10-18-2016

Charboneau v. State Appellant's Reply Brief Dckt. 43015

IN THE SUPREME COURT OF THE STATE OF IDAHO

JAIMI DEAN CHARBONEAU,	)	
	)	**NO. 43015**
Petitioner-Respondent-Cross Appellant,	)	**JEROME COUNTY NO. CV 2011-638**
	)	
v.	)	
	)	
STATE OF IDAHO,	)	**CROSS APPELLANT'S REPLY BRIEF**
	)	
Respondent-Appellant-Cross Respondent.	)	
	)	

REPLY BRIEF OF CROSS APPELLANT

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

HONORABLE ROBERT J. ELGEE
District Judge

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STATEMENT OF THE CASE

Nature of the Case

More than 30 years after being sentenced to death for the murder of his ex-wife, the district court granted Jaimi Charboneau's successive petition for post-conviction relief and ordered a new trial. However, while the district court recognized it would be impossible for Mr. Charboneau to have a fair retrial, it denied his motion to bar further prosecution.

Mr. Charboneau cross appealed, contending that rather than just granting him a new trial, the district court should have barred the State from re-trying him.

The present brief addresses only Mr. Charboneau's cross appeal issue. The State has proffered multiple reasons why it believes the district court was correct to have denied Mr. Charboneau's motion to bar further prosecution. However, for the reasons set forth below, the State's arguments are misplaced.

Statement of Facts and Course of Proceedings

The factual and procedural histories of this case were set forth in Mr. Charboneau's Respondent-Cross Appellant's Brief[1] and, therefore, are not repeated herein.

[1] For the sake of brevity, Mr. Charboneau's Respondent-Cross Appellant's Brief is referenced herein as "Cross Appellant's Brief," and cited as "Cross App. Br." The State's Reply-Cross Respondent's Brief is referenced as "Reply Brief," and cited as "Reply Br."

ISSUES

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

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

III. Did the district court err in finding a violation of Mr. Charboneau's due process rights under *Brady v. Maryland*[2]?

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

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

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

VII. Did the district court err in declining to bar further prosecution (*i.e.*, retrial) of Mr. Charboneau? Alternatively, should this Court bar further prosecution under its supervisory authority?[3]

[2] 373 U.S. 83 (1963).

[3] This is the only issue discussed in the present brief.

ARGUMENT

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

A. Introduction

In his Cross Appellant's Brief, Mr. Charboneau argued the district court abused its discretion in denying his motion to bar further prosecution for two reasons: first, due to the loss or destruction of evidence since his original trial more than 30 years ago, he could not possibly receive a fair re-trial; second, subjecting Mr. Charboneau to a re-trial following egregious misconduct on the part of the State would violate the double jeopardy guarantee of the Idaho Constitution. (Resp. Br., pp.158-73.) Alternatively, but for the very same reasons, he argued this Court should invoke its supervisory authority to bar further prosecution. (Resp. Br., pp.174-75.)

In response, the State urges this Court to affirm the district court's order. (*See* Reply Br., pp.61-69.) Initially, it attempts to impose certain procedural bars. (Reply Br., pp.62-63.) Thereafter, it argues Mr. Charboneau's arguments fail on their merits. (Reply Br., pp.63-68.)

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

B. Mr. Charboneau Did Not Waive His Argument That The District Court Abused Its Discretion In Denying His Motion To Bar Further Prosecution

The State seeks to impose two procedural bars to this Court's consideration of Mr. Charboneau's arguments concerning the district court's denial of his motion to bar further prosecution. It argues first that when Mr. Charboneau's case concluded in 2015, he was foreclosed from obtaining an order barring further prosecution because he did

not *specifically* request that extraordinary remedy in his 2011 amended petition for post-conviction relief. (Reply Br., p.62.) Alternatively, the State contends that Mr. Charboneau waived his appellate argument on this issue because he cited the wrong authority in his opening brief on appeal. (Reply Br., pp.62-63.) Neither argument is availing.

1. The Requested Relief Was Sufficiently Pled

The State makes a perfunctory argument that, because Mr. Charboneau's amended petition requested that the district court "vacate the underlying conviction and/or sentence," he received the relief he requested and, therefore was prohibited from seeking further relief in the form of an order barring his re-trial. (Reply Br., p.62 (quoting R. Vol. 1, p.140).) It provides minimal authority for this argument. (Reply Br., p.62 (citing *Hull v. Giesler*, 156 Idaho 765, 777 (2014).)

