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# Fields v. State Respondent's Brief Dckt. 38571

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

ZANE JACK FIELDS,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

NO. 38571-2011

**BRIEF OF RESPONDENT**

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA

HONORABLE THOMAS F. NEVILLE  
District Judge

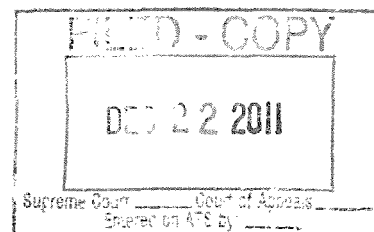
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## TABLE OF CONTENTS

|   | <u>PAGE</u> |
|---|-------------|
| TABLE OF AUTHORITIES .....  | iii         |
| STATEMENT OF THE CASE.....  | 1           |
| Nature Of The Case .....  | 1           |
| Statement Of Facts And Course Of The Underlying Criminal<br>And First Post-Conviction Proceedings.....  | 1           |
| Statement Of Facts And Course Of Fields’ First Successive<br>Post-Conviction Case.....  | 3           |
| Statement Of Facts And Course Of Fields’ Second Successive<br>Post-Conviction Petition .....  | 3           |
| Statement Of Facts And Course Of Fields’ Third Successive<br>Post-Conviction Petition .....   | 3           |
| Statement Of Facts And Course Of Fields’ Fourth And<br>Instant Successive Post-Conviction Petition.....   | 5           |
| ISSUES .....  | 7           |
| ARGUMENT .....  | 8           |
| I.    Not Only Has Fields Failed To Establish The District Court Erred By<br>Summarily Dismissing His Successive Post-Conviction Petition,<br>But Because He Failed To Provide This Court With The Underlying<br>Record To Support His Claims And Establish His Claims Are<br>Timely, The District Court Must Be Affirmed ..... | 8           |
| A.    Introduction.....   | 8           |
| B.    Fields Failed To Provide An Adequate Record On<br>Appeal To Review His Claims.....  | 9           |
| C.    Standard Of Review.....   | 10          |
| D.    Fields’ Successive Post-Conviction Petition Is Governed<br>By I.C. § 19-2719.....   | 11          |

|    |  |    |
|----|--|----|
| E. | Fields Has Failed To Establish The Claims In His Successive Petition Were Timely Filed .....   | 13 |
| F. | Not Only Is Fields' Claim Of "Actual Innocence" Barred By I.C. § 19-2719(5)(b) Because It Alleges Matters That Are Merely Cumulative Or Impeaching And Does Not Cast Doubt On The Reliability Of The Conviction, But It Must Be Rejected Because He Has Failed To Support The Claim With Authority Or Establish A "Free-Standing" Innocence Claim Is Cognizable In Idaho ..... | 17 |
| 1. | Fields Has Failed To Support His "Actual Innocence" Claim With Authority and Argument .....  | 17 |
| 2. | Idaho Law Does Not Provide A "Free-Standing" Innocence Claim .....   | 18 |
| 3. | Fields' First Claim Merely Alleges Matters That Are Cumulative Or Impeaching .....   | 19 |
| 4. | Destruction Of The Coat Does Not Cast Doubt On The Reliability Of Fields' Conviction Or Sentence.....  | 21 |
| 5. | Fields Has Failed To Establish Actual Innocence .....  | 29 |
| G. | Not Only Is Fields' Due Process Claim Barred By I.C. § 19-2719(5)(b) Because It Does Not Cast Doubt On The Reliability Of The Conviction, But It Fails Since He Has Failed To Establish A Due Process Violation .....  | 30 |
| H. | The Eighth Amendment And Idaho Constitution Claims Were Not Raised In Fields Successive Petition.....  | 34 |
|    | CONCLUSION.....  | 35 |
|    | CERTIFICATE OF SERVICE .....   | 36 |

## TABLE OF AUTHORITIES

|  | <u>PAGE</u> |
|--|-------------|
| <br><u>CASES</u>   |             |
| <u>Amrine v. Bowersox</u> , 128 F.3d 1222 (8 <sup>th</sup> Cir. 1997) .....    | 30          |
| <u>Arave v. Creech</u> , 507 U.S. 463 (1993).....                              | 2           |
| <u>Arizona v. Youngblood</u> , 488 U.S. 51 (1988).....                         | 31, 32      |
| <u>Brady v. Maryland</u> , 373 U.S. 83 (1963) .....                            | 30          |
| <u>California v. Trombetta</u> , 467 U.S. 479 (1984).....                      | 31, 32      |
| <u>Creech v. Arave</u> , 947 F.2d 873 (9 <sup>th</sup> Cir. 1991) .....        | 2           |
| <u>Creech v. State</u> , 137 Idaho 573, 51 P.3d 387 (2002) .....               | 10          |
| <u>Cress v. Palmer</u> , 484 F.3d 844 (6 <sup>th</sup> Cir. 2007) .....        | 32          |
| <u>Dunlap v. State</u> , 141 Idaho 50, 106 P.3d 376 (2004).....                | 35          |
| <u>Ferguson v. Roper</u> , 400 F.3d 635 (8 <sup>th</sup> Cir. 2005).....       | 32          |
| <u>Fields v. State (Fields II)</u> , 135 Idaho 286, 17 P.3d 230 (2000).....    | 3, 13       |
| <u>Fields v. State (Fields III)</u> , 149 Idaho 399, 234 P.3d 723 (2010) ..... | 3           |
| <u>Fields v. State (Fields IV)</u> , 151 Idaho 18, 253 P.3d 692 (2011) .....   | 5, 11, 18   |
| <u>Gandarela v. Johnson</u> , 286 F.3d 1080 (9 <sup>th</sup> Cir. 2002).....   | 29, 30      |
| <u>Garcia v. State Tax Comm.</u> , 136 Idaho 610, 38 P.3d 1266 (2002).....     | 32, 33, 34  |
| <u>Hairston v. Idaho</u> , 552 U.S. 1228 (2008).....                           | 10          |
| <u>Hairston v. State</u> , 144 Idaho 51, 156 P.3d 552 (2007).....              | 10          |
| <u>House v. Bell</u> , 547 U.S. 518 (2006).....                                | 18, 29      |
| <u>Lovitt v. True</u> , 403 F.3d 171 (4 <sup>th</sup> Cir. 2005) .....         | 32          |
| <u>Lyons v. Lee</u> , 316 F.3d 528 (4 <sup>th</sup> Cir. 2003) .....           | 30          |
| <u>McKinney v. State</u> , 133 Idaho 695, 992 P.2d 144 (1999) .....            | 11, 12, 13  |

|   |        |
|---|--------|
| <u>Morris v. Dormire</u> , 217 F.3d 556 (8 <sup>th</sup> Cir. 2000).....      | 30     |
| <u>Murray v. Carrier</u> , 477 U.S. 478 (1986) .....                          | 29     |
| <u>Paz v. State</u> , 123 Idaho 758, 852 P.2d 1355 (1993).....                | 11     |
| <u>Pizzuto v. State</u> , 127 Idaho 469, 903 P.2d 58 (1995).....              | 11     |
| <u>Pizzuto v. State</u> , 146 Idaho 720, 202 P.3d 642 (2008).....             | 12, 16 |
| <u>Rhoades v. State</u> , 148 Idaho 247, 220 P.3d 1066 (2009).....            | 19     |
| <u>Ring v. Arizona</u> , 536 U.S. 584 (2002) .....                            | 3      |
| <u>Schlup v. Delo</u> , 513 U.S. 298 (1995).....                              | 18, 29 |
| <u>Schriro v. Summerlin</u> , 542 U.S. 348 (2004) .....                       | 15     |
| <u>Shumway v. Payne</u> , 223 F.3d 982 (9 <sup>th</sup> Cir. 2000).....       | 29, 30 |
| <u>Sivak v. State</u> , 134 Idaho 641, 8 P.3d 636 (2000) .....                | 12, 19 |
| <u>State v. Beam</u> , 115 Idaho 208, 766 P.2d 678 (1988) .....               | 13     |
| <u>State v. Creech</u> , 132 Idaho 1, 966 P.2d 1 (1998) .....                 | 18     |
| <u>State v. Fields</u> , 115 Idaho 1101, 772 P.2d 739 (Ct. App. 1989) .....   | 25     |
| <u>State v. Fields (Fields I)</u> , 127 Idaho 904, 908 P.2d 1211 (1995).....  | 1, 2   |
| <u>State v. Lewis</u> , 144 Idaho 64, 157 P.2d 565 (2007).....                | 31, 34 |
| <u>State v. Longoria</u> , 133 Idaho 819, 992 P.2d 1219 (Ct. App. 1999) ..... | 10     |
| <u>State v. Repici</u> , 122 Idaho 538, 835 P.2d 1349 (Ct. App. 1992) .....   | 10     |
| <u>State v. Rhoades</u> , 120 Idaho 795, 820 P.2d 665 (1991).....             | 11     |
| <u>State v. Sima</u> , 98 Idaho 643, 570 P.2d 1333 (1977) .....               | 10     |
| <u>State v. Toney</u> , 130 Idaho 858, 949 P.2d 1065 (Ct. App. 1997).....     | 10     |
| <u>State v. Wood</u> , 132 Idaho 88, 967 P.2d 702 (1998).....                 | 17     |
| <u>State v. Zichko</u> , 129 Idaho 259, 923 P.2d 966 (1996) .....             | 17     |

