

MAY 27 2014

Board of Pardons
and Parole

May 13, 2014

TO: Mike McKee, Chairman, Montana Board of Pardons and Parole
John Rex, Board member, Montana Board of Pardons and Parole

From: Pete Lawrenson, Board member, Montana Board of Pardons and Parole

RE: Barry Beach Application for Clemency dated 09/12/2013

Chairman McKee and Board Member Rex,

I submit my opinion and decision on the Application for Clemency of Barry Allan Beach dated September 12, 2013, received at the BOPP September 30, 2013. I take this charge with the utmost sense of responsibility to all involved and interested parties to include but not limited to all Montana citizens, prior serving members of the Montana Board of Pardons and Parole, persons submitting support of or dissent to clemency consideration, the state and federal judicial representatives involved in this case, law enforcement agencies and officials, Mr. Barry Allan Beach and on behalf of Kimberly Nees and her family.

I have never met Barry Beach nor conversed with him in any manner. I have no special ability to evaluate the evidence, testimony and opinions of the many people involved in the submission of this application other than I am a Montana citizen with a lengthy work history of being responsible, demonstrating common sense and a commitment to right over wrong and believing "our" justice system does work. I come to the Board with almost 40 years of law enforcement experience in the public and private work sectors, to include 14 years as a criminal investigator. Because of my past work history, there may be a perception that I am "pro" prosecution, imprisonment, and out to keep offenders in prison. However, I assure you and the Board that I approach this responsibility completely without bias or preconceived notions, assumptions or beliefs.

In taking on the responsibility of evaluating the Application for Executive Clemency, I had to have a starting place of time in relation to the crime of 1979. As stated by Mr. Peter Camiel at the Board hearing on April 28, 2014, this application is "not asking for a guilt or innocence pardon", it is a request for commutation of a sentence. For that reason, I started my evaluation with the receipt of the Application for Executive Clemency dated 09/12/2013 but with history of the Barry Beach legal process dating back to 2007.

The Montana Board of Pardons and Parole conducted an intensive and exhaustive review and hearing on the Application for Clemency for Pardon and Commutation of Sentence for Barry Allan Beach submitted in November 2007 considering the following factors:

In weighing the evidence of exceptional and compelling circumstances presented by the applicant, clemency officials will investigate:

- (1) The nature of the crime, the attitude of the judge and prosecuting attorney, the attitude of the community toward the applicant, the attitude of the victim and victim's family, and consideration of whether release would pose a threat to the public safety. The public safety determination overrides even the most substantial showing of exceptional or compelling circumstances.**
- (2) Relevant institutional, social, psychological, and psychiatric records of the applicant.**
- (3) All parties who have entered a plea of guilty or have been found guilty by a jury are to be deemed guilty. However, the Board may initiate an investigation into a case where there is offered substantial evidence showing innocence or complete justification on the part of the person convicted.**

The history of the length and depth of examination of evidence and testimony the Board dedicated to that process is well documented and I do not need to detail all the findings with exception of the Board's closing statement dated August 20, 2007:

"We are convinced to the best of our abilities at discernment that Mr. Beach was properly convicted and that each of the appellate stages through which he has progressed over the years also came to the correct decision. No proof of innocence, or newly discovered evidence of non-guilt or justification has been presented. Short of such a presentation, this unprecedented clemency hearing will not be repeated, from our perspective and to the best of our combined ability, we have laid this matter to rest".

While the Board thought the "matter laid to rest", on January 18, 2008, Beach filed a postconviction petition in state district court claiming "newly discovered" evidence warranting the court's consideration. The State filed a motion to dismiss, the Montana Supreme Court remanded Beach's case for an evidentiary hearing to District Court only on Beach's claim that he had new evidence of his actual innocence.