Certainly, the Uniform Post-Conviction Procedures Act ("UPCPA") requires that a petitioner seeking post-conviction relief "clearly state the relief desired," I.C. § 19-4903. Nonetheless, there is no reason to believe that this requirement of the UPCPA is so strict as to foreclose a court from granting appropriate relief just because the relief requested was not as thorough and specific as it could have been.[4]

[4] This is especially true in cases such as this one—where the primary need for the additional relief could not reasonably have been known to the petitioner at the outset of the case. Indeed, it was not until this case was well underway, and Mr. Charboneau was granted leave to conduct discovery, that he came to find out just how much evidence had been lost or destroyed. For example, while Mr. Charboneau certainly knew that Tira had passed away, he clearly did not know that the original investigative file, including a recording of an interview with Tira and certain important forensic material, had disappeared (*compare* R. Vol. 1, pp.415-16 (granting Mr. Charboneau access to all of the investigative and prosecutorial records from his criminal case), pp.430-39, 594-99 (March 20, 2012 and December 31, 2012 affidavits from Mr. Charboneau's investigator

Such an interpretation of section 19-4903 is certainly not warranted by the authority cited by the State. In *Hull v. Giesler*, the Idaho Supreme Court actually construed the obligation to plead civil remedies fairly liberally. *See* 156 Idaho at 777. It held that where a claim is tried by consent of the parties, the entire range of potential remedies for that claim becomes possible. It reasoned that, "Even when a possible remedy is not specifically requested, *a party can be on notice when that remedy follows from an issue* tried by express or implied consent." *Id*. at 777 (emphasis added). In other words, it held that the *issues* pled or tried by consent dictate the appropriate

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alleging that after initially being denied access to the State's file in violation of the district court's order, he was ultimately granted access to a file containing only transcripts of the court proceedings in Mr. Charboneau's original case, and also detailing his conversations with law enforcement personnel who informed him they could not locate the original investigative file); R. Vol. 2, pp.764-69 (June 14, 2013 motion to compel production of, among other things, the original investigative files), pp.774-75 (State's May 13, 2013 acknowledgement that the investigative files are missing, and that it does not know how they were lost or destroyed), pp.519-20 (State's July 10, 2013 response to motion to compel production, acknowledging the loss or destruction of the investigative file from the original criminal case); R. Vol. 3, pp.253-54 (State's discovery response of July 14, 2014, acknowledging it could not locate the report from Tiffnie Arbaugh's polygraph examination, the latent fingerprint cards for the print on the supposed murder weapon, or the results of a compositional bullet analysis), *with* Tr. Vol. 1, pp.134-40 (October 25, 2011 amended petition for post-conviction relief)), or that the Calamity Jane rifle buried by the Arbaugh family had been lost when El Rancho 93 was excavated for purposes of re-development (*compare* R. Vol. 1, p.75 (July 6, 2010 email to Mr. Charboneau's sister concerning her desire to search El Rancho 93 for the rifle), pp.76-77 (June 6, 2011 contractor's estimate for searching the El Rancho 93 property with metal detectors), pp.103-04, 106-10, 121-22 (July 21, 2011, September 8, 2011, and October 25, 2011 motions seeking an order allowing Mr. Charboneau's contractor to search the El Rancho 93 property), pp.311-12 (December 8, 2011 order denying, as premature, Mr. Charboneau's motion for access to the El Rancho 93 property), pp.399-400 (renewed motion seeking access to the El Rancho 93 property); Tr. Vol. 3, pp.242-43 n.6 (August 4, 2014 representation of counsel that the search of the El Rancho 93 "was fruitless as the property and structures had been completely excavated) *with* Tr. Vol. 1, pp.134-40 (October 25, 2011 amended petition for post-conviction relief)). Thus, when he filed his original and amended petitions in 2011, Mr. Charboneau could not have known that it would be impossible for him to have a fair retrial and, therefore, that this would be a case calling for the extraordinary remedy of barring re-trial.

remedy or remedies. Thus, when a claim is properly before the court, the whole range of remedies appropriate to that claim is also before the court. *See id*. Applying *Hull* to this case, because an order barring further prosecution is a remedy appropriate for the claim pled, that remedy need not have been specifically pled in the original or amended petition. *See id*.; *see also O'Connor v. Harger Constr., Inc.*, 145 Idaho 904, 911 (2008) (holding in a breach of contract action that where a party was "on notice that rescission was a possible remedy" because the other party had argued a "mutual mistake" theory, that remedy could properly be granted by the trial court even though it had never been pled).

