

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

STATE ex rel.)	
MICHAEL ANTHONY TAYLOR)	THIS IS A CAPITAL CASE
)	
Petitioner,)	No. SC90925
)	
v.)	
)	
TROY STEEL, Warden,)	
Potosi Correctional Center,)	
)	
Respondent.)	

Original Proceeding in Habeas Corpus

**BRIEF OF PETITIONER
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JURISDICTIONAL STATEMENT

This action is an original proceeding in habeas corpus, and this Court has jurisdiction pursuant to Article V, Section 4 of the Missouri Constitution and Missouri Supreme Court Rule 91.02(b).

Michael Anthony Taylor filed his Petition for Writ of Habeas Corpus and Suggestions in Support on May 27, 2010. A supporting submission of *amici curiae* was filed on June 2. The State of Missouri filed its Suggestions in Opposition on June 4, and Taylor filed a reply on June 11.

On October 22, this Court ordered full briefing and oral argument, which has been scheduled for January 5, 2011.

STATEMENT OF FACTS

A. Introduction

Petitioner Michael Anthony Taylor pleaded guilty in 1991 to a homicide offense and was sentenced to death by a judge. This Court vacated that judgment, however, and remanded Taylor’s case for a “new penalty hearing, imposition of sentence, and entry of new judgment.” (Exhibit M)¹

A new judge was assigned, and Taylor asked for a jury to find the facts at his new sentencing hearing. The judge denied that request, found those facts himself and sentenced Taylor to death. This Court affirmed in 1996.

In 2002, the United States Supreme Court held that the Sixth Amendment requires that a jury – not a judge – find the facts required to impose a death sentence. This Court then made that ruling retroactive in Missouri and, over the past seven years, at least 10 capital defendants have received life sentences because no jury ever found the facts required to put them to death.

Taylor is one of three people left in Missouri whose death sentence is based on judge-found facts. He and several *amici curiae* – including a former Chief Justice of this Court – respectfully request that he receive only the same life sentence given to those 10 other defendants once in his position.

¹ All exhibits referenced herein are in the Exhibits to Petition for Writ of Habeas Corpus and Suggestions in Support, filed on May 27, 2010.

B. Taylor's Background

Taylor, a black man, was born to an impoverished family with a history of mental illness. (Exhibit B at A-5) He was physically and verbally abused from a young age by his alcoholic father, who also battered Taylor's mother and siblings. In addition to being hit by a car when he was three years old, he was taken to the emergency room 24 times over a 10-year period. (Exhibit C at 672-676; Exhibit D at 121-123)

When Taylor was about five years old, his father shot himself while Taylor was in the next room. Taylor started to suffer from nightmares. (Exhibit E at 395-397; Exhibit F at 59-60; Exhibit G at 443-444) Also around that time, Taylor's babysitter sexually abused him by performing fellatio on him on more than one occasion. (Exhibit D at 124-125; Exhibit H at 313-316)

One day around that time, Taylor came upon the dead body of a girl he knew from the neighborhood. Taylor's nightmares worsened. (Exhibit E at 397; Exhibit F at 65-66; Exhibit G at 445) He started using alcohol around the age of eight (Exhibit I at 281) and drugs in about the sixth grade. (Exhibit J at A-2) Taylor developed severe problems with alcohol and drugs – such as cocaine and crack cocaine – during his adolescence. (Exhibit K at 524-526, 539-540)

Besides his physical and substance abuse, and besides his family history of mental illness, evaluations of Taylor have indicated brain damage,

dissociative disorder, post-traumatic stress disorder, impaired judgment, paranoia, delusional behavior and poor emotional control. Evaluations have also suggested bipolar disorder and multiple-personality disorder. (Exhibit K at 521-524, 530-537, 546-548; Exhibit C at 677-687; Exhibit I at 277-285)

C. The Criminal Offense

Taylor and Roderick Nunley spent the night of March 21, 1989 driving around, smoking marijuana and drinking wine coolers. In the morning they encountered Ann Harrison, a 15-year-old white girl, who was waiting for her school bus. See State v. Taylor, 929 S.W.2d 209, 214 (Mo. banc 1996).

According to evidence presented in Taylor's case, Nunley told Taylor to stop the car so Nunley could snatch Harrison's purse. Instead, Nunley forced her into the car and Taylor drove to Nunley's house. There, Nunley took Harrison's clothes off and raped her. Taylor then raped Harrison as well. Nunley and Taylor then put Harrison into the trunk of the car on the pretense that they would take her to a telephone to call her parents. Nunley then told Taylor they should kill Harrison to prevent her from testifying against them. Id.

The two argued, but Nunley took a knife and stabbed Harrison in the throat. He then told Taylor to stab her as well, which Taylor did. Harrison died of the stab wounds. Id. Nunley and Taylor were later arrested, and the State sought the death penalty for them both. Taylor committed these crimes when he was 22.

D. The Guilty Plea And Taylor's Death Sentences

On February 8, 1991, Taylor pleaded guilty before the Honorable Alvin C. Randall to first degree murder, armed criminal action, kidnapping and forcible rape. Pursuant to section 565.006.2, RSMo, “[n]o defendant who pleads guilty to a homicide offense . . . shall be permitted a trial by jury on the issue of the punishment to be imposed, except by agreement of the state.” The State did not agree, and the prosecutor asked Taylor:

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: Do you know that by pleading guilty here today that instead of 12 people deciding, there will only be one person deciding [on sentence], this Judge: do you understand that?

A: Yes, I do.

(Exhibit L at 8:21-8:24, 36:4-36:7)

On May 3, 1991, Judge Randall sentenced Taylor to death after making the factual findings statutorily required to impose that punishment.

