

No. 90925

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In the  
Missouri Supreme Court

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**MICHAEL A. TAYLOR,**

**Petitioner,**

**v.**

**TROY STEELE, Warden,  
Potosi Correctional Center,**

**Respondent.**

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**ORIGINAL PROCEEDING IN HABEAS CORPUS**

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**BRIEF OF RESPONDENT TROY STEELE**

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## CASE SUMMARY

On March 22, 1989 Michael Taylor 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. On February 8, 1991, Taylor 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 Taylor believed would be lenient sentenced Taylor to death for the first degree murder. Taylor 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. State v. Taylor, No. SC74220 (Mo. banc).

Taylor was then brought before a new judge, whom he apparently did not view as lenient, for re-sentencing. Taylor 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 Taylor to death. This Court affirmed the judgment of conviction and sentence and found the death penalty proportionate to the crime Taylor committed. The court also affirmed the denial of post-conviction relief. State v. Taylor, 929 S.W.2d 209 (Mo. banc 1996).

Taylor now seeks a writ of habeas corpus from this Court to overturn his death sentence based on the allegation that his second judicial sentencing is contrary to Ring v. Arizona, 536 U.S. 584 (2002). This case presents one main issue for this court.

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

Taylor to jury sentencing anyway, if the sentence by the initial judge is overturned and Taylor 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 Taylor cannot take back his waiver if he successfully challenges his sentence on appeal.

The case also presents a secondary issue. Unlike Nunley, Taylor has already litigated his Sixth Amendment claim twice in successive motions to recall the mandates (Petitioner's Exhibits P, Q). Accordingly, the issue is whether he can resubmit the same issue in a third litigation.

## **STATEMENT OF THE CASE**

### **Past Litigation**

The grand jury charged petitioner Michael Taylor in the Circuit Court of Jackson County, State of Missouri, with one count of murder in the first degree, in violation of §565.020, RSMo. 1994; one count of the felony of armed criminal action, in violation of §571.015, RSMo. 1994; one count of the Class B felony of kidnapping, in violation of §565.110, RSMo. 1994; and one count of the felony of forcible rape, in violation of §566.030, RSMo. Cum. Supp. 1993. On June 11, 1990, the State filed an information in lieu of indictment charging petitioner as a prior, persistent and Class X offender.

On February 8, 1991, petitioner appeared with his attorneys before the Honorable Alvin C. Randall and expressed his desire to enter a plea of guilty to the charges in open court and on the record pursuant to Missouri Supreme Court Rule 27.01(b). After a three-day punishment phase hearing, Judge Randall sentenced petitioner to death. Petitioner also received sentences of life imprisonment for rape, fifteen years imprisonment for kidnapping, and ten years imprisonment for armed criminal action, all terms to run consecutively.

Petitioner brought a post-conviction action pursuant to Missouri Supreme Court Rule 24.035, challenging his guilty plea and sentence. Because of the allegations contained in his post-conviction pleadings, the entire bench in the Sixteenth Judicial Circuit in Jackson County recused itself from the post-conviction litigation by order of the presiding judge, and the Missouri Supreme Court appointed Special Judge Robert H. Dierker, Jr. After an extensive evidentiary hearing, mostly centered on the issue of Judge Randall's alleged

drinking during the sentencing proceeding, Judge Dierker denied petitioner's post-conviction motion.

A consolidated appeal challenging the guilty plea, the imposition of the death penalty, and the denial of the Rule 24.035 motion for post-conviction relief came to the Missouri Supreme Court alleging some fifteen claims of error. After the case was fully briefed by the parties, and after hearing oral argument in the matter, the Missouri Supreme Court issued the following order on June 29, 1993:

**ORDER**

Judgment vacated. Cause remanded for new penalty hearing, imposition of sentence, and entry of new judgment.

On January 11, 1994, petitioner filed a motion in the trial court to withdraw his guilty plea; he filed suggestions in support of this motion on January 20, 1994. After denial by the trial court, petitioner filed a motion for reconsideration of petitioner's motion to withdraw his guilty plea, which was denied on April 8, 1994. Immediately before resentencing, defense counsel reasserted petitioner's motion and argued its merits before the trial court, which it denied.