On May 6, 2010, Judge Wayne Phillips assumed jurisdiction of Beach's postconviction case. On August 1-3, 2011, Judge Phillips conducted an evidentiary hearing and granted Beach a new trial. Beach was released on his own recognizance. The State appealed to the Montana Supreme Court and on May 13, 2013, the Montana Supreme Court reversed Judge Phillips' decision/order and dismissed Beach's petition for postconviction relief. In dismissing the petition, the Court wrote:

"Beach's new evidence – in the form of testimony that is primarily hearsay, internally inconsistent with the evidence presented at Beach's 1984 trial – does not reliably displace the evidence at Beach's trial, including his confession... Instead, after reviewing the entirety of the combined, hybrid evidentiary record of the case, we conclude a jury would still be likely to convict Beach of the crime".

Following the May 13, 2013 Court decision, Beach voluntarily surrendered himself to the Yellowstone County Sheriff's Department and was returned to Montana State Prison after his much publicized 18 month release on his own recognizance.

Now before the Board is an Application for Executive Clemency for Barry Allan Beach dated September 12, 2013. Mr. Beach is asking that his sentence be commuted from the 100 years, no parole to allow him to be immediately eligible for parole. The application bases this request on substantially changed circumstances that did not exist at the time of the 2007 clemency hearing. Beach's application states the changed circumstances include:

- 1) Changes in the law and public opinion regarding lifetime incarceration of persons who were juveniles at the time of the offense;
- 2) New witness evidence that was deemed by the only judge to personally hear such evidence to be highly credible;
- 3) Mr. Beach's exemplary prison record during over 30 years of incarceration, and;
- 4) Mr. Beach's vivid and concrete demonstration of responsible, law abiding behavior over a period of 18 months of freedom.

Having read, studied, and discussed the thousands of pages of documents pertaining to Beach, and applying my knowledge and experience to each of the four (4) categories of "substantially changed circumstances that did not exist at the time of the 2007 clemency hearing" presented by Beach, I conclude the following:

1) Changes in the law and public opinion:

The United States Supreme Court's decision in *Miller v. Alabama* rendered in 2012 has no application here. Barry Allan Beach was not sentenced under a mandatory sentencing statute, Judge Sorte, the presiding Judge at Beach's trial, had full discretion in sentencing Beach and exercised that discretion by imposing a sentence of 100 years without parole eligibility. Even if Beach could benefit from the *Miller* ruling, it would not retroactively apply to this case. On the "changes in the law", Montana does not exercise a mandatory "life or no parole" condition upon a conviction of homicide or any other criminal offense for adults or juveniles. Finally regarding "changes in the law", the Board does not have the authority to legally "interpret the applicability of a court decision", that is the responsibility of the courts.

The second portion of the "substantially changed circumstances" presented is "changes in public opinion regarding the lifetime incarceration of persons who were juveniles at the time of the offense". Public opinion is just that, an opinion that varies from individual, family, work environment, community, state or even country. If the judicial system, including sentencing, is to be subject to public opinion, such public opinion must be enacted through legislation. It is important for the Board to appreciate public opinion but Board decisions must be founded on factual information and the law to the best of its ability.

When the letters, calls, emails and other forms of communication in support of Beach are viewed in close detail, a common thread becomes apparent. Most supporters know of Beach only through the television documentary "Dateline", the file compiled by Centurion Ministries and the media coverage since the 2007 Board hearing. Very few of the supporters and support documents demonstrate any intimate knowledge of the total facts of the investigation, trial and subsequent legal proceedings.

Of the supporters that know Barry Beach and testify about his character, the majority of those individuals have met Beach through prison ministries or met Beach while he was released for the 18 months. As they reference his character, good citizenship, and responsibility, it is again apparent very few of these associates know the details of the entire case file – they know the case from the Beach perspective.

I admire the many people willing to take a stand on behalf of their beliefs. But the facts as presented by Centurion Ministries and as reported in the "Dateline" television program, as well as many letters of support, do not represent the true, unedited facts of the investigation and trial that lead to a guilty verdict. The trial jury and trial judge, hearing both the defense and prosecution presentation of facts and arguments, including the detailed confession, believed beyond a reasonable doubt that Beach killed Kimberly Nees. The 2007 Board hearing on Beach's Application for Executive Clemency came to the same conclusion as the trial jury.

