In The

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

DALE CARTER SHACKELFORD,

Respondent.

On Petition For Writ Of Certiorari To The Idaho Supreme Court

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

Pursuant to Idaho state law existing at the time, after being found guilty by a jury of two counts of first degree murder and other criminal offenses, Respondent Dale Carter Shackelford was sentenced to death by a judge without the jury having been instructed regarding the statutory aggravating factors found by the judge that made Shackelford eligible for the death penalty. During post-conviction proceedings, while Shackelford's direct appeal was stayed, this Court decided *Ring v. Arizona*, 536 U.S. 584, 588 (2002), concluding statutory aggravating factors are the functional equivalent of an element of a greater offense and must, under the Sixth Amendment, be found by a jury. While the trial court found *Ring* error because the jury was not instructed on the aggravators, the court also applied the harmless error doctrine and reasoned the jury's verdicts established the multiple murder aggravator even though the jury had not been instructed regarding the aggravator. Relying upon *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993), the Idaho Supreme Court reversed and ordered that Shackelford be resentenced because the harmless error doctrine would violate "the jury trial guarantee for any court to hypothesize a guilty verdict that was never in fact rendered." App. at 78.

1. Because statutory aggravating factors are the functional equivalent of a greater offense and the

QUESTIONS PRESENTED – Continued

failure to instruct the jury regarding the multiple murder aggravator did not vitiate all of the jury's findings, did the Idaho Supreme Court err by concluding *Ring* error is not subject to harmless error analysis?

2. Based upon the jury's verdicts finding Shackelford guilty of two murders and the evidence presented at trial, did the state meet its burden of establishing beyond a reasonable doubt that any *Ring* error involving the failure to instruct the jury regarding the multiple murder aggravator was harmless?

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PETITION FOR WRIT OF CERTIORARI TO THE IDAHO SUPREME COURT

The Attorney General for the State of Idaho, on behalf of the State of Idaho, respectfully petitions for a writ of certiorari to review the decision of the Idaho Supreme Court, which overturned Shackelford's death sentence based upon an incorrect conclusion that error under *Ring v. Arizona*, 536 U.S. 584 (2002), is not subject to harmless error analysis.

OPINION BELOW

The opinion of the Idaho Supreme Court is reported at *State v. Shackelford*, ___ P.3d ___, 2010 WL 2163361 (Idaho 2010). App. at 1-80.

JURISDICTION

The opinion of the Idaho Supreme Court was filed June 1, 2010. App. at 1. On June 2, 2010, the supreme court denied the parties' petitions for rehearing "NUNC PRO TUNC May 28, 2010." App. at 100-01. Petitioner requested and received two extensions of time to file its petition for writ of certiorari, to and including October 29, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fifth Amendment to the United States Constitution provides, "No person shall be . . . deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation. . . ."

The relevant portion of the Fourteenth Amendment to the United States Constitution provides, "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

The facts leading to Dale Shackelford's convictions for the murders of Donna Fontaine and Fred Palahniuk were summarized by the Idaho Supreme Court:

> Dale Shackelford was convicted of the murders of his ex-wife, Donna Fontaine, and her boyfriend, Fred Palahniuk, which occurred near the Latah County town of Kendrick, Idaho, in May 1999. The state alleged that Shackelford conspired with

Martha Millar, Bernadette Lasater, Mary Abitz, Sonja Abitz, and, John Abitz. Millar and Lasater worked for Shackelford's trucking business, Shackelford Enterprises, in Missouri. The Abitz family lived near the residence where the bodies of Donna and Fred were found. Sonja Abitz was Shackelford's fiancée at the time of the murders, and John and Mary Abitz are Sonja's parents. The alleged conspirators eventually pled guilty to charges related to the murders.

Shackelford and Donna married in Missouri in December 1995 and the relationship ended in the summer of 1997, with the couple divorcing in November of that year. Donna accused Shackelford of raping her in July 1997, and charges were filed in 1998. In the spring of 1999, Donna developed a relationship with Fred and, on May 28, 1999, the two visited Donna's brother, Gary Fontaine, at the home Gary and Donna's daughter owned together outside of Kendrick. The morning of May 29, Donna, Fred, and Gary went to the Locust Blossom Festival in Kendrick, where they met John, Mary, and Sonja Abitz.

After leaving the festival, Gary went to the Abitz's house, but he left around dark, returned home, noticed Donna's pickup in the driveway, and smelled smoke. Gary called the Abitz's house and reported that his two-story garage was on fire. Mary, Sonja, Ted Meske (Mary's brother), and Shackelford arrived at the fire and various individuals tried to extinguish it, but were unsuccessful.

At 7:40 p.m., Latah County Sheriff Patrol Deputy Richard Skiles was called to investigate the fire at 2168 Three Bear Road. When Skiles arrived at the scene, nearly an hour later, he observed several persons – including Gary Fontaine, Mary Abitz, Sonja Abitz, Brian Abitz (Sonja's brother), Ted Meske, and Shackelford – standing near the garage that was completely engulfed in flames. Based upon information obtained from Ted and Shackelford, Deputy Skiles contacted dispatch to have an on-call detective sent "because there was a possibility there could be a suicide victim in the fire." By the time the fire department arrived, the garage had been utterly destroyed. Several hours later, after the fire had been extinguished, two bodies were found in the rubble. The bodies were subsequently identified as the remains of Donna and Fred. At trial, a state fire investigator testified as to his opinion that the fire was arson.

