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Barry Beach released on own recognizance

AP Photo/Billings Gazette, Larry Mayer Attorneys for Barry Beach, c

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District Judge E. Wayne Phillips ordered Beach's release at a hearing in Lewistown just weeks after ordering a new trial for the 49-year-old man.

AP Photo/Billings Gazette, Larry Mayer

Attorneys for Barry Beach, center left, smile and shake hands after Judge Wayne Phillips' ruling to deny a delay for a bond hearing in Lewistown on Wednesday. Barry Beach, who's spent nearly 30 years in prison has been released on his own recognizance while he awaits a new murder trial, in a case that has been closely watched across the state.

Following the hearing, Beach changed from a suit and tie into a Washington Redskins football jersey with the number 28. He said the number was symbolic, citing the 28 years and 11 months he has spent in jail and prison.

Beach pointed to his supporters gathered around him and said, "This picture is proof that the United States of America still believes in right and wrong, and when there's a wrong, you correct it."

Phillips said there was enough evidence to raise doubts about Beach's guilt after a court hearing last summer in which witnesses linked Kim Nees' death to an out-of-control fight among teenage girls.

The state argued for bail to be set at \$250,000 after the judge earlier Wednesday turned down the state's motion to stay the hearing pending its appeal to the Montana Supreme Court.

But Phillips determined Beach has already served more time than most people convicted of similar crimes.

Beach supporters cheered the judge's decision.

A Billings man, Ziggy Ziegler, told the judge he would provide Beach with housing and a job at his restaurant if he was released.

"My wife and I would be honored to have Barry come live with us," he said.

Montana Department of Justice spokesman John Doran said state prosecutors do not plan to contest Beach's release but will focus on its appeal to the state Supreme Court seeking to overturn Phillip's order for a new trial.

"We have an obligation to defend a murder conviction rendered by a Montana jury against a man who confessed to the most serious of crimes," Brant Light, a prosecutor representing the state in the case, said in a statement. "This is one more step in a lengthy legal process, and the final word has not been spoken."

Beach was convicted of deliberate homicide in 1984 and sentenced to 100 years in prison for Nees' death. He entered the Montana State Prison on Dec. 7, 1985, 26 years to the day

of his release.

He has proclaimed his innocence for years, saying his 1983 confession to Louisiana police about the killing was coerced and that there is no evidence linking him to the crime.

In that confession, Beach said he tried to kiss Nees and became angry when she fought back. He described hitting her with a wrench and a tire iron, then thinking, "Oh my God, what have I done?" after checking her pulse and finding she was dead.

The case made headlines across Montana in 2007, when the state parole board agreed to review evidence from Beach backers pointing to a gang of girls as the real killers.

The Montana Board of Pardons and Parole took the unusual step of taking testimony from the original prosecutors, investigators, the witnesses brought by Beach to support his claims, and Beach himself.

The dramatic events over several days thrust the case into the spotlight. But the board ultimately was not convinced, and rejected either commutation of Beach's sentence or an executive pardon. Barry Beach released on own recognizance

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PATRICIA STENNES

DEPUTY CLERK

MONTANA FIFTEENTH JUDICIAL DISTRICT COURT
ROOSEVELT COUNTY

No. 1068-C

BARRY ALLAN BEACH,)	Judge E. Wayne Phillips
)	
Petitioner,)	
)	
vs.)	<u>FINDINGS OF FACT,</u>
)	<u>ANALYSIS, AND ORDER</u>
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

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 occurring 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 unflinching. 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 (*Herrera 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.



DISTRICT COURT JUDGE

Hon. E. Wayne Phillips

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Lewistown, Montana 59457

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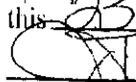
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CERTIFICATE OF SERVICE

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On 25 April 2008 Rebekah Price of the American Chronicle reported "Barry Beach: Justice & Truth--Never the Twain Shall Meet".

She said we have all heard this story before: I DIDN'T DO IT. As a child, the lying may start when questioned about the whereabouts of the missing cookies. Crumbs on the tee shirt and chocolate chip smears about the lips do not stop the quick-talking denial of the obvious. After thorough interrogation, typically from a poker-faced parent, a child realizes he or she is busted and sheepishly confesses to the culinary robbery. A crime spree thwarted, extra broccoli for dinner is administered as punishment and all is right again with the world. But what happens when someone confesses and there are no crumbs on the shirt, no chocolate smears on the lips? In fact, he was not even near the cookie jar. What if the trail of crumbs lead to a completely different direction like they did 29 years ago in Poplar, Montana?

Poplar, Montana. The name alone conjures up visions of small town beauty, tenderly framed by the still wild Montana landscape. A place that welcomes visitors with down-home grace and long established businesses run by several generations. One can imagine a bustling diner on the main drag where all the locals congregate to share the news of the day over steaming mugs of hot coffee. Poplar has all that, and more. Much more. Imagination is one thing; reality is another. Poplar, Montana is a toxic dump of murders, secrets and suppositions, oozing out slowly through 24 years of overheard admissions and guilt-racked souls. For whatever reasons--and there seem to be many--the truth failed to surface initially, and a man's life hangs in suspension for a crime he may not have committed. Barry Beach, now 45 years old, was convicted in 1984 of the 1979 murder of Kim Nees, a popular 17 year old high school graduate, and fellow student. Though Beach was questioned by police, he was assured by the authorities he was not a suspect. Beach states he did all he could to cooperate, even agreeing to a second polygraph test while he was back visiting in Poplar a year later, after visiting his father in Louisiana. The second polygraph test never happened before he returned to Louisiana. A year had passed since the murder and the police were no closer to identifying the killer. Or were they?

