years and  
6 now Your Honor, has found that no reasonable juror, in light of the new evidence,  
7 would have found him guilty. It is true that this was a violent, horrible crime Your  
8 Honor, but the fact of the matter is that, based on the evidence that you heard in  
9 August and your findings in relation to the petition for post conviction relief, Mr.  
10 Beach is entitled to a new trial. The weight of the evidence against him, given the  
11 newly discovered evidence, is not great, and the amount of your bail determination  
12 should reflect that. Thank you Your Honor.  
13  
14  
15

16 COURT: Mr. Light, I would give you another opportunity if you wish.

17 MR. LIGHT: That is fine Your Honor. Nothing Your Honor.

18 COURT: All right. I am gonna take a brief recess and think about this. We  
19 will be back in ten minutes or so.  
20

21 (RECESS)

22 CLERK: All rise.  
23  
24  
25

1 COURT: Please be seated. Just for purposes of the record, again,  
2 something I forgot. But, from the initial get-go this morning the defendant has  
3 been present with his counsel. I just wanted the record to reflect that.

4 As an initial consideration in this matter there has been raised this very  
5 interesting issue of whether the Court's order has placed Mr. Beach in the posture  
6 of basically being an innocent man.  
7

8 Mr. Light, we get a feedback from your area. So, if you wouldn't mind  
9 muting your microphone and just indicating by hand sign that you can still hear  
10 me.  
11

12 MR. LIGHT: Oh, I can hear you right now Your Honor.

13 COURT: Okay. Can you mute that speaker so that we don't get all the  
14 feedback here? Excellent.  
15

16 All right. Whether the Court's Order creates a position where Mr. Beach is  
17 considered innocent, that was not part of what the Court's consideration was from  
18 the Montana Supreme Court. That is sort of a gloss that has been added onto this  
19 and this Court does not go that far to make that determination.  
20

21 All right. The factors to be considered: the nature of the circumstances of  
22 the offense charged; whether it used force or violence. There is no question, you  
23 know. We must not forget that a very bright and promising young Native  
24  
25

1 American woman headed for college and sure success was brutally, brutally  
2 murdered.

3         The weight of evidence against the defendant. The Court certainly found  
4 that the evidence that it heard, if considered by a jury reasonably instructed, would  
5 possibly lead to that jury finding that he would be not guilty. But, there is other  
6 evidence besides that that must be weighed in for this consideration for sure. And  
7 that is, of course, the evidence of the confession as well as some of the other  
8 evidence from the original trial. This is not a clean wash to this Court. There is  
9 sufficient evidence to cause the Court concern which it stated in its Order.  
10  
11

12         The history and the characteristics of the defendant; which there is a lot of  
13 factors here. I think given what we heard from the testimony of Mr. Ziegler and  
14 Mr. Gengler you know we have a gentleman who has been in prison twenty-eight,  
15 twenty-nine years. It is awful hard to try to apply some of these characteristics to  
16 somebody who hasn't been able to be a part of our community for almost three  
17 decades. I think we can rely on Mr. Gengler and Mr. Ziegler. I rely on them. I  
18 find them very credible, very substantial witnesses and that, you know, their  
19 relatively brief relationship with Mr. Beach demonstrates to this Court that he has  
20 got the character and the history and the characteristics that would be amenable to  
21 release.  
22  
23  
24  
25

1 Whether there is any danger to the community: this Court does not believe  
2 there is any danger to the community for Mr. Beach. Mr. Beach is, assuming all  
3 things being equal, is facing a new trial. It certainly would not be intelligent in the  
4 least for him to go out and do something stupid. And that would be, of course,  
5 something that would cause a danger or harm to the public or individuals.  
6

7 The Court will therefore rule that Mr. Beach is eligible for release. The  
8 question then is; eligible for release pending trial. The question then is bail, how  
9 much? It has always been fascinating to this Court that we assign a monetary  
10 value to these things; that if Two hundred fifty thousand dollars (\$250,000.00) is  
11 somehow satisfactory, One dollar (\$1.00) is somehow ridiculous and absurd.  
12 Somewhere; you know, it has always been fascinating that we try to assign some  
13 dollar value to these things. It seems more important to the Court that we set  
14 conditions to be sure that the public is safe. To be sure that Mr. Beach appears  
15 when he is supposed to appear and that justice is served. Mr. Beach doesn't have  
16 any money. If this Court sets bond at any level beyond a dollar, what value would  
17 that be? He would remain in prison.  
18  
19  
20

