

NO SC76981

IN THE SUPREME COURT OF MISSOURI

RODERICK NUNLEY,
Appellant,

v.

THE STATE OF MISSOURI,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO MOTION TO RECALL THE
MANDATE

Respectfully submitted,

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CASE SUMMARY

On March 22, 1989 Roderick Nunley and an accomplice kidnapped a fifteen-year-old girl from a school bus stop, tied her up, forced her to crawl into a basement, raped her, stabbed her multiple times and left her to bleed to death in the trunk of a stolen car. Nunley pleaded guilty with the intention of avoiding jury sentencing and being sentenced by a particular judge whom he viewed as being lenient, and less likely to sentence him to death than a jury would be. But the judge whom Nunley believed would be lenient sentenced Nunley to death. Nunley alleged the judge had had been drinking before the sentencing, and the judge recused himself from further involvement in the case. This Court overturned the death sentence and remanded the case for re-sentencing.

Nunley was then brought before a new judge, whom he apparently did not view as lenient, for re-sentencing. Nunley then sought to withdraw his guilty plea and his waiver of jury sentencing. But he was not allowed to do so. The new judge also sentenced Nunley to death. This Court affirmed the judgment of conviction and sentence and found the death penalty proportionate to the crime Nunley committed. Nunley now asks this Court to recall its mandate and overturn his death sentence based on the allegation that his second judicial sentencing is contrary to *Ring v. Arizona*, 536 U.S. 584 (2002). Nunley also alleges that the proportionality review used in his case should be done on a larger universe of cases than this Court used in reviewing whether Nunley's sentence is proportionate to his crime. This case therefore presents two main issues for this Court.

The first issue is even though Nunley pleaded guilty and validly waived jury sentencing in order to avoid a jury and be sentenced by a judge, does *Ring v. Arizona*,

entitle Nunley to jury sentencing anyway, if the sentence by the initial judge is overturned and Nunley is re-sentenced by a different judge? The answer to that question is necessarily no. While *Ring* provides a right to jury sentencing in capital cases, that right can be waived. And *Ring* does not change or even address the law on waiver, which dictates that Nunley cannot take back his waiver if he successfully challenges his sentence on appeal.

The second issue is should the type of expanded proportionality review conducted in *State v. Davis*, 318 S.W.3d 618 (Mo. banc 2010) be retroactively applied to all inmates under sentence of death under the analysis in *State v. Whitfield*, 107 S.W.3d 253 (Mo banc 2002)? The answer to this question is also necessarily no. Analysis under the three factors in the *Whitfield* test; 1) the purpose of the new rule, 2) the extent of reliance on the old rule, and 3) the effect of retroactive application on the administration justice, dictates that the proportionality analysis of *Davis* not be applied retroactively because the old procedure was fair and constitutional, and retroactive application of the new procedure would have a widespread and very detrimental impact on the administration of justice.

Further, it is questionable whether a state law, as opposed to a constitutional, retroactivity claim should even receive *Whitfield* analysis. *State v. Ferguson*, 887 S.W.2d 585, 587 (Mo. banc 1994) teaches that state law procedural changes have only prospective application and although substantive changes are applied retroactively, those changes are applied retroactively only to cases, unlike this one, that have not been finally

adjudicated. *See Johns v. Bowersox*, 208 F.3d 724 (8th Cir. 2000) (recognizing this Court's teaching in *Ferguson* on the issue of the retroactivity of new state law rules).

This case also presents the secondary issue of whether the doctrine of laches should bar the first claim. Nunley held back the claim for years and brought it only after an execution date was scheduled. Nunley could have litigated the motion to recall the mandate on the *Ring* issue years ago. Instead he strategically delayed bringing the claim. This should not be permitted, particularly because over two decades have already passed since the kidnapping, rape, and murder.

