

STATE OF MONTANA
BOARD OF PARDONS AND PAROLE

IN THE MATTER OF THE)
APPLICATION FOR EXECUTIVE) **POST HEARING MEMORANDUM**
CLEMENCY OF BARRY ALLAN)
BEACH)

Peter A. Camiel on behalf of Barry Allan Beach submits the following post hearing memorandum offering closing arguments regarding the evidence presented at the hearing conducted between June 13th and June 15th, 2007 before this Board.

The Murder of Kimberly Ann Nees

The following facts with regard to the murder of Kimberly Ann Nees are not in dispute. During the early morning hours of June 16, 1979, Kimberly Ann Nees was attacked while sitting in the driver’s side of her pickup truck down in the park along the Poplar River. Her truck was parked over 250 feet from the train bridge. The attack began inside the cab of the pickup and continued on the passenger side outside the pickup. Kimberly Nees’ body was moved from an area outside the pickup where the attack upon her was completed and a pool of blood accumulated and her body was left laying face up in about two feet of water in the Poplar River, 256 feet from the pickup truck. Kimberly Nees’ red purse and light colored sweater were found sitting directly outside the passenger door of the pickup truck. Fingerprints and palm prints were located on the exterior and interior of the pickup truck. At least two different types of footprints as well as some bare foot prints were located in or near the drag trail that ran from the truck to the river edge. The keys to the pickup truck were missing and no murder weapon or murder weapons were located.

The murder remained unsolved for 3-1/2 years until Barry Beach gave a statement to Louisiana detectives Jay Via and Alfred Calhoun on January 7, 1983.

1 At Barry Beach's trial the only evidence properly presented before the jury was a recitation of
2 Barry Beach's statement to the detectives. No tape was played as the original had been erased by the
3 Louisiana police. No eyewitnesses placed Barry Beach at the scene of the crime or with Kim Nees on
4 the evening of the crime or out and about in Poplar on the Friday evening of the crime. No forensic
5 evidence connected Barry Beach to the crime scene. No witnesses other than the detectives maintained
6 that Barry Beach incriminated himself with regard to this homicide.

7 Evidence of Innocence

8 In support of his claim of innocence, Barry Beach has presented evidence showing that two
9 females who resided in the Poplar area at the time of Kim Nees' murder made admissions to having been
10 involved in the murder of Kim Nees along with a number of other girls. None of this evidence was ever
11 presented to Barry Beach's trial jury.

12 Judy Grayhawk

13 The Board heard from Judy Grayhawk, the sister-in-law of Maude Grayhawk. Her testimony can
14 not be dismissed or diminished. Judy Grayhawk explained that she has been married for the past 30
15 years to Steve Grayhawk, Jr., the son of Steve Grayhawk, Sr., a former Poplar police officer who was
16 on duty on the night that Kim Nees was murdered. This is the same Steve Grayhawk, Sr. who kicked
17 in the door of the evidence room at the Poplar police department. It is also the same Steve Grayhawk,
18 Sr. who received the oral statement from Richard Holen days after the murder regarding Holen's
19 observations of Kim Nees and her pickup truck full of passengers turning down into the train bridge park
20 sometime around 2:30 a.m. on June 16, 1979.

21 Judy Grayhawk was an impressive witness. She came forward to give testimony regarding
22 admissions made by her sister-in-law, Maude Grayhawk Kim, risking her 30 year marriage to Steve
23 Grayhawk, Jr. and perhaps her safety in the Poplar and Fort Peck reservation community. Judy
24 Grayhawk described how she, in early 2004, received a telephone call from Maude Grayhawk who was
25 calling to speak with Judy's son. Judy described Maude Grayhawk as despondent. She described how
26 Maude Grayhawk started to talk and she just listened. Maude explained that she was trying to avoid an

1 investigator who wanted to speak with her about the Kim Nees murder¹. Maude Grayhawk told Judy
2 that she was fearful of going to prison and when asked what for, indicated that she would go to prison
3 “for that Kim Nees murder.” Judy Grayhawk asked, “What did you do?” and Maude replied, “I didn’t
4 kill that girl, all I did was kick her in the head a few times.” Maude Grayhawk also described how she
5 was the one who lured Kim Nees down to the park immediately prior to her murder.

6 Judy Grayhawk was stunned upon hearing Maude’s words. This was information she never
7 wanted to hear. She was immediately overcome with anguish over what she heard. Judy was placed in
8 the awkward position of having to possibly implicate her husband’s sister, Maude. Judy described how
9 she felt she had to unburden herself by telling someone about the information she received from Maude
10 and later that day, she went down to the Legion Club where she sought out Kim Nees’ cousin, Glenna
11 Lochman. Judy Grayhawk then described for Glenna the phone call that she had with Maude Grayhawk.

12 Over the next period of months, Judy Grayhawk struggled with the information she had received.
13 She knew that the murder of Kim Nees was being reinvestigated by Centurion Ministries investigators.
14 She knew that Maude Grayhawk had made a direct admission to her about her direct participation in that
15 murder. She also knew that she was a part of the Grayhawk family. Her husband, Steve Grayhawk, Jr.,
16 attempted to dissuade her from coming forward. Judy Grayhawk described a full day of arguments and
17 anguish between she and her husband as they argued about whether or not she should come forward.
18 She described how her husband threatened to divorce her after 30 years of marriage and how she told
19 him that if that is what he wanted to do, then he should do it. She described how she told her husband
20 that she would not perjure herself for his sister. In February 2007, Judy signed a sworn statement
21 attesting to the phone call from Maude. When Centurion Ministries first contacted her in 2004, she
22 refused to sign a declaration out of fear that doing so would upset her husband and family. Judy
23 Grayhawk then made the 950 mile round trip drive to Deer Lodge from Poplar, took an oath to tell the
24 truth and sat before this Board and described the statements made by Maude Grayhawk.

25 ¹ The investigator was Ron Kemp who was working for the County prosecutor. Kemp came to
26 see Maude to set up an appointment for an interview.

1 Judy Grayhawk's testimony was unimpeached. She had no axe to grind with Maude Grayhawk
2 and, in fact, remains a member of the Grayhawk family. She risked her 30 year marriage to come before
3 the Board. She holds a responsible job as a rehabilitation counselor and has lived a responsible life. Her
4 words simply ring true and are corroborated in part by the testimony of Undersheriff Ron Kemp who
5 interviewed Maude Grayhawk and by Kim Nees' own cousin, Glenna Lochman, who testified to her
6 conversation with Judy Grayhawk in the spring of 2004.

7 **Glenna Lochman**

8 Glenna was always concerned by the talk of the town that a gang of girls killed Kim. Upon
9 hearing what Maude told Judy, Glenna contacted both Ron Kemp and Centurion Ministries. Glenna's
10 sole interest is to obtain justice for her cousin. She wants the real killers brought to account.

11 **Marie Decker**

12 The Board heard from Marie Decker, the half-sister of the now deceased Dana Kim. Dana Kim
13 had been Maude Grayhawk Kim's husband. Marie Decker testified that in 2002, Dana Kim and Maude
14 were in the process of an acrimonious divorce. Dana came to stay with Marie Decker at her home in
15 Billings. During that stay, he described on a number of occasions how Maude had confessed to him that
16 she was a part of a group of girls who participated in the fatal beating of Kim Nees. Maude also told
17 Dana that Eddie VanDover had lured Kim to the park that night. Maude confided in her then husband,
18 Dana, that she along with Sissy Atkinson, Joanne Jackson, Roberta Jackson, Jordis Ferguson and Rhea
19 Red Dog lured Kim Nees to the location where she was murdered.

20 Marie Decker described how Dana Kim had decided that he was going to disclose the
21 information he had received from Maude to the Centurion Ministries investigators and to the court
22 during his final divorce proceeding hearing which was scheduled to take place only days before Dana
23 Kim was murdered by Maude Kim's boyfriend, Tracy McGowan. Dana Kim, however, never got the
24 chance to come forward as he was murdered by Maude's boyfriend only days before the final divorce
25 hearing.

1 Marie Decker was a credible witness. Her testimony was unimpeached. She, as well, drove
2 several hundred miles to come before the Board and under oath described the statements she received
3 from her brother, Dana Kirn, regarding Maude Kirn's confessions.

