5-5-2009

Fields v. State Clerk's Record v. 1 Dckt. 35679

LAW CLERK Vol. 1 of 3

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

ZANE JACK FIELDS,

PETITIONER-APPELLANT,

vs.

STATE OF IDAHO,

RESPONDENT.

Appealed from the District Court of the Fourth Judicial District of the State of Idaho, in and for ADA County

Hon THOMAS F. NEVILLE, *District Judge*

JOAN M. FISHER

Attorney for Appellant

LAWRENCE G. WASDEN
Attorney General

Attorney for Respondent

VOLUME I

COPY

35679

IN THE SUPREME COURT OF THE STATE OF IDAHO

ZANE JACK FIELDS, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	Supreme Court Case No. 35679

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE THOMAS F. NEVILLE

JOAN M. FISHER

ATTORNEY FOR APPELLANT

MOSCOW, IDAHO

LAWRENCE G. WASDEN

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

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8/2/2002	NEWC	TCGATEGM	New Case Filed	Thomas F. Neville
		TCGATEGM	Petition For Post-conviction Relief Or Writ	Thomas F. Neville
	CONT	TCGATEGM	Of Habeas Corpus	Thomas F. Neville
	AFSM	TCGATEGM	Affidavit In Support Of Petition	Thomas F. Neville
	CERT	TCGATEGM	Certificate Of Mailing	Thomas F. Neville
9/3/2002	RSPS	CCVASQME	State's Response To Petition And Motion	Thomas F. Neville
9/6/2002	NOTC	CCBROOTA	Notice Of Intent To File Opposition And	Thomas F. Neville
	CONT	CCBROOTA	Supporting Memo And Request For Hearing	Thomas F. Neville
11/7/2002	RSPS	CCSTACAK	Petn Response In Opposition To Request To	Thomas F. Neville
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11/25/2002	MOTN	CCDUBOJL	Motion For Limited Admission	Thomas F. Neville
11/27/2002	MISC	CCBURKML	Denial Re:limited Appearance & Waiving Fee	Thomas F. Neville
1/17/2003	RSPS	CCBURKML	Response To Petitioner's Brief In Opposition	Thomas F. Neville
4/11/2003	LODG	CCMONGKJ	**lodged**petnrs Suppl Authority In Support	Thomas F. Neville
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8/5/2008	CDIS	DCELLISJ	Civil Disposition entered for: State of Idaho, Other Party; Fields, Zane Jack, Subject. Filing date: 8/5/2008 MEMO DECISION & Order Dismissing Succ. Petition and Motion for Writ of Habeas Corpus	Thomas F. Neville
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	APSC	CCTHIEBJ	Appealed To The Supreme Court	Thomas F. Neville
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Zane Jack Fields, Plaintiff vs State Of Idaho, Defendant

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9/22/2008	ORDR	DCELLISJ	Order on Motion That Costs of appeal be Waived	Thomas F. Neville

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ZANE JACK FIELDS, **Petitioner,**	**Case No.** SP OT 0200711D
v	**PETITION FOR POST-CONVICTION RELIEF OR WRIT OF HABEAS CORPUS**
STATE OF IDAHO, **Respondent.**	
and	
STATE OF IDAHO, **Plaintiff**	**Case No. 16259**
v.	**MOTIONS TO CORRECT ILLEGAL SENTENCES, TO VACATE SENTENCES OF DEATH AND FOR NEW SENTENCING TRIAL**
ZANE JACK FIELDS, **Defendant.**	

Petitioner, Zane Jack Fields, by and through his attorney, Joan M. Fisher of the Capital Habeas Unit of the Federal Defenders of Eastern Washington and Idaho, files this Petition for Post-Conviction Relief and/or Writ of Habeas Corpus and his Motion to Correct an Illegal Sentence, to Vacate the Sentence of Death and For New Sentencing Trial. This petition is filed

pursuant to Idaho Code Sections 19- 2719 and- 4901 *et seq.*, Idaho Criminal Rules 35 and 57. The relief requested must be granted to avoid a manifest injustice and violations of the United States Constitution Amendments 5, 6, 8, and 14 and Idaho Constitution, Article I, Sections 1, 2, 3, 5, 6, 7, 8, 13, 18 and 21.

Overview of Grounds for Relief

On June 24, 2002, the United States Supreme Court issued an opinion in *Ring v. Arizona*, 536 U.S. -, 122 S. Ct. 2428 (June 24, 2002), which clearly establishes that petitioner's death sentence is unconstitutional. In *Ring*, the Court held that the fundamental constitutional principle it had made clear three years earlier, in *Jones v. United States*, 119 S.Ct. 1215, 1224 n.6 (1999) applies to capital cases like all others. That constitutional principle is this: "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Ibid.*

The *Ring* decision has immediate, obvious and profound implications for this case. Most obviously, it means that petitioner's death sentence is unconstitutional because he was not given a jury trial on the statutory aggravating factors that made him eligible for a death sentence under Idaho law--the very reason the Court in *Ring* held the death sentence imposed by the State of Arizona in that case was unconstitutional. It also means that petitioner's death sentence is unconstitutional because the procedures by which it was imposed disregarded the *Jones* principle in a number of other ways, ways that were not immediately at issue in *Ring* itself. In addition,

the concurring opinion of Justice Breyer in *Ring* reopens a related constitutional issue which is presented by this case, an issue previously thought to be foreclosed by Supreme Court precedent: whether the jury sentencing in capital cases, that the vast majority of death penalty states afford, is required by the Eighth Amendment. And the principles set forth and applied in *Ring* and *Jones* call into question the continued validity of the Idaho Supreme Court's previous decisions rejecting claims that jury trials on capital eligibility and sentence are required by Idaho's constitution.

The decision in *Ring* is thus a truly extraordinary legal development which compels this Court's reconsideration of the constitutionality of Petitioner's death sentence under both the United States' and Idaho's constitutional protections. This petition is being filed so that this Court can give this case that reconsideration.

The specific grounds for relief it raises are as follows:

I. Custody Status of Petitioner

Petitioner is incarcerated on death row in solitary confinement at the Idaho Maximum Security Institute at Boise, Idaho.

II. Course of Proceedings

A. Judgment and Sentence

Judgment and sentence were imposed by then District Judge Gerald F. Schroeder, Fourth Judicial District, State of Idaho, County of Ada, Boise, Idaho on March 7, 1991. *State of Idaho v. Zane Jack Fields*, Ada County Case No. 16259.

B. Sentences for Which Relief Is Sought

The sentence imposed for which relief is sought is a sentence of death for one count of murder in the first degree.

C. Jury Verdict

The jury in Petitioner's case returned a verdict of guilty on one count of murder in the first degree for murder in the perpetration of a robbery. The information under which petitioner was tried did not allege any aggravating circumstances making petitioner eligible for the death penalty and no aggravating circumstances were submitted to the jury.

D. Direct Appeal

Petitioner appealed to the Idaho Supreme Court from the Judgment and Conviction, the imposition of sentence, and the denial of post-conviction relief. The conviction and sentence of death were affirmed. *State v. Fields*, 908 P.2d 1211, 127 Idaho 904 (1995), rehearing denied May 17, 1995, *cert. denied*, 116 S.Ct. 319 (October 10, 1995).

On direct appeal Petitioner challenged Idaho's sentencing scheme for depriving him of a jury determination of specific intent to kill in connection with the felony murder aggravating circumstance in violation of the Eighth and Fourteenth Amendments to the United States Constitution. *State v. Fields*, Nos.19185 & 19809, Brief of Appellant at 57-58 (Idaho Supreme Court, filed January 27, 1994). In rejecting this argument, the Idaho Supreme Court stated that it "was not necessary for the jury to find specific intent to Kill in order to convict Fields of that offense [first degree felony murder]." *Fields*, 908 P.2d at 1223.

E. Prior Post-Conviction Proceedings

Following the denial of his appeal and affirmance of the denial of his initial postconviction petition, Petitioner filed another petition for post-conviction relief, raising the issue of jury finding of facts necessary for aggravating circumstances, which was denied by the District Court and affirmed on appeal. *Fields v. State*, 17 P.3d 230, 135 Idaho 286 (2000). On rehearing Petitioner raised the issue of jury determination of aggravating factors as requirements under the Sixth and Fourteenth Amendments, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Jones v. United States*, 526 U.S. 227 (1999). The Idaho Supreme Court denied rehearing on January 25, 2001.

F. Federal Habeas Corpus Proceedings

Petitioner sought federal habeas corpus relief, including a determination that he was denied his right to have a jury determine the existence of aggravating circumstances. *Fields v. Klauser*, No. 95-0422-S-EJL, Amended Petition for Writ of Habeas Corpus, Claim 36 at 76-77 (D. Idaho, Oct. 1, 2001). The petition is pending in the federal district court.

III. Due Diligence

Petitioner brings this post-conviction relief petition less than 42 days after the decision in *Ring v. Arizona*. Although Petitioner raised on both direct appeal and federal habeas proceedings the constitutionality of the Judge determining the aggravating circumstances and the sentence (see brief on direct appeal, p. 124 et. seq.) he could not have prevailed earlier because of the erroneous constitutional analysis applied by the Idaho Supreme Court until the United States Supreme Court recognized that only a jury may make the factual findings which make a defendant eligible for the death penalty. Petitioner's other claims herein, including the

constitutional right to notice in the information of the aggravating circumstances, the right to a preliminary hearing on the existence of such circumstances, and the violation of his right to be free from cruel and unusual punishment due to excessive delay could also not have been raised earlier as they arise directly from the constitutional parameters of *Ring v. Arizona*.

V. Grounds for Relief

A. Factual Background

Petitioner was charged with an information which contained no notice of any of the statutory aggravating circumstances ultimately found by the sentencing judge. Exhibit 1 (Information); Exhibit 2 (Findings of Judge). No preliminary hearing was held to determine probable cause respecting any aggravating circumstances. At trial the jury was not required to determine the Petitioner's mens rea as constitutionally required under *Enmund v. Florida*, 458 U.S. 782 (1982).

The jury which tried petitioner was not instructed on and did not determine any of the statutory aggravating circumstances. In fact, the jury was explicitly instructed that it could not consider punishment in its deliberations. Exhibit 3.

B. Claims

1. The death penalty statute under which petitioner was tried and sentenced (Idaho Code §19-2515) denied petitioner his right under the United States and Idaho Constitutions to have the aggravating circumstances which made him eligible for the death penalty determined only by a jury. United States Constitution, Fifth, Sixth and Fourteenth Amendments, Idaho Constitution Article I, Sections 1, 2, 7, 13, 18, Idaho Code 19-1902; *Ring v. Arizona*, *supra*; *Apprendi v. New*

Jersey, 530 U. S. 466 (2000); *Sullivan v. Louisiana,* 508 U.S. 275 (1993); *In re Winship*, 397 U.S. 358 (1972); *Duncan v. Louisiana,* 391 U.S. 145 (1968).

2. The death penalty statute under which petitioner was tried and sentenced denied petitioner his right to notice in the charging document of the aggravating circumstances which would make him eligible to be sentenced to death. United States Constitution, Fifth, Sixth, and Fourteenth Amendments; Idaho Constitution, Article I, Sections 1, 8, and 13, Idaho Code 19-102; *Ring v. Arizona, supra; Jones v. United States*, 526 U.S. 227 (1999).

3. The death penalty statute under which petitioner was tried and sentenced to death deprived petitioner of his right under Idaho law and the Idaho Constitution of a preliminary examination on the existence of aggravating circumstances which would make petitioner eligible for the death penalty, denial of which violates the due process clauses of the Fourteenth Amendment to the United States; Idaho Constitution Article I, Sections 1, 7, 13, 18; Idaho Code 19-1308; *Hicks v. Oklahoma,* 447 U.S.343 (1980).

4. The death penalty statute under which petitioner was tried and sentenced denied petitioner his right to have a jury determine his sentence. United States Constitution, Eighth and Fourteenth Amendments, Idaho Constitution, Article I, Sections 1, 6, 7 and 13, *Ring v. Arizona*, 536 U.S. at —, 122 S.Ct. at 2446 (Breyer J., *concurring in the judgment*); *Furman v. Georgia*, 408 U.S. 238 (1972).

5. A jury did not determine whether Petitioner acted with requisite mens rea as required under *Enmund v. Florida*, 458 U.S. 477 (1981), in violation of Petitioner's rights under the Sixth,

Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 13, and 18 of the Idaho Constitution.

6. The death penalty statute under which petitioner was tried and sentenced denied petitioner his right to have the factual question whether all of the mitigating circumstances outweighed each of the aggravating circumstances. United States Constitution, Fifth, Sixth and Fourteenth Amendments, Idaho Constitution, Article I, sections 1, 7, 13, and 18, *Ring v. Arizona*, *supra; State v. Charboneau*, 116 Idaho 129, 774 P.2d 299 (1989).

7. The 11 years under which petitioner has been confined under a sentence of death obtained through an unconstitutional process despite petitioner complaining at the trial, direct appeal and habeas stages of the unconstitutionality of the sentencing scheme used to secure his death sentence has subjected petitioner to cruel and unusual punishment under both the federal and Idaho state constitutions. United States Constitution, Eighth and Fourteenth Amendments; Idaho Constitution, Article I, sections 1, 6, 13, and 18; *State v. Fain*, 116 Idaho 82, 113, 774 P.2d 242, 283 (1989) (Bistline, J, *concurring and dissenting)*; *State v. Osborn*, 104 Idaho 809,821, 663 P.2d 1111, 1123 (1983) Bistline, J., *concurring and dissenting.*)

8. To execute petitioner despite the clear unconstitutionality of the procedures by which his death sentence was imposed, despite the fact that he made timely objection to those procedures, and despite the fact that most or all other similarly situated and tried capital defendants in Idaho will not be put to death without being afforded those constitutional

protections, would constitute a gross and unjustifiable denial of the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I, Section 2 of the Idaho Constitution and the arbitrary imposition of death in violation of the Eighth Amendment to the Constitution of the United States and Article I, Section 6 of the Idaho Constitution. *Furman v. Georgia*, 408 U.S. 238 (1972); *Douglas v. California,* 372 U.S. 353, 357 (1963); *Smith v. Bennett*, 365 U.S. 708, 713-14 (1961).

This Petition and Motions are based on the files and records of the *State of Idaho v. Zane Jack Fields,* Ada County Case No. 16259, and the prior post-conviction proceedings held thereon, judicial notice of which is requested, the Verification of Petitioner herein below and the Affidavit of Counsel filed in Support hereof.

Wherefore, Petitioner seeks from this Court:

1. An order vacating petitioner's sentences of death and setting the same for re-sentencing with instructions that death may not be imposed; and

2. Any and all other relief which the court deems necessary in the interests of justice.

DATED this 1st day of August, 2002.

Joan M. Fisher, Idaho Bar NO. 2854

VERIFICATION

STATE OF IDAHO)
:ss
County of Ada)

Zane Jack Fields, being first duly sworn under oath, deposes and says as follows:

That he is the Petitioner in the above-entitled action; that he has read the above and foregoing Petition For Post-Conviction Relief and/or Writ of Habeas Corpus and Motion to Correct Illegal Sentence, Vacate Sentence of Death and for New Sentencing Trial, that he knows the contents thereof and that the facts stated herein are true and to the best of his knowledge and belief.

Zane Jack Fields,
Petitioner

SUBSCRIBED AND SWORN TO before me this 1st day of August, 2002.

NOTARY PUBLIC in and for the
State of Idaho, residing at
Moscow, therein.
Commission expires: 7-17-04

EXHIBIT #1

INFORMATION

GREG H. BOWER
Ada County Prosecuting Attorney
Room 103 Courthouse
Boise, ID 83702-5954
Telephone: 383-1237

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,

Plaintiff,

-vs-

ZANE JACK FIELDS,

Defendant.

I N F O R M A T I O N

16259

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GREG H. BOWER, Prosecuting Attorney in and for the County of Ada, State of Idaho, who in the name and by the authority of the State, prosecutes in its behalf, comes now into District Court of the County of Ada, and states that Zane Jack Fields is/are accused by this Information of the crime(s) of: MURDER IN THE FIRST DEGREE, FELONY, I.C. 18-4001, 02, 03(d) which crime(s) was committed as follows:

That the defendant, ZANE JACK FIELDS, on or about 11th day of February, 1988, in the County of Ada, State of Idaho, did,

willfully, unlawfully, and with malice aforethought, kill Mary Catherine Vanderford, a human being, by stabbing her in the neck, chest, and back from which she died on February 11, 1988, which murder was committed in the perpretation of a robbery and/or burglary.

All of which is contrary to the form, force and effect of the statute in such case and against the peace and dignity of the State of Idaho.

GREG H. BOWER
Ada County Prosecuting Attorney

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EXHIBIT #2

FINDINGS OF THE COURT IN CONSIDERING THE DEATH PENALTY UNDER SECTION 19-2515, IDAHO CODE

NO. _____
FILED
A.M. _____ P.M. 2:08

MAR 07 1991

J. DAVID NAVARRO, CLERK
BY Dianne Holstine
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO, Plaintiff, vs. ZANE JACK FIELDS, Defendant.	Case No. 16259 FINDINGS OF THE COURT IN CONSIDERING DEATH PENALTY UNDER SECTION 19-2515, IDAHO CODE.

The above-named defendant having been found guilty by a jury of the criminal offense of Murder in the First Degree which under law authorizes imposition of the death penalty; and the court having ordered a presentence investigation of the defendant and thereafter held a sentencing hearing for the purpose of hearing all relevant evidence and argument of counsel in aggravation and mitigation of the offense.

NOW THEREFORE the court makes the following findings:

1. Conviction. The defendant while represented by counsel was found guilty of the offense of Murder in the First Degree by jury verdict.

2. Presentence Report. A presentence report was prepared by order of the court and a copy delivered to the defendant or his counsel at least seven (7) days prior to the sentencing hearing pursuant to section 19-2515, Idaho Code, and the Idaho Criminal

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Rules. The defendant objected to portions of the presentence report, and the court has ruled on those objections in a separate memorandum. The court has excised those portions of the report to which an objection was sustained.

3. Sentencing Hearing. A sentencing hearing was held on January 14, 1991, pursuant to notice to counsel for the defendant; and that at the hearing, in the presence of the defendant, the court heard the arguments of counsel. Evidence was not submitted by either the prosecutor or the defendant, but each had previously submitted sentencing memoranda.

4. Facts Found in Mitigation. The mitigating factors that appear to the court are as follows:

The defendant was abandoned by his father when he was two years old.

Apparently he was oppressed by a dominant female figure early in life which has contributed to the aggressive attitude he has displayed toward women.

There is some indication that he suffered childhood convulsions and that he reacted poorly under stress.

The defendant has relative low intelligence. As a teenager he was evaluated in the area of borderline retardation. However, he has completed a GED program.

The defendant has been a drug and alcohol abuser for many years, commencing at an early age. As a teenager he indicated

that he used "all kinds of alcohol" and "as much as possible. The use of alcohol and drugs has impaired his ability to conform his conduct to legal and social standards.

As an inmate in the penal system he has been able to conform his conduct to institutional standards for substantial periods of time. A Department of Corrections report dated June 6, 1981, indicates that he volunteered to help and seemed willing to work. A progress report dated September 1, 1981, indicates that he was "manageable within the protective custody unit at the ISMF, having received no disciplinary reports and generally receiving above average on his work evaluations." A report November 11, 1984, indicates that he completed a high school course in the penitentiary. On January 20, 1986, he was evaluated as a good worker and on August 6, 1986, he was noted to be polite to staff, friendly with other inmates and generally to follow the rules.

5. Statutory Aggravating Circumstance Considered But Not Found Beyond a Reasonable Doubt. Idaho Code § 19-2515(g)(5). The state seeks a determination that the aggravating circumstance set forth in Idaho Code § 19-2515(g)(5) exists, asserting that, "The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity." In ordinary language it might appear that this killing falls within those words. The victim was a 69 year old woman who was stabbed numerous times and left to die by a large, young man. However, to find this aggravating circumstance

the court must find that the killing was accompanied by additional acts which set the crime apart from the norm of capital felonies -- "the conscienceless or pitiless crime which is unnecessarily tortuous to the victim." Clearly this crime was conscienceless and pitiless to the victim. However, the court cannot find beyond a reasonable doubt that it was more tortuous than other killings. The killing was not accomplished with surgical precision. It was cruel, as virtually all murders are, but the victim was not tortured or put to pain beyond the infliction of the wounds, one of which was fatal.

6. Statutory Aggravating Circumstances Found Beyond a Reasonable Doubt.

a. Idaho Code § 19-2515(g)(6). The state seeks a determination that the aggravating circumstance set forth in Idaho Code § 19-2515(g)(6) exists in that, "By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life." This element requires a showing of acts or circumstances "which exhibit the highest, the utmost, callous disregard for human life, i.e. the cold-blooded, pitiless slayer." This aggravating circumstance has been proved beyond a reasonable doubt. The defendant stabbed a 69 year old woman multiple times. She posed no physical threat to him. He left her to die. He stabbed her to complete a small value property crime or to avoid detection for that crime. In any use of language, he

displayed utter disregard for human life which was callous, cold-blooded, pitiless.

b. Idaho Code § 19-2515(g)(7). The state seeks a determination that the aggravating circumstances set forth in Idaho Code § 19-2515(g)(7) has been proved beyond a reasonable doubt in that the murder was committed in the perpetration of a robbery and/or burglary and was accompanied by an intent to cause death. The jury found the defendant guilty of felony murder, that is, murder committed in the perpetration of a robbery and/or a burglary. In this case the court gave a more restrictive instruction on the element of intent than may be necessary for felony murder, instructing the jury on the elements of malice aforethought. Express malice involves an intention to kill. Implied malice involves conduct with a wanton disregard for human life. To be a statutory aggravating circumstance under I.C. § 19-2515(g)(7) the court must find beyond a reasonable doubt that the killing was with a specific intent to cause death, not the wanton disregard for human life of implied malice. The element of a killing with a specific intent to cause death has been established beyond a reasonable doubt.

The state relies upon the number and savagery of the wounds as evidence of an intention to kill. It is powerful evidence of that intention, but by itself is also consistent with a wanton disregard for human life. However, additional facts support the

finding that the wounds were inflicted with an intention to kill. If the defendant had merely sought escape when confronted by Mrs. Vanderford, he could have overpowered her easily without the infliction of a lethal wound. The only reason to use a knife was to silence her forever. As Scott Bianchi testified, echoing the defendant's words, he, the defendant, needed "to finish the job." The fact that she was still alive when he left does not weigh significantly against the finding that he intended to kill her. The number and extent of the wounds would have left no reasonable doubt as to the outcome. He intended to "finish the job" - to kill her - and he did.

c. Idaho Code § 19-2515(g)(8). The state seeks a determination that the aggravating circumstance set forth in Idaho Code § 19-2515(g)(8) exists in that, "The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will constitute a continuing threat to society."

A 1974 report by Ira Nadler a psychiatrist at State Hospital South has a chilling forecast of this case, noting of Zane Fields that, "He also denies any actual rape of people and denies ever having used a knife in order to commit assault on a lady." The report continues to state the following: "He does not show any appropriate concern about the acts he has committed and does not look at all upset about the accusation of having raped a three

year old." Dr. Nadler diagnosed him as antisocial personality, borderline mental retardation.

The clinical record from State Hospital South in 1975 notes another instance of inappropriate sexual behavior that required his removal from the facility for the safety of other patients.

The presentence report dated December 12, 1976, for his first adult felony notes the following:

> "The subject's commitment to the Youth Training Center in St. Anthony, Idaho, began in 1972. This commitment occurred when the subject violated curfew and made threatening gestures with a knife toward a girl. During that same year, the subject was granted an extended leave to Idaho Falls. June 14, 1973, Zane was returned to the Youth Training Center after being charged with assaulting a woman in an Idaho Falls laundromat. According to YTC records, this charge was subsequently dropped.
>
> In June of 1974, another incident involving attempted rape reportedly occurred in a park in the area."

The presentence investigator noted in the 1976 report that, "The subject's behavioral problems were not altered significantly by either hospitalization or commitment to the Youth Training Center. Zane's performance under probation as a juvenile was poor."

Clinical records from State Hospital South in Blackfoot from January, 1975, reveal the following comments from Richard Grow, Ed. D., Psychologist III:

"Zane has not internalized the values and norms of our

society. He is impulsive and has a low frustration tolerance. He is prone to be suspicious of others and tends to blame others for his mistakes. He seems unable to learn from experience and, thus, modify his behavior. Finally, I deeply fear that Zane is incapable of significant loyalty and tends to perceive people as objects. His views of sexuality are distorted, and he has felt downtrodden by some important female sexual figure in the past.

While he is not actively psychotic, there are hints of a thought disorder which will increase in proportions in time.

In a psychiatric sense, there is nothing about Zane that should excuse him from criminal responsibility for his behavior. In my judgment this is not the last that the criminal justice system will hear from this individual, and he will be a habitual offender of a progressive nature."

In 1978 Fred Kirn, a psychologist at the Idaho Security Medical Facility, reported as follows: "In summary unless Mr. Fields changes, his present thought patterns and decreases his alcoholic consumption there is a strong likelihood that he will continue to act out criminally, violently and sexually."

As an adult Mr. Fields failed on probation, committing forgery while on bond for delivery of marijuana. By August, 1982, Mr. Fields developed a plan to become a private detective, but according to the progress report of August 5, 1982, had made little progress towards rehabilitation.

The 120 day jurisdiction evaluation dated September 21, 1983, noted that Mr. Fields was free of disciplinary violations, but the social workers rated him as a poor candidate for successful completion of probation. The concerns were accurate. On April

10, 1984, he was declared a probation violator.

In general the defendant has not been a discipline problem in the penitentiary, but he has consistently violated laws when released. The following is a summary of the defendant's criminal record: 1) a 1976 conviction for grand larceny, resulting in a five year commitment with a 120 day retained jurisdiction; 2) a 1977 conviction from Bonneville County for unlawful possession of controlled substance, resulting in a suspended sentence and probation; 3) a 1977 probation violation in Bonneville County, resulting in revocation of probation and commitment to the Idaho State Correctional Institution for the indeterminate three year period that was previously suspended; 4) a 1980 misdemeanor conviction in Bonneville County for petit theft, resulting in a $60.00 fine, plus a jail sentence; 5) two felony convictions in Bonneville County in 1980 for forgery and delivery of a controlled substance resulting in indeterminate five year sentences to the Idaho State Correctional Institution. Additionally, at that time there was a probation violation; 6) a 1984 felony conviction for second degree burglary, accompanied by a probation violation for the burglary, resulting in concurrent sentences to the Idaho State Correctional Institution for terms not to exceed five years; 7) a 1986 felony conviction in Bannock County for grand larceny, resulting in a jail sentence; 8) a 1987 conviction in Ada County (Boise) for pedestrian under the influence, resulting in a fine

and costs; 9) a 1988 felony conviction in Ada County for aggravated assault, resulting in a sentence of five years to the Idaho State Correctional Institution and at the same time a misdemeanor conviction for petit theft, resulting in a 127 day jail sentence. The aggravated assault and the petit theft occurred subsequent to the murder in this case.

In addition to the adult criminal record, the defendant's juvenile record began in 1968 with a finding under the Youth Rehabilitation Act that he committed burglary. In 1969 he was found to have committed shoplifting, "car prowl," and auto theft. In 1972 he committed assault. In 1973 he was charged with assault with intent to commit rape. In 1974 another incident involving assault with intent to commit rape occurred. As a juvenile he was placed on probation, was ordered to undergo psychological counselling, was committed to the Youth Training Center, to a Harbor House and to the Idaho Youth Ranch. He also was in State Hospital South in Blackfoot on two occasions.

Sworn testimony from pre-trial proceedings in this case indicates that he is volatile and threatening.

A dichotomy exists in this case. The record establishes beyond a reasonable doubt that in free society the defendant has exhibited a propensity to commit crimes which will constitute a continuing threat to society. He views people as objects. He is fascinated with weapons, particularly knives. In commission of

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the murder at hand he killed when his property crime was detected. In free society he would constitute a continuing threat to kill when others interfere with his desires, as occurred in this case.

On the other hand much of the defendant's institutional record is discipline free. An argument can be made that institutionalization would take away the continuing threat. Obviously if one is isolated from the opportunity to commit harmful acts he will not commit harmful acts. However, the court is convinced beyond a reasonable doubt that if frustration or aggravation confronted the defendant in confinement he would kill if the opportunity arose. The fact that, hypothetically the defendant can be prevented from committing acts by isolation does not mean he does not constitute a continuing threat to society to commit murder if the occasion arises.

The aggravating factor of a propensity to commit murder which will be a continuing threat to society has been proved beyond a reasonable doubt.

7. Additional Fact in Aggravation. Eleven days after murdering Mrs. Vanderford the defendant committed a petit theft at Shopko in Boise, Idaho. When an attempt to apprehend him occurred he drew a handgun on store personnel, resulting in a conviction following jury trial for aggravated assault and petit theft. The murder and the aggravated assault occurred within approximately two months of his release from the penitentiary. The fact that he

had murdered a woman eleven days earlier did not deter him from committing another theft, carrying a weapon and threatening use of the weapon. The number of witnesses present eliminated the practicality of killing to avoid detection.

This is a factor that would logically seem to fall within the consideration of I.C. § 19-2515(g)(8) as an aggravating circumstance, but the reference to "prior conduct" precludes its consideration under that statutory provision, since it occurred subsequent to the murder. Therefore, the court sets it forth separately as a factor considered in understanding the defendant. Imposition of the death penalty upon this circumstance would not be proper.

8. Weighing the Aggravating and Mitigating Circumstances in Determining the Penalty. The court is required to weigh all mitigating factors against each aggravating circumstance.

The aggravating circumstance in I.C. 2515(g)(6) that, "By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life" outweighs all mitigating circumstances. One may have sympathy for the circumstances of the defendant's life, but the cumulative effect of all mitigating factors pales in the face of the aggravating circumstance of utter disregard for Mrs. Vanderford's life. The mitigating factors do not outweigh the aggravating circumstance and do not make imposition of death unjust.

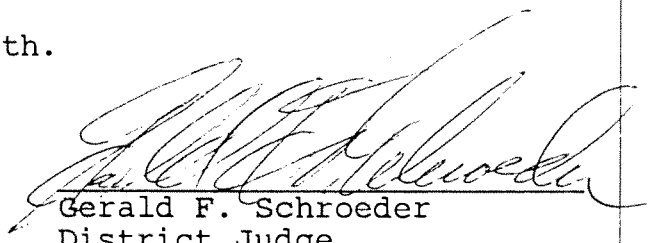
FINDINGS OF THE COURT IN -
CONSIDERING DEATH PENALTY

Similarly the mitigating factors do not outweigh or balance the aggravating circumstance in I.C. § 19-2515(g)(7) that in the commission of felony murder the defendant had a specific intent to kill. The cumulative mitigating circumstances are insubstantial in comparison to the magnitude of the act of intending to kill in the commission of a felony. Again, the mitigating factors do not outweigh the aggravating circumstance and do not make imposition of death unjust.

The cumulative effect of the mitigating circumstances does not outweigh the propensity to commit murder as a continuing threat to society so as to make imposition of death unjust. There have been some sad events in the defendant's life and a limited number of positive factors. The limited positive traits shown by the defendant are insubstantial in comparison to the danger he poses to others. The mitigating factors do not outweigh the aggravating circumstance and do not make imposition of death unjust.

9. The Factor of Guilt. A jury has found the defendant guilty beyond a reasonable doubt. That finding was based in significant part on inmate testimony implicating the defendant. Before considering imposition of a death penalty the court feels a legal and moral obligation to test whether there is sufficient certainty in the evidence to dictate that a person die when inmate testimony constitutes a substantial part of the evidence leading

to the conviction. If the court harbors doubts about imposing a death penalty based on the inmate testimony, apart from any other weighing process, individual conscience would dictate against the imposition of death. The only barrier that might stand between the defendant and the ultimate criminal penalty is if the quality of evidence were such that the death penalty would be too final in light of that evidence. There is no such barrier. No doubts of conscience shield the defendant. It is the court's conclusion that the appropriate penalty is death.



Gerald F. Schroeder
District Judge

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EXHIBIT #3

JURY INSTRUCTION NO.23

INSTRUCTION NO. 23

It is not within your province to concern yourselves with the question of penalty or punishment. That feature of the case is solely for the Court. Therefore, I instruct you not to concern yourselves with it at all. Your duty as jurors is solely to determine the guilt or innocence of the accused and upon that question and that question alone you, as jurors, are to vote and return your verdict.

JOAN M. FISHER
Idaho State Bar 2854
Capital Habeas Unit
Federal Defenders of Eastern Washington & Idaho
201 N. Main
Moscow, ID 83843
(208) 883-0180

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ZANE JACK FIELDS, **Petitioner,**	**Case No.** SP OT 0200711D
v	**AFFIDAVIT IN SUPPORT OF PETITION FOR POST-CONVICTION RELIEF OR WRIT OF HABEAS CORPUS**
STATE OF IDAHO, **Respondent.**	
and	
STATE OF IDAHO, **Plaintiff**	**Case No. 16259**
v.	**AFFIDAVIT IN SUPPORT OF MOTION TO CORRECT ILLEGAL SENTENCE, TO VACATE SENTENCE OF DEATH AND FOR NEW SENTENCING TRIAL**
ZANE JACK FIELDS, **Defendant.**	

STATE OF IDAHO)
: ss.
County of Latah)

I, Joan M. Fisher, counsel for the Petitioner, a person over eighteen years of age and competent to testify, and mindful of the penalties of perjury, and in compliance with Idaho Code §19-2719(5)(a) say and declare as follows:

1. I am and have been the court-appointed counsel for Petitioner since 1996 and as such am fully familiar with the facts and circumstances surrounding Petitioner's conviction and sentence which are challenged herein.

2. That I am familiar with the record of the case and law surrounding the issues raised herein.

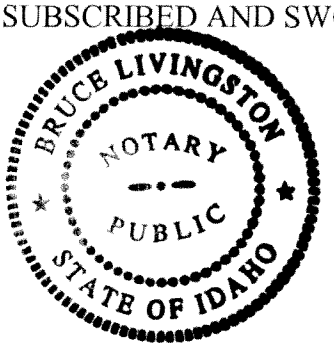
3. The documents attached to the Petition are true and correct copies of the original documents filed in the underlying conviction, *State of Idaho vs. Zane Jack Fields.* Ada County Case No. 16259.

4. The facts raised in the Petition for Post-conviction Relief, and Motion to Correct Illegal Sentence and For New Sentencing are true and correct to the best of my knowledge.

DATED this 1st day of August, 2002.

JOAN M. FISHER

SUBSCRIBED AND SWORN TO before me this 1st day of August, 2002.



NOTARY PUBLIC FOR IDAHO
Residing at Moscow
Commission expires: 7-17-04

GREG H. BOWER
Ada County Prosecuting Attorney

Roger Bourne
Deputy Prosecuting Attorney
Idaho State Bar #2127
200 W. Front Street, Room 3191
Boise, Idaho 83702
Telephone: (208) 287-7700

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ZANE JACK FIELDS, Petitioner, vs. STATE OF IDAHO, Respondent.	Case No. SPOT0200711D STATE'S RESPONSE TO PETITION FOR POST CONVICTION RELIEF, MOTION TO CORRECT ILLEGAL SENTENCES, TO VACATE SENTENCES OF DEATH AND FOR NEW SENTENCING TRIAL AND STATE'S MOTION TO DISMISS

COMES NOW, Roger Bourne, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and makes the State's Response to the above-described motion for new sentencing.

This defendant should not be resentenced. The U.S. Supreme Court opinion in Ring v. Arizona does not apply retroactively for the reasons set out below. Additionally, even if the Ring holding were to be applied, the jury that found FIELDS guilty of First Degree Murder also found the statutory aggravating circumstance that Judge Schroeder relied on in sentencing the defendant to death. Both issues will be discussed below.

In Fetterly v. State, 121 Idaho 417 (1991), the Petitioner made a claim similar to Fields' to justify the filing of his successive post-conviction petition. Fetterly claimed the *"Charboneau* interpretation of I.C. §19-2515 was not a claim that was known or should have been known" when he filed his initial post-conviction petition. In State v. Charboneau, 116 Idaho 129, 153, 774 P.2d 299 (1989), the supreme court concluded, "the trial court may sentence the defendant to death, only if the trial court finds that all the mitigating circumstances do not outweigh the gravity of each of the aggravating circumstances found and make imposition of death unjust." Because Charboneau, had not been used prior to the filing of his initial post-conviction petition, Fetterly contended the claim was not known and could not have been known when he filed his initial petition. The supreme court expressly rejected Fetterly's claim, finding, "this claim is one 'that should be reasonably known immediately upon completion of the trial and can be raised in a post-conviction petition.'" Fetterly, 121 Idaho at 419.

In Fetterly, the court also discussed the question of retroactivity. Relying upon Griffith v. Kentucky, 479 U.S. 314 (1987), the court explained that new decisions do not apply to defendants whose cases were final before the issuance of the new decision. Fetterly, 121 Idaho at 418-19. This basic principle of law was also applied in Stuart v. State, 128 Idaho 436, 914 P.2d 933 (1996). In Stuart, the petitioner sought retroactive application of the supreme court's holding. In State v. Tribe, 123 Idaho 721, 852 P.2d 87 (1987), which reversed a murder case because the jury was instructed on second degree murder by torture. The supreme court concluded, because Stuart's case was final when Tribe was issued, that the court was precluded from applying tribe retroactively. *See also* Butler v. State, 129 Idaho 899, 901, 935 P.2d 162 (1997)(refusing to retroactively apply the court's holding in State v. Townsend, 124 Idaho 881, 865 P.2d 972 (1993)(holding that hands, other body

parts, or appendages may not by themselves constitute deadly weapons under the aggravated assault and aggravated battery statutes.))

In his dissent from the Ring decision, Chief Justice Rehnquist stated his belief that many death row inmates would challenge their convictions based on the Ring decision. He stated:

> "I believe many of these challenges will ultimately be unsuccessful, either because the prisoners will be unable to satisfy the standards of harmless error or plain error review, or because, having completed their direct appeals, they will be barred from taking advantage of today's holding on federal collateral review. See 28 U.S.C. Section 2244(b)(2)(A), 2254(d)(1); Teague v. Lane, 489 U.S. 288, 103 L.Ed.2d 334, 109 S. Ct. 1060 (1989).

The Teague case clearly holds that new rules announced by the Supreme Court do not apply retroactively to defendants whose conviction is final in state court and who is only collaterally attacking the conviction in federal court. Fields' conviction in state court was final in 1995. State v. Fields, 127 Idaho 904 (1995). The denial of Fields' successive petition for post conviction relief was affirmed in Fields v. State, 135 Idaho 286 (S. Ct. 2000). The Ring holding is a new rule that does not apply to Fields.