Statement of Facts

On the morning of March 22, 1989, Roderick Nunley and his accomplice Michael Taylor were driving around in a car they had stolen the night before, drinking, and smoking marijuana when they saw a fifteen-year old girl at a school bus stop waiting to go to school. *State v. Taylor*, 929 S.W.2d 209, 214 (Mo. banc 1996); *State v. Nunley*, 923 S.W.2d 911, 915 (Mo. banc 1996). The two men grabbed the child placed her in the car, blindfolded her with a sock, bound her hands with cable wire and menaced her with a screw driver. *Taylor*, 929 S.W.2d at 214.

The pair took the child to Nunley's mother's home where they forced her to crawl down the stairs into the basement *Id.* at 915. In Taylor's version of events, both men raped the child, and in Nunley's version of events he provided lubricant for Taylor to rape her. *Taylor*, 929 S.W.2d at 214; *Nunley*, 923 S.W.2d at 915.

Nunley and Taylor tied the girl up and put her in the trunk of the stolen car. *Nunley*, 923 S.W.2d at 915, *Taylor*, 929 S.W.2d at 215. Nunley retrieved a steak knife and butcher knife from the kitchen and the two stabbed the girl repeatedly so that she would not live to identify them. *Nunley*, 923 S.W.2d at 915-916, *Taylor*, 929 S.W.2d at 214. The men then drove the car to another neighborhood and abandoned it, leaving the girl to bleed to death, which occurred around thirty minutes after the stabbing. *Nunley*, 923 S.W.2d at 915-916, *Taylor*, 929 S.W.2d at 214.

Nunley pleaded guilty to first degree murder, armed criminal action, forcible rape, and kidnapping. *Nunley*, 923 S.W.2d at 916. Nunley testified at his plea hearing that he knew he was waiving his right to jury sentencing and that he would be sentenced by the

court *Id.* at 923; *see also* (G.P. Tr. at 9). Nunley pleaded guilty because he felt a jury would be outraged by his crime and would certainly sentence him to death and therefore he wished to avoid being sentenced by a jury, and to be sentenced judicially (Judge Dierker's PCR Memorandum at 23-24 PCR LF Case No. 74104 at 345-346, citing Nunley's testimony PCR Hrng. Tr. Case 74104 at 588-589, 594-595). Nunley now admits that he waived jury sentencing when the case was before the original sentencing judge (Appellant's Brief at 15, "Although Nunley did waive sentencing before Judge Randall that sentence was vacated and set aside.") But this Court overturned the death sentence imposed by the original judge and remanded the case for re-sentencing. *Nunley*, 923 S.W.2d at 916. On remand Nunley came before a different judge for re-sentencing as the original judge had recused himself after being accused by Nunley of drinking alcohol at lunch before the sentencing. *Id.*

Nunley filed a motion to withdraw his guilty plea under Rule 29.07 (Case No. 76981 L.F. 676-703). That motion was denied (*Id.* at 811). Nunley then filed a motion for reconsideration or in the alternative jury sentencing (*Id.* at 812-814). Nunley argued that §565.035.5(3) RSMo dictated jury sentencing because it states that after a death sentence is vacated "a jury shall be selected or waived by agreement of both parties" (*Id.* at 813).

Nunley received a hearing on his motion to withdraw his plea on January 26, 1994 at which he testified. At the hearing Nunley admitted he now wanted a jury because he had put all his "eggs in one basket" with judicial sentencing but had been sentenced to death and wanted to "try a different approach" (Transcript January 26, 1994 Hearing

Case CR89-3323 at 26). Nunley admitted that he had known before pleading guilty that he had a right to a jury trial, but that his attorneys felt a jury would be outraged by the evidence (*Id.* at 28-29). Nunley testified that he felt there was a strong likelihood a jury would sentence him to death and that he discussed the option of judicial sentencing with his attorneys (*Id.* at 29). Nunley testified that he knew that if he pleaded guilty he would waive his constitutional rights, but that he would be sentenced by a judge (*Id.* at 29-30).

