MONTANA FIFTEENTH JUDICIAL DISTRICT COURT
ROOSEVELT COUNTY

No. 1068-C

BARRY ALLAN BEACH,	)	Judge E. Wayne Phillips
Petitioner,	)	
vs.	)	**FINDINGS OF FACT, ANALYSIS, AND ORDER**
STATE OF MONTANA,	)	
Respondent.	)	

PROCEDURAL HISTORY

"Beach filed his latest petition (for post-conviction relief) on January 18, 2008. Beach has filed his petition well beyond the five-year statutory limitation. . . . Beach may escape the five-year statute of limitations only if he can satisfy the fundamental miscarriage of justice exception." *State v. Beach*, 2009 MT 398, ¶24, 353 Mont. 411, 220 P.3d 667. The *Beach* Court remanded to the District Court to:

> conduct an evidentiary hearing on the newly discovered evidence alleged in Beach's petition. The court must evaluate whether Beach's alleged new evidence constitutes actual new evidence. The court shall apply a modified version of the five-prong *Clark* test and the *Schlup* "clear and convincing" standard to Beach's alleged newly

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> discovered evidence to determine in the first instance whether Beach's petition establishes that a "jury could find, in light of the newly discovered evidence," that Beach actually is innocent of his crime. *Redcrow*, P 37. The court must assess whether a jury, acting reasonably, would have voted to find Beach guilty beyond a reasonable doubt. *Schlup*, 513 U.S. at 329, 115 S. Ct. at 868. The District Court shall provide a written order of its decision in accordance with the legal standards set forth in this opinion.

Beach, ¶ 51.

FINDINGS OF FACT

Pursuant to the Remand instructions, this Court conducted an evidentiary hearing commencing on August 1, 2011. From that hearing and the evidence presented, this Court makes the following Findings:

1. Judy Greyhawk, sister-in-law of Maude Greyhawk Kern, testified as to a telephone call received from Maude in February of 2004. She stated that Maude sounded depressed and said to her: "I think I'm going to prison. I didn't kill that girl, but I kicked her in the head a few times. I'm the one who lured her down there. I want to get out of here. There's an investigator at my house, so I want to get out of here."

Judy Greyhawk further testified that she called her sister Mary and told her that Maude had confessed to murder. Judy also told her husband, Maude's brother. Further, she talked with Maude's sister, Glenna, and repeated to her Maude's statements.

The Court found Judy Greyhawk credible and believable. One impressive indicator of these attributes was Ms. Greyhawk's testimony regarding the strong conflict she felt between family betrayal and telling

the truth. Initially, on being interviewed by a representative of Centurion Ministries, Ms. Greyhawk refused to sign a statement. She did, eventually (State's Exh. 1). Her husband tried to talk her out of signing a statement. This has caused significant marital stress. Her husband was upset with her regarding her testifying, this occuring as recently as the Saturday before the Monday hearing. The emotional state exhibited by Ms. Greyhawk regarding this conflict was compelling. Also compelling was that Judy Greyhawk testified in several ways that she had not heard about the murder until the telephone call from Maude and that Judy had helped Maude get a good, federal job (which she rather wished she would have gotten for herself).

2. Janice White Eagle-Johnson also testified. Ms. White Eagle-Johnson is a four-year Vietnam veteran and has been a member of the Reserves for 17 years. She has worked with Indian Health Services for 42 years. Ms. White Eagle-Johnson was credible and believable.

She testified that in 2005 or 2006 she was working the switchboard at IHS (where Maude Greyhawk also worked at the time). Investigators for Centurion Ministries arrived and asked for Maude. When Ms. White Eagle-Johnson called Maude on the phone, Maude said, "Tell them I'm not here." Ms. White Eagle-Johnson then testified that the investigators left, and she asked Maude why she didn't want to talk to them. The response was, "They're investigating the Kim Nees murder. My car was down there that night. Those girls had my car."

3. Also testifying was Richard Holen. In the early morning hours of June 16, 1979, Mr. Holen testified that he waited until closing of the Legion Club because his girlfriend was working there. They left the Club and drove west toward the Poplar River. He saw the Nees pickup ahead of them and followed it for a while before it turned off into the Train Bridge area. He testified seeing the silhouettes of four people plus one on the right passenger's lap. He believed the driver's silhouette looked like Kim Nees - "It was her." He also believed the person in the right passenger seat was a male. When they returned to town a few minutes later, he testified he saw two vehicles in the Train Bridge area, one of which was the Nees pickup.

Two days later, Mr. Holen saw two law enforcement officers at the gas station, Bobby Atkinson, brother of Sissy Atkinson, and Steve Greyhawk, father of Maude Greyhawk. Mr. Holen stated he told them of what he had seen. No follow-up occurred. Mr. Holen was reasonably credible.

4. Carl Four Star is a graduate of Montana State University-Billings with a Bachelor of Science Degree in Finance. He testified that after testifying at the Clemency Hearing before the Montana Board of Pardons, he was attacked by four people in Poplar, one of whom was Sissy Atkinson's nephew.

