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Newly Discovered Evidence of Innocence: Its History and Future Treatment in Montana

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COMMENT

NEWLY DISCOVERED EVIDENCE OF INNOCENCE: ITS HISTORY AND FUTURE TREATMENT IN MONTANA

E. Lars Phillips*

I. Introduction

In May 2013, the Montana Supreme Court appeared to advocate for the adoption of a brand new, one-size-fits-all standard for evaluating newly discovered evidence in petitions for post-conviction relief, with a majority of the Court signing on to Justice McKinnon's concurring opinion in *Beach v. State* (*Beach II*).[1] The adoption of this standard would constitute a divergence from not only the governing statutory law, but also from nearly a century of the Court's own precedent.

In Montana, post-conviction relief is codified within Title 46, Chapter 21, of the Montana Code Annotated. The statute's ambiguity, coupled with the *Beach II* concurrence and its focus on proposing new standards of review for such claims,[2] has left the future of post-conviction relief jurisprudence muddled and confused. The confusion stems from the result of applying the concurrence's standards to timely post-conviction relief claims alleging newly discovered evidence under Montana Code Annotated § 46–21–102(2), the newly discovered evidence provision. Essentially, by

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1. *Beach v. State* (*Beach II*), 302 P.3d 47, 79–84 (Mont. 2013) (McKinnon, J., concurring).

2. *Id.* at 72 (McKinnon, J., concurring).

advocating for a heightened standard of review,[3] the concurrence's standard effectively reads the provision out of the statute by failing to distinguish between timely and untimely claims. To illustrate, when a petitioner is proceeding under the newly discovered evidence provision, the central focus of this article, the statute requires separate, consecutive showings at multiple stages that the petitioner must meet in order to attain the relief sought. Initially, in order to bring a claim under § 46–21–102(2), a petitioner must "allege the existence of newly discovered evidence that, if proved and viewed in light of the evidence as a whole would establish" the petitioner's innocence.[4] However, this section of the statute governs when a petition may be filed,[5] therefore requiring the petitioner to make an initial showing of innocence before the district court may hold a hearing to determine the merits of the claim. The confusion stemming from the construction of the statute is apparent: if a petitioner has already established his evidence to the reviewing court's satisfaction in order to bring his claim, what purpose does the evidentiary hearing serve to further evaluate the claim? Essentially, the structure of the statute results in the same test being applied twice to petitioners alleging claims of newly discovered evidence. First, at the district court's review of the petition, when the petitioner must only allege the facts that would establish his innocence in light of the evidence as a whole. And second, after successfully passing over the initial threshold, at the evidentiary hearing where the petitioner must actually produce the alleged evidence, allowing the district court to once again weigh the evidence in light of the evidence as a whole and determine whether the relief sought should be granted. The standard to be applied to petitioners seeking to overcome these two hurdles is the focus of this article.[6]

This article begins with a brief history of the treatment of newly discovered evidence in Montana. Next, it summarizes the current standards for evaluating a petition for post-conviction relief in light of the recent decision by the Montana Supreme Court in *Beach v. State* (*Beach II*). Further, it addresses the potential effects of *Beach II* by analyzing *Marble v. State*;[7] a case currently awaiting review by the Court. Finally, the article recom-

3. *Compare Crosby v. State*, 139 P.3d 832, 835 (Mont. 2006); *to Beach II*, 302 P.3d at 84 (McKinnon, J., concurring).

4. Mont. Code Ann. § 46–21–102(2) (2013).

5. *Id.* at § 46–21–102.

6. In this regard, this article addresses only the missing distinction between timely and untimely claims. There is a more subtle distinction that must be considered: whether a petitioner is proceeding under a substantive or procedural innocence claim. That is, whether the petitioner is seeking his immediate release or some lesser form of relief (such as a new trial). In this context, the relief sought must define the standards to be applied. On that note, this article assumes that the relief sought in a petition is a new trial (and the standards set forth in this article should only be applied when a petitioner is seeking relief on a level similar to that).

7. No. DA 13-0763 (Mont. filed Nov. 15, 2013).

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mends proposed standards of review for post-conviction relief, and concludes by offering a few points for further consideration of the post-conviction landscape in Montana.

II. A Brief History of the Treatment of Newly Discovered Evidence in Montana

Within our judicial system, there is a presumption that each individual has been afforded his Due Process. Due Process refers to the protections granted the individual by the U.S. Constitution.[8] Therefore, every conviction enjoys a fundamental assumption of validity grounded in the belief that the conviction is constitutionally sound. This validity is given further support by the "societal interests in finality, comity, and conservation of judicial resources."[9] Yet, as in all things, there are instances in which this assumption has resulted in error.[10]

Ratified in 1972, the Montana Constitution is one of the most progressive in the nation.[11] The purpose of the Montana Constitution is to provide heightened protections above and beyond those guaranteed by the U.S. Constitution. As the State's district courts provide the initial "bite at the apple" for post-conviction petitioners, these heightened protections should be interpreted to encompass the post-conviction relief petitioner.

A. Emergence in Common Law

The Montana Supreme Court first addressed the issue of how newly discovered evidence impacts a conviction in *State v. Matkins*,[12] decided in 1912. Three years earlier, a number of colts disappeared from pasture only to reappear five months later at a ranch "several miles away."[13] Two men, the owner of the ranch and his employee, Matkins, were charged with grand larceny in connection with the event. After Matkins was convicted, he attempted to show, largely through the use of affidavits, that he was factually innocent of the crime.[14]

Before reaching the merits of the case, the Court noted "[a]pplications for new trials on the ground of newly discovered evidence are not favored

8. *See e.g. Herrera v. Collins*, 506 U.S. 390, 399 (1993) (providing the following examples: *Gideon v. Wainwright*, 372 U.S. 335 (1963) (the right to assistance of counsel); *Strickland v. Wash.*, 466 U.S. 668 (1984) (the right to effective assistance of counsel); *Coy v. Iowa*, 487 U.S. 1012 (1988) (the right to confront adverse witnesses); *Duncan v. La.*, 391 U.S. 145 (1968) (the right to trial by jury)).

9. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013).

10. *See e.g. Powell v. Ala.*, 287 U.S. 45 (1932).

11. *Buhmann v. State*, 201 P.3d 70, 108–109 (Mont. 2008) (Nelson & Swandal, JJ., dissenting).

12. 121 P. 881, 882 (Mont. 1912).

13. *Id.*

14. *Id.*

by the courts."[15] In support of this premise, the Court listed a series of concerns: the petitioner may be "under strong temptation to manufacture" evidence of innocence; losing the trial "arouses [the petitioner] to the diligent activity which he should have put forth before the trial"; and the petitioner may persuade others to manufacture merely "cumulative or impeaching" evidence.[16] To adequately alleviate these concerns, the Court looked to other jurisdictions that had previously addressed the problem. In 1851, the Supreme Court of Georgia addressed a case, *Berry v. Georgia*,[17] in which the individual proceeded under circumstances similar to those in *Matkins*. Faced with this relatively novel procedure, the *Berry* Court developed a test to evaluate the newly discovered evidence introduced by the petitioner.[18]

The Montana Supreme Court found *Berry* persuasive and held newly discovered evidence would not warrant a new trial unless each of the following factors were met:

> (1) [t]hat the evidence must have come to the knowledge of the applicant since the trial;
> (2) that it was not through want of diligence that it was not discovered earlier;
> (3) that it is so material that it would probably produce a different result upon another trial;
> (4) that it is not cumulative merely—that is, does not speak as to facts in relation to which there was evidence at the trial;
> (5) that the application must be supported by the affidavit of the witness whose evidence is alleged to have been newly discovered, or its absence accounted for; and
> (6) that the evidence must not be such as will only tend to impeach the character or credit of a witness.[19]

However, the Court also recognized certain necessary exceptions, specifically noting the possibility of a situation in which "the cumulative evidence may be so overwhelmingly convincing as to compel the conclusion that to sustain the verdict would be a gross injustice."[20] The Court applied the test in *Matkins* and determined the evidence amounted to merely "a clever device by which [Matkins's associate] seeks to aid [Matkins to escape] what appears to be a proper conviction," and dismissed the claim.[21]

In 1959, the Court reaffirmed the *Matkins* test for evaluating newly discovered evidence in *State v. Greeno*.[22] Gerald Greeno had been convicted after his brand was found on eight steers identified as belonging to a

15. *Id.* at 885.
16. *Id.*
17. 10 Ga. 511 (Ga. 1851).
18. *Id.*
19. *Matkins*, 121 P. at 885 (citing *Berry*, 10 Ga. at 511).
20. *Id.*
21. *Id.* at 886.
22. 342 P.2d 1052, 1055–1056 (Mont. 1959).

