IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 11-0181

BARRY ALLAN BEACH,

Petitioner,

v.

MONTANA FIFTEENTH JUDICIAL DISTRICT COURT, ROOSEVELT COUNTY, and THE HONORABLE E. WAYNE PHILLIPS, Presiding Judge,

Respondents.

SUMMARY RESPONSE TO PETITION FOR WRIT OF SUPERVISORY CONTROL

On Appeal from the Montana Fifteenth Judicial District Court,
Roosevelt County, The Honorable E. Wayne Phillips, Presiding

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The Attorney General of the State of Montana, on behalf of the Respondents, herein responds to the Petition for Writ of Supervisory Control filed in this matter.

STATEMENT OF THE ISSUES

1. Since the district court deemed Petitioner Barry Beach's (Beach) motions for discovery and to amend his petition as premature, did not proceed under a mistake of law when it did so, and there is no constitutional issue of statewide importance, is it appropriate for this Court to intervene?

2. Since there is no constitutional issue of statewide importance and Judge Phillips did not proceed under a mistake of law when, after assuming jurisdiction of this matter following Beach's substitution of Judge Cybulski, he moved the hearing from Wolf Point to Lewistown, is it appropriate for this Court to intervene?

BACKGROUND

On May 3, 1983, the State charged Beach with deliberate homicide for the 1979 murder of Kim Nees in Poplar, Montana. State v. Beach, 217 Mont. 132, 141, 705 P.2d 94, 100 (1985). Beach confessed to killing Nees on January 7, 1983. Beach, 217 Mont. at 139, 705 P.2d at 99. On April 13, 1984, a jury found Beach guilty of deliberate homicide. The district court sentenced Beach to 100 years in

prison and designated him ineligible for parole. Beach, 217 Mont. at 141, 705 P.2d at 100.

This Court affirmed his conviction and later denied his request for post-conviction relief. State v. Beach, 217 Mont. 132, 705 P.2d 94 (1985); Beach v. Day, 275 Mont. 370, 913 P.2d 622 (1996). Beach filed a petition for federal habeas corpus relief. The federal magistrate judge recommended denial of Beach's petition, and the federal district court denied Beach habeas corpus relief. Federal Magistrate Judge Anderson's 8/6/97 Find. & Recomms. Beach v. Mahoney, CV 92-92-BLG-RWA; 3/31/98 Order, Beach v. Mahoney, CR 92-92-BLS-JDS. The Ninth Circuit Court of Appeals affirmed the federal district court's denial of Beach's request for habeas corpus relief. Beach v. McCormick, 191 F.3d 459 (9th Cir. 1999).

On August 20, 2007, the Montana Board of Pardons and Parole issued a lengthy decision denying Beach's request for clemency and commutation after the Board conducted an unprecedented three-day hearing on Beach's claimed actual innocence. (8/24/07, Decision, In the Matter of Executive Clemency for Pardon and Commutation of the Sentence of Barry Allan Beach.)

On January 18, 2008, Beach filed his postconviction petition at issue. On March 28, 2008, Judge Cybulski dismissed Beach's petition on procedural grounds without a hearing. (3/28/08 Order, Cause No. 1068-C.) On appeal, this Court

remanded Beach's case to Judge Cybulski for an evidentiary hearing on Beach's claim of new evidence establishing actual innocence. Beach v. State, 2009 MT 398, 353 Mont. 411, 220 P.3d 667.

On remand, Beach moved to substitute Judge Cybulski. The State filed an objection, arguing, based on Mont. Code Ann. § 46-21-101(1), that Beach was not entitled to a substitution pursuant to Mont. Code Ann. § 3-1-804. Judge Cybulski denied Beach's substitution request. (1/12/10 Order, Cause No. 1068-C.) Beach filed a petition for writ of supervisory control. On March 24, 2010, this Court entered an order granting Beach's petition, vacated Judge Cybulski's substitution order and remanded the matter to Judge Cybulski for the purpose of calling a new judge to preside over Beach's postconviction petition. (3/24/2010 Order, Beach v. Montana Fifteenth Judicial District, OP 10-0056.)

Judge Phillips assumed jurisdiction on May 5, 2010. (5/6/10 Assumption of Jurisdiction, Cause No. 1068-C.) Judge Phillips ordered that Beach file a prehearing memorandum in which he identify his new evidence and analyze the evidence in accord with this Court's analysis identified in Beach v. State. He did so on June 7, 2010. (Beach's Prehr'g Mem. attached as App. A.) The State filed a response. (State's Resp. to Prehr'g Mem. attached as App. B.)