Doctor Robert Cihak conducted autopsies of the remains, which were severely burned. Shotgun pellets were found in Donna's right chest region and a bullet was found in the back of her neck. Dr. Cihak opined that the bullet wound was fatal and was inflicted when Donna was still alive. A bullet was also found in Fred's body behind the upper breastbone, which Dr. Cihak concluded was the cause of death. Dr. Cihak offered his opinion that Donna and Fred were dead at the time of the fire.

> Shackelford was indicted on February 11, 2000, and charged with two counts of first-degree murder, first-degree arson, conspiracy to commit first-degree murder, conspiracy to commit arson and preparing false evidence. Trial began on October 16, 2000, and concluded December 22, 2000. The jury returned guilty verdicts on all counts charged in the Indictment. Sentencing commenced on August 27, 2001, and, on October 25, 2001, the district court read its Findings of the Court in Considering the Death Penalty. As to Donna's murder, the court found that the State had proven beyond a reasonable doubt two statutory aggravating factors: I.C. § 19-2515(h)(2) (2000) and I.C. § 19-2515(h)(10) (2000). As to Fred's murder, the court found the statutory aggravating factor under I.C. § 19-2515(h)(2) (2000). After weighing the mitigating factors against the individual statutory aggravating factors, the court concluded that the mitigating factors were not sufficiently compelling to render the death penalty unjust, and sentenced Shackelford to death for both first-degree murders.

App. at 2-5 (footnotes omitted).

Pursuant to I.C. § 19-2719(6) (1995), Shackelford's direct appeal was stayed pending completion of post-conviction proceedings. On June 24, 2002, while Shackelford's post-conviction case was pending and his direct appeal was stayed, the Supreme Court decided *Ring*, 536 U.S. at 588, expressly overruling,

in part, *Walton v. Arizona*, 497 U.S. 639, 649 (1990), which had held a judge sitting without a jury was permitted to find statutory aggravating factors even if necessary for imposition of the death penalty. The Court concluded, because statutory aggravating factors "operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Ring*, 536 U.S. at 609 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)).

The trial court denied all guilt phase post-conviction relief. App. at 5-6. Addressing the question of whether Shackelford was entitled to post-conviction sentencing relief based upon *Ring*, the trial court concluded, "the jury found [Shackelford] guilty of the first degree murders of both Donna Fontaine and Fred Palahniuk at the same location and on the same date. Those verdicts, standing alone, appear to establish the existence of multiple murders which constitutes a statutory aggravator beyond a reasonable doubt" under I.C. § 19-2515(h)(2) (2000).[1] App. at 94. However, concluding *Ring* allegedly mandates the jury "to weigh mitigating circumstances against aggravating factors to determine whether a death sentence is appropriate," the court granted post-conviction sentencing relief and ordered that

[1] This statutory aggravator was recodified at I.C. § 19-2515(9)(b) (2006), but still reads as follows: "At the time the murder was committed the defendant also committed another murder."

Shackelford be resentenced before a jury. App. at 99. Based upon its grant of sentencing relief under *Ring*, the trial court concluded Shackelford's remaining post-conviction sentencing claims were moot. App. at 6.

In a consolidated appeal under I.C. § 19-2719(6) (1995), the Idaho Supreme Court affirmed Shackelford's convictions. App. at 80. Addressing whether Shackelford's death sentence had to be vacated because of *Ring*, the Idaho Supreme Court rejected the trial court's reasoning that the jury's verdicts established the multiple murder statutory aggravating factor. App. at 74-80. Relying upon *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993), the supreme court concluded the trial court's decision was constitutionally infirm because harmless error analysis would violate "the jury trial guarantee for any court to hypothesize a guilty verdict that was never in fact rendered" and "the Sixth Amendment requires more than appellate speculation about a hypothetical jury's action." App. at 78-79 (internal quotations and citation omitted).[2] Both parties petitioned for rehearing, which was denied on June 2, 2010, "Nunc Pro Tunc May 28, 2010." App. at 100-01.

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[2] Because of its decision regarding harmless error, the Idaho Supreme Court declined to address the trial court's conclusion that *Ring* allegedly requires the jury to weigh mitigating factors. App. at 80.

REASONS FOR GRANTING THE PETITION

The Idaho Supreme Court's conclusion that *Ring* error is "structural" and cannot be reviewed for harmless error is an important federal constitutional question and one upon which there is now a conflict and significant controversy. *See* Supreme Court Rule 10(b), (c). In Idaho, harmless error is analyzed under the federal standard enunciated in *Chapman v. California*, 386 U.S. 18, 23-24 (1967). *State v. LePage*, 630 P.2d 674, 680-81 (Idaho 1981). This creates a substantial question under the Constitution because the Idaho Supreme Court's decision establishes the court's belief that *Sullivan*, 508 U.S. at 279-80, precludes harmless error analysis involving *Ring* error.

Moreover, the Idaho Supreme Court's decision conflicts with this Court's decisions, federal appellate court decisions and the decisions of other state supreme courts. Review by writ of certiorari to a state supreme court is appropriate under such circumstances to determine whether the Idaho Supreme Court "has properly interpreted, applied, or extended a prior Supreme Court decision in a given situation." R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* at 273(j) (citing cases including *Bullington v. Missouri*, 451 U.S. 430, 431 (1981) (certiorari granted regarding whether reasoning of prior Court precedent applies to a different kind of sentencing hearing) and *Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) (certiorari granted because state court "has read *Miranda* too broadly")).