Nunley also admitted that he had testified in a deposition that he knew before he pleaded guilty that the initial sentencing judge was reputed to be “drinking buddies” with a particular public defender and that they drank at “Buffalo Bills” (*Id.* at 32-34). After his recollection was refreshed with his deposition Nunley admitted that his attorney had discussed with him that the judge drank at “Buffalo Bills” (*Id.* at 34-35). Nunley then candidly admitted that he pleaded guilty because the evidence was overwhelming, he was guilty, he thought a jury might sentence him to death, and the judge to whom he would plead guilty was a good judge to be in front of (*Id.* at 35).

On Appeal Nunley argued that he had a right to withdraw his guilty plea because he had pleaded guilty expecting to be sentenced by a particular judge and it was unfair and unjust for him to ultimately be sentenced by a different judge (Appellant’s Brief Case 76981, 77941 at 26-28). This Court rejected the argument. *Nunley*, 923 S.W.2d at 919-922. This Court also rejected a claim that Nunley had been denied his constitutional right to jury sentencing, both because no such constitutional right existed, and because Nunley waived jury sentencing. *Nunley*, 923 S.W.2d at 923.

This Court found that the death sentence was not imposed based on passion, prejudice or other arbitrary factors, that the five statutory aggravating factors found by the sentencing court are supported by sufficient evidence, and that the penalty imposed is not excessive or disproportionate to penalties imposed in similar cases. *Id.* at 926.

Nunley was informed in January 2005 by the United States Court of Appeals for the Eighth Circuit that this *Ring/Whitfield* challenge to judicial sentencing, which he presented to that court, should be “addressed in the first instance – if it all- by a state court.” *Nunley v. Bowersox*, 394 F.3d 1079, 1081 (8th Cir. 2005). Yet he waited nearly six more years to raise his *Ring/Whitfield* challenge in this Court.

ARGUMENT I

Nunley waived jury sentencing and pleaded guilty in order to be sentenced by a judge rather than a jury. That waiver does not disappear because the judge sentenced Nunley to death and that sentence was later overturned requiring a different judge to pronounce sentence. There is no conflict between *Ring v. Arizona*, 536 U.S. 584 (2002) and this case because of Nunley's waiver of jury sentencing.

(Responds to Nunley's Point 1)

There is no dispute that *Ring v. Arizona*, 536 U.S. 584 (2002), which recognizes a right to penalty phase sentencing by a jury, applies retroactively to Missouri cases under *State v. Whitfield*, 107 S.W.3d 253, 264-269 (Mo. banc 2003). But nothing in *Ring* teaches that jury sentencing cannot be waived. This is a waiver case in that Nunley pleaded guilty and waived jury sentencing for the purpose of avoiding being sentenced by a jury because he thought a jury would certainly sentence him to death (Judge Dierker's Memorandum and Order at 23-24 Case 74104 PCR L.F. 345-346 citing PCR Tr. 588-589, 594-595).

Nunley now argues that §565.002 RSMo is unconstitutional because it requires a defendant who pleads guilty to a capital crime, waiving his right to a jury trial at the guilt phase, to also waive jury sentencing, unless the parties agree to jury sentencing, and that this alleged infirmity invalidates his waiver (Appellants Brief at 13-15). This argument fails for two reasons.

First, it is not unconstitutional to require a defendant to make a single choice that binds him for the guilt and penalty phases of his case on the question of whether he wishes a judge or a jury to be the finder of fact. Nunley had no absolute right to have a guilty plea accepted and therefore Missouri law could properly condition acceptance of a plea on his willingness to have a judge decide the facts as well as the law at sentencing. *See State v. Copeland*, 928 S.W.2d 828, 840 (Mo. banc 1996) (“[a] criminal defendant has no absolute right to have a guilty plea accepted”); *Ruiz v. Arkansas*, 630 S.W.3d 44, 47 (Ark. 1982) (“there is no right to plead guilty”); *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977) (“It is a novel argument that constitutional rights are violated by trying the defendant rather than accepting a plea of guilty.”) Nunley had the right to go to trial and not contest his guilt, and then be sentenced by a jury if he chose to do so. But he did not. The whole point of his plea was to avoid jury sentencing, which leads to the second reason there was no *Ring* violation in the initial judicial sentencing.