In a small town of 800 people, one must wonder why law enforcement was having such a difficult time. For one thing, there was confusion from the start. This investigation was earmarked for disaster with the conglomerate of different law enforcement descending on the quaint town. Because Kim's murder was on the Native American soil of Fort Peck, not only did the local sheriff's office investigate, but so did tribal law enforcement and the FBI. Already a cluster was starting to form. Add to this Keystone Cop mix a local police officer breaking into the evidence room with the lame excuse of

having to pee like a racehorse, knowing full well he would break the chain of custody by his actions. Why did he do that, you ask? Was there not another place to relieve himself? Of course there was, but he was Officer Stephen Grayhawk, father of Maude Grayhawk, who may have had something to do with Kim Nees' death. Interesting he should emergently choose the evidence room, which had been cordoned off, to relieve himself. Perhaps he mistook the police tape for toilet paper.

By this time the sheriff's office must have been looking bad. The Nees family was well known and active in the community. So, in a small town where everybody knows everybody, and nobody is talking--or at least nobody is saying anything the police wanted to hear-- the next best thing to do is, well, grab the next best thing. Enter Barry Beach, a basically wild kid who got into some bad stuff. He liked fast cars and partying. He looked like he could be guilty, so the local authorities sought to make it stick. Barry Beach left town soon after the murder. Certainly because of guilt, local authorities reasoned. It didn't matter this trip had been planned for some time before that fateful night. It looked suspicious enough. And then, let's see, Barry was in and out of trouble with the law in Louisiana for a few things like DUI and driving on a suspended license. Yep, he looks like a killer. But wait, there was no forensic evidence at the crime scene linking Barry Beach to Kim Nees. No matter, he's still our killer. As a matter of fact, there were two people who gave him reasonable alibis for his whereabouts that night. Oh, let's just suppress that; anyway, they are relatives. Who'd believe them?

Oh, and he confessed. Confessed? Yes, he did. He confessed bigger 'n life to the Louisiana cops who played him until he was a dog tired rag doll, unable to continue coherently and scared out of his pants. Two Louisiana cops who destroyed Barry's confession tapes and were later found to be derelict in other cases. Barry describes the interrogation tactics swinging from praying with him to threatening him with the electric chair, and everything in between. So he confessed not just to Kim Nees' murder, but to several others in Louisiana as well. Did they have evidence? Of course not. In fact, he was not even in Louisiana when the other women were killed. They didn't need no stinking evidence. They just scared him and broke him down. Another notch in their corrupt belts. So now he sits, patiently impatient, in prison in Deer Lodge, Montana watching his stolen life slip by under the confines of the state. He maintains his innocence, as he has done from day one, aware that he may well spend the rest of his life serving his strange sentence without any chance for parole. His one shot was in March 2007 where he, and a plethora of supporters, faced the Montana State Board of Parole and Pardons. The Board listened politely, offered hope by their mere presence, then shot down any chance of fairness for a man who may well be innocent. Why is he innocent?

Kim Nees was lured by a small herd of contemporaries--girls possibly jealous of her--down to a popular riverside park where things got out of hand. Rumors abound that eight or nine people were there that night. At least three sets of footprints are reported to be found at the site of the murder. None match Barry Beach. A bloody handprint on the Nees' truck does not match Barry Beach; yet, others who would be suspects were never investigated further. Three girls in particular stand out in this story: Sissy

Atkinson, Joanne Jackson and Maude Grayhawk, whose father contaminated the evidence. These girls were known to have harassed Kim Nees as she allegedly dated the father of Sissy Atkinson's baby. All allegedly confessed at one time or another to someone close to them; but when confronted by authorities, all deny any involvement, even to this day. These girls are rumored to have committed most of the beating that ultimately stole Kim's life. And there were witnesses who saw the girls all in the truck together and could discount an alibi or two or three.

People are hesitant to come forward, even after all these years. There have been accusations of threats, intimidation, and even murder since Maude Grayhawk's estranged husband (to whom she allegedly confessed) turned up dead two days prior to a custody hearing where he had threatened to tell her dirty little secret. Her then boyfriend was charged and convicted in his murder. Maude, party now to two murders, still walks free. Nasty young girls tend to grow up to be nasty old women, and that is what these rumored killers now appear to be. Wretched and used up by life, two appeared on Dateline, defensive and worn down by time. Maude Grayhawk has stayed out of the limelight by conveniently ignoring subpoenas and checking herself into a mental ward in Colorado. Perhaps they have made their own prisons in trying to keep their terrible secret; that may be some justice in Kim Nees' death.

But what of Barry Beach? Is he innocent? It sure looks like it. Then why is he still in prison? Good question. Initially, the Keystone Cops mucked the whole thing up, no doubt helped by an over zealous police officer, trying to protect his daughter--with no regard for the law he swore to uphold--and by an overly ambitious prosecuting attorney more interested in his personal future than the truth. As Spock said, "the needs of the many outweigh the needs of the one", so Barry remains in jail when there are many who should be there in his place. Montana would like this to go away; however, the truth must be found and justice meted out or the town of Poplar, Montana will never heal. Sissy Atkinson, Joanne Jackson and Maude Grayhawk should be indicted for murder, and former Governor Marc Racicot should be indicted for prosecutorial misconduct for starters. The case will be murky after 24 years of covering up the facts; but the outcome may be a man's life. What is more precious than the truth? At the very least, Barry Beach deserves a new trial. And even though 29 years have passed since Kim Nees' untimely death, late justice is better than no justice. Let the crumbs fall where they may.

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The Investigation by the Police

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As the murder of Kim Nees occurred on the Fort Peck Reservation, the FBI initially took charge of the investigation and in the month that followed, virtually all of the information that emerged was funneled through the Bureau's two-man field office in Glasgow, Montana. Within a few days of the murder, lead agent Brent Warberg interviewed more than three dozen witnesses, oftentimes in the presence of Dean Mahlum, Undersheriff of the Roosevelt County Sheriff's Department.

