9-14-2015

Charboneau v. State Appellant's Brief Dckt. 43015

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

BRIEF OF APPELLANT

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

HONORABLE ROBERT J. ELGEE
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-APPELLANT

ERIK. R. LEHTINEN
Deputy State Appellate
Public Defender
P. O. Box 2816
Boise, Idaho 83701
(208) 334-2712

ATTORNEY FOR
DEFENDANT-RESPONDENT

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

BRIEF OF APPELLANT

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

HONORABLE ROBERT J. ELGEE
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-APPELLANT

ERIK. R. LEHTINEN
Deputy State Appellate
Public Defender
P. O. Box 2816
Boise, Idaho 83701
(208) 334-2712

ATTORNEY FOR
DEFENDANT-RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

STATEMENT OF THE CASE

Nature Of The Case

The state appeals from the district court's judgment granting Jaimi Charboneau's fifth petition for post-conviction relief from his 1986 conviction for the first-degree murder of his ex-wife, Marilyn Arbaugh. In this case Charboneau claimed that in 2011 a prison guard handed him an envelope containing several documents. The documents included a copy of a letter allegedly written by Tira Arbaugh, the victim's daughter and a witness at his criminal trial, which Charboneau alleged substantiated the claims he had asserted in his third petition for post-conviction relief. Charboneau claimed other documents in the envelope established the state's efforts to keep him from obtaining this letter from 1989 on, although most of these documents were proved to be forgeries. The district court nevertheless found that prison personnel had suppressed the letter from 2003 to 2011, and on that basis granted Charboneau a new trial in his criminal case.

The state appeals the judgment, asserting that the district court erred by (1) finding that the statute of limitations did not bar the claim even though the same claim was found to be time-barred in Charboneau's third petition; (2) concluding that three documents, including two written by persons who died before this case was initiated, were admissible hearsay; (3) finding that suppression of evidence by prison personnel years after completion of the criminal trial was a *Brady* violation that prejudiced Charboneau's criminal trial; (4) explicitly considering inadmissible evidence excluded at the evidentiary hearing in making its ruling; and (5) admitting evidence of prior bad acts to show actions

in conformity with character. Because of its long involvement in the underlying criminal and related post-conviction cases the state requests that this case be retained by the Idaho Supreme Court.

Statement Of The Facts And Course Of The Proceedings

I. The Criminal Case

A. The Charges And Pre-trial Proceedings

The state filed a complaint charging Charboneau with first-degree kidnapping and grand theft for abducting his ex-wife, Marilyn Arbaugh, and stealing her car on June 21, 1984. (#16339 R., vol. I, pp. 1-3.) Shortly thereafter the state filed a complaint charging him with the July 1, 1984 first-degree murder of Marilyn. (#16339 R., vol. I, p. 4.)

The case proceeded to preliminary hearing where Marilyn's oldest daughter, Tiffnie Arbaugh, was called as a witness by the state. (P.H. Tr., vol. 1, p. 81, Ls. 1-3.[1]) The victim's youngest daughter, Tira Arbaugh, was called by the defense. (P.H. Tr., vol. 2, p. 282, Ls. 21-23.) Both Tira and Tiffnie testified that on the morning of the murder they were awakened when their mother, Marilyn, returned home at around 10:30 or 11:00. (P.H. Tr., vol. 1, p. 87, Ls. 7-21; P.H. Tr., vol. 2, p. 285, L. 5 – p. 287, L. 16.) Their mother had brought them some magazines that they looked at together. (P.H. Tr., vol. 1, p. 88, L. 24 – p. 89, L. 9; P.H. Tr., vol. 2, p. 287, L. 17 – p. 288, L. 2.) Marilyn then took a bath. (P.H. Tr., vol. 1, p. 89, Ls. 10-15; P.H. Tr., vol. 2, p. 288, Ls. 1-16.) After her bath,

[1] The preliminary hearing and trial transcripts from the underlying criminal case are part of the record in docket no. 16339, and are cited, respectively, as "P.H. Tr." and "Trial Tr."

Marilyn went out to the phone, located in a shop near the house, to call her parents, while Tira got in the bath. (P.H. Tr., vol. 1, p. 89, L. 21 – p. 90, L. 16; P.H. Tr., vol. 2, p. 288, L. 20 – p. 289, L. 7.) Marilyn returned about ten minutes later, asking if the girls had turned the horses out into the corral. (P.H. Tr., vol. 1, p. 89, Ls. 23-24; p. 91, Ls. 6-25; P.H. Tr., vol. 2, p. 289, Ls. 14-23.) She then went back out to put the horses back. (P.H. Tr., vol. 1, p. 93, Ls. 2-4; P.H. Tr., vol. 2, p. 297, L. 24 – p. 298, L. 4.)

Shortly after Marilyn left the house to move the horses, Tiffnie heard shots and both Tira and Tiffnie heard their mother scream. (P.H. Tr., vol. 1, p. 93, Ls. 5-17, p. 95, Ls. 16-24; P.H. Tr., vol. 2, p. 298, Ls. 5-25.) Tiffnie grabbed her mother's .22 pistol and ran outside to investigate. (P.H. Tr., vol. 1, p. 96, L. 4 – p. 97, L. 8; P.H. Tr., vol. 2, p. 298, L. 17 – p. 299, L. 21.) She found Charboneau with a .22 rifle in his hands, standing over her mother, who was sitting on the ground and bleeding. (P.H. Tr., vol. 1, p. 97, L. 9 – p. 99, L. 19; p. 112, L. 22 – p. 113, L. 1.) Charboneau told Tiffnie to leave, and that he would take Marilyn to the doctor. (P.H. Tr., vol. 1, p. 99, Ls. 20-23.) Tiffnie called the police. (P.H. Tr., vol. 1, p. 100, Ls. 22-25.) She then ran to get Tira out of the bath. (P.H. Tr., vol. 1, p. 101, Ls. 8-19; P.H. Tr., vol. 2, p. 299, L. 24 – p. 300, L. 20.) While Tira dressed, Tiffnie hid the keys to the pickup in the freezer to make sure Charboneau could not get them and escape. (P.H. Tr., vol. 1, p. 101, L. 16 – p. 102, L. 7.) Moments later, while both girls dressed, they heard more shots. (P.H. Tr., vol. 1, p. 102, L. 16 – p. 103, L. 4; P.H. Tr., vol. 2, p. 302, L. 10 – p. 303, L. 9; p. 327, L. 16 – p. 328, L. 19.)

Both girls went back out and hid behind a sheep wagon. (P.H. Tr., vol. 1, p. 103, Ls. 5-9; P.H. Tr., vol. 2, p. 300, L. 22 – p. 301, L. 4.) They called out to their mother. (P.H. Tr., vol. 1, p. 103, Ls. 10-23; P.H. Tr., vol. 2, p. 301, Ls. 7-9.) Tiffnie accidentally discharged the .22 pistol, and then took it back inside the house. (P.H. Tr., vol. 1, p. 103, L. 24 – p. 104, L. 6; P.H. Tr., vol. 2, p. 303, L. 12 – p. 304, L. 12.) The girls went to the barn and found their mother lying there dead. (P.H. Tr., vol. 1, p. 104, L. 7 – p. 107, L. 20.)

The magistrate bound Charboneau over on all charges, and the state filed informations charging first-degree murder in one case and first-degree kidnapping and grand theft in another. (#16339 R., vol. I, pp. 76-83.) The cases were consolidated for trial. (#16339 R., vol. I, pp. 111-12; #16339 Supp. Tr., vol. I, p. 48, Ls. 3-12.)

Charboneau filed a motion to dismiss and testified in support of that motion. (#16339 R., vol. II, pp. 339-342; #16339 Supp. Tr., p. 102, L. 1 – p. 325, L. 18.) He testified he purchased a .22 rifle, two boxes of shells, and some gift wrap to present the rifle to Tira as a gift. (#16339 Supp. Tr., p. 137, L. 15 – p. 139, L. 7.) He then went out to the ranch where Marilyn and the girls lived. (#16339 Supp. Tr., p. 140, L. 3 – p. 141, L. 7.) He claimed he lived in the tack shed on the property for the next three days prior to the murder, with Marilyn's permission, because Marilyn was waiting for the right time to tell the girls about her and Charboneau's reconciliation. (#16339 Supp. Tr., p. 140, L. 24 – p. 151, L. 14.) Charboneau testified that Marilyn made the decision to tell the girls of the reconciliation on Sunday morning and also decided to give Tira the rifle

Charboneau purchased. (#16339 Supp. Tr., p. 151, L. 12 – p. 152, L. 22.) Charboneau testified that Marilyn took the rifle into the house and returned a few minutes later with the rifle, but without the scope that had been on it. (#16339 Supp. Tr., p. 152, L. 23 – p. 153, L. 10.) As Charboneau put on his boots, she loaded the rifle. (#16339 Supp. Tr., p. 153, Ls. 10-22.)

According to Charboneau, when he asked Marilyn where she had spent the previous night she announced she could not "take it," told him she loved him, but that she could not live with or without him. (#16339 Supp. Tr., p. 153, L. 23 – p. 154, L. 13.) She pointed the rifle at him and said, "You're dead. No other woman is going to have you." (#16339 Supp. Tr., p. 154, Ls. 14-16.) She pulled the trigger but the gun did not fire. (#16339 Supp. Tr., p. 154, Ls. 16-19.)

Charboneau testified that he then wrestled the rifle away from Marilyn while Marilyn screamed at Tiffnie to get "Rufus," her shotgun. (#16339 Supp. Tr., p. 154, L. 20 – p. 155, L. 7.) Once Charboneau had the .22 rifle, Marilyn ran toward the house. (#16339 Supp. Tr., p. 155, Ls. 7-9.) Tiffnie exited the house with the .22 pistol. (#16339 Supp. Tr., p. 155, Ls. 9-11.) Charboneau testified that at that point he closed his eyes and the rifle in his hands just "went off ... four or five times." (#16339 Supp. Tr., p. 155, Ls. 11-16.)

Charboneau claimed he opened his eyes and saw Marilyn bleeding from her shoulder and leg. (#16339 Supp. Tr., p. 155, Ls. 17-25.) He knelt down beside her and she apologized for "all the lies" she had told him. (#16339 Supp. Tr., p. 156, Ls. 1-6.) Charboneau testified that at that moment Tiffnie ran at them and shot "two or three times." (#16339 Supp. Tr., p. 156, Ls. 7-11.) Assuming

she was shooting at him, he fled. (#16339 Supp. Tr., p. 156, Ls. 10-19.) He came back, however, and saw Tiffnie shoot Marilyn one time. (#16339 Supp. Tr., p. 156, L. 20 – p. 157, L. 11.) When Tiffnie left the scene he retrieved the rifle and fled to a nearby field. (#16339 Supp. Tr., p. 157, L. 12 – p. 158, L. 11.)

The district court denied the motion to dismiss on November 27, 1984. (#16339 R., vol. II, pp. 437-38.) Shortly after denial of the motion to dismiss, the district court appointed Deputy Attorney General Marc Haws as special prosecutor. (#16339 R., vol. II, pp. 452-53.)

B. The Trial

At the criminal trial the state presented the following evidence:

On June 22, 1984, Marilyn Arbaugh fled out the hatchback of her car on a rural road to escape her ex-husband, Jaime Charboneau, who had abducted her after work the previous day and refused to take her home. (Trial Tr., vol. 1., p. 50, L. 5 – p. 68, L. 20; p. 74, L. 5 – p. 85, L. 5; see also, p. 196, L. 20 – p. 205, L. 8; p. 231, L. 13 – p. 242, L. 23; vol. 2, p. 260, L. 8 – p. 266, L. 7.) Charboneau had choked Marilyn unconscious and she had bruising on her head, neck and breast. (Trial Tr., vol. 1, p. 94, L. 5 – p. 103, L. 2; p. 150, L. 21 – p. 151, L. 24; p. 155, L. 24 – p. 156, L. 22.) The Sherriff's office put out an alert for Charboneau and the car, and a judge issued an arrest warrant. (Trial Tr., vol. 1, p. 151, L. 25 – p. 157, L. 11.)

After Marilyn fled from the car, Charboneau went to a casino in Nevada. (Trial Tr., vol. 5, p. 1231, L. 2 – p. 1232, L. 10.) Police later discovered Marilyn's briefcase, which she always carried in her car and which contained important

papers, discarded near that casino. (Trial Tr., vol. 1, p. 108, L. 7 – p. 119, L. 6; p. 122, L. 5 – p. 130, L. 8; p. 143, L. 2 – p. 145, L. 1.)

On June 26, 1984, south of Mountain Home, witnesses saw Charboneau in possession of the backpack Marilyn used as a purse. (Trial Tr., vol. 2, p. 290, L.22 – p. 293, L. 17; p. 365, L. 7 – p. 368, L. 21.) Charboneau was using the name "Sam," claiming he worked for the government, and claiming at different times he was walking because (1) his truck had recently run out of gas, (2) his horse had gotten loose after being spooked by a rattlesnake, or (3) he shot his horse because it was bitten by a rattlesnake. (Trial Tr., vol. 2, p. 378, L. 14 – p. 386, L. 23; p. 401, L. 24 – p. 419, L. 2; vol. 3, p. 506, L. 4 – p. 510, L. 20; p. 514, L. 25 – p. 526, L. 11.) The next day, June 27, 1984, Marilyn's burned out car (minus VIN plate and license plates) was found in the same area where Charboneau was hitchhiking, and tracks consistent with Charboneau's boots were all around it. (Trial Tr., vol. 2, p. 420, L. 2 – p. 441, L. 25; p. 451, L. 7 – p. 470, L. 17.)

Charboneau got a ride to Hagerman on June 27, 1984. (Trial Tr., vol. 3, p. p. 514, L. 25 – p. 526, L. 11.) That same day he tried to buy a .22 caliber Remington rifle from the local hardware store, completing the transaction (and also buying two boxes of ammunition) on the 28th when the store owners brought the gun in from their other store in Gooding. (Trial Tr., vol. 3, p. 534, L. 24 – p. 542, L. 19; p. 554, L. 2 – p. 560, L. 1; p. 572, L. 17 – p. 573, L. 7; p. 575, L. 9 – p. 576, L. 12.) The Remington rifle held up to fifteen bullets at a time and was easy to reload. (Trial Tr., vol. 4, p. 859, Ls. 23-25; vol. 5, p. 1169, L. 14 – p. 1170, L.

2; p. 1171, L. 24 – p. 1172, L. 19.) Charboneau claimed he was working in the desert and needed the Remington Rifle to kill rattlesnakes. (Trial Tr., vol. 3, p. 556, Ls. 2-5; p. 559, L. 24 – p. 560, L. 1; p. 573, L. 22 – p. 574, L. 6.)

Charboneau had threatened Marilyn in April of 1984, telling her that if he could not have her no man could. (Trial Tr., vol. 2, p. 327, L. 15 – p. 331, L. 20; vol. 5, p. 1247, L. 13 – p. 1250, L. 3.) On the day immediately preceding the murder, Marilyn repeatedly expressed her fear of Charboneau. (Trial Tr., vol. 2, p. 260, L. 20 – p. 262, L. 24; p. 331, L. 21 – p. 337, L. 21.)