Finally, the analysis used by the Idaho Supreme Court will have a continuing impact on capital cases involving *Ring* error, particularly in those states, like Idaho, that relied upon this Court's conclusion in *Walton*, 497 U.S. at 649, that judge sentencing was not constitutionally infirm. As those cases weave their way through laborious state appellate and federal habeas review, the courts, both state and federal, need to know whether *Ring* error is subject to harmless error analysis, particularly since the Idaho Supreme Court's decision precludes harmless error analysis if **any** mistake is made in instructing the jury regarding statutory aggravating factors.

A. Conflict With This Court's Precedent

The Idaho Supreme Court's decision in *Shackelford* conflicts with several decisions of this Court on an important question of federal constitutional law and resulted in an improper application of this Court's precedent.

In *Chapman*, 386 U.S. at 21-24, this Court rejected the contention that all federal constitutional errors must be deemed harmful requiring automatic reversal and adopted a harmless error test requiring the state to establish "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." In *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991), the Court noted the numerous constitutional errors to which

harmless error has been applied and explained, "most constitutional errors can be harmless."

However, errors "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself" are structural defects, "which defy analysis by 'harmless-error' standards." *Id.* at 309-10. Admittedly, this Court has concluded an erroneous reasonable doubt jury instruction is structural error and cannot be reviewed for harmlessness. *Sullivan*, 508 U.S. at 280. However, underlying the Court's decision was the recognition that an erroneous reasonable doubt instruction "vitiates *all* the jury's findings," which then permits the reviewing court to "only engage in pure speculation – its view of what a reasonable jury would have done" if properly instructed on the reasonable doubt standard. *Id.* at 281 (emphasis in original).

This is in stark contrast to cases in which a judge decides only one of the elements of an offense. In *Johnson v. United States*, 520 U.S. 451, 463-64 (1997), the judge decided the materiality element in a federal perjury prosecution in violation of *United States v. Gaudin*, 515 U.S. 506 (1995). Addressing whether such error is structural, this Court explained, "it is by no means clear that the error here fits within this limited class of cases" and that "[t]he failure to submit materiality to the jury . . . can just as easily be analogized to improperly instructing the jury on an element of the offense." *Id.* at 469. While the Court declined to address this exact question, it decided the error did not require correction because

"there is no basis for concluding that the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings'" – the fourth prong of the plain error standard under F.R.C.P. 52(b) – particularly in light of the overwhelming evidence supporting the materiality element that was decided by the judge and not the jury. *Johnson* at 469-70.

Based upon *Johnson*, and other cases applying harmless error analysis when an improper instruction is given regarding an element of the offense, this Court concluded the omission of an element of the offense in the jury instructions is not structural error. *Neder v. United States*, 527 U.S. 1, 8 (1999). "Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* (emphasis in original). The Court recognized that omission of the materiality instruction "did not 'vitiat[e] *all* of the jury's findings,'" but merely "prevent[ed] the jury from making a finding on the element of materiality." *Id.* at 10 (emphasis in original) (quoting *Sullivan*, 508 U.S. at 281). Addressing the harmless error standard that should be used, the Court explained, "a court, in typical appellate-court fashion, asks whether the record contains evidence that would rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is 'no,' holding the error harmless does not 'reflec[t] a denigration of the constitutional rights involved.'" *Id.*

at 19 (quoting *Rose v. Clark*, 478 U.S. 570, 577 (1986)).

In *Mitchell v. Esparza*, 540 U.S. 12 (2004), this Court applied the principles from *Neder* to error associated with *Apprendi*, 530 U.S. 466.[3] Esparza was charged with aggravated murder during the commission of an aggravated robbery. *Id.* at 13. Because the indictment failed to charge him as a "principal offender" as required by state law, Esparza contended he had not been convicted of an offense for which a death sentence could be imposed under Ohio law. *Id.* at 14. The Ohio Court of Appeals rejected Esparza's contention, concluding literal compliance with the statute was not required. *Id.* In federal habeas, the Sixth Circuit concluded the Ohio court's decision was an unreasonable application of *Apprendi* because Ohio's failure to charge in the indictment that respondent was a principal was the functional equivalent of dispensing with the reasonable doubt requirement and that, under *Sullivan*, harmless error analysis was inappropriate. *Mitchell*, 540 U.S. at 15. Addressing the question of harmless error, the

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[3] In *Apprendi*, 530 U.S. at 483, *Ring*'s precursor, the Court concluded the Sixth Amendment does not permit a defendant to be "expose[d] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." Despite holding otherwise in *Apprendi*, at 496-97 (relying upon *Walton*, 497 U.S. at 647-49), two years later the Court concluded, "*Apprendi's* reasoning is irreconcilable with *Walton's* holding in this regard, and today we overrule *Walton* in relevant part." *Ring*, 536 U.S. at 58.

Supreme Court relied upon multiple cases, particularly *Neder*, to conclude the Ohio court's decision was a reasonable application of Supreme Court precedent, and that "the jury verdict would surely have been the same had it been instructed to find as well that the respondent was a 'principal' in the offense." *Mitchell* at 16-18.

