6-10-2016

Charboneau v. State Respondent's Brief 1 Dckt. 43015

IN THE SUPREME COURT OF THE STATE OF IDAHO

JAIMI DEAN CHARBONEAU,	)	
	)	
Petitioner-Respondent,	)	**NO. 43015**
	)	
v.	)	**JEROME COUNTY NO. CV 2011-638**
	)	
STATE OF IDAHO,	)	**RESPONDENT / CROSS APPELANT'S**
	)	**BRIEF**
Respondent-Appellant.	)	
_____	)	

_____

BRIEF OF RESPONDENT / CROSS-APPELLANT

_____

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

_____

HONORABLE ROBERT J. ELGEE
District Judge

_____

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STATEMENT OF THE CASE

Nature of the Case

More than 30 years after being sentenced to death for the murder of his ex-wife, Jaimi Charboneau was handed an envelope full of documents showing a vast conspiracy by those in law enforcement to wrongfully convict and punish him, and then to cover up their misdeeds for decades. Perhaps the most critical document in that envelope was a letter written by the daughter of the victim (who had been one of the State's key witnesses), addressed to the presiding judge, and alleging: she had been encouraged by the police and prosecutors to testify falsely on certain critical matters; her family had planted physical evidence; and the prosecutor had asked her family to bury a firearm involved in her mother's death. Other documents suggested this letter had been mailed to the judge in 1989—while Mr. Charboneau's case was still pending re-sentencing—but had been intercepted by those in law enforcement and/or the prosecutor's office, and, with the help of individuals at the Idaho Department of Correction ("IDOC"), was successfully concealed from Mr. Charboneau from 1989 through 2011.

Within 90 days of his receipt of this newly-discovered evidence, Mr. Charboneau filed a successive petition for post-conviction relief alleging the State had withheld favorable, material evidence (the letter) in violation of his right to due process under the Fourteenth Amendment. After holding an evidentiary hearing and making extensive factual findings, the district court eventually granted summary disposition in Mr. Charboneau's favor. The district court granted Mr. Charboneau a new trial and set a reasonable bond, which Mr. Charboneau posted.

The State appeals, asserting five claims of error and asking this Court to have Mr. Charboneau returned to custody immediately. Mr. Charboneau cross-appeals. He contends that rather than just granting him a new trial, the district court should have barred the State from re-trying him.

Statement of Facts and Course of Proceedings

This case has its genesis in events occurring more than 30 years ago. Those initial events were previously summed up by the Idaho Supreme Court:

> Jaimi [Charboneau] and Marilyn [Arabaugh] lived together for approximately two years before they were married in June 1983. Marilyn had two teenage daughters, Tiffnie and Tira.[1] The relationship between Jaimi and Marilyn was stormy. There is evidence that Jaimi physically abused Marilyn. In August 1983 Marilyn shot Jaimi with a .22 caliber pistol during a dispute. An aggravated battery charge was filed against Marilyn but was subsequently dismissed on the motion of the prosecuting attorney. In the spring of 1984 Marilyn filed for divorce. A default judgment was granted on June 13, 1984. There is evidence that Jaimi and Marilyn continued to see each other and were sometimes intimate after the divorce.
>
> On June 21, 1984, Jaimi went to the cafe where Marilyn worked. They left in Marilyn's car. There is some dispute whether Marilyn went with Jaimi voluntarily. The next day Marilyn reported to the police that Jaimi had kidnapped and raped her and had stolen her car. There is evidence that Jaimi traveled to Nevada after June 21. The burned remains of Marilyn's car were found in southern Idaho in late June 1984. On June 25, 1984, Jaimi was charged in Jerome County, Idaho with first degree kidnapping of Marilyn and grand theft of her car.[2]

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[1] Tiffnie and Tira Arbaugh are individually referenced herein by their first names or, collectively, as "the girls," as the Supreme Court did in 1989. Mr. Charboneau does so to avoid confusing them with their mother, whom he refers to as "Ms. Arbaugh."

On July 1, 1984, the most critical date in this case, Tiffnie was sixteen (16339 Trial Tr., p.595, L.24 – p.596, L.5), and Tira was fourteen (16339 Trial Tr., p.1234, Ls.5-6).

[2] Mr. Charboneau was also charged with rape in a separate Lincoln County case.

> On June 28, 1984, Jaimi purchased a .22 caliber rifle from a hardware store in Gooding, Idaho.[3]

State v. Charboneau, 116 Idaho 129, 132-33 (1989). The .22 rifle Mr. Charboneau purchased was manufactured by Remington and had a nylon stock.[4]

The tension in the relationship between Ms. Arbaugh and Mr. Charboneau came to a head on July 1, 1984. Based on the evidence from Mr. Charboneau's trial (much of which Mr. Charboneau disputes), the Idaho Supreme Court has described the events of that day as follows:

> About mid-morning on Sunday, July 1, 1984, Marilyn returned to her residence on a ranch near Jerome,[5] after being gone since the evening before. Some time after 11:00 o'clock that morning Marilyn went out to check some horses in a corral near her home. Shortly after that Marilyn's daughter Tiffnie heard shots outside, grabbed Marilyn's .22 pistol,[6] and went to see what had happened. She found her mother sitting on the ground in the barn with blood on her. Jaimi was standing close to Marilyn with a .22 caliber rifle pointed at Marilyn. Tiffnie asked Jaimi to leave and told him she was going to call the police. Jaimi told Tiffnie that he would take Marilyn to the doctor. Both Marilyn and Jaimi told Tiffnie to leave.
>
> At 11:38 that morning Tiffnie called the Jerome County Sheriff's office and said that Jaimi had shot her mother. Tiffnie then told her sister Tira about the shooting, and they both got dressed. They heard more shots and ran outside where they hid behind a sheep wagon and called to their mother. Tiffnie had her mother's .22 caliber pistol with her, and it accidentally discharged behind her. She ran into the house, hid the gun,

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[3] The rifle was actually purchased from Hagerman Hardware, a store in Hagerman, Idaho. However, the Supreme Court's reference to Gooding is not necessarily incorrect. The proprietor of Hagerman Hardware owned a second store in Gooding, and he testified that is where his firearms are kept. (*See* Trial Tr., p.552, L.20 – p.553, L.1.) So, while Mr. Charboneau purchased the gun from Hagerman Hardware in Hagerman, it actually originated from a store in Gooding.

[4] This particular rifle is referenced herein as the "nylon Remington." As will become clear, this designation is important because there are multiple rifles at issue in this case.

[5] The ranch was known to the Arbaugh family (and, apparently, to friends and neighbors), and was described at trial, as "El Rancho 93." Thus, that moniker is sometimes used herein.

[6] The pistol was manufactured by Ruger. It is referenced herein as the "Ruger pistol," or just "the pistol," since it is the only pistol at issue in this case.

> returned to the sheep wagon, and then ran to the barn. Tira followed close behind. Marilyn was lying on her back with her arms over her head. The girls ran back to call for an ambulance. At 11:42 a.m. Tira telephoned for assistance and reached the Jerome County Sheriff's office. She told them to get an ambulance and that her mother was dying. When the sheriff's deputies arrived at the scene, they found Marilyn's body in the barn and located Jaimi in a field near the barn with a .22 caliber rifle lying nearby. Jaimi was arrested and charged with first degree murder. At the time of his arrest, Jaimi acknowledged that he had shot Marilyn, although he stated that he did so because she was going to shoot him.

Charboneau, 116 Idaho at 133. This summary is derived primarily from the testimony of the Tiffnie and Tira since, other than Mr. Charboneau (who did not testify) and Ms. Arbaugh (who died), they were the only ones at the residence on the morning of July 1, 1984. (*See generally* Trial Tr., p.594, L.1 – p.730, L.11 (Tiffnie's trial testimony); p.1233, L.1 – p.1304, L.22 (Tira's testimony); p.1420, L.1 – p.1425, L.4 (further testimony from Tiffnie).)

Mr. Charboneau's case was tried in late-April through early-May 1985. At trial, the State offered evidence tending to support the above summary of the facts. The State theorized Mr. Charboneau had been lying in wait for Ms. Arbaugh for days prior her death. (*See, e.g.*, 16339 Supp. Tr., p.1464, L.21 – p.1465, L.7 (State's opening statement).) This theory was supported by physical evidence suggesting Mr. Charboneau had been in the barn and potato cellar for a prolonged period (*see, e.g.,* 16339 Tr., p.980, L.14 – p.1014, L.16), and the girls' testimony that they did not know he was on the property (*see* 16339 Trial Tr., p.680, Ls.3-9, p.700, L.13 – p.701, L.6, p.1246, L.19 – p.1247, L.12, p.1252, Ls.8-10). The State also sought to connect Mr. Charboneau to the fatal shots. (*See, e.g.*, 16339 Supp. Tr., p.1468, L.10 – p.1469, L.17 (State's opening statement).) It did this by matching the fatal shots to the nylon Remington (*see* 16339 Trial Tr., p.1018, L.1 – p.1123, L.12, p.1125, L.1 – p.1194, L.19),

which the State placed in Mr. Charboneau's hands (*see* 16339 Trial Tr., p.532, L.1 – p.577, L.6, p.629, L.14 – p.630, L.14, p.1297, L.16 – p.1298, L.4, p.1420, L.12 – p.1424, L.24). Finally, the State argued Mr. Charboneau not only had to be Ms. Arbaugh's killer, but he premeditatedly executed her. (*See, e.g.*, 16339 Supp. Tr., p.1469, Ls.7-13, p.1371, Ls.12-15.) This contention was based on the girls' testimony that they heard a second round of shots after Tiffnie saw Mr. Charboneau standing over their already-wounded mother with a rifle, and while both girls were in the house. (*See* 16339 Trial Tr., p.640, L.21 – p.642, L.16, p.644, Ls.10-23, p.1266, L.12 – p.1268, L.10.) Ultimately, the jury found Mr. Charboneau guilty of first degree murder.[7] (16339 R., pp.1035-38).

Two months later, the State filed notice of its intent to seek the death penalty. (*See* 16339 R., pp.1048-49.) Accordingly, an evidentiary hearing on aggravating and mitigating circumstances was held over the course of two days (September 2 and December 19) in 1985. (*See* Sent. Tr., p.7, L.1 – p.203, L.21, p.204, L.1 – p.289, L.12.) On January 28, 1986, the district court held a hearing to pronounce its sentence: death. (*See* 16339 R., p.1250; 16339 Sent. Tr., p.291, L.1 – p.306, L.10.) It also entered a written order stating its findings of fact with regard to the aggravating and mitigating circumstances, and explaining its rationale for imposing the death penalty. (16339 R., pp.1230-42.) In so doing, the district court placed special emphasis on the evidence suggesting that, after the first volley of shots, Mr. Charboneau had time to consider his actions before choosing to fire a second, fatal round of shots in Ms. Arbaugh:

[7] The kidnapping and grand theft counts had been dismissed by the district court during the trial, based on the fact that there had been no evidence presented that those crimes had been committed in Jerome County. *Charboneau*, 116 Idaho at 135. Incidentally, the Lincoln County rape charge that had *not* been consolidated with the murder case was eventually dismissed on the motion of the Lincoln County prosecutor. (16339 R., p.476.)

> [I]t is obvious that the defendant intended to and did shoot and kill Marilyn Arbaugh. That after firing the first volley of shots the victim Marilyn Arbaugh was wounded but her life could have been saved if she had received necessary medical attention. At that moment the defendant, Jaimi Charboneau had a choice. He could have saved the woman he professed to love. However, with at least two minutes to give thought to the matter, the defendant, Jaimi Dean Charboneau, chose to fire additional shots into the wounded and helpless body of Marilyn Arbaugh. It appears from the facts that Jaimi Dean Charboneau acted intentionally, methodically and violently while he erased from the face of this the life of a human being.

(16339 R., p.1241.) The district court also entered its judgment of conviction on January 28, 1986. (16339 R., pp.1243-44.)

On March 11, 1986, Mr. Charboneau filed his first petition for post-conviction relief. (*See* 16741 R., pp.1-4.) Following multiple amendments, portions of that petition were summarily dismissed in July 1986 (see 16741, pp.140-42) and, in October 1986, the rest was denied following an evidentiary hearing (*see* 16741, pp.203-10).

Thereafter, in January and February 1987, Mr. Charboneau made numerous filings, including a second petition for post-conviction relief, all of which challenged defense counsel's questionable performance. (*See, e.g.,* 16741 Supp. R., pp.95-96 (motion for a new trial), pp.97-98 (motion to reconsider sentence and denial of post-conviction relief), pp.119-27 (second post-conviction petition), pp.153-55 (petition for a writ of *habeas corpus*), pp.128-31 (petition for a writ of *coram nobis*).) Through multiple orders entered in April and May 2007, all of Mr. Charboneau's requests for relief were denied. (*See* 16741 Supp. R. Vol. II, pp.150-54 (findings of fact and conclusions of law), pp.157-58 (order denying all motions and petitions in all cases), pp.165-67 (order overruling Mr. Charboneau's objections to the previously-entered findings of fact and conclusions of law).)

In the meantime, on December 8, 1986, Mr. Charboneau had filed a joint notice of appeal for both his criminal case and his first post-conviction case. (16741 R., pp.231-33.) On July 20, 1987, he filed a second notice of appeal bearing the case number of the second post-conviction case (*see* 16741 R., pp.212-15) and apparently bringing all of the post-judgment rulings in all of the cases into the consolidated appeal.

Mr. Charboneau's consolidated appeal was decided by the Idaho Supreme Court on April 4, 1989. The only reversible error found was with regard to the capital sentencing proceedings, so the Court vacated Mr. Charboneau's judgment of conviction and remanded his case to the district court for re-sentencing. *See Charboneau*, 116 Idaho at 145-54. Following issuance of the Idaho Supreme Court's Opinion, both parties filed petitions for a writ of *certiorari* with the United States Supreme Court; however, those petitions were denied on October 16, 1989. *Charboneau v. State*, 493 U.S. 922 (1989); *Idaho v. Charboneau*, 493 U.S. 923 (1989).

Upon remand to the district court, the State abandoned its request for the death penalty. *See State v. Charboneau*, 124 Idaho 497, 499 (1993). Ultimately, on October 15, 1991, the district court[8] imposed a sentence of fixed life. *Id*. In a subsequent appeal, decided in 1993, the Idaho Supreme Court affirmed that sentence. *Id*. at 499-500.

Roughly nine years later, in 2002, Mr. Charboneau filed another petition for post-conviction relief. (*See* 29042 R., pp.5-14.) In that petition, Mr. Charboneau sought relief based on his discovery of new evidence. (*See generally id*.) In particular,

[8] Whereas Judge Phillip Becker had presided over all of the prior proceedings, including Mr. Charboneau's 1985 trial, Judge George Granata presided over the re-sentencing in 1991.

Mr. Charboneau's petition identified two new pieces of evidence that had come to light. First, the petition discussed a letter Mr. Charboneau had received from Jerome County Sheriff Larry Gold.[9] (*See id*. at 8-9.) That letter (the "Gold Letter"), which Mr. Charboneau provided in support of his petition, was dated June 3, 2001, and indicated Sheriff Gold suspected there had been misconduct in Mr. Charboneau's case. (*See id*. at 48-49.) It stated, in part, as follows:

> The most disgusting issues were the apparent acts of a few people that "appeared to conspire" to punish a person far beyond the limits of the law, because the law "if fully enforced" may have required a "Guilty Man" to go free. How could this sleepy little town not be "easily self convinced" to "stretch or even manipulate the facts" to arrange for a finding of guilt without sufficient admissible evidence, even if the chain of evidence needed a little repairing here and there, behind the scenes[?]
>
> There also appeared to be a "collaboration of minds" intelligent enough to control[ ] the events of the time, but "little enough" to feel that they "had to collaborate" because the facts "may not have been strong enough," or "evidence that was collected under suspect conditions, dismissed because of contamination" and may have required manipulation by design. Jaimi, remember that this is just a personal hypothesis now. I have no proof of this in your case, just a deep down feeling that I am right because I have witnessed this "collaboration of minds" do the same thing in a different situation.

(*Id*.) The other new evidence referenced in the 2002 petition concerned the fact that one of the firearms from Mr. Charboneau's original case (the .22 Ruger pistol, as it turns out) had been found, stashed in a bag in the attic of the Jerome County Courthouse, by the courthouse janitor. (*See id*. at 9-10.)[10] Finally, although it was not actually tied to any

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[9] Larry Gold had not been the sheriff when Mr. Charboneau's case was being investigated and prosecuted. Elza Hall was the sheriff at that time. (16339 R., p.6.)

[10] The details of the Ruger's appearance in the courthouse attic were not made particularly clear in the 2002 case. They were better developed in this case. (*See, e.g.*, R. Vol. 1, p.36 (2008 affidavit of Melvin Wright, the janitor who found the Ruger, about his discovery of the gun in the courthouse attic "sometime between 1992-1993").) However, because the discovery of the gun in the attic is not particularly relevant to the present appeal, it is not discussed further herein.

claim in his petition, Mr. Charboneau submitted evidence indicating Tira had made statements suggesting the State had manipulated the evidence in Mr. Charboneau's case. (*See id*. at 24, 53, 77.) Specifically, it was alleged that:

- Tira "had been instructed to remain silent about her knowledge of certain objects which had been found at the scene on July 1st, 1984" (*id*. at 24);
- Tira told Mr. Charboneau's mother, Betsy Charboneau,[11] the events of July 1, 1984 "did not happen the way it was played out in court" (*id*. at 53);
- Tira told Mr. Charboneau's mother that the original prosecutor (Dannis Adamson), the special prosecutor (Marc Haws), and a policeman (Deputy Larry Webb) "did instruct her on what they wanted her to say regarding the events" of July 1, 1984 (*id*.);
- Tira told Mr. Charboneau's mother that Mr. Haws and his investigator, Gary Carr, "had told her not to reveal certain facts about the things which were found at the scene of the shooting," including "her mother's holster, and her mother's guns," and she "had been instructed to say that the only gun that she could remember seeing that day was the [nylon Remington] rifle" (*id*.; *accord id.* at 77).

Unfortunately, Tira could not confirm that she had made such statements to Betsy Charboneau, as Tira had died in September 1998. (R. Ex. Vol. 1, p.973.)

[11] Throughout this saga, Betsy Charboneau has been identified by many different names, as she has apparently gone by the nicknames Bessie and Misty at times, and she has had other last names, including Cheek (her maiden name), Crabtree (a previous married name), and McKeel.

Betsy Charboneau is not just Mr. Charboneau's mother; following a strange twist, she also became Tira's mother-in-law. After Mr. Charboneau was sent to prison, Tira wound up marrying Jimmy Griggs, Mr. Charboneau's half-brother. (Evid. Tr., p.453, Ls.14-23; 29042 R., pp.53, 76.)

Mr. Charboneau's 2002 petition was first summarily dismissed by the district court in September 2002. (29042 R., pp.90-92.) The court reasoned that Mr. Charboneau's petition was untimely, and the "new evidence" was neither new, nor admissible. (*Id*. at 91-92.) On an appeal from that summary dismissal order, the Idaho Supreme Court remanded Mr. Charboneau's case for the appointment of counsel. *See Charboneau v. State*, 140 Idaho 789 (2004). Following remand (and Mr. Charboneau's retention of counsel), the district court again dismissed Mr. Charboneau's petition on the grounds that it was untimely filed, and it was not supported by admissible evidence. (*See* 32120 R., pp.43-64.) In another appeal, the Idaho Supreme Court this time affirmed the dismissal, but only on the basis that Mr. Charboneau's petition was untimely; it did not reach the merits of his claims. *See generally Charboneau v. State*, 144 Idaho 900 (2007).

That brings us to the present case. On March 18, 2011, while Mr. Charboneau was being housed at the Idaho Correctional Institution-Orofino ("ICIO"), he was approached by one of his jailers, Corporal Michael Hiskett. (R. Vol. 3, pp.116-17.) Corporal Hiskett handed Mr. Charboneau a large white envelope containing multiple documents (collectively, "Hiskett Packet"). (*Id*.) Included in the Hiskett Packet were four especially noteworthy items: (1) a seven-page handwritten letter, dated September 6, 1989, from Tira to Judge Becker ("Tira Arbaugh Letter") (*see* R. Ex. Vol. 1, pp.122-28)[12];

[12] The Tira Arbaugh Letter appears in numerous places in the record on appeal. It was submitted to the district court in conjunction with Mr. Charboneau's initial and amended petitions (*see* R. Vol. I, pp.53-59, 158-64), and admitted during the evidentiary hearing as Exhibit 14 (*see* R. Ex. Vol. I, pp.122-28), to name just three. For ease of reference, Mr. Charboneau cites to the copy of the letter that was admitted during the evidentiary hearing, which the parties below frequently referred to as Exhibit 14. Although he refers

(2) an envelope, postmarked September 7, 1989, with Judge Becker shown as the recipient and Tira shown as the sender (*see* R. Ex. Vol. 1, p.97); (3) a typed affidavit of Sheriff Larry Gold, dated November 13, 2001 ("Gold Affidavit") (*see* R. Ex. Vol. 1, pp.109-10)[13]; and (4) a one-page handwritten note, dated June 27, 2003, and signed by A. DeWayne Shedd, who was the paralegal at ICIO while Mr. Charboneau was there ("Shedd Note") (*see* R. Ex. Vol. 1, p.95).[14] (R. Vol. 3, p.119.)

The Tira Arabaugh Letter contains explosive allegations. Written on or about September 6, 1989—shortly after Mr. Charboneau's judgment of conviction had been vacated by the Supreme Court and his case was remanded for re-sentencing, but before any re-sentencing had actually occurred—and directed to Judge Becker, the judge who had presided over all of the district court proceedings to that point, the letter alleges the State systematically and fundamentally manipulated the evidence in Mr. Charboneau's case. (*See id*. at 122-28.) Specifically, the letter alleges: the testimony about certain things (whether Mr. Charboneau was lying in wait at El Rancho

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to it throughout this case as the "Tira Arbaugh Letter," the State refers to it as "Exhibit 14."

[13] The Gold Affidavit also appears in numerous places in the record. For ease of reference, Mr. Charboneau cites to the copy of the affidavit that was admitted during the evidentiary hearing, which the parties below frequently referred to as Exhibit 8. Although he refers to it throughout this case as the "Gold Affidavit," the State refers to it as "Exhibit 8."

The Gold Affidavit, dated November 13, 2001, should not be confused with the Gold Letter, dated June 3, 2001. Not only are they different documents, but whereas the Gold Letter was known to Mr. Charboneau in 2002 when he filed his third post-conviction petition, the Gold Affidavit was not known to him until he received the Hiskett Packet. (R. Vol. 4, pp.547-48.)

[14] As with the Tira Arbaugh Letter and the Gold Affidavit, the Shedd Note appears in numerous places in the record. Again, Mr. Charboneau cites to the copy that was admitted during the evidentiary hearing, which the parties below frequently referred to as Exhibit 4. Although he refers to it throughout this case as the "Shedd Note," the State refers to it as "Exhibit 4."

93, whether he was the one who fired the deadly shots from the nylon Remington, and whether there was a second volley of shots at all) was false; the Arbaugh family planted the evidence making it appear Mr. Charboneau had been lying in wait for days; and the prosecutor urged the family to destroy critical evidence—a second .22 rifle. (*See id*.)

Although it is impossible to fully capture the thrust of that letter without quoting all seven of its pages verbatim, below is a list of its major points:

- "I am writing this letter to you because I believe you should know the truth about some of the things that happened the day my mom died [and] the truth about some of the things that I was told to say [and] told not to say." (*Id*. at 122.)
- "[T]hey all tell me I should only do [and] say what the prosecutor [and] Mr. Carr[15] tell me to do. But I believe you should know that some of the things in my statements to the police were not all true." (*Id*. at 122-23.)
- "When I wrote my statement on the day it happened I was told by an officer, I think his name is Driesal [sic][16] to only say certain things so that my statement wouldn't be confusing." (*Id*. at 123.)
- "I do not recall everything that I said in my statement that day, but I do remember that officer Driesal [sic] told me to say certain things that were not really true. One thing I remember is when I wrote down the time that I woke up that morning. Officer Driesal [sic] told me to write down a specific time which I knew was not true . . . . I just wrote down what [O]fficer Driesal [sic] told me to say." (*Id*.)

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[15] As noted, Gary Carr was an investigator for the State. He was employed by the Attorney General's office and started working on Mr. Charboneau's case when Deputy Attorney General Marc Haws took over as a special prosecutor. (*See generally* R. Vol. 3, pp.344, 347-58.)

[16] It appears Tira was referring to Officer Roger Driesel. (*See* R. Vol. 3, p.359.) Throughout her letter, Tira misspelled his last name.

- "What I told [O]fficer Driesal [sic] is that after mom woke up that morning I remember her asking Jamie [sic] to go out [and] check on our horse . . . . Before going outside I remember that Jamie [sic] tied a new white [illegible] around my neck [and] he kissed my forehead [and] he told me that the wrangle horse was waiting on me . . . ." (*Id*. at 123-24.)
- "Before Jamie [sic] went outside to check on the horse mom came back to my bedroom [and] gave me a big box wrapped in decorative paper. When I opened the box it had a new .22 rifle in it. That was my graduation gift from mom [and] Jamie [sic]." (*Id*. at 124.)
- "After mom got dressed she told Tif [and] me that she was going outside to help Jamie [sic] with the horses." (*Id*.)
- "I remember telling Officer Driesal [sic] that when Tif [and] I first heard mom screaming I could hear her yelling for Tif. At that time I was still in the bath tub. It was just a few second later when we heard the gunshots." (*Id*. at 124-25.)
- "When I had gotten dressed Tif grabbed my new .22 rifle that mom [and] Jamie [sic] had just given to me that morning. Tiffi gave me one of mom's .22 pistols [and] then she took me outside . . . ." (*Id*. at 125.)
- From behind the sheep wagon, "We could see mom in the alleyway by the feed corrals . . . . I remember I heard Tif shoot the rifle while we were behind the sheep wagon. I remember this because it startled me so much that I accidentally fired mom's pistol . . . ." (*Id*.)
- "I asked Tif what was going on. That's when she told me mom had taken Calamity Jane with her when she went outside to help Jamie [sic] with the

horses. Calamity Jane is what we call one of mom's .22 rifles. When I told this to [O]fficer Driesal [sic] that day he told me he would make a note of it but he told me it wasn't necessary to state every little thing in my statement." (*Id*. at 125-26.)

- A few days later, Deputy Larry Webb "said I had forgotten to write down some important things in my statement. Officer Webb told me that I had forgotten to put down the part about hearing more shots that day after Tiffie [and] I had went back into the house. Officer Webb told me to write out another statement saying I had heard 6 or 8 more shots . . . . I remember I had to sign another statement when Officer Webb told me to write that down even though I know it was not true." (*Id*. at 126.)
- "Mr. Haws has told us that we need to get rid of mom's Calamity Jane rifle. . . . [G]randpa [and] me [and] [U]ncle Jimmy we all went out to the el rancho property last week [and] we buried mom's rifle out there behind the potato cellar . . . ." (*Id*. at 126-27.)
- Uncle Jimmy "had thrown some of mom's other things in the crawl space at the back of the potato cellar a few weeks after the day my mom died. That's the stuff we told Dwane Brown [and] [O]fficer Orvil[17] about back then. Everybody told me not to say anything about Uncle Jimmy throwing those things away in the crawl space." (*Id*. at 127.)
- "Can you please call or write to my grandpa [and] talk to him about this stuff? . . . [H]e is a good man [and] if he is doing anything bad or wrong it's only because

[17] It appears Tira was referring to Duane Brown, the owner of El Rancho 93, the property on which the Arbaugh family was living on July 1, 1984, and Officer Orville Balzer, the officer who responded to the Arbaugh family's report that they found evidence in the potato cellar on July 11, 1984.

he is so mad at Jamie [sic] . . . . My Aunt Margene, mom's sister, can also tell you about this stuff because she was also there when Mr. Haws told Uncle Jimmy [and] grandpa [and] all of us to get rid of mom's rifle." (*Id*. at 127-28.)

In a post-script, Tira explained she was sending her letter from Bruneau, Idaho, where she was attending a street dance at which a family friend, Frederick "Pinto" Bennett, and his band were performing. (*Id*. at 128.) She said she decided to send her letter after having discussed the matter with Mr. Bennett. (*Id*.)

The Gold Affidavit expands on the allegations Sheriff Gold had made in the Gold Letter, and ties those allegations to the Tira Arbaugh Letter. (*See* R. Ex. Vol. 1, pp.109-10.) It states, in relevant part, as follows:

> 4. That as stated in my June 3rd 2001 letter to Mr. Charboneau, I am aware of certain improprieties committed by the Jerome County prosecutor[']s office and the special prosecutor from the Idaho Attorney General's office (Marc Haws) in preparing various cases for trial, specifically Mr. Charboneau's case.
>
> . . .
>
> 6. That it is my belief that facts and evidence in the Charboneau case were purposely manipulated and altered to arrange for a verdict of guilty. A specific example of this came to my knowledge when in the fall of 1989, my chief deputy Mito Alanzo [sic[18]] confided in me his concern about the fact that the District Court clerk Cheryl Watts was in possession of a letter which had been delivered to the Jerome County Courthouse via the United States Postal Service. Chief Deputy Alanzo [sic] informed me that the letter at issue had been addressed to district court Judge Philip Becker and had been sent by Tira Arbaugh, the daughter of Marilyn Arbaugh. Chief Deputy Alzanzo [sic] told me that the subject matter of this letter had significant relevance concerning the Charboneau case. Chief Deputy Alanzo [sic] stated that his concern was that the District Court Clerk Cheryl Watts had requested that he help her to destroy the letter.

(*Id*. at 109-110.)

[18] Sheriff Gold misspelled Chief Deputy Alonzo's last name throughout his affidavit.

Finally, the Shedd Note provides an explanation of why the Tira Arbaugh Letter, sent in 1989, and the Gold Affidavit, drafted in 2001, had never seen the light of day. The body of the note states as follows:

> Per Tim McNeese from the AG's office / Instructed to monitor all of inmate Charboneau's personal/legal mail. All incoming and outgoing legal mail. If a letter arrives at ICI-O for Charboneau from Larry Gold, a former sheriff of Jerome County, seize it without notifying Charboneau. Look for any documents depicting the name Tira Arbaugh, confiscate any such documents and notify McNeese immediately. If McNeese is not available then contact another attorney Mark [sic] Haws at the federal court building in Boise. His phone number and address is in the directory on my desk. Notified Lt. Unger and he agreed to help monitor Charboneau's mail.

(R. Ex. Vol. 1, p.95.) It is signed by Mr. Shedd, the ICIO paralegal, and dated June 27, 2003.

Less than 90 days after receiving the Hiskett Packet, Mr. Charboneau filed another petition for post-conviction relief, thereby initiating this case. (*See* R. Vol. 1, pp.20-23; *see also id*. at 25-28 (supporting affidavit), 35-77 (supporting exhibits).) He alleged a *Brady* claim.[19] After counsel was appointed, Mr. Charboneau filed an amended petition clarifying his claim somewhat.[20] (*See id*. at 134-40; *see also id*. at 142-93 (supporting exhibits).)

Early in the case, the State filed two separate motions for summary dismissal (*see* R. Vol. 1, pp.330, 721-22) and a motion to reconsider the denial of the second such motion (*see* R. Vol. 2, pp.936-40.) All three motions were denied by the district court. (*See* R. Vol. 1, p.418; R. Vol. 2, pp.755-56.)

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[19] *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

[20] The amended petition incorporated by reference the allegations and verifications set forth in his original petition. (R. Ex. Vol. 1, p.134.)

Ultimately, the district court decided to bifurcate the proceedings. It decided to hold an initial evidentiary hearing to address two limited questions: (1) whether the Tira Arbaugh Letter is true and genuine, and (2) whether that letter was concealed by the State or its agents. (*See* R. Vol. 1, p.688.) Reserved for another day would be the question of whether Mr. Charboneau was entitled to relief under *Brady*, which the court recognized might involve an inquiry into the admissibility and materiality of the Tira Arbaugh Letter. (R. Vol. 1, p.688.)

Prior to the initial evidentiary hearing, the parties stipulated the Tira Arbaugh Letter and the accompanying envelope were, in fact, written by Tira, although the State reserved its right to challenge the veracity of any of the statements contained therein. (*See* R. Vol. 2, pp.957, 971-72, 975.) Based on this stipulation, the district court entered an order stating, "Pursuant to the state's admission and stipulation in open court, the Court does hereby find that the handwriting appearing on the copy of the letter and envelope . . . is the handwriting of Tira Arbaugh. This letter is authentic in the sense that it is not a forgery." (R. Vol. 2, p.975.)

In October 2013, a two-day evidentiary hearing was held. (*See generally* Evid. Tr., p.15, L.1 – p.624, L.13.) Per the prior bifurcation order, and in light of the parties' stipulation concerning Tira's authorship of the Tira Arbaugh Letter, that hearing was limited to the question of whether the letter was concealed by the State. (*See id*., p.1, Ls.12-18.)

Following that evidentiary hearing, the district court entered an order making fairly extensive findings of fact. (*See* R. Vol. 3, pp.109-43.) These findings included, but were not limited to, the following:

- Tira wrote the Tira Arabaugh Letter, and she mailed it from Bruneau, Idaho on September 7, 1989. (*Id*. at 115, 134.) It was sent to Judge Becker at the Jerome County Courthouse. (*Id*. at 115, 134.)
- It is unknown whether the Tira Arabaugh Letter ever reached Judge Becker. (*Id*. at 134.)
- "There is no evidence as to who had possession of the Tira Arbaugh letter from 1989 to December 2002. Wherever the letter was between 1989 and 2003, it was originally taken or concealed by someone who had the state's purposes in mind, and who acted on behalf of the state, rather than" Mr. Charboneau. (*Id*. at 134.)
- "Someone sent or delivered a copy of the letter to Charboneau, who was in IDOC's custody, sometime between December 2002 and September 2003." (*Id*.)
- "[S]omeone at ICIO was opening and reading Charboneau's legal mail in 2003 before it got to him." (*Id*. at 131.)
- Mr. Shedd wrote the Shedd Note or, at a minimum, signed it knowing it to be true, thereby ratifying and adopting its contents. (*Id*. at 125, 129.)
- "[T]he Tira Arbaugh letter arrived at ICIO between June of 2003 and September of 2003. . . . It was intentionally intercepted by Shedd at the direction of others and concealed . . . ." (*Id*. at 135.) "Shedd did not and could not have acted alone." (*Id*.) "The inferences and conclusions the Court draws from the evidence is that McNeese or someone in a similar capacity directed Shedd to do what he did. . . . [S]tate agents deliberately and consciously intercepted and withheld evidence of extraordinary value to Charboneau . . . and that it would have been

concealed from Charboneau forever but for the fortuitous intervention of Michael Hiskett." (*Id*. at 136.)[21]

- The Tira Arabaugh Letter was delivered to Mr. Charboneau as part of the Hiskett Packet on March 18, 2011. (*Id*. at 116-17.)
- The Tira Arabaugh Letter had remained hidden from Mr. Charboneau "from 1989 until it was delivered to Charboneau by Michael Hiskett at ICIO on March 18, 2011, a period of 21½ years." (*Id*. at 134; *accord id.* at 135.)

As anticipated, the court made it clear that it would leave for another day questions as to whether the Tira Arabaugh Letter was "material" within the meaning of *Brady*, and whether it would be admissible evidence, and also what, if any, remedy might be appropriate. (*Id*. at 142-43.)

Thereafter, Mr. Charboneau moved for summary disposition. (R. Vol. 3, pp.219-20; *see also* R. Vol. 3, pp.223-51, 252-505, pp.973-85; R. Vol. 4, pp.10-58, 439-46, 454-67.) A hearing was held on Mr. Charboneau's motion in September 2014. (*See generally* 9/14/14 Tr., pp.639-757.) At the hearing, the State suggested there were outstanding questions of fact warranting a second evidentiary hearing; however, the district court questioned the value of such a hearing, given that it did not appear either party had additional evidence to present that could in any way help resolve the unanswered factual questions in the case. (*See* 9/14/13 Tr., p.676, L.18 – p.687, L.18.) In the end, the court invited the parties to submit post-hearing briefing and evidence. (*See* 9/14/13 Tr., p.723, L.5 – p.732, L.2.)

[21] The district court specifically declined to determine whether Mr. Haws, Mr. McNeese, or Lieutenant Unger were involved in the conspiracy. (*See* R. Vol. 3, pp.137-38.)

Following the summary disposition hearing, the district court entered a written order reiterating its invitation for further briefing and additional evidence, and acknowledging a second evidentiary hearing might become necessary should there be disputed material issues of fact. (*See* R. Vol. 4, pp.62-67.) Thereafter, it entered a second order discussing various procedural matters, including briefing deadlines. (*See id*. at 494-97.) In that second order, the court invited the parties to request a hearing if they deemed one necessary, and it indicated a failure to request an evidentiary hearing would be a concession that "the parties see no disputed issues of material fact." (*Id*. at 496.) Neither party ever requested another hearing of any kind; as promised, the district court took this as a concession that there were no disputed issues of material fact that could be resolved through an evidentiary hearing. (*Id*. at 554.)

Thereafter, in early 2015, the district court entered a lengthy order granting summary disposition in favor of Mr. Charboneau. (*See id*. at 523-81.) In doing so, the district court recognized it was free to draw reasonable inferences from the facts. (*Id*. at 550, 554, 559.) Among its more notable rulings were the following:

- The Tira Arbaugh Letter is admissible evidence. (*Id*. at 531-47.)
- The Gold Affidavit is admissible for the limited purpose of showing that former Chief Deputy Mito Alonzo had detailed knowledge of the contents of the Tira Arbaugh Letter in the fall of 1989. (*Id*. at 547-49.)
- Based on Chief Deputy Alonzo's knowledge of the letter in 1989, as well as the Shedd Note, it can be inferred the Tira Arbaugh Letter was in the hands of unidentified prosecutorial and/or law enforcement officials soon after its delivery

to the Jerome County Courthouse in 1989 (although the precise date of its seizure cannot be determined). (*Id*. at 550-52.)