In 1985, Mr. Four Star was working at A & S Industries with Sissy Atkinson. He testified that a co-worker was reading a newspaper story

about the Beach trial and stated, "It's a shame what happened to Barry." Four Star then testified that Sissy Atkinson stated, "They got the wrong man." She further stated, testified Mr. Four Star, "She and a few other women had beaten Kim Nees up and they did quite a number on her." Then Mr. Four Star testified that while making these statements, Ms. Atkinson "made a couple of gestures like she was kicking something on the ground and striking somebody." Finally he stated that while walking past his work table, Ms. Atkinson said "they got away with the perfect crime." He also stated she named several first names: "Maude" and Rose." The Court found Mr. Four Star believable and credible.

5. Richard McDonald, a former Tribal Police Officer and Roosevelt County Sheriff's Office Deputy, testified he worked at A & S Industries in the spring to late summer of 1983, two years before the time period testified to by Mr. Four Star. He claimed that the work area where Four Star and Atkinson were working was too noisy for hearing conversations. It was hard for the Court to evaluate Mr. McDonald's credibility.

6. Steffanie Eagle Boy was 10 years old at the time of the Kim Nees murder, and lived on a bluff above the Poplar River overlooking the Train Bridge area where Nees was murdered. The night of the incident, she and her cousin were sitting on a rock on the edge of that bluff. She testified as follows: She saw two vehicles enter the Train Bridge area. The Court notes the similarity between this identification of two vehicles and the same identification of two vehicles by Mr. Holen.

Subsequently, Ms. Eagle Boy said she heard loud yelling of girls' voices: "Get her", "Get the Bitch", "Kick the Bitch."
She testified she heard a different voice: "Don't Please." Here is how Ms. Eagle Boy testified about her reactions to this: "It was horrible." "The voices were high pitched, angry." "It's something I'll never forget. I've had nightmares all my life about it. It's something I won't forget."

Ms. Eagle Boy further testified that a police car with lights joined the two vehicles and shut off its lights. The pickup drove for a bit and she heard digging sounds, clinking tool sounds. The pickup then spotlighted the area and left.

Finally, Ms. Eagle Boy saw a Dateline TV story about Barry Beach and called the tip line. She stated: "I was crying when I called the tip line."

Ms. Eagle Boy was questioned extensively by counsel. She was crying and emotionally fragile. The Court then conducted its own questioning. Given the proximity of the Judge and the witness chair, this is a quite close encounter. The Court specifically wanted to see Ms. Eagle Boy's reaction when pressed about the memories and the nightmares elicited by them. It has been this Court's experience that, under similar circumstances, some witnesses calm down, cease crying, become more matter-of-fact - sober up if you will. In contrast, Ms. Eagle Boy became even more emotional, cried on an even deeper level and seemed to be dredging the nightmares from their deep place in her psyche.

The Court wants to be extra cautious regarding the language it uses to discuss Ms. Eagle Boy's credibility and believability. It is too easy to dismiss language containing hyperbole simply because that language is over used so often. However, the language used here is deemed by this Court to be essential in translating the emotional believability of Ms. Eagle Boy. The Court found Ms. Eagle Boy extraordinarily credible and believable. No reasonable juror could experience her testimony without being convinced of its genuine, heartfelt purity.

7. Testimony was received from Billie Marie Smith, a CNA care worker at an assisted living facility in Missoula for 11 years. Ms. Smith was a co-worker with Joanne Todd and Susan Molar. On a smoke break with Ms. Todd and several others, the group was sharing get-to-know-you stories. Ms. Todd proceeded to tell a story about an incident in Poplar where some girls "dragged a girl, beat her, and she died." Shortly after this telling, Susan Molar joined them and Ms. Smith asked Ms. Todd to tell the story again - as she found it almost unbelievable. Ms. Todd told the same story and added they (the girls) were attacking "out of jealousy."

Ms. Smith came forward after seeing the Dateline TV show. She was very credible and believable, particularly as to making sure the statements she was reiterating were what she had heard.

8. Susan Molar testified that Ms. Todd said: "A bunch of girls were riding around and they went down by the river." "I was not involved." "The girls drug her out of her truck and they beat her." Ms. Molar also

came forward because of the Dateline TV show. She, too, was very credible and believable.

9. The most unusual witness during the Evidentiary Hearing was Kevin Hall. Mr. Hall was an apartment or townhouse neighbor of Sissy Atkinson in Great Falls. At the time (circa 2005), Mr. Hall frankly testified, he was buying, selling and using drugs heavily. He testified that Sissy Atkinson was stoned most of the time. She would visit Mr. Hall and his girlfriend, usually in this "state", and that she was always talking about things in her past, "Without fail" she was "always crying about Karma" (her husband had recently died). She would state, "I got arrested. It was Karma." Mr. Hall stated he would respond to her that "there was nothing in this world she could have done to deserve that much (bad) Karma." Then, he testified, she stated "she had played a part . . . had really hurt this girl and they rolled her into the river." "They used a tire tool." Ms. Atkinson said "she participated to the extent she didn't stop it." Mr. Hall testified that Ms. Atkinson told this same story at least five times, maybe 20, and always under the influence. At various times she stated: "There was jealousy." Kim Nees was "lured" to the river. Mr. Hall went to the police with this information twice and the Great Falls Tribune twice.

