7-23-2009

Fields v. State Respondent's Brief Dckt. 35679

IN THE SUPREME COURT OF THE STATE OF IDAHO

ZANE JACK FIELDS,	)	
	)	
Petitioner-Appellant,	)	NO. 35679
	)	
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF RESPONDENT

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

HONORABLE THOMAS F. NEVILLE
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

STEPHEN A. BYWATER
Deputy Attorney General
Chief, Criminal Law Division

L. LAMONT ANDERSON
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
RESPONDENT

DENNIS BENJAMIN
Nevin, Benjamin, McKay &
Bartlett, LLP
PO Box 2772
Boise, ID 83701
(208) 343-1000

ATTORNEY FOR
PETITIONER-APPELLANT

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STATEMENT OF THE CASE

Nature Of The Case

Petitioner-Appellant Zane Jack Fields appeals from the district court's Memorandum Decision and Order denying sentencing relief based upon claims in his "Petition for Post-Conviction Relief or Writ of Habeas Corpus" and "Motions to Correct Illegal Sentences, to Vacate Sentences of Death and for New Sentencing Trial," primarily stemming from the Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), after his death sentence was already final.

Statement Of Facts And Course Of The Underlying Criminal And Prior Post-Conviction Proceedings

The "material facts" leading to Fields' conviction for first-degree murder and his sentence of death for the murder of Katherine Marie Vanderford are summarized in State v. Fields, 127 Idaho 904, 907-08, 908 P.2d 1211 (1995) (Fields I):

> At approximately 11:15 a.m., February 11, 1988, Vanderford was stabbed to death while working at the Wishing Well Gift Shop (the Wishing Well) in Boise. The stabbing occurred during a robbery in which approximately fifty dollars in cash was taken. Vanderford was working alone in the shop at the time. Soon after the perpetrator left, Ralph P. Simmons (Simmons) arrived at the store. When Simmons arrived Vanderford was speaking to the emergency dispatcher. Simmons put pressure on a wound on Vanderford's neck and began speaking with the dispatcher.
>
> Ada County Police Detective Randy Folwell (Folwell), who was in the area at the time, heard the emergency dispatch and drove to the Wishing Well. Vanderford told Folwell that her attacker was a lone male who had left the store. Emergency medical personnel soon arrived and began treating Vanderford. Vanderford was immediately transported to Saint Alphonsus Hospital.
>
> Dr. Frank J. Fazzio, Jr., the doctor who treated Vanderford when she arrived at the emergency room, testified that Vanderford was in full cardiac arrest upon arrival. Vanderford was never resuscitated. Dr.

> Fazzio opined that Vanderford's death was a result of loss of blood. Frank A. Roberts, the pathologist who performed the autopsy on Vanderford, similarly concluded that the cause of death was loss of blood as a result of stab wounds, primarily a neck wound.
>
> The State also called a number of witnesses who identified Fields as a person they saw in or near the store immediately before and after the incident. . . .
>
> . . . .
>
> Most of the State's remaining witnesses were inmates who testified about statements Fields made about the killing while in jail.

An Information was filed charging Fields with Katherine's first-degree murder, which was committed "willfully, unlawfully, and with malice aforethought . . . by stabbing her in the neck, chest, and back from which she died on February 11, 1988, which murder was committed in the perpretation [sic] of a robbery and/or burglary." (##19185/19809, R., pp.17-18.)[1] Upon completion of his trial, a jury found Fields guilty as charged. (##19185/19809, R., p.104.) After a sentencing hearing, the district court found the state had proven three statutory aggravating factors, including: (1) utter disregard, I.C. § 19-2515(g)(6); (2) the murder was committed in the perpetration of a robbery and/or burglary and was accompanied by an intent to cause death, I.C. § 19-2515(g)(7); and (3) propensity, I.C. § 19-2515(g)(8).[2] (##19185/19809, R., pp.167-74.) After weighing the collective mitigation against each of the statutory aggravating factors individually, the court sentenced Fields to death. (##19185/19809, R., pp.164-79.)

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[1] Because there are multiple records and transcripts in this appeal, the state will refer to the records and transcripts by their respective supreme court docket numbers. The supreme court docket numbers for Fields' underlying trial, sentencing and first post-conviction case are ##19185 and 19809. The supreme court docket number for Fields' first successive post-conviction case is #24119. The supreme court docket number for his second successive post-conviction case, and the subject of this appeal, is #35679.

[2] The citations to the Idaho Code have subsequently been amended and are now delineated as I.C. § 19-2515(9)(e), (f), and (g).

Fields filed his first post-conviction petition on April 18, 1991. (##19185/19809, R., pp.197-203.) After being appointed new counsel, an amended petition was filed (##19185/19809, R., pp.218-19), which was denied after an evidentiary hearing (##19185/19809, R., pp.226-35). Fields filed another amended petition for post-conviction relief and motion for new trial (##19185/19809, Supp. R., pp.9-10), which was also denied after another evidentiary hearing (##19185/19809, Supp. R., pp.58-62).

On appeal, Fields did not raise a claim regarding jury involvement in the sentencing process, which also was not raised at anytime prior to his sentencing. *See* Fields I. The Idaho Supreme Court affirmed Fields' conviction, death sentence and denial of post-conviction relief on February 16, 1995. Id.

Statement Of Facts And Course Of Fields' Second Post-Conviction Case

After filing a federal writ of habeas corpus, Fields returned to state court and filed his first successive post-conviction petition (#24119, R., pp.4-51), which included a claim that the trial court's failure to submit the statutory aggravating factors to a jury violated his Fifth, Eighth and Fourteenth Amendment rights (#24119, R., p.31). The district court concluded Fields failed to satisfy the requirements of I.C. § 19-2515(5) because his claims were known or reasonably could have been known when he filed his first post-conviction petition, and entered a final order denying relief. (#24119, R., pp.87-96, 130-35.) The Idaho Supreme Court affirmed the district court's decision denying post-conviction relief on September 7, 2000. Fields v. State, 135 Idaho 286, 17 P.3d 230 (2000) (Fields II).

Statement Of Facts And Course Of Fields' Successive Post-Conviction Petition Based Upon *Ring v. Arizona*

On June 24, 2002, the Supreme Court issued Ring, expressly overruling, in part, Walton v. Arizona, 497 U.S. 639 (1990), which had specifically held that a judge, sitting without a jury, was permitted to find statutory aggravating factors even if necessary for imposition of the death penalty. In Ring, the Court concluded a jury must now find the statutory aggravating factors before a death sentence can be imposed. 536 U.S. at 589.

On August 2, 2002, relying in part upon Ring, Fields filed the instant "Petition for Post-Conviction Relief or Writ of Habeas Corpus" and "Motions to Correct Illegal Sentences, to Vacate Sentences of Death and for New Sentencing Trial," containing eight separate claims. (#35679, R., pp.5-14.)[3] The state filed a response asking that the petition be dismissed because Ring does not apply retroactively, and even if Ring applies retroactively, the jury's finding of guilt in Fields' case was sufficient to establish the felony-murder with intent aggravator. (#35679, R., pp.37-46.) After extensive briefing, on August 5, 2008, relying primarily upon Hoffman v. State, 142 Idaho 27, 29, 121 P.3d 958 (2005), the district court granted the state's motion to dismiss, concluding Ring is not retroactive to cases in collateral review and the petition is "expressly barred by Idaho Code Section 19-2719." (#35679, R., pp.293-304.) Fields' timely notices of appeal were filed September 12, 2008. (#35679, R., pp.307-14.)[4]

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[3] Four claims rely directly upon Ring. (#35679, pp.10-13, ¶¶ V(B)(1), (2), (4) and (6).) Only claim two is the direct subject of Fields' appeal. Although claim three does not directly cite Ring, it is implicitly based upon Ring. Claim five does not involve Ring, but is a "mens rea" argument based upon Enmund v. Florida, 458 U.S. 782 (1982). Claim seven is a "confinement" issue that is also unrelated to Ring. Finally, claim eight involves an "execution" claim that is unrelated to Ring.

