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Charboneau v. State Respondent's Brief 2 Dckt. 43015

IN THE SUPREME COURT OF THE STATE OF IDAHO

JAIMI DEAN CHARBONEAU,	)	
	)	**No. 43015**
Petitioner-Respondent-Cross-Appellant,	)	
	)	**Jerome County Case No. CV-2011-638**
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent-Appellant-Cross-Respondent.	)	
	)	

REPLY BRIEF OF RESPONDENT-APPELLANT-CROSS RESPONDENT

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

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I.
The District Court Erred By Concluding That Charboneau's Claims Were Not Barred By The Applicable Statute Of Limitation

A. Introduction

As set forth in the state's initial brief, Charboneau was required to bring his claims that Tira Arbaugh had presented false testimony and that the prosecution had withheld evidence within a reasonable time of acquiring notice of them, and the record establishes he had notice of them no later than 2002 (when he brought his third petition for post-conviction relief) and as early as 1986 (the year Charboneau's mother claimed Tira Arbaugh first told her that she had presented false testimony at the prosecutor's request). (Appellant's brief, pp. 26-32.) Charboneau argues that he did not have notice of the current claim until March 18, 2011, the date Corporal Hiskett delivered an envelope containing several documents, including a multi-generational copy of a letter purportedly written by Tira Arbaugh. (Respondent's brief, pp. 25-36.) This argument is without merit because the record shows that Charboneau's current claim is merely that he discovered new evidence to support his old, time-barred claim.

B. The Record Establishes That Charboneau Had Notice Of His Claims That Tira Arbaugh Was Allegedly Coerced By The Prosecution Into Giving False Or Incomplete Testimony Years Before He Filed The Current Petition

Charboneau's first argument is that his 2002 post-conviction *Brady*[1] claim does not show he had notice of the currently asserted *Brady* claim.

[1] Brady v. Maryland, 373 U.S. 83 (1963).

(Respondent's brief, pp. 26-29.) Charboneau acknowledges, by quoting materials he submitted in support of his 2002 post-conviction petition, that he claimed that Tira Arbaugh told his mother, Betsy Charboneau, that prosecutors Dan Adamson and Marc Haws, deputy sheriff Larry Webb, and prosecutor's investigator Gary Carr "'did instruct her on what they wanted her to say'" regarding the murder and "'instructed her to not reveal certain facts'" about evidence found at the scene. (Respondent's brief, pp. 27-28 (quoting #29042 R., p. 53).) He argues, however, that because the 2002 *Brady* claim related to Tira's testimony and statements about the facts related to the murder, whereas his current claim is limited to suppression of "physical evidence," *to wit* the letter and envelope purportedly written by Tira, the claims are different and knowledge of one does not imply knowledge of the other. (Respondent's brief, pp. 28-31.) This argument is without merit because the record shows that the current claim and the prior claim are the same, and both were brought after the applicable statute of limitation had run.

First, if the Court accepts Charboneau's argument it must also accept the underlying concession that *Charboneau was and is not claiming a Brady violation associated with evidence available for his trial.* Charboneau's 2002 petition, as Charboneau concedes, claimed that prosecutors and law enforcement suppressed evidence by coercing Tira to omit facts from or to present false evidence in her testimony in the criminal proceedings. If the current claim does not assert manipulation of trial evidence, and is limited to suppression of the letter (Exhibit 14) which did not exist until some point after the

trial, then Charboneau is effectively conceding he was erroneously granted a new trial. The state believes, Charboneau's protestations to the contrary on appeal notwithstanding, he was and is asserting a claim that the state withheld evidence and presented false testimony at his criminal trial, a claim he had notice of as early as the trial in 1985 and no later than 2002. If this Court accepts Charboneau's current argument that his claim is based exclusively upon the alleged withholding of Exhibit 14 itself, the state is entitled to reversal of the district court's judgment granting Charboneau a new trial.

Second, the state submits that Charboneau's claim was not limited to suppression of the letter, but that he was relying on the contents of the letter to show suppression of trial evidence or the presentation of false testimony at trial. (R., vol. 1, pp. 138-39, 158-64.) This is not a case, as argued by Charboneau (Respondent's brief, pp., 30-31), that if the state suppressed two items of evidence notice of the suppression of the first item would not lead to notice of suppression of the second item. Rather, in this case there were multiple alleged statements by the same person regarding the same topic and Charboneau knew of some of those statements. Not knowing of other statements *by the same person and regarding the same events* did not deprive him of notice of his claim. Because the record establishes that Charboneau had notice of his claim that trial evidence had been manipulated by the prosecution or law enforcement as early as the criminal trial itself and certainly no later than at least one year prior to bringing his 2002 petition (as found by the district court in Charboneau's third post-conviction case), his claim is time-barred.

C. The Statute Of Limitations Runs From The Date Of Notice, Not The Date Of Acquisition Of Evidence

Charboneau next argues that the state's argument is "directly contrary" to Sivak v. State, 134 Idaho 641, 8 P.3d 636 (2000). (Respondent's brief, pp. 31-35.) Specifically, he argues: "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." (Respondent's brief, p. 33.) Charboneau does not articulate, however, how the Sivak standard is relevant to this case.

As set forth in the state's initial briefing, the holding of Sivak (that withholding of evidence by which Sivak could have possibly proved a timely brought and litigated claim would estop the state from relying on the result of the previous litigation to bar the reasserted claim) is inapplicable in this case because that holding had nothing to do with notice. (Appellant's brief, pp. 31-32.) Sivak timely brought his claim, which was rejected after an evidentiary hearing, but was prevented from fully litigating the claim because the state withheld relevant evidence. Here Charboneau never brought a timely claim, despite having notice. Although a *Brady* violation may result in tolling *where the suppression of evidence denies a party of notice*, timeliness of asserting the claim of a *Brady* violation will be measured "from the date of notice." Charboneau v. State, 144 Idaho 900, 904-05, 174 P. 3d 870, 874-75 (2007). Where, as here, the party gains knowledge of the claim, *even though the suppression of evidence might still be ongoing*, the requirement of bringing the

claim within a reasonable time is applicable. See Id. (citing McKinney v. State, 143 Idaho 590, 594, 150 P.3d 283, 287 (2006), cert. granted, judgment vacated 552 U.S. 1227 (2008), and denial of post-conviction relief aff'd *sub nom.* Rhoades v. State, 149 Idaho 130, 233 P.3d 61 (2009)).

The present case is indistinguishable from McKinney. In that case the petitioner obtained a note by the prosecutor saying "tighten gun cylinder" in the course of federal habeas corpus proceedings. On the basis of that note McKinney filed a petition claiming that the prosecutor had altered the evidence by making the murder weapon's trigger pull more difficult, in order to counter McKinney's claim that he fired the gun accidentally. McKinney, 143 Idaho at 591-92, 150 P.3d at 284-85. The Idaho Supreme Court held that the "petition raising this issue is untimely." Id. at 593, 150 P.3d at 286. The court applied the notice standard as follows:

> If we assume, even in the absence of any evidence supporting the assumption, that the trigger pull of the revolver had been altered to make it heavier, McKinney would have known of that at his trial in November 1981. He admittedly fired the first shot that hit the victim, claiming he did it accidentally. If the revolver's double-action trigger pull was so light that he could have accidentally fired the gun in the manner he claimed, he should reasonably have known something was wrong when he heard the State's firearms expert testify that the trigger pull was one of the heaviest he had ever encountered. Yet, McKinney did nothing to investigate whether the trigger pull had been altered. Under the circumstances, the lapse of almost twenty years is not a reasonable time to wait before raising the possibility that the trigger pull may have been altered.

Id. at 593, 150 P.3d at 286.

Charboneau claims that the state withheld evidence of a second gun being involved in the murder and presented false testimony at trial related to who

had possession of the murder weapon and when it was shot. Charboneau, who has never denied being present at the crime, had notice of how many rifles were involved, what rifle he in fact possessed at the time of the crime, and who fired the fatal shots. Thus, he had notice of the allegedly hidden evidence and allegedly false testimony by the state's witnesses at the time of the trial and at the time of his first two post-conviction cases.

Moreover, the state did not prevent his investigation of this known claim. The record establishes that Charboneau asserted he knew of this claim when Tira Arbaugh was alive and could have testified. Instead he waited until after Tira was dead to first bring this claim in 2002, a time when it was already time-barred. Even if we assume (although the state disputes this) that the government successfully kept Exhibit 14 out of Charboneau's hands until March 18, 2011, because Charboneau had notice of his *Brady* violation claim from other sources he was required to not delay for years before bringing that claim.

As stated in more detail in the state's initial briefing (Appellant's brief, pp. 26-32), the district court applied an incorrect legal standard and failed to measure the running of the reasonable period for bringing the claim from the date of notice. Application of the correct legal standard shows that this claim was untimely.

II.
The District Court Erred When It Concluded That Three Documents—Two Letters Purportedly Written By Persons Who Are Deceased And One Document Purportedly Written Or Signed By Shedd—Were Admissible Hearsay

A. Introduction

Exhibits 4 (the document purportedly signed by prison paralegal DeWayne Shedd), 14 (the copy of the letter allegedly written by Tira Arbaugh), and 8 (a document purportedly signed by Larry Gold) were inadmissible hearsay, and so the district court erred by admitting them. (Appellant's brief, pp. 33-48.) Charboneau acknowledges that the district court failed to articulate why Exhibit 4 was admissible, but argues the district court reached the correct result because the exhibit is admissible as an admission of a party opponent, under the present sense impression hearsay exception, or under the then-existing mental state exception. (Respondent's brief, pp. 93-107.) Charboneau argues that the district court correctly concluded that Exhibit 14 was admissible as a statement against penal interest and under the residual hearsay exception. (Respondent's brief, pp. 37-90.) Charboneau does not defend the district court's grounds for admitting Exhibit 8, but instead argues that it is an "affidavit" and therefore independently admissible in post-conviction proceedings. (Respondent's brief, pp. 108-12.) Review of these arguments shows they lack merit. Application of the relevant legal standards shows the district court erred in admitting these documents for the truth of matters asserted.

B. Exhibit 4 Is Inadmissible Hearsay

Charboneau acknowledges that the state objected to the admission of Exhibit 4 on hearsay grounds, that he did not offer a hearsay exception or argue that the contents of the document were not hearsay, and that the district court did not explicitly rule on the state's hearsay objection when admitting the exhibit without limitation. (Respondent's brief, pp. 93-94.) He claims, however, that the exhibit was admissible as an admission of a party opponent, or under the present sense impression or state of mind hearsay exceptions. (Respondent's brief, pp. 93-107.) This argument fails because Charboneau failed to lay any foundation for admission of the document as an admission by a party opponent or under the hearsay exceptions for present sense impression or state of mind.

1. Exhibit 4 Is Not Admissible As An Admission Of A Party Opponent

An admission of a party opponent is not hearsay. I.R.E. 801(d)(2). 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" is an admission by a party opponent. I.R.E. 801(d)(2)(D). A "foundational requirement of this rule is that 'independent evidence of the agency relationship, i.e., evidence apart from the alleged agent's own statements, are necessary before the alleged agent's out-of-court declarations may be admitted.'" Vreeken v. Lockwood Engineering, B.V., 148 Idaho 89, 107, 218 P.3d 1150, 1168 (2009) (quoting R Homes Corp. v. Herr, 142 Idaho 87, 92, 123 P.3d 720, 725 (Ct. App. 2005)). "In order for the statement of an employee to be binding on his or her employer, the statement must have been made within the

scope of the employee's authority and pertain to the subject matter of the suit." Mann v. Safeway Stores, Inc., 95 Idaho 732, 739, 518 P.2d 1194, 1201 (1974). Thus, a statement by a checker in a grocery store that "the floor was too slick or that it had too much wax on it" was inadmissible in a tort claim based on a fall because there was "nothing in the record to indicate that [the witness'] authority as a grocery checker extended in any manner to the condition of the floor." Id.