While Mr. Hall's July 2010 statement did not contain the details about "jealousy" and "luring", his statement to the Attorney General did. Mr. Hall had a 2004 psychological evaluation which showed memory impairment and he was, apparently, adjudicated unfit to proceed on criminal charges.

Mr. Hall exhibited that rather outrageous candidness that often arises in those "saved" by sobriety. He testified he had been clean since 2005. The memory he exhibited was altogether detailed and generally unfailing. He attends four to five self-help meetings a week. His honesty was almost painful and occasionally humorous for its devastating indictment of self. Consequently, the Court found him very credible and believable.

10. Michael McIntyre was a next-door neighbor of Sissy Atkinson in 2004-2005 in a 12-plex in Great Falls. Mr. McIntyre had a young daughter at the time and testified that he was very concerned about the use of drugs with people going in and out of Sissy Atkinson's apartment "24/7." He told Ms. Atkinson of his concerns, and her response was he "didn't know who he was messing with as she had killed someone up on the reservation." He testified he read a Tribune article about Sissy Atkinson and a murder on the reservation. He called the Attorney General but there was no follow up. He called the Great Falls police, again no follow up. He called the Tribune. Mr. McIntyre was credible and believable.

11. Dean Mahlum was Under Sheriff for Roosevelt County in 1976-1983 and was lead investigator on the Kim Nees murder. While he testified as to Nees' injuries, he had not inspected the body. He did state that the severity of her injuries showed high emotion and the injuries to the back of her hands were from protective behaviors.

He testified they inspected the Train Bridge area and found no sign of digging. He further testified it was 800 yards from the top of the bluff to

the murder site. Mr. Mahlum was credible, but seemed to lack substance on his evidentiary testimony.

ANALYSIS AND ORDER

Legal Landscape. The legal issues before this Court intertwine the procedural time bar to Petitions for Post Conviction Relief and a fundamental miscarriage of justice. *c.f.* Procedural History. Those issues also necessitate evaluation of "gateways" of innocence, either actual or procedural.

The terms and concepts pivotal to gateways of actual or procedural innocence are used throughout the case law in a way that, to be charitable, lacks clarity. "Use of the term 'actual innocence' in both cases (*Herrerra v. Collins* (1993), 506 U.S. 390, 113 S.Ct. 853 and *Schlup v. Delo* (1995), 513 U.S. 298, 115 S.Ct. 851) has blurred the meaning of the phrase". *State v. Pope,* 2003 MT 330, ¶48, 318 Mont. 383, 80 P.3d 1232. Consequently, this Court deems it essential to first lay out the definitional landscape surrounding these gateways - a legal landscape essential to its Remand undertaking.

1. Actual innocence.

A. Actual innocence can be "a novel constitutional claim . . . that the execution of an innocent person would violate the Eighth Amendment." *Schlup at* 313-14, 115 S.Ct. at 860.

B. Actual innocence is a substantive claim. *Id.* at 314, 115 S.Ct. at 860; *Id.* at 316, 115 S.Ct. at 862; *Beach*, ¶31 citing *State v. Redcrow, 199 MT 95*, ¶33, 294 Mont. 252, 980 P.2d 622. See also *Beach*, ¶44 citing *Pope*, ¶53. Actual innocence is contrasted with "legal innocence claims involving allegations of procedural error or abuse". *Beach*, ¶ 31, citing *Sawyer v. Whitley* (1992), 505 U.S. 333, 339, 112 S.Ct. 2514, 2519.

C. A *Schlup* "actual innocence inquiry does not concern itself with the merits of the constitutional error claims raised by a defendant." *Pope*, ¶59.

D. Actual innocence is a "defendant's claim that he was innocent of the crime charged." *Beach*, ¶31 citing *Sawyer* at 339, 112 S.Ct. at 2519.

E. An actual innocence "inquiry may involve the interplay of substantive *and* procedural innocence claims. *Beach*, ¶43 (emphasis orig.).

F. Actually innocent is "not merely a showing that a reasonable doubt exists in light of the new evidence, but rather that 'no reasonable juror would have found the defendant guilty'." *Beach*, ¶29, citing *Schlup* at 329, 115 U.S. at 868. See also *Beach*, ¶31.

2. Procedural Innocence.

A. A procedural innocence claim is distinct from a substantive claim. *Schlup* at p. 316, 115 S.Ct. at 862.

B. Procedural innocence is legal innocence "involving allegations of procedural error or abuse." *Beach*, ¶31 citing *Sawyer* at 339, 112 S.Ct. at 2519.

