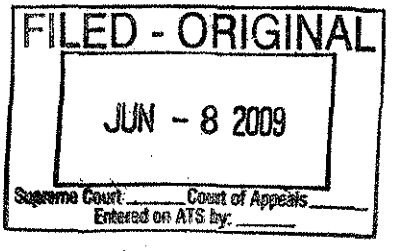
6-8-2009

Fields v. State Appellant's Brief Dckt. 35679

IN THE SUPREME COURT OF THE STATE OF IDAHO

ZANE JACK FIELDS,	)	
	)	
Petitioner-Appellant,	)	**DOCKET NO. 35679**
	)	
v.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	



APPELLANT'S OPENING BRIEF

Appeal from the District Court of the
Fourth Judicial District for Ada County
Honorable Thomas F. Neville, District Judge presiding

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A. NATURE OF THE CASE

This is an appeal the district court's dismissal of Appellant Fields' petition for postconviction relief, in which he sought the benefit of a newly acknowledged rule guaranteed by the Sixth Amendment: if a convicted defendant may be sentenced to death only after one or more additional facts are found to exist, he is entitled to have a jury determine the existence of those additional facts. *Ring v. Arizona*, 536 U.S. 584, 589 (2002). Fields seeks a determination by this Court that as a matter of state law, *Ring* should have been retroactively applied to his case and the district court should have been granted his petition and a new sentencing proceeding.

B. COURSE OF THE PROCEEDINGS & STATEMENT OF FACTS

At the time of Petitioner's trial, eligibility for death turned on the trial court making a statutorily required fact-finding. Specifically, a defendant was eligible for death only if the trial court found a statutory aggravating circumstance to exist.[1] In Petitioner's trial, the court complied with this. The jury was released upon returning its verdict, after which the trial court found a statutory aggravating circumstance to exist and made additional fact-findings before sentencing the Petitioner to death. On direct appeal, this Court rejected the argument that Fields' sentencing proceeding was constitutionally infirm for lack of jury determination of an aggravating circumstance, specific intent to kill during the commission of a felony. *State v. Fields*, Nos. 19185 & 19809, Brief of Appellant at 57-58 (Idaho Supreme Court, filed Jan. 27,

[1]Also in keeping with the statutory scheme then in effect, the trial court was required to select the sentence. Whether it elected to sentence the defendant to death or a lesser penalty turned on certain additional fact-findings which the trial court was statutorily required to make. I.C. §19-2515.

1994). *See State v. Fields*, 127 Idaho 904, 916, 908 P.2d 1211, 1223 (1995). At a subsequent post-conviction in 1995, Fields again raised the issue of his denial of a jury determination of facts necessary for aggravating circumstances, which was denied by the district court and affirmed on appeal. *Fields v. State*, 135 Idaho 286, 17 P.3d 230 (2000).

The statutory sentencing scheme under which Petitioner was tried was enacted in its original form in 1977. Idaho Code Section 19-2515 (1977). While various amendments were made to the scheme over time, Fields was tried in all respects relevant to this appeal under the original capital statutory scheme as enacted in 1977.

Within forty-two days of the *Ring* decision, Fields sought redress by filing in the district court (1) a Motion to Correct an Illegal Sentence under Idaho Criminal Rule 35, and (2) a postconviction proceeding under Idaho Code Section 19-2719, alternatively denominated a Petition for Writ of Habeas Corpus pursuant to Idaho Constitution. CR at 5-36. Fields explicitly raised the claim that the state courts were not bound to a federal retroactivity standard and urged that he be granted relief under state retroactivity law. CR 65-72, 174-76. The district court denied the Rule 35 motion and rejected the postconviction claims. CR at 293-304. Fields timely appealed. CR at 307. By the time *Ring* was decided in 2002, the original conviction, sentence and judgment against Fields was final.

As Fields was seeking relief in Idaho state courts, the United States Supreme Court decided that, as a matter of federal law, *Ring* was not retroactively applicable to individuals whose cases were final when *Ring* was decided. *Schriro v. Summerlin*, 542 U.S. 348 (2004).

In this Court's lead case on the matter, *Porter v. State*, 140 Idaho 780, 102 P. 3d 1099 (2004), the Court declined to retroactively apply *Ring* "under a more lenient [state] standard of

retroactivity," finding that the issue raised by Porter was "based solely upon the Federal Constitution" making "the question of retroactivity of that decision [] a matter for federal law, not state law." *Porter* at 783, 1102. *See also*, *State v. Hoffman*, 142 Idaho 27, 121 P.3d 958 (2005), and *State v. Leavitt,* 141 Idaho 895, 120 P. 3d 283 (2005).

Last year, the United States Supreme Court held that federal retroactivity doctrine, initially set out in *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), "limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague.*" *Danforth v. Minnesota*, 128 S.Ct. 1029, 1042 (2008).[2] The district court mentioned the *Danforth* decision in its opinion dismissing Fields' petition, acknowledging that States are "free to evaluate whether the new rule should be applied retroactively," CR at 297, but it did not further analyze the case under the retroactivity doctrines that it identified under state law. *See* CR at 299 (identifying three part test, *BHA Investments, Inc. v. City of Boise*, 141 Idaho 168, 108 P.3d 315 (2004)); CR at 297 (identifying "implicit in the concept of ordered liberty test" of *In re Gafford*, 127 Idaho, 472, 903 P.2d 61 (1995). Instead the district court cited what it considered to be the binding precedent of *Porter* and *Hoffman* as the basis for rejecting Fields' claims. CR at 299-300.

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[2]Shortly thereafter, the United States Supreme Court remanded five other Idaho capital cases for reconsideration in light of its opinion in *Danforth v. Minnesota. Rhoades v. Idaho*, 128 S.Ct. 1441 (2008) (mem.); *McKinney v. Idaho*, 128 S.Ct. 1441 (2008) (mem.); *Pizzuto v. Idaho*, 128 S.Ct. 1441 (2008) (mem.); *Card v. Idaho*, 128 S.Ct. 1442 (2008) (mem.); *Hairston v. Idaho*, 128 S.Ct. 1442 (2008) (mem.).

III. ISSUE ON APPEAL

Whether in light of Idaho's long history of jury participation in sentencing in capital cases, the fundamental role which the right to jury fact-finding plays in our conception of justice, and the Court's consistent use of Idaho's established test for determining which new court decisions should be given retroactive effect, *Ring* should be applied retroactively to provide Petitioner a remedy for the indisputable denial of his constitutionally guaranteed right to a jury trial on whether the facts necessary to make him eligible for a death sentence existed.

IV. ARGUMENT

A. SUMMARY OF ARGUMENT

Fields is not before the Court seeking windfall relief on an issue he is litigating for the first time in light of an unanticipated favorable ruling. He previously lost the issue in one form or another on direct appeal and a successive post-conviction proceeding before this Court. This Court consistently has rejected the argument whenever (and by whomever) it was raised. After *Furman* struck down death penalty statutes across the nation in 1972, general uncertainty reigned for many years in the death penalty arena. In the midst of the confusion, Idaho courts repeatedly overruled capital defendants objections to jury-free penalty phase proceedings. Many courts read *Walton v. Arizona*, 497 U.S. 639 (1990), to hold that there is no Sixth Amendment right to jury participation in sentencing proceedings.

However, acknowledging it had erred in *Walton*, the United States Supreme Court held in 2002 that where a convicted defendant may be sentenced to death only after one or more additional facts are found to exist, he is entitled to have a jury determine the existence of those additional facts. *Ring v. Arizona*, 536 U.S. 584, 589 (2002). The statutory scheme under which

Fields was sentenced required that the State could sentence him to death only after one or more additional facts were found to exist, and the trial court conducted the required fact-finding. It is, therefore, beyond dispute that Fields' death sentence cannot withstand constitutional scrutiny. Fundamental fairness requires that this unconstitutional sentence be remedied. Withholding a remedy because the United States Supreme Court took until 2002 to acknowledge Fields' position was correct all along cannot be squared with any basic conception of justice. This Court has the authority to correct this basic injustice. *Danforth v. Minnesota*, 128 S.Ct. 1029, 1041-42 (2008) (federal non-retroactivity doctrine, intended to limit federal court authority to overturn state convictions, does not limit state court authority to grant relief for violations of new rules of constitutional law).