For several days following the murder, authorities focused on two primary suspects, both former classmates of the victim who graduated from Poplar High School several years ahead of her. One was Albert Gooch Kirn, a Native American and former all state guard on the Poplar High School basketball team. Investigators found out that Kirn had a reputation for heavy drinking, fighting and forcing his affections on younger women. In addition, 17-year old Joanne Jackson reported to the FBI two days after the murder that a boy who lived across the Poplar River from the murder scene had heard Kim Nees scream, "No, Gooch, no." While Joanne Jackson initially declined to identify the source, she ultimately claimed to the police she had heard the story from Caleb Gorneau. Gorneau insisted to the investigators he told Jackson no such thing.

The other police suspect was Kim Nees' boyfriend, Greg Norgaard. It appears that the interest in Norgaard stemmed primarily from the knowledge of investigators that he had a falling out with Kim just before the murder. Fingerprints lifted from the inside of Nees' pickup truck and the bloody palm print on the door matched neither Norgaard nor Kirn. The investigators focused their attention elsewhere.

Over the course of the investigation, either immediately following the murder, or in subsequent years, each of the following pieces of eyewitness testimony and evidence have been brought to light. Any one of these cast doubt on Barry's guilt. Unfortunately, the jury heard none of this evidence:

- *A group of people were with Kim at the time of the murder.*

Richard Holen, driving home from a local bar, observed Kim Nees in her father's pickup truck heading down toward the park near the time of her murder accompanied by a cab

full of people. This statement clearly cast doubt on Barry's story that he was alone with Kim at the time of the murder.

- *Others have been specifically implicated in the crime.*

Mike Longtree, a local resident has told several people that he was present at the time of the murder. He has told two different people that he witnessed Kim Nees' murder by several Native American girls, not by Barry Beach. Though Longtree has refused to testify, these two Longtree confidants provided sworn testimony subsequent to the initial trial. Maude Greyhawk, a local resident also confessed to having been present when Kim Nees was murdered and to having kicked her during the course of the assault that led to her death. These witnesses put Maude Kirn (maiden name Greyhawk), Sissy Atkinson, Joanne Jackson, and Jordis Ferguson at the crime scene and implicate them in the murder.

- *The bloody palm print isn't Barry's or Kim's.*

The jury was never told that the bloody palm print found on the passenger side door of the pickup truck belonged to neither Kim Nees nor to Barry Beach. Since the original trial, the state has claimed that the print was made by a passerby, not by someone actively involved in the crime.

- *Barry's testimony is inconsistent with the facts of the case.*

The jury never heard that large parts of Barry Beach's alleged confession, including his description of Kim Nees' clothes, his description of having punched and choked Kim Nees, his description of having confronted Kim Nees outside the driver's door of the truck, the use of a crescent wrench as the sole weapon and numerous other details that were in fact not true.

Barry Beach's Actions on the Day of the Murder

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Not one person in the twenty-five plus years since the murder, including the over 200 persons Centurion Ministries has interviewed, has ever come forward to say they saw Barry Beach at any time during the evening of Kim Nees' murder out and about in Poplar.

On the afternoon prior to Kim Nees' murder, Barry Beach accompanied his then close friend, Caleb Gorneau, and Gorneau's girlfriend, Shannon O'Brien, to the swimming hole known as Sandy Beach which is on the Poplar River just a mile or two northeast of town.

While there were conflicting accounts of how long they remained there, as they were departing, Beach got the wheels of his car stuck in the sand and destroyed the

transmission in his attempts to free the vehicle. When he was unable to dislodge the vehicle, Barry left Caleb Gorneau and Shannon O'Brien with his car and set out to walk to town.

Barry maintained that he walked to the Tastee Freeze on the West side of Poplar, and then received a ride in a pickup by friends Larry Rowe and Dorrance Steele the rest of the way to his home. These are the last two people who saw Barry out that night. He stated that no one was home when he arrived and that after eating a snack, he went upstairs, flopped onto his bed and quickly fell asleep. Barry claimed he didn't wake until dawn and he didn't learn about Kim Nees' murder until late that morning when his sister, Barbara Beach, delivered the news to him at their grandparents' ranch, about 15 miles northeast of Poplar where Barry had gone to help with the branding.

Within a few hours of the discovery of Kim Nees' body, Deputy Sheriff Errol "Red" Wilson was knocking on the doors on the west side of town looking for witnesses who might have observed anything suspicious the previous night. One of the residents he spoke with was Barry Beach's mother, Bobbie Clincher. Bobbie had been to Williston, ND the day before and returned home late in the evening. Upon returning home, Bobbie did not see Barry's car as it was still stuck at Sandy Beach, and concluded that Barry was still out. Bobbie told the deputy of what she thought were Barry's whereabouts the previous night. Bobbie said she also informed Wilson that Barry was still sleeping when she looked into his bedroom early that morning and that her son hadn't even taken off the shorts and shirt he had been wearing the previous day.

The morning after the murder Barry Beach went to his grandparents' ranch outside of Brockton, Montana and helped out with the calf branding. Two weeks after Kim Nees' murder, Barry Beach left the state on a long-planned trip to spend the summer with his father in Monroe, Louisiana. While police logically might have been curious about the timing of Beach's departure, the investigators hadn't bothered to talk with him before he left, nor did they attempt to contact him after he left the state.

After returning to Poplar in the fall of 1979, Barry Beach was picked up by the Roosevelt County Sheriff's Department and questioned about Kim Nees' murder for the first time.

He also voluntarily provided fingerprints and submitted to a polygraph. According to the examiner, Barry appeared to have knowledge of the murder (everyone in Poplar did) but was cleared by the examiner as having any involvement in the crime. In June 1980, Sheriff Mahlum summoned Barry Beach to his office and again questioned him. Nothing came of this and Barry left town soon thereafter to return to Louisiana.

