

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 08-0244

BARRY BEACH,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Fifteenth Judicial District Court,
Roosevelt County, The Honorable David Cybulski, Presiding

APPEARANCES:

MIKE McGRATH
Montana Attorney General
JOHN PAULSON
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

TERRANCE L. TOAVS
429 Second Avenue South
Wolf Point, MT 59201

PETER K. CAMIEL
710 Cherry Street
Seattle, WA 98104

RYAN RUSCHE
Roosevelt County Attorney
116 Main Street
P.O. Box 816
Wolf Point, MT 59201-0816

ATTORNEYS FOR PETITIONER
AND APPELLANT

ATTORNEYS FOR RESPONDENT
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

FACTUAL AND PROCEDURAL BACKGROUND 1

STANDARDS OF REVIEW 8

SUMMARY OF THE ARGUMENT 9

ARGUMENT 11

THE DISTRICT COURT PROPERLY DENIED BEACH’S PETITION
FOR POSTCONVICTION RELIEF AS UNTIMELY AND
PROCEDURALLY BARRED 11

 A. Statute of Limitations 11

 B. Procedural Bar 17

 C. Clear and Consistent Application of Procedural Rules 19

 D. Legal Standard for Newly Discovered Evidence 20

 E. Actual Innocence Gateway 22

 F. Evidentiary Hearing 23

 G. Prosecutors’ Duty 25

CONCLUSION 26

CERTIFICATE OF SERVICE 27

CERTIFICATE OF COMPLIANCE 28

APPENDIX 29

TABLE OF AUTHORITIES

CASES

Beach v. Day, 275 Mont. 370, 913 P.2d 622 (1996).....	4, 13, 14
Beach v. McCormick, No. 98-35957	5
Berger v. United States, 295 U.S. 78 (1935)	26
Calderon v. United States Dist. Court, 96 F.3d 1126 (9th Cir. 1996)	19
Crosby v. State, 2006 MT 155, 332 Mont. 460, 139 P.3d 832	21, 24
Davis v. State, 2008 MT 226, 344 Mont. 300, 187 P.3d 654.....	15
DuBray v. State, 2008 MT 121, 342 Mont. 520, 182 P.3d 753	9
English v. United States, 42 F.3d 473 (9th Cir. 1994)	19
Ford v. State, 2005 MT 151, 327 Mont. 378, 114 P.3d 244	9
Hawkins v. Mahoney, 199 MT 82, 294 Mont. 124, 979 P.2d 697	13
Herman v. State, 2006 MT 7, 330 Mont. 267, 127 P.3d 422	23
Kills On Top v. State, 273 Mont. 32, 901 P.2d 1368 (1995).....	20

TABLE OF AUTHORITIES
(Cont.)

Morrison v. Mahoney,
2002 MT 21, 308 Mont. 196, 41 P.3d 320 13, 14

Oatman v. State,
2004 MT 360, 324 Mont. 472, 104 P.3d 1048 16, 17

Preston v. State,
615 P.2d 594 (Alaska 1980) 26

Sanchez v. State,
2004 MT 9, 319 Mont. 226, 86 P.3d 1 13, 14, 15

Schlup v. Delo,
513 U.S. 298 (1995) 4, 21

State ex rel. Fletcher v. District Court,
260 Mont. 410, 859 P.2d 992 (1993)..... 26

State v. Abe,
2001 MT 260, 307 Mont. 233, 37 P.3d 77 15

State v. Beach,
217 Mont. 132, 705 P.2d 94 (1985).....2

State v. Carson,
2002 MT 234, 311 Mont. 485, 56 P.3d 844 13, 14

State v. Clark,
2005 MT 330, 330 Mont. 8, 125 P.3d 1099 15, 21, 24

State v. Evert,
2007 MT 30, 336 Mont. 36, 152 P.3d 713 20

State v. Gollehon,
274 Mont. 116, 906 P.2d 697 (1995)..... 15

TABLE OF AUTHORITIES
(Cont.)

State v. Hart,
191 Mont. 375, 625 P.2d 21 (1981)..... 26

State v. LaFreniere,
2008 MT 99, 342 Mont. 309, 180 P.3d 1161 20

State v. Nichols,
1999 MT 212, 295 Mont. 489, 986 P.2d 1093 13

State v. Perry,
232 Mont. 455, 758 P.2d 268 (1988)..... 14, 15, 24

State v. Pope,
2003 MT 330, 318 Mont. 383, 80 P.3d 1232 21, 22

State v. Redcrow,
1999 MT 95, 294 Mont. 252, 980 P.2d 622 17, 20, 21

State v. Rosales,
2000 MT 89, 299 Mont. 226, 999 P.2d 313 15, 20

State v. Whitehorn,
2002 MT 54, 309 Mont. 63, 50 P.3d 121 13

State v. Wilson,
2007 MT 327, 340 Mont. 191, 172 P.3d 1264 23

Stevens v. State,
2007 MT 137, 337 Mont. 400, 162 P.3d 82 18

TABLE OF AUTHORITIES
(Cont.)