Second, Nunley admittedly pleaded guilty and waived jury sentencing because he thought a jury was more likely to sentence him to death than the judge to whom he pleaded guilty. Nunley’s waiver of jury sentencing before the initial sentencing judge therefore eliminates any possible conflict with *Ring*, even if there is a theoretical right for a defendant who wishes to plead guilty but be judicially sentenced not to have to make a choice that binds the defendant for both phases of the trial. Nunley is not that theoretical defendant. Nunley made a strategic choice to be sentenced by a judge rather than a jury to improve his chances at sentencing. Therefore, Nunley’s claim really reduces to the question of whether his initial valid waiver of jury sentencing is invalidated by remand

and re-sentencing by a different judge. Respondent will briefly discuss the case law establishing that the validity of the initial waiver, and its elimination of any possible conflict with *Ring*, before addressing how the remand affected the validity of the waiver.

In *Colwell v. State*, 59 P.3d 463, 973-474 (Nev. 2002), the Supreme Court of Nevada addressed the question of whether an inmate who pleaded guilty to a capital offense, in a case controlled by a Nevada law that required judicial sentencing if the defendant pleaded guilty, had a claim under *Ring v. Arizona*. The Nevada Supreme Court found that there was no *Ring* violation because the defendant was aware that by waiving a jury trial he was waiving jury sentencing and he did not try to limit or condition his waiver, even though Nevada law linked a guilty plea to judicial penalty phase sentencing.

Similarly, the Supreme Court of South Carolina in *South Carolina v. Downs*, 604 S.E.2d 377, 380 (S.C. 2004) rejected the idea that a *Ring* violation occurred where a defendant pleaded guilty in a capital case and was judicially sentenced, as was required by South Carolina law. *See* S.C. Code Ann §16-3-20(B) (2003) (Stating “if the defendant pleaded guilty sentencing must be conducted before the judge.”) The Supreme Court of South Carolina relied on courts from other states that had already held that “*Ring* did not involve jury trial waivers and is not implicated when a defendant pleads guilty.” *South Carolina v. Downs*, 604 S.E. 2d at 380 citing *Leone v. Indiana*, 797 N.E.2d 743, 749-750 (Ind. 2003) (rejecting *Ring* claim even though Indiana statute requires judicial sentencing after a guilty plea) *Colwell v. Nevada*, 59 P.3d 463, 473-474 (Nev. 2003); *Illinois v. Altom*, 788 N.E.2d 55, 61 (5. Dist. Ill.) app. denied 792 N.E.2d (Ill. 2003). The teaching of these cases is that there is nothing unconstitutional about a system that requires a

defendant to choose either to be tried by a jury or to be tried by a judge at both stages, as long as he is aware that in pleading guilty he chooses a judge for the guilt and penalty phases.

In *State v. Piper*, 709 N.W.2d 783, 806-609 (S.D. 2006), the South Dakota Supreme Court found that a defendant who had pleaded guilty and waived jury sentencing to avoid being sentenced by a jury could not claim that his waiver was invalid because the statute allegedly required judicial sentencing. The South Dakota Supreme Court reasoned that even if the alleged statutory linkage between a guilty plea and mandatory-judicial sentencing is theoretically improper it did not invalidate the waiver of a defendant who pleaded guilty for the purpose of receiving judicial sentencing. *Id.*

Nunley's case is like *Piper* in that Nunley pleaded guilty in order to avoid jury sentencing and receive judicial sentencing. Therefore, even if it is theoretically improper to link a guilty plea with mandatory judicial sentencing, which it is not, that linkage did not make Nunley's waiver of jury sentencing, made for the purpose of avoiding a jury he thought would sentence him to death, invalid. Nunley's waiver of jury sentencing made in the hope of more lenient sentencing by a judge eliminates any possible conflict with *Ring*.