Timothy McNeese testified he did not supervise Shedd and did not instruct him to intercept Charboneau's mail. (Evid. Tr., p. 441, Ls. 7-8, 15-20; p. 442, Ls. 8-10.) Shedd testified that in the relevant time he worked as a library specialist helping inmates with their legal issues by providing forms. (Evid. Tr., p. 190, L. 16 – p. 191, L. 13; p. 266, Ls. 3-18; p. 266, L. 24 – p. 267, L. 5.) At the prison there are three types of mail—personal mail, confidential mail, and legal mail—and all three types have different systems for handling incoming and outgoing mail. (Evid. Tr., p. 267, L. 10 – p. 268, L. 4.) As part of his duties Shedd handled outgoing legal mail. (Evid. Tr., p. 191, Ls. 15-19; p. 270, L. 6 – p. 271, L. 7.) He handled incoming legal mail "for a very brief time" after September 11, 2001. (Evid. Tr., p. 191, Ls. 17-25; p. 268, L. 8 – p. 269, L. 14.) Sometimes he was consulted by correctional officers on whether incoming mail marked legal mail should be treated as personal mail. (Evid. Tr., p. 269, L. 15 – p. 270, L. 5.) One of those occasions included monitoring incoming legal mail when it was suspected that Charboneau's family was attempting to get him receipts that Charboneau was not supposed to have by using the legal mail system. (Evid. Tr., p. 192, Ls. 1-25; p. 273, L. 14 – p. 276, L. 2.) He never had

any involvement in processing incoming personal mail. (Evid. Tr., p. 268, Ls. 5-7.)

The evidence fails to establish any of the foundational elements required by Rule 801(d)(2)(D). First, there is no evidence Shedd is an employee of a party. He is an employee of the Idaho Department of Correction, which is not a party in this post-conviction case. Because the Idaho Department of Correction is not involved in the prosecution of criminal cases or the defense of post-conviction cases, Shedd is not an employee or agent of the Respondent.

Charboneau argues that because IDOC is a state agency, that makes Shedd an employee of the state as a party. (Respondent's brief, pp. 95-101.) If this argument were true, then this Court is also a party to this action (Idaho Const., art. V, § 2 ("The judicial power of the state shall be vested in … a Supreme Court …."), as is the office of the State Appellate Public Defender (I.C. § 19-869(1) ("The office of state appellate public defender is hereby created in the department of self-governing agencies."). Charboneau's argument that all subdivisions of state government are necessarily parties must fail. Charboneau has failed to demonstrate that the Idaho Department of Correction, Shedd's employer, is a party to this case.

Second, there is no independent evidence that the matter addressed in the exhibit is within the scope of Shedd's employment. Shedd's duties do not include the monitoring or inspection of incoming personal mail. Moreover, Shedd's official involvement with incoming legal mail is extremely limited. There is no independent evidence that blanket monitoring of all incoming inmate mail

was within the scope of Shedd's employment duties. (See also Layne Depo. Tr., p. 39, L. 5 – p. 43, L. 1 (Exhibits Part 1, pp. 398-402); Id. at p. 63, L. 25 – p. 65, L. 20 (Exhibits Part 1, pp. 422-24); Id. at p. 67, L. 1 – p. 72, L. 20 (Exhibits Part 1, pp. 426-31); Carlin Depo. Tr., p. 60, Ls. 1-24 (Exhibits Part 1, p. 323).)

Charboneau argues that the "Shedd Note itself" shows the matter was within the scope of Shedd's employment. (Respondent's brief, pp. 101, 103-04.) This argument is directly contrary to the requirement that foundation be laid by "independent evidence." Vreeken, 148 Idaho at 107, 218 P.3d at 1168; Herr, 142 Idaho at 92, 123 P.3d at 725. Once the portion of Charboneau's argument improperly based on the exhibit is excluded, his entire foundational argument is reduced to claiming Shedd "had some responsibility for handling incoming and outgoing mail." (Respondent's brief, p. 103.) As set forth above in greater detail, "some responsibility" does not show the statement in the exhibit was regarding a matter within the scope of Shedd's employment.

Charboneau also argues that the district court's finding of a conspiracy involving Shedd shows the statement in the exhibit was regarding a matter in the scope of his employment. (Respondent's brief, pp. 102-03.) The finding, however, relies almost exclusively on the exhibit itself (R., vol. 3, pp. 121, 135-36), and is therefore not based on "independent evidence." Vreeken, 148 Idaho at 107, 218 P.3d at 1168; Herr, 142 Idaho at 92, 123 P.3d at 725. In addition, there is no "independent evidence" that entering into conspiracies to violate civil rights was part of Shedd's job description.

Because the only evidence outside of the challenged exhibit was that Shedd had no duties regarding monitoring incoming personal mail and only very limited duties regarding incoming legal mail, none of which were shown to be relevant to the time-frame or circumstances in question, there is no foundation establishing that monitoring incoming legal and personal mail was 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).

2. Exhibit 4 Is Not Admissible Under The Hearsay Exceptions For Present Sense Impression Or State Of Mind

Alternatively, Charboneau argues the hearsay statements in Exhibit 4 are admissible under the present sense impression and state of mind exceptions to the general rule excluding hearsay. (Respondent's brief, pp. 105-07.) Application of relevant legal standards shows this argument to be without merit.

The present sense impression exception to the hearsay rule applies to a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." I.R.E. 803(1). "The rationale underlying this exception is that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation." State v. Woodbury, 127 Idaho 757, 762, 905 P.2d 1066, 1071 (Ct. App. 1995) (Lansing, J. concurring) (internal quotes omitted). No foundation for admission of the exhibit under this exception was laid at trial.

Although he admits that there is no evidence actually establishing that the exhibit was written "immediately []after" the alleged actions set forth in the

document, Charboneau argues the "only reasonable inference" is that the document was written "shortly" after the events recited therein. (Respondent's brief, pp. 105-07.) To accept Charboneau's argument this Court would have to conclude that Shedd received his marching orders from McNeese, planned how to carry them out, enacted the plan by contacting Lt. Unger and securing his cooperation, decided to "cover [his] ass" (Evid. Tr., p. 308, L. 17 - p. 309, L. 12, *cited in* Respondent's brief, p. 106) by documenting these events, and then signed the exhibit (which very well may have been written by someone else). Even under Charboneau's best case scenario the exhibit lacks the "substantial contemporaneity" that would "negative the likelihood of deliberate or conscious misrepresentation." Charboneau has failed to show that Exhibit 4 was admissible as a present sense impression.

The state of mind exception provides: "A statement 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). Exhibit 4 is offered as a "statement of memory or belief to prove the fact remembered or believed." It is therefore inadmissible under the state of mind exception.

Charboneau argues that Exhibit 4 is admissible as Shedd's state of mind because it puts forward his plan or design. (Respondent's brief, p. 107.) The main flaw in this argument is that the document does not purport to set forth Shedd's plan or design, but McNeese's. (Exhibit 4 (Exhibits Part 1, p. 95).) The

exhibit allegedly documents Shedd's previously taken efforts to carry out McNeese's plan. Charboneau has failed to establish that this exhibit was admissible under the state of mind, or any other, hearsay exception.

C. Exhibits 14 And 5A Are Not Admissible As Statements Against Penal Interest Or Under The Present Sense Impression Or State Of Mind Exceptions

As set forth in the state's initial briefing, the district court erred by applying incorrect legal standards and thereby concluding that hearsay statements contradicting sworn testimony are sufficiently reliable to be admitted under hearsay exceptions. (Appellant's brief, pp. 36-46.) More specifically, neither the statement against penal interest nor the general catch-all hearsay exceptions apply to make the multi-generational copies of the letter and envelope (Exhibits 14, 5A) admissible evidence merely because Tira Arbaugh's handwriting is apparently present in those documents. (Id.) Charboneau's arguments to the contrary are unavailing.

1. Exhibits 14 and 5A Are Not Admissible As Statements Against Penal Interest

(a) The District Court Erred By Admitting Exhibit 14 As A Whole Rather Than Determining The Admissibility Of Individual Declarations Within The Exhibit

The statement against penal interest exception does not allow admission of statements or parts of statements implicating other persons but not the declarant. State v. Averett, 142 Idaho 879, 890, 136 P.3d 350, 361 (Ct. App. 2006) (quoting Williamson v. United States, 512 U.S. 594, 600-01 (1994) (interpreting nearly identical federal rule)). The district court erred because it

admitted both exhibits in their entireties even though most of Exhibit 14 and all of Exhibit 5A are not against the declarant's penal interest. (Appellant's brief, pp. 36-37.) Specifically, declarations in the exhibits that the document was intended for Judge Becker, the date and circumstances that the original document was supposedly created, and claims of actions by law enforcement officers and prosecutors are not admissible under this exception. (Id.) Moreover, the district court utterly failed to address how such statements within the exhibits would be admissible under its logic that statements contradicting prior sworn testimony were admissible (id.) because Tira Arbaugh never gave testimony in the criminal case on these subjects.

On appeal Charboneau does not challenge many of these arguments. For example, he does not claim that writing names and addresses on an envelope falls within the statement against penal interest exception, or that dating the document and explaining the motivations and circumstances for writing the letter might have subjected Tira Arbaugh to prosecution. (Respondent's brief, pp. 44-45.) These out-of-court declarations are inadmissible hearsay and the district court erred in admitting them.

Charboneau also does not present any argument that the district court applied the correct legal standards in relation to alleged acts or statements by law enforcement officers or prosecutors. (Id.[2]) Instead, he offers the alternative theory that statements implicating officers and prosecutors are admissible as

[2] Charboneau "freely admits" that the penal interest exception does not apply to many of the statements in Exhibit 14. (Respondent's brief, pp. 80-81.) His claim that those statements are admissible under other exceptions is addressed below.

against penal interests because they would have subjected Tira Arbaugh to prosecution for conspiracy to present perjury or to destroy evidence. (Id. at p. 45, n. 35.) This theory does not withstand analysis.

To be admissible under this theory, the evidence must satisfy a three-part test: "(1) the statement must be genuinely self-inculpatory to the declarant, (2) the statement is made to a private person and does not seek to curry the favor of law enforcement authorities, and (3) it does not shift blame." Averett, 142 Idaho at 890, 136 P.3d at 361 (addressing statements made by one co-conspirator tending to implicate another co-conspirator). See also Williamson, 512 U.S. at 604 (statements implicating co-conspirators may actually decrease exposure to criminal liability); State v. Pecor, 132 Idaho 359, 363, 972 P.2d 737, 741 (Ct. App. 1998) ("the portion of her statement implicating *Pecor* [the defendant] was not against *Haddock's* [the declarant] penal interest" (emphasis original, brackets added)). Exhibit 14 meets none of the three required elements.

First, statements inculpating officers and prosecutors in soliciting perjury and withholding or destroying evidence are not genuinely self-inculpatory because they do not portray Tira as a true partner in the alleged perjury or the destruction of evidence. The declarant portrays Tira as an unwilling participant or observer only, while law enforcement officers and prosecutors bear the weight of true responsibility. The declarant's efforts to shift the blame for allegedly false testimony and hidden evidence to prosecutors and police officers were not statements against penal interest. Williamson, 512 U.S. at 604 (statements implicating co-defendant not admissible); Averett, 142 Idaho at 890, 136 P.3d at

361 (“Accomplice confession or admissions to police that shift some of the blame to the defendant do not fall within this hearsay exception.”).

Second, the evidence does not indicate the statement was to a private person; it was allegedly to a judge and is filled with justifications and excuses for the supposed perjury and destruction of evidence.

Finally, the statements implicating prosecutors and law enforcement officers as the instigators in pressuring a young girl to testify falsely clearly shift blame. The district court erred in admitting the entirety of Exhibits 14 and 5A; the contents of Exhibit 5A should have been excluded and not considered for the truth asserted therein, and statements in Exhibit 14 relating to the alleged circumstances under which the letter was created, the motive of the declarant in preparing the letter, and allegations of misconduct by other persons should have been excised from Exhibit 14.

(b) The Declarations In The Exhibits Had No Tendency To Subject The Declarant To Criminal Liability

The remaining statements in the exhibit are also not admissible. In its initial briefing, the state demonstrated that the statements in Exhibits 14 and 5A were not against penal interests because, as a matter of law, the declarant could not have been prosecuted. (Appellant’s brief, pp. 37-39.) Charboneau does not dispute that the statements in the exhibits could not, as a matter of law, have been against the declarant’s penal interest. (Respondent’s brief, pp. 48-54.) He contends, however, that the standard is subjective and therefore the declarant’s subjective belief the statements were against her penal interest, even though they were not,

is sufficient to allow its admissibility. (Id.) This argument fails on both the law and the facts.