In *Washington v. Recuenco*, 548 U.S. 212 (2006), the Supreme Court applied harmless error to *Blakely* error.[4] Recuenco was charged with "intentiona[l] assault . . . with a deadly weapon, to wit: a handgun." *Recuenco* at 215. The special verdict form failed to require the jury to find Recuenco had engaged in assault with a "firearm," as opposed to any other kind of "deadly weapon." *Id.* On appeal, the state court vacated Recuenco's sentence, concluding *Blakely* error can never be harmless. *Id.* Reversing the state court, this Court concluded:

> The only difference between this case and *Neder* is that in *Neder*, the prosecution failed to prove the element of materiality to the jury beyond a reasonable doubt, while here the prosecution failed to prove the sentencing factor of 'armed with a firearm' to the jury beyond a reasonable doubt. Assigning this

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[4] *Blakely v. Washington*, 542 U.S. 296, 303 (2004), is another progeny of *Apprendi*, in which this Court clarified, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

> distinction constitutional significance cannot be reconciled with our recognition in *Apprendi* that elements and sentencing factors must be treated the same for Sixth Amendment purposes.

Id. at 220. In other words, "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." *Id.* at 222.

Finally, in *Hedgpeth v. Pulido*, ___ U.S. ___, 129 S.Ct. 530 (2008), this Court continued to limit the structural error doctrine by concluding it did not apply when a jury returns a general verdict after being instructed on both a valid and invalid theory. The Court reasoned, "An instructional error arising in the context of multiple theories of guilt, no more vitiates *all* the jury's findings than does omission or misstatement of an element of the offense when only one theory is submitted." *Id.* at 532 (emphasis in original).

This Court's precedents establish harmless error analysis is appropriate even if the trial court omitted an element of the crime from a jury instruction or charging document. It is also clear that the broader language from *Sullivan*, which was relied upon by the Idaho Supreme Court, App. at 78-79, suggesting that any gap in the jury instructions could not be filled by harmless error analysis, has been limited by *Neder* and its progeny, particularly *Mitchell* and *Recuenco*.

It follows that the error in this case – failure to instruct the jury regarding the multiple murder

aggravator contained in I.C. § 19-2515(h)(2) (2000) – should be subject to harmless error analysis. The multiple murder aggravator is a sentencing enhancement, not an element of the crime of murder; *Ring* did not create new criminal offenses. *Porter v. State*, 102 P.3d 1099, 1103 (Idaho 2004). Admittedly, as with virtually all sentencing enhancements, the multiple murder aggravator is the "functional equivalent" of an element for purposes of the Sixth Amendment. *Ring*, 536 U.S. at 609. However, statutory aggravating factors in death penalty cases should not be of greater significance than the elements of the actual crime, particularly in light of Justice O'Connor's conclusion that "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. . . ." *Ring*, 536 U.S. at 621 (O'Connor, J., dissenting); *see also Mitchell*, 540 U.S. at 17 (citing cases) ("a number of our harmless-error cases have involved capital defendants"). Failing to instruct on a sentencing enhancement, such as the multiple murder aggravator, no more vitiates the entire jury trial than does omitting an element of first-degree murder. Therefore, it would be illogical to permit harmless error analysis involving the element of a crime, but prohibit such analysis as to a missing sentencing factor even in a capital case.

The Idaho Supreme Court has not "properly interpreted, applied, or extended [*Neder* and its progeny] in a given situation." R. Stern, E. Gressman,

S. Shapiro & K. Geller, *Supreme Court Practice*, at 273(j). Review should be granted to correct this conflict between this Court's precedents and the erroneous interpretation of the federal Constitution by the Idaho Supreme Court. Supreme Court Rule 10(c).

B. Conflict With The Circuit Courts Of Appeals

Every federal circuit to address the question has now rejected the contention that sentencing errors are structural errors not subject to harmless error analysis. Admittedly, few federal courts have addressed the explicit question of whether *Ring* error is subject to harmless error analysis. In *United States v. Allen*, 406 F.3d 940, 943 (8th Cir. 2005), the court examined whether the government's failure to prove at least one statutory aggravator before the grand jury and charge the aggravator in the indictment was error under *Ring* and the Fifth Amendment. Relying upon several Supreme Court cases, the court concluded a Fifth Amendment violation under *Ring* should be analyzed in the same manner as a Sixth Amendment violation, and reasoned that any defects as a result of a *Ring* violation are not structural. *Id.* at 944-45.

Initially, the Ninth Circuit determined *Ring* error is structural and could not be reviewed for harmless error. *Summerlin v. Stewart*, 341 F.3d 1082, 1119 (9th Cir. 2003) ("Given *Ring's* declaration that a defendant is entitled under the Sixth Amendment to a jury

verdict in the penalty phase of a capital case, the substitution of a non-jury verdict cannot be subject to harmless-error analysis"). Not only did the Ninth Circuit's conclusion conflict with *Mitchell* and *Recuenco*, *Summerlin* was reversed by this Court in *Schriro v. Summerlin*, 542 U.S. 348 (2004). Moreover, the Ninth Circuit's decision regarding harmless error was based exclusively upon the Sixth Circuit's decision in *Esparza v. Mitchell*, 310 F.3d 414 (6th Cir. 2002), which was likewise reversed by this Court in *Mitchell v. Esparza*, 540 U.S. 12 (2004). Finally, even the Ninth Circuit has now recognized, based upon *Recuenco*, "*Apprendi* errors are reviewed under the harmless error standard as applied in *Neder*." *United States v. Zepeda-Martinez*, 470 F.3d 909, 913 (9th Cir. 2006). *Zepeda-Martinez* has been applied in the context of a death penalty case. *Lewis v. Woodford*, 2007 WL 196635, *58 (E.D. Cal. 2007).

