STATE OF MONTANA SUPREME COURT

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

APPELLANT'S 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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STATEMENT OF THE CASE AND RELEVANT FACTS

1. On April 13, 1984, the defendant-appellant, Barry Allan Beach (hereinafter referred to as "Beach"), was convicted of Deliberate Homicide in the Montana Fifteenth Judicial District Court. The presiding judge sentenced Beach to 100 years in the Montana State Prison without the possibility of parole.

2. Beach appealed his conviction to the Montana Supreme Court on multiple grounds. His conviction and sentence were affirmed by the Court on July 25, 1985. State v. Beach, 217 Mont. 132, 705 P.2d 94 (1985). Beach filed a Petition for Rehearing on August 7 of that year, and the Court denied it on August 27.

3. On May 18, 1992, Beach filed a Petition for Writ of Habeas Corpus in the Federal District Court for the District of Montana. The federal court stayed the habeas corpus proceeding pending the exhaustion of Beach's remedies in state court.

4. Beach filed a Petition for Postconviction Relief with the Montana Supreme Court on October 30, 1995. This petition was denied. Beach v. Day, 275 Mont. 370, 913 P.2d 622 (1996).

5. On February 16, 1996, the federal court lifted the stay on Beach's petition for habeas corpus. On March 31, 1998, the federal court denied the petition. Beach appealed and the Ninth Circuit Court of Appeals affirmed. Beach v. McCormick, Appeal No. 98-5957 (1999).

6. In 2005, Beach filed an Application for Executive Clemency with the Montana Board of Pardons and Parole (hereinafter referred to as the "MBPP"). This application was denied on November 20, 2005.

7. On August 10, 2006, Beach submitted an Application for Clemency, Pardon or Commutation with Governor Brian Schweitzer. Governor Schweitzer referred this application to the MBPP for consideration, which denied it on August 20, 2007.

8. Beach filed a Verified Petition for Postconviction Relief with the Montana Fifteenth Judicial District Court on January 18, 2008, based in part upon newly-discovered evidence. The newly-discovered evidence included:

   a. Testimony from Jack D. Atkinson ("J.D.") that his sister Dottie Sue Atkinson ("Sissy") confessed to him that she and others were involved in Kimberly Nees's death and that Barry Beach is innocent. See Petition, pgs. 6-7.

b. Testimony from Vonnie Brown, a friend of Sissy Atkinson's, that Sissy also confessed to her that she and Maude Greyhawk "had something to do" with Nees's murder. See Petition, pgs. 7-8.

c. Testimony from Carl Four Star, a former co-worker of Sissy's, that Sissy mentioned "getting away with a capital crime" in his presence. See Petition, pg. 8.

d. Testimony from Dun O'Connor that Sissy telephoned him at 5 A.M. on the morning after Nees's murder to tell him that Nees was dead. The police did not come upon the scene until 7 A.M. See Petition, pgs. 8-9.

e. Testimony from Judy Grayhawk, sister-in-law of Maude Grayhawk, that Maude confessed to Judy that she had been involved in Nees's death. See Petition, pgs. 10-11.

f. Testimony from Janice White Eagle-Johnson that Maude told her some girls had her car at the train bridge park on the night of Nees's death. See Petition, pg. 11.

g. Testimony from Ron Kemp, former Roosevelt County Criminal Investigator, that Maude denied involvement in Nees's death but admitted being present at the train bridge park that night. Kemp

further testified that Maude asked him if she might have witnessed the killing but "blacked out" and could not remember due to her extensive drug and alcohol use. See Petition, pgs. 11-12.

9. Since Beach filed his petition, he has also learned of additional new evidence which tends to exonerate him. Scientific analysis has shown that the bloody palm print (made in Nees's blood) left on the side of Kim Nees's vehicle did not belong to Nees or to Beach. At Beach's trial, the prosecutor told the jury in his closing argument that the palm print was probably that of Nees, but this new evidence proves that someone else was present and literally had Nees's blood on his or her hands.