On July 1, 1984, the day of the murder, Marilyn arrived home at about 10:00 to 10:30 in the morning, having spent the night out on a date. (Trial Tr., vol. 3, p. 614, L. 9 – p. 620, L. 20; p. 701, L. 3 – p. 702, L. 1; vol. 6, p. 1252, L. 14 – p. 1261, L. 11.) She took a bath and got dressed. (Trial Tr., vol. 3, p. 620, L. 21 – p. 623, L. 5; vol. 6, p. 1261, Ls. 12-16; p. 1262, Ls. 1-18.) She left the house and went to the shed (where the phone was) and called her father at 11:30 a.m. to ask if he had heard from the Sherriff's office regarding its search for Charboneau, something she did every time she came home because she did not have a phone in her house, and she was scared of Charboneau. (Trial Tr., vol. 3, p. 587, L. 24 – p. 590, L. 4; p. 623, Ls. 6-22; vol. 6, p. 1261, Ls. 15-16.) When she returned she asked her daughters, Tira and Tiffnie, if either of them had turned loose the horses. (Trial Tr., vol. 3, p. 623, L. 6 – p. 625, L. 6; p. 637, L. 13 – p. 638, L. 3; vol. 6, p. 1262, L. 19 – p. 1263, L. 15.) She then left the house again to corral the horses. (Trial Tr., vol. 3, p. 638, Ls. 4-23.)

Shortly after Marilyn left the house, Charboneau shot her and she screamed. (Trial Tr., vol. 3, p. 638, L. 24 – p. 640, L. 4.) Her daughter Tiffnie grabbed her mother's pistol and went out to the barn. (Trial Tr., vol. 3, p. 640, Ls. 5-20; vol. 6, p. 1263, L. 16 – p. 1264, L. 20.) In the barn, in an alleyway between corrals, Tiffnie saw her mother sitting on the ground with Charboneau standing over her pointing a rifle at her. (Trial Tr., vol. 3, p. 640, L. 18 – p. 642, L. 16.) Marilyn had a hand to one shoulder, staunching a flow of blood, and she was also bleeding from one leg. (Trial Tr., vol. 3, p. 641, Ls. 7-25.) Both Charboneau and Marilyn told Tiffnie to leave. (Trial Tr., vol. 3, p. 643, L. 4 – p. 644, L. 3.)

Tiffnie ran to the shop, called the police, and reported that Charboneau had shot her mother. (Trial Tr., vol. 3, p. 644, Ls. 4-7.) The dispatcher described her as "very hysterical, crying, screaming into the phone." (Trial Tr., vol. 3, p. 734, L. 18 – p. 737, L. 3.) Tiffnie then ran back to the house, got Tira out of the bath, and they both dressed. (Trial Tr., vol. 3, p. 644, Ls. 8-19; vol. 6, p. 1264, L. 21 – p. 1265, L. 24.) As they got dressed they heard more shots. (Trial Tr., vol. 3, p. 644, L. 20 – p. 645, L. 6; vol. 6, p. 1267, L. 3 – p. 1268, L. 25; p. 1303, Ls. 21-24.) The sisters left the house together and eventually entered the barn where they saw their mother's body. (Trial Tr., vol. 3, p. 645, L. 7 – p. 662, L. 21; vol. 6, p. 1269, L. 1 – p. 1270, L. 17.) Marilyn's shirt had been pulled down to expose her left breast. (Trial Tr., p. 663, Ls. 2-7.)

Tira called for an ambulance. (Trial Tr., vol. 3, p. 662, Ls. 22-24; vol. 6, p. 1270, Ls. 17-25.) She was hysterical and reported that "Jamie [sic] had a gun" and had gone out the back way. (Trial Tr., vol. 3, p. 738, L. 21 – p. 740, L. 3.)

Charboneau was arrested a short distance away not long after police were dispatched. (Trial Tr., vol. 4, p.751, L. 6 – p. 766, L. 17; p. 881, L. 1 – p. 886, L. 12.) After being informed he was under arrest for murder, Charboneau claimed he killed Marilyn because she would have shot him and she had shot him once before, and indicated where he had thrown the rifle. (Trial Tr., vol. 4, p. 766, L. 18 – p. 769, L. 24; p. 886, L. 13 – p. 889, L. 4.) The Remington rifle Charboneau had purchased on June 28 was found nearby. (Trial Tr., p. 796, L. 18 – p. 798, L. 14; p. 892, Ls. 14-24; p. 895, L. 2 – p. 899, L. 19.) There was blood on the end of the barrel from "blowback type splatter." (Trial Tr., vol. 4, p. 898, Ls. 10-23; p. 901, Ls. 2-24.)

The floor of the alleyway in the barn was covered by approximately three inches of hay stems and clippings and manure on top of dirt. (Trial Tr., vol. 4, p. 772, L. 1 – p. 773, L. 6.) Several officers and others were in that area during the investigation. (Trial Tr., vol. 4, p. 773, L. 7 – p. 780, L. 3.) Officers found seven spent Remington .22 caliber bullet casings in the barn. (Trial Tr., vol. 4, p. 780, Ls. 4-8; p. 784, L. 2 – p. 796, L. 17; p. 934, L. 9 – p. 945, L. 17.[2]) Marilyn's backpack, the same one Charboneau possessed after Marilyn fled from him, was found in the cellar by the barn; among the items in the backpack were the boxes of shells Charboneau purchased in Hagerman, one full and one only partly full. (Trial Tr., vol. 4, p. 800, L. 9 – p. 807, L. 3; p. 980, L. 19 – p. 998, L. 7.)

[2] Another .22 casing was found near the sheep wagon; although it was photographed, and the photograph admitted into evidence, the casing was not retained as evidence. (Trial Tr., vol. 4, p. 906, L. 24 – p. 916, L. 13.)

Autopsies on Marilyn's body revealed between 14 and 17 entrance wounds, assuming no ricochets to bring the number even lower. (Trial Tr., vol. 5, p. 1040, Ls. 16-20; p. 1083, L. 14 – p. 1086, L. 5.) There were four entrance wounds in her right upper mid-chest that appeared to have been inflicted at long range (greater than two and one-half feet), and would have been fatal wounds. (Trial Tr., vol. 5, p. 1044, L. 1 – p. 1050, L. 12; p. 1055, L. 2 – p. 1056, L. 19; p. 1063, L. 1 – p. 1064, L. 9; p. 1068, Ls. 12-18.) A fifth entrance wound was directly under the left breast, and was produced by putting the muzzle of the rifle directly against the skin under the breast before firing. (Trial Tr., vol. 5, p. 1050, L. 13 – p. 1054, L. 23; p. 1068, Ls. 12-18; p. 1166, L. 7 – p. 1167, L. 11.) A sixth entrance wound in the upper left chest corresponded with an exit wound, and was in the nature of a flesh wound that would not have been fatal. (Trial Tr., vol. 5, p. 1066, Ls. 1-18.) A seventh entrance wound in the lower abdomen was also long range and corresponded with an exit wound. (Trial Tr., vol. 5, p. 1069, L. 15 – p. 1070, L. 12.) There were three entrance wounds in the thigh, two of which exited and one of which broke the femur. (Trial Tr., vol. 5, p. 1071, L. 13 – p. 1075, L. 18.) Another entrance wound was in an ankle. (Trial Tr., vol. 5, p. 1075, L. 19 – p. 1077, L. 10.) There was an entrance wound in the left calf, and the bullet was recovered. (Trial Tr., vol. 5, p. 1080, Ls. 2-19.) Entrance and exit wounds were found in the right hand, indicating that the same bullet may have caused another of the entrance wounds if it passed through the hand and entered the body. (Trial Tr., vol. 5, p. 1077, L. 11 – p. 1080, L. 1.) Marilyn had also been shot in the back of the left shoulder (Trial Tr., vol. 5, p. 1080, L. 20 – p.

1081, L. 12) and in the back of the neck with the bullet exiting beneath her left ear (Trial Tr., vol. 5, p. 1081, L. 13 – p. 1082, L. 22).

There were seven bullets found in Marilyn's body: all were Remingtons, five were definitely fired through the Remington nylon stock rifle Charboneau purchased on June 28, one was mangled too much for sure identification, but the possibility the last was fired from another weapon was "remote" or "slight." (Trial Tr., vol. 5, p. 1128, L. 3 – p. 1151, L. 12; p. 1177, L. 4 – p. 1179, L. 19.[3]) The shell casings were also identified as having being shot by the Remington. (Trial Tr., vol. 5, p. 1151, L. 25 – p. 1157, L. 6.) Tests on the pants Charboneau was wearing and the Remington rifle were both positive for blood of Marilyn's type but not for Charboneau's. (Trial Tr., vol. 5, p. 1200, L. 16 – p. 1208, L. 23; p. 1216, L. 14 – p. 1218, L. 4.)

The trial judge dismissed the kidnapping and grand theft charges on the basis that the state failed to prove venue. (Trial Tr., vol. 6, p. 1347, Ls. 4-13.) The jury found Charboneau guilty of first-degree murder. (#16339 R., vol. IV, pp. 1035-38.)

C. Sentencing And Judgment

The case proceeded to a capital sentencing hearing, after which the district court imposed the death penalty. (#16339 R., vol. V, pp. 1230-44.) The district court entered judgment on January 28, 1986. (#16339 R., vol. V, p. 1243.)

[3] Compositional analysis apparently also confirmed that the bullets in Marilyn's body came from the same batch as the bullets in the Remington box Charboneau purchased. (Trial Tr., vol. 6, p. 1308, L. 6 – p. 1309, L. 5; State's Exhibit 122.)

II. The First Post-Conviction Case

Based on Idaho's unitary review for capital cases, Charboneau filed a petition for post-conviction relief 42 days after entry of judgment in the criminal case. (#16339 Supp. R., pp. 1-15.) He asserted claims of ineffective assistance of counsel for allowing Charboneau to be interviewed by the state's investigator; calling Charboneau as a witness in support of the motion to dismiss; moving to combine the murder and the kidnapping cases for trial; failing to get a psychological evaluation of Charboneau prior to trial; failing to adequately advise Charboneau prior to undertaking the previously listed actions; being ignorant of the prejudice that would come from the previously listed actions; and failing to move for a new trial. (#16339 Supp. R., pp. 2-3, 6-8.) He also asserted numerous claims of trial error. (#16339 Supp. R., pp. 8-11.) Finally, he challenged the constitutionality of the death penalty, generally and as applied in his case. (#16339 Supp. R., pp. 11-14.) After an evidentiary hearing the district court denied the petition. (#16339 Supp. R., pp. 203-10.) On December 8, 1986, Charboneau filed a notice of appeal from both the criminal judgment and the post-conviction ruling. (#16339 Supp. R., pp. 231-34.) Marc Haws' last appearance as special prosecutor was shortly thereafter, on December 16, 1986.[4] (#16741 R., vol. I, pp. 155-56.)

[4] This corresponds to when Haws left the Attorney General's office for a job in Salt Lake City before returning to Idaho a little less than a year later to become an Assistant United States Attorney. (Evid. Tr., p. 430, L. 25 – p. 431, L. 23.)

III. The Second Post-Conviction Action

Charboneau filed his second petition for post-conviction relief, making additional claims of ineffective assistance of counsel, on February 20, 1987. (#16339 R., augmentation, pp. 119-31.) The district court appointed Deputy Attorney General Peter Erbland as special prosecutor, replacing Haws, on April 28, 1987. (#16741 R., vol. II, pp. 155-56.) The second petition and related motions were denied on May 19, 1987. (#16339 R., augmentation, pp. 206-08.) Charboneau thereafter filed an amended notice of appeal to include the second post-conviction action in the previously filed appeal. (#16339 R., augmentation, pp. 212-15.)

IV. The First Appeal

On appeal the Idaho Supreme Court first gave a general accounting of the facts of the crimes. State v. Charboneau, 116 Idaho 129, 132-33, 774 P.2d 299, 302-03 (1989). It noted that Charboneau had given two very different accounts of the shooting to his attorney:

> Initially, Jaimi told the defense attorney that on the morning of July 1, 1984, Marilyn had taken the .22 caliber rifle he had purchased for Tira into the house to remove a scope sight from it. He said that when she returned to the barn she loaded the rifle, pointed it at Jaimi, and pulled the trigger, but that it did not fire. Jaimi told the defense attorney that he grabbed the rifle from Marilyn and pulled the trigger several times while the rifle was on his hip and Marilyn was running away. He said that he closed his eyes while shooting. He said that after the shooting he took the rifle and fled to the nearby field.
>
> Later, but prior to August 22, 1984, Jaimi told the defense attorney that after he fired the shots at Marilyn, instead of running directly out into the field, he had stayed around the end of the barn. He told the defense attorney that he heard Tiffnie talking to her

> mother and had looked around the corner. He said he saw Tiffnie holding a pistol in both hands pointed at Marilyn. Jaimi said that Tiffnie told Marilyn that Marilyn had screwed up their lives, ruined Tira's life, and was ruining Jaimi. He stated that he saw Tiffnie fire a shot from the pistol and saw Marilyn's hair fly up.

Id. at 134, 774 P.2d at 304.

The Court concluded that Charboneau had not been denied the right to effective assistance of counsel. Id. at 137-41, 774 P.2d at 307-11. The Court also found no trial error. Id. at 141-44, 774 P.2d at 311-14. The Court found no error in the conduct of the post-conviction proceedings. Id. at 144-45, 774 P.2d at 314-15. It did find error in the sentencing, however, and vacated the death sentence and remanded for a new sentencing. Id. at 145-54, 774 P.2d at 315-24.

The Idaho Supreme Court issued its opinion on April 4, 1989, denied rehearing on May 25, 1989, and issued its remittitur the same day. Id. at 129, 774 P.2d at 299. The Supreme Court of the United States denied Charboneau's petition for certiorari on October 16, 1989. Charboneau v. Idaho, 493 U.S. 922 (1989).