**STATUTES**

|                      |        |
|----------------------|--------|
| I.C. § 19-2517 ..... | 21     |
| I.C. § 19-2719 ..... | passim |
| I.C. § 19-4901 ..... | 19     |

**RULES**

|                   |    |
|-------------------|----|
| I.C.A.R. 38 ..... | 33 |
|-------------------|----|

**CONSTITUTIONS**

|  |       |
|--|-------|
| Idaho Constitution, Art. I, § 13 ..... | 8, 34 |
|--|-------|

## STATEMENT OF THE CASE

### Nature Of The Case

Petitioner-Appellant Zane Jack Fields appeals from the district court's Memorandum and Order of Dismissal based upon allegations in his successive Petition for Post-Conviction Relief in which he contended "newly discovered evidence" of the post-trial and successive post-conviction destruction of his orange camouflage coat, which was introduced at trial, establishes his innocence and violates Due Process under the Fourteenth Amendment.

### Statement Of Facts And Course Of The Underlying Criminal And First Post-Conviction Proceedings

The material facts leading to Fields' conviction for the first-degree murder of Mary Katherine Vanderford and his sentence of death are summarized in State v. Fields (Fields I), 127 Idaho 904, 907-09, 908 P.2d 1211 (1995), and will be further discussed in detail in the argument below.

An Information was filed charging Fields with Mary's first-degree murder based upon the felony-murder doctrine (##19185/19809, R., pp.17-18).<sup>1</sup> After Fields' trial, the jury found him guilty as charged. (Id., pp.67-104.)

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<sup>1</sup> These records are not part of the record on appeal and, as discussed below, that alone is sufficient reason to affirm the district court. However, in the event this Court should grant an untimely motion permitting consideration of the records, the state will refer to the records and transcripts by their respective supreme court docket numbers. The supreme court docket numbers for Fields' underlying trial, sentencing and first post-conviction case are ##19185 and 19809. The supreme court docket number for Fields' first successive post-conviction case is #24119. The supreme court docket number for his second successive post-conviction case is ##35679/36704. The supreme court docket number for his third successive post-conviction case is #36508. The supreme court docket number for his fourth successive post-conviction case, and the subject of the instant appeal, is #38571-2011. "Brief" refers to Fields' opening brief in the instant case.



Fields filed a Motion for New Trial, contending an inmate, Salvador Martinez, advised he overheard two state witnesses, Joe Heistand and Scott Bianchi, and another inmate, Raymond Gilcrist, who did not testify at Fields' trial, state "they had lied, or intended to lie, at Fields' trial in exchange for promised benefits from the authorities." (##19185/19809, R., pp.108-12.) After an evidentiary hearing (id., pp.1716-1905), the district court denied Fields' motion, concluding Martinez's testimony "was not believable to this court and would not be believable to a jury" and "the testimony of the inmate witnesses that they had not spoken to Mr. Martinez is credible" (id., pp.144-49).

After Fields' sentencing hearing (##19185/19809, R., pp.1907-08), the district court found the state had proven three statutory aggravating factors and, after weighing the collective mitigation against the statutory aggravating factors individually, sentenced Fields to death on March 7, 1991 (id., pp.164-77).

On April 18, 1991, Fields filed his first post-conviction petition. (##19185/19809, R., pp.197-203.) An amended petition was filed raising one additional claim. (Id., pp.218-19.) After an evidentiary hearing (id., pp.221-24), the district court denied Fields' claims, but withdrew the "utter disregard" statutory aggravating factor because of the Ninth Circuit's erroneous conclusion that it was unconstitutionally vague, *see Creech v. Arave*, 947 F.2d 873, 881 (9<sup>th</sup> Cir. 1991) (id., pp.226-235).<sup>2</sup> Fields filed another amended petition and motion for new trial (##19185/19809, Supp. R., pp.9-10), which was also denied after another evidentiary hearing (id., pp.58-62).

On February 16, 1995, the Idaho Supreme Court affirmed Fields' conviction, sentence and denial of post-conviction relief. *See Fields I, supra*.

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<sup>2</sup> The Supreme Court subsequently reversed the Ninth Circuit's decision in *Arave v. Creech*, 507 U.S. 463, 471 (1993).

### Statement Of Facts And Course Of Fields' First Successive Post-Conviction Case

After filing a federal writ of habeas corpus, on September 11, 1996, Fields filed his first successive post-conviction petition. (#24119, R., pp.4-51.) The district court concluded Fields failed to satisfy the requirements of I.C. § 19-2719 because his claims were known or reasonably could have been known when he filed his first post-conviction petition, and entered a final order denying relief. (Id., pp.87-96, 130-35.) The Idaho Supreme Court affirmed the district court's decision denying post-conviction relief on September 7, 2000. Fields v. State (Fields II), 135 Idaho 286, 17 P.3d 230 (2000).

### Statement Of Facts And Course Of Fields' Second Successive Post-Conviction Petition

On August 2, 2002, relying upon Ring v. Arizona, 536 U.S. 584 (2002), Fields filed a "Petition for Post-Conviction Relief or Writ of Habeas Corpus" and "Motions to Correct Illegal Sentences, to Vacate Sentences of Death and for New Sentencing Trial." (#35679, R., pp.5-14.) The state responded, asking that the petition be dismissed because Ring does not apply retroactively (id., pp.37-46), which the district court granted (id., pp.293-304). The Idaho Supreme Court affirmed the district court. Fields v. State (Fields III), 149 Idaho 399, 234 P.3d 723 (2010).

### Statement Of Facts And Course Of Fields' Third Successive Post-Conviction Petition

On June 27, 2002, Fields filed a Petition for Post-Conviction Scientific Testing, requesting testing of "three distinct pieces of evidence" including DNA testing of Fields' coat admitted at trial as exhibit 22, comparison of nineteen latent fingerprints taken from the murder scene with a national fingerprint data base ("AFIS"), and DNA testing of fingernail scrapings from Mary's body. (#36508, R., pp.7-14.) Fields noted the coat "has

been in the possession of the courts since admission at trial, and currently is within the custody and control of Patricia Miller, Appeals Clerk at the Ada County Courthouse.” (Id., p.8.) On August 30, 2002, the state responded and attached a proposed Order relating to the coat. (Id., pp.52-59.) Pursuant to Fields’ motion, which is not part of the record, coupled with the “concurrence of the State,” the district court entered an order on December 3, 2002, for release of the coat “by the Ada County Clerk’s Office to a representative of law enforcement for transport to the Idaho State Police Forensic Lab for DNA testing. The coat is to be returned to the Ada County Court Clerk’s Office at the completion of the DNA testing” and “is to be transported and contained in such a manner as to protect the integrity of the evidence and the chain of custody.” (Id., pp.64-65.) That same day, Fields responded to the state’s earlier response (id., pp.68-71) and complained he would “prefer[] to submit the coat for DNA testing to a lab other than the Idaho State Police Forensic Laboratory” (“State Lab”) (id., pp.68-69). The coat was retrieved on December 9, 2002 by Gary Starkey (#38571-2011, R., pp.48-49) and tested by the State Lab on January 2, 2003, but it was determined there was an inadequate sample to do additional testing (id., p.55). This information was conveyed to Fields’ attorney by prosecutor Roger Bourne on February 3, 2003. (Id., p.54.)

Nevertheless, Fields waited until October 10, 2003, to file a Motion for Independent Scientific Testing requesting independent testing of the coat. (#36508, R., pp.77-78.) The state’s objection was filed on October 31, 2003. (Id., pp.84-84.) While he filed several motions for production of documents (#36508, R., pp.117-20) and access to evidence (id., pp.123-31), which the district court generally granted (id., pp.151-54), Fields never noticed a hearing on the motion seeking independent testing of the coat.

