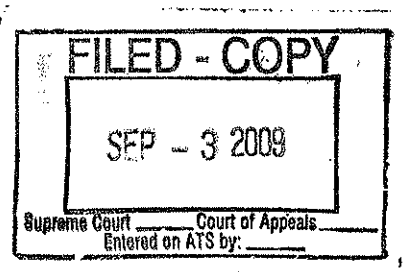
9-3-2009

Fields v. State Appellant's Reply 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 REPLY 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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ISSUE & STANDARD OF REVIEW

The issue before the Court is whether, in light of several relevant factors, *Ring v. Arizona* 536 U.S. 584 (2002), should be applied retroactively. The answer to this question must take into account the law of retroactivity in Idaho, what test the Court uses to determine whether a new rule should be retroactively applied, and what outcome application of that test would have when applied to *Ring*. In light of *Danforth v. Minnesota*, 128 S.Ct. 1029, 1041-42 (2008), this Court should explore whether Idaho's long established three factor retroactivity test (the "*Linkletter* test"[1]) should be employed to determine whether *Ring* should be applied to collateral review cases or, alternatively, whether there is sufficient cause to override *stare decisis* by rejecting the *Linkletter* test in favor of that adopted by the United States Supreme Court in *Teague v. Lane*, 489 U.S. 288 (1989).

By contrast, the State explicitly seeks to rephrase the issue, transforming it into whether this appeal must be dismissed for lack of jurisdiction, then spends well over half its argument to trying to persuade the Court to dismiss the case for lack of jurisdiction. Brief Of Respondent ("Respondent's Brief") at 6, 7-23. The State's asserted proper standard of review–"'this Court should. . .directly address the motion, determine whether or not the requirements of section 19-2719 have been met, and rule accordingly'"[2]–reflects the State's effort to refocus the Court from whether *Ring* should be applied retroactively to whether this case should be dismissed for want of jurisdiction. The State characterizes the issue and standard of review exclusively in terms of

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[1]*Linkletter v. Walker*, 381 U.S. 618, 622-23 (1965).

[2]Respondent's Brief at 8 (quoting *Hairston v. State*, 144 Idaho 51, 55, 156 P.3d 552 (2007) (quoting *Creech v. State*, 137 Idaho 573, 575, 51 P.3d 387 (2002)), *remanded on other grounds Hairston v. Idaho*, 128 S.Ct. 1442 (2008))

Idaho Code Section 19-2719, notwithstanding Petitioner's state and federal constitutionally based arguments regarding retroactivity doctrine, the fundamental right to a jury trial, and equal protection and due process guarantees.

The State's blindered approach to the issue before the Court is reflected throughout its brief, most notably, perhaps, where it characterizes Petitioner's arguments as an effort "to skirt [his] conviction[] or death sentence[] based upon a new technicality[.]" Respondent's Brief at 14. To characterize the fundamental right to a jury trial as a "technicality" trivializes our constitutional rights into a collection of obstacles without any appreciation for how denying those rights to criminal defendants threatens not merely criminal defendants but citizens and their relationship to their government. By serving as "'jurors actual or possible[,]'" ordinary citizens can prevent the jury system's "'arbitrary use or abuse.'" *Powers v. Ohio*, 499 U.S. 400, 406 (1991) (quoting *Balzac v. Puerto Rico*, 258 U.S. 298, 310 (1922)).

The State makes three arguments which this brief addresses. First, the State contends that Idaho's legislature has removed from its courts the jurisdiction to entertain any successive post-conviction claims which are based on the retroactive application of new rules of law. Respondent's Brief at 7-23. For this reason, the State asserts, the Court has properly never reached the question of what test should be used to determine what retroactive application a new rule of law should be given, if any, in a successive capital post-conviction case. Second, contending that the three-factor *Linkletter* retroactivity test is difficult to apply and causes inconsistent results, the State argues that the Court should adopt the federal retroactivity test (the "*Teague* test") which the federal courts developed to address concerns not present in state court systems–the need for comity and respect for finality of state court convictions in our federalist

system. Respondent's Brief at 24-27. Third, the State asserts that *Ring* is not retroactively applicable under the *Linkletter* test. *Id.* at 28-31. Fourth, the State contends that fundamental fairness does not mandate the retroactive application of *Ring*. *Id.* at 31-33.

ARGUMENT

I. UNDER IDAHO'S RETROACTIVITY TEST, *RING* SHOULD BE GIVEN RETROACTIVE EFFECT IN THIS CASE.

The State contends that this Court has implicitly rejected the *Linkletter* test in favor of what it calls the *"Griffith* test," under which new decisional rules of law apply only to those cases not final at the time the new case is decided. Respondent's Brief at 15. However, the State argues, alternatively, that under the quasi-*Griffith* test[3], *Ring* should not be applied retroactively to cases on collateral review.

A. *Linkletter* Is Idaho's Long-Established Retroactivity Test For Determining Whether A New Decisional Rule Should Be Applied To Cases On Collateral Review.

When this Court first addressed the question of retroactivity, it adopted the three factor test developed by the United States Supreme Court in *Linkletter*. *Thompson v. Hagan*, 96 Idaho 19, 25, 523 P.2d 1365, 1371 (1974). There, the Court held:

> Three different approaches to retroactivity can be identified. The first approach is the traditional rule . . . [and under it] a decision [is] applicable to both past and future cases. [Under] [t]he second approach[, the prospective rule approach,] . . . a

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[3]The term "quasi-*Griffith*" is used deliberately. The Court has stated that the United States Supreme Court developed the latter test in *Griffith v. Kentucky*, 479 U.S. 314 (1987). *Fetterly v. State*, 121 Idaho 417, 419, 825 P.2d 1073,1075, *reh'g denied* (Idaho 1992). While *Griffith* held that new rules applied to all non-final cases, it did not address the applicability of new rules in collateral review cases. Thus, *Griffith* did not support the *Fetterly* holding prohibiting the retroactive application of new rules to collateral review cases.

> decision is effective only in future actions, and does not affect the rule of law in the case in which the new rule is announced. Under the [third approach, the] modified prospective rule, the new decision applies 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.
>
> To aid the courts in determining which rule to apply, *Linkletter v. Walker* set forth the following factors to be considered. First, the purpose of the new decision must be analyzed in connection with the question of retroactivity. . . . The second factor is reliance on the prior rule of law. . . . The third factor is the effect on the administration of justice. This factor takes into account the number of cases that would be reopened if the decision . . . is applied retroactively.

Thompson. *See also Sims v. State*, 94 Idaho 801, 498 P.2d 1274 (1972) ("In *Linkletter v. Walker*, the Supreme Court of the United States said regarding prospective overrulings: 'Thus, the accepted rule today is that in appropriate cases the court may in the interest of justice make the rule prospective.'") (quoting *Linkletter* at 628).

The State does not contest that the Court adopted the *Linkletter* test, nor does it dispute the Court's continued use of that test. Instead, in the course of asserting that Idaho Code Section 19-2719(5)[4] precludes the courts from entertaining on their merits successive capital post-conviction claims which rely on the retroactive application of new rules, the State appears to argue that the Court carved out capital post-conviction cases as an exception to that test's universal applicability. *Respondent's Brief* at 14-18.

For *stare decisis* purposes, what matters is the retroactivity analysis which the Court has in fact employed. *Fetterly* and the remaining cases the State cites unquestionably departed from the Court's earlier consistent application of the *Linkletter* test. However, the Court decisions in

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[4]Throughout this brief, references to Section 19-2719(5) are to the initial paragraph of that statute section as opposed to its subsections (5)(a), (b), or (c). References to those particular subsections are specific, e.g., Section 19-2719(5)(c).

which the *Linkletter* test is employed to determine the retroactive effect of new rules bookend *Fetterly* and the other cases on which the State relies. Further, as of the 1990, the Court had been relying on the *Linkletter* test since 1974.

The State contends that in *Fetterly v. State*, 121 Idaho 417, 825 P.2d 1073, *reh'g denied* (1992), the Court utilized a quasi-*Griffith* bright line of finality test to deny relief. It is true that Justice Bistline dissented from the majority on, among other things, its retroactivity analysis. He wrote:

> There are three problems with this analysis: 1) *Griffith* does not stand for the proposition stated by the majority, 2) this Court has never adopted *Griffith* as the law, nor is it required to fully adopt that case, and 3) under Idaho's current retroactivity doctrine, *Charboneau* is fully retroactive.

Fetterly, 121 Idaho at 420, 825 P.2d at 1076 (Bistline J., dissenting). The State contends that "the majority rejected Justice Bistline's position when it relied upon I.C. §19-2719(5) and *Griffith*, concluding, 'the *Charboneau* interpretation of I.C. §19-2515 does not apply to the present case because the present case was final prior to the issuance of *Charboneau*.'" Respondent's Brief at 16. The State's assertion that the majority "rejected Justice Bistline's position" in his dissenting opinion is sheer speculation grounded in its wrongly equating the majority's silence regarding Justice Bistline's position with its rejection of that position. The structure of the State's argument–that this Court's overruling the application of the long established *Linkletter* test to determine the retroactive effect of a new rule is revealed by a comparison between the majority opinion and Justice Bistline's dissent–makes little sense, and other courts have rejected this argument as unsound. One possible reason why the majority may not have rejected Justice Bistline's position is that the parties may not have raised the issue.