[4] Fields also has a "DNA" post-conviction case pending before this Court; the parties are settling the record. Fields v. State, Idaho Supreme Court Case No. 36508-2009.

While Fields' appeal has been pending, five Idaho death-sentenced inmates had petitions for certiorari granted with an order remanding to the Idaho Supreme Court "for further consideration in light of *Danforth v. Minnesota*, 552 U.S. --- (2008)."[5] Rhoades v. Idaho, --- U.S. ---, 128 S.Ct. 1441 (2008); McKinney v. Idaho, --- U.S. ---, 128 S.Ct. 1441 (2008); Pizzuto v. Idaho, --- U.S. ---, 128 S.Ct. 1441 (2008); Card v. Idaho, --- U.S. ---, 128 S.Ct. 1442 (2008); Hairston v. Idaho, --- U.S. ---, 128 S.Ct. 1442 (2008). Another death-sentenced inmate, Gene Francis Stuart, has raised similar Ring arguments on appeal. *See* Stuart v. State, Idaho Supreme Court Case ##34198, 34199. All six cases have been consolidated for oral argument before the Idaho Supreme Court on August 24, 2009. (Appendices A and B.)

[5] In Danforth v. Minnesota, --- U.S. ---, 128 S.Ct. 1029, 1035 (2008), the Court held that the federal rule of retroactivity adopted in Teague v. Lane, 489 U.S. 288 (1989), does not limit state courts from applying a broader rule of retroactivity even if the new rule of law is based upon the federal Constitution.

ISSUE

Fields has stated the issue on appeal as follows:

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

(Appellant's brief, p.4.)

The state wishes to rephrase the issue on appeal as follows:

Because his successive post-conviction petition is governed by I.C. § 19-2719, which does not contain a provision for the retroactive application of new rules of law, has Fields failed to establish the district court had jurisdiction to grant him post-conviction relief based upon the dictates of Ring v. Arizona, and because he has failed to meet the dictates of I.C. § 19-2719, must his appeal be dismissed?

ARGUMENT

The District Court Was Without Jurisdiction To Grant Field's Post-Conviction Relief Because I.C. § 19-2719 Does Not Grant The Courts Jurisdiction To Retroactively Apply New Rules Of Law In Cases On Collateral Review

A. Introduction

While Fields' successive petition raises eight claims, he has challenged the district court's decision with respect to only the first claim - the right to have a jury find the statutory aggravating factors - which is based upon Ring v. Arizona, 536 U.S. 584 (2002). Relying upon principles of "fundamental fairness," Fields contends he is entitled to the retroactive application of Ring. (Appellant's brief, pp.6-10.) Fields also contends he is entitled to the retroactive application of Ring based upon State v. Whitman, 96 Idaho 489, 531 P.2d 579 (1975), which applied a three-prong retroactivity test adopted by the Supreme Court in Linkletter v. Walker, 381 U.S. 618 (1965), but was abandoned by the Supreme Court in Griffith v. Kentucky, 479 U.S. 314 (1987) and Teague v. Lane, 489 U.S. 288 (1989). (Appellant's brief, pp.10-24.) Fields further contends this Court should not adopt the Teague doctrine for purposes of retroactivity analysis, but continue to follow the three-prong Linkletter test. (Appellant's brief, pp.24-30.) Apparently recognizing his case is governed by I.C. § 19-2719, Fields also raises four constitutional and statutory challenges to I.C. § 19-2719(5)(c). (Appellant's brief, pp.30-37.)

Idaho Code § 19-2719 imposes a jurisdictional bar which prohibits the courts from granting relief stemming from successive capital post-conviction claims unless the claim fits the narrow exception of I.C. § 19-2719(5). Because I.C. § 19-2719 does not provide an exception for the retroactive application of new rules of constitutional law, the

district court was without jurisdiction to grant post-conviction relief and this Court is without jurisdiction to reverse the district court. Therefore, the state expressly moves this Court to dismiss Fields' appeal. Alternatively, should this Court conclude I.C. § 19-2719(5) does not prohibit the retroactive application of Ring, because of the difficulties and inconsistent results associated with the three-prong Linkletter test, this Court should adopt the Teague rule of retroactivity. Finally, even under Linkletter, Fields has failed to meet his burden under the three-prong test.

B. Standard Of Review

The Idaho Supreme Court recently articulated the standard of review in appeals stemming from the denial of post-conviction relief in capital successive petitions. "When this Court is presented with a motion to dismiss by the State based upon the provisions of Idaho Code § 19-2719, the proper standard of review this Court should utilize is to directly address the motion, determine whether or not the requirements of section 19-2719 have been met, and rule accordingly." Hairston v. State, 144 Idaho 51, 55, 156 P.3d 552 (2007) (quoting Creech v. State, 137 Idaho 573, 575, 51 P.3d 387 (2002)), *remanded on other grounds* Hairston v. Idaho, --- U.S. ---, 128 S.Ct. 1442 (2008)).

C. Because Idaho Code § 19-2719(5) Does Not Have An Exception For New Rules Of Federal Constitutional Law, Fields' Appeal Must Be Dismissed

1. Fields' Successive Post-Conviction Petition Is Governed By I.C. § 19-2719

Idaho Code § 19-2719 sets forth special appellate and post-conviction procedures in all capital cases. Capital post-conviction proceedings, like non-capital post-conviction proceedings which are governed by the Uniform Post-Conviction Procedure Act

(UPCPA), are civil in nature and governed by the Idaho Rules of Civil Procedure. Pizzuto v. State, 127 Idaho 469, 470, 903 P.2d 58 (1995). Idaho Code § 19-2719 does not eliminate the applicability of the UPCPA in capital cases, but acts as a modifier and "supersedes the UPCPA to the extent that their provisions conflict." McKinney v. State, 133 Idaho 695, 700, 992 P.2d 144 (1999); Pizzuto, 127 Idaho at 470.

Specifically, I.C. § 19-2719 provides a capital defendant one opportunity to raise all challenges to the conviction and sentence in a post-conviction relief petition which must be filed within forty-two days after entry of judgment. State v. Rhoades, 120 Idaho 795, 806, 820 P.2d 665 (1991). The **only exception** is provided in I.C. § 19-2719(5), which permits a successive petition "in those unusual cases where it can be demonstrated that the issues raised were not known and reasonably could not have been known within the time frame allowed by the statute." Id., 120 Idaho at 807. If a capital defendant fails to comply with the specific requirements of I.C. § 19-2719, including the specified time limits, the issues are "deemed to have [been] waived" and "[t]he courts of Idaho shall have no power to consider any such claims for relief as have been so waived or grant any such relief." I.C. § 19-2719(5); McKinney, 133 Idaho at 700.

