

No. 10-589

Supreme Court, 17th  
FILED

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In The  
**Supreme Court of the United States**

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STATE OF IDAHO,

*Petitioner,*

v.

DALE CARTER SHACKELFORD,

*Respondent.*

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**On Petition For Writ Of Certiorari  
To The Idaho Supreme Court**

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**PETITIONER'S REPLY BRIEF**

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## ARGUMENT IN REPLY

### A. Introduction

Shackelford does not dispute that *Ring*<sup>1</sup> error is subject to harmless error analysis, but contends the Idaho Supreme Court (1) conducted a “*de facto*” harmless error analysis, (2) rejected the trial court’s conclusion “that because the murders were committed on the same date and at the same location, the murders necessarily were committed ‘at the same time,’” and (3) concluded the “evidence presented at trial did not prove beyond a reasonable doubt that the murders were committed ‘at the same time.’” Shackelford further contends there will be little, if any, impact on future cases because judge-sentencing states have adopted procedures for a jury determination of statutory aggravating factors.

Contrary to Shackelford’s contention, the state has not misconstrued the Idaho Supreme Court’s decision because the underlying analysis supporting the decision is based upon the erroneous conclusion that *Ring* error is structural and cannot be reviewed for harmless error. Nor did the Idaho Supreme Court opine that multiple murders committed on the same date and location fail to meet the requirements of the multiple murder aggravator. Rather, the court discussed only the charging document and the verdict forms, ignoring the evidence presented at trial, to conclude *Ring* error is structural and that “[t]here

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<sup>1</sup> *Ring v. Arizona*, 536 U.S. 584 (2002).

was no finding by this jury that, at the same time one murder was committed, the defendant committed another murder.” Further, the Idaho Supreme Court’s conclusion that the state failed in its burden of establishing harmless error was based upon the erroneous conclusion that *Ring* error is structural and cannot be reviewed for harmless error. Finally, Shackelford has grossly understated the impact of the Idaho Supreme Court’s conclusion that *Ring* error is structural because it could impact any case in which the jury is improperly advised regarding the elements of a statutory aggravating factor not just those cases in which defendants were not sentenced by a jury.

#### **B. The Idaho Supreme Court Did Not Conduct A *De Facto* Harmless Error Analysis**

Shackelford contends the state has misstated the Idaho Supreme Court’s holding because the court “applied a *de facto* harmless error analysis of the *Ring* error” and “[n]o fair reading of the decision . . . reveals that the Court was treating *Ring* error in this case as structural” since the court did not use the word “structural” in its opinion. Brief in Opp. at 3-6. While it is true the Idaho Supreme Court did not expressly state “*Ring* error is structural and cannot be reviewed for harmless error,” based upon the court’s reliance upon *Sullivan v. Louisiana*, 508 U.S. 275 (1993), and *State v. Lovelace*, 90 P.3d 298 (Idaho 2004), it is clear the court’s decision was based upon the conclusion that since the jury was not instructed regarding the multiple murder aggravator, the court

could not engage in harmless error analysis because the failure to instruct was structural error.

In *Sullivan*, this Court reasoned that an erroneous reasonable doubt jury instruction “vitiates all the jury’s findings,” which then permits the reviewing court to “only engage in pure speculation.” 508 U.S. at 281 (emphasis in original). In *Lovelace*, the Idaho Supreme Court cited *Neder v. United States*, 527 U.S. 1, 10 (1999), and recognized, “The Supreme Court has applied harmless error analysis to a jury instruction that omits an essential element.” 90 P.3d at 79. The state court explained, “When a jury is not instructed as to an element of an offense, the standard for determining harmlessness is whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.” *Lovelace*, 90 P.3d at 79. The court recognized, “[t]he State is asking the Court to determine what the jury would have found had it been presented with instructions defining the language of [the statutory aggravating factor], that was to be applied to the facts surrounding the murder.” *Id.* Because the “facts in evidence contesting that the murder was committed in perpetration of kidnapping” were contested, the court concluded “application of harmless error [was] inappropriate.” *Id.*

