IN THE SUPREME COURT OF THE STATE OF MONTANA

BARRY ALLAN BEACH,

Petitioner,

v. Case No. _____

MONTANA FIFTEENTH JUDICIAL DISTRICT COURT, ROOSEVELT COUNTY, and THE HONORABLE E. WAYNE PHILLIPS,

Respondents.

PETITION FOR WRIT OF SUPERVISORY CONTROL

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I. INTRODUCTION.

A writ is necessary to prevent the gross miscarriage of justice which would occur if this case were to proceed to an evidentiary hearing which (1) excludes the additional new evidence gathered by Beach since January, 2008, (2) occurs without any pre-hearing discovery, and (3) requires subpoenaing witnesses to Fergus County where venue is not proper and where none of the witness reside.

While this case was on appeal (twice since the original petition was filed), Beach continued his investigation which resulted in additional new forensic evidence concerning the bloody palm print, new witnesses, and new leads which, with the benefit of subpoena power, could solve this case once and for all.

However, the District Court refuses to consider any of Beach's subsequently discovered new evidence on remand, refuses to permit Beach any pre-hearing discovery, and has essentially changed the venue of the case to Fergus County on its' own motion. This petition should be granted.

II. FACTUAL AND PROCEDURAL BACKGROUND.

Beach was convicted of deliberate homicide in April 1984 and sentenced to 100 years in the Montana State Prison, without possibility of parole. In January 2008, Beach filed a petition for post-conviction relief based on newly discovered evidence. The petition was denied and Beach appealed. On November 24, 2009,

this Court reversed, and remanded Beach's petition for an evidentiary hearing. A petition for a writ of supervisory control concerning substitution of the district judge followed, after which this Court directed a substitute judge be called in on March 24, 2010. The Hon. E. Wayne Phillips from Fergus County assumed jurisdiction on May 5, 2010.

On June 8, 2010, Beach filed a motion for leave to conduct discovery. On September 30, 2010, Beach's motion for leave to conduct discovery was denied as premature. (A true and correct copy of the order is attached hereto as Exhibit A.)

On October 14, 2010, Beach filed a Motion to Establish Scope of Evidentiary Hearing and to Allow Amendment of Post Conviction Petition. A telephonic scheduling conference was held October 25, 2010, at which time the District Court directed Beach to file a motion to amend the petition for post conviction relief which included a proposed amended petition. At the scheduling conference, the District Court also inquired whether the parties' objected to moving the evidentiary hearing to Fergus County. Beach objected and the District Court set the hearing in Roosevelt County.

On November 8, 2010, Beach filed his motion to amend the petition along with a proposed amended petition for post conviction relief. On December 12, 2010, the District Court issued an order changing the location of the evidentiary

hearing to Fergus County. (A true and correct copy of the December 12, 2010 order is attached hereto as Exhibit B.) On February 28, 2011, the District Court denied Beach's motion to amend the petition for post-conviction relief as "premature." (A true and correct copy of the District Court's February 28, 2011, order is attached hereto as Exhibit C, and a copy of Beach's proposed amended petition is attached hereto as Exhibit D.)

An evidentiary hearing is set to commence in the Fergus County Courthouse, Lewistown, Montana, on August 1, 2011.

III. ARGUMENT.

A. A Writ of Supervisory Control is Necessary and Appropriate.

This case meets the requirements for the exercise of supervisory control. Urgency exists because Beach is currently wrongfully imprisoned, as he has been since 1984. Three vital witnesses have passed away since the petition was filed in January 2008. The remaining evidence and witnesses' memories will only grow more stale as time goes by. See Plumb v. Fourth Judicial District Court, 279 Mont. 363, 369 (1996).

The normal appeal process is inadequate. If petitioner waits to raise the denial of his motion to amend his petition until after the evidentiary hearing, he may run afoul of MCA § 46-21-105, which provides, not only that an original

petition may be amended only once, but also that the petition may not be amended less than 30 days prior to the date of the evidentiary hearing. Further, if this Court does not address these matters now, an entirely new evidentiary hearing requiring duplicate efforts and expense on the part of both Beach and the state would be required if this Court were to later remand.

The issues raised in this petition are "purely legal" questions involving application of post-conviction statutes including MCA § 46-21-105, this court's interpretation of its own decision in Beach v. State, 353 Mont. 411 (2009), and whether venue for the evidentiary hearing can be moved by the District Court over Beach's objection. Resolution of this petition does not require this court to make any factual determinations. The District Court's orders implicate Beach's fundamental constitutional right to due process, are of statewide importance and cast public doubt upon the fairness and integrity of Montana's justice system.

B. The District Court Cannot Properly Assess Beach's 2008 Petition in a Vacuum.

The District Court found Beach's motion to amend was premature, stating it must first determine whether the new evidence contained in his original petition is "new evidence." However, the District Court cannot properly determine whether Beach's evidence is admissible in a vacuum without considering all of Beach's new evidence.