A capital defendant who brings a successive petition for post-conviction relief has a "heightened burden and must make a *prima facie* showing that issues raised in that petition fit within the narrow exception provided by the statute." Pizzuto, 127 Idaho at 471. Even if the petitioner can demonstrate the claims were not known or could not reasonably have been known, I.C. § 19-2719(5)(a) details the additional requirements that must be met before the successive petition may be heard:

> 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.

I.C. § 19-2719(5)(a). Failure to meet the requirements of I.C. § 19-2719(5)(a) mandates dismissal of the successive post-conviction petition. Fields v. State, 135 Idaho 286, 289-90, 17 P.3d 230 (2000).

Additionally, claims which were not known or which could not have reasonably been known within forty-two days of judgment "must be asserted within a reasonable time after they are known or reasonably could have been known." Paz v. State, 123 Idaho 758, 760, 852 P.2d 1355 (1993); McKinney, 133 Idaho at 701. If the petitioner fails to comply with each of the requirements detailed in I.C. § 19-2719(5), the petition must be summarily dismissed. I.C. § 19-2719(5) specifically provides:

> 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.**

(Emphasis added.)

In State v. Beam, 115 Idaho 208, 213, 766 P.2d 678 (1988), the Idaho Supreme Court discussed the purpose and policy behind the passage of I.C. § 19-2719:

> The underlying legislative purpose behind the statute stated the need to expeditiously conclude criminal proceedings and recognized the use of dilatory tactics by those sentenced to death to "thwart their sentences." The statute's purpose is to "avoid such abuses of legal process by requiring that all collateral claims for relief . . . be consolidated in one proceeding. . . ." We hold that the legislature's determination that it was necessary to reduce the interminable delay in capital cases is a rational basis for the imposition of the 42-day time limit set for I.C. § 19-2719.

> The legislature has identified the problem and attempted to remedy it with a statutory scheme that is rationally related to the legitimate legislative purpose of expediting constitutionally imposed sentences.

The United States Supreme Court has specifically approved requiring a criminal defendant to present all of his collateral claims in a single post-conviction proceeding. In Murch v. Mottram, 409 U.S. 41 (1972), the Court, discussing federal habeas corpus proceedings which prohibit piecemeal litigation by requiring that all claims be brought in a single petition for a writ of habeas corpus, explained the respective states can employ a similar procedure for post-conviction relief procedures. The Court concluded:

> There can be no doubt that States may likewise provide, as Maine has done, that a prisoner seeking post-conviction relief must assert all known constitutional claims in a single proceeding. Indeed, the Court of Appeals agreed that the Maine statutory scheme was an "orderly procedure of the state courts," as that term is used in *Fay v. Noia*, [372 U.S. 391, 438, 83 S. Ct. 822, 849, 9 L. Ed. 2d 837 (1963)]. No prisoner has a right either under the Federal Constitution or under 28 U.S.C. § 2241 to insist upon piecemeal collateral attack on a presumptively valid criminal conviction in the face of such a statutory provision.

Id. at 45-46.

Idaho Code § 19-2719 also has a great deal of interplay with federal habeas law. The ability of a state to ensure its judgments carry a measure of finality rather than being subject to repetitive federal attack depends in substantial measure on the regular and consistent enforcement of state procedural rules and bars. Addressing the interplay between state procedural bars and federal review, in Johnson v. Mississippi, 486 U.S. 578, 587 (1988), the Supreme Court refused to honor a state procedural bar, explaining:

> [W]e consider whether that bar provides an adequate and independent state ground for the refusal to vacate petitioner's sentence. "[W]e have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question." *Henry v. Mississippi*, 379 U.S. 443, 447, [85 S. Ct. 564, 567, 13 L. Ed. 2d 408] (1965). "[A] state

> procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.' *Barr v. City of Columbia,* 378 U.S. 146, 149, [84 S. Ct. 1734, 1736, 12 L. Ed. 2d 766] (1964)." *Hathorn v. Lovorn*, 457 U.S. 255, 262-263, 102 S. Ct. 2421, 2426-2427, 72 L. Ed. 2d 824 (1982); *see Henry v. Mississippi*, 379 U.S. at 447-448, 85 S. Ct. at 567-568. We find no evidence that the procedural bar relied on by the Mississippi Supreme Court here has been consistently or regularly applied. Rather, the weight of Mississippi law is to the contrary.

The Idaho Supreme Court has historically followed the requirements of I.C. § 19-2719, strictly and regularly dismissing successive capital post-conviction relief claims because of petitioners' failure to meet the narrow exception of I.C. § 19-2719(5). *See* Creech v. State, 137 Idaho 573, 51 P.3d 387 (2002); Porter v. State, 136 Idaho 257, 32 P.3d 151 (2001); Row v. State, 135 Idaho 573, 21 P.3d 895 (2001); Rhoades v. State, 135 Idaho 299, 17 P.3d 243 (2000); Paradis v. State, 128 Idaho 223, 912 P.2d 110 (1996); Pizzuto v. State, 127 Idaho 469, 903 P.2d 58 (1995); Lankford v. State, 127 Idaho 100, 897 P.2d 991 (1995); Paz v. State, 123 Idaho 758, 852 P.2d 1355 (1993); Fetterly v. State, 121 Idaho 417, 825 P.2d 1073 (1991). The Court has also historically followed the requirements of I.C. § 19-2719, strictly and regularly affirming the district courts' dismissal of successive capital post-conviction claims because of petitioners' failure to meet the narrow exceptions of I.C. § 19-2719(5), including the pleading requirements of I.C. §§ 19-2719(5)(a) and (b). *See* Fields v. State, 135 Idaho 286, 17 P.3d 230 (2000); Pizzuto v. State, 134 Idaho 793, 10 P.3d 742 (2000); Sivak v. State, 134 Idaho 641, 8 P.3d 636 (2000); McKinney v. State, 133 Idaho 695, 992 P.2d 144 (1999).

2. Fields' Appeal Must Be Dismissed Because The Claims In His Successive Petition Do Not Fall Within The Exception Contained In I.C. § 19-2719(5)

As detailed above, capital defendants are provided only one opportunity to raise all factual and legal challenges to their convictions and sentences, which must be filed

within forty-two days after entry of judgment. Rhoades, 120 Idaho at 806. The **only exception** is for those claims which were not known and reasonably could not have been known within the time frame allowed by the statute. Id.

Fields failed to raise the issue regarding juries finding statutory aggravators in his initial direct and post-conviction appeal. Nevertheless, the claim clearly was known or reasonably could have been known at the time Fields filed his initial post-conviction case. In Hoffman v. State, 142 Idaho 27, 30, 121 P.3d 958 (2005), the petitioner previously raised the claim of jury participation in a capital sentencing in his initial consolidated appeal. Therefore, the claim in his successive petition was "clearly known and asserted in prior proceedings." Id. As explained in Hairston, 144 Idaho at 58, this Court has dismissed Ring claims in successive post-conviction petitions because "the claims do not fall within the exceptions of I.C. § 19-2719 and are therefore barred." Fields' Ring claim fails to meet the only exception in I.C. § 19-2719(5) that permits the filing of claims in a successive petition. Therefore, unless this Court overrules Hoffman and Hairston, Fields' appeal must be dismissed.