In Shackelford’s case, the Idaho Supreme Court again concluded the state was “‘asking the Court to determine what the jury would have found had it been presented with instructions defining [the statutory aggravating factors that were] to be applied to

the facts surrounding the murder.’” App. at 78 (quoting *Lovelace*, 90 P.3d at 304) (brackets in original). However, instead of reviewing the facts as it did in *Lovelace*, the court cited *Sullivan*, and concluded:

To engage in appellate hindsight on this issue, such as that advanced by the State, is constitutionally infirm [because] it violates the jury-trial guarantee for a court to “hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support the verdict might be” [and] the Sixth Amendment “requires more than appellate speculation about a hypothetical jury’s action.”

App. at 79-80 (quoting *Sullivan*, 508 U.S. at 279-80). Moreover, unlike *Lovelace*, in which the court concluded the evidence regarding the statutory aggravating factor was contested making harmless error review inappropriate, 90 P.3d at 79, not only did Shackelford fail to challenge the assertion that the murders were committed at the same time, but the state court examined only the charging language from the information and the verdict forms, concluding, “There was no finding by this jury that, at the same time one murder was committed, the defendant committed another murder.” App. at 79-80.

The Idaho Supreme Court’s analysis is contrary to *Neder*, 527 U.S. at 8, where this Court explained, “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.” (Emphasis in original.) Rather than focusing upon *Sullivan*, the charging language and the verdict forms, the Idaho Supreme Court should have asked “whether the record contains evidence that would rationally lead to a contrary finding with respect to the omitted element,” *Neder*, 527 at 10, which in this case is the statutory aggravating factor – whether “at the time the murder was committed the defendant also committed another murder,” I.C. § 19-2515(h)(2) (2000). Therefore, when the Idaho Supreme Court concluded, “because we cannot find beyond a reasonable doubt that a reasonable jury could find that the State proved that Donna and Fred were killed at the same time,” App. at 80, it was because the court concluded the error was structural under *Sullivan*, and could not be reviewed for harmlessness. This assertion is further exemplified by the court’s final statement “that the jury was required to find the aggravator, and such a finding was not explicit in the first-degree murder verdicts.” App. at 80. There simply is no requirement under *Neder* and its progeny to focus exclusively upon the charging language and verdict forms. The state court’s finding was based upon language from *Sullivan*, 508 U.S. at 279, ignoring the fact that *Neder* permits a review for harmlessness even when the jury is not instructed regarding the element of an offense, such as the statutory aggravating factor in this case.

As in *Washington v. Recuenco*, 548 U.S. 212 (2006), the question is whether sentencing enhancement error – in this case *Ring* error – is subject to harmless error analysis at all, and whether the instructional error made in this case – failing to instruct on the multiple murder aggravator – is more akin to the missing element as in *Neder*, or the structural error described in *Sullivan*. Based upon Shackelford’s failure to assert the error is more akin to structural error, this case is virtually indistinguishable from *Neder*-type error where the appellate court made a finding on an element that went beyond the jury’s express verdict, but where that finding was unquestionably supported by the evidence, particularly since Shackelford never questioned whether the murders were committed at the same time, which he also fails to dispute in his Brief in Opposition.

### **C. The Idaho Supreme Court Did Not Define “At The Same Time”**

In two related arguments, Shackelford contends this Court should deny certiorari because the state is allegedly challenging the Idaho Supreme Court’s definition of “at the same time” in the multiple murder aggravator and asking this Court to “reexamine the facts of this case” in concert with the state court’s definition. Brief in Opp. at 5-7.

While the state readily acknowledges the general rule that this Court does not review issues of state law, *Barclay v. Florida*, 493 U.S. 939, 947 (1983), the

Idaho Supreme Court's decision was not based upon a state law holding. Not only did the Idaho Supreme Court fail to define the phrase, "at the same time," in the multiple murder aggravator, the court never examined or even discussed any of the evidence presented at Shackelford's trial supporting the multiple murder aggravator. Rather, the court discussed only the charge and the verdict forms in concluding "[t]here was no finding by this jury that, at the same time one murder was committed, the defendant committed another murder." App. at 79-80. In fact, the Idaho Supreme Court expressly relied upon the federal Constitution, stating, "To engage in appellate hindsight on this issue, such as that advanced by the State, is constitutionally infirm." App. at 78. As detailed above, the lower court's decision was premised upon the mistaken belief that *Ring* error is structural, which cannot be reviewed for harmlessness. Such a conclusion is clearly a federal, not a state law question that can and should be reviewed by this Court.

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

Finally, Shackelford contends the Idaho Supreme Court's decision will have little or no impact on future or pending cases because "[t]here are no Idaho capital cases which are pending on direct review which involve *Ring* error." Brief in Opp. at 7. Irrespective of whether Idaho still has pending direct review cases

involving *Ring* error, the issue continues to be a source of contention as demonstrated in *Rhoades v. State*, 233 P.3d 61 (Idaho 2010), which involves the retroactivity of *Ring* under Idaho law. In *Rhoades*, 233 P.3d at 63, the Idaho Supreme Court consolidated the cases of six post-conviction petitioners who contended they should be given sentencing relief under *Ring*, and whose cases had been remanded by this Court for reconsideration in light of *Danforth v. Minnesota*, 552 U.S. 264 (2008).<sup>2</sup> Expressly abandoning its prior rule of retroactivity, the Idaho Supreme Court “explicitly adopt[ed] the *Teague* standard in criminal cases on collateral review,” *Rhoades*, 233 P.3d at 64, but also concluded that decisions of retroactivity in Idaho “should reflect independent judgment, based upon the concerns of this Court and the uniqueness of our state, our Constitution and our long-standing jurisprudence,” *id.* at 70.

Although it might be presumed that a state court’s adoption of a new rule of retroactivity under state law is a state law question, *Rhoades* and four other petitioners have filed a petition for certiorari that remains pending before this Court. *Rhoades v.*

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<sup>2</sup> In *Danforth*, this Court concluded the federal retroactivity doctrine articulated in *Teague v. Lane*, 489 U.S. 288 (1989), does not constrain the authority of state courts to give broader effect to new rules of criminal procedure.

*Idaho*, #10-7831. Additionally, numerous other death-sentenced inmates in Idaho have filed successive post-conviction petitions raising new *Ring* issues.<sup>3</sup>

More importantly, despite Shackelford's assertion to the contrary, based upon the Idaho Supreme Court's decision, any mistake in the jury instructions involving statutory aggravating factors cannot be reviewed for harmlessness because, according to the court, "[t]o engage in appellate hindsight on this issue, . . . is constitutionally infirm" because "it violates the jury-trial guarantee for a court to 'hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support the verdict might be[.]'" App. at 78-79 (quoting *Sullivan*, 508 U.S. at 279). The Idaho Supreme Court's opinion will perpetuate confusion and inconsistent results because harmless error analysis is appropriate if an element of the underlying offense is omitted or incorrectly defined, but the same is not true for a statutory aggravating factor, which, under *Ring*, is merely another element that must be proven beyond a reasonable doubt before the death penalty may be imposed.

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<sup>3</sup> *Leavitt v. State*, Idaho Supreme Court #38263; *Creech v. State*, district court #CV-PC-2008-06064; *Sivak v. State*, district court #CV-PC-2008-06170; *Row v. State*, district court #CV-PC-2008-06067. This is not an exhaustive list of death-sentenced inmates in Idaho that have filed successive post-conviction petitions requesting sentencing relief under *Ring* that remain pending.

This case provides an excellent vehicle for preventing the confusion that will result, particularly in the state courts, if the Idaho Supreme Court's decision is permitted to stand. At the very least, the Idaho Supreme Court should be required to reexamine the question in light of *Neder* and its progeny, particularly *Recuenco*, where this Court explained, "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." 548 U.S. at 222.



### 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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