4 **J.D. Atkinson**

5 The Board heard from J.D. Atkinson, the older brother of Sissy Atkinson. J.D. Atkinson testified
6 that he visited his sister, Sissy Atkinson, in Great Falls in 2003 and 2004 at a time when Sissy Atkinson
7 was heavily addicted to narcotics. J.D. Atkinson described how Sissy Atkinson on a number of
8 occasions began to talk about the Kim Nees murder and on at least one occasion began to "unload" and
9 described that on the night of Kim Nees' murder she, Sissy Atkinson, along with Maude Grayhawk,
10 Joanne Johnson and Jordis Ferguson were partying down off Highway 2 near the river. Sissy Atkinson
11 described a fight breaking out and one of the girls with a wrench chasing Kim around the pickup truck.
12 Sissy Atkinson described herself to her brother as a witness rather than a participant. Nevertheless, she
13 has never publicly described herself as a witness, but always claimed that she was home by 11:00 p.m.
14 on the night of Kim Nees' murder.

15 J.D. Atkinson first came forward in January 2007 by signing a sworn statement. He has stated
16 under oath that his sister, Sissy, told him that Barry is innocent. J.D. has described Sissy's life since Kim
17 Nees' murder as a downward spiral of drug addiction. He has expressed concern that his sister will end
18 up killing herself if she does not admit what she knows.

19 Although the state attempted to impeach J.D. Atkinson by suggesting that prior conflicts between
20 he and his sister would be a motive to fabricate these statements, the state failed in its attempt to
21 discredit J.D. Atkinson. J.D. Atkinson sat before this Board, under oath, with his sister, Sissy Atkinson,
22 and his brother, Bobby Atkinson, sitting behind him in the courtroom. J.D. Atkinson testified before
23 this Board despite only days before having received a phone call from the Attorney General's
24 investigator, Ward McKay, who threatened him with being charged with perjury. J.D. Atkinson's
25 testimony regarding being threatened with perjury was never rebutted. Ward McKay was never called
26 as a witness despite the fact that he was on the Attorney General's witness list leading to the reasonable

1 inference that J.D. Atkinson's testimony about the attempt to intimidate him to prevent him from
2 testifying was in fact true. J.D. Atkinson has risked his return to the Fort Peck reservation by coming
3 forward and giving public testimony implicating his sister in the murder of Kim Nees. He was
4 unwavering despite an aggressive attempt to discredit him. J.D. Atkinson received nothing for his
5 testimony and came forward despite the intimidating environment.

6 **Bobby Atkinson**

7 Bobby Atkinson is the brother of Sissy Atkinson and the brother of J.D. Atkinson. At the time
8 of Kim Nees' murder, Bobby Atkinson was Acting Poplar City Police Chief. Bobby Atkinson described
9 how the evidence that was collected at the crime scene was stored in the Poplar City Police Department
10 judge's chambers. He described how he carefully locked the door and placed multiple signs up
11 indicating that the officers were to stay out of the room. He described how two days later when he
12 attempted to retrieve the evidence along with either Roosevelt County Sheriff Deputy Wilson or
13 Mahlum, he found that the door had been kicked in and the hasp on the door had been broken. Upon
14 inquiry, he learned that Steve Grayhawk, Sr., Maude Grayhawk's own father, had kicked in the door to
15 the evidence room, breaking the hasp. When confronted, Steve Grayhawk, Sr. indicated he simply
16 wanted to use the restroom. Bobby Atkinson testified that he reprimanded Steve Grayhawk, Sr. but did
17 not prepare or file any reports for the Roosevelt County Sheriffs office since they were present when he
18 found that the door had been kicked in.

19 Bobby Atkinson testified that during the commencement of Barry Beach's trial, he told
20 prosecutor Mark Racicot about the break in to the evidence room. Bobby Atkinson also testified that
21 Steve Grayhawk, Sr. was on duty on the evening that Kim Nees was killed. Bobby Atkinson's testimony
22 regarding the break in to the evidence room by Steve Grayhawk, Sr. leads to the reasonable inference
23 that Steve Grayhawk, Sr. was concerned that there may be evidence in the room linking his daughter,
24 Maude Grayhawk, to the murder of Kim Nees and wanted to enter the evidence room to see what had
25 been collected. Steve Grayhawk's explanation that he simply wanted to use the restroom is simply
26 absurd.

1 **Vonnie Brown**

2 Forty-two year old North Dakota resident, Vonnie Brown, testified about her contact with Sissy
3 Atkinson in June of 2004 in Great Falls. Vonnie Brown had been born and raised in Poplar and lived
4 there most of her life. When she visited Sissy Atkinson in 2004, Sissy was in the midst of heavy drug
5 use. During one visit, Sissy began to talk about the Kim Nees' murder. Sissy told Vonnie Brown, "I
6 know who really did it." When Vonnie asked who, Sissy began describing girls kicking Kim and pulling
7 her by the hair². Sissy said that Maude was one of them. She then began describing Maude, herself and
8 others being present, but then stopped and changed the subject.

9 Vonnie Brown described how during her visits with Sissy in Great Falls, she saw Sissy's brother,
10 J.D., visit on occasion. This corroborates J.D. Atkinson's testimony that he visited his sister at her
11 apartment in Great Falls.

12 The state attempted to impeach Vonnie Brown by claiming she and Sissy had had conflicts in
13 the past. However, Vonnie Brown was also an impressive witness. She traveled a total of nearly 2,000
14 miles from eastern North Dakota with her daughter and two infant grandchildren to Deer Lodge and back
15 and gave testimony under oath regarding what Sissy Atkinson had told her. Vonnie Brown's testimony
16 is corroborated by J.D. Atkinson's own testimony which demonstrates that when Sissy Atkinson would
17 be under the influence of narcotics, she would at times describe what had occurred when Kim Nees was
18 murdered and her presence and possible participation in that murder.

19 **Roberta "Bobby" Ryan**

20 Bobby Ryan appeared before this Board two weeks after having quintuple heart surgery. She
21 traveled the several hundred miles from Glasgow to Deer Lodge to give testimony regarding her
22 recollections of the evening and early morning hours of June 15th and June 16th, 1979. Bobby Ryan and
23 her now deceased husband had owned the Bum Steer bar in Poplar in 1979. Bobby Ryan described how
24 the week-end of June 15th/16th, 1979 was her first rodeo week-end owning the bar and how she had

25 _____
26 ² Clumps of hair were found in various areas of the crime scene. (FBI 6/19/79 crime scene
report, p.2, Ex. No. 12.) Barry Beach never described pulling Kim Nees' hair in his confession.

1 made plans to build a float with the assistance of the Jackson girls on Saturday, June 16, 1979. Bobby
2 Ryan described how a dance was being held at the Bum Steer on Friday night, June 15, 1979. She
3 described her clear recollection that the bar didn't get busy until midnight and the bar stayed open until
4 2:00 a.m. Bobby Ryan explained that she was well acquainted with the Jackson sisters, Maude
5 Grayhawk and Sissy Atkinson. She saw the girls in and out of her bar on the night of June 15, 1979 and
6 the early morning hours of June 16th. In fact, she spent a good deal of the night chasing the underage
7 girls out of her bar. She described how they were all hyped up and kept gathering around Sissy
8 Atkinson. She described her clear recollection that she saw these girls in her bar between the hours of
9 midnight and 2:00 a.m.

10 The significance of Bobby Ryan's testimony is that she directly contradicts Sissy Atkinson's
11 testimony before this Board that she, Sissy Atkinson, was home and in bed by 11:00 p.m. Bobby Ryan
12 also testified regarding how the next day the Jackson sisters never showed up to assist in building the
13 float and she went over to the Jackson residence but could not get the girls out of bed to assist.

14 Bobby Ryan also recalled the display in Beck's Sporting Goods store that included pictures of
15 the crime scene, including a photograph of Kim Nees' body in the river and another photograph of the
16 pickup truck along with the display of a crescent wrench.