In addition to basic fairness requiring remedial measures, longstanding and consistently applied Idaho precedent requires the retroactive application of *Ring*. In particular, this Court determines whether a new rule announced in a court decision will be retroactively applied by balancing the first against the remaining two of three factors, *i.e.*- it balances (1) the purpose of the new rule against (2) the reliance on the prior decisions of this Court and (3) the effect of the new rule on the administration of justice. There is no cause for departure from this test. In this case, *stare decisis* controls that application of the state rule of retroactivity.

Applied here, this test overwhelmingly favors the full retroactive application of *Ring*. The purpose of *Ring* is to ensure that juries determine the existence (or non-existence) of any fact necessary to increase the upper range of a convicted first degree murder defendant's possible sentence from life to death in order to enforce the Sixth Amendment's dual purpose of ensuring jury trials to individual defendants and participation in serious criminal trials by the community,

thereby ensuring that community values are reflected in the sentence imposed. As for reliance, the State has no legitimate interest in relying on unconstitutional laws or in death sentences obtained unconstitutionally, so can have no such interest in standing by sentences already achieved through such laws. Applying *Ring* retroactively will have a substantial positive but, at most, only a minimal negative impact on the administration of justice. Consequently, under Idaho's retroactivity test, *Ring* should be applied to Mr. Fields.

B. *RING*'S HISTORICAL CONTEXT INFORMS ANY RETROACTIVITY ANALYSIS.

Idaho's 1977 capital statutory scheme, in all relevant respects identical to the statutory scheme under which Petitioner was tried, was one of a series of necessary state court responses to changing federal Eighth Amendment jurisprudence in the 1970s. Modern capital jurisprudence was born with the United States Supreme Court striking down capital statutory schemes throughout the Nation in 1972. *Furman v. Georgia*, 408 U.S. 238 (1972). *Furman* held that states must provide capital sentencers guidance on how to determine whether to impose the death penalty. "[U]nquestionably [Idaho's] pre-1973 statute violated the Eighth and Fourteenth Amendments to the United States Constitution under . . . *Furman*[.]" *State v. Lindquist*, 99 Idaho 766, 768, 589 P.2d 101, 103 (1979). Responding to *Furman*, in 1973 Idaho revised its death penalty scheme making death sentences mandatory for "[e]very person guilty of murder in the first degree[.]" Idaho Code §18-4004 (am. 1973). Three years later, the United States Supreme Court struck down a mandatory death penalty statute virtually identical to Idaho's revised statute. *Woodson v. North Carolina*, 428 U.S. 280 (1976). In an effort to align its death penalty scheme with *Woodson*, in 1977 Idaho removed from the jury its traditional role as adjudicator of who,

among capital defendants, would live and who would die. Specifically, and relevant to the question now before the Court, was the Idaho modified scheme provision that before a defendant could face a range of penalties which included death, a *court* had to find that at least one statutory aggravating circumstance existed. I.C. §19-2515 (1977).

Despite Idaho's long history of, and its constitutional reverence for, the right to a jury trial, when confronted with the question of whether the United States or Idaho Constitutions guaranteed the right to jury participation in the capital sentencing process, a narrow majority of this Court "held that there is no federal constitutional requirement of jury participation in the sentencing process and that the decision to have jury participation in the sentencing process, as contrasted with judicial discretion sentencing, is within the policy determination of the individual states." *State v. Creech*, 132 Idaho 1, 15, 966 P.2d 1, 15 (1998) (quoting *Creech v. Arave*, 105 Idaho 362, 373, 670 P.2d 463, 474 (1983)). This Court later held that "Art. 1, §7 of the Idaho Constitution does not require participation of a jury in the sentencing process in a capital case." *State v. Sivak,* 105 Idaho 900, 904, 674 P.2d 396, 400 (1983). In *State v. Charboneau,* 116 Idaho 129, 774 P.2d 299, *reh'g denied* (1989), a 3 to 2 majority of this Court specifically rejected, as a matter of federal law, that which the United States Supreme Court ultimately acknowledged in *Ring v. Arizona*, 536 U.S. 584, 589 (2002), "that a capital sentencing statute that requires the judge to determine aggravating circumstances takes this factual element out of the jury's hands in violation of the sixth amendment." *Charboneau* at 148, 317.

In light of the uncertainty in death penalty law created by United States Supreme Court capital decisions in the post-*Furman* 1970s, particularly regarding issues concerning penalty phase juries, neither Idaho's statutory sentencing scheme's reserving the sentencing

responsibilities exclusively to the court nor this Court's continued rejection of attacks on it is surprising. Indeed, in 1990, the United States Supreme Court signaled state courts that excluding juries from capital sentencing proceedings was constitutionally acceptable. *Walton v. Arizona*, 497 U.S. 639 (1990) (no constitutional requirement that a jury must determine whether aggravating factors exist).

Ten year later, the United States Supreme Court overruled *Walton*, holding that "capital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring* at 589. In overruling *Walton*, the *Ring* holding made plain that Idaho's statutory scheme violated the Sixth Amendment right to trial by jury. *See State v. Fetterly*, 137 Idaho 729, 730, 52 P.3d 874, 875 (2002) (*Ring* "appears to invalidate the death penalty scheme in Idaho which to this time has allowed the sentencing judge to make factual findings of the aggravating factors necessary to the imposition of a death sentence").

C. IDAHO SHOULD REMEDY THE VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHT TO A JURY TRIAL BY APPLYING *RING* TO A BROADER RANGE OF CASES THAN UNDER THE RETROACTIVITY DOCTRINE.

In *Danforth*, the United States Supreme Court clarified that "the source of a 'new rule' is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists [the United States Supreme Court's] articulation of the new rule." *Id.* at 1035. In *Ring*, the Court did not "create" the right to jury fact-finding of a statutory aggravating factor. Rather, it belatedly determined that that right is inherent in the Sixth Amendment to the United States Constitution. Indeed, in overruling *Walton v. Arizona*,

497 U.S. 639 (1990), the *Ring* Court acknowledged that it had come down on the wrong side of the issue over ten years earlier. *Danforth* also clarified that the federal retroactivity doctrine enunciated in *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), and upon which it relied in *Schriro v. Summerlin,* 542 U.S 348, 352 (2004), to reject the retroactive application of *Ring*, is a federal rule limited in its restrictive application to federal habeas proceedings. *Danforth,* 128 S.Ct. at 1038. Thus, the only question Fields presents to this Court is whether Idaho's retroactivity doctrine compels the application of *Ring's* acknowledgment of the right to jury fact-finding in a capital case to persons whose convictions and sentences were final on June 24, 2002, the date the United States Supreme Court issued its decision in *Ring*.

In the postconviction proceeding below, the district court rejected Fields' efforts to enforce his right to have a jury determine whether an aggravating circumstance existed, without which death would not be within the range of sentences available to the state to impose. The district court denied relief based on this Court's decisions. In the leading case on the issue, this Court unequivocally held:

> Porter asks that we apply a more lenient standard of retroactivity than that applied by the United States Supreme Court. In a capital case, jury participation in the sentencing process is not required under the Idaho Constitution. *State v. Hoffman,* 123 Idaho 638, 643, 851 P.2d 934, 939 (1993); *State v. Pizzuto,* 119 Idaho 742, 770, 810 P.2d 680, 708 (1991). The issue raised by Porter in this application for post-conviction relief is based solely upon the Federal Constitution. Therefore, *the retroactivity of that decision is a matter of federal law, not state law.* The United States Supreme Court has resolved that issue in *Summerlin*.