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Mr. Miller.[23] Greeno was proceeding under a provision of the Revised Code of Montana (1947) that governed when a new trial may be granted and stated, in relevant part:

> 7. When new evidence is discovered material to the defendant and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all the circumstances of the case, may seem reasonable.[24]

In essence, this provision had codified the theory recognized in *Matkins* roughly four decades earlier.[25] Further, the Court noted that the test had been consistently applied in at least five other proceedings in Montana:[26] *State v. Belland*[27] in 1921, *State v. Mott*[28] and *State v. Gangner*[29] in 1925, *State v. Hamilton*[30] in 1930, and *State v. Curtiss*[31] in 1943.

B. Legislative Recognition of, and Remedy for, Error in Convictions

In 1963, the U.S. Supreme Court decided *Fay v. Noia*.[32] Implicit in this decision was an opportunity for the states to play a larger role in post-conviction relief. The Supreme Court stated "we think that comity demands that the state courts, under whose process [the petitioner] is held, and which are, equally with the Federal courts, charged with the duty of protecting the accused in the enjoyment of his constitutional rights, should be appealed to in the first instance."[33] Effectively, *Fay* allowed states to create procedures for processing claims of error that arise after a conviction became final.

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23. *Id.* at 1052–1053.

24. *Id.* at 1055 (quoting Rev. Codes of Mont. 1947 § 94–7603).

25. At first blush, one may argue *Greeno* is distinguishable from post-conviction relief because the Court referred to the avenue under which Greeno proceeded as a "motion for a new trial." *Greeno*, 342 P.2d at 1055. However, this would completely ignore the fact that the statute at issue, listed above, is the historical version of the modern post-conviction relief statute. Further, the Court has routinely conflated the two modes of procedure, clearly indicating a willingness to pull from one area of jurisprudence to interpret the other. *See State v. Hatfield*, 888 P.2d 899, 903 (Mont. 1995).

26. *Greeno*, 342 P.2d at 1056.

27. 197 P. 841 (Mont. 1921).

28. 233 P. 602 (Mont. 1925).

29. 235 P. 703 (Mont. 1925).

30. 287 P. 933 (Mont. 1930).

31. 135 P.2d 361 (Mont. 1943).

32. 372 U.S. 391 (1963).

33. *Id.* at 418–419.

1. Original Version: Chapter 26, Title 95 of the Laws of Montana

In 1967, the Montana Legislature passed a series of laws that guaranteed the availability of certain post-conviction avenues to petitioners convicted of a crime, including the Post-Conviction Hearing.[34] The Post-Conviction Hearing statute provided detailed guidance to the courts regarding the treatment of petitions seeking "to vacate, set aside, or correct [a petitioner's] sentence."[35] Further, the law contained several notable provisions. First, it explicitly stated the petition was required only to "identify the proceedings in which the petitioner was convicted, give date of the rendition of the final judgment complained of, and clearly set forth the alleged violation or violations."[36] Second, the law allowed for a petition to be filed "at *any time* after conviction."[37] Finally and most importantly, to address the action of the court when considering a petition of such nature, it stated: "*Unless* the motion and the files and records of the case *conclusively show* that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issue and make findings of fact and conclusions with respect thereto."[38] Read in concert, the provisions presented a very low bar for petitioners who sought to challenge the validity of their conviction. Further, once a hearing was held, the law specifically required certain actions by the reviewing court:

> If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such supplementary orders as to reassignment, re-trial, custody, bail or discharge as may be necessary and proper. If the court finds for the state, the petitioner shall be returned to the custody of the person to whom the writ was directed.[39]

2. Introduction of the Procedural Bar

In 1980, the Montana Supreme Court decided *In re McNair*,[40] which fundamentally altered the landscape of post-conviction relief. The central issue in *McNair* was the passage of time––eight and a half years––between the sentence becoming final and the petitioner filing for post-conviction relief.[41] The Court relied on two arguments to support the denial of the petition: first, the existence of a "[l]ong delay [between conviction and the peti-

34. 1967 Mont. Laws 458–460.
35. *Id.* at 459.
36. *Id.*
37. *Id.* (emphasis added).
38. *Id.* (emphasis added).
39. *Id.*
40. 615 P.2d 916 (Mont. 1980).
41. *Id.* at 917.

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tion] may raise a question of good faith";[42] and second, the passage of time was insurmountably prejudicial to the State's ability to try a case.[43] In 1981, apparently attempting to balance the potency of the concerns the Court had raised in *McNair* with the opportunity created by the U.S. Supreme Court in *Fay*, the Legislature amended Montana Code Annotated § 46–21–102.[44] The amendment changed the amount of time in which a petitioner could file for post-conviction relief from any time after conviction to "within 5 years of the date of conviction."[45] However, even after the imposition of this new procedural bar, the Montana Supreme Court continued to consistently apply the *Greeno* test (first adopted in *Matkins*) to petitions for post-conviction relief that alleged newly discovered evidence in cases, such as *In re J.R.T.*,[46] decided in 1993.

3. Introduction of the Evidentiary Bar

In 1997, citing similar changes in federal law, the Legislature approved two changes to Montana Code Annotated § 46–21–102.[47] First, the new version allowed petitions seeking to "vacate, set aside, or correct [a] sentence,"[48] to be filed "at any time within [one] year" of the conviction becoming "final."[49] Second, the statute was changed to allow claims alleging newly discovered evidence to be brought "within [one] year of the date on which the conviction becomes final or the date on which the petitioner discovers, or reasonably should have discovered, the existence of evidence, whichever is later," as long as the evidence, when "proved and viewed in light of the evidence as a whole would *establish* the petitioner did not engage in the criminal conduct for which the petitioner was convicted."[50]

This amendment created two types of claims under the statute: those proceeding within a year of the conviction becoming final[51] and those proceeding within a year of the discovery of new evidence.[52] Notably, this was the first amendment, since the statute was passed in 1967, which created an additional hurdle over which certain petitioners must cross before receiving a hearing on the merits of their claim. This unprecedented hurdle, formed

42. *Id.* at 918 (quoting *U.S. v. Bostic*, 206 F. Supp. 855 (D.D.C. 1962)).
43. *Id.* at 918.
44. 1981 Mont. Laws 270–272.
45. *Id.*
46. 853 P.2d 710, 711 (Mont. 1993).
47. Mont. Code Ann. § 46–21–102 (2013) (including commission comments that cite 28 U.S.C. 2255 as the source and *Fay* as the impetus for the addition).
48. *Id.* at § 46–21–101(1).
49. *Id.* at § 46–21–102(1).
50. *Id.* at § 46–21–102(2) (emphasis added).
51. *Id.* at § 46–21–102(1).
52. *Id.* at § 46–21–102(2).

by the requirement that petitioners "establish" elements of their claims in the pleading stage, would prove to be notoriously hard to navigate for both the courts and practitioners. As noted, however, this hurdle does not affect *every* post-conviction relief petition. As explicitly stated in the statute, if the newly discovered evidence is presented in a petition filed within one year of the judgment becoming final, the petitioner does not face the added burden of initially "establish[ing]" his innocence of the crime.[53]

While the 1997 amendment substantively changed the statute, the Montana Supreme Court remained remarkably steady in its application of the *Greeno* test. The following cases illustrate the Court's consistent holdings that if the newly discovered evidence in a petition for post-conviction relief passed the *Greeno* test, the petitioner had sufficiently "established" his innocence to proceed to the post-conviction hearing. In *State v. Clark*,[54] decided in 2005, the Court noted "innumerable alterations" to the *Berry* test that had occurred since its adoption in Montana, "usually with little or no rationale or explanation for the differing versions," and restated the test to establish a "cogent rationale."[55] In February of 2003, Kelly Clark was convicted of sexual assault.[56] After the victim partially recanted her trial testimony, upon which Clark's conviction largely rested, Clark moved for a new trial submitting the recantation as newly discovered evidence.[57] On appeal, the Court was forced to determine whether the district court erred when "denying Clark's motion for a new trial after [the victim] recanted her testimony."[58] The Court, "in an effort to establish a clearer test with a cogent rationale," reformed the *Greeno* test into the following:

> To prevail on a motion for a new trial grounded on newly discovered evidence, the defendant must satisfy a five-part test:
> (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.[59]

The Court explained the fifth factor would likely prove "to be the crux of any district court's evaluation of new trial motions based on new evidence."[60] Further, the Court noted "'reasonable probability' is somewhere

53. Mont. Code Ann. § 46–21–102.
54. 125 P.3d 1099 (Mont. 2005).
55. *Id.* at 1105.
56. *Id.* at 1100–1101.
57. *Id.* at 1101–1102.
58. *Id.* at 1103.
59. *Id.* at 1105.
60. *Clark*, 125 P.3d at 1106.