- "[L]aw enforcement, by and through unknown (or identified) persons, acted in concert with IDOC to suppress and conceal" the letter from Mr. Charboneau. (*Id*. at 556.)
- The Tira Arbaugh Letter is both impeaching and exculpatory. (*Id*.)
- Had the letter been disclosed to Mr. Charboneau in 1989, there is a reasonable probability the result of his case would have been different. (*Id*. at 556-80.) At a minimum, since the letter was written prior to Mr. Charboneau's re-sentencing in 1991, "it most certainly would have provoked a different [sentencing] outcome . . . ." (*Id*. at 556, 577.) Further, since Mr. Charboneau was still within his time to file a motion for a new trial, there is a reasonable probability he would have been granted a new trial and, on re-trial, been convicted of a lesser offense.[22] (*Id*. at 557-80.)
- Mr. Charboneau is entitled to a new trial. (*Id*. at 580-81.)

[22] The district court analyzed only whether there is a reasonable probability that Mr. Charboneau would have been convicted of some crime less than first degree murder. It did not even entertain the possibility that Mr. Charboneau could be completely innocent, commenting, "no one, not Tira Arbaugh, nor even Charboneau's present attorneys, contend that Charboneau is innocent. They do not even seriously contend that he is not guilty of murder . . . ." (R. Vol. 4, p.558.) However, that is not true. Below, counsel specifically argued that if the evidence is as stated in the Tira Arbaugh Letter, "this could have been second degree murder, this could have been manslaughter, *this could have been self-defense*." (9/19/14 Tr., p.755. *Accord* R. Vol. 4, p.466.) And there is a view of the evidence to support this theory. For example, if the jury found Ms. Arbaugh had fired first and Mr. Charboneau responded by wresting Calamity Jane from her grip and fired some non-fatal shots in the process, and that Tiffnie fired a fatal volley with the nylon Remington, there is a good chance a jury would have acquitted Mr. Charboneau.

Shortly after the district court granted summary disposition in his favor, Mr. Charboneau filed a motion seeking to bar the State from re-trying him. (*See id*. at 599-600; *see also id*. at 630-33 (reply memorandum in support of motion).) He argued the egregiousness of the State's actions, and the prejudice attendant to the loss of evidence over the past 30+ years, called for an extraordinary remedy. (*Id*. at 630-33.) The district court, however, denied that motion. (*See* 4/10/15 Tr., p.7, L.5 – p.8, L.18.)

The district court formally entered judgment in Mr. Charboneau's favor on April 14, 2015. (R. Vol. 4, pp.659-61.) In the meantime, the State had filed a premature notice of appeal on April 6, 2015. (*Id*. at 626-29.) It then filed an amended notice of appeal immediately after judgment was entered. (*Id*. at 663-66.) The State's appeal is timely from the judgment. *See* I.A.R. 14(a) & 17(e)(2). Mr. Charboneau then filed a notice of cross-appeal on May 6, 2015. (R. Vol. 4, pp.670-74.) That notice was also timely from the district court's judgment. *See* I.A.R. 15.

On appeal, the State argues: (1) the district court erred in failing to dismiss Mr. Charboneau's petition as barred by the applicable statute of limitation (App. Br., pp.26-32); (2) the district court erred in finding the Tira Arbaugh Letter, the Gold Affidavit, and the Shedd Note to be admissible (App. Br., pp.33-48); (3) the district court erred in finding a *Brady* violation (App. Br., pp.48-72); (4) the district court erred in considering evidence it had ruled inadmissible (relating to the prior bad acts of Mr. Haws) (App. Br., pp.72-74); (5) the district court erred in considering evidence of prior bad acts by Mr. McNeese (App. Br., pp.75-77); and (6) assuming this Court rules in the State's favor, it should order Mr. Charboneau remanded into custody (App. Br., pp.77-78).

In this brief, Mr. Charboneau explains in detail why none of the arguments proffered by the State have merit and, in fact, the district court correctly granted summary disposition in his favor. He also presents a single issue on cross-appeal—whether, after granting his petition for post-conviction relief and vacating his conviction, the district court should have also entered an order barring his retrial. He argues the unique circumstances of this case warrant such an extraordinary remedy.

Finally, it should be noted that the Idaho Prosecuting Attorneys Association ("IPAA"), essentially acting as counsel for Marc Haws, has filed a brief as *amicus curiae*. The IPAA: (1) asks this Court to "affirm" the fact that the district court did not make any finding that Mr. Haws was involved in a conspiracy to seize and conceal evidence favorable to Mr. Charboneau (Amicus Br., pp.8-10, 14); (2) joins in the State's fourth claim of error (alleging the district court erroneously considered evidence of Mr. Haws' prior bad acts which it had previously ruled inadmissible) (Amicus Br., p.10); (3) argues that the district court did not find the prior bad act evidence concerning Mr. Haws admissible, but if it did, it erred under Idaho Rule of Evidence 404(b) (Amicus Br., pp.10-12, 14); and (4) because Mr. Haws has a due process right to not be accused of misconduct, requests this Court affirm the non-finding of the district court "with a more definitive statement," *i.e.*, make a definitive factual finding that Mr. Haws did nothing wrong (Amicus Br., pp.12-13). To the extent the IPAA's arguments are relevant to the issues on appeal such that any response is necessary, Mr. Charboneau's comments are interwoven with his arguments in response to the State's fourth claim of error.

ISSUES

II. Did the district court err in concluding that Mr. Charboneau's claims were not barred by the applicable statute of limitation?

III. Did the district court err in finding the Tira Arbaugh Letter, the Gold Affidavit, and/or the Shedd Note to be admissible?

IV. Did the district court err in finding a violation of Mr. Charboneau's due process rights under *Brady v. Maryland*?

V. Did the district court err in referencing Marc Haws' *Brady* Violation from a prior capital case?

VI. Was any error by the district court in referencing Tim McNeese's prior bad acts harmless?

VII. In the event this Court rules in the State's favor, should it revoke Mr. Charboneau's bond, and at what point would such a revocation be appropriate?

VIII. Did the district court err in declining to bar further prosecution (*i.e.*, retrial) of Mr. Charboneau? Alternatively, should this Court bar further prosecution under its supervisory authority?

ARGUMENT

I.

The District Court Correctly Determined Mr. Charboneau's Claims Are Not Barred By The Statute Of Limitation

A. Introduction

The State seeks to have this Court reward it for successfully concealing critical evidence—the Tira Arbaugh Letter—from Mr. Charboneau for nearly 22 years. It argues that, although the district court found the State knowingly withheld that evidence the whole time, Mr. Charboneau is somehow to blame for not bringing his *Brady* claim before he even knew of the evidence in question. As the district court said, the State's argument is "beyond ironic." (R. Vol. 4, p.526 n.3.)

Notwithstanding that Mr. Charboneau filed his post-conviction petition in this case less than 90 days after his receipt of the Hiskett Packet containing the *Brady* evidence at issue, *i.e.*, the Tira Arbaugh Letter, the State's primary, and oft-repeated, argument below was that Mr. Charboneau's current *Brady* claim is barred by the UPCPA's statute of limitation.[23] And that is now the State's first argument on appeal. (*See* App. Br., pp.26-32.) For the reasons detailed below, this argument is without merit.

B. Standard Of Review

"Legal conclusions of the district court are reviewed *de novo*. Whether [a] post-conviction action is barred by the statute of limitations is an issue of law and is therefore subject to free review." *Green v. State*, 156 Idaho 722, 724 (Ct. App. 2014) (citations omitted). *Accord Evensiosky v. State*, 136 Idaho 189, 190-91 (2001).

[23] Below, the State raised its statute of limitation argument *four* separate times. (*See* R. Vol. 1, pp.332-60, 731-33; R. Vol. 2, pp.445-47, 936-40; R. Vol. 3, pp.552-53.) The district court rejected these arguments each and every time. (R. Vol. 1, p.418; R. Vol. 2, pp.755-56; 5/24/13 Tr., p.60, Ls.20-21; R. Vol. 2, pp.798-99; R. Vol. 4, p.526 n.3.)

C. Properly Characterized, It Is Clear Mr. Charboneau's *Brady* Claim Accrued On March 18, 2011

The State's argument on appeal is that Mr. Charboneau's *Brady* claim is essentially duplicative of a claim he *untimely* raised in his 2002 post-conviction petition, and so the new claim is necessarily untimely as well. (*See* App. Br., pp.26-32.) Under the State's argument, the statute of limitation for Mr. Charboneau's current *Brady* claim would have begun to run whenever Mr. Charboneau had notice of the claim he raised in his 2002 petition—obviously sometime before May 23, 2002, the date that petition was filed. (*See* App. Br., pp.27-28, 29-32.)[24] The basic premise of this argument is that Mr. Charboneau's current *Brady* claim is the same as that which was presented in 2002. That premise, however, is faulty.

In his 2002 post-conviction petition, Mr. Charboneau pled certain *Brady* violations based on newly discovered evidence. Among the *Brady* claims arguably alleged,[25] was

[24] Below, the State advanced an alternative argument—that even if the statute of limitation began to run upon Mr. Charboneau's notice of the existence of the Tira Arbaugh Letter, *i.e.*, on the date the Hiskett Packet containing the letter was delivered to Mr. Charboneau, his petition was still untimely because 90 days is not a "reasonable time" for Mr. Charboneau to have taken to file the current petition. (*See* R. Vol. 2, pp.446-47, 939-40.) However, the State has abandoned this argument (*see* App. Br., pp.26-33), and thereby waived it on appeal. *See State v. Raudebaugh*, 124 Idaho 758, 763 (1993).

[25] Mr. Charboneau uses the term "arguably" because the allegations concerning Tira were not contained within his 2002 verified petition or his original affidavit in support of that petition. (*See* 29042 R., pp.5-14, 31-32.) They appeared only his memorandum of law in support of his petition (29042 R., p.24), an affidavit from his mother (29042 R., p.53), and, later, in his own supplemental affidavit (29042 R., p.77). Thus, they were probably never actually properly before the district court. *See Kelly v. State*, 149 Idaho 517, 523-24 (2010) (holding that a claim raised in an un-notarized brief in support of a petition for post-conviction relief, but not the petition or a supporting affidavit, was not properly pled and, therefore, could not be considered). Nevertheless, the district court treated these allegations as a distinct *Brady* claim. (*See* 32120 R., pp.43, 111-12.) Ultimately though, Mr. Charboneau concedes that whether the allegations concerning Tira were properly considered an independent claim in his 2002 petition is of no consequence to the current analysis because the critical question for statute of limitation

that prosecutors and police had withheld from him the fact that they instructed Tira to remain quiet about certain physical evidence found at El Rancho 93, and the additional fact that they told her what to say regarding the events of July 1, 1984. (29042 R., pp.24, 53, 77.) Specifically, Mr. Charboneau alleged as follows: "Tira informed her mother-in-law[26] about the fact that she had been instructed to remain silent about her knowledge of certain objects which had been found at the scene on July 1st, 1984 and identified by Jerome County Prosecutor 'Dan Adamson' and other law enforcement officers at the scene." (29042 R., p.24.) This allegation was based on the affidavit of Betsy Charboneau, which stated as follows:

> 7) That Tira Arbaugh Griggs did personally confess to me information about her feelings towards my son Jaimi Charboneau, her former step father. Tira told me that she was sorry for what Jaimi was going through. Tira told me that the tragedy which took the life of her mother on July 1st, 1984 did **not** happen the way it was played out in court. And;
>
> 8) That Tira also told me that Dan Adamson the first prosecutor to handle the case[,] and[ ] Mark [sic] Haws[,] the trial prosecutor[,] and Jerome [C]ounty's sheriff's deputy Larry Webb, did instruct her on what they wanted her to say regarding the events which took place on July 1st, 1984 in regards to the shooting incident at the El Rancho 93 outside of Jerome, which involved my son Jaimi Charboneau, his recent ex-wife and the biological mother to Tira, Marilyn Arbaugh. And;
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> 9) That Tira did inform me that Mark [sic] Haws and an investigator named Gary [C]arr who was working with law enforcement during the investigation regarding the death of Marilyn Arbaugh, had instructed her not to reveal certain facts about things which were found at the scene of the shooting on July 1st, 1984. Tira told me about two things which she said she was instructed to remain silent about[.] [T]hey were her mother's holster and[ ] her mother's guns. Tira told me that she had been instructed

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purposes is when Mr. Charboneau knew of the factual basis for the current claim, not whether he previously litigated that claim. *See Charboneau*, 144 Idaho at 905 (holding that the statute of limitation for a successive petition based on newly discovered evidence begins to run when the petitioner receives "notice" of the basis for his claim, not when he "assembles a complete cache of evidence" to support that claim).

[26] As noted, Betsy Charboneau was both Mr. Charboneau's mother and Tira's mother-in-law. (*See* note 11, *supra*.)

> to say that the only gun that she could remember seeing that day was the rifle. . . .

(29042 R., p.53 (bold emphasis in original; underlined emphases omitted).)[27] In a subsequent affidavit, Mr. Charboneau also alleged his half-brother, Jimmy Griggs, had informed him that Tira had said "things which sharply conflict with testimony presented at petitioner's trial. Information which was until now not known to petitioner"; however, Mr. Charboneau did not specify what Tira had told Mr. Griggs. (29042 R., p.76.) Clearly, the *evidence* at the heart of the 2002 claim (*i.e.*, the *evidence* which Mr. Charboneau contended was wrongfully suppressed by the State) was the knowledge of the State's own agents (Mr. Adamson, Mr. Haws, Mr. Carr, and Deputy Webb) concerning their statements to Tira. Obviously, the claim was not that the evidence suppressed was the knowledge of Tira or Mr. Griggs, as neither of them was an agent of the State and, therefore, their knowledge was not in any way in the control of the State. Nor was it that the *evidence* suppressed was any particular document (such as Tira's letter), as Mr. Charboneau never referenced any such document (and, in hindsight, we know he had no knowledge of any such document).

In contrast to the 2002 post-conviction case, the *Brady* evidence at issue in this case consists of physical items—Tira's seven-page letter to Judge Becker and the

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[27] Later, in a separate affidavit, Mr. Charboneau made similar allegations:

> 9) My mother, Betsy Charboneau Crabtree, has also recently submitted sworn statements and affidavits regarding information which she learned about personally from Tira several years after petitioner's arrest and subsequent trial and appeals process. Betsy Charboneau Crabtree will testify that she was approached by Tira on more than one occasion regarding information concerning the fact that Tira had been instructed by both "Dannis Adamson," and "Mar[c] Haws," to "keep [quiet]" about certain evidence which had been found at the scene belonging to Marilyn, i.e. Marilyn's pistols, holsters, and her brownish colored back-pack.

(29042 R., p.77.)

envelope in which it was mailed. Because the *Brady* evidence is different, the *Brady* claim is different. The fact that this claim is *related to* a prior *Brady* claim, or that it tends to prove facts Mr. Charboneau already suspected, is wholly inconsequential. Because the State was required to disclose all material evidence favorable to Mr. Charboneau, every piece of material, favorable evidence suppressed gives rise to a separate *Brady* claim.

The State would have this Court hold that, despite the fact the *Brady evidence* is different, because the 2002 *Brady* claim and the present *Brady* claim relate to the same general subject—the State's manipulation of the physical evidence and its suborning of Tira's perjury—the current *Brady* claim is somehow the same as the 2002 claim. However, this contention is neither supported, nor supportable.

The State's argument is not supported because the State cites no authority for the notion that a defendant cannot bring multiple *Brady* claims as he discovers additional evidence wrongfully suppressed by the government. (*See* App. Br., pp.26-32.) And, in fact, precedent suggests otherwise. In one of Mr. Charboneau's prior appeals, the Idaho Supreme Court identified the standard for when the statute of limitation begins to run for a successive post-conviction petition based on newly-discovered evidence. It held it begins to run "once [the] claims are known." *Charboneau*, 144 Idaho at 905. It went on explain "known" means "notice" of the claim, not the point where the petitioner "assembles a complete cache of evidence" to assert his claim. *Id*. Applying that standard to the present case, it is apparent the statute of limitation began to run when the Hiskett Packet was delivered to Mr. Charboneau on March 18, 2011. That was the first time Mr. Charboneau had any notice that the Tira Arbaugh Letter

existed and had been suppressed by the State for 22 years. In other words, March 18, 2011 was the first date on which Mr. Charboneau knew of a *Brady* claim for suppression of the Tira Arbaugh Letter.

And the State's argument is not supportable because, on its face, it is absurd. Under the State's argument, if, after the government wrongfully suppressed a large cache of evidence favorable to a criminal defendant, a small, relatively inconsequential piece of evidence found its way into the defendant's hands and he asserted a *Brady* claim based on that evidence, but was unsuccessful, he would be foreclosed from asserting a second *Brady* claim when the rest of the evidence came to light. The ridiculousness of such a scenario is apparent when one considers an extreme example. Let us assume the large cache of evidence hidden by the government included the following:

- a firearm and spent shell casings (consistent with ammunition used by that firearm), found in the home of a potential alternate perpetrator;
- an opinion from an expert firearms examiner that a slug recovered from the body of a murder victim matched the firearm, and an opinion that the shell casings also matched the firearm;
- latent fingerprint impressions lifted from both the firearm and some of the casings; and
- an opinion from an expert fingerprint examiner that all of the fingerprints matched a known print of the alternate perpetrator.

Let us also assume that, years after the defendant was tried and wrongfully convicted of murder, a single piece of evidence—a single shell casing with no discernible finger

prints—finds its way into the defendant's hands. The defendant could seek post-conviction relief under *Brady*, arguing a casing matching the caliber of gun used in the murder, and found in the residence of a known potential alternate perpetrator, warranted relief. But he could very well be unsuccessful—likely because without fingerprints or a match to the murder weapon, the lone shell casing was insufficient for a reviewing court to say there was a reasonable probability that its admission would have led to a different result in the case. Now let us assume that five years after losing on his shell casing-related *Brady* claim, the defendant learned of the existence of the rest of the suppressed evidence—evidence likely establishing his innocence. Under the State's argument in this case, he could not bring a second *Brady* claim. Under the State's reasoning, because the defendant knew, some five years earlier, that there was firearm-related evidence suppressed by the government, that knowledge was sufficient to start the statute of limitation for a successive post-conviction claim related to *all* of the wrongfully suppressed evidence, even that which was still being actively concealed by the government and, therefore, was still unknown.

While the foregoing example presents an extreme case where the equities should be clear, in principle, it is no different from the facts of this case. Here, the State wants this Court to hold Mr. Charboneau should have raised a *Brady* claim alleging the wrongful suppression of the Tira Arbaugh Letter more than ten years before he knew (or could have known) of the existence of that letter. However, because he did not know the letter existed, he did not know a potential claim existed.

Alternatively, even if Mr. Charboneau's current claim is somehow deemed part of the same claim as was raised in 2002, the State's argument still fails, as it is directly

contrary to the Idaho Supreme Court's decision in *Sivak v. State*, 134 Idaho 641 (2000). In *Sivak*, the State had relied on "snitch" testimony at trial. *Sivak*, 134 Idaho at 644. As it turns out, that snitch, Jimmy Leytham, had been handsomely rewarded for his testimony against Mr. Sivak. *See id*. at 645. However, on the witness stand he significantly downplayed that reward, suggesting to the jury he was testifying against Mr. Sivak out of the goodness of his heart, and the reason he was then out of State custody had nothing to do with the fact that he was testifying for the State. *Id*. at 644. Mr. Sivak knew, or at least suspected, this was not true and, in his original post-conviction petition, alleged the State had failed to disclose the substance of the agreements between the State and Mr. Leytham. *Id*. at 644-45. Ultimately the prosecutor testified, claiming Mr. Leytham had not, in fact, received any benefits in exchange for his favorable testimony against Mr. Sivak. *Id*. at 645. Based on that testimony from the prosecutor, Mr. Sivak's claim was denied and the Supreme Court affirmed the denial. *Id*. That was in 1990. *Id*. at 643. In 1996, Mr. Sivak discovered the State had suppressed four letters showing the extent of the benefits Mr. Leytham had received from the prosecution. *Id*. at 643, 645. Based on those four letters, Mr. Sivak filed another post-conviction petition, apparently asserting *Brady* and *Napue*[28] violations. *See id*. at 643-44. In response, the State argued this claim was waived because it had been asserted in Mr. Sivak's original post-conviction petition years earlier. *Id*. at 646. However, the Supreme Court rejected that argument:

> We reject the State's theory that Sivak has waived this claim for relief merely because he raised the issue in his first post-conviction petition. As Sivak concedes, this petition presents not a new claim but new

[28] *Napue v. Illinois*, 360 U.S. 264 (1959) (holding it is a due process violation for a prosecutor failure to fail to correct testimony the prosecutor knows to be false).

> evidence supporting an old claim. *Applying this rule as the State requests would result in Idaho courts being unable to entertain evidence of actual innocence in successive post-conviction petitions, even where the evidence was clearly material or had been suppressed by prosecutorial misconduct*. *We must be vigilant against imposing a rule of law that will work injustice in the name of judicial efficiency*.

Id. at 647 (emphasis added). The *Sivak* Court was absolutely correct—to say a claim is presently barred, and it was required to have been fully litigated when the evidence underlying that claim was being actively concealed by the government, would be improper, as it would exalt judicial "efficiency" over justice.

Unable to attack the reasoning of *Sivak*, the State attempts to argue its holding does not apply to this case. Its arguments are unpersuasive though. Initially, the State points out *Sivak* was a capital case and so the statute governing the post-conviction proceedings in that case (I.C. § 19-2719) is different from the statute governing the proceedings in this non-capital case (I.C. §§ 19-4901 & -4908), and the State argues the Idaho Supreme Court has previously distinguished "*Sivak* on the basis that the court has never applied its rationale to I.C. § 19-4902." (App. Br., p.31.) This argument fails for at least three reasons. First, while *Sivak* was indeed a capital case subject to section 19-2719, the Idaho Supreme Court has previously drawn from cases interpreting that provision in determining when the statute of limitation begins to run for successive petitions based on newly-discovered *Brady* evidence in non-capital cases. *See Charboneau*, 144 Idaho at 904-05 (recognizing that, just as in capital cases, the discovery of new *Brady* evidence in non-capital cases is a basis for the filing of a successive petition for post-conviction relief, and adopting the "reasonable time" standard from section 19-2719 for filing successive petitions in non-capital cases). Second, any attempt to argue the successive petition provision of the death penalty

post-conviction statute (section 19-2719) should be interpreted as being less restrictive than the successive petition provision of the UPCPA section 19-4908) is baseless, as the waiver language in the former statute is actually far *more* restrictive on its face than that of the latter statute. *Compare* I.C. § 19-2719(5) (creating a waiver *as a matter of law*) *with* I.C. § 19-4908 (requiring a knowing, intelligent, and voluntary waiver). Indeed, the fact that section 19-2719 is actually more restrictive than section 19-4908 was acknowledged by the Idaho Supreme Court in *McKinney v. State*, 133 Idaho 695, 703 (1999). Third, the State's claim that *Rhoades v. State*, 148 Idaho 247 (2009), distinguished "*Sivak* on the basis that the court has never applied its rationale to I.C. § 19-4902," is misleading at best. In *Rhoades*, the Supreme Court was talking about *free-standing actual innocence claims*, not *Brady* claims, when it considered whether *Sivak* was controlling. Further, the *Rhoades* Court simply did not say the rationale of *Sivak* "has never been applied . . . to I.C. § 19-4902." What the *Rhoades* Court actually said was the following:

> Rhoades argues that *Sivak v. State* supports his argument that a claim of actual innocence provides a basis for equitable tolling. 134 Idaho 641, 8 P.3d 636 (2000). However, Sivak, unlike Rhoades, was making a claim of actual innocence to support overriding a time-bar and reach the merits of an otherwise-barred *constitutional* claim. *Id*. at 644, 8 P.3d at 639 ("[Sivak] asserted that the state denied his due process rights by withholding evidence of an agreement between Leytham and the prosecution."). We need not and do not decide today *whether due process requires a free-standing actual innocence exception to the application of I.C. § 19–4902*.
>
> Even if actual innocence provides a basis for equitable tolling, the facts alleged by Rhoades do not establish a prima facie case of actual innocence.

Rhoades, 148 Idaho at 252-53 (emphases added). The foregoing language demonstrates the *Rhoades* Court was distinguishing between claims that are well-

established as being constitutionally-based (such as *Brady* claims) and claims for which the constitutional basis was still an open question. This strongly suggests the *Sivak* analysis *does* apply to *Brady* cases brought under the UPCPA.

Because the present *Brady* claim is distinct from that which was arguably asserted in 2002, and Mr. Charboneau did not know of the existence of the new *Brady* claim until he received the Hiskett Packet with the enclosed Tira Arbaugh Letter on March 18, 2011, the statute of limitation did not begin to run until that day. Alternatively, even if the new *Brady* claim is considered to be the same as that which was presented in 2002, under *Sivak*, because Mr. Charboneau received new evidence in support of his claim on March 18, 2011, the statute of limitation began to run that day.

D. Mr. Charboneau's *Brady* Claim Was Filed Within A "Reasonable Time"

The Idaho Supreme Court has held that, under the UPCPA, a successive petition for post-conviction relief based on a newly-discovered *Brady* violation must be filed within a "reasonable time" of the time that the *Brady* claim is "known" by the petitioner.[29] *Charboneau v. State*, 144 Idaho 900, 905 (2007). It has held this "reasonable time" standard will be applied on a case-by-case basis. *Id*.

Here, Mr. Charboneau first knew of his claim related to the Tira Arbaugh Letter on March 18, 2011, when it was finally disclosed to him as part of the Hiskett Packet. (*See* R. Vol. 3, p.132 (finding Mr. Charboneau did not know of the letter until it was delivered to him in 2011).) He filed the present post-conviction on or before June 15,

[29] Although the UPCPA clearly contemplates the filing of successive petitions, it does not actually contain a limitation period for successive petitions as it does for initial petitions. *Compare* I.C. § 19-4902(a) (providing for a one-year limitation period for initial petitions) *and* I.C. § 19-4902(b) (providing that petitions based on new DNA testing technology may be brought at "any time") *with* I.C. § 19-4908 (discussing the situations under which a successive petition may be filed, but identifying no limitation period).

2011 (*see* R. Vol. 1, p.20),[30] less than 90 days later. He also filed affidavits explaining exactly why it took him nearly 90 days to file his petition. (*See* R. Vol. 2, pp.807-09 (affidavit of Mr. Charboneau), pp.814-16 (affidavit of attorney Greg Silvey).) Under these circumstances, it cannot be said that the district court erred in ruling that the present petition was timely filed.

Further, it cannot even be *argued* that it was not timely filed. As is discussed above, the State has abandoned its argument that Mr. Charboneau's petition was not filed in a reasonable time, and so that argument is waived on appeal. (*See* note 24, *supra*.) Thus, if this Court finds Mr. Charboneau first knew of the present *Brady* claim when the Tira Abaugh Letter was disclosed to him on March 18, 2011, it must conclude the district court correctly ruled that Mr. Charboneau's petition was timely filed.

II.

The State Has Failed To Show Any Abuse Of Discretion In The District Court's Admissibility Determinations For Any Exhibits

A. Introduction

Between both its written findings of fact entered following the evidentiary hearing, and its subsequent summary disposition order, the district court addressed the admissibility of three critical documents from the Hiskett Packet—the Tira Arbaugh Letter, the Shedd Note, and the Gold Affidavit. Those admissibility determinations were unique to each document given the stage of the proceeding and the purpose for which the document was to be used.

[30] Mr. Charboneau's *pro se* petition was probably actually "filed" a few days earlier—likely on June 2, 2011 (the date it was signed and notarized, and the date it was served upon the State (*see* R. Vol. 1, pp.23-24))—because under the "prison mailbox rule," it is deemed to have been filed when it was delivered to prison officials for mailing. *Hayes v. State*, 143 Idaho 88, 91 (Ct. App. 2006).

While the Shedd Note was unconditionally admitted at the evidentiary hearing, the Tira Arbaugh Letter and the Gold Affidavit were admitted at that hearing only for the limited purpose of showing those documents were in the Hiskett Packet. In the district court's summary disposition order though, both the Tira Arbaugh Letter and the Gold Affidavit were ruled admissible to varying degrees and for different purposes. The district court ruled that the Tira Arbaugh Letter would be admissible at a new sentencing hearing should Mr. Charboneau get one, and most of its contents would also be admissible at a new trial should that be his relief. And it ruled the Gold Affidavit was admissible to a limited extent for purposes of determining whether Mr. Charboneau was entitled to post-conviction relief.

On appeal, the State argues all of the district court's rulings were erroneous, and the contents of each of the three documents are inadmissible hearsay. For the reasons stated below though, the State's arguments are without merit.

B. Standard Of Review

Generally, the decision whether to admit a given piece of evidence is reviewed for an abuse of discretion. *State v. Almaraz*, 154 Idaho 584, 590 (2013).

C. The State Has Failed To Show An Abuse Of Discretion In The District Court's Decision To Admit Exhibit 14 (The "Tira Arbaugh Letter")

As noted, the Tira Arbaugh Letter is the crux of this case. In that letter, which the State has conceded Tira wrote (*see* R. Vol. 2, pp.957, 971-72, 974; Evid. Tr., p.337, Ls.2-9, p.407, Ls.17-24),[31] Tira made shocking and deeply disturbing disclosures about the destruction of physical evidence as requested by the prosecutor, the planting of

[31] The State has also conceded the envelope accompanying the letter was addressed by Tira (R. Vol. 2, pp.971, 975; Evid. Tr., p.337, Ls.2-9, p.409, Ls.15-21), and the postmark on that envelope is genuine (Evid. Tr., p.409, Ls.2-14).

physical evidence by the victim's family, and the solicitation of false statements and testimony by law enforcement. (*See generally* R. Ex. Vol. 1, pp.122-28.) If the statements in the Tira Arbaugh Letter are true, the State's whole theory of the case against Mr. Charboneau was a hoax. For example, the State argued Mr. Charboneau lay in wait for Ms. Arbaugh for days before shooting her. However, Tira's letter suggests this is not true at all, as Ms. Arbaugh and the girls not only knew Mr. Charboneau was there, but they were interacting with him in a very normal way. The State also presented evidence indicating Ms. Arbaugh was unarmed, thus undermining any self-defense claim Mr. Charboneau may have made. However, Tira's letter suggests this was not true either, as Ms. Arbaugh was carrying her .22 rifle, known as "Calamity Jane." The State also placed in Mr. Charboneau's hands the .22 nylon Remington rifle responsible for the fatal shots. However, Tira's letter suggests her sister, Tiffnie, was the one firing the nylon Remington. Finally, at trial, the State used the alleged second round of six to eight shots to argue Mr. Charboneau intentionally and premeditatedly executed Ms. Arbaugh. However, Tira's letter suggests there was no second round of shots when Mr. Charboneau was alone with Ms. Arbaugh.

Throughout this case, the State has argued the Tira Arbaugh Letter consists of inadmissible hearsay. It first raised this argument in support of its second motion for summary dismissal. The State argued that because the letter consists of inadmissible hearsay, Mr. Charboneau's *Brady* claim was not supported by admissible evidence and should be dismissed. (R. Vol. 1, p.742; R. Vol. 2, pp.454-60.) In denying the State's motion for summary dismissal, the district court declined to decide whether the letter would be admissible under the Idaho Rules of Evidence *at a new trial*; instead, it ruled

that because the contents of the letter were impeachment evidence, would likely have been admissible at Mr. Charboneau's sentencing hearing, and certainly would have led to the discovery of admissible evidence—Tira's live testimony (because she was still alive when the letter was intercepted and suppressed)—there were questions of fact which precluded a grant of summary dismissal.[32] (*See* 5/24/13 Tr., p.52, L.3 – p.61, L.10.)

At the evidentiary hearing, the State raised its "hearsay" argument once more. When Mr. Charboneau was asked to identify the Tira Arbaugh Letter (Exhibit 14), the State objected on hearsay grounds. (Evid. Tr., p.65, Ls.6-23.) In response to that objection, the Tira Arbaugh Letter was initially admitted only for the limited purpose of showing that that document was among the documents provided to Mr. Charboneau in the Hiskett Packet. (Evid. Tr., p.66, Ls.14-21.) Later, the question of the admissibility of the Tira Arbaugh Letter (and its accompanying envelope, Exhibit 5a) came up again, and again the State voiced a hearsay objection. (*See* Evid. Tr., p.407, Ls.8-15, p.410, L.17 – p.421, L.10.) In response, the court noted the question of whether the statements in the letter were inadmissible hearsay was not critical because even if the entire letter

[32] The State misrepresents the district court's ruling at the summary dismissal hearing. The State claims the district court ruled "Exhibit 14 was admissible as a statement against penal interest." (App. Br., p.33 (citing 5/24/13 Tr., p.52, L.3 – p.60, L.19).) However, while the district court discussed at some length the question of whether the statements in the letter would be admissible as statements against interest (*see* 5/24/13 Tr., p.52, L.23 – p.55, L.16), it noted there may be a difference between whether those statements would be admissible at a new trial versus whether they would have been admissible at Mr. Charboneau's re-sentencing (*see* 5/24/13 Tr., p.55, L.17 – p.56, L.13), and it declined to decide whether they would be admissible at a new trial (*see* 5/24/13 Tr., p.56, L.14 – p.61, L.10). Ultimately, the court ruled that, regardless of whether the letter would be admissible at a new trial, it would have been admissible at Mr. Charboneau's re-sentencing and, therefore, Mr. Charboneau's *Brady* claim was supported by admissible evidence and was not ripe for summary dismissal. (5/24/13 Tr., p.59, Ls.14-25, p.60, L.20 – p.61, L.10.)

was hearsay, it would still be *Brady* evidence, at a minimum, for purposes of sentencing (because hearsay is admissible at sentencing). (Evid. Tr., p.415, L.11 – p.416, L.14.) Thus, the district court made it clear that, at least for the time being, it was not admitting the letter for the truth of the matters asserted therein; rather, it simply considered the date (September 6, 1989), Tira's statement that she wrote the letter while in Bruneau, and the addressee (Judge Becker) on the letter for the fact that they were consistent with the date and location on the postmark (September 7, 1989 and Bruneau, respectively) and the addressee (Judge Becker) on the envelope, and it used that corroboration to authenticate both documents.[33] (Evid. Tr., p.418, L.4 – p.421, L.10.)

In its initial findings of fact and conclusions of law following the evidentiary hearing, the district court specifically declined to address the truth of the statements made in the Tira Arbaugh Letter. (*See* R. Vol. 3, pp.112, 141.) The court reasoned that, since the purpose of the evidentiary hearing was limited to the question of whether IDOC had concealed the letter, "The content of the Tira Arbaugh letter, and whether it is actually true or false, is really not the issue at this point." (R. Vol. 3, p.141.) The court also indicated it would, on another day, determine whether the letter was "material" for purposes of *Brady*, and "whether and to what extent the Tira Arbaugh letter would be or is inadmissible hearsay, or the extent to which it may be considered, what remedy, if any, Charboneau is entitled to . . . ." (R. Vol. 3, pp.142-43.)

[33] To the extent the district court considered the statements as to the date, Tira's location, and the addressee for their truth in determining the letter was authentic, the district court acted properly. *See* I.R.E. 101(e)(1) ("These rules, other than those with respect to privileges, do not apply in the following situations: . . . Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence . . . .").

Thereafter, Mr. Charboneau filed a motion for summary disposition. This motion squarely raised the question of the admissibility of the Tira Arbaugh Letter, under the theory that the manner in which the letter could be used going forward bears upon the "materiality" analysis under *Brady*.[34] (*See* R. Vol. 3, pp.227-28, 237-48, 249.) Specifically, Mr. Charboneau argued the statements in the Tira Arbaugh Letter are independently admissible under the hearsay exception for statements against interest (I.R.E. 804(b)(3)), the exception for statements of the declarant's then-existing state of mind (I.R.E. 803(3)), and under the residual ("catch-all") hearsay exception (I.R.E. 804(b)(6)). (*See* R. Vol. 3, pp.237-48, 249, 979-81; R. Vol. 4, pp.425-34, 455-60; 9/19/14 Tr., p.655, L.3 – p.665, L.4.) In response, the State argued the letter consists of hearsay which is not admissible for any purpose—even impeachment. (R. Vol. 3, pp.546-52; R. Vol. 4, pp.70-74, 447-50; Tr., p.671, L.17 – p.679, L.24.)

Ultimately, the district court ruled the Tira Arbaugh Letter would be independently admissible for the truth of the matters asserted therein—either under the "statement against interest" hearsay exception, or under the residual hearsay exception (9/19/14 Tr., p.736, L.14 – p.739, L.6; R. Vol. 4, pp.531-45, 546-47), and it would be likewise admissible for impeachment purposes (9/19/14 Tr., p.740, Ls.9-24).

[34] Mr. Charboneau argued that evidence is "material" under *Brady* if it is independently admissible, could have been used for impeachment purposes, or could have led to the discovery of admissible evidence. (R. Vol. 3, p.227; R. Vol. 4, pp.424-25; 9/19/14 Tr., p.645, Ls.16-24; *see also* R. Vol. 3, pp.976-78 (reply memorandum explaining how the Tira Arbaugh Letter likely would have led to the discovery of admissible evidence (Tira's live testimony)).) With regard to impeachment, Mr. Charboneau pointed out that because numerous statements in the letter were inconsistent with Tira's trial testimony, that letter could have been used extensively to impeach her testimony, as well as that of her sister, Tiffnie. (*See* R. Vol. 3, pp.236-37, 978-79; R. Vol. 4, p.425.) He also argued the letter could have been used to impeach the testimony of Officers Diesel and Webb because it demonstrated their bias and dishonesty. (*See* R. Vol. 3, pp.236-37.)

1. The District Court Correctly Ruled That The Tira Arbugh Letter Would Be Admissible For The Truth Of The Matters Asserted Therein Because It Primarily Consists Of Statements Which Are Admissible Under The "Statements Against Interest" Hearsay Exception (I.R.E. 804(b)(3))

As a general proposition, out-of-court statements offered for their truth are considered hearsay and are not admissible. I.R.E 801(c) & 802. However, the Idaho Rules of Evidence contain many exceptions to this general rule. *See* I.R.E. 802 ("Hearsay is not admissible *except as provided by these rules or other rules* . . . ."). *See, e.g.*, I.R.E. 803 (identifying 24 exceptions for which the available of the declarant is irrelevant); I.R.E. 804(b) (identifying six additional exceptions, all of which apply where the declarant is unavailable). *See also* I.R.E. 801(d) (providing certain out-of-court statements, although they may be offered for their truth, are non-hearsay).