Sivak v. State, 134 Idaho 641, 8 P.3d 636 (2000), does not salvage Fields' claim. In Sivak, the state asserted a prosecutorial misconduct claim was procedurally barred under I.C. § 19-2719(5) because "the identical issue" had been previously raised before the court. Id. at 642. Rejecting the state's argument, the court explained:

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

> misconduct. We must be vigilant against imposing a rule of law that will work injustice in the name of judicial efficiency.

Id.

Sivak was premised upon the presentation of additional **evidence** supporting an old claim, not a new rule of law from the Supreme Court. The court was concerned that a rule preventing the presentation of additional or new **evidence** supporting an old claim could prevent the Court from addressing claims of actual innocence. However, a new rule of law does not raise concerns of actual innocence, but merely provides a mechanism for death sentenced murderers, who have been legally and constitutionally convicted and sentenced based upon then existing law, to skirt their convictions or death sentences based upon a new technicality which the original courts never envisioned; it does not involve actual innocence.

Fields contends this Court should apply the three-prong Linkletter test for determining whether Ring is retroactive in cases on collateral review in Idaho. (Appellant's brief, pp.10-24.) Contrary to Fields' contention that this Court has "consistently employed precedent requiring the use of a three-factor test to settle questions of retroactivity" (Appellant's brief, p.10), and that, "[u]ntil *Danforth*, the sole exception to this Court's use of the three-factor test to determine a new decision's retroactive effect was where a rule required by the federal constitution announced in a United States Supreme Court decision was at issue" (Appellant's brief, p.12), this Court has not consistently applied the three-prong Linkletter test and has **never applied** the three-prong test in capital cases. Rather, this Court has applied I.C. § 19-2719 to address whether Idaho law permits the retroactive application of new rules of law raised in successive post-conviction petitions.

In Fetterly v. State, 121 Idaho 417, 418, 825 P.2d 1073 (1991), the petitioner contended, "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.[6] Because Charboneau had not been issued prior to the filing of his initial post-conviction petition, Fetterly contended the claim was not known and reasonably could not have been known when he filed his initial petition, and that it should be given retroactive application. The Idaho Supreme Court recognized Charboneau was issued after Fetterly filed his first post-conviction petition, but expressly reframed the issue, stating, "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." Fetterly, 121 Idaho at 418. Relying upon Griffith v. Kentucky, 479 U.S. 314 (1987), the court recognized, "the distinction between defendants whose cases were final before the issuance of *Charboneau* and those whose cases were not is a valid distinction." Id. at 418-19. Based upon that distinction, the court refused to retroactively apply Charboneau, concluding, "the *Charboneau* interpretation of I.C. § 19-2515 does not apply to the present case because the present case was final prior to the issuance of *Charboneau*." Id.

In dissent, Justice Bistline addressed the three-pronged Linkletter test and noted Idaho had used the test "in both direct appeals and collateral attacks to determine the retroactive effect of cases." Fetterly, 121 Idaho at 420 (Bistline, J., dissenting). Justice Bistline explained the Griffith test requires new constitutional rules to be applied

[6] In State v. Charboneau, 116 Idaho 129, 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."

retroactively in criminal cases "to all cases pending on direct review or which are not yet final" and did not apply to cases on collateral review. Id. Because Griffith addressed only retroactivity in direct review cases involving new constitutional rules, Justice Bistline advocated for a continuation of the Linkletter three-prong test for new rules of law in cases on collateral review. Id. at 420-21. However, the majority rejected Justice Bistline's position when it relied upon I.C. § 19-2719(5) and Griffith, concluding, "the *Charboneau* interpretation of I.C. § 19-2515 does not apply to the present case because the present case was final prior to the issuance of *Charboneau*." Id. at 419. Obviously, Charboneau was a new state rule, not "a new rule required by the federal constitution announced in a United States Supreme Court decision."

In Stuart v. State, 128 Idaho 436, 438, 914 P.2d 933 (1996), the supreme court applied the principles established in Fetterly when it rejected Stuart's request for retroactive application of the Idaho Supreme Court's holding in State v. Tribe, 123 Idaho 721, 852 P.2d 87 (1993), which reversed a murder conviction because the jury was not instructed on second-degree murder by torture. Relying upon Fetterly, the supreme court concluded, because Stuart's case was final when Tribe was issued, the court was precluded from applying Tribe retroactively. Stuart, 128 Idaho at 438.

In Butler v. State, 129 Idaho 899, 901, 935 P.2d 162 (1997), the petitioner sought the retroactive application of State v. Townsend, 124 Idaho 881, 865 P.2d 972 (1993), which held that hands, other body parts, or appendages may not by themselves constitute deadly weapons under the aggravated assault and aggravated battery statutes. Again, relying upon Fetterly, this Court concluded Townsend would not be retroactively applied because the petitioner's direct appeal was final. Butler, 129 Idaho at 901-02. Tribe and

Townsend were obviously new state rules, not "a new rule required by the federal constitution announced in a United States Supreme Court decision," as Fields contends.

The three-prong Linkletter test was also implicitly rejected in State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991), in which the Idaho Supreme Court applied Payne v. Tennessee, 501 U.S. 808 (1991), which overruled in part, Booth v. Maryland, 482 U.S. 496 (1987). Justice Bistline, again in dissent, contended that under Whitman, Payne *should not be applied retroactively*, Card, 121 Idaho at 461-63 (Bistline, J., dissenting), which this Court implicitly rejected when it applied Payne without any reference to the three-prong Linkletter test.

Since Griffith, this Court has declined to retroactively apply new rules of law to cases on collateral review in any criminal or capital case.[7] In fact, Justice Bistline has repeatedly criticized this Court for its decisions regarding the retroactive application of new rules of law in criminal cases. In addition to those cited above, in State v. Gallegos, 120 Idaho 894, 900-01, 821 P.2d 949 (1991) (Bistline, J., concurring in part and dissenting), Justice Bistline again criticized the majority for refusing to address the three-prong *Linkletter test in a direct review case that retroactively applied* California v. Acevedo, 500 U.S. 565 (1991). Justice Bistline detailed cases in which this Court had addressed the retroactivity issue in criminal cases and noted the Court was again

[7] State v. Adair, 145 Idaho 514, ---, 181 P.3d 440, 443 (2008), is not contrary. While Adair cited State v. Tipton, 99 Idaho 670, 672, 587 P.2d 305 (1978), it was only in the context of whether any retroactive analysis should be applied to the issue raised, not whether the three-prong test should be applied. As explained in Tipton, 99 Idaho at 672, the question of retroactivity "arises when the rule announced in the more recent case overrules a precedent upon which parties may have justifiably relied." Because the question in Adair was whether some prior precedent had been overruled, it was appropriate for this Court to cite the rule from Tipton. Because this Court concluded past precedent had not been overruled, any contention that the Court's citation to Tipton establishes the three-prong Linkletter test is still viable after Griffith is simply incorrect.

retroactively applying a new rule of law without addressing the three-prong Linkletter test. Gallegos, 120 Idaho at 900-01. It is clear that Griffith changed Idaho's retroactive test in criminal cases and I.C. § 19-2719 changed the rule in capital cases.