17 Bobby Ryan's testimony was not only unimpeached, but she put her own health at risk to come
18 before this Board. Although initially reluctant to come forward, Bobby Ryan was convinced by Dallas
19 O'Conner, the then Mayor of Poplar, to come forward. Ms. Ryan had no reason to travel 800 miles to
20 lie to the Board.

21 Dun O'Connor

22 Dun O'Connor is a rancher from Poplar. He knows Barry Beach and his family only slightly as
23 Barry had worked for him on one occasion when Barry was in high school. Dun had also been friends
24 with Sissy Atkinson. Dun O'Connor described how during the early morning hours of June 16, 1979
25 at 5:00 a.m., he was awakened by a phone call at his trailer home. As he went to the kitchen to answer
26 the phone, he looked at the clock on the wall and saw the time, 5:00 a.m. On the phone was Sissy

1 Atkinson who told him that Kim Nees' body was in the river. Upon hearing his, Dun went back to bed
2 but later that morning, after waking up, learned that Kim Nees had been murdered and her body had been
3 found in the river. It was not until later that Dun realized the significance of Sissy Atkinson's phone
4 call. He learned the police had not found Kim Nees' body until 7:00 a.m. Dun O'Connor learned this
5 in talking with another witness, Richard Holen.

6 Dun O'Connor's testimony was unimpeached. He has no axe to grind or bad blood with Sissy
7 Atkinson. He came forward out of concern regarding the significance of Sissy Atkinson's call. How
8 did Sissy Atkinson know by 5:00 a.m. that Kim Nees' body was in the Poplar River?

9 **Richard Holen**

10 Richard Holen testified before this Board regarding his observation sometime around 2:30 a.m.
11 on June 16, 1979. Richard Holen had spent the evening at the Legion Hall in Poplar, Montana leaving
12 sometime after closing with his girlfriend, Gretchen Youpee. Gretchen had worked as a waitress at the
13 Legion Hall and Richard had to wait until she finished cleaning up after the closing of the bar. Richard
14 recalled this evening in particular because he had been in a fight that night. He recalled that he and
15 Gretchen left the Legion Hall and traveled on Highway 2 westbound out of town, driving the loop that
16 many of the Poplar kids drove during that time. As he was headed out of town, he saw the distinctive
17 Nees pickup truck ahead of him. Inside the cab of the pickup truck, he saw who he believed to be Kim
18 Nees as the driver and the seat full of occupants, including someone sitting on another person's lap. He
19 described approximately five occupants of the vehicle. His car pulled closer to the pickup truck as it
20 stopped to make a left turn down into the park near the Poplar River. Richard Holen continued in his
21 car westbound on Highway 2, made the loop and came back eastbound on Highway 2 into town. As he
22 crossed over the river bridge, he saw the Nees pickup truck on the road headed down toward the train
23 bridge stopped. He saw another car adjacent to the driver's door of the Nees pickup truck stopped, as
24 if the occupants of both vehicles were talking. Richard Holen continued on into Poplar. A few days
25 later, while at the Poplar Coneco station, Richard Holen spoke with Steve Grayhawk, Sr., then a Poplar
26 police officer, and told him that he had seen Kim Nees and her vehicle full of passengers during the early

1 morning hours of June 16th heading down toward the train bridge. Grayhawk said he would get back to
2 Richard Holen, but never did.

3 Richard Holen's observations coincide with the statements Sheriff Mahlum took from Joel and
4 Maybelle Sparvier on June 16, 1979 regarding screams they heard coming from the park by the train
5 bridge at 2:30 a.m. on June 16, 1979.

6 Richard Holen was cross examined regarding notes of an investigator who spoke with Richard
7 Holen sometime after the Kim Nees murder. Richard Holen did not recall being questioned by any such
8 officer. The notes appear to be questions regarding Richard's observations of Greg Norgard, the state's
9 initial suspect who was at the Legion Hall on June 15th. Richard Holen was a strong witness with no
10 reason to fabricate his testimony. He observed Kim Nees perhaps moments before her death. Kim was
11 not alone or with just one person, but rather accompanied by a group.

12 Susie Bissell

13 Susie Bissell is a second grade school teacher who resides in Anchorage, Alaska. She grew up
14 in Poplar and resided in Poplar until she turned 18 when she went off to college. Susie Bissell described
15 a friendship with a girl a couple of years older than her, Orie Burshia. Orie Burshia had come to Susie
16 Bissell in the fall of 1979 extremely upset over a conversation she had with Mike Long Tree. Although
17 Susie Bissell's testimony was limited to a description of Orie Burshia's demeanor and her advice to Orie
18 Burshia. Orie Burshia's statement to then Sheriff Don Carpenter is attached to Mr. Beach's petition as
19 Exhibit 5.

20 Susie Bissell told Orie Burshia that she should take the information that she had received from
21 Mike Long Tree and go to Susie Bissell's cousin, then Sheriff Don Carpenter. Orie Burshia did just that
22 and in September of 1979, Don Carpenter recorded a conversation with Orie Burshia who described
23 having talked with Mike Long Tree who claimed to have witnessed the Kim Nees murder. Long Tree
24 had told Orie Burshia that he was present when Kim Nees was killed and observed Kim Nees being
25 beaten by girls including Sissy Atkinson, one of Red Dog girls and another girl. The transcript of Orie
26

1 Burshia's statement to Sheriff Carpenter was never disclosed to Barry Beach's trial lawyer. Orie Burshia
2 died many years ago in a car accident.

3 Susie Bissell was an impressive and unimpeached witness who came forward and traveled a long
4 distance to give her brief testimony before this Board.

5 **Carl Four Star**

6 Carl Four Star is a college educated, computer consultant who grew up and lived in Poplar who
7 came before this Board despite his belief of attempts to intimidate him from giving testimony regarding
8 his overhearing of a conversation between Sissy Atkinson and her boyfriend, William Stubby Balbinot,
9 as they worked at A & S Industries in approximately 1985. Carl Four Star is not friendly with the Beach
10 family nor does he know Barry Beach. He testified that in about 1985, he worked at A & S Industries
11 less than 20 feet from Sissy Atkinson's work station. One day, as he was working, he overheard a
12 conversation between Sissy Atkinson and William Balbinot where Balbinot said that it was a shame
13 about what happened. Carl Four Star interpreted this to be a reference to either Barry Beach's conviction
14 or Kim Nees' murder. He then heard Sissy clearly respond, "They got the wrong man" and he heard
15 Sissy explain that she was there with Maude, Rose and another girl whose name he did not recall. He
16 heard Sissy explain that it was a perfect crime and that they got away with murder. In addition, he
17 observed Sissy make a motion with her arm as if she was demonstrating how Kim Nees was struck.
18 Immediately after this statement, Sissy Atkinson walked toward Carl and looked at him and told him that
19 she had got away with a capital crime.

20 Carl Four Star was shocked at what he heard. Like Judy Grayhawk, Carl Four Star didn't want
21 to hear these words. He was in turmoil about whether he should come forward or keep quiet. He was
22 fearful of repercussions on the reservation if he were to come forward and did not trust the Poplar police.
23 Some time later, after carrying this inside of him for a time, Carl Four Star confessed to his priest, Father
24 Jim, about what he had overheard. As Barry Beach had already been convicted, Father Jim advised Carl
25 to simply pray. Years later, when Centurion Ministries investigators were searching for William
26 Balbinot and showed up at Carl Four Star's mother's home, Carl Four Star heard that the Nees murder

1 was being reinvestigated. It was at that time that Carl came forward and described what he heard Sissy
2 Atkinson say.

3 In an attempt to impeach Carl Four Star, the state introduced the testimony of Deputy Richie
4 McDonald who testified that he had worked at A & S Industries a year or two before Carl Four Star.
5 McDonald tried to impeach Carl Four Star by claiming that it would have been too noisy to overhear
6 such a conversation. However, Carl Four Star clearly described his work area and told the Board he had
7 no difficulty hearing Sissy Atkinson's statements. Carl was so troubled by Sissy's admission that he
8 went to his priest for advice. Carl had no reason to subject himself to the attacks on his honesty, but
9 chose to do the right thing and testify.