Another is that the parties may have raise the issue only as a matter of federal and not state law. In any event, silence cannot properly be equated with rejection. United *States v. Sterling*, 283 F.3d 216, 219 (4th Cir. 2002) ("overruling by implication is not favored"); *see also In re Morrissey*, 168 F.3d 134, 139-40 (4th Cir. 1999) ("arguing that a precedent has been overruled through a court's silence is a disfavored enterprise").

Beyond the structure of the State's argument, its substance is counter to this Court's holdings on *stare decisis*. This Court consistently holds that "'a question once deliberately examined and decided should be considered settled.'" *Ultrawell, Inc. v. Washington Mut. Bank, FSB*, 135 Idaho 832, 835, 25 P.3d 855, 858 (2001) (quoting *Scott v. Gossett*, 66 Idaho 329, 335, 158 P.2d 804, 807 (1945). Thus, if the *Fetterly* majority believed it was shifting course from the settled law that the retroactivity of a new rule of law was to be determined by application of the *Linkletter* test, it would have provided additional deliberate examination and a reasoned decision. The absence of reasons strongly suggests that the majority did not intend to alter the Idaho retroactivity test.

Further, while there can be no question that the *Fetterly* retroactivity analysis is inconsistent with the *Linkletter* test employed from the 1970s until that point (and after that point as well, both in the 1990s and later), the Court's intention is unclear. Whatever the Court's intention at the time, however, it is now clear that *Fetterly*'s use of the bright line of finality test was an anomaly limited to the 1990s. *See infra at* 9-11.

In addition to *Fetterly,* the State cites four other cases as support for its position that the Court has excepted successive post-conviction cases from the *Linkletter* test. Respondent's Brief at 16-17. *Stuart v. State*, 128 Idaho 436, 914 P.2d 933 (1996); *Butler v. State*, 129 Idaho 899,

935 P.2d 162 (1997); *State v. Card*, 121 Idaho 425, 825 P.2d 1081, *reh'g denied* (1992); *State v. Gallegos*, 120 Idaho 894, 821 P.2d 949 (1991). As with *Fetterly*, none of these four additional cases supports the State's contention.

In only two of the State's five cases, *Fetterly* and *Butler*, did the Court plainly state that it was applying the quasi-*Griffith* bright line of finality rule.[5] *Fetterly* has been discussed above.

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[5]In *Stuart*, the only language relevant to the issue is dicta, and even it fails to support the State's position. *Stuart* was an appeal from the denial of Mr. Stuart's motion pursuant to Idaho Rule of Criminal Procedure 60(b)(5). The Court affirmed that denial on the basis of substantive law, not on the basis of Section 19-2719(5) analysis. *Stuart* at 437-38, 934-35. In the relevant dicta, the Court noted that even if the substantive law had favored Mr. Stuart, he still would have lost because it was announced in a case released after his conviction was final: this "fact. . .would preclude retroactive application. *See Fetterly v. State*, 121 Idaho 417, 418-19, 825 P.2d 1073, 1074-75 (1991), *cert. den.* 506 U.S. 1002 (1992) (holding new decision on death penalty sentencing did not apply retroactively to already final cases)." *Stuart* at 438, 935. The Court supplied no reasons for why it would have departed from the quasi-*Griffith* test. As in *Fetterly*, the absence of reasons strongly suggests that the majority did not intend to alter the Idaho retroactivity test.

Card was a unified direct and initial post-conviction appeal case. Here, as with *Fetterly*, the State claims that the Court "implicitly rejected" the *Linkletter* test. And, again as with *Fetterly*, it reaches its conclusion by equating the majority's silence regarding the *Linkletter* test with its rejecting that test. As the State notes, Justice Bistline advocated, in his dissent, for the application of the *Linkletter* test while the majority applied the new rule "without any reference to the three-prong *Linkletter* test." Respondent's Brief at 17. In fact, the majority applied the quasi-*Griffith* rule without any reference to any retroactivity test or any discussion of the retroactive application of the new rule. Thus, just as in *Fetterly*, the majority opinion ignores Justice Bistline's argument. This lack of discussion does not mean that the Court was rejecting Justice Bistline's argument. The majority might have been in agreement with Justice Bistline that the *Linkletter* test be employed to determine the retroactive applicability of the new rule; if it did so, it may simply have reached different conclusions regarding the weight of each of the three factors and, therefore, the outcome of the test's application. Indeed, Justice Bistline acknowledged this by noting only that "the majority *seems* to assume that *Payne* applies here, such is not *necessarily* the case." *Card* at 461, 1117 (italics added). In any event, the absence of reasons strongly suggests that the majority did not intend to alter the Idaho retroactivity test.

Finally, the State argues that by not adopting the position of the dissent on retroactivity, the majority rejected it in *State v. Gallegos*, 120 Idaho 894, 821 P.2d 949 (1991). For the same reason that this argument fails with regard to the holdings in *Fetterly* and *Card*, it fails here. And, again, the Court's providing no reasons for departing from the quasi-*Griffith* test strongly suggests that the majority did not intend to alter the Idaho retroactivity test.

See supra at 5-7. *Butler*, a non-capital case, applies the quasi-*Griffith* test without providing reasons for the departure from the *Linkletter* test. "The *Fetterly* Court held that while this Court applied *Charboneau* to cases that were still open for sentencing on the date *Charboneau* was released, the defendant's case in *Fetterly* was finally decided. . . .The remittitur in Butler's direct appeal was issued on November 12, 1992. . . . On December 28, 1993, this court decided *Townsend*. . . . *Townsend* does not apply to Butler's case." *Butler*, 129 Idaho at 901-02, 935 P.2d at 164-5. As in *Fetterly*, the absence of reasons strongly suggests that the majority did not intend to alter the Idaho retroactivity test. Similar language may also be found in a 1993 case from this Court, *State v. Josephson*, 123 Idaho 790, 795, 852 P.2d 1387, 1392 (1993) ("We hold that the *Guzman* decision will be applied retroactively to all cases that had not become final when *Guzman* was issued, including those that were in progress in the trial courts. See *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708 (1987); *Fetterly v. State*, 121 Idaho 417, 825 P.2d 1073 (1991)."). *Cf. State v. Chapple*, 124 Idaho 525, 531, 861 P.2d 95, 101 (Ct.App. 1993) (recognizing that in *Josephson*, the Idaho Supreme Court held that *Guzman*'s "rejection of the 'good faith' exception is retroactively applicable to all cases that had not become final when *Guzman* was issued, including those that were in progress in the trial courts.") (internal quotation marks and citation omitted).

While *Linkletter* was applied in none of the State's five cases, the Court engaged in no retroactivity analysis shedding light on its apparent departure. Importantly, these cases provide only an incomplete picture of the Court's retroactivity rulings from the 1990s. In 1993, the same year that it decided *Josephson*, the Court decided the retroactive effect of a new decision without referring, expressly or otherwise, to the quasi-*Griffith* bright line of finality rule. *State v. Dopp*,

124 Idaho 481, 861 P.2d 51 (1993). At issue was what showing a defendant must make to be entitled to withdraw a guilty plea. The *Dopp* court overruled its earlier holding in *State v. Jackson*, 96 Idaho 584, 532 P.2d 926 (1975), finding that "withdrawal [of an *Alford* plea] is not an automatic right and more substantial reasons than just asserting legal innocence must be given." *Id.* at 486, 56. The Court then limited its new rule to all guilty pleas entered *after* the *Dopp* decision date. *Id.* This limitation plainly excludes from the retroactive application of *Dopp* some of those whose convictions were not final at the time of that decision, specifically anyone who entered a guilty plea before the *Dopp* decision date but whose case remained in trial court (e.g., because a sentence had not yet been imposed). It is plain from the reasoning in *Dopp* as well that the Court did not employ the bright line of finality test.

Fetterly, *Stuart*, *Butler*, and *Josephson* are examples of this Court's temporary determination that the distinction of import for questions of retroactivity is between those cases in which direct appeal was complete, and those in which it was not, at the time the new case was decided. The Court draws this same distinction in another direct appeal case cited by the State, *State v. Gallegos*, 120 Idaho 894, 821 P.2d 949 (1991), as support for the proposition that Justice Bistline's criticism there of the majority's failure to address the *Linkletter* test and the cases he cites somehow demonstrates that "[i]t is clear that *Griffith* changed Idaho's retroactive test in criminal cases and I.C. §19-2719 changed the rule in capital cases." Respondent's Brief at 18. This Court has never held, stated in dicta, or merely alluded to a distinction between initial petition and successive petition post-conviction cases for retroactivity analysis purposes. The distinction the State draws between initial and successive post-conviction petitions is a distinction without a difference for Idaho retroactivity analysis purposes.

Further, the Court had been relying on the *Linkletter* test since 1974. *Thompson v. Hagan*. And it employed that test in all manner of cases (civil and criminal, direct appeal and post-conviction) throughout the 1970s, the 1980s, and into the 1990s. *See, e.g., Jones v. Watson*, 98 Idaho 606, 608, 570 P.2d 284, 286 (1977) (creditor lawsuit); *State v. Tipton,* 99 Idaho 670, 587 P.2d 305 (1978) (first degree burglary convictions);*State v. Machen*, 100 Idaho 167, 595 P.2d 316 (1979) (escape conviction); *Gay v. County Commissioners of Bonneville County*, 103 Idaho 626, 651 P.2d 560 (Ct.App.1982) (zoning case); *State v. Tisdale*, 103 Idaho 836, 654 P.2d 1389 (Ct.App. 1982) (citing to *Gay* as authority for three-factor *Linkletter* test); *Robertson v. Magic Valley Regional Medical Center*, 117 Idaho 979, 793 P.2d 211 (1990) (tort action); *Baker v. Shavers, Inc.*, 117 Idaho 696, 791 P.2d 1275 (1990); *Potlatch Corp. v. Idaho State Tax Com'n*, 120 Idaho 1, 813 P.2d 340 (1991) (tax case); and *V-1 Oil Co. v. Idaho Petroleum clean Water Trust Fund*, 128 Idaho 890, 894-95, 920 P.2d 909, 913-14 (1996) (transfer fee/tax case).