Fields' reliance upon civil cases is also unavailing. As explained in American Trucking Associations, Inc. v. Smith, 496 U.S. 167, 197 (1990) (Thomas, J., with three justices concurring), four Justices declined to extend Griffith to civil cases, concluding, "there are important distinctions between the retroactive applications of civil and criminal decisions that make the *Griffith* rationale far less compelling in the civil sphere." Recognizing Griffith's adoption of a *per se* rule of retroactivity expanded procedural protections to criminal defendants because it allowed the retroactive application of new rules of law in any criminal case that was still pending, the Court concluded, "[t]here are no analogous reasons for adopting a *per se* rule of retroactivity in the civil context [because] [e]ither party before a court may benefit from the application of the *Chevron Oil* rule," which is similar to the Linkletter test. American Trucking, 496 U.S. at 198. While the Supreme Court has subsequently concluded Griffith is the proper retroactive test for new rules of federal law in civil cases, Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 97 (1993), the Idaho Supreme Court has apparently concluded there is a distinction between civil and criminal cases because the court has continued to apply the three-part Linkletter/Whitman test to civil cases. *See* State v. Hooper, 145 Idaho 139, 141 n.1, 176 P.3d 911 (2007) (citing Harper and Idaho criminal cases in which the Griffith/Harper test for retroactivity was applied to Idaho criminal cases).

More importantly, as detailed above, there simply is not an exception under I.C. § 19-2719 providing for the retroactive application of either new state or federal rules of

law. Because there is no exception for the retroactive application of new rules of law in capital cases, Fields' claims fail, were properly dismissed by the district court, and his appeal must be dismissed by this Court.

3. Fields Has Failed To Establish I.C. § 19-2719(5)(c) Violates Either The State Or Federal Constitutions Or Idaho Code

a. Introduction

Fields raises four constitutional and statutory challenges to I.C. § 19-2719(5)(c), including: (1) Idaho's separation of powers doctrine; (2) I.C. § 73-101 bars the retroactive application of I.C. § 19-2719(5)(c); (3) due process and equal protection; and (4) violation of the federal constitutional guarantee of a "republican form of state government" under Article 4, §4 of the Constitution. (Appellant's brief, pp.30-37.)

Initially, it must be noted the state is not relying upon I.C. § 19-2719(5)(c), but upon I.C. § 19-2719(5), which does not provide an exception for the retroactive application of new rules of law, as established by this Court in Fetterly. As detailed below, I.C. § 19-2719(5)(c) is merely a codification of what this Court concluded in Fetterly. However, to the extent Fields converts the same arguments to a challenge against I.C. § 19-2719(5), his arguments still fail.

b. Fields' "Republican Form Of State Government" Issue Is Being Raised For The First Time On Appeal

Fields' fourth basis - violation of the federal constitutional guarantee of a "republican form of state government" under Article 4, §4 of the Constitution - is being raised for the first time on appeal. Therefore, this Court is precluded from addressing his argument. Porter v. State, 136 Idaho 257, 262, 32 P.3d 151 (2001).

c. I.C. § 19-2719 Does Not Violate The Idaho Constitution's Separation Of Powers Doctrine

Fields contends I.C. § 19-2719 violates Idaho's separation of powers doctrine. (Appellant's brief, pp.30-33.) While Idaho has not directly addressed this issue, it has been addressed in the context of habeas corpus. In Mahaffey v. State, 87 Idaho 228, 230, 392 P.2d 279 (1964), the Idaho Supreme Court explained that because the writ of habeas corpus is expressly recognized in Idaho's constitution, "the writ is not a statutory remedy." The court concluded, "While the legislature (absent certain contingencies) is without power to abridge this remedy secured by the Constitution, it may add to the efficacy of the writ. Statutes are usually enacted for this purpose and should be construed so as to promote the effectiveness of the proceeding." Id. Addressing the enactment of the UPCPA, the supreme court concluded the UPCPA is "an expansion of the Writ of Habeas Corpus." Dionne v. State, 93 Idaho 235, 237, 459 P.2d 1017 (1969).

Because the UPCPA is an expansion of the writ of habeas corpus and the legislature is not barred from adding to the efficacy of the writ, it naturally follows that I.C. § 19-2719 does not unduly restrict the district court's jurisdiction in violation of the separation of powers doctrine. Rather, I.C. § 19-2719 merely establishes the parameters in which relief may be granted when a successive post-conviction petition has been filed. As explained in Kirkland v. Blaine County Medical Ctr., 134 Idaho 464, 471, 4 P.3d 1115 (2000):

> Because it is properly within the power of the legislature to establish statutes of limitations, statutes of repose, create new causes of action, and otherwise modify the common law without violating separation of powers principles, it necessarily follows that the legislature also has the power to limit remedies available to plaintiffs without violating the separation of powers doctrine.

Because the legislature has the power to limit the remedies available to plaintiffs, it necessarily has the power to limit the remedies of capital petitioners in seeking post-conviction relief. Fields has failed to establish I.C. § 19-2719 results in a constitutional violation under the separation of powers doctrine.

d. The Legislature Has Stated Its Clear Intent That I.C. § 19-2719(5) Be Applied Retroactively In Capital Cases

The legislature clearly explained it meant for I.C. § 19-2719(5) to be applied retroactively. Idaho law "prohibits the retroactive application of newly passed legislation." Matthews v. State, 122 Idaho 801, 804, 839 P.2d 1215 (1992) (citing I.C. § 73-101). However, I.C. § 73-101 provides an exception when the legislature declares its intent to make a new rule of law retroactive. Id. When the legislature enacted I.C. § 19-2719 in 1984, it included the relevant portion of section (5), which reads as follows, "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 claim for relief as have been so waived or grant any such relief." 1984 Idaho Sess. Laws 389. This portion of the statute is the same even today. At the time I.C. § 19-2719 was passed, the legislature also expressly stated:

> This act shall apply to all cases in which capital sentences were imposed on or prior to the effective date of this act but which have not been carried out, and to all capital cases arising after the effective date of this act.

1984 Idaho Sess. Laws 390.

This language clearly states the legislature's intent to make I.C. § 19-2719(5) retroactive to all capital cases. Because of this language, Fields' argument regarding the retroactivity of I.C. § 19-2719(5) fails.

Second, Fields' argument also fails with respect to I.C. § 19-2719(5), and subsection (c), which was enacted in 1995, 1995 Idaho Sess. Laws 597, because Fields filed his successive petitions after Ring was issued in 2002. Because the state is not relying upon a statute or a portion of a statute enacted after the successive petition was filed, I.C. § 73-101 has no application to Fields' case. *See* Matthews, 122 Idaho at 804.

e. Idaho Code § 19-2719(5) Does Not Violate Fields' Due Process Or Equal Protection Rights

Fields contends I.C. § 19-2719(5)(c) violates his equal protection and due process rights. (Appellant's brief, pp.33-36.) In State v. Beam, 115 Idaho 208, 211-13, 766 P.2d 678 (1988), the court expressly held I.C. § 19-2719 does not violate equal protection. In State v. Rhoades, 120 Idaho 795, 806, 820 P.2d 665 (1991), the court expressly concluded I.C. § 19-2719 does not violate due process. The Idaho Supreme Court has repeatedly affirmed both of these cases. *See* Hairston v. State, 144 Idaho 51, 55, 156 P.3d 552 (2007); Lankford v. State, 127 Idaho 100, 102, 897 P.2d 991 (1995); State v. Hoffman, 123 Idaho 638, 647, 851 P.2d 934 (1993); State v. Card, 121 Idaho 425, 430-31, 825 P.2d 1081 (1991); State v. Rhoades, 121 Idaho 63, 72, 822 P.2d 960 (1991); State v. Paz, 118 Idaho 542, 559, 798 P.2d 1 (1990); State v. Fetterly, 115 Idaho 231, 235-36, 766 P.2d 701 (1988). Because Fields has failed to even cite these cases, he obviously has failed to provide any argument as to why they are not controlling or should be reconsidered.