10 Carl Four Star has no reason to lie to this Board. He is not a friend of Barry Beach or the Beach
11 family and had no axe to grind with Sissy Atkinson. He knows what he heard and knows of its
12 significance. He was willing to travel hundreds of miles to testify before this Board despite his
13 continuing fear of repercussions to him and his family.

14 **The Significance of the Above-Described Witnesses**

15 The state has claimed that the application for clemency and the claim that a group of girls are
16 responsible for the murder of Kim Nees is nothing more than rumor, gossip or theory. The witnesses
17 who came before this Board and testified under oath belie that claim. Each of those witnesses traveled
18 hundreds if not thousands of miles. Each of these witnesses endured their own personal hardship, Judy
19 Grayhawk risking her marriage, Bobby Ryan risking her health, and others risking their personal safety
20 or their family and community relationships to give testimony before this Board. None of this testimony
21 was based on rumor, gossip or hearsay but was rather testimony based on personal observation or
22 directly receiving admissions from Maude Grayhawk and Sissy Atkinson.

23 **Sissy Atkinson**

24 Sissy Atkinson testified before this Board and denied having participated in the murder of Kim
25 Nees. Sissy Atkinson claimed that she was in Poplar on the evening of June 15, 1979 after earlier in the
26 evening having been near the train bridge with Maude Grayhawk, Jordis Ferguson and Joanne Jackson.

1 She claimed they came back into Poplar to buy beer and then she went home. Sissy Atkinson gave
2 inconsistent testimony before this Board regarding whether or not she simply walked home by herself
3 or was given a ride by Maude Grayhawk. She was confronted with the fact that in statements that she
4 gave to law enforcement in 1979, she never explained her whereabouts during the early morning hours
5 of June 16, 1979. She also claimed to be a friend of Kim Nees at one point and at another point claimed
6 that she didn't know her. She claimed that each of the witnesses who testified that she made admissions
7 to them, including her brother, J.D. Atkinson, her friend, Vonnie Brown, Dun O'Connor and Carl Four
8 Star were all simply lying. Yet she could give no reason why her own brother, J.D. Atkinson, or Carl
9 Four Star would give such testimony against her.

10 **Maude Grayhawk**

11 Maude Grayhawk voluntarily chose not to appear before this Board despite having been given
12 a subpoena and advance travel and subsistence costs. She chose not to appear after assuring Mr. Beach's
13 attorney that she would appear. She chose not to appear after a phone call she had with the Attorney
14 General's Office. Maude Grayhawk had the opportunity to come before this Board and give testimony
15 under oath explaining whether or not she was involved in the murder of Kim Nees. She chose not to
16 explain her phone call with Judy Grayhawk. She chose not to appear rather than explain whether her
17 now deceased former husband, Dana Kirn, was about to come forward and give information that she had
18 confessed being involved in the Kim Nees murder. Because Maude Grayhawk was under subpoena and
19 ignored the subpoena, this Board should interpret her failure to appear as an inference against her.

20 **Ron Kemp**

21 Ron Kemp is now Roosevelt County Undersheriff. Provoked by his interview with Calvin Lester
22 who Kemp found to be credible, he interviewed Maude Grayhawk. He testified about his participation
23 in an interview with Maude Grayhawk at the request of Roosevelt County Attorney Fred Hofman. He
24 explained that he went to Maude Grayhawk's home to tell her that he wanted to interview her about the
25 Nees murder. He set up a time for the interview to take place the next day. When Maude appeared the
26 next day, he learned that Maude had, after his initial contact with her, had a phone call with Sissy

1 Atkinson. He learned that Sissy Atkinson tried to dissuade Maude from talking with him. Ron Kemp
2 told Maude Grayhawk that he had spoken with a witness who indicated that she was present when Kim
3 Nees was murdered. Kemp described Maude's demeanor during the interview as upset and crying.
4 Maude told Kemp girls were jealous of Kim and that Maude believed someone else was involved in
5 Kim's murder. He questioned Maude Kim who denied participating in the murder. However, Maude
6 Grayhawk made a number of incriminating statements to Ron Kemp. Maude Grayhawk told Kemp that
7 at the time she was drinking and using drugs heavily. She wondered aloud whether she could have been
8 present when Kim Nees was murdered and simply blacked it out. Maude Grayhawk also said that Sissy
9 Atkinson had disappeared the evening of Kim Nees' murder. Maude Grayhawk also described a phone
10 call with Sissy Atkinson where Sissy Atkinson described being in possession of Kim Nees' diamond
11 necklace. Ron Kemp asked Maude to take a polygraph and she agreed but then left for Colorado before
12 the test was performed.

13 Evidence of a False Confession

14 The only evidence presented against Barry Beach at his trial was the confession given to
15 Louisiana police officers Jay Via and Alfred Calhoun. At the hearing before this Board, Mr. Beach
16 presented evidence demonstrating that the confession that he gave was false.

17 Dr. Richard Leo

18 Dr. Richard Leo, a nationally renown expert in the field of false confessions explained to this
19 Board the phenomenon of false confessions and the frequency of false confessions. There is no doubt
20 whatsoever that innocent people falsely confess for a number of reasons. Dr. Leo explained that in the
21 over 200 DNA exonerations demonstrating with certainty innocence, 20% to 25 % of those individuals
22 gave false confessions. Dr. Leo explained how through a series of studies a methodology has been
23 developed to assist in attempting to discern whether or not a confession is reliable or whether it is false.
24 Dr. Leo described this methodology as a "fit test." He described this methodology in common sense
25 terms as carefully reviewing the content of the confession against the known facts of the crime. In
26 particular where a confession is uncorroborated by other witness testimony or any forensic evidence,

1 there should be serious concerns about the reliability of the confession where the statement doesn't
2 reveal non-public information which could only been known to the killer and where there is not a danger
3 of contamination by police officers. Dr. Leo also expressed concern about the failure of police to record
4 the earlier parts of an interrogation, thus leaving no objective record of the interrogation techniques used.

5 Dr. Leo went on to describe his analysis of Barry Beach's confession statement. Dr. Leo based
6 his analysis on the understanding that there was no forensic evidence to corroborate Barry Beach's
7 confession and further that there were no other witnesses implicating Barry Beach in the murder of
8 Kimberly Nees. Dr. Leo indicated that an analysis of Barry Beach's confession against the known crime
9 facts demonstrated the lack of any specific knowledge on the part of Barry Beach that would have only
10 been known to the killer and could not have been the product of contamination. Dr. Leo also stressed
11 the importance of all the factual errors made by Barry Beach in the confession as indicating the
12 unreliability of the confession. In cross examining Dr. Leo, the state never questioned Dr. Leo about the
13 reliability of Barry's confession, but instead suggested that Dr. Leo was biased. The failure to inquire
14 about the reliability of the confession demonstrates the state's inability to explain all the factual mistakes
15 in the confession. The essence of Dr. Leo's testimony was not his own conclusion about Barry Beach's
16 confession, but was in explaining an accepted methodology for this Board to evaluate the reliability of
17 Barry's confession.

18 The Confession

19 Barry Beach's confession statement taken by Louisiana police officers Jay Via and Alfred
20 Calhoun is fraught with error and provides ample evidence that Barry Beach was not at the crime scene.
21 The facts contained in Barry Beach's confession, although at times detailed, provide no unique
22 information that would have been known only to the killer. Within the confession there are numerous
23 facts that Barry Beach clearly got wrong. There are other facts that Barry Beach generally got right but
24 were so well known to the public that any number of Poplar residents could have provided the same
25 facts. Finally, there were a number of facts that Barry Beach provided that could not be corroborated
26 either way and thus provide no basis for determining the reliability of the confession.

1 **Statements Regarding Activities Earlier on June 15th**

2 The state relies heavily in its analysis of the confession upon statements Barry Beach gave
3 regarding his activities earlier in the day on June 15th when he went to Sandy Beach with Caleb Gorneau
4 and Shannon O'Brien. None of those facts are really in dispute and occurred many hours before the
5 murder. The fact that Barry Beach described activities corroborated by Shannon O'Brien and Caleb
6 Gorneau provide no insight into what occurred during the early morning hours of June 16, 1979. The
7 state's theory that because Barry was angry earlier in the day at his truck breaking down, he must have
8 acted violently toward Kim Nees is unsupported by any evidence. Barry said in his confession that by
9 the time he walked into town, he was no longer upset.