On June 29, 1993, however, this Court vacated the judgment and remanded the case for a “new penalty hearing, imposition of sentence, and entry of new judgment.” (Exhibit M)

The case was assigned to the Honorable H. Michael Coburn, who denied Taylor’s request for a jury to find the facts required for sentence. See Taylor, 929 S.W.2d at 215. Instead, Judge Coburn made those factual determinations, finding six statutory aggravating circumstances, three non-statutory aggravating circumstances, and one mitigating circumstance, which Judge Coburn found did not outweigh the aggravating circumstances. Judge Coburn also found that the aggravating circumstances warranted a death sentence, which he imposed on June 17, 1994. (Exhibit A)

Taylor appealed, arguing in part that he was entitled to have a jury find the facts required to order his execution. This Court rejected that argument in 1996, stating then that a “defendant has no constitutional right to have a jury assess punishment.” Taylor, 929 S.W.2d at 219 (citation omitted).

E. The Ring And Whitfield Decisions

Six years after this Court affirmed Taylor’s death sentence, the United States Supreme Court issued its decision in Ring v. Arizona, 536 U.S. 584 (2002). Relying on the Sixth Amendment right to trial by jury, as applicable to the states under the Fourteenth Amendment and especially as applied in Apprendi v. New

Jersey, 530 U.S. 466 (2000), the Court held that facts not admitted by a defendant but necessary to impose a capital sentence must be found by a jury, not a judge. “Capital defendants,” the Court ruled, “are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.” Ring, 536 U.S. at 589.

When Taylor was sentenced to death for the second time, the ordinary maximum punishment for a homicide conviction – life imprisonment – could be increased to the ultimate punishment of death only if three distinct factual findings were made: (1) at least one statutory aggravating factor was present in the defendant’s case; (2) the aggravating evidence “warrant[ed] imposing the death sentence”; and (3) any mitigating evidence was not “sufficient to outweigh the evidence in aggravation.” Section 565.030.4, RSMo 1994. No jury ever made any of those findings in Taylor’s case.

A year after Ring, this Court ruled that the Sixth Amendment right to a capital sentencing jury applies retroactively in Missouri. In State v. Whitfield, 107 S.W.3d 253 (Mo. banc 2003), this Court set aside Joseph Whitfield’s death sentence, which it had affirmed on appeal before Ring was decided, “because the judge rather than the jury made the factual determinations on which his eligibility for the death sentence was predicated.” Id. at 256. In applying Ring retroactively,

this Court explained that “the right asserted is the fundamental right to trial by jury and [] the stake is of the highest magnitude— the defendant’s life.” Id. at 267.

Although Whitfield sought relief via a motion to recall the mandate, this Court noted that, “even were a recall of mandate not available, defendant would be entitled to the same remedy in habeas corpus. In sentencing Mr. Whitfield to death without a jury finding of [the required] factors . . . , the court below imposed a sentence in excess of that permitted by law.” Id. at 269 n.19.

F. Subsequent Application Of Ring

To date, Ring has been applied in at least 10 Missouri cases to order life imprisonment for a capital defendant denied the Sixth Amendment right to jury fact-finding at sentencing.

In the first such case, Whitfield, this Court explained that Joseph Whitfield could not be executed because his death sentence was based on judge-found facts, and Ring mandates that “every fact that the legislature requires be found before death may be imposed must be found by the jury.” Whitfield, 107 S.W.3d at 257.

In Deandra Buchanan’s case, where the jury “was unable to agree on the punishment for the murders and made no findings as to the issues specified by [the capital sentencing statute], [t]he court sentenced Buchanan to death for each of the murders.” State v. Buchanan, 115 S.W.3d 841, 841-842 (Mo. banc 2003).

This Court reduced that sentence to life imprisonment because “a jury, rather than a judge is required to determine each fact on which the legislature conditions an increase in the maximum punishment.” Id. at 842.

Likewise, Rufus James Ervin received a life sentence given that his initial “death sentence violated the Sixth and Fourteenth Amendments because it was imposed by the court absent any finding by the jury beyond a reasonable doubt that an aggravating circumstance existed.” Ervin v. Purkett, No. 4:04-CV-1296, 2007 WL 2782332, at *1 (E.D. Mo. Sept. 21, 2007). See also Exhibit N.

Additionally, in three orders issued in October 2003, this Court reduced sentences of death to life imprisonment for Andre Morrow, Antonio Richardson and Keith Smith because all three men had been sentenced to death without a jury finding the facts required to permit their executions. (Exhibit O)

Again recognizing that the “Sixth Amendment requires the jury, not a judge, to determine the facts supporting imposition of the death penalty,” this Court re-sentenced Kenneth Thompson to life imprisonment because he had been “sentenced to death by a judge in violation of his federal constitutional right to jury fact finding.” State v. Thompson, 134 S.W.3d 32, 33 (Mo. banc 2004).

Similarly, this Court ordered life imprisonment for Barry Baker even though a jury had found the presence of four statutory aggravating factors before deadlocking on the other steps of the sentencing procedure. The record “fail[ed] to

show that the jury completed the other steps necessary to impose a death sentence, including considering whether mitigating circumstances outweighed those in aggravation . . . , as required by Ring, Whitfield, and section 565.030.4(3), RSMo.” State ex rel. Baker v. Kendrick, 136 S.W.3d 491, 492 (Mo. banc 2004).

Likewise, this Court ordered life imprisonment for Bobby Joe Mayes because his jury could not agree on a sentence although it had

found the presence of aggravating circumstances; however, [the record] is devoid of findings of mitigating circumstances or as to what circumstances the jurors relied upon when not finding that these aggravators warranted an imposition of death. . . .

[U]nder such circumstances [the judge] had but one option—to declare a sentence of life without probation, parole, or release except by act of the governor.

State ex rel. Mayes v. Wiggins, 150 S.W.3d 290, 291-292 (Mo. banc 2004).