Porter v. State, 140 Idaho at 783, 102 P. 3d at 1102 (emphasis added). In *McKinney v. State*, the Court reaffirmed its *Porter* holding:

> In *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the United States Supreme Court held that the Sixth Amendment's jury trial guarantee

> requires that a jury, not a judge, find an aggravating circumstance necessary for the imposition of the death penalty. In *Schriro v. Summerlin,* 542 U.S. 348, 358, 124 S.Ct. 2519, 2526, 159 L.Ed.2d 442, 453 (2004), the Supreme Court held, " *Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." McKinney asks us to hold that *Ring* is retroactive, thereby overruling *Summerlin.* The retroactivity of *Ring* was a matter of federal constitutional law, not state law. *We have no authority to overrule decisions of the United States Supreme Court on issues of federal constitutional law.*

McKinney v. State, 143 Idaho 590, 595, 150 P.2d 283 (2006) (emphasis added).

The United States Supreme Court specifically acknowledged the state's right to provide a remedy to a constitutional right even where the federal courts declined.

> It is thus abundantly clear that the *Teague* rule of nonretroactivity was fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings. It was intended to limit the authority of federal courts to overturn state convictions-not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions.

Danforth v. Minnesota, 128 S.Ct. at 1041. This Court must acknowledge that Fields was sentenced in violation of his constitutional right to trial by jury and that his sentence is, therefore, constitutionally infirm. This Court ought to apply *Ring* retroactively and grant him a new sentencing proceeding.

D. APPLYING THIS COURT'S LONG ESTABLISHED AND CONSISTENTLY EMPLOYED PRECEDENT REQUIRING THE USE OF A THREE-FACTOR TEST TO SETTLE QUESTIONS OF RETROACTIVITY MANDATES THAT *RING* BE GIVEN FULL RETROACTIVE EFFECT.

This Court first applied the current state test in a criminal case in 1975. *State v. Whitman*, 96 Idaho 489, 531 P.2d 579 (1975). When applied here, the three factor test requires that *Ring* be given full retroactive effect.

As recently as 2006, this Court has held that where controlling precedent on questions of Idaho law exists, *stare decisis* requires that the precedent be followed "'unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice.'" *Greenough v. Farm Bureau Mutual Insurance Co.*, 142 Idaho 589, 592, 130 P.3d 1127, 1130 (2006) (quoting *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 77, 803 P.2d 978, 983 (1990). There is no reason to depart from this Court's longstanding and consistently applied retroactivity precedent.

1. *State v. Whitman* Established the State Retroactivity Test Applicable in this Case.

This Court first addressed the question of retroactivity in a civil case, finding that a statute relating to "a host's liability in a negligently caused accident" was unconstitutional. *Thompson v. Hagan,* 96 Idaho 19, 24, 523 P.2d 1365, 1370 (1974). In *Thompson*, this Court identified three approaches to retroactivity: the "traditional rule" under which new decisions are applied to "both past and future cases"; the "prospective rule" under which new decisions are "effective only in future actions"; and the "modified prospective rule" under which the new decisions apply prospectively "and to the parties bringing the action resulting in the new decision[] or, to the parties bringing the action and all similar pending actions." *Id.* at 25, 523 P.2d at 1371. To determine which approach to apply in a given case, this Court adopted the United States Supreme Court's rationale in *Linkletter v. Walker,* 381 U.S. 618 (1965). *Thompson, supra.* The following year, this Court applied the *Linkletter* factors in a criminal context, firmly establishing the approach to be taken in determining whether or not a decision is to be retroactively applied. Under *State v. Whitman*, *supra*, "The Court must weigh: (1) The

purpose of the new rule; (2) Reliance on the prior decisions of this Court; and (3) The effect of the new rule on the administration of justice." *Id.* at 491, 531 P.2d at 581 (footnote omitted). Later the Court explained that the first factor to be balanced against the other two to determine whether to limit the retroactive application of the decision. *Jones v. Watson*, 98 Idaho 606, 609, 570 P.2d 284, 287 (1977). As recently as 2004, the Court has employed this three factor test to determine whether a new court decision should be given retroactive effect. *BHA Investments, Inc. v. City of Boise*, 141 Idaho 168, 173, 108 P.3d 315, 320 (2004).

Until *Danforth*, the sole exception to this Court's use of the three factor test to determine a new decision's retroactive effect was where a rule required by the federal constitution announced in a United States Supreme Court decision was at issue. When such rules have been at issue, the Court consistently restricted its analysis to the application of federal retroactivity doctrine. The Court's decisions regarding the retroactive application of *Ring* in the individual death row inmates' cases currently or previously before this Court reflect that fact. So, too, does the Court's identical analysis in all the remaining cases in which the Court ruled on the retroactive application of *Ring*. *Danforth* changed all that.

2. Applied Here, Idaho's Retroactivity Test Shows That *Ring* must Be Given Full Retroactive Effect.

a. *Ring's* purpose is to preserve both the defendant's and the community's right to a jury.

The aim of the "purpose of the decision" factor is to assess the extent to which the decision's purpose "would be served by applying the case to both past and future actions." *Thompson*, 96 Idaho at 25, 523 P.2d at 1371. Put alternatively, the aim is to assess the extent to

which the failure to apply a decision retroactively "would...thwart[]" its purpose. *Gay v. County Commissioners of Bonneville County*, 103 Idaho 626, 631, 651 P.2d 560, 565 (1982).

The narrow holding of *Ring* is that, as a matter of Sixth Amendment law, "[c]apital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring* at 588 & 589. The right to a jury trial is a fundamental right guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Duncan v. Louisiana,* 391 U.S. 145 (1968).

The Sixth Amendment's jury trial guarantee has a dual purpose of ensuring jury trials to individual defendants and participation in serious trials by the community, thereby ensuring that community values are reflected in the sentence imposed.

Thus, one purpose of *Ring* is to ensure that each potentially death sentenced defendant is accorded his or her constitutionally guaranteed right to have a jury determine the existence (or non-existence) of any fact necessary to increase his maximum imposable sentence to death from a non-death sentence that would be imposable based on his conviction alone. This straight-forward purpose would obviously be served by giving *Ring* full retroactive effect.

> [A]n accused's right to trial by a jury of his fellow citizens when charged with a serious criminal offense is unquestionably one of his most valuable and well-established safeguards in this country. . . . [J]urors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances. . . than any single man, however pure, wise, and eminent he may be. Trial by an impartial jury . . . raises another imposing barrier to oppression by government offices. . . . The institution of the jury . . . places the real direction of society in the hands of the governed . . . and not in that of the government.

Green v. U.S., 356 U.S. 165, 215-16 (1958) (Black, J., dissenting, joined by Warren, C.J., and Douglas, J.) (citations, internal quotation marks, and footnotes omitted). *See also, Blakely v. Washington*, 542 U.S. 296, 306 (2004) (framers intended jury to exercise ultimate control in the judiciary; unless the judge's authority to sentence derives wholly from the jury's verdict, the jury cannot exercise the intended control); *Reid v. Covert*, 354 U.S. 1, 10 (1957) ("Trial by jury in a court of law . . . has served and remains one of our most vital barriers to governmental arbitrariness. These elemental procedural safeguards were embedded in our Constitution to secure their inviolateness and sanctity against the passing demands of expediency or convenience.").

The failure to apply *Ring* with full retroactivity would thwart its purpose; for having denied Mr. Fields the benefit of *Ring*, the State will execute him pursuant to a death sentence which it imposed based on facts determined not by a jury but a judge. Mr. Fields and the small number of others denied the benefit of *Ring* will be executed pursuant to a sentence which cannot withstand constitutional scrutiny.