In light of the hearsay exceptions set forth in the Idaho Rules of Evidence, Mr. Charboneau submits the district court correctly ruled the Tira Arbaugh Letter admissible. Specifically, because the vast majority of the statements were very much against Tira's interests when she wrote the letter, those statements were properly admitted under Idaho Rule of Evidence 804(b)(3)—the hearsay exception for statements against interest. Further, virtually all of the rest of the statements in the letter were admissible under Rules 803(1) and (3)—the hearsay exceptions for present sense impressions and statements of then-existing state of mind, respectively.

The "statement against interest" exception provides that where a hearsay declarant is unavailable to testify, her out-of-court statements may nonetheless be admitted if they fit the following criteria:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject declarant to civil or criminal liability, or to render invalid a claim by declarant against another, that a reasonable man in declarant's position

> would not have made the statement unless declarant believed it to be true. A statement tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

I.R.E. 804(b)(3). Thus, under this exception, there are three applicable requirements: (1) unavailability of the declarant; (2) a statement which is so far contrary to the declarant's interests that a reasonable person would not have made it unless it was true; and (3) corroborating circumstances clearly indicating the trustworthiness of the statement. Because it is undisputed that Tira has been deceased since 1998 (R. Ex. Vol. 1, p.973), the first requirement is satisfied here. The remaining two requirements are discussed in Parts II.C.1(a) & (b), *infra*.

Additionally, as the State correctly notes (*see* App. Br., pp.36-37), the Idaho Court of Appeals has held that when it comes to the admission of statements against interest contained within a larger narrative, the entire narrative is not necessarily admissible; each statement must be analyzed to determine whether it is independently admissible as a statement against interest or pursuant to another hearsay exception. *State v. Averett*, 142 Idaho 879, 890 (Ct. App. 2006); *see also Williamson v. United States*, 512 U.S. 594, 6001-01 (1994) (holding similarly with regard to Federal Rule of Evidence 804(b)(3)). Here, Mr. Charboneau submits that whatever statements in the Tira Arbaugh Letter are not admissible as statements against interest under Rule 804(b)(3) are admissible as present sense impressions and/or statements of Tira's then-existing state of mind under Rules 803(1) and (3). That issue is discussed in Part II.C.1(c), *infra*.

a) The Bulk Of The Statements In The Tira Arbaugh Letter, At The Time Of Their Making So Far Tended To Subject Her To Civil Or Criminal Liability, That a Reasonable Person In Her Position Would Not Have Made Those Statements Unless They Were True

Because it is undisputed that Tira is now permanently "unavailable" within the meaning of Rule 804, the first relevant inquiry is whether her statements in the Tira Arbaugh Letter so far tended to subject her to civil or criminal liability that a reasonable person in her position would not have made them if they were not true. Mr. Charboneau submits that, clearly, a reasonable person in Tira's shoes would not have written that letter unless the information contained therein was, in fact, true.

The district court ruled the bulk of the statements in the letter were, in fact, statements so far against Tira's interests that a reasonable person in her situation would not have made such statements unless they were true. (9/19/14 Tr., p.736, L.14 – p.737, L.10; R. Vol. 4, pp.532-34.)

Initially, the State misconstrues the district court's ruling, asserting the district court erred in failing to analyze each statement in the Tira Arbaugh Letter individually, as is required by *Averett*. The State claims the district court:

> [I]dentified only two discrete parts of the letter that could have subjected Tira to a perjury charge because they were contrary to her trial testimony: specifically, the statement that she did not hear a second episode of shots fired and the statement she had a pistol and Tiffnie had a rifle when they first left the house. . . . Under the district court's own reasoning, therefore, only these two declarations could fall within the ambit of the statement against penal interest exception—the rest of Exhibit 14 would not.

(App. Br., p.37 (citing R. Vol. 4, pp.532-33).) This is not correct. As the cited portion of the district court's order makes clear, the two discrete parts of the Tira Arabaugh Letter discussed by the district court were cited as *examples* of how Tira's letter tended to subject her to a perjury charge. (*See* R. Vol. 4, p.532 (using the phrase "for example"

before discussing Tira's conflicting statements concerning the alleged second round of shots), p.533 (using "for example" once more before discussing Tira's conflicting statements concerning which girl had which gun behind the sheep wagon).) The fact is the overwhelming majority of the statements in the seven-page letter were statements against Tira's penal interest. Starting with the second full paragraph on the second page of the letter ("When I wrote out my statement on the day it happened . . . .") and continuing through the end of the last full paragraph on the sixth page of the letter ("I know that this is not right [and] I hope that I am doing the right thing by telling you these things"), practically every statement she made tended to reveal a falsity in her prior testimony, explain a falsity in her prior testimony, and/or demonstrate her involvement in a conspiracy to manipulate evidence and present false testimony.[35] Thus, the district court did not err in failing to reproduce each individual statement in the seven-page letter; under these circumstances, it was sufficient for the district court to have pointed out that the bulk of the statements in the letter were statements against Tira's interest.[36]

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[35] The discussion of the Tira Arbaugh Letter has primarily revolved around the crime of perjury, as Tira obviously confessed to having given false testimony. However, insofar as Tira implicated herself in a conspiracy to produce false evidence and/or destroy existing evidence, those actions were criminal as well. *See, e.g.*, I.C. §§ 18-1701 (criminal conspiracy), 18-2602 (preparing false evidence), 18-2603 (destroying or concealing evidence).

[36] A close reading of the Tira Arbaugh Letter reveals that it contains six categories of statements that were against Tira's penal interest when they were made:

- Statements revealing Mr. Charboneau was a known guest at the Arbaugh home on the morning of July 1, 1984, and he and Ms. Arbaugh gave the .22 nylon Remington rifle to Tira as a gift that day;
- Statements indicating there was a second .22 rifle—"Calamity Jane"—involved in the events of July 1, 1984;
- Statements placing Calamity Jane in the hands of Ms. Arbaugh, the nylon Remington in the hands of Tiffnie, and the .22 Ruger pistol in the hands of Tira;
- Statements admitting there was no second round of shots while Tiffnie and Tira were inside the Arbaugh residence;

Further, the State's entire argument is a red herring. The Tira Arbaugh Letter was not admitted for its truth at the evidentiary hearing, so this Court is not being asked to determine whether the district court abused its discretion in admitting that document in open court and considering its contents without limitation. Rather, the district court simply ruled the letter *would be* admissible at some future date upon Mr. Charboneau's retrial and, therefore, it is "material" under *Brady* and its suppression by the State was prejudicial to Mr. Charboneau. For purposes of this ruling, it makes no difference whether 100 percent of the statements in the letter are admissible or only 90 percent. What is important is that the statements contradicting Tira's sworn testimony and evidencing a conspiracy to manipulate the evidence are admissible and, thus, the letter itself was material under *Brady* and its suppression was prejudicial.

The State next challenges the district court's ruling on its merits. It offers two arguments why, in its view, the statements in her letter did not tend to subject Tira to criminal liability, and two reasons why, in its view, a reasonable person would not have perceived a sufficient risk of criminal liability that she would not have made the statements unless they were true. Those arguments are as follows: (1) the State could not successfully prosecute Tira for perjury because the applicable statute of limitation had run; (2) because Tira was only fourteen years old when she testified falsely, she could not have been charged *criminally*, only adjudicated as a juvenile; (3) Tira (or any

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- Statements disclosing the Calamity Jane rifle was hidden/destroyed at the request of the prosecution; and
- Statements indicating the Arbaugh family had planted evidence in the potato cellar.

(*See* R. Ex. Vol. 1, pp.122-28.) The first four categories of statements tended to subject Tira to criminal liability for having testified falsely, and the last two categories tended to subject her to criminal liability for her involvement in the manipulation of the physical evidence.

reasonable person) would know the State would never charge one of its *own* witnesses with perjury for testifying falsely on behalf of the State; and (4) because it did not find the statements were actually true, the district court erred in ruling them admissible. (*See* App. Br., pp.37-41.)

The State fundamentally misconstrues the standard at issue. At their core, each of the foregoing arguments rest on the premise that statements do not meet the standard for admissibility under Rule 804(b)(3) unless the declarant knows to a near certainty she would actually be prosecuted, and convicted, of the crime of perjury. Rule 804(b)(3) is not so demanding though. It speaks in terms of the statement at issue "*tend[ing]* to subject declarant to civil or criminal liability," such that *a reasonable person* would not make it unless it was true. Because it is couched in terms of a *tendency*, the Rule does not require certain, or even near-certain, liability. And because it is based on a *reasonable person standard*, the Rule does not require the declarant to be a skilled attorney, capable of knowing whether she would have viable defenses to a perjury charge. All the Rule requires is awareness of a danger of civil or criminal liability such that a reasonable person in the declarant's shoes would not risk making the statement unless it was true. As the Court of Appeals has explained,

> The rationale of this exception is that "a man will not make a damaging statement against himself unless it is true." Report of Idaho State Bar Evidence Committee, C 804, at 21 (Supp. Dec. 31, 1984) (hereinafter Evidence Committee Report). "Under the theory that people do not lightly make statements that are damaging to their interests, [this] requirement provides the safeguard of special trustworthiness justifying most of the exceptions to the hearsay rule." Kenneth S. Broun et al., McCORMICK ON EVIDENCE § 316, at 335, 336 (4th ed. 1992).
>
> Rule 804(b)(3) requires that the statement be so decidedly against the declarant's interest "that a reasonable man in declarant's position would not have made the statement unless declarant believed it to be true." Even if the statement seems to be against the declarant's interest in

> some respect, if it appears that the declarant had some motive of self-interest when the statement was made which was likely to lead to misrepresentation of the facts, the statement should be excluded. *Id*., § 319 at 348. As the Evidence Committee Report explains,
>
> > *Another aspect of the "reasonable man" test is whether the declarant believed the statement was against his interest. If not, the rationale for the exception fails. Weinstein points out 'it is not the fact that the declaration is against interest but the awareness of the fact by the declarant which gives the statement significance.'...*
>
> Evidence Committee Report, *supra*, citing 4 J. Weinstein & M. Berger, WEINSTEIN'S EVIDENCE § 804(b)(3)[02], at 97 (Supp.1983).

Quinto v. Millwood Forest Products, Inc., 130 Idaho 162, 168 (Ct. App. 1997) (emphasis added).

With this clarification in mind, the weaknesses of the State's arguments are readily apparent.

(i) <u>The Fact That The Statute Of Limitation May Have Run On A Perjury Charge Is Irrelevant To The Question Of Whether Tira Would Have Perceived A Threat Of Civil Or Criminal Liability Such That She Reasonably Would Not Have Written Her Letter Had The Statements Contained Therein Not Been True</u>

The State claims the statements in the Tira Arbaugh Letter were not statements against Tira's penal interests because the statute of limitation for perjury had run by the time she made the statement in 1989. (App. Br., pp.37-38.) It reasons that when Tira testified in April 1985, the statute of limitation for perjury was only three years, but she did not write the Tira Arbaugh Letter until September 1989—more than four years later—so when she wrote the statement she was not at any risk of a criminal prosecution. (App. Br., pp.37-38.) Thus, the State's argument presumes Tira knew (or a reasonable person in Tira's situation would have known) the statute of limitation for perjury in Idaho required charges to be filed within three years.

The State's argument is not one that is in any way supported by Rule 804(b)(3). Indeed, the Alaska Court of Appeals explicitly rejected just such an argument under a virtually identical rule of evidence. *See Linton v. State*, 880 P.2d 123, 127 (Alaska Ct. App. 1994). The *Linton* Court rejected the notion that the question of whether a statement was against the declarant's penal interests is decided based on a technical determination of whether he could still be charged with a crime in light of the applicable statute of limitation. *See id*. Instead, it looked to the declarant's knowledge and considered what a reasonable person would do in the circumstances. *See id*. Specifically, it observed there was nothing in the record in that case to suggest the declarant "was aware of or influenced by the possible expiration of the statute of limitations," and, given the nature of the statement, a reasonable person in the declarant's situation would not have felt free to make the statement at issue—regardless of whether he was aware the statute of limitation may have expired—unless it was true. *Id*.

Likewise, in this case, there is no reason to believe Tira knew the statute of limitation had expired, or that this fact in any way motivated her decision to write the letter. When Tira testified at Mr. Charboneau's preliminary hearing, she was only fourteen years old. At that age, she undoubtedly understood on some level that it was important to tell the truth in court. (*See* R. Vol. 3, p.874 (Tira explaining her oath meant she was "not supposed to lie").) Nevertheless, to impress upon Tira the seriousness of the matter, Judge (now Justice) Burdick told Tira if she lied she "could be held accountable for perjury which is a criminal case," and she could be held accountable to God. (R. Vol. 3, p.874.) A few years later, when Tira wrote the letter recanting much of

her prior testimony, she was nineteen years old. (*See* R. Ex. Vol. 1, p.128.) At that age, even if she did not specifically remember Judge Burdick's admonishment, she was old enough that she should have known lying under oath is perjury, a crime. Indeed, as an adult, she is presumed to know as much. *See Wilson v. State*, 133 Idaho 874, 880 (Ct. App. 2000).

By the same token though, even if she was sophisticated enough to understand there is a statute of limitation for bringing charges for most crimes, there is no evidence she was particularly knowledgeable in the law so as to know the statute of limitation for perjury in Idaho was, at that time, three years. Likewise, there is no evidence she was in any way motivated to write her letter by the fact the statute of limitation had recently expired. In fact, the letter itself demonstrates just the opposite. In her letter, Tira explained she was motivated to write the letter in order to right her prior wrong, suggesting she felt guilty for having lied under oath. She wrote, in part, as follows:

> I believe you should know the truth about some of the things that happened the day my mom died [and] the truth about some of the things that I was told to say [and] told not to say. I believe my mom would want me to tell the truth about these things. None of this is easy for me . . . .
>
> It's just that I keep having bad dreams about all of this [and] I can't talk to anyone about this, even my sister. . . . Everybody . . . tell[s] me I should only do [and] say what the prosecutor [and] Mr. Carr tell me to do. But I believe you should know that some of the things in my statements to the police were not all true.

(R. Ex. Vol. 1, pp.122-23.)

> One other thing that bothers me sir is something Marc Haws the new prosecutor from Boise had told us to do. Mr. Haws has told us that we need to get rid of mom's Calamity Jane rifle. I don't understand why he would want us to do that . . . .

(R. Ex., Vol. 1, pp.126-27.)

> Everybody told me not to say anything about Uncle Jimmy throwing those things away in the crawl space. But [Judge] Becker I know that this is not right [and] I hope that I am doing the right thing by telling you these things.
>
> Can you please call or write to my grandpa [and] talk to him about this stuff? Because I know he is a good man [and] if he is doing anything bad or wrong it's only because he is so mad at Jamie [sic] for what happened to my mom.

(R. Ex. Vol. 1, pp.127-28.)

> [Judge] Becker, I am 19 years old now [and] I need to tell you the truth about the things in this letter.

(R. Ex. Vol. 1, p.128.) So, regardless of whether Tira technically could have been *convicted* of perjury based on the admissions she made in her letter in 1989, she certainly knew she was admitting to serious misconduct—misconduct which Judge Burdick had already warned her was a crime.

(ii) <u>The Fact That Tira Was A Minor When She Perjured Herself Is Irrelevant To The Question Of Whether She Would Have Perceived A Threat Of Civil Or Criminal Liability Such That She Reasonably Would Not Have Written Her Letter Had The Statements Contained Therein Not Been True</u>

The State also claims the statements in the Tira Arbaugh Letter were not statements against Tira's penal interests because, when she gave her perjured testimony in 1984 (preliminary hearing) and 1985 (trial) she was not an adult and, therefore, could not have been charged as such; she only could have been adjudicated as a juvenile. (App. Br., p.38.) This argument also fails. Initially, it fails because it suffers from the same flaw as the State's argument concerning the statute of limitation—it incorrectly assumes the relevant inquiry is whether Tira actually would have been convicted of a crime. As noted, what matters is whether Tira (or a reasonable person in her shoes) would have believed she was subject to criminal liability, such that she would

not have made the statements in the letter unless they were true. Thus, the State's argument is misplaced from the outset. It also fails as a matter of law.

Initially, the State's argument assumes Tira could only have been adjudicated as a juvenile. That is not true though. Tira was fourteen years old when she committed perjury (*see* 16339 Trial Tr., p.1234, Ls.5-6) in Mr. Charboneau's case, so she could have been tried as an adult. *See* I.C. § 16-1806(a) (1984). But even if we assume Tira would not have been tried as an adult, and instead would have been adjudicated as a juvenile, the State's argument still fails because a juvenile adjudication still tends to subject people to "civil or criminal liability" within the meaning of Rule 804(b)(3).

While Idaho still characterizes juvenile proceedings as civil cases,[37] the "civil" label should not be relevant to the question of whether a given statement is admissible under the hearsay exception for statements against interest. Clearly, the underlying premise of that hearsay exception is that statements that are likely to lead to the declarant's punishment are not typically made unless they are true. And, while juvenile adjudications may not be labeled "criminal" cases, they often lead to the exact same type of punishment—a loss of liberty. *See State v. Gibbs*, 94 Idaho 908, 912-13 (1972) (in the context of evaluating whether double jeopardy protections exist with respect to juvenile adjudications, discussing the question of whether juvenile proceedings are criminal or noncriminal in nature and, although declining to answer that question, holding that where there is a potential for a loss of liberty, jeopardy attaches). *See also Application of Gault*, 387 U.S. 1 (1967) (discussing the history and theoretical underpinnings of having juvenile justice systems distinct from adult criminal justice

[37] *See Beale v. Department of Labor*, 139 Idaho 356, 359 n.3 (2003); *Hewlett v. Probate Court of Clearwater County*, 66 Idaho 690, 695 (1946).

systems; explaining the reality that, despite good intentions underlying a juvenile system without the formality of the adult criminal system, juvenile cases in many respects differ from adult criminal cases *only* insofar as juveniles are deprived of basic procedural safeguards before suffering similarly harsh punishments; and holding juveniles are entitled to due process under the Fourteenth Amendment). Indeed, in *Gault*, the United States Supreme Court explicitly observed that attaching the "civil" label to juvenile cases is, in many ways, little more than semantics:

> It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to "criminal" involvement. In the first place, juvenile proceedings to determine "delinquency," which may lead to commitment to a state institution, must be regarded as "criminal" for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the "civil" label-of-convenience which has been attached to juvenile proceedings. . . . For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil."

Gault, 387 U.S. at 49-50. Thus, despite the "civil" label attached to the proceedings that could have been brought against Tira for her perjured testimony, Mr. Charboneau submits those proceedings fell within the "criminal liability" language of Rule 804(b)(3). *See, e.g., In the Matter of King*, 2002 WL 982418, *4 (Ohio Ct. App. May 9, 2002) (unpublished) (finding no error in trial court's decision to admit a hearsay statement of a juvenile under the "statement against interest" hearsay exception where, although he faced only a juvenile adjudication, the declarant knew he was under investigation by the police for what was essentially a criminal offense).

But even if the "civil" label attached to juvenile proceedings brought Tira's potential sanctions outside the realm of the "criminal liability" language of Rule 804(b)(3), Tira's statements were still statements against interest within the meaning of

the Rule. That is because Rule 804(b)(3) is not exclusively couched in terms of *criminal* liability; it speaks in terms of "*civil or criminal* liability." Thus, even if this Court accepts the State's argument, the district court still correctly ruled Tira's statements admissible. If a juvenile matter was brought against Tira, she still would have faced liability within the meaning of Rule 804(b)(3) regardless of whether that liability would be considered civil or criminal. *See Robinson v. State*, 11 P.3d 361, 369-70 (Wyo. 2000) (finding no error in trial court's decision to admit a hearsay statement of a juvenile under the "statement against interest" hearsay exception where the juvenile would have known the information contained in the statement could have led to delinquency proceedings being brought against her).

(iii) The Proponent Of Hearsay Evidence Offered Under Rule 803(b)(3) Need Not Prove That The Declarant Actually Would Have Been Charged With, Or Convicted Of, A Crime

Next, the State argues that even if Tira faced the possibility of criminal liability for her perjured testimony[38] a reasonable person in her shoes would not actually believe she would be prosecuted for said perjury. (App. Br., pp.39, 41.) This argument is based on two premises—first, the State would never charge a witness with perjury unless it could prove its case and obtain a conviction[39]; second, the State would never abandon

[38] The State does not address the prospect of civil liability; however, presumably, the State's argument would be the same if this Court determined Tira would have faced "civil" juvenile liability.

[39] It is misleading for the State to suggest a prosecutor would only bring a charge against Tira if it was clear there was sufficient evidence for a jury to find guilt beyond a reasonable doubt. Given that some charges are dismissed following preliminary hearings and that some defendants are acquitted following trial, such cannot possibly be the standard. Indeed, the current Idaho Rules of Professional Conduct require only that a prosecutor believe a charge is supported by *probable cause* before bringing that charge. I.R.P.C. 3.8(a).

its theory of Mr. Charboneau's guilt and charge one of its *own* witnesses with perjury (*see* App. Br., pp.39, 41)—both of which are flawed.

First, there is nothing about Rule 804(b)(3) which requires the proponent of the hearsay statements to first prove the truth of those statements in order to show the declarant would actually be charged and convicted based on the making of those statements.[40] Rather, as noted, the question is whether the statements "*tended* to subject declarant to civil or criminal liability." I.R.E. 804(b)(3) (emphasis added). And certainly an admission of perjury has such a *tendency*. Further, and as has also already been noted, the question is not whether the declarant *actually* could or would have been convicted, but whether she would have *believed* there was such a risk of liability such that she would not have made the statements if they were not true.

Second, the notion that Tira should have known the State would never have charged her with perjury *because she was a government witness* and to undermine her testimony would be to undermine its case against Mr. Charboneau is to impute to Tira a level of cynicism akin to that of a jaded criminal defense attorney (which Tira certainly was not). A prosecutor holds a special position in the criminal justice system. He is "a public officer, acting in a quasi judicial capacity. It is his duty to use all fair, honorable, reasonable, and lawful means to secure the conviction of the guilty who are or may be

[40] As the State correctly notes (*see* App. Br., p.39), the district court declined to decide whether the allegations in the Tira Arbaugh Letter were true (*see* R. Vol. 4, pp.533, 545, 578 n.28). It opined that that was a job for a jury. (R. Vol. 4, p.578 n.28.) This approach was absolutely correct under *State v. Meister*, where the Idaho Supreme Court, in discussing the standards of Rule 804(b)(3), observed it is the court's job to weigh the trustworthiness of the hearsay statement at issue, not its truth: "This test is desirable because it prevents the trial judge from substituting himself or herself as the ultimate fact-finder. If the statements clearly establish trustworthiness through corroborating evidence it is within the province of the jury to weigh the testimony and determine where the truth lies." 148 Idaho 236, 243 (2009).

indicted in the courts of his judicial circuit." *State v. Irwin*, 9 Idaho 35, _, 71 P. 608, 610 (1903) (quoting *Holder v. State*, 25 S.W. 279, 281 (1894)). In other words, a prosecuting attorney is expected to be more than a zealous advocate who seeks (or seeks to protect) convictions at all cost; he should seek justice through fair and honorable means. *Cf. Irwin*, 71 P. at 610 (discussing prosecutorial misconduct and making it clear prosecutors may not adopt a win-at-all-costs mentality). Indeed, the Idaho Rules of Professional Conduct impose upon prosecutors an obligation to attempt to remedy convictions for which there is clear and convincing evidence of innocence. I.R.P.C. 3.8(h). Although the Idaho Rules of Professional Conduct were not in effect in 1989 (and most likely would not have been known to Tira even if they were), surely Tira would have recognized the powerful, privileged, prestigious position occupied by the local prosecutor, and would have believed—as most people would—that the prosecutor would have been concerned about justice, not just shielding Mr. Charboneau's conviction from challenge. Thus, a reasonable person in Tira's shoes would have expected to suffer consequences for admitting to having committed perjury in Mr. Charboneau's case and, thus, she would not have written her letter had its contents not been true.

(iv) <u>The District Court Correctly Evaluated The Statements At Issue In Light Of The Facts Of This Case</u>

Finally, expanding on its claim that Tira's admissions of perjury were not statements that tended to subject her to civil or criminal liability because Mr. Charboneau did not *prove* Tira was guilty of the crime of perjury, the State argues "[t]he district court[ ] determin[ed] that any statement recanting prior testimony is sufficient to meet this reasonable man standard" and its "determination" "is contrary to

the analysis of every court that has reviewed the reliability of such statements." (App. Br., p.39; *see also* App. Br., pp.40-41 (claiming the district court "reason[ed] that the declaration is trustworthy because it is inconsistent with prior sworn testimony" and arguing such a conclusion is "illogical and contrary to applicable legal standards").) Supposedly in support of this argument, the State then string-cites a series of cases which support the notion that court's have traditionally been skeptical of witness recantations.

There are a host of errors in this short argument from the State. First, and most fundamentally, the State misrepresents the district court's ruling. In rejecting the State's argument that it had to find Tira actually committed the crime of perjury in order to find the statements in her letter tended to subject her to civil or criminal liability, the district court relied upon the language of Rule 804(b)(3) and concluded that, under the facts of this case (*i.e.*, Tira had specifically been told by Judge Burdick that lying under oath would subject her to criminal liability), when Tira called into question her own statements under oath, she was making statements that "so far tended to subject her to criminal liability that a reasonable person in her position would not have made the statements in the letter unless she believed them to be true." (R. Vol. 4, p.533.) This was the correct analysis under the second prong of the Rule 804(b)(3) standard. At this point in its analysis, the district court simply did not make a determination as to the "reliability" of the Tira Arbaugh Letter, as the State now claims. Indeed, evaluating the overall reliability of the Tira Arbaugh Letter was the point of the *entire* analysis under Rule 804(b)(3) and it undoubtedly encompassed the third prong of the Rule 804(b)(3) standard (whether the "corroborating circumstances clearly indicate the trustworthiness

of the statement") as well. Thus, after concluding the letter contained statements that "tended to subject declarant to civil or criminal liability" under the second prong of the standard (*see* R. Vol. 4, pp.533-34), the district court immediately went on to analyze the third prong in depth (*see* R. Vol. 4, pp.534-45). It was only after that analysis was completed that the district court could be said to have implicitly concluded the Tira Arbaugh Letter was "reliable":

> Overall, one would be hard pressed to find a more worthy example of an exhibit carrying more circumstantial guarantees of trustworthiness than the Tira Arbaugh letter. Now is not the time to decide whether the assertions in the letter are true or not. The Court's conclusion is that the Arbaugh letter meets all of the requirements for admissibility pursuant to IRE 804(b)(3).

(R. Vol. 4, p.545.)

Second, the State uses its misrepresentation of the district court's ruling in furtherance of a straw-man argument. Having falsely claimed the district court made a sweeping statement about how any statement recanting prior testimony is automatically "reliable" or "trustworthy" (and therefore admissible, presumably), the State proceeds to try to knock down its straw-man by arguing such a sweeping statement is contrary to "the analysis of every court" that has reviewed the issue. (*See* App. Br., pp.39-41.) Since this entire argument is based upon a false premise, it fails.

Third, the State's argument misapplies the precedent cited. In support of its claim that the district court erred in finding statements recanting prior testimony automatically reliable, it cites a host of cases recognizing that courts have traditionally been skeptical of witness recantations. (*See* App. Br., pp.39-41.) However, this is a fundamentally different issue than whether a statement essentially confessing to perjury is a statement "tend[ing] to subject declarant to civil or criminal liability." It is undisputed that courts

have traditionally viewed recantations with skepticism. Likewise, Mr. Charboneau readily concedes courts have traditionally viewed third-party confessions with skepticism. But Rule 804(b)(3) already *assumes* recantations and third-party confessions are unreliable, as it includes a "corroboration" requirement for "statement[s] tending to expose the declarant to criminal liability and offered to exculpate the accused . . . ." As the *Meister* Court explained (*see* note 40, *supra*), the aim of this corroboration requirement is to ensure that those statements which are typically viewed with skepticism actually are reliable or trustworthy. Thus, the fact that, in a vacuum, the Tira Arbaugh Letter would be viewed skeptically, has nothing whatsoever to do with whether it contained statements tending to expose Tira to civil or criminal liability. And, as is mentioned above (and discussed in greater detail below), the district court went on to evaluate the corroborating circumstances and find they clearly indicated the trustworthiness of the statements in the letter.

b) Corroborating Circumstances Clearly Indicate The Trustworthiness Of The Statements Made In The Tira Arbaugh Letter

The next step in the analysis under Rule 804(b)(3) requires a determination of whether "corroborating circumstances clearly indicate the trustworthiness of the statement." This district court did this, identifying ten[41] circumstantial guarantees of trustworthiness and discussing them in detail:

- Tira's mental state, as disclosed by the letter itself, suggests she was motivated to come forward with the truth because she felt guilty over her part in framing Mr. Charboneau. Further, nothing in the letter suggests she was seeking the

[41] In summarizing the district court's analysis, Mr. Charboneau has grouped the district court's circumstantial guarantees of trustworthiness slightly differently than the district court did; however, the information is the same.

limelight; to the contrary, her own statements suggest she was a reluctant whistleblower.

- Tira was an adolescent who had no discernible motive to lie for Mr. Charboneau; if anything, she had a personal stake in doing what she could to keep Mr. Charboneau in prison (especially if she felt he murdered Ms. Arabaugh) because she was still grieving over the loss of her mother.
- Tira's statements were not offered in exchange for, or given with the expectation of receiving, anything in return.
- Tira's statements were not over-the-top in their exculpatory effect, as one would expect if Tira had concocted a story aimed at winning Mr. Charboneau's release from prison.
- Some of Tira's statements are corroborated. For example, in her letter, she alleged Officer Larry Webb spoke to her a few days after Ms. Arbaugh died, asking that she add to her statement the false claim that she heard a second round of shots. This is consistent with the statement itself, which clearly shows the statement about a second round of shots was added after-the-fact. Also, she alleged that when she and Tiffnie were behind the sheep wagon, Tiffnie had a rifle (as opposed to the pistol Tiffnie testified she had). This is consistent with the original police reports, which the prosecution had tried to claim were in error.
- Tira's "letter appears to be the product of a rational mind," in that it is neat and logical, it flows, it makes sense, and it reflects a good memory of relevant events.
- The allegations in Tira's letter are consistent with those in other statements attributed to Tira over the years.

- Tira's letter explicitly invited further inquiry into her claims—for example, by specifically identifying those involved in manipulating the evidence, by explaining precisely where the missing rifle was buried, and by asking Judge Becker to call her grandfather—which is not typically what one would do if fabricating evidence.
- Tira's letter implicated Marc Haws, but little could Tira have known when she wrote that letter in 1989 that Mr. Haws had a history of the same type of misconduct.[42]
- State actors went to great lengths to intercept and conceal the Tira Arbaugh Letter. Further, the Shedd Note suggests Mr. Haws was in on the conspiracy to hide the Tira Arbaugh Letter from Mr. Charboneau. The fact that State actors were so intent upon hiding this evidence suggests they feared the consequences of it coming to light, which thereby suggests it is true.

(R. Vol. 4, pp.535-43.)

On appeal, it is the State's contention that there are *no* corroborating circumstances clearly indicating the trustworthiness of the statements in the Tira Arbaugh Letter. (App. Br., pp.41-43.) The State points out (App. Br., p.41) that in *Meister* the Idaho Supreme Court held that in determining whether "the corroboration requirement of Rule 804(b)(3) has been satisfied, [the court] should be limited to asking *whether evidence in the record corroborating and contradicting the declarant's statement would permit a reasonable person to believe that the statement could be true*." 148 Idaho at 242 (quoting *State v. LaGrand*, 734 P.2d 563, 570 (1987)) (emphasis in *Meister*). And the State acknowledges the *Meister* Court adopted from *LaGrand* a

[42] The district court's references to Mr. Haws' misconduct in Donald Paradis' case is discussed in much greater detail in Part IV, *infra*.

seven-factor test for evaluating the trustworthiness of the statement(s) in question. (App. Br., p.41.) However, at no point does the State attempt to apply the seven-factored *Meister* standard.[43] (*See* App. Br., pp.41-43). Instead, the State argues that because Tira's statements in her letter conflict with her trial testimony, as well as certain other evidence, all of which the State characterizes as "overwhelming" evidence of guilt,[44] the statements in the Tira Arbaugh Letter cannot reasonably be believed to be true. (App. Br., p.42.) It also argues the district court's "trustworthiness" evaluation was completely off-base because it focused on the credibility of Tira's statements, not whether those statements were consistent with the evidence. (App. Br., pp.42-43.)

The State has misapplied *Meister*. While the State repeatedly quotes the *Meister*/*LaGrand* language regarding "evidence in the record corroborating and

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[43] Because the State has failed to apply the seven-factored *Meister* test to the facts at issue in this case, it has waived any argument that the statements in the Tira Arbaugh Letter were not sufficiently corroborated to be deemed "trustworthy" under Rule 804(b)(3). Idaho Appellate Rule 35(a)(6) requires that an appellant's brief contain "the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon." Because the State's brief failed to comply with this requirement, the State has waived the issue cited on appeal. *State v. Zichko*, 129 Idaho 259, 263 (1996); *see also Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 745 (2000) (explaining that although appellants and respondents face the same briefing requirements under Idaho Appellate Rules 35(a) and (b), respectively, only the appellant is deemed to waive an issue inadequately briefed because it is the appellant's burden to establish the lower court erred).

[44] The State does not discuss this supposedly-overwhelming evidence. Rather, it simply parenthetically asserts such evidence was "set forth above." (App. Br., p.42.) As it is neither Mr. Charboneau nor this Court's burden to guess what evidence the State is referring to, or to make an argument on the State's behalf, the State has failed to support its contention with sufficient argument and, therefore, has waived its "overwhelming evidence" argument. *Zichko*, 129 Idaho at 263. This is of little importance though because, for the reasons set forth below, the *Meister* test does not call for an inquiry of whether a court believes a defendant is overwhelmingly guilty; rather, it delves into the circumstances tending to show whether the statement is reliable, including the circumstances surrounding its making.

contradicting the declarant's statement," because, on its face, that language would appear to support the argument the State wishes to make (*i.e.*, because the Tira Arbaugh Letter is inconsistent with the State's evidence it is not trustworthy and, therefore, inadmissible), the State utterly ignores the seven-factor test which gives the quoted language meaning. *See Meister*, 148 Idaho at 242 ("This Court adopts Arizona's standard and seven factor test for the corroboration requirement pursuant to I.R.E. 804(b)(3)."). When one considers the seven-factored test, it becomes readily apparent that the above-quoted language repeatedly invoked by the State does not call for an examination of whether the statement(s) in question are consistent with the State's evidence, so much as an examination of the circumstances under which the statement(s) in question was/were made. *Id.* at 242 & n.7.

The seven factors adopted by the Idaho Supreme Court in *Meister* are as follows:

> (1) whether the declarant is unavailable; (2) whether the statement is against the declarant's interest; (3) whether corroborating circumstances exist which clearly indicate the trustworthiness of the exculpatory statement, taking into account contradictory evidence, the relationship between the declarant and the listener, and the relationship between the declarant and the defendant; (4) whether the declarant has issued the statement multiple times; (5) whether a significant amount of time has passed between the incident and the statement; (6) whether the declarant will benefit from making the statement; and (7) whether the psychological and physical surroundings could affect the statement.

Meister, 148 Idaho 242 n.7. Applying these factors to the Tira Arabaugh Letter, it is readily apparent that the district court did not abuse its discretion in finding the statements in that letter to be sufficiently trustworthy as to be admissible. Below, each factor is discussed in turn.[45]

[45] Since the first two factors—the unavailability of the declarant and fact that the statement was against the declarant's interest—were discussed above, they are not elaborated upon herein. Thus, Mr. Charboneau's analysis begins with the third factor,

(i) Corroborating And Contradictory Evidence

The only one of the seven trustworthiness factors the State addresses in its Appellant's Brief is the first one—the degree to which the statement is corroborated or contradicted by the other evidence. (*See* App. Br., p.42.) And on this point, the State's argument is of no value; it simply asserts as follows:

> First, contradictory evidence is legion. Claims in Exhibit 14 that Tiffnie had a second rifle and that there was not a second round of shots are directly contrary to Tira's preliminary hearing testimony, Tira's trial testimony, Tiffnie's preliminary hearing testimony, Tiffnie's trial testimony, the physical evidence of a single gun as the murder weapon, and even Charboneau's testimony (all as set forth above). No reasonable person could believe the recitation of events in Exhibit 14 is true in the face of nearly universal and overwhelming evidence.

(App. Br., p.42.) The State fails to support this vague, conclusory argument with any citations to the record or any explanation of what "set forth above" means. (*See* App. Br., p.42.)

Assuming the State's argument is sufficient for this Court to even consider (*see* notes 43 & 44, *supra*), it is not sufficient to show an abuse of discretion. While the Tira Arbaugh Letter is quite lengthy (seven pages) and contains a myriad of statements against interest, as noted (*see* note 36, *supra*), those statements tend to fall into six categories:

- Statements revealing Mr. Charboneau was a known guest at the Arbaugh home, and he and Ms. Arbaugh gave the nylon Remington to Tira;
- Statements indicating the involvement of a second rifle—"Calamity Jane";
- Statements placing Calamity Jane in Ms. Arbaugh's hands, the nylon Remington in Tiffnie's hand, and the Ruger pistol in Tira's hands;

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which actually has three parts which Mr. Charboneau has broken out for the ease of the Court.

- Statements admitting there was no second round of shots;
- Statements disclosing that Calamity Jane was hidden/destroyed at the prosecutor's request; and
- Statements indicating the Arbaugh family planted evidence.

(*See* R. Ex. Vol. 1, pp.122-28.) Each of these categories of statements is supported by at least some corroborating evidence, and in many cases the corroborating evidence is quite compelling.