There is no precedent that supports finding a constitutional violation in cases that are truly similar to Nunley's case. *Blakely v. Washington*, 524 U.S. 296 (2004) was not a case in which a defendant deliberately waived jury sentencing in order to avoid being sentenced by a jury. It was a case in which a judge, to the defendant's surprise, tacked on a period of time above the un-enhanced statutory punishment range for the crime, based

on a judicial finding of deliberate cruelty. If the defendant in *Blakely* had the option of jury sentencing and explicitly expressed his desire to be sentenced by a judge rather than a jury he would have had nothing to complain about. But he was surprised by judicial sentencing outside the un-enhanced statutory range, based on judicial fact findings made at sentencing. The fact pattern in *Blakely* has little in common with the fact pattern in this case.

Similarly, in *People v. Montour*, 157 P.3d 489 (Colo. 2007) the record gives the impression that the defendant waived jury sentencing because he was required to do so in order to plead guilty, not because he wanted to avoid jury sentencing. *Id.* at 494-495. The defendant in *Montour* made a *Ring* challenge to the Colorado statute that linked a guilty-plea to mandatory judicial sentencing, before pleading guilty, and again at the sentencing hearing. *Id.* at 495. He, unlike the defendant in *Nunley* did not acknowledge a deliberate choice to be sentenced by a judge rather than a jury for the strategic reason of increasing the chances of avoiding a death sentence. What the defendant in *Montour* appears to have skillfully done is to have carried out a strategy that gave him a good chance of two bites at the sentencing apple. By pleading guilty and accepting judicial sentencing under apparent protest the defendant in *Montour* had a chance at favorable judicial sentencing, and he had the tools to successfully attack the sentence and insist on a jury if the judge imposed a death sentence. This case is distinguishable from *Montour*, because Nunley acknowledged that the purpose of his guilty plea was to gain judicial rather than jury sentencing. Further, the type of gamesmanship permitted in *Montour* is not a model to be emulated.

Nunley does not strongly contest that his waiver of jury sentencing was at least initially valid and cut off a claim under *Ring v. Arizona*. (See Appellant’s Brief at 15 stating “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 retroactive application of *Ring* comes into play.”) What Nunley is really arguing is not that he did not initially make a knowing and voluntary waiver of jury sentencing that defeated any possible *Ring* claim, but rather that this 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. And this Court has already rejected that argument when it was raised by Nunley and by his accomplice Taylor in earlier litigation before this Court.¹

Nunley argued in an earlier appeal to this Court that he should have been given a fresh slate and allowed to withdraw his guilty plea when his sentence was overturned and the case was remanded for re-sentencing by a new judge. This Court rejected that claim finding that although it is preferable that the judge who took the plea of guilty should impose sentence, when this becomes impossible the plea is not invalidated. *State v. Nunley*, 923 S.W.2d 911, 919-922 (Mo. banc 1996). This Court reached the same result

¹ Contrary to Nunley’s assertion (Appellant’s Brief at 16) an error in failing to vacate the guilty plea is not the type of error in the death penalty statute itself that would prevent re-sentencing. See *Whitfield*, 107 S.W.3d at 271 n.23.

in the case of Nunley's accomplice in *State v. Taylor*, 929 S.W.2d 209, 215-216 (Mo. banc 1996). The United States Court of Appeals for the Eighth Circuit agreed with this Court finding in Taylor's habeas case, finding that Taylor had no substantial and legitimate expectation of being sentenced by the judge to whom he pleaded guilty under Missouri law and no independent federal right to be sentenced by the same judge who took the plea. *Taylor v. Bowersox*, 329 F.3d 963, 968-969 (8th Cir. 2002).