10. Beach's petition was also based in part upon evidence which had been discovered more than one year before filing the petition, but after his trial, which he argued opened the actual innocence gateway for the Court to consider it and other constitutional errors which were otherwise time-barred. This evidence included:

a. A previously undisclosed statement from Orrie Burshia to the former Sheriff that Mike Longtree told Orrie that he witnessed Sissy Atkinson and Terra Red Dog kill Nees. See Petition, pgs. 9-10.

b. Testimony from Richard Holen that he saw Nees drive a pickup full of people down to the train bridge park shortly before her estimated time of death. Holen further testified that he informed Officer Steven Grayhawk, Sr. (Maude's father), of what he had seen, and that Grayhawk said he would call Holen for an interview but never did. See Petition, pgs. 12-14.

c. Testimony from Roberta Ryan that she observed Sissy, Maude, Jordis Ferguson, Rhea Red Dog, Joanne Jackson, Roberta Jackson, Leslie Jackson, and Rose Failing at Ryan's bar, the Bum Steer, between midnight and 2 A.M. on the night of Nees's death. Ryan testified that she repeatedly kicked these girls out of her bar because some of them were underage. Ryan's testimony contradicts Sissy's alibi that she was home before 11 P.M. that night. See Petition, pgs. 14-15.

11. One of Beach's constitutional claims alleges ineffective assistance of counsel. The basis for this claim lies in his trial counsel's failure to illuminate for the jury the inconsistencies between Beach's confession and the facts of the crime, particularly concerning:

a. The location of the crime;

b. The manner in which Nees's body was deposited into the river;

c. The nature of Nees's injuries and wounds;

d. The manner in which Nees exited the vehicle during the attack;

e. The type of murder weapon and its disposition following the murder;

f. Nees's clothing;

g. The bag in which the body was found;

h. The manner in which Nees's body was transported to the river;

i. The clothing Beach wore on the night of the murder and its disposition; and

j. The lack of Beach's fingerprints, palm prints or any other physical evidence to place him at the murder scene.

See Memorandum in Support of Petition, pgs. 18-23. Beach's confession was the only evidence linking him to the crime.

12. On March 13, 2008, the State filed a Motion to Dismiss Beach's Petition. On March 28, 2008, the District Court issued an order denying the petition, stating:

> Beach's petition is procedurally and time barred. Even if the court ignored the evidentiary problems and the new versus old problems, the cumulative evidence proffered by Beach does not warrant a finding of actual innocence in support of the fundamental miscarriage of justice exemption to the time requirements.

SUMMARY OF ARGUMENT

The Montana Fifteenth Judicial District Court erred in denying the defendant-appellant's Petition for Postconviction Relief on the basis of timeliness. The District Court applied the statute of limitations in effect at the time of Beach's conviction, which provided that petitions for postconviction relief must be filed within five years of the date upon which the conviction became final, and contained no provision for a scenario in which new exculpatory evidence is discovered after conviction, as has happened in this case.

In Montana, however, the applicable statute of limitations for postconviction relief petitions is the statute in effect at the time the petition is filed, not the statute in effect at the time of conviction. Under M.C.A. Section 46-21-102 (2007), Beach's petition for postconviction relief on the grounds of newly-discovered evidence had to be filed within one year of the date upon which he discovered, or reasonably should have discovered, the new evidence. Beach's petition was filed on January 18, 2008, and the majority of the evidence upon which he relied in his petition was discovered on or after January 19, 2007. Hence, Beach's petition was timely filed and the District Court erred in dismissing it on the basis of timeliness.

The District Court erred in ruling that Beach's petition is procedurally barred. The District Court failed to state with any specificity how or why Beach's petition was procedurally barred, other than that it found the petition time-barred. Beach's petition met the statutory requirements of M.C.A. Section 46-21-104, which sets forth the necessary elements of a proper petition for postconviction relief.