C. A procedural innocence claim is a constitutional innocence claim. *Schlup* at 314, 115 S.Ct. at 860.

3. Miscarriage of Justice.

A. "[T]he fundamental miscarriage of justice exception (to the statutory time bar applied to Petitions for Post Conviction Relief, § 46-21-102, MCA (1995)) concerns actual, or substantive innocence, rather than legal, or procedural innocence." *Beach*, ¶31 citing *Redcrow*, ¶33. See also *Redcrow*, ¶37; *Beach*, ¶42 and ¶27; *Sawyer* at 339, 112 S.Ct. at 2518 (the miscarriage of justice exception and the actual innocence exception are synonymous).

B. "[A]n interplay between 'actual' and 'legal' innocence claims could result in a Petition for Post Conviction Relief falling within the 'fundamental miscarriage of justice' exception to the general rule of *res judicata*. *Beach*, ¶31 citing Sawyer at 339, 112 S.Ct. at 2518. See also *Beach*, ¶43 citing *Sawyer* at 336, 112 S.Ct. at 2517; *Schlup* at 316, 115 S.Ct. at 861.

C. "A 'fundamental miscarriage of justice' trigger[s] the limited exception to the five-year statute of limitations." *Beach*, ¶28 citing *Redcrow*, ¶31.

D. "Explicitly tying the miscarriage of justice exception to innocence thus accommodates both the systemic interests in finality, comity, and conservation of judicial resources, and the overriding individual interest in doing justice in the 'extraordinary case'." *Schlup* at 322, 115 S.Ct. at 864 (citation omitted). The "innocence" referred to is "actual innocence." *Id.* at 321, 115 S.Ct. at 864. This conclusion is affirmed in *Redcrow*, ¶33 citing *Schlup* at 324, 115 S.Ct. at 865-66.

E. If a miscarriage of justice concerns actual, substantive innocence, and not legal, procedural innocence, *Beach*, ¶ 31, *Redcrow*, ¶ 33, then there is some question about the *Beach* court's determination "that the standards explicated in *Redcrow* and *Schlup* adhere most closely to the notion of a miscarriage of justice." *Id.*, ¶ 48. *Redcrow* is distinctly a procedural, constitutional, legal innocence case, as she was arguing ineffective assistance of counsel. *Redcrow*, ¶ 35-37. The *Redcrow* court reviewed at length these alleged instances of Redcrow's ineffective assistance of counsel claims and stated, "We are not convinced that Redcrow meets the standard of being actually innocent." *Id.*, ¶ 37. *Schlup*, too, is a procedural, constitutional innocence case. *Schlup* at 316, 513 U.S. 828; *Pope*, ¶ 43.

The most legally rational resolution, and the one which this Court adopts, is to rely upon the interplay between these separate types of "innocence", which the *Beach*, *Sawyer*, and *Schlup* courts discuss as a means to apply the fundamental miscarriage of justice exception to the statutory

time bar. *Beach*, ¶ 31, ¶ 43; *Sawyer*, at 336 and 339, 112 S.Ct. at 2518; *Schlup* at 316, 115 S.Ct. at 861.

4. Gateways.

A. In *Schlup*, the United States Supreme Court articulated two different types of claims - procedural, constitutional innocence claims and actual, substantive claims. *Schlup* at p. 316, 115 S.Ct. at 862. The court stated, "Schlup's claim of innocence is thus not 'itself a constitutional claim, but instead a gateway through which [he] must pass to have his otherwise barred constitutional claim considered on the merits'." *Schlup* at 315, 115 S.Ct. at 828. The *Beach* court described the applicable gateway as a "*Schlup* actual innocence gateway." *Id.*, ¶34 citing *Pope*, ¶56. See also *Pope*, ¶68.

There is clear precedential history establishing an actual innocence gateway. *Schlup supra, Beach supra, Pope supra. Beach* in fact mentions it specifically four times. *Beach, passim.* "The fact that Pope had not presented the DNA evidence to the jury because it had not been available at the time of trial allowed Pope to pass through the *Schlup* actual innocence gateway." *Beach*, ¶ 34, citing *Pope*, ¶ 56.

The procedural innocence "gateway" is not nearly as clearly articulated. The citation in *Beach*, ¶ 44, is to *Schlup* at 316, 115 S.Ct. 861. The *Schlup* reference to a gateway at that cite is:

> if a petitioner such as Schlup presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied

> that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.

Schlup at 316-17, 115 S.Ct. at 861-62 (emphasis added). A case "free of nonharmless constitutional error" is an actual innocence gateway proceeding, in this Court's estimation at any rate.

B. While *Schlup* claims a "gateway" standard exists in *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, *Schlup* at 328, 115 S.Ct. at 867, Carrier mentions no "gateway". Thus, Schlup is likely the origin of this particular metaphor in miscarriage of justice jurisprudence.

C. This Court holds that implicit in these gateways is also the legal concept of a "standard of review". Pursuant to *Schlup* the petitioner must show "that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt [in light of the new evidence]." *Id.* at 327 115 S.Ct. at 867. A *Herrera* standard, in contrast, requires satisfaction of an "extraordinarily high" level of proof, *Beach*, ¶44, that provides more convincing evidence of innocence - evidence that he did not commit the crime for which he was convicted - because his trial was error free. *Pope*, ¶48.