between the *Larrison*[61] test's 'might have reached a different conclusion' and *Berry's* 'probably produce a different verdict' standard."[62] Importantly, the Court stated "a 51 percent or greater chance of producing [a] different verdict" was "too restrictive," and advocated for the "reasonable probability standard" because it allowed the reviewing court to determine the "weight and credibility of the new evidence, and to consider what impact, looking prospectively at a new trial with a new jury, this evidence may have on that new jury."[63]

One year later, the Court affirmed the application of the newly minted *Clark* test to a petition for post-conviction relief under Montana Code Annotated § 46–21–102(2) in *Crosby v. State*.[64] In *Crosby*, the Court stated that while in *Clark* the test was applied to a motion for a new trial, the Court "deem[ed] it appropriate to apply the same 'newly discovered evidence' test" in post-conviction relief.[65] The Court reaffirmed the requirement that the reviewing court determine only "whether a new trial would have the *reasonable probability* of resulting in a different outcome," and overturned the denial of Crosby's petition because the district court had "violated [the *Clark* test] when it first determined the ultimate veracity of the recanting testimony, and then used that determination as the sole basis to deny postconviction relief."[66]

By the beginning of the 21st century, the consistent treatment of newly discovered evidence that challenged an original conviction had created a strong, and reliable, post-conviction relief jurisprudence in Montana. As described above, the Court had a long history of applying what became the *Clark* test to petitions for post-conviction relief alleging newly discovered evidence to determine whether the *contents* of the petition warranted the relief sought.

III. The Saga of Barry Beach

In an abrupt departure from the line of reasoning developed in *Matkins*, *Greeno*, and *Crosby*, the Montana Supreme Court recently advocated for the adoption of the evidentiary standards found in federal habeas corpus jurisprudence when evaluating newly discovered evidence in petitions under Montana Code Annotated § 46–21–101.[67] This section briefly recounts the history behind *Beach v. State* (*Beach II*), summarizes the

61. *Larrison v. U.S.*, 24 F.2d 82 (7th Cir. 1928).
62. *Clark*, 125 P.3d at 1106 (citing *Larrison*, 24 F.2d at 87; *Berry*, 10 Ga. at 527).
63. *Id.*
64. 139 P.3d 832, 835 (Mont. 2006).
65. *Crosby*, 139 P.3d at 835.
66. *Id.* at 835–836 (emphasis in original).
67. *Beach II*, 302 P.3d at 79–84.

Court's decision in *Beach II*, and concludes by analyzing the potential effect of the *Beach II* concurrence.

A. The History

In June of 1979, the body of Kimberly Nees was found near Poplar, Montana.[68] Four years later, on January 4, 1983, twenty-year-old Barry Beach was taken into custody by the Ouachita Parish Sheriff's Office in Louisiana and charged with "contributing to the delinquency of minors."[69] Three days later, he confessed to murdering Kimberly Nees.[70] He confessed again the next day in the presence of counsel as well as two Sheriff's department personnel.[71] Subsequently, in April of 1984, almost five years after the body of Kimberly Nees was discovered, a jury found Beach guilty of deliberate homicide.[72] On initial appeal, Beach argued the State failed to prove his confession was made voluntarily.[73] The Court held, because the case was "one where the resolution of the voluntariness issue [turned] on the credibility of witnesses," it was required to "'defer to the district judge who [was] in a superior position to judge the credibility of [the witnesses].'"[74] Beach's confession proved to be the determining factor in the case; the concurring opinion of Justice Sheehy, which, in its entirety, read simply: "I agree with the result. The question of voluntariness is ended in the fact Beach confessed in the presence of his attorney. All other issues fade in that fact."[75] In spite of the Court's confidence, however, litigation concerning Mr. Beach's innocence has continued for over thirty years.[76]

B. Beach I & Beach II

On January 18, 2008, Beach filed a petition for post-conviction relief alleging newly discovered evidence.[77] Beach argued his petition was timely under Montana Code Annotated § 46–21–102(2) because he had discovered the "majority" of the new evidence "on or after January 19, 2007."[78] The district court brusquely dismissed the claim as "procedurally and time

68. *State v. Beach* (*Beach*), 705 P.2d 94, 97 (Mont. 1985).
69. *Id.* at 98.
70. *Id.* at 98–99.
71. *Id.* at 99.
72. *Id.* at 100.
73. *Id.* at 106.
74. *Beach*, 705 P.2d at 106 (citing *State v. Camitsch*, 626 P.2d 1250, 1253 (Mont. 1981)).
75. *Id.* at 108 (Sheehy, J., concurring).
76. *See* Pet. for Writ of Habeas Corpus, *State v. Beach* (Mont. Oct. 23, 2004) (No. DC 11-0723).
77. Appellant's Br., *State v. Beach*, 2008 WL 2791289 at *8 (Mont. July 10, 2008) (No. DA 08-0244).
78. *Id.*

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barred."[79] Beach appealed and in November of 2009, after reviewing the district court's "skeletal" order denying post-conviction relief, the Montana Supreme Court remanded the case for further consideration.[80] The determination of two issues by the Court was crucial to the ensuing treatment of Beach's petition. First, the Court determined Beach's petition was time-barred.[81] In support of this determination, the Court explained that the "1997 amendments [to Montana Code Annotated § 46–21–102, under which Beach was proceeding,] appl[ied] only to those convictions that became final 12 months before the effective date of April 24, 1997."[82] In contrast to proceeding under Montana Code Annotated § 46–21–102(2), which, at that time, required only that a petitioner satisfy the *Clark* test,[83] the Court held, in order to proceed under a time-barred petition, the petitioner must show "strict enforcement [of the statutory bar] would result in a fundamental miscarriage of justice."[84]

The nature of his petition placed Beach in a unique position in an already unique field of law. Had the petition been timely filed, the Court could have applied the *Clark* test to determine whether the newly discovered evidence warranted the relief sought, as it had recently done in *Crosby*.[85] By filing outside of the statutorily prescribed time limit, Beach faced a necessarily strict standard of review. The specters of "good faith" and "prejudice" to the state—first considered by the Court one-hundred years earlier in *Matkins*—combined with *In re McNair*—where the Court allowed post-conviction relief petitions to be procedurally barred by the passage of time[86]—to require the Court to create a heightened barrier to relief in the form of a hybrid *Clark* test.[87] By creating this test, the Court allowed Beach to have his claim evaluated at a post-conviction hearing, as required by statute, while compensating for his unique position.[88]

The development of the hybrid test itself presents the second important issue in *Beach I*. To determine whether Beach's newly discovered evidence satisfied the "fundamental miscarriage of justice exception," the Court instructed the district court to "apply a modified version of the five-prong *Clark* test and the [*Schlup v. Delo*[89]] 'clear and convincing' standard" to

79. *Beach v. State* (*Beach I*), 220 P.3d 667, 669 (Mont. 2009).

80. *Id.* at 674–675.

81. *Id.* at 671.

82. *Id.* at 670.

83. *Crosby*, 139 P.3d at 834–836.

84. *Beach I*, 220 P.3d at 670 (citing *State v. Redcrow*, 980 P.2d 622, 627 (Mont. 1999); *State v. Pope*, 80 P.3d 1232, 1242–1244 (Mont. 2003)).

85. *Crosby*, 139 P.3d at 834–835.

86. *In re McNair*, 615 P.2d at 918–920.

87. *Beach I*, 220 P.3d at 672–673.

88. *Id.* at 672–674.

89. 513 U.S. 298 (1995).

determine if "a 'jury could find, in light of newly discovered evidence,' that Beach actually is innocent of his crime."[90]

Essentially, the Court used the heightened 'clear and convincing' standard from *Schlup* as the remedy for whatever prejudice the State might face should the relief be granted and the case proceed to a new trial. This implies that, if Beach was before the Court on a timely petition, he would necessarily be subject to a lower evidentiary bar. After a post-conviction hearing that lasted three days, the district court determined newly discovered evidence presented in Beach's petition warranted the relief sought and released Beach pending a new trial.[91] However, before the trial could occur, the State appealed and, for the second time in less than five years, the saga of Barry Beach came before the Montana Supreme Court.[92]

The sole issue on appeal was the validity of the district court's conclusion that the evidence presented at the post-conviction hearing was sufficient to warrant the grant of a new trial.[93] Initially, the Court reaffirmed the application of the *Clark* test as "the usual framework [for determining] whether 'newly discovered evidence' warranted a new trial."[94] Further, the Court affirmed that, because Beach filed "beyond the statutory time bar," the *Clark* test was not appropriate and the application of a hybrid test developed in *Beach I* was required.[95] After a lengthy review of the record, the Court reversed the district court's order granting a new trial, dismissed the case, and remanded Beach back into the custody of the State.[96]

Under the majority's decision in *Beach II*, two things are clear. First, the hybrid test from *Beach I* and the clear and convincing standard present the appropriate threshold for evaluating newly discovered evidence contained in petitions filed outside of the statutorily allowed timeframe. Second, a standard less than clear and convincing would necessarily be applied to claims that proceed in a timely manner.