Charboneau's argument fails on the law because a complete absence of any potential criminal liability prevents finding that the statements are against penal interests. The exception applies to: "A statement which … at the time of its making … so far tended to subject declarant to civil or criminal liability… that a reasonable man in declarant's position would not have made the statement unless declarant believed it to be true." I.R.E. 804(b)(3). Although the rule considers the "declarant's position," which may include her subjective understanding of the liability exposure engendered by the statement, it still requires that the statement "tend[] to subject declarant to … criminal liability." Id. Even assuming that "a reasonable man in declarant's position" allows the court to consider the declarant's legal acumen or the lack thereof when applying this reasonable person standard, the rule is not so broad as to make admissible a statement with no tendency to subject a declarant to criminal liability. By the plain language of this rule, a statement with no tendency to subject the declarant to criminal liability is not within the scope of the exception.

Charboneau's argument also fails on the facts, for there is no evidence that the declarant's circumstances included selective ignorance of the law. The state may just as easily speculate that the declarant inaccurately believed that presenting false testimony at the behest of a prosecutor was not perjury (and therefore not against penal interests) as the district court speculated that the declarant believed she could be criminally prosecuted (1) even though the statute

of limitations had run and (2) even though she could not be prosecuted for offenses she committed when she was a juvenile. The record is devoid of evidence indicating what the declarant believed regarding whether she could or could not be held criminally liable for perjury. Because Charboneau, like the district court, is merely speculating about what the declarant knew or believed, he has failed to show that the statement against penal interest exception applies. Because the statements in Exhibits 14 and 5A could not, as a matter of law, have subjected the declarant to penal liability, the statements are not against penal interest.

(c) The Record Does Not Support Any Conclusion That A "Reasonable Man" In The Declarant's Position Would Have Believed Himself So At Risk Of Prosecution That Reliability May Be Inferred

As pointed out in the state's brief, the odds of the state prosecuting Tira Arbaugh for committing perjury at Charboneau's criminal trial were non-existent at worst and miniscule at best, in part because recantations are viewed with great skepticism and also because it was unlikely that the state would accept the truth of the recantation over the truth of the sworn trial testimony. (Appellant's brief, pp. 39-41.) Thus the letter, "at the time of its making," did not "so far tend[] to subject declarant to civil or criminal liability… that a reasonable man in declarant's position would not have made the statement unless declarant believed it to be true." I.R.E. 804(b)(3). To the contrary, a "reasonable man" would not have felt compelled to state the truth, because there was no possibility that the state would charge Tira Arbaugh with perjury based on the contents of Exhibits 14 and 5A.

Charboneau does not address the state's argument, but instead attempts to refute the straw-man argument that the state is claiming that prosecution and conviction must be a near certainty. (Respondent's brief, pp. 54-59.) Like the district court, Charboneau has failed to articulate a plausible reason why a "reasonable man" would have felt that the risk of criminal liability was sufficiently likely so as to assure the reliability of the statements.

(d) There Are No Corroborating Circumstances Clearly Indicating The Trustworthiness Of The Statements

"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). This corroboration requirement is "'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*.'" State v. Meister, 148 Idaho 236, 242, 220 P.3d 1055, 1061 (2009) (brackets omitted, emphasis original) (quoting State v. LeGrand, 734 P.2d 563, 570 (Ariz. 1987)). As set forth in the state's initial brief, there was no corroboration of the statements in Exhibit 14, and the district court erroneously relied on its own credibility determination instead of looking in the record for evidence that would corroborate the factual claims in the statement. (Appellant's brief, pp. 41-43.)

In response, Charboneau does not argue that the district court applied the correct legal standard. (Respondent's brief, pp. 59-80.) First, he argues that the state did not preserve its claim of error because it did not address all seven factors in Meister. (Respondent's brief, p. 62, n. 43.) The state, however,

addressed the elements of I.R.E. 804(b)(3) and the test as articulated in Meister. (Appellant's brief, pp. 36-43.) The seven factors in Meister are merely a restatement of the requirements articulated by the rule. Meister, 148 Idaho at 242, 220 P.3d at 1061. Moreover, the state's argument is not that the district court misapplied the Meister standard, it is that the district court employed a completely different legal theory at odds with the applicable one. (Id.) Application of an incorrect legal standard is grounds for finding an abuse of discretion in evidentiary rulings. See Shea v. Kevic Corp., 156 Idaho 540, 544, 328 P.3d 520, 524 (2014) (a "trial court does not abuse its discretion" in relation to admission of evidence in summary judgment if it, among other things, "applies the correct legal standards" (internal quotations omitted)). Charboneau has failed to show that the state failed to raise an issue ripe for appellate review.

Second, Charboneau claims the state forfeited consideration of this issue by not identifying what evidence it was relying on. (Respondent's brief, p. 62, n. 44, p. 64.) The part of the brief he focuses on reads: "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)." (Appellant's brief, p. 42.) All of the referenced testimony, however, is set forth in great detail—including citations—in the statement of facts and the course of proceedings in the state's brief. (Appellant's brief, pp. 2-4 (Tira and Tiffnie's preliminary hearing testimony), 4-6 (Charboneau's

testimony in support of his motion to dismiss), 6-12 (evidence presented at trial).) In the context of an argument that the district court applied an incorrect legal standard (an argument Charboneau makes no effort to refute[3]) the state referenced evidence that it had previously set forth in detail in the statement of the case, including with citations to the relevant portions of the record. The state's brief fully complied with the requirements of I.A.R. 35(a)(6). Charboneau's argument otherwise is meritless.

Charboneau, without challenging the state's central argument that the district court applied an incorrect legal standard, next argues there was evidence corroborating the statements made in Exhibit 14 if the correct legal standard is applied. (Respondent's brief, pp. 65-80.) Review of the record under the applicable legal standard does not support this argument.

"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). This corroboration requirement is "'limited to asking *whether evidence in the record*

[3] The state argued below for application of the seven factors articulated in Meister. (R., vol. 4, pp. 71-73.) The district court did not apply the seven factors, and instead substituted its own factors. (R., vol. 4, pp. 532-45.) The state's position on this appeal is that substituting its own factors for those articulated by the Idaho Supreme Court was legal error. (Appellant's brief, pp. 41-43.) Charboneau's argument that application of the correct legal standard leads to the same result reached by the district court by application of an erroneous legal standard is therefore a "right result, wrong reason" argument. See, e.g., Walker v. Boozer, 140 Idaho 451, 456, 95 P.3d 69, 74 (2004). The state was not required to rebut this argument until after Charboneau made it; therefore even if the state had not cited to the record such would not have waived its argument that the district court applied an erroneous legal standard.

corroborating and contradicting the declarant's statement would permit a reasonable person to believe that the statement could be true.'" Meister, 148 Idaho at 242, 220 P.3d at 1061 (brackets omitted, emphasis original) (quoting LeGrand, 734 P.2d at 570). The factors relevant to this corroboration requirement are:

> (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 at 242, 220 P.3d at 1061.

Charboneau is trying to corroborate statements directly contrary to testimony Tira Arbaugh had previously given, twice, under oath. Thus, the analysis starts from the "premise that recantations by witnesses for the prosecution are viewed with suspicion." United States v. Mackin, 561 F.2d 958, 961-62 (D.C. Cir. 1977). Even an express claim of a high motive for providing the recantation (to "get right with God") and acknowledgement that the trial testimony was perjurious is insufficient to vest the hearsay statement recanting sworn testimony with reliability. Id. at 962-63. "It is axiomatic that witness recantations must be looked upon with the utmost suspicion." Haouari v. United States, 510 F.3d 350, 353 (2d Cir. 2007). See also Haas v. Com., 721 S.E.2d 479, 482 (Va. 2012) ("Traditionally, courts view recantations with 'great suspicion.'") (quoting Dobbert v. Wainwright, 468 U.S. 1231, 1233–34 (1984) (dissent on denial of cert.)).

"[R]ecanted testimony is notoriously unreliable, 'easy to find but difficult to confirm or refute: witnesses forget, witnesses disappear, witnesses with personal motives change their stories many times, before and after trial.'" Case v. Hatch, 731 F.3d 1015, 1044 (10th Cir. 2013) (quoting Carriger v. Stewart, 132 F.3d 463, 483 (9th Cir. 1997)). Indeed, "there is no form of proof so unreliable as recanting testimony." State v. Sims, 409 P.2d 17, 22 (Ariz. 1965) (internal quotation omitted). "Recantations of trial testimony should be looked upon with the utmost suspicion." State v. Clayton, 427 So. 2d 827, 832 (La. 1982). Recanted testimony remains highly suspect "even when it involves an admission of perjury." Commonwealth v. Woods, 575 A.2d 601, 603 (Pa. Super. 1990). As suspicious and unreliable as recantations are, "unsworn recantations deserve increased suspicion." Ferrell v. Wall, 889 A.2d 177, 184 (R.I. 2005). The record in this case does not support any inference that a reasonable person could conclude that the statements in the exhibit are more reliable than the testimony given twice under oath.

The most important claim in the letter is that there was a second rifle involved in the shooting and that the murder weapon was in Tiffnie Arbaugh's hands, and fired only by her, while a completely different rifle was in Charboneau's hands during the commission of the murder. Specifically, the exhibit asserts that Tira was in the bathtub and Tiffnie in the house when they heard their mother scream for Tiffnie, and then they heard shots "a few seconds later." (Exhibit 14, pp. 3-4 (Exhibits part 1, pp. 124-25).) The letter claims the girls left the house, Tiffnie armed with the Remington rifle and Tira armed with

the pistol. (Exhibit 14, p. 4 (Exhibits part 1, p. 125).) Once outside, behind the sheep wagon, Tiffnie fired the Remington rifle, according to the exhibit. (Exhibit 14, p. 4 (Exhibits part 1, p. 125).) The exhibit claims that Tiffnie stated that Marilyn had left the house armed with a different rifle. (Exhibit 14, pp. 4-5 (Exhibits part 1, pp. 125-26).) The letter claims that the discrepancies between this version of events and the version in Tira's witness statement (which was also consistent with her later testimony) was the product of Deputy Driesal telling her that "it wasn't necessary to state every little thing in [her] statement." (Exhibit 14, p. 5 (Exhibits part 1, p. 126).)

The claims of the exhibit are in stark contrast to the evidence presented at trial. The only mention of a rifle in relation to the shooting in Tiffnie's testimony was when she testified that she rushed outside after hearing shots and saw Charboneau by her mother with a .22 rifle in his hands. (P.H. Tr., vol. 1, p. 95, L. 7 – p. 104, L. 6; p. 112, L. 22 – p. 113, L. 8; Trial Tr., vol. 3, p. 638, L. 24 – p. 663, L. 7.) Tira did not mention a rifle in her testimony about the events surrounding the murder, because she never saw Charboneau. (P.H. Tr., vol. 2, p. 297, L. 11 – p. 304, L. 12; p. 327, L. 16 – p. 328, L. 19; Trial Tr., vol. 6, p. 1262, L. 19 – p. 1270, L. 25.) Charboneau's testimony regarding the murder mentions only one rifle, the Remington he bought shortly before using it to shoot Marilyn. (#16339 Supp. Tr., p. 137, L. 15 – p. 158, L. 11.) That same Remington rifle was found by police near Charboneau in the field where they arrested him. (Trial Tr., vol. 4, p.751, L. 6 – p. 899, L. 19.) Ballistics testing on bullets and casings found at the murder scene tied them to the same Remington

rifle. (Trial Tr., vol. 5, p. 1128, L. 3 – p. 1157, L. 6; p. 1177, L. 4 – p. 1179, L. 19.) In addition, all three eyewitnesses (Tira, Tiffnie and Charboneau) testified that Tiffnie left the house in response to her mother with a Ruger pistol, not a Remington rifle, in her hands. (P.H. Tr., vol. 1, p. 96, L. 4 – p. 97, L. 8; p. 103, L. 24 – p. 104, L. 6; P.H. Tr., vol. 2, p. 298, L. 17 – p. 299, L. 21; p. 303, L. 12 – p. 304, L. 12; #16339 Supp. Tr., vol. 1, p. 155, L. 5 – p. 156, L. 13; Trial Tr., vol. 3, p. 640, Ls. 5-20; vol. 6, p. 1265, Ls. 12-24.)