Petitioner's second sentencing hearing began on May 2, 1994, and the court heard evidence for three days. The evidence was held open for over a month, and petitioner presented the testimony of additional witnesses on May 12, 1994 and June 6, 1994. The State adduced evidence concerning the abduction and murder of Ann Harrison, as well as evidence of an escape from custody by petitioner. The defense called ten witnesses in purported mitigation of punishment, including three witnesses who testified about

petitioner's mental condition and the effects of his drug and alcohol abuse, a minister who was opposed to the death penalty, a Catholic brother who had witnessed an execution by lethal injection, and numerous relatives of petitioner who recounted his relatively normal background and upbringing. In addition, Judge Coburn agreed to consider testimony of four witnesses from prior proceedings: Professor Nunn, an expert in the study of patterns of racial discrimination in the imposition of the death penalty; Dr. Patricia Fleming, a psychologist who testified as to her mental health evaluation of petitioner; the Reverend Albert Johnson, petitioner's minister; and Kareem Hurley's testimony from co-defendant Nunley's second sentencing proceeding.

On June 17, 1994, over three years after he had first received the penalty of death, petitioner appeared before Judge Coburn for formal sentencing. In oral and written findings, Judge Coburn found six statutory aggravating circumstances beyond a reasonable doubt, as well as three non-statutory aggravating circumstances. Judge Coburn found the existence of one mitigating circumstance, rejecting several others offered by petitioner, and concluded that the mitigating circumstance did not outweigh the aggravating circumstances of this case, making the sentence of death appropriate. Petitioner also received fifty years for armed criminal action, fifteen years for kidnapping, and life imprisonment for rape, all terms to run consecutively. Petitioner filed an appeal.

On September 15, 1994, petitioner filed his pro se motion for state post-conviction relief pursuant to Missouri Supreme Court Rule 24.035, challenging his guilty plea and challenging his second sentencing proceeding and sentence of death. Appointed counsel filed an amended petition on December 27, 1994. The circuit court held an evidentiary

hearing on May 18, 1995, wherein petitioner presented evidence almost exclusively on the issue of ineffective assistance of counsel for failing to investigate and present sufficient mitigating evidence. On June 20, 1995, the motion court issued findings of fact and conclusions of law denying petitioner's Rule 24.035 motion.

Because petitioner pled guilty, his consolidated appeal was limited to the Missouri Supreme Court's mandatory sentence review (proportionality), §565.035.5, RSMo. 1994, and review of the denial of the motion to withdraw plea and the denial of post-conviction relief. The Missouri Supreme Court affirmed. State v. Taylor, 929 S.W.2d 209 (Mo. banc 1996).

Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Western District of Missouri. The district court denied the petition; the United States Court of Appeals for the Eighth Circuit affirmed; and the Supreme Court denied further review. Taylor v. Bowersox, 329 F.3d 963 (8th Cir. 2003), cert. denied, 541 U.S. 947 (2004).

Then petitioner filed a motion to recall the mandate in the Missouri Supreme Court. That court denied the motion, and the Supreme Court denied discretionary review. Taylor v. Missouri, 126 S.Ct. 737 (2005). On January 3, 2006, the Missouri Supreme Court set February 1, 2006 as petitioner's execution date.

On November 8, 2005, petitioner filed a petition in the Jackson County Circuit Court alleging that he was entitled to relief from his criminal judgment and sentence because of "fraud" in the post-conviction proceeding. On January 31, 2006, on the eve of the execution, the trial court conducted an evidentiary hearing and indicated it would rule on the petition on

February 1, 2006. Also on January 31, 2006, the State filed a petition for writ of prohibition with the Missouri Supreme Court, and on February 1, it granted a preliminary writ. The Jackson County Circuit Court also denied the underlying petition on February 1, 2006. Petitioner did not appeal that judgment. After briefing, the Missouri Supreme Court made the preliminary writ absolute. State ex rel. Nixon v. Daugherty, 186 S.W.3d 253 (Mo. banc 2006).

The Supreme Court has also denied discretionary review in a second motion-to-recall-the-mandate litigation, Taylor v. Missouri, 128 S.Ct. 871 (2008), and a state habeas litigation, Taylor v. Crawford, 546 U.S. 1161 (2006), and another state post-conviction litigation. Taylor v. State, 254 S.W.3d 856 (Mo. banc 2008), cert. denied, 129 S.Ct. 1037 (2009).

The courts also denied challenges to lethal injection as a means of execution. Taylor v. Crawford, 487 F.3d 1072 (8th Cir. 2007), cert. denied, 128 S.Ct. 2047 (2008). Clemons v. Crawford, 585 F.3d 1119 (8<sup>th</sup> Cir. 2009), cert. denied, 130 S.Ct. 3507 (2010). He has also challenged the written protocol as violative of the Missouri Administrative Procedure Act. Middleton v. Missouri Department of Corrections, 278 S.W.3d 193 (Mo. banc 2009).