It is not a coincidence that the trial jury and judge, the state and federal appellate courts, and the 2007 Board have all come to the same conclusion on Beach's guilt, appropriateness of sentence, and denials of clemency requests – because they have heard or read all the trial evidence, appeals and decisions leading them to the same conclusion(s).

2) *New witness evidence that was deemed by the only Judge to personally hear such evidence as highly credible:*

When in 2007 the Board "declared this matter is put to rest", it meant just that. In the countless number of reviews and examinations of this case performed by the Board and various state and federal trial and appellate courts at the request of Mr. Beach, no entity has ever found error on the conduct of the investigation, trial, verdict or sentence imposed. Further, the Board stated "No further clemency hearings will be conducted, however, upon arguments that the whole has never been told or nobody has ever heard Mr. Beach's side of the story as this one was".

However, as referenced above, on January 18, 2008, Beach filed a postconviction petition claiming the discovery of "new evidence" and an evidentiary hearing was held by Judge Phillips. The State appealed Judge Phillips findings.

The Montana Supreme Court decision of May 14, 2013 regarding the evidence as presented in testimony by Steffie Eagle Boy before Judge Phillips was found to be unreliable. The Court further rejected the evidence concluding "Beach's new evidence – in the form of testimony that is primarily hearsay, internally inconsistent, and inconsistent with evidence presented at Beach's 1984 trial – does

not reliably displace the evidence tested at Beach's trial, including his confession". Beach's argument that the limited testimony heard by Judge Phillips discounts the entirety of evidence heard by Judge Sorte during the full trial yet Judge Sorte, during sentencing, made it very clear to Beach that he, Judge Sorte, believed in Beach's guilt.

There are two (2) other evidence matters raised in the current Application for Executive Clemency that I feel deserve observation and comment.

The first item is "the confession" Beach provided to the Louisiana detectives, in particular, Detective Jay Via. Counsel for Beach does its best to paint Detective Via as a law enforcement officer with questionable ethics. Detective Via was examined at the original trial by counsel for Beach and state's attorney's. By all reasoning, the jury found Detective Via's testimony credible and the confession solid, direct evidence of Beach's criminal act in killing Kimberly Nees. So did the state and federal appellate courts and the 2007 Board.

The Application for Executive Clemency also explores the phenomenon of False Confessions not being understood in 1984 and the many factors that can lead to a false confession. Beach's confession was believed unanimously by the trial jury, Judge Sorte and has endured examination by appellate courts as well as the Board 2007 clemency hearing. There is no evidence to suggest that Beach was duped, drugged, coerced, exhausted, deprived of food or not smart enough to understand what he was confessing to. As a criminal investigator who has conducted hundreds of criminal interviews soliciting admission of guilt, including murder confessions, I find Beach's confession to be 100% credible and containing details that only the killer could describe in the detail he provided.

The last piece of new evidence suggested by Beach is the "bloody handprint" located on the door of the truck. In the Application for Clemency, page 6, Beach states the bloody palm print did not match that of Kimberly Nees or Beach. At the evidence trial before Judge Phillips, Beach had provided notice that an "expert" would testify the "bloody palm print did not match Kimberly Nees, that she was not the contributor of the print. Just prior to the evidentiary hearing, Beach notified Judge Phillips that his expert "could not" eliminate Kimberly Nees as the contributor of the bloody palm print. The fact is the FBI and Beach's own expert do not state the bloody palm print is not a match for Kimberly Beach, they state Kimberly Nees or Beach cannot be ruled out as contributors of the bloody palm

print. But somehow the "bloody palm print" continues to be the rally call of Beach's innocence, that the real killer is yet to be caught and that is not reality.

Again, the matter of "new evidence" is put to rest.

3) Mr. Beach's exemplary prison record during over 30 years of incarceration:

There is no reason to consider or view Beach's behavior and demeanor during incarceration as "exemplary" behavior when compared to many other incarcerated men. To describe Beach's incarceration as "exemplary" is like rewarding a person for doing the right thing when that is the expectation of all people all the time, incarcerated or not. Beach is not absent conduct violations while incarcerated, he has been cited 19 times although none in the immediate past years.