Recently, in describing Idaho's current retroactivity law, the Court reached back to three of its seminal retroactivity decisions from the 1970s, *Thompson*, *Tipton*, and *Watson*, as support for its holding:

> The usual rule is that decisions of this Court apply retroactively to all past and pending cases. *State v. Tipton*, 99 Idaho 670, 587 P.2d 305 (1978). For policy reasons, however, this Court has discretion to limit the retroactive application of a particular decision. . . .When deciding whether to limit the retroactive application of a decision we weigh three factors: (1) the purpose of the decision; (2) the reliance upon the prior law; and (3) the effect upon the administration of justice if the decision is applied retroactively. *Thompson v. Hagan*, 96 Idaho 19, 523 P.2d 1365 (1974). We balance the first factor against the other two to determine whether to limit the retroactive application of the decision. *Jones v. Watson*, 98 Idaho 606, 570 P.2d 284 (1977).

BHA Investments, Inc. v. City of Boise, 141 Idaho 168, 173, 108 P.3d 315, 320 (2004). The Court has very recently cited in a criminal case to *Tipton* as support for the proposition that a judicial rule may be given only prospective effect if it overrules precedent on which the parties may have justifiably relied. *State v. Adair*, 145 Idaho 514, 181 P.3d 440 (2008).[6] Plainly, if the quasi-*Griffith* rule was ever live Idaho doctrine, it is no longer.

Even if it would make sense (which it would not) to read the proposition for which *Tipton* is cited as invoking the *Fetterly* bright line of finality test, citing to *Tipton* rather than *Fetterly* or one of the other cases from the 1990s employing the *Fetterly* test is inconsistent with such a reading. While standing alone, then, *Adair* may not be a clear invocation or application of the *Linkletter* test, it and the *Fetterly* bright line of finality test clearly are mutually exclusive. When read in the context of *BHA Investments, Inc.*, *Adair* reflects the Court's adoption of the *Linkletter* test for determining the retroactive effect of a new decision which breaks with precedent.

Thus, whatever the Court's intent in the 1990s, *Linkletter* plainly remains Idaho's retroactivity test.

B. Under *Linkletter*, *Ring* Should Be Applied To Idaho Cases On Collateral Review.

On the State's view, even under *Linkletter*, *Ring* is not retroactively applicable on collateral review. Respondent's Brief at 28-31. This is because, the State continues, the United States Supreme Court has already decided that the Sixth Amendment right to a jury trial is not retroactively applicable. *DeStefano v. Woods*, 392 U.S. 631 (1968), and *Duncan v. Louisiana*,

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[6]While the State asserts that *Adair* is irrelevant to *Linkletter's* applicability, Respondent's Brief at 17 n.7, *Adair*'s consideration of a criminal case in terms of *Linkletter*'s retroactivity analytical organization is clearly significant.

391 U.S. 145 (1968). The State contends that "[t]here is simply no basis for distinguishing . . . *DeStefano*[.]" Respondent's Brief at 31. In fact, there are three deep, obvious, and relevant divides between *DeStefano* and the instant case.

First, the question in *DeStefano* was whether the Sixth Amendment right to jury *guilt* phase trial was retroactively applicable, whereas the question before this Court is much more limited. Here, however, the question not only concerns just the sentencing phase but, more narrowly still, the initial question in that proceeding: whether a capital defendant is eligible for the death penalty.[7] The practical difference between the questions posed by *Danforth* and this case is seen in how the third of the three factors is framed. The *DeStefano* court found that

> the effect of a holding of general retroactivity on law enforcement and the administration of justice would be significant, because the denial of jury trial has occurred in a very great number of cases in those States not until now according the Sixth Amendment guarantee. For example, in Louisiana all those convicted of noncapital serious crimes could make a Sixth Amendment argument. And, depending on the Court's decisions about unanimous and 12-man juries, all convictions for serious crimes in certain other States would be in jeopardy.

Id. at 634. The case at bar, by contrast, implicates an extremely limited number of cases. Only capital cases would be affected by a finding that the right to a jury determination of death penalty eligibility is retroactive. Of the capital cases in Idaho, eleven or, at most, twelve cases would be affected. Opening Brief at 21 n.6. While this is a compelling difference, there is another, perhaps more compelling, one. The *DeStefano* court was partly driven by a perceived twin risk of gargantuan proportion to the administration of justice: not merely the prospect "in Louisiana

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[7]The Court has very recently noted that the holding in *Ring* is limited to this question. *State v. Payne*, slip op. at *27, 2008 WL 5205959 (Idaho 12/15/08) ("Although unnecessary under *Ring v. Arizona,* it is very plain the Idaho Legislature meant that in all capital cases after the enactment of the 2003 amendments juries were to conduct the analysis the judge had previously conducted under the old I.C. § 19-2515.").

[of] all those convicted of noncapital serious crimes. . .making a Sixth Amendment argument [and, therefore, at risk of being released, but also by the prospect of] all convictions for serious crimes in certain other States. . .be[ing] in jeopardy." *Id.* at 634. There is no risk of release in the instant or any case which could be governed by the Court's holding that *Ring* retroactively applies on collateral review. The very worst case scenario from the State's perspective is that of a resentencing proceeding resulting in a life without parole sentence. Thus, the retroactivity question presented by the instant case differs dramatically from that decided in *DeStefano* in ways which should result, correlatively, in dramatically less weight being accorded the administrative of justice part of the *Linkletter* test.

Second, the *DeStefano* court's Sixth Amendment jury trial right analysis was exclusively in terms of individual defendants' right to trial by jury. Nowhere in the decision is there mention or consideration of the prospective jurors' stake in that right. Thus, the Court's conclusion that "[t]he value implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial" is in no way an assessment of whether the value to the community would be served by requiring retrial of persons convicted of the gravest offense and sentenced to the harshest penalty. *Id.* at 634. *See infra* at 15; *Opening Brief* at 14-17.

Third, contrary to the State's argument, the value judgments made by courts of co-ordinate jurisdiction, in this instance the United States Supreme Court, neither prevent nor absolve this Court from making its own deliberate assessments of each of the three factors. This is not only because, as outlined in the last two paragraphs, the question at issue in this case is different from that presented in *DeStefano*, but also because it is the essence of the holding in

Danforth. See, e.g., id. at 1041 (the *Teague* test "was tailored to the unique context of federal habeas and therefore had no bearing on whether States could provide broader relief in their own postconviction proceedings than required by that opinion"). It is also because the facts which inform the assessment may differ between jurisdictions.[8] Historically, different states have made different assessments in applying those factors to determine the retroactive effect of a new rule. In fact, other courts of coordinate jurisdiction have employed the *Linkletter* test to reach conflicting conclusions on whether *Ring* may be applied retroactively to cases on collateral review. *Compare, e.g., Johnson v. State*, 904 So.2d 400, 412 (Fla. 2005) (applying three factor test, concludes *Ring* is not retroactive on collateral review) *and State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003) (applying three factor test, concludes *Ring* is retroactive on collateral review). There is no reason to assume that this Court will or should make the same assessments and reach the same conclusions as the United States Supreme Court or any other court of coordinate jurisdiction. *Cf. State v. Newman*, 108 Idaho 5, 11 n.6, 696 P.2d 856, 862 n.6 (1985) ("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.").

DeStefano does not control. Independent application of the *Linkletter* test demonstrates that *Ring* should be applied to collateral review cases.

The dual purposes of the fundamental right to jury trial guaranteed state defendants by the Sixth and Fourteenth Amendments is to protect individual defendants and to ensure community participation in serious trials, thereby ensuring that community values are reflected in the

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[8]Of course, the relevant facts may change over time within a single jurisdiction. Thus, with regard to some new rules, it may be that a change in relevant facts would lead a court to change its assessment.

sentence imposed. Applying *Ring* to collateral review cases would further these purposes, whereas failure to do so would thwart them. Failure to apply *Ring* retroactively in collateral review cases would thwart its dual purposes. Having been denied his fundamental right to a jury determination of eligibility for a death sentence, Mr. Fields would be executed pursuant to a sentence which cannot withstand constitutional scrutiny. At the same time, the community would be denied participation in a critical part of the most serious kind of criminal trial, the sentencing proceeding of a capital trial.

As for the reliance on the prior state of the law, the State has no interest in executing *unconstitutionally imposed* sentences. The State does not dispute that the federal constitutional issue of jury participation in capital sentencing proceedings was hotly disputed, at least until the United States Supreme Court temporarily and mistakenly "settled" the question in *Walton v. Arizona*, 497 U.S. 639 (1990). While Fields was sentenced post-*Walton*, the State's reliance on an erroneous Supreme Court decision should carry relatively little weight given the few cases affected and the fundamental right that was violated.

Additionally, because applying *Ring* retroactively to cases on collateral review would affect only a small number of cases, the weight accorded the reliance factor should be small. *Gafford v. State*, 127 Idaho 472, 475, 903 P.2d 61, 64, *reh'g denied* (1995) (on case before Court, retroactive effect to cases already final found to be "of limited applicability and will affect only those criminal defendants currently [committed] in Idaho under the prior statutory scheme").