10 **The Location of the Pickup Truck**

11 Perhaps one of the most important errors made by Barry Beach is the location of the pickup truck.
12 Barry Beach described in his confession the pickup truck being located near the train bridge when in fact
13 it was over 250 feet from the train bridge. Although the state attempts to gloss over this error regarding
14 the truck's location by claiming that the entire park was known as the "train bridge", Barry Beach's error
15 is highlighted when one looks at Sgt. Jay Via's January 9, 1983 report at page 7 wherein Detective Via
16 describes Barry Beach having a vision "of Kim lying on her side next to the right rear passenger tire of
17 the vehicle by the river. In this vision, Barry could also see a railroad bridge next to the vehicle." It is
18 thus clear that Barry Beach thought that Kim Nees' vehicle was parked next to the railroad bridge and
19 not some 250 feet away.

20 This error is highlighted by Barry Beach's later description of three to four trips from the pickup
21 truck to the river. In his confession, Barry Beach describes (at page 9 bottom) "three to four trips made
22 from the truck to the river." It is clear that Barry Beach has no idea that each of the trips would have
23 required traveling approximately 500 feet. Barry Beach says, "The first thing I could think of was to get
24 rid of the evidence so I threw the tire iron and crescent wrench in the river (trip 1) and I went, I started
25 looking for a blanket or something in the pickup and there is a plastic bag in there - it's a garbage sack
26 and I got it and I tried to put the body in it. I drug it over to the edge of the bank of the river and I just

1 pushed her off the edge of the bank (trip 2) and I turned around and started looking to try to think of what
2 to do. I didn't really know what to do. I was scared. And so I went and got the keys out of the pickup
3 and I threw the keys in the river (trip 3). And I picked her jacket up off the ground and threw it in the
4 river by the body (trip 4)." (Parentheticals added) It is clear that Barry Beach thought that the truck was
5 so close to the river that he could quickly run back and forth rather than making a 500 foot round trip
6 between the truck and the river.

7 Pushing Kim's Body into the River

8 Attached to this memorandum is a crime scene photograph taken on the morning of June 16,
9 1979 showing the location of the pickup truck, the steep ledge down to the river bank, and Kim Nees'
10 body in the river. This photo graphically demonstrates the distance Barry would have had to travel back
11 and forth for each of the four trips to the river he described.

12 At page 9 (bottom) of the confession, Barry Beach described that he "just pushed her off over
13 the edge of the bank." A review of the photographs, diagrams and crime scene reports show that this
14 was physically impossible. Exhibit 12 attached to Mr. Beach's clemency petition at pages 3 and 4 is an
15 FBI crime scene report dated June 19, 1979 wherein it states: "Of interest is the fact that the unsub drug
16 victim 256 feet, pushed her over a 10 foot cliff, and jumped down, lifted victim, and threw her into river.
17 In doing so, unsub passed 200 feet of high grass and brush, which would have better concealed body."
18 It is also important to note the footprints clearly visible in the photograph admitted into evidence during
19 the hearing in the mud on the riverbank near the body. Barry's confession makes clear he did not realize
20 that it would have been necessary to jump down and carry Kim's body to the river.

21 Exiting the Driver's Door

22 In his confession statement, Barry Beach clearly stated his belief that Kim Nees exited the
23 driver's door. At page 8, he stated, "She started backing away from me and trying to get out of the
24 pickup. She slid back over to the driver's side and started to get out the door and I jumped out and ran
25 around the pickup, caught her as she was coming out the door. I threw her up against the pickup and
26

1 grabbed her and tried to kiss her and she scratched me³.” Kim Nees did not exit the driver’s door. All
2 of the forensic evidence demonstrates that Kim Nees was dragged out the passenger door, pulled
3 approximately 9 feet from the vehicle and thrown to the ground where a large pool of blood was
4 located⁴. The blood stains on the seat of the vehicle and the blood stains on the outside of the passenger
5 side of the vehicle corroborate this. Absolutely no blood was found on the outside driver’s side of the
6 vehicle nor on the ground outside the driver’s side. Sheriff Dean Mahlum in his January 7, 1983 report
7 listing the 9 points of information provided to the Louisiana detectives clearly indicates his confirmation
8 of this fact when he wrote at item #5: “Victim was dragged from the passenger door of the victim’s
9 pickup.”

10 This glaring error by Barry completely undercuts Mr. Racicot’s claim that Barry got the sequence
11 of events correct. Indeed, this error demonstrates Barry Beach’s ignorance of how the attack on Kim
12 Nees unfolded.

13 Choking Kimberly Nees

14 In his confession, Barry Beach described choking Kimberly Nees as he held her up against the
15 driver’s side of the vehicle. First, Kimberly Nees was severely injured and bleeding heavily inside the
16 vehicle when she was initially attacked. Not only is there no evidence she was outside the driver’s side
17 of the vehicle, but Dr. Pfaff related no evidence whatsoever that Kimberly Nees was choked. The state
18 attempts to explain this away by indicating that the choking may not have left any marks but the fact
19 remains that there was no evidence that Kimberly Nees was choked nor that she was held against the
20 vehicle on the driver’s side. Had she been choked, there would have been bruising or marks on her neck.
21 There was neither. Had she been held up against the driver’s side of the truck, there would have been
22 blood on that side of the truck. There was none.

23
24 ³ The autopsy revealed that no blood, skin or tissue were found under Kim’s fingernails. There
25 is no corroboration that Barry was scratched by Kim.

26 ⁴ The large pool of blood was not located by the rear passenger tire, but was 9 feet straight out
27 from the passenger door. In Barry’s confession, he had stated he tackled Kim by the rear passenger tire.

1 **The Clothing**

2 Barry Beach's description of Kim Nees' clothing provides unique evidence not only that Barry
3 Beach was not at the crime scene but of contamination on the part of the Louisiana detectives. Barry
4 Beach in this confession indicates that Kim Nees was wearing a brown sports jacket and a plaid polyester
5 blouse. Barry Beach was wrong on both counts. As noted by Dr. Richard Leo, Barry Beach's mis-
6 description of Kim Nees' clothing is particularly important because Detective Jay Via made the exact
7 same mistake about Kim Nees' clothing. Evidence of this contamination appears in the January 7, 1983
8 phone call between Detective Jay Via and Sheriff Dean Mahlum. In that phone call, a transcript of
9 which is before the Board at page 1 bottom, Sgt. Via indicates the following: "But, the details he ran
10 down are almost identical to what you found at the scene. He's only got one thing wrong. The clothes
11 the victim was wearing. You said she had on a brown, plaid shirt. And he said she had on a brown or
12 tan colored sport coat. But he said he took the sport coat thing off her and ...".

13 The above indicates that Sgt. Via wrongly believed he had been told by Sheriff Mahlum that
14 Kimberly Nees was wearing a brown, plaid shirt. This is what is known as a false fact. This false fact
15 then appeared in Barry Beach's confession at page 10. Barry Beach was asked to describe the clothing
16 Kim was wearing. He stated she was wearing a brown sports jacket and blue jeans and a plaid, polyester
17 blouse. Kim was actually wearing a blue and red pullover sweater. Sgt. Via's clothing description error
18 found its way into Barry's confession. This could not have occurred by chance. It is evidence of
19 contamination by Sgt. Via prior to the tape recorder being turned on.

20 **The Jacket**

21 Not only did Barry describe Kim having worn a brown sports jacket but he said he tossed it over
22 the river bank. No such jacket was ever located.

23 **The Murder Weapon or Murder Weapons**

24 Much has been made of the fact that Barry Beach described two murder weapons - a crescent
25 wrench and a tire iron. Dr. Pfaff testified that while it was possible that a crescent wrench made some
26 of the wounds, such could not have made all of the wounds. He also testified that a tire iron could have

1 made some of the wounds, but not all of the wounds. Most importantly, he testified that he could not
2 say with certainty that either of these weapons made any of the wounds. In addition, he never testified
3 that there were in fact two weapons used. It was well known in Poplar that a crescent wrench was used.
4 In addition, the June 19, 1979 FBI report attached as Exhibit 12 as page 2 indicates that initially Dr. Pfaff
5 believed that a tire iron or small light hammer was responsible for the wounds. Page 2 of Exhibit 12
6 indicates: "Autopsy reveals victim died as a result of at least 20 blows to the head with either a tire iron
7 or a small light hammer." Finally, although Ted Nees reported that his crescent wrench was missing,
8 he never reported that the tire iron was missing. Moreover, as a number of witnesses have testified,
9 Becks Sporting Goods in downtown Poplar had a large window display that included a full size crescent
10 wrench along with crime scene photos.