Petitioner is involved in two other pending litigations. He is a co-plaintiff in the Ringo litigation. He also has pending a certiorari petition before the Supreme Court on the topic of the federal district court's denial of a Rule 60(b) motion. Taylor v. Bowersox, No. 10-7728 (U.S.).

## Facts Of The Crime

The Supreme Court of Missouri described the circumstances surrounding petitioner's offenses in the direct appeal opinion.

According to Taylor's testimony at his guilty plea, Taylor's videotaped statement and other evidence adduced in the sentencing hearing, Taylor and a companion, Roderick Nunley, spent the night of March 21, 1989, driving a stolen Chevrolet Monte Carlo, stealing "T-tops," smoking marijuana and drinking wine coolers. At one point during the early morning hours of March 22, they were followed by a police car, but lost the police after a high speed chase on a highway. About 7:00 a.m., they saw fifteen-year-old Ann Harrison waiting for the school bus at the end of her driveway. Nunley told Taylor, who was driving at the time, to stop so Nunley could snatch her purse. Taylor stopped the car, Nunley got out, pretended to need directions, grabbed her and put her in the front seat between Taylor and Nunley. Once in the car, Nunley blindfolded Ann with his sock and threatened to stab her with a screwdriver if she was not quiet. Taylor drove to Nunley's house and took Ann to the basement. By this time her hands were bound with cable wire. Nunley removed Ann's clothes and had forcible sexual intercourse with her. Taylor then had forcible intercourse with her. They untied her, and allowed her to dress. Ann tried to persuade them to call her parents for ransom, and Nunley indicated he would take her to a telephone to call home. They put the blindfold back on her and tied her hands and led her to the trunk of the Monte

Carlo. Ann resisted getting into the trunk until Nunley told her it was necessary so she would not be seen. Both men helped her into the trunk.

Nunley then returned to the house for two knives, a butcher knife and a smaller steak knife. Nunley argued with Taylor about whether to kill her. Nunley did not want Ann to be able to testify against him and emphasized he and Taylor were in this together. Nunley then attempted to slash her throat but the knife was too dull. He stabbed her through the throat and told Taylor to "stick her." Nunley continued to stab, and Taylor stabbed Ann "two or three times, probably four." He described how "her eyes rolled up in her head, and she was sort to like trying to catch her, her breath."

Nunley and Taylor argued about who would drive the Monte Carlo, and Nunley ended up driving it following Taylor who was driving another car. Taylor picked up Nunley after he abandoned the Monte Carlo with Ann Harrison in the trunk. They returned to Nunley's house where Nunley disposed of the sock, the cable wire, and the knives.

When the school bus arrived at the Harrison home to pick up Ann, the driver honked because she was not there. Mrs. Harrison looked out of the window and noticed Ann's purse, gym clothes, books, and flute lying on the driveway. She waved for the bus to go on and began to look for her daughter. Police quickly mounted a ground and air search. Ann Harrison's body was discovered the evening of March 23rd when police found the abandoned Monte Carlo and a friend of the car's owner opened the trunk.

The State's physical evidence included hair matching Taylor's collected from Ann Harrison's body and the passenger side of the Monte Carlo, hair matching Ann's collected from Nunley's basement, sperm and semen belonging to Taylor found on Ann's clothes and body. An autopsy revealed a lacerated vagina, six stab wounds to Ann's chest, side, and back which penetrated her heart and lungs, and four stab wounds to her neck. The medical examiner testified Ann Harrison was alive when all the wounds were inflicted and could have remained conscious for ten minutes after the stabbing. She probably lived thirty minutes after the attack.

## ARGUMENT

### I.

**Taylor waived jury sentencing and pleaded guilty in order to receive his sentence from a judge instead of a jury. That waiver does not disappear because the judge sentenced Taylor to death and that the sentence was later overturned requiring a different judge to pronounce sentence. There is no conflict between Ring and Arizona, 536 U.S. 584 (2002) and this case because of Taylor’s waiver of jury sentencing. Because Taylor’s procedural posture is unique, he is not being treated differently from other capital offenders and no due process, equal protection or proportionality issue exists (Responds to Taylor’s Point 1 and 2).**

Petitioner presents one ground for relief: petitioner contends his constitutional rights under the Sixth and Fourteenth Amendments were violated because he did not have jury sentencing. In particular, he contends the lack of jury sentencing violated his Sixth Amendment rights under Ring v. Arizona, 536 U.S. 584 (2002) (Petition, pages 16-27; Brief, pages 13-27) and his equal protection and due process rights under the Fourteenth Amendment (Petitioner, pages 28-39; Brief, pages 28-42). The amici brief suggests that because of his Ring claim, his sentence is disproportionate<sup>1</sup> (Amici Petition, pages 5-13). Petitioner’s ground does not warrant state habeas relief.