Finally, applying *Ring* retroactively to cases on collateral review will have a substantial positive but minimal, if any, negative impact on the administration of justice. The number of cases which could be affected is known: ten, or depending on the outcome of the federal district

court's order granting sentencing relief in one case, possibly eleven. *See* Opening Brief at 21 n.6. 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 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). Based on the small number of cases at stake here, the administration of justice factor weighs strongly in favor of retroactively applying *Ring*. Finally, administration of justice must also be measured by the degree to which the public's respect for judicial decisions through justice and equitable outcomes will likely continue. 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.

Retroactively applying *Ring* will further its purpose, whereas not retroactively apply it would thwart its purpose. There was no legitimate reliance in pre-*Walton* cases on the refusal to involve juries in sentencing proceedings. Applying *Ring* retroactively will have a net substantial positive effect on the administration of justice. Under *Linkletter*, *Ring* must be retroactively applied to cases on collateral review.

The Court also has the authority to prevent the need for resentencing proceedings in those few cases by reducing the sentence at issue to the maximum legal term. *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 pre-amendment 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 (Idaho1979) (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).

II. THE *TEAGUE* RETROACTIVITY TEST, TAILORED TO THE FEDERAL COURTS' OBLIGATION TO MEET THE NEEDS OF THE NATION'S FEDERALIST SYSTEM, SHOULD NOT BE SUBSTITUTED FOR THE LONG ESTABLISHED IDAHO TEST FOR DETERMINING THE RETROACTIVE EFFECT OF NEW DECISIONAL LAW.

Teague was fashioned to reflect and promote our Nation's federalist system, specifically the role federal courts play in relation to state courts. As the United States Supreme Court has recently noted, *Teague* speaks to 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*, 128 S.Ct. at 1041 (emphasis added).

The State contends that if the Court rejects its argument that Idaho Code Section 19-2719(5) prohibits the courts from entertaining any successive capital post-conviction claim based on the retroactive application of new law, then it should adopt the *Teague* standard for determining a new decision's retroactive effect. Respondent's Brief at 24-27. For the reasons set forth here and in the Opening Brief, the Court should decline the State's invitation and adhere to the *Linkletter* test.

The arguments in favor of adopting the *Teague* test, the State claims, are that it will (1) "provide uniformity in Idaho's application of new rules of criminal law[,]" (2) "eliminate a confusing and unbridled standard that was abandoned years ago by the [United States] Supreme Court and a majority of states[,]" and (3) preserve finality of judgments, without which "'the criminal law is deprived of much of its deterrent effect.'" *Id.* at 27 (quoting *Flamer v. State*, 585 A.2d 736, 749 (Del. 1990)). The State also notes that the United States Supreme Court has criticized the *Linkletter* standard as "'unprincipled and inequitable.'" Respondent's Brief at 24 (quoting *Danforth v. Minnesota*, 128 S.Ct. at 1037). The State notes, as well, that the Supreme Court criticized the *Linkletter* standard as leading "'to unfortunate disparity in the treatment of similarly situated defendants on collateral review'" due to its "'failure to treat retroactivity as a threshold question and [its] inability to account for the nature and function of collateral review.'" Respondent's Brief at 25. These three arguments are addressed below in serial order.

A. Far From Creating Uniformity In Idaho's Application Of New Rules Of Criminal Law, The *Teague* Standard Has Created Illegitimate And Massive Disparities In The Application Of Those New Rules.

As noted just above, the State recites the United States Supreme Court's criticisms of the *Linkletter* test. Those criticisms were lodged by the *Teague* court. It should come as no surprise, then, that the criticisms assume a pre-ordained divide between cases on direct review and those on collateral review. One of the criticisms was that the *Linkletter* test led to indefensible disparities in the treatment of similarly situated defendants on collateral review. Whatever one thinks of the direct/collateral review distinction in theory, it is indisputable that in practice whether a particular case remains in direct appeal proceedings or moves into collateral proceedings is a matter of how quickly (or not) a case is processed by the judicial system. For this reason, the *Teague* standard creates unprincipled and inequitable disparities in the treatment of defendants are identically situated but for fortuitous timing differences.

For these same reasons, Respondent's argument that fundamental fairness is not violated by a failure to apply *Ring* retroactively is mis-guided. Like the arbitrary application of the death penalty found unconstitutional in *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (criticizing "capricously selected random handful" of death sentences as "cruel and unusual in the same way that being struck by lightning is cruel and unusual")(Stewart, J., concurring), the random, fortuitous grant of a jury trial right to some, but not all capitally sentenced inmates in Idaho is unprincipled and inequitable.

The instant case illustrates exactly how fortuitous differences can lead to the enforcement of a fundamental constitutional right in one person's case and the intentional lack of enforcement of that same fundamental constitutional right in another person's, with the lives of both

individuals hanging in the balance. As noted in the Opening Brief, Mr. Fetterly was charged with first degree murder in 1983 while Mr. Fields was charged in 1989. After Mr. Fetterly's initial death sentence was overturned by the federal courts, he was resentenced to death. His direct appeal from that resentencing was ongoing when *Ring* was decided. Consequently, in 2002, this Court ordered that Mr. Fetterly's case be remanded for resentencing proceedings. By contrast, Mr. Fields, convicted approximately six years after Mr. Fetterly, has been in collateral proceedings since the early 1990s. He has been denied *Ring* relief under *Teague*. Mr. Fetterly received *Ring* relief based on the chance event that the federal courts ordered sentencing relief, not based on anything he did.

B. Finality's Purpose Of Administrative Efficiency Must Not Trump Fundamental Constitutional Rights.

The argument that finality is necessary to prevent the release of large numbers of convicted criminals or the expenditure of large sums of money necessary for further court proceedings to avoid their release implies that finality is of no concern in the *Linkletter* test. But the implication is plainly false. The third factor in the *Linkletter* test takes finality into account in considering the administrative burden which would be caused by the retroactive application of the new rule. Instead, the State's argument seems to be that finality should trump other legitimate considerations, e.g.- that the violated right is a fundamental constitutional right.

C. Finality No More Favors *Teague* Than *Linkletter*.

The State cites finality as a value which supports the adoption of the *Teague* test. Respondent's Brief at 26 (providing as an example of why some other states have adopted *Teague* that Illinois did so "focusing upon the interests of finality"). This wrongly suggests that

the *Linkletter* test either undervalues or altogether fails to take finality into account. The weight a court gives the second and third *Linkletter* factors–prior reliance and effect on the administration of justice–is partly a function of the value placed on finality. With *Teague*, on the other hand, finality is the *only* value generally worthy of consideration. Its two exceptions are just that, exceptions. And the United States Supreme Court has made the extraordinarily limited scope of the second exception very plain: "This class of rules is extremely narrow, and 'it is unlikely that any . . . has yet to emerge.'" *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (quoting *Tyler v. Cain*, 533 U.S. 656, 667 n. 7 (2001) (quoting *Sawyer v. Smith*, 497 U.S. 227, 243 (1990)) (internal quotation marks omitted). If this Court were to replace *Linkletter* with *Teague*, it would be replacing discretion with rigidity.

Finality was introduced into retroactivity jurisprudence when, in the 1960s, the United States Supreme Court decided several cases introducing into legal practice a variety constitutionally guaranteed rules of criminal procedure. At issue in *Linkletter*, for example, "was whether *Mapp v. Ohio*, 367 U.S. 643 (1961), which made the exclusionary rule applicable to the States, should be applied retroactively to cases on collateral review." *Teague*, 489 U.S. at 302. The test developed in *Linkletter* and, more specifically, its application in that and similar cases in the 1960s responded to the fear that *Mapp* and the related decisions would cause the release of a large percentage of defendants convicted of serious crimes. But *Linkletter* allows for sensible judgments in different factual contexts. Where the threat of emptying prisons is not so great or where, as in the instant case, it is non-existent, courts need not accord as much weight to the administration of justice factor. *Teague* allows no such flexibility.

Obviously, *Teague* represents the court's normative judgment that finality should trump most other values. The second exception to the non-retroactivity presumption for some constitutionally mandated rules of criminal procedure incorporates the normative judgment that when the likelihood of an accurate conviction is seriously diminished without the new procedural rule under consideration, finality should be trumped. But *Teague* nowhere suggests any appreciation for according some similarly heightened value to those constitutionally mandated rules of criminal procedure aimed at not only protecting individual defendants but, by reinforcing the particular constitutional structure of our government, the citizenry generally. *See, e.g., Dickerson v. U.S.*, 530 U.S. 428 (2000) (though the *Miranda* rule is a prophylactic, it "safeguards a 'fundamental trial right'") (quoting *Withrow v. Williams*, 507 U.S. 680, 691 (1993)). The Sixth Amendment right to jury trial is a right with just such a dual purpose. *See supra* at 13-16; Opening Brief at 14-17. *Teague* fails to allow courts to account for this duality by failing to allow them, when determining whether the right to jury trial applies retroactively to cases on collateral review, to consider the Idaho citizens' stake in preserving the structure of their government–specifically, preserving undiminished the federal right to trial by jury as a check against potential government abuse. Even if the presumptive non-retroactivity of *Teague* were attractive, its exceptions are too narrow. Courts must not relinquish authority to retroactively apply newly acknowledged rules of criminal procedure mandated by fundamental constitutional rights, especially those which serve not merely to protect individual defendants but the governmental structure of our Nation as well. In addition to the policy reasons for why courts should not do this, the constitutional separation of powers mandate prohibits their doing it. For pronouncing that a constitutionally mandated, judicially acknowledged but not legislatively

codified rule is retroactively applicable is an essential function of the courts. Relinquishing it is to legislate a fundamental change of Idaho's government structure, and doing so would thus infringe on the legislative function in violation of the constitutionally mandated separation of powers.