C. The Beach II Concurrence

Justice McKinnon authored the concurrence in *Beach II* with the specific goal of "[setting] forth what in [her] view [were] the correct legal principles that should apply in future [post-conviction relief] cases."[97] Normally, a concurring opinion serves only to illustrate a different path taken to

90. *Beach I*, 220 P.3d at 674–675 (citing *Redcrow*, 980 P.2d at 628).
91. *Beach II*, 302 P.3d at 51.
92. *Id.* at 50.
93. *Id.*
94. *Id.* at 52 (citing *Beach I*, 220 P.3d at 672).
95. *Id.*
96. *Id.* at 71.
97. *Beach II*, 302 P.3d at 77 (McKinnon, Baker, Rice & Simonton, JJ., concurring).

the Court's result. In *Beach II*, however, Justices Baker and Rice, along with district court Judge Simonton, who sat for Chief Justice McGrath, signed on to the concurrence,[98] adding greatly to the persuasive weight of the opinion.

Justice McKinnon recognized the Court had applied the *Clark* test in *Crosby* to "a timely petition filed under [Montana Code Annotated § 46–21–102(2)]," but, citing her previous analysis of "actual innocence," she found the *Clark* test was at odds with the statute.[99] Justice McKinnon grounded the argument for the abandonment of the *Clark* test in four separate propositions. First, Justice McKinnon found there was no new trial guarantee in § 46–21–102(2),[100] which rendered the *Clark* test inapplicable because the *Clark* test factors "bear [instead] on whether a new trial should be granted under § 46–16–702 . . . (the 'new trial' statute)."[101] Second, Justice McKinnon found the language of § 46–21–102(2), specifically the word "establish," required the application of a more stringent standard of review than was required by the *Clark* test.[102] She argued: "The *Clark* test . . . requires only a reasonable probability that a new trial will result in a different outcome; § 46–21–102(2) . . . , conversely, requires the petitioner's evidence to 'establish' he did not engage in the criminal conduct for which he was convicted."[103] Third, Justice McKinnon found the *Clark* test required a different level of diligence than § 46–21–102(2).[104] She argued:

> The *Clark* test requires the court to assess the defendant's diligence; § 46–21–102(2) . . . , however, has its own diligence standard: the petition is timely if it is filed within one year of the date on which the conviction became final or the date on which the petitioner discovered, or reasonably should have discovered, the existence of the evidence, whichever is later.[105]

Fourth, and finally, Justice McKinnon argued the *Clark* test had a different standard for what constitutes newly discovered evidence.[106] In particular, she noted: "The *Clark* test requires the evidence to be material to the issues at trial and not cumulative or merely impeaching; § 46–21–102(2) . . . states no such criteria."[107] Justice McKinnon's reasons for abandoning the *Clark* test in future cases evaluating post-conviction relief petitions al-

98. *Id.* at 86.
99. *Id.* at 83–84.
100. *Id.* at 83.
101. *Id.*
102. *Id.*
103. *Beach II*, 302 P.3d at 83.
104. *Id.* at 83–84.
105. *Id.*
106. *Id.* at 84.
107. *Id.*

leging newly discovered evidence may be subjected to pointed challenges. The following sections briefly offer criticism on each point.

1. No New Trial Guarantee

Justice McKinnon argued the lack of a new trial provision in Montana Code Annotated § 46–21–102(2) requires a different test than the *Clark* test because the test was used to evaluate motions for new trial not petitions for post-conviction relief.[108] Section 46–21–102(2) "says nothing about a new trial"[109] because the provision addresses "*when* a petition may be filed."[110] The provision declaring *what* relief may be granted is § 46–21–201, which states: "If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and *any supplementary orders* as to reassignment, *retrial*, custody, bail, or discharge that may be necessary and proper."[111] Further, in *Crosby*, and *Beach I*, the Court explicitly held the test applicable in either situation.[112]

Therefore, rejecting the use of the *Clark* test to evaluate petitions for post-conviction relief based solely on the grounds that Montana Code Annotated § 46–21–102(2) does not contain a provision granting a new trial is an error. This argument illustrates the problems with adopting a one-size-fits-all standard in post-conviction relief. Clearly, Justice McKinnon correctly argues that a motion for a new trial based on newly discovered evidence and filed "within 30 days" of a verdict, as allowed by Montana Code Annotated § 46–16–702, is not identical to a motion for a new trial based on the same grounds but proceeding at some point after the thirty day deadline. This does not mean, however, that the *Clark* test should be completely disregarded. Rather, as is shown later, the fifth element of the *Clark* test, which contains the standard of proof to be met, should vary depending upon the situation in which it is applied.

2. The Definition of "Establish"

Justice McKinnon's second reason for rejecting the *Clark* test assumes the word "establish," as found in Montana Code Annotated § 46–21–102(2), creates a higher burden of proof than is required by the *Clark* test.[113] Justice McKinnon argues that "to establish innocence" means to "affirmatively and unquestionably" prove the petitioner is not guilty of

108. *Id.* at 83.
109. *Beach II*, 302 P.3d at 83.
110. Mont. Code Ann. § 46–21–102 (emphasis added).
111. *Id.* at § 46–21–201(6) (emphasis added).
112. *Crosby*, 139 P.3d at 835; *Beach I*, 220 P.3d at 673.
113. *Beach II*, 302 P.3d at 83 (McKinnon, Baker, Rice & Simonton, JJ., concurring).

the crime charged.[114] To adopt Justice McKinnon's definition of "establish" would require a petitioner to prove, "affirmatively and unquestionably,"[115] that he is innocent of the crime charged, while the trial court simultaneously determines whether the petitioner can bring his claim in the first place.

Carrying the application of this standard out to its conclusion illustrates the flaw in the underlying argument. It is illogical to require a petitioner to prematurely establish his innocence by such a high standard to then only have him sent back before a jury at a new trial. If the reviewing court has actually been convinced that a petitioner has *affirmatively and unquestionably* proven he is innocent, the only logical result would be his immediate release. While this standard may be appropriate for post-conviction petitions where the petitioner *is* seeking his immediate release, it is not appropriate for petitioners seeking only to challenge their conviction by more procedural means, for example: a new trial. This illustrates the central issue of applying a one-size-fits-all standard to petitions for post-conviction relief. When the reviewing courts are forced to treat every petition the same regardless of the relief sought, the petitioner seeking immediate release will necessarily be subject to the same standard of review as petitioners seeking to demonstrate their innocence at a new trial.

3. The Level of Diligence Required

Justice McKinnon's third reason for rejecting the *Clark* test, that the test requires a different level of diligence than § 46–21–102(2),[116] is a distinction without consequence. Statutorily, a post-conviction relief petition may only be subject to evaluation under the *Clark* test when it is filed within one year of the discovery of new evidence. In other words, an evaluation under the *Clark* test only occurs when the petition is found to be appropriately before the reviewing court. In this instance, that requires that the petitioner has filed his petition within one year of the discovery of new evidence. Therefore, the fact that the *Clark* test states that the evidence "must have been discovered since trial" instead of mirroring the statutory language requiring the petition to be filed within "one year of the discovery of new evidence," is a distinction without a difference as the *Clark* test is only applied after the reviewing court has determined that the petitioner has filed his claim within one year of the discovery of new evidence.

114. *Id.* at 84.

115. *Id.*

116. *Beach II*, 302 P.3d at 83–84 (McKinnon, Baker, Rice & Simonton, JJ., concurring).

4. The Definition of "Newly Discovered Evidence"

Justice McKinnon argued the *Clark* test had a different standard for what constitutes newly discovered evidence when compared with Montana Code Annotated § 46–21–102(2), which meant the two were incompatible.[117] Justice McKinnon noted that, unlike the *Clark* test, § 46–21–102(2) states no explicit criteria requiring that the evidence "be material to the issues at trial and not cumulative or merely impeaching."[118] The statute does, however, require that the reviewing court determine whether the alleged evidence, "if proved and viewed in light of the evidence as a whole," would establish innocence.[119] The *Clark* test adequately addresses the requirement that the reviewing court consider the newly discovered evidence along with the evidence as a whole by requiring that the new evidence "be neither cumulative nor merely impeaching."[120] Therefore, the *Clark* test is well tailored to the statute. Further, in this area in particular, the *Clark* test provides much needed guidance to courts faced with determining the merits of post-conviction relief petitions.