Furthermore, even if a post-conviction petitioner's potential remedies may be constrained by the prayer(s) for relief in his petition (as opposed to the violation(s) found), Mr. Charboneau's prayer for relief in this case was not so narrowly drawn as to prohibit an order barring his re-trial. Mr. Charboneau's amended petition asked the district court to "vacate the underlying conviction and/or sentence"; it did not specify what further relief should obtain thereafter—for example, whether Mr. Charboneau should be re-tried or, instead, whether re-trial should be barred and the case dismissed. (R., p.140.) Indeed, at one point Mr. Charboneau recognized that the relief most appropriate in this case could be subject to debate as the case evolved. In his amended petition, not only did he ask that his "conviction and/or sentence" be vacated, but he also incorporated by reference his original *pro se* petition (*see* R., Vol. 1, p.134), which requested "such other relief as this Court deems appropriate and just." (R. Vol. 1, p.22.) Thus, contrary to the State's implication, Mr. Charboneau's pleadings did not

constrain his scope of permissible relief to a re-trial; they left open the possibility of the extraordinary relief ultimately requested.

Finally, it should be noted that the State purports to be prejudiced by Mr. Charboneau not having specifically pled, at the outset of his case in 2011, the extraordinary remedy of an order barring his re-trial. (Reply Br., p.62.) It complains that because Mr. Charboneau did not seek extraordinary relief in his initial pleadings, "the state did not litigate other potential remedies." (Reply Br., p.62.) This argument is meritless. The fact is the State *could have* litigated the remedy ultimately sought, but *chose* not to do so. Mr. Charboneau filed his motion to bar further prosecution on March 31, 2015 (R. Vol. 4, pp.599-600), just eight days after the district court entered its order finding a *Brady* violation and ruling that he was entitled to a new trial (*see* R. Vol. 4, pp.523-51), and more than two weeks before any final judgment was entered in the case (*see* R. Vol. 4, pp.659-61). The State could have responded to the substance of Mr. Charboneau's motion and made whatever argument it has as to why the relief requested might be inappropriate; however, it chose not to do so. Instead, the State, in its apparent haste for an appeal to get underway, initially filed a motion asking the district court to vacate a proposed April 10, 2015 hearing (during which time Mr. Charboneau's motion could have been heard)[5] and enter judgment "forthwith."[6]

[5] It appears that when the State filed this response, the hearing had not yet been properly noticed. The record contains a motion to have Mr. Charboneau transported to court for an April 10, 2015 hearing (R. Vol. 4, p.602); however, it contains no notice of hearing filed during the relevant timeframe. In its filing, the State acknowledged that a notice of hearing had been filed, but asserted it had not been properly served. (*See* R. Vol. 4, p.604.)

Ultimately though, the lack of proper notice became a non-issue, as Mr. Charboneau later properly "noticed up" a hearing on his motion to bar further

(R. Vol. 4, pp.604-06.) In that motion, the State briefly addressed Mr. Charboneau's motion, but only to argue the district court should not even entertain it.[7] (R. Vol. 4, p.605.) It failed to address the merits of the motion. (*See* R. Vol. 4, p.604-06.) Likewise, at the hearing on Mr. Charboneau's motion, the State declined to address its merits.[8] (*See* 4/10/15 Tr., p.7, L.5 – p.8, L.18.) Where the State has *chosen* not to address the merits of an issue that was squarely before the district court, it cannot now claim to have been unfairly denied an opportunity to address the merits of that motion.

Despite the State's complaints about the fact that the extraordinary remedy ultimately requested in this case was not specifically pled when the case was initiated, this Court can, and indeed should, consider whether the district court abused its discretion in declining to grant that remedy.

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prosecution. (*See* R. Vol. 4, p.612.) That hearing was, in fact, held on April 10, 2015. (*See generally* 4/10/15 Tr.)

[6] Shortly after filing its motion with the district court, the State also filed a petition for a writ of mandate asking the Idaho Supreme Court to order the district court to immediately enter final judgment. *See* Expedited Petition for Writ of Mandate, *State v. District Court of the Fifth Judicial District*, No. 42986, pp.1, 7-9 (Apr. 7, 2015). That petition was denied as to the State's request for an order commanding the district court to immediately enter judgment. Order, *State v. District Court of the Fifth Judicial District*, No. 42986, p.1 (Apr. 9, 2015). Further, the Court made it clear the district court was free to consider any matters permitted under I.C. § 19-4907 before entering judgment. *Id*.