Even if the Court were to relinquish that authority generally, there is at least one constitutional constraint prohibiting total relinquishment. Deploying, especially where nothing compels it and where the defendant has done nothing to deserve it, a judicially created doctrine to preclude reaching the merits of a claimed violation of a federal constitutionally guaranteed fundamental right violates federal constitutionally guaranteed due process.

D. There Is No Evidence That The Finality Of Judgments Has A Deterrent Effect.

The State repeats the frequently made assertion that finality has a deterrent effect. However, it does not burden its assertion with factual support. It is, at best, a highly suspect proposition that most individuals who murder would not –if only they knew that constitutional rights acknowledged after their conviction and sentence were final would not apply to them.

E. While The Majority Of States Have Adopted *Teague*, It Is Unclear How Many Understood That The Federal Constitution Empowered Them To Do Otherwise.

The State asserts that the majority of states have adopted *Teague*. While that may be so, it is also true that, before *Danforth*, a variety of state high courts mistakenly believed that they had no choice, at least with respect to federal constitutional rights. Further, judicial decision-making is not a popularity contest. The question should not be whether the majority of courts rule one way or another, but whether there is thoughtful dispute between those states which have

adopted different approaches. The fact that there is a significant split suggests that there is thoughtful dispute. The decisions reflect this as well. Finally, at least thirteen state high courts have adopted non-*Teague* tests for determining the retroactive application of new state law rules. *See*, e.g., *Smart v. State*, 146 P.3d 15, 28 (Alas. App. 2006) (Alaska's retroactivity test is *Linkletter*); *State v. Towery*, 204 Ariz. 386, 393, 64 P.3d 828, 835 (2003) (applying a hybrid *Teague-Linkletter* test for determining whether a rule is retroactive); *People v. Carrera*, 49 Cal.3d 291, 312-13, 777 P.2d 121, 142-43 (1989) (declining to adopt *Teague* for state law retroactivity issues); *Johnson v. State*, 904 So.2d 400, 409 (Fla. 2005) (rejecting *Teague* and applying its own retroactivity test); *State v. Nakata*, 76 Hawai'i 360, 378, 878 P.2d 699, 717 (1994) (reaffirming that *Linkletter* is retroactivity test for new state law); *Pohutski v. City of Allen Park*, 465 Mich. 675, 641 N.W.2d 219 (2002) (court applies *Linkletter*, explaining that *Teague* doesn't apply to new state law); *State v. Whitfield*, 107 S.W.3d 253, 267 (Mo. 2003) (adopting *Linkletter*); *Cowell v. Leapley*, 458 N.W.2d 514, 518 (S.D. 1990) (rejecting *Teague*); *People v. Martello*, 93 N.Y.2d 645, 647-48, 717 N.E.2d 684, 686-87 (1999) (applies *Linkletter* for state law retroactivity issues); *Page v. Palmateer*, 336 Or.379, 382-84, 84 P.3d 133, 136-38 (2004) (not bound by federal retroactivity doctrine when determining retroactive application of new state law); *Meadows v. State*, 849 S.W.2d 748, 755 (Tenn. 1993) (declining to adopt *Teague* for state constitutional laws); *Labrum v. Utah State Bd. of Pardons*, 870 P.2d 902, 912 n.9 (Utah 1993) (noting that Court adopted *Linkletter* in *Andrews v. Morris*, 677 P.2d 81 (Utah 1983)); *Farbotnik v. State*, 850 P.2d 594, 601-02 (Wyo. 1993) (reaffirming that *Linkletter* test still used post-*Teague* because allows the court "to weigh the interest of justice").

III. IDAHO CODE SECTION 19-2719 ALLOWS SUCCESSIVE POST-CONVICTION CLAIMS BASED ON THE RETROACTIVE APPLICATION OF NEW DECISIONAL RULES OF LAW.

The State argues that Idaho's legislature has removed from her courts jurisdiction to consider successive capital post-conviction claims based on the retroactive application of new rules of law. Respondent's Brief at 7-23. Even though Idaho Code Section 19-2719(5)(c) explicitly prohibits such claims, the State expressly eschews that subsection as the basis of its argument. Instead, the State opts to base its argument on Idaho Code Section 19-2719(5), which was enacted before Section 19-2719(5)(c) and which contains no language regarding retroactivity. *Subsection A addresses the State's jurisdictional argument.*

In the course of making its jurisdictional argument, the State disputes some but not all of the arguments Mr. Fields makes in his Opening Brief attacking Section 19-2719(5) and Section 19-2719(5)(c) on state and federal constitutional grounds. In particular, the State argues that Section 19-2719(5) does not violate either the Idaho Constitution's separation of powers mandate or Mr. Fields' state and federal rights to due process and equal protection. Along the way, the State argues that the legislature's expression at the time of enacting Section 19-2719(5) that it be applied retroactively means that successive post-conviction claims in capital cases based on the retroactive application of new rules of law are prohibited. These arguments are addressed in serial order below.

A. Applying Established Rules Of Statutory Analysis Demonstrates That The Legislature Intended Idaho Code §19-2719(5) To Allow Successive Post-Conviction Claims Based On The Retroactive Application Of New Rules Of Law.

Idaho Code Section 19-2719(3) sets out the general rule that capital defendants are limited to a single post-conviction petition:

> Within forty-two (42) days of the filing of the judgment imposing the punishment of death, and before the death warrant is filed, the defendant must file any legal or factual challenge to the sentence or conviction that is known or reasonably should be known.

I.C. §19-2719(3). The State notes that the only exception to this rule is provided for by Section 19-2719(5), and that the Court has summarized the exception to this rule as allowing "those unusual cases where it can be demonstrated that the issues raised were not known and reasonably could not have been known within the time frame allowed by the statute." *State v. Rhoades*, 120 Idaho 795, 807, 820 P.2d 665, 677 (1991); Respondent's Brief at 9. Section 19-2719(5) also provides, the State notes, that "[i]f a capital defendant fails to comply with the specific requirements of I.C. §19-2719, including the specified time limits, the issues are 'deemed to have [been] waived' and '[t]he courts of Idaho shall have no power to consider any such claims for relief as have been so waived or grant any such relief.' I.C. §19-2719(5); *McKinney* [*v. State*], 133 Idaho [695,] 700[, 992 P.2d 144,]149 [(1999)]." Respondent's Brief at 9. The State claims that the Idaho Code Section 19-2719(5) exception to the general rule restricting capital defendants to a single post-conviction petition does not allow claims based on the retroactive application of new rules of law.

The State argues that because Mr. Fields failed to raise his jury participation in sentencing proceedings claim in his initial consolidated appeal,[9] but that the claim was known at that time, and therefore, that section 19-2719 precludes its being raised in a successive petition. Acknowledging that in *Sivak v. State*, 134 Idaho 641, 8 P.3d 636 (2000), the Court has allowed a successive petition on a claim raised in earlier proceedings, the State contends that the new information there was new evidence whereas here it is merely a new constitutional right acknowledged by the United States Supreme Court. While in *Sivak*, the Court was concerned that failure to allow the successive claim would block the consideration of a *prima facie* actual innocence claim, the State suggests that no similarly compelling concern is at issue here. Instead, according to the State, all that is at issue is "a new technicality which the original courts never envisioned[.]" Respondent's Brief at 14.

1. Applied to Section 19-2719(5), long established rules of statutory analysis demonstrate that the legislature intended §19-2719(5) to allow successive capital claims based on retroactive application of new decisional rules of law.

The meaning of Idaho Code Section 19-2719(5) is plain on its face, and it has nothing whatsoever to say about retroactivity.

> If the defendant fails to apply for relief as provided in this section and within the time limits specified, he shall be deemed to have waived such claims for relief as were known, or reasonably should have been known. The courts of Idaho shall have no power to consider any such claims for relief as have been so waived or grant any such relief.

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[9] *But see* Opening Brief at 1-2 (citing this court's prior determination, in response to argument raised in Fields' brief, rejecting Fields' argument that his sentencing proceeding was constitutionally infirm for lack of jury determination in the finding of an aggravating circumstance).

I.C. §19-2719(5). "Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction. *State v. McCoy*, 128 Idaho 362, 365, 913 P.2d 578, 581 (1996). Unless the result is palpably absurd, this Court assumes that the legislature meant what is clearly stated in the statute." *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999). For these reasons, the State's project to read retroactivity into Section 19-2719(5) trips at the starting gate.

Even if ambiguity is read into Section 19-2719(5), the State's argument utterly fails to apply long established rules of statutory analysis. Applying these principles reveals that the legislature intended Idaho Code Section 19-2719(5) to allow successive post-conviction claims resting on the retroactive application of new rules of law. **First**, the State never addresses how Section 19-2719 (5) can possibly be squared with the legislature's later amending subsection (5)(c) into the statute, expressly prohibiting as facially insufficient any "successive post-conviction pleading. . .to the extent it seeks retroactive application of new rules of law." I.C. §19-2719(5)(c) (1995).