Each reason proposed by Justice McKinnon as justification for the abandonment of the *Clark* test fails to hold up under scrutiny. Further, as illustrated in Part II of this paper, the application of the *Clark* test and its predecessors is well documented in decisions by the Court. In *Certain v. Tonn*,[121] the Court held, while "*stare decisis* is not a rigid doctrine that forecloses the reexamination of cases when necessary, 'weighty considerations underlie the principle that the courts should not lightly overrule past decisions.'"[122] Notably, the Court stated in the same decision that when "[f]aced with viable alternatives, *stare decisis* provides the 'preferred course.'"[123] In *Payne v. Tennessee*, which the Court looked to as authority in *Certain*,[124] the U.S. Supreme Court suggested factors such as the promotion of "evenhanded, predictable, and consistent development of legal principles," the fostering of "reliance on judicial decisions," and the contribution "to the actual and perceived integrity of the judicial process," all of which reinforce the idea that courts should be very wary when overruling precedent.[125]

117. *Id.* at 84.

118. *Id.*

119. Mont. Code Ann. § 46–21–102(2).

120. *Clark*, 125 P.3d at 1105.

121. 220 P.3d 384 (Mont. 2009).

122. *Id.* at 387.

123. *Id.* at 387 (citing *State v. Kirkbride*, 185 P.3d 340, 343 (Mont. 2008) (quoting *Payne v. Tenn.*, 501 U.S. 808, 827 (1991))).

124. 220 P.3d at 387.

125. *Payne*, 501 U.S. at 827.

The infirmities within Justice McKinnon's arguments for abandoning the *Clark* test, coupled the Court's inability to avoid overruling almost one hundred years of precedent, show that the Court should affirm *Crosby* and apply the *Clark* test in future cases involving timely petitions for newly discovered evidence.

D. Proposed Reliance on Federal Habeas Corpus Jurisprudence

One additional aspect of the concurrence warrants a brief review. In her analysis, Justice McKinnon argued petitions proceeding under Montana Code Annotated § 46–21–102(2) should be evaluated under the standards used to evaluate federal habeas corpus claims.[126] This section briefly presents an overview of the federal habeas corpus jurisprudence at issue while emphasizing the distinction between a petition for post-conviction relief and the writ of habeas corpus.

The writ of habeas corpus is separate and distinct from the petition for post-conviction relief under § 46–21–101. While the statute allows claims that could proceed under the writ to do so,[127] the fundamental nature of the two modes of procedure are different enough to make standards applied to one distinguishable when applied to the other. In Montana, the writ of habeas corpus is designed to challenge the unjust incarceration of an individual.[128] Conversely, the petition for post-conviction relief is designed to challenge the validity of the conviction.[129] Simply put: in Montana, the factual or legal innocence of the individual is not at issue in a habeas proceeding. Even if the Court found these two modes similar enough to warrant the application of the same standards of review, an analysis of *Herrera* shows it is not the proper case from which to draw those standards. Further, even if U.S. Supreme Court habeas jurisprudence did provide the proper foundation for evaluating petitions for post-conviction relief, the Court has clearly distinguished the standards to be applied in legal claims of innocence, referred to as procedural innocence, and standards to be applied when the factual, also referred to as substantive, innocence of a petitioner is at issue. Similar to the distinction between post-conviction relief and habeas corpus, claims alleging procedural or legal innocence require different standards of review.

In the context of Montana Code Annotated § 46–21–101, every claim for newly discovered evidence implies one or both of the underlying constitutional violations recognized by American jurisprudence: (1) the hybrid Eighth and Fourteenth amendment violation where the incarceration of an

126. *Beach II*, 302 P.3d at 84 (McKinnon, Baker, Rice & Simonton, JJ., concurring) (emphasis added).

127. Mont. Code Ann. § 46–21–101.

128. *Id.* at § 46–22–101.

129. *Id.* at § 46–21–101.

individual amounts to cruel and unusual punishment because the individual is factually innocent of the crime charged; or (2) through the 14th amendment, any one of the recognized violations where the incarceration of an individual is unconstitutional because of a violation of the defendants constitutional rights that occurred at trial.[130] These two underlying violations create two different forms of innocence: substantive innocence, where a person is innocent of the crime charged as a matter of fact; and procedural innocence, where a violation of the petitioner's constitutional rights has occurred at trial. The distinction here is critical: a person who proves his substantive innocence is entitled to walk free because keeping a person whom the Court has found to be substantively innocent of the crime charged would constitute cruel and unusual punishment. Importantly, the Montana statute grants the reviewing court the power to issue any supplementary orders that are necessary and proper, including discharge of the petitioner, as shown above.[131] Procedural innocence, on the other hand, requires no such relief, instead where a procedural violation of a petitioner's rights has occurred at trial, he is necessarily entitled to other forms of relief as granted by the statute, including a new trial.[132]

The U.S. Supreme Court addressed the distinction between procedural and substantive innocence in *Schlup v. Delo*, where the petitioner was proceeding under a procedural innocence claim.[133] While *Schlup* is similar to *Herrera* in that both cases dealt with second, successive federal habeas petitions,[134] the distinction between the type of innocence claimed clearly separates the two cases. Schlup's claim of innocence was "procedural, rather than substantive" because, unlike *Herrera*, where the claim at issue was based on the theory "that the execution of an innocent person would violate the Eighth Amendment," Schlup's claim was based, "not on his innocence, but rather on his contention that the ineffectiveness of his counsel . . . and the withholding of evidence by the prosecution . . . denied him the full panoply of protections afforded to criminal defendants by the Constitution."[135] Further, the Court noted two distinctions between procedural and substantive innocence. First, a procedural innocence claim "does not by it-

130. *See Brady v. Md.*, 373 U.S. 83 (1963) (constitutional violation based on the prosecutions failure to disclose exculpatory evidence); *Gideon*, 372 U.S. 335 (constitutional violation of the right to assistance of counsel); *Duncan*, 391 U.S. 145 (constitutional violation of the right to jury trial); *Strickland*, 466 U.S. 668 (constitutional violation of the right to effective assistance of counsel); *Coy*, 487 U.S. 1012 (constitutional violation involving the right to confront adverse witnesses); *Taylor v. Ill.*, 484 U.S. 400 (1988) (constitutional violation involving the right to compulsory process).

131. Mont. Code Ann. § 46–21–201(6).

132. *Id.* at § 46–21–201(6).

133. *Schlup*, 513 U.S. at 313–314.

134. *Id.* at 301; *Herrera*, 506 U.S. at 393.

135. *Schlup*, 513 U.S. at 314 (internal citations omitted).

self provide a basis for relief."[136] In that light, Schlup's claim of innocence was "not itself a constitutional claim, but instead a gateway through which [he was required to pass] to have his otherwise barred constitutional claim considered on the merits."[137] Therefore, Schlup's claim for relief rested "on the validity of his [underlying constitutional claims]."[138] Because Schlup's claim was brought in concert with "an assertion of constitutional error at trial," the Court stated that "Schlup's conviction may not be entitled to the same degree of respect as [Herrera's]."[139] For this reason, the Court held that "Schlup's evidence of innocence need carry less of a burden," and required that "the evidence must establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice *unless* his conviction was the product of a fair trial."[140] Conversely, the Court noted that "In *Herrera* (on the assumption that petitioner's claim was, in principle, legally well founded), the evidence of innocence would have had to be strong enough to make his execution 'constitutionally intolerable' *even if* his conviction was the product of a fair trial."[141] Distinguishing between these two types of innocence illustrates the problem with a one-size-fits-all standard of evidentiary review for all post-conviction claims in Montana.

To reiterate, such a one-size-fits-all approach was proposed by the concurring opinion in *Beach II*, where Justice McKinnon stated, "Based on the statute's language, it appears § 46–21–102(2) . . . is *effectively*––though perhaps not intentionally––a codification of the substantive/freestanding claim"[142] recognized by the U.S. Supreme Court in *Herrera* and in *House v. Bell*.[143] First, in making this assumption, Justice McKinnon advocated for the adoption of federal habeas standards when evaluating state petitions for post-conviction relief. More importantly, however, this standard defines all claims under Montana Code Annotated § 46–21–102(2) as "substantive" innocence claims. In reality, a petitioner is far more likely to proceed under a procedural innocence claim, such as ineffective assistance of counsel, when proceeding under a statute designed to correct errors of fact in the original conviction.