OTHER AUTHORITIES

Montana Code Annotated

§ 46-15-322.....	8
§ 46-21-102.....	passim
§ 46-21-102 (1995).....	12
§ 46-21-102(2).....	passim
§ 46-21-104.....	17, 18
§ 46-21-105.....	18, 19
§ 46-21-105 (1995).....	18
§ 46-21-105(2).....	4
§ 46-21-201.....	23
§ 46-21-201(5).....	23

1997 Montana Laws

Ch. 378, § 9(1).....	13
Ch. 378, § 10.....	13

STATEMENT OF THE ISSUES

Did the district court properly deny Beach's petition for postconviction relief as untimely and procedurally barred?

STATEMENT OF THE CASE

On January 18, 2008, Barry Allan Beach filed a petition for postconviction relief, with exhibits and a supporting memorandum, in the Fifteenth Judicial District Court, Roosevelt County. (D.C. Docs. 177, 178.) The district court ordered a response (D.C. Doc. 180), and the State filed a motion to dismiss the petition, accompanied by exhibits, transcripts, and a supporting memorandum. (D.C. Docs. 183, 184.) On March 31, 2008, the district court issued its order denying the petition as time barred and procedurally barred. (D.C. Doc. 185.) Beach filed a notice of appeal on May 1, 2008. (D.C. Doc. 186.)

Copies of Beach's petition and supporting memorandum, the State's motion to dismiss and supporting memorandum, and the district court's order are included in the appendix to this brief.

FACTUAL AND PROCEDURAL BACKGROUND

The State's supporting memorandum sets out, at length, the factual and procedural background for Beach's petition for postconviction relief.

(D.C. Doc. 184.) The following summary is based upon the memorandum, the State's exhibits (State's Ex.) filed with the memorandum, and this Court's previous decisions in Beach's direct appeal and initial request for postconviction relief.

While in custody on an unrelated charge in Monroe, Louisiana, in January 1983, Beach confessed to the murder of Kimberly Nees, whose body had been discovered on June 16, 1979, in the Poplar River near Poplar, Montana. Beach was charged, in the Fifteenth Judicial District Court, Roosevelt County, with the deliberate homicide of Nees. Represented by Charles "Timer" Moses, Beach sought to suppress his confession on a variety of grounds, including the claim that the confession was involuntary. Following an evidentiary hearing that examined the circumstances of the confession, the district court denied the motion to suppress, finding that there was no police misconduct and that the voluntariness of Beach's statements was obvious. Venue for the trial was changed to Valley County, and on April 13, 1984, a jury convicted Beach of the deliberate homicide. On May 11, 1984, the district court sentenced Beach to a term of 100 years without parole.

Beach appealed to this Court. Among other issues, the appeal included a challenge to the district court's denial of his motion to suppress the confession. On July 25, 1985, this Court affirmed. State v. Beach, 217 Mont. 132, 705 P.2d 94 (1985) (Beach I). The Court noted that Beach's confession described in detail

facts, not known to the general public, concerning the murder of Kimberly Nees. The Court also noted that Beach had received ten Miranda warnings, eight of which were given with respect to the Nees homicide, and that no evidence suggested that Beach possessed less than average intelligence or was incapable of understanding the Miranda warnings. In addition, the Court found that the circumstances of Beach's confession, including the duration of the questioning and the absence of any promises or threats, supported the district court's determination that the confession was voluntarily given.

Beach filed a petition for rehearing and sought to supplement the petition with an affidavit from his Louisiana attorney, Paul Kidd, stating that Beach had not confessed a second time to the Montana murder in Kidd's presence, contrary to evidence presented at trial. On August 27, 1985, this Court denied the petition for rehearing and the motion for additional time to supplement the petition. (State's Ex. 5.)

Nearly seven years later, on May 18, 1992, Beach filed a petition for writ of habeas corpus in the federal district court. The federal court stayed the habeas proceeding pending Beach's exhaustion of his claims in state court.

On October 30, 1995, Beach filed a petition for postconviction relief in this Court, raising claims concerning the validity of his confession and the effectiveness of his trial counsel's assistance. (State's Ex. 6.) This Court denied

Beach's request for postconviction relief. Beach v. Day, 275 Mont. 370, 913 P.2d 622 (1996) (Beach II). The Court held that Beach's claims concerning his confession, with one exception, were identical to the ones he previously raised in his 1985 direct appeal, and that the claims were therefore barred by the doctrine of res judicata. Beach's additional claim that his confession was false was also barred by res judicata and Mont. Code Ann. § 46-21-105(2) as a claim which could have been raised on direct appeal. The Court further held that Beach's claims of ineffective assistance of counsel were untimely under the five-year statute of limitations in Mont. Code Ann. § 46-21-102.