I.C. §19-2719(5)(c) also expressly prohibits successive post-conviction petitions seeking the retroactive application of new rules of law. Fields' successive post-conviction petition must be dismissed.

Jury Found The Statutory Aggravator

The defendant was convicted of First Degree Murder for the killing of Mary Catherine Vanderford by stabbing her in the neck, chest and back from which she died, on February 11, 1988. It was charged that the murder was done willfully, unlawfully, and with malice aforethought, and was committed in the perpetration of a robbery and/or burglary.

The jury was instructed on the elements of the crime of murder. Instruction #13, which is attached to this response, was given to the jury. Instruction #13 told the jury that the crime of murder required the jury to find an unlawful killing of a human being with malice aforethought. The jury was given the definition of malice as follows in Jury Instruction #13, which is attached:

> The crime of murder is the unlawful killing of a human being with malice aforethought. Malice is express where the evidence manifests or shows an unlawful and deliberate intent to take away the life of a human being without just cause or excuse.
>
> Malice is implied if the evidence shows no considerable provocation for the killing. Malice is also implied where the evidence or circumstances surrounding the killing shows the presence of an abandoned and malignant heart, which means a condition of heart and mind which has no regard for social or moral obligation.
>
> Thus, malice is implied when the evidence shows that a killing resulted for any act and/or acts involving a high degree of probability that death would result, when such act and/or acts have been committed for a base, anti-social purpose, and with a wanton disregard for human life.

The jury was instructed that to find the defendant guilty of murder, they must find that the defendant either had the specific intent to cause death or that the defendant's conduct showed a wanton disregard for human life. The jury found the defendant guilty of First Degree Murder for the killing of Catherine Vanderford during the commission of a robbery or burglary and was done with malice. That combination satisfied Idaho Code §19-2515(g)(7). That being that the murder was committed during the perpetration of an enumerated felony and was done with an intent to kill.

Idaho Code §19-2515(g)(7)

> "The murder was one defined as murder of the first degree by section 18-4003, Idaho Code, subsections (b), (c), (d), (e), or (f), and it was accompanied with the specific intent to cause the death of a human being."

Idaho Code §18-4003(d) was then as follows:

> "Any murder committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem is murder of the first degree."

As Judge, now Justice, Schroeder stated in his Findings of the Court in Considering Death Penalty under Section 19-2515, Idaho Code, the jury was thoroughly instructed on the element of intent to kill as an element of murder. Justice Schroeder stated the following:

> b. Idaho Code Section 19-2515(g)(7). The State seeks a determination that the aggravating circumstances set forth in I.C. §19-2515(g)(7) has been proved beyond a reasonable doubt in that the murder was committed in the perpetration of a robbery and/or burglary and was accompanied by an intent to cause death. The jury found the defendant guilty of felony murder, that is, murder committed in the perpetration of a robbery and/or burglary. In this case, the court gave a more restrictive instruction on the element of intent that may be necessary for felony murder, instructing the jury on the elements of malice aforethought. Express malice involves an intention to kill. Implied malice involves conduct with a wanton disregard for human life.
>
> To be a statutory aggravating circumstance under I.C. §19-2515(g)(7), the court must find beyond a reasonable doubt that the killing was with a specific intent to cause death, not the wanton disregard for human life of implied malice. The element of a killing with a specific ntent to cause death has been established beyond a reasonable doubt.

> The State relies upon the number and savagery of the wounds as evidence of an intention to kill. It is powerful evidence of that intention, but by itself is also consistent with the wanton disregard for human life. However, additional facts support the finding that the wounds were inflicted with an intention to kill. If the defendant had merely sought escape when confronted by Mrs. Vanderford, he could have overpowered her easily without the infliction of a lethal wound. The only reason he used a knife was to silence her forever. As Scott Beianchi testified, echoing the defendant's words, he, the defendant, needed "to finish the job." The fact that she was still alive when he left is not weighed significantly against the finding that he intended to kill her. The number and extent of the wounds would have left no reasonable doubt as to the outcome. He intended to "finish the job" – to kill her – and he did.

Judge Schroeder left no doubt that in his view the jury found that the murder was done with malice and occurred during the perpetration of a robbery or burglary. Express malice is the specific intent to kill. Implied malice is the intent to kill as shown by a wanton disregard for human life. While the jury wasn't given a specific interrogatory as to which type of malice they found, the evidence certainly supports a specific intent to kill. In other words, Judge Schroeder relied upon the same evidence that the jury found as supporting the aggravating circumstance. That is all that Ring v. Arizona requires.

Justice Scalia stated the following in his concurrence in the Ring case:

> While I am, as always, pleased to travel in Justice Breyer's company, the unfortunate fact is that today's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed. Those states that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase, or more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.

Harmless Error

The defendant Ring had been charged with and convicted of shooting the driver of an armored car and then stealing the money from the car. The State evidently argued that the aggravating factor of murder for pecuniary gain was implicit in the jury's guilty verdict and as such was a jury finding of a statutory aggravating circumstance. The State apparently argued that sentencing by the court with those facts was harmless error. The Supreme Court made this notation in footnote 7.

> We do not reach the State's assertion that any error was harmless because a pecuniary gain finding was implicit in the jury's guilty verdict. See Neder v. United States, 227 US 1, 144 L. Ed 2d 35, 119 Sp. Ct. 1827 (1999) (This court ordinarily leaves it to lower courts to pass on the harmlessness of error in the first instance).

The petitioner has argued that it was error for Judge Schroeder to make the finding beyond a reasonable doubt of the existence of a statutory aggravating factor supporting the death penalty for the petitioner. The State's view is that the jury did find the statutory aggravator as described by Judge Schroeder. However, at most, this is error subject to a harmless error analysis.

In the Neder case, *supra*, the facts were that the District Court had failed to properly instruct the jury on "the materiality" element of the crime of tax evasion. The government did not dispute that the District Court erred in deciding the materiality element itself rather than submitting the issue to the jury. The court stated the following at p. 1833:

> We have recognized that "most constitutional errors can be harmless." Fulminante, *supra*, at 306, 111 Sup. Ct. 1246." If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that

> any other constitutional errors that may have occurred are subject to harmless error analysis." Rose v. Clark, 487 US 570, 579, 106 Sup. Ct. 3101, 92 L.Ed 2d 460 (1986). Indeed, we have found an error to be "structural," and thus subject to automatic reversal, only in an "very limited class of cases."

The Supreme Court went on to list certain structural defects that were subject to automatic reversal. The list was as follows, a complete denial of counsel; biased trial judge; racial discrimination in selection of grand jury; denial of self-representation at trial; denial of public trial; defective reasonable doubt instruction.

The Supreme Court then went on to state the following about the jury instruction in Neder at p. 1833:

> The error at issue here—a jury instruction that omits an element of the offense—differs markedly from the constitutional violations we have found to defy harmless error review. Those cases, we have explained, contain a "defect affecting the frame work within which the trial proceeds, rather than simply an error in the trial process itself."
>
> Fulminante, *supra*, at 310, 111 Sup. Ct. 1246. Such errors "infect the entire trial process," Brecht v. Abrahamson, 507 US 619, 630, 113 Sup. Ct. 1710, 123 L. Ed. 2d 353 (1993), and "necessarily render a trial fundamentally unfair," Rose, 478 US, at 577, 106 Sup. Ct. 3101. Put another way, these errors deprive defendants of "basic protections" without which "a criminal trial cannot reliable serve its function as a vehicle for determination of guilt or innocence...and no criminal punishment may be regarded as fundamentally fair." Id., at 577-578, 106 Sup. Ct. 3101.

The Court went on to hold that this omission in a jury instruction was subject to a harmless error analysis and was in fact harmless error because the evidence of the existence of materiality was overwhelming.

CONCLUSION

The Ring holding is not retroactive. Nonetheless, the facts supported a finding of express malice. As Judge Schroeder pointed out, the evidence left no reasonable doubt of the intended outcome. At most, the sentencing procedure was harmless error.

For the reasons stated above, The Defendant's Motion for Resentencing and Post-Conviction Relief should be denied. The State moves for dismissal.

RESPECTFULLY SUBMITTED this 30th day of August, 2002.

GREG H. BOWER
Ada County Prosecuting Attorney

By: Roger Bourne
Deputy Prosecuting Attorney

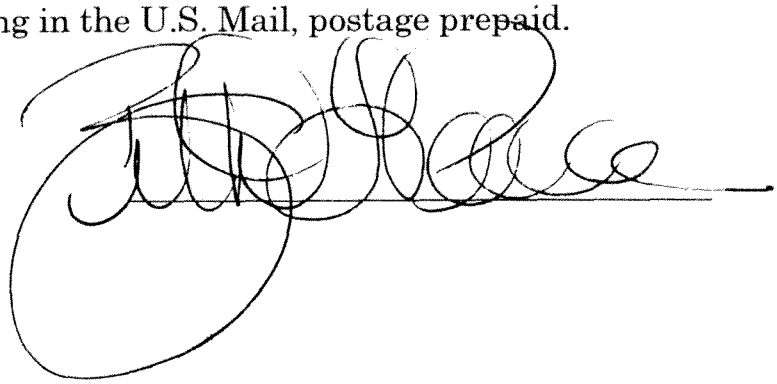
SUBSCRIBED AND SWORN to be me this 30 day of August, 2002.

KARI ERICHSON NOTARY PUBLIC STATE OF IDAHO

Notary Public
Resides at: Boise Idaho
Commission Expires 5-1-07

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30 day of August, 2002, I served a true and correct copy of the foregoing ANSWER TO PETITION FOR POST-CONVICTION RELIEF to Joan M. Fisher, Capital Habeas Unit, Federal Defenders of Eastern Washington and Idaho, 201 N. Main, Moscow ID 83843, the following person(s) by depositing in the U.S. Mail, postage prepaid.



CAPITAL HABEAS UNIT
Federal Defenders of
Eastern Washington and Idaho
Joan M. Fisher, ID Bar #2854
201 North Main
Moscow ID 83843
Telephone: 208-883-0810
Facsimile: 208-883-1472
defenders@turbonet.com

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ZANE JACK FIELDS,	
Petitioner,	**CASE NO. SP OT 0200711D**
vs.	**NOTICE OF INTENT TO FILE OPPOSITION AND SUPPORTING MEMORANDUM, AND REQUEST FOR HEARING**
STATE OF IDAHO,	
Respondent.	

PLEASE TAKE NOTICE that in this action, Mr. Zane Fields, Petitioner, intends to exercise his statutory and constitutional rights by filing an opposition to Respondent's State's Response to Petition For Post-Conviction Relief, Motion To Correct Illegal Sentences of Death and For New Sentencing Trial and State's Motion to Dismiss, which was filed on or about August 30, 2002, and a copy of which undersigned counsel first received today, September 5, 2002. Additionally, Petitioner requests oral argument on the matters at issue. This Notice of Intent to File Opposition and Supporting Memorandum, and Request for Hearing is brought

pursuant to the Idaho Code §§ 19-2719(5) [Special Appellate and Postconviction Proceedings in Capital Cases], 19-4907(a) [Applicability of civil statutes and rules of procedure], Idaho Criminal Rule 57(b) [post conviction proceedings governed by Rules of Civil Procedure] and Rule 56(c) of the Idaho Rules of Civil Procedure [Motion for Summary Judgment and Proceedings thereon]. It is also brought pursuant to Mr. Fields's right to due process as guaranteed by the Idaho Constitution art. I, §13, and the United States Constitution, amend. XIV. It is, as well, brought pursuant to Mr. Fields's Eighth and Fourteenth Amendment right against cruel and unusual punishment which mandates that greater safeguards be applied to capital than non-capital guilt-innocence and sentencing proceedings. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("because death is qualitatively different from imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"), and Beck v. Alabama, 447 U.S. 625, 638 (1980)("To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination.").

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DATED this 6th day of September, 2002.

RESPECTFULLY SUBMITTED,

Joan M. Fisher
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of September, 2002, I caused to be served a true and correct copy of the foregoing document by ~~mailing it via the United States Postal Service~~ hand delivery ~~in an envelope, first class postage affixed, addressed~~ to:

Roger Bourne
Ada County Prosecuting Attorney
200 West Front Street, Room 3191
Boise, Idaho 83702

Joan M Fisher

CAPITAL HABEAS UNIT
Federal Defenders of
Eastern Washington and Idaho
Joan M. Fisher, ID Bar #2854
201 North Main
Moscow ID 83843
Telephone: 208-883-0810
Facsimile: 208-883-1472
defenders@turbonet.com

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,	HCR-
Plaintiff,	**CASE NO. 16259**
vs.	**NOTICE OF INTENT TO FILE OPPOSITION AND SUPPORTING MEMORANDUM, AND REQUEST FOR HEARING**
ZANE JACK FIELDS,	
Defendant.	

PLEASE TAKE NOTICE that in this action, Mr. Zane Fields, Defendant, intends to exercise his statutory and constitutional rights by filing an opposition to Plaintiff's State's Response to Petition For Post-Conviction Relief, Motion To Correct Illegal Sentences of Death and For New Sentencing Trial and State's Motion to Dismiss to the extent that that pleading is considered a response to Mr. Fields's Motions To Correct Illegal Sentences, To Vacate Sentences of Death and For New Sentencing Trial in the above captioned case. Notably, Plaintiff filed its State's Response in Case No. SP OT 0200711D, not in the above-captioned case. Plaintiff filed

its State's Response on or about August 30, 2002, and undersigned counsel first received a copy today, September 5, 2002. Additionally, Defendant requests oral argument on the matters at issue. This Notice of Intent to File Opposition and Supporting Memorandum, and Request for Hearing is brought pursuant to the Idaho Code §§ 19-2719(5) [Special Appellate and Postconviction Proceedings in Capital Cases], 19-4907(a) [Applicability of civil statutes and rules of procedure], Idaho Criminal Rule 57(b) [post conviction proceedings governed by Rules of Civil Procedure] and Rule 56(c) of the Idaho Rules of Civil Procedure [Motion for Summary Judgment and Proceedings thereon]. It is also brought pursuant to Mr. Fields's right to due process as guaranteed by the Idaho Constitution art. I, §13, and the United States Constitution, amend. XIV. It is, as well, brought pursuant to Mr. Fields's Eighth and Fourteenth Amendment right against cruel and unusual punishment which mandates that greater safeguards be applied to capital than non-capital guilt-innocence and sentencing proceedings. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("because death is qualitatively different from imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"), and Beck v. Alabama, 447 U.S. 625, 638 (1980)("To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination.").

DATED this 6th day of September, 2002.

RESPECTFULLY SUBMITTED,

Joan M. Fisher
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September, 2002, I caused to ~~be~~ served a true and correct copy of the foregoing document by hand-delivery ~~mailing it via the United States Postal Service in an envelope, first class postage affixed, addressed~~ to:

Greg H. Bower
Ada County Prosecuting Attorney
200 West Front Street, Room 3191
Boise, Idaho 83702

Joan M. Fisher

JOAN M. FISHER
Idaho State Bar No. 2854
Capital Habeas Unit
Federal Defenders of Eastern Washington & Idaho
201 N. Main
Moscow, ID 83843
(208) 883-0180

Attorney for Petitioner Zane Fields

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ZANE FIELDS, **Petitioner,**	**Case Nos. SPOT02-00711D & ~~16259~~**
v	**PETITIONER'S RESPONSE IN OPPOSITION TO REQUEST TO SUMMARILY DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY DISMISSAL**
STATE OF IDAHO, **Respondent.**	

Petitioner Zane Jack Fields responds in opposition to Respondent's Response to Petition for Post Conviction Relief, Motion to Correct Illegal Sentence, to Vacate Sentence of Death and State's Motion to Dismiss ("State's Response"), and in support of Petitioner's claim for sentencing relief under *Ring v. Arizona*. Respondent contends that Fields should not be re-sentenced because *Ring* is not retroactive, Idaho Code section 19-2719(5)(c) prohibits retroactive application of a new rule of law, the jury found the statutory aggravating circumstance in Fields' case, and even if the jury failed to find the statutory aggravating circumstance, the error is harmless. For the reasons set forth below Respondent's motion should be denied and Petitioner's petition should be granted.

I. PETITIONER WAS DENIED HIS RIGHT TO TRIAL BY JURY ON STATUTORY AGGRAVATING CIRCUMSTANCES.

Ring v. Arizona clearly establishes that petitioner's death sentence is unconstitutional. *Ring v. Arizona,* 536 U.S. __, 122 S. Ct. 2428 (June 24, 2002). In *Ring*, the Supreme Court of the United States held that "[c]apital defendants, no less than non-capital defendants ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 122 S. Ct. at 2432. In *Ring*, the Court held that the fundamental constitutional principle it had made clear three years earlier, in *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999), applies to capital cases. *Ring*, 122 S. Ct. at 2438-43. That constitutional principle is this: "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones,* 526 U.S. at 243 n.6, *quoted in*, *Ring*, 122 S. Ct. at 2438-39.

The immediate effect of *Ring v. Arizona*, *supra*, has been "to invalidate the death penalty scheme in Idaho." *State v. Fetterly,* __ Idaho __, 52 P.3d 874, 875 (Idaho August 6, 2002) (rehearing denied Aug. 22, 2002). As the Idaho Supreme Court explained in *Fetterly*, *Ring* requires a jury to make "the factual findings of the aggravating factors necessary to the imposition of a death sentence." *Id.*

Ring and *Fetterly* constitute a dramatic and unprecedented reversal of constitutional precedent, by the Supreme Court of the United States, and by the Idaho Supreme Court. Relying on now-overruled U.S. Supreme Court precedent, the Idaho Supreme Court has repeatedly rejected the federal constitutional argument that *Ring* accepted, and that *Ring* now requires this

court to accept. The line of Idaho Supreme Court decisions overruled by *Ring* and *Fetterly* traces back to *State v. Sivak*, 105 Idaho 900, 904, 674 P.2d 396, 400 (1983), and *State v. Creech,* 105 Idaho 362, 372-373, 670 P.2d 463, 474 (1983). That line of case law was most thoroughly summarized in an oft-cited passage in *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299 (1989):

> [The Appellant] asserts that the imposition of the death penalty with no participation by the jury in the sentencing process violates the sixth, eighth, and fourteenth amendments to the Constitution of the United States. He also contends that the sentence was unconstitutional because he was denied a jury determination of the aggravating circumstances enumerated in I.C. § 19-2515(g).
>
> In 1983 this Court held "that there is no federal constitutional requirement of jury participation in the sentencing process and that the decision to have jury participation in the sentencing process, as contrasted with judicial discretion sentencing, is within the policy determination of the individual states." *State v. Creech*, 105 Idaho 362, 373, 670 P.2d 463, 474 (1983) *cert. den.* 465 U.S. 1051, 104 S.Ct. 1327, 79 L.Ed.2d 722 (1984). *See also State v. Sivak*, 105 Idaho 900, 902, 674 P.2d 396, 398 (1983) *cert. den.* 468 U.S. 1220, 104 S.Ct. 3591, 82 L.Ed.2d 887 (1984); *State v. Fetterly*, 109 Idaho 766, 710 P.2d 1202 (1985) *cert. den.* 479 U.S. 870, 107 S.Ct. 239, 93 L.Ed.2d 164 (1986). In 1984 the United States Supreme Court upheld death sentencing by trial judges. *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).
>
> This Court has also held "that Art. 1, § 7, of the Idaho Constitution does not require the participation of a jury in the sentencing process in a capital case." *Sivak*, 105 Idaho at 904, 674 P.2d at 400. See also *State v. Fain*, 116 Idaho 82, 774 P.2d 252 (1989).
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> * * * * *
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> To accept [Appellant's] argument that the jury must be involved in determining whether aggravating circumstances exist, **we would have to conclude that the aggravating circumstances listed in I.C. § 19-2515(g) are elements of first degree murder**. We are unable to reach that conclusion. **The circumstances listed in the statute are clearly circumstances to be considered in sentencing and not elements of first degree murder**. It is not unconstitutional for a judge, instead of a jury, to determine whether any of the aggravating circumstances listed in the statute exist.
>
> Our opinion in this aspect of the case is not changed by the decision of the Ninth Circuit in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir.1988). In *Adamson* the Ninth Circuit held Arizona's death penalty sentencing statutes to be in violation of the sixth amendment. During reargument of this case to determine what impact *Adamson* might have on our

> opinion here, the solicitor general for the state of Idaho acknowledged that there is no significant difference between the Arizona death penalty sentencing statutes and those of Idaho. Nevertheless, we are not convinced that *Adamson* correctly states the requirements of the sixth amendment on this issue.

Charboneau, 774 P.2d at 315-17 (emphasis added); *see also State v. Porter*, 130 Idaho 772, 795-96, 948 P.2d 127, 150-51 (1997), *cert. denied*, 523 U.S. 1126 (1998); *State v. Pizzuto,* 119 Idaho 742, 769, 810 P.2d 680, 707 (1991) *cert. denied,* 503 U.S. 908 (1992); *State v. Card,* 121 Idaho 425, 430, 825 P.2d 1081, 1086 (1991) *cert. denied,* 506 U.S. 915 (1992); *State v. Paz,* 118 Idaho 542, 552-53, 798 P.2d 1, 11-12 (1990), *cert. denied,* 501 U.S. 1259 (1991), *overruled on other grounds by State v. Card, supra*; *State v. Fain,* 119 Idaho 670, 675, 809 P.2d 1149, 1154 (1991) *cert. denied*, 504 U.S. 987 (1992); *State v. Lankford*, 116 Idaho 860, 868, 781 P.2d 197, 205 (1989), *cert. denied,* 497 U.S. 1032 (1990).

Ring and *Fetterly* hold that the Idaho Supreme Court's reasoning was incorrect at every step. Aggravating circumstances necessary to impose a death sentence **are** elements of the offense, for constitutional purposes; *Adamson v. Ricketts* was right on this point, and the Supreme Court decision that effectively overruled it,[1] *Walton v. Arizona*, 487 U.S. 639, 648 (1990), was wrong. The dissenting Justices of the Idaho Supreme Court who have repeatedly and passionately argued that the Idaho statute is unconstitutional on this ground, have turned out to be right. See *State v. Lankford,* 116 Idaho 860, 880-84, 781 P.2d 197 (1989) (Huntley, J., dissenting); *State v. Pizzuto,* 119 Idaho 742, 784, 810 P.2d 680, 722 (1991) (Bistline, J.,

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[1] The Ninth Circuit's decision in *Adamson* has never actually been overruled. *See Adamson v. Lewis*, 955 F.2d 614 (9th Cir. 1992) (en banc). However, the court has assumed that the *en banc* decision on this point is superseded by the seemingly irreconcilable Supreme Court authority of *Walton*. *See id.* at 619.

dissenting), *cert. denied,* 503 U.S. 908 (1992); *State v. Charboneau,* 116 Idaho 129, 169, 774 P.2d 299, 339 (1989) (Bistline, J., dissenting), *cert. denied,* 493 U.S. 922 (1989) and 493 U.S. 923 (1989); *State v. Creech,* 105 Idaho 362, 375-404, 670 P.2d 463, 476-505 (1983) (Huntley and Bistline, JJ., dissenting), *cert. denied,* 465 U.S. 1051 (1984); *State v. Sivak,* 105 Idaho 900, 908- 09, 674 P.2d 396, 404-05 (1983) (Bistline, J., dissenting), *cert. denied,* 468 U.S. 1220 (1984). "It is high time to comply with our Idaho Constitution and put the awesome decision of life or death back in the hands of twelve tried and true jurors." *State v. Rhoades,* 120 Idaho 795, 814, 820 P.2d 665, 684 (1991) (Bistline, J., dissenting), *cert. denied,* 504 U.S. 987 (1992).

It is therefore clear that defendant Zane Fields' death sentence was imposed in a fundamentally unconstitutional proceeding, a proceeding in which he was denied a right that our state constitution says must be "inviolate." Idaho Constitution Article I, § 7. That denial plainly made a difference in his case for his death sentence was based on a judge-made determination that the "the killing was with a specific intent to cause death, not the wanton disregard of human life for implied malice," Findings of the Court in Considering the Death Penalty ("Findings"), Clerk's Record ("CR") at 168, while the jury was instructed that it could convict Fields of felony murder based on finding *either* express or implied malice. Jury Instruction # 13. Thus, it is apparent that the body that was constitutionally required to make the findings that made Mr. Fields eligible for a death sentence did not make the finding of specific intent that Judge Schroeder did in his sentencing findings. Yet, Zane Fields stands condemned by the decision of a judge alone, a decision that a judge had no power to make -- an argument that the Idaho Supreme Court and the Supreme Court of the United States rejected, but which both courts have now acknowledged was correct all along.

Fortunately, that death sentence has not been carried out, and this grave constitutional error is not irrevocable. The interests of this state in the review of its own state judgments, protection of its citizens and application of its Constitution require this court to answer the critical questions now raised by *Ring* and grant Petitioner the relief mandated by *Ring* and the Idaho and United States Constitutions.

A. STATUTORY AGGRAVATING CIRCUMSTANCES ARE ELEMENTS OF THE CRIME OF CAPITAL MURDER WHICH MUST BE FOUND BY A JURY BEYOND A REASONABLE DOUBT FOLLOWING PRETRIAL NOTICE AND APPROPRIATE JURY INSTRUCTIONS.

There is no question in Idaho that a defendant has a right to a jury trial on all the elements of the offense. *State v. Pratt*, 125 Idaho 594, 600, 873 P.2d 848, 854 (Idaho 1994). "The rule in Idaho has always been that a criminal defendant cannot be convicted of a crime unless the factfinder finds the defendant guilty of committing every fact necessary to constitute the crime beyond a reasonable doubt." *Id.* (citing *State v. Hoffman*, 123 Idaho 638, 693, 851 P.2d 934, 939 (Idaho 1993); *State v. Seymour*, 7 Idaho 257, 260, 61 P. 1033, 1034 (Idaho 1900)).

The question that had not been answered correctly in *Walton,* and which was fundamentally misunderstood by the Idaho Supreme Court and the United States Supreme Court, was whether the statutory aggravating "circumstances" which rendered a person death-eligible were elements of a greater offense of "capital murder" as opposed to mere sentencing factors of first degree murder. The answer, we now know, is that the aggravating circumstances are elements of a greater death eligible crime, of which first degree murder is a lesser included offense. *See Ring v. Arizona,* 122 S.Ct. at 2443 (under Arizona's sentencing structure, [which is essentially identical to Idaho's], "aggravating factors operate as 'the functional equivalent of an

element of a greater offense'", quoting *Apprendi*). We now know that "those facts setting the outer limits of a sentence, and of the judicial power to impose it, are elements of the crime for the purposes of the constitutional analysis," *Harris v. United States*, __ U.S. __, 122 S.Ct. 2406, 2409 (2002), and that aggravating circumstances necessarily constitute elements of a "greater offense." As Justice Thomas clearly stated, "When a fact exposes a defendant to greater punishment than what is otherwise legally prescribed, that fact is "by definition [an] 'elemen[t]' of a separate legal offense." *Harris v. United States,* 122 S. Ct. at 2426 (Thomas, J, dissenting) (quoting *Apprendi v. New Jersey,* 530 U.S. at 483 n.10).

There is no question that Idaho Code § 19-2515 sets out facts which if found to be true beyond a reasonable doubt expose the defendant to a greater punishment, namely death, than he could otherwise be exposed. I. C. §§18-4004, 19-2515(c). As in Arizona, those facts are elements of the crime and must be found by a jury.

Petitioner was convicted and sentenced to die under a statutory scheme which required the finding of at least one statutory aggravating circumstance beyond a reasonable doubt before he could be sentenced to death. The statutory aggravating circumstances were elements of the greater offense of "capital" murder and thus required a jury verdict. *Ring v. Arizona,* 122 S.Ct. at 2443. Because no jury made the findings of aggravating circumstances, Petitioner was only convicted by a jury of the lesser included offense of first degree murder, and his death sentence must be vacated under *Ring v. Arizona* and *State v. Fetterly*, 52 P.3d at 875.[2]

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[2] It is this verdict of the lesser included offense that Petitioner's Rule 35 Motion to Correct the Sentence is based. Having been convicted of murder in the first degree by jury verdict, the maximum penalty for which is life imprisonment, the matter before the court is not a "capital case" and thus, not governed by Idaho Code §19-2719. Thus a Rule 35 Motion to

B. THE RIGHT TO TRIAL BY JURY IS NOT A NEW RULE BUT IS AN ANCIENT, FUNDAMENTAL RIGHT.

Ring's requirement that juries, not judges, find the elements of the charge is derived from ancient principles of law:

> The principle that the jury were the judges of fact and the judges the deciders of law was stated as an established principle as early as 1628 by Coke. *See* 1 E. Coke, Institutes of the Laws of England 155b (1628) ("ad questionem facti non respondent judices; ad questionem juris non respondent juratores "). *See also* Langbein, The English Criminal Trial Jury on the Eve of the French Revolution, in The Trial Jury in England, France, Germany 1700-1900, [(A. Schioppa ed. 1987)] at 34, n. 60.

Jones v. United States, 526 U.S. at 247.

Walton v. Arizona, 487 U.S. 639 (1990), did not contravene those principles but simply misread the Arizona statute to which it was applying them. The United States Supreme Court enfeebled the institution of the jury through its ruling in *Walton v. Arizona*, as did the Idaho Supreme Court in its original rejection of right to a jury trial on the aggravating circumstances in *Creech* and *Sivak.*

Before the United States Supreme Court's incorrect rejection of the jury trial issue in *Walton,* the Ninth Circuit Court of Appeals in *Adamson v. Ricketts* found otherwise, correctly emphasizing the historical, longstanding basis for finding aggravating circumstances to be elements of the offense in Arizona's nearly identical capital statute:

> The historic roots of the right to jury trial provide an essential backdrop to this discussion. The Framers of the Bill of Rights included the Sixth Amendment's guarantee of a right to jury trial as an essential protection against government oppression. "Fear of unchecked power, so typical of our State and Federal

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correct the illegal sentences (of death) imposed can and must be heard and granted. Any argument that the motion to correct illegal sentence cannot be heard in this capital case violates equal protection and suspends the writ, as set forth in section IV, *infra*.

> Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." *Duncan v. Louisiana,* 391 U.S. 145, 156, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968). The cornerstone of this protection is the right to have the jury determine the existence of the facts necessary to determine guilt or innocence of a given crime. Only by maintaining the integrity of the factfinding function does the jury "stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction." *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 572, 97 S.Ct. 1349, 1355, 51 L.Ed.2d 642 (1977).
>
> The Court has recognized that the defendant's right to a jury trial and the concomitant factfinding responsibilities of the jury merit greater protection as the potential punishment increases. *See, e.g., Duncan,* 391 U.S. at 160-61, 88 S.Ct. at 1453 (jury trial not constitutionally mandated for petty offenses; seriousness of punishment determines when right attaches). As we have previously stated, the Supreme Court has repeatedly held that the death penalty is qualitatively different from all other punishments and that heightened scrutiny of death sentencing decisions is required. Thus, when the death penalty is implicated courts must be particularly careful to prevent the infringement of Sixth Amendment rights.
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> To avoid the dangers of government oppression recognized in *Duncan* and reaffirmed in later cases, there must be strict separation of determinations of guilt or innocence (factfinding) and determinations of the appropriate punishment (sentencing). To otherwise blur the distinctions between those concepts would result in the ultimate tyranny feared by the Founders and condemned by *Duncan:* the unchecked power of the government to execute at will.

Adamson v. Ricketts, 865 F. 2d at 1023. The Court noted further the attributes of the legal landscape in effect at the time of petitioner's conviction and sentence:

> The Constitution requires that the state prove beyond a reasonable doubt all elements of the offense with which the defendant is charged. *In re Winship,* 397 U.S. 358, 361, 90 S.Ct. 1068, 1071, 25 L.Ed.2d 368 (1970). Yet the parameters of what constitutes an "element"--so as to fall within the jury's factfinding responsibility--remain elusive. A line of due process cases considering such contours has failed to produce concrete guidelines. *Cf. McMillan v. Pennsylvania,* 477 U.S. 79, 106 S.Ct. 2411, 2417, 91 L.Ed.2d 67 (1986) (Court has "never attempted to define precisely the constitutional limits [of] the extent to which due process forbids the reallocation or reduction of burdens of proof in criminal cases, and do[es] not do so today...."); *see also Patterson v. New York,* 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); *Mullaney v. Wilbur,* 421

> U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1969). We find, however, that a framework for analysis emerges from these cases. Thus, in assessing Adamson's claim, we examine (1) the legislative history of Arizona's death penalty statutes; (2) the actual role played by aggravating circumstances under Arizona's revised statute § 13- 703; and (3) the application of *McMillan v. Pennsylvania,* the Supreme Court's most recent pronouncement on the distinction between elements and sentencing factors, to this case.

Adamson, 865 F.2d at 1024.

Ring expressly rejected *Walton*'s erroneous conclusion, contrary to *Adamson*, that statutory aggravating factors were not elements of the greater offense of "capital" murder. By returning the right to jury trial, notice of elements of the offense charged, and due process to their ancient moorings, it is now clear that petitioner's claim of entitlement to jury involvement in the finding of aggravating circumstances is correct, and that his sentence violated his right to notice, a jury trial and appropriate instructions on all the elements of the offense required under the United States Constitution Amendments 5, 6 and 14 and the Idaho Constitution, articles I, §§ 7, 8, and 13.

The Supreme Court's retraction of the *Walton* ruling in *Ring* restores a right to jury trial that is neither trivial nor transitory but "the most transcendent privilege which any subject can enjoy." Blackstone's Commentaries, *quoted in* Lewis Powell, *Jury Trial of Crimes*, 23 Washington & Lee L. Rev. 1, 3 n.7 (1966). *See also, e.g., United States v. Battiste*, 24 Fed Cas. 1042, 1043 (C.C.D. Mass.) (No. 14,545), 2 Sumner 240 (1835) (Justice Story): "I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law." 2 Sumner 240, 243 (1835). Petitioner should not be

denied the jury rights restored in *Ring* simply because the state and federal supreme courts temporarily overlooked the point before finally getting it right.

C. UNDER THE IDAHO CONSTITUTION THE RIGHT TO A JURY TRIAL IS INVIOLATE AND PETITIONER WAS DENIED THE RIGHT TO JURY DETERMINATION OF THE § 19-2515 ELEMENTS OF THE OFFENSE.

Under *Ring v. Arizona*, *Harris v United States*, *Apprendi v. New Jersey* and *Jones v. United States*, petitioner has a right to a jury trial on the factual elements under Idaho law that are necessary to increase the maximum sentence for first degree murder to death, i.e., facts necessary to prove the elements of the greater crime of "capital" murder. Petitioner's jury never convicted him of committing a statutory aggravating circumstance under § 19-2515, a necessary element for death eligibility. Therefore, petitioner has only been convicted of the lesser included offense of first degree murder. The Supreme Court of the United States corrected the mistake announced in *Walton v. Arizona* and recognized that aggravating circumstances are facts that must be found by a jury. With that clarification in the law, the longstanding, "sacred," fundamental right under the Idaho Constitution to the right to trial by jury mandates the vacation of petitioner's death sentence.

The Idaho Constitution sanctifies and defends the right to trial by jury as one of the fundamental protections inherent in the state constitution. The right is protected in not one but two explicit sections of the state constitution. *See* Idaho Const. art. I, § 7; *id.* art V, § 1. The first reference to the venerated right in the constitution provides that: "[t]he right of trial by jury shall remain inviolate." Idaho Const. art. I, § 7. The second reference to the right states that any "fact at issue shall be tried by order of court before a jury." Idaho Const. art. V, § 1.

Numerous Idaho cases recount that the right to trial by jury established by these state constitutional provisions secured "that right as it existed at the time of the adoption of the constitution." *Johnson v. Nichels*, 48 Idaho 654, __, 284 P. 840, 842 (Idaho 1930); *Christensen v. Hollingsworth*, 6 Idaho 87, __, 53 P. 211, 212 (Idaho 1898). *See, e.g., State v. Pratt*, 125 Idaho 594, 599, 873 P.2d 848, 853 (Idaho 1994), *State v. Bennion*, 112 Idaho 32, 37, 730 P.2d 952, 957 (Idaho 1986); *State v. Sivak*, 105 Idaho 900, 903, 674 P.2d 396, 399 (Idaho 1983); *Comish v. Smith*, 97 Idaho 89, 92, 540 P.2d 274, 277 (Idaho 1975); *State v. Nadlman*, 63 Idaho 153, __, 118 P.2d 58, 61 (Idaho 1941); *State v. Miles*, 43 Idaho 46, __, 248 P. 442, 442-43 (Idaho 1926); *Brady v. Place*, 41 Idaho 747, __, 242 P. 314 (Idaho 1925); *People ex rel. Brown v. Burnham*, 35 Idaho 522, __, 207 P. 589, 590 (Idaho 1922); *Shields v. Johnson*, 110 Idaho 476, __, 79 P. 391, 393 (Idaho 1904).

Justices Huntley and Bistline summarized the historical fact that Idaho juries by their verdicts chose whether or not death would be imposed from territorial times until passage of Idaho Code § 19-2515 in 1977. *State v. Creech*, 105 Idaho 362, 375-77 670 P.2d 463, 476-78 (Huntley, J., dissenting); *id.* at 386-404, 487-505 (Bistline, J., dissenting). Justices Huntley and Bistline dissented vigorously in *Sivak* and *Creech* because the Legislature's removal of the jury participation in sentencing proceedings through the enactment of §19-2515 in 1977 violated the constitutional mandate that the right to jury trial "remain inviolate." The United States Supreme Court's opinion in *Ring* makes clear that I.C. § 19-2515 is unconstitutional in requiring that the trial judge make the factual findings regarding the existence of aggravating circumstances. *See State v. Fetterly*, 52 P.3d at 875. As set forth *supra*, in *Ring* and *Harris* the Supreme Court

conclusively established that statutory aggravating circumstances are elements of the crime, and corrected the error of *Walton* in holding to the contrary.

Once that legal principle is accepted, the right to jury determination of the elements that make a defendant eligible for the death penalty is a simple matter of long established state and federal constitutional law. "The rule in Idaho has *always* been that a criminal defendant cannot be convicted of a crime unless the factfinder finds the defendant guilty of committing every fact necessary to constitute the crime beyond a reasonable doubt." *Pratt*, 873 P.2d at 854 (emphasis added) (citing *State v. Hoffman*, 123 Idaho 638, 693, 851 P.2d 934, 939 (Idaho 1993); *State v. Seymour*, 7 Idaho 257, __, 61 P. 1033, 1034 (Idaho 1900)). The factfinder in a criminal case in Idaho must be a jury: "Article I, § 7 guarantees a jury trial whenever the possible sanction includes imprisonment." *Bennion*, 112 Idaho at 44, 730 P.2d at 964.

