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8

9 MONTANA 15<sup>th</sup> JUDICIAL DISTRICT COURT, ROOSEVELT COUNTY

10

STATE OF MONTANA,

11

Plaintiff,

12

-vs-

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BARRY ALLAN BEACH,

14

Defendant.

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17 COMES NOW the defendant/petitioner, Barry Allan Beach, by  
18 and through his attorneys of record, to respectfully submit this  
19 memorandum of points and authorities in support of his petition  
20 for post-conviction relief.

21 Evidence has been discovered within the past one year which  
22 demonstrates Mr. Beach did not commit the crime of which he was  
23 convicted. This new evidence, particularly in light of the  
24 serious errors and weaknesses in the government's case, warrant a  
25 new trial.

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1 I.

2 INTRODUCTION

3 The sole evidence used to convict Barry Beach at trial was  
4 an alleged confession given by Mr. Beach in January of 1983, in  
5 Ouachita Parish, Louisiana. No physical or forensic evidence  
6 connects Mr. Beach to the crime. No eye-witness testimony  
7 connects Mr. Beach to the crime. The prosecution did not  
8 identify or call any witnesses who saw Mr. Beach at all that  
9 night - with or without Kimberly Nees. The prosecution did not  
10 introduce any physical or forensic evidence which connects Beach  
11 to the murder.

12 The only witnesses called by the prosecution who linked Mr.  
13 Beach with the incident were two Louisiana detectives who  
14 testified Beach confessed after extensive custodial  
15 interrogation.

16 Experience and research show that in more than 25% of DNA  
17 exoneration cases, innocent defendants made incriminating  
18 statements, delivered outright confessions or pled guilty.  
19 (Innocence Project Analysis of 210 DNA exonerations.) Since the  
20 late 1980's, numerous studies have documented hundreds of false  
21 confessions. (See e.g. Hugo A. Bedau & Michael L. Radelet,  
22 Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L.  
23 Rev. 21-179(1987); Richard A. Leo & Richard Ofshe, The  
24 Consequences of False Confessions; Deprivations of Liberty and  
25 Miscarriages of Justice in the Age of Psychological  
26 Interrogation, 88 Crim. Law & Criminology 429-496 (1998); Brandon  
27 Garrett, Judging Innocence, forthcoming in Colum L. Rev. (2008);  
28 Robert Warden, The Role of False Confessions in Illinois Wrongful

1 Murder Convictions Since 1970 (Center on Wrongful Convictions  
2 Research Report 2003); Steven Drizin & Richard Leo, The Problem  
3 of False Confessions in the Post-DNA World, 82 N.C.L. Rev. 891-  
4 1007 (2004); Samuel Gross, Kirsten Jacoby, Daniel Matheson,  
5 Nicholas Montgomery & Sumate Patil, Exonerations in the United  
6 States, 1989 Through 2003, 95 J. Crim L. & Criminology 523-553  
7 (2005). Any number of factors can contribute to a false  
8 confession during a police interrogation, including but not  
9 limited to ignorance of the law, the threat of a harsh sentence  
10 and misunderstanding the situation. (Id.)

11 Even mentally capable adults give false confessions due to a  
12 variety of factors such as the length of interrogation,  
13 exhaustion, hopelessness, and/or a belief that they can be  
14 released after confessing and prove their innocence later. (Id.;  
15 See also Testimony of Dr. Richard Leo, June 13, 2007, p.14.)

16 In the case at bench, Barry Beach was detained and  
17 interrogated in Louisiana by three different officers for over  
18 seven (unrecorded) hours before he provided the tape-recorded  
19 statement used to convict him at trial. Both before and after  
20 this statement, he has maintained his innocence.

21 Beach's statement provided after lengthy interrogation is  
22 not reliable. While it contains some details concerning the case  
23 it also contradicts basic known facts about the crime. Further,  
24 case-specific details concerning the murder were known and  
25 publicized for years before Beach's detention or arrest.

26 While Mr. Beach has done what he can to gather DNA evidence  
27 to support his innocence, no helpful DNA testing can be conducted  
28 because the State has inexplicably failed to preserve portions of

1 the case file.

2 Nevertheless, a secret like the Nees murder is a hard thing  
3 to keep quiet forever, especially in a small town like Poplar,  
4 Montana. Within the past year, several people have come forward  
5 with admissible evidence which supports Mr. Beach's innocence,  
6 casts serious additional doubts upon his confession, and requires  
7 a new trial.

8 The petition for post-conviction relief should be granted.

9 **II.**

10 **NEWLY DISCOVERED EVIDENCE REQUIRES**  
11 **THE COURT GRANT A NEW TRIAL**

12 To prevail on a motion for new trial on the basis of newly  
13 discovered evidence, the defendant must satisfy a five-part test  
14 outlined by the Montana Supreme Court in State v. Clark, 2005 MT.  
15 330, 330 MT. 8, 125 P.3d 1099 (2005). The new evidence contained  
16 in Exhibits 1-8 and 10-13 satisfies this test and is admissible,  
17 either in the form of the current exhibits or as sworn testimony  
18 at trial.