Nunley's original waiver of jury sentencing was valid and cuts off a *Ring* claim under cases such as *Colwell*, *Downs*, and *Piper* because Nunley's waiver of jury sentencing was made specifically to avoid jury sentencing and improve the perceived chance of a lighter sentence from a judge. That waiver was not retroactively invalidated by re-sentencing by a different judge, because Nunley had no state or federal right to be sentenced by the judge who took the plea when this became impossible upon the recusal of the initial sentencing judge.

Nunley made a strategic choice to be sentenced judicially because he thought it gave him a better chance of not being sentenced to death. Had the initial sentence not been reversed by this Court, the analysis would end with cases such as *Colwell*, *Downs*, and *Piper* finding no *Ring* violation under similar fact patterns. Nunley cites no case in which a defendant who pleaded guilty and waived jury sentencing, specifically to avoid jury sentencing, has been granted relief by this Court or any other court based on a *Ring* claim that he was deprived of a right to jury sentencing. Such a claim is at its core a self-contradiction and therefore it unsurprising that Nunley does not cite cases that are on point and support his position. There is no conflict between Nunley's case and *Ring v.*

Arizona, 536 U.S. 584 (2002), which was a jury tried case in which the judge imposed the death penalty without any waiver of jury sentencing.

Nunley also cites no binding or persuasive case in which a remand for re-sentencing has invalidated a guilty plea, entitling a defendant to obtain jury sentencing. This Court analyzed Missouri precedent and precedent from other jurisdictions in rejecting the claim that Nunley’s guilty plea and its included waivers were invalidated by the remand for sentencing by a different judge the last time Nunley and his accomplice, Taylor, presented that theory to this Court. *See Nunley* 923 S.W. 2d 919-922; *Taylor* 929 S.W 2d 215; *Taylor v. Bowersox*, 329 F.3d 963, 968-969(8th Cir. 2003). Nunley provides no explanation as to why this Court and the United States Court of Appeals got the issue wrong the last time he and Taylor raised it. Nothing in *Ring* addresses or controls the issue of whether re-sentencing by a different judge vacates an earlier valid waiver of jury sentencing. This Court’s earlier decision still controls.

Laches

“Laches is neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence to do what should have been done” *Rentschler v. Nixon*, 311 S.W.3d 783, 787 n.3 (Mo banc 2010) (rejecting a constitutional challenge to a statute by an inmate based on laches). *Ring v. Arizona*, 536 U.S 584 (2002) and *State v. Whitfield*, 107 S.W.3d 253 (Mo. Banc 2003) provided the tools necessary to raise Nunley’s current claim in 2003. Almost six years ago the United States Court of Appeals for the Eighth Circuit told Nunley that he should raise his *Ring/Whitfield* claim – if at all

– in state court when Nunley attempted to present it to the United States Court of Appeals. *Nunley v. Bowersox*, 394 F.3d 1079, 1081 (8th Cir. 2005).

Yet Nunley did not raise the claim for nearly six years after that decision, holding it back until it was used as a tool to delay Nunley’s scheduled October 20, 2010 execution. Nunley committed his crime in March 1989, over twenty years ago. Nunley should have raised his current claim years ago. The 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. This is a proper case for denying a claim based on laches.

As a practical matter murderers on death row now have a strategic interest in holding back one or more colorable claims challenging their own conviction or sentence until an execution date is set in order to delay their executions during the litigation of the claims. This practice may allow the murderer to not only to take advantage of the delay caused by the litigation of his own tardily raised claim particular to his own judgment of conviction and sentence, but to also then be shielded by one or more of the systemic challenges to the Missouri death penalty that now tend to be under more or less continuous but ultimately unsuccessful litigation in the state or federal courts. *See e.g. Ringo v. Lombardi*, Slip Op. 09CV4095-NKL, 2010 W.L. 410320 (W.D. Mo. Oct 18, 2010)(denying Nunley a stay of execution based on allegation in a case in which he is a co-plaintiff that Missouri lethal injections violate the Food Drug and Cosmetic Act and the Controlled Substances Act, because the case has no significant possibility of success on the merits, the State has a strong interest in carrying out Nunley’s sentence, and the