Furthermore, the law regarding the timeliness of petitions for postconviction relief on the grounds of newly-discovered evidence has not been clearly and consistently applied in Montana, and therefore the District Court should not have dismissed this petition on those grounds.

The District Court also erred in applying the standard for new evidence set forth for the fundamental miscarriage of justice exception to the evidence which Beach discovered less than one year before bringing the instant petition. This standard is significantly more difficult to meet than the standard applied to newly-discovered evidence in cases where the petition is filed less than one year after the evidence is discovered. Because Beach's petition was timely filed, the District Court should have applied the test set forth in State v. Clark, 330 Mont. 8, 125 P.3d 1099 (2005).

The District Court incorrectly ruled that the evidence presented by Beach which had been discovered more than one year before the petition was filed did not meet the requirements for opening the actual innocence gateway set forth in State v. Pope, 318 Mont. 383, 80 P.3d 1232 (2003). In addition, given that the evidence older than one year did satisfy the Pope test, the District Court erred in not examining Beach's otherwise time-barred constitutional claims.

The District Court further erred in denying the Petition without holding the evidentiary hearing requested by Beach. The Court implicitly made findings of fact as to the veracity of the witnesses who proffered the new evidence without first hearing from those witnesses. While Beach concedes that a District Court is permitted to dismiss a petition for postconviction relief without a hearing when the corroborating evidence required by M.C.A. Section 46-21-201(1)(a) is not provided, Beach's petition was properly accompanied by the necessary affidavits and transcribed testimony from the clemency hearings. The Supreme Court has held that unsupported allegations are not sufficient to entitle a postconviction petitioner to an evidentiary hearing, but in this case the petitioner did provide substantial evidentiary support for his claims.

The fifth Clark factor requires the District Court to consider whether a new trial has a reasonable probability of resulting in a new outcome. Clark, supra, at

18, 1105. In order to make a finding answering this question, the court needs to hear and judge the new testimony to be given at trial. A finding on this point is necessary to deny a petition for postconviction relief, and the District Court erred in making this sort of judgment without first hearing the evidence.

Finally, the District Court also erred in basing its ruling upon the proposition that the prosecutors have reviewed the evidence and are "morally and ethically bound to act to see that justice was done." The prosecutors are obviously entitled to review the evidence and to form an opinion as to its value, but the proposition that their judgment of the evidence might substitute for that of a judge or jury is patently incorrect. If the District Court's proposition were true, there would never be a need for a jury trial in any case, because prosecutors would always act in the interests of justice and would never prosecute an innocent defendant. Even if prosecutors did unfailingly act in what they perceive to be the interests of justice, it is certainly still possible that the jury will disagree – and clearly, judges and juries often do disagree and acquit defendants.

ARGUMENT

The standard of review of a district court's denial of a petition for postconviction relief is whether the district court's findings of fact are clearly erroneous and whether its conclusions of law are correct. Porter v. State, 313

Mont. 149, 153, 60 P.3d 951, 953 (2002). Whether or not a petition for postconviction relief is timely is a conclusion of law to be reviewed de novo.

Discretionary rulings in postconviction relief proceedings, including rulings related to whether to hold an evidentiary hearing, are reviewed for an abuse of discretion. Notti v. State, 341 Mont. 183, 186, 176 P.3d 1040, 1043 (2008).

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

A. The District Court applied the incorrect statute of limitations.

Montana Code Annotated Section 46-21-102(2) currently governs the timeliness of petitions for postconviction relief on the basis of newly-discovered evidence. Section 102(2) states, in pertinent part:

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

The State has asserted, correctly, that a different version of section 46-21-102 was on the books at the time of the defendant's conviction in 1984. Pursuant to that statute, defendants were allowed five years from the date of conviction to file a petition for postconviction relief. That earlier version of the law contained

no provision protecting the rights of defendants who discover new evidence after trial.