In Idaho, the "right to a jury trial is a fundamental right, and must be guarded jealously." *Bennion*, 730 P.2d at 957 (citing *Farmer v. Loofbourrow*, 75 Idaho 88, 94, 267 P.2d 113, 116 (1954)). The Idaho Supreme Court has characterized the right to trial by jury as the "most precious constitutional right." *David Steed and Assocs., Inc. v. Young*, 115 Idaho 247, 250, 766 P.2d 717, 720 (Idaho 1988). Writing for the court of appeals, then Chief Judge, now Justice, Walters stated that "[b]ecause trial by jury is one of the fundamental guaranties of the rights and liberties of the people, every reasonable presumption should be indulged against its waiver." *State v. Wheeler*, 114 Idaho 97, 101, 753 P.2d 833, 837 (Id. Ct. App. 1988). In *State v. Paz*, the Idaho Supreme Court stated that the "right to a fair and impartial jury is one of the most sacred and important guarantees of the Constitution." *State v. Paz*, 118 Idaho, 542, 551, 798 P.2d 1, 10 (Idaho 1990).

The right to trial by jury under the Idaho Constitution "is the right which is guaranteed to the American people by the Sixth Amendment to the Constitution of the United States, which was in force in Idaho Territory when our state came into existence."[3] *Nadlman*, 118 P.2d at 61-62. *See also Rex v. Poole*, Cases Tempore Hardwicke 23, 27 (1734), quoted in *Sparf v. United States*, 156 U.S. 51, 94 (1895):

> [I]t is of the greatest consequence to the law of England, and to the subject, that these powers of the judge and the jury are kept distinct; that the judge determines the law, and the jury the fact; and, if ever they come to be confounded, it will prove the confusion and destruction of the law of England.

Id. As an ancient, fundamental component of criminal law in our society, the Sixth Amendment right to a jury trial on all the elements of the offense – including the statutory aggravating circumstances, which enhance the jury verdict from potential life sentence to potential death sentence – existed at the time of adoption of the State Constitution.

Significantly, in *Wheeler* then Chief Judge Walters quoted a U.S. Supreme Court case that required a judge who was evaluating a defendant's purported waiver of the right to jury trial to exercise "caution increasing in degree as the offenses dealt with increase in gravity." *Patton v. United States,* 281 U.S. 276, 312-13 (1930), *quoted with approval in, Wheeler*, 114 Idaho at 101, 753 P.2d at 837. The gravity of the offense in this capital case is of the highest order of magnitude, and the deprivation of the fundamental right to a trial by jury on every element of the offense must not be countenanced.

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[3] The state constitution was drafted August 6, 1889, adopted by the people in November of 1889, *Sivak*, 674 P.2d at 399, and approved by Congress on July 3, 1890. *Pratt*, 873 P.2d at 599.

There is no question that under Idaho's Constitution, petitioner had an "inviolate," fundamental right to jury factfinding on statutory aggravating circumstances before a sentence of death could be imposed.

II. PETITIONER IS ENTITLED TO RETROACTIVE APPLICATION OF *RING*.

A. EQUITY REQUIRES APPLICATION OF *RING* TO PETITIONER'S CASE.

Assuming *arguendo* the State's characterization of *Ring* as announcing a new rule, rather than the restoration of an ancient rule, *Ring* is a new development in support of an old claim. Under *Sivak v. State*, 134 Idaho 641, 8 P.3d 636 (Idaho 2000) (*Sivak V*), the Idaho Supreme Court has rejected the notion that a previously raised claim is waived when supported by new evidence. "We must be vigilant against imposing a rule of law that will work injustice in the name of judicial efficiency." *Id.* at 642, 8 P.3d at 647. Here, the same sort of injustice would arise from rejection of any assumed "new" rule under *Ring*, as the Idaho Supreme Court has already acknowledged that Idaho's § 19-2515 capital sentencing proceedings without a jury are unconstitutional under *Ring*. *State v. Fetterly*, 52 P.3d at 875 (vacating death sentence under *Ring* and remanding for re-sentencing). Equitable principles alone demand that petitioner's death sentence be vacated, as he raised the very point addressed in *Ring* in his direct appeal case years ago.

The State seeks the inequitable result, indeed, miscarriage of justice, that would deny retroactive application of the "new" rule in *Ring* and allow execution of petitioner – despite the fact that petitioner had been denied a jury on the question of whether aggravating factors existed. The State relies on *Fetterly v. State*, 121 Idaho 417, 825 P.2d 1073 (Idaho 1991), which in turn

cited *Griffith v. Kentucky*, 479 U.S. 314 (1987), for its contention that "new" rules should not be applied to cases that are "already final." The State's position is flawed for several reasons.

B. *RING* ANNOUNCES A SUBSTANTIVE RULE OF LAW NOT CONTEMPLATED BY SECTION 19-2719(5).

Ring's recognition that aggravating circumstances are elements of a greater, capital offense that must be found by a jury is a substantive rule, and even "new" substantive rules of criminal law *are* retroactive. *See Bousley v. United States*, 523 U.S. 614, 620-21 (1995) (inconsistent with the doctrinal underpinnings of habeas review to preclude a petitioner from relying on a decision announcing applicable substantive criminal law after petitioner's conviction and sentence were final). In *Davis v. United States*, the Supreme Court addressed the issue of "the availability of collateral relief from a federal criminal conviction based upon an intervening change in *substantive* law." 417 U.S. 333, 334 (1974) (emphasis added). Concluding that a subsequent, substantive change in the law that established that petitioner's conviction and punishment were invalid would "inherently result in a complete miscarriage of justice," the Court held that collateral relief would be required. *Davis*, 417 U.S. at 346-47. *See United States v. Sood*, 969 F.2d 774, 775-76 (9th Cir. 1992); *United States v. McClelland*, 941 F.2d 999, 1000-01 (9th Cir. 1991).

The rule gleaned from *Ring* under the *Jones* jurisprudence must be read to refine the definition of an element of a capital offense, which is unquestionably a substantive decision governed by *Davis*. 417 U.S. at 346-47 (holding that a defendant may assert in a collateral proceeding a claim based on an intervening substantive change in the interpretation of a federal criminal statute).

The essence of criminal law is the definition of elements of the offense. *Jones* clarified that maximum-punishment-increasing facts are elements. *Apprendi* applied to that definition the well-established rule that elements must be found by a jury, and *Ring* confirmed and extends that rule to the capital arena. The "new" rule, if indeed there is any, in this sequence was *Jones*, and it is one of criminal law, not procedure. All the other procedural benefits that inure as a result of the definition of the offense of capital murder, i.e., jury decision, unanimity, notice by indictment or information follow as a result of the determination that the statutory aggravating factor is an element of the substantive offense under long-established law.

As the right to a jury determination of the existence of an element of the offense is clearly a matter of substantive criminal law, *Ring* must be applied to vacate petitioner's sentence.

C. THE REQUIREMENT OF A JURY TRIAL ON FACTS WHICH INCREASE THE MAXIMUM SENTENCE IS "IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY."

Even *if* the right to a jury trial on all of the elements of an offense were a procedural, rather than substantive, right, (which it is not), petitioner is entitled to its benefit. As set forth in prior sections, the right to a jury trial on all elements of an offense is an ancient rule, not a new one. As a rule that preceded petitioner's conviction and sentence by centuries, it is clearly applicable to petitioner.

Moreover, even if one accepts the State's mis-characterization of *Ring* as a "new" rule of criminal procedure, under retroactivity principles announced by the Idaho Supreme Court, *Ring* must clearly be given retrospective effect. The State relies on state retroactivity cases that only state the general rule, that new decisions will not apply retroactively to cases that are already final on direct appeal. State's Response at 2-3. *See Fetterly v. State*, 121 Idaho 417, 418-19, 825

P.2d 1073, 1074-75 (1991) (citing *Griffith v. Kentucky*, 479 U.S. 314 (1987)); *Stuart v. State*, 128 Idaho 436, 914 P.2d 933 (1996) (citing *Fetterly*), and *Butler v. State*, 129 Idaho 899, 901, 935 P.2d 162, 164 (1997) (citing *Fetterly*).

Both the Idaho Supreme Court and the Supreme Court of the United States recognize an *exception* to the general rule and allow retroactive application for a new rule that is "implicit in the concept of ordered liberty," *Matter of Gafford*,127 Idaho 472, 476, 903 P.2d 61, 65 (Idaho 1995). *See Teague v. Lane*, 489 U.S. 288 (1989). The State entirely ignores this exception.

Instead, the State incorrectly asserts that the "*Teague* case clearly holds that new rules announced by the Supreme Court do not apply retroactively to defendants whose conviction is final in state court and who is only collaterally attacking the conviction in federal court." State's Response at 3. The State ignores the two exceptions to *Teague*'s general rule of non-retroactivity, the first, for primary conduct which is beyond the power of the State criminal law-making authority to proscribe,[4] and a second for rules that are "implicit in ordered liberty," i.e., watershed rules of criminal procedure. *Teague*, 489 U.S. at 311. While the Idaho Supreme Court has not explicitly discussed the *Teague* exceptions, (both of which petitioner contends apply to his case), the state supreme court's recognition of the "implicit in ordered liberty exception" in *Gafford* is controlling and mandates retroactive application of *Ring* in this case.

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[4] Petitioner's *Ring* claim fits *Teague*'s first exception because recognition of the aggravating circumstances as elements places imposition of the punishment of death beyond the power of the state, absent a constitutional finding of those elements. This differentiates *Ring* from *Apprendi*, which did not involve a qualitatively different form of punishment, death as opposed to imprisonment, that was unavailable in the absence of the aggravation findings.

In *Matter of Gafford*, the Idaho Supreme Court announced that a "new rule will be applied on collateral review if it requires the observance of procedures 'implicit in the concept of ordered liberty.'" *Gafford*, 127 Idaho 472, 476, 903 P.2d 61, 65 (Idaho 1995) (quoting the second exception in *Teague v. Lane*, 489 U.S. 288 (1989) and citing *Penry v. Lynaugh*, 492 U.S. 302 (1989)). In *Gafford* the state supreme court stated that a new rule under *Foucha v. Louisiana*, 504 U.S. 71 (1992), which required the release of an insanity acquitee who had regained his sanity or was no longer dangerous, was grounded in due process, was formulated to protect a fundamental liberty interest, and *must be applied retroactively to cases on collateral review* because it required the observance of procedures that are "*implicit in the concept of ordered liberty*." *Gafford*, 903 P.2d at 65 (emphasis added).[5]

The right to "trial by jury in criminal cases is fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). *Gafford*'s due process notion of fundamental rights being "implicit in the concept of ordered liberty" derives from the Supreme Court's decision in *Palko v. Connecticut*, 302 U.S. 319 (1937). *Palko* used that description to describe a subset of rights set forth in the Bill of Rights which were applicable against the States

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[5] The cases relied upon by the State to preclude retroactivity in this case, *Fetterly*, 121 Idaho at 418-19, *Stuart v. State*, 128 Idaho 436, 914 P.2d 933 (1996), and *Butler v. State*, 129 Idaho 899, 901, 935 P.2d 162, 164 (1997), are irrelevant, because they do not implicate the *Gafford* exception for rules that are implicit in ordered liberty. At issue in *Fetterly*, *Butler*, and *Stuart*, respectively, were the retroactivity of *State v. Charboneau*, 116 Idaho129, 774 P.2d 299 (1989) (prescribing the method of weighing mitigating and aggravating evidence); *State v. Townsend*, 124 Idaho 881, 865 P.2d 972 (1993) (concluding that parts of the human body are not a deadly weapon); and *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993) (requiring submission of lesser included offense of second degree torture murder). None of these cases involve a fundamental right that is "implicit in the concept of ordered liberty," in contrast to the fundamental right in this case, trial by jury on all elements of the offense.

through the Fourteenth Amendment. *Id.* at 324-25 (setting analytical framework for whether Double Jeopardy Clause was binding on the States). In dictum in *Palko*, the Supreme Court stated that the right to trial by jury was "not of the very essence of a scheme of ordered liberty," and that its abolition would not "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 325 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). Thirty-one years later the Supreme Court specifically *rejected* the dictum in *Palko* that the right to trial by jury was *not* implicit in ordered liberty. *Duncan v. Louisiana*, 391 U.S. at 155. In explicitly rejecting *Palko*'s dictum and in holding that "the right to jury trial in serious criminal cases is a fundamental right" that "must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction," *id.* at 154, the Supreme Court necessarily found that the right to trial by jury in criminal cases *is* "implicit in the concept of ordered liberty."

In the most basic sense, *Ring* remedies a "'structural defect[ ] in the constitution of the trial mechanism.'" *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). In *Sullivan*, Justice Scalia writing for the Court recognized not only that the right to trial by jury is "'fundamental to the American scheme of justice,'" *id.* at 277 (quoting *Duncan v. Louisiana*, 391 U.S. at 149), but also that its "most important element" is "the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan*, 508 U.S. at 277 (citing *Sparf v. United States*, 156 U.S. 51, 105-06 (1895)).

In *Johnson v. Zerbst*, 304 U.S. 458 (1938) – which, of course, was the taproot of *Gideon v. Wainwright*, the model case for retroactive application of constitutional change – the Supreme Court held that a denial of the right to counsel could be vindicated in postconviction proceedings

because the Sixth Amendment required a lawyer's participation in a criminal trial to "complete the court." *Johnson v. Zerbst*, 304 U.S. at 468. A judgment rendered by an incomplete court was subject to collateral attack. *Id.* What was a mere imaginative metaphor in *Johnson* is ***literally*** true of a capital sentencing proceeding in which the jury has not participated in the life-or-death factfinding role that the Sixth Amendment reserves to a jury under *Apprendi* and *Ring*: the constitutionally requisite tribunal was simply ***not there*** for the critical finding of aggravating circumstances; and such a radical defect necessarily "cast[s] serious doubt on the veracity or integrity of the . . . trial proceeding," *Witt v. State*, 387 So.2d 922, 929 (Fla. 1980).

"[T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power . . . found expression . . . in this insistence upon community participation in the determination of guilt or innocence." *Duncan v. Louisiana*, 391 U.S. at 156. These same principles require jury participation in the determination of guilt or innocence of the factual accusations "necessary for imposition of the death penalty." *Ring*, 122 U.S. at 2443. *See Apprendi*, 530 U.S. at 494-495. The right to a jury determination of factual accusations of this sort has long been the central bastion of the Anglo-American legal system's defenses against injustice and oppression.[6] As

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[6] *See* Blackstone's Commentaries, §§ 349-350 (Lewis ed. 1897):

> [T]he founders of the English law have with excellent forecast contrived . . . that the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors. . . . So that the liberties of England cannot but subsist, so long as this *palladium* remains sacred and inviolate; not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it. . . .

former Justice Lewis F. Powell, Jr. wrote: "jury trial has been a principal element in maintaining individual freedom among English speaking peoples for the longest span in the history of man." Powell, *Jury Trial of Crimes*, 23 Washington & Lee L. Rev. 1, 11 (1966).

Justice Powell also quotes de Tocqueville as observing:

> that the jury "places the real direction of society in the hands of the governed. . . . and not in . . . the government. . . He who punishes the criminal . . . is the real master of society. All the sovereigns who have chosen to govern by their own authority, and to direct society, instead of obeying its direction, have destroyed or enfeebled the institution of the jury."

Id. at 5 (quoting 1 Alexis de Tocqueville, Democracy in America 282 (Henry Reeve trans., 1948).

Section 19-2719 and the UPCPA must be interpreted consistently with the Idaho Supreme Court's retroactivity decision in *Gafford* or it is a violation of equal protection, due process and an improper suspension of the writ of habeas corpus under the Idaho and United States Constitutions, as argued in Section IV *infra*. In *Duncan*, the Supreme Court of the United States found the right to jury trial to be a fundamental right, one which necessarily is "implicit in the concept of ordered liberty," given the Supreme Court's express rejection in *Duncan* of *Palko*'s dictum that the jury trial right was not implicit in ordered liberty. The right to jury trial

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Id. See also Rex v. Poole, Cases Tempore Hardwicke 23, 27 (1734), quoted in *Sparf v. United States*, 156 U.S. 51, 94 (1895):

> [I]t is of the greatest consequence to the law of England, and to the subject, that these powers of the judge and the jury are kept distinct; that the judge determines the law, and the jury the fact; and, if ever they come to be confounded, it will prove the confusion and destruction of the law of England.

Id.

is implicit in ordered liberty and fundamental under both the Idaho and United States Constitutions. The right to jury trial on aggravating circumstances in capital cases announced in *Ring* is a fundamental right, implicit in ordered liberty, and entitled to retroactive application under *Gafford*.

III. THE DENIAL OF PETITIONER'S RIGHT TO A JURY TRIAL ON THE CIRCUMSTANCES WHICH MADE HIM ELIGIBLE FOR THE DEATH PENALTY IS A STRUCTURAL ERROR NOT SUBJECT TO HARMLESS ERROR ANALYSIS, AND EVEN IF HARMLESS ERROR ANALYSIS IS ATTEMPTED THE ERROR IS NOT HARMLESS.

The State argues that the denial of a jury trial on statutory aggravating circumstances is harmless error. State's Response at 7-8. The deprivation of a jury trial on the existence of statutory aggravating circumstances is a structural error not amenable to harmless error analysis. As the *Ring* error in this case is structural, harmless error analysis cannot be undertaken. It is impossible to determine retrospectively what structure and what record would have existed had *Ring* been in effect at the time of petitioner's trial. In any event, the *Ring* error is not harmless under the facts of petitioner's case.

A. Idaho Law Provides for a Separate Trial to Determine Statutory Aggravating Circumstances.

Idaho law under which petitioner was tried and sentenced, establishes a bifurcated proceeding. I.C. §§ 18-4004, 19-2515 The jury finds only whether a defendant has committed a first degree murder. The judge finds both whether the State has proved beyond a reasonable doubt at least one statutory aggravating circumstance rendering the defendant death eligible and then "whether the mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make the imposition of death unjust." Idaho Code §19-

2515(c) (1977, am. 1984).[7] *See Hoffman v. Arave*, 236 F.3d at 543-544 (explaining how the "... *judge* must hold a separate sentencing proceeding.") (emphasis in original). The judge makes the determination of the existence of statutory aggravating circumstances after a separate trial in which he considers both the evidence adduced at trial and a separate body of evidence, including, inter alia, evidence ruled inadmissable at trial and a presentence report. I.C. §19-2515(e). Hearsay evidence is admissible at the trial in which the aggravating circumstances are determined. *See State v. Osborn*, 631 P.2d 187, 193-5 (Idaho 1981) (intent of statute is to place as much relevant information as possible before sentencing judge). The judge also hears all evidence presented in mitigation before he determines whether the statutory aggravating circumstances have been proved. I.C. §19-2515(e).

Idaho law requires a preliminary hearing and probable cause determination for felony offenses. I.C. § 19-804. In petitioner's case the preliminary hearing did not consider or determine the existence of probable cause for any statutory aggravating circumstance. *See generally,* Preliminary Hearing Transcript. The Information did not allege or mention any statutory aggravating circumstance. CR 17-18 (Information).

The jury in petitioner's case returned a verdict of guilty on one count of murder in the first degree for murder in the perpetration of a robbery and/or a burglary. Contrary to the constitutional requirement that all elements of the offense be determined by a jury, no statutory

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[7] The statute now reads: Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented *are sufficiently compelling that the death penalty would be unjust.* I.C.§19-2515(c) (1977, am. 1984, am. 1995).

aggravating circumstances were submitted for jury determination. In fact, the jury was explicitly instructed that it could not consider punishment in its deliberations. Jury Instruction No. 23.

Judgment and sentence of death for conviction of felony murder were imposed by then District Judge Gerald f. Schroeder, Fourth Judicial District, State of Idaho, County of Ada, Boise, Idaho on March 7, 1991. The findings in aggravation which made Mr. Fields eligible for a death sentence necessarily rested on the conclusion the jury did not reach: that Mr. Fields acted with express rather than implied malice. CR 168 (§19-2515 Findings).

The trial judge in petitioner's case found three statutory aggravating circumstances. These were: (1) by the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life [§19-2515(g) (6)]; (2)the murder was one defined as murder of the first degree by I.C. § 18-4003, subsection (d), commission of a murder in the perpetration of a robbery and/or burglary, accompanied with the specific intent to cause the death of a human being [§19-2515(g)(7)]; (3) the defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder, which will probably constitute a continuing threat to society [§19-2515(g) (8)]. CR 170-74 (Findings of the Court in Considering the Death Penalty, filed March 7, 1991).

Judge Schroeder made these findings at the conclusion of a hearing in which he considered not only the evidence at trial but an entirely different range of evidence, including: the presentence report, testimony by a number of additional witnesses in sentencing and post trial hearings, and arguments of counsel. *See generally* Tr Trial vol. VIII; Presentence Report. Petitioner never conceded either guilt on the underlying charges or the existence of any statutory aggravating circumstance.

Mr. Fields timely appealed to the Idaho Supreme Court, which affirmed his conviction and sentence on February 16, 1995, *State v. Fields*, 127 Idaho 904, 908 P.2d 1211 (Idaho 1995).

B. The Denial of A Jury Trial Is Structural Error Which Cannot Be Harmless.

The denial of the right to a jury trial is structural error which cannot be harmless. *McGurk v. Stenberg*, 163 F.3d 470 (8th Cir. 1998); *People v. Collins*, 27 P.3d 726 (Cal. 2001). In *Harmon v. Marshall*, 69 F.3d 963, 965 (9th Cir. 1995) the Ninth Circuit Court of Appeals found that when the jury was not instructed on any elements for two of the crimes in a multi-count indictment the error could not be harmless. "We find it difficult to imagine a more fundamental or structural defect than allowing the jury to deliberate on and convict Harmon of an offense, for which it had *no* definition." *Id.* at 966. The court stated further "[t]here is no way we can determine the extent to which Harmon's convictions were actually affected by the failure to instruct, because we simply cannot tell how the jury reached its decision."[8] *Id.*

The Supreme Court recognizes that the right to a jury trial is fundamental and violation of that right cannot be harmless. "When that right [to jury trial in serious criminal cases] is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty." *Rose v. Clark*, 478 U.S. 570, 578 (1986). *See Sullivan v. Louisiana*, 508

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[8] The State's citation to *Neder v. United States*, 527 U.S. 1 (1999) (holding that jury instruction omitting element of offense can be harmless error), is not apposite. *See* State's Response at 7-8. *Neder* analogizes the omission of an element of the offense to cases involving improper instructions on a single element and finds that such an omission is subject to harmless error. This case, by contrast, involves not just the omission of one element of instructions on an aggravating circumstance but the denial of the entire trial at which any of the statutory aggravating circumstances were found and the lack of any instructions on any element of the statutory aggravating circumstances.

U.S. at 281. The structural error precludes appellate harmlessness findings precisely because: "[a] reviewing court can only engage in pure speculation -- its view of what a reasonable jury would have done. And when it does that, "the wrong entity judge[s] the defendant guilty.'" *Id.* (quoting *Rose v. Clark*). The Idaho statutory sentencing scheme's "[d]enial of the right to a jury verdict of guilt beyond a reasonable doubt" is structural error, "the jury guarantee being a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." *See Sullivan*, 508 U.S. at 281. "The deprivation of that [jury trial] right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" *Id.*

The statute under which petitioner received his death sentence provides for a separate trial to establish the statutory aggravating circumstances, to consider mitigation, to weigh mitigation against any statutory aggravating circumstance, and to determine the justness of a death penalty in light of mitigating and aggravating (statutory and non-statutory) circumstances. I.C. § 19-2515(c). Petitioner was entitled at a minimum to a jury trial on the existence of the statutory aggravating circumstances and was completely deprived of that right. This deprivation is not subject to harmless error analysis.

C. Harmless Error Analysis Cannot Be Meaningfully Conducted In this Case.

Even if harmless error analysis could be applied, the error here may not be deemed harmless. Harmless error analysis involves reviewing the record and then determining whether or not the error affected the jury's determination of guilt. *Yates v. Evatt*, 500 U.S. 391 (1991) (error can be said to be harmless when it is unimportant in relation to everything else the jury considered on the issue, as shown by the record). This test cannot be meaningfully performed

here because it is impossible to retrospectively determine how petitioner's trial would have been conducted and how his lawyers would have tried the case had *Ring* been in effect. No one can do more than guess as to what procedure Idaho would have employed if the jury had to find the statutory aggravating circumstances and how petitioner would have defended against the aggravating circumstances if the trier of fact were the jury and not the judge.

Harmless error analysis depends on being able to assess the impact of an error on a known record. When, the very nature of the proceeding itself is a matter of pure speculation, then harmless error analysis becomes a meaningless endeavor. *Coleman v. McCormick*, 874 F.2d. 1280 (9th Cir. 1989), illustrates this point. In *Coleman* the defendant was resentenced to death after his death sentence, imposed pursuant to a mandatory death sentencing scheme, was overturned. The resentencing proceeding allowed the court to consider evidence from the defendant's guilt phase trial. The Ninth Circuit, sitting en banc, found that this resentencing violated the defendant's right to due process and that harmless error did not apply because of "the reviewing court's inability to determine whether such violations were in fact harmless beyond a reasonable doubt." 874 F.2d at 1289. The court reasoned that since Coleman's trial counsel had no notice of the consequences of the trial record on the death decision, it would be purely speculative to determine what tactical decisions he would have made had he had such notice. *Id.*

Similarly, because petitioner and his counsel had no notice that the jury would play any role in the finding of the statutory aggravating circumstances which must be found before he could be eligible to die, their tactical decisions could not have been influenced by such knowledge. Thus, decisions on such vital topics such as whether petitoner should testify were made absent this knowledge. *Coleman* observes that "[T]his decision, whether or not to testify in

one's own defense, can only be made rationally if the consequences of such a course of action are known. Here they were not." *Coleman*, 847 F.2d at 1287. This statement applies in full to petitioner. Changing the identity of the fact finder on the initial question of death eligibility has a pervasive but unknowable impact on virtually every aspect of strategy on both the guilt issues and the aggravating circumstances questions.

United States v. Jordan, 291 F.3d 1091, 1096 (9th Cir. 2002) makes much the same point in the context of an *Apprendi* error. The *Jordan* court found that not charging or including in the elements the question of drug quantity was not harmless error when the defendant received a life sentence for a drug offense involving more than 50 grams of methamphetamine.

> When quantity is neither alleged in the indictment nor proved to a jury beyond a reasonable doubt, there are too many unknowns to say with any confidence, let alone beyond reasonable doubt, that the error was harmless. What evidence might have been proffered by Jordan, in a defensive effort to minimize quantity, if the indictment had properly charged the quantity involved in the offense, is entirely speculative. We hold that the government cannot meet its burden under the harmless error standard when drug quantity is neither charged in the indictment nor proved to a jury beyond reasonable doubt, if the sentence received is greater than the combined maximum sentences for the indeterminate quantity offenses charged.

Id. at 1096-97.

Here, the petitioner was charged under an Information which did not mention the statutory aggravating circumstances. CR 17-18. The jury was never instructed on any of the statutory aggravating circumstances, and counsel had no notice that any of those aggravating circumstances were for the jury's consideration. The error in petitioner's case is more pervasive than in *Jordan* and its impact even more speculative. The result involves the difference not just between number of years in prison but between life and death. And the issues which were never alleged in the Information or placed before the jury are far more complex than merely

determining how many grams of a controlled substance a defendant possessed. Just as harmless error could not be found in *Jordan*, it cannot be found here.

D. Even If Harmless Error Analysis Is Performed, the Error Is Not Harmless.

Even if harmless error analysis is performed, the error is not harmless under the facts of this case where Fields contested guilt and did not concede the existence of any aggravating factor.

Harmless error cannot be found by cobbling together the jury's verdicts on guilt issues. The Idaho Supreme Court does not accept the notion that a jury finding on a guilt issue equates with a finding of an aggravating circumstance.

In *State v. Sivak*, 674 P.2d 396 (1983), the jury acquitted the defendant of premeditated murder but convicted him of first degree felony murder. The judge, however, sentenced Sivak to death after finding, inter alia, that the murder was planned and calculated. On appeal, Sivak complained about this inconsistency but the Idaho Supreme court rejected his argument, noting that no inconsistency existed because the judge's finding was based on evidence which the jury didn't hear. "Thus, the findings of the jury and the findings of the trial judge are not inconsistent; rather they are based on different ranges of information." *Sivak*, 674 P.2d at 403.

Sivak's recognition that the statutory aggravating circumstances involve a different inquiry and different evidence than the guilt phase findings flows inexorably from the statute itself. If Idaho had intended that a jury's determination that a defendant killed a person with specific intent in the course of a robbery constituted a finding that the (f) (7) statutory aggravating circumstance, now codified as I.C. § 19-2515 (h)(7), had been proved beyond a reasonable doubt, there would be no reason to require a separate proceeding based on different

evidence. The statute could have, but does not, state that the judge's verdict on any statutory aggravating circumstances is controlled by the jury's guilt phase verdicts. Instead the statute unambiguously requires the judge to make a new finding beyond a reasonable doubt in order for **any** statutory aggravating circumstance to be established.

Once it is realized that Idaho intends for the statutory aggravating circumstances to be determined in a separate proceeding from the guilt phase, the impossibility of finding harmless error is apparent. The sentencing judge considered a significant amount of evidence not heard by the jury, and only rendered his opinion after hearing this evidence. No one can say how any or all of the additional evidence and testimony the judge heard would have affected the jurors' assessment of Fields' mental state, his degree of culpability, the credibility of the state's witnesses subject to more or different cross-examination, all of which is highly relevant to the existence of the statutory aggravating circumstances. For the very reasons that the trial judge in *Sivak* reached conclusions different from the jury as to Sivak's mental state regarding specific intent, the jury here might well have reached conclusions in a penalty phase different from those reached by the sentencing judge regarding the "specific intent to kill in the course of a felony," "utter disregard" and "propensity" aggravating circumstances.

E. The Statutory Aggravating Circumstances Cannot Be Inferred from the Jury's Guilt Phase Verdicts.

It also cannot be assumed that even if the jury had been required to reach its verdicts on the statutory aggravating circumstances at the same time it returned its guilt phase verdicts, that the jury would necessarily have found any of the statutory aggravating circumstances.[9] In

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[9] Two of the statutory aggravating circumstances found by this court, namely, that Fields acted with utter disregard for human life, and that he has a propensity to commit murder

particular, it cannot be said that the jury would have found the I.C. §19-2515 (g)(7), now (h)(7), circumstance.

This is true because (1) we do not know whether the composition of the jury would have been the same and whether their verdicts would have been affected by their knowledge that the death penalty was at issue, (2) what instructions the jury would have received, (3) what evidence Fields would have presented had he known the statutory aggravating circumstances were at stake, (4) whether Fields would have testified, and (5) what arguments his lawyers would have made.

1. The Jury Did Not Know the Death Penalty Was At Stake.

The decision about whether to find a person eligible for death is qualitatively different than the decision to find him guilty of murder. It has long been recognized that the jury's knowledge of the consequences of the decision in a death penalty case may impact on its verdict. *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (stressing importance of jurors appreciating the consequence of their decision in a death penalty case); *see also Adams v. Texas*, 448 U.S. 38, 50 (1980) (Constitution will not allow exclusion of jurors who "frankly concede that the prospects of the death penalty may affect what their honest judgement of the facts will be or what they may deem to be a reasonable doubt"). Here the guilt verdict was rendered by a jury assured and instructed that sentencing was solely the responsibility of the judge. The jury was specifically instructed:

> *It is not within your province to concern yourselves with the question of penalty or punishment.* That feature of the case is solely for the Court. Therefore, *I instruct you not to concern yourselves with it at all.* Your duty as jurors is solely

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are not even arguably implied by the jury's guilt phase verdicts. Notably, the State only argues, albeit incorrectly, that the jury's findings "satisfied Idaho Code § 19-2515 (g)(7)." State's Response at 4.

to determine the guilt or innocence of the accused and upon that question, and that question alone you, as jurors, are to vote and return your verdict.

State v. Fields, No. 16259, Jury Instructions filed May 16, 1990, Instruction 23 (4th Jud. Dist. Ct., County of Ada) (emphasis added). It thus cannot be presumed that the composition of the jury would have been the same. Even more critically, the jurors' diminished, indeed absent, sense of responsibility for making a death eligibility determination precludes deducing the verdicts on the statutory aggravating circumstances from the guilt verdicts.

2. Both the Instructions the Jurors Did Receive and Those They Did Not Prevent a Finding of Harmless Error.

Both the instructions the jurors did receive on the guilt issues and the unknown instructions for the aggravating circumstances[10] prevent a finding of harmless error. The jurors were instructed that they would not make any decision concerning the sentencing or penalty. *Id.* The instruction was affirmatively and drastically misleading if the jury's task included finding the statutory aggravating circumstances.

We also do not know how the jurors would have been instructed on the (g) (7) circumstance to be established. The (g) (7) aggravating circumstance, which requires a finding that the murder be a first degree felony murder and be "accompanied with the specific intent to cause the death of a human being" has also never been precisely defined. Indeed, the Idaho courts have warned against instructing jurors on "specific intent." *State v. Enno*, 807 P.2d 610, 621 (Idaho 1991) ("We note that the distinction between general intent and specific intent is a difficult distinction and has been abandoned in the Model Penal Code. The jury need not be

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[10] Presumably the jury would have had to receive instructions on the elements of the statutory aggravating circumstances.

instructed in the esoteric distinctions between general and specific intent"). Here, for a jury to find the (g) (7) aggravating circumstance, an instruction and a decision by the jury on the "esoteric" concept of specific intent was required.

It is entirely possible, indeed probable, that a jury which had acquitted Mr. Fields of premeditated and deliberate murder, would not have found the specific intent required for the (g)(7) circumstance, particularly if the jury knew that its verdict would determine whether Mr. Fields was eligible to be sentenced to death.

IV. THE STATE'S PROCEDURAL DEFENSES ARE UNCONSTITUTIONAL

A. Idaho Code Section 19-2519(5) Violates Petitioner's Rights to Due Process and Equal Protection Guaranteed under the United States and Idaho Constitutions.

The State's argument that Fields' *Ring* claim cannot be raised in a successive proceeding under I. C. §19-2719, because it is not within the exception of I.C. § 19-2719(5) is without merit.[11]

Section 19-2719 treats capitally sentenced inmates who attempt to challenge their convictions differently from other criminally convicted petitioners who are subject only to the UPCPA. Under the UPCPA, "*post-conviction relief is not barred* where new evidence is discovered, or *where later case law suggests a conviction is unlawful.*" *Aragon v. State*, 114 Idaho 758, 766 n.12, 760 P.2d, 1174, 1182 n.12 (Idaho 1988) (citing I.C.§ 19-4901) (emphasis added). Under the UPCPA, I.C. § 19-4908, a claim can only be waived *if the waiver is knowing,*

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[11] Although the State makes no arguments opposing petitioner's motion to correct illegal sentence pursuant to Rule 35, the differing treatment of Rule 35 movants based on whether they are capital or non-capital cases is unconstitutional for all of the reasons set forth in section IV of this brief.

voluntary and intelligent. *McKinney v. State*, 133 Idaho 695, 700-01, 922 P.2d 144, 149-50 (Idaho 1999). Under *McKinney*, section 19-2719 "supersedes the UPCPA to the extent that their provisions conflict." *Id.* at 700, 922 P.2d at 149. In allowing non-capital, convicted inmates a collateral challenge to their conviction based upon new law or claims that were not waived knowingly, voluntarily or intelligently, the UPCPA offers non-capital inmates far broader protection and ability to correct an illegal, unconstitutional sentence than Idaho offers to inmates under a sentence of death.

To the extent Idaho Code section19-2719(5) is construed to preclude review of petitioner's claims, the statute is unconstitutional. It violates equal protection and due process under the 14th Amendment of the United States Constitution, and Article 1, §§ 2 and 13 of the Idaho Constitution, in that there is no rational basis, *Romer v. Evans*, 517 U.S. 620, 631-36 (1995); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446-51 (1985); *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982); *U.S.D.A. v. Moreno*, 413 U.S. 528, 535 (1973); *Sterling H. Nelson & Sons, Inc. v. Bender*, 95 Idaho 813, 815-16, 520 P.2d 860, 861-62 (Idaho 1974), for the disparate treatment of non-capital prisoners who do not need to demonstrate the "heightened burden" for postconviction relief which capital petitioners must meet, *e.g., Paz v. State*, 123 Idaho 758, 760, 852 P.2d 1355, 1357 (Idaho 1993), or meet the limitations imposed by I.C. § 19-2719(5). *See, e.g., Sivak v.* State, 134 Idaho 641, 648-49, 8 P.3d 636, 643-44 (Idaho 2000); *Pizzuto v. State*, 134 Idaho 793, 796-97, 10 P.3d 742, 745-46 (Idaho 1995).

Moreover, the differing treatment of capital and non-capital petitioners in the context of the right which petitioner seeks to vindicate in this case, the fundamental right to a trial by jury, entitles petitioner to strict scrutiny of the discriminatory classification. *See Newlan v. State*, 96

Idaho 711, 714, 535 P.2d 1348, 1351 (Idaho 1975) (strict scrutiny when statute's classification infringes upon a fundamental right); *State v. Breed*, 111 Idaho 497, 500, 725 P.2d 202, 205 (Idaho Ct. App. 1986) (strict scrutiny of statutory schemes that infringe upon a "'fundamental right' such as voting, procreation, or constitutional safeguards for persons accused of crimes"). *See generally* Nowak, Rotunda & Young, Constitutional Law, § 14.41 at 785 (3rd ed. 1986) ("When the government takes actions that burden the rights of a classification of persons in terms of their treatment in a criminal justice system it is proper to review these laws under the strict scrutiny standard for equal protection"). As the right to trial by jury is a fundamental right,[12] this court must review regulations that purport to regulate the right with strict scrutiny. *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 126, 15 P.3d 1129, 1134 (Idaho 2000) (if a fundamental right is at issue, appropriate standard of review of law infringing on that right is strict scrutiny).

As Idaho's differing treatment of postconviction petitioners fails under a rational basis analysis, it clearly fails under strict scrutiny. "A law which infringes on a fundamental right will

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[12] "[C]onstitutional safeguards for persons accused of crimes are fundamental rights under the state constitution." *Idaho Schools for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 581, 850 P.2d 724, 732 (Idaho 1993) (dictum). A right is fundamental under the Idaho Constitution if it is implicit in the concept of ordered liberty or expressed as a positive right in the constitution. *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 126, 15 P.3d 1129, 1134 (Idaho 2000). Citing the Idaho Constitution's protection of the right of suffrage in two places, the state supreme court concluded that the right of suffrage is a fundamental right. *Id.* The right to trial by jury is likewise explicitly protected in two places in the Idaho Constitution. Idaho Const. Art. I, §7, *id.* Art. V, §1. Consistent with the supreme court's dictum regarding the fundamental nature of constitutional protections for persons accused of crime, together with the explicit recognition of the right to trial by jury in two places in the Idaho Constitution, it is unassailable that the right to trial by jury is a fundamental right under Idaho law.

be upheld only where the State can demonstrate the law is necessary to promote a compelling state interest." *Id.* The state's interest in expeditious handling of capital cases, the purpose of the offending provision, I.C. § 19-2719, is not a sufficiently compelling interest to justify the violation of petitioner's fundamental right to trial by jury.