19 The Clark test sets forth the following requirements:

- 20 1) The evidence must have been discovered since the  
21 defendant's trial;
- 22 2) The failure to discover the evidence sooner must not be  
23 the result of lack of diligence on the defendant's  
24 part;
- 25 3) The evidence must be material to the issues at trial;
- 26 4) The evidence must be neither cumulative nor merely  
27 impeaching; and
- 28 5) The evidence must indicate that a new trial has a

1 reasonable probability of resulting in a different  
2 outcome.

3 In Crosby v. State, 2006 MT 155, 332 Mont. 460, 139 P.3d 832, the  
4 Montana Supreme Court extended the application of this test to  
5 cases involving petitions for post-conviction relief. The new  
6 evidence presented herein satisfies the five prongs of the test  
7 established in State v. Clark.

8 **A. The evidence has been discovered since Mr. Beach's**  
9 **trial, and is admissible.**

10 The new evidence primarily consists of sworn statements and  
11 testimony of witnesses regarding Sissy Atkinson and Maude  
12 Grayhawk's probable involvement in Kimberly Nees' murder. All of  
13 these statements and testimony have been given on and after  
14 January 19, 2007 - more than two decades after Barry Beach was  
15 convicted but within one year of this petition.

16 The newly discovered evidence in the form of testimony from  
17 the aforementioned witnesses is admissible at trial under Rule  
18 804(b)(3), M.R.E. Rule 804 defines certain exceptions to the  
19 general rule prohibiting hearsay, and provides:

20 Statement Against Interest: A statement which was at  
21 the time of its making so far contrary to the  
22 declarant's pecuniary or proprietary interest, or so  
23 far tended to subject the declarant to civil or  
24 criminal liability, or to render invalid a claim by the  
25 declarant against another, or to make the declarant an  
26 object of hatred, ridicule, or disgrace, that a  
27 reasonable person in the declarant's position would not  
28 have made the statement unless the declarant believed  
it to be true. A statement tending to expose the  
declarant to criminal liability and offer to exculpate  
the accused is not admissible unless corroborating  
circumstances clearly indicate the trustworthiness of  
the statement.

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1 In State v. Castle, the Montana Supreme Court looked to the  
2 U.S. Supreme Court for guidance on the issue of admitting self-  
3 inculpatory statements under Rule 804(b) (3) (285 Mont. 363). The  
4 Court cited the U.S. Supreme Court's 1994 decision in Williamson  
5 v. United States: "Rule 804(b) (3) is founded on the commonsense  
6 notion that reasonable people, even reasonable people who are not  
7 especially honest, tend not to make self-inculpatory statements  
8 unless they believe them to be true." (Quoted in Castle, at  
9 372).

10 **1. The statements and testimony regarding Sissy**  
11 **Atkinson's statements of involvement in the**  
12 **incident (Exhibits 1-8).**

12 Sissy Atkinson's statements of involvement in and knowledge  
13 of Kimberly Nees' murder were clearly "contrary" to her interest.  
14 She directly implicated herself in criminal activity on multiple  
15 occasions. Furthermore, her statements could easily make her "an  
16 object of hatred, ridicule, or disgrace." No "reasonable person"  
17 in Sissy's position would confess to having knowledge of a murder  
18 and protecting the perpetrators of such a heinous crime - unless  
19 they had actually done so.

20 The "corroborating circumstances" required by Rule 804(b) (3)  
21 are present in the case of Sissy Atkinson's testimony. Atkinson  
22 made inculpatory statements to a variety of individuals on  
23 numerous occasions - to her brother, Jack D. Atkinson, in 2004;  
24 to her friend, Vonnie Brown, also in 2004; to Carl Four Star, in  
25 1984; and to Dun O'Connor in 1979. The time span over which  
26 these inculpatory statements were made provides corroboration, as  
27 does their repetitious nature.

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**2. The statements and testimony regarding Maude Grayhawk's statements of involvement (Exhibits 10-13).**

Like Sissy Atkinson's, Maude Grayhawk's repeated statements of involvement in Kimberly Nees' death are obviously "contrary" to her interest. Her statements to her sister-in-law, Judy Grayhawk, and her co-worker, Janice White Eagle-Johnson, expose her to criminal liability. In addition, these statements could make her "an object of hatred, ridicule, or disgrace." It would be clearly unreasonable for Maude Grayhawk to voluntarily, with no inducement, give incriminating information to either Judy Grayhawk or Janice White Eagle-Johnson, if the information was untrue.

The necessary "corroborating circumstances" are present in Maude Grayhawk's case as well. Maude also made incriminating statements to multiple individuals on various occasions - to her sister-in-law, Judy Grayhawk, in 2004; to Janice White Eagle-Johnson, at some point several years ago; and to Ron Kemp, in 2004.