The Montana State Legislature amended this section in 1997, adding subsection 2, which is, in effect, a statute of limitations on filing a petition for postconviction relief on the grounds of newly-discovered evidence. Subsection 2 rectified the prior statute's lack of a provision protecting those who discover new evidence more than five years after their conviction. Prior to the enactment of the 1997 amendments, a defendant who discovered new evidence more than five years after being convicted had no codified legal remedy. The State has argued that the pre-1997 statute applies to Beach, and that Beach's ability to file a petition for postconviction relief is time-barred. The District Court agreed.

1. Concerning petitions for postconviction relief, the Montana Supreme Court has repeatedly held that the statute of limitations in effect at the time the petition was filed is controlling.

The Montana Supreme Court has repeatedly held that, "to determine whether a petition for postconviction relief is timely, we look to the statute of limitations in effect at the time the petition is filed, not to the statute in effect at the time of charge or conviction." Sanchez v. State, 319 Mont. 226, 229, 86 P.3d 1, 2 (2004), citing State v. Carson, 311 Mont. 485, 489, 56 P.3d 844, 846 (2002).

While neither Sanchez nor Carson is exactly on point to the case at bar, these cases are analogous and the Court's language is unequivocal. In both cases, the defendants argued for the application of the five-year statute of limitations which existed prior to the 1997 amendments, as the crimes with which they had been charged were committed prior to the adoption of those amendments. In each case, the Supreme Court ruled that the post-1997 version of the statute applied.

While it is true that Sanchez and Carson were both convicted after the effective date of the 1997 amendments, the Supreme Court explicitly stated that the basis for its applications for the post-1997 statute was the fact that they had petitioned for postconviction relief after its effective date. In Sanchez, the Court wrote, "although there was a five-year time period allowed for filing petitions for postconviction relief when Sanchez committed the deliberate homicide offense, the statute in effect at the time he filed his petition, as well as when his conviction became final, only allowed for one year to file such a petition." Sanchez, supra, at 230, 3.

The defendant-appellant herein, through the efforts of his defense team, discovered significant new evidence between January 19, 2007, and January 18, 2008. His petition was filed in accordance with the statute which was in effect at the time that he became aware of this evidence. If the State's theory is correct – if

Beach could not timely file a petition for postconviction relief after 1989 – then what means does he have to bring this new evidence to the attention of the Court? In State v. Perry, the Montana Supreme Court recognized the folly of this sort of theory. Perry, 232 Mont. 455, 462, 758 P.2d 268, 272-273 (1988), overruled on other grounds.

The State has argued that, because subsection 2 was not part of the law until more than five years after Beach was convicted, Beach does not deserve its protection. Instead, the State theorizes that Beach's petition could be heard under the clear miscarriage of justice exception, which imposes a much heavier burden upon a petitioner seeking a new trial. Sanchez, supra, 229, 2; State v. Rosales, 299 Mont. 226, 228, 999 P.2d 313, 314 (2000); State v. Redcrow, 294 Mont. 252, 259, 980 P.2d 622, 627 (1999). In other words, the State seems to believe that defendants convicted before subsection 2 went into effect should have fewer rights and heavier burdens than those convicted later. That proposition is simply unfair, inequitable, and unjust, and this Court should not promote it.

In its Memorandum in support of the Motion to Dismiss, the State declared that "Beach cannot meet the clear miscarriage of justice exception." Memorandum, pg. 21. But the State itself seriously diminished Beach's ability to ever meet that standard when it lost crucial evidence. Beach has continually

pressed for DNA testing of an alleged pubic hair found on the victim's sweater, and the State maintains that it cannot locate this evidence. This Court should not make the defendant-appellant liable for the State's mistake.

It is the State's responsibility to safeguard evidence, even after the trial. Science is continually advancing, and more accurate tests of hair, blood, and semen are being developed all the time. The District Court forced the defendant-appellant to meet an already inappropriately difficult standard because the State lost the evidence that could potentially exonerate him. This Court should send a message to the State that it simply must safeguard all potentially exonerating evidence, even, perhaps especially, after it has obtained a conviction.