B. Section 19-2719 Unconstitutionally Suspends the Right to Petition for Writ of Habeas Corpus.

Section 19-2719 also unlawfully suspends the writ of habeas corpus under Article 1, § 5 of the Idaho Constitution and Article I, § 9, clause 2 of the federal constitution, by precluding petitioner from raising valid claims under *Ring* that invalidate his sentence. Although the legislature has regulated the use of habeas corpus by statute, "the writ is not a statutory remedy, but rather a remedy recognized and protected by the Idaho Constitution." *Mahaffey v. State*, 87 Idaho 228, 231, 392 P.2d 279, 280 (Idaho 1964). The legislature "is without power to abridge this remedy secured by the Constitution," *id.*, though by statute the legislature "may add to the efficacy of the writ," and the statute "should be construed so as to promote the effectiveness of the proceeding." *Id.* Idaho Code section 19-2719(5)(c)'s purported refusal to allow retroactive consideration of *Ring* violates petitioner's right to challenge his conviction through habeas corpus under the state constitution.[13] Id. Const. art. I, § 5.

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[13] Idaho Code section 19-2719(5)(c)'s purported refusal to allow retroactive consideration of *Ring* additionally violates not only equal protection and due process under the state and federal constitutions, *Cleburne, supra,* Nowak et al., *supra*, but also petitioner's fundamental right to a trial by jury, Idaho Const. Art. I, § 7, *id.* Art. V, § 1, U.S. Const. amend. VI and notice of every element of the offense in the charging papers, Idaho Const. Art. I, § 8, U.S. Const. amend. V. *See State v. Colwell*, 124 Idaho 560, 564-67, 861 P.2d 1225, 1229-32 (Id. Ct. App. 1993) (Walters, J.).

The legislature's regulation of the writ of habeas corpus in I.C. §§ 19-4901 et seq. and 19-2719 may not operate to suspend the writ. As the Idaho Supreme Court stated so aptly in *Mahaffey*, the legislature's regulation of habeas corpus must *preserve* it:

> the limitations upon the remedy afforded by habeas corpus *should be flexible and readily available to prevent manifest injustice*, for, as Mr. Justice Black has expressed it, the principles judicially established for the delimitation of habeas corpus action '*must be construed and applied so as to preserve – not destroy – constitutional safeguards of human life and liberty*.' [Citation omitted]

Mahaffey, 87 Idaho at 231, 392 P.2d at 280 (emphasis added).

Idaho Code section 19-2719 (5)(c) does not allow habeas corpus actions that seek vindication of fundamental rights through the retroactive application of judicial decisions and accordingly precludes relief for a *Ring* violation of petitioner's right to a jury trial, notice and due process. If the legislature's elimination of that aspect of state habeas corpus were constitutional, it would leave petitioner with rights to a jury trial, notice of charges and due process under *Ring*, but no remedy. *Mahaffey* makes clear, however, that the withdrawal of a habeas corpus remedy for the denial of fundamental rights violates Article I, section 5 of the Idaho Constitution.

> In the instant case, however, we must face *the unique fact that 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. Unless we wish to destroy petitioner's constitutionally guaranteed right to be secure from cruel and unusual punishment, we must hold that the writ of habeas corpus may issue in this type of situation.*

Mahaffey, 87 Idaho at 231-32, 392 P.2d at 281 (emphasis added).

Refusal by the Idaho state courts to enforce the state constitutional and statutory rights asserted by Petitioner violates the Fourteenth Amendment of the United States Constitution and petitioner's rights to due process of law and violates his liberty interest in the enforcement of rights created and recognized by state law. *See Hicks v. Oklahoma*, 447 U.S. 343 (1980).

In sum, construing Idaho Code section 19-2719 and the UPCPA to preclude consideration of the merits of petitioner's claims would violate both the Idaho Constitution, Article I, §§ 2, 5, 7, 8, 13 and 18, and Article V, § 1, and the United States Constitution, Article I § 9 cl. 2, the Fifth and Sixth Amendments, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

VI. CONCLUSION

The ruling in *Ring* has reduced Idaho's death penalty scheme to constitutional rubble. Attempting to retrospectively determine under what framework Fields's case would have been tried, and what decisions his lawyers would have made had *Ring* been the law, is an exercise in guesswork. What *Ring* does make unmistakably clear is that petitioner was tried under a fundamentally flawed statute, that the impact of the error cannot be deemed harmless, and that his sentence of death must be vacated.

DATED this 7th day of November, 2002.

Joan M. Fisher

Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of November, 2002, I served the foregoing document on all interested parties by the method indicated below, postage prepaid where applicable, addressed to:

Roger Bourne
Deputy Prosecuting Attorney
200 W. Front St., Room 3191
Boise ID 83720

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Bruce Livingston

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ZANE JACK FIELDS, **Petitioner,**	
v	**Case No. SP OT 0200711D**
STATE OF IDAHO, **Respondent.**	
STATE OF IDAHO, **Plaintiff**	
v.	**Case No. 16259**
ZANE JACK FIELDS, **Defendant.**	**MOTION FOR LIMITED ADMISSION**

The undersigned local counsel, Joan Fisher, petitions the Court for admission of the undersigned applying counsel, Bruce D. Livingston, pursuant to Idaho Bar Commission Rule 222, to allow him to appear *pro hac vice* for petitioner in these proceedings without payment of any fee.

Applying counsel, Bruce Livingston, certifies that he is an active member, in good standing, of the bar of the State of Missouri, that he maintains the regular practice of law at the above-noted address as a Federal Defender exclusively representing indigent clients, and that he is a resident of the State of Idaho but is not licensed to practice law in the state courts of Idaho. Mr. Livingston certifies that he has never previously been admitted under ICBR or appeared as counsel in the Idaho state courts.

Both undersigned counsel certify that a copy of this motion has been served on all other parties to this matter and that a copy of the motion has been provided to the Idaho State Bar.

Local counsel, Joan Fisher, certifies that the above information is true to the best of her knowledge, after reasonable investigation. Local counsel acknowledges that her attendance shall be required at all court proceedings in which applying counsel appears, unless specifically excused by the trial judge.

Applying counsel also petitions the court for a waiver of the $200 fee for a limited appearance. Petitioner is an indigent death row inmate who has previously been granted *in forma pauperis* status by the Idaho state courts and the United States District Court for the District of Idaho. Applying counsel, Bruce D. Livingston, generates no fees as a result of his representation of petitioner and is an attorney employed by the Capital Habeas Unit of the Federal Defenders of Eastern Washington & Idaho, which was appointed to represent petitioner in federal court. The Federal Defenders will not seek payment for their representation of petitioner in state court.

Dated this 21st day of November, 2002.

Local Counsel

Joan M. Fisher

Applying Counsel

Bruce D. Livingston

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of November, 2002, I caused to be served a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to:

Greg H. Bower
Ada County Prosecuting Attorney

Roger Bourne
Deputy Prosecuting Attorney
200 W. Front Street, Room 3191
Boise, Idaho 83702

✓ U.S. Mail
____ Hand Delivery
____ Facsimile
____ Overnight Mail

Heidi Thomas

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ZANE JACK FIELDS, **Petitioner,**	
v	**Case No. SP OT 0200711D**
STATE OF IDAHO, **Respondent.**	
STATE OF IDAHO, **Plaintiff**	
v.	**Case No. 16259**
ZANE JACK FIELDS, **Defendant.**	**ORDER GRANTING LIMITED APPEARANCE AND WAIVING FEE**

The motion for limited appearance of Bruce D. Livingston in these proceedings is granted. The request to grant the limited appearance with waiver of the fee is also granted. The court will not authorize the payment of any attorney fees or travel expenses to Mr. Livingston or his employer, the Federal Defenders of Eastern Washington & Idaho.

Idaho District Court Judge

DENIED. The Court understands that Idaho Bar Commission Rule 222 allows for Pro Hac Vice admission for individuals who are not members of the Idaho Bar or a resident of the State of Idaho, and provides that such individuals shall pay $200 in fees. Mr. Livingston practices in Moscow, Idaho and may well be a resident of Idaho. Even if the $200 fee were waivable, this Court should not waive a fee to be paid to the Bar. So ordered. Dated: Nov. 27, 2002.

DISTRICT JUDGE

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ZANE JACK FIELDS Petitioner, vs. STATE OF IDAHO, Respondent. AND STATE OF IDAHO, Plaintiff, vs. ZANE JACK FIELDS, Defendant.	CASE NO. HCR16259/SPOT0200711D STATE'S RESPONSE TO PETITIONER'S BRIEF IN OPPOSITION TO STATE'S MOTION FOR SUMMARY DISMISSAL

COMES NOW, Roger Bourne, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and makes the State's response to the Petitioner's Memorandum in Opposition to the State's earlier response and motion for summary dismissal of Fields' petition requesting that he be resentenced based upon the holding in Ring v. Arizona.

The State has earlier responded to Fields' petition by filing a response dated August 30, 2002. In that response, the State has urged the Court to find that United States Supreme Court decision in Ring v. Arizona does not apply retroactively to petitioner Fields. The State brought to the Court's attention several Idaho decisions together with Idaho Code §19-2719(5)(c), which preclude the filing of a successive post conviction pleading that attempts to seek the retroactive application of a new rule of law. The State also moved this Court for summary dismissal of Fields' petition.

Since that time, Fields has filed a response, which argues that the Ring decision should be applied retroactively to him for several reasons set out in the response. Today's State's response is in direct contradiction of Fields' arguments and sets out recent case law showing conclusively that the Ring decision cannot be applied retroactively by this Court.

THE U.S. SUPREME COURT IN RING V. ARIZONA DID NOT MAKE THE HOLDING RETROACTIVE AND THE HOLDING CANNOT BE RETROACTIVELY APPLIED OTHERWISE BY THIS COURT

In 1991, when defendant Fields was sentenced to death by Judge Schroeder, the law of the land was clear. A judge, without participation by the jury, could constitutionally find statutory aggravating circumstances after a guilty verdict or plea to first-degree murder and sentence the defendant to death. There was no question about it. Fields' judgment and denial of post-conviction relief became final in Fields v. State, 127 Idaho 904 (1995).

In the years before Fields was sentenced, and in the years since, the Idaho Supreme Court has repeatedly upheld the constitutionality of judge sentencing in first degree murder cases.

A prominent case among the several cases is State v. Charboneau, 116 Idaho 129 (1989). The United State Supreme Court also upheld judge sentencing in Walton v. Arizona, 487 U.S. 639 (1990).

It wasn't until years later when the United State Supreme Court decided Apprendi v. New Jersey, 530 US 466, 120 S.Ct. 2348 147 L.Ed.2d 435 (2000) that there began to be doubt concerning the continued vitality of judge sentencing. The court in Apprendi held that, "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Apprendi court vacated the sentence of a person convicted in New Jersey whose sentence was enhanced because the sentencing judge found that the crime was committed in violation of New Jersey's hate crime statutes. The hate crime statutes increased the maximum potential available sentence for the offender. Apprendi's jury had not been asked to find that Apprendi's crime was committed for hate bias reasons.

At the time of the Apprendi decision, it was apparent that Apprendi and Walton were in conflict. Walton could not stand for the proposition that a judge could make factual findings that increase the maximum potential sentence in death penalty cases in the face of the Apprendi decision. The issue had to be decided and Ring v. Arizona is the application of the Apprendi rule to death penalty litigation.

Fields now argues that the Ring decision should be retroactive to his death

sentence, which was final years earlier. There is no legal basis for a retroactive application. To begin with, only the Supreme Court can make the holding retroactive and they did not.

The only reference to retroactivity is in Justice O'Connor's dissent, which the Chief Justice joins. They point out that each prisoner on death row in the states affected by the Ring holding, will likely challenge his or her death sentence. Justice O'Connor said the following:

> "I believe many of these challenges will ultimately be unsuccessful, either because the prisoners will be unable to satisfy the standards of harmless error or plain error review or because, having completed their direct appeals, they will be barred from taking advantage of today's holding on federal collateral review." See 28 U.S.C. section 2244 (b)(2)(A), 2254(d)(1); Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); Ring 122 Sup. Ct. at page 2449 and 2450.

The Supreme Court did not say that the decision was retroactive and Justice O'Conner recognized that most defendants who attempted to have it applied to their cases would be barred from doing so on collateral review. This is in keeping with other U.S. Supreme Court decisions. The Supreme Court has decided the retroactivity issue in other cases and has given us clear direction on its application.

One such recent case is Tyler v. Cain, 533 US 656, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001). A synopsis of the issue before the court in Tyler was set out by Justice Thomas in the first paragraph of the decision as follows:

> "Under Cage v. Louisiana, 498 US 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990)(per curiam), a jury instruction is unconstitutional if there is a reasonable likelihood that the jury understood the instruction to allow conviction without proof beyond a reasonable doubt. In this case, we must decide whether this rule was "made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. Section 2244(b)(2)(A) (1994 ed., Supp V). We hold that it was not." 533 U.S. at page 658.

In 1975, the petitioner Tyler shot and killed his 20-day-old daughter during a fight with his girlfriend. Tyler was convicted of second-degree murder and his conviction was affirmed on appeal. Over the next ten years, Tyler filed five (5) post conviction petitions, all of which were denied. In 1990 the United States Supreme Court issued the Cage decision, afterwhich Tyler filed a federal habeas petition claiming that the jury instruction defining reasonable doubt in his trial was substantially identical to the instruction condemned in the Cage decision. Tyler also filed a sixth state post-conviction petition raising the Cage claim. The Court of Appeals for the Fifth Circuit allowed Tyler to raise the claim, but the Federal District Court denied his petition. The Court of Appeals affirmed the denial of the petition, which sets the stage for the Tyler v. Cain decision.

The Supreme Court held that the Cage decision was not retroactively applicable to Tyler. This was done in the context of interpreting the federal rule, which prohibits a successive petition based upon the application of a new rule of law, much the same as Idaho Code §19-2719(5)(c) does in Idaho. The Court stated the following:

> Quite significantly, under this provision, the Supreme Court is the only entity that can "make" a new rule retroactive. The new rule becomes retroactive, not by the decisions of a lower court or by the combined action of the Supreme Court and the lower courts, but simply by the actions of the Supreme Court. The only way the Supreme Court can, by itself, "lay out and construct, a rule's retroactive effect, or "cause" that effect "to exist, or occur, or appear," is through a holding. The Supreme Court does not "make" a rule retroactive when it merely establishes principals of retroactivity and leaves the application of those principals to lower courts. In such an event, any legal conclusion that is derived from the principles is developed by the lower court (or perhaps by a combination of courts), not by the Supreme Court. We thus conclude that a new rule is not "made retroactive to cases on collateral review" unless the Supreme Court holds it to be retroactive. 533 U.S. at page 662.

THE RING HOLDING IS NOT RETROACTIVE BASED ON A "TEAGUE" ANALYSIS

Tyler also argued that the Cage rule should be retroactive under a Teague v. Lane, *supra*, analysis. The Tyler court rejected the argument that the Teague case made Cage retroactive as well. An understanding of the Teague case is helpful in understanding why the Tyler court held that Cage was not retroactive to Tyler. As quoted above, the Tyler, case analyses at length the Teague v. Lane, decision. In the Teague case, the question before the court was whether nor not the court's decision in Batson v. Kentucky, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986) should be applied retroactively to petitioner Teague.

Teague was a black man who had been convicted by an all white jury in Illinois. The prosecutor had used all ten of his preemptory challenges to exclude blacks from the petitioner's jury. The petitioner was convicted and his conviction became final prior to the decision by the Supreme Court in Batson.

As is well known, the Supreme Court in Batson held that a prosecutor could not use peremptory challenges to remove jury members based upon the juror's race.

Even though Teague's conviction was final in state court, his conviction was being collaterally reviewed in federal court on a writ of habeas corpus when the Batson case was decided. Much of the Teague decision deals with procedural default and other issues related specifically to Teague's petition. However, Teague urged that the Sixth Amendment's fair cross section requirement should apply to petit juries. In that context, the Court addressed the question of retroactivity.

The Court pointed out that the retroactive application of a new rule upon state courts causes a great deal of cost and frustration. The Court stated the following:

> The "costs imposed upon the states by retroactive application of new rules of constitutional law on habeas corpus... generally far outweigh the benefits of this application." In many ways, the application of new rules to cases on collateral review may be more intrusive than enjoining of criminal prosecutions for it continually forces the states to marshal resources in order to keep in prison defendants whose trials and appeals conform to then-existing constitutional standards. Furthermore as we recognized in Engle v. Isaac, "state courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands. *citations omitted* 103 L.Ed.2d at p.355

The Court said that it found those criticisms to be "persuasive" and so held the following:

> Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases, which have become final before the new rules are announced. 103 L.Ed.2d at page 355 and 356.

It is for that reason, that the Tyler court held that a new rule is not retroactive unless the Supreme Court specifically held that it was to be retroactive at the time the decision was made or unless some subsequent case or a series of cases specifically makes it retroactive.

The Teague court goes on to hold though that a new rule can be applicable to a case on collateral review if, and only if, it falls within an exception to the non-retroactivity rule. The Court found two exceptions. The first being that a new rule should be applied retroactively if it places "certain kinds of primary private individual conduct beyond the power of the criminal law making authority to proscribe."

The second exception was to be the observance of "those procedures that are implicit in the concept of ordered liberty" which the court defined to mean "watershed rules of criminal procedure." The Court further defined watershed to mean "bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." An example the Court gave would be the right to counsel at trial.

The Court expanded on "bedrock procedural elements" with the "requirement that the procedure at issue must implicate the fundamental fairness of the trial." 103 L.Ed.2d at p. 357

The Court gave an example of an "accuracy enhancing procedural rule" to be a rule "without which the likelihood of an accurate conviction is seriously diminished." The Court said the following:

> We are also of the view that such rules are best illustrated by revealing the classic grounds for the issuance of a writ of habeas corpus -- that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods." 103 L.Ed.2d at p. 358

The Teague court went on to determine that the rule requiring that petit juries be composed of a fair cross section of the community was not a "bedrock procedural element" that should be retroactively applied. The defendant's petition was denied. Once Teague is understood, the holding in Tyler is not surprising.

The Tyler court said the following of Teague:

> Under Teague, a new rule can be retroactive to cases on collateral review if, and only if, it falls within one of two narrow exceptions to the general rule of non-retroactivity. Id. at 311-313 109 S.Ct. 1060 (plurality opinion). See also O'Dell v. Netherland, 521 US 151, 156-157, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997).

> The exception relevant here is for "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Graham v. Collins, 506 US 461, 478, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993). To fall within this exception, a new rule must meet two requirements: Infringement of the rule must "seriously diminish the likelihood of obtaining an accurate conviction," and the rule must "alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." Sawyer v. Smith, 497 US 227, 242, 110 S.Ct. 2822, 111 L.Ed.2d 1993 (1990)(quoting Teague, *supra* at 311, 109 S.Ct. 1060 (plurality opinion), in turn quoting Mackey v. United States, 401 US 667, 693, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971)(Harlan, J., concurring in judgments in part and dissenting in part.)
>
> According to Tyler, the reasoning of Sullivan demonstrates that the Cage rule satisfies both prongs of this Teague exception. First, Tyler notes, Sullivan repeatedly emphasized that a Cage error fundamentally undermines the reliability of a trials outcome. And second, Tyler contends, the central point of Sullivan is that a Cage error deprives a defendant of a bedrock element of procedural fairness: the right to have the jury make the determination of guilt beyond a reasonable doubt. Tyler's arguments fail to persuade, however. The most he can claim is that, based on the principals outlined in Teague, this court *should* make Cage retroactive to cases on collateral review. What is clear, however, is that we have not "made" Cage retroactive to cases on collateral review. 533 U.S. at page 665.

Tyler also claimed that the Cage error was "structural error" and that as such should apply retroactively to him. The Court rejected that argument as follows:

> The only holding in Sullivan is that a Cage error is structural error. There is not a second case that held that all structural error rules apply retroactively or that all structural error rules fit within the second Teague exception. The standard for determining whether an error is structural, see generally Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), is not coextensive with the second Teague exception, and a holding that a particular error is structural does not logically dictate the conclusion that the second Teague exception has been met.
>
> Footnote 7 – as explained above, the second Teague exception is available only if the new rule "alters our understanding of the *bedrock procedural essentials* "essential to the fairness of a proceeding." Classifying an error as structural does not necessarily alter our understanding of these *bedrock procedural elements*. Nor can it be said that all new rules relating to due process (or even the "fundamental requirements of due process,") alter such understanding. *Citations omitted.* P.665

The court went on to reject Tyler's argument that Cage was retroactive and denied his request to make it retroactive. The Tyler case clearly stands for the proposition that a Supreme Court holding is not retroactive until either the court says that it is retroactive or the holdings in multiple cases necessarily dictate retroactivity of the new rule. It also teaches us that calling a procedural error structural does not necessarily require retroactivity under Teague. As applied to Tyler, even though his jury instruction was unconstitutional because it did not require a proof beyond a reasonable doubt finding by the jury, the Cage rule was not retroactive.

As pointed out above, nothing in the Ring decision makes the holding retroactive. The State has been unable to find any reported case holding that the Ring decision has been applied retroactively. The Tenth Circuit has specifically held that the Ring decision is not retroactive. In Cannon v. Mullin, 297 F.3d. 989 (10th Cir. July 19, 2002) the court addressed the Ring retroactivity question directly.

Cannon was convicted of first-degree murder under an Oklahoma law that required the jury, if they made a unanimous recommendation of death, to find a statutory aggravating circumstance unanimously beyond a reasonable doubt. The aggravating circumstance must outweigh the finding of any mitigating circumstances.

The question of the existence of the statutory aggravators was submitted to the jury and expressly made subject to proof beyond a reasonable doubt, but the jury was not instructed that it needed to find beyond a reasonable doubt that the aggravating circumstance outweighed the mitigating circumstances. Both of those factual determinations were necessary to make the defendant death eligible under Oklahoma

law. The defendant was sentenced to death and filed a habeas corpus petition, which was denied. In the instant case, the defendant sought to file a second or successive habeas petition.

The Court held that Cannon was entitled to file a second habeas petition only if the Ring decision "set forth a new rule of constitutional law that was previously unavailable and the Supreme Court has made the new rule retroactive to cases on collateral review." The Court said the following:

> Cannon's argument in favor of his assertion that the Supreme Court has made Ring retroactive to cases on collateral review is two-fold: (1) because Ring announced a new rule of substantive criminal law under the Eight Amendment applicable to state capital crimes, the limitations of Teague v. Lane, 489 US 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), therefore do not apply, and the requirements of section 2244(b)(2)(A) are met; and (2) the Supreme Court has made Ring retroactive to cases on collateral review through the combination of Teague, Ring, and cases preceding Ring in the Apprendi line. Neither assertion is convincing.
>
> Cannon is simply incorrect in asserting that the combination of Teague, Ring, and the cases in the Apprendi line render the rule announced in Ring retroactively applicable to cases on collateral review. The Supreme Court considered the contours of section 2244(b)(2)(A) in Tyler. The Court began by noting that, "under this provision, the Supreme Court is the only entity that can make a new rule retroactive.
>
> The new rule becomes retroactive, not by the decisions of the lower court or by the combined action of the Supreme Court and the lower courts, but simply by the actions of the Supreme Court." The Court went on to note that the only way it could make a rule retroactively applicable is through a "holding" to that effect. "The Supreme Court does not make a rule retroactive when it merely establishes principles of retroactivity and leaves the application of those principles to lower courts." (quoting Tyler) . . .the Court did recognize that it could "make a rule retroactive over the course of two cases," but only if "the holdings in those cases necessarily dictate retroactivity of the new rule."
>
> Despite this language from Tyler, the thrust of Cannon's multiple case argument is that the rule set out in Apprendi and extended in Ring to the death penalty context, fits within Teague's second exception for watershed

> rules of criminal procedure and has therefore been made retroactively applicable by the Supreme Court to cases on collateral review. This argument seriously misconstrues Tyler. Page 992 – 993.

The Court went on to find that the mere fact that a new rule *might* be retroactive was not sufficient. The Court held that Cannon had failed to identify language in any of the cases mandating "by strict logical necessity" that the Supreme Court has made the rule in Ring retroactive.

However, Cannon argued in the alternative that Ring announced a new rule of *substantive* criminal law and that the Supreme Court's decision in Bousley v. United States, 523 U.S. 614, 620, 118 Sup. Ct. 1604, 140 L.Ed.2d 828 (1998), holding that Teague's retroactivity analysis does not apply to substantive interpretations of criminal statutes, and renders Ring retroactive for purposes of collateral review.

But the Court held that:

> It is clear, however, that Ring is simply an extension of Apprendi to the death penalty context. Accordingly, this courts recent decision in United States v. Mora, 293 F.2d 1213, (10th Cir. 2002), that Apprendi announces a rule of criminal procedure forecloses Cannon's argument that Ring announced a substantive rule. Page 994

Based on the above, the Tenth Circuit denied Cannon's request to be allowed to file a successive petition. The Court found that Apprendi announced a rule of criminal procedure and that Ring was just an extension of that and therefore was not substantive.

The Ninth Circuit has similarly held that the Apprendi decision is not retroactive. In Jones v. Smith, 231 F.3d 1227 (May 2000) the Ninth Circuit refused to apply Apprendi retroactively to a case where the defendant was convicted of attempting to murder a cab driver. The language in the Information was, "willfully, unlawfully,

and with malice aforethought". The Information did not allege that the attempted murder was premeditated. The case went to trial with both the prosecution and the defense assuming that premeditation had been alleged in the Information, and premeditation was argued to the jury.

The jury was instructed that they could only find the defendant guilty of attempted murder if the attempted murder was "willful, deliberate, and premeditated." The jury so found and the defendant was convicted and sentenced to life imprisonment. The sentence of life imprisonment was only available if the defendant's attempted murder was done with premeditation.

The sentencing court found premeditation, but as noted above, the defendant's charging document did not contain premeditation language. The California Supreme Court held that the increased penalty for premeditated attempted murder was a sentencing enhancement and upheld the defendant's conviction and sentence. Without premeditation, the person guilty of the attempt could only be sentenced for up to nine years.

The issue then before the Ninth Circuit was whether the Apprendi holding was retroactive to the set of circumstances described above. The Ninth Circuit denied the defendant's claim as follows:

> After Apprendi, California's treatment of premeditation as a sentencing factor, which was the basis for the California Supreme Court's holding in Bright, 909 P.2d 1354, is open to question. We need not decide the question of whether the petitioner's conviction comports with Apprendi, however, because we find that the non-retroactivity principle pronounced in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), prevents petitioner from benefiting from Apprendi's new rule on collateral review. Page 1236

The Court then analyzed the Teague case as it applied to the petitioner. The Court noted the following, "the retroactivity rule adopted in Teague reflects not only a healthy measure of respect for state court decisions that complied with contemporaneous constitutional norms, but it also serves a policy of treating all similarly situated defendants equally on federal habeas." Carriger v. Lewis, 948 F.2d. 588 (9th Cir. 1991).

The Court said of Teague, "A case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government [or] if the result was not dictated by precedent existing at the time the defendant's conviction became final." Teague, *supra*, page 1236.

The Court then observed that Apprendi established a new rule and so determined that an analysis of Teague factors was appropriate. The Court viewed Teague as requiring a three-step inquiry as follows:

> First, the court must ascertain the date on which the defendant's conviction and sentence became final for Teague purposes. Second, the court must survey the legal landscape as it then existed and determine whether a state court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the constitution.
>
> Finally, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the non-retroactivity principle.
>
> A state conviction and sentence becomes final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied. Page 1237

With that criteria in mind, the Court held that a state court considering the petitioners claim in 1992, which was when his case was final, would not have concluded that the petitioners conviction violated the constitution.

The Court then turned to the third prong of Teague, which is whether the new rule fits within the two narrow exceptions to the non-retroactivity principle.

The new rule must be of a kind that either places "certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to proscribe [or] requires the observance of those procedures which are implicit in the concept of ordered liberty." Teague, *supra*. Obviously, the first exception identified in Teague was not applicable since the law against attempted murder had not been changed.

The second exception identified in Teague requires retroactive application of certain "watershed rules of criminal procedure." Teague, *supra*. The Court stated the following:

> Retroactive application will occur where both (1) a failure to adopt the new rule "creates an impermissibly large risk that the innocent will be convicted," and (2) "the procedure at issue...implicates the fundamental fairness of the trial." In order to qualify under this exception, the new rule must do more than systematically enhance the reliability a criminal proceeding; the rule must be an absolute prerequisite to the trial's fundamental fairness. See Carriger, 948 F.2d. at 598. Page 1237
>
> In the case at bar, the Apprendi rule, at least as applied to the omission of certain necessary elements from the state court information, is neither implicit in the concept of ordered liberty nor an absolute prerequisite to a fair trial. Page 1238

The court found that the defendant was on notice of the nature and details of the accusation against him, as well as the possible sentences he might receive and therefore declined to apply the Apprendi rule retroactively. Under the state of the law at the time

the defendant was convicted, premeditation was constitutionally viewed as a sentencing factor only.

The undersigned cannot help but observe the similarities between the Jones case and Fields. At the time of Fields' sentencing, the aggravators were mere sentencing factors under well-settled law. There was no question about it. Ring cannot be retroactively applied to Fields on the theory that to do otherwise would "create an impermissibly large risk that the innocent will be convicted." The legality of his conviction has been upheld by the Supreme Court and is not at issue here. We are arguing about sentencing *procedure* only.

The Ninth Circuit visited the Apprendi retroactivity question again in United States v. Juan Sanchez-Cervantes, 282 F.3d 664 (9th Cir. November 2001). In that case, Sanchez-Cervantes was convicted by a jury of several drug offenses, but the jury made no finding as to the drug amounts. However, after a presentence report, the court found that the defendant was responsible for having distributed methamphetamine, cocaine, and marijuana in certain amounts. Based on the amounts found by the judge, Sanchez-Cervantes was sentenced to a term of months much higher than he would have been eligible for without the finding of drug quantities. The defendant appealed his conviction and sentence which the Ninth Circuit affirmed in 1996.

Later, the defendant filed an ineffective assistance of counsel claim and while that claim was pending in federal district court, the Supreme Court decided Apprendi. Sanchez-Cervantes sought to amend his petition arguing that his sentence violated the ruling in Apprendi because his jury had not made the drug quantity determination beyond a reasonable doubt. The Ninth Circuit noted that at the time of Sanchez-

Cervantes trial, all of the circuits in the country allowed a judge to determine drug quantity for sentencing purposes. The Court denied the defendant's Apprendi claim, and stated the following:

> Our decisions that subjected Apprendi claims to harmless error analysis or plain error review lend additional support to our determination that Apprendi is not a bedrock procedural rule. In these cases, we did not consider Apprendi errors to be structural. A structural error is one that necessarily renders a trial fundamentally unfair and therefore invalidates the conviction.
>
> We only review for plain error or assess whether an error is harmless when the error is not structural; in those circumstances, the court must determine whether any substantial rights were prejudiced by the error. By applying harmless error analysis or plain error review to Apprendi claims, we have necessarily held that Apprendi errors do not render a trial fundamentally unfair. Therefore, it would seem illogical to hold that such an error is a watershed rule that "implicates the fundamental fairness of the trial." In addition, the Supreme Court noted in Tyler v. Cain, *supra*, that not all structural-error rules fit into Teague's second exception. This implies that Teague's second exception is even narrower than the category of structural error rules. From these holdings, it follows that the new Apprendi rule is not so fundamental as to fit within Teague's second exception. Page 670

In other words, the Court found that the Apprendi decision was not a "watershed rule" that implicated the trial's fundamental fairness. The Court noted that some decisions were given retroactive effect because they were to "overcome an aspect of the criminal trial that substantially impairs its truth finding function" and so raises serious doubts about the accuracy of guilty verdicts. The Court points out that "the application of Apprendi only effects the enhancement of a defendant's sentence once he or she has already been convicted beyond a reasonable doubt. Therefore, it does not rise to the importance of other cases that have been made retroactive.

The Sanchez-Cervatnes court cited the examples of In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 35 L.Ed.2d 368 (1970) and Mullaney v. Wilber, 421 U.S. 684 95 S.Ct. 1881, 44 L.Ed.2d 509 (1975) as decisions later made retroactive by the Supreme Court. Winship required that the standard of proof in juvenile prosecutions be proof beyond a reasonable doubt. Mullaney required that the state prove the absence of heat of passion upon sudden provocation in a homicide case. The burden of proof could not be shifted to the defendant.

The Court said Winship and Mullaney were given retroactive effect because to do otherwise would "substantially impair" the trial's "truth-finding function" and would raise "serious questions about the accuracy of guilty verdicts."

Apprendi does not "rise to the level of importance of Winship or Mullaney" because it does not affect verdict accuracy. Allowing the judge to determine the quantity of drugs for sentencing purposes does not impair the jury's ability to find the truth regarding whether the defendant possessed, distributed, or conspired to distribute some amount of drugs.

There is no question that the Apprendi decision is only procedural and not substantive. The Supreme Court said as much in the Apprendi decision at 530 U.S. at 475, 120 Sup. Ct. at 2348: "the substantive basis for New Jersey's enhancement is thus not at issue; the adequacy of New Jersey's procedure is." A number of federal circuit courts have also held that Apprendi is procedural rather than substantive. United States v. Sanders, 247 F.3d. 139 (4th Cir. 2001); United States v. Brown, 305 F.3d. 304 (5th Cir. 2002); Curtis v. United States, 294 F.3d. 841 (7th Cir. 2002); U.S. ex rel. Perez v. Warden, FMC Rochester, 252 F.3d. 993 (8th Cir. 2002); McCoy v. United States, 266 F.3d. 1245, (11th Cir. 2001).

As noted in Harris v. United States, ___ U.S. ___, 122 S.Ct. 2406, 2427 (2002)(Thomas J., dissenting), "No Court of Appeals, let alone this Court, has held that *Apprendi* has retroactive effect." *See also* Curtis v. United States, 294 F.3d 841, 842 (7th Cir. 2002), *listing cases*.

The State is confident that, following these rulings, the Ninth Circuit would also find that the Ring decision flows from Apprendi and as such is a procedural change that does not affect the fundamental fairness of the trial and so is not retroactive.

APPLICATION OF THE LAW TO THE FACTS IN FIELDS' CASE

There is no question that Fields' case was final before the Ring decision was announced. It was final before the decision in Apprendi. The United States Supreme Court has made it clear that a decision is only retroactive if the Supreme Court makes it retroactive or a series of Supreme Court decisions dictate that the decision be retroactive. The Supreme Court did not make the Ring holding retroactive.

There has been no series of Supreme Court cases since that time dictating that the Ring decision be retroactive.

That means then, that the Ring decision can only be applied retroactively if it meets the narrow exception set out in the Teague case. The Teague court held that a new rule can only be applied retroactively if it: (1) "places certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to proscribe." That obviously is not the case here. Or, (2) "a new rule should be applied retroactively if it requires the observance of those "procedures that are implicit in the concept of ordered liberty."

The phrase, "implicit in the concept of ordered liberty" is further defined by the court to be watershed rules that "alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction."

The court gives examples of it's "accuracy-enhancing procedural rules" that might be applied retroactively as being proceedings dominated by mob violence, the use of perjured testimony, or the use of a confession extorted from a defendant by brutal methods. In the court's view, those are bedrock procedural elements that are in place to ensure an accurate conviction.

By comparison to the issue at hand, there is no argument, and indeed there can be no sensible argument made, that any of the classic examples given by the court as requiring retroactive application are at issue here. The only issue is whether a jury should have been asked to find statutory aggravators instead of the judge. That has nothing to do with the accuracy of the underlying conviction.

The Ninth Circuit has denied retroactive application of the Apprendi case in Jones where premeditation language was left out of the Information charging Jones with attempted murder and that the judge thereafter found. The court finding of premeditation greatly enhanced the defendant's sentence. The Ninth Circuit again denied retroactive application of Apprendi in U.S. v. Sanchez-Cervantes where the jury was not asked to make a finding as to the quantity of drugs possessed by the defendant. Rather, the court made that finding and enhanced the defendant's sentence. There is no reason to think that the Ninth Circuit, following their own line of cases, would make a different finding in applying Ring retroactively.

As pointed out above, the Tenth Circuit in Cannon v. Mullin, *supra*, determined that Ring was not retroactive. The Tenth Circuit Court found that Ring was simply an extension of Apprendi in the death penalty context and since they had found that Apprendi was a procedural rule and not retroactive, they held that Ring was not retroactive. That is basically the same analysis used and applied by the Ninth Circuit in Sanchez-Cervantes and Jones.

There is no reason to think that the Ninth Circuit would apply Ring retroactively to Fields. At the time Fields was sentenced in 1991, his sentencing procedure was on all fours with existing Idaho and United States Supreme Court case law.

CONCLUSION

The basic principle of retroactivity as discussed above is not new. It was clearly understood by the Idaho Supreme Court in Fetterly v. State, 121 Idaho 417 (1991); in Stuart v. State, 128 Idaho 436 (1996); and in Butler v. State, 129 Idaho 899 (1997). Each of the defendants named above sought the retroactive application of a later holding to their own conviction after their own conviction had become final.

The holding in Stuart is representative of the holdings in all three of the above-cited cases:

> Even if *Tribe* had overruled *Stuart I*, the fact that *Stuart I* was final when *Tribe* was issued 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, 113 S.Ct. 607, 121 L.Ed.2d 542 (1992) (holding new decision on death penalty sentencing did not apply retroactively to already final cases.) Page 438

Idaho Code 19-2719(5)(c) similarly precludes the retroactive application of a new rule in a successive petition. The petition before the court is, without question, a successive petition filed long after the conviction became final.

> I.C. §19-2719(5)(c)
> 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.

The Ring decision is a new procedural rule flowing from the Apprendi holding. For the reasons set out above, Ring cannot be applied retroactively and Apprendi has not been applied retroactively by the Ninth Circuit. Fields' sentence was constitutional at the time it was entered. The retroactive application of the Ring decision to Fields' sentence certainly "far outweighs the benefits of this application" and "continually forces the states to marshal resources in order to keep in prison defendants whose trials and appeals conform to then existing constitutional standards." Teague, *supra*, 103 L.Ed.2d page 355.

Additionally, the petitioner argues that I.C. §19-2716(5)(c) should be found unconstitutional because it violates due process. This issue has been considered and rejected by the Idaho Supreme Court in McKinney v. State, 133 Idaho 695 (1999). Finally, many of the same claims made by this petitioner were made by another death row inmate, Maxwell Hoffman. Judge Culet in the Third Judicial District rejected those arguments in a written opinion which is attached for reference. The State understands that Judge Culet's opinion is not binding, but may be of some use to the Court.