Finally, Andrew Lyons was convicted of two murders and given two death sentences. “In August 2007, as required by Ring v. Arizona, this Court set aside the death sentence for one of the murders because the jury failed to set out findings necessary to impose the death penalty.” State ex rel. Lyons v. Lombardi, 303 S.W.3d 523, 525 n.2 (Mo. banc 2010) (citation omitted). (This Court set aside the second death sentence because Lyons is mentally retarded. See id.)

G. Taylor's Prior Requests For Relief

This Court has not adjudicated the constitutionality of Taylor's death sentence in light of Ring and Whitfield.

Taylor sought relief pursuant to those decisions in two motions to recall the mandate, which this Court denied without opinion in one-sentence orders. (Exhibits P, Q) (This Court also denied, without opinion, three prior habeas petitions *not* raising a Ring/Whitfield claim. (Exhibits R, S, T))

This is Taylor's third request – and first in habeas – for an order setting aside his death sentence pursuant to Ring and Whitfield.

POINTS RELIED ON

- I. Taylor is entitled to a writ of habeas corpus reducing his death sentence to life imprisonment, because the death sentence violates the Sixth Amendment and Missouri law, in that a judge rather than a jury found the facts necessary to authorize that sentence.**

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

State v. Whitfield, 107 S.W.3d 253 (Mo. banc 2003)

State v. Bucklew, 973 S.W.2d 83 (Mo. banc 1998)

State v. Bibb, 702 S.W.2d 462 (Mo. banc 1985)

U.S. Const. amend. VI

- II. Taylor is entitled to a writ of habeas corpus reducing his death sentence to life imprisonment, because the death sentence violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment and Missouri law, in that similarly situated defendants have been sentenced to life imprisonment rather than death.**

Bernat v. State, 194 S.W.3d 863 (Mo. banc 2006)

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

State v. Davis, 318 S.W.3d 618 (Mo. banc 2010)

U.S. Const. amend. XIV

Section 565.035.3(3), RSMo

ARGUMENT

**I. TAYLOR IS ENTITLED TO A WRIT OF HABEAS CORPUS
REDUCING HIS DEATH SENTENCE TO LIFE
IMPRISONMENT, BECAUSE THE DEATH SENTENCE
VIOLATES THE SIXTH AMENDMENT AND MISSOURI
LAW, IN THAT A JUDGE RATHER THAN A JURY FOUND
THE FACTS NECESSARY TO AUTHORIZE THAT
SENTENCE**

A. Standard Of Review

The question whether Taylor’s death sentence is in excess of that authorized by law – because it was imposed in violation of the Sixth Amendment and Missouri law – is a legal question subject to *de novo* review. See, e.g., State v. Richardson, 347 S.W.2d 165, 168 (Mo. 1961).

**B. The Sixth Amendment Entitles Capital Defendants To A Jury
Finding Of Every Fact Required To Impose A Death Sentence**

“The Sixth Amendment requires the jury, not a judge, to determine the facts supporting imposition of the death penalty. Accordingly, a judge is not authorized to impose the death penalty if the jury did not find the facts necessary to impose the death penalty.” State v. Thompson, 134 S.W.3d 32, 33 (Mo. banc 2004) (citing Ring v. Arizona, 536 U.S. 584, 589 (2002)). See also State v. Deck,

303 S.W.3d 527, 534 (Mo. banc 2010) (In Whitfield, “the entry of the death sentence itself was accomplished through the application of an unconstitutional procedure . . . because the trial court made findings that the Sixth Amendment required a jury to make.”); State v. McLaughlin, 265 S.W.3d 257, 264 (Mo. banc 2008) (“[U]nder the principles set out in Ring, the jury must make the required factual findings that increase the punishment from a life sentence to death.”); State v. Whitfield, 107 S.W.3d 253, 257 (Mo. banc 2003).

No jury ever found the facts necessary to sentence Taylor to death. Specifically, no jury ever found that (1) at least one statutory aggravating factor was present, (2) the aggravating evidence warranted the death penalty or that (3) any mitigating evidence did not outweigh the aggravating evidence. See section 565.030.4, RSMo 1994. Moreover, Taylor never admitted facts sufficient to authorize a capital sentence.²

² Even assuming that, at his plea hearing, Taylor admitted to acts comprising one of the statutory aggravating factors alluded to in section 565.030.4(1), RSMo 1994, Taylor never admitted that the “evidence in aggravation . . . warrant[ed] imposing the death sentence,” id. § 565.030.4(2), or that the “evidence in mitigation” was not “sufficient to outweigh the evidence in aggravation.” Id. § 565.030.4(3).

“In Whitfield, this Court determined that the factual determinations required in the first three steps, set out in subsections 565.030.4(1), (2) and (3), *must be made by a jury, not a judge.*” State v. Glass, 136 S.W.3d 496, 521 (Mo. banc 2004) (emphasis added). A jury had found Whitfield guilty of murder but “could not agree on punishment.” Whitfield, 107 S.W.3d at 261. The judge then

independently went through each of the four statutory steps, independently determined each fact against Mr. Whitfield, and imposed a death sentence. As a result, the death sentence imposed on Mr. Whitfield was not based on a jury finding of any fact, but rather was entirely based on the judge’s findings that all four steps favored imposition of the death penalty. *This process clearly violated the requirement of Ring that the jury rather than the judge determine the facts on which the death penalty is based.*

Id. at 261-262 (emphasis added; citation omitted). The judge’s error in the face of the deadlock was not harmless “[b]ecause the record does not contain any basis for the Court to conclude the jury made the requisite determinations in steps 1, 2, and 3 against Mr. Whitfield before deadlocking.” Id. at 264.

In Taylor’s case, the Ring violation is equally clear and even more clearly harmful: because Taylor was denied his request for a jury, obviously there

is no possibility that a jury ever considered – let alone found – any of the facts required to authorize his death sentence.