4. Because The Claim In Fields' Successive Petition Seeks The Retroactive Application Of A New Rule Of Law In Violation Of I.C. § 19-2719(5)(c), His Appeal Must Be Dismissed

As detailed above, in 1995, the Idaho Legislature enacted I.C. § 19-2719(5)(c), which expressly states, "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." 1995 Idaho Sess. Laws 594. Idaho Code § 19-2719(5)(c) is based upon the Court's decision in Fetterly, which discussed the question of retroactivity. While Fetterly did not expressly cite I.C. § 19-2719(5), the legislature obviously wanted to ensure Justice Bistline's dissent did not result in a judicially created exception permitting the retroactive application of new rules of law in violation of the legislature's clear intent to limit claims in successive petitions to those which were not known and could not reasonably have been known when a capital petitioner's first petition was filed.

Fields does not dispute his claims are based upon the retroactive application of a new rule of law, but challenges the statute, contending it violates: (1) Idaho's separation of powers doctrine; (2) I.C. § 73-101 and the retroactive application of I.C. § 19-2719(5)(c); (3) due process and equal protection; and (4) the federal constitutional guarantee of a "republican form of state government" under Article 4, §4 of the Constitution (Appellant's brief, pp.30-37), which the state has addressed above.

Because I.C. § 19-2719(5)(c) is nothing more than an affirmation and codification of Fetterly, there is no significant difference in the analysis associated with I.C. § 19-2719(5). However, should this Court determine subsection (c) is more than a codification of Fetterly or that Fields' claims are not controlled by Fetterly, the state expressly relies upon the prohibition of I.C. § 19-2719(5)(c), and requests that his appeal be dismissed.

D. Because The Three-Prong *Linkletter* Test Is Difficult To Apply And Causes Inconsistent Results, This Court Should Adopt The *Teague* Test For New Rules Of Law Arising In Collateral Challenges In Criminal Cases

As explained in Danforth, 128 S.Ct. at 1036, the Supreme Court first addressed the issue of retroactivity in Linkletter, which involved only the question of whether the dictates of Mapp v. Ohio, 367 U.S. 643 (1961), would be retroactively applied to cases that were already final. Linkletter, 381 U.S. at 621-22. After reviewing "the history and theory of the problem presented," id. at 622-26, and, based upon that review, concluding, "the Constitution neither prohibits nor requires retrospective effect," id. at 629, a rule was adopted requiring the Court to "look to the purpose of the [new] rule; the reliance placed upon the [prior] doctrine; and the effect on the administration of justice of a retrospective application of [the new rule]." Id. at 636. The three-prong test was subsequently applied to cases which had not become final, but were still pending review, in Johnson v. New Jersey, 384 U.S. 719, 732 (1966).

Nine years later in Thompson v. Hagan, 96 Idaho 19, 25, 523 P.2d 1365 (1974), the Idaho Supreme Court reviewed Linkletter and concluded the three-prong test would be applied to a case involving "a major change in a host's liability in a negligently caused automobile accident" "to past, pending and future cases." The Linkletter three-prong test was applied in an Idaho criminal case the following year in Whitman, 96 Idaho at 491.

During the succeeding years, "application of the *Linkletter* standards produced strikingly divergent results" resulting in the "eventual demise of the *Linkletter* standard" *in cases pending on direct review* because it was "unprincipled and inequitable." Danforth, 128 S.Ct. at 1037. Therefore, in Griffith, 479 U.S. at 328, the Court abandoned the Linkletter standard *in cases on direct review and concluded, "a new rule for the*

conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final."

However, it was not until Teague that the Court abandoned the Linkletter standard in federal habeas cases, stating, "The *Linkletter* standard also led to unfortunate disparity in the treatment of similarly situated defendants on collateral review," which was based upon two factors, "failure to treat retroactivity as a threshold question and the *Linkletter* standard's inability to account for the nature and function of collateral review." Teague, 489 U.S. at 305-06. The Court concluded, "commentators have had a veritable field day with the *Linkletter* standard, with much of the discussion being more than mildly negative." Id. at 303. Relying upon Justice Harlan's concurrence in Mackey v. United States, 401 U.S. 667 (1971), the Court recognized habeas corpus has always been a "*collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review." Teague, 489 U.S. at 306 (emphasis in original) (quoting Mackey, 401 U.S. at 682-83 (concurring in judgments in part and dissenting in part)). Therefore, the Court developed a three-step process to determine when new rules of law should be applied retroactively in federal habeas:

> First, [the court] determines the date upon which the defendant's conviction became final. Second, [the court] must [s]urve[y] the legal landscape as it then existed, and determine whether a state court considering [the defendant's] claims 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, if the court determines that the habeas petitioner seeks the benefit of a new rule, the court must consider whether the relief sought falls within one of the two narrow exceptions to nonretroactivity.

Lambrix v. Singletary, 520 U.S. 518, 527 (1997) (internal quotes and citations omitted).

While the Supreme Court has determined the States are not mandated to apply Teague to new rules of law, Danforth, 128 S.Ct. at 1041, many of the problems associated with the unbridled Linkletter standard exist in state collateral proceedings, resulting in a majority of States choosing to adopt Teague's standard for determining the retroactive application of new rules of law in cases on collateral review. *See* Smart v. State, 146 P.3d 15, 28 (Alaska Ct. App. 2006) ("several of the state courts that have recognized that they are not bound by the *Teague* retroactivity rule have nevertheless adopted the *Teague* rule as a matter of state law - either because they were troubled by the difficulties posed by the *Linkletter* rule, or simply because they wished to bring their state law into conformity with federal law on this subject"). In Pailin v. Vose, 603 A.2d 738, 742 (R.I. 1992), the court adopted Teague, abandoning the confusion from the Linkletter standard. *See also* Carmichael v. State, 927 A.2d 1172, 1179 (Me. 2007).

Additionally, as recognized in Daniels v. State, 561 N.E.2d 487, 489 (Ind. 1990), some states have adopted the Teague standard "[b]ecause the purposes for which [the] Court affords the remedy of post-conviction relief are substantially similar to those for which the federal writ of habeas corpus is made available." In People v. Flowers, 561 N.E.2d 674, 682 (Ill. 1990), the court adopted the Teague standard for retroactivity analysis in post-conviction cases, focusing upon the interests of finality. *See also* Flamer v. State, 585 A.2d 736, 749 (Del. 1990).

Perhaps more importantly, a trend has developed wherein the States have adopted the Teague standard. For example, as recently as 2006, Colorado expressly abandoned the Linkletter test and adopted Teague, "for reasons of uniformity and compliance with current Supreme Court precedent, and because *Teague* meets the underlying goals of

Crim. P. 35(c) collateral attacks," which focus upon a "dual purpose: to prevent constitutional injustice and to bring finality to judgment." Edwards v. People, 129 P.3d 977, 982-83 (Colo. 2006). In adopting Teague, the Colorado Supreme Court noted it was joining the ranks of a majority of states. Id. (citing Windom v. State, 886 So.2d 915, 943 (Fla. 2004) (noting twenty-eight state supreme courts and the District of Columbia had adopted the Teague test at that point in time) (citing cases)). In fact, Windom noted only six state supreme courts have decided against adopting Teague's retroactivity standards to new rules of federal constitutional law. Windom, 886 So.2d at 915 (citing cases).