V. Proceedings On Remand And The Second Appeal

After the criminal case was remanded to the district court, the state was initially represented by Jerome County Prosecutor John Horgan, who made his first appearance on August 15, 1989. (#19635/19973 R., pp. 103-04) On February 22, 1990, the district court appointed Keith Roark as special prosecutor. (#19635/19973 R., p. 126) In August 1991, the state withdrew its intention to seek the death penalty. (#19635/19973 R., pp. 609-11.) The district court

entered judgment on a fixed life sentence on October 15, 1991. (#19635/19973 R., pp. 621-22.) The Idaho Supreme Court affirmed. State v. Charboneau, 124 Idaho 497, 861 P.2d 67 (1993).[5]

VI. The Third Post-Conviction Case

Charboneau filed his third petition for post-conviction relief on May 23, 2002. (#29042 R., p. 5.) His claims were based on two things: First, on a letter allegedly written by Larry Gold, former Jerome County Sheriff,[6] received by Charboneau on June 5, 2001. (#29042 R., p. 8.) Second, on a claim that "[o]ver the years since the tragic death of Marilyn Arbaugh her daughter 'Tira' had discussed the subject of her personal knowledge regarding certain facts about the day of the shooting with Betsy Charboneau/Crabtree" and told her "she had been instructed to remain silent about her knowledge." (#29042 R., pp. 23-24.) Betsy Charboneau-Crabtree filed an affidavit stating that Tira told her "that the tragedy which took the life of her mother on July 1st, 1984 did not happen the way it played out in court." (#29042 R., p. 53.) She stated that Tira told her that prosecutors Dan Adamson and Marc Haws and sheriff's deputy Larry Webb "did instruct her on what they wanted her to say regarding the events which took place on July 1st, 1984," and that Marc Haws and state's investigator Gary Carr

[5] After failing to obtain relief in state courts, Charboneau filed for federal habeas corpus relief, but his petition was denied. Charboneau v. Klauser, 107 F.3d 15 (9th Cir. 1997) (unpublished).

[6] Gold was not the sheriff at the time of the murder or trial (Trial Tr., vol. 6, p. 1393, Ls. 6-17) and had no connection to the investigation of Marilyn's murder or the prosecution of Charboneau.

"instructed her not to reveal certain facts about things which were found at the scene of the shooting," including "her mother's holster and, her mother's guns." (#29042 R., p. 53 (underlining and comma original).) According to Ms. Charboneau-Crabtree, Tira was "willing to testify in court" but "tragically ... passed away recently[7] ... before she had a chance to testify." (#29042 R., p. 54.)

The district court dismissed the petition as untimely. (#29042 R., pp. 90-92.) The Idaho Supreme Court reversed, with two justices dissenting,[8] finding error in failing to rule on Charboneau's request for counsel prior to dismissing. Charboneau v. State, 140 Idaho 789, 102 P.3d 1108 (2004).

On remand, the district court appointed counsel. (#32120 R., pp. 22-23.) The district court, on July 12, 2005, summarily dismissed the petition as untimely and unsupported by admissible evidence (because the evidence was hearsay). (#32120 R., pp. 43-64.) The Idaho Supreme Court affirmed. Charboneau v. State, 144 Idaho 900, 174 P.3d 870 (2007).

---

[7] Tira had passed away almost four years previously, in 1998. (Exhibit D.)

[8] The dissenting justices would have found the claims frivolous because they were based on hearsay. Charboneau v. State, 140 Idaho 789, 794-96, 102 P.3d 1108, 113-15 (2004).

VII. The Present Case

Charboneau filed his fifth[9] petition for post-conviction relief on June 15, 2011 (R., vol. 1, pp. 20-24), and his appointed counsel filed an amended petition about four months later (R., vol. 1, pp. 134-40). In the Amended Petition, Charboneau alleged that on March 18, 2011, he was provided an envelope with several documents. (R., vol. 1, pp. 136-37.) These documents, he alleged, showed that Tira Arbaugh had given false testimony at the trial at the behest of prosecutors and that prosecutors had also concealed physical evidence. (R., vol. 1, pp. 138-39.) Charboneau alleged that other documents in the envelope showed a conspiracy or conspiracies involving prison paralegal DeWayne Shedd, prison guard William Unger, former prosecutor Marc Haws, Deputy Attorney General Tim McNeese, and court clerk Cheryl Watts to keep him from getting the letters allegedly written by Tira Arbaugh and Larry Gold. (R., vol. 1, pp. 139-40.)

The document primarily relied on to support Charboneau's claims is a multigenerational copy of a document allegedly written by Tira. (R., vol. 1, pp. 158-64 (later introduced into evidence as Exhibit 14).) In this document the declarant claims that (1) when writing her statement police officers told her to fabricate the time she woke up (R., vol. 1, p. 159); (2) she now remembers that her sister, and not her mother, is the one that "said something about the horses" and Marilyn asked Jaimi to go out and check on them "after [Marilyn] woke up

[9] Charboneau's fourth petition was filed on February 4, 2008, and dismissed shortly thereafter, and his appeal was also dismissed. (Supreme Court docket 35193.)

that morning" (R., vol. 1, pp. 159-60); (3) before Jaimi left the house he commented on her oversleeping and her mother gave her "a new .22 rifle" in a wrapped box (R., vol. 1, p. 160); (4) Marilyn then took a bath, dressed and went outside to help Jaimi with the horses (R., vol.1, p. 160); (5) she told an officer she was in the bath when she heard Marilyn scream for Tiff, and a few seconds later heard gunshots (R., vol. 1, pp. 160-61); (6) she got out of the bath and she and Tiff went outside, she armed with her mother's pistol and Tiff taking the new rifle (R., vol. 1, p. 161); (7) they went behind the sheep wagon and Tiff fired the rifle into the barn (R., vol. 1, p. 161); (8) Tiff told her that Marilyn had taken a different .22 rifle with her when she went to help with the horses, but the officer told her it was not necessary to include this in her statement (R., vol. 1, pp. 161-62); (9) another officer told her to add a statement to her report that she later heard additional shots (R., vol. 1, p. 162); and (10) on the instructions of Marc Haws her family got rid of the .22 rifle Marilyn had been carrying that day, which they did "last week" (R., vol. 1, pp. 162-63). The format of the document is a letter to Judge Becker and is dated September 6, 1989. (R., vol. 1, pp. 158, 164.)

The other exhibits presented as support for the petition included a document labelled "sworn statement" allegedly signed by former Jerome County Sheriff Larry Gold, which claims that Gold's Chief Deputy, Mito Alanzo [sic] told him he had seen a letter by Tira Arbaugh in the hands of court clerk Cheryl Watts (R., vol. 1, pp. 148-49 (later introduced as Exhibit 8)); a document purportedly signed by former Jerome County Deputy Orville Balzer saying he had seen "a letter from Tira Arbaugh ... addressed to Judge Phillip Becker" in the possession

of Watts (R., vol. 1, p. 154 (later introduced as Exhibit 5)); a document allegedly written by prison paralegal DeWayne Shedd with a date of "6/27/02" stating Deputy Attorney General Tim McNeese had instructed him to intercept documents meant for Charboneau if they related to Larry Gold or Tira Arbaugh (R., vol. 1, p. 146 (later introduced as Exhibit 4)); and two purported print-outs of e-mail exchanges between Shedd and prison guard William Unger detailing the "Charboneau mission" of intercepting documents related to Tira Arbaugh or Larry Gold (R., vol. 1, pp. 143-44 (later introduced as Exhibits 7C and 7D)).

The state filed an answer (R., vol. 1, pp. 520-22) and a motion for summary dismissal (R., vol. 1, pp. 721-22). The bases for the motion were that the claim was time-barred and successive, being basically a reiteration of the same claims found untimely in Charboneau's previous post-conviction action; that Charboneau failed to present a viable *Brady*[10] claim of suppression of evidence at the trial; and that the letters on which the claims were based are hearsay. (R., vol. 1, pp. 727-43; 5/24/13 Tr., p. 31, L. 2 – p. 35, L. 9.) The district court denied the motion. (R., vol. 2, pp. 755-56, 797-800; 5/24/13 Tr., p. 46, L. 24 – p. 61, L. 13.)

Prior to the evidentiary hearing, the state conceded that the handwriting on the copy of the letter and envelope alleged to have been written by Tira was hers (on the basis of handwriting analysis). (R., vol. 2, p. 957; see also Evid. Tr., p. 66, Ls. 3-13.) The state limited its concession to the handwriting being Tira's: it specifically did not concede that the letter or envelope was "genuine or

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

authentic," that the "letter [was] what it purports to be," or that its contents were true. (R., vol. 2, p. 971; Evid. Tr., p. 66, Ls. 3-13.)

The case proceeded to an evidentiary hearing on the limited issue of "whether the State or State's agents played a role in concealment of the Tira Arbaugh letter or whether it has, in fact, been concealed or withheld." (Evid. Tr., p. 1, Ls. 12-18; see also R., vol. I, p. 688 (bifurcating the evidentiary hearing and limiting the scope of the initial hearing to whether "state agents played a role in ... concealment").) Because of this limited scope, no evidence of what Charboneau or others close to him knew in relation to his claims and when they knew it was admitted at the hearing. (Evid. Tr., p. 159, L. 6 – p. 160, L. 17; p. 263, Ls. 9-22.) The hearing ultimately included, in part, the following evidence:

On March 18, 2011, Corporal Hiskett, a guard at the Idaho Correctional Institution—Orofino (hereinafter ICIO) was cleaning a guard room when he encountered a large envelope with Charboneau's name on it. (Evid. Tr., p. 487, L. 3 – p. 488, L. 6; p. 497, L. 15 – p. 498, L. 2; see also p. 21, Ls. 12-19.) The envelope was in the incoming and outgoing tier mail. (Evid. Tr., p. 488, Ls. 7-8.) Tier mail is an internal system for delivering papers to different parts of the prison, including "Inmate Concern Forms" or "kites," which are written exchanges between correction staff and offenders. (Evid. Tr., p. 528, L. 7 – p. 530, L. 2.) When he did his rounds checking on the cells Corporal Hiskett informed Charboneau that he had mail at the guard room. (Evid. Tr., p. 487, Ls. 16-20; p. 488, Ls. 15-19.) When Charboneau came to the guard room, Corporal Hiskett

delivered the envelope to Charboneau and had him open the envelope to make sure it contained no contraband. (Evid. Tr., p. 492, L. 4 – p. 495, L. 18.)

Charboneau presented 20 exhibits associated with this envelope. He claimed two of the exhibits were exculpatory evidence. (Exhibits 8 (document allegedly signed by former Jerome County Sheriff Larry Gold), 14 (copy of a document allegedly written by Tira Arbaugh); see also Exhibits 5A (allegedly a copy of an envelope to Judge Becker from Tira Arbaugh), 7E (letter allegedly signed by Larry Gold, used as one of the bases for Charboneau's third post-conviction petition).) Charboneau initially claimed four exhibits were evidence that State agents had withheld the documents he alleged were exculpatory. (Exhibits 4 (document allegedly written by prison paralegal DeWayne Shedd), 5 (document allegedly written by former sheriff's deputy Orville Balzer), 7C (print-out of alleged email exchange between Shedd and Correction Lieutenant Unger), 7D (an alleged email exchange between Shedd and Correction Lieutenant Unger).) Three are envelopes. (Exhibits 1, 6, 13.) The remaining nine documents relate to Charboneau's efforts to bring the post-conviction claims raised in his third and fifth post-conviction petitions. (Exhibits 2, 3, 7A, 7B, 7F, 9, 10, 11, 12.)

During the hearing Marc Haws, the prosecutor at Charboneau's criminal trial, denied ever hiding or instructing others to hide evidence regarding the trial and testified he had no knowledge of any letter allegedly written by Tira and had no contact with anyone in the Idaho Department of Correction since leaving the attorney general's office in 1986. (Evid. Tr., p. 430, L. 21 – p. 433, L. 14.)

After the evidentiary hearing and submission of evidence, the district court entered factual findings and legal conclusions. (R., vol. 3, pp. 109-43.) The court concluded that three of the four documents purportedly showing a conspiracy to intercept documents intended for Charboneau, Exhibits 5, 7C and 7D, were forgeries. (R., vol. 3, pp. 126, 138-40; vol. 4, p. 527 n.4.) Nevertheless, the district court "conclud[ed] the Tira Arbaugh letter was suppressed or withheld by the State, either willfully or inadvertently, from at least 2003 on." (R., vol. 3, p. 142.)

Charboneau moved for summary judgment on the remaining question of whether he was entitled to relief. (R., vol. 3, pp. 219-20.) In support of that motion he submitted the record of the underlying criminal and initial post-conviction actions (R., vol. 3, pp. 207-09[11]) and affidavits (R., vol. 3, pp. 210-18, 252-505; vol. 4, pp. 1-2). After a hearing on the motion (see generally 9/19/14 Tr.), the court entered an order setting forth preliminary rulings and requesting additional briefing and input (R., vol. 4, pp. 60-67). In response, the state presented several affidavits and deposition transcripts (R., vol. 4, pp. 83-418), as did Charboneau (R., vol. 4, pp. 439-46). The district court ultimately granted summary judgment in favor of Charboneau and ordered a new trial. (R., vol. 4, pp. 523-94.) In so doing, the district court held that Exhibit 14, the multigenerational copy of a document with Tira Arbaugh's handwriting, was

[11] Because this submission was on a disc that was merely photocopied into the record (R., vol. 3, p. 209), the state requested the Court to take judicial notice of its records in dockets 16339 (the first appeal in the criminal case), 16741 (the appeal of the first two post-conviction actions, addressed in the same appeal as the criminal case pursuant to unitary review), and 19635 (the second appeal in the criminal case).

admissible hearsay (R., vol. 4, pp. 531-47); that Exhibit 8, the document allegedly signed by Larry Gold detailing a conversation with Mito Alonzo (which Alonzo claimed did not happen), was admissible for the non-hearsay purpose of showing Mito Alonzo had "very detailed knowledge of the contents" of Exhibit 14, from which it was possible to draw the inference that Marc Haws also knew about Exhibit 14 (R., vol. 4, pp. 547-52); and that withholding Exhibit 14 constituted a *Brady* violation (R., vol. 4, pp. 554-81).

The state filed a timely appeal from the judgment. (R., vol. 4, pp. 659-61, 663-66.)

ISSUES

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

2. Did the district court err when it concluded that three documents, one purportedly written by Tira Arbaugh and one purportedly written by Larry Gold, both of whom died years prior to the filing of this case, and one document purportedly signed by DeWayne Shedd, were admissible hearsay?

3. Did the district court err when it found a *Brady* violation?

4. Did the district court err by considering, *ex parte*, evidence it had specifically ruled inadmissible at the evidentiary hearing?

5. Did the district court err by admitting evidence of prior bad acts and then considering that evidence to show actions in conformity with character?

6. If this Court reverses the district court's judgment granting post-conviction relief, should it vacate the district court's order granting release on bond and order that Charboneau be **immediately** taken into custody so as to prevent flight during the 21-day or more interval between the issuance of its written opinion and that opinion becoming final?

ARGUMENT

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

A. Introduction

District Judge Butler dismissed Charboneau's third petition for post-conviction relief as untimely. (R., vol. 2, pp. 362-83.) That petition included claims that "Tira Arbaugh during the trial and sentencing told petitioner's mother that she and her sister Tiffinie [sic] had been instructed by the prosecutor to withhold certain evidence and testimony relative to the killing of Marilyn Arbaugh" and that "Tira Arbaugh made statements to the brother of the petitioner which incriminated Tiffinie [sic] Arbaugh in the killing of her mother, Marilyn Arbaugh." (R., vol. 2, p. 368.) He also supported his petition with "a letter from Larry Gold" he received on June 5, 2001, that stated Gold's belief that the facts of Charboneau's case had been manipulated. (R., vol. 2, pp. 367, 371.) Judge Butler dismissed the petition as time-barred and unsupported by relevant or admissible evidence. (R., vol. 2, pp. 364-71.) This Court affirmed the dismissal. Charboneau v. State, 144 Idaho 900, 904-06, 174 P. 3d 870, 874-76 (2007).