2. The Montana Supreme Court has extended the protections of the newly-discovered evidence exception to defendants against whom judgments became final prior to April 24, 1996.

While Sanchez and Carson are not exactly analogous to this case, the Montana Supreme Court has considered a case which is quite similar. Oatman v. State, 324 Mont. 472, 104 P.3d 1048 (2004). Oatman's conviction, like that of the defendant herein, became final prior to April 24, 1996. Under the statute in effect at the time of his 1994 conviction (which was the same statute in effect at the time

of Beach's conviction), Oatman had five years in which to file a petition for postconviction relief. Those five years lapsed.

Then, in 2002, Oatman filed a petition for postconviction relief, on the grounds of newly-discovered exculpatory evidence. The District Court denied Oatman's petition, ruling that it was time-barred under the five-year window provided by M.C.A. 46-21-102 (1993). On appeal, the State Supreme Court found that Oatman's petition "was clearly time-barred" under the 1993 code – but then went on to consider subsection 2 added by the 1997 amendments. Oatman, supra, at 475, 1050.

The Court found that "Section 46-21-102(2), M.C.A., waives the statute of limitations and allows for an appeal based on newly-discovered evidence," presumably referring to the time bar in M.C.A. 46-21-102 (1993). Oatman, supra, at 475, 1050. In other words, the Court extended to Oatman the five years allowed by the old statute, but also afforded him the protection extended by the 1997 amendments. Essentially, the Supreme Court ruled that subsection (2) waives both the statute of limitations specified by M.C.A. 46-21-102(1) and the statute of limitations specified by the pre-1997 version of the statute.

The denial of Oatman's petition was ultimately upheld, as the testimony he asked the Court to consider did not qualify as "newly-discovered evidence." But,

the Supreme Court first considered that evidence on the merits – it did not dismiss Oatman's petition on the basis of it being filed more than five years after his conviction became final. Instead, the Court applied the 1997 amendments to Oatman's petition, and considered his newly-discovered evidence. The point is not that the Court ultimately rejected Oatman's claim, but that the Court found it could not dismiss Oatman's claim on the basis of its timeliness. The Court had to reach the merits of Oatman's newly-discovered evidence and probe what effect that evidence might have, even though subsection 2 was not codified until after Oatman's conviction. The Supreme Court essentially extended the protection of subsection 2 to those whose convictions became final prior to April 24, 1996.

In the case at bar, the State asked the District Court to reject the defendant's petition on the basis of its timeliness, which it did. Yet the Montana Supreme Court examined the merits of the newly-discovered evidence in a case whose timeline is essentially identical. In so doing, the Court set a precedent of extending the statutory time bar for an additional year to pre-1997 Section 102 petitions involving newly-discovered evidence. This precedent should be applied to the case at bar.

II. THE DISTRICT COURT ERRED IN RULING THAT THE PETITION WAS PROCEDURALLY BARRED.

M.C.A. 46-21-104 specifies the necessary elements of a properly-filed petition for postconviction relief. It states, in pertinent part:

> (1) The petition for postconviction relief must:
>
> (a) identify the proceeding in which the petitioner was convicted, give the date of the rendition of the final judgment complained of, and clearly set forth the alleged violation or violations;
>
> (b) identify any previous proceedings that the petitioner may have taken to secure relief from the conviction; and
>
> (c) identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts.
>
> (2) The petition must be accompanied by a supporting memorandum, including appropriate arguments and citations and discussion of authorities.