21 The Court has the authority in a bail hearing to consider a variety of  
22 information. The US Department of Justice has public information on its website  
23 that looks at data. They love data, right? It looks at data for the average sentence  
24 for a non-negligent homicide. I looked at 1999 to 2009. I don't claim that my  
25

1 mathematics is absolutely perfect, but ... because it wasn't my best subject; but,  
2 for those ten years 1999 to 2009 the average sentence for a non negligent homicide  
3 was eighteen point ninety-four hundredths (18.94) years; nineteen (19) years. The  
4 average time served was eleven point seven (11.7) years. It is this Court's  
5 determination that it can release Mr. Beach on its own recognizance.  
6

7 (CHEERING IN THE COURTROOM)

8 I told you folks I didn't want anything. I will have you removed. This is not  
9 a circus. This is not some sort of celebratory kind of entertainment game. This is  
10 very serious stuff.  
11

12 I will release him on his own recognizance. The Court believes that there is  
13 a possibility that if a jury were to find Mr. Beach guilty, that after having already  
14 spent twenty-nine years in jail, it is possible that a district judge somewhere would  
15 release him on time served because he has served so much more than most people  
16 have ever served for this kind of; even horrific crime.  
17

18 So, the Court will now walk through the conditions. First of all, not  
19 mentioned by anybody, but required by the Court is the Court will require a waiver  
20 of extradition from any state, any foreign land.  
21

22 I want Mr. Beach, if he has a passport, to surrender it. I doubt that he has  
23 one, but if he does he is not allowed to apply for a passport or to receive a passport.  
24 He is not allowed to receive any travel permit or card that would allow entry into  
25

1 any country contiguous to the United States; Canada and Mexico, sometimes you  
2 can get in without a passport. All you need is certain other documents. He is not  
3 allowed to possess or to obtain any of those documents necessary for travel to any  
4 country. He may not leave the State of Montana without the express written  
5 permission of the Attorney General's Office of the State of Montana.  
6

7 I was very impressed with Mr. Ziegler. It was in large part based on he and  
8 Mr. Gengler's testimony that the Court believes that an OR release is appropriate.  
9 Mr. Ziegler is not just some dilatant. It is clear that he knows the ins and outs of  
10 working with the Department of Corrections supervised individuals and that it is  
11 not always a cupcake in Stella's Kitchen and Bakery. So, the Court will rely on  
12 Mr. Ziegler and Mrs. Ziegler to do their duty and report any violation of this  
13 Court's conditions.  
14

15  
16 The Court will require that he live with the Ziegler's until other  
17 arrangements are made. If other arrangements are made, then the State of Montana  
18 Attorney General's Office must be given at least thirty (30) days notice prior to  
19 any change so that they have chance to object to this Court and the Court can  
20 weigh in on it.  
21

22 Mr. Beach must obey all laws of the cities, the states, the federal  
23 government, and the tribal governments.  
24  
25

1 He must be in contact with his attorney at least once a week. He must  
2 maintain or actively seek employment. I agree with Mr. Ziegler. I think we have a  
3 transition issue here. This is not easy to move from the kind of environment that a  
4 state prison is into a public setting after thirty years of absence. This is not easy.  
5 And, I think it is, you know, fraught with challenges in and of itself. But, Mr.  
6 Ziegler has a good head on his shoulders as demonstrated by his testimony;  
7 demonstrated that he has got an idea of how this could unfold well. So, the Court  
8 will allow some latitude on when employment must be obtained. In conformance  
9 with Mr. Ziegler's testimony, let's let him adjust a bit. Let's let him explore Mr.  
10 Ziegler's business, other potential businesses. Let's give him an opportunity to be  
11 a citizen.  
12  
13  
14

15 Number four is inappropriate. Number five the Court deems inappropriate.  
16 Alcoholic beverages. There is supposed to be, by Supreme Court order, a nexus  
17 between the conditions set by a court for release and the case before it. Well, the  
18 case before it as the testimony from the hearing and anything you look at at the  
19 original trial was fraught with alcohol. It is the curse of many a community and I  
20 have to say it is a challenge for the Native American communities in particular. It  
21 would not be in Mr. Beach's best interest to be consuming alcohol. It could lead to  
22 diminution of inhibitions. The Court is gonna prohibit, find a nexus because of the  
23 crime, the nature of the crime, the relationship of alcohol to the crime that he is not  
24  
25