On June 8, 2010, Beach filed a motion for leave to conduct discovery. (Beach's Disc. Mot. attached as App. C.) The State filed a response. (State's Resp. to Mot. for Disc. attached as App. D.) The district court denied, without prejudice, Beach's discovery request as premature. (10/5/10 Order attached to Beach's Pet. for Writ as Ex. A.)

Beach filed a motion to amend his postconviction petition and a proposed amended petition on November 8, 2010. (Beach's Proposed Am. Pet. attached to Beach's Pet. as Ex. D.) The State objected. (State's Obj. to Mot. to Amend Pet. attached as Ex. E.) The district court denied as premature, Beach's motion to amend his petition. The court did not decide as a matter of law whether Beach had a right to amend a successive petition. (2/28/11 Order attached to Beach's Pet. as Ex. C.)

Judge Phillips changed the evidentiary hearing location from the Roosevelt County Courthouse in Wolf Point to the Fergus County Courthouse in Lewistown, explaining: "The Court is faced with difficult challenges in managing its own court calendar for the one week projected for the hearing. . . ." (12/15/10 Order attached to Beach's Pet. as Ex. B.)

ARGUMENT

A WRIT OF SUPERVISORY CONTROL IS UNWARRANTED

I. INTRODUCTION

This Court has general supervisory control over all other courts and may, on a case-by-case basis, supervise another court by way of a writ of supervisory control. Mont. Const. art. VII, § 2(2); Mont. R. App. P. 14(3). Supervisory control is an extraordinary remedy which this Court exercises only when (1) urgency or emergency factors exist making the normal appeal process inadequate, (2) the case involves purely legal questions, and (3) one or more of the following circumstances exist: (a) the other court is proceeding under a mistake of law and is causing a gross injustice, (b) constitutional issues of state-wide importance are involved, or (c) the other court has granted or denied a motion for substitution of a judge in a criminal case. Lamb v. District Ct. of the Fourth Judicial Dist. of Mont., 2010 MT 141, ¶ 10, 356 Mont. 534, 234 P.3d 893. Beach cannot meet these rigorous standards.

II. THIS CASE DOES NOT INVOLVE ANY LEGAL QUESTION.

In both the instance of Beach's discovery motion and his motion to amend his untimely, successive petition, the district court ruled that Beach's motions were premature. The State objected to both motions. The district court did not address

either Beach's or the State's legal arguments. The district court expressed its intention of managing the case by first conducting the evidentiary hearing this Court mandated.

Since the district court has not denied either of Beach's motions with prejudice, and has not denied either of the motions on legal grounds, a writ of supervisory control is premature. See State ex rel. Klein v. District Court, 35 Mont. 364, 366, 90 P. 161 (1907). Moreover, this Court will not anticipate a district court's ruling to conclude that the district court will reach the wrong result. Id.

Beach generally claims that urgency exists in his case because he is "wrongfully imprisoned, and has been since 1984," and three "vital witnesses" whom he does not identify, have died. (Pet. at 3.) Over the past 27 years, no court has found that Beach is wrongfully imprisoned. In as much as Beach feels disadvantaged by the passage of time, so does the State. This crime occurred in 1979, and a jury convicted Beach in 1984. This presents unique challenges to the State in defending against Beach's numerous claims of wrongdoing, only highlighting the importance of allowing the district court to manage the course of this case by first proceeding with the evidentiary hearing.

III. THE COURT IS NOT PROCEEDING UNDER A MISTAKE OF LAW.

A. Discovery Motion

In the course of civil litigation, the district court has inherent discretionary power to control discovery under its authority to control trial administration. Bartlett v. Allstate Ins. Co., 280 Mont. 63, 72, 929 P.2d 227, 232 (1996). In postconviction cases, Mont. Code Ann. § 46-21-201(4) provides:

> The court, for good cause, may grant leave to either party to use the discovery procedures available in criminal or civil proceedings. Discovery procedures may be used only to the extent and in the manner that the court has ordered or to which the parties have agreed.