> Our rather full statement of the facts illustrates the foregoing distinction between a substantive *Herrera* claim and Schlup's procedural claim. . . . If there were no question about the fairness of the criminal trial, a *Herrera*-type claim would have to fail unless the federal habeas court is itself convinced that those new facts unquestionably establish Schlup's innocence. On the other hand, if the habeas court were merely convinced

> that those new facts raised sufficient doubt about Schlup's guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error, Schlup's threshold showing of innocence would justify a review of the merits of the constitutional claims.

Schlup. at 316-17, 115 S.Ct. at 861-62 (emphasis added).

As stated in *Pope*: "It has been noted by both parties here that this court adopted the more demanding *Herrera* type standard in *Redcrow.*" *Pope,* ¶53. If so, and given the interpretation that *Redcrow* is a procedural innocence case, then the Court violated its own lucid distinction between an *Herrera* petitioner/claim and a *Schlup* petitioner/claim, the former being one of actual innocence and the latter being one of procedural "actual innocence." *Id.*, ¶48-49.

Analysis pertinent to the Legal Landscape. The Court relies to a great extent on *Pope*, and its interpretation by *Beach.* In part that is because Beach bears a reasonable, factual similarity to *Pope.* As noted in the *Beach* decision,

> "[t]he fact that Pope had not presented the DNA evidence to the jury because it had not been available at the time of trial allowed Pope to pass through the *Schlup* actual innocence gateway. Once having passed through the actual innocence gateway, the Court allowed Pope to pursue relief for his alleged constitutional violations through a petition for post-conviction relief".

Beach, ¶34, citing *Pope*, ¶56. The Court went on to state: "Beach's current petition relies on the fact that his newly discovered evidence establishes

his actual innocence. Similar to the petitioner Pope, Beach argues that this newly discovered evidence allows him to pass through the *Schlup* gateway". Id., ¶36, citing *Pope*, ¶59.

Here Beach has presented testamentary evidence as uniquely objective as the DNA evidence was in the *Pope* case. The important distinction between *Pope* and the case at bar is that in the former case "[t]he State did not contest the fact that errors at Pope's trial rendered his conviction constitutionally infirm", *Id.*, ¶34 citing *Pope*, ¶68, while here the Court conducted an Actual Innocence evidentiary hearing **not** a Procedural Innocence evidentiary hearing. Part of the reason for that was the State vigorously contested the existence of any such Procedural/Constitutional errors and required additional time and notice in order to be prepared to present evidence upholding their position.

Given the evidence which is outlined in the Findings of Fact above, the matter then becomes "how the District Court should evaluate Beach's allegedly newly discovered evidence". *Id.*, ¶36. As noted previously, this Court is to:

> apply a modified version of the five-prong Clark test and the Schlup 'clear and convincing' standard to . . . determine in the first instance whether Beach's petition establishes that a 'jury could find, in light of the newly discovered evidence,' that Beach actually is innocent of his crime. *Redcrow*, ¶37. The court must assess whether a jury, acting reasonably, would have voted to find Beach

> guilty beyond a reasonable doubt. *Schlup*, 513 U.S. at 329, 115 S. Ct. at 868.

Id., ¶51.

The Clark test is:

> (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 a 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.

Id., ¶38, citing *State v. Clark*, 2005 MT 330, P 34, 330 Mont. 8, 125 P.3d 1099.

Discovery Since Trial? This Court explicitly holds that the testimony and evidence presented to this Court at the evidentiary hearing, and on which it relies, was discovered since the original Beach trial. The most significant of the witnesses came forth because of a Date Line Television show in the Spring of 2008 or stories subsequently appearing in the newspaper.

Due Diligence? In its Remand Order, the Montana Supreme Court granted "Beach the benefit of the doubt as to whether he acted with sufficient alacrity in locating this newly discovered evidence . . ." *Id.*, ¶19. In an abundance of caution, this Court conducted its own inquiry and found unequivocally that the failure to discover the evidence revealed at hearing was not because of lack of due diligence. Quite the contrary, the representatives of Centurion Ministries appeared to this Court to have

acted with exceptional diligence. A degree of delay was inherent in the methodical manner in which those representatives interviewed witnesses and potential witnesses, obtained witness statements, prepared for the Petition, etc.

Materiality? The issue is whether Barry Beach murdered Kim Nees. The evidence adduced by this Court materially addresses that fundamental question.

Cumulative or Impeaching? This Court deems this factor to mean cumulative to and impeaching of evidence received at the original trial. Each witness at this Court's evidentiary hearing was a "new" witness in that not one had appeared at the original trial. The substantial part of the testimony at the evidentiary hearing dealt with direct, overheard conversations (admittedly hearsay), none of which were elicited at trial and therefore were not attempts at impeaching such evidence.