Following this Court's decision in Beach II, the federal district court lifted the stay on Beach's habeas corpus proceedings. The magistrate judge who reviewed Beach's habeas claims issued findings and recommendations on August 6, 1997, recommending dismissal of the habeas petition. (State's Ex. 8.) The magistrate judge found that the totality of the circumstances surrounding Beach's confession did not support a finding of involuntariness. The magistrate judge declined to address Beach's procedurally defaulted claims of ineffective assistance of counsel under the "fundamental miscarriage of justice" exception set forth in Schlup v. Delo, 513 U.S. 298 (1995), because Beach failed to show he was actually innocent of the homicide.

The federal district court reviewed the magistrate judge's findings and recommendations and, on March 31, 1998, denied Beach's petition for writ of habeas corpus. (State's Ex. 9.) The federal court concluded that Beach voluntarily confessed to killing Nees. Finding Beach's ineffective assistance claims to be procedurally defaulted, the court refused to apply the "fundamental miscarriage of justice" exception to consider the claims. The court concluded that Beach had not come forward with any new evidence to warrant a finding of actual innocence in support of this exception to the procedural bar doctrine.

Beach appealed from the denial of his federal habeas corpus petition. In an unpublished memorandum decision issued on August 30, 1999, the Ninth Circuit Court of Appeals affirmed the federal district court's decision. Beach v. McCormick, No. 98-35957. (State's Ex. 10.) The Ninth Circuit panel agreed that the totality of the circumstances indicated that Beach's confession was not coerced. The panel also agreed that Beach did not make a sufficient threshold showing of factual innocence to allow habeas review of his procedurally defaulted claims.

In January 2005, Beach filed a petition for DNA testing of some of the physical evidence collected during the 1979 investigation of the Nees homicide. Much of the evidence, including a pubic hair found on the victim's sweater, could not be located for testing. DNA testing of a bloody towel found near the Nees

residence confirmed the state crime lab's conclusion that the blood on the towel did not belong to Kim Nees or to Beach. (State's Ex. 11.)

Also in 2005, Beach filed an application for executive clemency with the Montana Board of Pardons and Parole (the Board), requesting that the Board remove the parole restriction from his sentence. On November 30, 2005, the Board denied the clemency application, finding that Beach had not satisfactorily proven his innocence or submitted newly discovered evidence showing complete justification or non-guilt. (State's Ex. 12.)

On August 10, 2006, with the assistance of Centurion Ministries, Beach submitted an application for clemency, pardon, or commutation to Governor Brian Schweitzer. (State's Ex. 13.) Included in the application were summaries of statements given to Centurion Ministries investigators by several individuals whose later testimony at a clemency hearing became the "new evidence" upon which Beach's present petition for postconviction relief was based.

The clemency application was referred to the Board for its consideration. In the application, Beach asserted that his confession was false as shown by the inconsistencies between the confession and the evidence at the crime scene. Beach also claimed that the confession was coerced, that the State had failed to disclose an alleged eyewitness statement, that the prosecutor had committed misconduct

during his trial, and that new evidence showed that Nees was killed by a group of women.

The State filed a full response to the application for clemency, discussing the protracted proceedings in the state and federal courts, the facts that corroborated Beach's confession, and the alleged new evidence of Beach's innocence. (State's Ex. 15.) On June 14-16, 2007, the Board conducted a clemency hearing on the question of the existence of new evidence of innocence that would support a recommendation of a pardon for Beach. On August 1, 2007, the Board conducted another hearing on the question of the fairness of Beach's sentence. At both hearings the Board received extensive testimony from witnesses subpoenaed by Beach, including those witnesses whose testimony Beach cited as the newly discovered evidence in his present petition for postconviction relief.

On August 20, 2007, the Board issued its written decision denying Beach's request for clemency and commutation of sentence. (State's Ex. 19.) The Board noted that the parties had been given wide latitude at the hearing with respect to the presentation of evidence, including hearsay, double hearsay, and triple hearsay testimony that would not have been admissible in a court of law. In an extensive review of the evidence submitted by Beach and the State, the Board concluded that Beach was properly convicted and that the state and federal courts considering his case also came to the correct decision.