C. The Sixth Amendment Jury Right Applies Retroactively To Taylor’s Case

Citing “this Court’s duty and authority to apply federal constitutional law retroactively,” this Court applied the jury right to Whitfield’s case even though his death sentence had been affirmed on direct appeal before Ring was decided. Whitfield, 107 S.W.3d at 266. Taylor’s case is materially indistinguishable from Whitfield’s and, in any event, independently merits retroactive application of Ring.

Employing the analysis for application of new constitutional rights to cases on collateral review, as set out in Linkletter v. Walker, 381 U.S. 618 (1965), and Stovall v. Denno, 388 U.S. 293 (1967), the Whitfield Court ruled that the Sixth Amendment right to a sentencing jury applies retroactively to “Missouri death penalty cases that are no longer on direct appeal and in which the jury was unable to reach a verdict and the judge made the required factual determinations and imposed the death penalty.” 107 S.W.3d at 268-69. By a “preliminary review of its records,” the Court identified five cases with those characteristics. Id. at 269. Although Taylor’s case was not among them, this Court later explained that its preliminary list “did not purport to deny review if, on further review, it was determined that Whitfield also applied to a limited number of additional cases on

collateral review that were not then brought to the Court's attention." State ex rel. Baker v. Kendrick, 136 S.W.3d 491, 494 n.2 (Mo. banc 2004).

Taylor's is such a case, as it is "no longer on direct appeal" and is one in which "the judge made the required factual determinations and imposed the death penalty." Although there was no jury "unable to reach a verdict" as to Taylor's sentence, that is only because Taylor's request for a sentencing jury was denied. Even if a jury had, as in Whitfield's case, initially been provided before deadlocking and being replaced by a judge, Taylor's death sentence still would be unconstitutionally based on judge-found facts. The point is that neither Whitfield's nor Taylor's death sentence was based on facts found by a jury. As this Court succinctly put it in Whitfield, "it is the very entry of the death sentence that is held to be unconstitutional, since made without the very jury findings required for imposition of the death penalty under Missouri law." Whitfield, 107 S.W.3d at 271 n.23. On that dispositive score, Whitfield and Taylor are in the same position.

Even were that not so, Taylor's case independently satisfies each of the three Linkletter-Stovall elements, thus meriting retroactive application of Ring.

In holding that the first Linkletter-Stovall factor – the "purpose to be served by the new rule" – warranted retroactive application in Whitfield's case, this Court explained that Ring's purpose "is to ensure a jury of defendant's peers finds each of the factual elements necessary to his conviction and sentence of

death. The Supreme Court and this Court have both held that the right to trial by jury is a fundamental right in serious criminal prosecutions.” Whitfield, 107 S.W.3d at 268. See also id. at 267 & n.14 (The Linkletter-Stovall analysis “permits this Court to consider the particular facts and legal issues relevant to the specific issue before the Court – for instance, here, to consider that the right asserted is the fundamental right to trial by jury and that the stake is of the highest magnitude – the defendant’s life. . . . *[B]y its very nature, death is different.*”) (citing Penry v. Lynaugh, 492 U.S. 302, 313-314 (1989)) (emphasis added). Taylor is in the same position, denied his fundamental right to have a jury decide whether the facts of his case warrant his execution.

Likewise, Linkletter-Stovall’s second factor – the “extent of reliance by law enforcement on the old rule” – “clearly favor[s] retroactivity. Unlike new constitutional rules dealing with Fourth Amendment violations, the rule at issue here will not invalidate any searches or preclude the admission of any evidence. . . . [I]n Missouri juries have always made the decision whether to impose the death penalty except in those few cases in which the jury was unable to reach a verdict.” Whitfield, 107 S.W.3d at 268. As in Whitfield, Taylor’s sentence broke with Missouri’s practice of ensuring that a jury of one’s peers – rather than one judge – makes the factual determinations necessary to take a fellow citizen’s life. See also Ring, 536 U.S. at 612 (“[O]ur people’s traditional belief in the right of trial by jury

is in perilous decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because *a judge* found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.”) (Scalia, J., concurring) (emphasis in original).

As to the final Linkletter-Stovall factor – the “effect on the administration of justice of retroactive application of the new standards” – the “application of Ring to [Taylor's] case[] on collateral review will not cause dislocation of the judicial or prosecutorial system.” Whitfield, 107 S.W.3d at 269. Missouri courts have already adjudicated 10 Ring/Whitfield claims. Of the roughly 50 people on Missouri death row, only three are still under a sentence based on judge-found facts: Taylor, Roderick Nunley and Michael Worthington. (Exhibit U) Nunley has requested Ring/Whitfield relief, and this Court will hear argument in January. Worthington may have no cause to raise a Ring/Whitfield claim: a federal court vacated his death sentence on another ground, see Worthington v. Roper, 619 F. Supp. 2d 661 (E.D.Mo. 2009), although the State appealed and the Eighth Circuit is now examining the issue. Even if Worthington were to ask this Court for Ring/Whitfield relief, that one additional request would not “cause dislocation of the judicial or prosecutorial system.”

In sum, Ring applies retroactively here, either because Taylor’s case is materially indistinguishable from Whitfield, or because it independently satisfies the Linkletter-Stovall test.

D. Taylor Never Waived His Sixth Amendment Right To Have A Jury Find The Facts Required To Take His Life

Combing the transcript of Taylor’s guilty plea for a waiver – or even a *mention* – of his Sixth Amendment right to jury sentencing is a fruitless endeavor for one very simple reason: when Taylor pleaded guilty in 1991, the right had not yet been recognized to exist. Thus, Taylor was not informed of the right. He was not asked to surrender it. And he did not waive it.

A waiver is the “intentional relinquishment or abandonment of a known right.” State v. Bucklew, 973 S.W.2d 83, 90 (Mo. banc 1998) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)) (internal quotation marks omitted). There was no “known right” in 1991, as a matter of Sixth Amendment law, to jury fact-finding at a capital sentencing, nor is there any evidence that Taylor “intentional[ly] relinquish[ed]” that right. Far from waiving the right, Taylor expressly asked for a jury *before* being given his extant death sentence and thus years before the right was even recognized. See Taylor, 929 S.W.2d at 215.