The state moved for summary dismissal of the current petition on the basis that it was time-barred, and that the holding in the third post-conviction case conclusively established that Charboneau did not bring the current claim within a reasonable time after having notice of it. (R., vol. 1, pp. 721, 731-33; vol. 2, pp. 445-47.) The district court denied the motion. (R., vol. 2, pp. 755-56.)

The district court, expressing the opinion that is it "unfair ... to make a rule which bars meritorious claims on timeliness grounds," concluded that the prior post-conviction had raised and ruled upon only a "particular narrow issue" of "awareness of a second gun" while the present petition "raises a number of questions across several fronts that are new." (5/24/13 Tr., p. 47, L. 14 – p. 49, L. 13.) The district court stated that the reason the claims are new is because Charboneau "no longer allege[s] that Tira told someone else some different version of what happened at trial" but the "claim now is that Tira herself purportedly made statements supporting Charboneau's current petition in a letter to the previously presiding trial judge." (R., vol. 2, p. 798.) The district court also stated: "Although these might be the same category of some claims made before, the current claims allege different facts." (R., vol. 2, p. 798.) The district court also stated it "continues to adhere to its previous ruling that this is not necessarily a new claim but new evidence supporting an old claim." (R., vol. 2, p. 799.) Finally, the district court said it "would be a paradox of the first order to rule that evidence allegedly suppressed for over 20 years could be deemed untimely, after it has finally been uncovered, because Petitioner knew about it or could have, (or actually did), make a similar claim earlier that he was unable to back up with sufficient or admissible evidence." (R., vol. 2, p. 799.)

The court erred for the following reasons: (1) The merits of the claim are irrelevant to its timeliness; (2) the current petition raised the same claims as the prior petition, and even if somehow different in details, the prior petition shows notice; (3) supporting an untimely claim with different evidence does not render it

timely; and (4) it is not a "paradox" to run the limitation period on a claim from the time it was known.

B. Standard Of Review

"The Court exercises free review over questions of law and matters of statutory interpretation. In particular, the determination of the applicable statute of limitation is a question of law over which this Court has free review." Guzman v. Oiercy, 155 Idaho 928, 934, 318 P3d 918, 924 (2014) (internal quotes, citations and brackets omitted).

C. Charboneau Did Not Bring The Current Action Within A Reasonable Time Of Acquiring Notice Of His Claim That Tira Arbaugh Stated She Had Provided False Testimony At Trial

A petition for post-conviction relief must be filed "within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later." I.C. § 19-4902. "[S]tate misconduct implicates core due process considerations that may trigger equitable tolling." Rhoades v. State, 148 Idaho 247, 251, 220 P.3d 1066, 1070 (2009). In the case of a *Brady* violation "there may be tolling of the one year statute of limitations until discovery of the *Brady* violation." Charboneau v. State, 144 Idaho 900, 904, 174 P. 3d 870, 874 (2007). Timeliness is then measured "from the date of notice, not from the date a petitioner assembles a complete cache of evidence." Id. at 905, 220 P.3d at 875. The party asserting an otherwise untimely *Brady* claim must "establish that he has done so within a reasonable time." Id. at 905, 174 P.3d at 875.

In this case there is no dispute that Charboneau did not bring the current petition within one year of the determination of his criminal appeal. Thus, the only question is whether he established that he brought his petition within a reasonable time after having notice of his claim. That issue is resolved by the fact that he made the same claim in 2002, and it was time-barred then because it was not brought within a reasonable time of having notice of the claim. Charboneau, 144 Idaho at 904, 174 P. 3d at 874.

The district court concluded that notice should be measured from the March 18, 2011 delivery of the "packet" of documents on two bases. First, the district court held that differences between the prior and current claims showed Charboneau lacked notice of the current claim. (5/24/13 Tr., p. 47, L. 14 – p. 48, L. 7; R., vol. 2, p. 798.) Second, although the current claim "is not necessarily a new claim" the statute of limitations should be tolled because the state suppressed evidence to support the claim. (5/24/13 Tr., p. 48, L. 7 – p. 49, L. 13; R., vol. 2, p. 799.) Neither determination withstands analysis.

The district court's ruling that Charboneau lacked notice of his claim is incompatible with the record. In his third petition, according to the district judge presiding in that case, Charboneau "claim[ed] there to be newly discovered evidence as follows: ... That Tira Arbaugh during the trial and sentencing told petitioner's mother that she and her sister Tiffinie [sic] had been instructed by the prosecutor to withhold certain evidence and testimony relative to the killing of Marilyn Arbaugh." (R., vol. 2, p. 368.) Charboneau also claimed that "at the trial and sentencing" Tira told Charboneau's mother that the prosecutors had

"suborned perjury" from her. (R., vol. 2, pp. 366-67.) He "attempt[ed] to offer as admissible evidence statements attributed to Tira Arbaugh" that she was "instructed by the prosecutors as to what to say and to not disclose evidence that may be favorable to the defense." (R., vol. 2, p. 370.) This is the same claim Charboneau made in the current petition. (R., vol. 1, pp. 135, 138, 140.) The district court's conclusion that Charboneau lacked notice of his claim that Tira had made statements challenging the accuracy of her testimony until he received the packet of documents does not withstand comparison to the record.

The district court's alternative holding, based on Sivak v. State, 134 Idaho 641, 8 P.3d 636 (2000), lacks legal merit. In that case an inmate named Leytham testified at Sivak's trial and in cross-examination stated he had not been given any deal or consideration in exchange for his testimony. Id. at 644, 8 P.3d at 639. Sivak claimed in his first post-conviction case "that the prosecution failed to reveal the substance of agreements with Leytham." Id. at 644-45, 8 P.3d at 639-40. The district court concluded Sivak failed to prove that claim, and the Idaho Supreme Court affirmed. Id. at 645, 8 P.3d at 640. Four letters regarding prosecutorial or police actions favoring Leytham, which had not previously been provided to Sivak, came to light in subsequent federal habeas corpus proceedings. Id. at 643, 8 P.3d at 638. Sivak brought a successive petition based on these letters, again asserting that the state failed to reveal an agreement with Leytham. Id. at 644, 8 P.3d at 639.

On appeal from the summary dismissal of the successive petition, the state argued that Sivak "waived this claim for relief under I.C. 19-2719(5)

because the claim was advanced in a previous post-conviction proceeding." Id. at 646, 8 P.3d at 641. In rejecting this argument the Court stated:

> We reject the State's theory that Sivak has waived this claim for relief merely because he raised the issue in his first post-conviction petition. As Sivak concedes, this petition presents not a new claim but new evidence supporting an old claim. Applying this rule as the State requests would result in Idaho courts being unable to entertain evidence of actual innocence in successive post-conviction petitions, even where the evidence was clearly material or had been suppressed by prosecutorial misconduct. We must be vigilant against imposing a rule of law that will work injustice in the name of judicial efficiency.

Id. at 647, 8 P.3d at 642. This analysis does not apply in this case.

First, the Sivak holding was an interpretation of I.C. § 19-2719, which applies in capital cases and does not apply to I.C. § 19-4902, the statute applicable in this case. See Rhoades v. State, 148 Idaho 247, 252-53, 220 P.3d 1066, 1071-72 (2009) (distinguishing Sivak on the basis that the court has never applied its rationale to I.C. § 19-4902).

Second, and more importantly, Sivak does not stand for the proposition that timeliness should be measured from the discovery of new evidence as opposed to notice of the claim. Sivak timely brought his claim and it was litigated on the merits; the only question was whether he could bring a successive petition asserting the same claim because of new evidence. Sivak's holding that state suppression of evidence prevents application of a successive petition bar is irrelevant to application of the statute of limitation. The relevant inquiry for purposes of the statute of limitation was when Charboneau had notice of his claim. Simply put, Charboneau cannot claim that state suppression of Exhibit 14

in 2003 (even if true) is what rendered his 2002 petition untimely, thus allowing him to resurrect the claim in that petition.

Finally, application of the rule that timeliness is measured from notice rather than acquisition of evidence does not work any injustice in this case. The record in this case establishes Charboneau had notice of his claim that Tira made statements asserting that she had given false testimony at the behest of the prosecution while she was alive, in fact as early as the criminal trial in 1985 and sentencing in 1986. Had he brought his claims timely then, Charboneau (or the state) could have called Tira Arbaugh as a witness. Instead, for reasons he has never presented to any court, Charboneau waited until after Tira's death to assert this claim. Although state action that deprives a petitioner of notice tolls the statute of limitation, Rhoades v. State, 148 Idaho 247, 251, 220 P.3d 1066, 1070 (2009) ("state misconduct implicates core due process considerations that may trigger equitable tolling"), the Sivak case does not support the proposition that a petitioner with notice despite state suppression of evidence is excused from making a timely post-conviction claim.

The record establishes that Charboneau did not bring his claim within a reasonable time after he had notice of it. To the contrary, the claim was untimely as of 2002 (when he filed this third petition), and more so in 2011 (when he filed the current petition). Because timeliness is measured from notice and not the acquisition of evidence, the district court erred by not dismissing this untimely petition.

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

The state moved for summary dismissal on the theory that the document ultimately introduced into evidence as Exhibit 14 could not support a claim in post-conviction because it was inadmissible hearsay. (R., vol. 1, p. 721, 742; vol. 2, pp. 454-60.) The district court denied the motion, concluding Exhibit 14 was admissible as a statement against penal interest. (Tr., p. 52, L. 3 – p. 60, L. 19.)

During the evidentiary hearing Charboneau offered Exhibit 4, a document allegedly handwritten by prison paralegal DeWayne Shedd; Exhibit 8, a document allegedly signed by former sheriff Larry Gold; and Exhibit 14, a document allegedly written by Tira Arbaugh. (Evid. Tr., p. 31, Ls. 7-8 (Exhibit 4); p. 384, Ls. 1-8 (requesting admission of Exhibit 4 for "substantive value"); p. 60, Ls. 6-7 (offering Exhibit 8); p. 65, Ls. 12-17 (Exhibit 14).) The state objected to consideration of the contents of each of these exhibits as hearsay. (Evid. Tr., p. 31, Ls. 9-22; p. 60, Ls. 8-9; p. 65, L. 18 – p. 66, L. 21; p. 384, L. 24 – p. 385, L. 3.) The district court overruled these objections and admitted Exhibits 4 and 14 without limitation. (Evid. Tr., p. 390, Ls. 2-22.)

The court reiterated its ruling of admissibility of Exhibit 14, and also concluded Exhibit 8, a document purportedly signed by Gold, was admissible for the non-hearsay purpose of showing the knowledge of third persons. (R., vol. 4, pp. 531-49.) It considered both exhibits in granting summary judgment to Charboneau. (R., vol. 4, pp. 550-52, 573-81.)

These decisions were erroneous because the exhibits are inadmissible hearsay.

B. Standard Of Review

Review of a trial court's hearsay rulings "is limited to determining whether" the district court's decision was "within the outer boundaries of its discretion," "consistent with" applicable legal standards, and "reached through an exercise of reason." In re Estate of Conway, 152 Idaho 933, 941, 277 P.3d 380, 388 (2012).

C. The District Court Erred By Admitting Exhibit 4 For The Truth Of The Matters Asserted Therein

Exhibit 4 is a document purportedly handwritten and signed by prison paralegal DeWayne Shedd. (R., vol. 3, pp. 119-21.) The district court deemed it of "extraordinary significance." (R., vol. 3, p. 121 (emphasis original).) Indeed, the district court based its findings that Shedd intercepted Charboneau's mail, and did so at the behest of others, almost exclusively upon this exhibit. (R., vol. 3, pp. 134-35.) The district court erred by admitting the exhibit at the evidentiary hearing over the state's hearsay objection.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." I.R.E. 801(c). There is no doubt that the document is a "statement," because it is a "written assertion." I.R.E. 801(a). There is likewise no doubt that the document's author (whether that be Shedd as found by the district court or the forger of other documents in this case as asserted by the state) is a "declarant." I.R.E. 801(b). Finally, the record shows the document

was both offered and received for the "truth of the matter[s] asserted." (R., vol. 3, p. 121.) The document is thus hearsay.

"Hearsay is not admissible except as provided by" the Idaho Rules of Evidence. I.R.E. 802. No hearsay exception applicable to Exhibit 4 has ever been offered by Charboneau nor found by the district court. (Evid. Tr., p. 384, L. 1 – p. 391, L. 8.) Because Exhibit 4 is hearsay and not subject to any exception, the district court abused its discretion in admitting it and then considering it for the truth of the matters asserted.

D. The District Court Erred By Admitting Exhibit 14 For The Truth Of The Matters Asserted Therein

The district court concluded that Exhibit 14 was admissible evidence when denying the state's motion for summary dismissal, at the evidentiary hearing, and in granting Charboneau summary judgment. Review shows the document is inadmissible hearsay, so the district court erred at all three stages.

The district court ultimately concluded that the exhibit fell within two hearsay exceptions: (1) as a statement against penal interest because it would have subjected Tira to perjury charges, and (2) under the general "catchall" provision. (R., vol. 4, pp. 532-47.[12]) The district court applied incorrect legal standards. Application of correct legal standards shows that neither exception applies.

[12] The state also submits the district court erred by overruling the state's hearsay objection and considering the date written in the document as evidence of when the document was written and the salutation to Judge Becker as evidence the declarant intended the letter to be read by Judge Becker under the "things that you write on a letter" hearsay exception (Evid. Tr., p. 418, L. 25 – p. 421, L. 10), because no such exception exists. See I.R.E. 801-804.

1. The Exhibit Is Not Admissible As A Statement Against Penal Interest

To be admissible as a statement against penal interest, the statement must have "at the time of its making ... so far tended to subject declarant to ... 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). Furthermore, a "statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." I.R.E. 804(b)(3). Analysis shows that Exhibit 14 meets none of these requirements for admissibility.

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

"'Rule 804(b)(3) ... does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory.'" 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 reason for this rule is that "within a given declaration, there may be many statements both self-inculpatory and implicating another person," and therefore "each statement must be determined to be sufficiently reliable even if it is made as part of a narrative." Id. "Accordingly, each admitted statement or part thereof must be found to be truly against the penal interest of the declarant." Id.

The district court did not apply these standards. It identified only two discrete parts of the letter that could have subjected Tira to a perjury charge because they were contrary to her trial testimony: specifically, the statement that she did not hear a second episode of shots fired and the statement she had a pistol and Tiffnie had a rifle when they first left the house. (R., vol. 4, pp. 532-33.) Under the district court's own reasoning, therefore, only these two declarations could fall within the ambit of the statement against penal interest exception—the rest of Exhibit 14 would not. Averett, 142 Idaho at 890, 136 P.3d at 361 (non-self-inculpatory statements in a broader self-inculpatory narrative not admissible). Statements in Exhibit 14 about what prosecutors, police officers, and family members did simply would not have subjected Tira to any risk of prosecution for perjury. See Williamson, 512 U.S. at 601 ("The district court may not assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else."). The district court erred by finding the entire document admissible when it identified only two discrete statements that tended to subject the asserted declarant to criminal liability.