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<sup>1</sup> Respondent does not believe an amicus can assert a group for relief that was not asserted by the real party in interest.

Petitioner has already received adverse ruling from this court on his claim in earlier litigation (Petition, page 14). Petitioner presented the Ring claim in his first motion to recall the mandate (Petitioner's Exhibit P, Petition, pages 6-7 quoting Ring v. Arizona, 536 U.S. 584, 589 (2002); State v. Whitfield, 107 S.W.3d 253, 257 (Mo. banc 2003); Apprendi v. New Jersey, 530 U.S. 466 (2000)). The court denied the motion to recall the mandate in an order dated May 31, 2005 (Petitioner's Exhibit P, page 1). Petitioner recycled his claim in a second motion to recall the mandate (Petitioner's Exhibit Q, Motion, page 2 citing Blakely v. Washington, 542 U.S. 296 (2004); Apprendi v. New Jersey, supra.; Ring v. Arizona, supra., and State v. Whitfield, supra.). The court denied the second motion to recall the mandate in an order dated November 25, 2008 (Petitioner's Exhibit Q, page 1). Given the court's invitation to litigants to use the "motion to recall the mandate" vehicle in State v. Whitfield, supra., the two orders denying the motions (Petitioner's Exhibits P, Q, page 1) appear to be determinations that petitioner's Ring claim is meritless. There was no language in those orders stating that the denials were without prejudice to refiling.

Petitioner's reply is that he can bring repetitive claim in a petition for writ of habeas corpus (Petition, page 5, paragraph 27). Of course, a state habeas corpus proceeding cannot be used to engage in repetitive and duplicative litigation. State ex rel. Simmons v. White, 866 S.W.2d 443, 446 (Mo. banc 1993). Petitioner seems to take the position that there is no limit to the number of state habeas litigations he can have (Petition, page 15, paragraph 27 citing In re Breck, 158 S.W. 843, 849 (Mo. banc 1913)). But the Breck case involved issues of child custody that were heard in a state habeas corpus petition in the circuit court. The language in Breck was not made in the context of state habeas review of a criminal judgment

where there was earlier review by the state Supreme Court. The Breck court also inquired if anything had changed since the previous review. Id. at 849. In Breck, nothing had. And from a review of the present litigation, nothing has changed since 2005 and 2008. The court should deny the petition because the Ring issue has been raised and rejected twice.

In any event, the petition is meritless. 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.3 253, 264-69 (Mo. banc 2003). But nothing Ring teaches that jury sentencing cannot be waived. This is a waiver case in that Taylor 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 Case 74104 PCR L.F. 28, 30, 33-34, citing PCR Tr. 622-23).

The Jackson County Circuit Court did not deprive the petitioner of a Sixth Amendment right to jury sentencing. The record amply demonstrates petitioner's waiver of the right to jury sentencing during the course of his February 8, 1991 plea of guilty. During the guilty plea proceeding, there were several discussions concerning petitioner's understanding that he was waiving the right to jury sentencing by pleading guilty.

Q. Do you also understand that if you plead guilty it will be up to the judge to decide the sentence on all charges?

A. Yes.

Q. And as the maximum that you can get on all of these charges, do you understand that the Judge can give you the death sentence?

A. Yes.

(Guilty Plea Tr., pages 8-9). Not only did petitioner understand that a guilty plea let the judge sentence him, he also understood that a not guilty plea led to a jury.

Q. If you plead not guilty, do you understand that you have a right to go to trial.

A. Yes.

Q. And if you plead not guilty, there would be a trial.

A. Yes.

Q. Do you understand that the trial would be in front of a jury of twelve people.

A. Yes, I do.

Q. And the twelve people would have to be unanimous in their verdict?

A. Yes.

Q. In other words, all twelve would have to agree.

A. Yes.

Q. The twelve people would have to be convinced beyond a reasonable doubt by the state that you're guilty.

A. Yes.

Q. And that would be on each charge, all four counts; do you understand that?

A. Yes. I do.

(Guilty Plea Tr., pages 9-10). Petitioner understood that by pleading guilty he was waiving this right.