Based on the above, Charboneau's theory of corroboration would require this Court to believe that (1) Tira Arbaugh wrote, on the day of the murder, an entirely inaccurate account of events surrounding the murder, which happened to match the account given by Tiffnie Arbaugh and all the physical evidence, because an officer told her "it wasn't necessary to state every little thing in [her] statement"; (2) Tira Arbaugh twice provided testimony, once at the preliminary hearing and once at the trial, consistent with her false and made-up version of events without being significantly impeached by two different defense attorneys; (3) Tiffnie Arbaugh was the real killer, shooting her mother from a place where neither daughter could even see her; (4) Tiffnie Arbaugh twice provided false testimony regarding most of the events in question, again without being significantly impeached; (5) every police officer in the case provided false evidence about where they found incriminating evidence, including shell casings and the Remington rifle; (6) two different prosecutors, one the Jerome County Prosecutor and the other from the Attorney General's office, knowingly presented

entirely fabricated testimony; and (7) Charboneau himself gave a false factual recitation *more incriminating than the truth*.

Compared to the testimony of all three eyewitnesses and all the physical evidence, Charboneau argues the statements in the exhibit are corroborated by evidence that Charboneau purchased gift wrapping paper at about the same time he purchased the murder weapon; a 2009 affidavit by a family friend stating that Marilyn was present when Charboneau bought the Remington (which Charboneau admits was contrary to the testimony of eyewitnesses to that event and is also contrary to Charboneau's testimony); a statement Charboneau allegedly wrote in 1984, which was contradicted by Charboneau's testimony, given about three months after the written statement was allegedly prepared[4]; his testimony at his original sentencing that Marilyn owned a rifle (without claiming that rifle was involved in the shooting); a letter he allegedly wrote in 2006; and deposition testimony by Frederick "Pinto" Bennett and Betsy Charboneau that Marilyn owned a .22 rifle; and a 1984 probable cause affidavit prepared by a records clerk and based on an unknown record (Trial Tr., vol. 6, p. 1431, Ls. 2-16). (Respondent's brief, pp. 67-68.) This evidence is not corroboration, much less corroboration "clearly indicat[ing] the trustworthiness of the statement." I.R.E. 804(b)(3). None of the evidence tends to prove what

[4] The first *public* claim that there had been a second rifle involved in the crime was in 2008 and 2009 in association with Charboneau's fourth petition for post-conviction relief. (R., vol. 4, pp. 249-53 (Betsy Charboneau Depo., p. 18, L. 1 – p. 33, L. 23), 276-291 (Exhibits 1-4 to deposition).)

weapons were involved in the crime, much less tends to establish what weapons were in whose hands.

The evidence that Charboneau asserts corroborates the claim that a second rifle was fired during the crime and that Tiffnie fired the fatal shots with the Remington fall into two general categories: (1) Evidence that when Charboneau bought the Remington he intended to give it to Tira as a gift, and (2) evidence that Marilyn owned a .22 rifle. Even if true, neither corroborates the version of events asserted in Exhibit 14. Even though evidence tending to show Charboneau intended to give the Remington to Tira as a gift might be considered relevant (the state submits that the 2009 affidavit asserting that two women were present for the purchase and the three eyewitnesses to the purchase, including Charboneau, apparently failed to notice them is inherently incredible), its corroborative value is minimal at best. Charboneau's testimony was that he intended to give the Remington to Tira as a gift, but his testimony was also that it was the gun he used to shoot Marilyn. (#16339 Supp. Tr., p. 137, L. 15 – p. 139, L. 7; p. 154, L. 20 – p. 155, L. 16.) Charboneau's intent did not necessarily lead to action: there are many entirely uncorroborated steps between Charboneau's alleged intent when he purchased of the Remington and the Remington allegedly ending up in Tiffnie's hands and being used to shoot her mother.

Likewise, although evidence that Marilyn owned a .22 rifle might be marginally relevant to the question of whether a second gun *could have been* involved, it is not evidence that the gun *was in fact* involved. The evidence cited

by Charboneau has minimal, if any, corroborative value to showing two rifles were involved while the evidence that only one rifle was involved is overwhelming. The statement that a second rifle was involved in the shooting and that the actual murder weapon was shot by Tiffnie Arbaugh is not corroborated in a manner "clearly indicat[ing] the trustworthiness of the statement." I.R.E. 804(b)(3).

Charboneau also argues that the exhibit's "statements concerning a lack of a second round of shots" are corroborated by Tira's written statement to police, Betsy Charboneau's claims that Tira had told her she had been told what to testify to by the prosecutors, and alleged discrepancies between Tira's and Tiffnie's testimony. (Respondent's brief, pp. 68-70.) This argument does not withstand analysis.

First, although it appears that Tira initially completed her witness statement without mentioning hearing any shots (as indicated by the initialed "X" on the second page), and then added a sentence on a new page indicating she had heard shots (and when), such in no way corroborates the claim that the added statement is false. To believe that the adding of the statement corroborates the falsity of the added statement is to believe that initial witness statements (even those made shortly after very emotional events) never omit anything important. Charboneau appears to be trying to corroborate the claim that the sentence was added *at the behest of law enforcement*. As noted above, however, actions by law enforcement are not provable as against the declarant's penal interest. That the statement about hearing shots was added to the witness

statement in no way corroborates a subsequent statement that no shots were heard.

Second, Betsy Charboneau's allegations that Tira told her that she presented false testimony at the request of prosecutors do not corroborate any claim that any statement or testimony about hearing shots while with Tiffnie in the house was false. Although "whether the declarant has issued the statement multiple times" may be a corroborative factor, Meister, 148 Idaho at 242, 220 P.3d at 1061, in this case the evidence does not show corroboration. Tira Arbaugh wrote a statement on the day of the murder that stated she heard a round of shots while she and Tiffnie were in the house. (R., vol. 1, pp. 170-72.) She testified consistently with that statement twice under oath. (P.H. Tr., vol. 2, p. 298, L. 5 – p. 302, L. 24; Trial Tr., vol. 6, p. 1263, L. 16 – p. 1268, L. 25.) According to Charboneau, Tira stated to his mother very shortly after testifying the second time that Tira made statements inconsistent with her witness statement. (#29042 R., pp. 23-24, 53.) She then allegedly wrote Exhibit 14 four years later. (Exhibit 14.) Betsy Charboneau's claim that Tira Arbaugh made statements at about the time of trial that might be consistent with the statements in the exhibit does not ultimately corroborate which of Tira's known and alleged statements are true. In short, a dubious claim that Tira told Betsy Charboneau that her testimony had been false in unspecified ways (dubious because one would have to believe that Charboneau, his mother and his attorneys took no action to follow up on these alleged statements for years), in no way

corroborates the claim in Exhibit 14 that no shots were heard while Tira and Tiffnie were in the house.

Finally, the claim that minor inconsistencies between Tira's and Tiffnie's trial testimony corroborate a version of events is, at best, counter-intuitive. Tiffnie testified that she heard shots before the girls ran outside and hid behind the sheep wagon (Trial Tr., vol. 3, p. 644, L. 4 – p. 645, L. 9), while Tira testified that she heard the shots after the girls had returned inside after running out to the sheep wagon (Trial Tr., vol. 6, p. 1265, L. 25 – p. 1268, L. 10). The alleged facts in Exhibit 14 are wildly inconsistent with the testimony of both witnesses, as well as the other trial evidence and even Charboneau's version of events. The slight differences in the renditions of the sequence of events do not support a conclusion that the exhibit's claim of entirely different events is more likely true. Both Tiffnie's and Tira's testimony clearly state that they heard shots while both were in the house. Neither corroborates the statement in the exhibit that the second round of shots occurred when Tiffnie fired the murder weapon while both girls were outside.

The next statement in Exhibit 14 that Charboneau claims was corroborated is that prosecutor Marc Haws "told us that we need to get rid of moms [sic] Calamity Jane rifle," so "last week" the declarant and family members of the victim went out to the scene of the crime and buried it. (Exhibit 14, pp. 5-6 (Exhibits Part 1, pp. 126-27).) The state first notes that there is no plausible theory that this statement could have exposed the declarant to penal liability. The declarant in the letter describes no more than a tangential role in this act of

hiding evidence; the act of hiding the evidence apparently occurred in 1989, well after the trial; and Tira Arbaugh never testified about anything having to do with any alleged "Calamity Jane" rifle.

Charboneau claims that the statement that a "Calamity Jane" rifle was hidden is corroborated by claims by Pinto Bennett that he knew Marilyn had such a rifle and by claims by Betsy Charboneau that Tira Arbaugh told her that Haws had asked the Arbaugh family to get rid of the rifle. (Respondent's brief, p. 70.) As above, evidence that a rifle existed does little to nothing to corroborate either its involvement in the crime or a claim that it was buried at the request of a prosecutor. In addition, the claim that Marilyn Arbaugh owned a .22 rifle at the time of the murder is refuted by the trial evidence. (Trial Tr., vol. 6, p. 1297, L. 16 – p. 1298, L. 4; see also P.H. Tr., vol. 1, p. 93, L. 18 – p. 94, L. 21; p. 109, L. 8 – p. 110, L. 25.)

Likewise, Betsy Charboneau's claims regarding Tira's alleged statement are not corroborative. Although the state does not believe the date on the letter is admissible evidence (it is a factual assertion made out of court and no hearsay exception applies), Charboneau's theory is that the letter was created in September of 1989 (Exhibit 14, p. 7 (Exhibits Part 1, p. 128)), more than four years after the trial, after the conclusion of the first two post-conviction cases, and after Charboneau's conviction (but not his sentence) had been affirmed by the Idaho Supreme Court. In chronological context, Betsy Charboneau testified that Tira told her "before the trial" that on Haws' instruction her family "bur[ied] the gun" that was "used at the scene." (Betsy Charboneau deposition, p. 15, L.

15 - p. 33, L. 23 (R., vol. 4, pp. 248-53); Betsy Charboneau Depo., Exhibits 1-4 (R., vol. 4, pp. 276-291).) The claim that Tira stated in 1984, prior to trial, that a gun allegedly used in the crime was buried at the prosecutor's request does not corroborate the statement allegedly made in September 1989 that the gun was buried "last week." Again, the corroborating circumstances fall far short of "clearly indicat[ing] the trustworthiness of the statement." I.R.E. 804(b)(3).

Charboneau's final claim of corroboration relates to the discovery of evidence in a potato cellar near the scene several days after the murder. (Respondent's brief, pp. 70-71.[5]) The actual statement in the exhibit was that the rifle was "buried right behind the cellar just a few feet from the place where [Marilyn's brother] had thrown some of moms [sic] other things in the crawl space at the back of the potato cellar a few weeks after the day [Marilyn Arbaugh] died." (Exhibit 14, p. 6 (Exhibits Part 1, p. 127).) The trial evidence showed that Marilyn's backpack, the same one Charboneau possessed after Marilyn fled from

[5] The recitation of facts in Charboneau's brief is misleading. For example, he relies on the fact that the "tack room" was very thoroughly searched by the police and claims it is highly suspicious that they did not find the evidence then. (Respondent's brief, p. 71.) The only evidence found in the tack room on July 11 was a snowmobile suit (R., vol. 1, pp. 406, 409; Trial Tr., vol. 5, p. 1012, L. 11 – p. 1013, L. 18), which was seen during the July 1 search but left because it was not at that time deemed pertinent to the investigation (Trial Tr., vol. 4., p. 843, Ls. 1-13). A photograph of the tack room taken by police during the July 1 search shows the snowmobile suit. (Trial Tr., vol. 4, p. 782, Ls. 7-25.) The significant evidence—Marilyn's backpack and her personal effects that had been taken by Charboneau when he kidnapped and raped Marilyn and the .22 rounds purchased by Charboneau with the murder weapon—were found in the potato cellar, which was separated from the murder scene by a wall. (Trial Tr., vol. 4, p. 980, L. 12 – p. 998, L. 7.) There was no evidence that the potato cellar (as opposed to the alleyway next to it, where the murder occurred) had been searched by law enforcement prior to July 11. (See, e.g., Trial Tr., vol. 4, p. 774, Ls. 8-17.)

him, was found in the cellar next to the alley between the cellar and the barn where Marilyn was shot. (Trial Tr., vol. 2, p. 290, L.22 – p. 297, L. 20; p. 365, L. 7 – p. 368, L. 21; vol. 3, p. 540, L. 24 – p. 542, L. 19; p. 558, Ls. 1-24; vol. 4, p. 800, L. 9 – p. 807, L. 3; p. 980, L. 19 – p. 998, L. 7.) Among the items in the backpack were the boxes of shells Charboneau purchased in Hagerman, one full and one only partly full. (Id.)