Should this Court conclude I.C. § 19-2719(5) is not controlling regarding the retroactive application of Ring, the Court should follow the majority of states and adopt the Teague standard, which will provide uniformity in Idaho's application of new rules of criminal law and eliminate a confusing and unbridled standard that was abandoned years ago by the Supreme Court and a majority of states. *See* Flowers, 561 N.E.2d at 682 ("The *Teague* test is helpful and concise and in it we have the pronouncement of the Supreme Court on an issue nearly identical to the one before us"). Post-conviction cases in Idaho, like federal habeas case, are collateral in nature and both are "collateral attacks that are not meant to be a substitute for direct review." Id.; *compare* Gilpin-Grubb v. State, 138 Idaho 76, 81, 57 P.3d 787 (2002) ("A post-conviction action is not a substitute for and does not supplant a direct appeal from the conviction or sentence"). Finally, "[t]he application of a constitutional rule 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." Flamer, 585 A.2d at 749.

E. Even Under The Three-Prong *Linkletter* Test Fields Has Failed To Establish *Ring* Should Be Retroactively Applied

Even if this Court applies the three-prong Linkletter test, Fields has failed to establish Ring should be retroactively applied. In Idaho, the Linkletter test encompasses the following: "The Court must weigh: (1) The purpose of the new rule; (2) Reliance on the prior decisions of this Court; and (3) The effect of the new rule on the administration of justice." Whitman, 96 Idaho at 491. "We balance the first factor against the other two to determine whether to limit the retroactive application of the decision." BHA Investments, Inc. v. City of Boise, 141 Idaho 168, 173, 108 P.3d 315 (2004).

While Fields has devoted considerable space in his argument regarding the three-prong test (Appellant's brief, pp.10-24), he has conspicuously ignored the fact that the Supreme Court applied the three-prong Linkletter test in DeStefano v. Woods, 392 U.S. 631, 633-34 (1968), and declined to retroactively apply Duncan v. Louisiana, 391 U.S. 145 (1968), which held the Sixth Amendment right to a jury trial applies to the states through the Fourteenth Amendment. As explained in Duncan, "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." 391 U.S. at 158. Therefore, addressing the first prong, the Court concluded, "The values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial." DeStefano, 392 U.S. at 634.

Addressing the second prong, Fields contends any reliance by the state was misplaced because "they knew or should have known that the legislature's enactment was not made in reliance on guidance from the United States Supreme Court." (Appellant's

brief, p.19.) Fields' argument is nonsensical. When this Court reviewed the question of whether the federal Constitution required a jury determination of statutory aggravating factors, there was a plethora of Supreme Court precedent suggesting no such requirement was mandated. *See e.g.*, Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam); Poland v. Arizona, 476 U.S. 147 (1986); Spaziano v. Florida, 468 U.S. 447 (1984); Enmund v. Florida, 458 U.S. 782 (1982); Proffit v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

In State v. Creech, 105 Idaho 362, 373-74, 670 P.2d 463 (1983), this Court carefully examined Supreme Court precedent and recognized the Supreme Court had not mandated jury participation in a capital sentencing. After examining additional Supreme Court cases in State v. Sivak, 105 Idaho 900, 902-03, 674 P.2d 396 (1983), this Court reaffirmed that jury participation in a capital sentencing was not required by the United States Supreme Court. Admittedly, in Adamson v. Ricketts, 865 F.2d 1011, 1023-28 (9th Cir. 1988), the Ninth Circuit reached an opposite conclusion. However, after further review of Supreme Court precedent, this Court expressly rejected Adamson, concluding, "we are not convinced that *Adamson* states the requirements of the sixth amendment on this issue." State v. Charboneau, 116 Idaho 129, 145-48, 774 P.2d 299 (1989).

Of course, the Supreme Court's precedent culminated in Walton, which expressly held the Constitution did not require a jury finding of statutory aggravating factors. While Walton has been overruled by Ring, until the Supreme Court expressly overruled Walton, and its preceding precedent, the Idaho Supreme Court had no basis to ignore the plethora of Supreme Court authority indicating the Constitution did not require a jury finding of statutory aggravating factors. Even the Ninth Circuit has recognized, "The

Supreme Court has specifically directed lower courts to 'leav[e] to this Court the prerogative of overruling its own decisions.'" Hoffman v. Arave, 236 F.3d 523, 542 (9th Cir. 2001) (quoting Agostini v. Felton, 521 U.S. 203, 207 (1997)). As explained in DeStefano, "[Idaho] undoubtedly relied in good faith upon the past opinions of this Court to the effect that the Sixth Amendment right to jury trial was not applicable to [capital sentencings]." 392 U.S. at 634. If the Supreme Court was permitted to rely upon its prior precedent to conclude there was no Sixth Amendment right to jury participation in a capital sentencing in Walton, certainly the Idaho Legislature and the Idaho Supreme Court were entitled that same right.

Addressing the third prong, Fields correctly notes the number of death-sentenced murderers in Idaho whose cases would be affected by Ring is less than twenty. (Appellant's brief, p.21.) However, even the resentencing of ten murderers would not be a *de minimus* undertaking in a capital case. As explained in Johnson v. State, 904 So.2d 400, 411 n.6 (Fla. 2005), "to equate death penalty cases with cases involving lesser crimes and punishments would be to ignore the obvious: death penalty cases require a much larger investment of societal resources than the average criminal case." While Idaho certainly does not have the number of death-sentenced murderers as Florida, even the resentencing of ten would constitute an enormous undertaking, particularly considering the limited resources available in Idaho and her smaller counties.

Finally, the state notes the Florida Supreme Court, using the three-prong Linkletter test, has expressly rejected Fields' arguments regarding Ring's retroactivity, concluding none of the three Linkletter prongs were met. Johnson, 904 So.2d at 409-12.

There is simply no basis for distinguishing either DeStefano or Johnson. Therefore, even if this Court concludes I.C. § 19-2719(5) is not controlling regarding the retroactive application of Ring, and the three-prong Linkletter test must be applied in lieu of Teague, Fields' claims fail because Ring is not retroactive under the three-prong test.

F. "Fundamental Fairness" Does Not Mandate The Retroactive Application of *Ring*

Fields' contends, "Fundamental fairness requires that Petitioners' unconstitutional sentences - unconstitutional on the very ground on which they objected at trial - be remedied." (Appellant's brief, p.5.) Contrary to Fields' contention, it is the retroactive application of Ring that would result in an inequitable result and miscarriage of justice.

In Griffith, the Supreme Court discussed the history and equities associated with the question of retroactivity. Reassessing the "clear break" exception, the Court concluded it should not be applied to cases on direct review. Id. 479 U.S. at 326-28. In Teague, the Supreme Court again addressed the question of retroactivity, but in the context of collateral review. Based upon the interests of comity and finality, a plurality of the Court concluded new constitutional rules of criminal procedure cannot be applied in those cases which have become final before the new rules are announced. Id., 489 U.S. at 308-10. Specifically addressing the issue of finality, the Court explained:

> 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. If 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.
>
> . . . .