**B. The petitioner exercised due diligence in attempting to discover new exculpatory evidence.**

The new evidence set forth in the petition could not have been discovered sooner because the witnesses did not reveal the information until 2007. In fact, it is in some respects amazing that such evidence has even been obtained by Mr. Beach at all. He has continuously attempted to exonerate himself before and throughout the period of his wrongful incarceration, and it was only with significant help from outside investigators that he has  
/ / /

1 been able to uncover the evidence linking Sissy Atkinson and  
2 Maude Grayhawk to the murder.

3 **C. The evidence is indispensable to the issues at trial.**

4 The newly discovered evidence is not only directly material  
5 to the issues at trial, it suggests an entirely different  
6 scenario for the night of Kimberly Nees' death. Simply put, the  
7 new evidence turns the prosecution's case upside down.

8 If presented at trial, evidence of Sissy Atkinson and Maude  
9 Grayhawk's involvement in Kimberly Nees' death would almost  
10 certainly raise reasonable doubts about the prosecution's  
11 assertion Mr. Beach is guilty.

12 **D. The evidence is neither cumulative nor merely**  
13 **impeaching.**

14 The evidence described in Mr. Beach's petition is completely  
15 new. No evidence was available or presented at trial indicating  
16 that either Maude Grayhawk or Sissy Atkinson were involved in the  
17 events which led up to Kim Nees' death.

18 **E. The evidence clearly indicates that a new trial has a**  
19 **substantial probability of resulting in a different**  
20 **outcome.**

21 It is probable that the defendant's new evidence of a  
22 different perpetrator would introduce reasonable doubt into the  
23 minds of reasonable jurors. In State v. Clark, 330 Mont. 8, 125  
24 P.3d 1099 (2005), the Montana Supreme Court refined the test for  
25 determining whether or not new evidence has a reasonable  
26 probability of resulting in a different outcome. In Clark, the  
27 Montana court stated:

28 The fifth element, pertaining to reasonable probability  
of a different outcome, is most likely to be the crux  
of any district court's evaluation of new trial motions



1 based on new evidence. In the present context,  
2 "reasonable probability" is somewhere between the  
3 Larrison test's "might have reached a different  
4 conclusion" standard and Berry's "probably produce a  
5 different verdict" standard, and for good reason. In  
6 any given case, a jury "might" have reached a different  
7 conclusion based on any small, even irrelevant, change  
8 in trial evidence because "might" means "any chance at  
9 all." This retrospective test is simply too broad. In  
10 contrast, a district court could be convinced that the  
11 new evidence before it has a strong chance of bringing  
12 about a different verdict upon a new trial, but it may  
13 not think this possibility so strong that it would  
14 "probably" produce a different verdict - i.e., that it  
15 has a 51% or greater chance of producing a different  
16 verdict. This prospective test is too restrictive.  
17 However, the reasonable probability standard adopted  
18 herein properly leaves to the trial judge  
19 determinations of weight and credibility of the new  
20 evidence, and to consider what impact, looking  
21 prospectively at a new trial with a new jury, this  
22 evidence may have on that new jury.

23 (Id. at p. \_\_\_\_.)

24 Here, the newly discovered evidence meets the Clark  
25 requirement. While Mr. Beach believes that there is a strong  
26 probability the evidence would lead to a different result in a  
27 new trial, he appreciates the fact that the Court may not agree.  
28 However, under Clark, the standard is "reasonable probability" of  
a different verdict. That standard is more than met here.

### 29 III.

#### 30 STATE V. POPE - ACTUAL INNOCENCE

31 The evidence contained in Exhibits 9 and 14-17 was  
32 discovered more than one year ago, and hence it is not considered  
33 as "newly discovered" evidence for purposes of Clark. However,  
34 the court may consider this evidence in this motion under the  
35 Montana Supreme Court's decision in State v. Pope, 318 Mont. 383,  
36 80 P.3d 1232 (2003), and may also consider constitutional errors  
37 at the original trial which were previously time barred. In

1 other words, because the new evidence cited above casts serious  
2 question on whether a jury could find Mr. Beach guilty beyond a  
3 reasonable doubt, he is entitled to have the constitutional  
4 errors which were previously time barred reviewed by this Court,  
5 as well as other post-trial evidence, that does not meet the  
6 'within one-year' standard.

7 In the United States Supreme Court decision in Schlup v.  
8 Delo, the Court held that Schulp's claim of innocence acted as  
9 the gateway through which a habeas petitioner must pass to have  
10 his otherwise barred constitutional claim considered on the  
11 merits. In Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639  
12 (1986), the court held the petitioner must demonstrate that a  
13 constitutional violation at his trial has probably resulted in  
14 the conviction of an individual who was "actually innocent".  
15 Carrier, 477 U.S. at 496. The claim must be supported by new  
16 evidence - i.e. evidence not presented to the jury at trial -  
17 that indicates the petitioner is actually innocent.