The Sixth Amendment jury right is fundamental, see Whitfield, 107 S.W.3d at 267, and this Court must “indulge every reasonable presumption against

waiver of fundamental constitutional rights.” Bucklew, 973 S.W.2d at 90. It is eminently reasonable to presume that Taylor did not waive, in 1991, a fundamental constitutional right then 11 years from being recognized. Indeed, Taylor cannot reasonably be said to have waived his Sixth Amendment jury right: it was unknown when he pleaded guilty, and there is *no evidence whatsoever* that he ever waived it.

Waiver of a state right to jury sentencing “must appear from the record with unmistakable clarity.” State v. Bibb, 702 S.W.2d 462, 466 (Mo. banc 1985). Waiver of the fundamental Sixth Amendment right must also be unmistakably clear, not cobbled together from a connect-the-hypotheticals chain of speculation that: *if* the right had been known in 1991, and *if* Taylor had been informed of it, and *if* he had been asked to waive it, then he would have done so. Such a guessing game, played 19 years after the fact, cannot establish that Taylor waived his fundamental Sixth Amendment right.

In Halbert v. Michigan, 545 U.S. 605 (2005), for example, the United States Supreme Court rejected the argument that a defendant can be deemed, years after the fact, to have impliedly waived a constitutional right that was unknown at the time of the supposed waiver.

In that case, a Michigan statute stripped defendants who pleaded guilty or *nolo contendere* of the right to appeal. State judges consequently denied

appointed counsel to indigent defendants convicted on their pleas, like Halbert, who wanted to seek leave to appeal. See id. at 609. The Supreme Court found that practice unconstitutional, ruling that the “Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review.” Id. at 610. Michigan argued that, even if Halbert had a constitutional right to appointed appellate counsel, he impliedly “waived that right by entering a plea of *nolo contendere*.” Id. at 623. “We disagree,” wrote the Court: “At the time he entered his plea, Halbert, in common with other defendants convicted on their pleas, had no recognized right to appointed appellate counsel he could elect to forgo.” Id.

Likewise, “[a]t the time he entered his plea,” Taylor “had no recognized right to [jury sentencing] he could elect to forgo.” Taylor was thus never advised of, or asked to surrender, the Sixth Amendment right to jury sentencing. Moreover, “[n]o conditional waiver – ‘on[e] in which a defendant agrees that, if he has . . . a right, he waives it,’ – is at issue here.” Id. at 623 n.7.

Nor can Taylor be deemed to have waived his Sixth Amendment right by virtue of section 565.006.2, RSMo. That statute denies a sentencing jury, under *state law*, to capital defendants who plead guilty unless the State agrees to a jury. The State has suggested that, in light of this statute, Taylor’s decision to plead

guilty without the State's consent to have a sentencing jury effected a waiver of any and all of Taylor's rights to jury sentencing, period. That is plainly wrong.

First, this Court held in 1996 that Taylor did not waive jury sentencing under Missouri statutory law. Discussing section 565.006.2, RSMo, this Court explained: "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." Taylor, 929 S.W.2d at 217.

Second, the *possibility* of jury sentencing that section 565.006.2, RSMo leaves open for capital defendants who plead guilty – namely, persuading the State to agree to a jury – is entirely distinct from the Sixth Amendment *right* to have a jury find the requisite facts regardless of whether the State agrees. "That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." Blakely v. Washington, 542 U.S. 296, 305-306 (2004).

Blakely makes plain that defendants who plead guilty retain the Sixth Amendment right to jury fact-finding at sentencing. The Court there vacated Blakely's sentence, despite his pleading guilty and being sentenced by a judge pursuant to state law, because he had been "sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed [judicial] finding that he had acted with 'deliberate cruelty.'" "

Id. at 313. Section 565.006.2, RSMo, was enacted before Ring, Whitfield and Blakely were decided, and has not been amended to reflect those rulings.

In a similar case from Colorado, Edward Montour pleaded guilty to first-degree murder. Because he did so, a state statute automatically denied him a sentencing jury in much the same way that Taylor was denied one. Montour was thus also sentenced to death based on judge-found facts. He later argued that his guilty plea, which he did not contest, did not itself waive his constitutional right to a sentencing jury. The Supreme Court of Colorado agreed: “Blakely established the right to a jury trial during sentencing on all facts essential to punishment as a right *independent* from the right to a jury trial on the issue of guilt.” People v. Montour, 157 P.3d 489, 497 (Colo. banc 2007) (emphasis added). Consequently, a “guilty plea alone does not constitute a waiver of the right to jury fact-finding on death eligibility. . . . *Once a capital defendant enters a guilty plea, he retains the Sixth Amendment right to jury sentencing on the facts essential to the determination of death eligibility.*” Id. at 498 (emphasis added). Significantly, the Court found that Montour had not waived his Sixth Amendment right even though he had acknowledged, just like Taylor, that a judge would sentence him pursuant to state law because he was pleading guilty:

While it is true that the record is awash with advisements by the district court and statements of waiver by Montour, *we disagree*

that these waivers were sufficient because they were linked to the statute's command that Montour's guilty plea automatically forfeited his right to a jury trial on his sentence.

We find as a matter of law that Montour's waiver could not have been knowing, voluntary, and intelligent because it was . . . inextricably linked to his guilty plea.

Id. at 500 (emphasis added).