Q. Michael, do you understand that if you plead guilty there won't be a trial?

A. Yes, I do.

Q. And you, in essence, would be giving up those rights. Do you understand that?

A. Yes, I do.

Q. Sometimes we use the word waive. If you plea guilty, you are waiving the right to a trial by a jury.

A. Yes, I understand.

Q. The right to a trial.

A. Yes, I understand.

(Guilty Plea Tr., page 13). Petitioner also understood that after pleading guilty, there would be a sentencing proceeding before the judge where the state would be seeking capital punishment.

Q. Has anyone made any promises to you about how this is going to turn out if you plead guilty?

A. No, they haven't.

Q. You know that if you plead guilty the state is going to ask for a death sentence and the Judge could impose death.

A. Yes, I do.

Q. Now, if you plead guilty, do you understand that all that would be left for the Court to do would be to sentence you?

A. Yes.

\* \* \* \* \*

Q. (By Mr. McClain) Do you understand, Michael, that there would still be a sentencing hearing where the state will be presenting evidence, and we, on your behalf, will be presenting evidence to the Judge as to what sentence to propose on the murder charge?

A. Yes.

Q. And actually the Judge can entertain evidence on all of the charges.

A. I understand.

(Guilty Plea Tr., pages 19-21). The proceedings continued:

Q. And do you understand that there will be a sentencing proceeding yet to occur in front of the Judge?

A. Yes, I do.

(Guilty Plea Tr., page 28). The details of the jury sentencing that petitioner waived were fully aired on the record.

Q. No one has guaranteed you what sentence you're going to receive?

A. No.

Q. No promises have been made to you as to what sentence you're going to receive.

A. No, they haven't.

Q. Has anyone told you what sentence you're likely to receive?

A. No, they haven't.

Q. What sentence do you think you're going to receive as to Count I, murder in the first degree?

A. What sentence do I think?

Q. Yes.

A. I don't know.

Q. Do you understand that the Judge might very well sentence you to the death penalty in this case?

A. Yes, I do.

Q. Do you know that by pleading guilty here today that instead of twelve people deciding, there will only be one person deciding, this Judge; do you understand that?

A. Yes, I do.

Q. As to the other counts, the Judge could sentence you to the minimum, or he may very well sentence you to the maximum on each of the other counts charged; do you understand that?

A. Yes.

(Guilty Plea Tr., pages 35-36). The questioning continued:

Q. Now, the second phase would be a separate trial in front of the same jury, if they do find you guilty of murder in the first degree. Do you understand that:

A. Yes, I do.

Q. It would be like a trial. There would be opening statements. The state would present evidence, and you could present evidence. Do you understand that?

A. Yes, I do.

Q. You would have a right to confront the witnesses, to subpoena witnesses, to subpoena witnesses in. Do you understand that?

A. Yes.

Q. The court would then instruct the jury, the attorneys would argue, and then they would deliberate, the jury would deliberate. Do you understand that?

A. Yes.

Q. During their deliberations, all twelve jurors must find, beyond a reasonable doubt, at least one aggravating circumstance. Do you understand that?

A. Yes.

Q. And if they don't find at least one aggravating circumstance, then they must sentence you to life without parole. Do you understand that?

A. Yes.

Q. Now, the state has filed notice of nine aggravating circumstances, statutory aggravating circumstances. Do you understand that?

A. Yes.

Q. Have you talked about those with your attorney; have you seen those?

A. I'm not real familiar with seeing them, but I have talked with them about them.

Q. When I say that the jury must find at least one, they must find at least one statutory aggravating circumstances. If they don't, it's life without parole.

Do you understand that?

A. Yes.

Q. If they do find at least one statutory aggravating circumstance, then they can determine if there are any non-statutory aggravating circumstances. Do you understand that?

A. Yes.

Q. And the state has filed notice, I believe, of twenty-five or twenty-six non-statutory aggravating circumstances. Are you aware of that?

A. Yes.

Q. And the jury would determine if the statutory aggravating circumstances non-statutory aggravating circumstances and the evidence in the case, whether they warrant the death penalty. Do you understand that?

A. Yes.

Q. And they must unanimously find that they do warrant the death penalty. Do you understand that?

A. Yes.

Q. And if they don't, then it's life without parole. Do you understand that?

A. Yes, I do.

Q. And then if they find that there are sufficient aggravating circumstances to warrant death, then they must consider whether there are mitigating circumstances. Do you understand that/

A. Yes, I do.

Q. And your attorney has supplied me with notice of five statutory mitigating circumstances that would be presented to the jury; do you understand that?

A. Yes.

Q. And the jury would then consider whether those mitigating circumstances, or the evidence in the case, whether it outweighs the aggravating circumstances. And if they found that the mitigating circumstances outweigh the aggravating circumstances, then they must sentence you to life without parole. Do you understand that.