In *Murdaugh v. Ryan*, 2010 WL 3523070, *48-49 (D. Ariz. 2010), the court discussed *Neder*, and recognized the Supreme Court has never concluded "*Ring* error is included in that limited class of cases" that fall under structural error. In *Jackson v. Carroll*, 2004 WL 1192650, *26 (D. Del. 2004), the court concluded, "Unlike a defect such as the complete deprivation of counsel or trial before a biased judge, a *Ring* error does not affect the framework within which the trial proceeds, but rather only the trial process itself." In *Ryan v. Clarke*, 287 F.Supp.2d 1008, 1014 (D. Neb. 2003), the court applied harmless error to *Ring*, concluding, "beyond all reasonable doubt any

such error would be harmless because no reasonable jury could come to factual conclusions different than those found by Judge Finn regarding aggravating circumstances."

While few federal courts have addressed the explicit question of whether *Ring* is subject to harmless error analysis, every circuit has concluded that *Apprendi* and its progeny are subject to harmless error analysis. For example, in *United States v. Colan-Nales*, 464 F.3d 21, 27 (1st Cir. 2006), the First Circuit, relying upon its own precedent and several Supreme Court cases, including *Neder*, and *Recuenco*, concluded judicial fact-finding of a sentencing enhancement "is not a structural error which obviates the requirement that defendant demonstrate prejudice" for purposes of the plain error doctrine under F.R.C.P. 52(b). *See also United States v. Antonakopoulos*, 399 F.3d 68, 80 n.11 (1st Cir. 2005) (plain error case); *United States v. Perez-Ruiz*, 353 F.3d 1, 17 (1st Cir. 2003) ("failure to submit appropriate drug type and quantity questions to the jury does not constitute structural error" under *Apprendi*) (citing cases).

Relying upon *Recuenco*, the Second Circuit, in a federal habeas case, concluded *Blakeley* error "is not structural error and is subject to harmless error analysis" and remanded for a determination of whether the sentencing error was harmless under the federal habeas harmless error standard in *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). *Besser v. Walsh*, 601 F.3d 163, 188 (2nd Cir. 2010); *see also*

United States v. Friedman, 300 F.3d 111, 127-28 (2nd Cir. 2002) (holding *Apprendi* error harmless).

In *United States v. Vasquez*, 271 F.3d 93, 102-03 (3rd Cir. 2001), the Third Circuit rejected the contention that *Apprendi* error constitutes a structural defect, concluding there is no difference between an instruction that omits an element of the offense at trial and sentencing error when the judge, rather than the jury, determined the drug quantity for purposes of a sentencing enhancement.

Addressing the question of harmless error stemming from a sentencing violation under *United States v. Booker*, 543 U.S. 220 (2005) – which decided *Apprendi* and its progeny applied to the federal mandatory sentencing guidelines – the Fourth Circuit "decline[d] to classify the error of sentencing a defendant under the pre-*Booker* mandatory regime as a structural error" and reaffirmed that "*Apprendi* error itself is not structural." *United States v. White*, 405 F.3d 208, 222 (4th Cir. 2005).

In *United States v. Matthews*, 312 F.3d 652, 665 (5th Cir. 2002), the Fifth Circuit extended this Court's holding in *Neder*, reasoning, "*Apprendi* error is susceptible to harmless error analysis." *See also United States v. Baptiste*, 309 F.3d 274, 277 (5th Cir. 2002) (quoting *United States v. Anderson*, 289 F.3d 1321, 1323-25 (11th Cir. 2002)) ("*Apprendi* errors are subject to harmless error analysis because they 'do not fall within the limited class of fundamental

constitutional errors that defy analysis by harmless error standards'").

Likewise, the Sixth Circuit has concluded, "*Apprendi* errors are considered to be trial-type errors subject to harmless-error review." *Campbell v. United States*, 364 F.3d 727, 737 (6th Cir. 2004); *see also Villagarcia v. Warden, Noble Corr. Inst.*, 599 F.3d 529, 536-37 (6th Cir. 2010) (applying *Brecht* harmless error standard to a *Blakely* and *Apprendi* claim in a federal habeas case).

In *United States v. Mansoori*, 480 F.3d 514, 523 (7th Cir. 2007), the Seventh Circuit addressed *Apprendi* error and explained, "the lack of a jury finding as to drug quantity does not preclude a reviewing court from concluding that the evidence of the requisite quantity was so strong as to leave no doubt as to what the jury's finding on that subject would have been." *See also Knox v. United States*, 400 F.3d 519, 523 (7th Cir. 2005) (citing *Summerlin*, 542 U.S. at 356) (*Apprendi* error is subject to harmless error analysis because "juries are not necessarily more accurate than judges at finding facts").

In another drug case, the Eighth Circuit examined the indictment and concluded, "In finding defendant guilty on this count, the jury necessarily found the quantity alleged in the indictment. Even if we assume that the jury did not make an express finding of drug quantity, that does not mean that reversal is required, 'because *Apprendi* did not recognize or create a structural error that would require

per se reversal.'" *United States v. McDonald*, 336 F.3d 734, 738 (8th Cir. 2003) (quoting *United States v. Anderson*, 236 F.3d 427, 429 (8th Cir. 2001)).