Further, the argument that the statute is a codification of *Herrera* fails to take into account the unique nature of that case in particular. To illus-

136. *Id.* at 315.
137. *Id.*
138. *Id.*
139. *Id.* at 316.
140. *Id.*
141. *Schlup*, 513 U.S. at 316.
142. *Beach II*, 302 P.3d at 84 (McKinnon, Baker, Rice & Simonton, JJ., concurring) (emphasis added).
143. 547 U.S. 518 (2006).

trate, Herrera was attempting to prove, in federal court, that he was actually innocent of the crime of which he was convicted.[144] This requires, procedurally, that he had already exhausted that particular claim in state court. The *Herrera* standard, requiring a petitioner to prove by clear and convincing evidence, is so strict because he has already unsuccessfully attempted to prove his actual innocence before the state courts. Further, this is precisely why it is unlikely that relief will ever be granted under the *Herrera* standard: if the petitioner *was* actually innocent, the state court would have already released him.

To summarize, a post-conviction relief petitioner alleging newly discovered evidence is, by the very nature of the proceeding, attempting to correct errors of fact in the underlying conviction. As illustrated in *Herrera*, this is not at issue in a federal habeas proceeding.[145] Further, a petition for post-conviction relief in Montana is not grounded in the U.S. Constitution, but in Montana Code Annotated § 46–21–101. As noted by the Court in *Herrera*, the "historic capacity" of the habeas proceeding in federal court is to "assure that the habeas petitioner is not being held in violation of his or her federal constitutional rights."[146] In light of this, the merits of the petition for post-conviction relief alleging newly discovered evidence should be determined without resorting to a misplaced reliance on federal habeas jurisprudence and it defies reason to believe the standards developed in federal habeas corpus jurisprudence could adequately serve to determine the merits of a petition for post-conviction relief in state court.

Even if federal habeas jurisprudence did provide the appropriate foundations for determining the merits of post-conviction relief claims, the distinction between the standards found in *Herrera* and *Schlup* shows that a one-size-fits-all standard fails to take into account one of the defining characteristics of post-conviction relief claims: the relief sought. As the U.S. Supreme Court stated:

> 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 a 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.[147]

144. *Herrera*, 506 U.S. at 393.
145. *Id.* at 400.
146. *Id.* at 402.
147. *Schlup*, 513 U.S. at 317.

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IV. A Brewing Storm: The Application of *Beach II* in *Marble v. State*[148]

In November of 2013, a district court issued an order that set the stage for the Montana Supreme Court to either accept or reject the standards proposed in the *Beach II* concurrence.[149] Cody Marble was convicted of sexual intercourse without consent in November of 2002.[150] On December 14, 2010, Marble filed a petition for post-conviction relief based on the recantation of the victim, who served as the key witness at his trial.[151] As the new evidence was discovered years after the conviction had become final, Marble brought his claim under Montana Code Annotated § 46–21–102(2).[152] The district court subsequently held a hearing on October 12, 2012, during which the witness recanted his recantation.[153] Following the hearing, the district court determined that "the recantation of [the witness] does not affirmatively, and unquestionably, establish Marble's innocence," thereby applying the standards developed within the *Beach II* concurrence to Marble's claim.[154]

In his order denying Marble's petition for post-conviction relief, Judge Harkin noted "the concurring opinion in Beach II made it abundantly clear that the legal standard to be used to analyze a petition based on [§] 46–21–102(2) . . . should *not* be based on the five factor *Clark* test" and proceeded to adopt, verbatim, the reasoning used by Justice McKinnon.[155] In adopting Justice McKinnon's conclusion, Judge Harkin stated "this court will apply the substantive/freestanding *Herrera* analysis to Marble's Petition for Postconviction Relief."[156] Under this analysis, Marble was required to "affirmatively and unquestionably" show that the newly discovered evidence established his innocence.[157] Even if the arguments presented are not convincing enough to refute the rejection of the *Clark* test, the district court's application of the proposed standards reveals the more fundamental problem of requiring a petitioner to "affirmatively and unquestionably" establish his innocence.[158]

148. On appeal, the author argued a portion of this case before the Montana Supreme Court.

149. Or., Memo., Findings of Fact & Conclusions of L.–Pet. for Postconviction Relief, *Marble v. State*, (Mont. 4th Jud. Dist. Ct. Nov. 4, 2013) (No. DV-10-1670), *appeal filed*, (Mont. Nov. 15, 2013) [hereinafter *Marble* Order].

150. *Id.* at 10.

151. *Id.* at 12.

152. *Id.* at 2.

153. *Id.* at 13.

154. *Id.* at 16.

155. *Marble* Order, *supra* n. 149, at 6–7. **R**

156. *Id.* at 7.

157. *Id.*

158. Notably, the post-conviction relief petition alleging newly discovered evidence in *State v. Marble* was timely filed under Mont. Code Ann. § 46–21–102(2).

To illustrate this point, the *Beach I* standard was developed to address a petition that was before the Court *twenty-five years* after the conviction became final, under a statute that required, without exception, that petitions be filed within five years of the conviction becoming final.[159] And yet, the "clear and convincing" standard developed in light of this twenty-five year lapse is no less strict than the "affirmatively and unquestionably" standard the concurrence argues should be applied to a claim filed *within one year* of the discovery of new evidence. This discussion illustrates the importance of the temporal placement of a petition: there is no circumstance more prejudicial to the post-conviction relief petition than the passage of time between the date of filing and the date of the original conviction. And yet, the U.S. Supreme Court has made it explicitly clear that even "unjustifiable delay" should not count "as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown."[160] Given the importance of time in the treatment of the post-conviction petition, this article next addresses the four temporal avenues under which a post-conviction petition may proceed.

V. Proposed Standards for Interpreting Petitions for Post-Conviction Relief

There are four distinct categories under which a petition may be filed: within one year of the judgment becoming final (Montana Code Annotated § 46–21–102(1)); within one year of the discovery of new evidence that establishes innocence (Montana Code Annotated § 46–21–102(2)); under the doctrine of equitable tolling (relating to either of the previous two provisions);[161] and outside of the time limit imposed by statute (termed the "miscarriage of justice" exception).[162] Because each of these categories warrants a different standard of review, it is absolutely imperative the reviewing court correctly determine which category a petition is filed under. This section analyzes each category and proposes the corresponding standards of review to be plugged into the *Crosby* test, allowing reviewing courts to clearly and consistently determine the merits of petitions for post-conviction relief.

159. *Beach I*, 220 P.3d at 668–669.
160. *McQuiggin*, 133 S. Ct. at 1928.
161. *See Davis v. State*, 187 P.3d 654 (Mont. 2008).
162. *See State v. Redcrow*, 980 P.2d 622 (Mont. 1999).

A. *Evaluating a Petition within One Year of the Judgment becoming Final*

Montana Code Annotated § 46–21–102(1) states "a petition for the relief referred to in [§] 46–21–101 may be filed at any time within [one] year of the date that the conviction becomes final." Therefore, if the petitioner files a petition under § 46–21–102(1) within one year of the conviction becoming final (as defined by statute[163]), the statute presents no additional statutory hurdle for him to overcome.

In *Herman v. State*,[164] the Montana Supreme Court addressed a petition brought within one year of conviction. In *Herman*, the Court upheld the district court's dismissal for failure to state a claim of a petition for post-conviction relief that alleged newly discovered evidence.[165] Importantly, this is the only avenue under which the reviewing court can dismiss a § 46–21–102(1) petition (as stated by Title 46, Chapter 24 of the Montana Code) without granting an evidentiary hearing to determine the merits of the post-conviction claim.[166] The dispositive issue in *Herman* was the failure of the petitioner to attach documents in the form of "affidavits, records or other evidence" adequately supporting his claim.[167] Citing § 46–21–104(1)(c), the Court affirmed the dismissal, stating that a petition alleging newly discovered evidence must "identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts."[168] The Court stated the standard used to evaluate the evidence contained in the supporting documents was whether the petitioner had proved "by a preponderance of the evidence that he or she is entitled to relief,"[169] and that the evidence presented could not constitute mere "allegations."[170] Further, the Court stated that a district court may dismiss a petition for post-conviction relief, but only if the petition "conclusively show[s] that the petitioner is *not entitled to relief*."[171] The Court reaffirmed a preponderance of the evidence standard for timely post-conviction relief claims in *Griffin v. State*,[172] stating, "A person requesting post-conviction relief has the burden to show, by a preponderance of the evidence, that the facts justify relief."[173]

163. Mont. Code Ann. § 46–21–102(1)(a)–(c).
164. 127 P.3d 422 (Mont. 2006).
165. *Id.* at 431–432.
166. Mont. Code Ann. § 46–21–201.
167. *Herman*, 127 P.3d at 425–426.
168. *Id.* at 425.
169. *Id.* at 430.
170. *Id.* at 431.
171. *Id.* at 425 (quoting Mont. Code Ann. § 46–21–201(1)(a)) (emphasis added).
172. 77 P.3d 545 (Mont. 2003).
173. *Id.* at 547 (citing *State v. Peck*, 865 P.2d 304, 305 (Mont. 1993)).