After additional testing and comparisons were completed on other evidence, the state filed a Motion to Dismiss asserting the testing and comparisons failed to produce results favorable to Fields (#36508, R., pp.176-78), which the district court granted (id., pp.257-61). Fields never noticed for hearing or otherwise expressed any interest in his Motion for Independent Scientific Testing of the coat. On May 25, 2011, the Idaho Supreme Court affirmed the denial of post-conviction relief. Fields v. State (Fields IV), 151 Idaho 18, 253 P.3d 692 (2011).

Statement Of Facts And Course Of Fields' Fourth And Instant Successive Post-Conviction Petition

On August 27, 2010, pursuant to Ada County Exhibits Clerk Margaret Lundquist's ("Lundquist") request, Bourne sent a letter explaining the coat was destroyed after it was tested by the State Lab. (#38571-2011, R., pp.76-78.) The letter detailed the coat's chain of custody, beginning with it being obtained by Starkey in 2002. (Id., p.76.) After testing was completed by the State Lab, on April 16, 2003, the coat was retrieved by Shawna Hilliard, who was in charge of the Boise Police Department Crime Lab ("Boise Lab") at that time. (Id., p.77.) Bridget Kinney, who was subsequently in charge of the Boise Lab, located a February 17, 2004 e-mail to Detective Dave Smith, asking what should be done with the coat. (Id., pp.77, 79.) Smith responded it should be destroyed. (Id.) A February 16, 2004 Property Invoice revealed the coat was scheduled for destruction (id., p.80), and Vicki Drown, who was in charge of the Ada County Sheriff's Property Room, informed Bourne "the coat was no doubt destroyed according to the instruction on the property invoice" (id., p.77). Bourne explained the decision to destroy the coat was made without his consultation or someone from the prosecutor's

office, and he assumed “neither Shawna Hilliard, Bridget Kinney or Dave Smith remembered the requirements of the Order probably due to the passage of time. (Id.) The record does not reveal if the letter was sent to Fields’ attorneys.

On October 10, 2010, Fields filed the instant successive Petition for Post-Conviction Relief raising another claim of “actual innocence” and a due process claim both based upon destruction of the coat. (Id., pp.10-19.) The state responded, asking that the petition be summarily dismissed. (Id., pp.88-100.) Fields responded (id., pp.142-45), conceding he “did not further pursue DNA testing of the coat,” but contending that was because of “the State’s own repeated concessions - in writing - that any allegation of blood on the coat could not have contributed to a guilty verdict.” (Id., p.143.) The state subsequently filed an affidavit from Smith with attachments (id., pp.162-72), explaining why he approved the coat’s destruction (id., p.163), as follows:

5. . . . . When asked by Ms. Kinney in the email what to do with the coat, your affiant recalls thinking that since fourteen (14) years had elapsed since the trial and since no further testing could be done on the coat, the coat was of no further value and could be disposed of. Your affiant was aware that the Idaho State Forensic Laboratory had determined that there was no blood sample left on the coat for DNA testing. Your affiant was not aware that the Court had ordered that the coat be returned to the clerk’s office. Your affiant had no intention of destroying anything that had evidentiary value and would not have ordered its destruction if it had appeared to your affiant that the coat had any evidentiary value. As stated above, your affiant assumed with the passage of time that the evidentiary portion of the case was long since over;
6. Your affiant was in no way attempting to interfere with the defendant’s right to a fair trial. Your affiant assumed that the coat had no further value since the trial was over.

On February 18, 2011, the district court denied post-conviction relief. (Id., pp.185-95.) Fields’ Notice of Appeal was filed February 25, 2011. (Id., pp.196-99.)

## ISSUES

Fields states the issues on appeal as follow:

Has Fields shown that the new evidence of the coat's destruction is material evidence that casts doubt on the reliability of his conviction, entitling him to post-conviction relief or to an evidentiary hearing to establish his innocence?

Does Detective Smith's intentional destruction of a material, exculpatory defense exhibit, in violation of a court order to preserve and return it, while Fields was seeking independent scientific testing of it, violate the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment?

(Brief, p.3.)

The state wishes to rephrase the issues on appeal as follows:

Has Fields failed to provide an adequate record to review his claims that the district court erred in dismissing his successive post-conviction petition because the underlying records from his trial and prior post-conviction cases, particularly his third post-conviction petition, are not included in the record on appeal?

Alternatively,

Because Fields has failed to establish the claims in his successive petition were filed within forty-two days after they were known or reasonably should have been known, is this Court without jurisdiction to hear the claims, requiring this Court to dismiss his appeal or affirm the district court?

Alternatively,

1. Is Fields' claim of "actual innocence" barred by I.C. § 19-2519(5)(b) because it alleges matters that are merely cumulative or impeaching and does not cast doubt on the reliability of his conviction, and must the claim be rejected because he has failed to support it with authority and argument, establish a "free-standing" claim of actual innocence is cognizable, and has failed to establish he is innocent?

2. Is Fields' due process claim barred by I.C. § 19-2719(5)(b) because it does not cast doubt on the reliability of his conviction, and must the claim be rejected because he failed to establish a due process violation?

## ARGUMENT

### I.

Not Only Has Fields Failed To Establish The District Court Erred By Summarily Dismissing His Successive Post-Conviction Petition, But Because He Failed To Provide This Court With The Underlying Record To Support His Claims And Establish His Claims Are Timely, The District Court Must Be Affirmed

#### A. Introduction

Fields filed the instant successive Petition for Post-Conviction Relief raising another claim of “actual innocence” and a violation of due process based upon destruction of the coat. (Id., pp.10-19.) On appeal, Fields contends the district court erred by dismissing his actual innocence claim because “Detective Smith’s illegal conduct in this case undermines confidence in the verdict, would likely result in an acquittal, and mandates that this Court reverse the district court and grant the petition or remand for an evidentiary hearing.” (Brief, p.5.) Fields further contends the district court erred by dismissing his due process claim because he “presented prima facie evidence of bad faith and is entitled to discovery and a hearing.” (Brief, p.18.) He also challenges dismissal of his second claim under the Eighth Amendment and the due process clause of the Idaho Constitution, Art. I, § 13. (Brief, p.19.)

Because the claims in Fields’ successive petition are based upon the underlying record from prior cases, particularly his trial, initial post-conviction, and third successive post-conviction cases, and he has failed to provide this Court with the record from those cases, the district court’s decision must be affirmed. Even if those records had been properly provided to this Court, because Fields failed to file his successive petition within forty-two days after the claims were known or reasonably should have been known, they are untimely and were properly dismissed.

As to claim one, an actual innocence claim based upon Detective Smith approving the coat's destruction, not only is actual innocence not a cognizable claim that Fields fails to support with argument and authority, but he also failed to overcome the prohibition of I.C. § 19-2719(5)(b) because the evidence of destruction of the coat is cumulative or impeaching, and would not cast doubt on the reliability of his conviction or sentence. Moreover, Fields has failed to establish no reasonable juror would have convicted him in light of the evidence regarding Detective Smith approving the coat's destruction.

As to claim two, a due process claim based upon the coat's destruction, Fields has failed to establish the evidence regarding the coat's destruction would cast doubt on the reliability of his conviction or sentence as required by I.C. § 19-2719(5)(b), or that destruction of the coat violates due process. Because he did not raise this claim under the Eighth Amendment and Idaho Constitution in his successive petition, it must be rejected.

B. Fields Failed To Provide An Adequate Record On Appeal To Review His Claims

Fields contends the district court erred by denying the claims in his fourth successive post-conviction petition because he provided the court with newly discovered evidence - destruction of the coat - which allegedly establishes his innocence and a denial of due process under the Fourteenth Amendment, all of which is premised upon the evidence presented at his trial and prior post-conviction cases. (Brief, pp.3-19.)

However, Fields has failed to provide an adequate record on appeal to review his claims.

Although he filed a Motion to Take Judicial Notice before the district court asking the court to take judicial notice of the "files and transcripts in the underlying criminal case, initial post-conviction" and his first (supreme court docket number 24119) and third successive post-conviction petitions (supreme court docket number 36508) (#38571-



2011, R., pp.105-41), there is no indication in the record the motion was noticed for hearing or otherwise considered by the district court.

More importantly, Fields has failed to move to augment the record or ask this Court to take judicial notice of any of his prior cases. The appellant bears the burden of providing a record on appeal to substantiate his claims. State v. Toney, 130 Idaho 858, 860-61, 949 P.2d 1065 (Ct. App. 1997). It is presumed that any missing portions of the record support the actions of the court below. State v. Repici, 122 Idaho 538, 541, 835 P.2d 1349 (Ct. App. 1992). In the absence of an adequate record on appeal, the appellate court will not presume error. State v. Sima, 98 Idaho 643, 644, 570 P.2d 1333, 1334 (1977); State v. Longoria, 133 Idaho 819, 823, 992 P.2d 1219, 1223 (Ct. App. 1999).