Tira's statements concerning Mr. Charboneau's being at the Arbaugh home on the morning of July 1, 1984, and presenting Tira with a .22 rifle as a graduation gift, are corroborated by evidence showing that rifle was purchased with the intent that it be given to Tira as a gift. Although the evidence on this point is not totally consistent, the common thread is that Mr. Charboneau (perhaps accompanied by Ms. Arbaugh) bought the nylon Remington at a hardware store in Hagerman a few days earlier with the intent of giving that gun to Tira as a gift. At Mr. Charboneau's trial, the jury heard from the proprietors of the hardware store in Hagerman, Richard and Rosela Myers. (*See* R. Vol. 3, pp.483-88 (Rosela Myers), pp.489-99 (Richard Myers).) Ms. Myers testified that on June 28, 1984, Mr. Charboneau purchased a gun from their store, and he also had a second package and some wrapping paper with him that day. (R. Vol. 3, p.484; Trial Tr., p.535, L.2 – p.538, L.4, p.546, L.11 – p.548, L.24, p.549, L.7 – p.550, L.21.) Her husband confirmed that information, but also added that he thought Mr. Charboneau mentioned he might give the Remington to his daughter as a gift. (*See* R. Vol. 3, p.493-94; Trial Tr., p.554, L.12 – p.555, L.15, p.560, L.7 – p.562, L.15, p.563, Ls.16-20, p.571, Ls.8-20, p.573, L.16 – p.574, L.6, p.574, L.13 – p.575, L.8.) Since Mr. Charboneau's

trial, additional evidence has surfaced further corroborating Tira's statement that Mr. Charboneau and Ms. Arbaugh presented her with a .22 rifle as a gift on the morning of July 1, 1984. Elizabeth Miles, a friend of Ms. Arbaugh, prepared an affidavit in 2009 indicating that during the week prior to Ms. Arbaugh's death, she had run into Mr. Charboneau and Ms. Arbaugh in a bar in Hagerman. (R. Vol. 1, pp.177-78.) According to Ms. Miles:

> We all played a few games of pool and drank a few beers. Then Marilyn told me that she was looking for a .22 rifle to buy for a gift for her youngest daughter Tira. I suggest[ed] that they try the local hardware store there in Hagerman. Later that same day we all went to the hardware store together, Marilyn, Jaime [sic], Sandy and myself.
>
> I was with Marilyn when she asked the store [proprietor] if he had any .22 rifles that would be suitable for a teenage girl to learn to shoot with.
>
> I remember Marilyn handling a rifle that the man had given to her and I also remember Marilyn asking the man if he had any gift wrapping paper.
>
> I also remember that Marilyn got money from Jaime [sic]. While we were in the store, I saw give [sic] money to the man.
>
> I did not see Jaime [sic] handle a rifle or even speak to the man in the hardware store.

(R. Vol. 1, p.177.) Although this affidavit is inconsistent with the trial testimony of Mr. and Mrs. Myers insofar as it placed Ms. Arbaugh at the hardware store for the purchase of the gun,[46] it is consistent to the extent it asserts the nylon Remington was intended as a gift for Tira.

[46] Ms. Miles' statement about Ms. Arbaugh being present for the gun purchase is not implausible. In 1984, one of the State's witnesses, Kathy Stewart, testified she picked Mr. Charboneau up near the rim of the Bruneau Canyon and gave him a ride to a bar in Hagerman, where Mr. Charboneau indicated he would call Ms. Arbaugh and ask her to pick him up. (*See* R. Vol. 3, pp.805-07, 811.)

Tira's statements concerning the presence of a second .22 rifle known as "Calamity Jane," are also corroborated. A month after Ms. Arbaugh was shot, in August 1984, Mr. Charboneau wrote his counsel inquiring about Ms. Arbaugh's .22 rifle with "Calamity Jane" inscribed on the stock. (*See* R. Vol. 1, p.189; *see also* 16339 Sent. Tr., p.123, Ls.5-10 (Mr. Charboneau testifying at his original sentencing that Ms. Arbaugh owned a rifle).) Likewise, in a 2006 letter to his counsel, Mr. Charboneau again referenced the Calamity Jane rifle, asserting that rifle was the one he used against Ms. Arbaugh back on July 1, 1984. (R. Vol. 1, pp.69-71.) And the fact that Ms. Arbaugh owned the Calamity Jane rifle was corroborated by multiple statements of Pinto Bennett (R. Vol. 4, pp.215, 216 (deposition testimony), p.229 (2011 affidavit)) and Betsy Charboneau (R. Vol. 4, pp.279, 290, 297.)[47]

Tira's statements concerning who had which guns are corroborated as well. The Tira Arbaugh Letter asserts Ms. Arbaugh had taken the Calamity Jane rifle with her to the barn, and that after Tiffnie heard shots she ran outside with the new nylon Remington, and handed the Ruger pistol to Tira. (R. Ex., pp.125-26.) This account is consistent with Mr. Charboneau's 2006 letter to his counsel, in which he asserted he wrestled the Calamity Jane rifle from Ms. Arbaugh's hands while the two of them were in the barn. (R. Vol. 1, pp.69-71.) It is also consistent with the original probable cause affidavit from 1984, which indicated Tiffnie told police that after hearing shots, she ran

[47] A police report from an unrelated incident on February 1984 (nearly five months prior to Ms. Arbaugh's death) references the fact that Ms. Arbaugh *owned* a rifle, but it was at that time in the possession of a neighbor. (16339 R., p.277.)

outside with "her mother's 22 rifle" (R. Vol. 3, p.392), as opposed to a "pistol," which was what she later testified to (*see, e.g.*, R. Vol. 3, p.682).[48]

Tira's statements concerning a lack of a second round of shots is corroborated by three things. First, Tira's initial written statement was clearly and indisputably altered after the fact to note the alleged second round of shots. (*See* R. Vol. 1, pp.170-72.) That statement initially ended approximately two-thirds of the way down the second page, as evidenced by the fact that the text terminated and Tira crossed out (with a large "X") the blank space following the text; however, this second page was then followed by a third page containing a single sentence: "While we were dressing we heard about 8 more shots." (*See* R. Vol. 1, p.171.) That sentence was then followed by a second, much larger "X" out. (*See* R. Vol. 1, p.171.) In his deposition, former Chief Deputy Larry Webb explained he had witnesses "X" out blank spaces in their statements so "nobody else can add anything in the statements." (R. Vol. 3, p.264.) Thus, Chief Deputy Webb opined Tira's statement had been completed on the second page, and she added the sentence about the supposed second round of shots after the fact. (R. Vol. 3, p.264.) This is wholly consistent with Tira's contention in her letter to Judge Becker that Chief Deputy Webb had her write a new statement claiming she had heard "6 or 8 more shots," even though that was not true. (R. Ex. Vol. 1, p.126.)

Second, Tira had previously told Betsy Charboneau the prosecution had asked her to give false testimony. (*See, e.g.,* 29042 R., p.53 (Betsy Charboneau's 2002 affidavit asserting Tira told her that her statements/testimony had been coached by the

[48] At Mr. Charboneau's trial, Tiffnie admitted she may have told the police she was carrying a .22 rifle; however, she insisted that if she had said that, it was a mistake. (R. Vol. 2, pp.123-24.)

original prosecutor (Dannis Adamson), the special prosecutor (Mr. Haws), and a sheriff's deputy (Larry Webb).)

Third, Tiffnie and Tira could not get their stories straight on the supposed second round of shots. Tiffnie testified as follows: she heard a round of shots and her mother's scream; she grabbed her mother's Ruger pistol and ran outside to find her mother injured but alive and conscious; she went back inside to get Tira and get dressed; while the girls were inside the house Tiffnie heard a second round of shots; she and Tira went back outside behind the sheep wagon where Tiffnie accidentally discharged the Ruger pistol; she returned to the house to put the Ruger away; and finally she went back outside and into the barn to find her mother unconscious and likely dead. (R. Vol. 1, pp.759-73 (preliminary hearing), pp.909-17 (trial).) Whereas Tiffnie claimed the girls heard the second round of shots after Tiffnie returned from her first trip outside, Tira testified the girls heard the second round of shots after Tiffnie's return from her second trip outside. Specifically, Tira testified as follows: she heard her mother scream (although she did not hear any gunshots at that time) and Tiffnie run out of the house; Tiffnie came back into house and told her their mother had been shot by Mr. Charboneau; the girls got dressed and went out to the sheep wagon for a short time; the girls then returned to the house to change clothes, during which time they heard a second round of shots; they returned to the sheep wagon a second time, then proceeded into the barn where they found their mother unconscious.[49] (R. Vol. 1,

[49] Tira's testimony was also internally inconsistent concerning the question of when Tiffnie supposedly discharged the Ruger. At the preliminary hearing, Tira testified Tiffnie fired the Ruger during Tiffnie's third trip outside (*see* R. Vol. 1, p.825, L.9 – p.829, L.3); however, at trial, she testified Tiffnie fired the Ruger during Tiffnie's *second* trip outside

p.823, L.7 – p.829, L.3, p.852, L.16 – p.853, L.19 (preliminary hearing); R. Vol. 2, p.79, L.17 – p.86, L.17 (trial).)

Tira's statements concerning the prosecutor's request to "get rid of mom's Calamity Jane rifle" is also corroborated. On its most basic level, it is corroborated by the fact that Pinto Bennett specifically recalled Ms. Arbaugh possessing such a rifle. (R. Vol. 4, pp.215, 216, 229.) But it is also corroborated by Tira's own prior statements to Betsy Charboneau indicating Mr. Haws had asked the Arbaugh family to get rid of Calamity Jane. (R. Vol. 4, pp.248, 281, 285-86, 290, 293-94, 298; *see also* 29042 R., p.53 ("Tira told me that she had been instructed to say that the only gun that she could remember seeing that day was the rifle.").)

Finally, Tira's statements concerning the Arbaugh family planting evidence in the crawl space at the back of the potato cellar are corroborated as well. On July 11, 1984, ten days after Ms. Arbaugh died, police received a call from the Arbaugh family indicating they had certain property of Ms. Arbaugh which they claimed they found in the tack room of the barn and stashed in the potato cellar. (*See* R. Vol. 3, pp.406-09; Trial Tr., p.980, L.12 – p.987, L.3, p.1012, L.11 – p.1013, L.18.) After that property was turned over to the responding officer, Bart Chisham (Tiffnie's boyfriend) told the officer he had "a hunch" about a vent area of the potato cellar; Mr. Chisham offered to search that vent area; and he quickly came back to report he found a knapsack in the vent area. (Trial Tr., p.991, L.8 – p.998, L.7.) Among other things, that knapsack contained Ms. Arbaugh's identification and a good number of .22 shells. (Trial Tr., p.995, Ls.9-10, p.996, Ls.10-11.) The timing and manner of the discovery of this evidence is highly

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(*see* R. Vol. 2, p.80, L.22 – p.82, L.12). The latter story was consistent with Tiffnie's version of events; the former version was not.

suggestive of its having been planted by the victim's family, just as Tira alleged in her letter to Judge Becker. First, the evidence was turned over to police *ten days* after Ms. Arbaugh died. Presumably, the police had already fully searched the premises, especially the "tack room," which was simply an alcove in the same barn in which Ms. Arbaugh was killed. (*See* R. Vol. 1, pp.929-30.) The fact that the evidence was not sooner discovered suggests it was not there when the police searched the barn. Second, the circumstances under which the evidence was found were highly suspect. The family was at the Arbaugh residence to pack Ms. Arbaugh and the girls' things. (*See* 16339 R., pp.252, 254, 256.) If so, it seems highly unlikely that James Arbaugh and Bart Chisham were using that time to play detective and sleuth around the potato cellar. Further, Mr. Chisham's unsupported "hunch" that there would be evidence stashed in a vent in the potato cellar (which turned out to be spot-on), his anxiousness to search that vent, and his personally volunteering to start that search (rather than leaving it up to the professional, Deputy Balzer), all suggested he knew there was evidence stashed in the vent, and the only way he could have known that was if he stashed it there or watched someone else (perhaps James Arbaugh) stash it there.

In sum, Tira's statements in her letter are well-corroborated by other evidence. And, while they are certainly contradicted by much of the trial evidence, that is to be expected where the statements at issue recant sworn testimony and expose the misconduct in the manipulation of testimony, production of false evidence, and destruction of exculpatory evidence. So, on the whole, the first *Meister* factor weighs in favor of finding the Tira Arbaugh Letter sufficiently trustworthy to warrant its admission.

(ii) Relationship Between The Declarant And The Listener

In *LaGrand*, the Arizona Supreme Court noted the relationship between the declarant and the listener might provide clues as to the reliability of the statement. *LaGrand*, 734 P.2d at 569. It explained a statement made to law enforcement "may be made in an attempt to curry favor and obtain a reduced sentence," or it may "be a product of coercion or force," and a statement made to a friend or family member may be more reliable. *Id*.

In this case, the statements in the Tira Arbaugh Letter were not directed at Tira's friends or family; they were directed at the judge who presided over Mr. Charboneau's trial—Judge Becker. (*See* R. Ex. Vol. 1, pp.122-28.) However, that does not make them any less reliable. This is not the normal "statement against interest" scenario where the declarant is a co-defendant or an alternative perpetrator. Here, as the district court pointed out (R. Vol. 4, pp.535-36), Tira had absolutely nothing to gain by sending her letter to Judge Becker. As the letter itself points out, Tira was afraid that by writing the judge directly, she may have been doing something improper. (*See* R. Ex. Vol. 1, p.122.) Further, Tira must have known her letter would "earn her ridicule and contempt from law enforcement" (R. Vol. 4, p.536)—the same people who were tasked with finding justice for the Arbaugh family. Finally, Tira seemed to recognize her letter "would earn her the scorn of her family, with no apparent benefit to her except to declare the truth and lift a great burden from her own conscience." (R. Vol. 4, p.536; *see also* R. Ex. Vol. 1, pp.122-23 (Tira explaining she could not talk to Tiffnie about the contents of her letter, and stating her family told her to only say and do what the prosecutor told her).)

Thus, there is no chance she penned that letter in an effort to curry favor with the court, anyone in law enforcement, or anyone else.

Further, there is no reason to believe Tira's letter was a product of pressure or coercion from Judge Becker. First, there is no evidence Judge Becker ever knew of the Tira Arbaugh Letter—either before it was written or after (*see* R. Vol. 3, p.134)—and it defies belief that Judge Becker would have had *ex parte* contact with a witness in order to influence her testimony shortly before the case came back to him for re-sentencing. Second, the letter itself reveals Tira wrote to Judge Becker while "in Bruneau, Idaho for a cowboy benefit [and] street dance," and after having discussed the matter with a long-time family friend, Pinto Bennett. (R. Ex. Vol. 1, p.128.) Such circumstances are in no way coercive.

Although Tira's letter was directed to a government official, as opposed to a close friend or family member, the unique circumstances of this case demonstrate that this consideration weighs in favor of the district court's conclusion that the statements in the letter were reliable.

(iii) Relationship Between The Declarant And The Defendant

The *LaGrand* Court explained the relationship between the declarant and the defendant can be an important factor in the reliability analysis because "[a] strong emotional or family bond between the declarant and defendant may render the declarant's statement less trustworthy because such a bond may motivate the declarant to fabricate his story." *LaGrand*, 734 P.2d 563, 569-70.

Here, while Mr. Charboneau was Tira's former stepfather (*see* R. Vol. 1, pp.747, 883; R. Vol. 2, pp.51-52), and she liked Mr. Charboneau somewhat,[50] Mr. Charboneau had not raised her.[51] Much more importantly though, Tira's *mother*—someone whom Tira loved deeply and missed terribly—was the victim. (R. Ex. Vol. 1, p.122 ("None of this is easy for me because I loved my mom. She was my best friend [and] I feel lost [and] alone without her.").) And Mr. Charboneau undeniably had some kind of role in her death. Thus, by the time of trial, when asked how she felt about Mr. Charboneau, Tira responded, "What am I supposed to think? . . . He—I—I don't know. He—he killed my mom. What am I supposed to think?" (R. Vol. 2, p.90.) In light of this, the district court correctly noted as follows:

> She [Tira] is, presumably, writing to clear up the truth about someone who killed the dearest person on earth to her. This is another *huge* circumstantial guarantee of trustworthiness. It would seem extraordinarily unlikely that anyone in Tira's position would write a letter such as this unless it was true. She did not suddenly come to hate her mother, or develop some affinity for Charboneau. . . . What possible motive could she have to help him? None is apparent.

(R. Vol. 4, pp.535-36 (emphasis in original).)

Because any emotional bond that Tira may have had with Mr. Charboneau was greatly overshadowed by the love that she had for her mother and the loss she felt as a result of her mother's death, and because Mr. Charboneau undeniably played some role

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[50] Tira testified in 1984 and 1985 that she liked Mr. Charboneau and got along with him "most of the time," but Tiffnie did not. (R. Vol. 1, p.837; *see also* R. Vol. 1, pp.843-44 (Tira testifying she "didn't hate Jaimi" and would not have minded if he and her mother had gotten back together with him, but Tiffinie "was kinda upset about" that possibility); R. Vol. 2, p.96 (Tira testifying she got along with Mr. Charboneau and he was pretty good to her).) Tiffnie's testimony was consistent with Tira's. (*See* R. Vol. 1, pp.794-95, 942.)

[51] Mr. Charboneau and Ms. Arbaugh were married for a very short time—just about a year. (*See* R. Vol. 1, pp.938, 941; R. Vol. 2, p.26; 16339 Sent. Tr., p.113, L.18 – p.119, L.3.) Tira testified she had only even known Mr. Charboneau for "about, two and a half years." (R. Vol. 2, p.51.)

in her mother's death, the district court correctly concluded that, viewing the relevant interpersonal relationships in context, the Tira Arbaugh Letter is reliable.

(iv) Number Of Times The Statement Was Made

In *LaGrand*, the Arizona Supreme Court observed that "[t]he number of times the statement is made and the consistency of multiple statements may assist in determining trustworthiness." *LaGrand*, 734 P.2d at 570. Likewise, the Idaho Supreme Court has recognized that multiple statements may corroborate each other. *Meister*, 148 Idaho at 242.

As the district court noted (R. Vol. 4, p.540), there is evidence to suggest that before she died Tira disclosed to others some of the prosecutorial improprieties at issue in this case. For example, Mr. Charboneau's mother, Betsy Charboneau, contends that Tira came to her "on several occasions" to disclose that Marc Haws had told her what to say and how to say it on the witness stand, and that Mr. Haws had asked the Arbaugh family to dispose of a .22 rifle. (R. Vol. 4, pp.248-49, 250, 281; *accord* R. Vol. 4, pp.286, 290, 294, 298; 29042 R., p.53.) Additionally, there is evidence that Tira shared her allegations with Pinto Bennett around the time that she drafted her letter to Judge Becker. Specifically, Tira herself indicated she had discussed the contents of her letter with Mr. Bennett (R. Ex. Vol. 1, p.128) and Mr. Bennett corroborated that statement (R. Vol. 4, pp.211-14, 217-18, 229, 238).[52]

[52] Mr. Bennett provided inconsistent accounts of his conversation with Tira during the late summer of 1989. In two affidavits he signed in 2011, Mr. Bennett said he saw the Tira Arbaugh Letter before Tira mailed it to Judge Becker. (*See* R. Vol. 4, p.238.) However, when he was deposed approximately three years later, he said did not recall having actually seen the letter; he said Tira did not disclose the specifics of the prosecutorial misconduct at issue; and he suggested his prior affidavits may not have been accurate. (*See* R. Vol. 4, pp.211-14, 217-18.) At a minimum though, Mr. Bennett

Given that at various times, and to various listeners, Tira made statements consistent with those in her letter to Judge Becker, that letter is well-corroborated.

(v) Passage Of Time

The *LaGrand* Court explained the "[t]he amount of time which has passed between the event at issue and when the statements are made also should be considered" because "[t]he degree of trustworthiness may relate inversely to the amount of time which passes . . . ." *LaGrand*, 734 P.2d 570.

Tira wrote her letter to Judge Becker in 1989—approximately four years after she testified falsely at Mr. Charboneau's trial. While this may seem like a long time, given the unique facts and circumstances of this case it is not. When Tira testified falsely, she was still a child (fifteen years old); when she recanted her testimony, she was just barely an adult. During the intervening years, Tira had undoubtedly grown and matured, refining her value system and developing the courage to ultimately write a letter to the judge. In fact, in her letter, she said she decided to come forward because she recognized that Mr. Charboneau's trial was not on the up and up, and she suggested she felt guilty for her role in that miscarriage of justice. (*See* R. Ex. Vol. 1, pp.122-23, 127-28.) This was a supremely courageous act on her part, and one that requires a strength of character one would not expect a child to possess. Thus, it is not at all surprising that Tira came forward with the truth in 1989 as a young adult, but not in 1984 or 1985 as a child.

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confirmed Tira approached him and told him she had information that would be helpful to Mr. Charboneau, and that he encouraged Tira tell somebody what she knew. (R. Vol. 4, pp.211-12, 214, 217, 218.)

Additionally, as noted, Mr. Charboneau's case had recently been remanded to the district court for a new sentencing hearing. Presumably, Tira knew this. Obviously, if Tira knew Mr. Charboneau's case was coming back to Judge Becker, she would have seen an opening to reveal the truth to him. Thus, the timing of Tira's letter, far from being suspicious, actually tends to show that the statements made in that letter are reliable.

(vi) Benefit To The Declarant

"A statement made by a declarant who will benefit therefrom is probably less reliable than a statement which does not benefit the declarant." *LaGrand*, 734 P.2d at 570.

Whether Tira had anything to gain by penning her letter to Judge Becker is a question the district court considered. (*See* R. Vol. 4, pp.535-37.) As the district court pointed out (and as is discussed in Parts II.C.1(b)(ii) & (iii), *supra*), Tira had absolutely nothing to gain and much to lose. She had no improper motive to write the letter—she was not trying to curry favor with the police or the court, and her personal relationship with Mr. Charboneau was not particularly strong under the circumstances. And she had much to lose. In addition to inviting a perjury charge, Tira was concerned that her letter to Judge Becker was improper. At the same time, she must have known that her letter would get her crosswise with both law enforcement and her own family. Finally, and perhaps most importantly, anything that she did that helped Mr. Charboneau risked impeding her ability to obtain "closure" over the untimely death of her beloved mother.

As the district court found, the fact that Tira had nothing to gain from her letter to Judge Becker and much to lose suggests her letter is trustworthy.

(vii) Psychological And Physical Surroundings

Neither the *LaGrand* Court, nor the *Meister* Court, has explained precisely how the psychological and physical environment surrounding the making of a statement may contribute to the reliability of that statement. *See LaGrand*, 734 P.2d at 570; *Meister*, 148 Idaho at 242 & n.7. However, the district court in this case has offered a compelling analysis in this regard. The district court focused first on Tira's mental state, noting that Tira admitted she had struggled with what happened in Mr. Charboneau's case, and had even had nightmares about it; the district court pointed out that Tira said her mother would have wanted her to come forward with the truth. (R. Vol. 4, p.535.) The district court next discussed how difficult the situation was for young Tira—partly because of the pain attendant to losing her mother, and partly because coming forward with the truth was against the wishes of the rest of her family. (R. Vol. 4, pp.535-36.) Thereafter, the district court referenced the fact that Tira gave it some thought, and even talked to an old friend of the family—Pinto Bennett—before deciding to send her letter. (R. Vol. 4, p.4, p.537.) Finally, the district court noted that the letter is clear, consistent and logical—obviously the product of a sound mind having engaged in thoughtful deliberation. (R. Vol. 4, pp.540-41.)

What the district court did not get into is that the physical environment in which Tira appears to have written her letter. According to the letter itself, she wrote it in Bruneau while attending "a cowboy benefit and street dance," where Pinto Bennett and his band were providing the music.[53] (R. Ex. Vol. 1, p.128.) Thus, she was in a festive

[53] In a footnote, the State asserts "there is overwhelming evidence that Exhibit 14 was not created under the circumstances set forth within it," *i.e.*, after a discussion with Pinto Bennett at a street dance in Bruneau on or about September 6, 1989. (App. Br., p.42 n.14.) This contention by the State is discussed (and rebutted) in Part III.E, *infra*.

environment—not the type of environment where one would be pressured into making a false confession to perjury.

(viii) Other Considerations

While not necessarily part of the *Meister* standard for evaluating the trustworthiness of a statement, it is worth noting that the district court found other compelling circumstantial guarantees that the statements in the Tira Arbaugh Letter are trustworthy. First, the district court noted Tira's version of events was not over-the-top in its exculpatory effect suggests it was not concocted for Mr. Charboneau's benefit. (*See* R. Vol. 4, p.536.) Second, the district court found the fact Tira "named names" and specifically invited further inquiry into her allegations tends to increase the reliability of those allegations because someone concocting a lie would not want to be fact-checked. (*See* R. Vol. 4, pp.541-42.) Third, the district court concluded that, although Tira could not possibly have known it when she wrote her letter in 1989, Marc Haws, one of the individuals she identified as having committed misconduct in Mr. Charboneau's case, just so happened to have committed similar misconduct in another capital murder case a couple years earlier.[54] (R. Vol. 4, pp.542-43.) Finally, the district court found very significant the fact that various state actors were so intent upon intercepting and concealing the Tira Arbaugh Letter. (R. Vol. 4, p.543.) As the district court explained, the "inference here . . . is that the Arbaugh letter was concealed precisely because it

[54] The question of whether the district court was permitted to consider Marc Haws' misconduct in the earlier case is discussed in detail in Part IV, *infra*. As is discussed therein, although the "prior bad act" evidence concerning the prior misconduct would have been inadmissible under Idaho Rule of Evidence 404(b), the Rules of Evidence did not apply to the district court's analysis of whether the Tira Arbaugh Letter was itself admissible. *See* I.R.E. 101(e)(1). Thus, Mr. Haws' prior misconduct was properly considered in conjunction with the limited question of whether the Tira Arbaugh Letter was sufficiently trustworthy as to be deemed admissible under Rule 804(b)(3).

does have destructive value to those who know the ins and outs and possible weaknesses of Charboneau's murder case." (R. Vol. 4, p.543.) As the district court found, all of these considerations suggest that, in fact, the statements in the Tira Arbaugh Letter are trustworthy.

(ix) Conclusion

Given all of the above considerations, the State has shown no abuse of discretion in the district court's conclusion that the statements against Tira's interest contained with her letter to Judge Becker are trustworthy. Accordingly, this Court should affirm the district court order finding them admissible under Rule 804(b)(3).

c) Those Statements In The Tira Arbaugh Letter That Are Not Statements Against Interest Are Nonetheless Admissible Under The Hearsay Exception For Present Sense Impressions (I.R.E. 803(1)) And/Or Statements Of Then-Existing State Of Mind (I.R.E. 803(3))

Mr. Charboneau freely admits that some of the individual statements in the Tira Arbaugh Letter are not statements which tended to subject Tira to civil or criminal liability when they were made but, rather, were statements of her then-existing state of mind and descriptions of her feelings. For example, virtually the entire first page of her letter explains why she wrote her letter and the internal turmoil she felt over writing that letter. For example, her letter begins as follows:

> Sir, I am writing this letter to you because I believe you should know the truth about some of the things that happened the day my mom died [and] the truth about some of the things that I was told to say [and] told not to say. I believe my mom would want me to tell the truth about these things. None of this is easy for me because I loved my mom. She was my best friend [and] I feel lost [and] alone without her.

(R. Ex. Vol. 1, p.122.) In then continues in a similar vein into the second page, where it begins its discussion of Tira's prior false testimony. (*See* R. Ex. Vol. 1, pp.122-23.)

Thereafter, it contains references to Tira's state of mind interwoven with one of her statements against interest:

> One other thing that bothers me sir is something Marc Haws the new prosecutor from Boise had told us to do. Mr. Haws has told us that we need to get rid of mom's Calamity Jane rifle. I don't understand why he would want us to do that but grandpa [and] me [and] uncle Jimmy we all went out to the el-rancho property last week [and] we buried mom's rifle out there behind the potato cellar . . . .

(R. Ex. Vol. 1, pp.126-27.) Finally, the letter concludes with two paragraphs again expressing Tira's feelings: "[Judge] Becker I know that this is not right [and] I hope that I am doing the right thing by telling you these things. Can you please call or write to my grandpa [and] talk to him about this stuff? Because I know he is a good man [and] if he is doing anything bad or wrong it's only because he is so mad at Jamie [sic] . . . ." (R. Ex. Vol. 1, pp.127-28.)

All of these types of statements were admissible as statements of Tira's then-exiting state of mind and/or as present sense impressions. Under the Idaho Rules of Evidence, hearsay statements are admissible if they "describ[e] or explain[ ] an event or condition made while the declarant was perceiving the event of condition, or immediately thereafter," I.R.E. 803(1), or if they reveal "the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)," I.R.E. 803(3). In her letter, Tira was describing her thoughts and feelings at the time of her writing of that letter. Among other things, she explained that she was unsure of whether her letter was proper and expressed a concern that her family would not approve of her revealing the truth; she discussed her feeling of guilt and confusion over what had happened in Mr. Charboneau's case; she said she believed she had a moral obligation to right her

wrongs and the wrongs of police and prosecutor involved; and she expressed her love and respect for her grandfather, and her belief that he would ultimately do the right thing by telling the truth too. (*See* R. Ex. Vol. 1, pp.122-23, 126-27.) These were all statements describing her state of mind and emotions at the time and, therefore, they are admissible under Rules 803(1) and/or 803(3).

2. The District Court Correctly Ruled That The Tira Arbaugh Letter Is Admissible For The Truth Of The Matters Asserted Therein Because It Consists Of Statements Which Are Admissible Under The Residual Hearsay Exception (I.R.E. 804(b)(6))

Under the residual (catch-all) hearsay exception, a hearsay statement by an unavailable declarant may be admitted if it is:

> A statement not specifically covered by any of the foregoing exceptions [for unavailable declarants] but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

I.R.E. 804(b)(6). The district court found the Tira Arbaugh Letter would be admissible under this hearsay exception. (R. Vol. 4, pp.546-47.) In doing so, the court relied primarily upon the ten indicia of trustworthiness it had previously discussed in determining the letter was sufficiently corroborated to be trustworthy within the meaning of the "statement against interest" exception of Rule 804(b)(3). (*See* R. Vol. 4, p.547; *see also* R. Vol. 4, pp.535-43 (discussing the ten circumstantial guarantees of trustworthiness).)

On appeal, the State challenges this ruling. (App. Br., pp.43-46.) First, it argues that the Tira Arbaugh Letter is not sufficiently trustworthy to be admitted under Rule

804(b)(6). (App. Br., pp.43-44, 45.) Second, it claims the letter does not evidence a material fact, as it merely impeached Tira's testimony. (App. Br., pp.44, 46.) Third, it asserts the letter is not more probative than the other evidence, *i.e.*, Tira's since-recanted testimony. (App. Br., pp.44-45, 46.) Fourth, the State says "the purpose of the hearsay rules and interests of justice are not served by admission" of the letter. (App. Br., p.45.)

a) The Statements In The Tira Arbaugh Letter Have Circumstantial Guarantees Of Trustworthiness Equivalent To Those In Statements Subject To The Specifically-Enumerated Hearsay Exceptions

The State contends the Tira Arbaugh Letter does not have adequate circumstantial guarantees of trustworthiness. (App. Br., pp.43-44, 45.) In making this argument though, the State misrepresents the applicable standard in the same way that it misrepresents the "trustworthiness" standard under Rule 804(b)(3) (*see* Part II.C.1(b), *supra*)—it falsely suggests the degree to which the statement at issue is contradicted or corroborated by the other evidence in the case is the sole question. (*See* App. Br., p.44 (arguing an unsworn hearsay statement cannot be trustworthy if it contradicts sworn testimony), p.45 (drawing a false distinction between "credible" and "trustworthy" statements, and claiming a credibility examination is not the proper inquiry under Rule 804(b)(6)).) However, under Rule 804(b)(6), just as with Rule 804(b)(3), the degree to which the statement at issue is consistent with the other evidence of guilt or innocence is only *part* of the required in analysis. In *State v. Giles*, the Idaho Supreme Court made it clear the critical question is whether the statement is *reliable*, and that reliability is not just judged by the degree to which the statement at issue is consistent with other evidence concerning the alleged crime, but also by evidence concerning the

circumstances under which the statement was made. *See* 115 Idaho 984, 987-88 (1989). Likewise, in *State v. Hester*, the Idaho Supreme Court held that "[t]he admissibility of hearsay pursuant to [the residual hearsay exception] depends upon the trustworthiness of the evidence and the necessity for its use," and it affirmed the trial court's admission of hearsay under that exception, in part, because the hearsay appeared reliable. 114 Idaho 688, 696-98 (1988). In determining reliability, the trial court had not focused on the degree to which the content of the declarant's statement was consistent with the other evidence in the case; instead, it focused on other, more circumstantial guarantees of trustworthiness—that the declarant seemed truthful, exhibited a good memory of the relevant events, did not show signs of confusion, and appropriately spoke up when he had relevant information to share and quieted down when he did not.[55] *Id*. at 698. Thus, for the State to suggest once more that the admissibility of the Tira Arbaugh Letter is wholly dependent on the degree to which it is consistent (or in conflict) with the other evidence of the alleged crime is wholly incorrect.

With regard to the substantive question of whether the Tira Arbaugh Letter has circumstantial guarantees of trustworthiness equivalent of those found in the specifically-enumerated exceptions to the hearsay rule, no further discussion is required here. A closely-related issue was discussed in Part II.C.1(b), above, where Mr. Charboneau analyzed the question of whether Tira's statements against interest were sufficiently trustworthy under Rule 804(b)(3). For the same reasons that Tira's

[55] In speaking of the residual hearsay exceptions, the *Hester* Court observed that, as a matter of policy, "[H]earsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant." *Hester*, 114 Idaho at 698.

statements are trustworthy for purposes of Rule 804(b)(3), so too are they trustworthy for purposes of Rule 804(b)(6).

Nonetheless, one final point warrants discussion. In finding that the statements in the Tira Arbaugh Letter are trustworthy, the district court relied upon the truth of statements contained within that letter. (*See, e.g.*, R. Vol. 1, p.535 (finding Tira's mental state, as revealed by statements in the letter itself, to provide a circumstantial guarantee of trustworthiness as to other statements in the letter).) Likewise, Mr. Charboneau has relied upon the truth of statements contained within the letter to argue that the contents of the letter are trustworthy and therefore admissible. (*See, e.g.*, Part II.C.1(b)(vii), *supra* (arguing that Tira's psychological condition and physical surroundings, as revealed by the letter itself, provided circumstantial guarantees of trustworthiness).) The State seems to think that this approach is incorrect, although it makes no argument as to why it would be incorrect. The whole of its argument on this point is as follows:

> [T]he district court relied primarily upon evidence within Exhibit 14 to bootstrap a finding of trustworthiness. The judge found statements within Exhibit 14—such as the declarant's statement of motive for writing the document, the description of the circumstances of writing the document, and the date and the statement the document was intended to go to Judge Becker—to be credible in order to find the Exhibit credible.

(*See* App. Br., p.45.) The State's argument is meritless. First, because it offers no explanation of how the district court's approach could have been wrong, it is inadequate under Idaho Appellate Rule 35(a) and, therefore, it is waived. *See Zichko*, 129 Idaho at 263. Second, it fails to account for the fact that the statements at issue were either independently admissible as present sense impressions or as statements of Tira's then-

existing state of mind (*see* Part II.C.1(c), *supra*), or were otherwise corroborated.[56] Third, and perhaps most importantly, even assuming the statements relied upon were not themselves admissible because they were hearsay, there was nothing improper about the district court relying on them to determine the admissibility of the balance of the statements in the letter. *See* I.R.E. 101(e)(1) (providing the Rules of Evidence do not apply to the determination of preliminary questions of fact necessary to determine whether evidence is admissible).

In light of all of this, the State has failed to demonstrate an abuse of discretion in the district court's determination that the contents of the Tira Arbaugh Letter have circumstantial guarantees of trustworthiness equivalent to those required for other hearsay exceptions.

b) The Statements In The Tira Arbaugh Letter Relate To Material Matters

The State contends the Tira Arbaugh Letter "is not offered as evidence of a material fact," but only "to contradict Tira's sworn trial testimony, an impeachment purpose." (App. Br., p.44.) However, the State fails to elaborate on this contention in any way; it offers no analysis whatsoever in support of the contention that the letter is not "material." (*See* App. Br., p.44.) Accordingly, the State's briefing is inadequate under Idaho Appellate Rule 35(a), and its argument on this issue is waived. *See Zichko*, 129 Idaho at 263.

[56] For example, Tira's statements about writing her letter in Bruneau, Idaho after speaking to Pinto Bennett are corroborated by both the postmark on the letter's envelope (*see* R. Ex. Vol. 1, p.97) and the statements of Mr. Bennett (*see* R. Vol. 4, pp.211-12, 229). And the date is corroborated by the file stamp on the envelope. (*See* R. Ex. Vol. 1, p.97.)

Even if this Court reaches the merit of the State's argument though, it should reject it. As the Idaho Supreme Court has explained, evidence may at the same time be both material *and* impeaching. *See State v. Ellington*, 151 Idaho 53, 74 (2011) (holding that where a witness' prior testimony was inconsistent with his testimony at trial, and it tended to support the defendant's claim of innocence, that prior inconsistent testimony was both material and impeaching).[57] Thus, while the statements in Tira's letter certainly tend to impeach her, they also tend to support Mr. Charboneau's version of the facts—for example, that Mr. Charboneau was interacting with the Arbaugh family on the day of the shooting, and thus was not lying in wait for days; that Tiffnie was armed with the rifle linked to the fatal shots, and she fired it; and that Mr. Charboneau did not fire a second round of shots while the girls were inside and, thus, did not execute Ms. Arbaugh. This evidence, at a minimum, undermines the basis for a first-degree, premeditated murder conviction and could even support a self-defense theory. Thus, it is clearly material.

c) The Statements In The Tira Arbaugh Letter Are The Most Highly Probative Evidence Available On The Point For Which It Will Be Offered

The State argues that the Tira Arbaugh Letter "is not more probative than other evidence"; it contends simply that Tira's trial testimony was more probative than the

[57] In *Ellington*, the Supreme Court adopted the Court of Appeals' explanation of the difference between material ("substantive") evidence and impeachment evidence:

> Unlike substantive evidence which is offered for the purpose of persuading the trier of fact as to the truth of a proposition on which the determination of the tribunal is to be asked, impeachment is that which is designed to discredit a witness, *i.e.* to reduce the effectiveness of his testimony by bringing forth the evidence which explains why the jury should not put faith in him or his testimony.

151 Idaho at 74.

statements in her letter because the testimony was sworn. (App. Br., pp.44-45.) In support of this argument, the State cites *State v. Hawkins*, 131 Idaho 396 (Ct. App. 1998). (*See* App. Br., pp.44-45.)