While *Griffin* and *Herman* clearly advocated for such a standard, a preponderance of the evidence may be too strict to adequately address claims brought within a year of trial. Going forward, claims brought under § 46–21–101(1) should be required to prove only by a "reasonable probability" that the facts justify the grant of a post-conviction hearing. This conclusion is supported by four main arguments. First, the temporal position of a case proceeding under § 46–21–102(1), when a petition is closest in time to the original conviction, justifies the very low hurdle presented by a reasonable probability standard. Second, prejudice to the state can hardly have formed into an insurmountable barrier to defending the case in such a short period of time. Third, the Court has never held the passage of up to a single year to be evidence of bad faith. And finally, the complete lack of an evidentiary standard in § 46–21–102(1) supports the conclusion that the evidentiary standard used by the courts should be as lenient as possible.[174]

Evaluating such a claim under the reasonable probability standard is not a new or novel idea. In *Clark*, subsequently adopted by *Crosby*, the Court advocated for precisely that standard to be applied, arguing that such a standard would allow the reviewing court to determine the "weight and credibility of the new evidence, and to consider what impact, looking prospectively at a new trial with a new jury, this evidence may have on that new jury."[175]

Therefore, when evaluating a petition for post-conviction relief filed within a year of the conviction becoming final, the reviewing court should apply the following test:

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 prove, by a reasonable probability, that the facts support the relief sought.[176]

174. *See* Mont. Code Ann. § 46–21–101(1).

175. *Clark*, 125 P.3d at 1106.

176. This test is a reiteration of the *Clark* test as adopted in *Crosby*. Here, the petitioner is proceeding within a very short time of the conviction becoming final which warrants the application of a relatively lenient standard of review.

B. The Newly Discovered Evidence Provision: Evaluating a Petition within One Year of the Discovery of New Evidence of Innocence

The treatment of Montana Code Annotated § 46–21–102(2), which allows a post-conviction relief petition to proceed within one year of the discovery of new evidence, is the source of most of the confusion and frustration within Montana's post-conviction relief jurisprudence. The provision reads, in full:

> A claim that *alleges the existence* of newly discovered evidence that, *if proved and viewed in light of the evidence as a whole would* establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted, may be raised in a petition filed within 1 year of the date on which the conviction becomes final or the date on which the petitioner discovers, or reasonably should have discovered, the existence of the evidence, whichever is later.[177]

The meaning of the provision turns on the word "establish." Black's Law Dictionary defines "establish" as "[t]o prove; to convince."[178] As recognized in *Howell v. State*,[179] the Court has a duty to "interpret individual sections of an act in such a manner as to ensure coordination with the other sections of the act."[180] The word "establish" falls under the section entitled "When petition may be filed,"[181] as opposed to the section entitled "Contents of petition."[182] Further, both of these sections are included in Part I of Chapter 21, entitled "Initiating Proceedings," while the evaluation of the petition by the reviewing court is governed by Part II, aptly named "Action of Court." Under this rationale, the word "establish" should be interpreted as presenting a relatively lenient, threshold barrier to the relief sought in the petition.

Claims proceeding under § 46–21–102(2) should be required to prove, by a preponderance of the evidence, that the facts justify the relief sought in the petition. A preponderance of the evidence is not a high standard; a petitioner must only prove that he, "on the whole, has the stronger evidence, however slight the edge may be."[183] However, this standard is slightly higher than that which should be applied to petitions proceeding within one year of the judgment becoming final. The claim's temporal position, the mounting prejudice faced by the state, the sheer passage of time, and the

177. Mont. Code Ann. § 46–21–102(2) (emphasis added).
178. *Black's Law Dictionary* 664 (Bryan A. Garner ed., 10th ed., West 2014).
179. 868 P.2d 568 (Mont. 1994).
180. *Howell*, 868 P.2d at 575.
181. Mont. Code Ann. § 46–21–102.
182. *Id.* at § 46–21–104.
183. *Black's Law Dictionary*, *supra* n.178 at 1373 (defining "preponderance of the evidence").

presence of an evidentiary standard in the statute all support the application of a heightened standard of review.

Therefore, when evaluating a petition for post-conviction relief proceeding under § 46–21–102(2), the reviewing court should apply the following test:

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 prove, by a preponderance of the evidence, that the facts support the relief sought.[184]

C. Evaluating a Petition Proceeding under the Doctrine of Equitable Tolling

In 2008, the Montana Supreme Court decided *Davis v. State*,[185] and held a post-conviction relief petition may prevail on a "motion to toll on equitable grounds the one-year time bar contained in § 46–21–102."[186] The Court stated that the question for consideration by the reviewing court was "whether the failure to toll on equitable grounds would work 'a clear miscarriage of justice, one so obvious' that the imposition of the time bar would compromise the integrity of the judicial process."[187]

The U.S. Supreme Court has reached similar conclusions regarding the applicability of equitable tolling to circumstances almost identical to those that can arise under the Montana statute. In 2010, the U.S. Supreme Court decided *Holland v. Florida*.[188] *Holland* affirmed this third type of innocence claim, which exists where a "petitioner is entitled to equitable tolling."[189] To proceed under *Holland*, the petition must show "'(1) that [the petitioner] has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in [the petitioner's] way' and prevented timely filing."[190] Equitable tolling, in such circumstances, would entitle the

184. This test is a reiteration of the *Clark* test, the difference being that the standard contained within the fifth 'crux' element has been modified to appropriately address the temporal position of the petitioner. Here, where a petitioner is proceeding within one of the statutorily recognized avenues for relief, namely the newly discovered evidence provision codified at Mont. Code Ann. § 46–21–102(2), a 'preponderance of the evidence' standard is appropriate.

185. 187 P.3d 654 (Mont. 2008).

186. *Id.* at 659.

187. *Id.* (quoting *Redcrow*, 980 P.2d at 627).

188. 560 U.S. 631 (2010).

189. *Id.* at 649.

190. *Id.* (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

petitioner to the standard of review applicable to whichever portion of the statute under which he was attempting to proceed.[191]

Allowing post-conviction relief petitioners to proceed under the doctrine of equitable tolling makes sense. Hypothetically, equitable tolling would allow a petitioner who files a claim a day after the statute tolls to avoid being treated the same as a petitioner who has filed his claim twenty-five years after the tolling of such a statute. Importantly, there is a distinction between the standards used to determine whether a petitioner may proceed under the doctrine of equitable tolling used by the U.S. Supreme Court in *Holland* and the Montana Supreme Court in *Davis*. *Holland* only requires the petitioner to show that diligence and an "extraordinary circumstance" preventing timely filing.[192] However *Davis*, because of its reliance on the miscarriage of justice exception, requires a petitioner to prove, by clear and convincing evidence, that the "integrity of the judicial process" would suffer if the petitioner was not allowed to proceed as a timely filed claim.[193] In light of the U.S. Supreme Court's decision in *Fay*, allowing state courts to be the first arena of appeal,[194] an argument exists that the *Davis* standard is too strict because it would be easier for the petitioner to seek relief, on an identical claim, in federal court, than it would be in state court.

Thus, the availability of equitable tolling underscores the problem with applying the heightened standards proposed by Justice McKinnon in the *Beach II* concurrence to timely claims under Montana Code Annotated § 46–21–102. Simply put, if there is no distinction between the treatment of an untimely claim, even one filed twenty-five years late, and a timely claim (filed under either § 46–21–102(1) or (2)), then why statutorily distinguish the claims in the first place? A sliding scale of evidentiary review would alleviate this problem by adequately compensating for the temporal positioning of the petitioner.

D. The Miscarriage of Justice Exception: Evaluating a Petition Filed Outside of the Statutorily Prescribed Time Limits

Because the statutorily prescribed time limits governing when a petitioner may bring a petition for post-conviction relief are strictly interpreted,[195] petitioners frequently attempt to file outside of these temporal limitations. When evaluating such petitions, referred to as 'untimely'

191. The most likely scenario would be, as noted, a petitioner would seek to proceed under §46–21–102(1) instead of the heightened requirement of § 102(2) or under § 102(2) instead of the heightened requirement found in this miscarriage of justice exception.

192. *Holland*, 560 U.S. at 649.

193. *Davis*, 187 P.3d at 659.

194. *Fay*, 372 U.S. at 418–419.