11 Uncorroborated Statements

12 The confession obtained from Barry Beach contained a number of statements that could never
13 be corroborated as being true. These included the following:

14 1. Wiping away of his fingerprints - no fingerprints of Barry Beach were found anywhere inside
15 or outside the pickup truck despite the fact that numerous fingerprints and palm prints were found on
16 both the interior and exterior. In addition, there were no references to finding wipe marks indicating that
17 fingerprints had been wiped from the vehicle. To this day, there remain eleven unidentified fingerprints
18 (five from beer cans, three from inside the truck and three from outside the truck) and four unidentified
19 palm prints, one of which is the bloody palm print on the outside passenger door. Barry's claim that he
20 wiped away his fingerprints seems highly implausible and can't be confirmed.

21 2. Use of a garbage bag - In the confession statement, Barry Beach mentions the use of a garbage
22 bag whereby Kim Nees' body was placed feet first up to her shoulders in a garbage bag and then dragged
23 the 256 feet from the area outside the pickup truck to the riverbank. At the time, Barry Beach weighed
24 approximately 150 pounds. Kim Nees weighed approximately 115 pounds.

25 The claim that the garbage bag explains the lack of blood in the drag trail makes no sense since
26 Barry said Kim was placed inside feet first. Barry would have had a very difficult time dragging Kim's

1 body the 256 feet to the river. Kim as bleeding from the head. According to Barry, her head was not
2 in the bag. Where, then, is the blood? No garbage bag was found nor were any remnants of a garbage
3 bag found anywhere in the crime scene area. The state speculates that the garbage bag may have blown
4 away or floated away in the river. There is no support for this speculation. Of interest is the fact that
5 Louisiana Detective Sgt. Via appears to have discussed a garbage bag with Sheriff Mahlum at some
6 point prior to the January 7th post-confession telephone call for which there is a transcript. On page 1
7 of the January 7th telephone call transcript, the very first time Sgt. Via mentions the garbage bag, he
8 states: "And here's what he says about the garbage bag." Given that there is absolutely no mention of
9 a garbage bag earlier in this transcript, it appears that prior to the recording of this phone conversation,
10 a garbage bag was discussed between Via and Mahlum.

11 **The Location of the Murder Weapons**

12 The state suggests that the confession is reliable because Barry Beach stated that he disposed of
13 the murder weapons in the Poplar River. The Poplar River was dragged and searched approximately one
14 month after the murder at which time a claw hammer was found about 30 feet from the body. Then,
15 after Barry Beach's confession, the Poplar River was searched again two more times. No murder
16 weapons were ever located. While it may be plausible that one or two of the three items - the keys, tire
17 iron and wrench would not be found, it is not plausible that all three would not be found if they had been
18 thrown in the river as Barry stated.

19 **The Keys**

20 As with the location of the murder weapons, Barry Beach indicated that the keys were thrown
21 into the Poplar River. It was well known that the keys had never been located. No keys were found in
22 the river. Thus, this is another aspect of the confession that could not be confirmed.

23 **Public Knowledge About the Details of Kim Nees' Murder**

24 Within hours of the discovery of Kim Nees' body, talk of Kim Nees' murder was widespread
25 throughout the town of Poplar. That talk continued for months and years. Details of the murder were
26 well known to many of the residents of Poplar. A number of the residents gathered to watch police

1 officers as they processed the crime scene. The previously described display at Beck's Sporting Goods
2 included not only a display of a crescent wrench but display of actual crime photos, including a
3 photograph of the truck in its location where Kim Nees was killed and a photograph showing Kim Nees'
4 body in the river. In addition, newspaper articles gave descriptions of the crime, including the fact that
5 Kim Nees had initially been attacked inside the pickup truck and the attack continued outside the pickup
6 truck where she died prior to being placed in the river. One such article which was introduced into
7 evidence at this hearing provided the following factual information as an example of the widespread
8 public knowledge of the case:

9 "Investigation into the case has shown that the attack on Ms. Nees began in the pickup
10 and continued on the ground outside the pickup. After death, Ms. Nees' body was
11 dragged approximately 100 yards and thrown into the Poplar River. Autopsy has shown
that the cause of death was a minimum of 20 blows to the head area with a blunt
weapon."

12 **Failure to Record the Pre-confession Interrogation**

13 A part of the problem with determining the reliability of Barry Beach's confession is not only
14 that numerous facts contained within the confession don't fit the known crime scene facts, but that most
15 of the interrogation of Barry Beach was not recorded and preserved. By the Louisiana detective's own
16 account, the interrogation of Barry Beach began somewhere around 12:30 p.m. on January 7, 1983. The
17 recording of the confession began at approximately 7:08 p.m. The several hours of interrogation prior
18 to that recording are not preserved and thus there is no way to determine the way in which Barry Beach
19 was questioned to determine whether or not he was "fed" factual information.

20 **Louisiana Sgt. Jay Via's and Alfred Calhoun's Reliability and Credibility**

21 Former Louisiana Sgt. Jay Via's credibility is seriously in question as is Alfred Calhoun.
22 Although Sgt. Via claims that he did nothing to either coerce the statement from Barry Beach or "feed"
23 him facts during the interrogation, Via's credibility is suspect. During the hearing, for example, Via
24 claimed that he did not receive any factual information about the crime other than that revealed to him
25 during the January 5, 1983 conversation with Sheriff Mahlum except for a description of the clothing
26 and the suspected weapons used. Via even claimed that the nine points listed in Sheriff Mahlum's

1 January 7, 1983 memorandum were not given to him until after the confession. Via claimed that the
2 10:30 time listed in Sheriff's Mahlum's memorandum referred to 10:30 p.m. in direct contradiction of
3 Sheriff Mahlum's own testimony that he provided the nine points prior to the interrogation of Barry
4 Beach. Another example of Via's credibility problems concern what he claimed he was told from Sheriff
5 Mahlum regarding Barry Beach's polygraph exam results. Via testified that he was told that Barry Beach
6 flunked the polygraph given in Montana and was on the verge of confessing. Via was then confronted
7 with a transcript of the January 5, 1983 phone conversation that he had with Sheriff Mahlum wherein
8 Mahlum indicated:

9 "Did submit to a polygraph but it's inconclusive, the operator felt that he possibly had
10 knowledge of, you know, first hand knowledge about the crime."

11 Question: Right.

12 Answer: But he didn't hit on actually doing it."

13 In response to being confronted with this transcript, Via then claimed that the conversation he
14 testified about must have taken place in another unrecorded call with Sheriff Mahlum.

15 During his hearing testimony, Via was evasive, refused to answer direct questions, and even
16 denied that he had misunderstood the description of Kim Nees' clothing despite the clear transcript
17 reference to the contrary. During the January 7, 1983 post-confession phone call, the transcript shows
18 that Via said to Mahlum: "You said she had on a brown, plaid shirt." When confronted with this
19 statement in the transcript, Via claimed that the "you" he was referring to Barry Beach which is an
20 absurd statement since he was in the process of speaking with Sheriff Mahlum.

21 It was interesting that Sgt. Via testified at Barry's trial that Barry was excluded from the
22 Louisiana murders because the facts that Via claimed he received from Paul Kidd didn't fit the crime
23 scene or the crime. (Trial Trans. p.768). However, Via in his January 26, 1983 report claimed that Barry
24 Beach flunked the psychological stress test with regard to Kathy Wharton and exhibited the same
25 mannerisms as he had prior to the Kim Nees confession.

1 The manner in which Sgt. Via and Alfred Calhoun interrogated Barry Beach is not corroborated
2 because it was not recorded. Nevertheless, Sgt. Via's own report indicates that they were able to get
3 Barry Beach to "break down," and that Sgt. Via told Sheriff Mahlum that he, Sgt. Via, lost his voice, that
4 and Calhoun were "tired men," and that Barry Beach was unaware of where he was.

5 The testimony of Via and Calhoun that Barry confessed two to three times in front of his own
6 lawyer, Paul Kidd, was directly contradicted by Paul Kidd. All of the above creates serious concerns
7 regarding the credibility of Jay Via and Alfred Calhoun both in their testimony before this Board and
8 at the time of Barry Beach's trial.

9 **Maria Jansen**

10 Maria Jansen was a dispatcher for the Roosevelt County Sheriff's Office in 1983. She was on
11 duty during the shift during which Jay Via was constantly calling and speaking with Sheriff Mahlum
12 during the interrogation of Barry Beach. Maria Jansen is the daughter of a sheriff who died in office
13 and was replaced by Sheriff Don Carpenter. Maria Jansen testified that during her shift, there were over
14 ten phone calls from Jay Via to Sheriff Mahlum during the interrogation of Barry Beach. This testimony
15 directly contradicts both the testimony of Sheriff Mahlum and the testimony of Jay Via regarding the
16 amount of communication going back and forth during the interrogation of Barry Beach. This is
17 significant because Jay Via maintained that he didn't have many of the details regarding the Kim Nees
18 murder. The number of phone calls with Sheriff Mahlum belie this claim.

19 **The Henry Lucas - Otis Toole Confessions**

20 As a further indication of Sgt. Via's lack of credibility, one only needs to look at the Otis Toole
21 Henry Lucas confessions obtained from Via with regard to the murder of Kathy Wharton. Six months
22 after Barry Beach was questioned about the Kathy Wharton murder and six months after Via claimed
23 that Barry Beach had flunked a psychological stress evaluation test with regard to the murder of Kathy
24 Wharton, Via extracted detailed confessions and Toole and Lucas. Toole and Lucas were separated by
25 over 1,000 miles with Lucas in Texas and Toole in Florida at the time of the confessions. Via described
26 these confessions as so detailed, that only the killer could have known the facts that Lucas and Toole

1 revealed. At the hearing before this Board, Via claimed he was “92% to 95% certain” that the
2 confessions from Lucas and Toole were valid. Via now admits that those confessions were in fact false.
3 Via had no choice but to admit the falsity of these confessions given the new DNA evidence linking
4 another suspect to this crime. One has to wonder how both Lucas and Toole could have so many details
5 about a crime with which they were not involved.

6 **Testimony of Former Prosecuting Attorney Mark Racicot**

7 Mr. Racicot testified with regard to his personal opinion that Barry Beach was guilty and that the
8 confession was valid. When pressed, however, Mr. Racicot could only speak in generalities. Racicot
9 refused to admit that misconduct occurred when he told the jury in his opening statement that the pubic
10 hair located on the sweater “was in fact the defendant’s” even though no competent forensic hair
11 examiner could have testified to any more than that Barry Beach’s hair shared common characteristics
12 with the hair found on the sweater. Racicot then amazingly denied any knowledge of former forensic
13 scientist Arnold Melnikoff’s having been discredited. Racicot said he didn’t rely on rumor and gossip.
14 The exoneration of Jimmy Bromgard is neither rumor or gossip and is clear evidence of Melnikoff’s
15 incompetence. Racicot then dismissed any concern with regard to his telling the jury that he didn’t know
16 where the towel was found or whether it was even found in Poplar. Mr. Racicot denied knowledge that
17 a June 19, 1983 FBI report shows that the towel was found on the morning of the murder approximately
18 one block from the victim’s house. This is the same towel that Sheriff Mahlum at one point described
19 as having Kim’s hair on it. Mr. Racicot also denied any misstatement with regard to the bloody palm
20 print found on the vehicle when he told the jury that the palm print was probably Kim Nees’.

21 Mark Racicot’s misstatements to the jury were numerous. Not only did he exaggerate the hair
22 analysis done by Arnold Melnikoff and then failed to introduce this hair evidence, and not only did he
23 tell the jury he didn’t know where the towel was found or when it was found despite the FBI report to
24 the contrary, but he also told the jury that Barry Beach placed Kim Nees head first into the garbage bag
25 (Trial Trans. p.898), when of course Barry Beach’s confession clearly indicated in his claim that he
26 placed her feet first. Racicot also told the jury that “Ted Nees testified that the tire iron was missing.”

1 (Trial Trans. p.898) when in fact Ted Nees testified at trial that "I didn't remember it being missing."
2 (P.544).

3 The combination of prosecuting attorney Racicot's misstatements to the jury prejudiced Barry
4 Beach's right to a fair trial. It misled the jury into believing there was forensic evidence when there was
5 none and misled the jury into believing that other evidence was completely insignificant. Indeed, Mr.
6 Racicot told the jury that the forensic evidence including the bloody fingerprint on the interior of the
7 pickup, the footprints, the fingerprints and blood evidence "didn't provide a clue as to who killed
8 Kimberly Nees." (Trial Trans. p.887). He told the jury that this forensic evidence "means nothing."
9 (Trial Trans. p.887).

10 Mr. Racicot's misstatements to the jury exacerbated the prejudice to Barry Beach at his trial. No
11 jury could have ignored the reference to the pubic hair and no jury could have disregarded all of Mr.
12 Racicot's other misstatements. The fact that Mr. Racicot refuses to acknowledge the misconduct does
13 not make that misconduct less egregious.

14 **The Attorney General's Fear of Identifying the Bloody Palm Print**

15 Prior to the initiation of this hearing, Mr. Beach's counsel requested that the Attorney General
16 seek to have the bloody palm print re-compared with Kim Nees' palm print to once and for all put to rest
17 any speculation that this palm print could possibly belong to Kim Nees. Instead, the Attorney General
18 indicated they would stipulate for purposes of the hearing that the palm print had not been identified as
19 having come from Kim Nees. Then during the hearing, through the testimony of former Sheriff Mahlum
20 and Mr. Racicot, it was again argued by the Attorney General that this palm print could still belong to
21 Kim Nees because she had not been "eliminated." Former Sheriff Grainger's testimony was crystal
22 clear. He recognized that the palm print did not belong to Kim Nees. The 1988 FBI report is equally
23 clear that Kim Nees' palm print was compared and not identified as consistent with the bloody palm
24 print. Any claim that Kim Nees' left palm print was not properly taken during the autopsy is also false.
25 Three of Kim Nees' left palm prints were identified on the vehicle as is reported in the July 12, 1979
26 report. This could not have happened if her palm print had not been clearly taken and preserved.

1 As a fall-back position, given the frailty of its argument that the palm print may still belong to
2 Kim Nees, the state speculates that a third person may have come upon the crime scene after the murder
3 but before its discovery, touched some blood soaked object and then left a bloody palm print on the
4 exterior passenger side of the truck. Not one witness has ever come forward and testified to either being
5 present at the crime scene or knowing of another person who was present and left that palm print. The
6 state has concocted this theory to try to explain away one of the most important pieces of forensic
7 evidence in this case. The importance of the palm print is demonstrated by the fact that on numerous
8 occasions after the murder, Sheriff Mahlum sent in various suspect palm prints to be compared to the
9 bloody palm print. On at least one occasion, even after Barry Beach had confessed, Sheriff Mahlum
10 again requested a comparison be made against the bloody palm print. In his requests to compare the
11 palm print, Sheriff Mahlum repeatedly wrote: "We would be particularly interested in the bloody palm
12 print recovered from the passenger door."

13 Early on, the FBI recognized the importance of this palm print. In the 6/19/79 report, the FBI
14 concluded at page 6: "The bloody palm print that is located on the passenger door would have to have
15 been left by the unsub." Unsub stands for unidentified subject.

16 The importance of the bloody palm print on the exterior door of the passenger side of the pickup
17 truck is evident when the blood evidence from the interior of the truck is closely examined. Centurion
18 Ministries engaged Stewart James, a forensic consultant to examine the crime scene photographs,
19 diagrams, crime scene reports, autopsy report, hair analysis, fingerprint reports and serology reports.
20 After conducting this examination, Stewart James concluded that:

21 "The area of blood transfer on the right vertical edge of the passenger seat indicates that
22 the victim exited the pickup truck from the passenger side door. There is no evidence
of blood transfer that would support a conclusion of her exiting the driver's side door."