This Court has long held that it will not presume that the legislature intends to enact duplicative statutory provisions and, correlatively, that the particular statutory words being inspected must be construed in light of the remaining statutory language. For example, the Court has repeatedly relied on the no duplicative language statutory provisions language in discerning the meaning of the "utter disregard" aggravating factor in Idaho's capital sentencing scheme. In *State v. Card*, 121 Idaho 425, 436, 825 P.2d 1081, 1092 (1991), the Court traced that history, noting that it was first called upon to determine the meaning of the "utter disregard" aggravating factor in *State v. Osborn*, 102 Idaho 405, 418-19, 631 P.2d 187, 200-01 (1981). There, to apply

the no duplicative provision presumption, the Court held that it had to compare the "utter disregard" factor to the other factors to ensure that whatever meaning ascribed to "utter disregard" was not part of one of the remaining aggravating factors, rendering the factor under consideration mere surplusage.

> To properly define this circumstance, it is important to note the other aggravating circumstances with which this provision overlaps. The second aggravating circumstance, I.C. §19-2515(f)(2), that the defendant committed another murder at the time this murder was committed, obviously could show an utter disregard for human life, as could the third aggravating circumstance, I.C. §19-2515(f)(3), that the defendant knowingly created a great risk of death to many persons. The same can be said for the fourth aggravating circumstance, I.C. §19-2515(f)(4), that the murder was committed for remuneration. **Since we will not presume that the legislative intent was to duplicate any already enumerated circumstance, thus making I.C. § 19-2515(f)(6) mere surplusage (See, e. g., Norton v. Dept. of Employment, 94 Idaho 924, 500 P.2d 825 (1972)), we hold that the phrase "utter disregard" must be viewed in reference to acts other than those set forth in I.C. §§ 19-2515(f)(2), (3), and (4).** We conclude instead that the phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer.

State v. Card, 121 Idaho 425, 436, 825 P.2d 1081, 1092 (1991) (quoting State *v. Osborn*, 102 Idaho 405, 418-19, 631 P.2d 187, 200-01 (1981) (emphasis added and quotation marks omitted)).

The *Card* Court relied on the no duplicative provision presumption in *State v. Fain*, 116 Idaho 82, 774 P.2d 252 (1989), to distinguish the utter disregard aggravator from the "heinous, atrocious or cruel" aggravator.

> [T]he "utter disregard" factor refers not to the outrageousness of the acts constituting the murder, but to the defendant's lack of conscientious scruples against killing another human being.
> ....
> The particularly cold-blooded killer need not act sadistically or in a particularly outrageous fashion in order to commit a killing with utter disregard for human life. One who commits a crime in an especially heinous way is punished for the heinousness of his crime, not because he acted with utter disregard for human life,

> although it may be expected that most especially heinous, atrocious or cruel murders will have been committed with utter disregard for human life.

State v. Card, 121 Idaho at 436, 825 P.2d at 1092 (quoting *State v. Fain*, 116 Idaho at 99, 774 P.2d at 269).[10]

The State's contention that the pre-subsection (c) version of Section 19-2719 does not allow post-conviction petition claims which rely on the retroactive application of a new rule of law runs afoul of the no duplicative statutory language principle. The State carefully notes that it "is not relying upon I.C. §19-2719(5)(c), but upon I.C. §19-2719(5), which does not provide an exception for the retroactive application of new rules of law, as established by this Court in *Fetterly*." The problem with the State's gloss on Section 19-2719(5) is that it renders into mere surplusage the legislature's subsequent enactment of Section 19-2719(5)(c)'s prohibition of any successive post-conviction petition that seeks retroactive application of new rules of law. The legislature would have had no need to enact Section 19-2719(5)(c) unless Section 19-2719(5) *allowed* retroactive application of new rules of law.

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[10]*See Stueve v. Northern Lights, Inc.*, 118 Idaho 422, 425, 797 P.2d 130, 133 (1990) ("We do not make mere 'surplusage' of the provisions of the statutes, and that we construe them, insofar as possible, to give meaning to all of their parts in light of the legislative intent expressed therein."); *Westerberg v. Andrus*, 114 Idaho 401, 403, 757 P.2d 664, 666 (1988) ("[O]ur prior cases have held that statutory or constitutional provisions cannot be read in isolation, but must be interpreted in the context of the entire document. *Wright v. Willer*, 111 Idaho 474, 476, 725 P.2d 179, 181 (1986) ('Statutes must be read to give effect to every word, clause and sentence.'); *Hartley v. Miller-Stephan*, 107 Idaho 688, 690, 692 P.2d 332, 334, *reh'g denied* (1984) ('We will not construe a statute in a way which makes mere surplusage of the provisions included therein.'); *Bastian v. City of Twin Falls*, 104 Idaho 307, 310-11, 658 P.2d 978, 981-82, *petition for review denied* (Ct. App.1983) ("The particular words of a statute should be read in context; and the statute as a whole should be construed, if possible, to give meaning to all its parts in light of the legislative intent.").

Second, "[i]t is assumed that when the legislature enacts or amends a statute it has full knowledge of the existing judicial decisions and case law of the state. *C. Forsman Real Estate Co. v. Hatch*, 97 Idaho 511, 547 P.2d 1116 (1976); *Idaho Mut. Benefit Ass'n v. Robison*, 65 Idaho 793, 154 P.2d 156 (1944); *Viking Pools, Inc. v. Maloney*, 48 Cal.3d 602, 257 Cal.Rptr. 320, 770 P.2d 732 (1989); *Daou v. Harris*, 139 Ariz. 353, 678 P.2d 934 (1984)." *George W. Watkins Family v. Messenger*, 118 Idaho 537, 540, 797 P.2d 1385, 1388 (1990). Further, "[t]he legislature is presumed not to intend to overturn long established principles of law unless an intention to do so plainly appears by express declaration or the language employed admits of no other reasonable construction." *Id.*

The Idaho Code provides that

> The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or law of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state.

I.C. §73-116. It is established that, "[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). When first enacted, §19-2719 included no language making plain any legislative intention to overturn the common law rule that new judicial decisions be applied retroactively. Nor did the statutory language admit of any other reasonable conclusion than that the legislature intended to overturn that common-law rule. Thus, the State's argument that §19-2719(5) does not allow successive post-conviction claims which rely on the retroactive application of new rules of decisional law fails.

2. Elevating judicial efficiency over the retroactive application of *Ring* would elevate judicial efficiency over justice, which *Sivak* prohibits.

Additionally, this Court has unambiguously held that successive post-conviction petitions litigating old claims on the basis of new information are permissible: "Applying this rule as the State requests would result in Idaho courts being unable to entertain evidence of actual innocence in successive post-conviction petitions, even where the evidence was clearly material or had been suppressed by prosecutorial misconduct. We must be vigilant against imposing a rule of law that will work injustice in the name of judicial efficiency." *Sivak v. State*, 134 Idaho 641, 8 P.3d 636 (2000). *Cf. Mahaffey v. State*, 87 Idaho 228, 231, 392 P.2d 279, 281 (1964) ("In the instant case ... if we deny petitioner's application he will be in the unfortunate and medieval position of possessing a right for which there exists no remedy."). *Ring* was decided only shortly before Mr. Fields filed his successive petition. As the Court is aware, *Ring* overruled *Walton v. Arizona*, 497 U.S. 639 (1990), which had held that Arizona's sentencing scheme under which the sentencing judge determined the existence of death qualifying aggravating factor(s) was compatible with the Sixth Amendment. Since Petitioner's claims were based on information which could not reasonably have been known at an earlier time since it did not exist at an earlier time, they met the Section 19-2719(5) exception. The State reads *Sivak* too narrowly, contending that the holding extends only to new evidence, as opposed to new law, because the Court's rationale was limited to actual innocence. Yet there is precious little in *Sivak* to support the State's view that this Court is willing to elevate judicial efficiency over justice in all cases except those where actual innocence is at issue. Mr. Fields was sentenced in violation of his Sixth

Amendment right to jury trial.[11] Elevating judicial efficiency over the enforcement of a constitutional right adopted to protect the community as well as individual defendants from governmental abuse by guaranteeing jury service to ordinary citizens would elevate efficiency over justice every bit as much as does elevating efficiency over the consideration of new evidence of actual innocence. *See Powers v. Ohio*, 499 U.S. 400, 406 (1991) (quoting *Balzac v. Puerto Rico*, 258 U.S. 298, 310 (1922)).

The State completely ignores the Sixth Amendment jury trial guarantee's critical community protection purpose, in favor of exclusively characterizing the guarantee as "merely ... a mechanism" and "a new technicality[.]" Respondent's Brief at 14. This mischaracterization by omission trivializes our constitutional rights into a collection of obstacles which should be extended to everyone *other* than criminal defendants –on the presumption that none of "us" will ever be "them."

Perhaps recognizing that its reading of Section 19-2719 ignores established rules of statutory analysis and that its reading of *Sivak* is unprincipled, the State asserts that, in *Hoffman v. State*, 142 Idaho 27, 30, 121 P.3d 958, 961 (2005), the Court held that jury participation in sentencing claims earlier litigated may not be litigated in successive post-conviction proceedings. Here is the sum total of the *Hoffman* Court's Section 19-2719 analysis:

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[11]The State erroneously insists that the Sixth Amendment right to a jury determination of death sentence eligibility is a new right. *See Danforth* at 1035 & 1047 (every individual sentenced to death where a jury did not make the eligibility finding was sentenced illegally, regardless of whether they were sentenced before or after *Ring* was decided; decisions by this Court that a new rule does not apply retroactively do not imply that there was no right and thus no violation of that right at the time of trial-only that no remedy will be provided; "would be quite wrong to assume, however, that the question whether constitutional violations occurred in trials conducted before a certain date depends on how much time was required to complete the appellate process").

