

## IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 11-0723

FILED

JUN 20 2013

STATE OF MONTANA,

Plaintiff and Appellant,

v.

ORDER

BARRY ALLAN BEACH,

Defendant and Appellee.

Barry Allan Beach has filed a petition for rehearing of the Court's decision in *State v. Beach (Beach II)*, 2013 MT 130, 370 Mont. 163, \_\_\_ P.3d \_\_\_. He argues that the decision overlooked facts material to the decision and conflicts with a statute or controlling decision not addressed by the Court. *See* M. R. App. P. 20(1).

Citing to *Beach v. State (Beach I)*, 2009 MT 398, ¶ 14, 353 Mont. 411, 220 P.3d 667, Beach asserts that *Beach II* violates the law-of-the-case doctrine because it applies a different standard of review than articulated in *Beach I*. However, the remand in *Beach I* set forth the five-factor *Clark* test, with incorporation of the U.S. Supreme Court's standards for innocence claims, as the legal standard to be applied. This is exactly the standard applied by the Court in *Beach II*. Further, the evidentiary standard of review used in *Beach II* is uniquely applicable to evidence introduced in support of innocence claims, as distinguished from other kinds of postconviction cases, and has been applied to

the new evidence Beach has offered throughout the long progress of this case. As U.S. Magistrate Judge Anderson stated in Beach's 1996 federal habeas proceeding:

The federal court is obviously not limited to consideration of only the new evidence. Rather, the court must make its determination "in light of all the evidence," *Schlup v. Delo*, 513 U.S. 298, 327, 115 S. Ct. 851, 867 (1995) (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160 (1970)), including "evidence of guilt adduced at trial." *Schlup*, 513 U.S. at 332, 115 S. Ct. at 869.

*Beach v. Mahoney*, CV 92-92-BLG-RWA, Slip Op. at 28, (D. Mont. Aug. 7, 1997).

Beach also argues that *Beach II* overlooks "undeniable" differences between Beach's confession and the crime scene. Beach posits:

[I]t is undeniable that there are numerous details between the confession and the crime scene that do not match: Nees was not choked, as Beach stated; Nees did not exit the driver's side of the pickup, nor was she attacked on that side of the truck, but was dragged through the passenger door; the body was not placed in a garbage bag; Nees was not dragged to the river by her shoulders, but by her feet[.]

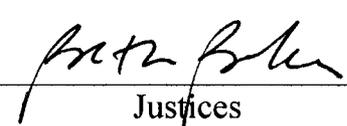
Notably absent from these statements is any citation to either the trial record or the record made at the postconviction hearing. That is because no citation exists: no evidence establishing these statements was introduced either at the trial or the postconviction hearing. They are counsel's assertions or theories. The Court will consider a petition for rehearing if "it overlooked some *fact* material to the decision." M. R. App. P. 20(1) (emphasis added). The facts established by evidence in the record were properly reviewed.

Having considered the petition for rehearing,

IT IS HEREBY ORDERED that the petition for rehearing is DENIED.

The Clerk is directed to mail copies hereof to counsel of record for the respective parties.

DATED this 20 day of June, 2013.

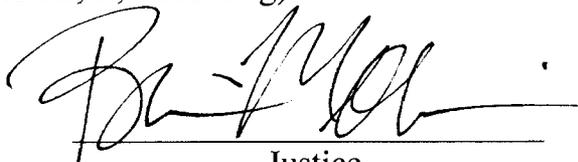
  
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Justices

Judge Richard Simonton joins in denying the petition.

Justice Brian Morris dissents.

I would grant the petition. The analysis set forth in *Beach I* comports with the recent decision of the United States Supreme Court in *McQuiggin v. Perkins*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1924 (May 28, 2013), in which the Court further explained the actual innocence gateway developed in *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851 (1995).

The District Court applied this analysis to the evidence presented at the hearing. I would defer to the District Court's witness credibility determinations and its weighing of the evidence at the hearing. This weighing of the evidence led the District Court to conclude that "[n]o reasonable juror, properly instructed" could have considered the testimony of the witnesses at the hearing "and not had reasonable doubt whether Mr. Beach committed the murder." *Beach II*, ¶ 145 (Morris, J., dissenting).

  
\_\_\_\_\_  
Justice

Justice Patricia O. Cotter and Justice Michael E Wheat join the Dissent of Justice Brian Morris.

*Patricia Cotter*  
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*Michael E. Wheat*  
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Justices