(b) The Declarations Identified By The District Court Had No Tendency To Subject The Declarant To Criminal Liability

The two statements identified by the district court as creating a risk of perjury would not have "tended to subject" Tira to "criminal liability" for two reasons. First, any perjury charge would have been barred by the applicable statute of limitation. Tira testified at trial on April 29, 1985. (Trial Tr., vol. 5, p. 1196, L. 1; p. 1233, Ls. 1-3.) At that time the limitation period for prosecution of felonies other than

murder was three years. I.C. § 19-402 (1972). There is no evidence in the record the letter was written before the statute of limitations would have run on April 29, 1988. Because the statute of limitation for perjury had run, the statements the district court found contrary to trial testimony had no tendency to "subject" Tira Griggs to "criminal liability" for perjury "at the time of [their] making." I.R.E. 804(b)(3).

Second, Tira was 14 years old when she testified. (Trial Tr., vol. 5, p. 1234, Ls. 5-6.) At that time, acts that would have been crimes if committed by adults were subject to the Youth Rehabilitation Act and not criminal proceedings. I.C. § 16-1803 (1982). As such, no "criminal liability" for perjury could have been pursued by the state, only juvenile adjudication.

The district court articulated no theory by which the statute of limitation and juvenile jurisdiction would not have absolutely prevented Tira from being criminally liable for perjury. (R., vol. 4, p. 534.) The district court instead stated that Tira "was only 19 when she wrote the letter" and "was not a sophisticated criminal or one schooled in the law." (Id.) The district court did not say what these characteristics have to do with admissibility, however.[13] Because there is

[13] The district court's opinion could be read as concluding that Tira was aware of what would constitute perjury but ignorant of the statute of limitations and that she would be subject to only juvenile jurisdiction. Such a conclusion would be based entirely upon speculation about the general knowledge of 19-year-olds and an assumption that Tira was neither a "sophisticated criminal" nor "schooled in law." Charboneau presented no evidence of what Tira did or did not know about these matters. More importantly, however, the district court did not explain how a statement that *as a matter of law* created no risk of prosecution could be deemed to have a tendency to subject the declarant to criminal liability.

no legal theory by which Exhibit 14 could have subjected Tira to criminal liability, it was not a statement against her penal interest.

(c) The Record Does Not Support Any Conclusion That A Reasonable Man In The Declarant's Position Would Not Have Made The Two Identified Declarations

Even if there had been some risk of criminal liability, that risk was not enough to show 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 subject Tira to criminal liability the state would have had to prove that she willfully provided false testimony. I.C. § 18-5401. She was at risk of prosecution, then, only if the state concluded that the statements in the document were in fact true and her testimony at trial was in fact false, and could prove it. A perjury prosecution would result only if the state abandoned its theory of Charboneau's guilt (and ignored most of the evidence presented at trial) and took a completely contrary position. The risk of the state doing so was so minimal it did nothing to guarantee truthfulness.

The district court concluded that it did not have to "make a determination whether the statements in the letter are actually true, or whether there was any substantial likelihood of a criminal prosecution" because it was sufficient to conclude "she was calling into question her own statements under oath." (R., vol. 4, p. 533.) The district court's determination that any statement recanting prior testimony is sufficient to meet this reasonable man standard is contrary to the analysis of every court that has reviewed the reliability of such statements.

"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). "Courts properly view recanting affidavits and testimony with great suspicion" and "unsworn recantations deserve increased suspicion." Ferrell v. Wall, 889 A.2d 177, 184 (R.I. 2005). The Arizona Supreme Court has declared that "there is no form of proof so unreliable as recanting testimony." State v. Sims, 409 P.2d 17, 22 (Ariz. 1965) (internal quotation omitted). "[R]ecantation evidence is highly suspect, even when it involves an admission of perjury." Commonwealth v. Woods, 575 A.2d 601, 603 (Pa.Super 1990). See also State v. Ruffin, 475 So.2d 1375, 1382 (La. App., 5th Cir., 1985) ("recantations are highly suspicious"); Case v. Hatch, 731 F.3d 1015, 1044 (10th Cir. 2013) ("recanted testimony is notoriously unreliable"). Inconsistency between statements and testimony given under oath demonstrates a lack of trustworthiness. United States v. Berry, 496 Fed.Appx. 938, 942 (11th Cir. 2012) (statement against penal interest not trustworthy where recanted and inconsistent statement made under oath). In United States v. Mackin, 561 F.2d 958, 961-62 (D.C. Cir. 1977), the court applied the same trustworthiness standard as articulated in I.R.E. 804(b)(3) and stated that the analysis starts from the "premise that recantations by witnesses for the prosecution are viewed with suspicion." 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 was insufficient to vest the hearsay statement recanting sworn testimony with reliability. Id. at 962-63. The district court's reasoning that the declaration is

trustworthy *because* it is inconsistent with prior sworn testimony is illogical and contrary to applicable legal standards.

A "reasonable man in declarant's position" would have known that the risk of prosecution (much less conviction) for perjury was directly proportional to the risk that the state would conclude that the new statement was truth and the evidence it presented at trial was false, and thus abandon its theory of the criminal case. The odds that the state would conclude in the underlying criminal case that the evidence showing two rounds of shots and one rifle was wrong and that the new statements that there was only one round of shots by Charboneau and a second round of shots by Tiffnie carrying a second rifle are nil. Therefore the risk of criminal liability arising from the new statements was nil. Fear of criminal liability would not have been a significant motivation to a reasonable man in Tira's position.

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

A statement against penal interest "offered to exculpate the accused" is not admissible unless "corroborating circumstances clearly indicate the trustworthiness of the statement." I.R.E. 804(b)(3). In State v. Meister, 148 Idaho 236, 242, 220 P.3d 1055, 1061 (2009), the Idaho Supreme Court adopted "Arizona's standard and seven factor test for the corroboration requirement pursuant to I.R.E. 804(b)(3)." Under that standard the 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.*'" Meister, 148 Idaho at 242, 220 P.3d at 1061 (brackets omitted, emphasis original) (quoting State v. LeGrand, 734 P.2d 563, 570 (1987)). "This will protect

the province of the jury as the fact-finder and prevent the judge from 'being able to bootstrap himself or herself into the jury box via the evidentiary rules.'" Id. (brackets omitted) (quoting LeGrand, 734 P.2d at 570). Application of this test shows that the corroboration requirement is not met.

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

In making its ruling the district court cited: (1) the declarant's mental state as set forth in the exhibit; (2) Tira, the purported declarant, was 19 and Charboneau killed her mother; (3) the declarant's stated motives in writing Exhibit 14; (4) "no evidence of 'tailoring'" Exhibit 14 to fit the evidence, so where it is contrary to other evidence it is without "contrivance"; (5) "*some* of her assertions ... might conveniently fit the truth"; (6) Exhibit 14 is "the product of a rational

[14] In addition, there is overwhelming evidence that Exhibit 14 was not created under the circumstances set forth within it. Tira was living in Nevada with her new husband and did not have transportation to travel to Bruneau. (Evid. Tr., p. 453, L. 7 – p. 455, L. 3; p. 467, Ls. 11-14.) In addition there was no street dance in Bruneau on the date on the document (September 6, 1984). (R., vol. 4, pp. 69-92.) The District court concluded that there was probably a perfectly good (but unknowable) reason for the inconsistency and, anyway, the truth or falsity of the explanation in Exhibit 14 for how it came into being is not really relevant to the reliability of Exhibit 14. (R., vol. 4, pp. 544-45.) The state submits this is substantial evidence of fabrication that should not have been ignored by the district court.

mind"; (7) Exhibit 14 "invites inquiry"; (8) Exhibit 14 "*names people*"; (9) the accusations of a *Brady* violation by Haws were corroborated (by inadmissible and unadmitted evidence regarding the *Paradis* case, see Argument IV, *infra*); and (10) the "value accorded" Exhibit 14 "by those who intentionally concealed it." (R., vol. 4, pp. 535-43 (emphasis original).) The factors found by the district court are irrelevant to the applicable test of "*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.*" Meister, 148 Idaho at 242, 220 P.3d at 1061 (emphasis original, brackets and internal quotes omitted). Rather than applying the correct standard, which measures trustworthiness of the statement against corroborating evidence, the factors cited by the district court address the declarant's credibility, a matter "within the province of the jury rather than the judge." LeGrand, 734 P.2d at 570. The district court applied a legal standard that allowed it to erroneously bootstrap a determination of admissibility from its own credibility determination.

Exhibit 14 is hearsay. It is not a document shown to have any tendency at all to expose the declarant to criminal liability, much less to a degree a reasonable person would feel the need to be truthful out of fear of criminal liability. In addition, the statements in Exhibit 14 are not corroborated in any meaningful way by evidence in the record.

2. Exhibit 14 Is Not Admissible Under The Catchall Exception

To be admissible under a "catchall" hearsay exception the proffered statement must have "equivalent circumstantial guarantees of trustworthiness" as

the other hearsay exceptions. I.R.E. 804(b)(6). The analysis "contemplates that the trial court will 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). In addition, the proffered hearsay must be "offered as evidence of a material fact," be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts," and "the general purposes of these rules and the interests of justice will best be served by admission of the statement." I.R.E. 804(b)(6). Exhibit 14 meets none of these criteria.

First, Exhibit 14 does not have equivalent circumstantial guarantees of trustworthiness. As set forth above, recantations of trial testimony are notoriously unreliable. One of the exceptions against which the trustworthiness of Exhibit 14 should be measured is previously presented sworn testimony subjected to cross-examination. I.R.E. 804(b)(1). It strains credulity to conclude that an unsworn, uncross-examined written statement recanting sworn testimony has equivalent guarantees of trustworthiness.

Second, Exhibit 14 is not offered as evidence of a material fact. To the contrary, the Exhibit's primary (if not exclusive) purpose would be to contradict Tira's sworn trial testimony, an impeachment purpose.

Third, Exhibit 14 is not more probative than other evidence. Generally, a witness's hearsay statement is not more probative than the same witness's sworn testimony on the same subject. State v. Hawkins, 131 Idaho 396, 404, 958 P.2d 22, 30 (Ct. App. 1998) (citing fact declarant had given testimony on

subject as ground for concluding his hearsay statement was not more probative). Exhibit 14 is not more probative than Tira's sworn testimony provided at the preliminary hearing and then the trial.

Finally, the purposes of the hearsay rules and interests of justice are not served by admission of Exhibit 14.

The district court concluded that "the primary difference" between the catchall exception and the statement against penal interest exception is that the former required "no showing that the statement subjects the declarant to civil or criminal liability." (R., vol. 4, p. 546.) The state submits that by applying half of the criteria for admissibility as a statement against penal interest the district court was not applying a test requiring equivalent guarantees of trustworthiness. Moreover, the district court relied primarily upon evidence within Exhibit 14 to bootstrap a finding of trustworthiness. The judge found statements within Exhibit 14—such as the declarant's statement of motive for writing the document, the description of the circumstances of writing the document, and the date and statement the document was intended to go to Judge Becker—to be credible in order to find the Exhibit credible. Finally, as set forth above in more detail, the district court did not make a finding of *trustworthiness* based on comparison of the Exhibit to other evidence of the same events, but rather made a *credibility* determination that was within the province of a jury. The question before the court was not the credibility of the declarant, but whether the statement was sufficiently trustworthy that it could be considered by a jury without the benefit of cross-examination.

As to the three other elements, the district court did not articulate how Exhibit 14 went to a material fact as opposed to mere impeachment, how Exhibit 14 was more probative than other evidence, especially sworn testimony, or how its admission would serve the general purposes of the hearsay rules or the interests of justice. (R., vol. 4, p. 547.) As stated above, none of these elements is shown by the record. The district court erred by finding Exhibit 14 admissible under the catch-all exception to the hearsay rule.

Because Exhibit 14 is inadmissible hearsay, the district court erred by not granting the state's motion for summary dismissal for failure to support the petition with admissible evidence. It also erred in granting Charboneau summary judgment.

E. The District Court Erred By Admitting Exhibit 8 To Demonstrate The Knowledge Of A Third Person

Exhibit 8 is a document apparently signed by Larry Gold, who died before this case was brought. It contains the following out-of-court statement:

> [I]n the fall of 1989, my chief deputy Mito Alanzo [sic—Alonzo] confided in me his concern about the fact that the District Court clerk [sic] Cheryl Watts was in possession of a letter which had been delivered to the Jerome County Courthouse via The [sic] United States postal [sic] Service. Chief deputy [sic] Alanzo [sic] informed me that the letter at issue had been addressed to the district court Judge [sic] Philip Becker and had been sent by Tira Arbaugh, the daughter of Marilyn Arbaugh. Chief Deputy Alanzo [sic] told me that the subject matter of this letter had significant relevance concerning the Charboneau case. Chief Deputy Alanzo [sic] stated that his concern was that the District Court Clerk Cheryl Watts had requested that he help her to destroy the letter.

(Exhibits, part 1, pp. 109-110.) The district court stated this evidence "was offered to prove Mito Alonzo had very detailed knowledge of the contents of that

letter, and when he knew about it" and "may be admitted for this purpose." (R., vol. 4, p. 549 (emphasis omitted).[15])

Evidence of an out-of-court statement is hearsay if "offered in evidence to prove the truth of the matter asserted." I.R.E. 801(c). Where hearsay is "included within hearsay" the evidence is admissible where "each part of the combined statements conforms with an exception to the hearsay rule." I.R.E. 805.

Exhibit 8 has multiple layers of hearsay. The first layer is that the document itself is an out-of-court statement offered for the truth of the matter asserted. In this layer is the factual assertion that Mito Alonzo made a statement to the declarant (supposedly Gold) in 1989. The second layer of hearsay is the contents of that claimed statement by Alonzo: that court clerk Cheryl Watts was in possession of a letter and solicited Alonzo's help to destroy it. The final layer (because the source of Alonzo's information is apparently Watts) is that the letter was from Tira Arbaugh to Judge Becker, was sent by mail, and was related to the Charboneau case. Everything in this statement is hearsay because every

[15] The district court determined it could, from the conclusion that Mito Alonzo (who had no involvement in the Charboneau case) had detailed knowledge of the letter, draw the inference for purposes of summary judgment that "*agents of the prosecuting attorney,*" apparently Marc Haws, also knew about the letter because it was "talk of the building" in 1989. (R., vol. 4, pp. 550-52 (emphasis original).) The record contains no indication that Marc Haws set foot in the Jerome County Courthouse after his last appearance in the underlying criminal case in 1986. (#16741 R., vol. 1, pp. 155-56 (Haws' last appearance); vol. 2, pp. 155-56 (appointment of Peter Erbland as special prosecutor).) Even disregarding the document's hearsay nature it was not relevant to prove any person's knowledge other than Alonzo, Gold and Watts. I.R.E. 401.

possible matter it could prove requires reliance on at least one, and generally all three, layers of hearsay being true.