For those reasons, the State moves this court to dismiss this successive petition and to deny the motion to correct illegal sentence or vacate the sentence of death.

RESPECTFULLY SUBMITTED this 15 day of January, 2003.

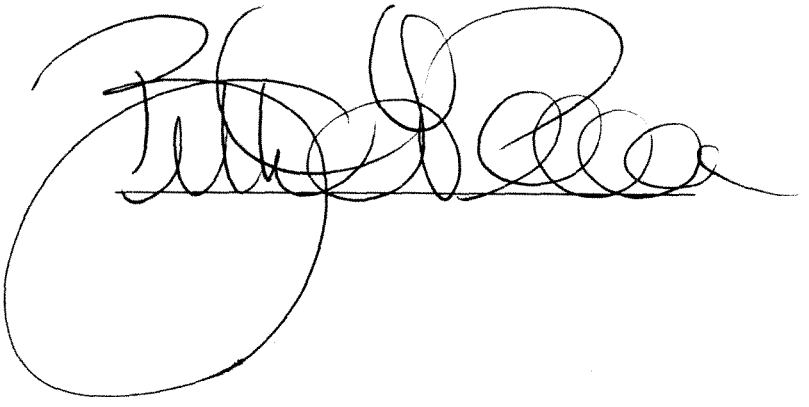
GREG H. BOWER
Ada County Prosecuting Attorney

R Bourne

Roger Bourne
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15 day of January, 2003, I served a true and correct copy of the foregoing Response to Petitioner's Opposition to the State's Motion to Summarily Dismiss Petition for Post Conviction Relief and/or Motion to Correct Illegal Sentence, Sentences, to Vacate Sentences of Death and for New Sentence and Trial to Joan Fisher, Federal Defender's, 201 N. Main, Moscow ID 83843, by depositing in the U.S. Mail, postage prepaid.



IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

MAXWELL HOFFMAN,

Plaintiff,

-vs-

STATE OF IDAHO,

Defendant.

CASE NO. SP02-1715

MEMORANDUM DECISION AND ORDER GRANTING STATE'S MOTION FOR SUMMARY DISMISSAL

STATE OF IDAHO,

Plaintiff,

-vs-

MAXWELL HOFFMAN,

Defendant.

CASE NO. 4843

The above-entitled cause came before the court on the State's motion for Summary Dismissal of Maxwell Hoffman's Petition of Post-Conviction Relief and/or Writ of Habeas Corpus and Motion to Correct Illegal Sentence, to Vacate Sentence of Death and for New Sentencing Trial filed by defendant on August 2, 2002. The court heard oral argument on the matter on November 19, 2002, with L. LaMont Anderson and G. Edward Yarbrough appearing for the state, and Ellison M. Mathews and Joan M. Fisher appearing with the defendant Maxwell Hoffman, who was also present. Mr. Anderson and Ms. Fisher presented argument, at the conclusion of which the court took

the matter under advisement and now issues its decision granting the Motion for Summary Dismissal.

Factual and Procedural Background

On September 23, 1988, an Information was filed charging Hoffman with the September 19, 1987 first-degree murder of Denise Williams. (Owyhee County Case No. 4843) A jury trial commenced March 7, 1989, after which Hoffman was found guilty of first-degree murder.

After the verdict, Hoffman filed a motion with the court to have a jury impaneled for purpose of sentencing, or in the alternative, to serve as an advisory jury, which was denied by the district court. On June 9, 1989, after a sentencing hearing before the district court, without a jury, the presiding judge read his written findings, which were subsequently filed June 13, 1989. The court found the state had proven two statutory aggravating factors beyond a reasonable doubt: (1) that the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity, and (2) that the murder was committed against a witness or potential witness in a legal proceeding because of such proceedings. The court rejected two other statutory aggravating factors requested by the state. The court also found additional non-statutory aggravating factors and several mitigating circumstances. After weighing the collective mitigating circumstances against each of the statutory aggravating factors individually, the court imposed the death penalty.

On July 25, 1989, Hoffman filed a Petition for Post Conviction Relief. (Owyhee County Case No. 4888) In an amended post conviction petition, Hoffman specially alleged, " The Idaho death penalty statute is unconstitutional, as it does not permit the participation of the jury, in violation of the Idaho Constitution and the United States Constitution." After an evidentiary hearing, the district court denied the petition. In addressing the claim regarding jury participation, the district court denied the claim based upon *State v. Charboneau*, 116 Idaho 129, 774 P2d 299 (1989).

On January 29, 1993, in a consolidated appeal, the Idaho Supreme Court affirmed Hoffman's conviction, sentence and the denial of post conviction relief. *State v.*

Hoffman, 123 Idaho 638, 851 P.2d 934 (1993). Addressing the question of whether jury involvement in a capital sentencing is mandated, the court concluded, "it is well settled that punishment in a capital case is to be determined by a judge rather than a jury." Id., 123 Idaho at 643.

Hoffman thereafter commenced federal habeas proceedings in May of 1994, and filed his initial Petition for Writ of Habeas Corpus on December 1, 1994. (*Hoffman v. Arave*, Case No. CIV94-200-S-EJL), claiming in part:

> Petitioner was sentenced to death under an Idaho Statute which allows the sentencing judge to determine elements of the crime in violation of Petitioner's right under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution to have a jury determine the elements of the crime.

An identical claim was raised in Hoffman's Final Petition for Writ of Habeas Corpus in that same case. On June 13, 1997, the federal district court dismissed the claim because it was not presented as a federal constitutional claim before the Idaho Supreme Court. *Hoffman v. Arave*, 973 F.Supp. 1152, 1162 (D. Idaho 1997). Alternatively, the court concluded that based upon *Walton v. Arizona*, 497 U.S. 639, 647 (1990), "there is no constitutional requirement 'that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence.' " *Id.*, at 1163.

On appeal, Hoffman challenged the Federal District Court's opinion. In the interim, the U.S. Supreme Court issued its decision in *Apprendi v. New Jersey*, 530 U.S. 466, (2000). Ninth Circuit still concluded, "*Walton* forecloses Hoffman's Apprendi-based challenge to Idaho's capital sentencing scheme." *Hoffman v. Arave*, 236 F.3d 523, 542 (9th Cir. 2001). However, the court reversed on other claims and ordered the district court to conduct an evidentiary hearing regarding ineffective assistance of counsel claims. *Id.*, at 542-43.

After the evidentiary hearing, the Federal District Court granted the writ with respect to ineffective assistance of counsel claims at sentencing, but denied the writ with respect to ineffective assistance of counsel claims at trial. Hoffman's appeal and the state's cross-appeal are pending before the Ninth Circuit. Counsel have informed the court that the Ninth Circuit Court of Appeals has stayed the pending cross-appeals from Hoffman's federal habeas proceedings pending both the state court's final disposition of

Hoffman's state post-conviction petition based upon *Ring v Arizona*, 122 S. Ct. 2428 (2002), and the Ninth Circuit's decision on the retroactive effect of *Ring*.

While litigating his federal habeas petition, Hoffman filed a successive post conviction petition in State Court on July 7, 1995. (Owyhee County Case No. SP95-492) On May 20, 1996, the trial court dismissed Hoffman's successive petition. Hoffman filed a Notice of Appeal June 7, 1996. On December 6, 1996, the Idaho Supreme Court granted the state's motion to dismiss and dismissed Hoffman's appeal.

Hoffman filed a second successive post conviction arguing ineffective assistance of counsel which is still pending before the district court. *Hoffman v. State*, #SP01-1551. That matter had been stayed pending outcome of the State's and Hoffman's aforementioned federal appeals in the Ninth Circuit.

On August 2, 2002, Hoffman filed the present successive post conviction petition, claiming the United States Supreme Court's decision in *Ring v. Arizona, supra*, " is truly [an] extraordinary legal development which compels this Court's reconsideration of the constitutionality of Petitioner's death sentence under both the United States' and Idaho's constitutional protections. The petition is being filed so that this Court can give this case that reconsideration."

The State of Idaho has filed a Motion for Summary Dismissal, which was argued on November 12, 2002.

Analysis

Hoffman argues the United States Supreme Court's decision in *Ring v. Arizona*, 122 S. Ct. 2428 (2002), "is truly [an] extraordinary legal development which compels this Court's reconsideration of the constitutionality of Petitioner's death sentence under both the United States' and Idaho's constitutional protections." The state responds that the petition must be dismissed under Idaho Code § 19-2719.

1. Hoffman's claims raised in his successive petition for post-conviction relief must be dismissed under Idaho Code § 19-2719.

Idaho Code § 19-2719[1] requires that the defendant in a capital case must "file any legal or factual challenge to the sentence or conviction that is known or reasonably should be known" within 42 days of the date of filing of the judgment imposing death. I.C. § 19-2719(3). The statute is quite specific in its requirement that all such actions, including post conviction relief and habeas corpus actions, must be commenced within the 42-day time period and in accordance to the procedures of the statute. I.C. § 19-2719(4). Any defendant who fails to file such proceedings within the time requirements of and in conformance with I.C. § 19-2719 is deemed to be have waived any such claims

[1] (In pertinent part) 19-2719 special appellate and post-conviction procedures for capital cases – Automatic stay.

The following special procedures shall be interpreted to accomplish the purpose of eliminating unnecessary delay in carrying out a valid death sentence . . .

(3) **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.

(4) **Any remedy available by post-conviction procedure, habeas corpus or any other provision of state law** must be pursued **according to the procedures set forth in this section and within the time limitations of subsection (3) of this section.** ...

(5) 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.

(a) An allegation that a successive post-conviction petition may be heard because of the applicability of the exception herein for issues that were not known or could not reasonably have been known shall not be considered unless the applicant shows the existence of such issues by (i) a precise statement of the issue or issues asserted together with (ii) material facts stated under oath or affirmation by credible persons with first hand knowledge that would support the issue or issues asserted. A pleading that fails to make a showing of excepted issues supported by material facts, or which is not credible, must be summarily dismissed.

(b) A successive post-conviction pleading asserting the exception shall be deemed facially insufficient to the extent it alleges matters that are cumulative or impeaching or would not, even if the allegations were true, cast doubt on the reliability of the conviction or sentence.

(c) 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.**

(6) In the event the defendant desires to appeal from any post-conviction order entered pursuant to this section, his appeal must be part of any appeal taken from the conviction or sentence. All issues relating to conviction, sentence and post-conviction challenge shall be considered in the same appellate proceeding . . . (Emphasis added)

...

for relief "*as were known or reasonably should have been known to the defendant.*" I.C. § 19-2719(5). Further, "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." *Id.*

The constitutionality of Idaho Code § 19-2719, with regard to the defendant's rights under an equal protection analysis, was upheld in *State v. Beam,* 115 Idaho 208, 766 P.2d 678 (1988), *cert. denied*, 489 U.S. 1073, 109 S. Ct. 1360, 103 L. Ed. 2d 827 (1989). The Court noted that the while the statute provides for special expedited procedures for post conviction review in capital cases, it does not involve a suspect class within the meaning of the United States Constitution or the Idaho Constitution, and accordingly, strict scrutiny is not required. In addition, the Court found no "obviously invidiously discriminatory classification" in the statute that would warrant a means-focus classification review to determine any equal protection violation. *Id.* The statute has also been held to be constitutional under a due process analysis. *State v. Rhoades*, 120 Idaho 795, 820 P.2d 665 (1991), cert. denied, 504 U.S. 987, 112 S.Ct. 2970, 119 L.Ed.2d 590 (1992). The constitutionality of Idaho's statutory scheme for capitol post-conviction proceedings has most recently been upheld in *Creech v. State*, 51 P.3d 387, 2002 WL 1225040 (2002).

Finally, while the Uniform Post Conviction Procedure Act (Idaho Code §§ 19-4901, et seq.) applies to capital cases, that act is modified by Idaho Code § 19-2719, which supersedes the UPCPA to the extent that their provisions conflict. *McKinney v. State*, 133 Idaho 695, 992 P.2d 144 (1999).

A. Hoffman's claims raised in his successive petition for post-conviction relief were known when he filed his first petition for post-conviction relief. He has failed to make a *prima facie* showing that his successive post conviction claims where not known or reasonably should not have been known when he filed his initial petition for post-conviction relief. Therefore, his claims do not fall under the exception in Idaho Code § 19-2719(5) and must be dismissed pursuant to that statute.

As reflected in the history of this case, Hoffman timely filed a motion for jury sentencing or alternatively, for an advisory jury, following the jury's guilty verdict of first degree murder. He timely raised the issue again in his initial post-conviction petition

that was filed within the 42-day requirement of Idaho Code § 19-2719. Both requests were properly denied under the existing law at the time[2].

Idaho Code § 19-2719 has been held to provide a defendant one opportunity to raise all challenges to a conviction and sentence in a capital case in a post-conviction petition, unless the petitioner can show that the claims raised in a successive petition were not known and could not reasonably have been known within 42 days of the entry of the judgment of conviction. *State v. Rhoades*, 120 Idaho 795, 820 P.2d 665 (1991), cert. denied, 504 U.S. 987, 112 S.Ct. 2970, 119 L.Ed.2d 590 (1992); *Pizzuto v. State*, 127 Idaho 469, 903 P.2d 58 (1995). Hoffman must meet a heightened burden and must make a *prima facie* showing that the issues raised in his petition fall within the narrow exception provided by the statute. *Pizzuto*, *supra*. Finally, the time limitations contained in Idaho Code § 19-2719 "are jurisdictional in nature, the statute specifically depriving the courts of Idaho the power to consider any claims for relief that have been waived under the statute. I.C. § 19-2729(5)." *Id.* at 471 and 60.

In the present case, Hoffman's argues that he could not have prevailed on the same claim earlier because of the "erroneous analysis applied to by the Idaho Supreme Court until the United States Supreme Court recognized that only a jury may make the factual findings which make a defendant eligible for the death penalty." That argument is essentially a request that *Ring* be given "retroactive effect," which is addressed elsewhere in this decision. The issue under § 19-2719(5) is whether the petitioner knew or reasonably could have known of the claims at the time he filed his initial post-conviction petition, not whether he could have prevailed.

B. Hoffman's successive petition is expressly barred by Idaho Code § 19-2719(5)(c).

Hoffman argues that he could not have prevailed earlier, and did not, on the issue of jury fact finding of aggravating factors because of erroneous constitutional analysis by the Idaho Supreme Court, until the United States Supreme Court recognized in *Ring v.*

[2] The then existing benchmark case was *Walton v. Arizona*, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990).

Arizona, supra, that only a jury may make the factual finding which would make a defendant eligible for the death penalty.

Despite the exceptions provided in Idaho Code § 19-2719(5) for issues raised that were not known or reasonably could not have been known within the time frame allowed by the statute, Idaho Code § 19-2719(5)(c) provides further restriction regarding post-conviction applications that seek retroactive application of new law:

> 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) (Emphasis added).

At the time of Hoffman's trial and sentencing hearings, and initial post-conviction proceedings, as well as his initial appeal to the Idaho Supreme Court, the existing law was that the U.S. Constitution did not mandate that juries impose the death sentence or find the aggravating factors prior to sentencing. (See, *Proffitt v. Florida*, 428 U.S. 242, 49 L. Ed. 2d 913, 96 S. Ct. 2960 (1976), *Walton v. Arizona*, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990).)

Idaho Code § 19-2729(5)(c) expressly prohibits successive post-conviction petitions which seek the retroactive application of new rules of law. There does not appear to be any Idaho appellate case specifically addressing the constitutionality of § 19-2719(5)(c), which was added by the legislature in 1995. However, prior to the adoption of § 19-2719(5)(c), the Idaho Supreme Court distinguished between retroactive application of new rules of law on capital cases that were already final as opposed to capital cases that were still open for sentencing, holding that the distinction is a proper basis for denying retroactive effect of new rules of law. *Fetterly v. State*, 121 Idaho 417, 825 P.2d 1073 (1991).

In *Fetterly*, a defendant under a death sentence had filed a successive post conviction relief petition on the basis of *State v. Charboneau,* 116 Idaho 129, 774 P.2d 299 (1989), requesting retroactive application of the *Charboneau* ruling that "the trial court may sentence the defendant to death, only if the trial court finds that all the mitigating circumstances do not outweigh the gravity of each of the aggravating circumstances found and make imposition of death unjust."[3] In rejecting Fetterly's

[3] *Fetterly, supra,* at 419 and 1074.

argument, the Court followed the U.S. Supreme Court decision of *Griffith v. Kentucky,* 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987):

> Obviously, the *Charboneau* decision was issued after petitioner-appellant's initial petition for post-conviction relief. Thus, the claim that the *Charboneau* interpretation of I.C. § 19-2515 was not known or should not have been known misses the real issue. **The real issue is whether *Charboneau* applies retroactively to cases that were final at the time of its issuance.**
>
> We have not applied the *Charboneau* decision to any case that was final prior to the issuance of *Charboneau* on April 4, 1989. Conversely, it has been applied to cases that were still open for sentencing on this date. **The distinction between defendants whose cases were final before the issuance of *Charboneau* and those whose cases were not is a valid distinction. In *Griffith v. Kentucky,* 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), the United States Supreme Court recognized this distinction as a proper basis for denying retroactive effect of new rules to cases that are already final.** Therefore, 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.*

Fetterly v. State, 121 Idaho 417, 418-419, 825 P.2d 1073,1074 - 1075 (1991) (Emphasis added).

The reasoning behind such a policy is addressed in *Teague v Lane,* 489 U.S. 288, 109 S.Ct. 1060 (1989), in which the U.S. Supreme Court addressed the issue of retroactive effect of new constitutional rules on collateral review of cases that are already final:

> **Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of *finality* which is essential to the operation of our criminal justice system.** Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions "shows only that 'conventional notions of finality' should not have *as much* place in criminal as in civil litigation, not that they should have *none.*" (Citation omitted)... "[I]f a criminal judgment is ever to be final, the notion of legality must at some point include the assignment of final competence to determine legality." (Citations omitted)...
> The "costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus ... generally far outweigh the benefits of this application." (Citation omitted) In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions (citation omitted), for it *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards. Furthermore, as we recognized in *Engle v. Isaac,* "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court

discover, during a [habeas] proceeding, new constitutional commands." 456 U.S., at 128, n. 33, 102 S.Ct., at 1572, n. 33.

Teague v. Lane, 489 U.S. 288, 309-310, 109 S.Ct. 1060, 1074 - 1075 (1989) (Emphasis added).

In the present case, both Idaho Code § 19-2719 and case law dictate that Hoffman is barred from bringing this successive post conviction petition seeking retroactive application of new rule of law.

C. *Ring v. Arizona* is does not appear to have retroactive application to Hoffman's case.

On the other hand, Hoffman argues that *Ring*[4] enunciates a "watershed" exception that is so fundamental that it warrants retroactive application to all defendants who have gone through the death penalty sentencing aspect in the Idaho court system since the current system has been in place. He argues that Idaho Code § 19-2719 merely articulates what has been stated in *Matter of Gafford,* 127 Idaho 472, 903 P2d 61 (1995)[5], and *Teague v Lane,* 489 US 288, 109 S.Ct. 1060 (1989), which he argues stand for retroactive application of "watershed" rights, or rights that are so fundamental as to be guaranteed and "implicit to the concept of ordered liberty."

Essentially, the "*Teague* doctrine" bars retroactive application, in the collateral attack on a sentence, of any new constitutional rule of criminal procedure which had not been announced at time that the petitioner's conviction became final. The *Teague* court did note two exceptions under which the new rule should be applied retroactively, (1) if it places certain kinds of primary, private individual conduct beyond the power of criminal law-making authority to proscribe, or (2) if it requires observance of those procedures that are "implicit in concept of ordered liberty," which the court further limited to "watershed rules of criminal procedure." 489 US 288, at 307 and 311, 109 S.Ct. 1060. The second exception has been further defined as requiring observance of "watershed

[4] *Ring* has been held to invalidate Idaho's death penalty statute. *State v. Fetterly,* ___ Idaho ____, 52 P.3d 874 (2002).

[5] *Gafford* involves a petitioner who had been committed to a state mental hospital after being acquitted of criminal charges by reason of insanity. Thereafter, his mental condition improved and he contended that he was no longer mentally ill. The Idaho Supreme Court held that the case turned on the prospective application of a new rule of law as opposed to a retroactive application. 127 Idaho 472, at 476. The case did not involve successive post-conviction relief petitions.

rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Tyler v. Cain,* 533 U.S. 656, 665, 121 S.Ct. 2478, 2483 - 2484 (2001).

Obviously, the first exception is inapplicable in the present case. For the second exception to apply to Hoffman's case, the new rule must meet two requirements:

> Infringement of the rule must "**seriously diminish the likelihood of obtaining an accurate conviction,**" and the rule must " ' "alter our understanding of the *bedrock procedural elements* " ' essential to the fairness of a proceeding." *Sawyer v. Smith,* 497 U.S. 227, 242, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990) (quoting *Teague, supra,* at 311, 109 S.Ct. 1060 (plurality opinion), in turn quoting *Mackey v. United States,* 401 U.S. 667, 693, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)).

Tyler v. Cain, 533 U.S. 656, 665, 121 S.Ct. 2478, 2483 - 2484 (2001) (Bold emphasis added).

In *Tyler*, the Court held that a "structural" error, which the court defined as one which "is not amenable to harmless-error analysis and 'will always invalidate the conviction,'" (*Id.* at 665), does not logically dictate the conclusion that the second *Teague* exception has been met. *Id.* at 666-667. The primary issue in that case was whether the Supreme Court's earlier ruling in *Cage v. Louisiana,* 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), (in which the court determined that a jury instruction is unconstitutional if there is a reasonable likelihood that the jury understood the instruction to allow conviction without proof beyond a reasonable doubt), was made retroactive to cases on collateral review by the Supreme Court. The court was quite unequivocal with regard to how and when they determine the retroactive effect of even new substantive rules on collateral review:

> According to Tyler, the reasoning of *Sullivan* demonstrates that the *Cage* rule satisfies both prongs of this *Teague* exception. First, Tyler notes, *Sullivan* repeatedly emphasized that a *Cage* error fundamentally undermines the reliability of a trial's outcome. And second, Tyler contends, the central point of *Sullivan* is that a *Cage* error deprives a defendant of a bedrock element of procedural fairness: the right to have the jury make the determination of guilt beyond a reasonable doubt. Tyler's arguments fail to persuade, however. **The most he can claim is that, based on the principles outlined in *Teague*, this Court *should* make *Cage* retroactive to cases on collateral review. What is clear, however, is that we have not "made" *Cage* retroactive to cases on collateral review.**

Tyler v. Cain, 533 U.S. 656, 665-666, 121 S.Ct. 2478, 2484 (2001) (Emphasis added)[6]

The Court further noted at footnote 7 of the decision:

> As explained above, the second *Teague* exception is available only if the new rule " ' "*alter[s] our understanding* of the bedrock procedural elements" ' essential to the fairness of a proceeding." (Citations omitted) Classifying an error as structural does not necessarily alter our understanding of these bedrock procedural elements. Nor can it be said that all new rules relating to due process (or even the "fundamental requirements of due process," see *post*, at 2489 (dissenting opinion)) alter such understanding. ...
> On the contrary, the second *Teague* exception is reserved only for truly "watershed" rules. ... **As we have recognized, it is unlikely that any of these watershed rules "ha[s] yet to emerge."**

Tyler, 533 U.S. 656, 665-666, 121 S.Ct. 2478, 2484 (2001) (Bold emphasis added)

The U.S. Supreme Court decisions in *Jones v. United States*,[7] 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), *Apprendi v. New Jersey*,[8] 530 US 466, 120 S.Ct. 2348 (2000), and *Ring* mark a shift in the manner in which the courts will view and apply enhanced sentencing factors. Prior to *Ring*, the Idaho statutory scheme was deemed valid, (*See*, *Walton v Arizona*, 497 US 639 (1990)). A trial judge sitting as the trier of fact could make the determination of statutory aggravating factors, and thereby determine whether those factors (what are now deemed additional elements) had been proven beyond a reasonable doubt, and still be well within the confines of both the Idaho Constitution and the Constitution of the United States. Those determinations have

[6] The case also refers to *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

[7] "Under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones v. U.S.*, 526 U.S. 227, fn.6, 243, 119 S.Ct. 1215, 1224 (1999)

[8] "In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: '**[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.**'" *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362 - 2363 (2000) (Emphasis added)

repeatedly been subject to stringent appellate scrutiny by the Idaho Supreme Court and by the federal court system.[9]

After a review of the case law history arising from the Idaho capital punishment scheme, which is largely the same as the Arizona statutory scheme invalidated in *Ring*, this court does not conclude that *Ring* enunciates an exception so fundamental as to "*seriously diminish the likelihood of obtaining an accurate conviction.*" (See *Tyler v. Cain, supra.*)

In the alternative, Hoffman argues that Idaho Code § 19-2719(5), and particularly § 19-2719(5)(c), violate his rights to due process and equal protection guaranteed under the U.S. and Idaho Constitutions. His argument partially stems from his position that *Ring* announces a substantive rule of law that is not contemplated by § 19-2719(5), that the statute's blanket prohibition against retroactive application of new rules of law to cases on collateral review denies him his fundamental right to a jury trial. This argument has been partially addressed elsewhere in this decision,[10] in addition to the following discussion.

While *Apprendi* and *Ring* represent a change in the manner in which the courts will view and apply enhancing sentencing factors, those cases have been determined to

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[9] E.g. State v. Creech, 105 Idaho 362, 670 P.2d 463 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1327, 79 L. Ed. 2d 722 (1984); State v. Sivak, 105 Idaho 900, 674 P.2d 396 (1983), cert. denied, 468 U.S. 1220, 104 S. Ct. 3591, 82 L. Ed. 2d 887 (1984); State v. Aragon, 107 Idaho 358, 690 P.2d 293 (1984); State v. Fetterly, 109 Idaho 766, 710 P.2d 1202 (1985), cert. denied, 479 U.S. 870, 107 S. Ct. 239, 93 L. Ed. 2d 164 (1986); State v. Wood, 132 Idaho 88, 967 P.2d 702 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1768, 143 L. Ed. 2d 798 (1999); State v. Charboneau, 116 Idaho 129, 774 P.2d 299, cert. denied, 493 U.S. 922, 110 S. Ct. 287, 107 L. Ed. 2d 267, , 493 U.S. 923, 110 S. Ct. 290, 107 L. Ed. 2d 270 (1989), overruled on other grounds, State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992); State v. Fields, 127 Idaho 904, 908 P.2d 1211 (1995), cert. denied, 516 U.S. 922, 116 S. Ct. 319, 133 L. Ed. 2d 221 (1995); State v. Pizzuto, 119 Idaho 742, 810 P.2d 680 (1991), cert. denied, 503 U.S. 908, 112 S. Ct. 1268, 117 L. Ed. 2d 495 (1992), overruled on other grounds, State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992); State v. Rhoades, 121 Idaho 63, 822 P.2d 960 (1991), cert. denied, 506 U.S. 1047, 113 S. Ct. 962, 122 L. Ed. 2d 119 (1993); State v. Fain, 119 Idaho 670, 809 P.2d 1149 (1991), cert. denied, 493 U.S. 917, 110 S. Ct. 277, 107 L. Ed. 2d 258 (1989), 504 U.S. 987, 112 S. Ct. 2970, 119 L. Ed. 2d 589 (1992); State v. Beam, 109 Idaho 616, 710 P.2d 526 (1985), cert. denied, 476 U.S. 1153, 106 S. Ct. 2260, 90 L. Ed. 2d 704 (1986); State v. Lankford, 116 Idaho 860, 781 P.2d 197 (1989), cert. denied, 497 U.S. 1032, 110 S. Ct. 3295, 111 L. Ed. 2d 803 (1990); State v. Leavitt, 121 Idaho 4, 822 P.2d 523 (1991), cert. denied, Leavitt v. Idaho, 506 U.S. 972, 113 S. Ct. 460, 121 L. Ed. 2d 368 (1992); State v. Hoffman, 123 Idaho 638, 851 P.2d 934 (1993), cert. denied, 511 U.S. 1012, 114 S. Ct. 1387, 128 L. Ed. 2d 61 (1994).

[10] This issue has partially been addressed in the previous discussion (section 1., above) of the Idaho Supreme Court's constitutional analysis of Idaho Code § 19-2719 prior to the 1995 enactment of § 19-

articulate a new rule of procedural, rather than substantive, law. Prior to the issuance of *Ring*, the U.S. Eleventh Circuit addressed the retroactive effect of *Apprendi* in *McCoy v. U.S.*, 266 F.3d 1245, 1257 -1257 (C.A.11 (Fla.) 2001), in which a defendant, who had been convicted of possession with intent to distribute crack cocaine, moved to vacate, set aside, or to correct the sentence. The court evaluated the case in lieu of *Teague* and held that the new constitutional rule of criminal procedure announced in *Apprendi* does not apply retroactively to cases on collateral review. The court further noted:

> FN16. We reject the concurring opinion's position that the *Apprendi* decision creates a new substantive rule of law. In *Apprendi,* the Supreme Court specifically noted that "[t]he substantive basis for New Jersey's enhancement ... is not at issue; the adequacy of New Jersey's procedure is." 530 U.S. at 475, 120 S.Ct. 2348 (2000). **The application of *Apprendi* merely changes the method or procedure for determining drug quantity and his sentence; it does not make McCoy's conduct not criminal, thereby raising the spectre of actual innocence as the concurring opinion implies. Thus, as other circuits have, we conclude *Apprendi* announced a new rule of criminal procedure.**

McCoy v. U.S., 266 F.3d 1245, 1257 -1257 (C.A.11 (Fla.) 2001) (Emphasis added).

Similarly, in *Cannon v Mullin,* 297 F 3d 989, 994 (10th Cir. 2002), the U.S. Tenth Circuit held that *Ring* enunciates a procedural, rather than a substantive change in the law.

> It is clear, however, that *Ring* is simply an extension of *Apprendi* to the death penalty context. *See Ring* ... 122 S.Ct. at 2432. Accordingly, this court's recent conclusions in *Untied States v. Mora*, 293 F.3d 1213, 2002 WL 1317126, at *4 (10thcir. 2002), that *Apprendi* announced a rule of criminal procedure forecloses Cannon's argument that *Ring* announced a substantive rule.

Cannon v Mullin, 297 F 3d 989, 994 (10th Cir 2002). The court also concluded that "Cannon is simply incorrect in asserting that the combination of *Teague*, *Ring* and the cases in the *Apprendi* line render the rule announced in *Ring* retroactively applicable to cases on collateral review." *Id.* at 992-993.

The Seventh Circuit Court of Appeals was also unable to conclude that *Ring* had retroactive effect, noting:

2719(5)(c) (See *State v. Beam, supra*, and *State v. Rhoades, supra*) and after its adoption (*Creech v. State,*

> After the argument of this appeal, the Supreme Court decided *Ring v. Arizona*, --- U.S. ----, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), holding that capital defendants are entitled to a jury determination of any fact, such as the existence of a mitigating or aggravating factor, that constitutes a legislatively ordained condition of capital punishment. The parties agree that we cannot consider *Ring* in deciding this appeal because the Supreme Court has not yet held it to be retroactive. See *Tyler v. Cain*, 533 U.S. 656, 662-64, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001).

Trueblood v. Davis 301 F.3d 784, 788 (C.A.7 (Ind.) 2002).

Both the *Cannon* and *Trueblood* cases involved petitioners who were convicted in state courts of first-degree murder and sentenced to death, and thereafter sought to challenge their death sentences in federal habeas actions. *Tyler* involved a petitioner who was convicted in state court of second-degree murder and who likewise, sought to challenge the state court conviction and sentence in a federal habeas action. Both *Tyler* and *Cannon* involved federal statutes that require dismissal of successive habeas applications unless "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court."[11]

While Idaho Code § 19-2719(5)(c) does not contain similar language as the federal counterpart applicable in those decisions, the *Tyler*, *McCoy* and *Cannon* cases shed persuasive analysis on the issue of whether this court is in a position to declare that *Ring* has retroactive application to Hoffman's case.

Further, because this court has not determined that *Ring* is retroactive to Hoffman's case, the specific constitutional conflicts of Idaho Code § 19-2719(5)(c) that have been raised by Hoffman need not be determined, as the issue is not dispositive of the case before the court.

D. Hoffman's alternative Rule 35 petition is barred by 19-2719.

Hoffman also raises his claims under Idaho Criminal Rule 35, which states in part:

> The court may correct an illegal sentence at any time and may correct a sentence that has been imposed in an illegal manner within the time provided herein for the reduction of sentence. ...

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supra), and discussed in the *Teague* analysis of retroactive effect, above.

[11] 28 U.S.C. § 2244(b).

However, even if pled as a Rule 35 motion, Hoffman's petition is still barred by 19-2719, which states at § 19-2719(4):

> Any remedy available by post-conviction procedure, habeas corpus or any other provision of state law **must be pursued according to the procedures set forth in this section and within the time limitations of subsection (3) of this section.** ... (Emphasis added)

The "subsection (3)" referred to above is Idaho Code § 19-2719(3), which has been held by the Idaho Supreme Court to require that a Rule 35 challenge of a claimed illegal sentence or conviction must be made within 42 days of the filing of judgment imposing punishment of death. (*State v Beam*, 121 Idaho 862, 828 P.2d 891 (1992), noting that § 19-2719(3) is a substantive rule and governs appeals in death penalty cases.)

In the present case, Hoffman failed to file his successive post conviction claims within the time limits of Idaho Code § 19-2729. Therefore, his Rule 35 motion is barred.

E. Idaho Code § 19-2719 does not unlawfully suspend Hoffman's right to file a writ of habeas corpus.

The Idaho Supreme Court addressed this issue in *McKinney v. State*, 133 Idaho 695, 992 P.2d 144 (1999), in which the petitioner had argued that Idaho Code § 19-2719 effectively suspends the writ of habeas corpus in violation of Article I, § 5 of the Idaho Constitution:

> We reject this argument, affirming the Court of Appeals' analysis of this issue in *Eubank v. State*, 130 Idaho 861, 863-64, 949 P.2d 1068, 1070-71 (Ct. App. 1997). All remedies in capital cases available by writ of habeas corpus or by post-conviction procedure must be pursued according to the procedures and the time limitations of I.C. § 19-2719. I.C. § 19-2719(4). The legislature may pass statutes regulating the use of the writ of habeas corpus. *Mahaffey v. State*, 87 Idaho 228, 231, 392 P.2d 279, 280 (1964). Post-conviction procedure acts have replaced the writ of habeas corpus for the purpose of challenging the validity of a conviction. See *Dionne v. State*, 93 Idaho 235, 237, 459 P.2d 1017, 1019 (1969). The proper use of a petition for post-conviction relief "avoids repetitious and successive applications; eliminates confusion and yet protects the applicant's constitutional rights." Id. Like the UPCPA, I.C. § 19-2719 does not deny the writ of habeas corpus. See id.

McKinney v. State, 133 Idaho 695, 703, 992 P.2d 144, 152 (1999).

Accordingly, Idaho Code § 19-2719 does not unlawfully suspend Hoffman's right to file a writ of habeas corpus.

2. This court is without jurisdiction to hear Hoffman's case as a writ of habeas corpus.

Hoffman has filed his claim in the alternative as a petition for writ of habeas corpus. However, Idaho Code § 19-4202 grants original jurisdiction to consider a writ of habeas corpus in the Idaho Supreme Court or the District Court of the county in which the person is detained.[12] In *Row v. State*, 135 Idaho 573, 21 P.3d 895 (2001), the defendant's petition for habeas corpus relief was dismissed without prejudice because the petitioner failed to file it in the county in which she was being detained. Hoffman is currently being detained at the Idaho Maximum Security Institution in Ada County, Idaho. This court is without jurisdiction to hear his petition for writ of habeas corpus in an Owyhee County proceeding.

Conclusion

Accordingly, the state's motion for summary dismissal of the above-entitled cause is granted.

Dated this 31 day of December, 2002.

Gregory M. Culet
District Judge

[12] 19-4202. Jurisdiction to consider petitions for writ of habeas corpus.
The following courts of this state shall have original jurisdiction to consider a petition for writ of habeas corpus, grant the writ and/or order relief under this chapter:
(1) The supreme court; or
(2) The district court of the county in which the person is detained.

CERTIFICATION OF MAILING

I hereby certify that copies of the foregoing document were forwarded to the following persons on the 2nd day of ~~December~~ Jan., 2003, ~~2002~~:

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ZANE FIELDS, **Petitioner,**	**Case Nos. SPOT02-00711D**
v	**PETITIONER'S SUPPLEMENTAL AUTHORITY IN SUPPORT OF PETITION FOR POST-CONVICTION RELIEF**
STATE OF IDAHO, **Respondent.**	

In support of his above-captioned Petition For Post-Conviction Relief And/Or Writ Of Habeas Corpus, Petitioner submits a recent decision by the Hon. John Bradbury of the Second Judicial District, Lewis County, *Porter v. State*, Nos. Sp-02-041 & 6053, slip op. (Memorandum Decision, April 2, 2003), a copy of which is attached. Petitioner incorporates herein the legal arguments and authority relied upon in said Memorandum Decision.

Dated this 10th day of April, 2003.

Respectfully submitted,

Joan M. Fisher

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of April, 2003, I caused to be served a true and correct copy of the foregoing document by the method indicated below, first class postage prepaid where applicable, addressed to:

Roger Bourne
Deputy Prosecuting Attorney
200 W. Front St., Room 3191
Boise ID 83720

✓ U.S. Mail
____ Hand Delivery
____ Facsimile
____ Federal Express

Joan M. Fisher

Porter v. State
Case Nos. SP-02-041 & 6053
Memorandum Decision
April 2, 2003

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LEWIS

GEORGE JUNIOR PORTER, Petitioner, v. STATE OF IDAHO, Respondent.	Case No. SP-02-041 Case No. 6053 MEMORANDUM DECISION

I. INTRODUCTION

George Junior Porter filed a Petition for Post Conviction Relief and/or Writ of Habeas Corpus (Lewis County Case No. SP-02-041) and a Motion to Correct Illegal Sentence, To Vacate Sentence of Death and for New Sentencing Trial (Lewis County Case No. 6053).[1] The State responded by filing a Motion for Summary Dismissal. The issues have been joined and both Porter's petition and the State's motion are now before me for decision.

It is important at the outset to understand what Porter's petition does not involve. It does not involve whether or not he was guilty of first-degree murder. A jury of his peers decided beyond a reasonable doubt that he was. Verdict, filed

[1] Porter's petition and motion are referred to as the petition unless individually identified.