Likewise, Taylor was denied a sentencing jury in 1991 not because he knowingly, voluntarily and intelligently waived a then-unrecognized Sixth Amendment right. He was denied a jury because the State did not agree to one, and thus Section 565.006.2, RSMo "automatically forfeited" a sentencing jury as a matter of Missouri law. That automatic forfeiture did not simultaneously waive, however, Taylor's wholly separate Sixth Amendment right. See Blakely; Montour; Halbert, 545 U.S. at 623 n.7 (assuming "that whether *Michigan* law conferred on Halbert a postplea right to appointed appellate counsel is irrelevant to whether Halbert waived a *federal* constitutional right to such counsel") (emphasis added); id. at 640 ("Whether Michigan law provides for [appellate] counsel says nothing about whether a defendant possesses (and hence can waive) a federal constitutional right to that effect.") (Thomas, J., dissenting).

The question here is not whether Taylor waived a sentencing jury under Missouri statutory law; he did not, as this Court held in 1996. See Taylor, 929 S.W.2d at 217. The real question is whether, by being *denied* a sentencing jury under state law on account of his guilty plea, Taylor can be deemed to have *waived* – years after the fact and with utterly no evidence of such waiver – his entirely separate Sixth Amendment right to jury sentencing. The answer is no.

E. Taylor Is Entitled To Habeas Relief Ordering Life Imprisonment

In granting Joseph Whitfield’s request to recall the mandate, this Court noted:

[E]ven were a recall of mandate not available, *defendant would be entitled to the same remedy in habeas corpus*. In sentencing Mr. Whitfield to death without a jury finding of factors 1, 2, and 3 against defendant, the court below imposed a sentence in excess of that permitted by law. “If a court imposes a sentence that is in excess of that authorized by law, habeas corpus is a proper remedy.”

Whitfield, 107 S.W.3d at 269 n.19 (emphasis added; citations omitted).

“[W]here a defendant is sentenced to death by a judge in violation of the Sixth Amendment, *the only possible sentence is life imprisonment*.” State v. Thompson, 134 S.W.3d 32, 33 (Mo. banc 2004) (citing section 565.040, RSMo)

(emphasis added). See also Whitfield, 107 S.W.3d at 272 n.23 (“[T]he only remedy is to order imposition of the proper penalty— a life sentence.”).

The fact that Taylor has twice before asked this Court for Ring/Whitfield relief, in two motions to recall the mandate, does not preclude his request in habeas now. The “privilege of the writ of habeas corpus shall never be suspended,” Mo. Const. art. I § 12, and a one-sentence rejection, without explanation, of a *capital defendant’s* request to recall the mandate cannot properly bar a habeas petition to set aside an unconstitutional death sentence. See, e.g., Whitfield, 107 S.W.3d at 267 (“[T]he right asserted is the fundamental right to trial by jury and [] the stake is of the highest magnitude— the defendant’s life.”).

Likewise, the fact that Taylor’s three prior habeas petitions to this Court did not raise a Ring/Whitfield claim does not mean that he waived the error of being unlawfully sentenced to death based on judge-found facts. Not only has Taylor been complaining of that error since it was committed in 1994, but the error – because it resulted in a “sentence [that] exceeds the maximum allowed by law” – is “jurisdictional, and cannot be waived.” Whitfield, 107 S.W.3d at 269 n.19 (internal quotation marks and citation omitted). See also Thomas v. McKenna, 55 S.W.3d 487, 490 (Mo. App. 2001) (A “claim that the court imposed ‘a sentence that is in excess of that authorized by law’ raises a jurisdictional issue” that, if valid, “entitle[s petitioner] to habeas relief.”) (Breckenridge, P.J.).

In any event, “there is no limit by res adjudicata, or by any other doctrine, to the number of applications which [Taylor] may make for [relief] by the writ of habeas corpus, except the bare statutory one [inapplicable here] that successive applications must not be made to courts of inferior jurisdiction.” In re Breck, 158 S.W. 843, 849 (Mo. banc 1913) (citation omitted) (cited in State v. Dodson, 556 S.W.2d 938, 945 (Mo. App. 1977)).

**II. TAYLOR IS ENTITLED TO A WRIT OF HABEAS CORPUS
REDUCING HIS DEATH SENTENCE TO LIFE
IMPRISONMENT, BECAUSE THE DEATH SENTENCE
VIOLATES THE EQUAL PROTECTION AND DUE PROCESS
CLAUSES OF THE FOURTEENTH AMENDMENT AND
MISSOURI LAW, IN THAT SIMILARLY SITUATED
DEFENDANTS HAVE BEEN SENTENCED TO LIFE
IMPRISONMENT RATHER THAN DEATH**

A. Standard Of Review

The question whether Taylor’s death sentence is in excess of that authorized by law – because it was imposed in violation of the Fourteenth Amendment and Missouri law – is a legal question subject to *de novo* review. See, e.g., Richardson, 347 S.W.2d at 168.

B. The Equal Protection Clause Requires That Taylor Receive The Same Life Sentence Ordered For 10 Similarly Situated Defendants

Life imprisonment has been ordered for at least 10 capital defendants – Barry Baker, Deandra Buchanan, Rufus James Ervin, Andrew Lyons, Bobby Joe Mayes, Andre Morrow, Antonio Richardson, Keith Smith, Kenneth Thompson and Joseph Whitfield – on the ground that no jury ever found the facts required to permit their executions. See Whitfield, 107 S.W.3d at 261-262; State v. Buchanan, 115 S.W.3d 841, 842 (Mo. banc 2003); State v. Thompson, 134 S.W.3d 32, 33 (Mo. banc 2004); State ex rel. Baker v. Kendrick, 136 S.W.3d 491, 491 (Mo. banc 2004); State ex rel. Mayes v. Wiggins, 150 S.W.3d 290, 291-292 (Mo. banc 2004); Ervin v. Purkett, 2007 WL 2782332, at *1 (E.D. Mo. 2007); State ex rel. Lyons v. Lombardi, 303 S.W.3d 523, 525 n.2 (Mo. banc 2010); (Exhibits N, O).