[7] The State argued that Mr. Charboneau's motion should not be considered because, not only had it not been properly noticed for hearing, but,

> This Court has already granted Charboneau the relief [he] requested. That Charboneau now wishes to change his request for relief from what he pled and requested by is not grounds to re-open the legal issues resolved in the Decision. To do so would require a whole new set of legal and evidentiary proceedings.

(R. Vol. 4, p.605.)

[8] The district court did not invite the State to address the substance of Mr. Charboneau's motion, and it quickly made it clear that it was going to deny the motion. (*See* 4/10/15 Tr., p.7, L.5 – p.8, L.18.) Thus, the State's silence was likely a tactical decision. Nevertheless, it was still the State's decision.

2. The Requested Relief Was Sufficiently Briefed On Appeal

The State also argues that, although Mr. Charboneau cited ample authority in support of his claim that the district court abused its discretion in denying his motion to bar further prosecution, because he failed to cite one specific case, he has waived his claim for purposes of this appeal. (Reply Br., pp.62-63.) This "waiver" argument, is without merit.

In his Cross Appellant's Brief, Mr. Charboneau argued that, because the UPCPA is open-ended in terms of the relief that may be granted in a post-conviction case, a district court granting post-conviction relief may enter an order barring further prosecution. (Resp. Br., pp.158-60.) In presenting this argument, Mr. Charboneau analogized Idaho's post-conviction proceedings with federal *habeas corpus* proceedings, and he asked this Court to hold that, as with the federal trial courts in habeas proceedings, Idaho's trial courts can bar further prosecution under extraordinary circumstances, including situations where a re-trial would violate the petitioner's constitutional rights. (*Id*.) Implicit in this argument was an acknowledgement that Mr. Charboneau was unaware of any Idaho precedent on this precise issue. (*See id*.) Nevertheless, he cited ample authority—the text of the UPCPA and a host of federal cases—in support of his contentions. (*See id*.)

In response, the State claims that Mr. Charboneau cited the wrong authority, thereby waiving his argument on appeal. (Reply Br., pp.62-63.) In particular, the State takes issue with Mr. Charboneau's reliance on an analogy to federal *habeas corpus* jurisprudence rather than the Idaho Court of Appeals' Opinion in *State v. Arrasmith*, 132 Idaho 33 (Ct. App. 1998). (Reply Br., pp.62-63.) However, even assuming *Arrasmith* were on-point, citation to alternate authorities would not constitute a waiver of the issue

on appeal. The State cites *Akers v. Mortensen*, 160 Idaho 286, __, 371 P.3d 340, 342 (2016), for the proposition that, "a party waives an appellate issue that is not supported with relevant argument or authority." However, nothing in *Akers* suggests that a failure to cite all, or even the best, of the authorities in support of a proposition constitutes a waiver. In fact, the *Akers* Court found the claim at issue was waived because the appellant provided no argument or authority in her brief. *Id*. at 342-43. And, in *Bach v. Bagley*, the case relied upon by the *Akers* Court, the Supreme Court made it clear that this waiver doctrine flows from I.A.R. 35(a)(6), which requires that the appellant's brief on appeal "contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of transcript and record relied upon." 148 Idaho 784, 790 (2010) (quoting I.A.R. 35(a)(6)). Clearly the intent is to ensure that whatever argument the appellant makes, that argument is presented with sufficient clarity for the appellate court to understand the argument and determine whether the appellant has carried his burden of establishing an error by the lower court, *see Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 745 (2000); it is not to ensure that the argument made is legally correct.

Besides, Mr. Charboneau has not cited the wrong line of authority. *Arrasmith* is not controlling.[9] *Arrasmith* had nothing to do with the question of whether a trial court may, under the UPCPA, enter an order barring further prosecution (which was the question raised by Mr. Charboneau). Rather, *Arrasmith* was a *direct appeal* of an order denying a motion to dismiss brought pursuant to *Idaho Criminal Rule 48*. Although the *Arrasmith* Court quoted certain standards for dismissals based on *Brady* violations

[9] As Court of Appeals precedent, *Arrasmith* certainly would not be binding on the Supreme Court should it retain this case. *State v. Schulz*, 151 Idaho 863, 867 (2011).

(including the standard quoted by the State in this case),[10] it went on to note that the district court had applied the "ends of justice" standard of Rule 48(a)(2) in denying the defendant's motion to dismiss, and it affirmed the district court's order. *Arrasmith*, 132 Idaho at 45-46. The Court of Appeals in *Arrasmith* was not entirely clear as to the standard ultimately applied, but it very much appears that the Court applied the standard of Criminal Rule 48(a)(2). Accordingly, it does not appear that *Arrasmith* has any application in this case, where the order barring re-trial is sought under the UPCPA, not the Idaho Criminal Rules.