The district court's conclusion that Exhibit 8 may be admitted for the non-hearsay purpose of showing Alonzo's knowledge of and about a letter regarding the Charboneau case does not withstand scrutiny. If the declarant (purportedly Gold) is not telling the truth about having a conversation with Alonzo, or is lying about the contents of that conversation, the evidence is not relevant to prove Alonzo's knowledge. If a person claimed that he had a conversation with Abraham Lincoln in 2008, in which Lincoln said that General Grant smoked only Cuban cigars, no sane person would conclude such was evidence of Lincoln's knowledge of Grant's smoking habits. Likewise, if the declarant is lying about having a conversation with Alonzo about a letter, the evidence has no ability to prove Alonzo's knowledge, much less Haws'. The district court's analysis relies on the truth of matters asserted in an out-of-court declaration and therefore its determination that it is not hearsay is error. The district court's grant of summary judgment, based on the above erroneous hearsay rulings, should be vacated.

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

A. Introduction

The district court initially granted Charboneau a new sentencing for what it concluded was a *Brady* violation, but after realizing that the law would not allow a

resentencing to grant its preferred remedy of credit for time served[16] the court reconsidered and granted Charboneau a new trial. (R., vol. 4, pp. 61-62, 530-31, 554-81.) The district court's ultimate conclusion there was a *Brady* violation is erroneous for three reasons. First, the *Brady* doctrine is inapplicable to post-conviction withholding of evidence. Second, application of the correct legal standards to the facts found by the district court shows no *Brady* violation. Third, the district court's factual findings are clearly erroneous and based upon shifting the burden of proof to the state.

B. Standard Of Review

> Post-conviction proceedings are civil in nature and therefore the applicant must prove the allegations by a preponderance of the evidence. On review, the appellate court will not disturb the lower court's factual findings unless the factual findings are clearly erroneous. The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. When reviewing mixed questions of law and fact, this Court will defer to the factual findings of the district judge unless those findings are clearly erroneous. This Court exercises free review of the district court's application of the relevant law to the facts.

---

[16] The statute controlling sentencing for first-degree murder in place at the relevant time required a sentence of life if the death penalty was not imposed, the district court having discretion only to impose a fixed life or an indeterminate life sentence. I.C. § 18-4004 (1977); State v. Wilson, 107 Idaho 506, 690 P.2d 1338 (1984). The district court found that leaving Charboneau's release up to the Commission of Pardons and Parole (presumably by imposing an indeterminate life sentence), which would then monitor his parole for the rest of Charboneau's life, was an inadequate remedy because the district court believed the Idaho Department of Correction was complicit in withholding evidence from Charboneau. (R., vol. 4, pp. 530-31.) The district court's self-reversal on remedy is troubling, and is based significantly on a failure to recognize that the Commission of Pardons and Parole is an independent commission not subject to the control of the Idaho Department of Correction. I.C. § 20-210.

Dunlap v. State, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004) (citations omitted). A factual finding can be clearly erroneous if it is against the "clear weight of the evidence." State v. Schaffer, 112 Idaho 1024, 1027, 739 P.2d 323, 326 (1987) (factual finding that order was mailed to the parties on date indicated on the certificate of service clearly erroneous where filing by clerk, post mark on envelope, and actual receipt of the notice occurred one week or more later).

C. *Brady* Is A Pre-Conviction Right Only, And The District Court Found No Pre-Conviction *Brady* Violation

"[S]uppression by the prosecution of evidence favorable *to the accused* ... violates due process." Brady v. Maryland, 373 U.S. 83, 87 (1963) (emphasis added). The right to production of exculpatory evidence by the prosecution under *Brady* is part of the Constitution's "*fair trial* guarantee." United States v. Ruiz, 536 U.S. 622, 628-33 (2002) (emphasis added) (*Brady* does not extend to require disclosure of impeachment materials prior to entry of a guilty plea). Under *Brady*, "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would *deprive the defendant of a fair trial.*" United States v. Bagley, 473 U.S. 667, 675 (1985) (emphasis added). See also Kyles v. Whitely, 514 U.S. 419, 433 (1995) (*Brady* applies "only when suppression of the evidence would be of sufficient significance to result in the denial of the defendant's right to a fair trial").

Because *Brady* is a requirement of *fair trials*, it goes "too far" to conclude that it "be extended to protect [a petitioner's] postconviction liberty interest."

District Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 68 (2009). The process due in post-conviction "is not parallel to a trial right" articulated in *Brady*. Id. Thus, "*Brady* is the wrong framework" for analyzing a post-conviction petitioner's entitlement to exculpatory evidence, and states have far more flexibility in determining what process is due. Id. See also Rhoades v. State, 148 Idaho 247, 253, 220 P.3d 1066, 1072 (2009) (applying Osborne and noting that the state constitution does not grant greater process).

The State of Idaho has provided a procedure for bringing claims of post-conviction discovery of new evidence. A criminal defendant may bring a motion for a new trial or a separate action in post-conviction based on newly discovered evidence (evidence found after the trial and conviction). I.C. §§ 19-2406(7), 19-4901(a)(4). A motion for new trial based on newly discovered evidence is, however, "[q]uite distinct from a *Brady* claim." State v. Branigh, 155 Idaho 404, 421, 313 P.3d 732, 749 (Ct. App. 2013). 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. Rhoades, 148 Idaho at 251, 220 P.3d at 1070.

In this case the district court did not find any pre-conviction suppression of evidence by the prosecution, only post-conviction suppression of Exhibit 14 more than a decade after the criminal case was final. (E.g., R., vol. 3, p. 136 (state agents withheld Exhibit 14 "from at least 2003 until 2011"). The only evidence of pre-trial suppression of evidence was the contents of Exhibit 14, the truth of which, the district court concluded, was "a matter of conjecture." (R., vol. 4, p.

529.) The district court concluded that Exhibit 14 was written in 1989,[17] at least four years after the conclusion of the trial and after the conviction was affirmed on appeal. (R., vol. 4, pp. 557-58.) The district court erred by applying *Brady* to a document that did not exist prior to trial, and therefore could not have been suppressed under the legal standards of *Brady*. Because the district court did not find any suppression of evidence related to the trial, there was no possibility of trial prejudice arising from suppression of evidence.

The problem with the district court's analysis is apparent. The district court articulated the legal standard as follows: "given this *new evidence*, is there a reasonable probability that the result of the proceeding would have been different." (R., vol. 4, p. 558 (emphasis altered).) The district court acknowledged that "in the context of this case" the task before the trial judge, had the letter come to light in 1989,[18] would have been "looking at the new evidence" and determining "whether he should grant a new trial." (Id.) Instead of applying the legal test for granting a new trial based on newly discovered evidence, however, the Court employed a *Brady* analysis. By granting a new trial under *Brady* for actions that could not have affected the trial, the district court granted Charboneau a windfall. Because Charboneau should only have been put back in the position he would have been but for the purported actions of state actors, the

---

[17] The state asserts that this conclusion was based on the erroneous overruling of a hearsay objection, as discussed in section II, *supra*.

[18] Of course because the district court specifically found suppression starting in 2003, the actual question, assuming the validity of that finding, is what the trial court would have done had the letter been available to Charboneau in 2003.

remedy should have been to put Charboneau in the position he would have been had Exhibit 14 come to light in 2003.

Because this case involves *at best* post-conviction evidence, "*Brady* is the wrong framework." Osborne, 557 U.S. at 69. The correct framework would have been to apply state process for asserting a claim of newly discovered evidence.[19] Because *Brady* is a pre-conviction right, and the district court found only a post-conviction withholding of evidence, it applied an erroneous legal standard.

D. Even If *Brady* Were The Correct Legal Standard, The Factual Findings Of The District Court Do Not Show Any *Brady* Violation

Even if the *Brady* standard were applicable, there was no *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). Although Exhibit 14 is favorable to the accused (in the sense that he could have moved for a new trial), the record shows that it was neither suppressed by the State nor was there any prejudice, as those elements are defined under *Brady*.

[19] Charboneau's claim would have failed under the test applicable to newly discovered evidence. State v. Drapeau, 97 Idaho 685, 691, 551 P.2d 972, 978 (1976) (setting forth a four-part test for a new trial under newly discovered evidence standard).

1. Exhibit 14 Was Not Suppressed By The State As Required By *Brady*

Application of correct legal standards to the factual findings of the district court shows that there was no suppression of evidence by the state. "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." Stevens v. State, 156 Idaho 396, 406, 327 P.3d 372, 382 (2013). 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." Id. See also Queen v. State, 146 Idaho 502, 505, 198 P.3d 731, 734 (Ct. App. 2008) ("a prosecutor is not required to disclose evidence the prosecutor does not possess or evidence of which the prosecutor could not reasonably be imputed to have knowledge or control").

The factual findings of the district court do not include possession or control of Exhibit 14 at any relevant time by "the state" as that term is defined for purposes of *Brady*. The district court made the following factual findings: (1) "There is no evidence as to who had possession of the Tira Arbaugh letter from 1989 to December 2002." (R., vol. 3, p. 134.) (2) "There is no evidence as to whether it was or was not delivered to Judge Becker." (Id.) (3) The "Tira Arbaugh letter arrived at ICIO between June of 2003 and September of 2003" and was "intentionally intercepted by [prison paralegal DeWayne] Shedd at the direction of others." (R., vol. 3, p. 135.) (4) Based on "inferences and conclusions," a Deputy Attorney General assigned to the Idaho Department of Correction, Tim "McNeese or someone in a similar capacity directed Shedd to do

what he did." (R., vol. 3, pp. 135-36.) The district court declined to find that Marc Haws, the prosecutor, had anything to do with any interception of mail. (R., vol. 3, pp. 137-38.)

The only two people found by the court to have had any role in the interception of the purported letter were a paralegal with the Department of Correction and a Deputy Attorney General representing the Department of Correction (R., vol. 3, pp. 135-36[20]), neither of whom qualified as a state agent for purposes of proving a *Brady* violation. Stevens, 156 Idaho at 406, 327 P.3d at 382 ("state" includes prosecutor and "government agents having a significant role in investigating and prosecuting the offense"). The district court's factual findings do not show the second required element a *Brady* violation.

The district court addressed the insufficiency of its factual findings to show this element in two ways when granting summary judgment in Charboneau's favor. First, it defined the state "in broad terms, which would include both the prosecution and the Idaho Dept. of Corrections [sic]." (R., vol. 4, p. 555.) The district court erred by applying a legally incorrect expansion of what constitutes "the state" for purposes of *Brady*. Stevens, 156 Idaho at 406, 327 P.3d at 382 (for purposes of *Brady* the state includes the prosecutor and "government agents having a significant role in investigating and prosecuting the offense").

Second, it concluded that "law enforcement, by and through unknown (or unidentified) persons, acted in concert with IDOC to suppress and conceal exculpatory information from Charboneau." (R., vol. 4, pp. 555-56.) Put another

[20] The finding that Shedd and McNeese intercepted Exhibit 14 is clearly erroneous as set forth in Section E.2, *infra*.

way: "The letter was written and likely received by **someone** at the Jerome County Courthouse at least a year before Charboneau was resentenced .... **Someone**, obviously unwilling to aid the defense, obtained the letter. It came into the hands of employees at IDOC sometime around 2003, if not sooner, and was deliberately concealed, **apparently** on instructions from those involved in the original trial." (R., vol. 4, p. 573 (bolding added or altered).) The district court did not make findings of fact that the prosecutor or government agents having a significant role in the investigation and prosecution of the murder suppressed evidence. To the contrary, the district court specifically declined to find that prosecutor Marc Haws suppressed any evidence. (R., vol. 3, pp. 137-38.) The district court's supposition in summary judgment proceedings that unknown persons other than Marc Haws "involved in the original trial" "apparently" gave instructions leading to suppression (a supposition supported by no evidence) does not substitute for the required finding of fact. The district court's *Brady* analysis fails because the allegedly exculpatory evidence was not found to be suppressed by the prosecutor or a government agent involved in the investigation or prosecution.

2. Any Withholding Of Exhibit 14 Was Prejudicial Under *Brady*

The court's analysis also fails on the third prong requiring prejudice. "Prejudice occurs if there is a reasonable probability that, had the withheld evidence been disclosed to the defense, the result of the proceeding would have been different." Stevens, 156 Idaho at 406, 327 P.3d at 382. The prejudice must have "ensued" from the state's suppression of evidence. Id. Because, according

to the district court's findings, the state first suppressed the evidence in 2003, the only "proceeding" that could have potentially "been different" because of the state's suppression of evidence was Charboneau's third post-conviction petition. The district court's legal conclusion that there was prejudice at trial (R., vol. 4, pp. 557-59) is erroneous because such prejudice could not have "ensued" from the suppression that the district court found happened 17 years after the end of the trial.

Furthermore, a defendant who knows or should know about the information cannot claim prejudice arising from its non-disclosure. United States v. Gaggi, 811 F.2d 47, 59 (2nd Cir. 1987) ("no *Brady* violation occurs if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence"); Fullwood v. Lee, 290 F.3d 663, 686 (4th Cir. 2002) (*Brady* rule does not compel disclosure of evidence available from other sources); Owens v. Guida, 549 F.3d 399, 415 (6th Cir. 2008) (no *Brady* violation if the defendant "knew or should have known" of facts allowing him to take advantage of exculpatory information); United States v. Barraza Casares, 465 F.3d 327, 334 (8th Cir. 2006) (evidence suppressed under *Brady* only if it "was otherwise unavailable to the defendant"); Pagan v. State, 29 So.3d 938, 948 (Fla. 2009) (evidence "known to the defense" cannot "be found to have been withheld from the defendant"); Williams v. State, 7 A.3d 1038, 1050 (Md. App. 2010) (cases holding that evidence known to the defendant or his counsel is not suppressed as that term is used in *Brady* "are legion"); Cronan ex rel. State v. Cronan, 774 A.2d 866, 881 (R.I. 2001) (evidence not "suppressed" within

meaning of *Brady* if the defendant "knew or should have known" the essential facts permitting him to take advantage of any exculpatory evidence). The state presented evidence that Charboneau, since at least 2002, has been claiming that Tira confided to Charboneau's mother as early as during 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. (R., vol. 3, pp. 559-80 (order dismissing third petition for post-conviction); R., vol. 4, pp. 247-50 (deposition Tr., p. 11, L. 9 – p. 23, L. 19), 251-52 (deposition Tr., p. 28, L. 7 – p. 29, L. 7), 276-82; see also #29042 R., pp. 5-13 (third post-conviction petition), 35-38 (supporting affidavit).) This uncontradicted evidence, ignored by the district court, affirmatively disproves any alleged *Brady* violation, at a minimum creating a material issue of fact.