Had it not been for this Court’s corrective action, those 10 individuals might have been unlawfully put to death based on a lone judge’s factual findings. Taylor is in the same position they once were, and equal protection requires that he also be sentenced to life imprisonment.

The Equal Protection Clause of the Fourteenth Amendment “is essentially a direction that all persons similarly situated should be treated alike.” Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985). This Court

interprets the Missouri equal protection clause to be coextensive with that in the Fourteenth Amendment, and has long recognized it provides “equal security or burden under the laws to every one similarly situated; and that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes of persons in the same place and under like circumstances.”

Bernat v. State, 194 S.W.3d 863, 867 (Mo. banc 2006) (citations omitted).

Equal protection analysis requires this Court to determine if the challenged state action “operates to the disadvantage of some suspect class or *impinges upon a fundamental right explicitly or implicitly protected by the Constitution*. If so, the [action] is subject to strict scrutiny and this Court must determine whether it is necessary to accomplish a compelling state interest.”

Bernat, 194 S.W.3d at 867 (emphasis in original; citation omitted).

Both Taylor’s right to jury sentencing and his right to life are fundamental rights, see Whitfield, 107 S.W.3d at 267; Mo. Const. art. I § 2, and he is similarly situated to the 10 other defendants in that all have faced execution based on judge-found facts. Accordingly, the State’s attempt to execute Taylor is subject to strict scrutiny, requiring the State to explain why putting him to death

based solely on a judge's factual findings – despite this Court setting aside several identical sentences – is “necessary to accomplish a compelling state interest.”

The State can provide no such explanation. Indeed, there is no valid interest – compelling, rational or otherwise – that justifies overlooking the unconstitutionality of Taylor's death sentence and simply executing him anyway.

The State has argued that Taylor may be put to death because he waived his right to a sentencing jury by pleading guilty in 1991. As explained above, however, Taylor never waived his fundamental Sixth Amendment right to jury sentencing.

Moreover, Taylor's decision to plead guilty does not differentiate his case from the 10 others so as to permit his execution. Relief was granted in those cases because the death sentences were unconstitutional, not because the defendants opted to go to trial rather than plead guilty. Indeed, the Constitution does not go out the window at sentencing just because a defendant pleads guilty. On the contrary, the law “expressly requires a bifurcated proceeding— on the issue of guilt (guilt stage) and on the issue of punishment (punishment stage). . . . [I]n Missouri the guilt stage and the punishment stage are discrete; [] *each is subject to constitutional proscriptions.*” Bibb, 702 S.W.2d at 464 (emphasis added). See also Blakely, 542 U.S. at 313 (vacating sentence of defendant who pleaded guilty because he was denied the constitutional “*right* to insist that the prosecutor prove

to a jury all facts legally essential to the punishment”) (emphasis in original); Montour, 157 P.3d at 501 (same). Taylor’s admission of guilt does not authorize a death sentence unconstitutionally based on judge-found facts.

Likewise, the fact that some of the 10 other defendants initially had some jury participation in sentencing – before a judge stepped in and found the facts required for a death sentence – does not set their cases apart from Taylor’s in any meaningful way. Regardless of whether a jury was initially asked to find sentencing facts, the singular reason that life imprisonment was ultimately ordered in all 10 of those cases is that no jury had made all the factual findings needed to impose a capital sentence. For example, even though Bobby Joe Mayes’s jury had initially “found the presence of aggravating circumstances,” this Court ordered life imprisonment because the record was “devoid of findings of mitigating circumstances or as to what circumstances the jurors relied upon when not finding that these aggravators warranted an imposition of death.” Mayes, 150 S.W.3d at 291. Because a life sentence was required there, one is especially necessary here given that Taylor never had *any* jury participation at sentencing.

The equal protection question is: “[H]as the state identified a compelling state interest that justifies the distinction [it wishes to] draw[] between [Taylor and the 10 other defendants]?” Bernat, 194 S.W.3d at 869. Again, the answer is no. There is no difference between Taylor’s case and those of the 10

others that offers even a reasonable basis for executing him, let alone a *compelling* one. The others faced death based on the factual findings of one judge, in violation of their fundamental right to a jury. Taylor is in the same position, and the State's desire to execute him fails both strict scrutiny and rational-basis review.

C. Executing Taylor Would Deprive Him Of Life Without Due Process Of Law, Especially Given That His Death Sentence Is Disproportionate To Life Sentences Imposed In Similar Cases

The “sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause.” Gardner v. Florida, 430 U.S. 349, 358 (1977). “Missouri’s due process provision parallels its federal counterpart, and in the past this Court has treated the state and federal due process clauses as equivalent.” Jamison v. State Dep’t. of Social Servs., 218 S.W.3d 399, 405 n.7 (Mo. banc 2007) (citations omitted).

A ““constant theme”” of the United States Supreme Court’s capital jurisprudence ““has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner.”” Lewis v. Jeffers, 497 U.S. 764, 776 (1990) (quoting Barclay v. Florida, 463 U.S. 939, 960 (1983) (Stevens, J., concurring)). The Court has “emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally.” Parker v. Dugger, 498 U.S. 308, 321

(1991) (citations omitted). In fact, the guilt/sentence “bifurcated hearing format was adopted in Missouri ‘to avoid the imposition of the death penalty in . . . [an] arbitrary and capricious manner.’” Bibb, 702 S.W.2d at 464 (citation omitted).

In cases such as Taylor’s, “the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.” Caldwell v. Mississippi, 472 U.S. 320, 329 (1985) (quoting California v. Ramos, 463 U.S. 992, 998-999 (1983)).