Beach's new witnesses and forensic evidence cross-corroborate the evidence set forth in the 2008 petition. The post-petition new evidence consists of forensic analysis of the bloody palm print, an eyewitness to the crime scene, and new evidence of third-party confessions. This new evidence bears on the issue of whether Beach's 2008 petition contains admissible new evidence. The hearsay analysis under M.R.E. Rule 803(24) as well as the due process analysis under Chambers v. Mississippi, 410 U.S. 284 (1973), and Green v. Georgia, 442 U.S. 95 (1979) depend upon the reliability of otherwise hearsay statements contained in Beach's 2008 petition. The post-petition new evidence Beach seeks to include forms part of the circumstances which the District Court is required to consider when judging the trustworthiness and reliability of the third-party confessions set forth in the 2008 petition. The District Court cannot properly consider whether Beach's petition contains new evidence without considering all the circumstances.

For example, proposed Exhibit 30 is the latent fingerprint examination report of Ivan Futrell dated May 21, 2008. Futrell found the bloody palm print on Nees's pickup truck (in her own blood) did not come from Kim Nees.[1] This post-

[1] Beach as well as a dozen others have previously been excluded as the owner of this palm print. The prosecutor stated in closing argument: "Another suggestion he [the defense attorney] made to you, is that the bloody palm print of the exterior of the pickup truck is somehow related to some unknown phantom killer or mystery man other than the defendant that we don't know about. [Sheriff]

petition new evidence demonstrates someone other than Beach was at the crime scene when Kim Nees was murdered.

Beach's post-petition investigation has also uncovered several previously unknown witnesses. Some witnesses have come forward describing inculpatory statements made by Sissy Atkinson wherein she confessed to being present at or involved in the murder of Kim Nees (Kevin Hall, Tamara Hall, John Strom, and Michael McIntyre). These new witnesses cross corroborate the earlier new evidence including the statements and testimony given by Jack Atkinson, Vonnie Brown, Carl Four Star, and Dun O'Connor regarding inculpatory statements made by Sissy Atkinson. They also independently support the reliability of Sissy Atkinson's third-party confessions.

Another new witness discovered after the 2008 petition was filed, Steffie Eagleboy, provides direct eyewitness testimony concerning the activities at the river bank park at the time of the murder. Eagleboy has no connection to Beach or his family. Her statement is not challengeable as hearsay as it consists of her

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Mahlum pointed out to you that palm print, was not only [not] the print of twelve suspects, but that it very well could have been the palm print of Kimberly Nees. The examiner could not exclude her as having left that print." (Trial Tr., p 886). At the trial, the prosecutor told the jury that Kim Nees' fingerprints were not correctly taken during the autopsy and therefore no comparison could be made between her prints and the bloody palm print found on the exterior of her pickup truck. (Trial Tr. 929).

direct eyewitness and earwitness observations at the time of the murder. Eagleboy heard multiple female voices during the attack on Kim Nees – no male voices.

Finally, the sworn statement and proffered testimony of Billie Smith provides evidence of inculpatory statements made by Joanne Jackson, another key suspect in the murder.

In sum, the additional new evidence discovered by Beach since the filing of his original petition in January, 2008 both corroborates the other new evidence discovered by Beach and provides direct factual support for the proposition Beach did not kill Kim Nees. This new evidence puts flesh on the circumstantial bones of this case, and must be considered in order for the District Court to assess whether Beach's petition meets the test set forth in Beach v. State, 353 Mont. 411, (2009).

C. Beach has a Statutory Right to Amend his Petition.

MCA § 46-21-105 authorizes a petitioner to amend a post-conviction petition once. That statute provides, at (1)(a):

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

In Maier v. State, 316 Mont. 181, (2003), the court noted that "the plain language of § 46-21(1)(a) clearly allows the petition for post-conviction relief to be amended once." Id. at 185. Similarly, in State v. Root, 316 Mont. 28, (2003), this court noted that "[a]mended petitions are governed by § 46-21-105(1)(a), M.C.A., which contemplates that a petition may be amended during the course of an ongoing proceeding that was timely initiated."

This Court's order for remand does not preclude Beach from amending the petition. The issue of amending the petition was not before this Court in Beach v. State, 353 Mont. 411 (2009). A trial court may generally consider any matters left open by the appellate court when a case is remanded for further proceedings. Zavarelli v.Might, 239 Mont. 120 (1989). Reversal and remand of a matter opens anew all matters not settled by such decision. See Story v. City of Bozeman, 259 Mont. 207, 230 (1993); State v. Gilder, 305 Mont. 362, 365 (2001).