The defendant-appellant satisfied the conditions of Sections 1(a) and 1(b) in the section of his petition titled "Background Information." See Verified Petition for Post-Conviction Relief, pgs. 2-4. In his petition, Beach provided nine pages summarizing the newly-discovered evidence and twenty-nine exhibits illustrating the new evidence, so he clearly also fulfilled the requirements of Section 1(c). Finally, Beach also provided a 27-page memorandum in support of his petition, fulfilling the requirement of Section 2. The petition was procedurally adequate, and the District Court's dismissal of the petition on this basis was error.

III. THE MONTANA STATUTE OF LIMITATIONS ON PETITIONS FOR POSTCONVICTION RELIEF ON THE BASIS OF NEWLY-DISCOVERED EVIDENCE HAS NOT BEEN CLEARLY AND CONSISTENTLY APPLIED.

A. A defendant defaults on a claim only when he fails to comply with an applicable procedural rule.

In English v. United States, 42 F.3d 473 (1994), the Ninth Circuit Court of Appeals held that "a defendant defaults on a claim only when he fails to comply with an applicable procedural rule." English, 477. Under English, a procedural rule is only applicable if it has been applied clearly and consistently by the State Court. See also Calderon v. United States District Court, 96 F.3d 1126, 1128 (1996).

B. Montana courts have not clearly and consistently applied the procedural rule at issue.

In amending the statute of limitations in 1997, the Montana Legislature stated in Section 9(1), Ch. 378, L. 1997, that the new statute would apply only to individuals convicted after April 24, 1996. This section concerning applicability of the amendments is not codified in the official Montana Code Annotated.

Despite the language of Section 9(1), Ch. 378, L. 1997, the Montana Supreme Court has repeatedly held that, "to determine whether a petition for postconviction relief is timely, we look to the statute of limitations in effect at the

time the petition is filed, not to the statute in effect at the time of charge or conviction." Sanchez, supra; Carson, supra. And in Oatman, the Montana Supreme Court extended the new statute's protection to a case which, according to the Legislature, it should not have.

There is an innate tension between the law as it was passed by the Legislature, the law as it appears in the Montana Code Annotated, and the law as it has been applied by the Montana courts. This tension, combined with the plethora of judicially-created exceptions to the statute created and then overruled, renders it very difficult if not impossible for a petitioner to clearly determine when his petition must be filed. See State v. Gollehon ("We are now persuaded that we originally started down this shaky staircase in error and that our judicially created exceptions to the statute are fast becoming the rule.") 274 Mont. 116, 116, 906 P.2d 697, 699 (1995). This inconsistency must be resolved for the statute of limitations to be applied clearly and consistently. If the law is not applied clearly and consistently, under English and Calderon it cannot be held to bar a defendant's claim.

IV. THE DISTRICT COURT APPLIED AN IMPROPER LEGAL STANDARD TO DETERMINE WHETHER THE NEWLY-DISCOVERED EVIDENCE ENTITLED THE DEFENDANT TO POSTCONVICTION RELIEF.

A. The District Court should have applied the Clark-Crosby test to determine whether the new evidence entitled the defendant to postconviction relief.

In the State's Memorandum in Support of its Motion to Dismiss, the State argued that the defendant's newly-discovered evidence must satisfy the requirements of the miscarriage of justice exception test set forth in Schlup v. Delo, 513 U.S. 298 (1995), and adopted by the Montana Supreme Court in Redcrow (supra, 259, 627), rather than the five-pronged test outlined in State v. Clark, (supra, 18, 1105), and adopted for postconviction relief petitions in Crosby v. State, 332 Mont. 460, 465, 139 P.3d 832, 835 (2006). In its order denying the defendant-appellant's petition, the Court found that "the cumulative evidence proffered by Beach does not warrant a finding of actual innocence in support of the fundamental miscarriage of justice exception." Order, pg. 1. While the District Court's very brief order does not specify what legal standard it applied or its specific reasoning for finding that the newly-discovered evidence does not entitle Beach to postconviction relief, its wording indicates the District Court

applied the Redcrow test for which the State advocated, rather than the appropriate test set forth in Clark and adopted in Crosby.