case could have been brought years ago); *Clemons v. Crawford*, 585 F.3d 1119 (8th Cir. 2009) (affirming the grant of judgment on the pleadings for the defendants in a case in which Nunley was a co-plaintiff alleging that Missouri lethal injection procedures violate the Eighth Amendment); *Middleton v. Missouri Department of Corrections*, 278 S.W.3d 193 (Mo. banc 2009) (rejecting claim in case in which Nunley was a co-plaintiff alleging that the Missouri execution protocol violates the Missouri Administrative Procedure Act.).

Nunley's delay in raising his *Ring/Whitfield* claim has worked in the sense of stopping his execution whether or not he prevails on the merits. If he had raised the claim in a timely manner and lost, that would not have stopped or even delayed his execution. In federal habeas corpus actions there is a one year statute of limitations under 28 U.S.C §2244(d) and challenges to a particular judgment of conviction and sentence by state prisoners generally must be raised in habeas corpus. That statute permits statutory and equitable tolling of the one-year period. But murderers like Nunley, who have no interest in their cases ever being finally resolved if resolution would lead to their execution, now have the option of raising claims in this Court for the first time years or even decades after the completion of the ordinary course of review, and if the claim is structured in a form of action such as a motion to recall the mandate they may also avoid the requirement of showing cause and prejudice or actual innocence, as would be required in a Rule 91 state habeas corpus action. This Court should enforce the doctrine of laches in this case, at least in an alternate holding, to put murderers seeking to use strategic delay as a tool to prevent their own executions, on notice that this practice will not be tolerated

in the future. Such a holding would also inform the federal courts that death row inmates are on notice that Missouri will not tolerate delays like the one Nunley used in this case, so that future murderers using delay as a strategic tool may not feign surprise and allege unfair treatment to the federal courts when this Court does not permit such tactics.

ARGUMENT II

The use of the expanded universe of cases for proportionality review set out in *State v. Davis*, 318 S.W.3d 618, 643-644 (Mo. banc 2010) does not meet the test for retroactive application set out in *State v. Whitfield*, 107 S.W.3d 253, 268 (Mo. banc 2007). Further, under *State v. Ferguson*, 887 S.W.2d 887, 585 (Mo. banc 1994) the claim should be rejected without even reaching *Whitfield* analysis. (Responds to Nunley's Point 2)

In *State v. Davis*, 318 S.W.3d 618, 643-644 (Mo. banc 2010) this Court expanded the universe of similar cases it considers in proportionality review of death sentences to include cases in which life imprisonment was imposed as well as cases in which the death penalty was imposed. This Court made the change to conform its practice to its current reading of §565.035.3 RSMo. This Court noted that from 1994 until 2010 it had used the narrower universe of similar cases, cases in which the defendant was also sentenced to death, in conducting proportionality review of death sentences. *Davis*, 318 S.W.3d at 644.

Nunley now argues that this Court should recall its mandate and redo the proportionality review in his case, essentially giving him a new direct appeal on this issue, and he implicitly argues that the same should be done for every inmate under sentence of death. Nunley's argument is in conflict with this Court's retroactivity analysis in *State v. Whitfield*, 107 S.W.3d 253, 264-269 (Mo. banc 2003). This Court held in *Whitfield* that a determination of whether a principle should be retroactively applied is to be made based on 1) the purpose of a new rule 2) the extent of reliance on

the old rule 3) the effect of retroactive application on the administration of justice. *Id.* at 268. *Ring* was applied retroactively under this analysis because the purpose of the rule was to ensure that criminal defendants received their fundamental right to trial by jury, and the rule imposed no hardship on law enforcement because it only potentially applied to a few cases. *Id.* at 268-269.