Reasonable Probability of Different Outcome? As the *Beach* Court in Remand noted, it is this factor which "presents the most likely crux of any [D]istrict [C]ourt's evaluation". *Id.*, ¶39. It is this factor which calls to the fore actual (substantive) innocence jurisprudence and procedural (constitutional) innocence jurisprudence, recognizing, of course, that the former may include an interplay of both. *Id.* ¶ 43, citing *Sawyer* at 336, 112 S. Ct. at 2517; *Schlup* at 316, 115 S. Ct. at 861.

These two areas of jurisprudence each have separate standards of review. *Id.* The first critical question is whether the standard of review

applied to substantive, actual innocence is applicable only after this Court has determined that Beach has navigated the procedural "gateway"? As noted by the *Beach* Court, "The higher standard of review would apply to Beach's substantive claims if he successfully has navigated the 'procedural gateway.'" *Beach*, ¶44, citing *Schlup* at 316, 115 S.Ct. at 861. The *Beach* Court goes on to "conclude that Beach must show by clear and convincing evidence that, but for a procedural error, no reasonable juror would have found him guilty of the offense in order for him to prevail on his substantive innocence claim. *Id.*, citing *Schlup* at 329, 115 S.Ct. at 868 (emphasis added). This Court agrees with the State in its analysis of this conclusion: "The difficulty with the standard the Court cited, however, is that a free standing, or substantive, claim of actual innocence is founded on the notion of an error free trial. See *Herrera*, 506 U.S at 393". Post Hearing Brief, p. 25.

This Court believes that the possible dilemma presented in the *Beach* Court's jurisprudential position may be resolved through *Pope.* In its Conclusion, the *Pope* Court held that Pope had met the actual innocence standard "to enable him to maintain a petition for postconviction relief beyond the five year period specified in sec. 46-21-102, MCA (1993)". *Pope*, ¶70. The Court then reversed the District Court order dismissing Pope's petition. The Court proceeded to address Pope's procedural innocence claim and reversed the District Court separately on that issue and remanded for a new trial. *Id.* This Court deems the bifurcation in *Pope*

is a satisfactory basis for considering the standard of review for actual innocence separate from a procedural gateway analysis.

To a degree, this Court finds it necessary to rearticulate the principle holding just stated, but from a slightly different angle. In other words, given the *Beach* Court's conclusion, must this Court conduct a separate procedural (constitutional) innocence hearing to accept evidence on Beach's claims in that arena before it can rule at all? After more than due consideration, this Court answers that question in the negative. Precedent is strong that these innocence claims are separate "gateways" leading to the same territory - an appropriate standard of review applied to determine whether a new trial is awarded or not. In support of this holding, the Court looks to *Pope* and *Beach*. Beach may pass through "the *Schlup* actual innocence gateway and his constitutional claims [would not be] jurisdictionally barred". *Id.*, ¶68. "We . . . deem it appropriate . . . to have the District Court follow a modified version of the *Clark* test that incorporates the *Redcrow* and *Schlup* standards to reflect the fact that Beach must establish a miscarriage of justice in order to escape the procedural bar". *Beach*, ¶46. As noted above, "[T]he fundamental miscarriage of justice exception (to the statutory time bar applied to Petitions for Post Conviction Relief, § 46-21-102, MCA (1995)) concerns actual, or substantive innocence, rather than legal, or procedural innocence". *Beach*, ¶31 citing *Redcrow*, ¶33. See also *Redcrow*, ¶37; *Beach*,

¶42 and ¶27; *Sawyer* at 339, 112 S.Ct. at 2518 (the miscarriage of justice exception and the actual innocence exception are synonymous).

While the Court is cognizant that the *Beach* Court held that "the standards explicated in *Redcrow* and *Schlup* adhere most closely to the notion of miscarriage of justice", *Id.* ¶48, it must again be noted that both *Redcrow* and *Schlup* were procedural innocence cases. Nevertheless, this Court rules that it is appropriate to proceed to evaluate the miscarriage of justice exception based solely on Beach's actual innocence evidence. It does so in reliance upon the interplay of both actual and procedural innocence in miscarriage of justice analysis. *Beach,* ¶31 citing Sawyer at 339, 112 S.Ct. at 2518. See also *Beach,* ¶43 citing *Sawyer* at 336, 112 S.Ct. at 2517; *Schlup* at 316, 115 S.Ct. at 861.

Before turning to an actual innocence evaluation, which constitutes the sum and substance of the fifth *Clark* factor, this Court must emphasize that the "standards" are a royal mix of those from actual innocence and procedural innocence jurisprudence. C.f. *Schlup* and *Herrera.* Such a mix can appear to be confusing forests and trees. However, the authority noted above allows construction of an interplay between the two, and *Pope's* separation of determinations in these two areas provides the basis for this Court's determination to proceed on just one - actual innocence. *Pope,* ¶68-9. See also *Schlup* at 316-17, 115 S.Ct. at 861-62.