January 26, 1990. Nor does it involve whether the trial for first-degree murder was fair. The Idaho Supreme Court has decided it was. *Porter v. State of Idaho,* 130 Idaho 772, 948 P.2d 127 (1997) *reh'g. denied* Dec. 12, 1997, *cert. denied* 523 U.S. 1126, 118 S.Ct. 1813 (May 18, 1998)(*Porter I*). Nor does it involve whether there is a right for a person accused of capital murder to have a jury rather than a judge decide the facts that justify a death sentence. The United States Supreme Court has decided there is. *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428 (2002).

II. THE ISSUE

The question presented for decision is whether the right to have a jury decide the factors that justify a death sentence applies retroactively to Porter. If it does, I am obliged to vacate his death sentence and resentence him. If it does not, then Porter's death sentence will stand.

III. PROCEDURAL HISTORY

The State of Idaho charged that Porter murdered Theresa Jones at Kamiah on December 21, 1988. The information charging Porter with first-degree murder did not list as elements of the crime the aggravating factors specified in Idaho Code § 19-2515 that warrant the death penalty. Criminal Information, filed July 13, 1989; Amended Criminal Information, filed September 21, 1989.

Nor did the instructions to the jury at trial defining first-degree murder include the aggravating factors as elements of the crime. Porter was neither charged nor tried for the crime of capital murder. Instead the jury was instructed that it was not to concern itself with the penalty.

> The jury has nothing whatever to do with the penalty which may be inflicted in this case if conviction is had. The province of the jury is simply to determine the facts. The penalty is for the Court to determine.

Jury Instructions Given by the Court, filed January 26, 1990.

Based on the evidence and those instructions, the jury convicted Porter of first-degree murder. Verdict, filed January 26, 1990. The State then notified the defendant it would seek the death penalty. Notice of Intent to Seek the Death Penalty, filed February 1, 1990. The State presented evidence of aggravating factors to the district judge at a sentencing hearing. Court Minutes, June 15, 1990, June 29, 1990. That evidence, if established beyond a reasonable doubt and found by the judge to outweigh the mitigating factors, permitted him to impose the death penalty. Idaho Code § 19-2515. Porter did not ask the judge to include the aggravating factors as elements of the crime in his instructions to the jury or to involve the jury in the penalty phase of the proceedings.

The district judge found the State established beyond a reasonable doubt that the murder manifested exceptional depravity, that Porter probably would be a continuing threat to society, and that the murder was of an actual or potential witness in a criminal proceeding. Findings of the Court in Considering the Death Penalty Pursuant to the Provisions of Idaho Code Section 19-2515(e), filed September 7, 1990. The procedure followed by the trial judge comported with supreme court precedent and I.C. § 19-2515(e). After weighing the aggravating factors against the mitigating factors and based on his findings, the district judge imposed the death penalty. Judgment and Sentence, filed September 7, 1990. Porter then appealed his conviction and death sentence to the Idaho Supreme Court. Notice of Appeal, filed September 30, 1990.

Porter next filed a series of post-conviction relief petitions. On November 28, 1994, more than four years after the judgment of conviction and the death sentence had been filed, Porter first broached the issue of the constitutionality of

the sentencing procedure. He contended the failure of the State to implement the Idaho Constitution and laws requiring "a jury to determine all questions of fact and the ultimate punishment of life or death deprived the Petitioner of his guarantees to equal protection as engendered by the United States Constitution." Second Amended Petition for Post-Conviction Relief, filed November 28, 1994, at 15. The district judge denied the petitions.

On appeal, the Idaho Supreme Court upheld Porter's conviction and death sentence. It concluded the record did not support the district court's finding that an actual or potential witness had been murdered. It also held the Federal and Idaho Constitutions did not require the jury to decide the aggravating factors:

> The United States Supreme Court has concluded definitively that the federal constitution does not require a jury determination of aggravating circumstances. *Spaziano v. Florida*, 468 U.S. 447, 460, 104 S.Ct. 3154, 3162, 82 L.Ed.2d 340 (1984). Additionally, this Court consistently has rejected arguments similar to Porter's and has upheld judicial determination of aggravating circumstances, as consistent with the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article I, Section 7 of the Idaho Constitution. (Citations omitted.)

Porter v. State, 130 Idaho at 795-96.

At the time of the trial and sentencing, the Idaho Supreme Court had repeatedly held that the death penalty phase of a capital murder trial was appropriately decided by a judge and that excluding the jury from that process did not offend the Sixth Amendment right to a jury trial. See, e.g., *State v. Creech*, 105 Idaho 362, 670 P.2d 463, (1983); *State v. Sivak*, 112 Idaho 197, 731 P.2d 192 (1987); *State v. Fain*, 116 Idaho 82, 774 P.2d 252 (1989); *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299 (1989).

Following the Idaho Supreme Court decision on the appeal, the district judge issued a death warrant commanding the warden to put Porter to death. Death Warrant, filed January 12, 1998. The execution was scheduled for February 4, 1998. Supreme Court Justice Sandra Day O'Connor stayed Porter's execution on January 23, 1998, pending Porter's petition for certiorari to the United States Supreme Court. Order, filed January 29, 1998. Upon denial of the certiorari petition, the district judge issued a new death warrant. Death Warrant, filed May 29, 1998.

Porter filed a successive post-conviction petition; the State moved for summary dismissal; the district judge granted the motion; and the supreme court dismissed the appeal. *Porter v. State*, 136 Idaho 257, 32 P.3d 151 (2001) (*Porter II*).

Porter's current petition seeks retroactive relief from his death sentence pursuant to the United States Supreme Court's decision in *Ring*. The *Ring* court held that aggravating factors which an Arizona trial judge had found justified the death penalty in connections with a first-degree murder conviction, were elements of the crime of capital murder. Since the Sixth Amendment right to a jury trial contemplates a jury, not a judge, decide all the factual elements of a crime, the Court concluded the death sentence violated Ring's right to a jury trial. *Ring*, 122 S.Ct. at 2443

On August 27, 2002, the State moved for summary dismissal of the petition. I am now called on to decide Porter's petition for relief and the State's motion for summary dismissal.

IV. DEATH PENALTY JURISPRUDENCE

Because the conclusion I reach depends largely on the nature and role of the jury in American criminal jurisprudence, a brief history of the jury's evolution is helpful.

By the middle of the thirteenth century the jury had become the body that determined the facts in English criminal cases. *See,* Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to a Jury Trial,* 65 NOTRE DAME L. REV. 1, 6 (1989). In their early role jurors were persons who had personal knowledge of the facts. The judge's role was to tell the jury what crime the law ascribed to the facts and the jury had found to exist. *Id.*

The jury, with its unfettered role as the factfinder, became the buffer between an overreaching and harsh sovereign and the subjects whom the sovereign accused of wrongdoing. Jurors used their factfinding power to nullify or reduce the charges by what they found the facts to be. By that means the jury could refuse to impose the penalty that the sovereign was trying to exact. *Id.* at 7.

During the sixteenth and seventeenth centuries jurors became limited to considering only evidence presented to them during a trial. Despite threats and pressure by Crown-appointed judges to accommodate the Crown's wishes, the jury resisted intrusions on its independence and role in criminal cases. *Id.* at 7 - 11. The turning point in jury independence occurred in *Bushell's Case,* which held a judge could not impose fines or imprisonment on jurors whose verdict he disliked. *Id.* at 9 (citing *Case of the Imprisonment of Edward Bushell,* 6 Howell's State Trials 999, 1010, 124 Eng.Rep. 1006, 1012 (1670)). The rationale was that since the decision of what the facts were was the sole province of the jurors, the

judge, as a matter of definition, could not conclude the verdict was contrary to the law. Rather, the legal penalty had to comport with the facts the jury found. *Id.*

The American colonists were keenly aware of the vital role a jury played in protecting the king's subjects from his arbitrary whims. In 1735, John Peter Zenger published the *New York Weekly Journal* in New York City. The Crown charged Zenger with the crime of sedition by "printing and publishing a false, scandalous and seditious libel in which His Excellency, the Governor who is the king's immediate representative here, is greatly and unjustly scandalized as a person that has no regard to law or justice." V. Buranelli, *The Trial of Peter Zenger*, 94 (1957); 17 Howell's State Trials 675 (1735).

Andrew Hamilton, Zenger's lawyer, admitted Zenger had published the issues of the *Journal* the governor found offensive. The Crown argued the sedition statute required the jury to return a guilty verdict. The judge agreed and prohibited Hamilton from presenting evidence that what Zenger had said was true. But Hamilton argued to the jurors that they were "witnesses to the truth of the facts we have offered, and are denied the liberty to prove." Buranelli at 112. The jury acquitted Zenger "in a small time." Buranelli at 132.

The tension between the prerogatives of the sovereign and the rights of the governed could not have been more pronounced. The jury, and the jury alone, decided Zenger would be free, the truth would be known, and the governor's prerogatives would be banished from the courtroom.

By the time of the American Revolution, in the colonies, as in England, the jury's role in criminal cases was secure. The jury had become an especially

important buffer between the sovereign and the governed because many crimes were punishable by death. White, at 9 – 11.

When a person was charged with a crime he or she knew exactly what the penalty would be if they were convicted as charged. The judge's role was not discretionary; he administratively imposed the penalty the statute prescribed for the offense the jury found had been committed. If the jury found a lesser offense had been committed, the judge, again, was limited to imposing the sentence prescribed for that offense, rather than the offense that had been charged. *Apprendi v. New Jersey*, 530 U.S. 466, 478-80 (2000), (citing 4 Blackstone, Commentaries on the Laws of England, 368-70 (Cooley ed. 1899)).

Our Declaration of Independence complained of the king "depriving us in many cases, of the benefits of Trial by Jury. . ." Alexander Hamilton authored the pamphlet supporting the right to a jury during the Federalist Papers campaign to persuade the colonies to approve the new constitution.

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any vast difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.

THE FEDERALIST NO. 83 (Alexander Hamilton).

It is little wonder, therefore, that when the hot-headed revolutionaries who put their lives, fortunes and sacred honor at risk during our war of independence became the sedate and somber founding fathers we now revere, that they included the right to a jury trial in both the Constitution and Bill of Rights.

The Constitution provides, "[t]he Trial of all Crimes, except in cases of impeachment, shall be by Jury . . ." U.S. CONST. art. III, § 2, cl. 3. The Sixth Amendment stipulates that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend VI.

As the Nation matured, legislation gave judges more discretion in sentencing by establishing a range of punishments for specified crimes. When it came to the death penalty, however, juror discretion led to its arbitrary application. For the same crime some died, others lived. The poor and minorities fared worse for the same offense. This disparity became so pronounced that in 1972 the United States Supreme Court declared that the death penalty, as applied, violated the cruel and unusual punishment prohibition of the Eighth Amendment. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972). Justice Potter Stewart concurred in the decision, saying, "I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." 408 U.S. at 310, 92 S.Ct. at 2763.

Following *Furman*, the states that wanted to retain the death penalty redrafted their statutes to ensure a more objective and uniform application of the penalty. Those states established aggravating factors, which, if proven to outweigh mitigating factors, would justify the death sentence. Most of the states left the determination of those factors to the jury. Idaho, together with Arizona,

Colorado, Montana , and Nebraska, assigned that role to the judge.[2] *See,* John W. Poulos, *Liability Rules, Sentencing Factors, and Sixth Amendment Right to a Jury Trial: A Preliminary Inquiry,* 44 U. MIAMI L. REV. 643, 657-60 (1990).

During the last eighteen years the United States Supreme Court struggled with the issue of whether the aggravating factors were part of the penalty procedure to be decided by a judge or whether they were elements of the crime itself to be decided by the jury. *Spaziano v. Florida,* 468 U.S. at 459 ("The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue [death penalty sentence]."); *Walton v. Arizona,* 497 U.S. 639, 110 S.Ct. 3047 (1990) (aggravating factors properly assist the sentencing judge); *Almendarez-Torres v. United States,* 523 U.S. 224, 118 S.Ct. 1219 (1998) (sometimes the aggravating factors are elements of the crime); *Jones v. United States,* 526 U.S. 227, 120 S.Ct. 2348 (1999) (interpreted statute so that the aggravating factors were elements of the crime); *Apprendi v. New Jersey,* 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

V. *RING v. ARIZONA*

The Supreme Court resolved this urgent question for capital cases in *Ring v. Arizona,* 122 S.Ct. at 2443. It concluded that any fact that increased a penalty is an element of the crime and must be proven to a jury beyond a reasonable doubt. It held that allowing a judge to determine if the death penalty should be imposed infringed on an accused's Sixth Amendment right to a jury trial.

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[2] IDAHO CODE § 19-2515; ARIZ. REV. STAT. § 13-703; COLO. REV. STAT. § 18-1.3-1201/ §16-11-103 (2001); MONT.CODE.ANN. § 46-18-301; NEB.REV.STAT. § 29-2520.

> Because Arizona's enumerated aggravating circumstances operate as "the functional equivalent of an element of a greater offense," *Apprendi*, 530 U.S., at 494, n. 19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury.
>
> * * *
>
> "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. . . . If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it." *Duncan v. Louisiana*, 391 U.S. 145, 155-156, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

Id. The flawed Arizona sentencing procedure in *Ring* is virtually identical to Idaho's. The Idaho Supreme Court followed *Ring's* mandate in *State v. Fetterly*, 137 Idaho 729, 52 P.3d 874 (2002).

VI. IS PORTER'S CLAIM FOR RELIEF WAIVED?

The State first asserts that Porter did not comply with the Act's provision that post-conviction claims for relief that were "known, or reasonably should have been known" are deemed waived unless filed within forty-two days of the "filing of the judgment imposing the judgment of death and before the death warrant is filed. . . ." I.C. § 19-2719(3).

Porter did not directly raise the issue of whether all the elements of a capital case should be tried only to a jury in his 1984 post-conviction relief petition. He did argue that trying all elements of all crimes to a jury except a capital crime offended the Equal Protection Clause. Second Amended Petition for Post-Conviction Relief, filed November 28, 1994.

The State nonetheless argues that Porter reasonably should have known about the claim within forty-two days of the judgment imposing the death sentence which was filed on September 7, 1990. Brief in Support of Motion for Summary Dismissal, at 6-7, 11-13. Since Porter did not file any "legal challenge

to the sentence or conviction," (I.C. § 19-2719 (3)), within forty-two days, the State argues he is "deemed to have waived" it by virtue of I.C. § 19-2719 (5). Brief in Support of Motion for Summary Dismissal, at 11-13.

Porter responds that he could not have raised the *Ring* decision within the forty-two day limit because it was not decided until twelve years later. He contends he diligently complied with the Act by bringing his petition within forty-two days of the *Ring* decision. Petitioner's Response to Motion for Summary Dismissal of Rule 35 Motion at 2.

When Porter was convicted the United States Supreme Court had held that judges could decide the aggravating factors necessary to justify the imposition of the death penalty. *Walton v. Arizona*, 497 U.S. at 649; *see, Spaziano v. Florida*, 468 U.S. at 459. The Idaho Supreme Court had specifically held that the U.S. and Idaho Constitutions permitted a judge to decide whether the death penalty should be imposed. *State v. Creech*, 105 Idaho at 367, 670 P.2d at 468 ("We hold that there is no federal constitutional requirement of jury participation in the sentencing process and that the decision to have jury participation in the sentencing process, as contrasted with the judicial discretion sentencing, is within the policy determination of the individual states."); *State v. Sivak*, 106 Idaho at 902-903. There was no reason *at that time* to think that either of those courts would reverse itself.

The only decision during that time that upheld an accused's right to have a jury decide all the elements of capital murder was *Adamson v. Rickets*, 865 F.2d 1011 (9th Cir. 1988). The Idaho Supreme Court specifically rejected *Adamson* in *State v. Charboneau*, 116 Idaho at 146, 774 P.2d at 317. It said:

> To accept [Appellant's] argument that the jury must be involved in determining whether aggravating circumstances exist, we would have to conclude that the aggravating circumstances listed in I.C. § 19-2515(g) are elements of first degree murder. We are unable to reach that conclusion. The circumstances listed in the statute are clearly circumstances to be considered in sentencing and not elements of first degree murder. It is not unconstitutional for a judge, instead of a jury, to determine whether any of the aggravating circumstances listed in the statute exist.
>
> Our opinion in this aspect of the case is not changed by the decision of the Ninth Circuit in *Adamson v. Rickets*, 865 F. 2d 1011(9th Cir. 1988). In *Adamson* the Ninth Circuit held Arizona's death penalty sentencing statutes to be in violation of the Sixth Amendment. During reargument of this case to determine what impact *Adamson* might have on our opinion here, the solicitor general for the state of Idaho acknowledged that there is no significant difference between the Arizona death penalty sentencing statutes and those of Idaho. Nevertheless, we are not convinced that Adamson correctly states the requirements of the Sixth Amendment on this issue.

The undeniable fact is, as a matter of adjudicated law in Idaho, and in the United States, there did not exist a credible claim for relief based on the assertion that the judge rather than the jury decided whether a person convicted of first-degree murder lived or died. That issue had been definitively decided. *Walton*, 497 U.S. at 649; *Creech*, 105 Idaho at 367; *Charboneau*, 116 Idaho at 146. The Idaho Supreme Court demonstrated the transparent futility of such a claim when it peremptorily dismissed Porter's constitutional appeal on that issue in a single paragraph without dissent. *State v. Porter*, 130 Idaho at 795-796, 948 P.2d 150-151(quoted *supra* at 4).

The Act does not say that any issue which might conceivably have been raised, even if contrary to all appellate precedent, must be raised within the forty-two day time frame or be forever barred. Rather, it deems waived "such

claims for relief as known, or reasonably should have been known" (emphasis added). I.C. § 19-2719 (3).

A claim for relief by definition is a claim based on a principle of law or a constitutional right that entitles a petitioner to a change in his or her legal status. Porter's *status quo* is that of a person convicted of first-degree murder against whom a warrant of death has been issued. The relief he seeks is to have the death warrant vacated. The predicate for his petition is that the aggravating factors which resulted in the warrant were decided by a judge instead of a jury. The right to have a jury decide those factors did not exist in a capital case until July 24, 2002, the date *Ring* was decided.

The State contends that even though both the Nation's highest court and Idaho's highest court had decided that the judges' imposition of the death penalty passed constitutional muster, Porter was nonetheless obliged to raise that issue within the forty-two day filing limit prescribed by I.C. § 19-2719. It argues that Ring himself raised that issue as a basis for a favorable ruling on his behalf and no less should be expected of Porter.

I am unpersuaded. At the time Porter was sentenced, *Walton* and *Spaziano* were the only United States Supreme Court decisions on the jury-death sentence horizon. When Ring was sentenced by the trial judge in 1997 (*Ring*, 122 S.Ct. at 2435), the legal landscape was significantly altered. The Court had expressly held that all the elements of a crime must be tried to a jury in *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604 (1998) and *United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310, 2320 (1995), which put the constitutional moorings of *Walton* on very shaky footings.

The issue Porter raised in his 1994 petition for post-conviction relief and on his appeal to the Idaho Supreme Court met with the predictable adverse result. *Porter I*, 130 Idaho at 795-796, 948 P.2d at 150-151. I conclude for one to have reason to know there is a claim for relief there must be at least *some credible authority* to support it. In Idaho at the time Porter was sentenced to death there was none. The judge's role in deciding whether a person who had committed first-degree murder lived or died had the imprimatur of the only two supreme courts from which Porter could seek relief.

VII. DOES THE ACT'S BAR TO RETROACTIVE EFFECT APPLY?

The State next argues the application of *Ring* to Porter is precluded by the Act because it provides that a pleading asserting an exception to the forty-two day time limit for filing a claim for relief "shall be deemed facially insufficient to the extent it seeks retroactive application of new rules of law." I.C. § 19-2719(5)(c).

The right to have all the elements of a capital case tried to a jury is not of recent vintage. As discussed above, until the various states tried to cope with the *Furman* decision finding the death penalty unconstitutional, that right had never been questioned. It was only after Idaho and four other states relegated that duty to a judge that any question about the jury's role arose. *Spaziano* validated the aberrant approach in 1984, *Walton* confirmed it in 1990, and *Ring* ended it in 2002.

Having a jury try all the elements of a crime was not a *new* rule of law. *See, e.g., In Re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

It was not *the* rule of law, however, during the time Porter was prosecuted and sentenced to death. The Idaho Supreme Court acknowledged as much in *State v. Creech*, 105 Idaho at 372-373, 670 P.2d 473-474, when it said, "At other places or at other times, juries have been given an integral role in imposing the death sentence. However, we hold that jury participation in the sentencing process is not constitutionally required."

Even if *Ring* had announced a new rule of law, the Act's ban on its retroactive effect would not apply to Porter. The Act was amended in 1995 to include subsection (5)(c). The first inquiry, therefore, is whether its constraints against retroactivity apply to Porter, whose conviction and death penalty preceded the date of the amendment's enactment. The statute itself makes no provision for its retroactive effect. Idaho Code § 73-101 instructs that "[n]o part of these compiled laws is retroactive, unless so declared." The Idaho Supreme Court has decided the statute means what it says. *Nebeker v. Piper Aircraft Corporation*, 113 Idaho 609, 614, 747 P.2d 18, 23(1987). I conclude, therefore, that Idaho Code § 19-2719(5)(c) has no retroactive effect in this case.

VIII. DOES *RING* APPLY RETROACTIVELY TO PORTER?

The next inquiry and the gravamen of Porter's petition is whether *Ring* applies retroactively to his death sentence.

The State argues that a new criminal procedural rule is not retroactive, citing *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989), and that finality of death sentences preceding *Ring* is essential, because "[t]o require the application of *Ring* to those cases and potentially force the resentencing of every capital defendant would seriously undermine any deterrent effect associated with the death penalty." Reply Brief In Support of Motion For Summary Dismissal at 4-7.

Porter argues *Ring* defines a substantive rule, citing *Bousley*, 523 U.S. at 620. He contends the *Teague* ban on retroactivity only applies to procedural rules of law and that *Ring* involves a substantive right that is within the "concept of ordered liberty," citing *Davis v. United States*, 417 U.S. 333 (1974). Petitioner's Response to Motion for Summary Dismissal at 16-22.

The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896 (1975); *see also, Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976). Porter's petition does not question the fairness of his trial for first degree murder. It does question the fairness of a trial for first-degree murder that results in a sentence for the crime of capital murder. Stated another way, he contends it is fundamentally unfair to sentence him for a crime for which he has not been convicted by a jury.

The history and role of the jury in Anglo-American jurisprudence is pivotal to my decision. In my judgment the jury is the single-most vital guarantor of our democratic form of government. Legislators can legislate, executives can execute and judges can adjudicate, but, as Peter Zenger discovered 265 years ago, it is ultimately a jury that protects our individual liberties as citizens from their overreaching. There is a very simple reason for that.

Twelve persons who are governed by the sovereign sit in judgment of the charges against the accused brought by the sovereign that governs them. Their life experiences, common sense, and collective wisdom buffer the unsavory traits that power and ambition often foster in those who govern. The fact that all twelve jurors must agree that the state has made its case beyond a reasonable doubt tempers any arbitrary or subjective approach that any one individual

might indulge, which is the peril of having just one person make a decision as fateful as life and death.

The United States Supreme Court acknowledged the jury's role when it held that "the right to a jury trial in serious criminal cases is a fundamental right and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisprudence." *Duncan v. Louisiana*, 391 U.S. 145, 154, 88 S.Ct. 1444, 1450 (1968).

Both the United States Supreme Court in *Teague*, 489 U.S. at 305-311, 109 S.Ct. at 1072-1075, and the Idaho Supreme Court in *In the Matter of Gafford*, 127 Idaho 472, 476, 903 P.2d 61, 65 (1995) carve out an exception to the general rule that new constitutional rules are not retroactive if the rule is "implicit in the concept of ordered liberty." If a right to a jury trial is a "fundamental right" and an essential element of due process, as the *Duncan* Court has held it is, then, by definition it is implicit in the concept of ordered liberty.

The State's reliance on *Fetterly v. State*, 121 Idaho 417 (1992) and *Griffith v. Kentucky*, 479 U.S. 314 (1987) is misplaced. There the courts assumed the new constitutional rules under review were procedural. Both decisions preceded *Teague* and *Gafford*. The *Teague* distinction between a procedural rule and fundamental right is now dispositive regarding retroactivity.

In that vein, the State argues that *Ring* just establishes a new procedural rule for trying capital cases and therefore is not retroactive under *Teague*. I disagree. In *Bousley* the Supreme Court held that the actual use of a weapon rather than its mere possession was a necessary element of the crime of "knowingly and intentionally [using] . . . firearms during and in relation to a drug trafficking crime." 523 U.S. at 616. Because the existence or absence of

actually using a weapon determined guilt or innocence of the crime, the decision establishing that distinction was considered substantive, and therefore retroactive. *Bousley*, 523 U.S. at 620.

The Court in *Bousley* reached that conclusion because of the "significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" (quoting *Davis v. United States*, 417 U.S. at 346), 523 U.S. at 620. Here Porter stands sentenced to death for capital murder, which the Idaho legislature had not made a crime and which was not submitted to the jury for its decision.

In sum, Porter has been sentenced to die for a crime for which a jury has not convicted him. His circumstance is indistinguishable in principle from *Bousley*. In *Bousley* the factual question was whether the weapon was being used while drugs were being trafficked. 523 U.S. at 620. In *Ring*, it was whether an aggravating factor existed when the murder was committed. 122 S.Ct. at 2434-37.

The flaw in the Arizona and Idaho statutes was that the judge was entitled to decide the aggravating factors precisely because that determination was erroneously considered to be procedural. The teaching of *Ring* is that the factors that decide life and death are substantive elements of the crime itself, not simply a procedural protocol to be wrapped up by a judge at the end of the trial.

At its core, the right to a jury trial is the right of all citizens to have the State's criminal charges against them decided by their fellow citizens, rather than by a judge who is employed by the same State that has brought the charges. There can be no more fundamental and substantive right in a free society than to have one's liberty decided by one's peers. Permitting a judge to decide the facts that determine whether a murder is capital murder subverts the very essence of the right to a jury trial. Even worse, it embraces the peril of an arbitrary judge

that the jury has to steadfastly vanquished in criminal trials during the past eight hundred years of Anglo-American jurisprudence.

Porter was sentenced to death for a crime that the jury had not found he committed, capital first-degree murder. That crime had additional factual elements the jury was not permitted to decide. I conclude, therefore, that sentencing Porter to death for a crime for which the jury did not convict him denied him his Sixth Amendment right to a jury trial and the process he was due by virtue of the Fourteenth Amendment.

The remedy for that wrong is prescribed by precedent. When a person has been convicted for a crime based on an instruction that omitted an essential element of that crime, the person can be sentenced only for the crime which the instructions defined. *State v. Jeppesen*, 138 Idaho 71, 76, 57 P.3d 782, 787 (2002); *State v. Nunez*, 133 Idaho 13, 19-20, 981 P.2d 738, 744-45 (1999). That principle is no less applicable here. Since Porter was convicted by the jury on only those elements which define first-degree murder, I conclude that it the only crime for which he can be sentenced. *Id.*

IX. ORDER

1. The State's Motion for Summary Dismissal is denied;

2. Porter's Petition for Post-Conviction Relief and/or Writ of Habeas Corpus (Lewis County Case No. 02-041) is granted;

3. Porter's Motion to Correct Illegal Sentence, to Vacate Sentence of Death and for New Sentencing Trial (Lewis County Case No. 6053) is denied without prejudice as moot;[3]

4. The Verdict, filed January 26, 1990, finding Porter guilty of first-degree murder shall stand;

5. The district court's order and judgment that Porter is "guilty of the CRIME OF MURDER IN THE FIRST DEGREE as charged in said information as found by the jury in their unanimous verdict" contained in the Judgment and Sentence, filed September 7, 1990 shall stand;

6. The district court's order, judgment and decree that Porter is "sentenced to suffer the punishment of death in accordance with the provisions of Idaho Code Section 18-4004 and in the manner prescribed by Chapter 27 of Title 19, Idaho Code, at the Idaho State Penitentiary in Boise, Ada County, Idaho" contained in the Judgment and Sentence, filed September 7, 1990 is hereby vacated;

7. A new date will be set to sentence Porter for first-degree murder, the only crime of which he now stands convicted by a jury of his peers.

IT IS SO ORDERED this 2 day of April, 2003.

John Bradbury
District Judge

[3] Although I have serious reservations about this court's jurisdiction to impose the death penalty in this case, Hays v. State, 113 Idaho 736, 739, 747 P.2d 758 (Ct.App. 1987) ("A jurisdictional defect exists when the alleged facts are not made criminal by statute, or where there is a failure to state facts essential to establish the offense charged"), because I conclude I.C. § 19-2719 does not bar Porter's petition for relief, I do not reach those issues raised by his Rule 35 motion.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above Memorandum Decision was delivered to the following persons by the manner indicated.

L. LaMont Anderson Office of the Attorney General Capital Litigation Unit P.O. Box 83720 Boise, Idaho 83720-0010	[X] U.S. Mail [ ] Overnight Mail [ ] Fax [ ] Hand Delivery
Kimron R. Torgerson Prosecuting Attorney Lewis County Courthouse Nezperce, Idaho 83543	[ ] U.S. Mail [ ] Overnight Mail [ ] Fax [X] Hand Delivery
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Dated this 3rd day of April, 2003

Jay Miller
Deputy Clerk

JOAN M. FISHER
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ZANE JACK FIELDS, **Petitioner,**	**Case No. SPOT 0200711D**
v	**REPLY TO STATE'S RESPONSE TO PETITIONER'S BRIEF IN OPPOSITION TO STATE'S MOTION FOR SUMMARY DISMISSAL**
STATE OF IDAHO, **Respondent.**	

Zane Jack Fields ("Petitioner"), through counsel, files this Reply to State's Response to Petitioner's Brief in Opposition to State's Motion for Summary Dismissal, dated January 15, 2003 [hereinafter "Response"]. For the reasons set forth below Respondent's motion to summarily dismiss Mr. Fields' Petition for Post-Conviction Petition should be denied.

I.

ARGUMENT

A. AEDPA's Successive Petition Requirements Do Not Apply to These Proceedings.

The State's first argument is that because the United States Supreme Court has not yet made *Ring v. Arizona* retroactive, this Court cannot do so. Response at 2. The argument relies in whole upon the State's fundamental misunderstanding of the Supreme Court's decision in

Tyler v. Cain, 533 U.S. 656 (2001). The principles of retroactivity under *Teague v. Lane,* 489 U.S. 288 (1989) must not be confused with the Anti-Terrorism and Effective Death Penalty Act ["AEDPA"]'s requirement for successor petitions, in which claims must rely on a previously unavailable "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2244(b)(2)(A).

The State thus misapprehends *Tyler* when it asserts "the Tyler court held that a new rule is not retroactive unless the Supreme Court specifically held that it was to be retroactive at the time the decision was made or unless some subsequent case or a series of cases specifically makes it retroactive." Response at 7. In fact, *Tyler v. Cain*, has no impact on the question of retroactivity before this Court. In *Tyler,* the United States Supreme Court held that 28 U.S.C. § 2244(b)(2)(A) did not incorporate the *Teague* standard but that in order for a new rule of constitutional law to be made retroactive to cases on collateral review, the Supreme Court must expressly hold it to apply retroactively. 533 U.S. at 664-667. 28 U.S. C. §2244(b)(2)(A) is a subsection of the federal statute regulating and limiting the federal courts power to grant relief in successive habeas proceedings. It has no applicability or enforceability in the context of these state proceedings. Thus, the thrust of the State's reliance thereon is seriously misplaced.

This misunderstanding of federal proceedings and the Supreme Court's rulings thereon is muddled further by the State's argument that the Supreme Court rejected an argument in *Tyler* "that the Cage rule should be retroactive under a *Teague v. Lane"* and thus, "held that Cage was not retroactive to Tyler." Response at 6. Indeed, the United States Supreme Court expressly stated that "[t]he most [Tyler] can claim is that, based on the principles outlined in *Teague,* this Court *should* make *Cage* retroactive to cases on collateral review. What is clear, however, is

that we have not 'made' *Cage* retroactive to cases on collateral review." *Tyler v. Cain*, 533 U.S. at 666. The question of whether or not *Cage* will be retroactively applied was not answered in *Tyler*– the only question the Court answered was whether at the time Tyler sought to file a successive petition for habeas corpus the *Cage* rule had been "made retroactive to cases on collateral review by the Supreme Court" for purposes of § 2244(b)(2)(A). They held it had not. 533 U.S. at 664.

Similarly, the State relies on a Tenth Circuit Court of Appeals' case, *Cannon v. Mullen* 297 F. 3d 989 (10th Cir. 2002). The State erroneously asserts that *Cannon* "specifically held that the *Ring* decision is not retroactive." Response at 10. *Cannon* did not so hold. *Cannon*, like *Tyler* and in reliance thereon, was held to be procedurally barred from proceeding in federal court on a successive habeas petition under 28 U.S.C. 2244(b)(2)(A). 297 F. 3d at 994. The Court held only that "Cannon has failed to make a *prima facie* showing that the Supreme Court has made *Ring* retroactively applicable to cases on collateral review" and denied his application for permission to file a second habeas petition. 297 F. 3d at 995. The analysis of whether *Ring* ought to be applied retroactively under *Teague v. Lane* is dicta and presented in a case in procedural posture of Cannon has no relevance to the issues at hand. As such, cases like *Tyler v. Cain*, 533 U.S. 656 (2001), and *Cannon* are easily distinguishable from the requirements imposed on Mr. Fields under *Teague* in these state proceedings.

B. The "Rule of *Ring*" is Retroactive Under *Bousley v. United States.*

The State next argues that *Ring* is not retroactive under *Teague v. Lane*. Response at 6. The argument fails for several reasons. Initially, this argument relies again on *Tyler v. Cain* in its effort to explain the substantive holding of *Teague*. Response at 6-10. To the extent the State's

argument relies on *Tyler*, an AEDPA case, to support its argument on *Teague*, the reliance is misplaced. As noted by the United States Supreme Court itself, "if our post-AEDPA cases suggest anything about AEDPA's relationship to *Teague,* it is that the AEDPA and *Teague* inquiries are distinct." *Horn v. Banks*, 536 U.S. 266 (2002).

Similarly, the State's summary rejection of the argument by Petitioner that *Teague* does not apply because *Ring* establishes a new rule, if it is new, of ***substantive*** criminal law rather than procedure is based on a faulty understanding of *Teague* and *Ring*. Response at 12. What is perhaps most misunderstood is what the rule of *Ring* is. *Ring* simply applies old procedural law of the 5th and 6th Amendment Due Process right to Notice by information and jury findings beyond a reasonable doubt to the new understanding of the substantive nature of the role that statutory aggravating factors play in a capital case. The role has not changed, *i.e.*, making a person convicted of first degree murder eligible for the death penalty, but rather the Supreme Court's understanding of their role was clarified in *Ring*, nor have the procedural protections which arise by the clarification changed. Simply because the rights which attach as a result of *Ring's* subtantive rule not previously acknowledged does not make the rule itself "procedural."

Since Petitioner's Brief in Opposition was filed in this case, the United States Supreme Court has made much more clear the substantive nature of the rule of *Ring.* In *Sattazahn v. Pennsylvania*, –U.S.–,123 S.Ct. 732, 154 L.Ed.2d 588 (Jan 14, 2003), the United States Supreme Court held that "neither the Fifth Amendment's Double Jeopardy Clause nor the Fourteenth Amendment's Due Process Clause barred Pennsylvania from seeking the death penalty against petitioner on retrial." *Id.,* 123 S. Ct at 742. In reaching its conclusion, Justice Scalia, joined by

Chief Justice Rehnquist and Justice Thomas, laid to rest any question regarding precise impact of *Ring v. Arizona* when he wrote:

> Just last Term we recognized the import of *Apprendi* in the context of capital-sentencing proceedings. In *Ring* v. *Arizona,* 536 U.S. ___, *122 S. Ct. 2428 (2002),* we held that aggravating circumstances that make a defendant eligible for the death penalty "operate as 'the functional equivalent of an element of a *greater offense*.'" *Id.,* at ___ (slip op., at 23) (emphasis added). That is to say, for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of "murder" is a distinct, lesser included offense of "murder plus one or more aggravating circumstances": Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death. Accordingly, we held that the Sixth Amendment requires that a jury, and not a judge, find the existence of any aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt. *Id.,* at ___-___ (slip op., at 22-23).

Sattazahn v. Pennsylvania, supra, 123 S. Ct at 739. Justice Scalia, with a majority of the court concurring in *Ring,* unambiguously establishes that "murder plus one or more aggravating circumstances" is a separate offense from "murder *simpliciter*." *Id.*

Three points illustrated by *Sattazahn* are essential to the question before this Court. First, that Petitioner here has been found guilty only of "murder *simpliciter*" [murder in the first degree] and not "murder plus one or more aggravating circumstances" [capital murder] and thus, death is not a statutorily permissible penalty. *See* Idaho Code 18-4004. In this case, instructions specifying the elements of a *murder simpliciter* were given to the jury. The jury was not instructed to find the element of any statutory aggravating circumstance, which raises the offense to a capital murder. Because the instructions did not define the crime as a lesser included offense of a capital murder, the jury was not asked to consider first whether the evidence was sufficient to find the defendant guilty of the capital murder before it determined that Fields was guilty of the lesser, murder offense. *See* I.C. § 19-2132(c). Accordingly, Fields should have

been sentenced only for *murder simpliciter* and not "murder plus aggravator." *See State v. Nunez*, 133 Idaho 13, 20, 981 P. 2d 738, 745 (1999), *rehearing denied.* [1]

Secondly, it is clear from Justice Scalia's opinion that *Ring,* in its application of *Apprendi* to the capital context, does not effect a "new rule of law" and thus, its application is not barred by Idaho Code Section 19-2719(5)(c). In *Sattazahn*, Justice Scalia expressly found that *Apprendi* "***clarified*** what constitutes an "element" of an offense for purposes of the Sixth Amendment's jury-trial guarantee." 123 S.Ct. at 739. To clarify simply does not create a new rule but makes the rule clear or intelligible or frees it from ambiguity. *See* Webster's Encyclopedic Unabridged Dictionary Random House, 1996 (2d Ed.) at 380. The statutory aggravating circumstances were elements of the offense at the time of crime, conviction and sentence and they remain elements. Petitioner was at all times entitled to notice and a jury trial thereon. The conviction which now stands is nothing more than a conviction for first degree murder," an offense for which death is not an available penalty.