The State's reliance on *Hawkins* is misplaced though. That case does not stand for the sweeping proposition that sworn testimony is always more probative than an out-of-court statement recanting that testimony, as the State suggests. Rather, it stands for the proposition that, under the unique facts and circumstances of that case, the district court did not abuse its discretion in precluding admission of a hearsay statement which not only controverted the sworn testimony of another witness, but which was also ambiguous on its face, had marginal relevance, and bore no circumstantial guarantees of trustworthiness. *Hawkins*, 131 Idaho at 404. Indeed, in *State v. Ransom*, the Idaho Supreme Court rejected the notion that testimony is automatically more probative than out-of-court statements "simply because of the procedural safeguards in the courtroom, including the presence of a jury and the fact that live testimony is subject to an oath and cross-examination." 124 Idaho 703, 708 (1993). It observed that such an argument, "[t]aken to its logical conclusion, . . . would preclude admissibility of any hearsay statement under [Idaho Rule of Evidence] 803(24)," the residual hearsay exception for available witnesses, and it made it clear that under the residual hearsay objections, "the trial court's analysis will generally be confined to a case-by-case basis." *Ransom*, 124 Idaho at 708.

Under the facts of this case, there is little reason to believe Tira's testimony is more probative than her subsequent letter. As her letter makes clear, that testimony was false—the product of manipulation at the hands of the police and the prosecutor. In

contrast, the letter is a product of Tira seeking to right her past wrong and clear her conscience. And, as is discussed at length above (*see* Parts II.C.1(b) & II.C.2(a), *supra*), it has significant circumstantial guarantees of trustworthiness.

d) Admission Of The Statements In The Tira Arbaugh Letter Is Necessary To Further The Objectives Of The Idaho Rules Of Evidence And Serve The Interests Of Justice

Finally, the State asserts in wholly conclusory fashion that "the purposes of the hearsay rules and interests of justice are not served by admission of Exhibit 14." (App. Br., p.45.) It does not elaborate at all.

The State's one-sentence argument is insufficient to comply with the briefing requirements of Idaho Appellate Rule 35(a) and, therefore, should be deemed waived. *See Zichko*, 129 Idaho at 263. However, to the extent this Court is willing to consider the State's argument, Mr. Charboneau contends it should be rejected on its merits.

A ruling that the Tira Arbaugh Letter is inadmissible on hearsay grounds, which would effectively mean that the truth could never be considered (since Tira is now dead), would be inconsistent with the objectives of the Idaho Rules of Evidence. As the Idaho Supreme Court has noted, "[H]earsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant." *Hester*, 114 Idaho at 698 (quoting M. Clark, Report of the Idaho State Bar Evidence Committee, C 804, p.11 (4th Supp.1985)). Further, to hold the Tira Arbaugh Letter inadmissible would constitute a tragic miscarriage of justice. Not only would it allow a wrongful conviction to stand, but such a ruling would tell prosecutors that their constitutional obligations under *Brady* are absolutely meaningless—all they have to do is hide exculpatory evidence long enough

for the relevant witnesses to die. Giving prosecutors a roadmap to circumvent defendants' rights and wrongfully incarcerate innocents is not justice.

e) Conclusion

For all of the reasons set forth above, the State has failed to demonstrate any abuse of discretion in the district court's ruling that the Tira Arbaugh Letter is admissible under the residual hearsay exception of Rule 804(b)(6).

3. Even If The Contents Of The Tira Arbaugh Letter Would Not Be Admissible For Their Truth Upon A Retrial, Such A Holding Would Not Entitle The State To The Relief It Seeks

As noted, since the district court did not admit the Tira Arbaugh Letter for its truth at Mr. Charboneau's evidentiary hearing, the State is not challenging its admission and use at a contested proceeding. Rather, the State's claim is that the district court erred in ruling that the contents of the letter *would be* admissible for their truth at a future retrial. The State argues this ruling was error because, under the Rules of Evidence, all of the contents of the letter are inadmissible hearsay. Thus, the State claims the district court erred in denying its motion for summary dismissal and, later, in granting summary disposition in favor of Mr. Charboneau. (*See* App. Br., p.46.)

Besides the fact that the State's briefing is insufficient on both of these points,[58] its arguments do not support the relief requested. As discussed above, in denying the State's motion for summary dismissal, the district court did not rule the Tira Arbaugh

[58] The State asserts in conclusory fashion that, "Because Exhibit 14 is inadmissible hearsay, the district court erred by not granting the state's motion for summary dismissal for failure to support the petition with admissible evidence. It also erred in granting Charboneau summary judgment." (App. Br., p.46.) However, it cites no authority in support of its argument, and it makes no effort to analyze the remaining evidence. (*See* App. Br., p.46.) Accordingly, the State's briefing is insufficient under Idaho Appellate Rule 35(a) and its argument is waived. *See Zichko*, 129 Idaho at 263.

Letter admissible for the truth of the matters asserted therein, as the State now claims[59]; rather, the district court simply held that, regardless of whether the contents of the letter would be admissible at a new trial now, either the letter itself would have been admissible at Mr. Charboneau's re-sentencing in 1991 or, alternatively, Tira's live testimony would have been available and admissible at that re-sentencing hearing. (*See* 5/24/13 Tr., p.59, Ls.14-25, p.60, L.20 – p.61, L.10.) And the district court was correct. Tira was still alive in 1991 and so, had Mr. Charboneau known of her letter recanting her prior testimony, he could have called her as a witness at his re-sentencing and she could have painted a very different picture of the events of July 1, 1984. Alternatively, Mr. Charboneau could have simply offered the Tira Arbaugh Letter into evidence at his 1991 re-sentencing hearing because the Rules of Evidence do not apply at sentencing hearings, I.R.E. 101(e)(3), and, indeed, hearsay is routinely admitted at such hearings, *see e.g., State v. Shackelford*, 155 Idaho 454, 460-62 (2013) (holding the Sixth Amendment right to confrontation does not apply to testimonial hearsay offered against the defendant at his sentencing hearing). In either case, the evidence suggests that Mr. Charboneau is far less culpable for Ms. Arbaugh's death than the State originally claimed, as it shows, at a minimum, that he did not lie in wait for her or deliver an execution-style second round of shots. Thus, regardless of whether the Tira Arbaugh Letter would be admissible under the Idaho Rules of Evidence *at a future trial*, that letter still constituted admissible evidence to support Mr. Charboneau's *Brady* claim because it was (and still is) material with regard to his sentence. *See Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995) (quoting Justice Blackmun's concurrence in *United States v. Bagley*,

[59] *See* note 32, *supra* (discussing the State's misrepresentation of the district court's ruling).

473 U.S. 667 (1985), for the proposition that "favorable evidence is material, and constitutional error results from its suppression by the government 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different'"); *Brady*, 373 U.S. at 87 ("[T]the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment . . ."). So even if this Court agrees with the State that the Tira Arbaugh Letter consists solely of hearsay which would be inadmissible under the Rules of Evidence, that does not mean the district court erred in denying the State's motion for summary dismissal.

In terms of the district court's grant of summary disposition in Mr. Charboneau's favor, again, the State's arguments do not support its ultimate prayer for relief. Even if the Tira Arbaugh Letter would constitute inadmissible hearsay at a future trial, it would still be admissible at a future sentencing hearing. Under *Brady*, the question is not whether the suppressed evidence would be material to a *future* proceeding; it is whether its suppression rendered the *prior* proceedings unfair. *See Kyles*, 514 U.S. at 434; *Brady*, 373 U.S. at 87. And here, the letter came into existence (and was promptly concealed by the State) in 1989—well before Mr. Charboneau's 1991 re-sentencing. Thus, its suppression impacted not only the sentence Mr. Charboneau received at his 1991 re-sentencing, but also his ability to file a motion for a new trial.[60] Based on the new version of events provided by Tira—*which she could have testified to* at any time prior to her death in 1998 (*see* R. Ex. Vol. 1, p.973)—Mr. Charboneau could reasonably

[60] Under Idaho Criminal Rule 34 (which has not changed since it first went into effect in 1980), a new trial based on newly discovered evidence may be filed within two years of the final judgment.

have been retried and acquitted (based on a self-defense theory); he could have been retried and convicted of a lesser offense of second degree murder or voluntary manslaughter; or he could have been convicted of first degree murder again, but received a sentence less than fixed life. Thus, the letter was material to both Mr. Charboneau's conviction and his sentence and, therefore, the district court did not err in granting summary disposition in Mr. Charboneau's favor.

D. The State Has Failed To Show An Abuse Of Discretion In The District Court's Decision To Admit Exhibit 4 (The "Shedd Note")

Included within the packet of documents delivered to Mr. Charboneau by Corporal Hiskett was the "Shedd Note." As discussed above, the Shedd Note—a one-page note signed by DeWayne Shedd—is a confession of sorts. It alleges that Deputy Attorney General Tim McNeese asked Mr. Shedd to monitor all of Mr. Charboneau's incoming and outgoing mail, including his legal mail, and to surreptitiously confiscate any mail from Jerome County Sheriff Larry Gold or bearing Tira's name. (R. Ex. Vol. 1, p.95.) The note further alleges Mr. Shedd was instructed that if he found any such mail, he should immediately notify Mr. McNeese or, alternatively, Marc Haws. (R. Ex. Vol. 1, p.95.) Ultimately, everyone agreed that Mr. Shedd signed the note, and the district court found as a factual matter that Mr. Shedd also wrote it and, even if he did not, he certainly ratified the statements contained therein. (R. Vol. 3, p.129.)

At the evidentiary hearing, Mr. Charboneau's counsel twice moved for admission of the Shedd Note (Evid. Tr., p.45, Ls.7-8, p.383, L.25 – p.384, L.3) and both times the State objected, arguing that the statements in the note were inadmissible hearsay (Evid. Tr., p.31, Ls.9-15, p.384, L.20 – p.385, L.3). The first time the issue arose, the district court admitted the note for the limited purpose of showing what was in the envelope.

(Evid. Tr., p.31, Ls.18-22, p.262, L.6 – p.263, L.6.) Later though, the court admitted the note unconditionally. (Evid. Tr., p.390, L.2 – p.391, L.8; *see also* Evid. Tr., p.414, Ls.9-11.) In admitting the Shedd Note for all purposes, including the truth of the matters asserted therein, the district court never specifically addressed the State's "hearsay" objection. (*See* Evid. Tr., p.390, L.2 – p.391, L.8.)

On appeal, the State complains that the district court abused its discretion in admitting the Shedd Note for the truth of the matters asserted therein. (App. Br., pp.34-35.) Specifically, it argues very simply that because the Shedd Note contains out-of-court statements which were offered for their truth, it fits the definition of hearsay under Idaho Rule of Evidence 801 and, because, no exception to the hearsay rule was cited by the district court, it was inadmissible under Rule 802. (App. Br., pp.34-35.)

The State's arguments fail. The Shedd Note was properly admitted as non-hearsay under Idaho Rule of Evidence 801(d)(2)(D) (admissions by a party's agent) or, alternatively, under the hearsay exception for present sense impressions (Rule 803(1)) and/or statements of then-existing states of mind (Rule 803(3)). Although these were apparently not the grounds upon which the Shedd Note was admitted, the Idaho Supreme Court has long held that a district court's order will be affirmed on appeal based on the correct theory, regardless of whether that theory formed the basis for the ruling below. *See, e.g., Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc.*, 153 Idaho 440, 460 (2012).

1. The Shedd Note Was Admissible As Non-Hearsay Under Idaho Rule of Evidence 801(d)(2)(D) (Statement By A Party's Agent Or Servant)

The Idaho Rules of Evidence provide that, "A statement is not hearsay if . . . The statement is offered against a party and is . . . a statement by a party's agent or servant

concerning a matter within the scope of the agency or employment of the servant or agent, made during the existence of the relationship . . . ." I.R.E. 801(d)(2)(D). Under this Rule, the statements in the Shedd Note are non-hearsay if: (a) DeWayne Shedd was an agent or servant of a party; (b) the statements concerned a matter within the scope of Mr. Shedd's agency or employment; and (c) the statements were made while Mr. Shedd was employed by a party.

a) DeWayne Shedd Was An Agent Or Servant Of A Party, The State Of Idaho

In civil cases,[61] government employees are considered agents of the government for purposes of Rule 801(d)(2)(D).[62] Thus, out-of-court statements made by government employees concerning matters within the scope of their employment, are non-hearsay within the meaning of Rule 801(d)(2)(D). *Cf., e.g., Lowber v. City of New Cordell, Okla.*, 378 Fed. Appx. 836, 840 (10th Cir. 2010) (in an employment discrimination action against a public employer (a city), the mayor's out-of-court state was non-hearsay, as it was a statement by a party's agent under F.R.E. 801(d)(2)(D)); *L-3 Communications Integrated Systems, L.P. v. United States*, 91 Fed. Cl. 347, 359 (Fed. Cl. 2010) (in review of an administrative action concerning alleged Air Force procurement improprieties, documents prepared by government employees and agents

[61] "An application for post-conviction relief under the Uniform Post Conviction Procedure Act (UPCPA) is civil in nature." *Kelly v. State*, 149 Idaho 517, 521 (2010).

[62] Some courts have refused to apply Rule 801(d)(2)(D) to government employees in *criminal* cases. *See, e.g., United States v. Garza*, 448 F.3d 294, 298-99 & n.14 (5th Cir. 2006). Although this Court need not reach that issue in this case, Mr. Charboneau submits those cases are wrongly decided, as they are inconsistent with the plain language of the Rule and represent an attempt to ascribe to the Rule a common law standard that was jettisoned with adoption of the rules of evidence. *See generally* Anne Bowen Poulin, *Party Admissions in Criminal Cases: Should the Government Have to Eat its Words?*, 87 MINN. L. REV. 401 (2002).

were non-hearsay under F.R.E. 801(d)(2)(D)); *Hoptowit v. Ray*, 682 F.2d 1237, 1262 (9th Cir. 1982) (in a civil rights action by inmates challenging conditions at a state penitentiary, out-of-court statements of employees of state Attorney General's office contained within an investigative report were non-hearsay under F.R.E. 801(d)(2)(D)), *abrogated on other grounds by Sandin v. O'Connor*, 515 U.S. 472 (1995); *Sanchez v. California*, 90 F.Supp.3d 1036, 1053 (E.D. Cal. 2015) (in an employment discrimination action against a public employer (the California Department of Corrections and Rehabilitation), a co-worker's out-of-court statement was non-hearsay, as it was a statement by a party's agent under F.R.E. 801(d)(2)(D)); *M.K.B. v. Eggleston*, 445 F.Supp.2d 400, 436 n.18 (S.D.N.Y. 2006) (in a civil rights action against heads of city and state agencies, out-of-court statements of city employees were non-hearsay, as they were statements by a the state's agent under F.R.E. 802(d)(2)(D)); *Sadrud-Din v. City of Chicago*, 883 F. Supp. 270 (N.D. Ill. 1995) (in a civil rights action against the City of Chicago and certain police supervisors, out-of-court statements of police officers were non-hearsay under F.R.E. 801(d)(2)(D)).[63]

Here DeWayne Shedd was clearly an agent of the State, as he was (and still is) an employee of the IDOC. (*See* Evid. Tr., p.265, L.17 – p.267, L.1.) And, while the State may try to claim that the IDOC is not a party to this case because that particular department has not been specifically named as a respondent,[64] such an argument would be meritless here. The two parties to this case are Mr. Charboneau and *the State*

[63] Federal Rule of Evidence 801 is substantively identical to Idaho Rule of Evidence 801.

[64] Below, the State argued it was not obligated to disclose through the discovery process documents or information under the control of the IDOC because IDOC is not a "party" to this case. (*See, e.g.,* R. Vol. 1, pp.603-06.) Mr. Charboneau assumes the State will try to make a similar argument here.

of Idaho (*see, e.g.*, R. Vol. 5, p.675 (Clerk's Certificate of Appeal)), and the latter includes the IDOC.

While it is certainly *possible* in civil cases in Idaho for a particular governmental agency, department, etc. (as opposed to the State as a whole) to be named as a party to the case, *see, e.g.*, I.R.C.P. 3(b) ("[A]ll civil actions by or against a governmental unit or agency . . . shall designate such party in its governmental . . . name only . . . ."), that common practice in no way precludes the State as a whole from being a party to an action. Indeed, every criminal case filed in Idaho bears the caption, "State of Idaho v. [Defendant]"; never is such a case brought in the name of the city or county in which the case is brought, the local prosecutor's office, the Attorney General's Office, or any other agency, department, etc. This makes sense, of course, because criminal cases are prosecuted by the government for the benefit of all the people of the State of Idaho.

Likewise, every civil post-conviction action in Idaho is captioned, "[Petitioner] v. State of Idaho," as it is properly filed against the State as a whole. *See* I.C. § 19-4905 ("All costs and expenses necessarily incurred by *the state* in the proceedings shall be paid by the county in which the application is filed."); 19-4906(a) ("Within 30 days after the docketing of the application, or within any further time the court may fix, *the state* shall respond by answer or by motion which may be supported by affidavits."); 19-4909 (providing that either the petitioner or "*the state*" may appeal any final judgment, and that on any such appeal, "*the state* shall be represented by the attorney general")

(emphases added). Thus, it is the State as a whole that is the party opposite the petitioner in a post-conviction case.[65]

With regard to Mr. Charboneau, no particular agency, department, or political subdivision was identified as the prosecuting party; rather, the State *as a whole* prosecuted Mr. Charboneau. (*See, e.g.*, 16339 R., pp.80-81 (information).) And, more recently, this post-conviction case was filed against the State as a whole. Under these circumstances, the "party" opposing Mr. Charboneau is not Jerome County or the Office of the Attorney General, but the State of Idaho. As was explained in *United States v. American Telephone & Telegraph Co.*, where prosecutorial or enforcement actions are undertaken on behalf of a sovereign as a whole for the benefit of all of its people, and the "concerns and activities of the government generally are implicated" in the action, not just those of the prosecuting or enforcing agency, it "makes no sense to hold that the [prosecuting or enforcing agency], which essentially is a law office, alone comprises" the party. 498 F. Supp. 353, 357 (D.D.C. 1980) [*hereinafter*, *AT&T*]. Thus, the *AT&T* Court went on to hold that, in an antitrust action initiated by the United States against AT&T, the plaintiff was the whole of the United States, not just the Department of Justice and the Attorney General, such that statements made by all executive branch personnel were statements by a party's agent under F.R.E. 801(d)(2)(D). *Id*. at 356-

[65] This is not unheard of in the civil context. For example, the Idaho Tort Claims Act (I.C. § 6-901 *et seq*.), makes it clear that not only can Idaho's agencies, departments, etc. and its political subdivisions be sued, but also the State as a whole can be sued. *See* I.C. § 6-902(1) (defining "State" to mean "*the state of Idaho* ***or*** any office, department, agency, authority, commission, board, institution, hospital, college, university or other instrumentality thereof") (emphases added).

58.[66] Mr. Charboneau submits that the same principle applies here—because the State of Idaho is the party opposing him, all statements made by executive branch personnel concerning matters within the scope of their employment were admissions by a party-opponent under Rule 801(d)(2)(D).

Insofar as the State attempts to limit the definition of "party" (as it is applied to the State of Idaho for purposes of Rule 801(d)(2)(D)) based on an analogy to the scope of the State's obligation to disclose exculpatory evidence under *Brady*,[67] the State's analogy will be misplaced. To compare the definition of "party" under Idaho Rule of Evidence 801(d)(2)(D) to the scope of the prosecution's obligation to disclose exculpatory evidence under the due process clause of the Fourteenth Amendment is to compare apples and oranges. The former is a rule of evidence, apparently calculated to allow judges and juries to hear all of the reliable evidence for and against each party to a case before engaging in the fact-finding function, *see* I.R.E. 102; the latter is a constitutional standard of fairness, imposed upon the lawyers for a certain party in a particular type of case, *see Brady*, 373 U.S. at 87-88. In other words, while the former is

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[66] *AT&T* was cited with approval in *Globe Savings Bank, F.S.B. v. United States*, 61 Fed. Cl. 91, 97 (Fed. Cl. 2004). *See also United States v. Kattar*, 840 F.2d 118, 127 (1st Cir. 1998) (leaving open the question of "[w]hether or not the entire federal government in all its capacities should be deemed a party-opponent in criminal cases," but holding the Justice Department is "certainly" all one entity such that prosecutors in one part of the Department are charged with knowledge of the activities of the rest of the Department).

[67] As noted, below, the State attempted to deny Mr. Charboneau discovery of evidence in the control of the IDOC based on an argument that the IDOC is not a party to this case. (*See* note 64, *supra*.) In making this argument, the State sought to limit the definition of itself as a "party" by making an analogy to the scope of its obligations under *Brady* in criminal cases. (R. Vol. 1, pp.603-06.) The State's point in making this analogy was to say a prosecutor's *Brady* obligations extend only to the prosecutor himself and "the government agents having a significant role in investigating and prosecuting the offense." (R. Vol. 1, p.603 (quoting *Queen v. State*, 146 Idaho 502, 505 (Ct. App. 2008).) Mr. Charboneau anticipates the State will make a similar argument here.

aimed at simply providing competent evidence to the fact-finder, the latter is geared toward preventing the prosecutor from manipulating the proceeding as a whole, *see id*. at 88 (indicating that allowing a prosecutor to withhold exculpatory evidence would "cast[ ] the prosecutor in the role of an architect of the proceeding"). Thus, the *Brady* standard would logically extend to those involved in the investigation and prosecution of crime, but not necessarily those in other branches of government without knowledge of, much less incentive to manipulate the process in, an individual prosecution. So, even assuming the State is correct in its characterization of the limited scope of its obligations under *Brady*,[68] the scope of those obligations cannot logically be analogized to the scope of the meaning of "party" in Rule 801(d)(2). Indeed, the State as a "party" under Rule 801(d)(2)(D) is better analogized to a large corporation with hundreds (or even thousands) of employees in multiple divisions and, perhaps, multiple physical sites, *see Poulin*, *supra*, at 468-69, where an a statement of an employee would certainly be considered an admission by a party-opponent under Rule 801(d)(2)(D).

[68] Mr. Charboneau does not concede that the State's characterization of the scope of its *Brady* obligations is correct. While the State correctly quotes *Queen*, and while *Queen* cites other Idaho precedent, the relevant *Brady* analysis is more nuanced than the State would have this Court believe. For example, the Ninth Circuit Court of Appeals has held that although the FDA is not generally a part of law enforcement, and certainly is not an arm of the Department of Justice, where it is charged with administering a certain statute, and consulted with the prosecutor, it "is to be considered as part of the prosecution in determining what information must be made available to the defendant . . . ." *United States v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995); *see also United States v. Santiago*, 46 F.3d 885, 893-94 (9th Cir. 1995) (holding evidence in the hands of the Bureau of Prisons was in the possession and control of the government for purposes of discovery because the prosecutor had knowledge of, and access to, the evidence in question). However, because the any analogy between a prosecutor's disclosure obligation under *Brady* and the definition of "party" under Rule 801(d)(2) is not appropriate, this Court need not address the State's characterization of the scope of its *Brady* obligations here.

In short, no matter how the State may try to distance itself from Mr. Shedd and his statements concerning the concealment of the Tira Arbaugh Letter, the fact is that because he was an employee of the State of Idaho, he was an agent or servant of a party.

Alternatively, even if all IDOC employees are not agents of a party (the State) for purposes of Rule 801(d)(2)(D) in all post-conviction cases, under the unique facts of this case, Mr. Shedd was still an agent of the State. The Shedd Note itself suggests that Mr. Shedd conspired with at least three other individuals to hide exculpatory evidence from Mr. Charboneau. It says that he received his orders from a Tim McNeese, a deputy attorney general; it indicates that Mr. McNeese had identified Marc Haws, the former prosecutor on Mr. Charboneau's case, as another member of the conspiracy; and it states that Mr. Shedd brought Lieutenant Unger, a second IDOC employee into the fold.[69] (*See* R. Ex. Vol. 1, p.95.) Further, the district court ultimately found that Mr. Shedd was part of a larger conspiracy to intercept and conceal the Tira Arbaugh Letter and, although it specifically declined to identify the other participants in the conspiracy, it found that Mr. Shedd did not act alone. (R. Vol. 3, pp.134-36, 137-38.) In terms of identifying the scope of the conspiracy, the district court found as follows:

[69] Mr. Shedd's contention that such a conspiracy existed was corroborated by other evidence. For example, the 2001 Gold Letter stated Sheriff Gold's belief that there was a conspiracy afoot. (*See* R. Vol. 1, pp.151-52.) As noted above, in that letter, Sheriff Gold asserted there "appeared to be a 'collaboration of minds'" manipulating Mr. Charboneau's criminal case. (R. Vol. 1, p.152.) And of course the Gold Affidavit, written a few months later, suggested Sheriff Gold had discovered the evidence which earlier eluded him. (*See* R. Ex. Vol. 1, pp.109-10.) In his affidavit, Sheriff Gold described the "collaboration of minds," *i.e.*, the conspiracy, in much greater detail. (*See* R. Ex. Vol. 1, pp.109-10.) He described the Tira Arbaugh Letter and asserted it had been intercepted at the Jerome County Courthouse. (R. Ex. Vol. 1, pp.109-10.)

- The Tira Arbaugh Letter "was originally taken or concealed by someone who had the state's purposes in mind, and who acted on behalf of the state, rather than" Mr. Charboneau (*id*. at 134);
- The letter "was intentionally intercepted by Shedd at the direction of others" (*id*. at 135); "Shedd did not and could not have acted alone. There is no way that Shedd knew of or could have known of the circumstances surrounding the Tira Arbaugh letter, or the names of the personnel . . . allegedly involved with the discovery of the letter in Jerome unless or until he was provided that information by others" (*id*.);
- "The inferences and conclusions the Court draws from the evidence is that McNeese or someone in a similar capacity directed Shedd to do what he did. Shedd personally had no interest in, and nothing to gain from, withholding evidence from Charboneau. Others did, and the obvious suspects are those involved with the investigation and prosecution of Charboneau. . . . The Court concludes that state agents deliberately and consciously interecepted and withheld evidence . . . from at least 2003 until 2011" (*id*. at 136); and
- "The court need not determine the extent of any conspiracy to seize or confiscate Charboneau's mail. It is sufficient for purposes of this case, at this time, to determine only that someone at IDOC did so, and did not act alone" (*id*. at 137).

Thus, regardless of whether IDOC staff may *always* be considered agents of the State as a party opponent in post-conviction cases, here, because Mr. Shedd was working on behalf of those individuals connected with Mr. Charboneau's case who were

seeking to hide critical exculpatory evidence, he was an agent of the State as a party opponent regardless of the agency or department paying his salary.

b) The Statements In The Shedd Note Concerned A Matter Within The Scope Of Mr. Shedd's Employment

The district court found Mr. Shedd wrote the Shedd Note or, at a minimum, ratified its contents. (*See* R. Vol. 3, pp.120-21, 124-25, 127-29.) At the time the note was written (June 27, 2003 (*see* R. Vol. 3, p.124)), Mr. Shedd was the "correctional law library specialist" at ICIO (Evid. Tr., p.190, Ls.16-21, p.266, Ls.3-170) and Mr. Charboneau was an inmate there (Evid. Tr., p.19, Ls.17-25). Thus, it was through his employment with IDOC that Mr. Shedd had contact, and was familiar, with Mr. Charboneau. (*See, e.g.*, Evid. Tr., p.201, L.25 – p.202, L.2 (Mr. Shedd acknowledging that he could have delivered mail to Mr. Charboneau), p.192, Ls.5-15 (Mr. Shedd testifying he was tasked with reviewing Mr. Charboneau's mail and looking through it in order to confiscate certain receipts), p.326, Ls.1-5 (Mr. Shedd acknowledging he kept a file on Mr. Charboneau).)

Mr. Shedd testified that while at ICIO he had some responsibility for handling incoming and outgoing mail, including legal mail. (Evid. Tr., p.191, Ls.15-25.) He also acknowledged that on an unrelated occasion he had been stationed in the prison mailroom with specific instructions to look for, and intercept, certain other mail expected to be delivered for Mr. Charboneau. (Evid. Tr., p.192, Ls.1-15, p.273, Ls.14-24.) With regard to the incident at issue in this case (interception of the Tira Arbaugh Letter), the Shedd Note itself reflects that Mr. Shedd was instructed by Deputy Attorney General Tim McNeese to monitor Mr. Charboneau's incoming and outgoing inmate mail (including his legal mail), surreptitiously seize certain correspondence, and report back

to Mr. McNeese or Marc Haws once any seizure was effectuated. (R. Ex. Vol. 1, p.95.) It also reflects he informed another IDOC employee, Lieutenant William Unger, of the plan and Lieutenant Unger agreed to assist him. (R. Ex. Vol. 1, p.95.) Thus, insofar as Mr. Shedd was instructed to, and actually did, monitor and intercept Mr. Charboneau's mail, those actions were part of his job with IDOC.

Finally, the Shedd Note itself was prepared as part of Mr. Shedd's job. He testified that while working at ICIO, he kept a file on Mr. Charboneau. (*See* Evid. Tr., p.313, L.15 – p.314, L.19.) He said he kept files for inmates whom he perceived to be litigious. (*See* Evid. Tr., p.326, Ls.1-5.) The only reasonable inference from this testimony is that Mr. Shedd felt these files would aid him in defending against claims by inmates or others. And, along these lines, Mr. Shedd acknowledged he signed the Shedd Note as a "CYA" ("cover your ass") measure. (*See* Evid. Tr., p.308, L.17 – p.309, L.12.)

From all of this (as well as its observations of Mr. Shedd's demeanor while testifying), the district court concluded Mr. "Shedd would do what he was asked to do by superiors or others in law enforcement, even if it was not proper, but that he would make a record of it." (R. Vol. 3, p.121 & n.2.) Under these circumstances, it is apparent the statements in the Shedd Note "concern[ed] a matter within the scope of the agency or employment of the servant or agent [Mr. Shedd] . . . ." I.R.E. 801(d)(2)(D).

c) DeWayne Shedd Wrote (Or Ratified) The Shedd Note While Employed By The IDOC

There can be little doubt Mr. Shedd wrote, or at least signed and adopted, the Shedd Note while he was employed by IDOC. The note is dated June 27, 2003 (R. Ex. Vol. 1, p.95), a time during which Mr. Shedd was working for IDOC at ICIO (Evid.

Tr., p.190, Ls.16-21, p.266, Ls.3-170). And the district court found as much: "A. DeWayne Shedd, an IDOC employee at ICIO (Idaho Correctional Institution-Orofino) at the very least signed Ex.4, and dated it 6/27/03—there is no question about this and there is no dispute about this." (R. Vol. 3, p.124.)

Further, Mr. Shedd's own statements suggest that even if he did not write the note, he signed it and acknowledged to be true, all while working at ICIO. (R. Vol. 3, p.124; *see also* Evid. Tr., p.223, L.23 – p.224, L.2, p.229, L1 – p.231, L.23, p.308, Ls.5-11, p.308, L.22 – p.311, L.5.)

d) Conclusion

Since the statements in the Shedd Note were made by Mr. Shedd, an IDOC employee and, therefore, an agent or servant of the State, and because those statements were made concerning a matter within the scope of Mr. Shedd's employment while he was actually an employee, those statements are non-hearsay under Rule 801(d)(2)(D).

2. To The Extent The Shedd Note Was "Hearsay," It Was Admissible Under The Hearsay Exceptions For Present Sense Impressions (I.R.E. 803(1)) And/Or Then-Existing Mental State (I.R.E. 803(3))

Assuming *arguendo* that the statements in the Shedd Note are determined to be "hearsay" within the meaning of Rule 801, Mr. Charboneau contends they were admissible nonetheless—as present sense impressions under Rule 803(1) and/or as statements of Mr. Shedd's then-existing state of mind under Rule 803(3).

The Idaho Rules of Evidence provide hearsay statements may be admitted if they either "describ[e] or explain[ ] an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter," I.R.E. 803(1), or if they are

"statement[s] of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed," I.R.E. 803(3). Either, or both, of these exceptions apply to the Shedd Note.

The Shedd Note is dated June 27, 2003. (R. Ex. Vol. 1, p.95.) The district court found Mr. Shedd was the one who signed and dated it (R. Vol. 3, p.124), and the court found that date was accurate (*see* R. Vol. 3, pp.122, 129, 132; *see also* R. Vol. 3, p.125 (finding that Mr. Shedd adopted all the statements contained within the Shedd Note)). While the record does not definitively reveal when Mr. McNeese instructed Mr. Shedd to monitor Mr. Charboneau's mail and surreptitiously seize the Tira Arbaugh Letter, the only reasonable inference is that the instructions were given very shortly before Mr. Shedd recorded them in the Shedd Note. This is apparent from the Shedd Note itself, which: (a) is largely written in the present tense and appears to have been penned before the Tira Arbaugh Letter was actually intercepted; (b) contains specific details that would be unlikely to be remembered long after the conversation with Mr. McNeece; and (c) generally reads like a memorandum prepared in order to aid the writer in remembering the critical details of a recent conversation. (*See* R. Ex. Vol. 1, p.95.) Further, Mr. Shedd explained he wrote the Shedd Note as a "CYA" measure. (Evid. Tr., p.308, L.17 – p.309, L.12; *see also* R. Vol. 1, p.136 ("Shedd did not want to be the one left holding the bag in the event things unraveled, and he left a trail to cover himself in the form of keeping the letter describing what he was told to look for and which documented what he was asked to do.").) That fact also suggests the note was

written immediately after his conversation with Mr. McNeese. After all, in order to effectively deflect blame, the Shedd Note would have to have been written before the conspiracy was uncovered. In other words, if the note were to fulfill its intended purpose of protecting Mr. Shedd, it would have to have been written immediately after the conversation with Mr. McNeese. In light of all of this, it is readily apparent that Mr. Shedd wrote the Shedd Note immediately after joining the conspiracy to seize and conceal the Tira Arbaugh Letter.

The Shedd Note describes an event (Mr. Shedd's conversation with Mr. McNeece) immediately after he perceived it, and explains a condition (the conspiracy to intercept and conceal the Tira Arbaugh Letter) while it was ongoing and he was perceiving it. Thus, the statements made in the note are present sense impressions within the meaning of Rule 803(1). *Cf. United States v. Dolan*, 120 F.3d 856, 869-70 (8th Cir. 1997) (affirming admission of declarant's figurative statement that he "had [defendant] by the balls" as both a present sense impression and a statement reflecting the declarant's then-existing state of mind, because it showed the declarant's "plan, motive, and design concerning his transactions and relationships with" the defendant).

The statements in the Shedd Note are also statements of Mr. Shedd's then-existing mental or emotional state within the meaning of Rule 803(3). They outline Mr. Shedd's plan to confiscate and conceal the Tira Arbaugh Letter, as that plan existed as of June 27, 2003, while the conspiracy was ongoing. *See id*.

E. The State Has Failed To Show An Abuse Of Discretion In The District Court's Decision To Admit Exhibit 8 (The "Gold Affidavit")

Included in the Hiskett Packet was the Gold Affidavit. (Evid. Tr., p.58, L.17 – p.59, L.3.) That affidavit repeated some of the vague allegations of misconduct in Mr. Charboneau's case which Sheriff Gold had made in the Gold Letter, which Mr. Charboneau used in his 2002 post-conviction petition. (*Compare* 29042 R., pp.48-49 (Gold Letter asserting, *inter alia*, that there was a "collaboration of minds" to manipulate Mr. Charboneau's case) *with* R. Ex. Vol. 1, pp.109-10 (Gold Affidavit asserting, *inter alia*, that Sheriff Gold was aware of "certain improprieties" by the prosecutors in Mr. Charboneau's case, and that "certain court and county officers often manipulated or affected the facts and evidence of cases to arrange for a finding of guilt").) But, as discussed above, it also included some very-specific allegations which had not been made in the earlier letter:

> [I]t is my belief that facts and evidence in the Charboneau case were purposely manipulated and altered to arrange for a verdict of guilty. A specific example of this came to my knowledge when in the fall of 1989, my chief deputy Mito Alanzo [sic] confided in me his concern about the fact that the District Court clerk Cheryl Watts was in possession of a letter which had been delivered to the Jerome County Courthouse via the United States Postal Service. Chief Deputy Alanzo [sic] informed me that the letter at issue had been addressed to district court Judge Philip Becker and had been sent by Tira Arbaugh, the daughter of Marilyn Arbaugh. Chief Deputy Alzanzo [sic] told me that the subject matter of this letter had significant relevance concerning the Charboneau case. Chief Deputy Alanzo [sic] stated that his concern was that the District Court Clerk Cheryl Watts had requested that he help her to destroy the letter.

(R. Ex. Vol. 1, pp.109-110.) Mr. Charboneau testified he had never seen this affidavit before. (Evid. Tr., p.58, Ls.21-23.)

At Mr. Charboneau's evidentiary hearing, the Gold Affidavit was admitted for the limited purpose of showing what was in the Hiskett Packet. (*See* Evid. Tr., p.60, Ls.6-

12.) Although the parties argued about the proper use and value of the affidavit in their closing arguments (*see* Evid. Tr., p.578, L.13 – p.579, L.24, p.612, L.7 – p.615, L.7), the district court did not make any factual findings based on the affidavit (*see generally* R. Vol. 3, pp.109-43).

Later, the Gold Affidavit came up at the hearing on Mr. Charboneau's motion for summary disposition. (*See* 9/19/14 Tr., p.632, L.10 – p.640, L.7, p.725, L.5 – p.731, L.4.) At that hearing, the district court recognized it might not be able to consider the affidavit because it arguably consisted of three levels of hearsay. (9/19/14 Tr., p.632, L.16 – p.633, L.6, p.635, L.6 – p.636, L.24.)

In its summary disposition order though, the district court ruled the Gold Affidavit admissible. Initially, it discussed the affidavit in its statement of facts, noting that it corroborated the existence and mailing of the Tira Arbaugh Letter. (*See* R. Vol. 4, p.527 & n.5.) Later, the district court discussed the affidavit again, noting it was concealed along with the Tira Arbaugh Letter, examining its admissibility, and discussing its significance. (*See* R. Vol. 4, pp.547-52.) On the final point, the district court acknowledged the affidavit "is at least double, if not triple, hearsay." (R. Vol. 4, p.548.) Ultimately though, the court ruled that it was admissible for a limited purpose—to prove that Chief Deputy Mito Alonzo told Sheriff Gold about the Tira Arbaugh Letter in the fall of 1989 and, in doing so, exhibited knowledge of its contents. (R. Vol. 4, p.549.) The district court then used this information to conclude the critical *Brady* evidence at issue in this case—the Tira Arbaugh Letter—was known to law enforcement in 1989, and to infer that it was concealed by unknown law enforcement actors at least up until the time that it was retained and concealed by IDOC. (R. Vol. 4, pp.550-52.)