Barry Beach's Arrest and Interrogation in Louisiana

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On the night of January 4, 1983, Barry Beach was picked up by Monroe, Louisiana police on a misdemeanor charge of contributing to the delinquency of a minor. In conjunction with Barry's arrest on this misdemeanor charge, detectives in Ouachita Parish, Louisiana were working overtime to try to solve the abduction murders of three young women, one of them the daughter of a high school principal. When homicide detective Sgt. Jay Via ran a background check on Barry Beach, he learned about the unsolved Montana murder of Kim Nees in Montana.

After spending several days trying to post his bail, Barry Beach's father, Bob Beach, and uncle, Tim Beach, showed up at the Monroe law office of Paul Henry Kidd on the morning of January 8th and retained him to find out why they had been getting the runaround at the jail. When Kidd appeared at the jail to inquire about the status of his new client, he learned that Barry had signed a murder confession the night before.

According to Detective Jay Via's report, Barry Beach also confessed in the presence of his attorney to being involved in the three Louisiana homicides. Those statements have been proven false. All three of those homicides were determined to have been committed by others and Barry Beach was never charged in Louisiana with any of those crimes. As Louisiana Detective Jay Via testified, Barry Beach's statements about the three Louisiana homicides were proven "absolutely false." (Tr. 679)

After Barry Beach had been confined for two days at the rural, minimum security detention facility known as the "pea farm," Detective Jay Via showed up there on January 6th and questioned him briefly about the local murders. Barry denied involvement in these murders. Detective Via returned to the "pea farm" the following morning (January 7th) and escorted Barry to the parish sheriff's office in Monroe where he placed Barry in a tiny interrogation room.

Without breaking for lunch, Detective Via then grilled Barry on the local murders throughout the morning and into the afternoon. Barry acknowledged having heard about the parish murders, but insisted to Detective Via that he had not been involved with them. Around 2:00 in the afternoon, Detective Via left the room and Detective Alfred Calhoun took over the interrogation, which, by this time, had shifted from the Louisiana murders to the unsolved Kim Nees murder in Montana.

According to Barry Beach, Detectives Alfred Calhoun and Jay Via put him through an emotional wringer, alternately demeaning him, threatening him, praying with him and describing to him in frightening detail the horrors of being put to death in the Louisiana electric chair. According to Barry, Detective Calhoun told him that unless he admitted to the Montana murder, Calhoun would personally see to it that he went to the electric chair in Louisiana. By the end of several hours of interrogation, the Louisiana detectives had a tape recorded confession to the Kim Nees murder.

During the course of the interrogation of Barry Beach, there were numerous phone calls between the Louisiana detectives and Roosevelt County Sheriff Dean Mahlum who provided the Louisiana detectives with a nine point list of things that Kim Nees' killer

should know. A comparison of Barry Beach's confession to the crime shows that Barry was wrong on eight of the nine points and that most of his confession was based upon either publicly known facts or is inconsistent with the actual evidence determined from Kim Nees' body at the crime scene.

At Barry Beach's trial, the prosecutor told the jury that Barry Beach had not only confessed, but had confessed in front of his own lawyer. Paul Kidd, Barry Beach's Louisiana attorney absolutely denies this assertion in a sworn statement. Kidd was not called to testify at Beach's trial and did not even know of the prosecutor's statement until well after Beach's trial was over.

In his sworn statement, attorney Paul Kidd states in part: "It goes without saying that I was outraged over Jay Via's alleged testimony that Barry Beach confessed to the Montana murders in my presence." "...Barry denied any involvement in the Montana murder."

During the course of the lengthy interrogation in Louisiana, it was reported that Barry Beach had confessed to three murders in Louisiana, as well. Detectives at Barry Beach's trial in Montana later reported that those confessions were "later proved unfounded." (Tr. 679). In fact, after being interrogated, Barry Beach had given incriminating statements about all three murders in Louisiana, each of which was "established later to be absolutely false." (Testimony of Louisiana detective Jay Via, Tr. 679). In fact, another person later confessed to one of those three murders (Tr. 683) and other suspects were later charged with those offenses.

The behavior of clearly falsely confessing to the Louisiana murders underscores the coercive tactics that were used to extract the Kim Nees confession from Barry Beach.

The most likely suspects

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Over the years, evidence has been accumulating that Kim Nees was killed by several female assailants who lured her to the Poplar riverbank park during the early morning hours of June 16, 1979. The accumulated evidence shows that several females beat Kim Nees to death as a result of jealousy harbored over Nees' romantic relationship with a man also involved with one of these girls.

- In September of 1979, three months after Kim Nees' murder, Roosevelt County Sheriff Don Carpenter took a taped statement from Orrie Burshia. Orrie Burshia approached Sheriff Carpenter to disclose information she learned about the Nees' murder. In that taped statement that was never disclosed to the defense, Orrie Burshia told Sheriff Carpenter of a conversation she had with Mike Longtree

approximately three weeks after Kim Nees' body was discovered.

Longtree told Burshia that he had been present at the scene of the crime on the night that Kim Nees was murdered. Longtree described to Burshia how he had watched a group of Native American girls, including Sissie Atkinson and one of the Reddog sisters, among others, beat Kim Nees to death. Longtree told Orrie Burshia how Kim Nees was trying to get away and begged people to help her. Longtree *never* said that he saw Barry Beach at the murder scene. The statement from Burshia was never turned over to Barry Beach's lawyer.

Over the years, Mike Longtree has reaffirmed to a number of people his statement that he was present at the time that Kim Nees was murdered. On July 1, 2004, Longtree had a conversation with Lisa Perry of Poplar, Montana. During that conversation, Longtree told her that he knew the names of the people who killed Kim Nees and further indicated the killers were Maude Kirn (maiden name Greyhawk), Sissy Atkinson, Joanne Jackson, and Jordis Ferguson. Lisa Perry has given a sworn statement relating to this conversation.

Although Orrie Burshia is now dead, the fact that Mike Longtree told her that he had witnessed the murder is confirmed in the statement by Susie Cowans Bissel. Bissel has given a sworn statement of what she was told by Orrie Burshia.