Typically, orders pertaining to discovery are interlocutory in nature and not reviewable in an original proceeding. Hegwood v. Montana Fourth Jud. Dist. Ct., 2003 MT 200, ¶ 6, 317 Mont. 30, 75 P.3d 308. This Court will only exercise its original jurisdiction with respect to a discovery order when the order will place a party at a significant disadvantage in litigating the merits of the case. Id., citing State ex rel. Burlington N. R.R. v. District Ct., 239 Mont. 207, 212, 779 P.2d 885, 889 (1989). For example, discovery of potentially privileged material "presents unique issues" that "under certain circumstances" are sufficient for this court to invoke original jurisdiction. Inter-Fluve v. Montana Eighteenth Judicial Dist. Ct., 2005 MT 103, ¶ 1, 327 Mont. 14, 112 P.3d 258, quoting Winslow v. Mont. Rail Link, 2001 MT 269, ¶ 2, 307 Montana 269, 38 P.3d 148. Beach's discovery

requests do not meet these unique circumstances. The district court's order will not place Beach at a significant disadvantage in litigating his case since at the time he filed his petition in 2008 he should have been prepared to proceed to a hearing on his claimed new evidence.

Beach's discovery requests are unprecedented. (App. C.) Moreover, since he is making a claim of actual innocence to overcome the time bar, he should not need discovery in the first instance. The very fact that he is seeking discovery exposes the weaknesses in his actual innocence claim.

Beach's request for mandated palm prints relates to an issue outside the scope of his 2008 postconviction petition. "[P]ostconviction proceedings are not a fishing expedition or discovery device in which a petitioner, through broad allegations in a verified petition, may establish the right to an evidentiary hearing." Robinson v. State, 2010 MT 108, ¶ 18, 356 Mont. 282, 232 P.3d 403, citing Smith v. State, 2000 MT 327, 303 Mont. 47, 15 P.3d 395.

Beach offers speculation to justify obtaining palm prints from ten individuals. For example, Beach has requested the palm print of Kara Red Dog based on a statement Orrie Burshia, who is deceased, allegedly made to Susan Bissell. According to Bissel, Burshia said that Mike Longtree told her that he was present when Nees was killed, and he was with one of Red Dog's sisters. Law enforcement questioned Longtree about his alleged statement to Burshia. Longtree

has consistently denied having any knowledge of the Nees homicide. (8/24/79 FBI Report and 5/22/06 County Attorney's Report Regarding Longtree attached as Apps. F and G.)

Beach's request is not a matter of running comparisons on existing palm prints available through the criminal justice system. It is a matter of forcing people, based upon hunches, to give their palm prints. In his January 2008 petition, Beach focuses his claim of third party guilt on Sissy Atkinson and Maude Grayhawk. Both of these women provided their palm prints back in 1998 and were eliminated as the person who left the palm print on the Nees truck. (1998 FBI Document and Fingerprint Report, attached as App. H.)

By using his discovery motion in an effort to widen his net of "third party suspects" Beach implicitly acknowledges that his actual innocence claims implicating Maude and Sissy are problematic. This is not good cause to force ten more people to give him their palm prints.

Beach offered no authority for his assertion that he ought to be allowed to force "witnesses" who refuse to speak with him voluntarily to be deposed. It may be that some of these "witnesses" feel harassed by Beach's investigators. (App. G.) Beach did not identify the witnesses, what efforts he made to interview them, the reasons the witnesses declined to speak with Beach, or what he hoped to gain by deposing them. When a petitioner applies for postconviction relief, his

claims for relief should already be developed. The proceedings "are not a fishing expedition or discovery device. . . ." Robinson v. State, 2010 MT 108, ¶ 18, citing Smith v. State, 2000 MT 327, ¶ 28.

Beach asked that his investigators be allowed to conduct their own search of the Roosevelt County and Valley County evidence rooms to look for "missing" evidence, including a hair found on the victim's sweater, hairs from a bloody towel, swabs from the Nees vehicle, and cigarette butts from the Nees vehicle. Sometime between the trial and now those items of evidence were lost or destroyed.

Law enforcement officers, along with Beach's own investigators, have exhaustively searched the Roosevelt County evidence room. Moreover, in response to Beach's motion in district court, both the Roosevelt County and Valley County Sheriffs filed affidavits indicating they have searched the evidence room and found nothing pertaining to Beach's case. (Exs. 1 and 2 attached to the State's Response to Petitioner's Motion for Discovery, attached hereto as Apps. I and J.)

In reviewing Beach's 2008 petition and the attached witness statements, it appears that none of those witnesses or their proposed testimony has anything to do with the items of evidence that are now lost or destroyed. In light of the exhaustive search that has already been conducted, Beach's lack of a clear, coherent theory on why the missing evidence would even be at all beneficial to his claim of actual

innocence, and the fact that none of the missing evidence was used to convict Beach, Beach failed to establish good cause for his discovery request.