On January 18, 2008, nearly 24 years after his conviction, Beach filed a second petition for postconviction relief with the district court. Beach raised the following claims for relief: (1) newly discovered evidence of Beach's innocence requires a new trial; (2) the Roosevelt County Sheriff's Department failed to disclose certain evidence in violation of Mont. Code Ann. § 46-15-322; (3) the prosecutor, Assistant Attorney General Marc Racicot, committed misconduct; (4) Beach's trial attorney, Charles "Timer" Moses, provided ineffective assistance of counsel. (D.C. Docs. 177, 178.)

The State filed a motion to dismiss the petition and submitted many of the exhibits that had been presented to the Board during the clemency hearing, together with a supporting memorandum and the transcripts from the clemency hearing and the 1984 trial proceedings. On March 28, 2008, the district court issued its order denying Beach's petition, finding that the petition was procedurally and time barred and that the cumulative evidence proffered by Beach does not warrant a finding of actual innocence in support of the fundamental miscarriage of justice exception to the time requirements.

STANDARDS OF REVIEW

The Court's general standard of review of a district court's denial of a petition for postconviction relief is whether the district court's findings of fact are

clearly erroneous and whether its conclusions of law are correct. DuBray v. State, 2008 MT 121, ¶ 11, 342 Mont. 520, 182 P.3d 753. The decision as to whether to hold an evidentiary hearing in a postconviction proceeding is discretionary and is reviewed for abuse of discretion. Ford v. State, 2005 MT 151, ¶ 6, 327 Mont. 378, 114 P.3d 244.

SUMMARY OF THE ARGUMENT

Filed nearly 24 years after conviction and sentence, Beach's petition for postconviction relief was not timely and could not be considered in the absence of a manifest and fundamental miscarriage of justice. The district court correctly determined that the five-year statute of limitations, which was in effect at the time of Beach's conviction and sentence, applied to his present petition and was not waived by his proffered evidence of actual innocence.

The district court also correctly concluded that Beach's postconviction claims were procedurally barred as well as time barred. The claims could reasonably have been raised in Beach's direct appeal or in his earlier petition for postconviction relief, and the claims have been procedurally defaulted for purposes of subsequent postconviction review.

Beach's argument concerning the clear and consistent application of the statute of limitations would be more appropriate for a federal court considering the

adequacy of the state procedural bars to foreclose federal habeas review of defaulted claims. In any event, the argument does not provide a basis for challenging the district court's ruling.

Nothing in the district court's order suggests that the court applied an incorrect standard for assessing Beach's evidence proffered in support of his actual innocence claim. The court correctly determined that the proffered evidence does not warrant a finding of actual innocence in support of the fundamental miscarriage of justice exception to the time requirements.

The district court did not abuse its discretion by ruling on the State's motion to dismiss without holding an evidentiary hearing. The records and files in the case, including the transcripts of the trial proceedings and the evidentiary hearing before the Board, were available to the court and provided a sufficient basis for the court's consideration of Beach's postconviction claims.

While the district court commented on the prosecution's duty to seek justice and on the thoroughness of the State's review of the evidence, the court's observations did not amount to an independent legal basis for its ruling. Instead, the court found that Beach's petition was time barred and procedurally barred, and that Beach had failed to proffer sufficient evidence of actual innocence to invoke the fundamental miscarriage of justice exception for consideration of untimely postconviction petitions.

ARGUMENT

THE DISTRICT COURT PROPERLY DENIED BEACH'S PETITION FOR POSTCONVICTION RELIEF AS UNTIMELY AND PROCEDURALLY BARRED.

Beach challenges the district court's order denying his petition for postconviction relief with a variety of assertions and arguments, none of which should persuade this Court to disturb the ruling. Beach's petition was time barred and procedurally barred, and his evidence, whether newly discovered or otherwise, did not establish his actual innocence or the existence of a fundamental miscarriage of justice.

A. Statute of Limitations

Beach contends that the district court applied the incorrect statute of limitations in deciding that his petition for postconviction relief was not timely filed. He argues that he is entitled to the benefit of the current version of Mont. Code Ann. § 46-21-102(2), which provides that a postconviction claim alleging the existence of newly discovered evidence may be raised in a petition filed within one year of the date on which the petitioner discovered the existence of the evidence.

Beach's present petition, filed on January 18, 2008, asserted that the petition was timely brought under § 46-21-102(2), because it was filed on the basis of evidence discovered by Beach on and after January 19, 2007. (D.C. Doc. 177.) The State responded by arguing that the petition was time barred by Mont. Code

Ann. § 46-21-102 (1995), which required a petition for postconviction relief to be filed within five years of the date of conviction. The State also noted that Beach's claim that the "new evidence" was discovered within one year was strained at best inasmuch as Centurion Ministries and Beach knew of the information much earlier than January 2007. (D.C. Doc. 184.)

The district court did not set forth its analysis of the statute of limitations issue in its order, but its determination indicates that the court agreed with the State's analysis. The court found that the petition was untimely and that the evidence proffered by Beach did not warrant allowing an exception to the time bar for a fundamental miscarriage of justice.