Around 1990, Mike Longtree told Sherrie DeMarias, Mike Longtree's common law wife and mother of his three children, that he saw the murder and told her some of the details. He told her that Sissie Atkinson, Maude Greyhawk, Jordis Ferguson and two Jackson sisters were involved. Longtree told her that he was with Les Bighorn and saw the girls drag Kim Nees to the river. Longtree has denied that he was a witness to the murder when contacted by police officers.

Nevertheless, his statements should have been revealed to Barry Beach's lawyer prior to the trial so the defense could investigate the statement.

- Judy Greyhawk is the sister-in-law of Maude Greyhawk. Maude Greyhawk was the daughter of Officer Steve Greyhawk, a tribal police officer who was on duty the night of Kim Nees' murder. He is also the tribal police officer who admitted to breaking into the evidence room following the collection of evidence from the Kim Nees' murder scene.

In 2004, Roosevelt County District Attorney investigator Ron Kemp attempted to interview Maude Greyhawk regarding the murder of Kim Nees. Maude Greyhawk initially told Kemp to return at another time. When he returned, she related that she had called Sissie Atkinson immediately after Kemp's visit with her and Atkinson told her not to talk to Kemp and that "they don't have anything." Maude Greyhawk then denied committing the murder, however, she then began to weep and asked Kemp whether she may have been involved in Kim Nees' murder and not now remember it. After Kemp left his attempted interview with Maude Greyhawk, Maude Greyhawk called her sister-in-law, Judy Greyhawk. Maude

Greyhawk told Judy Greyhawk that she hadn't been the one who actually killed Kim Nees.

Maude Greyhawk confessed to Judy Greyhawk that she, Maude, had in fact lured Kim Nees to the park that night and "I might have kicked her in the head once or twice," but did not kill her. Judy Greyhawk testified before the Board of Pardons and Parole regarding this confession by Maude Greyhawk.

- Maude Greyhawk had been married to Dana Kirn. In 2002, Dana Kirn and Maude Kirn separated and then engaged in a bitter custody battle over their children. A final hearing on their divorce and custody issues was scheduled for April 7, 2003. Two days before the scheduled court hearing, Dana Kirn was stabbed to death by Maude's new boyfriend, Tracy McGowan. There is significant evidence that Dana Kirn planned to reveal at the upcoming divorce/custody hearing that Maude Greyhawk had confessed to him about participating in Kim Nees' murder.

Before his death, Dana Kirn told a number of people that Maude had confessed to him that she was a participant in Kim Nees' murder and that he was going to reveal this information. Prior to the death of Dana Kirn, he told his father, Albert Kirn, Sr., that with regard to the upcoming hearing he didn't need a lawyer because he had enough information on Maude to put her away for life.

Desiree Kirn-Lambert was Dana Kirn's younger sister. Dana Kirn revealed to his sister that while he and Maude were still living together, Maude revealed several things that led him to believe she was involved in the murder of Kim Nees. He said they were sitting on the couch at their home one day when she said to him, there's something I haven't told you in all these years. I know about the Kim Nees murder. Maude confessed to Dana, according to Desiree, that Maude was afraid she was going to be going to jail.

Finally, Maria Decker, Dana Kirn's half-sister, gave a sworn statement that after Dana separated from his wife, Maude, he lived with Maria and her husband for a while. She says Dana disclosed to her that Maude admitted to him more than once during their marriage that she was involved in the murder of Kim Nees. Specifically, Dana said Maude told him that she participated in the fatal beating of Kim Nees along with Sissy Atkinson, Joanne Jackson, Roberta Jackson, Jordis Ferguson and Rhea Reddog. Dana said that Maude revealed to him that Ed Vandover devised a plan to lure Kim to the location where she was murdered; that they planned to beat Kim, not kill her, then realized they had gone too far.

Dana brought up Maude's admissions to him regarding the murder of Kim Nees on multiple occasions according to Maria Decker. Michael Burshia has also given a statement that over a period of several years, Dana told him a number of times that Maude confessed to him that she was involved with others in the murder of Kim Nees.

- Sissy Atkinson has been a suspect in Kim Nees' murder since 1979. An FBI report dated July 19, 1979 states: “The name of Sissy Atkinson has also come up on numerous occasions as a possible suspect in this matter.”

Calvin First, a Tribal patrolman, reported that while he was at an Exxon station getting gas at about 1:30 to 1:45 a.m. on June 16, 1979, he saw Sissy Atkinson driving Maude Greyhawk's car away from the area of the murder. A passenger was in the car. Calvin First believed the passenger might have been Maude Greyhawk, but he wasn't certain. Calvin First was never called as a witness at trial.

Sissy Atkinson has confessed to a number of people that she was responsible for Kim Nees' death. In the mid-1990s, Sissy Atkinson revealed to her longtime boyfriend, William Stubby Balbinot, that she, Sissy Atkinson, bludgeoned Kim Nees to death with a tire iron and that Maude Greyhawk, Joanne Jackson, and Jordis Ferguson participated with her in the murder.

Atkinson's confession to her boyfriend, William Stubby Balbinot, was disclosed by Balbinot to his sister, Sheryl. In 1984, Atkinson bragged to coworkers at the Tribal Industries plant in Poplar that she had committed the perfect crime.

Witness Calvin Fourstars heard Atkinson gloating over the Beach conviction and the fact that she had committed the perfect crime.