Moreover, amendment of the petition would not in any way be inconsistent with the decision issued by this court. The test set forth by this court in its decision about whether Beach's evidence constitutes " new evidence" would apply to all of the evidence presented in both the original and amended petition in the same manner. The test of whether the evidence shows that Mr. Beach is actually

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innocent would also be equally applicable to both the evidence in the original petition and the amended petition.

The District Court should consider all of the evidence and its cumulative effect, thereby providing Beach with a fair hearing, and preventing the need for piecemeal litigation or the filing of a new post conviction petition.

D. The District Court's Erred in Denying Beach's Discovery Motion.

Beach filed a motion for leave to conduct discovery on June 8, 2010. His motion outlined the matters he wished to pursue: (1) find the owner of the bloody palm print; (2) depose key witnesses who refuse to give statements; and (3) locate the misplaced forensic evidence for DNA analysis, including the victim's sweater and numerous biological slides.[2]

The District Court denied Beach's motion, reasoning that until the court determines whether Beach's petition contains any "new evidence," discovery

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[2] The interests of justice require every effort be made to locate this misplaced evidence. Forensic science is far more advanced now than it was at the time of trial. In 2005, Beach filed a petition for DNA testing as permitted by Montana statutes. The District Court granted his motion, but only one item of physical evidence (swatches from a bloody towel) was produced. The State claims that the other samples, including hair, swabs and cigarette butts from Nees's vehicle have all been misplaced. No record exists indicating the evidence was destroyed.

would be premature. This was error. Beach is entitled to conduct discovery to prepare his case for hearing upon a showing of "good cause":

> The court, for good cause, may grant leave to either party to use the discovery procedures available in criminal or civil proceedings. Discovery procedures may be used only to the extent and in the manner that the court has ordered or to which the parties have agreed.

(M.C.A. §46-21-201(4).) Beach has demonstrated ample "good cause". He has (1) pursued the missing physical evidence through voluntary interviews without success, (2) unsuccessfully attempted to enlist the cooperation of law enforcement agencies in running comparisons of the unidentified bloody palm print and (3) hired investigators to attempt to interview numerous uncooperative witnesses.

This court has not had occasion to define "good cause" in specific relation to M.C.A. §46-21-201. The issue did arise generally in State v. Sullivan, 285 Mont. 235 (1997), where this Court affirmed the dismissal of a post conviction petition without the District Court providing the petitioner the opportunity to conduct discovery or holding an evidentiary hearing. However, in Sullivan the Court noted "Sullivan's unsupported allegation, made on information and belief, did not establish good cause for permission to conduct discovery" when the petitioner "did not attach an affidavit or other evidence substantiating his allegation" to his petition. Id. at 240.

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The case at bar is dramatically different from Sullivan. Here the petitioner attached 29 exhibits to his original petition and an additional 13 to his proposed amended petition. Here Petitioner was granted an order to conduct DNA testing by the District Court but the state claims it cannot find the evidence.

Generally, "good cause" in the context of discovery exists if the information sought is material to the moving party's trial preparation. Daniels v. Allen Industries, Inc., 391 Mich. 398 (1974); See also Black v. Sheraton Corp. of America, 47 FRD 263 (1969). Beach should be permitted to engage in the pre-hearing discovery outlined in his motion.

D. The District Court Erred in Moving the Location of the Hearing to Fergus County.

On December 15, 2010, the District Court entered an order, sua sponte, changing the hearing location to Fergus County. At the October 25, 2010 conference, Beach expressed his objection to holding the hearing in Lewistown due to witness availability and logistical concerns. The proper venue of a post conviction petition is the county where the original criminal charge was filed. M.C.A. § 46-21-101(2).

By its order (Exhibit B), the District Court has effectively changed the venue of this case on its own motion to a location hundreds of miles away citing its' calendering pressures. Beach's presentation of his case at the evidentiary

hearing will be far more difficult in Fergus County. Not only will Beach be required to subpoena each of his witnesses to travel hundreds of miles, his attorneys and support team will be required to secure accommodations in Lewistown, all at considerable expense.

The District Court's scheduling responsibilities are legitimate. However, they do not meet any legal standard known to Beach. (M.C.A. § 46-21-101(2); M.C.A. § 46-13-203.)

IV. CONCLUSION.

For all of the foregoing reasons, the petition should be granted.

DATED this _____ day of _____, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing motion for extension of time to be mailed first class, postage prepaid to:

The Honorable E. Wayne Phillips
District Court Judge
P. O. Box 1124
Lewistown, Montana 59457

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Dated this _____ day of _____, 2011.

_____
Eric Martell

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Petition is printed with a Times New Roman, proportionately spaced typeface of 14 points, is double spaced except for footnotes and quoted and indented material, is 12 pages or less and has 2619 words as counted by the attorney's word processing software, excluding table of contents, table of citations, certificate of service, certificate of compliance and addendum, if any.

Dated this ____ day of April, 2011.

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Terrance L. Toavs