Certainly, this Court could analogize the motion to bar retrial in this case to a motion to dismiss brought under Rule 48(a)(2) in a criminal case, or it could adopt one of the Ninth Circuit standards discussed in *Arrasmith*.[11] However, the fact that the State would rather analogize this case to its characterization of the holding in *Arrasmith* than

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[10] The first standard was derived from a Ninth Circuit case evaluating whether dismissal is the appropriate remedy where there has been a due process violation generally. Under that standard, dismissal is appropriate where the "government conduct [is] so grossly shocking and outrageous as to violate the universal sense of justice." *Arrasmith*, 132 Idaho at 45 (citing *United States v. Green*, 962 F.2d 938, 941 (9th Cir. 1992)).

The second standard was derived from a different Ninth Circuit case, this time dealing specifically with *Brady* violations. Under that standard, "dismissal of an indictment is an appropriate sanction for a constitutional violation only where less drastic alternatives are not available." *Id*. (citing *United States v. Kearns*, 5 F.3d 1251, 1254 (9th Cir. 1993)). This is the standard discussed in the State's Reply Brief in this case. (*See* Reply Br., pp.62-63.)

[11] If this Court were to adopt the standard from *Kearns*, as the State apparently urges, Mr. Charboneau would be entitled to reversal of the district court's order denying his motion to bar further prosecution for the same reasons he has already argued at pages 161-66 of his Cross Appellant's Brief. Because Mr. Charboneau could not possibly receive a fair re-trial owing to the loss or destruction of evidence in his case, the less drastic alternative of a re-trial is not available.

the holdings of the cases cited by Mr. Charboneau does not mean Mr. Charboneau did not support his argument on appeal with sufficient argument or proper citations to authority. Accordingly, there is no support for the State's contention that Mr. Charboneau has waived his claim on cross appeal.

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

As an alternative to its proposed procedural bars, the State also argues the merits of Mr. Charboneau's claim that the district court erred in denying his motion to bar further prosecution. (*See* Reply Br., pp.63-67.) Again, the State's arguments are unconvincing.

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

In his Cross Appellant's Brief, Mr. Charboneau argued that one of the reasons the district court abused its discretion in denying his motion to bar further prosecution is that he could not possibly have a fair re-trial at this point, owing to the loss or destruction of evidence. (*See* Cross App. Br., pp.161-66.) In attempting to rebut this contention, the State seeks to build upon one of its proposed procedural bars by arguing that, since "this question was never litigated below," there is an insufficient factual record, and a lack of factual findings by the district court, to support Mr. Charboneau's appellate argument. (Reply Br., p.64.) This is incorrect on multiple levels.

First, as discussed above, this issue *was* litigated below. Mr. Charboneau filed a timely motion setting forth his argument (*see* R. Vol. 4, pp.599-600); the State *chose* not

to address the merits of that motion (*see* R. Vol. 4, pp.604-06); Mr. Charboneau filed a reply memorandum (*see* R. Vol. 4, pp.630-33); and a hearing was held on the motion (*see generally* 4/10/15 Tr.). Thus, the State had every opportunity to contest the merits of Mr. Charboneau's claim. The fact that it neglected to do so does not mean it was deprived of its opportunity to do so.

Second, there was an ample factual record for the district court to have found that Mr. Charboneau could not obtain a fair re-trial. In his Cross Appellant's Brief, Mr. Charboneau detailed the evidence lost or destroyed, and the factual record supporting his contentions. (*See* Cross App. Br., pp.162-64 & ns.90-92.) In response, the State has neither offered a contrary argument, nor identified contrary evidence. (*See* Reply Br., p.64.) The lone challenge that the State makes is the bare assertion—unsupported by a citation to the record—that Mr. Charboneau's argument that Tiffnie Arbaugh could not be located "is completely false." (Reply Br., p.64.) However, this bare assertion from counsel for the State is, at best, new evidence. This Court will not consider new evidence for the first time on appeal, *see Nelson v. Nelson*, 144 Idaho 710, 714 (2007), much less new "evidence" consisting only of an unsworn allegation by counsel, *see Bennett v. Patrick*, 152 Idaho 854, 859 (2012) ("Argument by an attorney is not evidence."). The fact is that Mr. Charboneau's argument is supported by the State's own discovery response (*see* R. Vol. 2, p.432 (State's March 2013 discovery response asserting, "Respondent has been unable to locate Tiffney [sic] Arbaugh")), and there is no contrary evidence in the record.[12] So, in total, the record clearly

[12] The State has been represented by Deputy Attorney General Kenneth Jorgensen both in the district court and on appeal. Thus, Mr. Jorgensen was the one who signed the discovery response in question. (R. Vol. 2, p.440.)

indicates that there has been a significant loss or destruction of evidence which would make it impossible for Mr. Charboneau to receive a fair re-trial.