B. Motion to Amend

Beach seeks to amend his second postconviction petition pursuant to Mont. Code Ann. § 46-21-105(1)(a), which provides:

> (1)(a) All grounds for relief claimed by a petitioner under 46-21-101 must be raised in the original or amended original petition. The original petition may be amended only once. At the request of the state or on its own motion, the court shall set a deadline for the filing of an amended original petition. If a hearing will be held, the deadline must be reasonably in advance of the hearing but may not be less than 30 days prior to the date of the hearing.

Beach asserts that the postconviction petition he filed on January 18, 2008, is the **original** petition for purposes of Mont. Code Ann. § 46-21-105(1)(a). Beach fails to mention the **actual** original postconviction petition he filed in 1995. The Montana Supreme Court concluded Beach's **original** petition was procedurally barred either by res judicata and/or by the five-year statutory limitation period for filing a postconviction petition. Beach v. Day, 275 Mont. at 375, 913 P.2d at 625 (1996).

The 1993 version of Mont. Code Ann. § 46-21-105 provided in pertinent part:

> (1) All grounds for relief claimed by a petitioner under 46-21-102 must be raised in the original or **amended** petition. Those grounds for relief not raised are waived unless the court on hearing a

> subsequent petition finds grounds for relief that could not reasonably have been raised in the original or amended petition.

In 1995, the Montana Legislature amended Mont. Code Ann. § 46-21-105 to its present wording of "original or **amended original** petition." 1995 Mont. Laws, ch. 96. The 1995 amendment went into effect on October 1, 1995. See Mont. Code Ann. § 2-1-201(1)(a). Beach's current petition is not **an original** petition. Beach's interpretation renders the 1995 legislative amendment meaningless since he interchanges the word **original** with **current**. According to Beach, if his current petition were ultimately dismissed because he cannot meet the fundamental miscarriage of justice exception, he could file another (third) petition, under the fundamental miscarriage of justice exception, and that petition would become the **original** petition. Thus, according to Beach, he would be entitled to one amendment to his third petition, regardless of when he filed that petition or the fact that he had filed two prior untimely petitions without success. The process of repetitive, successive petitions and amendments to successive petitions could thereby go on indefinitely. Montana's postconviction statutory scheme does not allow a petitioner to "file petitions *ad nauseam*." State v. Root, 2003 MT 28, ¶ 10, 314 Mont. 186, 64 P.3d 1035.

This Court considered a similar issue in Root in which it ultimately held that the time limitation in Mont. Code Ann. § 46-21-102 applied to the initiation of all postconviction proceedings, including a subsequent petition. Id., ¶ 16. The Court

affirmed Root's conviction on August 30, 1999. Root, ¶ 2. On January 18, 2000, Root filed a pro se postconviction petition in which he asserted several ineffective assistance of counsel claims. The district court dismissed the petition without ordering a response from the State. Root appealed. The Montana Supreme Court issued an order appointing Root counsel. On June 21, 2000, Root moved to voluntarily dismiss his appeal, and the Court granted his request. Id., ¶¶ 4-5.

On December 4, 2000, Root filed a second petition for postconviction relief in state district court again alleging that he had received ineffective assistance of counsel at trial. The district court dismissed Root's second petition, concluding that the petition was time barred, barred under the provisions governing second or subsequent petitions, and was procedurally barred. Root, ¶ 6. On appeal, Root argued that the district court erred in applying the one-year limitation period to his second postconviction petition because, in his estimation, the one-year period only applies to an initial or original petition. Root, ¶ 10. In so arguing, Root relied upon the language set forth in Mont. Code Ann. § 46-21-105(1).

This Court responded to Root's argument by stating:

> Root incorrectly lumps amended petitions together with second or subsequent petitions. "Amended" petitions and "subsequent" petitions are different in nature and are governed by different statutory provisions. Amended petitions are governed by § 46-21-105(1)(a), MCA, **which contemplates that a petition may be amended during the course of an ongoing proceeding that was timely initiated.** The provision allows a district court to set a deadline for filing an amended

> petition. These petitions are referenced in § 46-21-105(1)(b), MCA, as "amended original" petitions.
>
> However, Root did not file an amended original petition, and thus, the timeliness of an amended petition is not before the Court here. We therefore do not address whether the one-year limitation period in §46-21-102(1), MCA, would apply to an amended petition filed during the course of a postconviction proceeding.
>
> Root filed a second petition for postconviction relief, **which is governed by § 46-21-105(1)(b), MCA**.

Root, ¶¶ 12-14. (Emphasis added).