18 In Schlup, the court held that to grant relief based upon  
19 actual innocence, the petitioner must show it is more likely than  
20 not that no reasonable juror would have found him guilty beyond a  
21 reasonable doubt. Schlup, 513 U.S. at 329. The Schlup court  
22 remarked that the innocence inquiry "must incorporate the  
23 understanding that proof beyond a reasonable doubt marks the  
24 legal boundary between guilt and innocence." Schlup, 513 U.S. at  
25 328. The court in Schlup distinguished between Schulp's  
26 situation and its decision in Herrera v. Collins, 506 U.S. 390,  
27 113 S.Ct. 853 (1993). Under Herrera, a petitioner must satisfy a  
28 higher standard and provide more convincing evidence of innocence

1 - evidence that he did not commit the crime for which he was  
2 convicted - because his or her trial was error free. In Schlup,  
3 the court explained that the claim of innocence is fundamentally  
4 different from the claim advanced in Herrera. In Schlup, the  
5 court set the standard that a petitioner need only demonstrate  
6 that a constitutional violation at trial has probably resulted in  
7 the conviction of an individual whom no reasonable juror would  
8 have found guilty beyond a reasonable doubt in order to satisfy  
9 actual innocence.

10 To summarize, actual innocence in this context must reflect  
11 the fundamental standard of proof beyond a reasonable doubt. The  
12 petitioner need not prove that he did not commit the crime, but  
13 he or she must make a sufficient showing that a reasonable jury  
14 would not convict him at a new trial in light of errors which  
15 occurred during the original trial.

16 As set forth below, the new evidence discovered in this  
17 case, combined with correcting errors which occurred in the  
18 original trial, would result in Mr. Beach's acquittal.

19 **A. The Roosevelt County Sheriff's Department failed to**  
20 **disclose evidence in violation of M.C.A. 46-15-322.**

21 M.C.A. § 46-13-322 requires that prosecutors disclose all  
22 evidence against the defendant that is in their possession,  
23 regardless of whether it is inculpatory or exculpatory in nature.  
24 The Montana statute requiring full disclosure is even broader  
25 than the national standard set forth in Brady v. Maryland, 373  
26 U.S. 83 (1963); State v. Weitzel, 2000 MT 86, 299 Mont. 192 at  
27 201 (2000).

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1 In this case, the defense was not given the information  
2 contained in Exhibit 18, which is a clear violation of M.C.A. §  
3 46-15-322. Because this evidence was undisclosed and hence  
4 unavailable to Mr. Beach at the time of his original trial, it  
5 should be available for consideration now.

6 **B. Eliminating Prosecutor References to Non-existent**  
7 **Evidence and Misstatements in a New Trial Would Result**  
8 **in Acquittal.**

9 **1. Hair Evidence.**

10 In both the state's opening statement and its closing  
11 argument, the prosecutor committed error by making references to  
12 an alleged pubic hair found on Kimberly Nees' sweater. The  
13 prosecutor told the jury this hair was found on the victim, that  
14 it was a pubic hair, and that it belonged to Barry Beach.  
15 However, neither the subject hair, nor any evidence concerning  
16 the subject hair, was ever introduced into evidence. To compound  
17 the problem, the jury was not given a curative instruction to  
18 disregard the prosecutor's references to this non-existent, but  
19 highly prejudicial, supposed evidence.

20 Specifically, the prosecuting attorney told the jury in his  
21 opening statement:

22 "And the forensic scientist from the lab in  
23 Missoula will tell that on that jacket of Kim  
24 Nees' laying - found laying on the outside  
25 that vehicle, that there was a pubic hair  
26 belonging to the defendant. They will tell  
27 you how easy it is for hair to transfer from  
28 one place to another and that this hair  
located on the sweater of Kim Nees was in  
fact the defendant's."

(Trial Transcript pp. 314-315).

In the above two sentences, the prosecuting attorney made  
two separate misstatements about the alleged hair. First, "that

1 there was a pubic hair belonging to the defendant" and second,  
2 "that this hair located on the sweater of Kim Nees was in fact  
3 the defendant's." Even had a forensic scientist testified, he  
4 could not have properly stated that the hair found on Kim Nees'  
5 sweater belonged to the defendant, nor could he have stated that  
6 the hair located on the sweater was in fact the defendant's. The  
7 prosecution's statement was clear error.

8 The prosecuting attorney compounded the error when, during  
9 his closing argument, he told the jury that the hair evidence  
10 that he had promised in his opening statement could not be  
11 introduced as a result of a technicality - a fact which should  
12 have been known to the prosecutor well before the trial began.  
13 In his closing argument, the prosecuting attorney stated:

14 "We speak of hair classification, and I  
15 promised you in my opening statement that we  
16 would have something to tell you about that  
17 classification. You heard from Sheriff  
18 Mahlum that in the interim, he found that  
19 there was a problem with those exhibits. We  
20 couldn't account where they were for a period  
21 of years. ...".

22 (trial transcript p. 932.) Thus, the State told the jury that  
23 physical evidence existed which did not exist. This was  
24 extremely prejudicial because these comments were the only  
25 reference to any physical evidence connecting Mr. Beach to Kim  
26 Nees' murder. And, these comments were wholly unsupported by any  
27 evidence at trial.