A. Yes.

Q. And do you understand that when they consider the mitigating circumstances that they don't have to all unanimously find the same mitigating circumstances; do you understand that?

A. Yes.

Q. And do you understand that even if they find that the mitigating circumstances do not outweigh the aggravating circumstances that they still are not obliged to sentence you to death; do you understand that?

A. Yes.

Q. The final decision would rest with the jury. Do you understand that?

A. Yes.

Q. But again in this case it will all be up to one man. Do you understand that:

A. Yes.

Q. Is that what you want?

A. Yes, it is.

(Guilty Plea Tr., pages 38-42). The record amply demonstrates petitioner's knowing and voluntary waiver of the jury sentencing option when he entered his February 8, 1991 plea of guilty.

And as noted earlier, during the Rule 24.035 litigation, Judge Dierker found that petitioner wanted to plead guilty and avoid jury sentencing. "Indeed, movant's own testimony, together with other evidence adduced during the post-conviction hearing convinces the court that both movants [Nunley and Taylor] intended to plead guilty at all times during the underlying cases, and had no desire whatsoever to go to trial on any issue before a jury." (Judge Dierker's Memorandum and Order, 74104 PCR L.F., page 62).

Petitioner contends that he did not knowingly waive the right to jury sentencing because the Supreme Court did not recognize that right until the 2002 Ring decision (Brief, pages 20-22). But the right was well known and protected in Missouri well before Ring. If Petitioner had not plead guilty, §565.006.1, RSMo 1994 would have required a jury trial for issues of guilt and punishment. Petitioner's contention that the right to a jury trial was not a

“known right” rings hollow as a generality. It also rings hollow specifically as to Petitioner as demonstrated by the quoted discussion between the court and Petitioner about the right to jury sentencing that petitioner was waiving with his guilty plea..

Petitioner also contends that this court made a statement that Petitioner did not waive jury sentencing (Petition, page 5; Brief, page 23). During Petitioner’s consolidated appeal the court stated, “Taylor did not waive sentencing by a jury because he could only obtain jury sentencing if the State agreed to it. The State did not agree.” (Petition page 5 quoting State v. Taylor, 929 S.W.2d at 217; Brief, page 23). The context of the language is determinative. On consolidated appeal Petitioner complained that his plea was not knowing because, after the guilty plea, there remained a remote and unwanted possibility of jury sentencing under §565.006.2, RSMo 1986. State v. Taylor, 929 S.W.2d at 217. This court properly found that the petitioner’s complaint was ephemeral because the State did not agree to jury sentencing after the guilty plea under §565.006.2, RSMo 1986. So it is with irony that Petitioner now complains that he was denied jury sentencing when the possibility of jury sentencing was something that he loathed at the time of his actual sentencing. As noted by Judge Dierker, petitioner pled guilty in order to avoid the jury’s participation in sentencing. See Taylor v. Bowersox, 329 F.3d at 973. Given the nature of Petitioner’s murder, State v. Taylor, 929 S.W.2d at 214, Petitioner’s motivation at that time is quite understandable. The court’s language, when read in context, indicates Petitioner had no right to jury sentencing after his guilty plea. Id. After Petitioner’s February 8, 1991 guilty plea, which include the waiver of jury trial and jury sentencing (as quoted above), the court statement from the consolidated appeal is absolutely correct.

Petitioner contends that before his 1994 sentencing, he requested a jury (Petition page 5). But that contention ignores the fact that Petitioner waived jury sentencing three years earlier in 1991.

Petitioner contends that he has a right to jury sentencing even though he pleads guilty, (Petition page 5 citing Blakely v. Washington, 542 U.S. 296, 313 (2004); Brief, page 23). In Blakely, the offender's plea of guilty did not waive jury sentencing. Here, Petitioner specifically did.

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 explicitly expressed his desire to be sentenced by a judge rather than a jury, then 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.

Petitioner suggests that Halbert v. Michigan, 545 U.S. 605 (2005), stands for the proposition that a defendant cannot implicitly waive an unrecognized right (Petition page 24). But in contrast to Halbert, Petitioner's waiver was not "implicit." It was explicit, as detailed on the record by the plea court.

Petitioner contends that §565.006.2, RSMo 1994, unconstitutionally denies an offender jury sentencing when the offender pleads guilty (Petition page 25). To the contrary,

as the detailed quote from the guilty plea transcript makes clear, Petitioner was well aware of the functioning of §565.006.2, RSMo 1986, and he waived the jury function by pleading guilty. Given the knowing and voluntary waiver, he cannot complain that his Sixth Amendment rights were violated.