Because Fields has not included the records from his underlying conviction, initial post-conviction case, first successive post-conviction case, or third successive post-conviction case, he has failed to present an adequate appellate record for review of the issues before this Court and, therefore, has failed to establish error.

#### C. Standard Of Review

“When this Court is presented with a motion to dismiss by the State based upon the provisions of Idaho Code § 19-2719, the proper standard of review this Court should utilize is to directly address the motion, determine whether or not the requirements of section 19-2719 have been met, and rule accordingly.” Hairston v. State, 144 Idaho 51, 55, 156 P.3d 552 (2007) (quoting Creech v. State, 137 Idaho 573, 575, 51 P.3d 387 (2002)), *remanded on other grounds* Hairston v. Idaho, 552 U.S. 1227 (2008).

D. Fields' Successive Post-Conviction Petition Is Governed By I.C. § 19-2719

Idaho Code § 19-2719 sets forth special appellate and post-conviction procedures in all capital cases. Fields IV, 253 P.3d at 967. Capital post-conviction proceedings, like non-capital post-conviction proceedings which are governed by the Uniform Post-Conviction Procedure Act (“UPCPA”), are civil in nature and governed by the Idaho Rules of Civil Procedure. Pizzuto v. State, 127 Idaho 469, 470, 903 P.2d 58 (1995). Idaho Code § 19-2719 does not eliminate the applicability of the UPCPA in capital cases, but acts as a modifier and “supersedes the UPCPA to the extent that their provisions conflict.” McKinney v. State, 133 Idaho 695, 700, 992 P.2d 144 (1999).

Specifically, I.C. § 19-2719 provides a capital defendant one opportunity to raise all challenges to the conviction and sentence in a post-conviction relief petition which must be filed within forty-two days after entry of judgment. State v. Rhoades, 120 Idaho 795, 806, 820 P.2d 665 (1991). The only exception is provided in I.C. § 19-2719(5), which permits a successive petition “in those unusual cases where it can be demonstrated that the issues raised were not known and reasonably could not have been known within the time frame allowed by the statute.” Id., 120 Idaho at 807. A capital defendant who brings a successive petition for post-conviction relief has a “heightened burden and must make a *prima facie* showing that issues raised in that petition fit within the narrow exception provided by the statute.” Pizzuto, 127 Idaho at 471.

Additionally, claims which were not known or which could not have reasonably been known within forty-two days of judgment “must be asserted within a reasonable time after they are known or reasonably could have been known.” Paz v. State, 123

Idaho 758, 760, 852 P.2d 1355 (1993); McKinney, 133 Idaho at 701. In ascertaining what constitutes a “reasonable time,” the Idaho Supreme Court has explained,

[A] reasonable time for filing a successive petition for post-conviction relief is forty-two days after the petitioner knew or reasonably should have known of the claim, unless petitioner shows that there were extraordinary circumstances that prevented him or her from filing the claim within that time period. In that event, it still must be filed within a reasonable time after the claim was known or knowable.

Pizzuto v. State, 146 Idaho 720, 727, 202 P.3d 642 (2008).

A successive post-conviction petition is “facially insufficient” if it merely alleges “matters that are cumulative or impeaching or would not, even if the allegations were true, cast doubt on the reliability of the conviction or sentence.” I.C. § 19-2719(5)(b). If evidence is merely cumulative with evidence already within the possession of the defense at the time the first petition for post-conviction relief is filed, a procedural bar exists mandating dismissal of the successive petition. Sivak v. State, 134 Idaho 641, 647-49, 8 P.3d 636 (2000).

Even if the petitioner can meet these mandates, I.C. § 19-2719(5)(a) details the additional requirements that must be met before the successive petition may be heard:

An allegation that a successive post-conviction petition may be heard because of the applicability of the exception herein for issues that were not known or could not reasonably have been known shall not be considered unless the applicant shows the existence of such issues by (i) a precise statement of the issue or issues asserted together with (ii) material facts stated under oath or affirmation by credible persons with first hand knowledge that would support the issue or issues asserted. A pleading that fails to make a showing of excepted issues supported by material facts, or which is not credible, must be summarily dismissed.

I.C. § 19-2719(5)(a).

If a capital petitioner fails to comply with the requirements of I.C. § 19-2719, the issues are “deemed to have [been] waived” and “[t]he courts of Idaho shall have no

power to consider any such claims for relief as have been so waived or grant any such relief.” I.C. § 19-2719(5); McKinney, 133 Idaho at 700. Likewise, failure to meet the requirements of I.C. § 19-2719(5)(a) mandates dismissal of the successive post-conviction petition. Fields v. State, 135 Idaho 286, 289-90, 17 P.3d 230 (2000).

In State v. Beam, 115 Idaho 208, 213, 766 P.2d 678 (1988), the Idaho Supreme Court discussed the purpose and policy behind the passage of I.C. § 19-2719:

The underlying legislative purpose behind the statute stated the need to expeditiously conclude criminal proceedings and recognized the use of dilatory tactics by those sentenced to death to “thwart their sentences.” The statute’s purpose is to “avoid such abuses of legal process by requiring that all collateral claims for relief . . . be consolidated in one proceeding. . . .” We hold that the legislature’s determination that it was necessary to reduce the interminable delay in capital cases is a rational basis for the imposition of the 42-day time limit set for I.C. § 19-2719. The legislature has identified the problem and attempted to remedy it with a statutory scheme that is rationally related to the legitimate legislative purpose of expediting constitutionally imposed sentences.

E. Fields Has Failed To Establish The Claims In His Successive Petition Were Timely Filed

In its response to Fields’ successive petition, the state asserted it was untimely because he failed to make a sufficient showing that the petition was filed within forty-two days after he knew or reasonably should have known of the claims since he abandoned his 2003 Motion for Independent Scientific Testing requesting independent testing of the coat that was destroyed in 2004. (#38571-2011, R., p.97.) Fields responded by contending, “The State’s motion contains the very reason that petitioner did not continue to pursue independent testing of the coat for blood: the State’s own repeated concessions -- in writing -- that any allegation of blood on the coat could not have contributed to a guilty verdict.” (Id., p.143.) Fields further argued, “Given the State’s concession in the

prior DNA proceeding, the parties agreed that Mrs. Vanderford's blood was not on Fields' coat and that the jury could not reasonably have thought her blood was present. Accordingly, Fields did not further pursue DNA testing of the coat." (Id.)

Rejecting the state's assertion that Fields' petition is untimely, the district court applied the wrong standard and erroneously determined the petition was timely, stating:

The Petitioner's abandonment of his Motion for Independent Testing was reasonable, and the Petitioner was not the party charged with the safe-keeping of the coat. Drawing the inferences in favor of the Petitioner as the non-moving party, the Court finds that the present Petition for Post-Conviction Relief is not time-barred under I.C. § 19-2719 because the Petitioner, having abandoned his Motion for Independent Testing, could not have reasonably known earlier about the destruction of the coat.

(Id., p.189.)

The question before the district court was not whether Fields' abandonment of his Motion for Independent Testing was "reasonable" or whether he was the party charged with the "safe-keeping of the coat"; the question was whether he "knew or reasonably should have known of the claim" within forty-two days after the coat was destroyed. If Fields had simply noticed his motion for hearing, which was filed October 10, 2003 (#36508, R., pp.77-78), more than eight months after he was advised the State Lab had determined the coat could not be tested (id., p.54), he would have learned of the destruction of the coat in 2004. Rather, because he allegedly agreed with the state's assessment that independent testing would have no evidentiary value because "[t]he jury was never given any reason to believe that the sample was the victim's blood to begin with" (#36508, R., p.82), he chose to abandon his request for further testing and, as a result, did not learn of the coat's destruction until sometime after Bourne wrote his letter to Lundquist on August 17, 2010 (#38571-2011, R., pp.76-78). Irrespective of whether it

was “reasonable” to abandon independent testing of the coat, Fields “reasonably should have known” of the coat’s destruction, and hence his claims, well before Bourne’s letter by merely noticing the motion for hearing. In fact, if Fields had timely noticed his motion, that may have prevented destruction of the coat since it was filed October 10, 2003, and the coat was not destroyed until sometime after March 16, 2004. (Id., p.80.)

Moreover, Fields’ explanation for not filing earlier is not only suspect, but it is without merit. The state made virtually the same “concession” or argument in its initial response to Fields’ successive petition on August 30, 2002 (#36508, R., pp.53-55), yet, after the coat was tested by the State Lab and the results were received, Fields still sought independent testing of the coat, but waited until October 10, 2003, more than seven months after being advised of the State Lab’s test results (id., pp.77-79).