> The claims in Hoffman's Third Petition were clearly known and asserted in prior proceedings. . .Because this is a second successive post-conviction petition which does not fall within the exceptions of the statute, it is specifically barred by I.C. §19-2719.

Id. at 30, 961. The *Hoffman* court did not address the argument that *Ring* constituted new evidence in support of one or more old claims and that, therefore, the claims fell within the Section 19-2719(5) exception to the forty-two day limitations period. *Hoffman* does not help the State.

B. This Court's Precedent Requires Applying The *Linkletter* Test.

The State makes two final arguments why new rules of law are not cognizable in successive post-conviction petitions. First, it contends, its position is bolstered by the Court never having applied the *Linkletter* test in a capital case and that, when confronted with retroactivity questions in successive capital post-conviction appeals, it has dismissed for lack of jurisdiction pursuant to Idaho Code Section 2719(5). Respondent's Brief at 14-19. Second, in the course of making its first argument, the State switches horses and argues that the Court has rejected the *Linkletter* test. Respondent's Brief at 15-18. Each of these two arguments fails.

1. None of the cases relied on by the State support its position that the Court has implicitly applied Section 19-2719 to determine whether the question of retroactivity may properly be reached.

As support for its first argument, the State contends that in *Fetterly v. State*, 121 Idaho 417, 825 P.2d 1073, *reh'g denied* (1992), the Court excepted successive post-conviction cases from the *Linkletter* test by "implicitly appl[ying] I.C. §19-2719 to address whether Idaho law permits the retroactive application of new rules of law raised in successive post-conviction petitions." Respondent's Brief at 15. It is important to note just what the State *is* and what it *is*

not saying here at this point in its argument. It is not contending that the Court has adopted some other test to determine whether a new rule should be retroactively applied to cases in a successive post-conviction posture. Rather, it claims that when confronted with a successive capital post-conviction petition appeal, the Court applies Section 19-2719(5) to determine "whether Idaho law permits the retroactive application of new rules of law raised in successive post-conviction petitions." Respondent's Brief at 14. It bears emphasizing that the State is relying upon I.C. §19-2719(5), which does not provide an exception for the retroactive application of new rules of law[.]" Respondent's Brief at 18.

Remarkably, the *Fetterly* rationale supplies no support whatsoever for the State's position: absent from the Court's analysis is any reliance on the purported lack of a new rule of law exception to the single post-conviction petition rule of Section 19-2719(5). Far from avoiding the retroactivity question, the Court squarely identified and addressed it: "The real issue is whether *Charboneau* applies retroactively to cases that were final at the time of its issuance.... [T]he *Charboneau* interpretation of I.C. § 19-2515 does not apply to the present case because the present case was final prior to the issuance of *Charboneau*." *Fetterly* at 418-19, 1074-75. Plainly, the Court held that the issue was whether Mr. Fetterly would be allowed the retroactive application of a new rule of law to support his cognizable claim, not whether Mr. Fetterly had stated a cognizable claim. The Court's negative answer sheds no light on whether the claim was cognizable in the first instance. If *that* issue was before the Court–and nothing in the Court's opinion suggests it was–it was left for another day.

The structure of the State's argument–that this Court's overruling the application of the long established *Linkletter* test to determine the retroactive effect of a new rule is revealed by a

comparison between the majority opinion and Justice Bistline's dissent–makes little sense. Silence cannot be equated with rejection. *See supra* at 5-6 and cases cited therein. Beyond the structure of the State's argument, its substance is counter to this Court's holdings on *stare decisis*. *Id.*

2. This Court has never rejected the *Linkletter* test.

The State contends that the Court has implicitly held that the *Linkletter* test is no longer Idaho law. For all the reasons set out *supra* at 4-11, the State's argument fails.

C. To The Extent That Section 19-2719 Purports To Deny The Courts Jurisdiction To Entertain Successive Post-Conviction Claims Relying On The Retroactive Application Of New Decisional Rules Of Law, It Invades The Judiciary's Province, In Violation Of The Idaho Constitution's Separation Of Powers Requirement.

Noting the Court's holding that the UPCPA is "an expansion of the Writ of Habeas Corpus[,]" *Dionne v. State*, 93 Idaho 235, 237, 459 P.2d 1017, 1019 (1969), and that the legislature "may add to the efficacy of the writ[,]" *Mahaffey v. State*, 87 Idaho 228, 231, 392 P.2d 280 (1964), the State asserts that "it naturally follows that I.C. §19-2719 does not unduly restrict the district court's jurisdiction in violation of the separation of powers doctrine." Respondent's Brief at 20. Missing from the State's argument is citation to any case holding or any reason to think that Section 19-2719 does in fact add to the efficacy of the writ. Removing from the courts jurisdiction to hear writs does not increase the effectiveness of the writ. But it does invade the power of the judiciary in violation of the constitutionally mandated separation of powers. *See* Opening Brief at 30-33.

The sole case relied on by the State and the court below for the opposite conclusion is *Kirkland v. Blaine County Medical Center*, 134 Idaho 464, 4 P.3d 1115 (2000). There, the plaintiffs argued that a statute reducing damages allowed in tort actions by operation of law violated the Idaho Constitution's separation of powers doctrine because it "infringes on the inherent right of the courts to reduce jury verdicts in those instances where the evidence demonstrates the jury's verdict is excessive as a matter of law." *Id.* at 471, 1122. Noting that none of the language in the statute at issue "purports to limit the exercise of the judiciary's constitutional powers or jurisdiction[,]" the Court held that "the legislature . . . has the power to limit remedies available to plaintiffs without violating the separation of powers doctrine." *Id.*, 471, 1122.

On the State's reading of Section 19-2719, and unlike the statute in *Kirkland*, that statute limits the Court's jurisdiction to entertain successive capital post-conviction claims which rely on the retroactive application of new law. *Kirkland* is inapposite.

Kirkland is inapposite for another reason as well. It nowhere addressed the interplay between the legislature's power to limit remedies available to plaintiffs and any constitutional rights vested in plaintiffs. Petitioner, on the other hand, is constitutionally guaranteed the right to seek a writ of habeas corpus, and Idaho courts hold that this remedy may now be sought exclusively through the vehicle of a post-conviction petition. This means that the legislature's prerogative to limit remedies in the post-conviction context is constrained by the constitutional prohibition against suspending the writ. Idaho Const. Art. I §5 ("The privilege of the writ of habeas corpus shall not be suspended, unless in the case of rebellion or invasion, the public safety requires it, and then only in such manner as shall be prescribed by law."). The fact that

before Idaho Code Section 19-2719 was enacted, district courts reached the merits of habeas claims filed outside the time restrictions later imposed by that statute, demonstrates that the statute suspends the writ in violation of the constitutional guarantee. *Mahaffey v. State*, 87 Idaho 228, 229-30, 392 P.2d 279-80 (1964) (reversing district court dismissal of successive habeas petition brought *ten years* after conviction). In short, while the legislature's express streamlining purpose in enacting Section 19-2719 may have been permissible, its chosen means violated the separation of powers constitutional requirement.

D. The Legislature's Intent That Idaho Code Section 19-2719(5) Be Applied Retroactively Is Irrelevant To Whether The Legislature Intended Section 19-2719(5) To Allow Successive Post-conviction Petitions Based On The Retroactive Application Of New Decisional Rules of Law.

The State contends that because, when enacting Idaho Code Section 19-2719 in 1984, the legislature expressed that the statute be retroactively applied, Section 19-2719 clearly applies to Petitioner's case. Mr. Fields agrees that that the legislature's statement in 1984 regarding Section 19-2719 means that *that* version of the statute applied retroactively. *Cf.* Idaho Code Section 73-101 (no statute may be retroactively applied absent an express legislative declaration to the contrary). However, for the reasons noted above and incorporated here by reference, there is no evidence that the legislature intended Section 19-2719(5) to prohibit successive post-conviction claims which rely on the retroactive application of new rules of decisional law. The available evidence suggests exactly the opposite. *Id.*

E. Idaho Law Prohibits Retroactively Applying Idaho Code Section 19-2719(5)©.

Idaho Code Section 19-2719(5)(c) provides that, "A successive post-conviction pleading asserting the exception shall be deemed facially insufficient to the extent it seeks retroactive application of new rules of law." I.C. §19-2719(5)(c). This provision was amended into the Idaho Code in 1995. Petitioner's conviction was final prior to the enactment of Section 19-2719(5)(c).

In Idaho, a new statute is not retroactive unless the legislature expressly declares that the law should be applied retroactively. I.C. § 73-101 ("No part of these compiled laws is retroactive, unless expressly so declared."). "In the absence of an express declaration of legislative intent that a statute apply retroactively, it will not be so applied." *Gailey v. Jerome County*, 113 Idaho 430, 433, 745 P.2d 1051, 1053 (1987); *see Johnson v. Stoddard*, 96 Idaho 230, 234, 526 P.2d 835, 839 (1974) ("No law in Idaho will be applied retroactively in the absence of a clear legislative intent to that effect.").

Even when an amendment is added to an existing statute, the legislature must expressly declare that the amendment is to be retroactively applied. It is long settled that "that an **amendment to an existing statute** 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) (emphasis added). *See Gailey v. Jerome County*, 113 Idaho 430, 433, 745 P.2d 1051, 1054 (1987) (finding that an amendment was not retroactive because "it was not 'expressly...declared' in the statue that the amendment was to be retroactively applied").