The Tenth Circuit has also concluded that preserved *Blakely* error is subject to harmless error analysis. *United States v. Corchado*, 427 F.3d 815, 820 (10th Cir. 2005).

The Eleventh Circuit is in accord with the other circuits, concluding that preserved *Blakely/Booker* error can be reviewed for harmless error. *United States v. Dulcio*, 441 F.3d 1269, 1277 (11th Cir. 2006). Likewise, relying upon *Neder*, the circuit determined, "*Apprendi* errors do not fall within the limited class of fundamental constitutional errors that defy analysis by harmless error standards." *United States v. Candelario*, 240 F.3d 1300, 1307 (11th Cir. 2001).

Finally, the D.C. Circuit agrees that post-*Apprendi* error is not structural, but can be reviewed for harmless error. *United States v. Samuel*, 296 F.3d 1169, 1176 (D.C. Cir. 2002).

The Idaho Supreme Court's decision clearly conflicts with every federal circuit and the lower federal courts. Therefore, review is appropriate under Supreme Court Rule 10(b).

C. Conflict With State Appellate Courts

State courts have also examined the express question of whether *Ring* is subject to harmless error analysis. Pursuant to this Court's instruction, *Ring*,

536 U.S. at 609, n.7, the Arizona Supreme Court addressed the question of whether any error was harmless because the statutory aggravating factor was implicit in the jury's verdict. *State v. Ring (Ring III)*, 65 P.3d 915, 934-35 (Ariz. 2003). The Arizona court examined Supreme Court precedent, including *Neder*, and *United States v. Cotton*, 535 U.S. 625, 630-31 (2002), and concluded *Ring* error is not structural, but must be examined for harmless error, reasoning, "Defendants' trials thus took place before an impartial judge and jury, who used the correct standard of proof. Defendants received the assistance of counsel, who were available during all phases of their prosecution. Any error, then, affected the submission of one element rather than the entire trial and did not render the entire trial fundamentally unfair." *Ring III*, 65 P.3d at 935. The court also noted the overwhelming number of federal circuits that had found the Supreme Court's holding in *Apprendi* is subject to harmless error analysis. *Id.* at 935-36 (citing cases).

The Delaware Supreme Court expressly concluded *Ring* error may be examined for harmlessness. *Brice v. State*, 815 A.2d 314, 324-25 (Del. 2003). Undertaking analysis similar to *Ring III*, the Delaware Supreme Court examined a number of Supreme Court decisions, noted the limited type of cases in which this Court has concluded harmless error cannot be applied and concluded this Court employs structural error analysis "only when reviewing constitutional errors that occurred during the

guilt/innocence phase of the trial." *Brice*, 915 A.2d at 324-25. Moreover, the court recognized *Ring* itself does not support the conclusion that such error is structural. *Id.* at 325. After completing its analysis, the court concluded capital sentences do not suffer from the same constitutional defect as those cases in which the Supreme Court has found structural error, explaining, "First, defendants sentenced under Delaware's 1991 scheme were not denied a jury verdict of guilty beyond a reasonable doubt. Second, the advisory jury made specific numerical findings as to the existence of statutory aggravating circumstances." *Id.* at 326; *see also Cauthern v. State*, 145 S.W.3d 571, 623 (Tenn. Ct. App. 2004) ("We detect no indication in *Ring* that the Supreme Court was jettisoning appellate review predicated on a harmless-error analysis").

Even more states have concluded *Apprendi* is subject to harmless error analysis. *See, e.g., State v. Fichera*, 2010 WL 3618689, *2 (N.H. 2010) ("An *Apprendi* violation concerning an omission from an indictment may constitute harmless error where the evidence is overwhelming [sic] that the grand jury would have found the fact at issue"); *State v. Garza*, 236 P.3d 501, 509-10 (Kan. 2010) ("we are convinced the *Apprendi*-type error that occurred in Garza's case, *i.e.,* when the trial court made the age determination rather than having the jury make the actual finding, was harmless"); *State v. Gibson*, 38 So.3d 373, 381 (La. 2010) ("Even though the trial court clearly committed an *Apprendi* violation, we conclude that the error was harmless"); *State v. Payan*, 765 N.W.2d 192,

204 (Neb. 2009) (relying upon *Recuenco*, to conclude that *Apprendi/Blakely* error is not structural); *Brown v. State*, 995 So.2d 698, 704 (Miss. 2008) ("*Apprendi* errors are not structural in nature and will not be reversed if the error was harmless"); *Galindez v. State*, 955 So.2d 517, 522-23 (Fla. 2007) ("to the extent some of our pre-*Apprendi* decisions may suggest that the failure to submit factual issues to the jury is not subject to harmless error analysis, *Recuenco* has superseded them"); *Adams v. State*, 153 P.3d 601, 612 (Mont. 2007) ("*Apprendi* error is subject to harmless error review"); *State v. Fagan*, 905 A.2d 1101, 1121 (Conn. 2006) ("even if the defendant were entitled under *Apprendi* to a jury trial on this issue . . . the failure to submit this factor to a jury necessarily would be harmless error"); *State v. Schofield*, 895 A.2d 927, 936 (Me. 2005) ("a violation of the jury determination required by *Apprendi* was *not* structural error requiring reversal") (emphasis in original).