The other purpose of the Sixth Amendment right to jury trial and, thus, the other purpose of *Ring* is to ensure community participation in serious criminal trials, thereby ensuring that community values are reflected in the sentence imposed. This additional aim, imported from common law, was to invest the general population with the means to check overreaching and otherwise corrupt prosecutorial and judicial decision-making.[3]

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[3]Colonists had themselves experienced such overreaching. "In the 1730s, two successive New York grand juries had refused to indict the popular publisher John Peter Zenger–and when the government instead proceeded by information, the petit jury famously acquitted. (One of the articles for which Zenger was prosecuted had featured an attack on New York Governor Cosby for having engaged in personal litigation tactics that sought to evade the right to jury trial in civil

> Because the purpose of the jury is to guard against arbitrary abuses of power by interposing the commonsense judgment of the community between the State and the defendant, the jury venire cannot be composed only of special segments of the population. "Community participation in the administration of the criminal law ... is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system." *Taylor* [*v. Louisiana*,] 419 U.S. [522,] 530[.]

Teague v. Lane, 489 U.S. at 314. Guaranteed in Article 3, Section 2 of the United States Constitution as well as in its Fifth (grand jury), Sixth (criminal petit), and Seventh (civil) Amendments, juries are literally a constitutive element of our Nation's democracy. U.S. Const. art. III, §2, amends. V, VI, & VII.

The purpose of the jury as a place for the citizenry's civic involvement did not end with the ratification of the Bill of Rights. On the contrary, the United States Supreme Court has comparatively recently sounded that theme in its fair jury selection decisions. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court held that, "The harm from discriminatory jury selection extends beyond . . . the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Id.* at 87. A few years later, the United States Supreme Court held that defendants have standing to object to the prosecution's illegally striking members of a cognizable group even where the defendants themselves do not belong to that group. *Powers v. Ohio*, 499 U.S. 400 (1991). The court reasoned that in such situations standing exists to, among other things, preserve the jury system as a constitutive element of American democracy, along the way highlighting three characteristics of the jury system which make it so. First, because ordinary citizens serve as

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cases.)" Akhil R. Amar, *The Bill of Rights* 84-5 (1998).

"'jurors actual or possible'" the people can prevent the jury system's "'arbitrary use or abuse.'" *Id.* at 406 (quoting *Balzac v. Puerto Rico*, 258 U.S. 298, 310 (1992)). Second, the jury system "guards the rights of the parties." *Id.* at 411. Third, it "preserves the democratic element of the law as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people . . . . The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset." *Powers* at 413.

b. Juries reflect community norms essential in death cases.

Additionally, under the Eighth Amendment, sentencing is *supposed* to reflect community values and "a community-based judgment that the sentence constitutes proper retribution." *Schriro v. Summerlin*, 542 U.S. 348 (2004) (Breyer, J., dissenting). *See Ring,* 536 U.S., at 613-19 (Breyer, J., concurring).

> Juries–comprised as they are of a fair cross section of the community–are more representative institutions than is the judiciary; they reflect more accurately the composition and experiences of the community as a whole, and inevitably make decisions based on community values more reliably, than can that segment of the community that is selected for service on the bench.

Spaziano v. Florida, 468 U.S. 447, 486-487 (1984) (Stevens, J., concurring in part and dissenting in part) (footnote omitted). *See also, Harris v. Alabama,* 513 U.S. 504, 515-526 (1995) (Stevens, J., dissenting) (("The 'higher authority' to whom present-day capital judges may be 'too responsive' is a political climate in which judges who covet higher office – or who merely wish to remain judges – must constantly profess their fealty to the death penalty . . . . . The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.")(omitting footnote with citations to newspaper articles as support for the proposition that the

political climate requires viable judicial and legislative candidates to strongly and clearly support the death penalty); *Witherspoon v. Illinois,* 391 U.S. 510, 519 (1968) (A jury more likely than a judge will "express the conscience of the community on the ultimate question of life or death.").

The purpose of *Ring v. Arizona* in its preservation of the right to a jury trial weighs heavily in favor of application to Mr. Fields' sentence of death.

3. The State's Reliance on Pre-*Ring* Law Should Carry Little Weight, If Any.

The second factor the Court considers is the "reliance factor," the extent to which litigants and courts generally have relied on the earlier rule. The more litigants and courts used the earlier rule, the greater the reliance. This is especially true in civil cases, where individuals and businesses make life and financial decisions based on the law as it is at the time the decision must be made.

a. Reliance is more compelling in civil cases.

In *Thompson v. Hagan*, 96 Idaho 19, 523 P.2d 1365 (1974), for example, the decision whose retroactivity was at issue invalidated a statute's precluding negligence lawsuits by automobile guests against their hosts. The Court found the reliance factor there very strong because "[t]he possibility exists that hosts may have offered rides to guests relying on the protection of the guest statute from negligence actions. Additionally, insurance companies may have relied upon the guest statute in setting their rates." *Thompson*, 96 Idaho at 25, 523 P. 2d at 1371. Thus, the greater the number of hosts and insurance companies which relied in their decision making on the guest statute, the stronger the reliance factor. In *BHA Investments*, the new rule whose retroactivity was at issue prohibited cities from imposing liquor license transfer

fees. The Court analyzed the reliance factor by looking to the number of times the City of Boise had relied on its ordinance allowing liquor license transfer fees. *Id.* at 320, 108 P.3d at 173. Similarly, in *Baker v. Shavers*, 117 Idaho 696, 697, 791 P.2d 1275, 1276 (1990), the decision at issue "abolished the open and obvious danger doctrine" whereby owners had no duty to keep their premises safe from dangerous conditions which were known or should have been known by them. *Id.* In analyzing the reliance factor, the Court looked to whether "landowners may have allowed dangerous conditions to remain on their property because they believed they had protection under our prior decisions" and whether such reliance could have existed in light of a relevant statute. *Id.*

In each of these cases, the litigants' interests served by reliance were plainly adversarial. Most civil cases are zero sum games, *i.e.*- when one litigant wins, the other loses. Criminal cases stand in stark contrast: the State wins when justice is done. *Berger v. United States,* 295 U.S. 78, 88 (1935).[4] Standing by a sentence which cannot withstand constitutional scrutiny is not doing justice. The underlying purpose of Idaho Code Section 19-2719's limitations on postconviction proceedings in capital cases is to "expedit[e] *constitutionally imposed* sentences." *State v. Beam*, 115 Idaho 208, 210, 766 P.2d 678, 680 (1988) (emphasis added). There is no interest in executing *unconstitutionally imposed* sentences, thus diminishing any real weight properly given to the reliance factor.

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[4]"The [prosecuting attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States,* 295 U.S. 78, 88 (1935).

b. Reliance, in spite of foreseeability of change, deserves less weight.

If the prosecuting attorneys and courts relied on the statutory rule without considering how that rule would fare under federal constitutional analysis, their reliance was misplaced. For they knew or should have known that the legislature's enactment was not made in reliance on guidance from the United States Supreme Court.[5] Indeed, what evidence there was at that time strongly disfavored removing juries altogether from sentencing proceedings. Whether the "Constitution requires that the death sentence be imposed by a jury" was raised but not addressed in *Lockett v. Ohio*, 438 U.S. 586, 609 n.16 (1978). After *Furman*, the overwhelming majority of states with the death penalty had kept juries. Indeed, in upholding the Florida capital statutory scheme against the general and broad attack that it violated *Furman*, the United States Supreme Court noted that, under Florida's scheme, "the sentence is determined by the trial judge rather than the jury" but nowhere suggested that states could dispense with penalty phase jury fact-finding. *Proffitt v. Florida*, 428 U.S. 242 (1976). Until *Walton*, this Court's later consistent rejections of challenges to Idaho's dispensing with the jury altogether for penalty phase purposes were not made in reliance on any clear law either.

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[5] However, removing juries from their traditional role resulted from a misunderstanding of United States Supreme Court caselaw. *See State v. Creech,* 105 Idaho 362, 377, 670 P. 2d 463, 478 (1983) (Huntley, J., *dissenting*) (legislative statement of purpose regarding 1977 statute wrongly "suggests that the Supreme Court decisions mandated the removal of the jury from its traditional powers and functions"); *State v. Sivak,* 105 Idaho 900, 910, 674 P.2d 396, 406 (1983), Bistline, J. *dissenting.* ("Following *Woodson* the legislature set guidelines to follow, and, unfortunately believing (as the Statement of Purpose to the proposed 1977 amendment shows, set out in the *Creech* dissenting opinion of Justice Huntley) that the Supreme Court of the United States had barred juries from continuing as sentencing authorities, made those guidelines for the benefit of judges.")

