

**IN THE SUPREME COURT OF MISSOURI
EN BANC**

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. SC76981
)	
RODERICK NUNLEY,)	
)	
Appellant.)	

APPELLANT’S MOTION TO RECALL THE MANDATE

APPELLANT’S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant, Roderick Nunley, pleaded guilty, *inter alia*, to first-degree murder in the Circuit Court of Jackson County in 1991 before Judge Alvin Randall, and was sentenced to death. This Court subsequently vacated the judgment in a summary order dated June 29, 1993, and remanded the matter to the circuit court for a new penalty phase hearing, imposition of sentence, and entry of a new judgment. Upon remand, Nunley was again sentenced to death, this time by John R. O'Malley, Circuit Judge of Jackson County. This Court affirmed Nunley's conviction and sentence of death. *State v. Nunley*, 923 S.W.2d 911 (Mo. banc 1996).

On September 30, 2010, Nunley filed a motion asking this Court to recall its mandate based on intervening federal and state authority. After initially considering and overruling the motion "on the merits" in a summary order dated October 12, 2010, this Court reversed course and ordered Nunley to brief the issues raised in his motion. *State v. Nunley*, No. SC76981, Order (October 20, 2010).

Because a sentence of death was imposed, this Court has exclusive appellate jurisdiction. Art. V, § 3, Mo. Const. (as amended 1982).

STATEMENT OF FACTS

The circumstances and procedural history of Roderick Nunley's case are set out in this Court's opinion affirming his conviction and sentence of death. *State v. Nunley*, 923 S.W. 911, 915-17 (Mo. banc 1996).¹ Rather than repeat those facts in detail, Nunley will focus on the facts that are significant to the determination of his motion to recall the mandate. Those facts are as follows:

Roderick Nunley and Michael Taylor were charged with the kidnaping, rape and murder of Ann Harrison. On January 28, 1991, Nunley entered a plea of guilty to first-degree murder before Judge Alvin Randall of the Jackson County Circuit Court. Thereafter, following a three day sentencing hearing, Judge Randall sentenced Nunley to death. Following contentious post-conviction proceedings where evidence was adduced that Judge Randall consumed alcohol immediately prior to Nunley's sentencing, this Court, on June 29, 1993, entered an order vacating the judgment and remanding the case for "a new penalty hearing, imposition of sentence, and entry of new judgment."

New counsel were appointed, and the case was assigned to the Honorable John R. O'Malley, Circuit Judge. Nunley's counsel filed a motion seeking to withdraw Nunley's guilty plea, or alternatively to allow a jury to determine his sentence. Judge

¹The opinion appears at App. A-1.

O'Malley denied both requests as well as a later motion to recuse himself that was based on the fact that the presiding judge of the circuit had previously entered an order recusing all judges from hearing the case once allegations of Judge Randall's drinking surfaced. Thereafter, Judge O'Malley presided at the sentencing hearing without a jury. Following the sentencing hearing, Judge O'Malley made the necessary factual determinations required under the Missouri death penalty statute, §565.030.4, and sentenced Nunley to death.

Nunley appealed to this Court and raised, among other issues, a claim that he was entitled to have a jury determine his punishment, asserting that he specifically requested jury sentencing before Judge O'Malley. This Court denied relief holding that Nunley had "no constitutional right to have a jury assess his punishment," and no statutory right to jury sentencing except by agreement with the state. *State v. Nunley*, 923 S.W.2d at 923. Additionally, the Court mentioned that Nunley testified at his plea hearing that he knew a judge, specifically Judge Randall, "would be sentencing him." *Id.*

On April 28, 2000, Nunley filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Western District of Missouri challenging his conviction for first degree murder, and resulting sentence of death. Nunley's petition raised five claims that were ripe for review, including a claim that

his constitutional rights were violated when Judge O'Malley refused to allow him to withdraw his guilty plea, or alternatively, proceed with jury sentencing.

While Nunley's habeas petition was pending, the United States Supreme Court issued its decision in *Ring v. Arizona*, 536 U.S. 584 (2002), holding that a capital defendant has a right under the Sixth and Fourteenth Amendments to have a jury determine the facts necessary to impose a sentence of death. *Id.* at 589. Shortly thereafter, Nunley requested leave to amend his traverse to address the *Ring* decision. The district court denied the motion, and subsequently, on June 5, 2003, issued its order and judgment denying relief.