Exemplary conduct is not easy to define and one's opinion of "exemplary" will vary from that of another. Beach was convicted of a brutal homicide following his confession that held information only the killer would know. Beach recanted his confession at his trial and for 30 years has proclaimed his innocence and unjust conviction. In my opinion, being "exemplary" must include coming to grips with honesty and admitting to what actually happened in 1979. Mr. Beach has painted himself into a "corner of innocence" that he cannot back out of, and moreover, he has probably convinced himself that he is innocent and wrongly convicted. In a psychological report prepared by Mark Mozer, PhD for the 2007 clemency consideration, having spoken with Beach about his confession yet from that point forward Beach vigorously proclaims his innocence, Mozer reports "Needless to say, there was a paranoid victim flavor to all of that, and one had the distinct sense that some pertinent details had been omitted". This too was the opinion of the Board following the Executive Clemency Application and hearing in 2007.

4) Mr. Beach's vivid and concrete demonstration of responsible, law abiding behavior over a period of 18 months of freedom.

The Board does not dispute that Beach lived and worked in the City of Billings as a responsible resident. Many supporters, the Mayor of Billings, a former Yellowstone County Commissioner, business persons, financial advisors and others all testify to his responsible citizenship – and that is how it should have been. The difference however, between the release of Beach on his own recognizance by Judge Phillips and Beach on parole is throughout the 18 months, Beach was unsupervised, a requirement for any parolee. Without accountability, it is assumed Beach was a model citizen and I have no suspicions otherwise.

Hundreds of people have written letters, emails and provided direct testimony on Beach's conduct. I applaud the support given to Beach, but much of that support comes from limited knowledge and insight to all the facts of the crime, the trial and Beach's incarceration.

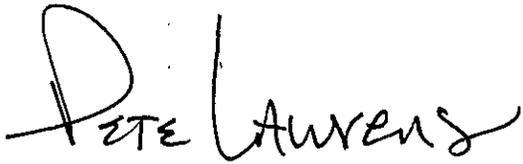
Whether Beach has the capacity to remain a law abiding citizen I do not know. Beach has failed to accept responsibility and accountability of the crime he confessed to and was convicted of by a jury and at sentencing, Judge Sorte reflected in his sentencing order:

"The evidence adduced at trial proved that Barry Allan Beach killed Kimberly Nees with cold blooded deliberateness and in a savage and vicious manner by beating her on the head more than thirty times with a twelve inch crescent wrench and a lug wrench. The evidence proved that Kimberly Nees attempted to flee and save her life, but Barry Allan Beach pursued and murdered her. The defendant then carefully concealed the crescent wrench and lug wrench in the river. He also tried to hide the body in the river. The defendant represents a very substantial threat to society and it is the duty of this Court and necessary for the protection of society that this Defendant be effectively removed from society".

As the presiding judge in murder trial of Kimberly Nees, Judge Sorte exercised the broad discretion provided by Montana law in sentencing Barry Allan Beach and effectively removed him from society. There is nothing in Judge Sorte's sentencing decision to lead one to believe the Judge expected Beach would be released from prison prior to the completion of his sentence.

A fact often neglected to be mentioned is that Barry Allan Beach, while sentenced to 100 years without parole, does "earn good time" on his sentence. Beach's good time is earned day for day effectively reducing his sentence to 50 years. I have no doubt Judge Sorte took this into consideration at sentencing of Beach.

Having duly considered the Application for Executive Clemency submitted by Barry Allan Beach dated September 12, 2013, under the authority of 43-23-301 MCA, as a duly appointed member of the Montana Board of Pardons and Parole, I vote to decline Barry Allan Beach's request for a clemency hearing dated September 12, 2013..

A handwritten signature in black ink that reads "PETE LAURENS". The signature is written in a cursive style with a large, stylized initial "P".