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 trier of fact. Taylor 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.”). 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, Taylor 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. After his plea of guilty and before his first sentencing, Taylor did not request a jury for the sentencing (74220 Tr. 52). At formal sentencing, Taylor did not complain about the lack for jury sentencing (74220 Tr. 386). At the PCR hearing, Taylor testified that he discussed the likelihood of receiving a death sentence from a jury (PCR Tr. 622). “I knew

that I didn't want to in front of a jury" (PCR Tr. 622), at least then (PCR Tr. 623). Taylor's waiver of jury sentencing before the initial sentencing judge therefore eliminated 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. Taylor is not that theoretical defendant. Taylor made a strategic choice to be sentenced by a judge rather than a jury to improve his chances at sentencing. Therefore, Taylor'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 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.

Taylor’s case is like Piper in that Taylor 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 Taylor’s waiver of jury sentencing, made for the purpose of avoiding a jury he thought

would sentence him to death, invalid. Taylor's waiver of jury sentencing made in the hope of more lenient sentencing by a judge eliminates any possible conflict with Ring.

Petitioner contends that the guilt phase and the punishment phase are discrete; thus, a valid guilty plea does not excuse an unconstitutional sentence, (Petition, page 25). Petitioner mischaracterizes respondent's contention. Respondent does not contend that a valid guilty plea excuses an unconstitutional sentence. Instead, respondent contends that the guilty plea proceeding made it clear to the Petitioner that by proceeding with the guilty plea he was waiving the right to jury sentencing. Petitioner's sentencing was not "an unconstitutional sentence" because of the 1991 waiver.

Petitioner also cites People v. Montour, 157 P.3d 489 (Colo. banc 2007) to support his petition. Similarly, in Montour 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 is 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 Taylor, 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 Taylor 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.

What Taylor 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 Taylor and by his accomplice Nunley in earlier litigation before this Court.

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 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 (8<sup>th</sup> Cir. 2002).

Taylor's original waiver of jury sentencing was valid and cuts off a Ring claim under cases such as Colwell, Downs, and Piper because his 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 Taylor 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.

Taylor 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. Taylor 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 Taylor does not cite cases that are on point and support his position. There is no conflict between Taylor'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.

Taylor 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 Taylor's guilty plea and its included waivers were invalidated by the remand for sentencing by a different judge the last time Taylor and his accomplice, Nunley, presented

that theory to this Court. See Taylor, 923 S.W.2d 919-922; Taylor, 929 S.W.2d 215; Taylor v. Bowersox, 329 F.3d 963, 968-69 (8<sup>th</sup> Cir. 2003). Taylor provides no explanation as to why this Court and the United States Court of Appeals got the issue wrong the last time he and Nunley 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.

Petitioner contends that his due process and equal protection rights are violated because he is being treated differently than ten other defendants whose sentences were reduced from capital punishment to life without parole. (Petition, pages 28-39; Brief, pages 29-36). But Petitioner does not identify a similarly situated offender – an offender who knowingly and voluntarily waived jury sentencing and then who has had his sentence remand for a new proceeding. To the contrary, each of the ten individuals cited by Petitioner had not waived jury sentencing.

Lastly, amici contend that Petitioner sentence is “disproportionate” because ten offenders who received capital punishment have had their sentences reduced to life without parole. Petitioner did not seem to embrace this theory in his original petition. The premise of amici's theory is that Petitioner did not waive jury sentencing, a premise thoroughly refuted by the record.

And as a matter of law, the amici legal theory should be rejected. If petitioner's Sixth Amendment legal theory were correct, then he maybe entitled to relief under Whitfield. State v. Whitfield, 107 S.W.3d at 253. The validity of the Ring – Whitfield claim does not make petitioner's murder more or less horrendous. Petitioner's Ring – Whitfield claim does

not render petitioner's character less aggravating or more mitigating. Phrased another way, the existence of a legal claim to set aside a conviction or sentence should not affect the proportionality review of a sentence. And in any event, the court determined on direct review that petitioner's sentence was not disproportionate. State v. Taylor, 929 S.W.2d at 223.

In petitioner's brief, for the first time in the litigation, petitioner asserts his sentence is disproportionate to those who received relief under Ring and Whitfield (App. Brf., pages 38-39). As noted, a constitutional challenge to a sentence should rise or fall based on the merits of the challenge.