Given the conflicting decisions from the state courts of last resort regarding the question of whether *Apprendi*, *Ring*, and their progeny can be reviewed for harmless error, and the lack of any viable reason to distinguish *Apprendi*, *Ring* or their progeny from the question of whether *Ring* can be reviewed for harmless error, review by this Court is appropriate under Supreme Court Rule 10(b).

D. The Idaho Supreme Court's Erroneous Interpretation Of The Federal Constitution Creates A Continuing Analytical Difficulty

For years, numerous states, including Idaho, relied upon the belief that statutory aggravating factors in capital cases could be decided by a judge. This belief was confirmed by this Court in 1990 in *Walton*, 497 U.S. at 647-49, and reaffirmed ten years later in *Apprendi*, 530 U.S. at 496-97, prior to Shackelford murdering Donna and Fred. Not until after Shackelford was sentenced and commenced post-conviction proceedings was *Ring* decided. In *Ring*, this Court declined to address Arizona's assertion that any error was harmless because the statutory aggravating factor was implicit in the jury's verdict since the question of harmlessness must first be addressed by the lower courts. 536 U.S. at 609 n.7. The courts have wrestled with this Court's unanswered question regarding whether *Ring* error can be reviewed for harmlessness. Because of the length of time associated with reviewing death penalty cases, this question will continue not only in Idaho, but other states, particularly the five states that employed exclusively judge sentencing prior to *Ring*, the four states that use "hybrid systems," *see Ring*, 536 U.S. at 608 n.6, and the federal courts when reviewing habeas cases.

More importantly, this unanswered question will not abate over a short period of time merely because some states have enacted new legislation requiring

juries to find statutory aggravating factors. Rather, under *Shackelford*, Idaho and any jurisdiction following its reasoning will be precluded by the Idaho Supreme Court's interpretation of the federal Constitution from conducting harmless error analysis if **any** mistake is made in instructing the jury regarding the respective sentencing enhancement. This continuing problem will perpetuate the inconsistent results stemming from *Shackelford*, whereby harmless error is possible where an element of a crime is completely omitted, but impossible if a sentencing factor (statutory aggravating factor) is omitted or merely incorrectly defined.

E. Based Upon The Jury's Verdicts, Evidence Presented At Trial, And Shackelford's Failure To Dispute The Aggravator, The State Met Its Burden Of Establishing Any Alleged Error Resulting From Not Instructing The Jury Regarding The Multiple Murder Aggravator Was Harmless

Whether couched in terms of harmless error or that the jury's verdicts established the multiple murder aggravator as to both Donna and Fred, the state met its burden of establishing any error from the jury's alleged failure to "explicitly" find the multiple murder aggravator or the failure to instruct regarding the aggravator was harmless.

As explained above, in addressing harmless error when an instruction regarding the elements has been

omitted, the question is "whether the record contains evidence that would rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is 'no,' holding the error harmless does not 'reflec[t] a denigration of the constitutional rights involved.'" *Neder*, 527 U.S. at 19 (quoting *Rose*, 478 U.S. at 577).

In addressing the failure to instruct a jury regarding a statutory aggravator, a number of courts have concluded the jury's verdicts at the guilt phase of a trial can establish the jury found a defendant guilty of a statutory aggravating factor. For example, in *Turner v. State*, 924 So.2d 737, 785 (Ala. Crim. App. 2002), the state court examined the evidence presented at the trial and the jury's verdicts, concluding, "the jury's verdict finding Turner guilty of two counts of capital murder – murder during a rape and murder during a robbery – also established that a jury had found two aggravating circumstances." Similarly, in *Tomlin v. State*, 909 So.2d 213, 281-82 (Ala. Crim. App. 2002), *rev'd on other grounds*, *Ex parte Tomlin*, 909 So.2d 283 (Ala. 2003), the court reasoned, "Tomlin was convicted of the capital offense of killing two or more people during one course of conduct. . . . Therefore, the jury's verdict in the guilt phase established the aggravating circumstance that made Tomlin eligible for death under Alabama law. There was no *Ring* violation here." *Accord Irvin v. State*, 940 So.2d 331, 365 (Ala. Crim. App. 2005) ("the jury unanimously found Irvin guilty of murdering Jackie Thompson during the commission of

first-degree robbery, making him eligible for the death penalty. Thus, *Ring* was satisfied").

Likewise, in *Belcher v. State*, 851 So.2d 678, 685 (Fla. 2003), the defendant raised several *Ring* challenges, which the court rejected, concluding, "Regarding the murder being committed in the course of a sexual battery aggravator, the fact remains that a unanimous jury found Belcher guilty of both murder and sexual battery, and therefore the guilt phase verdicts reflect that the jury independently found the aggravator of the murder being committed in the course of a sexual battery." *Id.*

In *Williams v. State*, 793 N.E.2d 1019, 1028 (Ind. 2003), the defendant contended the jury did not find a statutory aggravating circumstance as required under *Ring*. Declining to address the retroactivity of *Ring*, the Indiana Supreme Court concluded, "The guilt phase verdict necessarily shows that the jury unanimously found that Williams had committed two murders, and thus, shows that the multiple-aggravating circumstance was proved beyond a reasonable doubt." *Id.* at 1028-29 (citing cases). *See also Holmes v. State*, 820 N.E.2d 136, 139 (Ind. 2005) ("The jury returned a verdict in the guilt phase of the trial finding Holmes guilty of two intentional murders and robbery. [Citation omitted]. This unanimous verdict in the guilt phase necessarily establishes that the jury found, beyond a reasonable doubt, aggravating circumstances rendering Holmes eligible for the death penalty").