It cannot be said that the change *Ring* has brought was unforeseeable. *See e.g., State v. Charboneau*, 116 Idaho at 155, 774 P.2d at 325 (*Huntley, J.* and *Bistline, J. dissenting)* ("The plain fact is, before a person is eligible to be executed, a *finding* must be made that the aggravating circumstance existed. That finding is typically a jury finding, it was a jury function in Idaho from territorial days through 1977, and is a fact to be found by the jury in all but four of the states which have the death penalty."). *See also, Adamson v. Ricketts,* 865 F. 2d 1011 (9th Cir. 1988) ("We therefore hold that Arizona's aggravating circumstances function as elements of the crime of capital murder requiring a jury's determination."). If the reliance by the courts was legitimate, it was not without compelling warning signals. The question of foreseeability diminishes the weight to be given to the reliance factor. *See State v. Machen*, 100 Idaho 167, 170, 595 P.2d 316, 319 (1979) (where change in law unforeseeable, reliance on earlier law was in "good faith").

c. There are few remaining cases in which reliance on the pre-*Ring* rule played any role.

A fully retroactive application of *Ring* would affect only a small number of cases. *See infra* at n.6 and accompanying text. Thus, the weight accorded the reliance factor should likewise be small. A decision from this Court extending the retroactive effect of *Ring* to cases already final will be "of limited applicability and will affect only those criminal defendants currently [sentenced] in Idaho under the prior statutory scheme." *Gafford v. State*, 127 Idaho 472, 475, 903 P.2d 61, 64, *reh'g denied* (1995).

Of course, even had the reliance been greater, the weight given that factor would not outweigh the right to a constitutionally imposed death sentence.

4. Application of *Ring* to Petitioners Will Have a Substantial Positive but Minimal Negative, If Any, Impact on the Administration of Justice.

"This factor takes into account the number of cases that would be reopened if the decision [at issue] is applied retroactively." *Thompson v. Hagan*, 96 Idaho at 25, 523 P.2d at 1371 (1974). *See, Jones v. Watson*, 98 Idaho 606, 609, 570 P.2d 284, 287 (Idaho 1977) (where the decision at issue struck a statute of limitations tolling rule, the Court noted that it was "convinced that [a] minimal number of cases will proceed to trial solely because of a prospective application of the [decision], and thus the impact on the administration of justice will be slight."). Unlike *Thompson* where the Court was left to speculate on how many hosts and insurance companies had relied on the guest statute and in *Baker* where it was left to speculate whether landowners had allowed dangerous conditions to go unrepaired in reliance on the earlier rule, here the number of cases affected by the reliance is known: eleven or, depending on the outcome of the federal district court's order granting sentencing relief in one case, possibly twelve.[6]

The Idaho Department of Correction reports that as of June, 2008, there were 7,817 Idaho offenders serving prison sentences. *See* Idaho Department of Correction Standard Reports For June 2008 (viewable at:http://www.idoc.idaho.gov/facts/monthly_stats/StandReportJune08.pdf).

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[6]*See* http://www.corr.state.id.us/facts/death_row.htm (Idaho Department of Corrections website, last visited 6/4/09). There are seventeen death sentenced individuals in Idaho. Five of those individuals stand to gain nothing from *Ring* because each of their sentencing (or resentencing) proceedings included or will include juries. They are Timothy Dunlap, Dale Shackelford, Darrell Payne, Erick Hall, and Azad Abdullah. The website includes Richard Leavitt as a death sentenced inmate when, in fact, the United States District Court granted him sentencing relief. *Leavitt v. Arave,* USDC Case CV 93-0024-S-BLW (*Judgment*, Dkt.# 297, 9/28/07). In November, 2007, that court stayed its order and associated matters until the State's appeal to the Ninth Circuit is complete. Thus, depending on the outcome of Mr. Leavitt's case, a ruling that *Ring* applies retroactively will affect at most 12 Idaho prisoners.

Of these, four hundred eleven inmates were, as of June, 2008, incarcerated for murder and manslaughter convictions. The eleven or twelve inmates who stand illegally sentenced to death represent 0.14% or 0.15% of the total number of Idaho offenders serving prison sentences, and 2.6% or 2.9% of the total number of Idaho offenders incarcerated for murder and manslaughter.

This Court has previously allowed retroactive application where it would add a relatively small number of cases to the district courts' dockets. *See e.g., Bergman v. Henry*, 115 Idaho 259, 263, 766 P. 2d 729, 733 (1988) (retroactively applying a new rule finding that a cause of action lies against a licensed vendor of intoxicating beverages for the wrongful death of and personal injuries to third parties caused by the continued serving of alcohol to the patron of the bar). In particular, acknowledging that the retroactive application at issue "may require the retrial of some cases[,]" the Court noted that it was "confident that our efficient and hardworking trial judges will be able to accommodate the relatively few cases that must be retried because of the change in the law[.]" *Baker*, 117 Idaho at 698, 791 P.2d at 1277 (Idaho 1990).[7] Based on the

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[7] Indeed, the system has already absorbed without disruption the resentencings of no less than 14 persons originally sentenced to death whose sentences were reversed for a number of statutory and/or constitutional errors and later sentenced to life. *See e.g., State v. Osborne,* 102 Idaho 405, 631 P.2d 187 (1981); *State v. Pratt,* 125 Idaho 546, 873 P.2d 800 (1993); *State v. Charboneau,* 116 Idaho 129, 774 P.2d 299 (1989); *State v. [Bryan] Lankford,* 127 Idaho 608, 903 P.2d 1305 (1995); *State v. [Mark] Lankford,* 468 F.3d 578 (9th Cir. 2006); *State v. Hoffman*, 236 F.3d 523 (9th Cir. 2001); *State v. Lovelace,* 140 Idaho 73, 90 P.3d 298 (2004); *State v. Ivey,* 123 Idaho 74, 844 P.2d 703 (1992); *Paradis v. Arave*, 954 F.2d 1483 (9th Cir. 1992); *Gibson v. Arave*, Nos. 98-99020 & 98-99021 (settled), *Barrajas v. State, Amended Judgment and Order*, Case No. CR-92-64 (D.Ct. Payette Cty. 2/2/95); *Paz v. Arave*, *Order* Case No. 93-132, Dkt. #49 (D.Ct. Idaho 10/3/1996); *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985); *Fetterly v. State*, *Order*, Case No. 89-1106 (D.Ct. Idaho 6/6/1999) (granting sentencing relief); *Beam v. Arave*, 966 F.2d 1563, *amended* (9th Cir. 1992) (granting sentencing relief). Additionally, resentencings were ordered in light of *Ring* by Idaho district courts in the cases of Jimmie V. Thomas (Jerome County), Michael A. Jauhola (Ada County), and Dale Schackleford (Latah County), and by this Court in *State v. Fetterly*, 137 Idaho 729, 52 P.3d 874, *reh'g denied* (Idaho 2002),and *State v. Lovelace*, 140 Idaho 53, 90 P.3d 278 (2003).

very small number of cases at stake here, the administration of justice factor weighs strongly in favor of retroactively applying *Ring*.

The Court also has the authority to prevent the need for resentencing proceedings in those few cases by reducing the sentences to the maximum legal term. *See, State v. Lindquist,* 99 Idaho 766, 589 P.2d 101 (1979) (when defendant was found guilty of first-degree murder, he was necessarily found guilty of the lesser included offense of second-degree murder; accordingly, despite the fact that defendant could not be sentenced under the unconstitutional death penalty statute then in effect or under the unconstitutional preamendment version, it was appropriate to remand the cause to district court for resentencing to any punishment permitted for conviction of the lesser included offense of second-degree murder); *State v. Creech,* 99 Idaho 779, 589 P.2d 114 (1979) (remanded for resentencing consistent with *State v. Lindquist*); *see also, State v. Morris*, 131 Idaho 263, 267, 954 P.2d 681, 685 (1998) (district court's Rule 35 motion denial reversed, and appellant's sentence modified to bring it within legal limits).