Consequently, the Court must determine whether Beach's new evidence establishes that a "jury could find, in light of the newly

discovered evidence, that Beach actually is innocent of his crime". *Redcrow*, ¶ 37. The court must assess whether a jury, acting reasonably, would have voted to find Beach guilty beyond a reasonable doubt. *Schlup*, 513 U.S. at 329, 115 S. Ct. at 868". *Beach*, ¶51. The Court will assume, for legal argument only, that the Beach trial was free of constitutional, procedural error. *Pope*, ¶48

Given that assumption, it is clear that the standard of review is "extraordinarily high". *Id.*, ¶44 (citation omitted). It is also clear that the "analysis for Beach's substantive claims 'must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence'". *Id.* (citation omitted). This Court must find, "by clear and convincing evidence . . . no reasonable juror would have found him guilty of the offense in order for him to prevail on his substantive innocence claim". *Id.* (citation omitted).

First a small digression regarding the evidence used in this analysis. The State claims "a court considering a claim of actual innocence must consider **all** the evidence, **old and new**, incriminating and exculpatory" (Post Hearing Brief, p. 39, citing *Schlup* at 327-328; emphasis original), that is not what the *Schlup* Court held: "the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial". *Schlup* at 327-28, 115 S.Ct. at 865. As determined earlier, the evidence utilized by this Court was unavailable at trial.

This Court has conducted at least 35 criminal, jury trials with Montana juries. It has been constantly impressed at the intelligent reasonableness that Montana citizens bring to their deliberations. It cannot be emphasized enough the kind of fairness and objectivity the Court has experience in juries, time and time and time again. Consequently, this Court believes it has a respectable grasp of what constitutes a "reasonable Montana juror, properly instructed".

Given that experience, the Court looks at the testimony of Janice White Eagle-Johnson, Billie Marie Smith, and Susan Molar as the substantial basis for scaling the clear and convincing evidence plateau. These individuals had, as our former President loved to say, "no dog in the fight". Ms. White Eagle-Johnson is a Vietnam Era veteran and a 17 year member of the Reserves. She maintained employment with Indian Health Services for 42 years. While the Court noted in its Findings that she was "credible and believable", that is an understatement. There were absolutely no indicators of anything but credibility and believability. She was directly told by Maude Greyhawk, one of the alleged perpetrators of the Kim Nees murder, "my car was down there that night. Those girls had my car".

Billie Marie Smith and Susan Molar were co-workers with Joanne Todd, another purported member of the "gang of four" girls who allegedly participated in murdering Kim Nees, at an Assisted Living Facility in Missoula. Both Ms. Smith and Ms. Molar were long serving care workers. Again, there were absolutely no indicators of anything but credibility and

believability. They both heard Ms. Todd state that "a bunch of girls were riding around and they went down by the river . . .the girls drug her out of her truck and they beat her".

Next the Court turns to the testimony of Steffanie Eagle Boy. Of all the testimony at the evidentiary hearing, Ms. Eagle Boy's is seared on the Court's conscience. The plateau of clear and convincing evidence was scaled by the testimony of Ms. White Eagle-Johnson, Smith and Molar, but it was absolutely surmounted by that of Ms. Eagle Boy.

Ms. Eagle Boy told of being on a bluff above the Poplar River area the night of Kim Nees' murder. She was 10 years old and was with her cousin. She saw two vehicles enter the area and heard loud, girl voices yelling "get her"; "get the bitch"; "kick the bitch". She testified that she heard a different voice plead "don't, please". In Ms. Eagle Boy's own words: "it was something I'll never forget." "It was horrible." "I've had nightmares all my life about it." "It's something I won't forget".

This Court has experienced many, many witnesses who show deep emotion on the witness stand. The Court has seen tears aplenty. The Court will often question such witnesses itself (non-jury setting, of course) to probe the validity of the testimony; the veracity of the tears if you will. A significant number of times, the witness will stop crying, emotionally stabilize, and forthrightly answer the Court's questions. Generally, those individuals are still found to be credible and believable. Occasionally, it becomes abundantly clear that the emotion was "ginned up".

After Ms. Eagle Boy's testimony, the Court felt it even more imperative that it explore the emotional veracity of the statements. Never has this Court experienced a witness who became even more emotional, even more believable during such Court questioning. The Court can only say that she cried on a deeper level - she was reliving the nightmare.

More than one reasonable juror, properly instructed, would have heard that testimony and had reasonable doubt whether Mr. Beach committed the murder. No reasonable juror, properly instructed, could have combined that testimony with the testimony of Ms. White Eagle-Johnson, Ms. Smith and Ms. Molar and not had reasonable doubt whether Mr. Beach committed the murder.

No less lacking in credibility or believability was Judy Greyhawk. Interestingly enough, Ms. Greyhawk had the most to gain by not testifying or not testifying as she did. As she stated, her husband, brother of Maude Greyhawk, put significant pressure on her to not sign a statement and then, subsequently, to not tell her story in court. The Court was made keenly aware of the very strong cultural pressures in Indian Country against "family betrayal" such as that indicated in Ms. Greyhawk's testimony. That testimony, in essence, was that she received a call from Maude Greyhawk Kern wherein Ms. Kern stated "I think I'm going to prison. I didn't kill that girl, but I kicked her in the head a few times". No reasonable juror, properly instructed, would have heard this testimony, especially in conjunction with that of Ms. White Eagle-Johnson about Ms. Kern's

statements to her, and not had reasonable doubt whether Mr. Beach committed the murder.