Additionally, on June 28, 2004, Fields filed an Amended Motion for Permission to Conduct Limited Discovery. (Id., pp.88-90.) The state responded on July 22, 2004 (id., pp.91-94), expressly noting Fields’ delay in filing motions and prosecuting his case, stating, “It appears to the State that the petitioner is not serious about the petition and has failed to timely prosecute the petition itself. More than two years have passed without a request for a hearing. . . The defendant’s petition appears to be nothing more than an effort to delay proceedings in federal court” (id., pp.93-94). In his response, Fields referred to the coat, never implying he was abandoning his motion to have it independently tested, but contending the reason for delay was to await the United States Supreme Court’s decision in Schriro v. Summerlin, 542 U.S. 348 (2004). (Id., pp.104-05.) On March 30, 2005, Fields sought the production of various documents (id., 117-20), and on June 5, 2005, he sought “access to all of the evidence collected by the police

to determine what additional items merit DNA or fingerprint testing” (id., pp.123-31). The district court granted, in part, Fields’ motions on May 5, 2006. (Id., pp.151-54.)

Despite the previous filing of multiple motions for access and discovery, not until May 2010, well after the district court had denied Fields’ third successive post-conviction petition, did Fields contact Lundquist and request to “examine, photograph and/or photocopy all of the [sic] Mr. Fields’ trial exhibits.” (#38571-2011, R., p.82.) On May 25, 2010, a member of Fields’ legal team went to the courthouse, photographed all of the exhibits that were available, and learned the coat was missing. (Id.) Fields made no further inquiry into the missing coat until August 31, 2010, when Lundquist was again contacted and Fields learned of Bourne’s letter stating the coat had been destroyed. (Id.)

Fields’ pattern of seeking access to evidence in a piecemeal and untimely fashion demonstrates he did not file the instant successive petition within forty-two days after he “should have known of the claim.” As explained by the Idaho Supreme Court, “The reasonable time at issue is the time necessary to develop sufficient facts to file the post-conviction proceeding, not the time necessary to develop all facts that will be offered in an attempt to prove the claim.” Pizzuto, 146 Idaho at 727. Sufficient facts were available within forty-two days after the coat’s destruction in 2004. However, even if that was too early to file the petition, certainly when he filed his motion for “access to all of the evidence collected by the police to determine what additional items merit DNA or fingerprint testing” on June 5, 2005, Fields should have requested access to the coat. It is simply unfathomable that Fields waited until May 25, 2010 to “examine, photograph and/or photocopy all of the [sic] Mr. Fields’ trial exhibits” (#38571-2011, R., p.82) and demonstrates his true motivation in filing multiple and untimely motions for discovery

and access, coupled with the filing of multiple successive post-conviction petitions, is to delay his return to federal court and his execution.

Because Fields failed to file his instant successive petition within forty-two days after he knew or reasonably should have known of the claims, the petition is untimely requiring that this appeal be dismissed or the district court be affirmed.

F. Not Only Is Fields' Claim Of "Actual Innocence" Barred By I.C. § 19-2719(5)(b) Because It Alleges Matters That Are Merely Cumulative Or Impeaching And Does Not Cast Doubt On The Reliability Of The Conviction, But It Must Be Rejected Because He Has Failed To Support The Claim With Authority Or Establish A "Free-Standing" Innocence Claim Is Cognizable In Idaho

1. Fields Has Failed To Support His "Actual Innocence" Claim With Authority and Argument

In his brief, Fields contends, "The newly discovered evidence that Detective Smith intentionally ordered the destruction of a court exhibit, Defense Exhibit 22, in violation of a court order to preserve and return it and while Fields was seeking independent testing of it, entitles Fields to post-conviction relief." (Brief, p.4.) However, Fields fails to cite under what statute or rule he believes this "newly discovered evidence" "entitles" him to post-conviction relief, but merely contends "Detective Smith's illegal conduct in this case undermines confidence in the verdict, would likely result in an acquittal, and mandates that this Court reverse the district court and grant the petition or remand for an evidentiary hearing." (Brief, pp.4-5.)

"When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered. A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking." State v. Wood, 132 Idaho 88, 94, 967 P.2d 702 (1998) (brackets omitted) (quoting State v. Zichko, 129 Idaho 259,



263, 923 P.2d 966 (1996)); *see also* State v. Creech, 132 Idaho 1, 20, 966 P.2d 1 (1998) (“Creech cites no legal authority to support his claim that his due process rights were violated. Failure to provide legal citations waives the issue.”). Because Fields has not cited any authority establishing the basis for his actual innocence claim, the manner in which it is cognizable under Idaho law, or authority for the proposition that he must establish “a reasonable probability of a different result” and that “a jury would likely acquit,” it has been waived.

The state recognizes Fields cites four cases for the proposition that failure to disclose information about Detective Smith’s alleged “evidence tampering violates the Due Process Clause of the Fourteenth Amendment, irrespective of the good or bad faith of the prosecution and even when the misconduct is known only to the police” (Brief, p.12), but this does not answer the question of what statute or rule governs presentation of this claim. Moreover, the claim is not based upon alleged “evidence tampering,” but is based upon “actual innocence.”

## 2. Idaho Law Does Not Provide A “Free-Standing” Innocence Claim

Presumably Fields did not provide the statutory basis for his “innocence claim” because none exists in Idaho. In Fields IV, the Idaho Supreme Court discussed the United States Supreme Court’s explanation of actual innocence and its refusal to resolve the question of whether a free-standing actual innocence claim is cognizable under the federal Constitution. 253 P.3d at 695-96 (citing House v. Bell, 547 U.S. 518 (2006), Schlup v. Delo, 513 U.S. 298 (1995)). The Idaho Supreme Court recognized that neither House nor Schlup “has any application to these proceedings.” Fields IV, 253 P.3d at 696. The Idaho Supreme Court further explained:

Idaho Code § 19-4901(a) lists the types of claims for which post-conviction relief can be granted. Subsection (6) authorizes a limited actual innocence claim based upon fingerprint or forensic DNA test results that establish innocence. It applies when the petitioner claims, “[s]ubject to the provisions of section 19-4902(b) through (g), Idaho Code, that the petitioner is innocent of the offense.”

Id. (brackets in original) (quoting I.C. § 19-4901(a)(6)).

Obviously, Fields’ latest claim of “actual innocence” is not premised “upon fingerprint or forensic DNA test results,” but is based upon destruction of the coat. The state certainly recognizes that in Sivak v. State, 134 Idaho 641, 647, 8 P.3d 636 (2000), the supreme court rejected the state’s argument that a claim was waived “merely because he raised the issue in his first post-conviction petition” since that “would result in Idaho courts being unable to entertain evidence of actual innocence in successive post-conviction petitions.” However, the supreme court never stated a free-standing claim of actual innocence was cognizable under Idaho law, but merely concluded it was not barred from reviewing new **evidence** of actual innocence in a successive post-conviction petition. In fact, in Rhoades v. State, 148 Idaho 247, 253, 220 P.3d 1066 (2009), the supreme court, after discussing Sivak, refused to decide “whether due process requires a free-standing actual innocence exception to the application of I.C. § 19-4902.”

Because actual innocence is not a cognizable post-conviction claim unless it is based upon fingerprint or forensic DNA test results, Fields’ first claim was properly dismissed by the district court.

3. Fields’ First Claim Merely Alleges Matters That Are Cumulative Or Impeaching

Fields’ claim of actual innocence is based upon Detective Smith approving the destruction of the coat with Fields contending, “Detective Smith’s destruction of the coat

was relevant as **another instance** of misconduct, like Smith's feeding the informant witnesses information about the crime." (Brief, p.6) (emphasis added). While Fields concedes "the coat may be irrelevant to the substance of inmate informant's testimony, Smith's destruction is relevant to his pattern and conduct of falsifying and destroying evidence in this case." (Id.) Fields further acknowledges, "**along with the other evidence** of misconduct, altered evidence and spoon-fed information to inmate informants, Detective Smith's destruction of the coat is substantive evidence of his continuing course of conduct in this case. . . ." (Brief, p.8) (emphasis added). Finally, Fields contends Detective Smith's approving the coat's destruction "is yet **another example** of his tampering with the evidence to secure or preserve Fields' conviction." (Id., p.8) (emphasis added). Apparently, Detective Smith's "pattern and conduct" is allegedly established by his providing "inmate informant witnesses facts about the crime to bolster their story that Fields confessed to them" (id.), which is presumably based upon Detective Smith providing information about the murder to informants Gilcrist, Heistand, and Bianchi (id., p.12).