- J. D. Atkinson, the older brother of Sissy Atkinson, testified that he visited his sister, Sissy Atkinson, in Great Falls in 2003 and 2004 at a time when Sissy Atkinson was heavily addicted to narcotics. J. D. Atkinson described how Sissy Atkinson on a number of occasions began to talk about the Kim Nees murder and on at least one occasion began to “unload” and described that on the night of Kim Nees' murder she, Sissy Atkinson, along with Maude Greyhawk, Joanne Jackson and Jordis Ferguson were partying down off Highway 2 near the river. Sissy Atkinson described a fight breaking out among these girls and Kim Nees. Sissy Atkinson described herself to her brother as a witness rather than a participant. Nevertheless, she has never publicly described herself as a witness, but always claimed that she was home by 11:00 p.m. on the night of Kim Nees' murder.
- Forty-two year old North Dakota resident, Vonnie Brown, testified about her contact with Sissy Atkinson in June of 2004 in Great Falls. Vonnie Brown was born and raised in Poplar and lived there most of her life. When she visited Sissy Atkinson in 2004, Sissy was in the midst of heavy drug use. During one visit, Sissy began to talk about the Kim Nees' murder. Sissy told Vonnie Brown, “I know who really did it.” When Vonnie asked who, Sissy began describing girls kicking Kim and pulling her by the hair. Sissy said that Maude was one of them. She then began describing Maude, herself and others being present, but then stopped and changed the subject. Vonnie Brown described how during her visits with Sissy in Great Falls, she saw Sissy's brother, J. D., visit on occasion. This

corroborates J. D. Atkinson's testimony that he visited his sister at her apartment in Great Falls.

Court proceedings

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On May 3, 1983, Barry Beach was charged with deliberate homicide in the District Court of the 15th Judicial District, Roosevelt County, Montana. He pled not guilty to the charges and the case was tried to the jury from April 9th to April 13th, 1984. Barry Beach was found guilty.

Judgment was entered on May 11, 1984. He was sentenced to a term of 100 years without possibility of parole. He appealed to the Montana Supreme Court which affirmed the conviction on July 25, 1985. State v. Beach, 705 P.2d 94 (Montana 1985).

In April of 1992, Barry Beach filed a petition for habeas corpus relief in Federal District Court. On August 5, 1993, the Magistrate Judge issued a recommendation that the petition be dismissed because it contained both exhausted and unexhausted claims. On September 28, 1993, the Federal District Judge issued an order granting an indefinite stay pending the exhaustion of state remedies.

On October 30, 1995, Barry Beach filed a petition for post-conviction relief in the Montana Supreme Court. On February 8, 1996, that court issued an order denying his petition.

On February 16, 1996, the stay issued by the Federal District Court was lifted and the case proceeded after referral to a magistrate. Counsel for Barry Beach filed a motion for discovery on April 1, 1996 which was denied on July 3, 1996. Briefing on the substantive issues continued for approximately the next year and on August 6, 1997, the United States Magistrate Judge issued his findings and recommendation denying the petition for writ of habeas corpus. Barry Beach's attorney filed his objections to those findings.

On April 21, 1998, the District Court Judge issued his final order denying the petition for writ of habeas corpus. Barry Beach then appealed to the Ninth Circuit Court of Appeals. His appeal was denied by the Ninth Circuit in a decision entered on August 30, 1999. Barry Beach then filed a petition for writ of certiorari in the United States Supreme Court. The petition was denied.

Barry Beach then filed a petition for DNA testing in the District Court of the 15th Judicial District in Roosevelt County. A hearing was held before the District Court Judge and an order was issued permitting DNA testing of evidence. The hair evidence at issue which was sought to be DNA tested could not be located and so no DNA testing has been

conducted on that evidence. DNA testing was conducted on cuttings from a bloody towel found near the scene of the crime. That testing resulted in findings that the blood stains did not come from either Barry Beach or Kimberly Nees.

In August of 2005, Barry Beach, pro se, filed an application for sentence commutation with the state of Montana Board of Pardons. That application was denied in a decision issued November 30, 2005 wherein the board stated:

"After duly considering your application for executive clemency in accordance with Sections 46-23-301 and 46-23-316, MCA, and in accordance with the Board of Pardons and Paroles Administrative Rules of Montana 20.25.901 and 20.25.902, the Board has by unanimous vote concluded that insufficient cause appears to necessitate a public hearing and orders that your clemency application be denied. In the Board's opinion, you have not satisfactorily proven your innocence of the crime or submitted newly discovered evidence showing complete justification or non-guilt. Additionally, you have not satisfactorily proven that further incarceration would be grossly unfair and that the board was unable to identify sufficient extraordinary, mitigating or extenuating circumstances."

In response to an outcry among Montanans familiar with the case and media attention, the Montana Board of Pardons and Parole relented to an unprecedented hearing on the evidence of Barry Beach's innocence and his fitness for life outside of prison should clemency be granted. The board's written decision was undisguised in its animus towards Centurion Ministries and towards the Montana citizens who testified in support of Barry Beach. In a decision rife with numerous misstatements of critical facts, the board dismissed the massive preponderance of evidence demonstrating Barry Beach's innocence with the flimsiest of explanations, and in some instances less than that. And yet, despite the very troubled circumstances of his conviction, the board still rejected any consideration of clemency. In the ultimate catch-22, the board rejected even the possibility of parole for Barry Beach because he was "remorseless" and refused to admit his guilt.

Barry Beach's Sentence

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Barry Beach was sentenced for the crime of deliberate homicide to a term of imprisonment of 100 years. Barry Beach was a juvenile at the time that Kim Nees was murdered.

According to the 2002 United States Department of Justice Bureau of Justice Statistics for felony sentences in state courts for year 2002, 24.1% of individuals convicted of murder received life sentences in state courts for that year. The average prison term in 2002 for a murder conviction was 142 months.

According to the Montana Department of Correction's 2005 report to the legislature, the average length of incarceration for males convicted of violent crimes in Montana in 2004 was 76.1 months (the average length of sentence in 1994 in Montana was 55.4 months).

A review has been conducted of sentences imposed for homicides in the state of Montana dating back to the 1970s. The pool included 388 cases. Of those 388 cases, only 25, including Barry Beach's case, involved an offender who was less than 18 years old at the time of the offense. Of those 25 offenders who were less than 18, between the years 1980 and 1985 there were eight juvenile offenders who were less than 18 at the time of their offenses.