28 Petitioner was previously before this Court with a petition  
to obtain DNA testing of the subject hair attributed to Mr.  
Beach. With DNA testing now available, the defendant hoped the  
hair could be tested to show he was not the source of the hair.

1 However, inexplicably, the State did not preserve this evidence,  
2 it was not maintained with the other evidence preserved in this  
3 case, and the state cannot produce it for testing.

4 This particular hair, which the State told the jury belonged  
5 to Beach - a claim it did not even attempt to support with any  
6 evidence - has since been misplaced. This injustice must be  
7 rectified.

## 8 **2. Blood Stained Towel.**

9 The State also misrepresented evidence about the blood  
10 stained towel. The prosecutor told the jury: "No one knew where  
11 the bloody towel was found or when it was found." (Trial  
12 transcript p.886). Later in his closing argument, he said: "I  
13 don't know where that bloody towel was found or even if it was  
14 found in Poplar." This was also direct misstatement of fact.

15 At the trial, the State was in possession of an FBI report  
16 that clearly states the bloody towel was found the morning after  
17 the murder on a fence one block from the victim's house. That  
18 report states: "It should be noted that an extremely bloody towel  
19 was found on a fence one block away from the victim's home."

## 20 **3. Bloody Palm Print.**

21 A left-handed bloody palm print was found on the exterior  
22 passenger door of the pickup truck where Kim Nees was assaulted  
23 and likely killed. (FBI crime scene report of 6/19/79, Ex. \_\_.)  
24 The palm print was well preserved and in the victim's own blood.  
25 (CITATION) The print does not match Barry Beach. (FBI report  
26 dated Feb. 4, 1980, Ex. \_\_.) The print does not match the  
27 victim. (FBI report dated \_\_/\_\_/88, Ex. \_\_.) This print belongs

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1 to a person yet to be identified - probably a person responsible  
2 for this crime.

3 No prints matching Barry Beach were found anywhere at the  
4 crime scene. The State speculated to the jury that the lack of  
5 any fingerprints from Beach was due to him having wiped them off.  
6 (Trial transcript, p. 887). In the course of advancing this  
7 theory, the State made another critical misstatement of fact; the  
8 State erroneously told the jury Kim Nees' fingerprints were not  
9 correctly taken during her autopsy and, therefore, no comparisons  
10 could be made. The prosecutor stated:

11 "The fingerprints that were taken of Kimberly  
12 Nees, after the autopsy, they were not taken  
13 correctly, but they were not complete and no  
14 comparisons could be made." (Trial  
15 transcript p. 929).

16 There was no evidence of this. The fact is, Kim Nees'  
17 fingerprints were taken, were used, and her fingerprints were  
18 identified all over the interior of the pickup truck. (July 12,  
19 1979 FBI fingerprint report, Ex. \_\_\_\_.)

20 Recently, at the Board of Pardons hearing held in June 2007,  
21 the State stipulated that there remain eleven unidentified  
22 fingerprints from the crime scene and pickup truck and that there  
23 remain four unidentified palm prints from the pickup truck.  
24 (Palm Print Exhibit from Clemency hearing, Ex \_\_\_\_.) The Attorney  
25 General specifically stipulated that the palm print in red brown  
26 substance found on the outside of the passenger door of the  
27 pickup truck was not identified as belonging to Kimberly Nees or  
28 Barry Beach. (Id.)

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1                   **4. Standard for considering prosecutorial errors.**

2           Claims of prosecutorial misconduct are measured by reference  
3 to established norms of professional conduct. State v. Martin,  
4 305 MT.123, 23 P.3d 216 (2001). Mistatements and other errors by  
5 a prosecutor may form the basis for granting a new trial where  
6 the prosecutor's actions have deprived the defendant of a fair  
7 and impartial trial. State v. Gray, 207 MT.261, 266-267, 673  
8 P.2d 1262, 1265-1266 (1983). State v. Soraich, 294 MT.175, 979  
9 P.2d 206 (1999).

10           The Montana Supreme Court has held it is improper for a  
11 prosecutor to comment on evidence not of record during closing  
12 argument. State v. Gladue, 293 Mont. 1, 972 P.2d 827 (1999),  
13 State v. Newman, 330 MT.160, 127 P.3d 374 (2005). In Newman, the  
14 Montana Supreme Court quoted from Berger v. United States, 295  
15 U.S. 78, 55 S.Ct. 629 (1935) where the Supreme Court discussed  
16 the special responsibility of a prosecutor and the harm  
17 potentially resulting from improper prosecutorial efforts. The  
18 Court stated:

19                   While a prosecutor may strike hard blows, he  
20                   is not at liberty to strike foul ones. It is  
21                   as much his duty to refrain from improper  
22                   methods calculated to produce a wrongful  
23                   conviction as it is to use every legitimate  
24                   means to bring about a just one."

25 Berger, 295 U.S. at 88; See also, State v. Stewart, 303 Mont. 507,  
26 16 P.3d 391 (2000).

27           Beach did not receive a fair trial as a result of the State  
28 (1) not producing evidence, (2) telling the jury the defendant's  
hair was found on the victim's clothing and later stating the  
evidence existed but was not presented due to a technicality; (3)



1 telling the jury it did not know where a blood-stained towel came  
2 from when it did know; and (4) telling the jury fingerprints  
3 could not be compared when they could and were.