The question of which test is appropriate hinges on the Court's answer to the statute of limitations question discussed above. If this Court agrees that M.C.A. Section 46-21-102(2) applies to this petition, then the Court must also find that the five-part Clark-Crosby test is the appropriate legal standard for determining whether the defendant-appellant is entitled to postconviction relief. The Montana Supreme Court's decisional law on this point is clear, and the State has not disputed that this test is the appropriate measure of whether newly-discovered evidence entitles a petitioner to postconviction relief under current law.

The Clark-Crosby test sets forth the following requirements:

1) The evidence must have been discovered since the defendant's trial;
2) The failure to discover the evidence sooner must not be the result of lack of diligence on the defendant's part;
3) The evidence must be material to the issues at trial;
4) The evidence must be neither cumulative nor merely impeaching; and
5) The evidence must indicate that a new trial has a reasonable probability of resulting in a different outcome.

Clark, supra, at 18, 1105. The State has not disputed that the defendant-appellant's newly-discovered evidence satisfies all five prongs of this test. This

matter should be remanded to the District Court with instructions to apply the Clark-Crosby test.

B. **In the alternative, the Court may apply the Pope test.**

In the event that the Court finds Beach's petition does not fall under the aegis of M.C.A. Section 46-21-102(2) , the Court must apply the Pope test, discussed in detail in Section V. State v. Pope, 318 Mont. 383, 80 P.3d 1232 (2003). Like the evidence discovered by Beach prior to January 19, 2007, the evidence discovered after that date satisfies the conditions of the Pope test, and, even if the Court could not properly consider it under Subsection 2, the Court should consider it under Pope.

V. THE DISTRICT COURT INCORRECTLY DETERMINED THAT THE EVIDENCE DISCOVERED MORE THAN ONE YEAR BEFORE BEACH FILED THE PETITION FAILED TO OPEN THE ACTUAL INNOCENCE GATEWAY.

A. Pursuant to State v. Pope, the statute of limitations on petitions for postconviction relief may be waived if the petitioner presents evidence which tends to show he is "actually innocent."

The petitioner in Pope was convicted of sexual intercourse without consent. Pope, supra, at 385, 1234. Several years later, after the statute of limitations for filing a petition for postconviction relief had expired, Pope became aware of DNA evidence which had not been presented at his trial and which tended to exonerate

him (though it did not do so conclusively). Id., at 390, 1237. Pope filed a petition for postconviction relief, which the District Court denied on the grounds that the evidence was not newly-discovered and failed to prove that he did not commit the crime of which he was convicted. On appeal, the Montana Supreme Court reversed, holding that the District Court erred in concluding that Pope had to prove he did not commit the crime to overcome the statutory bar. Id., at 397, 1242. Given the DNA evidence, it was probable that no reasonable juror would have found Pope guilty as charged. The combination of the new evidence and the errors at Pope's trial entitled him to a new trial, according to the Supreme Court. Id., at 401, 1244.

The situation at bar is analogous to that of Pope. Here too, the petitioner has discovered new evidence since his trial but the statute of limitations has expired. (Pope's evidence qualified as "new" even though he and his counsel were aware that the test results were forthcoming at the time of his trial and did not seek a continuance.) Like Pope, Beach also confessed, though these confessions were under very different circumstances. Finally, Beach was also prejudiced by errors at his trial, including ineffective assistance of counsel, prosecutorial misconduct, and the loss of crucial evidence by the State.

The Pope court held that, "when a conviction is not error-free, the standard of producing evidence of innocence carries a lower burden." Pope, supra, at 394, 1240. The Montana Supreme Court, adopting a standard set forth in Schlup v. Delo, supra, at 329, 868, wrote:

> [T]his Court must consider how a reasonable juror would view the new evidence: The standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do. Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.

Pope, supra, at 397-398, 1242. A petitioner who satisfies these requirements opens the "actual innocence gateway" and is entitled to have his otherwise time-barred constitutional claims reviewed on the merits. Schlup, id., at 316, 862.