Even if *Brady* were the correct rubric for analyzing an alleged post-conviction withholding of evidence, the district court's factual findings do not support the legal conclusion of a due process violation. Because the district court's factual findings show neither suppression by the state nor prejudice, as those elements are defined under *Brady*, the district court erred by granting post-conviction relief.

E. The District Court Erred In Its Factual Findings By Shifting The Burden Of Proof To The State And Making Clearly Erroneous Factual Findings

The district court concluded that a conspiracy of mostly unknown persons colluded to prevent, and in fact did prevent, Charboneau from receiving documents related to Tira and Gold. The district court admitted that to do so it

had to leave many questions unanswered, use evidence that did not fit neatly together, and make assumptions from the state's failure to disprove Charboneau's allegations. (R., vol. 3, pp. 139-40; vol. 4, p. 527 n.4.) By doing this the district court relieved Charboneau of the burden of proving his claims, made several clearly erroneous factual findings, and erroneously concluded Charboneau was entitled to post-conviction relief.

1. The District Court Erred When It Concluded That Charboneau Met His Burden Of Proving His Claim That The "Packet" Of Documents Was Assembled By Shedd Or Some Other Unknown Person Involved In A Conspiracy To Keep Documents Away From Charboneau

"Petitions for post-conviction relief are civil proceedings governed by the Idaho Rules of Civil Procedure." Pizzuto v. State, 149 Idaho 155, 159, 233 P.3d 86, 90 (2010). The "petitioner must prove by a preponderance of the evidence the allegations upon which the request for post-conviction relief is based." State v. Abdullah, 158 Idaho 386, ___, 348 P.3d 1, 95-96 (2014). See also Klein v. State, 16 Idaho 792, 796, 331 P.3d 534, 538 (Ct. App. 2014) ("the petitioner must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based"). It is error to shift the burden of proof to a party who does not bear it. Frontier Development Group, LLC v. Caravella, 157 Idaho 589, 598, 338 P.3d 1193, 1202 (2014) (error to shift the burden of proof and putting the responding party in the position of "proving a negative"); Jensen v. Jensen, 128 Idaho 600, 605, 917 P.2d 757, 762 (1996).

The district court violated these standards by relieving Charboneau of the burden of proving his claim that the "packet" of documents (Exhibits 1-14) was

compiled by Shedd or some other unknown member of an amorphous conspiracy, and instead shifting the burden of proof to the state. It acknowledged that its factual resolution of the evidence left "many questions ... unresolved" and that "many parts of this evidentiary puzzle ... do not fit neatly together." (R., vol. 3, p. 140.) The "forgeries and false emails" among the documents, the district court stated, create a "monstrous puzzle." (R., vol. 4, p. 527 n.4.) The court felt that resolving at least some of these questions and puzzles against the state, however, was appropriate "[a]bsent some evidence as to when or how Charboneau could possibly have manufactured Ex. 4 and obtained Shedd's signature on it, and placed all these documents in the unit office for Hiskett to find, and HOPEFULLY deliver." (R., vol. 3, pp. 139-40 (emphasis original).) Review of the evidence under the correct, non-shifted, burden of proof shows that Charboneau did not prove his allegations.

To review the "packet" of documents is to understand that it has only two reasons for existing: to establish Charboneau's claims asserted in the third (and current) post-conviction petition and to show that he should be found to have timely raised those claims.[21] Taking the documents in the order of the dates that appear on them:

9/06/89 Exhibit 14. A document containing what is apparently the handwriting of Tira. The document is a multi-generational copy, meaning it is a

[21] The state is not here conceding or relying on the truth asserted in any of the documents in the "packet." On the contrary, there is ample reason to believe that several documents have been forged or altered (even in addition to the three forgeries found by the district court) and it is the state's position that all the documents constitute hearsay.

copy of a copy of a copy, etc. In the copy presented the declarant claims that Tira provided false information and observed the hiding of evidence at the behest of police officers and prosecutors. Charboneau's expert admitted that "photocopies can be manipulated." (Evid. Tr., p. 348, Ls. 3-4.) "[Y]ou can take [a document] and photocopy it and delete and add different types of items on one generation" and the alteration would be harder to detect in future generations. (Evid. Tr., p. 361, L. 14 – p. 362, L. 9.) Thus, although it contains what appears to be Tira's handwriting, nothing excludes the possibility of alteration of this document.

In a post-script the declarant averred to being in "Bruneau Idaho for a cowboy benefit & street dance where Pinto Bennett's band is providing the music" and that the declarant "talked with Pinto" who "convinced me to write" the document. (Exhibit 14 (Exhibits Part 1, at p. 128).) This document could not have come into existence in the manner described therein because there was no street dance in Bruneau on the date set forth on the letter. (R., vol. 4, pp. 69-92 (Bruneau street dance was held ten days after date on letter).) In addition, Tira was married by that time, living in Nevada, and did not have access to a car. (Evid. Tr., p. 453, L. 7 – p.455, L. 15; p. 467, Ls. 11-14.) Either Tira was lying, or there was some alteration to this document.

9/07/89 Exhibit 5A. An envelope addressed to Judge Becker with a return name of Tira Arbaugh at her parents' address, and a postmark of September 7, 1989, Bruneau, Idaho. With the uncontroverted evidence that changes on copies can be easily hidden by recopying, the state showed it would be easy for anyone

to put a new address and return address on a copy of an envelope with a genuine postmark. (R., vol. 3, pp. 73-93; Exhibits, part 2, pp. 465-67, 499-502 (Severe Depo. Tr., p. 85, L. 15 – p. 93, L. 15; Exhibit 5).) Charboneau's grandfather lived in Bruneau (Evid. Tr., p. 158, Ls. 6-8), so it is likely that he or other family members had access to envelopes with genuine postmarks.

5/18/01 Exhibit 7B. Documentation of checking out law books from the ISCI (the prison in Boise) resource center to pursue a claim of "actual innocence" based on "the letter that [Charboneau] received from the Sheriff." This document on its face shows efforts by Charboneau in May of 2001 to bring the claims he would eventually bring in the third petition for post-conviction relief.

6/03/01 Exhibit 7E. Document allegedly signed by ex-sheriff Larry Gold, used as a basis for the third petition. Charboneau testified that this was the letter referenced in Exhibit 7B, and that he checked out books to pursue a claim based on it about two weeks before receiving the letter because his mother and friends Tina Venable and Lynn Martin had been in contact with Gold and informed Charboneau a letter would be forthcoming. (Evid. Tr., p. 137, L. 16 – p. 143, L. 7.)

6/17/01 Exhibits 7A and 9. Respectively a concern form to the ISCI paralegal, Ms. Davis, and an access to courts request. The yellow copy would have been Charboneau's (although part of that is covered by the exhibit sticker) indicating that this was a document actually in Charboneau's possession in 2001.

6/18/01 Exhibit 3. An ISCI resource document originally attached to a packet of forms to file a state habeas corpus action. Charboneau admitted that

he received this original document with the packet. (Evid. Tr., p. 144, L. 6 – p. 145, L. 8.) Charboneau offered no explanation for how this document left his possession. The most obvious answer is that Charboneau himself put this document in the envelope (Exhibit 1) with the other documents that form the "packet."

11/05/01 Exhibit 10. An ISCI access to courts request.

11/06/01 Exhibit 7F. Front page only of a petition for writ of habeas corpus with a filing stamp of November 6, 2001.

11/13/01 Exhibit 8. Second document apparently signed by Larry Gold. As set forth below in more detail, this document is dated a year before Charboneau's transfer to ICIO (Orofino prison) where Shedd worked as the paralegal. Charboneau offered no evidence of how this letter would have been intercepted by Shedd. (See generally R., vol. 3; Evid. Tr.)

12/30/01 Exhibit 6. Envelope from federal district court addressed to Charboneau.

Several significant events occur between December 30, 2001, and December 5, 2002, the date on the next sequential document in the "packet." On May 3, 2002, Charboneau filed his third petition for post-conviction relief based on the first Gold document (Exhibit 7E) and claimed that Tira Arbaugh had informed Charboneau's family that she had provided false testimony under pressure. (#29042 R., pp. 5-14.) The petition was dismissed on September 30, 2002. (#29042 R., pp. 90-92.)

On November 24, 2002, Charboneau was transferred to ICIO (Orofino), where Shedd worked as a paralegal. (Evid. Tr., p. 158, Ls. 9-11; p. 266, Ls. 15-16.) This necessarily means that Shedd could not have intercepted any documents intended for Charboneau prior to this time. Exhibit 7E, the document bearing what appears to be Larry Gold's signature dated June 3, 2001, was presented in relation to Charboneau's third post-conviction petition (#29042 R., p. 48), and was obviously not intercepted. Any finding that Shedd (or anyone else) intercepted Exhibit 8, the document bearing what appears to be Larry Gold's signature dated November 13, 2001, is unsupported by any evidence.

Furthermore, to the extent the district court concluded that Shedd gathered the documents related to Charboneau's efforts to raise the claims asserted in the third petition, such is clear error. First, Shedd had no motive to gather documentary evidence that would assist Charboneau to claim that he made reasonable efforts to bring his post-conviction claims in a timely manner while Charboneau obviously would. Moreover, Exhibit 3 is an original document that Charboneau obtained in conjunction with forms to bring a habeas corpus claim. Charboneau presented no evidence how this document got out of his possession and into Shedd's. The only possible conclusion from the evidence is that the compiler of the packet was Charboneau.

12/05/02 Exhibit 7. Envelope with Charboneau's name, inmate number and a notation to "forward to ICIO." There is a notation on the back, "Recieved [sic] 01/06/03 A. DeWayne Shedd." Nothing in this exhibit is inconsistent with the

normal processing of "transport mail" (mail forwarded or delivered within IDOC with the transportation of prisoners). (Evid. Tr., p. 276, L. 3 – p. 277, L. 22.)

6/27/03 Exhibit 4. Handwritten document purporting to memorialize instructions from Deputy Attorney General Tim McNeese to DeWayne Shedd to monitor Charboneau's mail and seize any letter from Larry Gold or documents "depicting the name Tira Arbaugh."

9/23/03 Exhibit 1. Envelope that Corporal Hiskett handed Charboneau. The date appears with the apparent signature of A. DeWayne Shedd on back. The front contains two notations, "Charboneau #22091 C-2" and "Legal Documents." Like Exhibit 7, nothing in this exhibit is inconsistent with the normal processing of "transport mail."

11/14/04 Exhibit 7C. Printout of what appears to be an e-mail from DeWayne Shedd to William Unger (in response to a prior email from Unger to Shedd). The district court found, on the basis of overwhelming evidence, that **this document is a forgery**. (R., vol. 3, pp. 138-40; vol. 4, p. 527 n.4.)

11/15/04 Exhibit 7D. Printout of what appears to be an e-mail from DeWayne Shedd to William Unger (in response to a prior email from Unger to Shedd). The district court found, on the basis of overwhelming evidence, that **this document is a forgery**. (R., vol. 3, pp. 138-40; vol. 4, p. 527 n.4.)

Undated Exhibit 5. Document purporting to be a declaration that Court Clerk Cheryl Watts had the original letter purportedly written by Tira Arbaugh and sent to Judge Becker. It bears what appears to be the signature of former

Jerome County Sherriff Deputy, Orville Balzer.[22] The district court found, based on the parties' stipulation, that **this document is a forgery**. (R., vol. 3, p. 126.)

Exhibits 4, 5, 7C and 7D are all, on their face, evidence that Court Clerk Cheryl Watts, Shedd, McNeese, and Unger were working to and did in fact intercept documents related to Tira Arbaugh and Larry Gold. **Three of these documents (Exhibits 5, 7C and 7D) are known forgeries.** The district court's conclusion that Exhibit 4 is genuine is contrary to the evidence and thus clearly erroneous. Regardless, whoever was compiling these documents was compiling evidence consisting of wholly or mostly forged documents to benefit Charboneau in relation to the claims he asserted in his third (and, ultimately, present) petition.

The Idaho Supreme Court reversed the dismissal of the third petition on November 23, 2004. Charboneau v. State, 140 Idaho 789, 102 P.3d 1108 (2004). The case was remanded and attorney Greg Fuller appeared on Charboneau's behalf. (#32120 R., pp. 2 (notice of appearance was filed on 3/15/05), 19 (order discharging attorney Greg Fuller on April 29, 2005).)

5/03/05 Exhibit 2. Concern form by Charboneau requesting Shedd to check mail logs from January to April 29, 2005, to determine if attorney Greg Fuller had sent him mail. Shedd responded that such logs would be kept in the mail room and Charboneau should check there. Notably, the document purports that this is the original concern form which was returned to Charboneau. (Exhibit 2 (noting that white original was to be returned to the offender).)

---

[22] Deputy Balzer testified at Charboneau's criminal trial. (Trial Tr., vol. 4, p. 979, Ls. 8-24.)

The district court dismissed Charboneau's third petition (for the second time) on July 12, 2005. (#32120 R., pp. 43-64.) Charboneau's appointed counsel filed a notice of appeal on July 19, 2005. (#32120 R., pp. 99-03.)

1/19/06 Exhibit 11. Copy of letter purportedly to attorney Greg Silvey from Charboneau regarding the brief he filed on Charboneau's behalf on appeal. Greg Silvey represented Charboneau on the appeal of his third petition. Charboneau v. State, 144 Idaho 900, 901, 174 P.3d 870, 872 (2008).

Shedd was transferred from ICIO to SICI in Boise in May of 2007.[23] (Evid. Tr., p. 266, Ls. 15-20.) The Idaho Supreme Court affirmed the dismissal of Charboneau's third petition on January 8, 2008. Charboneau v. State, 144 Idaho 900, 174 P.3d 870 (2008).

3/31/08 Exhibit 12. Copy of letter apparently to Idaho Attorney General Lawrence Wasden complaining that on March 28, 2008, the prison staff interfered with Charboneau's ability to file an appeal from a dismissal of his fourth post-conviction case. (Docket number 35193.)

The documents (Exhibits 2-14) were found in a single envelope with Charboneau's name on it (Exhibit 1) in the guard station next to the day room on Charboneau's tier on March 18, 2011, and delivered to Charboneau. (Evid. Tr., p. 21, L. 1 – p. 25, L. 5; p. 68, L. 19 – p. 69, L. 21; p. 179, L. 25 – p. 181, L. 2; p.

[23] How the "packet" migrated from Shedd's office in another part of the building to the guardroom almost four years after Shedd left is one of the mysteries unresolved by any evidence. However, the evidence does show that Charboneau was at ICIO and apparently still in possession of at least some of the documents in the "packet" from 2007 through 2011.

186, Ls. 21-25; p. 487, L. 3 – p. 488, L. 19; p. 492, L. 4 – p. 495, L. 18; p. 497, L. 15 – p. 498, L. 2; p. 528, L. 7 – p. 530, L. 2.)