Thirdly, there can be little argument that the definition of a crime by its elements is undoubtedly substantive and not procedural. Thus, *Teague v. Lane* does not apply and the holding of *Ring* must be applied to Petitioner under *Bousely v. United States,* 523 U.S. 614, 620-21 (1995). Inherent in the State's arguments is a fundamental misapprehension of greater and lesser included offenses and the application of that criminal law structure to Petitioner's conviction. The State continues to argue that Petitioner was convicted of murder, a conviction which is not subject to question in this proceeding, and the aggravating circumstances were mere

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[1] *Nunez* also makes clear that a proceeding under Idaho Criminal Rule 35 is the appropriate vehicle to correct the sentence. *See id.*, 133 Idaho at 16, 981 P.2d at 741.

sentencing factors. Response at 16. We agree Petitioner was convicted of murder but the conviction under scrutiny here is the conviction, or more importantly lack of conviction, for capital murder, without which Petitioner cannot legally be sentenced to death.

C. Even If *Teague* Applies, *Ring* Should Be Applied Retroactively.

1. *Ring* Satisfies the "Private Conduct Beyond the Power to Proscribe" Exception to the *Teague* Doctrine.

It is in understanding the substantive nature of the statutory aggravating circumstances that the State's argument dismissing the first exception of *Teague* under authority of *Jones v. Smith*, 231 F.3d 1227 (9th Cir 2000) must be rejected as well. *See* Response at 15-16. Even if *Ring* were a new rule of criminal procedure, it would be applied retroactively because "it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Teague,* 489 U.S. at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971)(Harlan, J. concurring in part and dissenting in part)). This exception arises from *Teague's* adoption of Justice Harlan's views on non-retroactivity in which he noted that "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Mackey,* 401 U.S. at 692-93 (Harlan, J., concurring in part and dissenting in part.) Thus, Justice Harlan concluded and the United States Supreme Court ultimately accepted that "[n]ew 'substantive due process' rules that . . . free[] individuals from punishment for conduct that is constitutionally protected" ought to be retroactive. *Mackey,* 401 U.S. at 692-93; *accord Bousley v. United States*, 523 U.S. at 620.

In *Penry v. Lynaugh,* 492 U.S. 303, 330 (1989) the Court recognized that the exception extended to capital cases in a unique way, noting that a "new rule placing a certain class of

individuals beyond the state's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all." A constitutional rule barring execution of the retarded would fall outside *Teague v. Lane* 's ban on retroactive application of new constitutional rules because it placed the ability to execute the retarded "beyond the State's power." *Id.* (discussing *Teague*, 489 U.S. at 301-02).

Unlike any other class of proscribed criminal conduct, before a government may sentence a person to death, it must adhere to stringent jurisprudential requirements under the Eighth and Fourteenth Amendments. *Ring v. Arizona,* 122 S. Ct at 2442 (quoting *Apprendi,* 530 U.S. at 522-23 (Thomas, J., concurring)) ("[I]n the area of capital punishment, unlike any other area, we have imposed special constraints on a legislature's ability to determine what facts shall lead to what punishment--we have restricted the legislature's ability to define crimes."). The first *Teague* exception permits a rule to be raised collaterally if it prevents lawmaking authority from criminalizing or punishing in a certain manner certain kinds of conduct. *Teague,* 489 U.S. at 311; *Penry*, 492 U.S. at 330. *Ring* like *Nunez* prohibits the state from imposing the death penalty upon those who have been convicted by jury only of the lesser included offense of murder and are not eligible for death absent additional jury fact finding which never took place. *Ring* clearly comes within the ambit of the first *Teague* exception compelling application of its constitutional principles to Zane Fields

2. *Ring* Satisfies The "Watershed" Exception to the *Teague* Doctrine.

Assuming arguendo that *Ring* announced a new rule of criminal procedure, the final step in the *Teague* analysis, is to ascertain whether the constitutional principle announced in *Jones,* applied in *Apprendi*, affirmed and extended in *Ring* is a watershed rule of criminal procedure,

implicating both the accuracy and fundamental fairness of criminal proceedings. *Teague,* 489 U.S. at 312. Justice O'Connor has certainly answered that question in the affirmative when she wrote in her dissent in *Apprendi*: "Today, in what will surely be remembered as a watershed change in constitutional law, the Court imposes as a constitutional rule the principle it first identified in *Jones*." *Apprendi v. New Jersey,* 530 U.S. at 524 (O'Connor, J., dissenting). *But see Ring*, 122 S.Ct. at 2449-50 (O'Connor, J. dissenting) (noting that claimants may be "barred from taking advantage" of *Ring* "on federal collateral review"). *Ring v. Arizona*, which extended *Apprendi* to capital case sentencing proceedings, requires jury findings on, and pre-trial notice of, aggravating circumstances -- concepts which are "implicit in the concept of ordered liberty" under *Teague*'s second exception. *See Teague*, 489 U.S. at 311.

A rule that qualifies under this exception "must not only improve accuracy [of the trial and conviction],[2] but also alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Sawyer v. Smith,* 497 U.S. 227, 242 (1990) (internal quotation marks and quoted cases omitted). *Ring* applies the principles of *Jones v. United States* and *Apprendi* in the capital context and is a sweeping rule of criminal law. *Ring* applies to every capital defendant in Idaho and in every other death penalty jurisdiction whose judge sentencing scheme usurped the jury's fact-finding function and stripped the accused of his or her right to notice, jury trial and due process.[3]

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[2] As argued in our Response in Opposition to Request to Summarily Dismiss, the *Teague* requirement of "accuracy-enhancing" does not appear to be applicable under Idaho law. *Matter of Gafford,* 127 Idaho 472, 476, 903 P. 2d 61, 65 (1995). *See* Petitioner's Response at p. 17-18.

[3] *See Ring v. Arizona*, 122 S. Ct. at 2442 n.6 ("[o]ther than Arizona [Ariz. Rev. Stat. §13-501(C)] , only four States commit both capital sentencing factfinding and the ultimate sentencing

Ring's requirement that a jury, not a judge, find beyond a reasonable doubt the factual elements necessary for a conviction of capital murder meets the second *Teague* exception qualifications. Applying *Jones* and *Apprendi* to the capital context, *Ring* raises the standard for determining factors that may subject a criminal defendant to a possible sentence of death from a preponderance of the evidence to beyond a reasonable doubt, thereby increasing accuracy. Similarly, *Ring*'s requirement, that every element of a crime – defined as every fact that increases the statutory maximum – be charged in the indictment and found by a jury by proof beyond a reasonable doubt improves the accuracy of the fact-finding process because it reduces the risk that an innocent person might be convicted of a more serious crime, or that a guilty person might be punished more severely than the law allows. In *Ring*, the Court explicitly declined to accept Arizona's argument that judicial factfinding is superior in capital cases. The Court found that argument "far from evident," noting that "the great majority of States . . . entrust[] those determinations to the jury." *Ring*, 122 S.Ct. at 2442.

In light of the fundamental nature of the right to pre-trial notice of every element of the offense and findings by a properly instructed jury beyond a reasonable doubt on every element of the offense, the holding in *Ring* must meet the *Teague* exception for a watershed rule affecting bedrock procedural requirements implicit in ordered liberty and necessary to a fair trial. A

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decision entirely to judges. *See* Colo. Rev. Stat. § 16-11-103 (2001) (three-judge panel); Idaho Code § 19-2515 (Supp.2001); Mont. Code Ann. § 46-18-301 (1997); Neb. Rev. Stat. § 29-2520 (1995). . . Four States have hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations. *See* Ala. Code §§ 13A-5-46, 13A-5-47 (1994); Del. Code Ann., Tit. 11, § 4209 (1995); Fla. Stat. Ann. § 921.141 (West 2001); Ind. Code Ann. § 35-50-2-9 (Supp.2001)).

comparison to other rules, held to meet *Teague*'s watershed rule exception, forces the conclusion that *Ring* necessarily falls within its purview.

> [C]ourts have applied the second exception of *Teague* to a range of constitutional rules of criminal procedure. *See, e.g., Ostrosky v. Alaska*, 913 F.2d 590, 594-95 (9th Cir.1990) (announcing a new due process rule concerning mistake of law defenses and finding that the rule falls within the *Teague* exception for "procedures implicit in the concept of ordered liberty"); *Hall v. Kelso*, 892 F.2d 1541, 1543 n. 1 (11th Cir.1990) (finding as an exception the rule announced in *Sandstrom v. Montana* regarding burden shifting instructions); *Graham v. Hoke*, 946 F.2d 982, 994 (2d Cir. 1991) (finding as an exception the rule announced in *Cruz*, that non testifying codefendant's confession may not be admitted); *Williams v. Dixon*, 961 F.2d 448, 454-56 (4th Cir. 1992) (finding as an exception the *Mills* rule striking the unanimity requirement in jury findings of mitigating evidence); *Gaines [v. Kelly]*, 202 F.3d [598,] 604 [(2d Cir. 2000)] (finding as an exception the *Cage* rule that describing reasonable doubt in terms of grave or substantial uncertainty and requiring a "moral certainty" violates due process).

Hoffman v. Arave, 236 F.3d 523, 547-48 (9th Cir. 2001) (Pregerson, J., dissenting).

The State assures the Court that the accuracy of the conviction is not at risk. Response at 20. "The only issue is whether a jury should have been asked to find statutory aggravators instead of the judge. That has nothing to do with the accuracy of the underlying conviction." Response at 20. The State's inability to comprehend the concept at the heart of *Ring v. Arizona* – the conviction in question is the conviction for capital murder, not simple murder – wholly undermines the State's analysis regarding the affect that the lack of a jury properly instructed had on the findings of aggravating circumstances and thus the accuracy of the verdict of "death-eligible."

D. Prior Rulings That Apprendi Is Not Retroactive Do Not Preclude This Court From Applying Ring Retroactively.

The State relies in part on the Ninth Circuit decisions of *Jones v. Smith,* 231 F. 3d 1227 (9th Cir 2000) and *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002), which have

declined to apply *Apprendi* retroactively. In *Jones v. Smith,* an element of the crime was omitted from the state court information, but the jury instructions were proper and argument to the jury was made as to all the elements. 231 F. 3d at 1237. In analyzing whether *Apprendi* was retroactive, the court held without disciplined analysis that *Apprendi* was a new rule of criminal procedure, thus satisfying the first step of the analysis. The Court went on to hold that the *Apprendi* rule, "*at least as applied to the omission of certain necessary elements from the state court information,*" did not fit into either *Teague* exception and declined to apply *Apprendi* retroactively. *Id.,* at 1238. Because *Jones* limited its analysis and holding regarding the *Teague* exceptions to the facts of that case, it guides but does not control here. *See United States v. Sanchez-Cervantes,* 282 F. 3d at 668. Indeed, in this case the jury was not properly instructed nor were they asked to find the existence of any statutory aggravating circumstances.

In *United States v. Sanchez-Cervantes*, the Ninth Circuit Court of Appeals found that *Apprendi* is not a watershed rule in the context of drug quantity determinations and does not apply retroactively. 282 F. 3d at 671. The holding of *Sanchez-Cervantes* does not undermine the retroactive application of *Ring.*

The *Sanchez-Cervantes* Court found that "requiring the jury to make drug quantity determinations beyond a reasonable doubt will [not] greatly affect the accuracy of convictions." 282 F. 3d at 669. This observation has no application to the qualitatively different, and infinitely more complex and important decision as to whether a defendant should be singled out as deserving the possibility of facing the death penalty. "The penalty of death is qualitatively different from a sentence of imprisonment." *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976). Because of this qualitative difference, procedures which may be acceptable in the non-

death arena cannot pass constitutional muster when death is involved. The bifurcated nature of capital proceedings compels the conclusion that the retroactive application of the critical constitutional principle of *Ring* is not barred. *Hoffman v. Arave,* 236 F. 3d at 539 (wherein the Ninth Circuit Court of Appeals reached Fifth and Sixth Amendment conclusions in a capital case that were different from a non-capital case (*Baumann)*, by distinguishing the capital bifurcated jury proceeding in *Estelle* from *Baumann*'s "noncapital," "routine" sentencing).

Just as the *Baumann* court limited its application to non-capital cases, so did *Sanchez-Cervantes,* 282 F. 3d at 671 n.45. The jurisprudential reasonableness of the distinction as noted in *Hoffman* is compelling.

> By distinguishing the procedures required in capital presentence stages from those permitted in non-capital presentence interviews, *Baumann* joined a long line of cases requiring heightened procedural safeguards in capital cases. *See Lankford v. Idaho*, 500 U.S. 110, 125-27, 111 S.Ct. 1723, 114 L.Ed.2d 173 (1991) (weighing the "special importance of fair procedure in the capital sentencing context" and holding that the lack of notice to the defendant of Idaho's intent to seek the death penalty violated Due Process); *Eddings v. Oklahoma*, 455 U.S. 104, 111, 113-15, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (discussing heightened protections in capital cases and reversing death sentence because the jury was not permitted to consider all of the capital defendant's mitigating character evidence); *Beck v. Alabama,* 447 U.S. 625, 637-38, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (noting the Court's "often stated" principle that "there is a significant constitutional difference between the death penalty and lesser punishments," and overturning death sentence because the jury was not instructed on a lesser included noncapital offense); *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (finding that "the penalty of death is qualitatively different from a sentence of imprisonment," and therefore holding North Carolina's mandatory death penalty statute unconstitutional).

Hoffman, 236 F. 3d at 539-540. Therefore, under *Hoffman* both *Apprendi* and *Ring* may be applied retroactively in the capital context without running afoul of federal precedent. The State's confidence "that, following these rulings, the Ninth Circuit would also find that the *Ring* decision

flows from *Apprendi* and as such is a procedural change that does not affect the fundamental fairness of the trial and so is not retroactive, " [Response at 19], is pure speculation as the issue has not been decided by the Ninth Circuit and no reliance thereon can be had.[4]

E. Idaho's Case law Does Not Preclude Relief

Notwithstanding the position of the federal courts, this Court has the responsibility to apply state law to the question as well. The State relies in part on the failure of the Idaho Supreme Court's opinions in *Fetterly v. State,* 121 Idaho 417, 825 P.2d 1073 (1991); *Stuart v. State,* 128 Idaho 436 (1996) and *Butler v. State,* 129 Idaho 899 (1997) to apply particular rulings retroactively. None of these cases are dispositive of the question of retroactive application of *Ring v. Arizona* to Petitioner's case.

"The federal constitution has no voice upon the subject [of retroactivity of a new rule of state law]. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward." *Gt. Northern Ry. v. Sunburst Co.,* (1932) 287 U.S. 358, 364. *Accord, People v. Carrera*, 777 P.2d 121, 142 (Cal. 1989). Idaho has used a three pronged test in both direct appeals and collateral attacks established by the United States Supreme Court in *Linkletter v. Walker,* 381 U.S. 618 (1965) to determine the retroactive effect of cases. *See e.g. State v. Whitman,* 96 Idaho 489, 491, 531 P.2d 579, 581 (1975) (a direct appeal where the Court cites *Linkletter*) and *Starkey v. State,* 91 Idaho 74, 76, 415 P.2d 717, 719 (1966) (a collateral attack where the Court cites *Linkletter*). The question in Idaho of whether a case applied retroactively was determined by weighing, 1) the

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[4] Indeed, the issue is currently pending decision in the Ninth Circuit in a case nominated *Summerlin v. Stewart*, No. 98-99002 (argued *en banc* Dec. 8, 2002).

purpose of the new rule, 2) the reliance placed on the former rule and 3) the effect the retroactive application of the new rule would have on the administration of justice. 381 U.S. at 636, 85 S.Ct. at 1741. Two important principles of Idaho law on the question of retroactivity must be kept in mind: (1) the usual rule is to give retroactive effect to judicial rulings, *Tipton v. State,* 99 Idaho 670, 672, 587 P.2d 305, 307 (1978) ("The question of whether to follow the ***usual rule*** that retroactive effect be given to judicial rulings or whether a particular case should be limited to prospective effect only, using the criteria we outlined in *State v. Whitman*, 96 Idaho 489, 491, 531 P.2d 579, 581 (1975), arises when the rule announced in the more recent case overrules a precedent upon which parties may have justifiably relied."); and (2) a state supreme court has unfettered discretion to apply a particular ruling either purely prospectively, purely retroactively, or partially retroactively, limited only 'by the juristic philosophy of the judges." *Id.* "Consideration is given to applying a ruling prospectively 'whenever injustice or hardship will thereby be averted.' " *Warwick v. State ex rel. Chance*, 548 P.2d 384, 393 (Alaska 1976)." *Id.*

It cannot be said that the reliance *on Walton v. Arizona* was reasonable in light of the clear language in *Walton* itself which misunderstood Arizona's statutory scheme and rejected Walton's contention that the aggravating factors in Arizona were elements. *Walton v. Arizona*, 497 US at 648. Unlike the United States Supreme Court, [5] the Idaho Supreme Court was well aware of the role that the statutory aggravating circumstances played in determining death eligibility, *See State v. Charboneau*, 116 Idaho 129, 774 P.2d 299 (1989) . Even if the reliance on *Walton* could be considered reasonable, prospective application only, is not necessary to avert

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[5] *See Ring v. Arizona*, 536 U.S. at 610, 122 S.Ct. At 2444 (Scalia J. concurring).

injustice or undue hardship. The need for finality in judgments must submit to the irrevocability of the death sentence and the absolute need for accurate and reliable findings regarding the verdict on the statutory aggravating circumstances. Courts can only be confident in the accuracy and the reliability in a finding of death eligibility when the factfinding body is able to debate and discourse and is free of any political pressure, *i.e.*, when a jury of twelve not a single judge is charged with the responsibility. Applying the third factor, there can be no reasonable finding that applying the rule to fifteen defendants who despite requests for the same were denied the factfinding cannot be considered an administrative hardship worthy of depriving persons sentenced to die of the retroactive effect of *Ring v. Arizona.*

F. Idaho Code Section 19-2719(5)(c) Does Not Preclude Relief.

As its final argument, the State contends "that Idaho Code 19-2719(5)(c) [] precludes the retroactive application of a new rule in a successive petition." Response at 22.

1. Idaho Code Section 19-2719 Does Not Apply Because Mr. Fields' Sentence Of Death Was Outside The Range Of Permissible Sentences For His Offense Of Conviction.

By its terms Idaho Code 19-2719 applies to death cases. Petitioner has been convicted only of murder, not capital murder as it is now understood to include the elements of the statutory aggravating circumstances. *See generally,* Petitioner's Response to State's Motion to Summarily Dismiss Rule 35, pp. 7-8, *State v. Fields, Case No. 16259.*

2. Idaho Code Section 19-2719's Time Limitation Jurisdictional Bar Violates The Idaho Constitution's Separation Of Powers Requirement.

Idaho Code Section 19-2719(5)(c) plainly aims to limit the jurisdiction of district courts. However, legislative efforts to restrict the district court's jurisdiction violate the Idaho

Constitution. Idaho Const. Art. II §1 (mandates that the powers of the three governmental branches remain separate); Art. V §13 (specifically prohibits legislative abrogation of judicial jurisdiction); Art. V § 20 (confers original jurisdiction on the district court to hear all cases). The Idaho Supreme Court has consistently and long held that the legislature may not directly or otherwise restrict the district court's jurisdiction. *See generally,* Petitioner's Response to State's Motion to Summarily Dismiss Rule 35 Petition, *State v. Fields*, Ada County Case No. 16259 (filed herewith.) Consequently, even if *Ring* does announce some new rule of law which Mr. Fields seeks to have applied to his case, Idaho Code Section 19-2719(5)(c) cannot stand as a bar.

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

It is long settled "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 (Idaho 1987)(citations omitted). *See* Idaho Code Section 73-101 ("No part of these compiled laws is retroactive, unless expressly so declared.")

Though the instant petition was filed after Idaho Code Section 19-2719(5) was amended to include subsection (c)[6], applying that statutory provision in this case would constitute a retroactive application. Idaho Code Section 19-2719(5)(c) raises an absolute bar to relief on any claim based on the retroactive application of a new rule of law. Section 19-2719(5)(c) does not create mere procedural requirements. It precludes an entire class of substantive claims, leaving postconviction petitioners with no mechanism by which to assert those claims. Consequently,

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[6]Subsection (c) was amended into Section 19-2719(5) in 1995.

applying Idaho Code Section 19-2719(5)(c) to Mr. Fields would constitute a retroactive application. Though Idaho Code Section 19-2719(5)(c) expressly and absolutely bars postconviction petitioners' claims dependent on retroactively applying a new rule of law, it contains no express legislative statement that it should itself be retroactively applied. It cannot, then, be applied to the case at bar. *See generally,* Petitioner's Response to State's Motion to Summarily Dismiss Rule 35 Petition, *State v. Fields*, Ada County Case No. 16259 (filed herewith).

4. Idaho Code Section 19-2519(5) Violates Petitioner's Rights To Due Process And Equal Protection Guaranteed Under The United States And Idaho Constitutions.

If Mr. Fields did not stand under sentence of death, Idaho Code Section 19-2719(5)'s time limitation jurisdictional bar would not apply.[7] "I.C. §19-2719 does not eliminate the applicability of the UPCPA to capital cases, but it supersedes the UPCPA to the extent that their provisions conflict." *McKinney v. State*, 133 Idaho 695, 700, 992 P.2d 144, 149 (Idaho 1999). Because of this difference, applying that bar in the instant case would violate Mr. Fields' due process and equal protection rights.

To the extent Idaho Code Section 19-2719's time limitation jurisdictional bar is construed to preclude review of petitioner's claims, the statute is unconstitutional. It would violate Mr. Fields' rights to equal protection and due process under the Fourteenth Amendment to the United

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[7]Under the Uniform Post Conviction Procedure Act ("UPCPA"), "*post-conviction relief is not barred* where new evidence is discovered, or *where later case law suggests a conviction is unlawful.*" *Aragon v. State*, 114 Idaho 758, 766 n.12, 760 P.2d, 1174, 1182 n.12 (Idaho 1988) (citing I.C.§ 19-4901) (emphasis added). Also, under the UPCPA, I.C. § 19-4908, a claim can only be waived *if the waiver is knowing, voluntary and intelligent. McKinney v. State*, 133 Idaho 695, 700-01, 922 P.2d 144, 149-50 (Idaho 1999). As noted in the text, to the extent that Idaho Code Section 19-2719 conflicts with the UPCPA, the Section 19-2719 provision governs.

States Constitution, and Article 1, Sections 2 and 13 of the Idaho Constitution, in that there is no rational basis, for the disparate treatment of non-capital prisoners who do not need to demonstrate the "heightened burden" for postconviction relief which capital petitioners must meet, *e.g., Paz v. State*, 123 Idaho 758, 760, 852 P.2d 1355, 1357 (Idaho 1993), or meet the limitations imposed by Idaho Code Section 19-2719(5), *see, e.g., Sivak v.* State, 134 Idaho 641, 648-49, 8 P.3d 636, 643-44 (Idaho 2000); *Pizzuto v. State*, 134 Idaho 793, 796-97, 10 P.3d 742, 745-46 (Idaho 1995). *See generally,* Petitioner's Response to State's Motion to Summarily Dismiss Rule 35 Petition, *State v. Fields*, Ada County Case No. 16259 (filed herewith).

Idaho's disparate treatment of capital as compared to non-capital postconviction petitioners fails under a rational basis analysis. Necessarily, then, it fails under strict scrutiny analysis, too. "A law which infringes on a fundamental right will be upheld only where the State can demonstrate the law is necessary to promote a compelling state interest." *Id.* The state's interest in expeditious handling of capital cases, the purpose of the offending provision, Idaho Code Section 19-2719(5)(c), is not a sufficiently compelling interest to justify the violation of petitioner's fundamental right to trial by jury.

CONCLUSION

For all these reasons and for all the reasons in Mr. Fields' previously filed pleadings in the instant matter and in the Rule 35 Motion filed under Case no. 16259, the Court should deny Respondent's motion to summarily dismiss the pending 19-2719 petition, vacate Petitioner's sentence of death and set the matter for sentencing anew.

Dated this 15 day of April, 2003.

Joan M. Fisher

Attorney for Petitioner Zane Jack Fields

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April, 2003, I caused to be served a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, addressed to:

GREG H. BOWER
Ada County Prosecuting Attorney

Roger Bourne
Deputy Prosecuting Attorney
Ada County Prosecuting Attorney's Office
200 W. Front St., Room 3191
Boise ID 83702
Facsimile: 208-287-7709

____ U.S. Mail
__✓__ Hand Delivery
____ Facsimile
____ Overnight Mail

Joan M. Fisher

JOAN M. FISHER
Idaho State Bar No. 2854
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO, **Plaintiff,**	**Case No. HCR 16259**
v.	**RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY DISMISSAL OF PETITIONER'S RULE 35 MOTION**
ZANE JACK FIELDS, **Defendant.**	

Zane Jack Fields ("Defendant"), through counsel, files this opposition to Respondent's Motion for Summary Dismissal of Mr. Fields' motion filed pursuant to Idaho Criminal Rule 35. Together with this Response, Mr. Fields is filing a supplemental response to respondent's motion to summarily dismiss the August 2, 2002, Petition For Post Conviction Relief And/Or Petition For Writ Of Habeas Corpus. *See* Petitioner's Response In Opposition State's Reply Brief in Support of Motion For Summary Dismissal of Petition For Post-Conviction Relief And/Or Writ Of Habeas Corpus. For the reasons set forth below Respondent's motion to summarily dismiss Mr. Fields' Rule 35 motion should be denied.

I.

ARGUMENT

A. BACKGROUND

Mr. Fields was convicted by a jury of first degree murder. The information did not charge, the jury was not instructed on and did not find that the prosecution had proved beyond a reasonable doubt the existence of any aggravating factor included in Idaho Code Section 19-2515. After the jury returned its verdict of guilt of Murder in the First Degree, the trial court conducted sentencing proceedings and determined beyond a reasonable doubt three aggravating circumstances existed[1] and sentenced Mr. Fields to death.

Shortly before Mr. Fields filed the Rule 35 Motion, the United States Supreme Court overruled its holding in *Walton v. Arizona*, 497 U.S. 639 (1990), that Arizona capital defendants were not entitled to a jury decision on whether sentencing aggravating factors existed beyond a reasonable doubt. *Ring v. Arizona*, 122 S.Ct. 2428, 2432 (2002). The court clarified that "[c]apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 2432. Before *Ring*, the Idaho Supreme Court consistently rejected the claim that the federal and state constitutions require that Idaho capital sentencing involve a jury. *See, e.g., State v.*

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[1]The trial judge found and the Idaho Supreme Court affirmed the three aggravating circumstance found and weighed by the trial court, (1) "by the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life"; (2) the "murder was committed in the perpetration of a robbery and/or burglary and was accompanied by an intent to cause death"; (3) "the defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder, which will constitute a continuing threat to society [§19-2515(g) (8)]. CR 167-170 (Findings of the Court in Considering the Death Penalty, filed March 7, 1991).

Charboneau, 116 Idaho 129, 774 P.2d 299, reh'g denied (1989). *Ring* compelled the Idaho Supreme Court to reverse course, demonstrating that its earlier position was mistaken because it was grounded in a misreading of United States Supreme Court precedent. *State v. Fetterly*, 137 Idaho 729, 730, 52 P.3d 874, 875 (2002)(vacating death sentence and remanding for resentencing on ground that *Ring* requires juries to "make factual findings of the aggravating factors necessary to the imposition of a death sentence").

In *Ring*, the United States Supreme Court attributed its erroneous holding in *Walton* to its misunderstanding that under Arizona state law, "the aggravating factors [were not] 'elements of the offense' [but, rather, were] 'sentencing considerations' guiding the choice between life and death. [*Walton*,] 497 U.S. at 648 (internal quotation marks omitted)." *Ring*, 122 S.Ct. at 2437. This was mistaken because under Arizona law, absent a finding of an aggravating circumstance, death and life imprisonment were not "the alternative verdicts." *Walton* at 648. Ten years later, the Arizona Supreme Court clarified that under its state law capital defendants are not eligible for a death sentence absent a finding of at least one aggravating circumstance. *State v. Ring*, 200 Ariz. 267, 279, 25 P.3d 1139, 1151 (Ariz. 2001)("In Arizona, a defendant cannot be put to death solely on the basis of a jury's [guilty] verdict[.] . . . [T]he death sentence becomes possible only after the trial judge makes a factual finding that at least one aggravating factor is present."); *see Ring*, 122 S.Ct. at 2436.

With this corrected understanding, the United States Supreme Court necessarily reached a different result than it had in *Walton*. In particular, the court held that "we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 122 S.Ct. at 2443. Put

another way, *Ring* made clear that any facts necessary to increase the maximum allowable sentence are *elements* of the offense. *Ring*, 122 S.Ct. at 2443 (because aggravating factors necessary to the imposition of a death sentence "operate as 'the functional equivalent of an element of a greater offense' the Sixth Amendment requires that they be found by a jury")(citation omitted); *see Harris v. United States*, 122 S.Ct. at 2409 (Kennedy, J., joined by Rehnquist, C.J., and O'Connor & Scalia, JJ.)("those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis") *and* at 2323-24 ("[I]f the legislature, rather than creating grades of crimes, has provided for setting the punishment of a crime based on some fact . . . that fact is also an element")(Thomas, J., joined by Stevens, Souter & Ginsberg, JJ.). As Justices Scalia, Rehnquist and Thomas very recently agreed:

> Our decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), clarified what constitutes an "element" of an offense for purposes of the Sixth Amendment's jury-trial guarantee. Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact . . . constitutes an element, and must be found by a jury beyond a reasonable doubt. *Id.*, at 482-484, 490.
>
> . . .
>
> [F]or purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of "murder" is a distinct, lesser included offense of "murder plus one or more aggravating circumstances": Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death. Accordingly, we held that the Sixth Amendment requires that a jury, and not a judge, find the existence of any aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt. [*Ring*], at [2443] (slip op. at 22-23).

Sattazahn v. Pennsylvania, 123 S.Ct. 732, 739 (2003)(Scalia, J., joined by Rehnquist, C.J., & Thomas, J.).

Applied to the instant case, this means that Mr. Fields was convicted of non-capital first degree murder, a lesser included offense of first degree murder "plus one or more aggravating circumstances[,]" i.e.-capital murder. For this reason, Mr. Fields' death sentence was outside the range of sentences lawfully available for his offense of conviction. Mr. Fields, then, must be resentenced for non-capital first degree murder. *See State v. Nunez*, 133 Idaho 13, 20, 981 P.2d 738, 745, reh'g denied (Idaho 1999)(where jury instructions omitted essential element of felony but included elements of misdemeanor, conviction was for misdemeanor; "accordingly, Nunez should have been sentenced only for misdemeanor convictions [and] [t]he case will be remanded for this purpose."); *State v. Roll*, 118 Idaho 936, 801 P.2d 1287 (Ct.App. 1990)(judgment of conviction reversed without any harmlessness analysis where essential element of offense omitted from jury instructions).

Indeed, because the jury did not convict Mr. Fields of capital murder, the trial court was without jurisdiction to impose a death sentence on him. It was without this jurisdiction for other reasons, too: the charging document, a prosecutor's information, did not include the aggravating factor elements relied on at trial; no preliminary hearing determination was made that there was substantial evidence supporting the existence of the aggravating factor elements relied on at trial; the jury did not determine that any aggravating circumstance outweighed the mitigating circumstances; and the jury did not determine that the mitigating circumstances did not make the

imposition of death unjust.[2] *Hays v. State*, 113 Idaho 736, 739, 747 P.2d 758, 761 (Ct.App. 1987)("A jurisdictional defect exists when the alleged facts are not made criminal by statute, or where there is a failure to state facts essential to establish the offense charged. *State v. Grady*, 89 Idaho 204,404 P.2d 347 (1965); *State v. Cole*, 31 Idaho 603, 174 P. 131 (1981); I.C.R. 7(b)."), *aff'd*, 115 Idaho 315, 316 766 P.2d 785, 786 (Idaho 1988)("we concur with the decision of the Court of Appeals"). Since Mr. Fields was sentenced to a penalty greater than authorized for non-capital first degree murder, his sentence "is void as to the excess if the valid portion is severable from that portion which is void." *State v. Jeppesen*, 138 Idaho 71, 76, 57 P.3d 782, 787 (Idaho 2002).[3] In any event, where a jury charge omits an essential element of a greater crime, but fully instructs on a lesser crime, a guilty verdict is a conviction for the lesser offense. *State v. Nunez*, 133 Idaho 13, 20, 981 P.2d 738, 745, reh'g denied (Idaho 1999). The sentence must, therefore, be within the range of penalties for that lesser offense. *Id.*

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[2]Mr. Fields raised each of these claims in his August 2, 2002 Motion to Correct Illegal Sentence pursuant to Rule 35.

[3]This claim is timely. "The issue of whether a court has exceeded its subject matter jurisdiction is never waived and purported judgments entered by that court, acting without subject matter jurisdiction, are void and subject to collateral attack. *Sierra Life Insurance Co. v. Granata*, 99 Idaho 624, 626, 586 P.2d 1068, 1070 (1978); *see Andre v. Morrow*, 106 Idaho 455, 459, 680 P.2d 1355, 1359 (1984)[void judgment is nullity and "can be collaterally attacked at any time"]." *State v. Heyrend*, 129 Idaho 568, 571, 929 P.2d 744, 747 (Ct. App. 1996). Even where the Uniform Post Conviction Act, Idaho Code Section 4901-4911, is generally unavailable as an avenue to relief, "it is available to cure fundamental errors occurring at the trial which affect either the jurisdiction of the court or the validity of the judgment, even though these errors could have been raised on appeal." *Smith v. State*, 94 Idaho 469, 474, 491 P.2d 733, 738 (Idaho 1971).

B. THE STATE'S ARGUMENTS FAIL.

Noting that Idaho Criminal Rule 35 allows a court to correct an illegal sentence at any time, Respondent while not specifically arguing attaches to its brief Judge Culet's Decision and Memorandum in *Hoffman v. Arave*, in which Judge Culet finds that this provision is trumped by Idaho Code Section 19-2719's time limitation. This argument fails because, as already noted, the trial court was without jurisdiction to impose a death sentence, and jurisdictional claims may be raised at any time. *Supra,* at 6 n.3 and accompanying text. Even if this Court disagrees, though, the argument fails for several other reasons. First, Section 19-2719 does not apply because Mr. Fields' sentence of death was outside the range of permissible sentences. Second, Section 19-2719's time limitation jurisdictional bar violates the Idaho Constitution's separation of powers requirement. Third, Idaho law prohibits retroactively applying Section 19-2719 to Mr. Fields' case. Finally, fourth, applying Section 19-2719's time limitation jurisdictional bar to Mr. Fields' case would violate his rights to due process and equal protection as guaranteed by the United States Constitution and Idaho Constitution.

1. Idaho Code Section 19-2719 Does Not Apply Because Mr. Fields' Sentence Of Death Was Outside The Range Of Permissible Sentences For His Offense Of Conviction, Non-Capital First Degree Murder.

The *Hoffman* decision relies on *State v. Beam*, 121 Idaho 862, 828 P.2d 891 (1992). There, the Idaho Supreme Court held "that the forty-two (42) day time limitation of I.C. §19-2719(3) applies to claims of illegality of a sentence of death." *Id.* at 864, 893. The petitioner in *Beam* asserted that his sentence was illegal because the trial judge failed to weigh each aggravating circumstance against all mitigating circumstances as required by *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299 (Idaho 1989). Thus, the petitioner complained that

the trial judge employed an illegal process to determine the otherwise permissible sentence not that death was an impermissible sentence. By contrast, Mr. Fields contends here that his sentence was outside the range of permissible sentences for his offense of conviction. *Beam* is inapposite.

2. Idaho Code Section 19-2719's Time Limitation Jurisdictional Bar Violates The Idaho Constitution's Separation Of Powers Requirement.

Idaho Code Section 19-2719(5) provides:

> (5) If the defendant fails to apply for relief as provided in this section and within the time limits specified . . . [t]he courts of Idaho shall have no power to consider any such claims[.]
>
> (a) An allegation that a successive post-conviction petition may be heard because of the applicability of the exception for issues that were not known or could not reasonably have been known shall not be considered unless the applicant [meets certain other enumerated requirements].
>
> . . . .
>
> (c) 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). This provision plainly aims to limit the jurisdiction of district courts. However, legislative efforts to restrict the district court's jurisdiction violate the Idaho Constitution.

The Idaho Constitution, Article V, Section 20, confers original jurisdiction on the district court to hear all cases. Idaho Constitution Article II, Section 1, mandates that the powers of the three governmental branches remain separate and, more particularly, Article V, Section 13, specifically prohibits legislative abrogation of judicial jurisdiction:

> The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government; but the legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, *so far as the same may be done without conflict with the Constitution*[.]

Id. (italics added). Of course, as the Supreme Court has long held, a postconviction petition "is a proceeding entirely new and independent from the criminal action which led to the conviction." *Paradis v. State*, 110 Idaho 534, 636, 716 P.2d 1306, 1308 (1986). Thus, Article V, Section 13's reservation of power to the legislature has no application to §19-2719 proceedings since they are not appeals.

Idaho Code Section 19-2719(5)(c)'s removing district court jurisdiction to consider postconviction claims seeking retroactive application of new rules of law violates the Idaho Constitution's separation of power mandate. In *State v. Interest of Lindsey*, 78 Idaho 241, 246, 300 P.2d 491, 494 (1956), the Idaho Supreme Court struck a statute purporting to transform previously criminal matters of juveniles into civil matters because "[t]he legislature, by denoting as a civil matter what the law has previously regarded as a felony, attempt[ed] to take away jurisdiction vested in the district court by the constitution itself, and . . . attempted to render that court powerless to do anything about the prosecution of such persons." Similarly, in *Boise City v. Better Homes, Inc.*, 72 Idaho 441, 444-45, 243 P.2d 303, 304 (1952), the Supreme Court held that "[t]he original jurisdiction conferred upon the district court by the constitution, Art. 5, §20, cannot be diminished by the legislature. Const. Art. 5, §13[.]" Again, in *Clemons v. Kinsley*, 72 Idaho 251, 256-57, 239 P.2d 266, 269 (1951), the Court held that "[t]he broad jurisdiction [created by Article 5, Section 13] is not subject to diminution by legislative act." The Court held

the same thing in *Robinson v. Robinson*, 70 Idaho 122, 127, 212 P.2d 1031, 1033-34 (1949). Finally, in *McKnight v. Grant*, 13 Idaho 629, 637, 92 P. 989, 990 (1907), the Court held that, "[w]e think [Article 5, Section 13] was . . . intended to preserve to the judicial department of the state government the right and power to finally determine controversies between parties involving their rights and upon whose claims some decision or judgment must be rendered or determination made." In short, the Idaho Supreme Court has consistently and long held that the legislature may not directly or otherwise restrict the district court's jurisdiction. Consequently, even if *Ring* does announce some new rule of law which Mr. Fields seeks to have applied to his case, Idaho Code Section 19-2719(5)(c) cannot stand as a bar.

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

It is long settled "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 (Idaho 1987)(citations omitted). *See* Idaho Code Section 73-101 ("No part of these compiled laws is retroactive, unless expressly so declared.")