Finally, administration of justice analysis cannot be merely by the numbers. It must also take into account the need to maintain the public's continuing respect for judicial decisions through justice and equitable outcomes. The jury injects a democratic element into the law. This element is vital to the effective administration of criminal justice, not only in safeguarding the rights of the accused, but in encouraging popular acceptance of the law and the necessary general acquiescence in their application. *Green v. U.S.*, 356 U.S. 165, 215-16 (1958) (Black, J., dissenting, joined by Warren, C.J., and Douglas, J.) (citations, internal quotation marks, and footnotes omitted). Far from maintaining the public's continuing respect for the judiciary,

treating similarly situated individuals dissimilarly based on fortuity creates a lack of trust –which is, of course, precisely the reason why the Constitution and Bill of Rights guarantee jury trials.

The *Whitman* test mandates that *Ring* be applied retroactively to Mr. Fields.

E. THE FEDERAL COURTS' RETROACTIVITY DOCTRINE OF *TEAGUE V. LANE* SHOULD NOT BE ADOPTED BY THE STATE OF IDAHO.

The purpose of the bar in *Teague* does not speak to the concerns of this Court in determining whether to apply *Ring* to Petitioners. First, as the United States Supreme Court has recently explained, *Teague* was adopted to limit federal habeas corpus relief based on the need for comity and respect for finality of state court convictions in our federalist system. "If anything, considerations of comity militate in favor of allowing state courts to grant habeas relief to a *broader* class of individuals than is required by *Teague*. And while finality is, of course, implicated in the context of state as well as federal habeas, finality of state convictions is a *state* interest, not a federal one. It is a matter that States are free to evaluate, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts." *Danforth* at 1041 (emphasis added).

Rather than adopting *Teague*, this Court should maintain its consistent independent examination, reasoning, and insistence on charting Idaho's own legal pathways. As the Court has explained in the context of constitutional doctrine:

> We do not suggest, however, that if federal courts were to change these rules we would likewise change ours, unless, of course, our rules were now held to violate the federal constitution. . . Long gone are the days when state courts will blindly apply United States Supreme Court interpretation and methodology when in the process of interpreting their own constitutions.

State v. Newman, 108 Idaho 5, 11 n.6, 696 P.2d 856, 862 n.6 (1985).[8] In *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (Idaho 1992), this Court refused to adopt the good faith exception to the exclusionary rule because to do so would constitute "an independent constitutional violation by the court in addition to the violation at the time of the illegal search," and recognized that "judicial integrity mandated the exclusionary rule." *Id.* at 992, 842 P.2d at 671. Similarly, "judicial integrity" now mandates the retroactive application of the right to a jury fact-finding in a capital sentencing. To do otherwise would constitute "an independent constitutional violation by this Court, in addition to the violation at the time of the" unconstitutional capital sentencing. *Id.*

For these same reasons, adopting *Teague* without first examining whether it is a sound retroactivity doctrine for cases on collateral review would also risk the unexpected expenditure of state resources.

Even when this Court accepted a similar search and seizure 'expectation of privacy" in garbage as delineated by the federal courts, it noted that in the cases in which this Court has found that the Idaho Constitution provides greater protection than the United States Constitution, it has done so "on the uniqueness of our state, our Constitution, and our long-standing jurisprudence." *State v. Donato*, 135 Idaho 469, 473, 20 P.3d 5, 8 (2001). Idaho's long-standing jurisprudence on retroactive application of fundamental rights requires granting to Mr. Fields

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[8]*See State v. Guzman*, 122 Idaho 981, 988, 842 P.2d 660, 667 (1992) (rejecting federal good faith exception to exclusionary rule); *State v. Webb*, 130 Idaho 462, 467, 943 P.2d 52, 57 (1997) (adopting broader test for scope of curtilage than required by the Fourth Amendment to the United States Constitution); *State v. Thompson*, 114 Idaho 746, 749, 760 P.2d 1162, 1165 (1988) (holding that Idaho Constitution requires more than Fourth Amendment regarding pen registers, *i.e.*- that a warrant based on probable cause must be obtained before law enforcement may use a pen register).

what the vast majority of death row inmates have and will enjoy. Beyond that, the even longer history in which juries were involved in the sentencing process in capital cases invites the retention of its current retroactivity doctrine rather than the limitations *Teague* imposes. There is nothing in *Teague's* efforts, to limit the remedies available in federal habeas and promote comity and finality, that undermines this Court's continued adherence to its established principles and commitment to justice.

1. The Right to a Jury Trial Is a Fundamental Right.

Just as the importance of the right to a jury trial speaks in favor of honoring that constitutional right retroactively, it speaks against the reasonableness of relying on *Teague* to bar its application to Mr. Fields' death sentence. As noted in greater detail above and acknowledged in *Summerlin*, the right to a jury trial is fundamental and thus, "implicit in the concept of ordered liberty," implicating "fundamental fairness." *Id.,* 542 U.S. at 358 ("the right to jury trial is fundamental to our system of criminal procedure and States are bound to enforce the Sixth Amendment's guarantees as we interpret them"); *see also,* 542 U.S. at 359 (Breyer, J. dissenting) ("The majority does not deny that *Ring* meets the first criterion, that its holding is "implicit in the concept of ordered liberty.").

2. The *Teague* Retroactivity Doctrine Violates Federal and State Equal Protection and Due Process Guarantees on Their Faces And as Applied.

Any retroactivity doctrine which denies the benefit of a new rule to some petitioners while allowing it to others based on a fortuitous difference violates a guiding principle of state and federal equal protection and due process guarantees: it fails to treat relevantly similar cases similarly. Further, state action violates the fundamental fairness due process guarantee when it

"violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), and which define 'the community's sense of fair play and decency,' *Rochin v. California*, [342 U.S. 165,] 173 [1952]." *Dowling v. United States*, 493 U.S. 342, 353 (1990).

The United States Supreme Court has long held that the Sixth Amendment right to a jury trial in serious criminal cases is a fundamental right the infringement of which violates the fundamental fairness guarantee of the Fourteenth Amendment's Due Process Clause. In *Duncan v. Louisiana,* 391 U.S. 145, 149 (1968). "[T]he right to jury trial in serious criminal cases is a fundamental right and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction." *Id.* at 154. The Court recently reaffirmed this, in a decision written by Justice Scalia, holding that the Sixth Amendment right to trial by jury "is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment's guarantees as we interpret them." *Summerlin*, 542 U.S. at 358.

The due process guarantee of the Fourteenth Amendment prohibits states from infringing fundamental rights unless "'narrowly tailored to serve a compelling state interest.'" *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). Similarly, the equal protection guarantee of the Fourteenth Amendment forbids states from either classifying people or applying laws such that only some individuals may exercise a fundamental right, unless the classification or application is narrowly tailored to serve some compelling state interest. *See, e.g., Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 458 (1988) (when law interferes with a fundamental right, it triggers strict scrutiny review); *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) ("whatever . . . the intent of the ordinances as adopted, they are applied . . .

with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured . . . by the . . . [F]ourteenth [A]mendment[.]").

Applying Idaho's retroactivity test as described above or any other test in a way that denies Mr. Fields the benefit of *Ring* because his conviction and sentence was final when *Ring* was decided would violate his state and federal equal protection and due process rights. It would violate those rights because it would deny his fundamental right to a jury trial without any compelling state interest being served. The State has no interest, let alone a compelling one, to see its citizens executed pursuant to a sentence which cannot withstand constitutional scrutiny. Denying full retroactivity to fundamental rights, regardless of their implications upon fact-finding accuracy, violates due process and equal protection under black letter law. The United States Supreme Court has not resolved whether a retroactivity doctrine which grants or denies relief in a case depending on the fortuity of the date of the judgment's finality, as does Idaho's, violates federal constitutional equal protection or due process guarantees. U.S. Const. amend. XIV.