Lastly, petitioner contends his sentence is disproportionate to some other cases. The request to look at these cases appears implicitly to rely on State v. Davis, 318 S.W.3d 618, 643-44 (Mo. banc 2010), concerning how proportionality review is conducted. Petitioner does not assert or demonstrate the decision applies retroactive. Davis is a rule of state law that is best described as procedural under Schriro v. Sumerlin, 542 U.S. 348, 352 (2004) (describing procedural verses substantive rules in federal law). Procedural rules under state law are not retroactive. State v. Ferguson, 887 S.W.2d 585, 587 (Mo. banc 1994). And substantive rules are applied retroactively only to cases on direct appeal and all pending cases that are not finally adjudicated. Id. Taylor fits neither category, and cannot receive benefit from Davis.

Alternatively, petitioner's claim is meritless. Appellant also suggests that his sentence is disproportionate. Section 565.035.3(3), RSMo. 2000 requires the court to consider the crime, the strength of the evidence and defendants in similar cases. During appellant's direct

appeal, the court outlined in detail the evidence of appellant's guilt. State v. Taylor, 929 S.W.2d at 223. As outlined earlier, the circumstances involving the kidnapping, rape and murder of the victim are lurid. The evidence of petitioner's guilt was strong, his plea of guilty.

Taylor's death sentence is proportionate to his crime. Taylor presents a list of cases that, he contends, shows that the death sentence in his case is disproportionate. The premise seems to be no death sentence can stand if the facts of the case are not more aggravated than those in a case where the jury selected life imprisonment. The premise is erroneous.<sup>2</sup>

Section 565.035.3(3), RSMo. 2000 now requires the court to consider the crime, the strength of the evidence and the defendant in similar cases. Each jury in a death penalty case is required to make "an individualized determination on the basis of the character of the individual and the circumstances of the crime." Tuilaepa v. California, 512 U.S. 967, 972 (1984) quoting Zant v. Stevens, 462 U.S. 862, 879 (1983). Juries may also choose to offer mercy to a defendant for no reason. Forrest v. State, 290 S.W.3d 704, 716 (Mo. 2009).

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<sup>2</sup> The most extreme form of this argument appears in State v. Cross, 132 P.3d 80 (Wash. 2006). In Cross, the offender argued that the Green River Killer (Gary Ridgeway) had been caught and sentenced to life without parole, but he had escaped capital punishment through a plea bargain. Id. at 99-100. The offender contended that his offense did not rise to the level of the Green River Killer; thus, his capital sentence was disproportionate. The Washington Supreme Court disagreed. Id. at 100, 105-06. "Ridgeway, standing alone, is not sufficient reason to find capital sentences always disproportionate." Id.

Thus, sentences in death penalty cases are individual, complex calculations that are heavily based on the particular facts of a particular case. “Perfect symmetry and uniform consistency are not possible under a statutory scheme that requires juries to make individualized sentencing decisions based upon the unique circumstances of a case.” State v. Addison, 2010 WL 4054125, \*27 (N.H. 2010). “Precise uniformity among the cases is not required. . . The cases are ‘unique and cannot be matched up like so many points on a graph.’” In re Elmore, 172 P.3d 335, 353 (Wash. 2007) citing State v. Lord, 822 P.2d 177 (1991). Thus, “the final resolution of a given appeal, if sentence is to be affirmed, should rest upon the unique correctness of the result in the given instance rather than its course resemblance to other cases.” State v. Copeland, 300 S.E.2d 63, 72 (S.C. 1982). Accordingly, this court therefore, should reject Taylor’s invitation to declare his death sentence disproportionate.

Further, as noted on direct appeal, this court has repeatedly upheld death sentences for defendants who murder with crime involving force (robbery and rape), who murder a witness and whose murder was outrageously or wantonly vile, horrible or inhuman. State v. Taylor, 929 S.W.2d at 223. And as part of the statutory review, the court found sufficient evidence of the statutory aggravating factors as well as Taylor’s seven prior felony convictions, his prior escape from custody and his threat to a correctional officer. Id. Taylor ignores this fact and cites a number of cases which persons who committed murders as well as other serious crimes were sentenced to life imprisonment. In none of the discussion does Taylor suggest that his list of offenders were similar to him. Moreover, Taylor does not suggest that any of those offenders had the criminal pedigree that he possessed.

**CONCLUSION**

WHEREFORE, for the foregoing reasons, respondent prays the court deny the petition for writ of habeas corpus.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains \_\_\_\_\_ words, excluding the cover, certification and appendix, as determined by Microsoft 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 a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this \_\_\_\_\_ day of December, 2010, to:

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