The statement about finding evidence in the potato cellar is not admissible as a statement against penal interest. Tira never testified regarding this evidence at trial. (Trial Tr., vol. 5, p. 1233, L. 1 – vol. 6, p. 1304, L. 20.) Charboneau does not explain how a perjury charge, or any other criminal charge, could have originated with this statement.

Even if it could be considered against penal interest, the statement is not corroborated. That the police did not find the evidence in the potato cellar located near the murder scene does not corroborate the statement that Marilyn's family somehow put it there later. Charboneau offers no theory (much less evidence) showing how the family could have obtained (1) a backpack seen in Charboneau's possession a few days before the murder and (2) the ammunition boxes Charboneau purchased in Hagerman other than by finding them near the scene of the murder as described in the trial evidence. (Trial Tr., vol. 3, p. 692, L. 11 – p. 693, L. 7; vol. 4, p. 980, L. 12 – p. 998, L. 7.) Even if the fact that the police did not initially find the backpack and shell boxes could be deemed in some way to corroborate the statement in the exhibit, Charboneau has fallen far

short of showing corroboration "clearly indicat[ing] the trustworthiness of the statement." I.R.E. 804(b)(3).

Charboneau next argues that the hearsay statements in the exhibit are corroborated by the other Meister factors—namely relationship between the declarant and the listener, relationship of declarant and defendant, the number of times the statement was made, the passage of time, benefit to the declarant, and psychological and physical surroundings—plus "other considerations." (Respondent's brief, pp. 72-80.)

The primary flaw in Charboneau's arguments is that he relies heavily upon statements in the exhibit to corroborate other statements in the exhibit. The applicable test is "whether evidence *in the record* corroborating and contradicting the declarant's statement would permit a reasonable person to believe the statement to be true." Meister, 148 Idaho at 243, 220 P.3d at 1062 (emphasis added). Trustworthiness must be established "through corroborating evidence." Id. It is not enough to say, as Charboneau does here, that the statements are trustworthy because the statements say they are trustworthy.

For example, Charboneau argues the statements are trustworthy because they were intended for Judge Becker. (Respondent's brief, pp. 72-73.) However, we must at best merely take the declarant's word that the statements were intended for Judge Becker. At worst we cannot assume that this was even the declarant's intent because, as set forth in the state's initial brief, multi-generational copies such as Exhibit 14 are subject to manipulation. (Appellant's brief, pp. 60-61.) Because there is nothing in the record outside of the salutation

line indicating that the statements were originally intended for Judge Becker, Charboneau's argument that the document is self-corroborating on this point fails.

Charboneau's argument in relation to passage of time (Respondent's brief, pp. 76-77) fails for the same reason. This argument apparently relies on the date written on the document and the post-mark on Exhibit 5A. As above, these indicators of date are unreliable and are not corroboration in the record. It is another attempt to bootstrap corroboration. Moreover, even if the document were written in 1989 such represents a considerable passage of time from the 1984 murder.

Finally, Charboneau's argument on the "psychological and physical surroundings" is based entirely upon claims in the document. (Respondent's brief, pp. 78-79.) This argument is nothing but a claim the statements are trustworthy because the document says they are.

Charboneau's arguments relying on corroboration in the record are unconvincing. (Respondent's brief, pp. 72-80.) Although factors related to a declarant's motives, mental health, repetition of consistent or contradictory statements, timing or coercion are certainly relevant, in this case they are found only in the proposed exhibit, not in corroborating evidence in the record as is required. The corroborating evidence in the record does not show that a reasonable person could conclude that the statements attributed to Tira Arbaugh in Exhibit 14 are more trustworthy than her twice given sworn testimony. I.R.E. 804(b)(3).

2. Exhibits 14 And 5A Are Not Admissible As Present Sense Impressions Or State Of Mind

Charboneau argues that "descriptions of [the declarant's] feelings" and explanations of the declarant's motives are admissible under the present sense impression and state of mind exceptions to the hearsay rule. (Respondent's brief, pp. 80-82.) The statements he believes admissible under these exceptions are the declarant's claims the document was prepared so Judge Becker would "know the truth"; that the declarant loves "my mom" and believes she would want the declarant to "tell the truth"; that a recent event "bothers me"; and that the declarant "know[s] that this is not right" and "hopes" that creating the document is the right thing. (Id. (quoting Exhibit 14).) Application of relevant legal standards shows this argument to be without merit.

The present sense impression exception to the hearsay rule applies to a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." I.R.E. 803(1). "The rationale underlying this exception is that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation." State v. Woodbury, 127 Idaho 757, 762, 905 P.2d 1066, 1071 (Ct. App. 1995) (Lansing, J. concurring) (internal quotes omitted). Charboneau claims the declarant was "describing her thoughts and feelings at the time" the declarant prepared the document. (Respondent's brief, p. 81.) This argument gets the rule exactly backward. The declarant was not claiming the "thoughts and feelings" described were the result of writing the letter, they were the motivations for the act of writing the letter. It is clear that the

declarant is claiming that the "thoughts and feelings" *preceded* the writing of the letter and is claiming that those "thoughts and feelings" were the motivation for doing so. Where, as here, a declarant is stating his or her motivations for a previous decision to take an act (here to create a document), such statements do not fall within the present sense impression exception.

The state of mind exception provides: "A statement 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). The same flaw in Charboneau's argument applies here. The statements in question are an alleged explanation for the motives underlying the decision to create the document. Any claim that the same "thoughts and feelings" that allegedly motivated the declarant to decide to create the document are ongoing during the creation or even thereafter does not shoehorn the statements into the state of mind exception. To hold otherwise would make admissible any preamble to any statement to the effect of "my motive for making this statement is …." Such is not the rule.

Charboneau has failed to show that statements alleging motivation for creating Exhibit 14 are admissible hearsay under the state of mind or present sense impression exceptions.

3. Exhibits 14 And 5A Are Not Admissible Under The "Catchall" Exception

As set forth in the state's initial brief, Exhibit 14 is not admissible under the "catchall" exception because it does not have circumstantial guarantees of

trustworthiness equivalent to other hearsay exceptions, is admissible only for impeachment purposes and not as evidence of a material fact, is not more probative than Tira Arbaugh's sworn testimony, is not corroborated by other evidence, and the purposes of the hearsay rules and interests of justice are not served by its admission. (Appellant's brief, pp. 43-46.) As part of this argument the state contended that the district court employed an erroneous legal standard. (Appellant's brief, p. 45.)

Charboneau argues that the state's argument "offers no explanation of how the district court's approach could have been wrong," and therefore the state has waived this argument. (Respondent's brief, p. 85.) The state, however, cited the applicable rule and two cases applying it, presented an argument about how the rule should have been applied in this case and how the district court actually applied it, and pointed out that the district court's analysis was inconsistent with the applicable legal standard. (Appellant's brief, pp. 43-46.) Specifically, the state relied upon the requirement that the trial court "look at all the *other evidence* to determine whether *it* tends to corroborate the hearsay statement." State v. Giles, 115 Idaho 984, 987, 772 P.2d 191, 194 (1989) (emphasis added) (cited in Appellant's brief, p. 44). Charboneau's argument that the state cited no authority for its argument that the district court erred by considering the credibility of the statements in the exhibit itself as a means to bootstrap a determination that the statements were trustworthy, instead of considering whether other evidence showed the statements to be trustworthy, is meritless.

Charboneau also argues that it was reasonable for the district court to review Exhibit 14, determine that the statements therein were credible, and conclude that the exhibit was therefore trustworthy. (Respondent's brief, pp. 83-86.) As stated above and in the state's brief, however, the court erred by relying on the statements themselves to determine their trustworthiness instead of the "*other evidence"* regarding trustworthiness.

Charboneau also contends that the state's argument that the exhibit is not offered as evidence of a material fact is "inadequate" because the state "fails to elaborate" and offers "no analysis." (Respondent's brief, p. 86.) First, the state is unaware of an "elaboration" requirement. Second, the state did provide analysis. The state provided the relevant legal standard (that the hearsay statements at issue must be "offered as evidence of a material fact") and contended the "primary (if not exclusive) purpose" of Exhibit 14, which is allegedly a letter written by Tira Arbaugh to recant her trial testimony, "would be to contradict Tira's sworn trial testimony, an impeachment purpose." (Appellant's brief, pp. 43-44.) The state's argument that an alleged recantation letter serves a primary purpose of impeachment requires neither further "analysis" nor "elaboration" to comply with I.A.R. 35(a).

Finally, Charboneau asserts that the other factors the state addresses in its brief do not show error by the trial court. (Respondent's brief, pp. 86-90.) For all the reasons stated in the state's brief, the district court erred.

D. Exhibit 8 Is Not An "Affidavit"

The state contends that Exhibit 8 is inadmissible hearsay and therefore erroneously admitted. (Appellant's brief, pp. 46-48.) The exhibit contains three layers of hearsay (Gold's statement about Alonzo's statement about Watts' statement) and "every possible matter" the exhibit could prove "requires reliance on at least one, and generally all three, layers of hearsay being true." (Appellant's brief, pp. 47-48.) Charboneau does not attempt to rebut the claim that the exhibit was inadmissible hearsay. (Respondent's brief, pp. 108-12.)

Charboneau presents the alternative argument that Exhibit 8 is an "affidavit" admissible even though it is hearsay. (Respondent's brief, pp. 110-11.) This argument fails because Exhibit 8 is not an affidavit and because, even if it were, such would resolve only one layer of hearsay.

"An affidavit is a voluntary declaration of facts written down and sworn to by the declarant *before an officer authorized to administer oaths*." Fields v. State, 155 Idaho 532, 537, 314 P.3d 587, 592 (2013) (emphasis added, brackets and ellipses omitted; quoting Black's Law Dictionary 66 (9th ed. 2009)). See also State v. McClure, 159 Idaho 758, ___, 367 P.3d 153, 155-56 (2016) (written statement sworn to deputy court clerk constituted an affidavit); Kelly v. State, 149 Idaho 517, 523, 236 P.3d 1277, 1283 (2010) (an affidavit is "a voluntary declaration of facts written down and sworn to by the declarant himself before an officer authorized to administer oaths, such as a notary public") (quoting Black's Law Dictionary 23 (3rd pocket ed. 2006)). Exhibit 8 does not meet this definition. Although it says "sworn statement" at the top and contains a jurat, there is no

evidence that it was sworn to before anyone, much less sworn to before someone legally authorized to administer oaths. Charboneau's claim that Exhibit 8 is an affidavit, with neither citation to law nor discussion of why the document should be considered an affidavit, is meritless.

Even if Exhibit 8 were an affidavit, such does not make any part of it admissible. At no point does the declarant claim personal knowledge of any fact related to this case. The only "personal knowledge" asserted relates to claims of what another person (Alonzo) stated about what a third person (Watts) had stated to him. We have no affidavits from Alonzo or Watts (although we have their testimony where they both deny making any such statements or having any knowledge as set forth in the document. (R., vol. 4, pp. 101-176; Evid. Tr., p. 469, L. 9 – p. 486, L. 9.) Even if the statements attributed to Gold were not hearsay, the statements attributed to Alonzo and Watts are still hearsay. Once the statements attributed to people other than Gold are excised, the "affidavit" asserts only that Gold is a citizen over 18 years of age, was once the elected sheriff of Jerome County, and would be "available to the Court." (Exhibit 8 (Exhibits Part 1, pp. 109-10).) The district court erred by considering this exhibit for any purpose.