The use of an expanded universe of comparison cases for retroactivity review has no impact on any fundamental right. *See Middleton v. Roper*, 498 F.3d 812, 821-822 (8th Cir. 2008) (upholding Missouri proportionality analysis using only cases in which death was imposed, and holding that a death penalty is not made unconstitutional because similarly situated defendants did not receive the death penalty). The new rule modifies analysis that already complied with all constitutional requirements and provided more safeguards than were constitutionally required. The new rule changes proportionality analysis to comply with this Court's current reading of a statute, as opposed to the way this Court read the statute from 1994 to 2010. The purpose of the new rule is to conform this Court's current practice to this Court's current reading of the applicable statute, not to grant new direct appeals in all the capital cases in which the death penalty was imposed, even though the sentences were based on the Court's previous reading of the statute, and even though the previous reading of the statute resulted in a practice that was fair and constitutional and more than sufficient to prevent arbitrary or freakish imposition of the death penalty. The first *Whitfield* factor therefore cuts against retroactivity.

The second and third factors also cut against retroactivity and do so strongly. Reliance on the old rule was universal and dictated by the precedent of this Court. And

the impact on the administration of justice of retroactive application of the new analysis would be large and detrimental. As a practical matter almost every inmate under sentence of death could argue for a new appeal to this Court in which he could argue that his sentence was disproportionate based on comparison to cases in which the death penalty was not imposed, and each would presumably argue that he could seek federal review of this Court's decision, although such review for several reasons would most probably ultimately be futile. Nevertheless, certiorari petitions and federal habeas corpus petitions would presumably be filed in multiple cases. In short, the administration of justice insofar as it dealt with the execution of constitutionally imposed capital sentences would grind to a halt, and there would be a shift of resources to re-litigating decisions that this Court has already made in particular cases, and then to again defending in federal court decisions of this Court that have already been successfully defended.

Further, the new rule in this case is beyond question procedural. *See Schriro v. Sumner*, 543 U.S. 348, 352 (U.S. 2004) (“a rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes . . . In contrast rules that regulate only the manner of determining the defendants culpability are procedural.”). In considering the retroactive application of new rules of state law, as opposed to constitutional law, the teaching of this Court is that procedural rules apply prospectively only and that substantive rules apply both retrospectively and prospectively. *State v. Ferguson*, 887 S.W.2d 585, 587 (Mo. Banc 1994) But in this context “retroactive application is limited to those cases subject to direct appeal [citation omitted] or to all pending cases not finally adjudicated.” *Id.*

Therefore, it is questionable at best whether Nunley's proportionality claim even survives to reach the *Whitfield* test, which it necessarily fails. If the claim is procedural, which it is, then it is not retroactive under *Ferguson*. And even if it is substantive it still fails under *Ferguson* because Nunley's case was finally adjudicated in this Court years before the recent decisions on proportionality review, and retroactive application of substantive state law rules only applies to cases not finally adjudicated on direct review. See *Johns v. Bowersox*, 208 F.3d 728 (8th Cir. 2000) (recognizing that this Court retroactively applies new rules of state law that are substantive only to cases that are still on direct review).

The new proportionality analysis therefore is a classic example of the type of new rule that would not be retroactively applicable under *Whitfield*, if *Whitfield* applied. But it is not even necessary to reach that level of analysis, because the claim is controlled by, and fails under, the analysis in *Ferguson*, which controls retroactivity of state law claims.

Conclusion

Nunley's death sentence should be left intact because the sentence in his case is not contrary to *Ring v. Arizona*, and changes in the way this Court conducts proportionality review are not retroactively applicable to Nunley's case under the standard set out in *Whitfield* or the standard in *Ferguson*.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 6,409 words, excluding the cover, this certification and the appendix, as determined by Microsoft Office Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free and

3. That two true and correct copies of the attached brief, and a compact disk containing a copy of this brief, were mailed, postage prepaid, this Ninth day of December, 2010, to:

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