To deny the retroactive application of *Ring* in Idaho where a dozen individuals may be executed having been deprived the right to a jury in the determination of their death-eligibility is morally inexplicable and defies the principles of uniformity and equity.

Consider, for example, the cases of Messrs. Fetterly and Fields. First degree murder prosecutions were commenced against Mr. Fetterly in 1983 and Mr. Fields in 1988. Based on *Ring*, Mr. Fetterly's sentence was overturned in 2002. Yet the State charged Mr. Fetterly six years before it charged Mr. Fields.

The reason Mr. Fetterly received the benefit of *Ring* was not based on anything other than the chance event that the federal courts ordered that Fetterly be resentenced, and his direct appeal from that resentencing was not final when *Ring* was decided. *State v. Fetterly*, 137 Idaho 729, 730, 52 P.3d 874, 875 (2002).

If this Court adopts the *Teague* doctrine or any other retroactivity doctrine that bars retroactive application based on fortuitous events, Mr. Fields, this Court, and Idaho will never know if a jury would have found him eligible for a death sentence.

A fact is beyond dispute: both Fields and Fetterly completed the direct appeal of their conviction and sentence before *Ring* was decided. The difference between them – that Fetterly was granted resentencing proceedings while Mr. Fields has not – is fortuitous. That Mr. Fields die due simply to the uncertain pace of litigation is undoubtedly not the intent of this Court and certainly is not illustrative of this State's commitment to justice and fair play. Where two prisoners are in every important respect identically situated, the ordinary citizen will not understand only one receiving *Ring* relief. "[T]he ordinary citizen . . . will simply witness two individuals, both sentenced through the use of unconstitutional procedures, one individual going to his death, the other saved, all through an accident of timing." *Summerlin* at 364 (Breyer J., dissenting). *See also, Shea v. Louisiana*, 470 U.S. 51, 63 (1985) ("Under the majority's rule, otherwise identically situated defendants may be subject to different constitutional rules, depending on just how long ago now-unconstitutional conduct occurred and how quickly cases proceed through the criminal justice system.") (White, J, dissenting, joined by Rehnquist, J, and O'Connor, J).

Teague and other retroactivity doctrines which turn on fortuity are unsound for cases on collateral review in state court. This Court should not employ a procedural bar based on technical differences wholly unattributable to the petitioner. Where a life hangs in the balance, as Mr. Fields' does here, it violates due process and equal protection guarantees to place a heavy thumb on the prosecution's side of the scales.

F. IDAHO CODE §2719(5)(C)'S ANTI-RETROACTIVITY PROVISION HAS NO APPLICATION HERE.

Petitioner acknowledges that Idaho Code Section 19-2719(c) provides that, "A successive post-conviction pleading . . . shall be deemed facially insufficient to the extent it seeks retroactive application of new rules of law." *Id.* at 19-2719(5)(c). Given the extraordinary circumstances presented here, Fields nevertheless seeks postconviction relief through the retroactive application of *Ring,* contending that Section 2719(5)(c) may not properly preclude successive postconviction petitions in this case.

There are four reasons for this. First, Section 19-2719(5)(c) violates the Idaho Constitution's separation of powers requirement. Second, Idaho law prohibits retroactively applying Section 19-2719(5)(c) to these cases. Third, Section 19-2719(5)(c) violates state and federal Equal Protection and Due Process guarantees. Fourth, that statutory provision's application in the instant case would violate the United States Constitution's guarantee of a republican form of state government.

1. Idaho Code Section 19-2719(5)(C) Violates the Idaho Constitution Separation of Powers Requirement.

Idaho Code Section 19-2719(5)(c) plainly aims to limit the jurisdiction of district courts, which the Idaho Constitution provides is "original jurisdiction in all cases, both at law and in

equity, and such appellate jurisdiction as may be conferred by law." By limiting the district court's jurisdiction, the statute runs afoul of the Idaho Constitution's mandate that the branches of government maintain separation of powers. That mandate is found in two places in the Idaho Constitution, Article 2, Section 1, and Article 5, Section 13.

It is settled that a Section 19-2719 proceeding "is a proceeding entirely new and independent from the criminal action which led to the conviction." *Paradis v. State*, 110 Idaho 534, 536, 716 P.2d 1306, 1308 (1986). Article V, Section 13's mandate that the legislature "provide a proper system of appeals" does not extend to Section 19-2719 proceedings because they are not appeals.

As applied to Section 19-2719(5)(c), Article V, Section 13's reservation of legislative power cannot be squared with its prohibition against the legislature's depriv[ing] "the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of government." There are at least two reasons for this. First, this Court has long held that, "the powers reserved to the several departments of the government, but not specifically enumerated in the constitution, must be defined in the context of the common law. *State v. McCoy*, 94 Idaho 236, 240, 486 P.2d 247, 251 (1971)." *State v. Branson*, 128 Idaho 790, 792, 919 P.2d 319, 321 (1996). If the courts possessed the authority at common law, then it "may not properly be abrogated by statute." *Id.* At common law, new constitutional decisions were given full retroactive effect. Thus, "[a]t common law there was no authority for the proposition that judicial decisions made law only for the future. Blackstone stated the rule that the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.' 1 Blackstone, Commentaries 69 (15th ed. 1809)." *Linkletter v. Walker*, 381 U.S. 618, 622-23 (1965) (footnote

omitted). Thus, because at common law the judiciary had authority to consider claims requiring retroactive application of new rules of law and because Idaho Code Section 19-2719(5)(c) purports to remove from district courts their authority to hear such claims, that statutory provision must be struck as offending Idaho Constitution Article V, Section 13.

This Court has consistently rejected past legislative efforts to restrict the judiciary's jurisdiction. In *State v. Interest of Lindsey*, 78 Idaho 241, 246, 300 P.2d 491, 494 (1956), this Court struck a statute purporting to transform previously criminal matters of juveniles into civil matters because "[t]he legislature, by denoting as a civil matter what the law has previously regarded as a felony, attempt[ed] to take away jurisdiction vested in the district court by the constitution itself, and . . . attempted to render that court powerless to do anything about the prosecution of such persons." Similarly, in *Boise City v. Better Homes, Inc.*, 72 Idaho 441, 444-45, 243 P.2d 303, 304 (1952), this Court held that "[t]he original jurisdiction conferred upon the district court by the constitution, Art. 5, §20, cannot be diminished by the legislature. Const. Art. 5, §13[.]" Again, in *Clemons v. Kinsley*, 72 Idaho 251, 256-57, 239 P.2d 266, 269 (1951), the Court held that "[t]he broad jurisdiction [created by Article 5, Section 13] is not subject to diminution by legislative act." The Court held the same thing in *Robinson v. Robinson*, 70 Idaho 122, 127, 212 P.2d 1031, 1033-34 (1949). Finally, in *McKnight v. Grant*, 13 Idaho 629, 637, 92 P. 989, 990 (1907), the Court held that, "We think [Article 5, Section13] was . . . intended to preserve to the judicial department of the state government the right and power to finally determine controversies between parties involving their rights and upon whose claims some decision or judgment must be rendered or determination made." In short, this Court has consistently and long held that the legislature may not directly or otherwise restrict the district

court's jurisdiction. Consequently, Idaho Code Section 19-2719(5)(c) cannot stand as a bar to granting *Ring* full retroactive application.