4 At a new trial, the elimination of these errors combined  
5 with the new evidence set forth above would probably result in  
6 acquittal.

7 **C. Eliminating Defense Counsel Errors in a New Trial would**  
8 **Result in Acquittal.**

9 Barry Beach's claim of ineffective assistance of counsel has  
10 not previously been considered on the merits as it has been  
11 determined to be time barred. It may be considered by this Court  
12 as a part of this post-conviction proceeding as a result of newly  
13 discovered evidence which allows the Court to consider other  
14 constitutional error.

15 Several errors were made by defense counsel which, if  
16 eliminated at a new trial, makes the likelihood of acquittal even  
17 stronger. These include:

18 **1. Failure to Object to Prosecutorial Error.**

19 The defense did not object to the State's incorrect claims  
20 and statements about the alleged hair evidence.

21 **2. Failure to Introduce Evidence to Attack the**  
22 **Validity of the Alleged Confession.**

23 The defense did not demonstrate the flaws in the Louisiana  
24 confession for the jury. To the extent the confession does not  
25 match known facts about the crime, the confession is less  
26 reliable. Many of the factual details contained in the Louisiana  
27 confession were and are inconsistent with evidence found at the  
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1 crime scene, but defense counsel did not highlight these for the  
2 jury.

3 Factual inconsistencies which should have been presented  
4 include the following:

5 **a. The location of the crime.**

6 It was common knowledge Kim Nees' body was found by the  
7 river's edge. The Louisiana confession states the victim's  
8 pickup truck was parked "by the train bridge" near the riverbank.  
9 In fact, Kim Nees' truck was located over 85 yards (257 feet)  
10 away from her body. (Crime Scene diagram, Ex. \_\_\_; FBI crime  
11 scene report dated June 19, 1979, Ex. \_\_\_.) Later in the  
12 confession, Barry Beach described making three and possibly four  
13 separate trips from the truck to the river bank to dispose of the  
14 body and evidence. (Confession transcript p. 9, Ex. \_\_\_.) Each  
15 of those trips from the truck to the river would have required a  
16 round trip distance of over 170 yards (514 feet) within a short  
17 period of time.

18 **b. The manner of depositing Kim Nees' body into**  
19 **the river.**

20 According to the confession, Barry Beach dragged Kim Nees'  
21 body from the truck, to the river bank, and pushed the body over  
22 the edge. (Confession transcript p. \_\_, Ex. \_\_ ("... I just pushed  
23 her off over the edge of the bank on the river and I just pushed  
24 her on off the ground.")) However, both the photographic and  
25 descriptive evidence from the crime scene clearly show Kim Nees'  
26 body could not have been deposited into the river from the top of  
27 the ledge - the distance is too great. (FBI crime scene report  
28 dated June 19, 1979, Ex. \_\_ ("Of interest is the fact that UNSUB

1 drug victim 256 feet, pushed her over ten foot cliff, and jumped  
2 down, lifted victim, and threw her into river.").

3 It was necessary for someone to first carry the body 85  
4 yards from the pickup truck to the riverbank ledge, drop the body  
5 down from the ledge to the riverbank, then climb down to the  
6 riverbank and pick up Kim Nees' body and carry her to the water  
7 and place her in the water. Indeed, barefoot prints were found  
8 and photographed on the riverbank very close to the body. (Crime  
9 Scene photo of river bank, Ex. \_\_\_\_ .) Beach did not know these  
10 details, and they are not included in the confession.

11 **c. Kim Nees' wounds.**

12 Beach was uncertain in his confession whether Kim Nees  
13 received any wounds that began to bleed while she still remained  
14 in the cab of the pickup truck. (Confession transcript p. 12,  
15 Ex. \_\_ ("Q: Do you know if she received any wounds that started  
16 to bleed inside the truck at that time? A: I'm not really sure  
17 if she did or not.")).) The examination of the interior of the  
18 pickup truck by law enforcement authorities revealed heavy blood  
19 spatters throughout the interior of the vehicle, particularly on  
20 the passenger side which was soaked with blood. (FBI crime scene  
21 report dated June 19, 1979, Ex. \_\_\_\_.)

22 **d. How Kim Nees exited the pickup truck.**

23 The confession states Kim Nees briefly escaped out of the  
24 driver's side of the pickup truck and further states Beach exited  
25 the passenger side, ran around the truck, and caught Kim Nees at  
26 the driver's side door. (Confession transcript p. 8, Ex. \_\_ .)  
27 The confession states Beach then pinned Nees against the driver's  
28 side of the vehicle where he then beat her with a tire iron.

1 (Confession transcript pp. 8-9, Ex. \_\_.) These statements do not  
2 match the evidence.