Beach acknowledges that at the time of his conviction in 1984, the statute of limitations for a postconviction relief petition was five years from the date of conviction. The pre-1997 version of Mont. Code Ann. § 46-21-102, which established the five-year limitations period, did not contain an exception for newly discovered evidence. In 1997, the Montana Legislature amended § 46-21-102 by providing for a one-year statute of limitations and, in subsection (2), allowing an exception for newly discovered evidence. Subsection (2) provides:

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

date on which the petitioner discovers, or reasonably should have discovered, the existence of the evidence, whichever is later.

The 1997 Legislature specified that these amendments applied only to those convictions which became final either after the statute's effective date of April 24, 1997, or within twelve months prior to that date if the petition was filed within twelve months after the date. 1997 Mont. Laws, ch. 378, §§ 9(1), 10; Morrison v. Mahoney, 2002 MT 21, ¶ 11, 308 Mont. 196, 41 P.3d 320. Because Beach was convicted in 1984, the 1997 amended version of § 46-21-102, including the “newly discovered evidence” exception in subsection (2), is inapplicable to his case. State v. Nichols, 1999 MT 212, ¶ 19, 295 Mont. 489, 986 P.2d 1093, overruled in part on other grounds by State v. Whitehorn, 2002 MT 54, ¶ 2, 309 Mont. 63, 50 P.3d 121; Hawkins v. Mahoney, 1999 MT 82, ¶ 10, 294 Mont. 124, 979 P.2d 697.

In fact, as the State pointed out in its supporting memorandum, this Court previously ruled that Beach's 1995 petition for postconviction relief was untimely and barred by the five-year limitation provision in § 46-21-102. Beach II, 913 P.2d at 624. Based on the Court's previous ruling, the five-year statute of limitations would clearly apply to Beach's present petition, filed in January 2008, and the petition is time barred and subject to dismissal on that basis.

Citing Sanchez v. State, 2004 MT 9, ¶ 9, 319 Mont. 226, 86 P.3d 1, and State v. Carson, 2002 MT 234, ¶ 13, 311 Mont. 485, 56 P.3d 844, Beach argues that this Court has held that to determine whether a petition for postconviction

relief is timely, the Court looks to the statute of limitations in effect at the time the petition is filed, not to the statute in effect at the time of the charge or conviction. Beach recognizes that the defendants in Sanchez and Carson were convicted after the effective date of the 1997 amendments, distinguishing the cases from his own, but he maintains that the Court's language is unequivocal and should apply to his petition as well.

However, the Court unequivocally answered the question in Morrison, ¶ 11, when it acknowledged the general rule cited in Sanchez but concluded nonetheless that the 1997 amendments to § 46-21-102 did not apply to a conviction that became final in 1993. Similarly, this Court should conclude, once again, that the five-year limitations period in effect in 1984 applies to Beach's case and that his present petition, filed nearly 24 years after his conviction and 23 years after his direct appeal to this Court, was not timely filed.

Beach argues that if he is barred from filing for postconviction relief after 1989, he is effectively precluded from bringing his newly discovered evidence to the attention of the Court, a folly which this Court recognized in State v. Perry, 232 Mont. 455, 758 P.2d 268 (1988). However, in Beach's first postconviction appeal (Beach II), this Court addressed and distinguished Perry, noting that its "miscarriage of justice" exception to the statute of limitations in fact may be applied to postconviction claims alleging newly discovered evidence that would

establish the defendant did not commit the offense. Perry has been limited to its unique facts, State v. Gollehon, 274 Mont. 116, 120, 906 P.2d 697, 700 (1995), and subsequently overruled in part, State v. Clark, 2005 MT 330, ¶¶ 32, 33, 330 Mont. 8, 125 P.3d 1099.

In summary, the failure of Beach to file his postconviction petition within the applicable five-year statute of limitations subjected the petition to dismissal as untimely. As discussed below, the time limit may be deemed waived in order to prevent a clear miscarriage of justice. State v. Abe, 2001 MT 260, ¶ 15, 307 Mont. 233, 37 P.3d 77. However, the statute of limitations, recently described as a “rigid, categorical time prescription” rather than a “jurisdictional” limit, Davis v. State, 2008 MT 226, ¶ 23, 344 Mont. 300, 187 P.3d 654, still applies unless the petitioner can meet the “miscarriage of justice” exception.