Only three received sentences of life with no parole, including Barry Beach. Out of the 25 juveniles sentenced for deliberate homicide between the 1970s and 2005, it appears that only three received no parole sentences of 100 years. Those three are Beach and two offenders convicted of multiple homicides (Steve Keefe and K. Hans). Notwithstanding the fact that Barry Beach was wrongfully convicted in the first place, the conclusion to be reached from a review of the sentences imposed for deliberate homicide in the last 30 years is that the sentence imposed upon Barry Beach was extraordinarily severe in relation to other sentences for similar crimes with offenders having similar age at the time of the offense.

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BARRY BEACH'S ACTIONS ON THE DAY OF THE MURDER

Not one person in the twenty-five plus years since the murder, including the over 200 persons Centurion Ministries has interviewed, has ever come forward to say they saw Barry Beach at any time during the evening of Kim Nees' murder out and about in Poplar.

On the afternoon prior to Kim Nees' murder, Barry Beach accompanied his then close friend, Caleb Gorneau, and Gorneau's girlfriend, Shannon O'Brien, to the swimming hole known as Sandy Beach which is on the Poplar River just a mile or two northeast of town.

While there were conflicting accounts of how long they remained there, as they were departing, Beach got the wheels of his car stuck in the sand and destroyed the transmission in his attempts to free the vehicle. When he was unable to dislodge the vehicle, Barry left Caleb Gorneau and Shannon O'Brien with his car and set out to walk to town.

Barry maintained that he walked to the Tastee Freeze on the West side of Poplar, and then received a ride in a pickup by friends Larry Rowe and Dorrance Steele the rest of the way to his home. These are the last two people who saw Barry out that night. He stated that no one was home when he arrived and that after eating a snack, he went upstairs, flopped onto his bed and quickly fell asleep. Barry claimed he didn't wake until dawn and he didn't learn about Kim Nees' murder until late that morning when his sister, Barbara Beach, delivered the news to him at their grandparents' ranch, about 15 miles northeast of Poplar where Barry had gone to help with the branding.

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Montana Department of Corrections Correctional Offender Information Sheet



DOC ID# 21520
NAME: BARRY ALLAN BEACH
CURRENT STATUS: RELEASED BY COURT ORDER
STATUS LAST UPDATED: 14-FEB-13
GENDER: MALE

PHYSICAL AND DEMOGRAPHIC CHARACTERISTICS

DOB: 1962
BIRTHPLACE: MONTANA
ETHNICITY: AMERICAN INDIAN OR ALASKAN NATIVE
MARITAL STATUS: DIVORCE
CITIZENSHIP: United States
MT RESIDENT: Y

HEIGHT: 5 FT 11 IN
WEIGHT: 195 LBS
L/R HANDED: R
HAIR COLOR: BROWN
BUILD: MEDIUM
SKIN TONE: MEDIUM
EYE COLOR: BROWN

AKAs

* * * NONE * * *

SCARS, MARKS, TATTOOS AND OTHER PHYSICAL CONDITIONS

<u>NCIC Code</u>	<u>TYPE</u>	<u>DESCRIPTION</u>
SC L ARM	SCARS ARM, LEFT, NONSPECIFIC	
SC R SHLD	SCARS SHOULDER, RIGHT	
TAT CHEST	TATTOO CHEST	NATIVE, EAGLE, MOUNTAINS
TAT UL AR	TATTOO ARM, LEFT UPPER	"BARRY", VINES
TAT UR AR	TATTOO ARM, RIGHT UPPER	FLOWER

LEGAL RECORD

DOCKET: 1068C	OFFENSE: DELIBERATE HOMICIDE
COUNTY: ROOSEVELT	CODE: 455102
JUDGE: SORTE J	OFFENSE DATE: 16-JUN-79
COUNTS: 1	SENTENCE PRONOUNCED: 11-MAY-84
LEGAL TYPE: ORIGINAL SENTENCE	SENTENCE EFFECTIVE: 11-MAY-84
SENTENCE TYPE: PRISON	NET SENTENCE (MONTHS): 1200

[CONWEB HOME](#)

<http://netk.net.au/Montana/Beach4.asp>

Networked Knowledge - Montana Reports

[This edited version of the report has been prepared by [Dr Robert N Moles](#)]

On 25 April 2008 Rebekah Price of the American Chronicle reported

“Barry Beach: Justice & Truth--Never the Twain Shall Meet”.

She said we have all heard this story before: I DIDN'T DO IT. As a child, the lying may start when questioned about the whereabouts of the missing cookies. Crumbs on the tee shirt and chocolate chip smears about the lips do not stop the quick-talking denial of the obvious. After thorough interrogation, typically from a poker-faced parent, a child realizes he or she is busted and sheepishly confesses to the culinary robbery. A crime spree thwarted, extra broccoli for dinner is administered as punishment and all is right again with the world. But what happens when someone confesses and there are no crumbs on the shirt, no chocolate smears on the lips? In fact, he was not even near the cookie jar. What if the trail of crumbs lead to a completely different direction like they did 29 years ago in Poplar, Montana?

Poplar, Montana. The name alone conjures up visions of small town beauty, tenderly framed by the still wild Montana landscape. A place that welcomes visitors with down-home grace and long established businesses run by several generations. One can imagine a bustling diner on the main drag where all the locals congregate to share the news of the day over steaming mugs of hot coffee. Poplar has all that, and more. Much more. Imagination is one thing; reality is another. Poplar, Montana is a toxic dump of murders, secrets and suppositions, oozing out slowly through 24 years of overheard admissions and guilt-racked souls. For whatever reasons--and there seem to be many--the truth failed to surface initially, and a man's life hangs in suspension for a crime he may not have committed. Barry Beach, now 45 years old, was convicted in 1984 of the 1979 murder of Kim Nees, a popular 17 year old high school graduate, and fellow student. Though Beach was questioned by police, he was assured by the authorities he was not a suspect. Beach states he did all he could to cooperate, even agreeing to a second polygraph test while he was back visiting in Poplar a year later, after visiting his father in Louisiana. The second polygraph test never happened before he returned to Louisiana. A year had passed since the murder and the police were no closer to identifying the killer. Or were they?