3 Given the extensive bleeding evident inside the pickup truck  
4 cab, it is clear Kim Nees was severely injured and bleeding  
5 profusely inside the pickup. Yet, there was no blood anywhere -  
6 on the exterior or the exterior - of the driver's side door. The  
7 blood on the exterior was located on the passenger side, not the  
8 driver's side as described in Beach's confession. The FBI crime  
9 scene reports concluded Kim Nees was dragged out of the passenger  
10 side of the vehicle.

11 **e. Kim Nees' injuries.**

12 In the confession, Beach said he choked Kim Nees while she  
13 was pinned against the driver's side. (Confession transcript p.  
14 8, Ex. \_\_.) Neither the autopsy report or trial testimony by the  
15 medical examiner, Dr. Pfaff, suggested any indication that Kim  
16 Nees was choked.

17 **f. The murder weapon.**

18 The confession states beach first attacked Nees with a 12-  
19 inch chrome crescent wrench which he grabbed from under the seat.  
20 (Confession transcript p. 8, Ex. \_\_.) Shortly after Kim Nees'  
21 death in Poplar, Montana, it became widely known that the police  
22 believed Nees had been attacked with a 12-inch chrome crescent  
23 wrench. A front window display was put up in Beck's sporting  
24 good store in Poplar that included a crime scene photograph of  
25 Kim Nees in the river and a large chrome crescent wrench.  
26 (Clemency hearing testimony of Robert Ryan p. 264, Clemency  
27 hearing testimony of Dean Mahlum p. 409-410, 413.) The  
28 authorities believed a crescent wrench had been used because Ted

1 Nees, Kim's father, stated he recently purchased such a wrench  
2 which was missing when he received his pickup truck back from the  
3 police. (Trial testimony of Ted Nees p. 544-545.)

4 What the defense failed to present to the jury was the fact  
5 that Ted Nees indicated that his crescent wrench was normally  
6 kept in a tool box which was located in the back bed of the  
7 pickup, not in the cab. (Ted Nees interview transcript dated  
8 June 16, 1979, p. 1, Ex. \_\_.) The confession places the wrench  
9 in the wrong location.

10 **g. Kim Nees' clothing.**

11 In his confession Beach stated Nees was wearing a brown  
12 sports jacket and plaid polyester blouse. (Confession transcript  
13 p. 10, Ex. \_\_.) In fact, Kim Nees was not wearing either of  
14 these items, but instead, was wearing a navy blue v-neck sweater.  
15 The victim's white sweater was found just outside the passenger  
16 door neatly folded on the ground. (FBI crime scene report dated  
17 June 19, 1979, p. 1, Ex. \_\_\_\_.)

18 In his confession Beach stated he threw Nees' jacket over  
19 the riverbank after the murder. No evidence of any jacket was  
20 ever found.

21 Beach's incorrect statement concerning Nees' clothing is a  
22 demonstrable example of how police suggestion contaminated this  
23 interview and led to Beach's false confession. The brown jacket  
24 and plaid shirt did not come from any knowledge about the  
25 incident, they came from the Louisiana police officers, who  
26 incorrectly believed that was what Nees was wearing at the time  
27 she was killed. (January 7, 1983, transcript, p.1.)

28 / / /



1 (Confession transcript p. 9, Ex. \_\_.) Dr. Pfaff, the forensic  
2 pathologist, opined Nees was probably dragged by the feet.

3 (Trial testimony of Dr. Pfaff pp. 489, 495.)

4 **k. Barry Beach's clothing.**

5 The confession states stripped off his clothing and burned  
6 it in a railroad car parked on the railroad tracks. (Confession  
7 transcript p. 9, Ex. \_\_.) No evidence of this sort was ever  
8 discovered.

9 **1. No Barry Beach fingerprints.**

10 Beach was asked about his fingerprints since no Barry Beach  
11 fingerprints were found anywhere on the interior or exterior of  
12 the Nees pickup. Beach said he wiped away his own fingerprints.  
13 (Confession transcript p. 9, Ex. \_\_.)

14 The evidence is that numerous identified and unidentified  
15 fingerprints and palm were left on both the interior and exterior  
16 of the truck, including a large bloody palm print on the  
17 passenger side. (FBI fingerprint report dated July 12, 1979.)  
18 It is unlikely Beach made a cleanup effort careful enough to  
19 eliminate all of his fingerprints, while leaving other prints,  
20 including a large bloody palm print on the pickup truck.

21 **3. Failure to Demonstrate that Many Case Specific**  
22 **facts contained in the Confession were Publicly**  
23 **known.**

24 Poplar, Montana, is a very small community where everyone  
25 knows everyone and word travels fast. Many facts about the Nees'  
26 murder were generally known. Beach's ability to tell a story  
27 about the Nees case does not mean he committed the crime.

28 The defense should have shown the jury newspaper articles  
that gave detailed descriptions of the murder. For example, the

1 defense could have introduced a news article which stated  
2 "investigation into the case has shown that the attack on Ms.  
3 Nees began in the pickup and continued on the ground outside the  
4 pickup. After death, Ms. Nees' body was dragged approximately  
5 100 yards and thrown into the Poplar River." (Ex. \_\_\_\_.) The  
6 defense could have shown the jury another newspaper article which  
7 stated: "The family's blood spattered pickup truck was found  
8 nearby, though the keys were never recovered." (Ex. \_\_\_\_.)