Third, although the district court did not make specific factual findings in denying Mr. Charboneau's motion to bar further prosecution (*see* 4/10/15 Tr., p.7, L.5 – p.8, L.18),[13] it elsewhere recognized that, owing to the loss or destruction of evidence, Mr. Charboneau could not have a fair re-trial. Specifically, the district court noted as follows:

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

(9/19/14 Tr., p.748, L.21 – p.729, L.6 (emphasis added).) Indeed, at one point it even hypothesized that the State could not re-try Mr. Charboneau: "I don't think the State has got a prayer in hell of getting the case to trial." (9/19/14 Tr., p.752, L.25 – p.753, L.2.) Accordingly, there are findings sufficient for this Court to hold that, owing to the loss or destruction of evidence, it was error for the district court to have denied Mr. Charboneau's motion to bar further prosecution.

[13] The district court denied Mr. Charboneau's motion because it questioned whether it had the authority to enter an order barring further prosecution, not because there was an insufficient factual basis to enter such an order. (4/10/15 Tr., p.7, L.5 – p.8, L.18.)

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

In addition to arguing that the district court abused its discretion in denying his motion to bar further prosecution because he could not receive a fair re-trial, he argued it was an abuse of discretion because a re-trial would violate his double jeopardy rights under the Idaho Constitution. (*See* Cross App. Br., pp.166-73.) In response, the State offers three reasons why it believes there was no error: first, Mr. Charboneau "never asserted any double jeopardy protections before the district court" (Reply Br., p.65); second, the Idaho Constitution's double jeopardy clause is no more protective of individual rights than the United States Constitution's double jeopardy clause, and the latter provision does not grant Mr. Charboneau the protection he sought (Reply Br., pp.65-66); and third, even if the Idaho Constitution is as protective as Mr. Charboneau claims, it should not apply under the facts of this case (Reply Br., pp.66-67).

Because the latter two arguments were adequately addressed in Mr. Charboneau's Cross Appellant's Brief, no further response is provided herein. However, the State's first argument (concerning preservation) warrants a brief response.

The State claims that Mr. Charboneau "never asserted any double jeopardy protections before the district court." (Reply Br., p.65.) That is untrue. While Mr. Charboneau's original motion focused on the loss or destruction of evidence which prejudiced his ability to have a fair re-trial (*see* R. Vol. 4, pp.599-600), his reply memorandum specifically invoked double jeopardy protections (*see* R. Vol. 4, p.632 (discussing *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992), where it was held, under the double jeopardy clause of the Pennsylvania Constitution, that re-trial was barred

following a Brady violation)). Thus, the double jeopardy question was before the Court below.

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

As an alternative to its argument that the district court erred in denying his motion to bar further prosecution, Mr. Charboneau contends this Court should, upon affirming the district court's finding of a *Brady* violation, bar his re-trial under its own supervisory authority. (*See* Cross App. Br., p.174-75.) He contends that such an exercise of the Court's supervisory power is warranted for the same reasons that he contends the district court abused its discretion in denying his motion below—because he could not possibly receive a far re-trial owing to the loss or destruction of evidence, and because a re-trial could run afoul of the Idaho Constitution's double jeopardy protections. (Cross App. Br., p.175.)

Because the State's arguments in response to this claim are unremarkable, no further response is necessary herein. Rather, Mr. Charboneau refers this Court back to pages 174-75 of his Cross Appellant's Brief.

CONCLUSION

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

DATED this 18th day of October, 2016.

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

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18th day of October, 2016, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JAIMI D CHARBONEAU
INMATE # 22091
ADA COUNTY JAIL
7200 BARRISTER
BOISE ID 83704

ROBERT J ELGEE
DISTRICT COURT JUDGE
E-MAILED BRIEF

JOHN LYNN
ATTORNEY AT LAW
E-MAILED BRIEF

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

_____/s/_____
EVAN A. SMITH
Administrative Assistant

ERL/eas