In a small town of 800 people, one must wonder why law enforcement was having such a difficult time. For one thing, there was confusion from the start. This investigation was earmarked for disaster with the conglomerate of different law enforcement descending on the quaint town. Because Kim's murder was on the Native American soil of Fort Peck, not only did the local sheriff's office investigate, but so did tribal law enforcement and the FBI. Already a cluster was starting to form. Add to this Keystone Cop mix a local police officer breaking into the evidence room with the lame excuse of having to pee like

a racehorse, knowing full well he would break the chain of custody by his actions. Why did he do that, you ask? Was there not another place to relieve himself? Of course there was, but he was Officer Stephen Grayhawk, father of Maude Grayhawk, who may have had something to do with Kim Nees' death. Interesting he should emergently choose the evidence room, which had been cordoned off, to relieve himself. Perhaps he mistook the police tape for toilet paper.

By this time the sheriff's office must have been looking bad. The Nees family was well known and active in the community. So, in a small town where everybody knows everybody, and nobody is talking--or at least nobody is saying anything the police wanted to hear-- the next best thing to do is, well, grab the next best thing. Enter Barry Beach, a basically wild kid who got into some bad stuff. He liked fast cars and partying. He looked like he could be guilty, so the local authorities sought to make it stick. Barry Beach left town soon after the murder. Certainly because of guilt, local authorities reasoned. It didn't matter this trip had been planned for some time before that fateful night. It looked suspicious enough. And then, let's see, Barry was in and out of trouble with the law in Louisiana for a few things like DUI and driving on a suspended license. Yep, he looks like a killer. But wait, there was no forensic evidence at the crime scene linking Barry Beach to Kim Nees. No matter, he's still our killer. As a matter of fact, there were two people who gave him reasonable alibis for his whereabouts that night. Oh, let's just suppress that; anyway, they are relatives. Who'd believe them?

Oh, and he confessed. Confessed? Yes, he did. He confessed bigger 'n life to the Louisiana cops who played him until he was a dog tired rag doll, unable to continue coherently and scared out of his pants. Two Louisiana cops who destroyed Barry's confession tapes and were later found to be derelict in other cases. Barry describes the interrogation tactics swinging from praying with him to threatening him with the electric chair, and everything in between. So he confessed not just to Kim Nees' murder, but to several others in Louisiana as well. Did they have evidence? Of course not. In fact, he was not even in Louisiana when the other women were killed. They didn't need no stinking evidence. They just scared him and broke him down. Another notch in their corrupt belts. So now he sits, patiently impatient, in prison in Deer Lodge, Montana watching his stolen life slip by under the confines of the state. He maintains his innocence, as he has done from day one, aware that he may well spend the rest of his life serving his strange sentence without any chance for parole. His one shot was in March 2007 where he, and a plethora of supporters, faced the Montana State Board of Parole and Pardons. The Board listened politely, offered hope by their mere presence, then shot down any chance of fairness for a man who may well be innocent. Why is he innocent?

Kim Nees was lured by a small herd of contemporaries--girls possibly jealous of her-- down to a popular riverside park where things got out of hand. Rumors abound that eight or nine people were there that night. At least three sets of footprints are reported to be found at the site of the murder. None match Barry Beach. A bloody handprint on the Nees' truck does not match Barry Beach; yet, others who would be suspects were never investigated further. Three girls in particular stand out in this story: Sissy Atkinson, Joanne Jackson and Maude Grayhawk, whose father contaminated the evidence. These

girls were known to have harassed Kim Nees as she allegedly dated the father of Sissy Atkinson's baby. All allegedly confessed at one time or another to someone close to them; but when confronted by authorities, all deny any involvement, even to this day. These girls are rumored to have committed most of the beating that ultimately stole Kim's life. And there were witnesses who saw the girls all in the truck together and could discount an alibi or two or three.

People are hesitant to come forward, even after all these years. There have been accusations of threats, intimidation, and even murder since Maude Grayhawk's estranged husband (to whom she allegedly confessed) turned up dead two days prior to a custody hearing where he had threatened to tell her dirty little secret. Her then boyfriend was charged and convicted in his murder. Maude, party now to two murders, still walks free. Nasty young girls tend to grow up to be nasty old women, and that is what these rumored killers now appear to be. Wretched and used up by life, two appeared on Dateline, defensive and worn down by time. Maude Grayhawk has stayed out of the limelight by conveniently ignoring subpoenas and checking herself into a mental ward in Colorado. Perhaps they have made their own prisons in trying to keep their terrible secret; that may be some justice in Kim Nees' death.

But what of Barry Beach? Is he innocent? It sure looks like it. Then why is he still in prison? Good question. Initially, the Keystone Cops mucked the whole thing up, no doubt helped by an over zealous police officer, trying to protect his daughter--with no regard for the law he swore to uphold--and by an overly ambitious prosecuting attorney more interested in his personal future than the truth. As Spock said, "the needs of the many outweigh the needs of the one", so Barry remains in jail when there are many who should be there in his place. Montana would like this to go away; however, the truth must be found and justice meted out or the town of Poplar, Montana will never heal. Sissy Atkinson, Joanne Jackson and Maude Grayhawk should be indicted for murder, and former Governor Marc Racicot should be indicted for prosecutorial misconduct for starters. The case will be murky after 24 years of covering up the facts; but the outcome may be a man's life. What is more precious than the truth? At the very least, Barry Beach deserves a new trial. And even though 29 years have passed since Kim Nees' untimely death, late justice is better than no justice. Let the crumbs fall where they may.