Beach asserts, without analysis, that the “clear miscarriage of justice” exception imposes a heavier burden upon a petitioner seeking a new trial on grounds of newly discovered evidence. A close review of the language in subsection (2) of the current § 46-21-102 reveals, however, that the Legislature effectively codified this Court’s “miscarriage of justice” precedent. Sanchez, ¶ 10, citing State v. Rosales, 2000 MT 89, ¶ 7, 299 Mont. 226, 999 P.2d 313 (a miscarriage of justice exists if a defendant provides the court with newly discovered evidence that proves the defendant is actually innocent). Beach fails to

show why the current version of § 46-21-102(2) should be viewed as granting greater rights, or a lighter burden of proof, to a postconviction petitioner convicted after the effective date of the 1997 amendments or, for that matter, why he should be entitled to the retroactive benefit, if any, of statutory amendments that the Legislature has expressly declared to be prospective.

Beach complains that his ability to meet the “miscarriage of justice” exception was diminished by the State’s loss of evidence, particularly a pubic hair recovered from the victim’s sweater, that he wished to submit for DNA testing. However, the request for this evidence came years after the completion of Beach’s direct appeal and the protracted posttrial litigation in the state and federal courts. The inability to locate the evidence 20 years after the trial may have been unfortunate but was hardly surprising, and it does not serve to justify a reduced burden of proof with respect to the “miscarriage of justice” exception.

Citing Oatman v. State, 2004 MT 360, 324 Mont. 472, 104 P.3d 1048, Beach argues that this Court has extended the protections of the newly discovered evidence exception to defendants whose convictions became final prior to April 24, 1996. In Oatman, the defendant was convicted in August 1994, and the five-year period for filing a postconviction petition lapsed in August 1999, two years after the 1997 amendments that provided an exception for newly discovered evidence and three years before the defendant filed his petition.

Beach is correct that the Court discussed the statutory exception in its analysis of the defendant's claim of newly discovered evidence before concluding that the alleged new evidence did not serve to extend the five-year statutory bar. Oatman, ¶¶ 11-13. The Court's discussion, however, demonstrates the Court's view that the "newly discovered evidence" exception in § 46-21-102(2) is essentially the same as the "miscarriage of justice" exception discussed in such cases as State v. Redcrow, 1999 MT 95, 294 Mont. 252, 980 P.2d 622. Both are concerned with actual, rather than legal, innocence, and both require a showing that, in light of the new evidence, no reasonable juror would have found the defendant guilty.

Assuming that the district court reviewed Beach's alleged new evidence under the "miscarriage of justice" exception, Beach was confronted, in essence, with the same burden of proof as he would have faced under the revised version of § 46-21-102. Application of subsection (2) of the statute would not have changed the result of the district court's assessment of the evidence. This Court should find no error with respect to the standard used by the district court.

B. Procedural Bar

Beach contends that the district court erred in ruling that his petition for postconviction relief was procedurally barred. He notes that the petition satisfied the requirements of Mont. Code Ann. § 46-21-104, in that he provided the

necessary background information, a summary of the new evidence with exhibits, and a supporting memorandum. Since the petition was procedurally adequate, he maintains that the court's dismissal on this basis was error.

Beach fails to distinguish between the procedural requirements of § 46-21-104, which he concededly satisfied, and the procedural requirements of § 46-21-105 (1995), which he did not satisfy. The State argued that this latter procedural bar, which precludes petitioners from raising claims that could reasonably have been raised on direct appeal or in an initial petition for postconviction relief, applied to bar consideration of his claims of prosecutorial misconduct, ineffective assistance of counsel, and failure to disclose evidence prior to trial. (D.C. Doc. 184 at 56-58.)

Beach does not attempt to argue that the procedural bar of § 46-21-105 does not preclude the consideration, or reconsideration, of these claims. The district court's determination that Beach's petition was procedurally barred was clearly premised upon the State's argument and § 46-21-105. While a postconviction petition may be properly dismissed for failure to comply with § 46-21-104, Stevens v. State, 2007 MT 137, ¶ 11, 337 Mont. 400, 162 P.3d 82, the State did not assert this procedural bar, and the district court did not apply it. In this appeal, Beach does not raise any issue with respect to the propriety of the dismissal under § 46-21-105, of these procedurally defaulted claims concerning the conduct of the

sheriff's office, the prosecutor, and his defense attorney. The district court's application of § 46-21-105's procedural bars was correct and should be affirmed.

C. Clear and Consistent Application of Procedural Rules

Beach argues that this Court has not clearly and consistently applied the statute of limitations to postconviction cases involving newly discovered evidence. He maintains that there is a tension between the statutory law and this Court's precedent such that it is impossible for a postconviction petitioner to clearly determine when his petition may be filed. Citing English v. United States, 42 F.3d 473 (9th Cir. 1994), and Calderon v. United States Dist. Ct., 96 F.3d 1126 (9th Cir. 1996), he contends that the inconsistent application of the procedural bar means that the bar cannot be held to preclude consideration of the merits of his claim.