Though the instant petition was filed after Idaho Code Section 19-2719(5) was amended to include subsection (c), [4] applying that statutory provision in this case would constitute a retroactive application. *Paradis v. State*, 128 Idaho 223, 912 P.2d 110 (Idaho 1996), illustrates why. There, the lower court applied a statute enacted after the trial and direct appeal were concluded. The Supreme Court held that the statute's application was prospective, not

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[4]Subsection (c) was amended into Section 19-2719(5) in 1995.

retroactive, because (1) the statute changed postconviction procedures and did not materially affect any substantive rights of the Appellant and (2) "the statutory limitations period [for filing the postconviction petition] had not yet run." *Id.* at 227, 114.

The statutory provision at issue in this case stands in dramatic contrast to the one at issue in *Paradis*. In particular, *Paradis* merely prescribed a procedural requirement imposed on every postconviction petitioner–that the petition be filed within a statutorily specified time. Far from prescribing a procedure imposed on all seeking relief, Idaho Code Section 19-2719(5)(c) purports to raise an absolute bar to relief on any claim based on the retroactive application of a new rule of law. The distinction is critical. The procedural requirement at issue in *Paradis* affected no substantive rights because all postconviction petitioners could comply with it. By contrast, Section 19-2719(5)(c) does not create mere procedural requirements. Rather, it precludes an entire class of substantive claims, leaving postconviction petitioners with no mechanism by which to assert those claims. Put another way, Section 19-2719(5) does not merely "affect" this class of substantive rights, it purports to destroy them. For this same reason, the second ground for the *Paradis* court's holding has no application here. Consequently, applying Idaho Code Section 19-2719(5)(c) to Mr. Fields would constitute a retroactive application.

Federal courts have noted that this same question may arise with regard to the Antiterrorism And Effective Death Penalty Act of 1996 ("AEDPA"). While the United States Supreme Court has held that, as a general rule, AEDPA applies to petitions filed after the act's enactment, it has also noted that specific AEDPA provisions may not be applied if doing so would have a retroactive effect. *Lindh v. Murphy*, 521 U.S. 320, 327-28 (1997). As the Fourth Circuit concluded:

> We agree with petitioner and those courts that having had cause to consider the question in full, have concluded that the Supreme court did not hold in *Lindh* that courts are *necessarily* to apply the new provisions of chapter 153 to all habeas petitions filed after April 24, 1996 [i.e.- AEDPA's enactment date]. More particularly, we hold that *Lindh* did not foreclose–and indeed contemplated–continuing resort to *Landgraf* [i.e.-retroactivity of statutes] analysis in order to ensure that application of chapter 153's new provisions is not impermissibly retroactive in such cases.

Mueller v. Angelone, 181 F.3d 557, 567 (4th Cir. 1999)(citing to *In re Hansard*, 123 F.3d 922, 933 n.22 (6th Cir. 1997), and citing to *In re Minarik*, 166 F.3d 591 (3rd Cir. 1999), and *Brown v. Angelone*, 150 F.3d 370 (4th Cir. 1998)). *See Scott v. Boos*, 215 F.3d 940, 949 (9th Cir. 2000)(federal prohibition against retroactive application of statute absent clear Congressional statement of intent looks to "parties' actions, not the date of filing").

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

4. Idaho Code Section 19-2519(5) Violates Petitioner's Rights To Due Process and Equal Protection Guaranteed Under The United States And Idaho Constitutions.

If Mr. Fields did not stand under sentence of death, Idaho Code Section 19-2719(5)'s time limitation jurisdictional bar would not apply.[5] "I.C. §19-2719 does not eliminate the

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[5]Under the Uniform Post Conviction Procedure Act ("UPCPA"), "*post-conviction relief is not barred* where new evidence is discovered, or *where later case law suggests a conviction is unlawful*." *Aragon v. State*, 114 Idaho 758, 766 n.12, 760 P.2d, 1174, 1182 n.12 (Idaho 1988) (citing I.C.§ 19-4901) (emphasis added). Also, under the UPCPA, I.C. § 19-4908, a claim can only be waived *if the waiver is knowing, voluntary and intelligent*. *McKinney v. State*, 133 Idaho

applicability of the UPCPA to capital cases, but it supersedes the UPCPA to the extent that their provisions conflict." *McKinney v. State*, 133 Idaho 695, 700, 992 P.2d 144, 149 (Idaho 1999). Because of this difference, applying that bar in the instant case would violate Mr. Fields' due process and equal protection rights.

To the extent Idaho Code Section 19-2719's time limitation jurisdictional bar is construed to preclude review of petitioner's claims, the statute is unconstitutional. It would violate Mr. Fields' rights to equal protection and due process under the Fourteenth Amendment to the United States Constitution, and Article 1, Sections 2 and 13 of the Idaho Constitution, in that there is no rational basis, for the disparate treatment of non-capital prisoners who do not need to demonstrate the "heightened burden" for postconviction relief which capital petitioners must meet, *e.g., Paz v. State*, 123 Idaho 758, 760, 852 P.2d 1355, 1357 (Idaho 1993), or meet the limitations imposed by Idaho Code Section 19-2719(5), *see, e.g., Sivak v.* State, 134 Idaho 641, 648-49, 8 P.3d 636, 643-44 (Idaho 2000); *Pizzuto v. State*, 134 Idaho 793, 796-97, 10 P.3d 742, 745-46 (Idaho 1995). *Romer v. Evans*, 517 U.S. 620, 631-36 (1995); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446-51 (1985); *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982); *U.S.D.A. v. Moreno*, 413 U.S. 528, 535 (1973); *Sterling H. Nelson & Sons, Inc. v. Bender*, 95 Idaho 813, 815-16, 520 P.2d 860, 861-62 (Idaho 1974).

Moreover, because Idaho's statutory postconviction scheme makes available different mechanisms for enforcing fundamental rights–here, the right to a jury trial–depending on whether the petitioner stands sentenced to death, that discriminatory scheme must be assessed with strict

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695, 700-01, 922 P.2d 144, 149-50 (Idaho 1999). As noted in the text, to the extent that Idaho Code Section 19-2719 conflicts with the UPCPA, the Section 19-2719 provision governs.

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

Idaho's disparate treatment of capital as compared to non-capital postconviction petitioners fails under a rational basis analysis. Necessarily, then, it fails under strict scrutiny analysis, too. "A law which infringes on a fundamental right will be upheld only where the State can demonstrate the law is necessary to promote a compelling state interest." *Id.* The state's interest in expeditious handling of capital cases, the purpose of the offending provision, Idaho Code Section 19-2719(5)(c), is not a sufficiently compelling interest to justify the violation of petitioner's fundamental right to trial by jury.

CONCLUSION

For all these reasons and for all the reasons in Mr. Fields' previously filed pleadings in the instant matter, the Court should deny Respondent's motion to summarily dismiss the pending Rule 35 petition, vacate Petitioner's sentence of death and set the matter for sentencing anew.

Dated this 15th day of April, 2003.

Joan M. Fisher

Attorney for Zane Jack Fields

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April, 2003, I caused to be served a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, addressed to:

GREG H. BOWER
Ada County Prosecuting Attorney

Roger Bourne
Deputy Prosecuting Attorney
Ada County Prosecuting Attorney's Office
200 W. Front St., Room 3191
Boise ID 83702
Facsimile: 208-287-7709

____ U.S. Mail
__✓__ Hand Delivery
____ Facsimile
____ Overnight Mail

Joan M. Fisher

GREG H. BOWER
Ada County Prosecuting Attorney

Roger Bourne
Deputy Prosecuting Attorney
Idaho State Bar #2127
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ZANE FIELDS, Petitioner, vs. STATE OF IDAHO, Respondent.	**Case No. SPOT0200711D** **STATE'S RESPONSE TO PETITIONER'S SUPPLEMENTAL AUTHORITY IN SUPPORT OF PETITION FOR POST CONVICTION RELIEF**

COMES NOW, Roger Bourne, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and makes a State's Response to the Supplemental Authority provided by the Petitioner in Support of Petition for Post Conviction Relief. This supplemental authority is the memorandum decision by District Judge Bradbury in the George Porter v. State of Idaho case from the Second Judicial District.

The State does not attempt an exhaustive analysis of Judge Bradbury's opinion in this response because of time constraints. However, the State's research indicates that every court that has considered the question of whether or not the Ring decision is retroactive has decided that it is not retroactive. The following federal courts have found

that the Ring decision is not retroactive: Cannon v. Mullin, 297 F.3d 98 (10th Cir. 2002); Trueblood v. Davis, 301 F.3d 784, 788 (7th Cir. 2002); Moore v. Kinney, 2003 WL 261799 (8th Cir. 2003); Sibley v. Culliver, 2003 WL 256907 (M.D. Ala. 2003); U.S. v. Thomas, 2002 WL 31545772 (D. Del. 2002); Gay v. U.S., 2003 WL 168416 (S.D. New York 2003); United State v. Johnson, 2003 WL 1193257 (N.D. III. 2003); Ben-Yisrayi v. Davis, 2003 WL 402829 (N.D. Ind. 2003).

The following state courts have found that the Ring decision is not retroactive: State v. Towery, 64 P3.d 828 (Ariz. 2003); Colwell v. State, 59 P.3d 463 (Nevada 2002).

In addition to the cases cited above, five Idaho district court opinions have denied post conviction relief based upon the Ring decision, including: McKinney v. State, Leavitt v. State, Rhoades v. State, Hoffman v. State, and Wood v. State. This Porter decision is the only one that the State is aware of that has found the Ring decision to be retroactive.

Additionally, regardless of whether or not Teague v. Lane, 489 U.S. 288 (1989), applies to Idaho Code §19-2719, every state and federal opinion that the State has been able to find that considers the Ring case and Apprendi v. New Jersey, has held that Ring and Apprendi are not substantive, but are procedural. The most recent cases include United States v. Davis, 2003 WL 1837701 (E.D. La. 2003); State v. Towery, 64 P.3d 828 (Ariz. 2003); Sibley v. Culliver, 2003 WL 256907 (M.C. Ala. 2003); United State v. Sampson, 2003 WL 352416 (D. Mass. 2003).

Judge Bradbury held that Fetterly v. State, 121 Idaho 417 (1991) may not apply because Fetterly was decided before Teague. However, subsequent cases have applied the Fetterly analysis after Teague was decided. Stewart v. State, 128 Idaho 436 (1996); Butler v. State, 129 Idaho 899 (1997); State v. Townsend, 124 Idaho 881 (1993).

Finally, as discussed in Towery, 64 P.3d at 834-35, the Supreme Court declined to make Duncan v. Louisiana, 391 U.S. 145 (1968), retroactive. DeStefano v. Woods, 392 U.S. 631, 633 (1968). Duncan held that the basic Sixth Amendment right to a jury trial applies to the states via the Fourteenth Amendment. In DeStefano at page 634-635, the court explained, "we would not assert, however, that every criminal trial – or any particular trial – held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury." In Towery, *supra,* the Arizona Supreme Court found this argument to be particularly persuasive in holding that Ring was a procedural change only.

CONCLUSION

For the reasons stated, it appears that the better weight of authority is that the Ring decision and the Apprendi decision are procedural changes and that they are not retroactive.

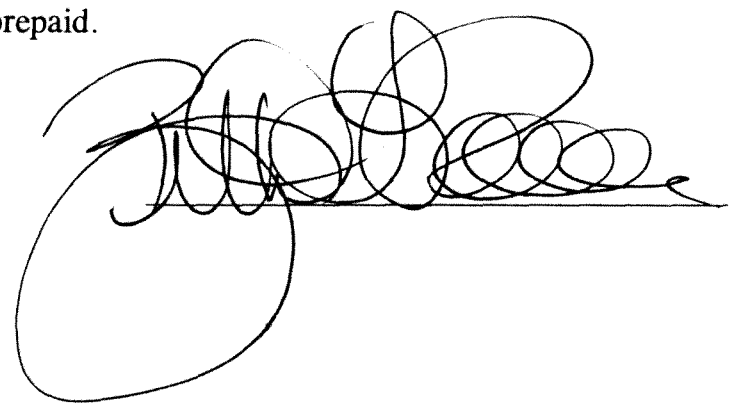
RESPECTFULLY SUBMITTED this 23 day of April 2003.

GREG H. BOWER
Ada County Prosecuting Attorney

By: Roger Bourne
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23 day of April, 2003, I served a true and correct copy of the foregoing State's Response to Supplemental Authority in Support of Petition for Post-Conviction Relief to Joan M. Fisher, Capital habeas Unit, Federal Defenders of Eastern Washington and Idaho, 201 N. Main, Moscow ID 83843, by depositing in the U.S. Mail, postage prepaid.



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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ZANE JACK FIELDS, Petitioner/Defendant, vs. STATE OF IDAHO, Respondent/Plaintiff.	**Case No. SPOT0200711D/HCR16259** **STATE'S SUPPLEMENTAL RESPONSE IN SUPPORT OF STATE'S MOTION TO DISMISS**

COMES NOW, Roger Bourne, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and makes a supplemental response to the State's earlier memorandum provided in support of its motion to dismiss. The supplemental information being provided by the State is the Memorandum Decision and Order in the Creech case and the Sivak case written by Fourth District Judge Ronald J. Wilper. The decisions are attached to this response. Judge Wilper granted the State's motion for summary judgment in those cases on the same issues that are before this Court.

The State understands that these decisions are not binding on this Court, but supplies them for the Court's information. The State has earlier supplied Judge Culet's decision in the Maxwell Hoffman case, which also granted the State's motion for summary judgment on similar issues.

The State is aware of a decision in State v. Porter, written by Second Judicial District Judge John Bradbury, which denies the State's motion to dismiss. A copy of that decision is also attached.

RESPECTFULLY SUBMITTED This 7 day of July, 2003.

GREG H. BOWER
Ada County Prosecuting Attorney

By: Roger Bourne
Deputy Prosecuting Attorney

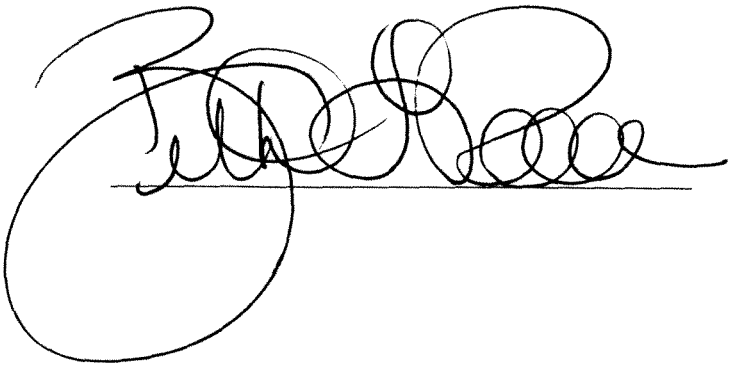
SUBSCRIBED AND SWORN to be me this 7 day of July, 2003.

KARI ERICHSON NOTARY PUBLIC STATE OF IDAHO

Notary Public
Resides at: Boise Idaho
Commission Expires 5-1-07

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7 day of July, 2003, I served a true and correct copy of the foregoing State's Supplemental Response in Support of State's Motion to Dismiss to Joan M. Fisher, Capital Habeas Unit, Federal Defender's, 201 N. Main St., Moscow ID 83843, the following person(s) by depositing in the U.S. Mail, postage prepaid.



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THOMAS EUGENE CREECH, Petitioner, vs. THE STATE OF IDAHO, Respondent.	Case No. SPOT 0200712D MEMORANDUM DECISION AND ORDER
STATE OF IDAHO, Plaintiff, vs. THOMAS EUGENE CREECH, Defendant.	Case No. HCR10252

This case came before the Court on the State's Motion to Dismiss Thomas Creech's Petition for Post-Conviction Relief and/or Writ of Habeas Corpus, and Petitioner's Motions to Correct or Vacate his sentence of death. Because the new rule announced by the United States Supreme Court in Ring v. Arizona[1] does not apply

[1] Ring v. Arizona, 122 S. Ct. 2428 (2002).

retroactively to the Petitioner's case, the State's Motion to Dismiss the Petition is GRANTED and Petitioner's Motions are DENIED.

COURSE OF PROCEEDINGS

On August 2, 2002, the Petitioner/Defendant, Thomas Eugene Creech (hereinafter Petitioner), filed a second successive Petition for Post-Conviction Relief and/or Writ of Habeas Corpus (Case No. SPOT-02-00712D), together with a Motion to Correct Illegal Sentence of Death and for New Sentencing Trial (Case No. HCR10252). The Respondent/Plaintiff, State of Idaho (hereinafter the State), filed a Response and a Motion to Dismiss the Petition on September 3, 2002.

Oral argument was heard on March 7, 2003. The Petitioner submitted additional post-hearing authority in support of his argument on April 11, 2003. The State filed a Reply on April 21, 2003.

FACTUAL AND PROCEDURAL BACKGROUND

On August 28, 1981, the Petitioner pled guilty to Murder in the First Degree for killing a fellow inmate while the Petitioner was a prisoner in the custody of the Idaho Department of Corrections.[2] Petitioner was sentenced to death on January 5, 1982. He appealed and his case was eventually remanded to the district court for resentencing.[3] On April 17, 1995, the district court entered its findings and imposed the death penalty under Idaho Code § 19-2515.[4]

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[2] The facts regarding the offense are contained in the Idaho Supreme Court's 1983 decision, State v. Creech, 607 P.2d 463, 105 Idaho 362.

[3] The procedural history of the remand is contained in the Idaho Supreme Court's 1998 decision, State v. Creech, 966 P.2d 1, 132 Idaho 1 (hereinafter Creech II).

[4] Petition Exhibit 2A.

The Petitioner filed his first petition for post-conviction relief on May 9, 1995. The district court denied relief and the Idaho Supreme Court affirmed the judgment of conviction, the imposition of the death sentence and the denial of his petition for post-conviction relief on August 19, 1998.[5]

The Petitioner filed a successive petition for post-conviction relief on June 1, 2000. The district court dismissed the successive petition. On June 6, 2002, the Idaho Supreme Court dismissed the Petitioner's appeal of the district court's decision.[6]

ANALYSIS

The instant petition and motions are based on the United State Supreme Court's 2002 decision in Ring v. Arizona, supra, which overruled their 1990 decision in Walton v. Arizona.[7] In overruling Walton, the Supreme Court relied on their 2000 decision in Apprendi v. New Jersey.[8]

In Walton, the Supreme Court said Arizona's death sentence statute was compatible with the Sixth Amendment of the United States Constitution, which guarantees criminal defendants the right to a trial by a jury. Specifically, the Arizona statute assigned to the judge, not the jury, the duty to decide whether or not certain aggravating factors were present in capital cases, and if so, to weigh those factors against any mitigating factors, and in this way to decide whether or not to impose the death penalty. The Court in Walton said the statute did not deprive defendants of their Sixth Amendment right to trial by jury because aggravating factors are sentencing considerations, not elements of the crime.

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[5] Creech II, infra.
[6] Creech v. State, 51 P.3d 387, 137 Idaho 573 (2002).
[7] Walton v. Arizona, 497 U.S. 639 (1990).
[8] Apprendi v. New Jersey, 530 U.S. 466 (2000).

In 2000, the United States Supreme Court issued its decision in the case of Apprendi v. New Jersey, a "hate crime" case. In Apprendi, the Supreme Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The New Jersey statute provided that once a defendant was convicted of a certain crime, it was the duty of the sentencing judge to decide whether or not the facts of the case made it a "hate crime." If so, the maximum penalty was greater than it would be if the judge determined it was not a hate crime. The Court said those factors operate as "the functional equivalent of an element of a greater offense." Id., at 494, n.19. That being the case, the defendant had a right to have a jury decide whether those facts were present.

The Supreme Court could not reconcile the Walton decision with the Apprendi decision. As a result, a divided court overruled Walton and announced a different rule in Ring. The rule announced in Ring is that aggravating factors in capital cases operate as the functional equivalent of elements of a greater offense. Therefore, the Sixth Amendment gives the defendant the right to have those facts determined by a jury.

Idaho's death penalty statute, as it existed at the time the Petitioner was ultimately sentenced to death in 1995, was essentially identical to the Arizona statute declared to be unconstitutional in Ring. The Idaho Supreme Court recognized this in State v. Fetterly, 52 P.3d 874, 137 Idaho 729, (2002). "...Ring v. Arizona...appears to invalidate the death penalty scheme in Idaho..." Id. at 875. The Court vacated the death sentence in Fetterly and remanded the case for sentencing.

A "new rule" applies retroactively to state cases pending on direct review, or not yet final.[9] The appeal in Fetterly was pending before the Idaho Supreme Court when the United States Supreme Court decided Ring on June 24, 2002. Therefore, the new rule applies to Fetterly's case and presumably to all Idaho death penalty cases pending on June 24, 2002. However, Creech's case was not pending on direct appeal on that date. Petitioner's conviction and sentence became "final" in 1998. Creech II, supra. A state conviction becomes final for the purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing for writ of certiorari (with the United States Supreme Court) has elapsed.[10]

Petitioner suggests the Ring decision is not a "new" rule of law, but the argument is not persuasive. A new rule is one not dictated by precedent existing at the time a judgment became final.[11] Walton was the precedent existing at the time Creech's judgment became final.

Under most circumstances, a new law does not apply to cases that are already final when the new law is declared. This is because the State, no less than a criminal defendant, has a reasonable right to rely on the law as it existed at the time the case is "finally" decided. In the instant case, the Petitioner pled guilty to First Degree Murder in 1982. He was sentenced to death following Appeal in 1995. The case became "final" in 1998. The doctrine of finality is not a novel concept. As the United States Supreme Court said in a 1989 decision,

> In many ways, the application of new rules to cases on collateral review may be more intrusive than enjoining of criminal prosecutions for it continually forces the states to marshal resources in order to keep in prison

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[9] Griffith v. Kentucky, 479 U.S. 314, 107 S. Ct. 708 (1987).
[10] Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 (1989); Jones v. Smith, 231 F.3d 1227 (2000); Fetterly v. State, 121 Idaho 417 (1992); Stuart v. State, 128 Idaho 436 (1996); Butler v. State, 129 Idaho 899 (1997).
[11] Butler v. McKellar, 494 U.S. 407 (1990).

> defendants whose trials and appeals conform to then existing Constitutional standards. Furthermore, as we recognized in Engle v. Issac, "state courts are understandably frustrated when they faithfully apply existing Constitutional law only to have a federal court discover...new Constitutional demands." Teague supra.

A new law may even apply to "final" cases in limited circumstances. The United States Supreme Court may specifically hold that the new law announced in a decision must be applied retroactively to other "final" cases. The Supreme Court is the only entity that can make a new rule retroactive in this manner, such that all other United States courts must apply the rule retroactively.[12] The Supreme Court did not state that the holding in Ring would be applied retroactively to final cases.

The next step in determining whether a new law should be applied retroactively to a final case is to determine whether the rule announced is a new "substantive" law, or a "procedural" law. If the new law is substantive, then it is applies retroactively.[13] If the new law is procedural, then the Court must go through what is commonly known as the Teague analysis. supra.

Petitioner argues that the new law created by Ring is a substantive law because Ring refines the definition of an element of a capital offense. However, the Ninth and Tenth Circuits have recently held that Apprendi announced a new rule of criminal procedure, not substantive law.[14] This Court is persuaded that since Ring is clearly an extension of Apprendi, and since the law created in Apprendi is procedural, the new law created by Ring is a procedural law.

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[12] Tyler v. Cain, 533 U.S. 656 (2001).
[13] Bousley v. United States, 532 U.S. 614, 620 (1998).
[14] Jones v. Smith, 231 F.3d 1227 (9th Cir. 2000); Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002); and United States v. Mora, 293 F.3d 1213 (10th Cir. 2002).

A new procedural law is not applied retroactively to cases that have become final prior to the new rule being announced, unless the case falls within one of two exceptions. Teague, 489 U.S. at 305-306. It is clear that Petitioner's case was final prior to the Ring decision. Therefore, the Ring decision can only be applied retroactively if the new procedural law falls within one of the two exceptions.

The first exception is that a new law shall be applied retroactively if it places "certain kinds of primary private individual conduct beyond the power of the criminal law-making authority to proscribe." Id. at 311. The second exception applies to "those procedures that...are implicit in the concept of ordered liberty." Id. The first exception is not applicable to Petitioner's case because the holding in Ring does not place "private individual conduct," in this case murder, beyond the power of the criminal law to proscribe.

The United States Supreme Court has held that the second exception involves "watershed rules of criminal procedure," which means "bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." Id. The procedural rule at issue "must implicate the fundamental fairness of the trial," and be an accuracy-enhancing procedural rule. Id. at 312-313. The Ninth Circuit has held that the new procedural rule create in Apprendi is not so fundamental as to fit within Teague's second exception.[15] Again, this Court finds the reasoning of the courts in those Federal cases to be persuasive. Since Ring is an extension of Apprendi, the new procedural rule created

[15] United States v. Juan Sanchez-Cervantes, 282 F.3d 664, 670 (9th Cir. 2001); Jones, 231 F.3d at 1238.

in Ring is not a procedure that is "implicit in the concept of ordered liberty." Therefore, the new law created in Ring shall not apply retroactively to Petitioner's case.

HABEAS CORPUS

The Writ of Habeas Corpus remedy is not available. The Uniform Post-Conviction Procedure Act has replaced the writ of habeas corpus for the purpose of challenging the validity of a conviction.[16] The proper use of a petition for post-conviction relief "avoids repetitious and successive applications; eliminates confusion and yet protects the applicant's constitutional rights."[17]

RULE 35 MOTION

The sentence of death was not illegal when it was imposed in 1995, nor when it became final in 1998. The new law announced in Ring does not apply retroactively to Petitioner's case. Therefore, the Petitioner's Rule 35 Motion[18] for correction of an "illegal" sentence is denied.

CONCLUSION

Because the new rule announced by the United States Supreme Court in Ring does not apply retroactively to the Petitioner's case, the State's Motion to Dismiss the Petition is GRANTED and Petitioner's Motions are DENIED.

[16] McKinney v. State, 992 P.2d 144, 133 Idaho 695 (1999).
[17] Dionne v. State, 459 P.2d 1017, 93 Idaho 235 (1969).
[18] Idaho Criminal Rule 35.

IT IS SO ORDERED.

Dated this 25th day of April, 2003.

Ronald J. Wilper
DISTRICT JUDGE

CERTIFICATE OF MAILING

I, J. David Navarro, the undersigned authority, do hereby certify that I have mailed, by United States Mail, on this 25 day of April, 2003, one copy of the MEMORANDUM DECISION AND ORDER as notice pursuant to Rule 77(d) I.C.R. to each of the attorneys of record in this cause in envelopes addressed as follows:

FEDERAL DEFENDERS OF EASTERN WASHINGTON & IDAHO
JOAN M. FISHER
CAPITAL HABEAS UNIT
201 N. MAIN
MOSCOW, ID 83843

HAMPTON & ELLIOT
TERESA A. HAMPTON
P.O. BOX 1352
BOISE, ID 83702

ADA COUNTY PROSECUTOR
VIA INTERDEPARTMENTAL MAIL

J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

By _____ Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

LACEY M. SIVAK, Petitioner, vs. THE STATE OF IDAHO, Respondent.	Case No. SPOT 0200710D MEMORANDUM DECISION AND ORDER
STATE OF IDAHO, Plaintiff, vs. LACEY M. SIVAK, Defendant.	Case No. HCR10183A

This case came before the Court on the State's Motion to Dismiss Lacey Sivak's Petition for Post-Conviction Relief and/or Writ of Habeas Corpus, and Petitioner's Motions to Correct or Vacate his sentence of death. Because the new rule announced by the United States Supreme Court in Ring v. Arizona[1] does not apply retroactively to the

[1] Ring v. Arizona, 122 S. Ct. 2428 (2002).

Petitioner's case, the State's Motion to Dismiss the Petition is GRANTED and Petitioner's Motions are DENIED.

COURSE OF PROCEEDINGS

On August 2, 2002, the Petitioner/Defendant, Lacey M. Sivak (hereinafter Petitioner), filed his fifth state Petition for Post-Conviction Relief and/or Writ of Habeas Corpus (Case No. SPOT-02-00710D), together with a Motion to Correct Illegal Sentence of Death and for New Sentencing Trial (Case No. HCR10183A). The Respondent/Plaintiff, State of Idaho (hereinafter the State), filed a Response and a Motion to Dismiss the Petition on September 3, 2002.

Oral argument was heard on March 7, 2003. The Petitioner submitted additional post-hearing authority in support of his argument on April 11, 2003. The State filed a Reply on April 21, 2003.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner was arrested for the April 1981 robbery and murder of Dixie Wilson. Petitioner's trial took place in September 1981.[2] The jury found Petitioner guilty of robbery and felony murder. On December 16, 1981, the district court imposed a fixed life sentence for the robbery conviction and the death sentence for the first-degree felony murder conviction.

[2] The facts regarding the offense are contained in the Idaho Supreme Court's 1983 decision, State v. Sivak, 674 P.2d 396, 105 Idaho 900 (hereinafter Sivak I).

The Idaho Supreme Court vacated Petitioner's death sentence three times for procedural defects.[3] After Petitioner's death sentence was vacated for the third time, the district court entered findings of fact, entered a new judgment of conviction, and re-imposed the death penalty under Idaho Coder § 19-2515 on September 29, 1992.[4] On August 18, 1995, the Supreme Court affirmed the district court's decision.[5]

Following re-imposition of the death sentence, Petitioner filed a second petition for post-conviction relief. On May 5, 1993, the district court dismissed the second petition. On August 18, 1995, the Idaho Supreme Court dismissed the Petitioner's appeal of the district court's decision.[6]

ANALYSIS

The instant petition and motions are based on the United State Supreme Court's 2002 decision in Ring v. Arizona, supra, which overruled their 1990 decision in Walton v. Arizona.[7] In overruling Walton, the Supreme Court relied on their 2000 decision in Apprendi v. New Jersey.[8]

In Walton, the Supreme Court said Arizona's death sentence statute was compatible with the Sixth Amendment of the United States Constitution, which guarantees criminal defendants the right to a trial by a jury. Specifically, the Arizona statute assigned

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[3] Sivak I (delivery of sentencing findings of fact and conclusions of law without an open court hearing); Sivak v. State, 112 Idaho 197, 203 (1986) (Sivak II) (failure to consider all of Sivak's mitigating evidence at sentencing hearing); State v. Sivak, 119 Idaho 320, 322 (1990) (Sivak III) (improper weighing of aggravating and mitigating circumstances and improper consideration of victim impact testimony).

[4] The procedural history of the remand is contained in the Idaho Supreme Court's 2000 decision, Sivak v. State, 8 P.3d 636, 134 Idaho 641.

[5] State v. Sivak, 901 P.2d 494, 127 Idaho 387 (1995) (Sivak IV).

[6] Sivak IV.

[7] Walton v. Arizona, 497 U.S. 639 (1990).

[8] Apprendi v. New Jersey, 530 U.S. 466 (2000).

to the judge, not the jury, the duty to decide whether or not certain aggravating factors were present in capital cases, and if so, to weigh those factors against any mitigating factors, and in this way to decide whether or not to impose the death penalty. The Court in Walton said the statute did not deprive defendants of their Sixth Amendment right to trial by jury because aggravating factors are sentencing considerations, not elements of the crime.

In 2000, the United States Supreme Court issued its decision in the case of Apprendi v. New Jersey, a "hate crime" case. In Apprendi, the Supreme Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The New Jersey statute provided that once a defendant was convicted of a certain crime, it was the duty of the sentencing judge to decide whether or not the facts of the case made it a "hate crime." If so, the maximum penalty was greater than it would be if the judge determined it was not a hate crime. The Court said those factors operate as "the functional equivalent of an element of a greater offense." Id., at 494, n.19. That being the case, the defendant had a right to have a jury decide whether those facts were present.

The Supreme Court could not reconcile the Walton decision with the Apprendi decision. As a result, a divided court overruled Walton and announced a different rule in Ring. The rule announced in Ring is that aggravating factors in capital cases operate as the functional equivalent of elements of a greater offense. Therefore, the Sixth Amendment gives the defendant the right to have those facts determined by a jury.

Idaho's death penalty statute, as it existed at the time the Petitioner was ultimately sentenced to death in 1992, was essentially identical to the Arizona statute declared to be unconstitutional in Ring. The Idaho Supreme Court recognized this in State v. Fetterly, 52

P.3d 874, 137 Idaho 729, (2002). "...Ring v. Arizona...appears to invalidate the death penalty scheme in Idaho..." Id. at 875. The Court vacated the death sentence in Fetterly and remanded the case for sentencing.

A "new rule" applies retroactively to state cases pending on direct review, or not yet final.[9] The appeal in Fetterly was pending before the Idaho Supreme Court when the United States Supreme Court decided Ring on June 24, 2002. Therefore, the new rule applies to Fetterly's case and presumably to all Idaho death penalty cases pending on June 24, 2002. However, Sivak's case was not pending on direct appeal on that date. Petitioner's conviction and sentence became "final" in 1995. Sivak IV, supra. A state conviction becomes final for the purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing for writ of certiorari (with the United States Supreme Court) has elapsed.[10]

Petitioner suggests the Ring decision is not a "new" rule of law, but the argument is not persuasive. A new rule is one not dictated by precedent existing at the time a judgment became final.[11] Walton was the precedent existing at the time Sivak's judgment became final.

Under most circumstances, a new law does not apply to cases that are already final when the new law is declared. This is because the State, no less than a criminal defendant, has a reasonable right to rely on the law as it existed at the time the case is "finally" decided. In the instant case, the Petitioner was found guilty of First Degree Murder in 1981. He was sentenced to death following Appeal in 1992. The case became

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[9] Griffith v. Kentucky, 479 U.S. 314, 107 S. Ct. 708 (1987).
[10] Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 (1989); Jones v. Smith, 231 F.3d 1227 (2000); Fetterly v. State, 121 Idaho 417 (1992); Stuart v. State, 128 Idaho 436 (1996); Butler v. State, 129 Idaho 899 (1997).
[11] Butler v. McKellar, 494 U.S. 407 (1990).

"final" in 1995. The doctrine of finality is not a novel concept. As the United States Supreme Court said in a 1989 decision,

> In many ways, the application of new rules to cases on collateral review may be more intrusive than enjoining of criminal prosecutions for it continually forces the states to marshal resources in order to keep in prison defendants whose trials and appeals conform to then existing Constitutional standards. Furthermore, as we recognized in Engle v. Issac, "state courts are understandably frustrated when they faithfully apply existing Constitutional law only to have a federal court discover...new Constitutional demands." Teague supra.

A new law may even apply to "final" cases in limited circumstances. The United States Supreme Court may specifically hold that the new law announced in a decision must be applied retroactively to other "final" cases. The Supreme Court is the only entity that can make a new rule retroactive in this manner, such that all other United States courts must apply the rule retroactively.[12] The Supreme Court did not state that the holding in Ring would be applied retroactively to final cases.

The next step in determining whether a new law should be applied retroactively to a final case is to determine whether the rule announced is a new "substantive" law, or a "procedural" law. If the new law is substantive, then it is applies retroactively.[13] If the new law is procedural, then the Court must go through what is commonly known as the Teague analysis. supra.

Petitioner argues that the new law created by Ring is a substantive law because Ring refines the definition of an element of a capital offense. However, the Ninth and Tenth Circuits have recently held that Apprendi announced a new rule of criminal

[12] Tyler v. Cain, 533 U.S. 656 (2001).
[13] Bousley v. United States, 532 U.S. 614, 620 (1998).

procedure, not substantive law.[14] This Court is persuaded that since Ring is clearly an extension of Apprendi, and since the law created in Apprendi is procedural, the new law created by Ring is a procedural law.

A new procedural law is not applied retroactively to cases that have become final prior to the new rule being announced, unless the case falls within one of two exceptions. Teague, 489 U.S. at 305-306. It is clear that Petitioner's case was final prior to the Ring decision. Therefore, the Ring decision can only be applied retroactively if the new procedural law falls within one of the two exceptions.

The first exception is that a new law shall be applied retroactively if it places "certain kinds of primary private individual conduct beyond the power of the criminal law-making authority to proscribe." Id. at 311. The second exception applies to "those procedures that...are implicit in the concept of ordered liberty." Id. The first exception is not applicable to Petitioner's case because the holding in Ring does not place "private individual conduct," in this case murder, beyond the power of the criminal law to proscribe.

The United States Supreme Court has held that the second exception involves "watershed rules of criminal procedure," which means "bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." Id. The procedural rule at issue "must implicate the fundamental fairness of the trial," and be an accuracy-enhancing procedural rule. Id. at 312-313. The Ninth Circuit has held that the new procedural rule create in Apprendi is not so fundamental as to fit within Teague's second

[14] Jones v. Smith, 231 F.3d 1227 (9th Cir. 2000); Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002); and United

exception.[15] Again, this Court finds the reasoning of the courts in those Federal cases to be persuasive. Since Ring is an extension of Apprendi, the new procedural rule created in Ring is not a procedure that is "implicit in the concept of ordered liberty." Therefore, the new law created in Ring shall not apply retroactively to Petitioner's case.

HABEAS CORPUS

The Writ of Habeas Corpus remedy is not available. The Uniform Post-Conviction Procedure Act has replaced the writ of habeas corpus for the purpose of challenging the validity of a conviction.[16] The proper use of a petition for post-conviction relief "avoids repetitious and successive applications; eliminates confusion and yet protects the applicant's constitutional rights."[17]

RULE 35 MOTION

The sentence of death was not illegal when it was imposed in 1992, nor when it became final in 1995. The new law announced in Ring does not apply retroactively to Petitioner's case. Therefore, the Petitioner's Rule 35 Motion[18] for correction of an "illegal" sentence is denied.

CONCLUSION

Because the new rule announced by the United States Supreme Court in Ring does not apply retroactively to the Petitioner's case, the State's Motion to Dismiss the Petition is GRANTED and Petitioner's Motions are DENIED.

States v. Mora, 293 F.3d 1213 (10th Cir. 2002).

[15] United States v. Juan Sanchez-Cervantes, 282 F.3d 664, 670 (9th Cir. 2001); Jones, 231 F.3d at 1238.

[16] McKinney v. State, 992 P.2d 144, 133 Idaho 695 (1999).

[17] Dionne v. State, 459 P.2d 1017, 93 Idaho 235 (1969).

[18] Idaho Criminal Rule 35.

IT IS SO ORDERED.

Dated this 25th day of April, 2003.

Ronald J. Wilper
DISTRICT JUDGE

CERTIFICATE OF MAILING

I, J. David Navarro, the undersigned authority, do hereby certify that I have mailed, by United States Mail, on this 25 day of April, 2003, one copy of the MEMORANDUM DECISION AND ORDER as notice pursuant to Rule 77(d) I.C.R. to each of the attorneys of record in this cause in envelopes addressed as follows:

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VIA INTERDEPARTMENTAL MAIL

J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

By _____
Deputy Clerk INGA JOHNSON