> 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 the enjoining of criminal prosecutions, 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. . . . [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 demands.

Id. at 309-10 (internal quotes, citations and emphasis omitted).

Despite Fields' protestations to the contrary, Ring is a new constitutional rule whose impact on the States is exactly as described in Teague if it is applied retroactively to collateral cases. For more than twenty years, Idaho's courts relied upon an abundance of Supreme Court precedent holding a jury finding of statutory aggravating factors is not mandated by the Constitution. *See* Sivak, 105 Idaho at 904; Creech, 105 Idaho at 372-73; Charboneau, 116 Idaho at 145-48. To now require the application of Ring to those cases and potentially force the resentencing of every capital murderer would seriously undermine any deterrent effect associated with the death penalty. More importantly, as explained in Teague, the entire operation of the criminal justice system would be seriously undermined because of the destruction of the principle of finality. The costs associated with such a holding would be enormous, particularly in Idaho's small counties, and seriously outweigh any benefits associated with the new rule. More importantly, Ring does not involve a rule associated with actual innocence, but merely the procedure employed to impose a death sentence. Ring merely changed who decides whether statutory aggravating factors have been proven; it did not change guilt or whether the aggravating factors have already been proven.

Fields' argument is particularly unavailing because several death-sentenced murderers may not be provided Ring relief irrespective of whether this Court concludes Ring should be retroactively applied in the seven cases before this Court because their cases have already been dismissed by this Court and they did not receive a reprieve from the Supreme Court based upon Danforth. *See* Row v. State, 145 Idaho 168, 177 P.3d 382 (2008); Hoffman v. State, 142 Idaho 27, 121 P.3d 958 (2005); State v. Leavitt, 141 Idaho 895, 120 P.3d 283 (2005); Porter v. State, 140 Idaho 780, 102 P.3d 1099 (2004); *see also* State v. Creech, S.Ct. ##29681/29682 (Idaho 2005) (granting the state's motion to dismiss Creech's Ring appeal in a one-page order); Sivak v. State, S.Ct. ##29662/29663 (Idaho 2005) (same as to Sivak); Rhoades v. State, S.Ct. ##29180/29212 (Idaho 2005) (same as to Rhoades).[8]

As explained in Linkletter, 381 U.S. at 639-40, "All that we decide today is that though the error complained of might be fundamental it is not of the nature requiring us to overturn all final convictions based upon it." Similarly, in Johnson, 384 U.S. at 728, the Court reiterated, "We here stress that the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved." Likewise, retroactivity in Idaho should not turn on a subjective determination of what constitutes "fundamental fairness." Rather, it must be based upon objective standards that result in a rule that can be regularly and consistently applied.

[8] While the state understands some of these inmates have again filed successive post-conviction petitions attempting to resurrect their Ring claims based upon Danforth, those petitions must be dismissed based upon I.C. § 19-2719(5), and/or *res judicata* because their claims encompass the same issues previously litigated and they are simply trying to relitigate the same issues already decided by the this Court.

CONCLUSION

The state respectfully requests that Fields' appeal be dismissed or, alternatively, that the decision of the trial court be affirmed on appeal.

DATED this 23rd day of July, 2009.

L. LaMONT ANDERSON
Deputy Attorney General and
Chief, Capital Litigation Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on or about the 23rd day of July, 2009, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

Bruce Livingston Federal Defender Services of Idaho Capital Habeas Unit 702 W. Idaho Street, Suite 900 Boise, ID 83702	X U.S. Mail ____ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Electronic Court Filing
Dennis Benjamin Nevin, Benjamin, McKay & Bartlett P.O. Box 2772 Boise, ID 83701	X U.S. Mail ____ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Electronic Court Filing

L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit

APPENDIX A

IDAHO SUPREME COURT

Clerk of the Courts
(208) 334-2210

IDAHO COURT OF APPEALS

P.O. Box 83720
Boise, Idaho 83720-0101

LANNY LAMONT ANDERSON
DEPUTY ATTORNEY GENERAL
STATEHOUSE MAIL
BOISE, ID
83720-0010

SET FOR HEARING BY SUPREME COURT ****AMENDED****

Docket No.	RE: RHOADES/MC KINNEY/PIZZUTO/CARD/H AIRSTON v. STATE OF IDAHO	DC Docket #
35187-2008(28528-2002/29411-2003/29653-2003/29680-2003/32677-2006/32678-2006/32897-2006/32898-2006/33002-2006/33023-2006/34198-2007/34199-2007)		

ALL ATTORNEYS OF RECORD MUST SIGN AND RETURN **ONE** COPY OF THIS NOTICE WITHIN TEN (10) DAYS INDICATING WHO WILL PRESENT ORAL ARGUMENT.

✓ I WILL PRESENT ARGUMENT
____ I WILL APPEAR BUT NOT ARGUE
____ OTHER COUNSEL WILL PRESENT MY ARGUMENT
(name) L. LaMont Anderson

You must review all recent opinions of this Court issued since the briefs were filed. Any additional citations, with references to the issues or argument for which they are cited, must be received by this office (original + 9 copies) 24 hours prior to oral argument if you intend to cite this authority during your argument. Oral argument will be as set forth below:

/s/

For the Court:
Stephen W. Kenyon, Clerk

Clerk of the Courts
04/28/2009

IDAHO SUPREME COURT

Clerk of the Courts
(208) 334-2210

IDAHO COURT OF APPEALS

P.O. Box 83720
Boise, Idaho 83720-0101

Time: 11:10 A.M. Date: 8-24-09

Argument City: BOISE Location: IDAHO SUPREME COURT

For the Court:
Stephen W. Kenyon, Clerk

Clerk of the Courts
04/28/2009

APPENDIX B

In the Supreme Court of the State of Idaho

GENE FRANCIS STUART,	)	ORDER GRANTING MOTION TO
	)	CONSOLIDATE WITH NO. 35187 FOR
Petitioner-Appellant,	)	ORAL ARGUMENT
	)	
v.	)	Supreme Court Docket Nos.
	)	34198-2007/34199-2007
STATE OF IDAHO,	)	Clearwater County District Court Nos.
	)	1981-8495/ 02-00443
Respondent.	)	Ref. No. 08-439

A MOTION TO CONSOLIDATE CASE FOR ORAL ARGUMENT with attachments was filed by counsel for Respondent on October 28, 2008, requesting that this Court enter an order consolidating the oral argument in this appeal with the oral argument in Supreme Court Docket No. 35187, *McKinney v. State,* which already involves the consolidation of five appellate cases. Thereafter, a RESPONSE TO MOTION TO CONSOLIDATE CASE FOR ORAL ARGUMENT was filed by counsel for Appellant on November 14, 2008. The Court is fully advised; therefore, good cause appearing,

IT HEREBY IS ORDERED that Respondent's MOTION TO CONSOLIDATE CASE FOR ORAL ARGUMENT be, and hereby is, GRANTED and Supreme Court Docket Nos. 34198-2007 and 34199-2007 shall be CONSOLIDATED FOR PURPOSES OF ORAL ARGUMENT with Supreme Court Docket No. 35187, *McKinney v. State.*

DATED this 2nd day of December 2008.

By Order of the Supreme Court

Stephen Kenyon

Stephen W. Kenyon, Clerk

cc: Counsel of Record