Idaho Code Section 19-2719(5)(c) contains no language stating that the amendment should be applied retroactively. When the legislature adopted the amended statute, it did not otherwise express any intention that the new law be applied retroactively. Therefore, Idaho Code Section 73-101 precludes the retroactive application of Section 19-2719(5) (c) to this case.

The State counters that, when first creating Section 19-2719, the legislature included language making it retroactively applicable. Respondent's Brief at 21. From this, the State concludes that subsection (5)(c), enacted over ten years later, is also retroactively applicable. But subsection (5)(c)'s enacting language does not meet this Court's clear requirement that if an amendment is to be retroactively applied, the legislature must provide "an *express* legislative statement." *Nebeker*, 113 Idaho at 614, 747 P.2d at 23. On the State's view, the legislature's *silence* is an implicit adoption of its earlier express language. *Nebeker* nowhere suggests that silence may sometimes take the place of an express statement. Further, the State's position requires reading ambiguity into an otherwise clear decision and, thus, invites muddying otherwise clear legislative waters. However, it is axiomatic that, "[w]here the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction. *State v. McCoy*, 128 Idaho 362, 365, 913 P.2d 578, 581 (1996). Unless the result is palpably absurd, this Court assumes that the legislature meant what is clearly stated in the statute. Miller v. State, 110 Idaho 298, 299, 715 P.2d 968, 969 (1986)." *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999).

Finally, absent a plainly expressed intent to the contrary, it stretches credulity to ascribe to individual legislators or a legislature an intent that some future law, the substance of which is entirely unknown, be retroactively applied.

Retroactively applying Section 19-2719(5)(c) is prohibited by clear and settled Idaho law. Consequently, the State's argument, made in reliance on Section 19-2719(5)(c), that Mr. Fields' appeal be dismissed, fails.

F. Idaho Code Section 19-2719(5)(c) and Section 2719, If The State's Reading Of That Statute Is Correct, Violate Petitioner's Rights To Due Process And Equal Protection Guaranteed Under The United States And Idaho Constitutions.

The Opening Brief argues that Idaho Code Section 19-2719(5)(c) violates his state and federal rights to equal protection and due process. Whereas Section 19-2719(5)(c) prohibits the retroactive application of new law in a successive capital post-conviction proceeding, no statute or state court decision contains a similar prohibition for non-capital successive post-conviction petitioners. Opening Brief at 33-36. In its answering brief, the State argues that Section 19-2719(5)(c) is immune to these challenges because Section 19-2719 has withstood process and equal protection challenges in the past.

While the Opening Brief anticipated some of the State's arguments, it did not foresee the State's argument that Section 19-2719, rather than one of its subsections, precluded his claims as non-cognizable. He, therefore, now also argues that applying Idaho Code Section 19-2719 by itself to preclude his claims violates his state and federal rights to equal protection and due process. His argument is nearly identical to the one he has already made regarding Section 19-2719(5)(c). In particular, his due process and equal protection rights would be violated if Section 19-2719 were applied to preclude the Idaho courts from reaching the merits of his jury trial as a fundamental right claims by either (1) extending that statute's 42-day limitations period to claims which did not exist within that period because, beyond the 42 day window, the United States

Supreme Court reversed an earlier ruling, thus breathing life into the previously dead claim, or (2) extending that 42-day limitations period to claims which did exist but for which additional supporting facts–here, the United States Supreme Court's ruling which reversed its earlier ruling–came to light outside that 42-day window.

Critical to both sets of equal protection and due process claims–that is, to the Section 19-2719(5)(c) as well as the Section 19-2719 claims–is that, if the statute at issue were applied to block a merits review of his claims, it would infringe on the fundamental right to a jury trial, to fairness in the criminal process, and to fairness in procedures for enforcing claims concerning governmental deprivations of life or liberty. Applying either of the statutes at issue to block a merits review of his claims would violate the due process guarantee by infringing on those fundamental rights without being narrowly tailored to serve a compelling state interest. It would violate the equal protection guarantee by creating a classification among people or applying laws such that only some individuals would be able to exercise those fundamental rights, without being narrowly tailored to serve a compelling state interest.

The statute's stated purpose, to eliminate purportedly unnecessary delay in carrying out death sentences, is not a compelling state interest justifying the violation of Mr. Fields' fundamental rights. Further, even if eliminating alleged unnecessary delay were a compelling state interest, the statutes are not narrowly tailored. On the contrary, their design obviously allows for some petitioners to die and others to live based on a fortuity –the uncertain pace of litigation. As noted in his Opening Brief, Mr. Fields has been denied the benefit of *Ring* while this Court granted *Ring* sentencing relief to Mr. Fetterly, whose first degree murder prosecution was commenced six years before Mr. Fields' was.

The State answers, first, by citing *State v. Beam*, 115 Idaho 208, 211-13, 766 P.2d 678, 681-83 (1988), for the proposition that "the court [sic] expressly held I.C. §19-2719 does not violate equal protection." Respondent's Brief at 22. It then cites to *State v. Rhoades*, 120 Idaho 795, 806, 820 P.2d 665, 676 (1991), noting that, there, "the court [sic] expressly concluded I.C. §19-2719 does not violate due process." Respondent's Brief at 22. Finally, the State cites to seven of this Court's decisions affirming *Beam* and/or *Rhoades*.[12]

The fundamental rights based equal protection and due process attacks on Sections 19-2719 and 19-2719(5)(c) raise issues of first impression for this Court. The State's answer regarding equal protection and due process fails because none of the cases on which it relies and no other decision from this Court's addresses equal protection or due process claims where a fundamental right is at stake. Instead, in *Beam* the Court only confronted whether the difference between the limitations periods for filing a petition under the Uniform Post-Conviction Procedure Act (five years) versus under the Section 19-2719 (forty-two days) creates a classification which violates the equal protection guarantee by having no rational relationship to a legitimate governmental purpose. *Beam*, 115 Idaho at 211-214, 766 P.2d at 681-684. The Court held that it did not.

> We hold that the legislature's determination that it was necessary to reduce the interminable delay in capital cases is a rational basis for the imposition of the 42-day time limit set for I.C. § 19-2719. The legislature has identified the problem and attempted to remedy it with a statutory scheme that is rationally

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[12]Those cases are *Hairston v. State*, 144 Idaho 51, 55, 156 P.3d 552 (2007), *remanded on other grounds Hairston v. Idaho*, __ U.S. __, 128 S.Ct. 1442 (2008); *Lankford v. State*, 127 Idaho 100, 102, 897 P.2d 991, 993 (1995); *State v. Hoffman*, 123 Idaho 638, 647, 851 P.2d 934 (1993); *State v. Card*, 121 Idaho 425, 430-31, 825 P.2d 1081 (1991); *State v. Rhoades*, 121 Idaho 63, 72, 822 P.2d 960, 969, *second reh'g denied* (1992); *Paz v. State*, 118 Idaho 542, 559, 798 P.2d 1, 18 (1990); and *State v. Fetterly*, 115 Idaho 231, 235-36, 766 P.2d 701 (1988).

> related to the legitimate legislative purpose of expediting constitutionally imposed sentences. Accordingly, I.C. § 19-2719 does not violate the defendant's constitutional right to equal protection, and the trial court correctly denied Beam's post conviction petition.

Beam at 213, 683. The shorter time allotted capital defendants to file upheld by *Beam* was not a fundamental right. In none of the other cases cited by the State nor in any other case has this Court confronted whether the classification violates the equal protection guarantee where a fundamental right is at stake.

Similarly, in *Rhoades* the Court confronted whether the 42-day limitations period for filing a post-conviction petition in capital cases violates the due process guarantee. The Court held that it did not.

> Therefore we hold that I.C. § 19-2719 provides a defendant one opportunity to raise all challenges to the conviction and sentence in a petition for post-conviction relief except in those unusual cases where it can be demonstrated that the issues raised were not known and reasonably could not have been known within the time frame allowed by the statute. The legislature has seen fit to appropriately limit the time frame within which to bring challenges which are known or which reasonably should be known. The process encompassed in I.C. § 19-2719 providing for review by the trial court and then this Court, provides adequate opportunity to present the issues raised and to have them adequately reviewed. Therefore, I.C. § 19-2719 is not unconstitutional under due process analysis.

Rhoades 120 Idaho at 808, 820 P.2d at 678. In none of the other cases cited by the State nor in any other case has this Court addressed whether the limitations period violates the due process guarantee when a fundamental right such as the right to a jury trial is at stake.

Where fundamental rights are at stake, "strict scrutiny" is the proper standard of review. Put differently, the due process inquiry is whether the restriction on the exercise of the fundamental right is narrowly tailored to serve a compelling state interest. The equal protection inquiry is whether the classification or application of laws such that only some individuals may

exercise the fundamental right at issue is narrowly tailored to serve a compelling state interest. The State has identified no compelling state interest in its answering brief. Nor has it proffered any explanation for how the 42-day limitation period constitutes narrow tailoring in furtherance of any legitimate state interest, compelling or otherwise. Even supposing, for the sake of argument, that some compelling state interest could be served by the 42-day limitations period, applying that limitation to prohibit the retroactive application of fundamental rights will–and indeed, has–resulted in extraordinarily unequal dispositions. As noted above, this Court granted *Ring* sentencing relief to Mr. Fetterly, whose prosecution commenced four years before the prosecution against Mr. Fields was started.

CONCLUSION

For these reasons and for all the reasons in the Opening Brief, the Court should remand this case for resentencing consistent with the principles announced in *Ring v. Arizona*. Alternatively, the Court should substitute a life sentence for the death sentence now imposed on Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September, 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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