Far from showing that Shedd collected these documents, the evidence shows he could not have. The dates on nine of the documents precede Charboneau's transfer to ICIO where Shedd was working. At least one document is dated after Shedd left ICIO. Several of the documents were documents actually in Charboneau's possession, with no evidence of where, when, why or how Shedd obtained them from Charboneau. In addition, several of the documents are known forgeries created for the sole purpose of providing evidence of Charboneau's claims as asserted in the third and current petitions for post-conviction relief. The only viable suspect for who collected these documents is Charboneau himself.

That Charboneau collected the documents in the packet including Exhibit 14 is further bolstered by evidence that his family members knew about and took action in relation to Exhibit 14 before March 18, 2011. Frederick Bennett, a friend of Charboneau's family, testified that at the request of someone associated with Charboneau he signed an affidavit on February 3, 2011. (R., vol. 4, p. 213 (Bennet Depo. Tr., p. 25, L. 11 – p. 28, L. 20).) That affidavit states he received a copy of a seven-page letter written by Tira Arbaugh "before she mailed it to Philip Becker, Fifth District Judge." (R., vol. 4, p. 238.) Although Bennett claimed the contents of the affidavit were not true (R., vol. 4, pp. 213-14 (Bennet Depo. Tr., p. 28, L. 21 – p. 29, L. 10)), someone associated with Charboneau

knew about Exhibit 14 at least 43 days before Corporal Hiskett delivered the packet of documents to Charboneau.

Likewise, on February 21, 2011, 18 days before Charboneau acquired the envelope full of documents from Corporal Hiskett, Charboneau's mother, Betsy Charboneau, wrote a letter to Jerome County Prosecutor John Horgan in which she stated she "just recently learned that Tira also confessed this information"—the same information she had told Betsy several years previously—"in a letter that she had written to Judge Becker." (R., vol. 3, p. 294.) Tira wrote the letter in 1989, according to Betsy Charboneau, the same date that appears on Exhibit 14. (Id.) Betsy wrote another letter to Deputy Rick Cowan on March 9, 2011, two days before Charboneau claims he first gained possession of Exhibit 14. (R., vol. 4, p. 297.) In the letter she claimed she had a "happenstance encounter" with a man who said "he was in possession of a copy of a letter that Tira Arbaugh had written to Judge Becker in 1989," and promised more information "in the near future." (R., vol. 4, p. 300.) The record establishes that two people close to Charboneau created written statements detailing knowledge of the existence of Exhibit 14 days and weeks before that document was purportedly handed to Charboneau by Corporal Hiskett.

Interpreting all this evidence as proving Charboneau's claims leaves "many questions ... unresolved" because the evidence does "not fit neatly together," while the "forgeries and false" evidence create a "monstrous puzzle." (R., vol. 3, p. 140; vol. 4, p. 527 n.4.) There are no unresolved mysteries created by concluding that Charboneau, with the help of family and friends, gathered the

documents in the packet, forging several of them. Only by shifting to the state the burden of proof of the questions left unanswered by Charboneau's theory did the district court rule in Charboneau's favor. (R., vol. 3, pp. 139-40.) Applying the correct standard shows that Charboneau did not meet his burden of proof.

2. The Evidence Does Not Support A Finding That Charboneau's Mail Was Intercepted

The only evidence in the record even purporting to show that Shedd successfully intercepted Exhibits 8 and 14 are two printouts of emails (Exhibits 7C and 7D) that are known forgeries. The district court's factual findings that: (1) "*Someone* sent or delivered [Exhibit 14] to Charboneau ... sometime between December 2002 and September 2003"; (2) Exhibit 14 "arrived at ICIO between June of 2003 and September of 2003"; (3) "It was mailed or addressed to Charboneau"; and (4) "It was intentionally intercepted by Shedd at the direction of others" (R., vol. 3, pp. 134-35 (emphasis original)) are not supported by any evidence. These findings are clearly erroneous.

Not only is there no evidence supporting these findings, the contrary evidence is legion. When mail at ICIO arrives, a guard opens the mail crates to make sure they are safe and then takes them to central control. (Exhibits part 1, p. 398 (Layne Depo. Tr., p. 39, Ls. 12-17); p. 944 (Unger Depo. Tr., p. 69, L. 15 – p. 70, L. 22).) Another officer stamps the mail received and then processes it by opening it, inspecting it for contraband, and sorting it by cell block. (Exhibits part 1, p. 398 (Layne Depo. Tr., p. 39, Ls. 17-24), p. 944 (Unger Depo. Tr., p. 70, L. 23 – p. 71, L. 3).) Another officer on a different shift again checks the mail then delivers it when offenders, notified they have mail, come to the tier office.

(Exhibits part 1., p. 399 (Layne Depo. Tr., p. 40, Ls. 1-20), p. 945-96 (Unger Depo. Tr., p. 74, L. 12 – p. 78, L. 23).) Shedd, a paralegal, played no role in this process. (Evid. Tr., p. 268, Ls. 1-7.) He would had to have organized "somewhere around twenty people" to maintain a conspiracy to intercept certain documents coming to an inmate through the mail. (Exhibits part 1, p. 323 (Carlin Depo. Tr., p. 60, Ls. 1-24).) There is no evidence that Shedd could have, much less did, create such an organization.

The district court's factual findings that Exhibits 8 and 14 were sent to Charboneau and intercepted by Shedd in a particular range of time are clearly erroneous and constitute reversible error.

F. Conclusion

The district court's finding of a *Brady* violation fails for three reasons. First, the *Brady* doctrine requires the state to disclose exculpatory evidence in its possession prior to trial, and does not govern access to exculpatory evidence after a final conviction. The *Brady* doctrine therefore did not apply to Charboneau's claims of suppression of evidence after the trial.

Second, even if the *Brady* doctrine were the correct legal standard, its application to the facts found shows no *Brady* violation. Specifically, the district court found suppression only by correctional authorities, not any prosecutor or law enforcement officer who investigated the case as required under *Brady*. In addition the findings of the court do not support a conclusion that post-trial suppression of a document that did not even exist at the time of trial could possibly have adversely affected the outcome of the trial.

Third, the district court's factual findings rely on shifting the burden of proof to the state and assuming dates and actions without any evidentiary support. No reasonable view of the evidence supports the court's findings Shedd could have, much less did, intercept specific documents in a specific range of time. For any or all of these reasons the district court's judgment should be reversed and Charboneau's petition dismissed with prejudice.

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

During cross-examination of Marc Haws at the evidentiary hearing, Charboneau's counsel asked about Mr. Haws' "prosecution of Mr. Paradis." (Evid. Tr., p. 436, Ls. 10-12.) The state objected on relevance grounds. (Evid. Tr., p. 436, Ls. 13-14.) Charboneau's counsel represented that he wished to "ask Mr. Haws if he was involved in any kind of concealment of exculpatory evidence from the Paradis prosecution." (Evid. Tr., p. 436, Ls. 15-18.) The state expanded its objection to include I.R.E. 403 and 404(b). (Evid. Tr., p. 436, Ls. 19-20.) Counsel for Charboneau stated he believed Haws was involved in a *Brady* violation in the *Paradis* case and wanted to "inquire whether [Haws] was involved in similar conduct in the Charboneau case." (Evid. Tr., p. 436, L. 23 – p. 437, L. 2.) The judge asked, "Isn't this just an offer of propensity evidence, did it once, did it twice?" (Evid. Tr., p. 437, Ls. 7-8.) Charboneau's counsel responded, "Yes." (Evid. Tr., p. 437, L. 9.) The district court sustained the

objection. (Evid. Tr., p. 438, Ls. 4-5.) Because of that ruling, no evidence related to that topic was introduced by either party. (See generally Evid. Tr.)

Despite excluding all evidence regarding Mr. Haws' prosecution of Mr. Paradis, the district court in its findings of fact and its order granting summary judgment repeatedly refers to the facts of the *Paradis* case. (R., vol. 3, p. 137; R., vol. 4, p. 542.) The district court erred by conducting an extra-judicial investigation into the facts of the *Paradis* case and considering on an *ex parte* basis evidence it ruled inadmissible.

B. Standard Of Review

"Due process issues are generally questions of law." Idaho Historic Preservation Council v. City of Council of the City of Boise, 134 Idaho 651, 654, 8 P.3d 646, 649 (2000).

C. The District Court Erred When It Based Its Findings And Conclusions Upon Evidence Excluded From The Hearing As Inadmissible

A basic requirement of a fair trial is that the "verdict must be based upon the evidence developed at the trial." Turner v. Louisiana, 379 U.S. 466, 472 (1965) (jury verdict in criminal trial tainted because deputies with charge of jury were also key witnesses at trial); Irvin v. Dowd, 366 U.S. 717, 722 (1961) (jurors exposed to extensive pre-trial information not unbiased). Failing to "confine its decision to the record produced at the public hearing ... violates procedural due process of law." Idaho Historic Preservation Council, 134 Idaho at 654, 8 P.3d at

649.[24] A decision that "deviates from the public record" is "essentially ... a second fact-gathering session without proper notice, a clear violation of due process," because it deprives a party of the "opportunity to rebut any evidence" received outside the record. Id. Findings "based on matters outside the record must be reversed as unsupported by substantial, competent evidence or as arbitrary and capricious." Laurino v. Board of Professional Discipline, 137 Idaho 596, 601, 51 P.3d 410, 415 (2002). See also Roll v. City of Middleton, 115 Idaho 833, 837, 771 P.2d 54, 58 (Ct. App. 1989) (where jury has had improper ex parte communications verdict must be vacated if "prejudice reasonably could have occurred").

Although the judge ruled at the hearing that evidence regarding any *Brady* claim in the *Paradis* case was inadmissible (Evid. Tr., p. 436, L. 10 - p. 438, L. 5), in making its ruling it relied on the facts underlying the *Paradis* case as evidence favorable to Charboneau (R., vol. 3, p. 137; R., vol. 4, p. 542). The district court necessarily conducted its own extrajudicial investigation into the facts of the *Paradis* case because no such evidence was put on the record, having been ruled inadmissible by the district court. By considering inadmissible evidence it gathered outside of the record the district court committed reversible error.

[24] The Court was applying the standard applicable to a "governing body" sitting in a "quasi-judicial capacity". Idaho Historic Preservation Council, 134 Idaho at 654, 8 P.3d at 649. This standard, not surprisingly, also applies "to courts." Eacret v. Bonner County, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004).

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

A. Introduction

Tim McNeese was a Deputy Attorney General who represented the Idaho Department of Correction between 1984 and 2006. (Evid. Tr., p. 439, Ls. 9-22.) During cross-examination Charboneau's counsel inquired about whether Mr. McNeese had been sanctioned in "the Gomez case." (Evid. Tr., p. 442, Ls. 17-21; p. 443, Ls 19-20; p. 444, Ls. 11-12.) The state objected, in part on the basis of I.R.E. 404(b). (Evid. Tr., p. 443, Ls. 21-22; p. 444, Ls. 11-14.) The district court overruled the objection. (Evid. Tr., p. 444, Ls. 15-20.) Likewise, during the testimony of DeWayne Shedd, the prison paralegal, the district court made the same ruling, concluding the evidence did not show character but instead showed only "a similar event" of confiscation of inmate documents "during the course of his employment." (Evid. Tr., p. 247, L. 6 – p. 249, L. 21.) It then considered the *Gomez* case in relation to both Shedd's and McNeese's alleged acts in this case. (R., vol. 3, pp. 120, 137.) The district court erred because evidence of the conduct of McNeese and Shedd in relation to the *Gomez* case was not relevant for any proper purpose.

B. Standard Of Review

Whether evidence is relevant is a question of law reviewed de novo. State v. Atkinson, 124 Idaho 816, 819, 864 P.2d 654, 657 (Ct. App. 1993) (citations omitted). However, the abuse of discretion standard applies to the district court's determination that the probative value of the evidence is not

substantially outweighed by unfair prejudice. State v. Grist, 147 Idaho 49, 51, 205 P.3d 1185, 1187 (2009).

C. Evidence Of The Conduct Of Shedd And McNeese In Relation To The *Gomez* Case Was Irrelevant To Any Proper Purpose

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in an attempt to show he or she acted in conformity with that character. State v. Grist, 147 Idaho 49, 52, 205 P.3d 1185, 1188 (2009). However, such evidence is admissible for other purposes, including proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. I.R.E. 404(b); State v. Phillips, 123 Idaho 178, 845 P.2d 1211 (1993); State v. Gauna, 117 Idaho 83, 87, 785 P.2d 647, 651 (Ct. App. 1989). Evidence of prior bad acts is admissible if (a) it is relevant to prove some issue other than the person's character, and (b) its probative value for the proper purpose is not substantially outweighed by the probability of unfair prejudice associated with character. State v. Cross, 132 Idaho 667, 670, 978 P.2d 227, 230 (1999). The second prong of this test only excludes evidence if the danger of unfair prejudice substantially outweighs its probative value. State v. Sheahan, 139 Idaho 267, 275-76, 77 P.3d 956, 964-65 (2003).

At the hearing, the district court, over the state's objection, allowed the admission of evidence that McNeese had been sanctioned by a court for acquiring a letter supplied to him by Shedd (who found it in the law library) that was ultimately found to be covered by the attorney-client privilege. (Evid. Tr., p. 442, L. 17 – p. 446, L. 19.) Charboneau's counsel did not articulate, nor did the

district court find, that the evidence was relevant to any issue other than proving actions in conformity with character. The evidence is cited rather prominently by the district court in the evidence related to Shedd (R., vol. 3, p. 120) and also is mentioned in relation to McNeese as evidence of whether he was involved in suppressing Exhibit 14 (R., vol. 3, p. 137). Again, the district court articulated no issue other than conformance with character for which this evidence was considered. Because this evidence was not relevant to any issue but propensity, and was in fact considered as propensity evidence by the district court, the district court erred.

VI.
The State Requests An Order Allowing It To Immediately Take Charboneau Into Custody

The district court ordered that Charboneau be released upon posting $20,000 cash or surety bond. (R., vol. 4, p. 660.) It put no conditions on the bond or release. (Id.) The state requests that if any reversible error is found, that this right to bond be vacated.

Moreover, the state requests that bond be immediately revoked upon issuance of an opinion and the state's authority to take Charboneau into custody reinstated without delay. This Court's opinion would not become final for at least 21 days following issuance of its opinion. I.A.R. 38(b). The state submits that giving Charboneau 21 days' notice that his bond will be revoked creates an undue risk of flight, even if the matter is remanded for further proceedings but especially if this Court concludes that he is not entitled to post-conviction relief. Thus, the state requests this Court to exercise its plenary jurisdiction and order

that the bond provision in the judgment be vacated and that Charboneau be brought back into custody either before or immediately upon issuance of its opinion. See Izaguirre v. R&L Carriers Shared Services, LLC, 155 Idaho 229, 232, 308 P.3d 929, 932 (2013) (Court may exercise plenary jurisdiction to reach issues outside appellate rules).

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 20th day of August, 2015.

KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 20th day of August, 2015, served a true and correct copy of the attached APPELLANT'S BRIEF by causing a copy addressed to:

ERIK R. LEHTINEN
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd