MONTANA SUPREME COURT

STATE OF MONTANA, Plaintiff and Appellee, v. BARRY BEACH, Defendant and Appellant.	Case No. DA 08-0244

APPELLANT'S REPLY BRIEF

ON APPEAL FROM: the District Court of the Fifteenth Judicial District , in and for the County of Roosevelt, Cause No. 1068-C, from the District Court's Order dismissing Defendant's Petition for Postconviction Relief, dated March 28, 2008, the Honorable David Cybulski, District Judge, presiding.

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SUMMARY OF ARGUMENT IN REPLY

In its response brief, the State maintains its position that Beach's time to file a petition for postconviction relief expired in 1989, and that, as a result, Beach must satisfy the "actual innocence" standard in order for his petition to be considered.

The State attempts to refute Beach's other arguments primarily by asserting that the District Court must have agreed with the analysis set forth in the State's brief in support of its motion to dismiss, and therefore its analysis must have been correct. As the State notes, however, the District Court's order was almost entirely devoid of analysis - it did not cite a single case or statute. As a result, it is impossible to know for sure what sort of analysis the Court engaged in before denying Beach's petition.

Finally, the State candidly concedes that it erroneously lost or disposed of the one bit of evidence which might exonerate Beach through D.N.A. analysis, the hair found on Kim Nees's sweater. The "ethically-bound State prosecutors" told the jury during opening statements that this was a pubic hair belonging to Beach, and mentioned the hair again in closing arguments, but failed to present any evidence to support this at trial. No curative instruction was given. The State's

position that its own negligent failure to preserve evidence in a capital case should not be considered is without authority and should be rejected.

I. THE DISTRICT COURT ERRED IN DENYING THE DEFENDANT-APPELLANT'S PETITION ON THE BASIS OF TIMELINESS.

In its brief, the State argues strenuously that the current version of M.C.A. Section 46-21-102(2) does not apply to Beach's instant petition, and that Beach's 2008 Petition for Postconviction Relief ("Petition") is thus time-barred under the 1983 version of the applicable statute of limitations. As Beach noted in his opening brief, this proposition is fatally flawed.

A. If the State's theory is correct, Beach would have no proper legal remedy.

Until Section 46-21-102(2) was added by the Montana State Legislature in 1997, there was no codified legal remedy applicable to cases like Beach's, wherein a convicted individual discovers new exonerating evidence more than five years after his or her conviction became final. Before 1997, a petition for postconviction relief could technically only be timely if it was filed within five years of the conviction.

In the amendment which altered Subsection 1 and added Subsection 2, the Montana Legislature also included a section specifying that the changes would only affect defendants convicted after April of 1996 (at the earliest). While its

intent is ultimately indiscernible, it seems likely the Legislature had Subsection 1 in mind when it added this provision, and simply wished to protect those whose convictions became final while the old statute of limitations was in effect. This addendum ensured, for example, that a defendant whose conviction became final in 1995 could file a timely petition for postconviction relief until 2000, and not be negatively affected by the 1997 amendment to Subsection 1. The Legislature did not explicitly say that its new statute of limitations set forth in Subsection 2 regarding petitions filed on the basis of newly-discovered evidence only applied prospectively.

As a result, a petitioner like Beach would be forced to show that his petition satisfied an exception to the statute of limitations carved out by Montana Supreme Court case law. The case law on these exceptions crafted by the Supreme Court between 1981 and 1997 is confusing, convoluted, and occasionally self-contradictory, as this Court noted in State v. Gollehon, 274 Mont. 116, 906 P.2d 697 (1995). In 1997, the addition of Subsection 2 eliminated the need for judicially-created exceptions in cases where an individual filed a petition promptly after discovering new evidence, which is what Beach did. Under the new statutory time frame, Beach's petition was undisputedly timely.

The State's argument that the 1997 amendments should not apply to Beach's petition is premised upon the assumption that this legislation actually "amended" the statute. Strictly speaking, the legislation was only truly an "amendment" to the affect that it altered M.C.A. Section 46-2-102(1); in terms of Subsection 2, this legislation really served to create a new statute of limitations applicable to cases involving newly-discovered evidence. Subsection 2 addresses an issue on which the state's statutory law was previously silent and on which state case law was unclear.

Beach respectfully submits that he could not have filed his petition by 1989, within the time frame suggested by the 1985 version of the statute, nor has the State made the argument that he could have. Yet the State and the District Court seem to have adopted the position that he should have filed his petition by 1989, even though he did not learn of the exonerating evidence until years later.

What, then, would be the appropriate statute of limitations to apply in this case? There must be some period in which Beach could have timely filed this petition. If it was untimely when filed less than a year after he learned of the new evidence, when would it have been timely? The State and the District Court have imposed on the defendant a statute of limitations that he could not meet and then denied his petition because he did not meet it.

This Court should not allow it.

B. The statute of limitations set forth in M.C.A. Section 46-21-102(2) (2007) applies to this petition.

The State concedes that the Court generally 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. State's Brief, pg. 14, p. 1; see Hawkins v. Mahoney, 294 Mont. 124, 127, 979 P.2d 697, 699 (1999); State v. Carson, 311 Mont. 485, 489, 56 P.3d 844, 846 (2002); Sanchez v. State, 319 Mont. 226, 229, 86 P.3d 1, 2 (2004). The State argues, however, that this rule does not apply to Beach's petition because the Legislature specified that its 1997 amendments to the statute only applied to convictions which became final after 1996 (at the earliest).

1. The authority cited by the State is not controlling.

However, the State fails to cite any authority other than the legislative amendment itself which might support its position. The cases cited by the State in support of its argument are all distinguishable from the case at bar, and none of them involve petitions for postconviction relief based on newly-discovered evidence. Beach's case appears to be one of first impression, with no truly binding legal precedent.

Morrison v. Mahoney, one authority cited by the State, involved a petition for habeas corpus filed by Morrison on the grounds that his sentence had been illegally enhanced. Morrison, 308 Mont. 196, 41 P.3d 320 (2002). Morrison's petition was treated as a petition for postconviction relief, the District Court denied it, and the Supreme Court affirmed. In its decision, the Morrison Court recognized this Court's general rule: "In determining whether a petition for postconviction relief is timely, we generally look to the statute of limitations in effect at the time the petition was filed." Morrison, 199, 322. The Court also acknowledged the 1997 Legislature's specification that its amendments not apply in cases wherein the petitioner's conviction became final before April 1996. Morrison, ibid. Morrison is an individual who that specification might have protected, but his petition was still untimely as his conviction became final in 1993.

Morrison is similar to this case in that the petitioner was also convicted prior to the enactment of the 1997 amendments. The crucial difference, which the State overlooks, is that Morrison did not allege the existence of newly-discovered evidence under Section 46-21-102(2). Beach does. Morrison is distinguishable from this case in that regard and should not be held as binding precedent.

State v. Nichols, like Morrison, involved a petition on the grounds that the defendant's sentence had been improperly enhanced. Nichols, 295 Mont. 489, 986 P.2d 1093 (1999). Nichols argued that the statutory time bar should be disregarded on the basis of the "clear miscarriage of justice" exception articulated by this Court in State v. Perry (232 Mont. 455, 758 P.2d 268 (1988)), but he did not argue that he had discovered new evidence or that he was actually innocent. Nichols, 494, 1097. As in Morrison, the failure of the defendant in Nichols to allege the discovery of new evidence under Section 46-21-102(2) or to allege his actual innocence distinguishes that case from the matter at hand.

Hawkins v. Mahoney is similarly distinguishable from the case here. Hawkins, 294 Mont. 124, 979 P.2d 697 (1999). Hawkins involved a defendant convicted in 1993 who later filed a petition for postconviction relief on the basis of "newly-discovered mitigating evidence." Hawkins, 127, 699. Hawkins, like Morrison and Nichols, did not allege the existence of newly-discovered evidence which would tend to show his innocence; Hawkins only alleged the existence of new evidence which showed his particular frame of mind at the time of committing the offense. Furthermore, the Court found that Hawkins's "new evidence" was actually available at the time of trial. Hawkins, 128, 699.

Finally, the State also cites prior litigation involving this defendant as support for its position that Beach's instant petition is time-barred. State's Brief, pg. 13, p. 2. In Beach v. Day, this Court dismissed Beach's petition on the basis of its timeliness and on other procedural grounds. Beach II, 275 Mont. 370, 913 P.2d 622 (1996). The State now incorrectly infers that Beach's present petition must also be time-barred. However, Beach's present petition and the one discussed in Beach II were filed upon different grounds. The Beach II Court noted that Beach's 1995 petition did not offer any new evidence. Beach II, 624. His 2008 petition does. This difference is of the utmost importance.

2. The State misapprehends the impact of Sanchez v. State and Oatman v. State on the case at bar.

According to the State, Paragraph 10 of Sanchez v. State shows that "the Legislature effectively codified this Court's 'miscarriage of justice' precedent." State's Brief, pg. 15, p. 2; Sanchez, 319 Mont. 226, 86 P.3d 1 (2004). In fact, nothing in that paragraph indicates as much. The State essentially conflates two separate lines of cases: those involving pre-1997 petitions (the progeny of State v. Perry, 232 Mont. 455, 758 P.2d 268 (1988)), and those filed under M.C.A. Section 46-21-102(2).

Under Subsection 2 of the current statute of limitations, a defendant does not have to prove a "clear miscarriage of justice" as he would have had to do under Perry. (Furthermore, as the State notes, the Gollehon court recognized that Perry was "unique on its facts." State's Brief, pg. 15.) The 1997 amendments to the statute of limitations may have been, and perhaps even likely were, a reaction to the existing case law on the issue, but it is an oversimplification on the State's part to call the amendments a "codification" of case law.

The State further misstates the proposition for which Beach cited Oatman v. State, 324 Mont. 472, 104 P.3d 1048 (2004). Beach does not cite Oatman for the standard applied therein to determine the adequacy of Oatman's new evidence, but because the Oatman Court did not bar Oatman's petition on the basis of timeliness. Instead, it considered Oatman's petition on the merits - the same thing Beach asked the District Court to do in this case.

Beach's petition was timely under M.C.A. Section 46-21-102(2) (2007), and it was reversible error for the District Court to dismiss it as untimely.

II. THE DISTRICT COURT ERRED IN DISMISSING BEACH'S PETITION ON PROCEDURAL GROUNDS.

In its reply brief, the State correctly notes that the District Court's order did not contain a significant amount of analysis explaining its decision. Because the

District Court ruled that Beach's petition was "procedurally barred," the State assumes that the District Court agreed with its analysis and found Beach's petition barred under M.C.A. Section 46-21-105. There is nothing in the Court's order, however, which indicates its reasoning for finding Beach's petition "procedurally barred."

Regardless of the District Court's grounds for finding a procedural bar against Beach's petition, the petition was not properly barred by either Section 46-21-104 or Section 46-21-105. The evidence raised by Beach in this petition could not have been raised at an earlier date, either in an earlier petition or on direct appeal, because all of the evidence was discovered on or after January 19, 2007. If that was the reasoning behind the District Court's decision, the District Court was in error.

III. THE STATUTE OF LIMITATIONS APPLICABLE TO POST-CONVICTION RELIEF PETITIONS HAS NOT BEEN CONSISTENTLY APPLIED.

The State cites nothing in its response brief to show that the statute of limitations upon which it relies in opposing Beach's petition has been applied regularly and consistently. As set forth in Beach's opening brief, it has not been.

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IV. THE DISTRICT COURT APPLIED AN INAPPROPRIATE LEGAL STANDARD FOR DETERMINING WHETHER BEACH'S NEWLY-DISCOVERED EVIDENCE MERITS POSTCONVICTION RELIEF.

The State concedes that the Clark-Crosby test outlined in Beach's 2008 Petition and in his opening brief herein is the appropriate measure to determine whether postconviction relief is warranted in a case involving newly-discovered evidence. State's Brief, pg. 21. But, the State argues, even though Beach's petition was filed less than one year after the new evidence was discovered, Beach's petition is nevertheless subject to the "miscarriage of justice" standard outlined by this Court in State v. Redcrow, 294 Mont. 252, 980 P.2d 622 (1999).[1]

As the State acknowledges, this issue hinges on the Court's determination as to the applicable statute of limitations. If the Court finds, as it must, that Beach's petition was timely filed, then the Court must also find that the proper legal standard for evaluating Beach's new evidence is found in the Clark-Crosby test outlined in the petition and opening brief filed herein.

The State further claims that "even under [the Clark-Crosby] test, however, the district court's assessment of Beach's proffered evidence would remain

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[1] The State's claim that Beach knew of the new evidence "much earlier" than January 2007 is completely baseless and without merit. State's Brief, pg. 12, p. 1. The State has cited no evidence to back up this claim. In his petition, Beach does reference other evidence, of which he admittedly knew earlier than January 2007, but he has not argued that this evidence can be considered under the same standard as the evidence discovered after January 19, 2007.

unchanged." State's Brief, pg. 21, p. 2. This assertion is merely a statement of the State's opinion. The District Court clearly applied an inappropriate standard, and it is impossible to know what the result might have been had the District Court heard the evidence and applied the proper standard.

V. THE DISTRICT COURT ERRED IN RULING THAT BEACH'S EVIDENCE FAILED TO OPEN THE ACTUAL INNOCENCE GATEWAY.

In its response brief, the State fails to make any new counter-arguments against the opening of the "actual innocence gateway" pursuant to State v. Pope, 318 Mont. 383, 80 P.3d 1232 (2003). The State is incorrect, however, in its assertion that Pope is distinguishable from the case at bar on the basis that Beach made a confession and Pope did not. Pope did, in fact, confess to law enforcement pursuant to a plea agreement. Pope, 386, 1235. His confession was inadmissible after the judge rejected the terms of his plea agreement. Despite this minor difference, this case is analogous to Pope, and the Court should consider Beach's constitutional claims.

VI. THE DISTRICT COURT SHOULD HAVE HELD AN EVIDENTIARY HEARING BEFORE RULING ON BEACH'S PETITION.

It was an abuse of discretion for the District Court to deny Beach's petition without first holding an evidentiary hearing. The State cites authority defining an

"abuse of discretion" as occurring only "when the district court acted arbitrarily without the employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice." State v. Wilson, 340 Mont. 191, 196, 172 P.3d 1264, 1268 (2007).

The State argues that Crosby v. State has no application here because Crosby involved a witness who later recanted her testimony, and this case involves no recantations. State's Brief, pg. 24; Crosby, 332 Mont. 460, 139 P.3d 832 (2006). But the main thrust of the Crosby decision is exactly on point: "the court does not pass on the ultimate truthfulness of the recanting testimony; rather, provided the five Clark factors are satisfied, the court leaves this determination to the fact-finder on retrial." Crosby, ibid, 465, 835.

In Crosby, the District Court made a ruling on the truthfulness of the recantation after a hearing. Here the District Court made an implicit finding that the exonerating testimony was untrue without even hearing it. This was clearly an abuse of discretion, even under the definition of "abuse of discretion" put forth by the State. State's Brief, pg. 23.

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VII. FULFILLMENT OF PROSECUTORIAL DUTY IS NOT A VALID BASIS FOR DENYING A PETITION FOR POSTCONVICTION RELIEF.

The State asserts that the District Court did not use the alleged fulfillment of its prosecutorial duty as a legal basis for the ruling. Yet the District Court's Order devotes too much space to lauding theoretical prosecutor nobility for this not to have formed at least a partial basis for its decision. While a prosecutor certainly does have a duty to seek justice, the State makes no argument that this is in fact a proper legal basis for the Court's decision, and indeed it is not.

CONCLUSION

For all of the foregoing reasons, the defendant-appellant, Barry Beach, respectfully requests this Court reverse the District Court's decision and remand this case with instructions to grant Beach's petition.

RESPECTFULLY SUBMITTED this 19 day of September, 2008.

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CERTIFICATE OF SERVICE

I, Brenda Redfield, hereby certify that I served the foregoing Appellant's Reply Brief by depositing a true and correct copy of the same in the United States Mail, postage prepaid, to:

Attorney General Mike McGrath
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Date: 9-19-08

Brenda Redfield

I, Brenda Redfield, hereby certify that I served the foregoing Appellant's Reply Brief by hand delivery to:

Ryan Rusche
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Date: 9-19-08

Brenda Redfield

MONTANA SUPREME COURT

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed in Times New Roman front, with proportionally spaced typeface of 14 points, is double spaced except for footnotes and quoted and indented material, is 14 pages and has 2,963 words as counted by the attorney's word processing software, excluding table of contents, table of citations, certificate of service, certificate of compliance and addendum, if any.

Dated this 19 day of September, 2008.

Terrance L. Toavs