English and Calderon, which are federal habeas cases, provide no support for Beach's proposition that arguably inconsistent state court decisions on a state procedural bar render invalid any subsequent state court application of the procedural bar to a particular case. English concerns the question of whether a procedural default has in fact occurred and does not address the timeliness or consistent application issues raised by Beach. Calderon discusses the adequacy of a state procedural bar for purposes of foreclosing federal habeas review, and it does not purport to require a state court to waive a state procedural bar under any circumstances in a state proceeding.

In Rosales, ¶ 11, this Court recognized the importance of applying a procedural bar regularly and consistently. The Court will apply a procedural bar consistently unless the postconviction petitioner demonstrates a fundamental miscarriage of justice. State v. Evert, 2007 MT 30, ¶ 16, 336 Mont. 36, 152 P.3d 713; Redcrow, ¶ 41. However, the Court has recognized that arguments such as Beach's are aimed at the federal courts rather than this Court, and this Court need not address them. Kills On Top v. State, 273 Mont. 32, 60, 901 P.2d 1368, 1386 (1995).

While Beach might present a similar argument in federal court about the clarity and consistency of this Court's application of a procedural bar, in an effort to persuade the federal court to reach the merits of a procedurally defaulted claim, Beach's argument here presents no challenge to the district court's ruling. In fact, his failure to raise the argument or legal theory to the district court in the first instance would ordinarily preclude this Court's appellate review. State v. LaFreniere, 2008 MT 99, ¶ 11, 342 Mont. 309, 180 P.3d 1161. Beach's theory provides no basis for disturbing the district court's ruling.

D. Legal Standard for Newly Discovered Evidence

Beach contends that the district court applied an improper legal standard to determine whether the newly discovered evidence entitled him to postconviction relief. He suggests that the Court should have applied the five-pronged test

outlined in State v. Clark, *supra*, and adopted for postconviction petitions in Crosby v. State, 2006 MT 155, 332 Mont. 460, 139 P.3d 832.

As the State argued in its supporting memorandum, the Court in Crosby first concluded that the defendant's petition was not time barred under § 46-21-102(2) before determining that the test in Clark should be applied to a postconviction case alleging newly discovered evidence. In Beach's case, however, the statutory exception in subsection (2) does not apply, and Beach was required to establish a "miscarriage of justice" under the analysis suggested in Schlup v. Delo, *supra*, and utilized in such cases as Redcrow and State v. Pope, 2003 MT 330, ¶¶ 58-68, 318 Mont. 383, 80 P.3d 1232.

The district court's order does not set forth its analysis of Beach's proffered evidence, but it may be assumed that the court agreed with the State that the "miscarriage of justice" analysis was the appropriate standard. Beach agrees that if the current version of § 46-21-102(2) does not apply to his petition, the court's failure to utilize the Clark/Crosby test would not be erroneous. Even under that test, however, the district court's assessment of Beach's proffered evidence would remain unchanged. Whether the Clark/Crosby test or the Schlup-based test discussed in Pope provided the analytical framework for the court's decision, the court plainly concluded that the alleged new evidence, in light of all the evidence, was insufficient to establish Beach's actual innocence.

E. Actual Innocence Gateway

Beach contends that his case is analogous to the situation in Pope, that he has a lower burden of producing evidence of innocence, and that his new evidence opens the “actual innocence gateway” to appellate review of his otherwise time-barred constitutional claims.

Beach’s alleged new evidence was proffered to support his clemency theory that he did not kill Kimberly Nees and that she was killed instead by a group of angry women. The evidence is thoroughly discussed in the State’s supporting memorandum (pages 28-56), and that discussion will not be repeated here. Similarly, the State’s extensive discussion of this Court’s decision in Pope (pages 25-28) will not be duplicated in this argument. It is sufficient to reiterate that Pope is a unique case where completed DNA testing cast serious doubt on whether the defendant in fact raped one of the victims and an erroneous jury instruction made it impossible to discern which victim the jury found the defendant guilty of raping. Unlike Beach, the defendant in Pope did not give a detailed confession to law enforcement. The case is easily distinguishable and does not provide Beach with an escape from the procedural bars that preclude consideration of his defaulted constitutional claims

F. Evidentiary Hearing

Beach contends that the district court erred in denying his petition without holding an evidentiary hearing. Beach maintains that a hearing was necessary for the court to assess the credibility and weight of the witness testimony offered in support of his claim of actual innocence.

As this Court has acknowledged, however, the district court's decision on the necessity of an evidentiary hearing involves the exercise of judicial discretion and is reviewed on appeal for abuse of discretion. Herman v. State, 2006 MT 7, ¶ 13, 330 Mont. 267, 127 P.3d 422; Mont. Code Ann. § 46-21-201(5). It is well established that a district court abuses its discretion only if the court acts arbitrarily without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice. State v. Wilson, 2007 MT 327, ¶ 18, 340 Mont. 191, 172 P.3d 1264.