On appeal, the State challenges this ruling by the district court. (*See* App. Br., pp.46-48.) It argues the Gold Affidavit is inadmissible hearsay,[70] and "[t]he district court's conclusion that Exhibit 8 may be admitted for the non-hearsay purpose of showing Alonzo's knowledge of and about" the Tira Arbaugh Letter "does not withstand scrutiny." (App. Br., pp.47-48.) In support of this argument, the State focuses on the first layer of hearsay—the fact that the affidavit is an out-of-court statement of Sheriff Gold[71]—and it argues that if Sheriff Gold was lying, the contents of his affidavit are irrelevant. (App. Br., p.48.)

The State's analysis is flawed on its most basic level, as the hearsay rules within the Idaho Rules of Evidence do not apply to affidavits in post-conviction cases. While the Rules of Evidence apply *generally* to post-conviction cases, there is an exception whereby they are "modified by Idaho Code § 19-4907." I.R.E. 101(d)(4). The modification appearing in section 19-4907 is that, "The court may receive proof by *affidavits*, depositions, oral testimony, or other evidence . . . ." I.C. § 19-4907(a) (emphasis added). In other words, while affidavits constitute inadmissible hearsay in many court proceedings, they are admissible in post-conviction proceedings. So here, where the State's concern is that Sheriff Gold's statements about Chief Deputy Alonzo are out-of-court statements made in an affidavit, the hearsay rules are of no aid to the

[70] The State argues there are three layers of hearsay: first, the affidavit itself is an out-of-court statement of Sheriff Gold; second, it recites out-of-court statements of Mito Alonzo to Sheriff Gold; and third, the statements of Chief Deputy Alonzo appear to be based on statements of Cheryl Watts. (App. Br., p.47.)

[71] The State cannot get to the second and third layers of hearsay because the district court did not consider the affidavit for the truth of the statements attributed to Chief Deputy Alonzo or Ms. Watts.

State. The fact is the Gold Affidavit was properly admitted and considered pursuant to section 19-4907 and Rule 101(d)(4).

The State also argues about the inference the district court drew based on the Gold Affidavit—that, because Chief Deputy Alonzo conveyed very specific information about the Tira Arbaugh Letter to Sheriff Gold in the fall of 1989, the letter must have been in the hands of prosecutorial or law enforcement agents by that time. (*See* App. Br., p.47 n.15.) Specifically, the State complains that the district court inferred that *Marc Haws* had knowledge of the Tira Arbaugh Letter, and it argues that this inference is unreasonable given that there is no evidence that "Marc Haws set foot in the Jerome County Courthouse after his last appearance in the underlying criminal case in 1986." (App. Br., p.47 n.15.) However, this argument is based on a false premise. The district court never made any finding related to Mr. Haws. Following the evidentiary hearing, the district court specifically declined to decide whether Mr. Haws was "involved in this case." (R. Vol. 3, p.137.) And nothing in the subsequent summary disposition order changed that. In the latter order, the district court found agents of law enforcement (at a minimum, Sheriff Gold and Chief Deputy Alonzo) knew of the Tira Arbaugh Letter, and it drew the inference that if law enforcement knew of the letter, then "*agents* of the prosecuting attorney" knew of the letter too. (R. Vol. 4, p.551 (emphasis added).) Although it certainly raised the possibility that Mr. Haws was involved, it never drew such a conclusion. (*See* R. Vol. 4, pp.551-52.) In fact, it specifically said it did not know who seized the letter:

> The inference from all the evidence is that the Arbaugh letter was known about in Jerome County by *those in law enforcement* commencing soon after delivery to the Jerome County Courthouse in 1989, and it was seized or confiscated or hidden from Charboneau *by unknown persons* from that

> time. The conclusion this leads to is that Shedd was given a mission by Mark [sic] Haws *or someone in law enforcement* with an interest in the Charboneau case . . . . It would be a fair inference to conclude the letter was concealed by those with *a connection to law enforcement* after 1989, but it is not possible to say when that commenced.

(R. Vol. 4, pp.551-52 (emphasis added).) Because the State's argument is based on a false premise, it should be rejected. The fact is the court's inference that someone in law enforcement was involved in the interception and concealment of the Tira Arbaugh Letter was infinitely reasonable given not only the Gold Affidavit, but also the balance of the circumstantial evidence in the case (*e.g.*, the envelope bearing Judge Becker's name and the canceled postmark and the subsequent conspiracy by Mr. Shedd and others to conceal the letter).

III.

The District Court Correctly Found The State Violated Mr. Charboneau's Fourteenth Amendment Right To Due Process Under *Brady v. Maryland*

A. Introduction

Under *Brady*, the government has an obligation to disclose to the defendant favorable evidence which is material to guilt or punishment. Here, Mr. Charboneau alleged the State violated *Brady* by failing to disclose the Tira Arbaugh Letter.

Following an evidentiary hearing, the district court made extensive findings concerning the Tira Arbaugh Letter and the State's concealment of that letter from at least 2003 through 2011. Later, in granting Mr. Charboneau's motion for summary disposition, the district court inferred from the undisputed evidence that the letter had actually been concealed by law enforcement and/or the prosecution since it was first sent in September 1989. This timing was important because it coincided with the Idaho Supreme Court's remand of Mr. Charboneau's case for re-sentencing (which did not

occur until 1991). The district court also ruled the Tira Arbaugh Letter would be admissible not only at the re-sentencing hearing, but also at a new trial. Thus, the district court ruled the letter was material to the question of punishment (because it almost surely would have led to a different sentence at Mr. Charboneau's 1991 re-sentencing), and to the question of guilt (because in 1991 Mr. Charboneau was still within his time to file a motion for a new trial, and there is a reasonable probability that such a motion would have been granted and, upon re-trial, he would have been convicted of a lesser offense). Accordingly, the court granted post-conviction relief and ordered a new trial.

On appeal, the State challenges the district court's grant of relief under *Brady*. (*See* App. Br., pp.48-72.) It offers three reasons why it believes the district court erred. First, it claims its *Brady* obligations no longer existed while Mr. Charboneau's case was on direct review and pending re-sentencing. (App. Br., pp.49, 50-53.) Second, it contends Mr. Charboneau failed to establish all of the elements of a *Brady* claim. (App. Br., pp.49, 53-57.) Third, it asserts the district court's factual findings were wrong. (App. Br., pp.49, 57-72.)

For the reasons set forth below, the State's arguments are without merit.

B. Standard Of Review

The State's first argument involves only a question of law, which this Court will review *de novo*. *McKinney v. State*, 133 Idaho 695, 706 (1999). The second argument primarily involves questions of law, so it too will be reviewed *de novo*. *Id*. And the third argument primarily involves question of fact, which will be reviewed for clear error. *State v. Rogers*, 144 Idaho 738, 740, 170 P.3d 881, 883 (2007).

> In deciding whether findings of fact are clearly erroneous, this Court determines whether the findings are supported by substantial, competent evidence. Evidence is substantial if a reasonable trier of fact would accept it and rely on it. Findings based on substantial, competent evidence, although conflicting, will not be disturbed on appeal.

Neider v. Shaw, 138 Idaho 503, 506 (2003) (citations omitted).

C. The District Court Correctly Ruled The State Still Owed Mr. Charboneau A Duty Under *Brady* To Disclose Favorable Evidence While There Was No Final Judgment Of Conviction In His Case And, In Fact, His Case Was Still Pending Re-Sentencing

The State's primary argument about *Brady* is that, even though there was no final judgment of conviction in Mr. Charboneau's case when the State came into possession of the Tira Arbaugh Letter, and even though a re-sentencing had been ordered by the Idaho Supreme Court, the State was free to conceal that critical letter. (*See* App Br., pp.50-53.) The State's reasoning is not entirely clear; however, it appears to get to its position in one (or both) of two ways—either by misrepresenting the district court's findings, or by torturing the term "post conviction" and ignoring United States Supreme Court precedent holding that its *Brady* obligations extend, at a minimum, through the defendant's sentencing hearing. In either case, the State's arguments are meritless.

Whatever the State's angle, its argument is based on the United States Supreme Court's Opinion in *District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009). (*See* App. Br., pp.50-53.) In that case, Osborne had been convicted and sentenced for his crime, and his conviction and sentence had been affirmed on appeal, when, many years later, he filed a petition for state post-conviction relief seeking additional DNA testing which he believed would exonerate him. *See Osborne*, 557 U.S. at 55-59. In addressing Osborne's claim that the government's refusal to turn over the evidence for DNA testing constituted a violation of his due process rights under

Brady, the Supreme Court held that *Brady* does not require the government to disclose favorable evidence *in post-conviction proceedings*: "Osborne's right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in post-conviction relief. *Brady* is the wrong framework." *Id*. at 68-69.

The State attempts to argue its suppression of the Tira Arbaugh Letter occurred post-conviction and, thus, under *Osborne*, did not constitute a *Brady* violation. (*See* App. Br., pp.50-53.) How the State gets there though is somewhat unclear. On the one hand, it appears to claim the district court found only that the State suppressed the letter from 2003 to 2011. (*See* App. Br., p.51 ("In this case the district court did not find any pre-conviction suppression of evidence by the prosecution, only post-conviction suppression [the letter] more than a decade after the criminal case was final.").) However, any such contention is patently false. Although, after the evidentiary hearing, the court explicitly found the State suppressed the letter from 2003 through 2011 (*see, e.g.*, R. Vol. 3, p.136), and was vague with respect to the 1989-2003 timeframe (finding only that, "Wherever the letter was between 1989 and 2003 or 2011, it was taken or concealed by someone who had the state's purposes in mind, and who acted on behalf of the state, rather than the defendant" (R. Vol. 3, p.116)), later, in its summary disposition order, the district court specifically found "*the Arbaugh letter was known about in Jerome County by those in law enforcement commencing soon after delivery to the Jerome County Courthouse in 1989, and it was seized or confiscated or hidden from Charboneau by unknown persons from that time*" (R. Vol. 4, pp.551-52)—a finding the State ignores.

On the other hand, the State also appears to suggest that because the *Osborne* Court used the term "post-conviction" in describing the limits of the State's *Brady* obligations, those obligations terminate after a defendant is found guilty, and do not extend through his appeal and re-sentencing. (*See* App. Br., p.52 (apparently arguing *Brady* did not apply because the Tira Arbaugh Letter was "written in 1989, at least four years after the conclusion of the trial and after the conviction was affirmed on appeal").) Assuming this is the State's argument, it fails for two reasons.

First, any such error was invited by the State, as the State conceded below that its *Brady* obligations persist throughout the lifetime of the criminal case. Below, when questioned by the district court about whether *Brady* deals with a trial right only, or whether it describes an obligation that extends through sentencing as well, the State acknowledged it applies through sentencing. (5/24/13 Tr., p.12, Ls.16-20.) When the court then pointed out that when the Tira Arbaugh Letter was written in 1989, Mr. Charboneau had yet to be re-sentenced, the State responded, "And that's why we do not dispute the timing of the Tira Arbaugh letter, if, of course, we accept all of the allegations established for purposes of this motion. The letter's dated 1989, so it was while the criminal proceeding was still pending. *So that is a* Brady *claim*." (5/24/13 Tr., p.12, L.21 - p.13, L.11 (emphasis added).) Moments later, counsel for the State explained further:

> So where the state has evidence that a witness has recanted *during the course of the criminal proceedings*, the state is required under *Brady* to disclose that evidence. And in fact if the state does not, that would constitute a *Brady* violation.
>
> If *after the judgment is final* a witness recants, and an agent of the state, meaning the prosecutor or an investigating officer, that sort of thing, learns of that recantation, there would still be an ethical duty to turn that over, but it wouldn't have anything to do with *Brady*. So the ongoing *Brady*

> duty is to disclose what should have been disclosed *in the criminal proceedings* themselves.

(5/24/13 Tr., p.14, Ls.6-17 (emphasis added). *See also* 9/19/14 Tr., p.694, L.17 – p.697, L.19 (arguing the State's *Brady* obligation exists only until such time as "everything was done, conviction was final, judgment was final").) Because the State invited the alleged error about which it now complains, the State is estopped from pressing that claim of error on appeal. *See State v. Owsley*, 105 Idaho 836, 837-38 (1983). "Errors consented to, acquiesced in, or invited are not reversible." *Id*. at 838.

Second, the State's argument fails on its merits, as it relies upon a distortion of *Osborne*'s holding. Not only was *Osborne* clearly limited to examining the scope of an individual's *Brady* rights *after his criminal case has ended*, but the State's argument flies in the face of other precedent clearly holding the State's *Brady* obligations exist through the defendant's sentencing. Indeed, in *Brady* itself the Supreme Court made this clear, as it framed the government's duty to disclose favorable evidence as an obligation to disclose evidence which would: (1) exculpate the accused, *or* (2) *"reduce the penalty."* *Brady*, 373 U.S. 87-88 (emphasis added). In other words, there is a duty of disclosure "where the evidence is material either to guilt *or to punishment* . . . ." *Id*. at 87 (emphasis added). And, indeed, *Brady* was a case where the evidence improperly suppressed by the government was material to punishment, so a due process violation was found and the defendant was ultimately entitled to a new sentencing hearing. *See id*. at 88-91.

Applying the correct framework, it is clear that the State had an obligation to disclose the Tira Arbaugh Letter to Mr. Charboneau. That letter was written, sent, and ultimately seized by agents of the State in September 1989. At the time of the letter's seizure, the Idaho Supreme Court had recently issued its opinion in Mr. Charboneau's

original direct/post-conviction appeal, *see State v. Charboneau*, 116 Idaho 129 (1989) (opinion issued April 4, 1989; rehearing denied May 25, 1989), and both parties had petitions for writs of *certiorari* pending with the United States Supreme Court, *see Charboneau v. State*, 493 U.S. 922 (1989) (denying Mr. Charboneau's petition on October 16, 1989); *Idaho v. Charboneau*, 493 U.S. 923 (1989) (denying the State's petition on October 16, 1989). Thus, Mr. Charboneau's criminal case was still ongoing when the State first obtained and initially failed to disclose the letter. *See Smith v. Roberts*, 115 F.3d 818, 819-20 (10th Cir. 1997) (holding the State's obligations under *Brady* continue while a case is on direct review).

More importantly though, in its April 4, 1989 opinion, the Idaho Supreme Court remanded Mr. Charboneau's case to the district court for a new sentencing hearing. *See Charboneau*, 116 Idaho at 148-54. Mr. Charboneau was not re-sentenced until 1991. (R. Vol. 4, p.530, n.6.) Thus, from the time the State seized the Tira Arbaugh Letter to the time that Mr. Charboneau was re-sentenced, the State was clearly obligated to turn it over under *Brady* because it was, at a minimum, material to the question of punishment upon re-sentencing.

In light of the foregoing, it is clear the district court correctly analyzed this case under the *Brady* framework.[72]

[72] After arguing *Brady* has no application in this case, the State implicitly asserts in a footnote that the district court should have employed the standard that applies generically to claims of newly-discovered evidence—the four-part test set forth in *State v. Drapeau*, 97 Idaho 685 (1976). (*See* App. Br., p.53, n.19.) It then asserts "Charboneau's claim would have failed" under this test. (App. Br., p.53 n.19.) However, the State offers no argument in support of this contention, and so it is waived. I.A.R 35(a); *Zichko*, 129 Idaho at 263.

D. The District Court Correctly Found The State Violated Mr. Charboneau's Due Process Rights As Outlined By *Brady* And Its Progeny

In *Brady*, the United States Supreme Court held the government has a duty (under the Fourteenth Amendment's due process clause) to disclose, upon the defendant's request, favorable evidence that "is material either to guilt or to punishment." 373 U.S. at 87. Subsequently, the Court expanded its holding to require the disclosure of favorable evidence regardless of whether it was requested by the defendant. *United States v. Agurs*, 427 U.S. 97, 108 (1976).

In order to make out a claim for relief under *Brady*, one must show three things: (1) the evidence at issue is favorable—either because it is exculpatory or impeaching; (2) the evidence must have been suppressed by the State (whether willfully or inadvertently); and (3) the evidence must be "material," meaning that the evidence must be of such a character that, had it been timely disclosed, there is a "reasonable probability" that the outcome of the case would have been different. *State v. Dunlap*, 155 Idaho 345, 389 (2013).

In this appeal, the State argues the district court erred in its application of the foregoing *Brady* standard. (App. Br., pp.53-58.) Specifically, although it concedes the Tira Arbaugh Letter is favorable to Mr. Charboneau (App. Br., p.53), it argues the court erred in finding it was suppressed by the State (App. Br., pp.53, 54-56), and that it is "material" (App. Br., pp.53, 56-58). The State's arguments, however, are without merit.

1. The District Court Correctly Found The Tira Arbaugh Letter Was Suppressed By The State

The State argues, "The factual findings of the district court do not include possession or control of [the Tira Arbaugh Letter] at any relevant time by 'the state' as

that term is defined for purposes of *Brady*." (App. Br., pp.53, 54-56.) In making this argument, the State focuses on the district court's original set of findings immediately following the evidentiary hearing (in which the court explicitly identified Mr. Shedd as having concealed the letter from 2003 through 2011), and it largely ignores the fact that the district court made additional findings in its subsequent summary disposition order. (*See* App. Br., pp.54-55.)

In fact, as noted above, in its summary disposition order, the district court found the letter was seized and concealed shortly after being sent in 1989: "the Arbaugh letter was known about in Jerome County by those in law enforcement commencing soon after delivery to the Jerome County Courthouse in 1989, and it was seized or confiscated or hidden from Charboneau by unknown persons from that time." (R. Vol. 4, pp.551-52.) It then went on to find Mr. "Shedd was given a mission by Mark [sic] Haws or someone in law enforcement with an interest in the Charboneau case sometime after that, and Shedd looked for and seized the Arbaugh letter, and kept it from Charboneau." (R. Vol. 4, p.552.)[73]

[73] Eventually, the State gets around to acknowledging (at least to a limited degree) the relevant findings. (*See* App. Br., pp.55-56.) It then complains these findings are actually suppositions on the part of the district court, not findings. (App. Br., p.56.) While it is not clear what the State thinks the difference is between a "finding" and a "supposition," the reality is the district court made it clear that its conclusions were "inferences." (*See* R. Vol. 4, pp.550-52.) The State has not challenged the district court's authority to draw reasonable inferences at the summary disposition stage (*see* App. Br., pp.54-56), nor can it. *See State v. Yakovac*, 145 Idaho 437, 444 (2008) ("When an action is to be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts."). Nor has the State challenged these inferences as clearly erroneous factual findings. Thus, the State has waived any legal challenge to the inferences.

The fact that the district court was unable or unwilling to name the individual participants (besides Mr. Shedd) in the conspiracy to seize and conceal the Tira Arbaugh Letter is of no consequence. The district court found those individuals, whoever they were, were involved with the prosecutor and/or law enforcement, and that is all that is necessary under *Brady*. "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others *acting on the government's behalf in the case*, including the police." *Kyles v. Whitley,* 514 U.S. 419, 437 (1995) (emphasis added).[74]

The fact that the State now disagrees with the factual findings and reasonable inferences of the district court does not establish the district court erred as a matter of law in ruling that the second ("suppression") prong of the *Brady* standard was established in this case.

2. The District Court Correctly Found The Tira Arbaugh Letter To Be Material

The State also argues the Tira Arbaugh Letter is not "material" within the meaning of *Brady*, in that its suppression did not cause Mr. Charboneau any prejudice. (App. Br., pp.53, 56-58.) In making this claim, the State offers two different theories:

[74] The Idaho Supreme Court has characterized the reach of *Brady* slightly differently than did the United States Supreme Court in *Kyles*. The Idaho Supreme Court has held, "The duty of disclosure enunciated in *Brady* is an obligation of not just the individual prosecutor assigned to the case, but of all the government agents having a significant role in investigating and prosecuting the offense." *State v. Avelar*, 132 Idaho 775, 781 (1999) (quoting *State v. Gardner*, 126 Idaho 428, 433 (Ct. App. 1994)). Insofar as the Idaho courts' inclusion of the phrase "significant role in investigating and prosecuting the offense" in its definition of the scope of the State's disclosure obligations under *Brady* causes that scope to be narrower than what was dictated in *Kyles*, Mr. Charboneau submits the *Kyles* standard controls. However, he submits the Court need not reach this issue, as the district court found law enforcement and/or prosecutorial officials were involved in the original seizure and concealment of the Tira Arabaugh Letter in this case, and they worked in concert with the IDOC in continuing to conceal the letter from 2003 through 2011.

first, "[b]ecause, according to the district court's findings, the state first suppressed the evidence in 2003," any suppression could not have impacted Mr. Charboneau's criminal case (App. Br., pp.56-57); second, because Mr. Charboneau knew, or should have known, that Tira testified falsely as of at least 2002, he cannot claim prejudice owing to the State's failure to disclose Tira's letter (App. Br., pp.57-58.) Neither theory has merit.

The State's first theory—that the district court found that the State first suppressed the Tira Arbaugh Letter in 2003—is based on its continued misrepresentation of the district court's rulings. As is discussed repeatedly above, the district court did *not* find that the State first suppressed the Tira Arbaugh Letter in 2003; it found the State suppressed the letter shortly after it was sent—in September 1989. (*See* R. Vol. 4, pp.551-52.) And, as is also discussed above, this was while Mr. Charboneau's case was still on direct review and pending a re-sentencing. Accordingly, the district court correctly found that, had the letter been disclosed when it came into the State's possession in 1989, "it most certainly would have provoked a different outcome of the sentencing proceeding," (R. Vol. 4, p.556; *accord* R. Vol. 4, pp.530, 577), and that, because Mr. Charboneau could have filed a motion for a new trial at that time, which "most likely" would have been granted, there is a reasonable possibility that at the end of that new trial he would have been convicted of something less than first degree murder (R. Vol. 4, pp.557-59, 577-79).

The State's second theory—that Mr. Charboneau knew, or should have known, of Tira's false testimony since at least 2002—is no more compelling than its first theory. Preliminarily, it is worth observing that this second theory harkens back to the State's argument that Mr. Charboneau's petition was untimely filed because the current *Brady*

claim is essentially the same as that which was brought in 2002. (*See* App. Br., pp.26-32.) However, as was pointed out in response to that argument, the *Brady* claim made in the present (2011) petition is fundamentally different from that which was made in 2002 because the present claim is based on evidence of which Mr. Charboneau had no knowledge until it was handed to him by Corporal Hiskett on March 18, 2011. (*See* Part I.C, *supra*.) Likewise, although in 2002 Mr. Charboneau had reason to believe Tira had testified falsely, he certainly did not know she had written a letter recanting her testimony. Thus, he simply could not have raised the current claim. Further, because there is nothing Mr. Charboneau could have done in 2002 to have learned of the Tira Arbaugh Letter, it cannot be said he *should have* known of its existence at any point before it was handed to him.

More importantly though, the State's second theory fails because it is based on what the State claims Mr. Charboneau knew, or should have known, *in 2002*, and that timeframe is irrelevant. The Tira Arbaugh Letter was seized and concealed from Mr. Charboneau in 1989, and the district court ruled that he suffered prejudice from that suppression at his 1991 re-sentencing (at a minimum). Thus, what the State claims Mr. Charboneau knew or should have known in 2002 is wholly irrelevant to the question of whether he suffered prejudice in 1991.

In short, the State has failed to demonstrate any error in the district court's determination that the Tira Arbaugh Letter is "material," in that its suppression prejudiced Mr. Charboneau. At a minimum, he was prejudiced at his re-sentencing hearing. But he was also prejudiced in terms of his ability to obtain a new trial where

there is a reasonable probability he would have been acquitted of at least first degree murder.

E. The State Has Failed To Show Clear Error In Any Of The District Court's Factual Findings, Or That It Shifted To The State A Burden Of *Disproving* Mr. Charboneau's Allegations

The State's final argument on the *Brady* issue is that the district court was wrong in finding the facts. (App. Br., pp.58-72.) The State challenges the court's factual findings on two subjects—whether Mr. Shedd was involved in a conspiracy to withhold the documents from Mr. Charboneau (*see* App. Br., pp.59-70), and whether Mr. Charboneau's mail was intercepted while he was incarcerated in 2003 (*see* App. Br., pp.70-71). The State also appears to argue that, insofar as the district court reached conclusions which were not factually supportable, it necessarily shifted the burden of proof to the State. (*See* App. Br., pp.59-60, 69-70.)

Although the State cloaks its arguments in the language of the proper legal standard ("clear error"), it is really nothing more than a naked plea for this Court to re-weigh the evidence and substitute its own factual findings for those of the district court. Because that is not an appropriate role of this Court, the State's arguments should be rejected. *See, e.g., Sherman Storage, LLC v. Global Signal Acquisitions II, LLC*, 159 Idaho 331, __, 360 P.3d 340, 345 (2015) ("The district court's factual findings are owed deference unless clearly erroneous. It is not this Court's role to reweigh evidence.") (citations and internal quotation marks omitted).

In making its clear error/burden shifting argument, the State urges this Court to accept its explanations of various individual pieces of evidence. It does so by: highlighting evidence it deems favorable and casting that evidence in its most favorable

(even if unreasonable) light; completely ignoring unfavorable evidence, and drawing inferences contrary to the reasonable inferences drawn by the district court. However, this does not demonstrate clear error, as is required under Idaho law. Some of the more flagrant deficiencies in the State's arguments are highlighted below.

First, in discussing the Tira Arbaugh Letter (Exhibit 14), the State wishes for this Court to believe it is, in some unspecified way, a forgery. (*See* App. Br., pp.60-61, 61-62.) The State claims it "is a multi-generational copy, meaning it is a copy of a copy of a copy, etc.," and it observes that, because of this, it *could have* been manipulated. (App. Br., pp.60-61.) However, the State cites nothing for its claim that the letter was a "multigenerational" copy. (*See* App. Br., p.61.) And it does not appear there is any actual evidence that it was a "multigenerational" copy. It appears that the evidence below was simply that it was a photocopy, not that it was a "multigenerational" photocopy, as the State claims. (*See* R. Vol. 2, pp.726-27; Evid. Tr., p.333, L.8 - p.382, L.21.) Further, even if the version of the letter before the court was a multigenerational copy, the State's observation that it *could have* been forged hardly shows clear error in the district court's reliance on that letter. After all, this is just wild speculation on the State's part; it has offered no evidence that the letter actually *was* altered. And the State's argument attempts to back away from its own stipulation. While, on appeal, the State acknowledges only that the letter is "*apparently* [in] the handwriting of Tira" (App. Br., p.60 (emphasis added)), below, the State *stipulated* that the letter was written in Tira's hand (R., pp.957, 971) and, based on that stipulation, the district court entered an order stating: "Pursuant to the state's admission and stipulation in open court, the Court does hereby find that the handwriting appearing on the copy of the letter and envelope .

. . is the handwriting of Tira Arbaugh. *This letter is authentic in the sense that it is not a forgery*." (R. Vol. 2, p.975 (emphasis added).) Further, the State wholly ignores the fact that the authenticity of the Tira Arbaugh Letter is corroborated by additional evidence. Given that the State has no evidence the Tira Arbaugh Letter is a forgery, only wild speculation that conflicts with its own stipulation below, it has failed to show clear error on the district court's part.

Second, in further attempting to undermine the legitimacy of the Tira Arbaugh Letter, the State argues, "This document could not have come into existence in the manner described therein because there was no street dance in Bruneau on the date set forth on the letter," and because a witness testified that Tira was living in Nevada on the date in question. (App. Br., p.61; *see also* App. Br., p.42 n.14 (arguing the Tira Arbaugh Letter was not sufficiently corroborated to be deemed admissible hearsay, in part, because "there is overwhelming evidence that Exhibit 14 was not created under the circumstances set forth within it," and basing this argument on the contentions that there was no street dance on the date in question and a witness said Tira was not there).) However, the claim that "there was no street dance" on the date in question is the State's inference, not a statement of fact. The evidence in this case shows only that there was apparently no *newspaper advertisement* of a street dance being held in Bruneau on the date in question. (*See* R. Vol. 4, pp.82-84, 86-92, 444-46.) The absence of a newspaper advertisement of a dance is not dispositive of whether a dance actually occurred, much less the more important question of whether Tira mailed her letter to Judge Becker from Bruneau in September 1989, as she claimed in her letter.

Further, the State fails to acknowledge there was conflicting evidence on these points. Included with the Tira Arbaugh Letter in the Hiskett Packet was an envelope, addressed from Tira to Judge Becker, and bearing a postmark indicating it was mailed from Bruneau, Idaho on September 7, 1989. (R. Ex. Vol. 1, p.97.)[75] Despite the lack of a *newspaper advertisement* of a dance in Bruneau on September 6-7, 1989, there is evidence that there was, in fact, some sort of street dance in Bruneau around that date. Pinto Bennett said: he and his band performed at such an event; he spoke to Tira during a break in the band's performance; and Tira told him she had information that would help Mr. Charboneau and he encouraged her to tell the authorities. (R. Vol. 4, pp.211-13.) The State's failure to mention Mr. Bennett's deposition testimony on this point is telling. Likewise, the State fails to mention that the one witness who testified that Tira was living in Nevada at the relevant timeframe and, therefore, could not have sent her letter from Bruneau in September 1989, was found by the district court not to be credible. (*See* R. Vol. 3, p.136.) That the State would have this Court find a lack of a newspaper advertisement and a bit of non-credible testimony is more convincing than a valid postal stamp and the sworn testimony of a credible witness, does not demonstrate a clear error in the district court's factual findings.

Third, in discussing various documents contained within the Hiskett Packet (Exhibit 2 (an offender concern form), Exhibit 3 (a resource center request form), Exhibit 7A (an offender concern form)), the State argues that, because the original copies found in the packet *should have* been in the possession of Mr. Charboneau, he *must have* been the one to have put them in the packet, thereby proving the whole packet was a

[75] A postal employee has verified the postmark is legitimate and correct. (R. Vol. 2, p.721.)

grand fraud perpetrated by Mr. Charboneau. (*See* App. Br., pp.62-63, 64, 66, 68.) However, the fact that these documents *should have* been provided to Mr. Charboneau by IDOC staff does not mean they *were* provided to him in the first place, or that they were not later confiscated.[76] Further, the State's assumption is controverted by evidence to the contrary, as Mr. Charboneau specifically denied that two out of the three documents the State now assumes were in his possession were actually in his possession. (*See* Evid. Tr., p.35, L.16 – p.37, L.7 (Mr. Charboneau testifying he had never received Exhibit 2), p.46, Ls.1-10 (Mr. Charboneau testifying he did not think he had received Exhibit 3).)[77] An assumption which is contradicted by evidence is not indicative of there being any clearly erroneous findings by the district court.

Fourth, the State suggests that because the Gold Affidavit is dated November 13, 2001, but Mr. Charboneau was not transferred to ICIO until 2002, that document could not have been intercepted by Mr. Shedd. (*See* App. Br., p.63.) However, this suggestion makes little sense. Just because the Gold Affidavit was dated November 13, 2001, that does not mean it was sent to ICIO on that date. The affidavit could well have been sent to the Idaho State Correctional Institution (ISCI), which is where Mr. Charboneau was housed prior to his transfer to ICIO (Evid. Tr., p.53, L.23 – p.54, L.2, p.158, Ls.9-11), and it could have been intercepted and held there before following Mr. Charboneau up to ICIO in 2002. This theory is supported by a separate item in the Hiskett Packet—an

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[76] Additionally, the State's characterization of the evidence is once more highly suspect. With regard to Exhibit 3, the State argues, "Charboneau admitted that he received this original document with the packet." (App. Br., pp.62-63 (citing Evid. Tr., p.144, L.6 – p.145, L.8).) That is false. In fact, when questioned about Exhibit 3, Mr. Charboneau agreed the original *should have been* returned to him; he never said it actually *was* returned to him. (Evid. Tr., p.144, L.25 – p.145, L.8.)

[77] Mr. Charboneau was not asked this question about Exhibit 7A.

envelope with multiple notations on it, including the following: "Forward to ICIO Legal Docs 12-5-02," and which has Mr. Shedd's signature on the back, along with an indication that he received it on January 6, 2003. (R. Ex. Vol. 1, pp.100-01.) Granted, under this theory, Mr. Shedd would have had to have been part of a larger conspiracy to intercept and confiscate Mr. Charboneau's mail. But that is precisely what the evidence suggests (*see, e.g.*, R. Ex. Vol. 1, p.95 (Shedd Note identifying a conspiracy)) and what the district court found (*see* R. Vol. 3, pp.134-36; R. Vol. 4, pp.550-52). Regardless, the district court's finding that the Gold Affidavit was seized and concealed along with the Tira Arbaugh Letter is amply supported by other evidence. For example, Mr. Shedd readily admitted in the Shedd Note that he had been instructed by others to seek out and confiscate any mail from Sheriff Gold or bearing Tira's name. (R. Ex. Vol. 1, p.95.) Perhaps the conspirators on the State's side feared that if Sheriff Gold had tried to send his affidavit to Mr. Charboneau at ISCI and learned it never reached him, he would try to re-send it to Mr. Charboneau at ICIO. Additionally, Mr. Charboneau testified that the first time he ever saw the Gold Affidavit was when he received the Hiskett Packet on March 18, 2011. (Evid. Tr., p.58, Ls.17-23.) Indeed, had Mr. Charboneau had the Gold Affidavit sooner—for example, before his move to ICIO in 2002—he undoubtedly would have used it in conjunction with his 2002 post-conviction petition. (*Cf*. R. Vol. 3, p.131 n.8 (district court observing that there is no chance that Mr. Charboneau would have sat on the Tira Arbaugh Letter had he had it in his possession when he filed his 2002 post-conviction petition).[78] In light of all of this, there is nothing clearly erroneous about the

[78] Mr. Charboneau did support his 2002 petition with the Gold Letter, which apparently did reach him. (*See* 29042 R., p.48.)

district court's findings.

Fifth, the State places tremendous emphasis on the fact that the district court found that certain documents contained within the Hiskett Packet (Exhibit 5 (a purported letter from Deputy Balzer), Exhibit 7C (a purported e-mail from Mr. Shedd), and Exhibit 7D (another purported e-mail from Mr. Shedd)) are forgeries. (App. Br., pp.65-66.) Apparently, the State wants this Court to assume that they were forgeries prepared by Mr. Charboneau or someone connected to him. (*See* App. Br., p.68 ("[S]everal of the documents are known forgeries created for the sole purpose of providing evidence of Charboneau's claims as asserted in the third and current petitions for post-conviction relief. The only viable suspect for who collected these documents is Charboneau himself.").) However, the State fails to disclose that the district court specifically addressed these forgeries and concluded Mr. Charboneau was *not* responsible for them. With regard Exhibit 5, the letter, the district court considered the opinions of the parties' respective handwriting experts, and found the opinion of Mr. Charboneau's expert, Lynn Terry, to be more credible. (*See* R. Vol. 3, pp.121-22, 125-29.) Mr. Terry opined that Mr. Shedd was the author of the forgery attributed to Mr. Balzer and, based on that expert opinion, the district court found that Mr. Shedd was, in fact, the author of Exhibit 5. (R. Vol. 3, pp.128-29.) The district court also addressed the forged e-mails—again, with expert assistance (a court appointed forensic computer examiner). (*See* R. Vol. 3, pp.137, 138-40.) Ultimately, the court found that the e-mails were likely created by "someone with access to IDOC computers and email." (R. Vol. 3, pp.139; *see also* R. Vol. 3, p.131 ("Even assuming some of the documents found in the packet are fake or forged, no evidence points to Charboneau, or anyone sympathetic to him, as

the culprit. He had far less opportunity to fake or forge documents than the state did.").) That conclusion was based on the following facts: (1) the court's "forensic examiner observed that the emails in question have a lot of formatting that would be difficult to fabricate if one did not have real emails to use as a template or reference" (R. Vol. 3, p.138); (2) there is no evidence actually linking the e-mails to "anyone friendly with Charboneau" (R. Vol. 3, p.139); (3) inmates have "no access to the internet, could not send or receive email, and had no access to IDOC email in order to observe what an IDOC email would look like" (R. Vol. 3, pp.138-39); (4) Mr. Charboneau's typewriter could not duplicate the font in the e-mails (R. Vol. 3, p.139); and (5) Mr. Charboneau had no knowledge of what details to put into the fake e-mails since he had seen neither the Shedd Note nor the Tira Arbaugh Letter (R. Vol. 3, p.139). In light of this well-reasoned, well-supported analysis, it cannot be said that the district court engaged in any clearly erroneous fact-finding based on the forged e-mails.

Sixth, the State asserts baldly that, "The district court's conclusion that Exhibit 4 [the Shedd Note] is genuine is contrary to the evidence and thus clearly erroneous." (App. Br., p.66.) However, it offers no argument whatsoever as to how the genuineness finding is "contrary to the evidence" and, thus, it has waived this issue on appeal. *See* I.A.R. 35(a); *Zichko*, 129 Idaho at 263. Additionally, whether a finding is "contrary to the evidence" is not the standard for clear error. As set forth above, the question is whether "the findings are supported by substantial, competent evidence," and "[e]vidence is substantial if a reasonable trier of fact would accept it and rely on it." *Neider*, 138 Idaho at 506. This standard obviously imposes upon the State a much higher burden than the "contrary to the evidence" standard the State now argues. Finally, when one considers

the evidence before the district court, it is clear the district court's finding that the Shedd Note is genuine is supported by substantial, competent evidence. Among the many facts supporting the district court's finding were the following: (1) when shown the note by an investigator and attorney from the attorney general's office, Mr. Shedd admitted that the statements in the note were true (*see* Evid. Tr., p.221, L.12 - p.222, L.1, p.223, L.23 – p.224, L.2, p.229, L.1 - p.230, L.14; *see also* R. Vol. 3, p.120)[79]; (2) although he has given conflicting statements as to whether he wrote the note, Mr. Shedd has consistently admitted that he at least signed it, and he has also said that he would not have signed it if its contents were not true (*see* Evid. Tr., p.218, L.19 – p.220, L.9, p.230, L.15 – p.231, L.23, p.233, Ls.8-9, p.233, L.14 – p.234, L.8, p.245, L.16 – p.246, L.4, p.307, L.17 – p.308, L.9, p.309, L.13 – p.311, L.5; *see also* R. Vol. 3, pp.124-25, 128-29, 132-33); (3) Mr. Shedd told investigators that he signed the note as a "CYA" ("cover your ass") measure (*see* Evid. Tr., p.308, L.17 - p.309, L.12; *see also* R. Vol. 3, pp.120-21); (4) Mr. Charboneau's handwriting expert (who was deemed to be more credible than the State's handwriting expert) opined that Mr. Shedd not only signed the note, but that he also wrote it (*see* Evid. Tr., p.346, L.9 - p.350, L.17; *see also* R. Vol. 3, pp.126-29). In light of all of this, the State's claim that the district court clearly erred in finding the Shedd Note genuine is meritless.