III.
The District Court Erred When It Found A *Brady* Violation

A. Introduction

The district court erred by granting a new trial based on a *Brady* violation for three reasons. First, application of relevant law to the facts found by the

district court shows no *Brady* violation associated with the trial. (Appellant's brief, pp. 50-53.) Second, the facts found by the district court do not support any conclusion there was a *Brady* violation under the correct legal standards. (Appellant's brief, pp. 53-58.) Finally, many of the district court's factual findings are clearly erroneous. (Appellant's brief, pp. 58-72.) Charboneau's arguments to the contrary lack merit.

B. The District Court Applied An Irrelevant Legal Standard Because The *Brady* Doctrine Does Not Apply To Post-Conviction Suppression Of Evidence

As set forth in more detail in the state's opening brief, the *Brady* doctrine applies to trial rights, and therefore merits ordering a new trial only if trial evidence is suppressed by the prosecution. (Appellant's brief, pp. 50-51.) Other due process doctrines apply to suppression of evidence post-conviction, and the due process doctrine applicable in Idaho is to toll the applicable statute of limitations to allow the defendant to bring the post-conviction motion or petition he could have brought but for the government suppression of evidence. (Appellant's brief, p. 51 (citing Rhoades v. State, 148 Idaho 247, 251, 220 P.3d 1066, 1070 (2009).) Thus, the district court erred by applying *Brady* instead of determining if the statute of limitations for a new trial claim had run. (Appellant's brief, pp. 51-53.)

Charboneau responds to this argument by mischaracterizing it, claiming that the state is contending that "the state was free to conceal that critical letter." (Respondent's brief, p. 114.) This is false. The state's position is, and has consistently been (see, e.g., Respondent's brief pp. 116-17 (noting that the state

did argue that it had a duty to disclose exculpatory evidence even post-conviction, but misrepresenting that this is inconsistent with the state's current position), that due process demands that the state not suppress exculpatory evidence at any time, but that the *Brady* doctrine is inapplicable where that suppression is in relation to post-conviction actions such as a motion for a new trial or a petition under the post-conviction act. Because Charboneau's argument is based on a mischaracterization of the state's argument (Respondent's brief, pp. 114-18), it is irrelevant.

Moreover, Charboneau has failed to argue that application of the correct legal standard leads to the same result reached by the district court by application of an incorrect legal standard. Charboneau claims it was the Appellant's burden to demonstrate that the district court's conclusion based on an incorrect legal standard was also incorrect under the proper legal standard, and therefore the Court must presume that a legal theory never applied would actually reach the same result. (Respondent's brief, p. 118, n. 72.) However, once an appellant has shown an error (application of an erroneous legal standard), the decision of the district court is no longer entitled to a presumption of regularity and the Respondent bears the burden of showing correctness under the "right result—wrong theory" rule. See, Idaho Schools for Equal Educational Opportunity v. Evans, 123 Idaho 573, 580, 850 P.2d 724, 731 (1992) (noting that the Court, in a different case, properly addressed an issue under the right result—wrong theory rule because it was addressed in the respondent's brief); Fournier v. Fournier, 125 Idaho 789, 791-92, 874 P.2d 600, 602-03 (Ct. App.

1994) (due process concerns limit application of right result—wrong theory to theories advanced by the parties). The state did not "waive[]" the argument that the result was not correct by "failing" to anticipate and address an argument raised for the first time in the Respondent's brief.

Moreover, Charboneau again misstates the state's argument. The state did not "implicitly" argue, as claimed by Charboneau (Respondent's brief, p. 118, n. 72), that the district court should have applied the new trial standard. The state argued: "The remedy applicable to state suppression of evidence after conviction is equitable tolling of time limitations to bring a motion for new trial or a post-conviction action." (Appellant's brief, p. 51 (citing Rhoades, 148 Idaho at 251, 220 P.3d at 1070). The state *did* address whether Charboneau was entitled to tolling of the statute of limitations as a result of the alleged suppression of evidence and demonstrated he was not. (Appellant's brief, pp. 26-32.)

As stated in the state's opening brief, the district court committed reversible error by applying the *Brady* doctrine outside the reach of its scope. (Appellant's brief, pp. 50-53.) The error is not harmless because application of the correct legal standard shows Charboneau was not entitled to tolling of the statute of limitations. The district court's application of an inapplicable legal standard was reversible error.

C. The Facts Found By The District Court Do Not Show A *Brady* Violation

"To establish that a *Brady* violation undermines a conviction, a convicted defendant must make each of three showings: (1) the evidence at issue is favorable to the accused, either because it is exculpatory or because it is

impeaching; (2) the State suppressed the evidence, either willfully or inadvertently; and (3) prejudice ensued." Skinner v. Switzer, 562 U.S. 521, 536 (2011) (internal quotes and ellipses omitted). (Appellant's brief, pp. 53-58.) "The state," for purposes of this analysis, consists of "the individual prosecutor assigned to the case" and "all of the government agents having a significant role in investigating and prosecuting the offense," and the duty to disclose does not extend to evidence the state "does not possess" or "could not reasonably be deemed to have imputed knowledge or control." Stevens v. State, 156 Idaho 396, 406, 327 P.3d 372, 382 (2013). As set forth in the state's initial brief, the district court's factual findings do not support a conclusion that the prosecutor or any person with a significant role in the investigation and prosecution of the criminal case ever had possession or knowledge and control of the alleged exculpatory evidence. (Appellant's brief, pp. 54-56.)

Charboneau does not respond to the state's argument that the factual finding that Shedd intercepted Exhibit 14 in 2003, made in the district court's "Charboneau Findings of Fact and Conclusions of Law" after the evidentiary hearing, does not support the legal conclusion that the state suppressed evidence under *Brady*. (Respondent's brief, pp. 119-21.) Instead, he argues the state "largely ignores" the "additional findings" made in the district court's "summary disposition order" granting summary judgment. (Respondent's brief, p. 120 (citing R., vol. 4, pp. 551-52).) Those "additional findings" are not findings of fact, and they do not support a determination of a *Brady* violation.

First, the "additional findings" relied on by Charboneau are not findings of fact. The district court specifically stated they were "reasonable inferences" drawn from "uncontested" facts. (R., vol. 4, p. 550.) It is clear, however, that they were inferences the district court drew entirely from inadmissible hearsay contained in Exhibit 8 (Gold's alleged statement about Alonzo's alleged statement about Watts' alleged statement). (R., vol. 4, pp. 547-52.) Moreover, although the district court did not articulate what "uncontested" facts it was relying on to draw "reasonable inferences," the record is clear that the claim in Exhibit 8 that Mito Alonzo made the alleged statements attributed to him was not only contested, but shown to be false. (R., vol. 4, pp. 75, n. 3 ("Even if the Court deemed any part of [Exhibit 8] admissible, the claims it ascribed to Mito Alonzo … are refuted by the … deposition of Mito Alonzo); 110 (Alonzo Depo. Tr., p. 14, Ls. 2-8) (denied discussing Charboneau case with Gold); 163-64 (Alonzo Depo. Tr., p. 67, L. 24 – p. 68, L. 6) (when asked if conversation described in Exhibit 8 happened, Alonzo testified "I know it didn't").)

Second, even if the district court properly concluded that the statements attributed to Alonzo in the exhibit could be considered without regard for the truth of the claim that those statements were made, and even if the district court could properly conclude that the statements attributed to Alonzo, regardless of their truth, show knowledge of the existence of the letter by Alonzo, and even if the district court properly concluded that Alonzo's testimony denying having made the statements did not create a material issue of fact as to whether Alonzo made the alleged statements, Alonzo had nothing to do with the investigation of the

Charboneau case. (R., vol. 4, pp. 139-40 (Alonzo Depo. Tr., p. 43, L. 5 – p. 44, L. 14).) Thus, even if the exhibit could reasonably be deemed to be uncontradicted, non-hearsay evidence that Alonzo knew of a letter by Tira Arbaugh in 1989, it was not a "reasonable inference" that someone connected to the investigation or prosecution of the Charboneau case had obtained the letter.

Finally, based on the legal standard articulated above and in the Appellant's brief, regardless of whether the alleged suppression started in 2003 or 1989, such alleged suppression of evidence occurred post-conviction and therefore *Brady* did not apply. Regardless of whether the persons suppressing the evidence were Shedd and McNeese or some unknown person with some unknown connection to law enforcement in 1989, there is no finding that the prosecutor or any government agents having a significant role in investigating and prosecuting the offense ever had possession or knowledge and control of the alleged exculpatory evidence. In short, even accepting the court's at least dubious "reasonable inferences" and evidentiary rulings, such do not show a *Brady* violation.

The state does not intend to respond to Charboneau's argument regarding the materiality element other than to point out that, yet again, he is mischaracterizing the state's argument. This was the state's argument in the context of law providing that evidence is not material under *Brady* if the defendant was aware of it: "The state presented evidence that Charboneau, since at least 2002, has been claiming that Tira confided to Charboneau's

mother as early as the criminal trial that her testimony did not reflect the actual facts and that Charboneau's mother shared this information with Charboneau and his counsel." (Appellant's brief, pp. 57-58 (citations omitted).) This is the way Charboneau describes the state's theory: "Charboneau knew, or should have known, of Tira's false testimony since at least 2002." (Respondent's brief, p. 122.) Because Charboneau had been claiming since 2002 that he knew *at the time of the trial* that Tira was trying to recant her testimony he cannot claim that the state withheld that knowledge from him by suppressing the letter. The state requests this Court to address the argument it is making, not Charboneau's false characterization of that argument.

D. The District Court's Holding Is Based On Clearly Erroneous Factual Findings

The district court rejected an interpretation of the evidence that answered every question while adopting an interpretation of the evidence that is convoluted, counter-intuitive, and leaves extremely important questions at best unanswered and at worst begged, and in the process of doing so made several clearly erroneous factual findings. (Appellant's brief, pp. 58-72.) The evidence shows that only Charboneau (with possible assistance from his family members or friends), and not Shedd, could have compiled the packet of documents on which he based his petition because Charboneau, and not Shedd, would have had access to many of the documents and because several forged documents

beneficial to Charboneau's claims were included.[6] (Appellant's briefs, pp. 59-70.) The evidence is also insufficient to show by a preponderance that Exhibits 5A, 8 and 14 were actually intercepted by Shedd. (Appellant's brief, pp. 70-71.) Charboneau responds with what he considers "flagrant deficiencies in the State's arguments." (Respondent's brief, pp. 124-34.) Review of some of those "deficiencies" highlights the flaws in the district court's reasoning.

Exhibits 5A and 14 are multi-generational copies. Charboneau's argument to the contrary notwithstanding, that Exhibits 5A and 14 are multi-generational copies (copies of copies of copies, etc.) is apparent on the face of the exhibits. (Appellant's brief, pp. 60-61.) This fact is important because such copies are more easily manipulated. (Id.)

Several Exhibits in the "packet" were Charboneau's documents and were not in Shedd's possession at any time. The evidence proves that Exhibits 3, 7A, 7F and 9 were all documents that were or should have been in Charboneau's possession while he was housed at ISCI, prior to his transfer to ICIO. Shedd, who worked as a paralegal at ICIO at that time, could not have obtained these documents. (Appellant's brief, pp. 62-64.) Likewise, Exhibit 12 is a copy of a letter apparently drafted ten months after Shedd was transferred from ICIO to SICI. (Appellant's brief, p. 67.) Because Shedd did not have access to several of the documents because they were created by or for Charboneau at institutions where Shedd was not working, Shedd could not have

[6] Undersigned counsel is honestly baffled by the logic of believing that a conspiracy to deny Charboneau evidence to support post-conviction claims would forge evidence designed to assist Charboneau in making such claims.

been the compiler of the “packet” of documents as alleged by Charboneau. The only one who could have compiled the “packet” of documents was Charboneau. (Appellant’s brief, p. 68.)