195. Mont. Code. Ann. § 46–21–102.

claims, the Montana Supreme Court has consistently looked to guidance from U.S. Supreme Court decisions interpreting federal habeas petitions.[196] In *State v. Redcrow*, the Montana Supreme Court cited *Schlup* as persuasive authority when defining the miscarriage of justice exception.[197] A few years later, in *State v. Pope*, the Court cited both *Schlup* and *Herrera* as persuasive authority for providing the definition of the exception in distinct circumstances.[198] Notably, in both *Schlup* and *Herrera,* the petitioners were not only proceeding on federal habeas petitions, but were attempting to proceed under the writ for the *second* time.[199] Because the Montana Supreme Court continues to rely on federal habeas jurisprudence,[200] U.S. Supreme Court decisions provide the most persuasive precedent for practitioners who are seeking to challenge a conviction after the statutorily allowed time period. This section briefly addresses the most relevant U.S. Supreme Court case regarding this issue.

In 2013, the U.S. Supreme Court decided *McQuiggin v. Perkins*, and specifically addressed the following issue: "[I]f the petitioner does not file her federal habeas petition, at the latest, within one year of 'the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence,' can the time bar be overcome by a convincing showing that she committed no crime?"[201] The Court held a showing of "actual innocence, if proved, serves as a gateway through which a petitioner may pass."[202] Prior to *McQuiggin*, at least in the realm of federal habeas, the Court had only allowed a showing of actual innocence to overcome "judge-made . . . barriers to relief."[203] The rationale, as noted by Justice Scalia who dissented in *McQuiggin*, was that a judicially created barrier to relief, such as the procedural bar in petitions for post-conviction relief, was fittingly overcome by a judicially created exception to the barrier.[204] *McQuiggin*'s expansion of the scope of the miscarriage of justice exception to include statutorily created barriers to relief is rational. By widening the scope, the Court recognized that the U.S. Constitution provides a fundamental protection to the person that federal or state statutes

196. *See Redcrow*, 980 P.2d at 626–627 (citing as persuasive authority *Schlup*, 513 U.S. at 301 (involving a petitioner proceeding on a "second federal habeas corpus petition")); *Pope*, 80 P.3d at 1239 (citing as persuasive authority *Herrera*, 506 U.S. at 393 (involving a petitioner proceeding on a "second federal habeas petition")).

197. *Redcrow*, 980 P.2d at 626–627.

198. *Pope*, 80 P.3d at 1238–1240.

199. *Schlup*, 513 U.S. at 301; *Herrera*, 506 U.S. at 393.

200. *See generally Pope*, 80 P.3d 1232; *Redcrow*, 980 P.2d 622; *Beach I*, 220 P.3d 667; *Beach II*, 302 P.3d 47.

201. *McQuiggin*, 133 S. Ct. at 1928 (citing 28 U.S.C. § 2244(d)(1)(D) (2012)).

202. *Id.*

203. *Id.* at 1937 (Scalia, J., Roberts, C.J., Thomas & Alito, JJ., dissenting).

204. *Id.* at 1937–1938.

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cannot remove. The Court clearly reiterated the standard to be applied in such a case: "'A petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty *beyond a reasonable doubt*.'"[205] Further, the Court illustrated the proper way in which to address the passage of time between the original proceeding and the filing of the petition when it stated, "[I]n making an assessment of the kind *Schlup* envisioned, 'the time of the [petition]' is a factor bearing on the 'reliability of th[e] evidence' purporting to show actual innocence."[206]

In light of the Montana Supreme Court's penchant for applying federal habeas jurisprudence to petitions for post-conviction relief,[207] and especially considering how similar the issue in the case is to the issues created by the statutory construction of Montana Code Annotated § 46–21–102, it would be worthwhile to consider whether the Court has been correctly applying federal habeas precedent. *Schlup* and *Herrera*, the two federal habeas cases most consistently cited by the Court, are outdated, and if the Court chooses to continue to rely on that line of precedent, *McQuiggin* provides the most persuasive precedent.

Given the U.S. Supreme Court's decision in *McQuiggin*, when a reviewing court is evaluating an untimely petition for post-conviction relief, it should apply the following test:

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 prove, clearly and convincingly, that the facts justify the relief sought.[208]

VI. Conclusion

The inflammatory nature of the issue underlying post-conviction relief, that a person may be convicted of a crime he did not commit, has propelled this area of law into the local and national spotlight.[209] At its core, post-conviction relief recognizes that as long as the judicial system is adminis-

205. *Id.* at 1928 (majority) (emphasis added) (quoting *Schlup*, 513 U.S. at 329).

206. *Id.* at 1928 (quoting *Schlup*, 513 U.S. at 332).

207. *See generally Pope*, 80 P.3d 1232; *Redcrow*, 980 P.2d 622; *Beach I*, 220 P.3d 667; *Beach II*, 302 P.3d 47.

208. This test is a reiteration of the *Clark* test, the difference being that the standard contained within the fifth 'crux' element has been modified to appropriately address the temporal position of the petitioner. Here, where a petitioner is proceeding outside of the statutorily recognized avenues for relief, the heightened 'clear and convincing' standard is appropriate.

209. At the national level the public's growing infatuation with post-conviction relief is best illustrated by the whirlwind media storm surrounding the case of Adnan Syed by the Serial podcast. (*See*

tered by the human mind there will be errors. As former Montana Supreme Court Justice Brian Morris recently noted, "Humans, by nature, are fallible and the processes that humans create share this same fallibility."[210] This fallibility emphasizes the humanity of the law. Such humanity should not be feared, but to fully understand our justice system it must not be ignored. In that light, the exceptional case of one who is innocent of the crime charged exists, and the interests of justice require that it not be ignored.

The language of the statutes in Title 46, Chapter 21, Part 1, of the Montana Code Annotated is ground zero for the current issues in post-conviction relief. The clarity within post-conviction relief jurisprudence that existed when *Crosby* was decided occurred in spite of, rather than because of, the governing statutory language. Going forward, a top down revision of Title 46, Chapter 21 of the Montana Code is the most effective way to clarify post-conviction relief jurisprudence in Montana.

However, until the Legislature revisits the statute, the Court should endeavor to evaluate petitions for newly discovered evidence in the clearest, most consistent way possible. In that regard, a one-size-fits-all approach to newly discovered evidence is inadequate. As Part V of this article illustrates, there are various temporal avenues under which a post-conviction relief petitioner may proceed. In the interests of justice, the petitioner who timely files within the statutorily prescribed time period should not be treated the same as the petitioner who files years after the statute has tolled.

A failure to revisit the standards proposed by Justice McKinnon in *Beach II* will likely result in an exodus of post-conviction relief claims to the federal courts. Historically, the federal courts have been reluctant to interfere with a state's "application of its own firmly established, consistently followed, constitutionally proper procedural rules."[211] Meaning, the federal courts would view a procedural default under a state law as resting upon "independent and adequate state ground[s]."[212] Were the federal courts to remain so reluctant, Montana would likely be allowed to stay the current course and adopt strict standards of review in post-conviction relief cases. There is, however, a sea change on the horizon.

In *Martinez v. Ryan*,[213] decided in 2012, the U.S. Supreme Court opened up a long sealed door to federal habeas review when it held:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective

Sarah Koenig, *Serial: Season One* (WBEZ Chicago, Podcast, May 31, 2015), http://serialpodcast.org/). In Montana, the story of Barry Beach, addressed in this article, has played a similar role.

210. *Beach II*, 302 P.3d at 87 (Morris, Cotter & Wheat, JJ., dissenting).

211. *Trevino v. Thaler*, 133 S. Ct. 1911, 1917 (2013).

212. *Coleman v. Thompson*, 501 U.S. 722, 729–730 (1991).

213. 132 S. Ct. 1309 (2012).

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> assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.[214]

Martinez signaled the willingness of the federal courts to become more involved in assuring the protection of the post-conviction relief petitioner's constitutional rights. This willingness was re-emphasized in *Trevino v. Thaler*,[215] decided by the U.S. Supreme Court in 2013. In *Trevino*, the Court held: "[W]here, as here, state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, our holding in Martinez applies."[216]

In summary, *McQuiggin*, *Holland*, *Martinez*, and *Trevino*, all cases guaranteeing additional protections to the petitioner seeking to challenge the validity of his sentence, have been decided within the last five years. While *Martinez* or *Trevino* may not have a dramatic impact on proceedings in Montana, this underlying current should give the courts and practitioners reason for pause. Arguably, the U.S. Supreme Court has expressed a willingness to ensure that meaningful opportunities exist for those attempting to challenge their convictions based on a violation of the protections afforded by the U.S. Constitution. Such a meaningful opportunity does not exist when a state court applies more stringent standards of evidentiary review than those a petitioner would be subject to in federal court. Therefore, the Montana Supreme Court should consider rejecting a one-size-fits-all standard in favor of a sliding scale of evidentiary review to balance the various concerns for both the petitioners and the state, while keeping Montana in line with the U.S. Supreme Court's interpretation of the U.S. Constitution.

214. *Id.* at 1320.
215. 133 S. Ct. 1911 (2013).
216. *Id.* at 1921.

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