Seventh, the State argues "there is no evidence" to support the district court's findings as to when the Tira Arbaugh Letter was sent to Mr. Charboneau at ICIO and

[79] When questioned under oath about his admission during the Attorney General's investigation, the district court observed Mr. "Shedd appeared surprised" to learn the interview had been recorded and disclosed. (*See* R. Vol. 3, p.121 n.2.) He suggested in his testimony that, had he known he was being recorded he would not have been so forthcoming during the interview. (*See* Evid. Tr., p.308, Ls.5-16; *see also* R. Vol. 3, p.121 & n.2.)

was intentionally intercepted by Mr. Shedd (at the direction of others), and "the contrary evidence is legion." (App. Br., p.70.) The contrary evidence relied upon by the State, and touted as being substantial, consists of nothing more than testimony as to how incoming mail should normally be processed at ICIO. (*See* App. Br., pp.70-71.) These arguments fail.

As an initial matter, it is not that "there is no evidence" to support the district court's findings; it is that the State ignores the relevant evidence. In terms of the finding that Mr. Shedd was involved in conspiracy to intercept Mr. Charboneau's mail, that finding is supported by a wealth of evidence, including: (1) the Shedd Note, which is essentially an admission that Mr. Shedd accepted the task of surreptitiously screening Mr. Charboneau's mail and secretly confiscating anything from Sheriff Gold or mentioning Tira's name; (2) Mr. Shedd's subsequent statements admitting the Shedd Note was true; (3) Mr. Shedd's admission that he kept a "big file" on Mr. Charboneau (*see* Evid. Tr., p.313, L.15 – p.314, L.19); and (4) the Hiskett Packet, which consisted of a group of documents, was consistent with the "big file" kept by Mr. Shedd, in that the documents arrived in a large white envelope bearing Mr. Charboneau's name on one side, along with the notation, "Legal Documents," and Mr. Shedd's signature, along with a date of September 23, 2003, on a piece of tape affixed to the back side (*see* R. Ex. Vol. 1, pp.91-92). And, in terms of the relevant timeframe, the district court's conclusion that the Tira Arbaugh Letter was intercepted by Mr. Shedd sometime between June and September of 2003 is supported by the Shedd Note, which reflects that as of June 27, 2003, Mr. Shedd was still looking for mail from Sheriff Gold and referencing Tira (*see* R. Ex. Vol. 1, p.95), and the envelope holding the Tira Arbaugh Letter, which had

Mr. Shedd's signature, along with the date of September 23, 2003, on a piece of tape affixed to its back side, thereby suggesting the letter was sealed into the envelope on September 23, 2003[80] (*see* R. Ex. Vol. 92). The precise timeframes are not particularly relevant anyway though. What is relevant is that the district court found the Tira Arbaugh Letter was first seized in September 1989, and it was concealed consistently from that time through its disclosure to Mr. Charboneau on March 18, 2011.

In summary, although the district court's factual findings are not to the State's liking, its misleading and one-sided representation of the evidence does not demonstrate clear error on the part of the district court. Nor does it demonstrate any endeavor by the district court to shift the burden of the proof to the State.

F. Conclusion

Because the State's constitutional obligations under *Brady* extended through Mr. Charboneau's re-sentencing in 1991, the State suppressed favorable evidence to Mr. Charboneau's prejudice, and the district court's findings withstand scrutiny, the State has failed to show any error in the district court's finding of a *Brady* violation and corresponding grant of post-conviction relief in this case.

IV.

The District Court Did Not Err In Referencing The Prosecutor, Marc Haws', *Brady* Violation In A Prior Capital Case

A. Introduction

This is not Marc Haws' first rodeo. Early in his career, he was involved in the capital-murder prosecution of Donald Paradis. Many years after putting Mr. Paradis on

[80] The district court drew the reasonable inference that the tape had been used to seal the envelope at one point and, based on the writing on the tape, the court inferred Mr. Shedd had been the one to seal the envelope on September 23, 2003. (R. Vol. 3, pp.116-17.)

death row, it came out that Mr. Haws had committed a *Brady* violation in the *Paradis* case.

In presenting Mr. Charboneau's *Brady* claim in this case, Mr. Charboneau's counsel repeatedly pointed out Mr. Haws' prior misconduct in *Paradis*, suggesting Mr. Haws had engaged in a disturbing pattern of withholding favorable evidence from defendants. (*See, e.g.*, R. Vol. 1, p.196; R. Vol. 3, p.163, n.1, p.232; R. Vol. 4, pp.462, 518-19.) However, when the case went to an evidentiary hearing and Mr. Charboneau's counsel attempted to question Mr. Haws about his misconduct in the *Paradis* case, the district court sustained the State's objections under Idaho Rules of Evidence 401, 403, and 404(b), and no evidence was heard on that misconduct at the hearing. (Evid. Tr., p.436, L.10 – p.438, L.5.)

Although Mr. Haws' *Brady* violation in *Paradis* was deemed inadmissible for purposes of the evidentiary hearing, the district court went on to mention that misconduct twice later in the case. (*See* R. Vol. 3, pp.137-38 & n.10; Tr. Vol. 4, p.542 & n.12.) On appeal, the State asserts that those two references to Mr. Haws' misconduct in *Paradis* were the product of "an extra-judicial investigation" and the district court's consideration of inadmissible evidence, both of which violated the State's right to due process. (App. Br., pp.72-74.)[81]

There are a myriad of reasons why the State's appellate claim fails, not the least of which is that the Fourteenth Amendment does not confer upon the State a right to due process. This flaw, along with the rest of the defects with the State's appellate claim, is discussed in detail below.

[81] The IPAA, as *amicus curiae*, joins (but does not expand upon) this argument by the State. (*See* Amicus Br., p.10.)

B. Relevant Background

1. Mr. Haws' *Brady* Violation In The *Paradis* Case

In 1980, while a deputy prosecutor in Kootenai County, Mr. Haws became involved in the capital-murder prosecution of Donald Paradis. *Idaho Counties Risk Management Program Underwriters v. Northland Ins. Cos.*, 147 Idaho 84, 85 (2009). Mr. Paradis had been implicated in the slayings of two people—Scott Currier and Kimberly Palmer (Mr. Currier's fiancée). *See State v. Paradis*, 106 Idaho 117, 119-20 (1983). A critical issue in the case was whether the victims were killed in Washington or Idaho. *Paradis v. Arave*, 240 F.3d 1169, 1173 (9th Circ. 2001); *Paradis v. Arave*, 130 F.3d 385, 392 (9th Cir. 1997); *State v. Paradis*, 106 Idaho at 120. The government's theory was that Mr. Currier was killed in Spokane, Washington, and Ms. Palmer was killed just outside Post Falls in Idaho. *See Paradis v. Arave*, 240 F.3d at 1172; *Paradis v. Arave*, 130 F.3d at 392; *State v. Paradis*, 106 Idaho at 119-20. This theory hinged on the forensic pathology evidence, part of which was that Ms. Palmer had water in her lungs, which suggested she was still alive when placed in the stream in or near Post Falls in which her body was ultimately discovered. *Paradis v. Arave*, 130 F.3d at 392; *State v. Paradis*, 106 Idaho at 119-20. In support of this theory, the State's forensic pathologist ultimately testified that the condition of Ms. Palmer's lungs were:

> not consistent with a textbook case of manual strangulation because they were heavy and filled with fluid. He then expressed his opinion that the lungs would have assumed such an appearance if Palmer had been manually strangled and immediately afterwards placed face down in water, concluding the immersion played a causal role in Palmer's death—that she aspired water once she had been immersed in the creek.

Paradis v. Arave, 130 F.3d at 394; *accord Paradis v. Arave*, 240 F.3d at 1174.

Mr. Paradis was tried for the murder of Mr. Currier in Washington, but was acquitted. *Id*. at 120. Thereafter, Mr. Paradis was tried in Idaho for the murder of Ms. Palmer. *Id*. Marc Haws and another deputy prosecutor for Kootenai County handled the prosecution in the Idaho case. *Idaho Counties Risk Management Program Underwriters*, 147 Idaho at 85. Mr. Paradis' case went to trial in 1981; he was found guilty of first degree murder and sentenced to death. *See id.* at 85; *State v. Paradis*, 106 Idaho at 117. On appeal, Mr. Paradis challenged, *inter alia*, the sufficiency of the evidence as to the jurisdictional question of whether Ms. Palmer was killed in Idaho, but the Idaho Supreme Court rejected that challenge and affirmed the conviction, apparently in light of the forensic evidence and the circumstantial evidence linking Mr. Paradis to the murders generally. *See State v. Paradis*, 106 Idaho at 120-21.

In 1996, fifteen years after he was convicted and sentenced, Mr. Paradis obtained exculpatory evidence which had been withheld by the Kootenai County prosecutors since before his trial. *See Paradis v. Arave*, 130 F.3d at 392-94. That evidence consisted of Mr. Haws' handwritten notes, taken shortly after Ms. Palmer's autopsy and summarizing the opinions of the State's forensic pathologist that Ms. Palmer did not die in the creek in which her body was later found. *Paradis v. Arave*, 240 F.3d at 1173; *Paradis v. Arave*, 130 F.3d 385 at 392, 394. Specifically, the notes indicated that Ms. Palmer was strangled and did not drown; she had only a spoonful of water in her lungs, which could be attributed to a siphon-effect; there was "nothing noteworthy in those lungs"; and she was probably already deceased when her body was placed in the creek. *Paradis v. Arave*, 240 F.3d at 1174; *Paradis v. Arave*, 130 F.3d at 394.

In light of Mr. Haws' withholding of the critical exculpatory evidence concerning the autopsy of Ms. Palmer, the Ninth Circuit Court of Appeals initially held that Mr. Paradis had raised a colorable claim that his rights under *Brady* had been violated. *Paradis v. Arave*, 130 F.3d at 400. On remand, "[t]he federal district court granted Paradis' *habeas* petition and ordered the State to initiate a new trial against Paradis or release him.[82] Paradis pled guilty to a lesser charge of accessory to a felony and was released" in 2001. *Idaho Counties Risk Management Program Underwriters*, 147 Idaho at 85-86.

2. Mr. Haws' Alleged *Brady* Violation In This Case

In this case, Mr. Charboneau alleged that the State committed a *Brady* violation by withholding and concealing the Tira Arbaugh Letter. That letter indicates that Tira offered false testimony at Mr. Charboneau's trial and that Mr. Haws personally solicited the destruction of certain physical evidence. (*See* R. Vol. 1, pp.53-59.)

3. Procedural History Relevant To The State's Claim

In presenting the *Brady* claim in this case, Mr. Charboneau's counsel repeatedly pointed out Mr. Haws' prior misconduct in *Paradis*, suggesting Mr. Haws has engaged in a disturbing pattern of behavior. (*See, e.g.*, R. Vol. 1, p.196; R. Vol. 3, p.163, n.1, p.232; R. Vol. 4, pp.462, 518-19.) However, when the case went to an evidentiary hearing (on the limited question of whether the State had willfully concealed the Tira Arbaugh Letter) and Mr. Charboneau's counsel attempted to question Mr. Haws about his misconduct in the *Paradis* case, the district court sustained the State's objections

[82] The State appealed again, and the Ninth Circuit affirmed the federal district court's order. *See generally Paradis v. Arave*, 240 F.3d 1169.

under Idaho Rules of Evidence 401, 403, and 404(b), and no evidence was heard on that misconduct at the evidentiary hearing. (Evid. Tr., p.436, L.10 – p.438, L.5.)

In the district court's findings of facts and conclusions of law following the evidentiary hearing, the district court explicitly declined to make findings as to whether the allegations in the Tira Arbaugh Letter were true (R. Vol. 3, pp.112, 141), or whether Mr. Haws had a hand in concealing that letter from Mr. Charboneau (R. Vol. 3, pp.137-38). In declining to make the latter finding, the district court mentioned Mr. Haws' *Brady* violation in *Paradis*, as revealed by the Ninth Circuit's published opinions in Mr. Paradis' federal *habeas* case. (R. Vol. 3, pp.137-38 & n.10.) Specifically, the court noted the open question of whether Mr. Haws could have been involved in the concealment conspiracy and mused as to two possible explanations—either Mr. Haws was engaged in a pattern of misconduct which covered the cases of both Mr. Paradis and Mr. Charboneau, or he was being "smeared" by someone unknown. (R. Vol. 3, pp.137-38.) But, as noted, the district court did not attempt to answer that question. (R. Vol. 3, pp.137-38.)[83]

[83] The IPAA, as *amicus curiae*, repeatedly points out the district court made no finding as to whether Mr. Haws was involved in the *Brady* violation in this case, it argues the district court was correct not to have made any such finding, and it asks this Court to "affirm" that *non*-finding. (Amicus Br., pp.8-10, 14.) However, since there was no factual finding made, and neither party has challenged the lack of a finding, there is nothing for this Court to affirm.

The IPAA also appears to seek to have this Court make an affirmative finding that Mr. Haws was not involved in the *Brady* violation in this case. (*See* Amicus Br., pp.12-13.) It argues such an affirmative finding is necessary to vindicate Mr. Haws' due process rights. (Amicus Br., pp.12-13.) However, regardless of whatever rights Mr. Haws might have in this case (and Mr. Charboneau submits he clearly has none), it is not for an appellate court to decide questions of fact left open by the trial court. *See Shubert v. Macy's West, Inc.*, 158 Idaho 92, 100 (2015); *State v. Meister*, 148 Idaho 236, 239 (2009). Accordingly, Mr. Charboneau asks this Court to decline the State's

Nearly a year later, in its order granting summary disposition in Mr. Charboneau's favor, the district court again referenced Mr. Haws' *Brady* violation in *Paradis*. (*See* R. Vol. 4, p.542 & n.12.) This time the district court did more than identify an open factual question though; it affirmatively used the *Paradis* evidence to make a finding preliminary to its determination of the admissibility of another piece of evidence (the Tira Arbaugh Letter itself). (*See* R. Vol. 4, p.542.) Specifically, it identified Mr. Haws' prior *Brady* violation—which was unknown to Tira when she wrote her letter—as one of many facts which tended to corroborate the allegations made in the letter. (*See* R. Vol. 4, p.542.)

On appeal, the State contends the district court erred in "refer[ring] to the facts of the *Paradis* case" in its findings of fact and conclusions of law concerning the question of whether the Tira Arbaugh Letter had been willfully concealed by the State, and, later, in its order granting summary disposition in favor of Mr. Charboneau. (*See* App. Br., pp.73, 74.) The State complains that the district court "conduct[ed] an extra-judicial investigation into the facts of the *Paradis* case and consider[ed] on an *ex parte* basis evidence it ruled inadmissible" at the evidentiary hearing. (App. Br., p.73.) The legal basis asserted in support of this claim of error is that, by so doing, the district court violated the State's right to due process. (*See* App. Br., pp.73-74.)

C. The State's "Due Process" Argument Is Not Properly Before This Court Because It Was Not Preserved, And It Fails On Its Merits Because The Government Is Not Entitled To Due Process Of Law

In complaining about the district court's alleged "extra-judicial investigation" and "*ex parte*" consideration of inadmissible evidence, the State rests its appellate claim

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invitation to make an affirmative finding of non-involvement without even reaching the IPAA's claim concerning Mr. Haw's due process rights.

upon a due process theory. (*See* App. Br., pp.73-74.) Although it never identifies the origin of its claimed right to due process, it cites a number of cases interpreting the Fourteenth Amendment to the United States Constitution. (*See* App. Br., pp.73-74 (citing, *inter alia*, *Turner v. Louisiana*, 379 U.S. 466 (1965), *Irvin v. Dowd*, 366 U.S. 717 (1961), and *Roll v. City of Middleton*, 115 Idaho 833 (Ct. App. 1989)).)[84]

For the reasons detailed below, the State's arguments are not properly before this Court and, even if they were, they fail on their merits because the State is not entitled to the due process protections conferred by the Fourteenth Amendment.

1. The State Failed To Preserve Its Due Process Argument Below

At Mr. Charboneau's October 16-17, 2013 evidentiary hearing, the State objected to Mr. Charboneau's counsel's attempted cross-examination of Mr. Haws concerning his prior *Brady* violation in *Paradis*. (*See* Evid. Tr., p.,436, L.10 – p.438, L.5.) Those objections were based on Idaho Rules of Evidence 401, 403, and 404(b). (*See id*., p.436, L.10 – p.438, L.5.) Nearly a year later, at the September 19, 2014 hearing on Mr. Charboneau's motion for summary disposition, the State again objected when Mr. Charboneau's counsel started discussing Mr. Haws' misconduct in *Paradis*—this time just based on Rule 404(b). (*See id*., p.650, L.11 – p.651, L.14.) Thus, in its

[84] In *Roll*, the Court of Appeals did not identify the origin of the due process right at issue; however, it quoted *Irvin v. Dowd*, which was a Fourteenth Amendment case. *See Roll*, 115 Idaho at 837.

Besides *Turner*, *Irvin*, and *Roll*, the State cites two other cases—*Idaho Historic Preservation Council v. City Council of the City of Boise*, 134 Idaho 651 (2000), and *Laurino v. Board of Professional Discipline*, 137 Idaho 596 (2002)—in support of its due process argument. *Laurino* was not based on due process standards at all, but the standards set forth Idaho Administrative Procedures Act. *See Laurino*, 137 Idaho at 601. And while *Idaho Historic Preservation Council* spoke in terms of due process without explicitly identifying the origin of the due process right at issue, viewed in context, the *Idaho Historic Preservation Council* Court was clearly speaking in terms of the Fourteenth Amendment's guarantee of procedural due process.

objections, the State never presented any argument based upon a purported right to due process of law.

As the State observes, after ruling that evidence of Mr. Haws' prior *Brady* violation was inadmissible for purposes of Mr. Charboneau's 2013 evidentiary hearing, the district court twice thereafter mentioned Mr. Haws' prior *Brady* violation—once in its April 14, 2014 findings of fact and conclusions of law (*see* R. Vol. 3, p.137), and a second time in its March 23, 2015 order granting Mr. Charboneau's motion for summary disposition (*see* R. Vol. 4, p.542). After neither order did the State ever seek reconsideration on the basis that the district court's reference to Mr. Haws' *Brady* violation in *Paradis* was error, much less that it violated the State's due process rights. (*See* R. Vol. 3, pp.147-875; R. Vol. 4, pp.1-686; 9/19/14 Tr., pp.639-772; 4/10/15 Tr., pp.1-14.)

In other words, the State's new "due process" argument was never presented to the district court. As such, it was not preserved for appeal. And it is well-established that the appellant generally may not raise unpreserved issues for the first time on appeal. *See, e.g., McCoy v. State*, 129 Idaho 70, 74 (1996) ("This Court has repeatedly held that issues which are raised for the first time on appeal will not be considered. . . . Because these claims were not raised before the district court in the civil post-conviction proceedings, we hold that they are not properly before the Court and will not be considered."). Because the State's new "due process" argument was not presented below, it should not be considered on appeal.

2. The State's Argument Fails On Its Merits Because The Government Is Not Entitled To The Due Process Protections Of The Fourteenth Amendment

As noted, although the State fails to explicitly identify the origin of its claimed right to due process, it cites a number of cases applying the Fourteenth Amendment's due process clause. Apparently then, it believes it is entitled to the protections of the Fourteenth Amendment. The State is incorrect.

The Fourteenth Amendment provides a right of due process to the people of each state *vis-à-vis* the governments of each such state.[85] It provides, in relevant part, as follows:

> Nor shall any State make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall* ***any State deprive any person*** *of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV (emphasis added). Because the State is not a "person," the Fourteenth Amendment does not give it a right of due process as against itself or its citizens. *See South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966) ("The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court."), *abrogated on other grounds by Shelby County v. Holder*, _ U.S. _, 133 S. Ct. 2612 (2013); *Bain v. City of Springfield*, 678 N.E.2d 155, 162 (Mass. 1997) ("The Fourteenth Amendment protects persons against exercises of State power; it has never been applied—and its text would hardly permit that it be so applied—to protect the state or its political

[85] Of course the Fifth Amendment provides such a right of due process *vis-à-vis* the federal government. *See* U.S. CONST. amend. V.

subdivisions against persons. *See South Carolina v. Katzenbach* . . . ."). Because the State has no Fourteenth Amendment rights, its claim in this case necessarily fails.[86]

3. To The Extent The State May Rely On A Rule, Statute, Or Constitutional Provision Other Than The Fourteenth Amendment For The Proposition That The State Was Entitled To Due Process Below, The State Waived Any Such Argument On Appeal By Failing To Identify That Authority Or Provide Any Argument In Support Of A Claim That The State Had A Right To Due Process

As noted, the State's Appellant's Brief is not entirely clear as to the origin of its claimed right to due process, although it appears to rely on the Fourteenth Amendment's due process clause (which, as noted, simply does not grant such a right to the State). However, to the extent that the State seeks to rely upon another authority for its contention that it has a right to due process of law, the State has failed to identify that authority or offer any argument as to how it may apply to this case. Accordingly, any such arguments have been waived. I.A.R. 35(a); *Zichko*, 129 Idaho at 263.

D. The District Court's References To Mr. Haws' *Brady* Violation In *Paradis* Were Wholly Proper

Although this Court need not reach an examination of the propriety of the district court's references to Mr. Haws' prior misconduct in *Paradis* (because the State's claim is improperly presented as a due process violation), to the extent that it does, it should conclude the district court's references to Mr. Haw's misconduct in *Paradis* were proper.

Preliminarily, it is important to note that the State's characterization of the district court's actions is questionable. The State assumes that because the district court

[86] At a minimum, because the State has failed to present any argument as to how it believes it is a "person" under the Fourteenth Amendment, and it has likewise failed to offer any authority in support of the proposition that it is a "person" for Fourteenth Amendment purposes, it has waived any such arguments. *See* I.A.R. 35(a); *Zichko*, 129 Idaho at 263.

"refer[red]" to the facts of the *Paradis* case, it must have engaged in an "*extra-judicial investigation* into the facts of the *Paradis* case . . . ." (App. Br., pp.73, 74 (emphasis added).) While the State's charge sounds very dramatic, it is actually just misleading. In fact, the district court's brief synopses of *Paradis* were derived from the facts stated in the published Ninth Circuit opinions in Mr. Paradis' cases: *Paradis v. Arave*, 130 F.3d 385 (9th Cir. 1997), and *Paradis v. Arave*, 240 F.3d 1169 (9th Cir. 2001). (R. Vol. 3, p.137 & n.10; R. Vol. 4, p.542 & n.12.) The latter of these two cases had already been cited to the district court multiple times prior to the evidentiary hearing (*see* R. Vol. 1, pp.196, 491), and the basic circumstances of *Paradis* were already known by the court (*see* R. Vol. 1, p.382 (court minutes from a hearing early in the case reflecting the district court indicated it knew "a little" about *Paradis*) before it entered its findings of fact and conclusions of law. In other words, the court was already well-aware of the facts of *Paradis*—based on publicly-available information already highlighted to the court—without having to engage in any "extra-judicial investigation."

More importantly though, the district court's references to Mr. Haws' *Brady* violation in *Paradis* was in no way improper. The State cites two references the district court made to *Paradis*. (*See* App. Br., pp.73, 74.) The first reference was in the district court's findings of fact and conclusions of law following the evidentiary hearing. (*See* App. Br., pp.73, 74 (citing R. Vol. 3, p.137).) In that order, the district court *explicitly declined to make any finding* as to whether Mr. Haws had participated in the conspiracy to hide the Tira Arbaugh Letter from Mr. Charboneau. (R. Vol. 3, pp.137-38.) Thus, the district court simply pointed out Mr. Haws' prior misconduct in explaining its reasons for *not making a finding* as to Mr. Haws' alleged involvement in the conspiracy. (R. Vol. 3,

pp.137-38.) Thus, the reference to *Paradis* the State now complains about was just that—a reference. It was not a finding, and it had no impact whatsoever on the ultimate conclusions reached in the court's order.

The district court's second reference to Mr. Haws' misconduct in *Paradis* was in its summary disposition order. The purpose of that order, entered nearly a year after the district court made its findings of fact based on the evidence adduced at the evidentiary hearing, was not to make additional findings of fact *based on the evidence offered at the evidentiary hearing*. *See* I.C. § 19-4906(c) (providing that in evaluating a motion for summary disposition, the court should consider the entire record in the case, *i.e.*, "the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted"). In fact, the purpose was not to make findings of fact at all; it was to decide whether, given that there were no remaining genuine issues of material fact, Mr. Charboneau was entitled to relief as a matter of law. *See id*. ("The court may grant a motion by either party for summary disposition of the application when it appears . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."). Thus, it should not be surprising that the district court again declined to make any finding as to whether Mr. Haws was responsible for the concealment of the Tira Arbaugh Letter. (*See* R. Vol. 4, p.543 (referring to its earlier non-findings regarding Mr. Haws from it's a year earlier), pp.551-52 (inferring that the Tira Arbaugh Letter was concealed by Mr. Shedd at the behest of "Marl [sic] Haws *or someone in law enforcement with an interest in the Charboneau case*").) And the fact that the *Paradis* evidence had been ruled

inadmissible *at the evidentiary hearing* was patently irrelevant to the ultimate conclusion that Mr. Charboneau was entitled to judgment as a matter of law.

Admittedly though, in the summary disposition order, the district court did use the *Paradis* information to the State's detriment, and it even used that information to infer that Mr. Haws has a propensity to commit misconduct. (*See* R. Vol. 4, p.542.) However, its use of that information was not improper under the circumstances. At that stage of the proceeding, the district court was evaluating whether the Tira Arbaugh Letter was sufficiently corroborated to be clearly trustworthy, such that it was itself admissible evidence. One of the corroborating factors the district court considered was that Mr. Haws had committed a *Brady* violation in *Paradis*: "Tira could not have known when she wrote that letter [in 1989] that many years later [in 1996], that same type of claim would be asserted in another death penalty case against the same attorney. *See Paradis v. Arave* . . . ." (R. Vol. 4, p.542.) Thus, the district court used the *Paradis* evidence to determine a question of fact (whether the Arbaugh letter was sufficiently corroborated, such that its trustworthiness was clearly indicated) preliminary to its determination of the admissibility of another piece of evidence (Tira Arbaugh's letter). Used in this manner, the admissibility of the *Paradis* evidence *under the Idaho Rules of Evidence* was quite irrelevant. *See* I.R.E. 101(e)(1) (providing that the Rules of Evidence do not apply to "[t]he determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a)").[87]

[87] The IPAA, as *amicus curiae*, argues the district court's reference to Mr. Haws' prior misconduct did not represent a reversal of its ruling at the evidentiary hearing that such prior misconduct was inadmissible under Rule 404(b), but if it was a reversal, such

In short, while the district court mentioned Mr. Haws' *Paradis* misconduct in its findings of fact and conclusions of law, and later relied upon Mr. Haws' *Paradis* misconduct in its summary disposition order, in neither case did the district court do anything improper. It did not conduct an "extra-judicial investigation"; it did not violate its own prior rulings; and it did not violate the Idaho Rules of Evidence.

E. Any Impropriety In Referencing Mr. Haws' *Brady* Violation In *Paradis* Was Harmless

Even if the district court erred in referencing Mr. Haws' misconduct in *Paradis*, the State is not entitled to relief because any such error was harmless. The Idaho Rules of Civil Procedure provide as follows:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

I.R.C.P. 61.

The State's substantial rights were not impaired by the district court's mention of *Paradis* in its findings of fact and conclusions of law because, as noted above, the district court explicitly declined to decide whether Mr. Haws played a role in concealing the Tira Arbaugh Letter. (R. Vol. 3, pp.137-38.) In other words, the district court did not

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reversal was error. (*See* Amicus Br., pp.10-12, 14.) Mr. Charboneau does not disagree. By referencing Mr. Haws' misconduct from *Paradis* in the summary disposition order, the district court was not retroactively changing its ruling from a year earlier. Nor was it making a ruling under Rule 404(b) at all. As noted, it was considering a preliminary question of fact to which the Rules of Evidence had no applicability.

hold Mr. Haws' misconduct in *Paradis* against the State in this case because it made no finding that Mr. Haws was actually culpable here.

Likewise, the State's substantial rights were not impaired by the district court's discussion of *Paradis* in its summary disposition order. In that order, Mr. Haws' misconduct in *Paradis* was discussed as one of *ten* different circumstances which tended to corroborate the Tira Arbaugh Letter. (*See* R. Vol. 4, pp.535-43.) Surely the *Paradis* evidence had no significant impact on the district court's determination that the Tira Arbaugh Letter was well-corroborated and, therefore, was sufficiently trustworthy to be deemed admissible where there were so many other significant corroborating facts. Indeed, for the reasons discussed in Part II.C.1(b), *supra*, the Tira Arbaugh Letter was exceptionally-well corroborated even independent of the *Paradis* evidence. Further, as is explained in detail Part II.C.3, *supra*, the district court did not need to find the Tira Arbaugh Letter was corroborated, or even that it was admissible, in order to find it was "material" within the meaning of *Brady*. Accordingly, the district court's use of the *Paradis* evidence for this purpose was not prejudicial at all.

Because the State has failed to show error, much less prejudicial error, in the district court's references to Mr. Haws' *Brady* violation in *Paradis*, this Court should affirm the district court's judgment.

V.

Any Error By The District Court In Referencing Tim McNeese's Prior Bad Acts Was Harmless

A. Introduction

At the evidentiary hearing, although the district court refused to admit any evidence related to Mr. Haws' prior misconduct, it did permit Mr. Charboneau's counsel

to elicit testimony concerning the prior misdeeds of another alleged participant in the conspiracy to conceal the Tira Arbaugh Letter—Tim McNeese. (*See* Evid. Tr., p.442, L.17 – p.446, L.25.) On appeal, the State argues the district court erred in admitting evidence of Mr. McNeese's prior misbehavior, because such evidence was inadmissible under Idaho Rule of Evidence 404(b). (App. Br., pp.75-77.) In response, Mr. Charboneau asserts that any error in admitting the evidence in question was harmless because it did not factor into the district court's fact-finding.

B. Relevant Background

Mr. McNeese is a former Deputy Attorney General who represented the IDOC for many years. (Evid. Tr., p.439, Ls.16-22.) During that time, Mr. McNeese and another deputy attorney general supervised by Mr. McNeese (Stephanie Altig), defended "the *Gomez* case," a class action lawsuit against IDOC regarding "access to courts issues." (*See* Evid. Tr., p.443, L.24 – p.446, L.12.) During the course of that case, Mr. Shedd went to Ms. Altig with a privileged attorney-client letter which had been left in the law library by an inmate. (Evid. Tr., p.443, L.24 – p.446, L.12.) Ms. Altig reviewed that letter. (Evid. Tr., p.443, L.24 – p.444, L.5.) Thereafter, additional documents, including more privileged attorney-client letters, were brought to Ms. Altig by a staff member. (*See* Evid. Tr., p.444, L.23 – p.445, L.9.) Mr. McNeese reviewed at least some of those communications. (Evid. Tr., p.445, Ls.10-11.) Ultimately, both Ms. Altig and Mr. McNeese were sanctioned by the federal court. (Evid. Tr., p.444, L.11 – p.445, L.23.) The record does not disclose whether Mr. Shedd was ever disciplined for his role. (*See* Evid. Tr., p.446, Ls.23-25.)

In this case, Mr. McNeese and Mr. Shedd are once more implicated. Undoubtedly, the best evidence of their involvement in the conspiracy to conceal the Tira Arbaugh Letter is the Shedd Note. As discussed above, the Shedd Note indicates Mr. McNeese instructed Mr. Shedd to monitor Mr. Charboneau's personal and legal mail, and to confiscate anything from Larry Gold, or bearing Tira Arbaugh's name. (R. Ex. Vol. 1, p.95.)

At the evidentiary hearing in this case, Mr. McNeese denied having ever instructed Mr. Shedd to intercept or interfere with any of Mr. Charboneau's incoming mail. (Evid. Tr., p.441, L.18 – p.442, L.10.) Thereafter, on cross-examination, Mr. Charboneau's counsel questioned Mr. McNeese regarding his actions and subsequent sanctions in *Gomez*. (*See* Evid. Tr., p.442, L.17 – p.446, L.25.) The State objected to this line of questioning under Idaho Rule of Evidence 404(b); however, the district court overruled the State's objections and allowed Mr. McNeese to be questioned about his actions and sanctions in the *Gomez* case. (Evid. Tr., p.443, L.19 – p.444, L.21.)

On appeal, the State argues the district court erred in allowing Mr. McNeese to be cross-examined about *Gomez*. (App. Br., pp.75-77.) Specifically, it argues that the *Gomez* evidence was not relevant to any issue other than "propensity," and that it was ultimately referenced by the district court in its discussions of Mr. McNeese and Mr. Shedd. (App. Br., pp.76-77.)

C. Standard Of Review

Under Idaho Rule of Evidence 404(b), there is a two-tiered analysis for determining the admissibility of "prior bad act" evidence. *State v. Grist*, 147 Idaho 49, 52

(2009). The court must first "determine whether there is sufficient evidence to establish the other crime or wrong as fact" and "whether the fact of another crime or wrong, if established, would be relevant . . . to a material and disputed issue concerning the crime charged, other than propensity." *Id*. If the evidence is insufficient to establish the other crime or wrong as fact, or if the other crime or wrong, even if proven, is not relevant to an issue other than character or propensity, it is inadmissible and the inquiry ends. *See id*. However, if the evidence is sufficient to prove the other crime or wrong, and that crime or wrong is relevant to some valid issue, the court must then "engage in a balancing under I.R.E. 403 and determine whether the danger of unfair prejudice substantially outweighs the probative value of the evidence." *Id*.

Even if a court has been found to have erred in admitting evidence under Rule 404(b), that error does not necessarily mandate reversal. The Idaho Rules of Civil Procedure provide as follows:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

I.R.C.P. 61.

D. Because Admission Of The *Gomez* Evidence Did Not Affect The State's Substantial Rights, It Was Harmless And, Therefore, The State Is Not Entitled To Relief

Assuming the district court erred in admitting the *Gomez* evidence, that error was harmless. Although the State says the *Gomez* "evidence is cited rather prominently by the district court in the evidence related to Shedd and also is mentioned in relation to

McNeese as evidence of whether he was involved in suppressing" the Tira Arbaugh Letter (App. Br., p.77 (citing R. Vol. 3, pp.120, 137)), the fact is the *Gomez* evidence had little to no importance in the district court's ultimate conclusions and, therefore, could not have affected the State's substantial rights.

The State correctly observes that the district court "mentioned" the *Gomez* evidence in discussing Mr. McNeese's potential involvement in the conspiracy to conceal the Tira Arbaugh Letter. (*See* R. Vol. 3, pp.137-38.) However, just as it did with regard to Mr. Haws, the district court explicitly declined to decide whether Mr. McNeese played a role in that conspiracy. (R. Vo. 3, pp.137-38.) Instead, the district court merely noted the open question of whether Mr. McNeese could have been involved in the conspiracy and indicated that Mr. McNeese's involvement, if any, was a question for another fact-finder on another day. (R. Vol. 3, pp.137-38.) In other words, the *Gomez* evidence was not factored into any findings regarding Mr. McNeese.

The State also correctly observes that the district court mentioned the *Gomez* evidence in discussing Mr. Shedd's involvement in the conspiracy. (R. Vol. 3, p.120.) And, while the district court ultimately did find Mr. Shedd was involved in that conspiracy (*see* R. Vol. 3, pp.134-36), it is obvious the *Gomez* evidence had little or no impact on that finding because there was other, far-more-probative evidence of Mr. Shedd's involvement in the conspiracy. The most significant piece of evidence connecting Mr. Shedd to the conspiracy was the Shedd Note, which indicated he had been instructed to monitor Mr. Charboneau's personal and legal mail, and to confiscate any mail from Sheriff Gold or bearing Tira Arbaugh's name. (*See* R. Ex. Vol. 1, p.95.) As the district court itself said, the Shedd Note has "extraordinary significance." (R. Vol. 3,

p.121 (emphasis in original); *see also* R. Vol. 3, pp.134-35 (finding the Tira Arbaugh Letter was concealed by IDOC from 2003 through 2011, and relying primarily on the Shedd Note in support of that finding).) Indeed, elsewhere in its Appellant's Brief, the State concedes the overwhelming importance of the Shedd Note. After quoting the "extraordinary significance" label attached to that note by the district court, the State goes on to argue that, "the district court based its findings that Shedd intercepted Charboneau's mail, and did so at the behest of others, almost exclusively upon that exhibit." (App. Br., p.34.)

The district court engaged in a lengthy analysis of the Shedd Note. It considered the physical characteristics of the note, the opinions of dueling handwriting experts, Mr. Shedd's own statements about the note and his demeanor on the witness stand,[88] before ultimately finding the note to have been written by, or at least endorsed by, Mr. Shedd. (*See* R. Vol. 3, pp.120-21, 124-25, 127-29.) And of course, as discussed above, the note was a direct confession by Mr. Shedd that he had been monitoring all of Mr. Charboneau's mail looking for documents from Larry Gold or bearing Tira Arbaugh's name, with the intent of confiscating those pieces of mail.

[88] When first questioned about the Shedd Note, Mr. Shedd told an IDOC investigator and a deputy attorney general the statements in that note were true, and he specifically indicated Mr. McNeese had asked him to monitor Mr. Charboneau's mail and look for something from Larry Gold, although he thought that Mr. Charboneau wrote the body of the note and he signed it because it was true. (R. Vol. 3, pp.120, 124.) By the time he testified at the evidentiary hearing in this case, Mr. Shedd's story evolved. While he admitted the Shedd Note was a "CYA" ("cover your ass") note, and he conceded "he may have been overly candid in his interview with IDOC investigators because he did not know he was being recorded," he was only willing to testify that "something like this [the events described in the Shedd Note] happened" and, further, he claimed his monitoring of Mr. Charboneau's mail had something to do with an incident involving Mr. Charboneau's boots (not mail from Larry Gold involving Tira Arbaugh). (R. Vol. 3, pp.121-22, 124.) The district court found Mr. Shedd's new story about the boots "unconvincing," "unlikely," and "utterly unbelievable." (R. Vol. 3, pp.124-25 & n.4.)