In response, Charboneau argues that, although the evidence shows Charboneau did or would have possessed these documents in the normal course of events, such "does not mean they *were* provided to him in the first place, or that they were not later confiscated.” (Respondent’s brief, pp. 127-28 (emphasis original, footnote omitted).) This argument, like the district court’s analysis, reverses the burden of proof and requires speculation on Charboneau’s behalf. There is no evidence suggesting that Shedd could have acquired, much less did acquire, documents created by or for Charboneau at a different prison in another part of the state both before and after the period both men were associated with ICIO.

There is no evidence Shedd could have intercepted Exhibit 8. The chronology related to Exhibit 8 is as follows:

11/13/01	Date on document purporting to be statement by Larry Gold. (Exhibit 8 (Exhibits Part 1, pp. 109-10).)
11/24/02	Charboneau transferred to ICIO, where Shedd worked as a paralegal. (Evid. Tr., p. 158, Ls. 9-11; p. 266, Ls. 15-16.)
12/05/02	Date on envelope alleged to be carrying “legal docs” sent by transfer mail to Charboneau at ICIO from ISCI (and allegedly containing Exhibits 7A-F). Date on back (with what appears to be a signature by Shedd) is 01/06/03. (Exhibit 7 (Exhibits Part 1, pp. 100-01).)
06/27/03	Date on document allegedly signed by Shedd documenting claimed request that he intercept

documents to Charboneau related to Larry Gold or Tira Arbaugh. (Exhibit 4 (Exhibits Part 1, p. 95).)

11/13/2004 Date on forged e-mail sealed in Exhibit 7 by tape, claiming that Gold letter was intercepted "last week." (Exhibit 7C (Exhibits Part 1, p. 104).)

Also of note, Charboneau claimed the document allegedly signed by Gold and dated June 3, 2001 (Exhibit 7E), reached him on June 5, 2001. (#29042 R., p. 8.) This evidence does not support a finding that Shedd and a larger conspiracy, which formed on or about June 27, 2003, intercepted a document allegedly created and sent on or about November 13, 2001. (Appellant's brief, pp. 62-64.)

Charboneau asserts that the state's argument "makes little sense." (Respondent's brief, p. 128.) What "makes … sense" to Charboneau is that the document was prepared on November 13, 2001 but was not sent to Charboneau until up to a year later, whereupon it was "intercepted and held" by unknown persons with no known motive to do so, until the document "follow[ed] Mr. Charboneau up to ICIO in 2002," specifically December 5, 2002, in the envelope introduced as Exhibit 7, which was then seized by Shedd and signed on January 6, 2003, and who apparently held on to the document for more than five months until the conspiracy to intercept letters from Larry Gold formed in late June of that year. (Respondent's brief, pp. 128-30.) Thereafter, apparently, Shedd forged emails claiming that the letter was intercepted in November 2004, which he printed and sealed in the same envelope from which he originally removed Exhibit 8. (Exhibits 7C, D (Exhibits Part 1, pp. 104-05).) Thus, concludes Charboneau, a finding that Exhibit 8 was a document prepared by Gold in November 2001 and intercepted by Shedd in June 2003, (or perhaps November,

2004) is "amply supported by the evidence." (Respondent's brief, p. 129). The state submits that Charboneau's speculative and hole-filled theory shows why the evidence is inadequate to support the district court's findings.

The district court acknowledged that under Charboneau's theory of the case, adopted by it as fact, "many questions [are] left unresolved" because the evidence does "not fit neatly together." (R., vol. 3, p. 140.) Every question the court asks (R., vol. 3, pp. 140-41) is a failure of proof. The Court noted the "forgeries and false" evidence and concluded "this case is a monstrous puzzle" (R., vol. 4, p. 527, n.4), while ignoring the simple and obvious answers to its questions. Ultimately, the court resolved the gaps in the evidence and the presence of falsified evidence by ignoring them or speculating.

As shown above and in the state's initial briefing (Appellant's brief, pp. 53-72), the evidence is insufficient to carry Charboneau's burden of proof on virtually every point (including that Exhibit 14 was created in the manner described therein and sent to Judge Becker), but especially (1) that a prosecutor or law enforcement officer involved in investigating or prosecuting Charboneau's criminal trial intercepted a letter intended for Judge Becker in 1989 and (2) that a prosecutor or law enforcement officer involved in investigating or prosecuting Charboneau's criminal trial intercepted a copy of that same letter when it was sent to Charboneau in 2003 or 2004.

IV.
The District Court Erred When It Based Its Factual Findings On Evidence It Determined Was Inadmissible But That It Investigated And Considered *Ex Parte*

A. Introduction

The district court erred by considering evidence of a prior *Brady* violation after it ruled such evidence inadmissible. (Appellant's brief, pp. 72-74.) Charboneau argues that the state failed to preserve this claim of error by moving for reconsideration; that a court (or other judicial fact finder) may consider inadmissible evidence prejudicial to the government if it wants to; and that the error was harmless. (Respondent's brief, pp. 141-49.) These arguments are without merit.

B. The Issue Is Preserved

Charboneau first argues that the state was required to file a motion for reconsideration to preserve for appeal the claim that the trial court erred in its order. (Respondent's brief, pp. 141-42.) However, a motion to reconsider is not required "in order to preserve the issue on appeal." In re Guardianship of Doe, 157 Idaho 750, 758, 339 P.3d 1154, 1162 (2014) (party not required to seek reconsideration of *sua sponte* attorney fees ruling before raising claim of error on appeal). See also Idaho Power Co. v. Idaho Dep't of Water Res., 151 Idaho 266, 279, 255 P.3d 1152, 1165 (2011) ("It is well established that in order for an issue to be raised on appeal, the record must reveal an adverse ruling which forms the basis for an assignment of error."); State v. Pickens, 148 Idaho 554, 557, 224 P.3d 1143, 1146 (Ct. App. 2010) ("In order for an issue to be raised on appeal, the record must reveal an adverse ruling that forms the basis for the

assignment of error."). Here the state successfully objected to the district court considering the evidence in question and the district court nevertheless considered the evidence. Moreover, the state did not withdraw its objection, nor did the state waive any right to have the district court's ruling limited to the admitted evidence. Charboneau's argument that a motion for reconsideration was necessary to preserve a claim of error on appeal is without merit.

Charboneau next argues the state failed to cite authority for its argument. (Respondent's brief, p. 144.) The state cited ample authority for the proposition that a court errs when it goes outside the admissible evidence to make its ruling. (Appellant's brief, pp. 72-74.)

C. The District Court Erred By Considering Evidence Not Admitted

Charboneau also argues that there was no error because the state is not entitled to due process. (Respondent's brief, pp. 143-44.) The state cited authority, some constitutional and some not specifically based in the Constitution, for the proposition that a decision based on matters outside the evidence presented is inherently unfair, arbitrary and capricious. (Appellant's brief, pp. 73-74.) Although the error was not one of constitutional significance, the state is surely entitled to civil trials and hearings based on evidence and not decisions by the district court without notice or an opportunity to meet the evidence. Because the district court decided this case, in part, based on matters outside the record, specifically on evidence it deemed inadmissible in the evidentiary hearing, the district court erred.

Charboneau also argues that the district court did not err because (1) it was already familiar with the facts of the *Paradis* opinion (the evidence the district court considered) because that case was cited to it; (2) the district court did not make a "finding" but merely made a "reference" to the facts set forth in the *Paradis* opinion; and (3) as to its second order (granting summary judgment) the district court was not making factual findings, but only addressing the preliminary admissibility of evidence. (Respondent's brief, pp. 145-48.) None of these arguments has merit.

First, the court's familiarity with the statements by the Ninth Circuit in *Paradis* is irrelevant. Familiarity did not render the statement of facts into admissible evidence, nor did it render consideration of evidence outside the scope of the record proper.

Second, the distinction between relying on evidence outside the record for "reference" as opposed to a "finding" is also irrelevant. Either way the court relied on a matter outside the evidence, and deprived the state of the opportunity to respond.

Finally, Charboneau's argument that the district court was making a preliminary determination of admissibility under I.R.E. 101(e)(1) is meritless. Neither the evidence nor the *Paradis* factual statement was offered for that purpose. The state was deprived of notice and an opportunity to respond *regardless* of what use the district court put the evidence to.

The record shows that the district court excluded proffered character evidence regarding Marc Haws, but later considered that evidence for the very

purpose of showing Marc Haws' character. (Evid. Tr., p. 436, L. 10 – p., 438, L. 5; R., vol. 3, p. 137; vol. 4, p. 542.) By doing so the district court deprived the state of any opportunity to meet or rebut that evidence. The district court erred by considering matters outside the evidence presented.

D. The Error Is Not Harmless

A court "must disregard all errors and defects that do not affect any party's substantial rights." I.R.C.P. 61. Charboneau claims that the district court's actions in subsequently considering evidence it had deemed inadmissible at the hearing was harmless because the court "declined to decide whether Mr. Haws played a role in concealing the Tira Arbaugh letter" and would have found the alleged copy of that letter admissible even without improperly considering the evidence. (Respondent's brief, pp. 148-49.) Neither argument has merit.

The district court relied on the unadmitted evidence twice. First, the district court specifically found Haws was "involved in another death penalty case in which there was a claim that exculpatory evidence was not disclosed." (R., vol. 3, p. 137.) The district court did not find Haws committed a *Brady* violation in this case, but did find the "possibility that he was somehow involved," based on the prior *Brady* allegation and because he was referenced in four of the exhibits (even though two of them were forgeries). (Id.) In doing so, the district court necessarily rejected Haws' testimony that he did not withhold any exculpatory evidence in this case and did not suppress any correspondence. (Evid. Tr., p. 432, L. 7 – p. 433, L. 15.) Clearly the unadmitted evidence played a central role in the district court's determination. If the unadmitted evidence had never been

erroneously considered, the district court could easily have determined, based on Haws' testimony, that Haws did not commit any *Brady* violation, a finding that would be of paramount significance.

Second, the district court relied on the unadmitted evidence when it concluded that the allegations of a *Brady* violation corroborated Exhibit 14 because it made similar allegations, and noted that Exhibit 4 (the note supposedly signed by Shedd mentioning Haws) was also corroborated by the inadmissible evidence. (R., vol. 4, pp. 542-43.) The district court's "corroboration" analysis (allegations of misdeeds found more credible because leveled at persons who have previously committed similar misdeeds) is exactly the analysis forbidden by I.R.E. 404(b) (evidence of prior bad acts not admissible to show actions in conformity with character). The unadmitted evidence also played a role in the tenth factor articulated by the district court. (R., vol. 4, p. 543 (ninth factor combines with tenth factor).) Again, there would have been no reason for the court to reject Marc Haws' sworn testimony absent its improper consideration of the unadmitted evidence. Because the unadmitted, but considered, evidence played a prominent role in the district court's "corroboration" analysis as related to two exhibits (the two most important exhibits in the case), the error was not harmless.

V.
The District Court Erred By Admitting And Considering Evidence Of Prior Bad Acts As Proof Of Actions In Conformity With Character

A. Introduction

The state contends that the district court erred in admitting character evidence related to Tim McNeese and DeWayne Shedd over its objection. (Appellant's brief, pp. 75-77.) Charboneau does not offer any argument that the district court did not err. (Respondent's brief, pp. 149-52.) He does, however, claim the error was harmless. (Respondent's brief, pp. 152-55.) Review of the record shows this argument is meritless.

B. Standard Of Review

"[I]f an error did not affect a party's substantial rights or the error did not affect the result of the trial, the error is harmless and not grounds for reversal." Myers v. Workmen's Auto Ins. Co., 140 Idaho 495, 504, 95 P.3d 977, 986 (2004) (citing I.R.C.P. 61). "In the case of an incorrect ruling regarding evidence, a new trial is merited only if the error affects a substantial right of one of the parties." Clark v. Klein, 137 Idaho 154, 156, 45 P.3d 810, 812 (2002).