As explained above, I.C. § 19-2719(5)(b) states, "A successive post-conviction pleading asserting the exception shall be deemed facially insufficient to the extent it alleges matters that are cumulative or impeaching. . . ." Fields' concession that Detective Smith approving the coat's destruction is "another instance" or "another example," "along with the other evidence," that is "relevant to his pattern and conduct of falsifying and destroying evidence in this case" establishes it is merely cumulative of other evidence that also establishes "his pattern and conduct of falsifying and destroying evidence in this case." In other words, Fields is contending there is a "pattern" of

conduct that was allegedly established even without the evidence of Detective Smith approving the coat's destruction. Therefore, destruction of the coat is merely cumulative evidence supporting that alleged pattern, which, under I.C. § 19-2719(5)(b), is "facially insufficient" to warrant post-conviction relief in a successive petition. In fact, Fields' "pattern" of filing successive post-conviction petitions, with another one pending before the district court, illustrates this latest claim is based upon nothing more than cumulative evidence that is being utilized in an attempt to add additional pebbles upon a pile of rocks that crumbles because it is without a foundation.

Because the destruction of the coat is nothing more than cumulative evidence, the district court properly dismissed Fields' claim of actual innocence since it is barred by I.C. § 19-2719(5)(b).

4. Destruction Of The Coat Does Not Cast Doubt On The Reliability Of Fields' Conviction Or Sentence

Idaho Code § 19-2719(5)(b) also mandates that Fields establish Detective Smith approving the destruction of the coat "cast doubt on the reliability of the conviction or sentence." Fields' entire argument is based upon the alleged "pattern" discussed above and the contention that "[t]his was a close case at trial." (Brief, pp.5-15.) Irrespective of the alleged "pattern" and "closeness of the case at trial," Fields has failed to meet his burden of casting doubt on the reliability of the conviction or sentence.

First, Fields' contention that the exhibit was destroyed "while [he] was seeking independent testing of it" (Brief, p.4) ignores his argument and concession detailed above that "Given the State's concession in the prior DNA proceeding, the parties agreed that Mrs. Vanderford's blood was not on Fields' coat and that the jury could not reasonably

have thought her blood was present. Accordingly, Fields did not further pursue DNA testing of the coat.” (#38571-2011, R., p.143.) Obviously, Fields cannot have it both ways: either he abandoned the motion to have independent testing completed or he desired to have the testing completed.

Moreover, this is not a situation in which Detective Smith had control of the coat. Rather, as detailed above, the coat was a court exhibit maintained by Lundquist that was, pursuant to the district court’s order, given to Starkey who apparently delivered the coat to the State Lab. (#38571-2011, R., pp.76-79.) After testing by the State Lab revealed there was no evidence of a bloodstain on the coat, it was retrieved in 2003 by Shawna Hilliard who was in charge of the Boise Lab. (Id.) Only after the coat had apparently sat in the Boise Lab for some period of time did the new person in charge of the lab, Bridget Kinney, e-mail Detective Smith on February 17, 2004, and inquire regarding the status of the coat. (Id.) Detective Smith recognized fourteen years had passed since the trial, that the coat had no further evidentiary value because the State Lab had determined there was no blood sample left on the coat for DNA testing thereby permitting its destruction; he did not know of the district court’s order requiring the coat be returned to the clerk’s office. (Id., p.163.)

This is hardly evidence of actual innocence based upon alleged police misconduct that would “cast doubt on the reliability of Fields’ conviction or sentence,” particularly in light of the fact there was no further evidentiary value associated with the coat because there were no blood stains to test and photographs were taken of the coat.

Finally, contrary to Fields’ contention, his case was not as “close” as he would have this Court believe. While the state’s case may not have been overwhelming, such as

cases that establish guilt with a confession to law enforcement, DNA or fingerprint evidence, ballistics testing or an eyewitness who actually saw the murder, as demonstrated below, it was certainly very compelling.

On February 11, 1988, at approximately 11:00 a.m., Mary's husband, Herbert Vanderford, left his wife working at the Wishing Well gift shop in Boise, Idaho, which was owned by their daughter, Karen Vanderford. (##19185/19809, Tr., pp.916-18.) Mary was still alive when Herbert left that morning. (Id., p.917.) On that same date at 11:18 a.m., dispatcher Jackie Pyle received a 911 telephone call from Mary stating, "I've just been stabbed. I'm bleeding." (Id., p.997.) Mary was able to explain she had been stabbed in the neck and chest, her assailant was no longer at the shop, the assailant was male and she had been robbed. (Id., pp.997-99.)

During Mary's 911 call, Ralph Simmons entered the store and saw her "propped up against the corner" of the counter "sitting on her legs in a crouched position facing the window . . . toward the front of the store" with a "telephone in one hand and her other hand was to her throat." (##19185/19809, Tr., pp.1008-10.) Simmons "saw a lot of blood on the front of [Mary's] blouse and sweater. There was blood on her hand that was holding her throat and blood on the hand that was holding the telephone." (Id., p.1011.) Simmons took the phone from Mary, spoke with the dispatcher and tried to administer first aid. (Id., pp.999-1000, 1011-12.) Mary stated and gestured that her assailant had fled through the front door. (Id., pp.1012-13.)

Ada County Detective Randy Folwell was the first law enforcement officer to arrive and found Mary with Simmons trying to assist her. (##19185/19809, Tr., pp.1021-22.) While Mary was unable to speak, she moved her head and confirmed her assailant

was male, no longer in the store and alone. (Id., p.1022.) Emergency medical personnel dispatched to the Wishing Well administered first aid and transported Mary to Saint Alphonsus Hospital. (Id., pp.1038-44.)

Upon arrival at the emergency room, Mary was in full cardiac arrest and “bleeding quite a bit from a stab wound in the right side of her neck.” (##19185/19809, Tr., p.1091.) Pressure was placed on Mary’s neck to stop the bleeding and she was immediately transported to the operating room, however, she could not be resuscitated. (Id., p.1093.) Mary was pronounced dead approximately forty-five minutes after first arriving at the emergency room from the “stab wound in her neck [which] caused her to lose enough blood that she was not able to sustain adequate blood pressure. She basically bled to death.” (Id., p.1094.)

Dr. Frank Roberts completed an autopsy of Mary’s body the following day and found six wounds on her body, including: (1) “a long incised, . . . cleanly cut wound that extended from behind the right ear and came around under the right side of the chin”; (2) “a puncture-type wound located just above the nipple of the right breast”; (3) “a puncture wound located just on the back at approximately – slightly lower than the one on the breast”; (4) “[t]he fourth was six inches towards the middle of the body and just slightly lower than the No. 3”; (5) “[t]he fifth was a small laceration between the eyebrows”; and (6) the sixth wound was “located on the top of the ring finger of the left hand” and was a “defensive wound.” (##19185/19809, Tr., pp.1061-63.) Dr. Roberts opined a “knifelike instrument” caused all six wounds. (Id., p.1067.) Dr. Roberts concurred with Dr. Fazzio that Mary bled to death from the major wounds caused by the “knifelike instrument.” (Id., pp.1074-75.)

In February 1988, a Shopko customer observed a man attempting to steal a cassette tape who was wearing a “distinctive orange camouflage jacket.” State v. Fields, 115 Idaho 1101, 1102, 772 P.2d 739 (Ct. App. 1989). While the specifics of this “Shopko incident” were not presented to the jury in the murder case, the jacket, which was confiscated at the time of the “Shopko incident,” was admitted during the murder trial. (##19185/19809, Tr., p.1171.) At least one witness, Keith Edson, identified the coat as being worn by Fields on the morning of Mary’s murder. (Id., p.1218.) Ann Bradley, a forensic scientist, examined Fields’ jacket and found two “extremely small” spots that, in a “preliminary screening” tested positive for blood. (Id., pp.1407-12.) While Bradley was unable to determine whether the blood was human, she explained that did not necessarily mean it was not human blood. (Id., pp.1410-11.)

To further establish Fields murdered Mary, the state called a number of witnesses who were in or near the Wishing Well on the morning of her murder. Edson testified he saw Fields go into the Wishing Well on the morning of Mary’s murder, but, because he could not remember who it was, waited to report the sighting until February 22, 1988, after watching the news and hearing the name “Zane,” which triggered Edson’s memory. (##19185/19809, Tr., pp.1197-1214.) Edson had met Fields while both were in prison. (Id., pp.1190-92.) Edson reported the sighting to police and identified Fields from a photo array and subsequently in court. (Id., pp.1214-18.) Edson also identified the coat taken from Fields during the “Shopko incident” as the coat Fields was wearing when entering the Wishing Well. (Id., p.1218.)