Beach's new evidence, like Pope's, satisfies the conditions necessary to pass through the actual innocence gateway and Beach deserves a new trial. Beach further deserves to have his heretofore unconsidered constitutional claims examined on their merits, particularly given the many inconsistencies between his confession and the crime scene, the shocking conduct of the prosecutor in relying upon mischaracterized evidence which was never even introduced, and the highly ineffective defense he received at trial.

VI. THE DISTRICT COURT ERRED IN DENYING THE PETITION FOR POSTCONVICTION RELIEF WITHOUT FIRST HOLDING AN EVIDENTIARY HEARING.

The District Court abused its discretion in refusing to hold a hearing in the case at bench. The District Court was not in a position to assess the veracity and strength of the witness testimony without hearing the testimony.

In Crosby, supra, the defendant filed a petition for postconviction relief on the basis of newly-discovered evidence after the prosecution's key witness recanted her trial testimony that he had raped her. The District Court found that the recanted testimony was "untrue" and denied Crosby's petition. Crosby, supra, at 466, 836. On appeal, the Montana Supreme Court found that the District Court had abused its discretion and "violated Clark when it first determined the ultimate veracity of the recanting testimony, and then used that determination as the sole basis to deny postconviction relief." Id., at 466, 836. "In doing so, the Court improperly placed itself in the role of fact-finder," the Supreme Court held. Id., at 465, 835.

The District Court in this case has committed a similar abuse of discretion. Beach has provided testimony from witnesses that someone else was responsible for the crime of which he was convicted. In ruling that this testimony "does not warrant a finding of actual innocence," the District Court has ruled on the veracity

and strength of those witnesses without hearing their testimony. While the findings of the District Court here are not as explicit – here the order consumes approximately half a page – the error is the same. Crosby makes clear that, under the Clark test, "the court does not pass on the ultimate truthfulness" of the new evidence; "rather, provided the five Clark factors are satisfied, the court leaves this determination to the fact-finder on retrial." Crosby, supra, at 465, 835-836.

VII. THE DISTRICT COURT ERRED WHEN IT DENIED BEACH'S PETITION ON THE BASIS THAT PROSECUTORS ARE "MORALLY AND ETHICALLY BOUND" TO "SEE THAT JUSTICE WAS DONE."

The assumed fulfillment of the prosecutors' moral and/or ethical obligations is not a legal basis upon which to deny a petition for postconviction relief. It is impossible to tell from the District Court's order how much weight this reasoning played in its' decision. The District Court merely wrote:

> In Montana the primary responsibility of the prosecution is to see that justice is accomplished. Prosecutors should seek justice and not simply convictions, and should not seek victory at the expense of a defendant's constitutional rights. *** Had this shown that Beach was truly innocent, the prosecutors would be morally and ethically bound to act to see that justice was done.

Order, pg. 1. Defendant's extensive research has revealed no authority for the District Court's denial of his petition on this basis.

Even if the State's prosecutors unfailingly pursued justice rather than convictions, that would still not justify the basis of the District Court's decision. If the District Court's proposition is correct, it would imply that a jury trial is never necessary because the State's prosecutors would always be working towards the ends of justice and would never make mistakes. No judge would ever be necessary either, as the omniscient and benevolent prosecutor could be entrusted with all aspects of criminal justice.

This court should overturn the District Court's decision.

CONCLUSION

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

RESPECTFULLY SUBMITTED this 9 day of July, 2008.

LAW OFFICES OF TERRANCE L. TOAVS

By: _____

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CERTIFICATE OF SERVICE

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

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STATE OF MONTANA SUPREME COURT

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

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a Times New Roman, proportionately spaced typeface of 14 points, is double spaced except for footnotes and quoted and indented material, is less than 30 pages and has 6,107 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 8 day of July, 2008.

Terrance L. Toavs