23 Stewart James went on to state:

24 "Additional physical activity occurred outside the passenger side of the pickup. This is
25 supported by the presence of projected blood stains near the attachment of the mirror on
the passenger side of the bed of the pickup truck."

1 It is clear that whoever dragged Kimberly Nees across the seat of the pickup truck and out the
2 passenger door was also involved in closing the passenger door, thus most probably leaving their left
3 palm print on the door.

4 **Dean Mahlum**

5 Dean Mahlum was the newly elected sheriff in January of 1983. He was a deputy sheriff in 1979
6 when the crime scene was examined although he was never present at the crime scene when it was
7 processed. Bobby Atkinson testified that it may have been Dean Mahlum who was present when he
8 discovered the break in to the evidence room at the Poplar Police Department, although Mahlum does
9 not recall this.

10 Mahlum confirmed that foot prints were found in the drag trail leading toward the pickup truck
11 including one set of barefoot prints and two different sets of foot wear. Mahlum confirms that the
12 identity of the person or persons who left the footprints were never discovered.

13 Mahlum recalled that a towel was recovered on the morning that the crime was discovered.
14 Mahlum in fact believed that Kim Nees' own hair was found on the towel based on Mahlum's own
15 investigation notes. Exhibit 12, the FBI crime scene report dated June 19, 1979 indicates at page 4:
16 "It should be noted that an extremely bloody towel was found on a fence one block away from victim's
17 home."

18 Sheriff Mahlum speculated that very little, if any, blood was found between the pickup truck and
19 the edge of the riverbank because of the use of a garbage bag. Logically, however, Sheriff Mahlum's
20 speculation is just that. Barry Beach's description of the use of the garbage bag did not involve Kim
21 Nees' head being covered and thus even with a garbage bag, more blood should have been found on the
22 drag trail. More likely, very little, if any, blood was found, not because of a garbage bag because
23 multiple people helped carry Kim to the river or because Kim was wrapped in something other than a
24 garbage bag. In either case, Barry Beach's version does not fit or explain the lack of blood on the drag
25 trail.

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Testimony of Barry Beach

Barry Beach testified on his own behalf before this Board. He did not testify at his trial. The only time that Barry Beach has previously testified was during a suppression hearing at which time he was asked very limited questions by his attorney concerning his arrest in Louisiana during an interrogation that took place on January 7, 1983. During the suppression hearing testimony, the only questions that Barry Beach was asked was the time that the interview commenced, whether or not he had anything to eat during the period of the interrogation and whether there were any threats made to him by Mr. Calhoun. The entire direct testimony lasted only three pages. Mr. Beach's attorney then objected to most of the questions asked on cross examination. He was not asked anything about his whereabouts on the evening or early morning hours of June 15/16, 1979, nor was he asked anything about the content of the confession.

With regard to his failure to testify during his trial, Barry Beach was at the time approximately 21 years old and had never before been through a trial. It is clear that Barry Beach received strong advice from his attorney not to testify and he interpreted that advice as his attorney prohibiting him from testifying. It is not surprising that a 21 year old young man on trial for deliberate homicide would accept

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1 the advice of his attorney regarding whether or not he should testify despite his own personal strong
2 desire to testify.

3 Barry Beach testified that during the course of the several hour interrogation by the Louisiana
4 police officers, he was alternately threatened and manipulated and literally worn down until he “broke
5 weak” as he stated ultimately leading to him giving a confession because of his desire to get away from
6 the Louisiana police officers.

7 The intensity of the interrogation that Barry described is confirmed by the transcript of Sgt. Via’s
8 testimony with Sheriff Mahlum immediately after the confession was obtained when Sgt. Via described
9 the fact that he himself was tired, “we’re tired men,” that he, Sgt. Via, had lost his voice, “right now, I
10 lost my voice and everything else but we’re still kicking (page 9). The detectives used a psychological
11 stress evaluation test as an interrogation tool, “then we ran him on what’s called a truth versus lie where
12 you tell the absolute truth the first time and the second time you tell an absolute lie. And he bomb the
13 shit out of that. Then we went in and started interviewing him til he broke down...”. Barry Beach had
14 reached the point where he wasn’t even aware of what was going on. “We’re not going to bring that -
15 he’s not even aware right now at all.” Barry was worn down and just wanted to escape from that
16 Louisiana interrogation room. He then apparently gave the detectives what they wanted to hear - a
17 detailed confession. The only problem was the details - most were wrong.

18 **Barbara Salanda**

19 Barry Beach’s sister, Barbara Salanda, testified before this Board regarding the events of June
20 15, 1979 and the early morning hours of June 16th. She had a clear recollection that she and her mother
21 returned home before 6:00 p.m. from the hospital where her brother, Bradley, was having his appendix
22 removed. At that time, not seeing her brother Barry’s car in the driveway, she and her mother assumed
23 that Barry was not home. (Barry’s car had broken down when it was stuck at Sandy Beach earlier in the
24 day.) Barbara testified that when it did not appear that Barry was at home, she and her mother went out
25 looking for Barry for a period of time and then returned home. Her mother, whose bedroom was
26 downstairs on the main floor of the house, then went off to bed. Barbara stayed up watching t.v. until

1 approximately 12:30 and then read for a while. She then went upstairs for the first time that evening and
2 saw that Barry was in fact in his bedroom laying in a t-shirt and his gym shorts. She did not hear Barry
3 wake up and leave the house that evening. The next morning, she was present when Barry came
4 downstairs. Barry then went with his grandmother to his uncle's ranch to go branding. Later in the
5 morning, Barbara heard about Kim Nees' death and went out to the ranch and told the boys who were
6 working at the ranch, including Barry that Kim Nees had been found beaten to death.

7 Barbara Salanda was both a clear factual witness and an emotional witness. She testified that
8 she told the same story to a number of Barry's attorneys, including his trial lawyer who advised that he
9 would not call her to testify because, since she was Barry Beach's sister, her testimony would be
10 discredited. She also testified that she told the same story to Sheriff Dean Mahlum.

11 The Attorney General had the opportunity to recall Sheriff Mahlum to respond to Barbara
12 Salanda's testimony, but chose not to do so after first indicating that they would be calling Sheriff
13 Mahlum as a rebuttal witness. The failure to recall Sheriff Mahlum lends credibility to Barbara
14 Salanda's testimony that she had in fact told Sheriff Mahlum that she saw Barry at home that evening.

15 Conclusion

16 For nearly one-quarter century, Barry Beach has sat in prison for a murder he did not commit.
17 The sole evidence against Barry Beach was a seriously flawed confession. The crime scene contained
18 many clues to the identity of the perpetrators, including the bloody palm print and still unidentified
19 fingerprints and footprints.

20 An array of credible new witnesses have now come forward despite their own personal fears and
21 hardships including Judy Grayhawk, J.D. Atkinson, Carl Four Star, Vonnie Brown, Marie Decker,
22 Bobby Ryan, Richard Holen and Dun O'Connor. Each witness came forward separately and
23 independently of each other at great inconvenience and under very stressful conditions. None of these
24 witnesses have received any benefit to themselves. This Board would have to disbelieve each and
25 everyone of these witnesses in order to make a finding that Barry Beach has not proven his innocence.

1 New evidence makes it clear Kim Nees was killed, not by Barry Beach, but by a group of
2 vengeful girls who lured her to the park and attacked her.

3 Barry Beach's conviction was based on a completely uncorroborated confession. An
4 examination of the confession calls its reliability into serious question both based on the content of the
5 confession and based on the conduct and credibility of the Louisiana detectives who took that
6 confession.

7 Based on all of the foregoing, it is requested that the Board recommend to the Governor of the
8 State of Montana that Barry Beach be granted clemency for his conviction for the murder of Kimberly
9 Ann Nees.

10 DATED this 20th day of June, 2007.

11 Respectfully submitted,

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14 Peter A. Camiel
15 Attorney for Barry Beach
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