Under Mont. Code Ann. § 46-21-201, the district court may dismiss a petition for postconviction relief as a matter of law after reviewing the files and records of the case and the responsive pleading. Here the district court was presented with extensive records concerning Beach's postconviction claims, including the transcripts of the suppression hearing and trial as well as the transcripts of the evidentiary hearing before the Board. The court had a sufficient

basis for the assessment of Beach's claims, and its decision to rule on those claims without an evidentiary hearing was neither arbitrary nor unreasonable.

Beach cites Crosby v. State, *supra*, as support for his argument that the court's denial of his request for an evidentiary hearing was an abuse of discretion. However, Crosby provides little support for the argument. In Crosby, this Court concluded that the district court had applied an improper standard to evaluate whether new testimony by a recanting witness entitled the petitioner to postconviction relief. After an evidentiary hearing, the court had applied the standard established in State v. Perry, *supra*, instead of the test later announced in State v. Clark, *supra*, which overruled Perry. Since a hearing was held, the question of the district court's exercise of discretion in ruling without a hearing did not arise in Crosby.

While it is true that the district court found that "the cumulative evidence proffered by Beach does not warrant a finding of actual innocence in support of the fundamental miscarriage of justice exception to the time requirements," the court did not make a finding, explicitly or impliedly, about the veracity of Beach's witnesses and did not pass on the ultimate truthfulness of the new evidence. Considering the proffered evidence in light of the entire record before the court, the court did not abuse its discretion by concluding that an evidentiary hearing was unnecessary for the resolution of Beach's postconviction claims.

G. Prosecutors' Duty

The district court noted in its order that the primary responsibility of the prosecution is to see that justice is accomplished. Although Beach's petition was procedurally and time barred, the prosecutors thoroughly reviewed the evidence and interviewed witnesses, and the court observed that if their investigation had shown that Beach was truly innocent, the prosecutors would be morally and ethically bound to act to see that justice was done.

Beach argues that the prosecutors' duty to seek justice is not a legal basis upon which to deny a petition for postconviction relief. Beach suggests that if the district court's proposition were correct, there would be no need for juries and judges, since the omniscient and benevolent prosecutor could be entrusted with all aspects of criminal justice.

However, the district court did not rely on the prosecutors' duty to seek justice as a legal basis for its ruling. At most, the court's comments should be considered dicta and incidental to its determination that Beach's petition was untimely and procedurally barred. The comments simply confirm what the record clearly shows: the State made a thorough and meticulous review of all of the evidence adduced at the trial and proffered at the posttrial proceedings in an effort to investigate and evaluate Beach's claim of actual innocence.

This Court has also commented on the prosecutors' duty to seek justice and not simply a conviction. State ex rel. Fletcher v. District Court, 260 Mont. 410, 415, 859 P.2d 992, 995 (1993), citing Preston v. State, 615 P.2d 594, 601 (Alaska 1980). As the United States Supreme Court observed long ago in Berger v. United States, 295 U.S. 78, 88 (1935), the prosecutor is the representative of a sovereignty whose interest in a criminal prosecution is that justice should be done; he is a servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer. See also State v. Hart, 191 Mont. 375, 381, 625 P.2d 21, 25 (1981).

Although the prosecutor's ethical duty demands that he refrain from seeking a wrongful conviction, as Berger admonishes, the prosecutor also has the equally compelling duty to use every legitimate means to bring about a just one. The prosecutors reviewing Beach's actual innocence claim did not breach that duty, as the district court recognized. This Court should find no reason to disagree with the district court's observation.

CONCLUSION

Beach's petition for postconviction relief was procedurally and time barred, and this Court should affirm the district court's order denying the petition.

Respectfully submitted this 8th day of September, 2008.

MIKE McGRATH
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: _____
JOHN PAULSON
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief
of Appellee to be mailed to:

Mr. Terrance L. Toavs
429 Second Avenue South
Wolf Point, MT 59201

Mr. Peter K. Camiel
710 Cherry Street
Seattle, WA 98104

Mr. Ryan Rusche
Roosevelt County Attorney
P.O. Box 816
Wolf Point, MT 59201-0816

DATED _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, excluding certificate of service and certificate of compliance.

JOHN PAULSON

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 08-0244

BARRY BEACH,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPENDIX

Verified Petition for Post-Conviction Relief Exhibit A

Memorandum of Points and Authorities in Support of Petition Exhibit B

State’s Motion to Dismiss Exhibit C

Memorandum in Support of Respondent’s Motion to Dismiss Exhibit D

Order dated March 28, 2008 Exhibit E