Betty Hornecker was at the Wishing Well at approximately 11:00 a.m. and saw a man enter the store who “immediately went” to the back of the store “farthest from the



door.” (##19185/19809, Tr., p.929.) Hornecker kept her eyes on him “all the time” because “his presence made me very uneasy and I also felt like he was trying to avoid me and move around the store.” (Id., p.929.) While Hornecker could not positively identify Fields as the man, the description she provided fit Fields’ general description. (Id., pp.932-34, 954-55.) Mari Munk, who was in the Wishing Well shortly after Hornecker, provided a similar description, although she did not see the man’s face. (Id., pp.967-73.)

Nancy Miller, who worked at the Quilt Crossing, a fabric store two blocks from the Wishing Well, testified that at approximately 12:30 p.m. on the day of Mary’s murder, a man entered the Quilt Crossing “searching and looking very wild-eyed.” (##19185/19809, Tr., pp.1100-01.) The man’s description fit Fields, who was wearing an orange coat and jeans with a knife in the coat with a brown wooden handle. (Id., pp.1103-04.) On February 24, 1988, Miller identified Fields as the man in the shop from a series of photographs shown her by police and subsequently identified him in court. (Id., pp.1105-08.) Miller also identified a coat obtained from Fields as the coat he was wearing in her shop. (Id., pp.1109-10.) Miller explained that after Fields left her store, he approached the neighboring T-Shirt Plus shop. (Id., p.1122.)

Vicky Tippetts testified a man came into her shop, T-Shirts Plus, at approximately 12:30 p.m. Tippetts’ attention was drawn to the man because “when he first came in he came and stood right by the cash register and stared at me.” (##19185/19809, Tr., p.1128.) After stating Tippetts could not help him, the man “looked at me, looked at the register, looked at the people in the shop and then he looked at me and looked at the register.” (Id., p.1128.) Tippetts was frightened because “[h]is eyes were very wild looking. They were just very scary eyes to look at. They were evil.” (Id., p.1128.)

Tippetts provided the same general description of the man as the prior witnesses, acknowledged she had identified the man in a photo array and subsequently identified Fields in court. (Id., pp.1132-35.) Like Miller, Tippetts also identified a coat obtained from Fields as the coat he was wearing in her shop. (Id., pp.1136-37.)

Robert Starbard, an employee at the Videon, a video store near the Wishing Well, testified that at approximately 12:30 p.m. on the afternoon of Mary's murder, a man also came into his shop "act[ing] real nervous." (#19185/19809, Tr., p.1150.) Starbard had received a telephone call about the robbery at the Wishing Well at 12:15 p.m. (Id., p.1151.) After giving a general description of the man that matched Fields, Starbard later identified him as the man from a photo array and subsequently identified him in court. (Id., pp.1154, 1159-61.) Starbard was so concerned about Fields' appearance and mannerisms that he contacted store manager Timothy McWilliams. (Id., p.1158.) McWilliams testified regarding his contact with Starbard, gave a general description of the man, and identified the man as Fields from a photo array. (Id., pp.1180-85.)

Detective Dave Smith testified regarding information that was provided to the media, which did not include information regarding whether money had been taken from the Wishing Well, the location of any money taken from the Wishing Well, the motive for Mary's murder or the amount of money taken from the Wishing Well. (##19185/19809, Tr., pp.1369-70.)

Jeffrey Acheson, an inmate at the Idaho State Penitentiary (#319185/19809, Tr., p.1420), testified that in late March 1988, Fields initiated several conversations regarding Mary's murder after the show Crimestoppers came on television. (Id., pp.1428-30.) During the show Fields "would sometimes go up and either change the channel, turn the

TV off, or turn the volume down.” (Id., p.1430.) Fields’ behavior was “[v]ery full of anxiety, pretty angry sometimes.” (Id., p.1430.) After changing channels or “calm[ing] down,” Fields would say, “They can’t pin that on me,” or “They’re trying to pin that on me but I took care of that.” (Id., pp.1430-31.) Fields indicated “they wouldn’t be able to link him with the [murder]” because “he had taken care of the evidence.” (Id., p.1431.)

Another inmate, Joe Heistand, also testified regarding conversations initiated by Fields between May 2-10, 1989, while they were both in custody. (##19185/19809, Tr., pp.1471-73.) Fields told Heistand “what the store looked like, who was running the store, where it was located” and that he “had been by it a few times . . . [j]ust to look at it for a possible score,” meaning “a theft or something of that nature . . . [b]urglary, robbery, whatever.” (Id., pp.1477-79.) Fields had learned “that an older lady ran the store” and that “[w]hen he had seen her she was in there alone.” (Id., p.1479.) Fields told Heistand, “[he] entered the store, went to the back of the store where the till area was and was getting the money. The lady from the store came from the back room, startled him – and screaming and hollering. She was asked to cooperate, nothing would happen, and she didn’t cooperate and that’s when the stabbing occurred.” (Id., p.1480.) Fields stated he stabbed her “[i]n the neck and upper shoulder, upper back area . . . a few times” with “an old hickory butcher knife.” (Id., p.1481.) Fields acknowledged getting “48 to 50 bucks” in “[p]aper and change.” (Id., pp.1481-82.) Fields conceded when he left Mary was “still alive” and people were in the area of the store that could have seen the knife. (Id., p.1482.)

A third inmate, Scott Bianchi, also testified that on November 10, 1989, while he and Fields were in custody together, Fields initiated a conversation regarding Mary’s

murder, stating, “he killed the lady, that he didn’t mean to kill her, and that he felt really bad for her.” (##19185/19809, Tr., p.1569.) Fields explained the murder occurred “in the Linda Vista Plaza” in a “gift shop.” (Id., p.1569.) Fields stated, “he got startled and he acted on impulse . . . he said once he got started it was like he had to finish the job.” (Id., p.1570.)

Based upon the evidence presented at trial and the *de minimus* value associated with Detective Smith approving the destruction of a coat that could no longer be tested and had been photographed, Fields has failed to cast doubt on the reliability of his conviction or sentence based upon his claim of actual innocence in claim one.

5. Fields Has Failed To Establish Actual Innocence

Even if Fields survives the arguments detailed above regarding his actual innocence claim, it fails because he has not established actual innocence. In Schlup, 513 U.S. at 327 (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)), the Supreme Court adopted the standard for actual innocence, requiring petitioners to establish “a constitutional violation has probably resulted in the conviction of one who is actually innocent,” and that “it is more likely than not that no reasonable juror would have convicted in light of the new evidence. The petitioner thus is required to make a stronger showing than that needed to establish prejudice.” Id. 513 U.S. at 327 (footnote omitted). This standard has been recently reaffirmed, even in the wake of the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”), in House v. Bell, 547 U.S. 518, 536-38 (2006).

The Ninth Circuit has emphasized this standard “is not easy to meet,” Gandarela v. Johnson, 286 F.3d 1080, 1086 (9<sup>th</sup> Cir. 2002), and is “narrow” in scope. Shumway v. Payne, 223 F.3d 982, 990 (9<sup>th</sup> Cir. 2000). Further, “[t]o be credible, a claim of actual

innocence must be based on reliable evidence not presented at trial.” Id., 223 F.3d at 982. Because such evidence is rare, “in virtually every case, the allegation of actual innocence has been summarily rejected.” Id. The Eighth Circuit has concluded not only must the evidence be new because it was unavailable at trial, the petitioner must establish it could not have been discovered earlier through the exercise of due diligence. Amrine v. Bowersox, 128 F.3d 1222, 1230 (8<sup>th</sup> Cir. 1997); Morris v. Dormire, 217 F.3d 556, 559 (8<sup>th</sup> Cir. 2000); *see also* Lyons v. Lee, 316 F.3d 528, 533 (4<sup>th</sup> Cir. 2003). In at least the context of whether an evidentiary hearing is warranted for an actual innocence claim, the Ninth Circuit concluded petitioners are “required to show some degree of due diligence in [the] initial factual development.” Gandarela, 286 F.3d at 1087.

Based upon the arguments provided in the prior section, Fields has failed to establish a free-standing claim of actual innocence based upon Detective Smith approving the coat’s destruction.

G. Not Only Is Fields’ Due Process Claim Barred By I.C. § 19-2719(5)(b) Because It Does Not Cast Doubt On The Reliability Of The Conviction, But It Fails Since He Has Failed To Establish A Due Process Violation

For the same reasons his actual innocence claim does not cast doubt on the reliability of his conviction, Fields’ due process claim also fails because it is based upon the same evidence -- destruction of the coat. Additionally, even if Fields could survive I.C. § 19-2719(5)(b), his claim fails because the coat’s destruction does not establish a due process violation.