Nunley then filed a motion for a certificate of appealability in the district court. On December 4, 2003, the district court issued a certificate of appealability (COA) on one issue: whether, under *Ring v. Arizona*, 536 U.S. 584, 609 (2002), Nunley was entitled to have a jury determine the facts necessary for the imposition of a sentence of death. The issuance of the COA was based on the fact that the United States Supreme Court recently granted certiorari to decide whether *Ring* was retroactive to cases on collateral review.

Meanwhile, on June 17, 2003, this Court issued its decision in *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), holding *Ring* to be retroactive to cases on collateral review where a judge made the factual determinations necessary to

impose a sentence of death. *Id.* at 265-69. This Court reached this result by applying the retroactivity analysis developed in *Linkletter v. Walker*, 308 U.S. 618 (1965), and *Stovall v. Deno*, 388 U.S. 293 (1967), rather than the analysis set out in *Teague v. Lane*, 489 U.S. 288 (1989). *See Whitfield*, 107 S.W.3d at 268-69.

While Nunley's case was pending in the Eighth Circuit, the Supreme Court decided *Schriro v. Summerlin*, 524 U.S. 348 (2004), holding that *Ring* was not retroactive to cases already final on direct review. *Id.* at 358. The Eighth Circuit eventually denied relief based on *Summerlin*; however, in doing so, the court specifically recognized that Missouri has made *Ring* retroactive to cases on collateral review in *Whitfield*, and opined that whatever claims that Nunley have under *Whitfield* should "be addressed in the first instance . . . by a state court." *Nunley v. Bowersox*, 394 F.3d 1079, 1081 (8th Cir. 2005).

On August 19, 2010, the Missouri Supreme Court issued an Order setting Nunley's execution date for October 20, 2010. Thereafter, on September 30, 2010, Nunley filed a motion to recall the mandate in this Court raising two claims: (1) that he is entitled to have his sentence of death set aside because *Ring* is retroactive to cases on collateral review under Missouri law, and in violation of *Ring*, a judge, rather than a jury, made the requisite findings and sentenced him to death; and (2) that he was deprived of the statutory proportionality review to which he is entitled under §

565.035.3 because his death sentence was only compared to similar cases resulting in death rather than to similar cases resulting in both life and death sentences. On October 12, 2010, this Court summarily overruled the motion as follows: “Appellant’s motion to recall the mandate having been considered on the merits, said motion is overruled.”

Following the Court’s denial of his motion to recall the mandate, Nunley filed a supplemental petition for writ of habeas corpus along with an application for stay of execution in the United States District Court for the Western District of Missouri.² The supplemental petition raised a claim that, under *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980), Nunley was denied due process of law as guaranteed by the Fourteenth Amendment when the state arbitrarily deprived him his state-created liberty interest not to be sentenced to death unless the jury finds the necessary facts to impose the death penalty.

On October 18, 2010, the Honorable Fernando J. Gaitan, Jr. issued an Order staying Nunley’s execution pending an explanation from this Court as to why it denied Nunley’s motion to recall the mandate. Order, *Nunley v. Bowersox*, No. 99-8001-CV-W-FJG (W.D.Mo. Oct. 14, 2010).³ Judge Gaitan’s Order specifically

²The supp. pet. and app. for stay appear at App. A-20 and A-33, respectively.

³Judge Gaitan’s Order appears at App. A-61.

referred to the fact that he was unsure how to apply 21 U.S.C. § 2254(d) given this Court's summary order denying relief. *Id.* at 8.

Following the issuance of Judge Gaitan's Order, respondent filed a motion to vacate the stay in the United States Court of Appeals for the Eighth Circuit. Nunley filed a response in opposition thereto and thereafter, a panel of the Eighth Circuit denied the motion in a *per curiam* opinion. *Nunley v. Bowersox*, No. 10-3292 (8th Cir. Oct. 19, 2010).⁴ Respondent's subsequently filed petition for rehearing en banc was considered by the Eighth Circuit and denied.⁵ Thereafter, respondent presented an application to vacate the stay of execution to Justice Samuel Anthony Alito, Jr. of the United States Supreme Court. The application was referred to the full Court and denied, 8-1. Order, *Bowersox v. Nunley*, No. 10A393 (U.S. Oct. 19, 2010).⁶

Meanwhile, while respondent was seeking to vacate the stay of execution in the federal courts, he filed a motion before this Court seeking modification of this Court's summary order overruling the motion to recall the mandate. In response thereto, this Court issued an Order on October 20, 2010 directing the parties to brief the issues raised in the motion to recall the mandate, and the motion for modification.