Finally, the Court turns to Mr. Hall. He was outrageously candid about his addictions, drug usage and sale, and his sobriety. His painfully humorous indictment of self lead this Court to find him credible and believable. His renditions of Sissy Atkinson's many and consistent statements about her having been present when a girl was hurt, rolled into the river and having a tire iron used on her had a ring of believability - particularly the fact of the body being rolled into the river - which comports with the case facts. As noted in *Schlup*, the standard means "no" juror, acting reasonably, would have voted to find Mr. Beach guilty. This Court holds that at least one juror would have found Mr. Hall credible enough to have reasonable doubt whether Mr. Beach committed the murder.

The evidence cited above is not scientific like in *Pope* (exculpatory DNA evidence). But this Court rules that it is of more than sufficient, objective credibility to meet the beyond a reasonable doubt standard.

As noted in the precedent for determinations such as this, it is not this Court's role to determine whether, based on the evidence outlined above, the jury would find Mr. Beach innocent. Rather, it's role is to look prospectively and ascertain what they "might" do, given the new evidence. *Beach*, ¶48. Here, the standards explicated in *Redcrow* and *Schlup*, as applicable to the interplay between actual and procedural innocence, are

clearly and convincingly satisfied. Based on that interplay, the evidence adduced by this Court leads it to rule that Beach has passed through the actual innocence gateway. He may thus pursue relief for his alleged constitutional violations through his Petition for Post Conviction Relief. *Beach*, ¶34, citing *Pope*, ¶56. In other words, based on that evidence his Petition falls within the fundamental miscarriage of justice exception to the five-year statute of limitations on that Petition.

Pursuant to *Beach*, this Court has the authority, if the *Herrera* extraordinarily high standard has been satisfied, to release Mr. Beach as being "absolutely innocent". Beach, ¶45. The Beach Court states, as a contrast, that a procedural innocence claim, if found successful, results in a new trial. *Id.* This distinction, as noted above, also seems to be articulated in *Pope*. *Pope*, ¶¶68-9. A similar distinction was articulated in *Schlup*:

> a *Herrera*-type claim would have to fail unless the federal habeas court is itself convinced that those new facts unquestionably establish Schlup's innocence. On the other hand, if the habeas court were merely convinced that those new facts raised sufficient doubt about Schlup's guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error, Schlup's threshold showing of innocence would justify a review of the merits of the constitutional claims.

Schlup at 316-17, 115 S.Ct. at 861-62 (Emphasis added).

The Pope Court ruled because of Pope's "proof" of absolute innocence (the new DNA evidence) his Petition for Post Conviction Relief

was not time barred and, by reversing the District Court, granted it. *Id.*, ¶70. That in itself would result in a new trial.

Here, the clear and convincing evidence demonstrates that a jury could find that Beach is actually innocent of his crime. *Beach*, ¶48. E.g., **at least one** juror acting reasonably and properly instructed would not have voted to find him guilty beyond a reasonable doubt. *Id.*

After review of the Court's analysis of the new evidence, it might reasonably be asked why the Court does not just release Mr. Beach. The testimony of Mr. Holen, that he saw not only Kim Nees in the pickup (with four other girls) that night but also a male in the right passenger seat, leads this Court to conclude that the evidence is not sufficiently clear and convincing to bust down the absolute innocence gateway and have Mr. Beach walk through it a free man. Also, we have Mr. Beach's confession to consider. However, the totality of the evidence is clear and convincing enough to rule that Mr. Beach has certainly opened the actual innocence gateway sufficiently enough to walk through the miscarriage of justice exception toward a new trial.

Given the *Pope* precedent, Id., ¶67, if Beach "has passed through the actual innocence gateway [then] his constitutional claims are not barred". Id., ¶68. In other words, Beach can proceed to a new trial where he can present not only the actual innocence evidence but also the constitutional innocence evidence.

It is hereby **Ordered** that Beach's Petition for Post Conviction Relief is not time barred, the Petition is **Granted**, and Mr. Beach is **Granted** a new trial on the charge of the murder of Kim Nees.

The Clerk of Court is directed to file these Findings of Fact, Analysis, and Order and provide copies to counsel of record.

DATED this 22 day of November 2011.

E. Wayne Phillips

DISTRICT COURT JUDGE
Hon. E. Wayne Phillips
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c: Peter Camiel, Esq.
c: Brant Light, Esq. and Tammy K. Plubell, Esq.

1068-C.1

CERTIFICATE OF SERVICE
This is to certify that the foregoing was duly served by
Mail _____ Email ✓ Fax _____
upon parties or Attorneys of record at their address or addresses
this 23 day of November, 2011.

PATRICIA A. STENNES
Clerk of District Court
Wolf Point, MT 59201