While due process mandates the state disclose exculpatory evidence, Brady v. Maryland, 373 U.S. 83, 87 (1963), if the state fails to preserve evidence that is only “potentially exculpatory,” due process is violated only if the evidence possesses

“exculpatory value that was apparent before the evidence was destroyed, and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” California v. Trombetta, 467 U.S. 479, 489 (1984)). Further, the defendant must demonstrate that the police acted in bad faith in failing to preserve the evidence. Id. at 488; Arizona v. Youngblood, 488 U.S. 51, 58 (1988). “The presence or absence of bad faith by the police for the purposes of the Due Process Clause must necessarily turn on the police’s knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.” Id. at 56 n.\*.

Relying upon Supreme Court and Idaho precedent, the Idaho Supreme Court has also addressed the issue of destroyed evidence:

The due process clause of the Fourteenth Amendment requires that criminal prosecutions comport with prevailing notions of fundamental fairness. Fundamental fairness requires a meaningful opportunity to present a complete defense, which in turn requires what might loosely be called the area of constitutionally guaranteed access to evidence. Under this doctrine the state has a duty to disclose to the defendant all material exculpatory evidence known to the state or in its possession. Implicit in this duty to disclose exculpatory evidence is a duty to preserve such evidence for use by the defense.

Destruction of evidence is not a *per se* violation of a defendant’s rights and depends upon the nature of the proceeding, nature of the evidence, and the circumstances surrounding the destruction of the evidence. In a criminal context, this Court has applied a balancing test which examines: (1) whether the evidence was material to the question of guilt or the degree of punishment; (2) whether the defendant was prejudiced by the loss or destruction of the evidence; and (3) whether the government was acting in good faith when it destroyed or lost the evidence. This same standard has been applied in the civil context. Where the value of the evidence is known, the person asserting the due process violation has the affirmative burden of establishing the materiality and prejudice elements of the balancing test. Where the value of the evidence is unknown, the materiality and prejudice elements are presumed and the inquiry focuses on the presence of bad faith.

State v. Lewis, 144 Idaho 64, 66-67, 157 P.2d 565 (2007) (quotes and citations omitted).

Addressing Fields' due process claim, the district court recognized the Supreme Court has never applied Youngblood's due process protection to post-conviction destruction of evidence, at least three federal circuits have declined to make such an extension, *see Lovitt v. True*, 403 F.3d 171, 187 (4<sup>th</sup> Cir. 2005); Ferguson v. Roper, 400 F.3d 635, 638 (8<sup>th</sup> Cir. 2005); Cress v. Palmer, 484 F.3d 844, 853 (6<sup>th</sup> Cir. 2007), and Idaho's appellate courts have yet to address the issue. (#38571-2011, R., pp.191-92.) Nevertheless, the court rejected Fields' claim because he failed to establish destruction of the coat was material and prejudicial; because Fields failed to meet his burden under the first two prongs, the court declined to address the issue of bad faith. (Id., pp.192-194.)

Referencing the trial testimony of various witnesses and trial counsel's closing statement regarding the coat -- all without citation to the record -- Fields contends the coat was material, exculpatory evidence because "[n]ot having inside pockets, the camouflage was materially exculpatory evidence." (Brief, pp.16-17.) Apparently, "not having inside pockets" is somehow relevant to "speculation" raised by one of the witnesses regarding whether "the coat was reversible." (Brief, p.16.) However, because the state has never contended or disputed there were no pockets on the inside of the coat or even that the coat was reversible, it is difficult to imagine how the coat "possess[ed] an exculpatory value that was apparent before [it] was destroyed," *see Trombetta*, 467 U.S. at 487, particularly since photographs were taken of the coat before the trial even commenced. *See Garcia v. State Tax Comm.*, 136 Idaho 610, 615, 38 P.3d 1266 (2002) (declining to find materiality when there is no challenge to the results of testing).

Fields makes the same argument regarding prejudice, contending, "The pictures of the coat are not adequate substitutes for the coat: they do not show the absence of

inside pockets.” (Brief, p.17.) However, as recognized by the district court, “because the State does not dispute the fact, there is no controversy surrounding the inside of the coat that may only be resolved by examination of the coat itself.” (#38571-2011, R., p.9.) It is absurd to contend prejudice has been established based upon a fact the state does not dispute -- whether the coat had inside pockets. Moreover, in Garcia, 136 Idaho at 616, the court recognized there is no prejudice when a defendant waits an inordinate amount of time to inspect the evidence before it was destroyed. Considering the fact Fields did not pursue his motion for independent testing and did not even ask to “examine, photograph and/or photocopy all of the [sic] Mr. Fields’ trial exhibits” until May 2010 (#38571-2011, R., p.82), it is incomprehensible how he has demonstrated prejudice.

Finally, Fields contends he has established “prima facie evidence of bad faith” merely because Detective Smith (1) “knew that he was ordering the destruction of a defense exhibit in a capital case” which I.C.A.R. 38(b) and (d) and the district court’s order prohibited, (2) “was a participant in this litigation” and “must have known that litigation of this case was ongoing,” and (3) should have known of “the practice of the police department and the prosecutor’s office was to preserve all of the evidence, not just admitted exhibits.” (Brief, p.18.) These three contentions fall far short of establishing anything remotely akin to “prima facie evidence of bad faith.” Assuming I.C.A.R. 38(b) and (d) apply to this case, Fields has presented no evidence establishing Detective Smith was aware of the rule. Further, not only has Fields failed to establish Detective Smith was aware of the district court’s order, but Detective Smith has sworn, “Your affiant was not aware that the Court had ordered that the coat be returned to the clerk’s office. Your affiant had no intention of destroying anything that had evidentiary value and would not



have ordered its destruction if it had appeared to your affiant that the coat had any evidentiary value.” (#38571-2011, R., p.163.) Rather, Detective Smith recognized fourteen years had elapsed since the trial and, because the State Lab determined there was no blood sample left on the coat for DNA testing, concluded, “the coat was of no further value and could be disposed of.” (Id.)

Even if Detective Smith approving the coat’s destruction was negligent, which the state denies, it was far short of bad faith, which “refers to ‘a calculated effort to circumvent the disclosure requirements’ under *Brady*.” Lewis, 144 Idaho at 67. As in Garcia, 136 Idaho at 617, Fields had the opportunity to inspect and test the coat during the months and years prior to the coat’s destruction. It is simply preposterous, based upon the time Fields had to examine, test, and photograph the coat, that after the State Lab concluded there was no blood for DNA testing Detective Smith would approve the coat’s destruction so it could not be reviewed to determine if it had inside pockets, particularly since the state has conceded it did not.

Whether under I.C. § 19-2719(5)(b) or on the merits, Fields’ second claim is without merit and the district court’s decision should be affirmed.

H. The Eighth Amendment And Idaho Constitution Claims Were Not Raised In Fields’ Successive Petition

As an apparent afterthought, Fields makes a cursory reference to the Eighth Amendment and Idaho Constitution, Art. I, § 13. (Brief, pp.18-19.) Because neither was raised as a basis for post-conviction relief in Fields’ successive petition, any argument must be summarily rejected.

“Idaho Code section 19-4903 mandates that the application for post-conviction relief ‘specifically set forth the grounds upon which the application is based, and clearly state the relief desired.’ ‘All grounds for relief . . . must be raised in [Fields’] original, supplemental, or amended application.’ I.C. § 19-4908.” Dunlap v. State, 141 Idaho 50, 56, 106 P.3d 376 (2004). Claims not raised in Fields’ application should not be considered for the first time on appeal. Dunlap, 141 Idaho at 56-58. Because Fields’ successive petition does not assert a claim based upon either the Eighth Amendment or the Idaho Constitution, any such claim or basis for a claim is not preserved for appeal and cannot be considered by this Court.

### **CONCLUSION**

The state respectfully requests that, because Fields has failed to meet the requirements of I.C. § 19-2719 that his appeal be dismissed or, alternatively, that the district court’s Memorandum and Order of Dismissal summarily dismissing Fields’ post-conviction claims be affirmed.

DATED this 22<sup>nd</sup> day of December, 2011.

A handwritten signature in black ink, appearing to read 'L. LaMONT ANDERSON', is written over a horizontal line.

L. LaMONT ANDERSON  
Deputy Attorney General  
Chief, Capital Litigation Unit

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY That on or about the 22<sup>nd</sup> day of December, 2011, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

Bruce Livingston  
Teresa A. Hampton  
Federal Defender Services of Idaho  
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☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Facsimile  
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L. LaMONT ANDERSON  
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