9 The state has attempted to argue it was not publicly known  
10 there was more than one weapon used to attack Kim Nees as Beach  
11 described. This is an attempted boot-strap argument which must  
12 fail because no evidence (other than the story Beach provided in  
13 Louisiana) demonstrates more than one weapon was involved. The  
14 FBI crime lab report dated June 19, 1979, states, "Autopsy  
15 revealed victim died as a result of at least 20 blows to the head  
16 with either a tire iron or small light hammer."

17 If voir dire was effective, the jury in this case consisted  
18 of citizens who had not heard about the murder. Effective  
19 representation would have shown the jury that Beach's statement  
20 to investigators was inconsistent with known facts, and  
21 consistent with the gossip mill and news articles of the time.

22  
23  
24 **4. Failure to Call Attorney Paul Kidd to Testify.**

25 At trial, detectives from Louisiana claimed Beach confessed  
26 to Nees' murder in the presence of his Louisiana attorney, Paul  
27 Kidd. (Trial testimony of Louisiana Detective Jay Via p. 658.)

28 / / /



1 Beach's trial attorney should have, but did not, call Paul Kidd  
2 to rebut this false testimony.

3 When Mr. Kidd learned of the detectives' testimony, long  
4 after Beach's trial had ended, he submitted a sworn affidavit  
5 stating he was not present during the interrogation and that  
6 Beach never confessed in his presence. Mr. Kidd reconfirmed his  
7 sworn statement in testimony given before the Board of Pardons  
8 and Parole. (Clemency hearing testimony of Paul Kidd of June 13,  
9 2007 p. 110.) Mr. Kidd was available to testify at Beach's trial  
10 and his testimony would have impeached the sole evidence used to  
11 convict Beach at trial.

12 **5. Standard for ineffective assistance.**

13 A defendant claiming ineffective assistance of counsel is  
14 first required to establish that counsel's performance was  
15 deficient. Swan v. State, 331 MT. 188, 130 P.3d 606 (2006). A  
16 defendant seeking to establish that counsel's performance was  
17 deficient must show that counsel's challenged actions stem from  
18 ignorance or neglect, rather than from professional deliberation.  
19 If deficient performance is established, the defendant must then  
20 establish that the deficient performance prejudiced the  
21 defendant. Strickland v. Washington, 466 U.S. 668, 688-689, 104  
22 S.Ct. 2052 (1984).

23 The Montana courts acknowledge that defense counsel has a  
24 duty to investigate and interview witnesses who may have  
25 knowledge of the case and counsel's complete failure to do so  
26 constitutes deficient performance. State v. Denny, 262 MT.248,  
27 253, 865 P.2d 226, 229 (1993). Defense counsel has a duty to  
28 / / /

1 either conduct reasonable investigations or make a reasonable  
2 decision that particular investigations are unnecessary.

3 The Sixth Amendment of the United States Constitution and  
4 Article 2, Section 24 of the Montana Constitution guarantee the  
5 right to effective assistance of counsel. Montana has adopted  
6 the two-part test of Strickland v. Washington to evaluate  
7 ineffective assistance of counsel claims. The Montana Supreme  
8 Court has held that post-conviction petition issues concerning  
9 ineffective assistance of counsel are often best resolved after  
10 an evidentiary proceeding in the district court. State v.  
11 Bromgard (1995) 273 MT.20, 24, 901 P.2d 611, 614; State v.  
12 Lawrence (2001) 307 MT.487, 38 P.3d 809.

13 Beach did not receive a fair trial because his defense  
14 attorney (1) did not object to prejudicial errors committed by  
15 the State, (2) did not introduce evidence to attack the validity  
16 of the alleged confession, (3) did not demonstrate that many case  
17 specific facts contained in the confession were publicly known,  
18 and (4) did not call attorney Kidd to correct the Louisiana  
19 police officers' testimony Beach's attorney was with him during  
20 the questioning.

21 At a new trial, the elimination of these errors combined  
22 with the new evidence set forth above would result in acquittal.

23 **V.**

24 **CONCLUSION**

25 Petitioner requests that this Court set this matter for an  
26 evidentiary hearing in order to allow petitioner to present  
27 evidence in support of the factual allegations set forth in the  
28 petition. A person requesting post-conviction relief has the

1 burden to show, by preponderance of the evidence, that the facts  
2 justify relief. State v. Peck, (1993) 263 MT.1, 3-4, 865 P.2d  
3 304, 305. Barry Beach accepts this burden and respectfully  
4 requests a hearing to present his case.

5 The petition herein meets all of the requirements of M.C.A.  
6 § 46-21-104. There is no apparent reasons why, given the gravity  
7 of this matter, a hearing should not be held.

8 The petition should be granted.

9 DATE: \_\_\_\_\_

\_\_\_\_\_  
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Attorneys for defendant

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