This Court remanded "Beach's petition to the District Court to conduct an evidentiary hearing on the newly discovered evidence alleged in Beach's petition." Beach, 2009 MT 398, ¶ 51. The plain language of the remand order dictates that Beach should not now be allowed to amend his successive petition. Judge Phillips has expressed his judicial preference of conducting the evidentiary hearing before entertaining motions on other matters. This decision makes good sense in light of Beach's attempt to include in his amended petition evidence that is demonstrably not new. (See App. E.)

For example, as additional "new" new evidence, Beach claims that he **now** has the ability to call a fingerprint expert to establish that the partial bloody palm print, photographed on the passenger side of the Nees truck, did not belong to Kim Nees. By making such a claim, Beach implies that he did not have the ability to present such testimony at his trial back in 1984. Expert testimony regarding

fingerprint identifications predated Beach's trial. See, e.g., Willoughby v. State, 122 So. 575, 578 (Miss. 1929). Prior to Beach's trial, an FBI fingerprint examiner completed finger and palm print comparisons and was available to testify at Beach's trial. Beach's claim that the evidence is "new" because the State did not provide him with a copy of Nees' palm print until February 21, 2008, is inaccurate. Beach had access to all of the FBI reports back in 1983 and 1984.

At trial, the State did not introduce the topic of the palm print. The State's interpretation of the FBI fingerprint examiner's report was that he could not conclusively exclude Kim Nees as the contributor of the palm print, but the State did not proactively present this evidence to the jury. Rather, Beach called Sheriff Mahlum and questioned him about the unidentified palm print. (Trial Tr. at 788-91.) On cross-examination, the prosecutor then asked if it was possible that Nees left the palm print. (Trial Tr. at 802.)

If the State had misinterpreted the FBI report, Beach only had to call the FBI examiner at trial to expose the State's error. Perhaps defense counsel Timer Moses made a strategic decision not to do so because there was more to lose by calling the fingerprint examiner than to gain. Instead, Beach held the State to its burden of proof. If the State reasonably interpreted the report, Beach has no grounds for complaint.

Moses clearly established that the partial palm print left in blood did not belong to Beach. (Trial Tr. at 317, 790-91, 794.) The State conceded that it could not ascertain who left the palm print. (Trial Tr. at 801.) Moses also repeatedly argued to the jury that the State, who had the burden of proof, did not present **any** evidence to the jury to establish who did leave the partial palm print. The State did not even allow the jury to see a photograph of the palm print, let alone call the FBI fingerprint examiner as a witness. (Trial Tr. at 912.)

Beach had the ability to procure a copy of Nees' palm prints prior to 2008. The fact the State provided him with a copy as a courtesy in 2008 does not establish that he could not have obtained it sooner. If Beach believed he had a legitimate claim based upon evidence related to the palm print, he was well aware of that fact at the conclusion of his trial. Moreover, Beach's actual innocence claim is based upon alleged statements that Sissy, Maude, and Joanne Jackson allegedly made to others years after the homicide. It has already been conclusively established that none of these three woman is the person who left the palm print. (App. H.)

C. Location of Hearing

Beach offers no analysis or authority as to why Judge Phillips' decision to conduct the evidentiary hearing in Lewistown rather than Wolf Point is worthy of supervisory control. This is not a trial; it is a hearing. When Beach moved to

substitute Judge Cybulski, he should have recognized that the judge who accepted jurisdiction of this case may wish to conduct the evidentiary hearing in his own courtroom. Since Beach defines the hearing length by weeks rather than days, having the hearing in Lewistown would enable Judge Phillips to still manage other matters on his calendar.

Beach's claims of inconvenience ring hollow since he will have to subpoena witnesses no matter the location of the hearing, and the witnesses he has listed have already demonstrated a willingness to travel during the clemency proceeding in Deer Lodge. Moreover, Beach's lead counsel, his investigators and representatives from Centurion Ministries do not reside in Montana, let alone Roosevelt County. Thus, they will be forced to secure accommodations at either location.

IV. THERE IS NO CONSTITUTIONAL ISSUE OF STATEWIDE IMPORTANCE.

Beach asserts the matters raised are constitutional issues of statewide importance because unless the district court meets all of his demands he will be denied due process and this will cast doubt upon the fairness and integrity of the criminal justice system. The due process Beach has already been afforded exemplifies the fairness and integrity of our criminal justice system. There is nothing to suggest that Judge Phillips will not continue to afford him due process.

CONCLUSION

The State of Montana, on behalf of Respondents, respectfully requests this Court deny Beach's petition for writ of supervisory control.

Respectfully submitted this 6th day of May, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this response brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes, quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 3,991, excluding certificate of service and certificate of compliance.

_____

TAMMY K PLUBELL

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APPENDIX