⁴The *per curiam* opinion of the Eighth Circuit appears at App. A-70.

⁵The order denying the petition for rehearing appears at App. A-73.

⁶The order of the Supreme Court appears at App. A-73.

POINTS RELIED ON

I

This Court should recall its mandate and set aside Nunley's sentence of death in light of *Ring v. Arizona*, 536 U.S. 584 (2002), and *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), because, pursuant to said intervening authorities, Nunley has a constitutional right to have a jury determine the necessary facts to impose a sentence of death, and Nunley was deprived of this right in violation of the Sixth and Fourteenth Amendments, and Art. I, §§ 2, 10, 18(a) & 21 of the Missouri Constitution, in that a judge, rather than a jury, made the requisite factual determinations and sentenced him to death.

Ring v. Arizona, 536 U.S. 584 (2002);

Apprendi v. New Jersey, 530 U.S. 566 (2000);

Hicks v. Oklahoma, 447 U.S. 343 (1980);

State v. Whitfield, 107 S.W.2d 253 (Mo. banc 2003).

II

This Court should recall its mandate in light of its intervening decision in *State v. Deck*, 303 S.W.3d 527 (Mo. banc 2010), and thereafter set aside Nunley's sentence of death because § 565.035.3 requires this Court to conduct proportionality review by comparing a defendant's sentence of death to similar cases, including those that resulted in a sentence of life imprisonment without probation or parole, and Nunley was deprived of due process of law as guaranteed by the Fourteenth Amendment to the U.S. Constitution and Art. I, §§ 2, 10, 18(a) & 21 of the Missouri Constitution in that his sentence of death was reviewed by only comparing it to similar cases where the defendant was sentenced to death, and a comparison of Nunley's case with all similar cases, including those resulting in a life sentence, demonstrate that Nunley's sentence is excessive and disproportionate.

Pulley v. Harris, 465 U.S. 37 (1984);

Hicks v. Oklahoma, 447 U.S. 343 (1980);

Tokar v. Bowersox, 198 F.3d 1039 (8th Cir. 1999);

State v. Deck, 303 S.W.3d 527 (Mo. banc 2010).

ARGUMENT

I

This Court should recall its mandate and set aside Nunley's sentence of death in light of *Ring v. Arizona*, 536 U.S. 584 (2002), and *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), because, pursuant to said intervening authorities, Nunley has a constitutional right to have a jury determine the necessary facts to impose a sentence of death, and Nunley was deprived of this right in violation of the Sixth and Fourteenth Amendments, and Art. I, §§ 2, 10, 18(a) & 21 of the Missouri Constitution, in that a judge, rather than a jury, made the requisite factual determinations and sentenced him to death.

In *Ring v. Arizona*, 536 U.S. 584, 589 (2002), the Supreme Court held that a defendant charged with a capital offense has the right under the Sixth and Fourteenth Amendments to have a jury determine the facts necessary to impose a sentence of death. *Id.* at 589. *Ring* was one of a series of cases stemming from the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Apprendi* held that any fact, other than a prior conviction, which exposes a defendant to greater punishment must be submitted to, and found by a jury beyond a reasonable doubt. *Id.*

at 490. *Ring* was the logical extension of *Apprendi* to capital sentencing proceedings. *Ring*, 536 U.S. at 602.

Ring applies retroactively to cases on collateral review in Missouri

Subject to limited circumstances, new rules of criminal procedure do not apply retroactively to cases on collateral review. *See Teague v. Lane*, 489 U.S. 288, 311 (1989). In *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Supreme Court, applying the *Teague* analysis, held *Ring* not to be retroactive to cases already final on direct review. *Id.* at 358. Were *Summerlin* the final word on this issue, Nunley would not be able to take advantage of the *Ring* decision. But, a state may “provide greater protections in [its] criminal justice system than the federal constitution requires,” *California v. Ramos*, 463 U.S. 992, 1013-14 (1983), and Missouri has chosen to give greater protection to its citizens by making *Ring* retroactive to cases where a judge made the requisite factual findings and imposed a sentence of death. *See State v. Whitfield*, 107 S.W.3d 253, 265-69 (Mo. banc 2003).

Ring/Whitfield warrants recall of the mandate

Upon the remand of his case for a new penalty hearing, Nunley specifically requested that Judge O’Malley either allow him to withdraw his pleas of guilty, or alternatively, proceed with jury sentencing. Judge O’Malley denied these requests, and held a bench-tryed sentencing hearing. Thereafter, Judge O’Malley made the

requisite factual determinations required by the Missouri death penalty statute, § 565.030.4, and sentenced Nunley to death.

Following the denial of post-conviction relief, Nunley asserted a claim in this Court that he was entitled to, and deprived of his right to jury sentencing by Judge O'Malley. This Court denied relief for three reasons: (1) that Nunley has no constitutional right to have a jury assess his punishment; (2) that Nunley has no statutory right to jury sentencing except by agreement with the state; and (3) that Nunley specifically waived any such right to jury sentencing. *Id.* at 923. While this Court's reasoning may have passed constitutional muster prior to the intervening decisions in *Ring* and *Whitfield*, it no longer does so.

This Court has the authority to recall its mandate “when the mandate abridges constitutional rights that have been recognized by the United States Supreme Court.” *State v. Whitfield*, 107 S.W.3d 253, 265 (Mo. banc 2003); *accord State v. Thompson*, 659 S.W.2d 766, 768-69 (Mo. banc 1983). The Court should recall its mandate because its earlier opinion in this case conflicts with the constitutional provisions set out in *Ring*, rights that apply retroactively to Nunley on his motion to recall the mandate.

***Nunley has the right to have a jury make the necessary determinations
to impose the death penalty***

Given the retroactive application of *Ring* through *Whitfield*, Nunley is entitled to have a jury make the necessary factual determinations that render him eligible for a sentence of death. Under Missouri’s capital sentencing scheme, a potential capital defendant is not eligible for a sentence of death unless (1) at least one statutory aggravator is found to exist; (2) the aggravating factors are found to warrant a death sentence; and (3) the mitigating evidence is found not to outweigh the aggravating circumstances. § 565.030.4 RSMo 2000.⁷ Since Judge O’Malley made these determinations, Nunley’s Sixth Amendment right to have a jury make the requisite factual determinations to impose a sentence of death was violated. *See State v. Whitfield*, 107 S.W.3d at 258-61.

***Section 565.006.2 RSMo is unconstitutional because it denies
capital defendants a right to jury sentencing***

Section 565.006.2 provides that: “no defendant who pleads guilty to a homicide offense . . . shall be permitted a trial by jury on this issue of punishment to be imposed, except by agreement of the state.” Although it could be argued that said statute precludes a defendant who pleads guilty of the right to have a jury determine

⁷All statutory references are to RSMo 2000 unless otherwise indicated.

his or her sentence, that argument fails because said statute is clearly unconstitutional in view of *Ring* and *Whitfield*. This Court's decision in *Whitfield* is particularly instructive on this issue.

Whitfield was sentenced to death by a judge after a jury was unable to reach a decision on punishment pursuant to § 565.030.4. *Whitfield*, 107 S.W.3d at 256. Said statute allowed the trial judge to make the necessary factual findings required for the death penalty whenever a jury deadlocked on punishment. Relying on *Ring*, this Court invalidated that portion of the statute, finding it to be in direct conflict with Whitfield's right to have a jury determine the facts necessary to make him death eligible under Missouri law. *Id.* at 261-62.

The same rationale used in *Whitfield* applies to invalidate § 565.006.2, which conditions a capital defendant's right to have a jury determine the requisite facts to impose the death penalty on the whim of the state. Said provision clearly conflicts with Nunley's right to have a jury determine the requisite facts to impose the death penalty. *See State v. Piper*, 709 N.W.2d 783, 803 (S.D. 2006) (capital sentencing scheme that prevents a defendant who pleads guilty from having alleged aggravating circumstances found by a jury is unconstitutional under *Ring*). Consistent with *Ring*, the Court cannot constitutionally rely § 565.006.2 to deny Nunley his Sixth

Amendment right to have a jury determine the requisite facts to impose the death penalty.

Mr. Nunley did not waive his right to jury sentencing

While respondent may argue that *Ring* and *Whitfield* do not apply to instances where a capital defendant pleads guilty to avoid jury sentencing, that argument would fail because it ignores the fact that Nunley did not waive jury sentencing before Judge O'Malley. In fact, as recognized by this Court in its opinion after its first remand, Nunley specifically requested that Judge O'Malley allow him to be sentenced by a jury. *See State v. Nunley*, 923 S.W.2d at 916. Although Nunley did waive sentencing before Judge Randall, that sentence was vacated and set aside. When Nunley came before Judge O'Malley for a sentencing hearing on remand, he necessarily came on a "fresh slate." It is at this point that the retroactive application of *Ring* comes into play.

In order to analyze this issue properly, one has to view Judge O'Malley's decision denying jury sentencing in the context that *Ring* was the law at the time. It then becomes clear that there was a *Ring* violation because: (1) petitioner had a constitutional right to have a jury determine the necessary facts to impose the death penalty; (2) petitioner specifically requested jury sentencing before Judge O'Malley; (3) the request was denied; (4) Judge O'Malley determined the facts necessary to

impose a sentence of death; and (5) thereafter sentenced Nunley to death. *See e.g. Whitfield*, 107 S.W.3d at 264.

Section 565.040.2 RSMo mandates a life sentence

Section 565.040.2 provides, in pertinent part, as follows:

In the event that any death sentence imposed pursuant to this chapter is held to be unconstitutional, the trial court which previously sentenced the defendant to death shall cause the defendant to be brought before the court and shall sentence the defendant to life imprisonment without eligibility for probation, parole . . .”

Because the imposition of Nunley’s death sentence was in violation of his rights under the Sixth and Fourteenth Amendments to a jury determination of the facts rendering him eligible for death, this section clearly applies. *See Whitfield*, 107 S.W.3d at 271-72. Nunley is therefore entitled to be resentenced to a term of life imprisonment without eligibility for probation or parole.

Nunley’s right to the retroactive application of Ring is protected by the Due Process Clause of the Fourteenth Amendment

While *Ring*’s retroactive application may be unique to Missouri, such right is not merely a matter of state concern, but a liberty interest protected against arbitrary deprivation by the Due Process Clause of the Fourteenth Amendment.

[W]here . . . a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. A defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the state.

Hicks v. Oklahoma, 447 U.S. 343, 346 (1980) (citation omitted).

Under *Whitfield*, Nunley has a state-created liberty right not to be sentenced to death unless the jury makes the requisite factual findings. This right is protected against arbitrary deprivation by the Due Process Clause of the Fourteenth Amendment. *See e.g. Hicks*, 447 U.S. at 346 (Hicks had a state-created liberty interest to have a jury determine his sentence); *Carter v. Bowersox*, 265 F.3d 705, 714-15 (8th Cir. 2001) (defendant had a due process "liberty interest" in having his jury instructed that it must unanimously find that aggravators warranted the death penalty); *Toney v. Gammon*, 79 F.3d 693, 700 (8th Cir. 1996) (Toney had a state-created liberty interest to have his sentences imposed concurrently or consecutively in the exercise of the judge's discretion); *Rust v. Hopkins*, 984 F.2d 1486, 1492-93 (8th Cir. 1993) (Rust had

a state-created liberty interest not to be sentenced to death unless a three judge panel determined the aggravating circumstances beyond a reasonable doubt).

This Court has retroactively applied *Ring* in nine capital cases, ordering life imprisonment because a jury had not found the facts required to impose a sentence of death. See *Ervin v. Puckett*, 2007 WL 2782332 (E.D.Mo. 2007) at *1; *State v. Buchanan*, 115 S.W.3d 841, 842 (Mo. banc 2003); *State v. Richardson*, No. 76059, Order Recalling Mandate and Setting Aside Death Sentence (Oct. 29, 2003); *State v. Morrow*, No. 79112, Order Recalling Mandate and Setting Aside Death Sentence (Oct. 29, 2003); *State v. Smith*, No. 77337, Order Recalling Mandate and Vacating Death Sentence (Oct. 28, 2003); *State v. Thompson*, 134 S.W.3d 32, 33 (Mo. banc 2004); *State ex rel. Baker v. Kendrick*, 136 S.W.3d 491, 494 (Mo. banc 2004); *State ex rel. Mayes v. Wiggins*, 150 S.W.3d 290, 291 (Mo. banc 2004); *State ex rel. Lyons v. Lombardi*, 303 S.W.3d 523, 525 n.2 (Mo. banc 2010).

In view of the numerous cases where this Court retroactively applied *Ring* to grant relief to similarly situated capital defendants, this Court's refusal to grant Nunley relief would clearly be an arbitrary deprivation of his state-created liberty interest not to be sentenced to death unless a jury determines the requisite factual findings.

The United States Supreme Court decision in *Ring* gives a capital defendant the right to have a jury determine the facts necessary for the imposition of a sentence of death. *Whitfield* expands the protection of *Ring* by specifically making *Ring* retroactive to capital cases on collateral review in Missouri where a judge made the factual findings necessary for the imposition of the death sentence. Because Judge O'Malley made the requisite factual determinations rendering Nunley eligible for death and imposed the death penalty, this Court should recall its mandate, vacate its judgment, and commute Nunley's sentence to life imprisonment without eligibility for probation, parole, or release except by act of the governor.

II.

This Court should recall its mandate in light of its intervening decision in *State v. Deck*, 303 S.W.3d 527 (Mo. banc 2010), and thereafter set aside Nunley's sentence of death because § 565.035.3 requires this Court to conduct proportionality review by comparing a defendant's sentence of death to similar cases, including those that resulted in a sentence of life imprisonment without probation or parole, and Nunley was deprived of due process of law as guaranteed by the Fourteenth Amendment to the U.S. Constitution and Art. I, §§ 2, 10, 18(a) & 21 of the Missouri Constitution in that his sentence

of death was reviewed by only comparing it to similar cases where the defendant was sentenced to death, and a comparison of Nunley's case with all similar cases, including those resulting in a life sentence, demonstrate that Nunley's sentence is excessive and disproportionate.

Section 565.035.3 requires the Court to conduct an independent review of Nunley's sentence of death to determine, among other things, "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence, and the defendant." Although proportionality review is not required by the United States Constitution, *see Pulley v. Harris*, 465 U.S. 37, 50-51 (1984), once a state mandates such review, "it must be conducted consistently with the Due Process Clause." *See Tokar v. Bowersox*, 198 F.3d 1039, 1052 (8th Cir. 1999). Because Missouri requires proportionality review, Nunley has a state-created liberty interest to the type of review set out in the statute. Further, this right is not merely a matter of state concern, but a liberty interest protected against arbitrary deprivation by the Due Process Clause of the Fourteenth Amendment. *See, e.g., Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

This Court conducted proportionality review in Nunley’s case by only comparing his sentence with similar cases where the death penalty was imposed. *Nunley*, 923 S.W.2d at 926. This truncated review is contrary to that mandated by § 565.035. 3. *State v. Davis*, 318 S.W.3d 618, 643-44 (Mo. banc 2010), citing *State v. Deck*, 303 S.W.3d 527, 555-63 (Mo. banc 2010) (Stith, J., concurring). At this time, there is no sound basis for denying Nunley the full review that he was entitled to all along. That review “requires consideration of all factually similar cases . . . including those resulting in a sentence of life imprisonment without the possibility of probation or parole.” *State v. Dorsey*, 318 S.W.3d 648, 659 (Mo. banc 2010); accord *State v. Anderson*, 306 S.W.3d 529, 545 (Mo. banc 2010) (Breckenridge, J., concurring).

This Court surely maintains a database of capital cases similar to that of Nunley that resulted in either a death sentence or a sentence of life imprisonment without probation or parole. Nunley does not have that database available to him, and thus, cannot put together a comprehensive list of all available similar capital cases. But, Nunley calls this Court’s attention to the following cases which are similar to his case, and resulted in a sentence of life imprisonment without probation or parole:

- *State v. Blair*, 298 S.W.3d 38 (Mo.App. 2009) - Blair was charged with eight counts of first-degree murder for the murders of eight women in Kansas City, Missouri. The death penalty was waived, and the case was

tried without a jury before Judge John R. O'Malley in Jackson County.⁸ Judge O'Malley found Blair guilty of six counts of first-degree murder, and sentenced him to six consecutive life sentences without the possibility of probation or parole;

- *State v. Crenshaw*, 59 S.W.3d 45 (Mo.App. 2000) - Crenshaw was convicted of first-degree murder, forcible rape, and sodomy. Following his conviction, he sentenced to life without probation or parole on the murder charge, and consecutive life on the other charges. His crime involved the strangulation murder and rape of a 14 year old victim;
- *State v. Harding, III*, 210 WL 3629539 (Mo.App. WD September 21, 2010) - Harding was convicted of murder in the first degree for the strangulation death of his female victim, and sentenced to life without probation or parole;
- *State v. Little*, 861 S.W.2d 729 (Mo.App. 1993) - Little was convicted of three counts of first-degree murder, one count of second-degree murder, two counts of forcible rape, two counts of robbery in the first degree, and one count of attempted forcible rape. While the state sought the death

⁸Judge O'Malley is the same judge who sentenced Nunley to death on remand.

penalty, the jury returned life sentences without probation or parole on the first-degree murder charges;

- *State v. McMilian*, 295 S.W.3d 537 (Mo.App. 2009) - McMilian was convicted by a jury of murder and forcible rape, and sentenced to life imprisonment without the possibility of probation or parole;
- *State v. Royal*, 610 S.W.2d 946 (Mo. banc 1981) - Royal was convicted of, among other offenses, capital murder and kidnapping. He was sentenced to life without probation or parole on the charge of capital murder. His crime involved a bank robbery and the subsequent abduction and murder of a bank employee;
- *State v. Ware*, 793 S.W.2d 412 (Mo.App. 1990) - Ware was convicted of first-degree murder, forcible rape, and sentenced to life without probation or parole on the murder charge;
- *State v. Wickizer*, 859 S.W.2d 873 (Mo.App. 1993) - Wickizer was convicted of the murder and rape of a four year old child, and sentenced to life without probation and parole on the murder charge;
- *State v. Williams*, 828 S.W.2d 894 (Mo.App. 1992) - Williams was convicted of first-degree murder and rape, and sentenced to life without probation or parole on the murder charge.

Although the above-referenced cases constitute a small sample, they are indicative of the fact that there are many cases similar to Nunley's in which the defendant was sentenced to life imprisonment. This Court has an independent duty to conduct a proportionality review by factoring these and other similar cases that resulted in a sentence of life imprisonment into its determination as to whether Nunley's sentence is excessive or disproportionate considering his crime, the strength of the evidence, and his personal characteristics.

Further, since Nunley's right to proportionality review is not merely a matter of state concern but a state-created liberty interest protected by the Fourteenth Amendment, *see Hicks v. Oklahoma*, 447 U.S. at 346, this Court's refusal to recall its mandate and properly conduct the proportionality analysis under § 565.035.3(3) would violate Nunley's due process rights under the Fourteenth Amendment.

Conclusion

The intervening decisions in *Ring v. Arizona* and *State v. Whitfield* warrant that this Court recall its mandate in *Nunley*, 923 S.W.2d 911, set aside Nunley's sentence of death, and pursuant to § 565.040.2 RSMo, sentenced Nunley to life imprisonment without probation, parole, or release except by act of the governor.

Alternatively, this Court should recall its mandate and conduct the full proportionality review mandated by § 565.035.3, and thereafter, sentenced Nunley to

life imprisonment without eligibility for probation, parole, or release except by act of the governor.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); (3) was completed using WordPerfect 10, in Times New Roman, size 14 point font; and (4) excluding the cover page, signature block, certificate of compliance, certificate of service, and appendix, contains 5,776 words.

The undersigned counsel further certifies that the compact disc provided with this brief: (1) contains a complete copy of the brief; (2) has been scanned for viruses using McAfee VirusScan program, which was updated in November, 2010, and (3) according to said program, is virus-free.

Michael J. Gorla

CERTIFICATE OF SERVICE

I hereby certify that one true and correct copy of this brief, the appendix thereto, and a compact disc containing a copy of the brief were served upon Mr. Michael J. Spillane, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899, by regular U.S. Mail, first-class postage prepaid, this 17th day of November, 2010.

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