Whether considered by an objective standard or a subjective one, the Shedd Note was obviously the critical evidence that informed the district court's findings regarding Mr. Shedd's involvement in the conspiracy to conceal the Tira Arbaugh Letter. Any reasonable observer would recognize that that note was the "smoking gun" which connected Mr. Shedd to the conspiracy, and which explained why the Tira Arbaugh Letter remained hidden for so long. And on a subjective level, the district court made it quite clear that the Shedd Note was the critical evidence actually relied upon in finding that Mr. Shedd was involved in the conspiracy. Since the significance of the *Gomez* evidence paled in comparison to that of the Shedd Note, the district court's findings regarding Mr. Shedd could not have been, and indeed were not, affected by the *Gomez* evidence.

In light of the relative unimportance of the *Gomez* evidence, it simply cannot be said that the district court's brief mentions of that evidence affected the court's findings and, thus, the State's substantial rights. Accordingly, any error in admitting the *Gomez* evidence was harmless.

VI.

This Court Should Only Revoke Mr. Charboneau's Bond If It Vacates The District Court's Judgment And Summary Disposition Order, And Only Then If The Remittitur Has Issued And The Court's Opinion Is Final

In its Appellant's Brief, the State requests that "if any reversible is found" on appeal, this court revoke Mr. Charboneau's bond and order that Mr. Charboneau *immediately* (*i.e.*, before the 21-day time period for Mr. Charboneau to seek review or rehearing expires) be taken into custody. (App. Br., pp.77-78.) While Mr. Charboneau has no objection to being returned to custody in this case if, *once the appeal is concluded* (*i.e.*, a remittitur is issued), the district court's judgment and its order granting

post-conviction relief is vacated. However, he objects to any order returning him to custody before the appeal is finally resolved, or where the relief granted the State is anything short of a vacation of the judgment and the summary disposition order.

The State's sole argument as to why Mr. Charboneau should be taken back into custody immediately upon issuance of an opinion granting the State any sort of relief is its bald assertion that Mr. Charboneau would become a greater flight risk if he thought he was going to lose the benefit of the district court's grant of post-conviction relief. However, this concern of the State touches upon only one of *ten* factors that should be considered as part of the bond calculus pursuant to I.C.R. 46(c). To revoke bond based on one consideration alone is to ignore the mandate of Rule 46(c).

The reality is the district court is in the best position to take a holistic approach in evaluating the factors set forth in Rule 46(c). This is what the district court presumably did in considering whether to set bond in the first place. (*See* 4/10/15 Tr., p.47, L.16.) And this is what the district court could again do in determining when, if ever, Mr. Charboneau should be returned to custody.

If Mr. Charboneau is at liberty on bond when this appeal concludes, the State should be required to file an appropriate motion with the district court and allow that court to decide whether, given the totality of the circumstances, his bond status should change. Accordingly, unless this Court vacates the district court's judgment and summary disposition order *in toto* (in which case Mr. Charboneau does not object to returning to custody once the appeal becomes final), Mr. Charboneau respectfully requests that this Court defer any decision on bond to the district court.

VII.

The District Court Erred In Declining To Enter An Order Barring Further Prosecution Of Mr. Charboneau; Alternatively, This Court, In An Exercise Of Its Supervisory Authority, Should Bar Further Prosecution

A. Introduction

After the district court entered an order granting Mr. Charboneau post-conviction relief and ordering a new trial (*see* R. Vol. 4, pp.523-81), Mr. Charboneau filed a motion seeking an order barring the State from re-trying him. (R. Vol. 4, pp.599-600; *see also* R. Vol. 4, pp.631-33.) Mr. Charboneau argued that the State's *Brady* violation in this case so prejudiced his ability to defend himself at a new trial—due to the death of witnesses and the loss or destruction of the original investigatory files (including recorded interviews and polygraph reports)—that any such trial would necessarily be unfair and, thus, violate his due process rights. (R. Vol. 4, pp.599-600, 631-32.) He also cited precedent suggesting a re-trial would violate his double jeopardy rights. (*See* R. Vol. 4, p.632.)

The district court orally denied Mr. Charboneau's motion, questioning whether it had the authority to bar further prosecution and opining that the authorities cited by Mr. Charboneau did not support such a proposition. (4/10/15 Tr., p.7, L.5 – p.8, L.18.)

Mr. Charboneau filed a timely notice of cross-appeal on this issue (*see* R. Vol. 4, pp.670-74). On appeal, Mr. Charboneau contends the district court erred in denying his motion. Alternatively, he requests that, upon affirming the district court's judgment, this Court exercise its supervisory authority and enter an order barring his re-trial.

B. The District Court Abused Its Discretion In Denying Mr. Charboneau's Motion To Bar Further Prosecution

1. The District Court Had Discretion To Enter An Order Barring Further Prosecution, *i.e.*, Re-Trial

Under the UPCPA, "If the court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, *or other matters that may be necessary and proper*." I.C. § 19-4907(a) (emphasis added). By authorizing trial courts to enter appropriate orders not only with respect to the conviction or sentence, but also as to "*other matters that may be necessary and proper*," the UPCPA clearly grants broad authority to fashion a remedy appropriate to the unique facts and circumstances of each case; it clearly does not limit the power of the district court to simply order a new trial or a new sentencing hearing. *See, e.g., State v. Dillard*, 110 Idaho 834, 837-38 (2986) (holding that where the petitioner established his claim of ineffective assistance of counsel for counsel's failure to file a timely notice of appeal, the district court did not err in ordering that the original judgment of conviction be vacated and a new judgment of conviction be entered so that the petitioner might then perfect a timely appeal).

An analogous federal (*habeas corpus*) statute, which contains similarly expansive language, has been interpreted to grant broad authority for federal district courts to grant whatever relief is appropriate in a given *habeas* case. In federal *habeas* cases, "The court shall summarily hear and determine the facts, and *dispose of the matter as law and justice require*." 28 U.S.C. § 2243 (emphasis added). The United States Supreme Court has made it clear that this broad language grants broad authority for fashioning remedies. *See Carafas v. LaVallee*, 391 U.S. 234, 239 (1968) ("[T]he

statute does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted. It provides that '[t]he court shall . . . dispose of the matter as law and justice require.' 28 U.S.C. § 2243."). This broad authorization even allows federal district courts to preclude state prosecutors from re-trying the petitioner. *See, e.g., Morales v. Portuondo*, 165 F. Supp. 2d 601, 608-09 (S.D.N.Y. 2001) (interpreting 28 U.S.C. § 2243 as granting authority to preclude a state from retrying the petitioner when that is deemed to be the appropriate remedy, but making it clear that unconditional release is the exception rather than the rule, and that a new trial is the usual remedy for a successful *habeas* petition).[89]

Since the relief that may be granted under the UPCPA (enter all orders "that may be necessary and proper") is just as open-ended as the relief that may be granted under the federal *habeas* statute ("dispose of the matter as law and justice require"), section 19-4907(a) should be given a comparable interpretation to 28 U.S.C. § 2243.

[89] *See also Satterlee*, 453 F.3d at 370 (noting that, in "extraordinary circumstances" a *habeas* court may preclude re-prosecution of the petitioner); *Capps v. Sullivan*, 13 F.3d 350, 352-53 (10th Cir. 1993) (holding "the district court normally should facilitate [a new trial] by suspending the writ for a time reasonably calculated to provide the state an adequate opportunity to conduct the new trial," but noting that because section 2243 vests the district court with the authority to grant the relief "law and justice require[s]," and such authority is "necessary to protect the purpose of habeas corpus jurisdiction when the error forming the basis for the relief cannot be corrected in further proceedings," "or other exceptional circumstances exist such that the holding of a new trial would be unjust," "the district court ha[s] the power to grant any form of relief necessary, including permanent discharge"); *Foster v. Lockhart*, 9 F.3d 722, 727 (8th Cir. 1993) ("A district court has authority to preclude a state from retrying a successful habeas petitioner when the court deems that remedy appropriate. Nevertheless, this is an extraordinary remedy that is suitable only in certain situations, such as when a retrial itself would violate the petitioner's constitutional rights."); *Burkett v. Cunningham*, 826 F.2d 1208, 1219-26 (3d Cir. 1987) (ordering unconditional release where no relief short of discharge could fully remedy the constitutional violations found).

Mr. Charboneau asks this Court to recognize that a trial court deciding a post-conviction matter in Idaho has discretion to bar the re-trial of the petitioner. Obviously though, re-trial should not be barred whenever post-conviction relief is granted. So assuming the Court recognizes the trial courts' discretion to bar retrial, the next question becomes: Under what circumstances should re-trial be barred?

In federal *habeas* proceedings, courts have found re-trial to be an inadequate remedy, and have therefore barred re-trial, in three situations:

> (1) where the act of retrial itself would violate petitioner's constitutional rights, for example, by subjecting him to double jeopardy; (2) where a conditional writ has issued and the petitioner has not been retried within the time period specified by the court; and (3) "where the petitioners had served extended and potentially unjustifiable periods of incarceration before the writ was granted."

Morales, 165 F.Supp. 2d at 609 (quoting *Latzer v. Abrams*, 615 F.Supp. 1226, 1230 (E.D.N.Y.1985)). This appears to be a reasonable standard that would guide Idaho's trial courts in barring re-trial only in extraordinary cases.

Whether this Court adopts the foregoing federal standard, or some other standard recognizing that re-trial should be barred in extraordinary cases, it should conclude that the district court abused its discretion by refusing to bar a re-trial in Mr. Charboneau's case.

2. Standard Of Review

The standard for reviewing trial courts' discretionary decisions is well-established in Idaho:

> When an exercise of discretion is reviewed on appeal, the appellate court conducts a multi-tiered inquiry. The sequence of the inquiry is (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and

consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason.

State v. Hedger, 115 Idaho 598, 600 (1989) (quoting *Associates Northwest, Inc. v. Beets*, 112 Idaho 603, 605 (Ct. App. 1987)).

3. The District Court Abused Its Discretion Because It Failed To Act Consistently With Applicable Legal Standards And Reach Its Decision By An Exercise Of Reason

Under the federal standard discussed above, the first consideration is whether "the act of retrial itself would violate petitioner's constitutional rights, for example, by subjecting him to double jeopardy . . . ." *Morales*, 165 F.Supp. 2d at 609. Under this standard, it would be clear that the district court abused its discretion in this case since: (a) at this point, Mr. Charboneau could not possibly receive a fair re-trial due to the loss of evidence over the past 30+ years; and (b) a re-trial would likely violate Mr. Charboneau's double jeopardy rights under Article I, Section 13 of the Idaho Constitution. Indeed, even if this Court does not adopt the federal standard discussed above, these considerations are so extraordinary that they required the district court to bar a re-trial.

a) Due To The Loss Or Destruction Of Evidence, Mr. Charboneau Could Not Possibly Receive A Fair Re-Trial

At this point, it is impossible for Mr. Charboneau to receive a fair re-trial. Ms. Arbaugh was killed in the middle of 1984 (nearly 32 years ago); Mr. Charboneau was tried in 1985 and sentenced to death in 1985; and Mr. Charboneau was re-sentenced to fixed life in 1991. In the interim, in 1989, Tira wrote her letter to Judge Becker alleging her own perjury and the State's manipulation of the physical evidence. Had Tira's letter been disclosed to Mr. Charboneau, he not only could have used it (or

Tira's live testimony) at his re-sentencing, but he could have moved for a new trial while Tira and the other witnesses were still alive, and while the evidence in the case still existed. At that time, Mr. Charboneau could have received a fair re-trial.

However, by the time the Tira Arbaugh Letter was disclosed in 2011, and the district court granted post-conviction relief in 2015, most of the evidence in Mr. Charboneau's case was irretrievably lost. Tira is now dead. (R. Ex. Vol. 1, p.973.) Sheriff Elza Hall is now dead.[90] (R. Vol. 3, p.262; R. Vol. 4, p.339.) Sheriff Larry Gold is now dead. (R. Vol. 1, p.600; R. Vol. 2, p.431; R. Vol. 4, pp.162-63.) Deputy Roger Driesel is now dead.[91] (R. Vol. 2, p.433; R. Vol. 3, p.262; *see also* R. Vol. 4, p.337.) And Deputy Ernie Coats is now dead.[92] (R. Vol. 3, p.262.) In addition, Tiffnie's whereabouts are apparently unknown, as the State has been unable to find her as of March 2013. (R. Vol. 2, p.432.) Without Tira, and potentially without even Tiffnie, available to testify, the only way for the State to offer evidence of the events of July 1, 1984, would be to

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[90] Sheriff Hall was the Jerome County Sheriff when Ms. Arbaugh was killed. (Trial Tr., p.1393, Ls.11-17.) He supervised the whole investigation into Ms. Arbaugh's death. (Trial Tr., p.1393, L.21 – p.1394, L.4.) As such, to the extent the prosecution was manipulating physical evidence and suborning perjury, Sheriff Hall would have known about it.

[91] Deputy Driesel was one of the first few police officers to report to the Arbaugh residence following the shooting of July 1, 1984. (*See* R. Vol. 3, pp.631, 645.) Deputy Driesel was not only the one to first discover Ms. Arabaugh's body, but he was also the first one to take statements from Tiffnie and Tira. (16339 R., p.535.) As noted, the Tira Arbaugh Letter alleges Deputy Driesel was involved in encouraging Tira's false testimony.

[92] Deputy Coats visited the Arbaugh residence approximately two weeks after Ms. Arbaugh was killed. (*See* Trial Tr., p.905, Ls.14-19.) He was accompanied by the original prosecutor on Mr. Charboneau's case, Mr. Adamson, as well as a number of members of the Arbaugh family. (Trial Tr., p.905, L.22 – p.906, L.10.) While they were there, they found a spent .22 shell casing on the ground behind the sheep wagon. (Trial Tr., p.906, L.24 – p.907, L.16.) He testified Mr. Adamson told him the spent casing was not important and could be discarded, and he eventually threw the casing in the trash. (Trial Tr., p.914, L.14 – p.915, L.25.) (Mr. Adamson denied telling Deputy Coats the casing could be discarded. (*See* Trial Tr., p.966, L.20 – p.968, L.5, p.971, Ls.2-13.))

offer Tira and Tiffnie's prior testimony. However, it would be fundamentally unfair for the State to be allowed to do so, given that we now have good evidence to suggest their prior testimony was false, and now Mr. Charboneau has no ability to cross-examine them based on the new evidence. It would be a poor substitute to allow the State to offer the prior testimony and allow Mr. Charboneau to offer Tira's letter in response because the jury would not be allowed to see whether Tira truly had a change of heart, or to see how Tiffnie reacted when confronted with evidence of the truth. Nor could Sheriff Hall be confronted with the evidence showing that his investigation was tainted by planted evidence, destroyed evidence, and false statements, or could Deputy Driesel be confronted with the evidence showing he coached Tira to file a false report and, ultimately, testify falsely.

In addition, the investigative files for Mr. Charboneau's case have gone missing.[93] (*See* R. Vol. 1, pp.434-38, 565, 595-98, 600-01; R. Vol. 3, pp.230-31, 977-78; R. Vol. 4, pp.21, 358-60, 600; 9/19/14 Tr., p.647, L.22 – p.649, L.1.) Although no one can ever know at this point all of what was included in the original investigation, we do know that among the missing files were a number of critical pieces of evidence. First, the police apparently recorded an interview of Tira on January 15, 1985, but that recording has been lost. (*See* R. Vol. 3, pp.231, 279-80; R. Vol. 4, pp.21, 490, 600; 9/19/14 Tr., p.648, Ls.13-15, p.662, Ls.21-22.) That recording, had it been preserved, might have provided insight into which of Tira's stories is true. Even if her recitation of events did not match her 1989 letter, the nature of the questioning (e.g., leading versus open-ended questions), whether she exhibited ready recall or, instead, had to be

[93] As John Horgan, the current Jerome County prosecutor said, "[W]ho knows where the file is[?] Somebody could have taken it home for a souvenir." (R. Vol. 4, p.360.)

coached, and the tones of voice of Tira and her interviewer, could have given a jury a clue as to whether she was being honest in her testimony. Second, a palm print was apparently lifted from the nylon Remington and, although it could go a long way toward determining whether Mr. Charboneau had possession of that rifle (as the State claimed at trial in 1985), or whether Tiffnie did (as Tira's 1989 letter claims), that print has been lost. (*See* R. Vol. 3, pp.231, 244, 283-84, 296, 478; R. Vol. 4, pp.459, 490, 507; 9/19/14 Tr., p.648, Ls.15-24, p.662, Ls.13-19, p.738, Ls.17-18.) Third, Tiffnie had undergone a polygraph examination, but the report from that examination was among the lost files. (*See* R. Vol. 3, pp.231, 244, 266-67, 275, 283, 459; R. Vol. 4, pp.21, 459, 473, 490, 507, 600; 9/19/14 Tr., p.648, Ls.14-15, p.662, Ls.20-21.) Fourth, there was a compositional bullet analysis that has been lost as well. (*See* R. Vol. 3, pp.231, 244, 284, 459, 977; R. Vol. 4, pp.459, 490; 9/19/14 Tr., p.648, L.25 – p.649, L.1, p.662, Ls.21-22.)

Finally, a critical piece of physical evidence is missing now as well. Tira's letter provides a fairly specific description of where Ms. Arbuagh's family buried her Calamity Jane rifle. (*See* R., pp.126-27.) Had Tira's letter been disclosed to Mr. Charboneau in 1989, there is every reason to believe that the rifle could have been found, thus corroborating Tira's then-recent disclosures. However, by the time Mr. Charboneau (through counsel) went looking for the rifle in 2008, it was too late. By that time the property had been completely excavated. (R. Vol. 3, pp.242-43 n.6.)

In light of the foregoing, the district court recognized the prejudice attendant to the passage of time and loss of evidence. (*See* 9/19/14 Tr., p.740, L.25 – p.741, L.6,

p.748, L.14 – p.749, L.6, p.752, L.23 – p.753, L.12.) And, in doing so, it even acknowledged that a new trial is an inadequate remedy:

> If the [Tira Arbaugh Letter] in all respects was true—and I want to make this point very, very clearly—the letter would raise a reasonable probability of a change in the outcome of trial, in big capital letters, if everything in the letter was true. *We don't know that; we won't know that; and a new trial won't tell us that. It's too late. There's too much evidence gone, files gone, witnesses, reports, statements. We will never know whether the claims in the letter are true*.
>
> Right now I have all the evidence I'm going to get.

(9/19/14 Tr., p.748, L.21 – p.729, L.6 (emphasis added).) Indeed, at one point it even hypothesized that the State could not even re-try Mr. Charboneau now: "I don't think the State has got a prayer in hell of getting the case to trial." (9/19/14 Tr., p.752, L.25 – p.753, L.2.)

Nevertheless, the district court denied Mr. Charboneau's motion to bar a re-trial. This was an abuse of the district court's discretion. Because of the passage of time, which has caused a monumental loss of evidence, Mr. Charboneau could not now—in 2016 or 2017—possibly receive a fair re-trial. Accordingly, a new trial would do little to vindicate Mr. Charboneau's rights. *Cf., e.g., Morales*, 165 F. Supp.2d at 611-12 (barring further prosecution, in part, because two witnesses (one of whom was deceased and the other of whom could not be located) would be unavailable for a re-trial). Further, because the 22-year delay and the attendant loss of evidence is wholly attributable to the State's egregious misconduct in concealing the Tira Arbaugh Letter for so long, the State can hardly be heard to complain about the equities of the situation. Indeed, to do anything other than bar further prosecution would be to reward the State for its gross misconduct. *Cf., e.g., id.* at 612-14 (barring further prosecution, in part, because the prosecution engaged in serious misconduct suggesting it was more interested in

obtaining and protecting a conviction than seeking justice). Thus, Mr. Charboneau requests that this Court reverse the district court's order denying his motion to bar further prosecution, and that it remand the case for entry of such an order.

b) A Re-Trial Would Likely Violate Mr. Charboneau's Rights Under The Double Jeopardy Provision Of The Idaho Constitution

The Fifth Amendment provides, in part, that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V. Under this double jeopardy clause, a defendant is protected "from repeated prosecutions for the same offense. . . . As a part of this protection against multiple prosecutions, the Double Jeopardy Clause affords a criminal defendant a 'valued right to have his trial completed by a particular tribunal.'" *Oregon v. Kennedy*, 456 U.S. 667, 671-72 (1982) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)). However, this right is not absolute; it does not always bar a second trial in the same case. *See id*. at 672. For example, a re-trial is not barred if there is "manifest necessity" for a second trial, as where there is a hung jury. *Id*. Likewise, a second trial *generally* is not barred where the defendant himself has requested a mistrial. *Id*. at 672-73.

Even in the latter scenario though, the United States Supreme Court has held that a second trial *will* be barred if the defendant was goaded into requesting a mistrial as part of a prosecutorial effort to subvert his double jeopardy rights. *Kennedy*, 456 U.S. at 673-76. In so holding though, the Supreme Court was careful to limit its holding to those scenarios where the prosecutor intended to goad the defense into moving for a mistrial; it specifically declined to adopt a broad rule whereby the double jeopardy

clause would preclude re-trials whenever it was found that the prosecution acted in bad faith.[94] *See id*.

Just as the Supreme Court has held that a mistrial based on prosecutorial misconduct does not prohibit the defendant's re-trial, so too has it suggested that a finding of error (such as prosecutorial misconduct) on appeal does not prohibit his retrial. *See Burks v. United States*, 437 U.S. 1, 15 (1978) (explaining that the double jeopardy clause of the Fifth Amendment bars re-trial following an acquittal, but it does not bar re-trial following an appellate "determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct"). Taken together, *Kennedy*, *Burks*, and their progeny suggest that the Fifth Amendment's double jeopardy clause will not bar a criminal defendant's re-trial even in cases of the most extreme prosecutorial misconduct.[95]

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[94] The *Kennedy* Court adopted the narrower standard for two reasons: first, the Court felt divining the prosecutor's intent is relatively easy compared to evaluating the extent of prosecutorial "overreaching"; second, the Court claimed the narrower standard is more defendant-friendly in that it encourages trial courts to grant defense motions for mistrials (or at least avoids a disincentive to granting such motions). *Kennedy*, 456 U.S. at 674-75, 676.

[95] Some courts have broadened *Kennedy* somewhat, holding the double jeopardy clause of the Fifth Amendment will not only bar the defendant's re-trial where the prosecutor engages in misconduct in order to goad the defendant into moving for a mistrial, but also where the prosecutor engages in misconduct "with the deliberate intent of depriving him of having his trial completed by a particular tribunal or prejudicing the possibility of an acquittal that the prosecutor believed likely." *United States v. Pavloyianis*, 996 F.2d 1467, 1473 (2d Cir. 1973). *See, e.g., State v. Colton*, 663 A.2d 339, 346 (Conn. 1995); *State v. Lettice*, 585 N.W.2d 171, 180-81 (Wis. Ct. App. 1998). *Cf. People v. Batts*, 68 P.3d 357, 380-81 (Cal. 2003) ("[W]e conclude that the double jeopardy clause of California Constitution article I, section 15 bars retrial following the grant of a defendant's mistrial motion . . . when the prosecution, believing in view of events that unfold during an ongoing trial that the defendant is likely to secure an acquittal at that trial in the absence of misconduct, intentionally and knowingly commits

Nonetheless, each state is free to give its citizens greater protection than that which is afforded under the United States Constitution. *See State v. Koivu*, 152 Idaho 511, 519 (2012) ("In some instances, we have construed Article I, section 17, to provide greater protection than is provided by the United States Supreme Court's construction of the Fourth Amendment. '[W]e provided greater protection to Idaho citizens based on the uniqueness of our state, our Constitution, and our long-standing jurisprudence.'"). This is true even where state constitutional protections use similar language as those in the United States Constitutions, as there is no reason why states must interpret their own constitutions in the same way the United States Supreme Court interprets the United States Constitution. *Id*. at 518. "Long gone are the days when state courts will blindly apply United States Supreme Court interpretation and methodology when in the process of interpreting their own constitutions." *Id*. In light of this, Mr. Charboneau submits that the double jeopardy clause of Idaho's Constitution should be read as being more protective of Idahoans than that of the Fifth Amendment.[96]

Over the past 30+ years, *Kennedy* has been criticized for adopting a standard that does too little to protect a criminal defendant's right to have his trial completed by a particular tribunal. For example, the Supreme Court of Hawaii criticized the *Kennedy* test on the basis that its subjective "specific-intent" standard is virtually impossible for a defendant to meet. *State v. Rogan*, 984 P.2d 1231, 1248 (Haw. 1999). Further, that

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misconduct in order to thwart such an acquittal—and a court, reviewing the circumstances as of the time of the misconduct, determines that from an objective perspective, the prosecutor's misconduct in fact deprived the defendant of a reasonable prospect of an acquittal.").

[96] Article I, section 13 of the Idaho Constitution states, in relevant part, "No person shall be twice put in jeopardy for the same offense . . . ." Thus, he concedes its language is comparable to that of the Fifth Amendment.

court observed the constitutional focus ought to be on the deprivation of the defendant's rights—an objective consideration—not the motive or intent of the actor. *Id*. Finally, the Supreme Court of Hawaii explained that the *Kennedy* plurality incorrectly sought to attribute the cause for a new trial to the defendant, when in fact it is the prosecutor's misconduct which is the true cause of the second trial. *Id*. at 1249. Thus, in *Rogan*, that court interpreted the Hawaii Constitution to grant greater protection than the Fifth Amendment, and it held that, "under the double jeopardy clause of article I, section 10 of the Hawai'i Constitution, . . . reprosecution of a defendant after a mistrial or reversal on appeal as a result of prosecutorial misconduct is barred where the prosecutorial misconduct is so egregious that, from an objective standpoint, it clearly denied a defendant his or her right to a fair trial."[97] *Id*.

Hawaii is not alone in granting greater protection under its own double jeopardy clause. The appellate courts of at least six states have rejected *Kennedy* in interpreting their own state constitutions, and have held that sufficiently egregious prosecutorial misconduct, regardless of whether that misconduct was intended to goad the defendant into moving for a mistrial, may warrant an order barring a new trial. *See, e.g., State v. Jorgenson*, 10 P.3d 1177 (Ariz. 2000) (*en banc*) (holding that after a conviction was vacated on appeal owing to egregious prosecutorial misconduct which overwhelmed a viable insanity defense, the Arizona Constitution's double jeopardy clause barred retrial of the defendant); *People v. Dawson*, 397 N.W.2d 277, 282-84 (Mich. Ct. App. 1986) (holding the prosecutor engaged in misconduct and, because the misconduct was

[97] The text of the double jeopardy clause appearing in the Hawaii Constitution is comparable to that of the Fifth Amendment and Article I, Section 13 of the Idaho Constitution. *See* HAW. CONST. Art. I § 10 ("[N]or shall any person be subject for the same offense to be twice put in jeopardy . . . .").

intentional and sufficiently egregious that it could not have been cured by further instructions from, or actions by, the court, retrial was barred under the double jeopardy clause of the Michigan Constitution); *State v. Breit*, 930 P.2d 792, 803 (N.M. 1996) ("Retrial is barred under Article II, Section 15, of the New Mexico Constitution, when improper official conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial, and if the official knows that the conduct is improper and prejudicial, and if the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal."); *State v. White*, 354 S.E.2d 324, 329 (N.C. Ct. App. 1987) (declining to apply the *Kennedy* Court's interpretation of the Fifth Amendment to the North Carolina Constitution, and holding the double jeopardy protections of the North Carolina Constitution prohibit re-trying a defendant where "egregious prosecutorial misconduct has rendered unmeaningful the defendant's choice to continue or abort" the original trial); *State v. Kennedy*, 666 P.2d 1316, 1326 (Or. 1983) ("We therefore conclude that a retrial is barred by article I, section 12, of the Oregon Constitution when improper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal.")[98]; *Commonwealth v. Smith*, 615 A.2d 321, 325 (Pa. 1992) ("We now hold that the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the

[98] This case represents the Oregon Supreme Court's handling of the *Kennedy* case following remand from the United States Supreme Court.

defendant to the point of the denial of a fair trial.").[99] *See also Commonwealth v. Murchison*, 465 N.E.2d 256, 258 (Mass. 1984) ("To implicate double jeopardy protections, and support a dismissal of the indictment or complaint, prosecutorial misconduct must be of a specific character: (1) Where the governmental conduct in question is intended to goad the defendant into moving for a mistrial, [*Commonwealth v. Lam Hue*, 461 N.E.2d 776 (1984)], quoting *Oregon v. Kennedy*, 456 U.S. 667, 676, 102 S.Ct. 2083, 2089, 72 L.Ed.2d 416 (1982); or (2) Where the governmental conduct resulted in such irremediable harm that a fair trial of the complaint or indictment is no longer possible, [*Lam Hue*], 461 N.E.2d 776.").[100]

Idaho's appellate courts have never decided whether the double jeopardy clause of Article I, Section 13 grants Idahoans greater protection than the Fifth Amendment, as interpreted by the United States Supreme Court in *Kennedy*.[101] The issue was raised in

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[99] With the exception of North Carolina, the double jeopardy clauses of the constitutions of all of these states are substantially similar to the Fifth Amendment and Article I, section 13 of the Idaho Constitution. *See* Ariz. Const. art. 2 § 10; MICH. CONST. art. 1 § 15; N.M. CONST. art. II § 15; OR. CONST. art. I § 12; PA. CONST. art. I § 10. In *White*, the North Carolina Court of Appeals cited Article I, Section 19 of the North Carolina Constitution; however, that provision does not contain traditional double jeopardy clause language. Rather, its language is somewhat similar to that of the due process and equal protection clauses of the Fourteenth Amendment. *See* N.C. CONST. art. I § 19. Presumably, North Carolina's courts have read a double jeopardy guarantee into its constitutional right to due process.

[100] In neither *Murchison* nor *Lam Hue*, did the Massachusetts Supreme Court cite the Massachusetts Constitution. In fact, *Lam Hue* was based on court rules. However, because the *Murchison* Court spoke in terms of "double jeopardy," it appears that Court was actually speaking in terms of Massachusetts' double jeopardy protection. That double jeopardy protection apparently arises out of the common law and/or a statute, MASS. GEN. LAWS ANN. ch. 263, § 7. *See Commonwealth v. Steward*, 483 N.E.2d 1091, 1092 (1985).

[101] In *State v. Sharp*, the Idaho Supreme Court had occasion to apply *Kennedy*, and ultimately concluded the defendant could be re-tried because there was no evidence the prosecutor attempted to goad the defendant into seeking a mistrial; however, the defendant in that case based his double jeopardy arguments solely on the Fifth

State v. Avelar; however, the Court of Appeals did not reach the merits of the issue. *See* 129 Idaho 704, 706 (Ct. App. 1996).

Mr. Charboneau requests this Court reach the issue, and that it hold Idaho's double jeopardy clause provides greater protection than the Fifth Amendment when it comes to convictions that have been vacated based on extreme prosecutorial misconduct. Idaho already has a history of providing greater protection in the area of double jeopardy. Specifically, Idaho has long employed a broader test for determining whether an offense is an included offense of another. While the United States Supreme Court employs the "statutory theory" for determining whether an offense is an included offense of another under the Fifth Amendment,[102] Idaho's courts have long recognized that Idahoans enjoy greater protection, as they have held that one offense is an included offense of another if it satisfies either the "statutory theory" *or the* "*pleading theory*." *See State v. Flegel*, 151 Idaho 525, 527, 529 (2011). Idaho's use of the pleading theory dates back to at least 1960, *see State v. Anderson*, 82 Idaho 293, 301 (1960) ("This Court has . . . in effect has held that an offense is an included offense if it is alleged in the information as a means or element of the commission of the higher

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Amendment and never argued the Idaho Constitution's double jeopardy clause grants greater protection. *See* 104 Idaho 691, 693-94 (1983), *overruling on other grounds recognized by State v. Alanis*, 109 Idaho 585, 599 (1985).

Somewhat similarly, in *State v. Pugsley*, the Court of Appeals had occasion to apply *Kennedy*, and ultimately concluded the defendant could be re-tried because there was no evidence the prosecutor attempted to goad the defendant into seeking a mistrial; however, there, although it appears the defendant may have raised a challenge under Article I, Section 13, there is no indication he argued the Idaho Constitution provides greater protection than the Fifth Amendment. 128 Idaho 168, 173-74 (Ct. App. 1995).

[102] *See Blockburger v. United States*, 284 U.S. 299, 304 (1932) ("The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

offense."), and has since been tied to the double jeopardy clause of Article I, Section 13 of the Idaho Constitution. *See State v. Moad*, 156 Idaho 654, 658 (Ct. App. 2014) (explaining that under the Fifth Amendment's double jeopardy clause the determination of whether an offense is an included offense of another is based on the "statutory theory," whereas, under the double jeopardy clause of article I, section 13, the determination is based on the "pleading theory" as well).)[103] Thus, the Idaho Constitution's double jeopardy clause has already been recognized to be more protective than that of the Fifth Amendment.[104]

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[103] In older cases such as *Anderson*, Idaho's use of the pleading theory was often tied to an Idaho statute, I.C. § 19-2312, which provides: "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit the offense." Although originally connected to a statute, the pleading theory is also appropriately tied to the Idaho Constitution, as the Court of Appeals recently pointed out in *Moad*. The current version of the statute has its roots in a statute that existed at statehood. *Compare* I.C. § 19-2312 *with* Idaho Cr. Prac. § 411 (1863-1864) *and* Idaho Rev. Stat. § 7926 (1887). *See also State v. Alcorn*, 7 Idaho 599, _, 64 P. 1014, 1018-19 (1901) (quoting Idaho Rev. Stat. § 7926, and revealing that provision to be identical to section 19-2312 as it existed in 1960 and as it still exists today). Thus, when Idaho's double jeopardy clause was written into the Constitution, it would have been under understood at the time to have embraced the pleading theory.

[104] In other contexts, the Idaho Supreme Court has declined to interpret Idaho's double jeopardy clause as being more protective than that of the Fifth Amendment. For example, in *State v. Reichenberg*, 128 Idaho 452, 457-58 (1996), the Idaho Supreme Court rejected an argument that the principles underlying a different statute (former I.C. § 18-301, which has since been repealed, but which had prohibited charging the defendant with multiple crimes under different statutory provisions for the same act of omission) which had pre-dated adoption of the Idaho Constitution was embraced within the double jeopardy clause in Article I, Section 13. In that case, the Idaho Supreme Court reasoned section 18-301 dealt with "acts" or "omissions," whereas the Constitution speaks in terms of the "offense." *Reichenberg*, 128 Idaho at 458 (quoting *State v. Gutke*, 25 Idaho 737, 740 (1914)). Here, however, the statute at issue also speaks in terms of the "offense." *See* I.C. § 19-2312. Thus, this case is distinguishable from *Reichenberg* and *Gutke*.

Further, in *Berglund v. Potlatch Corp.*, the Court, citing *Reichenberg*, made the sweeping statement that: "We recently held that the Idaho Constitution does not provide greater protection against double jeopardy than does its federal counterpart.

C. Under Its General Supervisory Power, This Court Should Enter An Order Precluding Mr. Charboneau's Re-Trial

Mr. Charboneau contends that even if this Court cannot conclude that the district court abused its discretion in refusing to bar his further prosecution (or that it even had discretion to bar his further prosecution), it should exercise its supervisory power and enter its own order barring his further prosecution.

The Idaho Constitution vests judicial power for the State of Idaho in the "Supreme Court, the district courts, and such other courts inferior to the Supreme Court as established by the legislature." IDAHO CONST. art. V § 2. This provision has been read to vest in the Supreme Court certain "inherent power," including the power to supervise the administration of the courts statewide, and to supervise all court personnel statewide, including the judges. *State v. Lee*, 156 Idaho 444, 445 (2014).

In the past, the Supreme Court has used this supervisory authority over the courts to adopt new procedures to protect the rights of the accused. *See, e.g., State v. Johnson*, 86 Idaho 51, 58-62 (1963) (adopting a bifurcated trial system where a defendant is charged with an enhancement based on prior convictions, and explaining that, "Absent legislative direction, [the Idaho Supreme Court] not only has the authority, but the duty to adopt procedure designed to safeguard the rights of an accused to a fair

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Because we held that the reimbursement order did not violate the United States Constitution's Double Jeopardy Clause, we now hold that it does not violate the Idaho Constitution." 129 Idaho 752, 757 (1996) (citation omitted). However, that statement was made in a wholly different context. There, the operative question was whether the forfeiture of worker's compensation benefits for making false statements placed him "in jeopardy" within the meaning of the double jeopardy clauses of the United States and Idaho Constitutions, and the Supreme Court held that because the statutory provision in question was civil and non-punitive, the double jeopardy clause was not even implicated. *See id*. at 755-57. Since the double jeopardy clauses were not even implicated in *Berglund*, it does not follow that the Court's sweeping language in that case constrains subsequent interpretations of the scope of Idaho's double jeopardy clause.

and impartial trial"). It has also used this authority to correct irregularities in individual cases. *See, e.g., Lee*, 156 Idaho at 446 (remanding a case for entry of an amended judgment of conviction where, though not technically violating any statute or court, the original judgment contained superfluous language editorializing on the case).

In this case, Mr. Charboneau asks that this Court to exercise its supervisory authority to bar his further prosecution. As is explained in Part VII.B.3, *supra*, at this point, he could not possibly receive a fair trial and, besides, his re-trial could run afoul of the double jeopardy clause of the Idaho Constitution.

CONCLUSION

For the reasons set forth above, Mr. Charboneau respectfully requests that this Court affirm the district court's grant of post-conviction relief, but reverse its denial of Mr. Charboneau's motion to bar further prosecution. He requests that this post-conviction case be remanded solely for an order granting his motion to bar further prosecution.

DATED this 10th day of June, 2016.

_____/s/_____
ERIK R. LEHTINEN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10th day of June, 2016, I served a true and correct copy of the foregoing RESPONDENT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JAIMI D CHARBONEAU
ADA COUNTY JAIL
7200 BARRISTER DR
BOISE ID 83704

ROBERT J ELGEE
DISTRICT COURT JUDGE
E-MAILED BRIEF

BRIAN TANNER
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

ERL/eas