C. The Error Was Not Harmless

The Idaho appellate courts have found erroneous admission of evidence harmless where "the objecting party has himself earlier in the action presented evidence to the same effect as evidence erroneously admitted," Rogers v. Hendrix, 92 Idaho 141, 146, 438 P.2d 653, 658 (1968); where the verdict was in the complaining party's favor, Lombard v. Cory, 95 Idaho 868, 870, 522 P.2d

581, 583 (1974); where jury instructions "cured any prejudice that may have been caused" by the improper admission of evidence, Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co., 153 Idaho 716, 724, 291 P.3d 399, 407 (2012); and where the jury's finding was contrary to the wrongly admitted evidence, "indicat[ing] that the court was not persuaded by this hearsay testimony," Bumgarner v. Bumgarner, 124 Idaho 629, 643, 862 P.2d 321, 335 (Ct. App. 1993). Although this list is not exhaustive, it is illustrative of the types of scenarios where the erroneous admission of evidence is deemed harmless.

The district court specifically cited the inadmissible evidence as weighing in favor of a finding of a conspiracy to screen Charboneau's mail that included McNeese and Shedd. (R., vol. 3, p. 137.) Charboneau argues that the error was harmless because the district court ultimately did not find that McNeese had conspired to screen Charboneau's mail. (Respondent's brief, p. 153.) This argument suffers the same flaw as the argument in relation to Haws. McNeese testified he had not entered into any conspiracy with Shedd, and in fact had no knowledge of any facts related to Charboneau's case. (Evid. Tr., p. 439, L. 23 – p. 442, L. 10.) The district court cited and relied upon the inadmissible evidence prominently when it rejected McNeese's testimony showing he was absolutely not engaged in the conduct alleged by Charboneau. (R., vol. 3, p. 137.) Because the district court specifically relied on the inadmissible and prejudicial character evidence in resolving conflicting evidence, the error was prejudicial.

The district court also specifically cited the inadmissible evidence as one of the grounds for concluding Shedd was involved in a conspiracy to search

Charboneau's mail for incriminating evidence. (R., vol. 3, pp. 119-22.) Charboneau argues that the error was harmless because of the prominence the district court gave to Exhibit 4, a document allegedly signed by Shedd indicating a conspiracy to monitor Charboneau's mail. (Respondent's brief, pp. 153-55.) However, to assign the exhibit such importance the court had to reject Shedd's testimony that he had not entered into a conspiracy and intercepted no documents intended for Charboneau. (Evid. Tr., p. 271, L. 20 – p. 273, L. 13; p. 279, Ls. 1-6.) Because one of the bases for assigning the exhibit such importance, and Shedd's testimony no importance, was reliance on the inadmissible and prejudicial character evidence, the error was prejudicial. The state's substantial right to have conflicting evidence weighed fairly, without a prejudicial belief that Haws, Shedd or McNeese were of a character to do what Charboneau alleged they did, was affected.

VI.
Charboneau's Bond Should Be Revoked If Reversible Error Found

The state requests immediate revocation of Charboneau's bond if this Court reverses, rather than waiting for a remittitur. (Appellant's brief, pp. 77-78.)

ARGUMENT ON CROSS-APPEAL

Charboneau Is Not Entitled To Dismissal Of Criminal Charges Arising From His Murder Of Marilyn Arbaugh

A. Introduction

Charboneau claims the district court erred by granting him a new trial instead of barring any retrial and releasing him outright. (Respondent's brief,

pp. 157-75.) The primary flaw in this argument is that, as set forth above and in the Appellant's brief, Charboneau is not entitled to a remedy. Even if he were entitled to a remedy, outright acquittal is not an appropriate remedy. First, the request for an acquittal or its substantive equivalent is not properly before this Court because it was not pled and because Charboneau failed to cite relevant authority. Second, even if the Court reaches the merits, Charboneau has failed to show he is entitled to this extraordinary remedy.

B. Charboneau's Argument Fails Because He Was Granted The Relief He Requested And Has Failed To Cite Or Apply The Applicable Legal Standard

In his amended petition Charboneau requested the following relief: "that this Court vacate the underlying conviction and/or sentence herein." (R., vol. 1, p. 140.) The district court noted Charboneau's alternative request for relief and granted a new trial. (R., vol. 4, p. 530 ("He has requested during the course of these proceedings that the Court grant him post-conviction relief in the form of a new sentencing, or, alternatively, that the Court grant him a new trial.").) Because Charboneau requested the relief of vacating his conviction or sentence in his petition, the state did not litigate other potential remedies. See Hull v. Giesler, 156 Idaho 765, 777, 331 P.3d 507, 519 (2014) (unpled remedies are appropriate where tried by express or implied consent). Charboneau is limited to the remedies requested in his pleadings.

A "party waives an appellate issue that is not supported with relevant argument or authority." Akers v. Mortensen, 160 Idaho 286, 371 P.3d 340, 342 (2016). The relevant authority is as follows: "In the case of an alleged *Brady*

violation, dismissal of an indictment is an appropriate sanction for a constitutional violation only where less drastic alternatives are not available." State v. Arrasmith, 132 Idaho 33, 45, 966 P.2d 33, 45 (Ct. App. 1998). Instead of the relevant authority, however, Charboneau relies on cases interpreting federal habeas corpus law. (Respondent's brief, pp. 158-60.) Because Charboneau has not cited to nor applied the relevant legal standard, this issue on cross-appeal is waived.

C. Even If Addressed, This Issue Fails On The Merits

"In the case of an alleged *Brady* violation, dismissal of an indictment is an appropriate sanction for a constitutional violation only where less drastic alternatives are not available." Arrasmith, 132 Idaho at 45, 966 P.2d at 45. The district court initially determined that the appropriate remedy would be to grant Charboneau a re-sentencing (and thus avoid the issue of whether Exhibit 14 was admissible hearsay). (R., vol. 4, pp. 60-61, 530 (re-sentencing would have been "easy way out").) Upon learning that the sentence the district court wished to impose was not legally available, it concluded the remedy of re-sentencing was inappropriate. (R., vol. 4, pp. 61-62, 530-31.) No longer able, in its opinion, to "achieve substantial justice," the district court granted a new trial. (R., vol. 4, pp. 62-63, 580-81.) Specifically, the district court concluded Exhibit 14 did not call into question Charboneau's guilt for second-degree murder, only his guilt of first-degree murder. (R., vol. 4, pp. 580-81.)

Charboneau first contends that the district court erred in providing a re-trial remedy because it would be impossible to have a fair re-trial. (Respondent's

brief, pp. 161-66.) As noted above, however, this question was never litigated below. Charboneau does not base his claim that a re-trial would be inherently unfair on factual findings of the district court (or even a determination that no material issue of fact exists), but instead cites to various evidence and portions of the record and essentially requests this Court to make its own factual findings. For example, he cites to a discovery response indicating that the state did not have Tiffnie Arbaugh's contact information and requests this Court to factually find that she would be unavailable for a re-trial. (Respondent's brief, p. 162 (citing R., vol. 2, p. 432).) The state would like a chance to respond to this factual claim because it is completely false, but the state has not had that chance because this issue was not raised to the district court.

In addition, Charboneau's claim that he lost the opportunity to present Tira Arbaugh's testimony live is completely contrary to his claim that Tira was telling his mother even before trial that she was being pressured into presenting false testimony. It is the state that would dearly love to have the ability to put Tira on the stand regarding Charboneau's allegations, but Charboneau chose to delay bringing those allegations for years, waiting until after Tira's death before doing so.

The question of what evidence would or would not be available on re-trial was not litigated below. There is nothing in the record suggesting that any evidence actually admitted at trial has been lost. Charboneau's appellate argument is devoid of support by factual findings by the district court. His argument fails on both the law and the facts.

Charboneau next requests this Court to expand state double jeopardy protections (he admits federal protections do not apply) to cover his situation. (Respondent's brief, pp. 166-73.) He never asserted any double jeopardy protections before the district court, however. (See R., vol. 4, pp. 599-600.) "This court will not address issues not raised in the lower court." Pines Grazing Ass'n, Inc. v. Flying Joseph Ranch, LLC, 151 Idaho 924, 930, 265 P.3d 1136, 1142 (2011) (internal quotations omitted). Whether a re-trial would violate Charboneau's double jeopardy rights is thus not preserved for appellate review.

Finally, even if considered on the merits Charboneau's argument fails for two reasons: (1) Idaho's double jeopardy protections are not broader than United States Constitutional double jeopardy protections in this context, and (2) even if they were broader as articulated by Charboneau, such would be irrelevant because the district court never found any trial misconduct by the prosecutor.

"It is well-settled that when interpreting the Idaho Constitution, this Court is free to confer broader protection to Idaho citizens than that provided by the United States Constitution." State v. Webb, 130 Idaho 462, 467, 943 P.2d 52, 57 (1997). However, "the federal framework is appropriate for analysis of state constitutional questions unless the state constitution, the unique nature of the state, or Idaho precedent clearly indicates that a different analysis applies." CDA Dairy Queen, Inc. v. State Ins. Fund, 154 Idaho 379, 383, 299 P.3d 186, 190 (2013). This Court has declined to interpret the double jeopardy provisions of Idaho Const., art. I, § 13, more broadly than the double jeopardy provisions of the Fifth Amendment. State v. Reichenberg, 128 Idaho 452, 457-59, 915 P.2d

14, 19-21 (1996) ("we decline in this case to interpret the double jeopardy provision of the Idaho Constitution in a manner different from the Fifth Amendment's double jeopardy provision of the United States Constitution"). Although Charboneau attempts to distinguish Reichenberg, its analysis demonstrates that the double jeopardy protections of the Idaho Constitution do not exceed those of the Fifth Amendment.

Even if Charboneau's proposed increased double jeopardy rights were adopted, they would not apply to him. The double jeopardy right at issue is the right to have the jury originally empaneled to hear the case render a verdict. Oregon v. Kennedy, 456 U.S. 667, 673-74 (1982) ("one of the principal threads making up the protection embodied in the Double Jeopardy Clause is the right of the defendant to have his trial completed before the first jury empaneled to try him"). "'The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions.'" Id. at 674 (quoting United States v. Dinitz, 424 U.S. 600, 611 (1976)). The Court held that "[p]rosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." Id. at 675-76. Charboneau relies on cases rejecting Kennedy's holding that a defendant's motion for mistrial will waive the double jeopardy right to have the jury originally empaneled render the verdict unless the prosecutor is deliberately goading the

defendant into the motion for tactical advantage on state law grounds. (Respondent's brief, pp. 166-71 (citing cases).) The underlying double jeopardy right in these cases, Kennedy and the cases rejecting its holding, is therefore the right to have the jury originally empaneled to hear the case render a verdict. See, e.g., State v. Rogan, 984 P.2d 1231, 1246 (Haw. 1999) ("a growing number of jurisdictions have rejected the *Kennedy* standard" and have barred re-trial "even without the prosecutor's specific intent to cause a mistrial with the purpose of obtaining a more favorable opportunity to secure a conviction") (cited at Respondent's brief, pp. 168-69).

Charboneau's right to have the jury originally empaneled render a verdict is not implicated here. The district court did not find any prosecutorial misconduct associated with the trial. To the contrary, the suppression of evidence found by the district court started no earlier than 1989, nearly five years after the trial concluded. Charboneau is arguing for a standard whereby prosecutorial misconduct after the trial was completed would require prejudicial dismissal of the charge, effectively acquitting the defendant.

Charboneau's claim of double jeopardy fails. First, it is premised upon a finding of a *Brady* violation which, as set forth previously, was erroneous. Second, Charboneau does not rely upon applicable Idaho legal authority. Finally, he has failed to show that a remedy less drastic than an acquittal, such as the normal remedy of a new trial, is not available.

Charboneau's final request is that this Court exercise its inherent power to supervise the courts to grant him an acquittal. (Respondent's brief, pp. 174-75.)

He does not explain how granting him an acquittal is supervising the courts. He has cited no authority that this Court may make up individual rights as he requests this Court to do. This case can, and should, be decided within the rubric of applicable constitutional and statutory standards.

CONCLUSION

The state requests that the district court's judgment be reversed and that Charboneau's petition be dismissed with prejudice. In the alternative, the state requests that the case be remanded for further proceedings before a different district judge.

DATED this 27th day of July, 2016.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 27th day of July, 2016, served a true and correct copy of the foregoing REPLY BRIEF OF RESPONDENT-APPELLANT-CROSS RESPONDENT by emailing an electronic copy to:

ERIK R. LEHTINEN
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd