

**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 REPLY BRIEF AND ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

POINTS RELIED ON..... 1

ARGUMENT 3

I. This Court should recall its mandate and set aside
Nunley’s sentence of death because he was deprived of
his retroactive Sixth Amendment right to have a jury
determine the requisite facts to impose the death
penalty..... 3

II. This Court should recall its mandate because it failed
to give Nunley the full proportionality review to which
he is entitled and thereafter set aside his sentence of
death because it is disproportionate to the sentences
imposed in similar cases 11

CONCLUSION..... 13

CERTIFICATE OF COMPLIANCE..... 15

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

CASES:	Page
<i>Colwell v. State</i> , 59 P.3d 463 (Nev. 2002).....	7
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	10
<i>Rentschler v. Nixon</i> , 311 F.3d 781 (Mo. banc 2010)	9, 10
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002).....	3
<i>South Carolina v. Downs</i> , 604 S.E.2d 377 (S.C. 2004).....	7
<i>State v. Davis</i> , 318 S.W.3d 618 (Mo. banc 2010).....	11
<i>State v. Deck</i> , 303 S.W.3d 527 (Mo. banc 2010).....	12
<i>State v. Dorsey</i> , 318 S.W.3d 648 (Mo. banc 2010)	13
<i>State v. Franklin</i> , 16 S.W.3d 692 (Mo. App. E.D. 2000)	6
<i>State v. Lowery</i> , 926 S.W.2d 712 (Mo. App. E.D. 1996)	6
<i>State v. Martin</i> , 882 S.W.2d 768 (Mo. App. E.D. 1994)	6
<i>State v. Nunley</i> , 923 S.W.2d 911 (Mo. banc 1996).....	5
<i>State v. Piper</i> , 709 N.W.2d 783 (S.D. 2006)	8, 9
<i>State v. Ramsey</i> , 864 S.W.2d 320 (Mo. banc 1993)	12
<i>State v. Whitfield</i> , 107 S.W.3d 253 (Mo. banc 2003)	3
<i>Texas v. McCullough</i> , 475 U.S. 134 (1986).....	6
STATUTES:	
§ 565.006.2 RSMo 2000	8

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);

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.

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

Section 565.035 RSMo.

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.

Ring mandates that Mr. Nunley be afforded jury sentencing on remand

The deciding question for Mr. Nunley is whether he had a right to ask for jury sentencing after his judge-imposed death sentence was vacated by this Court and remanded for “a new penalty hearing, imposition of sentence, and entry of new judgment.” (June 29, 1993 Summary Order) It is undisputed, and respondent acknowledges, that pursuant to *State v. Whitfield*, 107 S.W.3d 253, 264-69 (Mo. banc 2003), the right to jury sentencing established in *Ring v. Arizona*, 536 U.S. 584 (2002), applies retroactively in Missouri cases.

Therefore, when Mr. Nunley requested jury sentencing following this Court’s remand of his case for a new penalty hearing, his right to such under *Ring*

was violated by Judge O'Malley's refusal to provide jury sentencing. Respondent attempts to avoid this inevitable conclusion by arguing that Mr. Nunley waived his right to jury sentencing forever when he initially pled guilty for the purpose of having Judge Randall impose sentence rather than a jury.

Respondent's argument fails in light of this Court's order vacating the sentence imposed by Judge Randall and granting Mr. Nunley a new penalty phase, new sentence and new judgment. Respondent fails to cite to any authority for its position that although the Court invalidated everything that happened at Mr. Nunley's original sentencing hearing, Mr. Nunley remained tied to his decision at the time to have a judge-imposed sentence.

Admittedly, Mr. Nunley does not cite to a case that specifically grants the defendant the right to choose a different sentencer when his original sentence is vacated. But such choice is mandated by the rule in *Ring*. The fact that this Court cannot be guided by a factually identical case speaks only to the uniqueness of the procedural history of Mr. Nunley's case, and does not leave any doubt as to the proper outcome.

This Court's jurisprudence provides definitive support for the fact that a defendant who is granted sentencing relief is entitled to jury sentencing. As detailed in Mr. Nunley's opening brief, this Court has retroactively applied *Ring* in nine cases where the jury did not find the necessary factors to impose a death sentence. (Appellant's Brief, p. 18) In each case, the death sentence was imposed by the trial judge. In each case, this Court ordered that the defendant's sentence

be reduced to life imprisonment as required by § 565.040.2 RSMo. However, in the absence of that statute, the Court would have remanded the cases for jury sentencing, as requiring judge sentencing on remand would have violated *Ring*.

Likewise, in Mr. Nunley's case, when this Court vacated his sentence and remanded his case for a new penalty phase hearing, had this Court required judge sentencing, *Ring* would have been violated. The only possible conclusion in light of *Ring*, therefore, is that this Court's 1993 remand gave Mr. Nunley the right to jury sentencing at his new penalty hearing.

Clearly, as stated in the record and found by this Court, Mr. Nunley chose to exercise his right to jury sentencing and made that choice known. *See State v. Nunley*, 923 S.W.2d 911, 916 (Mo. banc 1990). *Ring* requires that the trial court honor that request. The court's refusal to do so violates the jury sentencing guarantee of *Ring* and requires that Mr. Nunley now be sentenced to life imprisonment.

Furthermore, a look at case law in which the defendant is granted a new sentencing opportunity shows that it is common practice to afford the defendant jury sentencing under such circumstances.

A common reason for ordering resentencing is the trial court's failure to properly find a defendant to be a prior offender. Such status takes sentencing out of the jury's hands and leaves the sentencing determination to the judge. Where the appellate court determines that the defendant was not proven to be a prior offender, the remedy is to vacate the sentence and grant the defendant a new trial

with jury sentencing, unless the state properly proves prior offender status. Only then can the trial court resentence the defendant. *See e.g., State v. Martin*, 882 S.W.2d 768, 772 (Mo. App. E.D. 1994); *State v. Lowery*, 926 S.W.2d 712, 713 (Mo. App. E.D. 1996); *State v. Franklin*, 16 S.W.3d 692, 699 (Mo. App. E.D. 2000).

The same procedure logically applies when this Court vacated Mr. Nunley's sentence. He is entitled to a new penalty phase with jury sentencing, unless he waives the right to jury sentencing, which he did not.

The defendant's option of choosing a different sentencer when relief is granted is also illustrated in *Texas v. McCullough*, 475 U.S. 134 (1986). McCullough was convicted and sentenced by a jury during his first trial. On retrial, he elected to have the judge sentence him. *Id.* 135-36. The issue in the case was whether the judge could impose a harsher sentence than the jury had given McCullough. *Id.* at 136. The defendant's decision to choose a different sentencer after his first sentence was vacated was uncontested.

In light of the law of *Ring*, and supported by the common practice in cases of resentencing, respondent's argument that Mr. Nunley was forever wed to his original choice of judge sentencing must fail.

Respondent's case law is inapplicable to the facts at issue in Mr. Nunley's case

Respondent recognizes that if *Ring* applies to Mr. Nunley's case, then he must be resentenced to life. Therefore, respondent argues that Mr. Nunley does not really advance a *Ring* claim. (Mr. Nunley is arguing that his "waiver was

vacated when the case was remanded for sentencing before a new judge. That is not really a *Ring* claim. It is instead a more general claim about what invalidates a knowing and voluntary waiver of a constitutional right.” Respondent’s Brief, p. 16) Referring to this Court’s previous refusal to invalidate Mr. Nunley’s guilty plea, respondent asserts that the claim has already been rejected by this Court. *Id.* at 16, 18.

Mr. Nunley makes no claim as to the validity of his guilty plea or his right to be sentenced by the judge before whom he pled guilty. Those issues were decided and rejected by this Court before *Ring* became the applicable law. They have no bearing on the *Ring* violation.

Respondent’s attempt to freeze the case at the moment in time when Mr. Nunley pled guilty and stated his desire to be sentenced by Judge Randall must fail. The events that occurred subsequent to this Court’s remanding the case violated *Ring* when Judge O’Malley denied Mr. Nunley’s right to jury sentencing. The only way respondent gets around this violation is by asking the Court to ignore these proceedings.

Respondent cites to *Colwell v. State*, 59 P.3d 463, 473-74 (Nev. 2002), and *South Carolina v. Downs*, 604 S.E.2d 377, 380 (S.C. 2004), for the proposition that *Ring* is not violated by a statute that makes judge sentencing mandatory upon a plea of guilty, as long as the defendant is aware that by pleading guilty he will receive judge sentencing. Again, this speaks only to Mr. Nunley’s initial guilty plea and jury waiver, which is not at issue here. Nothing about these cases relied

on by respondent changes the fact that when Mr. Nunley's death sentence was vacated, *Ring* prohibited the trial court from denying him jury sentencing on remand.

Furthermore, *Colwell* and *Downs* do not save § 565.006.2 RSMo from being unconstitutional. In contrast to those cases, the Missouri statute does not provide for mandatory judge sentencing upon a plea of guilty. Instead, § 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.”

In the statutes at issue in *Colwell* and *Downs*, a defendant who pleads guilty is aware that waiver of jury sentencing is an automatic consequence of the plea. In pleading guilty, the defendant explicitly waives his rights under *Ring*.

In contrast, under the Missouri statute, jury waiver is not automatic upon a guilty plea. Instead, the guilty plea deprives the defendant of his right to jury sentencing unless the state acquiesces in such right. This scheme certainly violates the right to jury sentencing established by *Ring*.

Respondent's reliance on *State v. Piper*, 709 N.W.2d 783, 806-809 (S.D. 2006) is likewise misplaced. Respondent cites to *Piper* for the proposition that there is no error when a defendant pleads guilty and waives jury sentencing. (Respondent's Brief, p. 14) But *Piper*'s situation bears no resemblance to Mr. Nunley's situation.

In *Piper*, the defendant argued on appeal that even though he didn't want jury sentencing, if he had wanted jury sentencing, the statute would have denied him that right. *Piper*, at 806. The court denied that claim, stating that other statutes provided the right to jury sentencing, and pointing out the fact that the judge had specifically offered Piper jury sentencing, which he waived. *Id.*

Respondent's citation to *Piper* again seeks to focus this Court's attention only on Mr. Nunley's original guilty plea and request for sentencing by Judge Randall. If the case had stopped here, Mr. Nunley would not be in this Court asking for relief under *Ring*. But the case obviously did not stop with the initial plea. As the court recognized in *Piper*, "*Ring* is limited to cases where a defendant is deprived of a *requested* jury sentencing. . ." *Piper*, at 807 (emphasis in original). Mr. Nunley did request jury sentencing. The court denied that request. That denial constituted a classic *Ring* violation.

Laches does not prohibit Mr. Nunley's valid legal claim

Respondent also argues that Mr. Nunley's *Ring* claim should be barred by the doctrine of laches. (Respondent's Brief, pp. 18-21) In support of its position, respondent cites to *Rentschler v. Nixon*, 311 F.3d 781 (Mo. banc 2010). But *Rentschler* has no application to Mr. Nunley's case.

Rentschler involved a challenge to a statutory amendment that removed conditional release eligibility for inmates convicted of certain violent felonies. A number of inmates challenged the amendment on the basis that it changed the original purpose of the statute in violation of Art. III, Section 21 of the Missouri

Constitution and it contained multiple subjects in violation of Art. III, Section 23. These amendments were made in 1990 and the inmates waited more than 20 years to raise these constitutional challenges. This Court held that Rentschler's complaints were well outside any reasonable time to bring these claims. *Id.* at 786-87.

Respondent claims that Mr. Nunley's *Ring* argument should not be considered by the Court simply because Mr. Nunley could have brought it earlier. Respondent alleges that "[t]he State, the people of Missouri, the survivors of the victim, and the administration of justice suffer great prejudice from the needless, unexplained and not plausibly explainable, delay in bringing this claim."

(Respondent's Brief, p. 19) But respondent fails to give even a hint as to what the alleged prejudice is. Whether Mr. Nunley raises the claim today, or six years ago as respondent asserts he should have, the fact remains that Mr. Nunley's constitutional right to jury sentencing was violated when the trial court denied his request to be sentenced by a jury.

To ignore this fact and kill Mr. Nunley despite the constitutional violation would bring far more prejudice upon Mr. Nunley than any imagined prejudice asserted by respondent. As the Supreme Court has recognized over and over in capital cases, "[D]eath is different." *See e.g., Gregg v. Georgia*, 428 U.S. 153, 188 (1976). Equity does not require this Court to disregard Mr. Nunley's claim because he could have brought it sooner. On the other hand, equity warrants that

this Court consider Mr. Nunley's constitutional claim that he was deprived of his right to jury sentencing given the fact that his life is on the line.

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.

Respondent's entire argument against proper proportionality review is based on its position that this Court's recent decisions, including *State v. Davis*, 318 S.W.3d 618 (Mo. banc 2010), recognizing that the proportionality review under § 565.035 RSMo requires consideration of all factually similar cases in

which a sentence of death or life imprisonment was imposed, somehow create a “new rule.”

Respondent goes on to argue that this “new rule” should not be applied to Mr. Nunley and other similarly situated death sentenced prisoners because to do so would grind the administration of justice to a halt and constitute a waste of judicial resources. (Respondent’s Brief, p. 24) Respondent’s argument is incorrect.

Judge Stith traced the history of proportionality review in Missouri in her concurring opinion in *State v. Deck*, 303 S.W.3d 527, 555-63 (Mo. banc 2010). As documented by Judge Stith, Missouri’s required proportionality review has, since its inception in 1977, always required consideration of all “other similar cases,” including “those in which a life sentence resulted, in determining whether the sentence is excessive or disproportionate. *Id.* at 555. From 1979 to 1993, this Court’s proportionality analysis reflected this approach - considering “other cases with similar facts, regardless of whether the penalty imposed was death or life imprisonment.” *Id.* at 557.

Although the language of the statute remained the same, this Court, beginning with *State v. Ramsey*, 864 S.W.2d 320 (Mo. banc 1993), began to take a different approach, comparing the “defendant’s case against only other cases in which the imposition of the death penalty had been approved.” *Id.* at 557-58.

The law has now come full circle with the majority of this Court now explicitly recognizing that “the proportionality review mandate by § 565.035.3 requires consideration of all factually similar cases in which the death penalty was

submitted to the jury, including those resulting in a sentence of life imprisonment.” *State v. Dorsey*, 318 S.W.3d 648, 659 (Mo. banc 2010).

While this Court did, for a time, stray from a proper application of the proportionality review required by § 565.035 RSMo, this doesn’t change the fact that the plain language of the statute has always required a comparison of both death and life imprisonment cases. Respondent’s assertion that this Court’s recent decisions in *Deck*, *Dorsey*, and *Davis* create a “new law” is simply wrong. This Court should recall its mandate and apply the full proportionality review mandated under § 565.035 RSMo by comparing Mr. Nunley’s sentence of death with all factually similar cases in which a sentence of death or life imprisonment was imposed.

Conclusion

For all of the above reasons, and all of those set out in Mr. Nunley’s opening brief, the decisions in *Ring v. Arizona* and *State v. Whitfield* require that this Court recall its mandate in *Nunley*, 923 S.W.2d 911, set aside Mr. Nunley’s sentence of death, and pursuant to § 565.040.2 RSMo, sentence him 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, sentence Mr. 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

I hereby certify 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 Word 2003, in Times New Roman, size 13 point font; and (4) excluding the cover page, signature block, certificate of compliance, and certificate of service, contains 3,300 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 that program, is virus-free.

Jennifer Herndon

CERTIFICATE OF SERVICE

I hereby certify that one true and correct copy of this reply brief 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 18th day of December, 2010.

Jennifer Herndon