1 allowed to possess or consume alcohol. He is not allowed to enter any  
2 establishment where alcohol is the chief item of sale. I will not agree to the food  
3 exception. If you can't find a place to eat like Mr. Ziegler's cafe that doesn't have  
4 alcohol, then you don't need to be going out. I will however, provide an exception  
5 if there is employment that is determined to be appropriate that may have an  
6 alcohol component to it.  
7

8 I am putting Mr. and Mrs. Ziegler under order of this Court to report any  
9 violations. You know, I am taking your word that you will do it.  
10

11 Mr. Beach is not to associate with persons who use alcohol, illegal drugs or  
12 other intoxicants. I think that that is very appropriate for the reasons previously  
13 stated.  
14

15 Mr. Beach is not to associate or to contact in any way by phone, by e-mail,  
16 by third person, by letter, under any circumstances, any victims, any witnesses in  
17 this matter. Now, both sides have said witnesses related to the prosecution and I  
18 guess I can live with that. But, I am concerned about contact with witnesses even  
19 for the defense unless it is under the supervision of his counsel. So, I am gonna  
20 prohibit contact with any of those witnesses unless it is under the supervision of  
21 counsel. Now, if it is a direct family member, a blood relative, I will allow an  
22 exception.  
23  
24

25 He must attend all scheduled court hearings.

1 I got a feeling, given that Mr. and Mrs. Ziegler are up early, they are  
2 probably in bed early. So, I don't think a curfew is gonna be necessary. I think  
3 they are gonna impose their own.

4 Clearly, Mr. Beach is not to possess firearms, destructive devices or other  
5 dangerous weapons.  
6

7 Now, this report to the release from custody to adult probation and parole.  
8 That gets somewhat to my issue I raised at first about what is his exact position  
9 with regard to the law. If the Department of Corrections will accept this Court's  
10 direction in this matter, the Court respectfully requests that they place Mr. Beach  
11 under their supervision so that he can report to his officer on a regular basis and we  
12 can have that kind of extra layer of community assurance of Mr. Beach's good  
13 behavior. I will not make that a revocable offense if the Department of Corrections  
14 deems that that ...; they may decide his stance is different than I think it is and so  
15 they may not deem it appropriate to be the supervisor. But, if they will accept that,  
16 the Court requests that respectfully.  
17  
18  
19

20 I hope you are taking notes gentleman because I am gonna ask the defense to  
21 do the order on this.

22 MR. TOAVS: Yes Your Honor.

23 COURT: I am not gonna require electronic monitoring. I think that Mr. and  
24 Mrs. Ziegler can fill in. I agree about not entering Roosevelt County without first  
25

1 giving forty-eight hours of notice to the Roosevelt County Sheriff's Department  
2 and the Attorney General's office.

3 Okay. All right. Mr. Light, any additions, corrections or concerns about the  
4 conditions set by the Court?

5  
6 MR. LIGHT: No Your Honor. I think that is fine. Maybe I missed it, but  
7 did you also cover number thirteen, avoiding contact with alleged victims, family  
8 of victims. That is all included with the defense witnesses is that right?

9  
10 COURT: Yes, correct. Yes, I did state that. But, I will state it again  
11 because it is terribly important. There is to be no contact with any victims,  
12 witnesses, or other potential prosecution witnesses; any non-blood family  
13 individuals who would be defense witnesses may not be contacted without the  
14 supervision of defense counsel.

15  
16 Anything else Mr. Light?

17 MR. LIGHT: No Your Honor. That is fine.

18 COURT: Mr. Toavs, Mr. Camiel, any concerns, issues?

19  
20 MR. TOAVS: No Your Honor. I think we have got it.

21 COURT: All right. I am ordering Mr. Beach released today. We are  
22 adjourned.

23 MR. TOAVS: Thank you Your Honor.  
24  
25

**CERTIFICATE**

1 STATE OF MONTANA )  
2 : SS.  
3 County of Fergus )

4 I, Deidre Dietrich, the official Court Reporter within and for the 10<sup>th</sup> Judicial  
5 District, State of Montana, duly appointed, qualified and acting, do hereby certify  
6 that the foregoing proceedings were duly taken by me and before me at the time  
7 and place specified in the caption hereof.  
8  
9  
10  
11  
12  
13  
14

15 \_\_\_\_\_  
16 Deidre Dietrich  
17 Official Court Reporter  
18  
19  
20  
21  
22  
23  
24  
25