2. Established Idaho Law Prohibits Retroactively Applying Idaho Code Section 19-2719(5)(C).

The Idaho Code provides that, "No part of these compiled laws is retroactive, unless expressly so declared." I.C. §73-101. With regard to amendments to existing statutes, they "will not, absent an express legislative statement to the contrary, be held to be retroactive in application. *Johnson v. Stoddard*, 96 Idaho 230, 526 P.2d 835 (1974)[.]" *Nebeker v. Piper Aircraft Corporation*, 113 Idaho 609, 614, 747 P.2d 18, 23 (1987) (citations omitted). In 1995, subsection (5)(c) was amended into Idaho Code Section 19-2719. This amendment was Section 3 of Chapter 140 (S.B. 1084) of the 1995 Idaho Session Laws. The Act containing the amendment did not contain any express statement that the amendment or any other part of the Act should be applied retroactively. Thus, Idaho Code Section 73-101 precludes Section 19-2719(5)(c)'s retroactive application to the instant case.

Though Idaho Code Section 19-2719(5)(c) expressly purports to absolutely bar postconviction petitioners' claims dependent on retroactively applying a new rule of law, it contains no express legislative statement that it should itself be retroactively applied. It cannot, then, be applied to the case at bar.

3. Idaho Code Section 19-2719(5)(C) Violates Petitioner's Rights to Due Process and Equal Protection Guaranteed Under the United States and Idaho Constitutions.

If Petitioners did not stand under sentence of death, Idaho Code Section19-2719(5)(c)'s anti-retroactivity provision would not apply. The Uniform Post Conviction Procedure Act

("UPCPA") governs non-capital postconviction proceedings. I.C. §19-4901 *et seq.* The UPCPA provides that "*post-conviction relief is not barred* where new evidence is discovered, or *where later case law suggests a conviction is unlawful.*" *Aragon v. State*, 114 Idaho 758, 766 n.12, 760 P.2d 1174, 1182 n.12 (1988) (citing I.C.§ 19-4901) (emphasis added). The Act also provides that a claim can only be waived *if the waiver is knowing, voluntary and intelligent.* I.C. §19-4908; *McKinney v. State*, 133 Idaho 695, 700-01, 992 P.2d 144, 149-50 (1999). However, in addition to the UPCPA, the statutory scheme governing capital postconviction cases includes Idaho Code Section 19-2719. This Court has held that, "I.C. §19-2719 does not eliminate the applicability of the UPCPA to capital cases, but it supersedes the UPCPA to the extent that their provisions conflict." *McKinney v. State*, 133 Idaho 695, 700, 992 P.2d 144, 149 (1999). Because Section 19-2719(5)(c) would not preclude the application of *Ring* to Petitioners were they not sentenced to death, that statutory provision violates Petitioners' due process and equal protection rights.

Enforcing Section 19-2719(5)(c) against Petitioners would violate their rights to equal protection and due process under the Fourteenth Amendment of the United States Constitution, and Article 1, Sections 2 and 13 of the Idaho Constitution because the disparate treatment of capital and non-capital postconviction petitioners is not necessary to promote a compelling state interest. Alternatively, it would violate their rights to equal protection and due process under the same authorities because there is no rational basis for the disparate treatment. *Romer v. Evans*, 517 U.S. 620, 631-36 (1996) (amendment to Colorado Constitution that prohibited all legislative,

executive, or judicial action designed to protect homosexual persons from discrimination violated equal protection clause).[9]

At issue is the disparity in the manner in which fundamental rights are enforced in Idaho postconviction proceedings, depending on whether the actions are being prosecuted by capital or non-capital petitioners. The fundamental rights at stake here are the right to fairness in the criminal process and the right to fairness in procedures for enforcing claims concerning governmental deprivations of life or liberty.[10] Where fundamental rights are at stake, the

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[9]*See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446-51 (1985) (Requiring a special use permit for proposed group home for the mentally retarded violated equal protection clause in that requirement, in absence of any rational basis in record for believing that group home would pose any special threat to city's legitimate interests, appeared to rest on an irrational prejudice against mentally retarded); *Zobel v. Williams*, 457 U.S. 55, 61-64 (1982) (holding that "the Alaska dividend distribution plan violates the guarantees of the Equal Protection Clause of the Fourteenth Amendment."); *U.S.D.A. v. Moreno*, 413 U.S. 528, 535 (1973) (Provision of the Food Stamp Act which excludes from participation any household containing an individual who is unrelated to any other member of the household creates an irrational classification in violation of the equal protection component of the due process clause of the Fifth Amendment); *Sterling H. Nelson & Sons, Inc. v. Bender*, 95 Idaho 813, 814-16, 520 P.2d 860, 861-63 (1974) (holding that subsection setting out higher weight limits for haulers of unprocessed agricultural commodities than haulers of processed agricultural commodities was unconstitutional as discriminatory.)

[10]*Douglas v. California*, 372 U.S. 353, 356-58 (1963) (holding that indigent defendants were denied equal protection of the law where merits of their one appeal they had as of right from their convictions are decided without benefit of counsel); *Mayer v. Chicago*, 404 U.S. 189, 194-98 (1971) (Distinction drawn by Illinois Supreme Court Rule which provided trial transcripts only in felony cases was 'unreasoned distinction' proscribed by the Fourteenth Amendment); *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (holding "that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (State must provide corrective rules to overcome denial to the poor of an adequate appellate review granted to all who have money enough to pay the costs in advance. *See* Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* §15.7 (4th ed. 2007).

discriminatory scheme must be assessed with strict scrutiny.[11] The stated purpose of the offending statute, to eliminate purportedly unnecessary delay in carrying out valid death sentences, is not a sufficiently compelling interest to justify the violation of Petitioner's fundamental rights by carrying out an undisputedly invalid death sentence. The disparity in enforcement mechanisms is not necessary to any compelling state interest.

4. Applying Idaho Code Section 19-2719(5)(c) Would Violate The Federal Constitution's Guarantee Of A Republican Form Of State Government.

The United States Constitution guarantees that state government will be republican in form. U.S. Const. Art. 4, §4. Petitioners concede that it is unclear whether the Guarantee Clause accords federal courts authority to review the internal allocations of power within a state. *Largess v. Supreme Judicial Court for the State of Massachusetts*, 373 F.3d 219, 227 (1st Cir. 2004) (comparing *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring, joined by Scalia and Thomas, JJ.) (Guarantee Clause allows such review) with *id.* at 123-24 (Stevens, J., dissenting, joined by Ginsburg and Breyer, JJ.) ("Nothing in Article II...frees the state legislature from the constraints in the State Constitution that created it."). Petitioners also concede that not every state law separation of powers violation constitutes a Guarantee Clause violation.

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[11] *See Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 126, 15 P.3d 1129, 1134 (2000) (if a fundamental right is at issue, appropriate standard of review of law infringing on that right is strict scrutiny); *Newlan v. State*, 96 Idaho 711, 714, 535 P.2d 1348, 1351 (1975) (strict scrutiny when statute's classification infringes upon a fundamental right); *State v. Breed*, 111 Idaho 497, 500, 725 P.2d 202, 205 (Ct. App. 1986) (strict scrutiny of statutory schemes that infringe upon a "'fundamental right' such as voting, procreation, or constitutional safeguards for persons accused of crimes"). *See generally*, Ronald D. Rotunda & John E. Nowak, Treatise On Constitutional Law § 18.41 at 800-01(3rd ed. 1999) ("When the government takes actions that burden the rights of a classification of persons in terms of their treatment in a criminal justice system it is proper to review these laws under the strict scrutiny standard for equal protection.").

However, Petitioners contend that some state law violations do violate the Guarantee Clause. Specifically, where a state government provides no form of redress for an egregious state law separation of powers violation, that state law violation constitutes a Guarantee Clause violation. Where a separation of powers violation precludes sentencing relief in cases where lives hang in the balance, as in Petitioners' cases before the Court, the violation is egregious and constitutes a Guarantee Clause violation.

CONCLUSION

For these reasons, Mr. Fields' death sentence should be vacated and the case should be remanded to the district court for resentencing consistent with the principles announced in *Ring v. Arizona*.

Respectfully submitted this 8TH day of June, 2009.

Dennis Benjamin
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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 2009, I caused to be served two true and correct copies of the foregoing document by the method indicated below, first class postage prepaid where applicable, addressed to:

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