Beginning with *Brice*, 815 A.2d at 323, Delaware has also concluded a jury's guilt phase verdicts can result in the finding of a statutory aggravating factor. *See also Swan v. State*, 820 A.2d 342, 359 (Del. 2003) (finding the jury found a statutory aggravator based upon its verdicts finding the defendant guilty of two counts of felony murder); *Norcross v. State*, 816 A.2d 757, 767 (Del. 2003) (same). This general principle was expressly applied to a multiple murder aggravator in *Reyes v. State*, 819 A.2d 305, 316-17 (Del. 2003), with the court explaining, "The jury convicted Reyes of, among other crimes, two counts of Murder in the First Degree under Section 636(a)(1). Multiple convictions under Section 636(a)(1), resulting from a single course of conduct, establish the existence of a statutory aggravator under Section 4209(e)(1)(k)." The court concluded, "When the very nature of a jury's guilty verdict simultaneously establishes the statutory aggravating circumstance set forth under Section 4209(e)(1)(k), that jury verdict authorizes a maximum punishment of death in a manner that comports with the United States Supreme Court's holding in *Ring*." *Id.* at 17. *Accord Starling v. State*, 882 A.2d 747, 758 (Del. 2005); *see also Jones v. United States*, 828 A.2d 169, 180 (D.C. 2003) (affirming a life sentence statutory aggravator because "the murder verdict itself established the aggravating factor beyond a reasonable doubt").

Admittedly, in *Ring III*, the court concluded the jury's verdicts alone did not establish the aggravator because there was not a finding "that the murders are

temporally, spatially and motivationally related." 65 P.3d at 941. However, the court explained it would still consider harmless error "in those cases in which no reasonable jury could find that the state failed to prove the [multiple murder] factor beyond a reasonable doubt." *Id.* at 942.

The federal courts have also concluded harmlessness need not be based exclusively upon the jury's verdicts. Relying upon *Neder*, the Eleventh Circuit not only found *Apprendi* error is not structural, but also concluded the evidence at the trial must be considered in determining whether the error is harmless, reasoning, "we must affirm the appellants' sentences unless we find that 'the record contains evidence that could rationally lead to a contrary finding with respect to the omitted evidence.'" *Anderson*, 236 F.3d at 429 (quoting *Neder*, 527 U.S. at 19); *see also McDonald*, 336 F.3d at 738 ("Under these facts, the failure to get a special verdict from the jury with an explicit finding of quantity did not impugn the integrity or raise doubt about the fairness of these proceedings"). The Ninth Circuit has concluded that the evidence presented at trial can be used in determining whether *Apprendi* error is harmless. *United States v. Smith*, 282 F.3d 758, 771-72 (9th Cir. 2002); *accord United States v. Hollis*, 490 F.3d 1149, 1156-57 (9th Cir. 2007). While these cases involve *Apprendi* error, there is simply no basis for concluding the evidence presented at trial cannot be considered in determining whether *Ring* error is harmless. *See Ryan*, 287 F.Supp.2d at 1014 ("beyond all reasonable

doubt any such error would be harmless because no reasonable jury could come to factual conclusions different than those found by Judge Finn regarding aggravating circumstances").

Based not only upon the jury's verdicts, but also the evidence presented at trial, any error associated with the jury not being instructed regarding the multiple murder aggravator was harmless. Dr. Cihak determined Fred's time of death was a half hour to three hours after eating food consistent with what he ate at the Cherry Locust Festival. (Tr., pp.2209-11, 2237.) Admittedly, because Donna's stomach was destroyed in the fire, Dr. Cihak could not determine the exact time of Donna's death. (Tr., p.2236.) However, Dr. Cihak was able to conclude both died from bullet wounds with their bodies subsequently being burned in the house fire. (Tr., pp.2192, 2195-96, 2208, 2215-16.) At approximately 11:30 a.m. Ted Meske, who was working on a fence line, saw a red Bronco, usually driven by Shackelford and Sonja Abitz, returning home. (Tr., pp.1098-1105.) An hour later, Meske saw the Bronco leaving "noticeably faster." (Tr., p.1108.) During the hour between the Bronco's return and subsequent departure, Meske heard multiple gunshots. (Tr., pp.1110-14.) Ballistics testing revealed the same gun was used to murder Donna and Fred. (Tr., pp.2477-78.) It was during that hour, after the Bronco returned to the house and subsequently left, that Shackelford murdered Donna and Fred.

Based not only upon this evidence, but all of the evidence presented at trial, coupled with the jury's verdicts finding Shackelford guilty of both Donna and Fred's murders, the record does not contain evidence that would rationally lead to a contrary finding with respect to the multiple murder aggravator. *See Neder*, 527 U.S. at 19. More importantly, Shackelford never questioned whether Donna and Fred were murdered at the same time, but based his defense upon the contention that he was not the murderer. Therefore, any alleged error based upon *Ring* was harmless.

CONCLUSION

Petitioner respectfully requests that a writ of certiorari be granted and the judgment of the Idaho Supreme Court be summarily reversed.

Respectfully submitted,

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