Due process requires application of this Court’s Whitfield ruling to Taylor’s case. Just as there, Taylor is under a death sentence unconstitutionally based on judge-found facts. Also as there, Taylor’s death sentence was affirmed on direct appeal before Ring established the unconstitutionality of his sentence. As explained above, the fact that Whitfield went to trial and had a jury initially consider his sentence – before a judge stepped in and found the requisite facts – makes no difference because it was the judicial fact-finding, not the sentencing jury’s deadlock, that rendered Whitfield’s death sentence unconstitutional. Taylor is therefore entitled to the same retroactive application of Ring that Whitfield received because the two men are in constitutionally indistinguishable positions.

As the United States Supreme Court decided in Hicks v. Oklahoma, 447 U.S. 343 (1980), the Fourteenth Amendment’s Due Process Clause requires evenhanded, non-arbitrary application of state rules of law at sentencing. There,

Hicks had been sentenced to a 40-year mandatory minimum term of imprisonment pursuant to a state statute later declared unconstitutional by the Oklahoma Court of Criminal Appeals. That same court, in Hicks’s case, “acknowledged that the provision was unconstitutional, but nonetheless affirmed [his] conviction and sentence, reasoning that [he] was not prejudiced . . . since his sentence was within the [10-40 year] range of punishment that could have been imposed” had the invalid mandatory minimum not applied. *Id.* at 345.

The Supreme Court reversed, finding it a “frail conjecture” that a “jury *might* have imposed a sentence equally as harsh as that mandated by the invalid [statute].” *Id.* at 346 (emphasis in original). The Court also rejected Oklahoma’s argument that the right at issue was “exclusively [of] state concern,” holding instead that Hicks had a constitutionally “substantial and legitimate expectation” that he would be sentenced not under an invalid law, but rather “to the extent determined by the jury in the exercise of its statutory discretion.” *Id.* That expectation, although created by state law, was “one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.” *Id.*

This Court has ruled, as a matter of Missouri law, that defendants sentenced to death based on judge-found facts are entitled to retroactive application of *Ring* to set aside their unconstitutional sentences. This created for Taylor a “substantial and legitimate expectation” that, because he is in that position, he too

is entitled to Ring's retroactive application. "Where," as here, "a State has provided for [retroactive application of Ring], it is not correct to say that the defendant's interest in [that application] is merely a matter of state procedural law." Id. And it is no more than "frail conjecture" to speculate that, had Taylor been informed of and asked to waive his Sixth Amendment right to jury sentencing 19 years ago, he would have done so. To execute Taylor despite the unconstitutionality of his death sentence would be an "arbitrary disregard" of his rights and thus a "denial of due process of law." Id. See also Toney v. Gammon, 79 F.3d 693, 699-700 (8th Cir. 1996) (granting federal habeas relief where Missouri Supreme Court ruled, after defendant was sentenced to two consecutive life terms, that applicable statute gave judge discretion to impose concurrent or consecutive terms; "Toney has a constitutionally protected liberty interest in the sentence resulting from the exercise of this discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.") (citing Hicks).

Taylor's due-process entitlement to a life sentence is especially clear given the fact that his death sentence is "disproportionate to the penalty imposed in similar cases." Section 565.035.3(3), RSMo.

"While [proportionality] review is not mandated by the Constitution, once in place it must be conducted consistently with the Due Process Clause."

Tokar v. Bowersox, 198 F.3d 1039, 1052 (8th Cir. 1999). See also Hicks; Wilkins v. Bowersox, 933 F. Supp. 1496, 1525 (W.D.Mo. 1996) (granting federal habeas relief where defendant “had a substantial and legitimate expectation that the Missouri Supreme Court’s proportionality review would be a thorough and meaningful one However, the record shows that the court did not consider certain facts necessary for an adequate review in this case.”) (citing Hicks).

Proportionality review is “‘an additional safeguard against arbitrary and capricious sentencing and [is designed] to promote the evenhanded, rational and consistent imposition of death sentences.’ In other words, it is designed to prevent ‘freakish and wanton application of the death penalty.’” State v. Barton, 240 S.W.3d 693, 709 (Mo. banc 2007) (quoting State v. Ramsey, 864 S.W.2d 320, 328 (Mo. banc 1993)).

This Court has a continuing duty to conduct proportionality review. See, e.g., State ex rel. Amrine v. Roper, 102 S.W.3d 541, 547 (Mo. banc 2003). To “determine whether a sentence of death is excessive or disproportionate in comparison to the penalty imposed in similar cases, ‘[s]ection 565.035.3 requires consideration of all factually similar cases . . . including those resulting in a sentence of life imprisonment.’” State v. Davis, 318 S.W.3d 618, 643 (Mo. banc 2010) (quoting State v. Anderson, 306 S.W.3d 529, 545 (Mo. banc 2010) (Breckenridge, J., concurring)) (emphasis added).

Whether compared to similar cases in which a death sentence was reduced to life imprisonment because of Ring/Whitfield error, or those in which a life sentence was originally imposed, Taylor's death sentence is disproportionate.

First, Taylor's death sentence is disproportionate to the life sentences imposed in similar cases of Ring/Whitfield error. This Court ordered life imprisonment for Bobby Joe Mayes, for example, despite his raping and killing his 14-year-old step-daughter, Amanda, and killing his wife, Sondra:

Amanda had been subdued by a blow to the head and then draped over the edge of her bed and stabbed in the back approximately 21 times. . . . Experts testified that in the 15 minutes following the stabbings, Amanda lost about half of her total blood volume. She died of exsanguination and lack of oxygen due to the aspiration of some of her gastric contents into her lungs.

Amanda was partially undressed, and her panties were pulled down around her ankles. Medical witnesses testified that sperm, consistent with Defendant's DNA, was found on the blood-stained bed sheet. Some of the sperm appeared to be on top of the blood, thereby indicating that the sperm was deposited after the stabbings. The abnormal size of her rectum

was consistent with either sodomy or with a spasm caused by strangulation. Amanda was also strangled with some type of cord, leaving a very pronounced ligature mark around her neck.

Sondra had been stabbed with a knife on her breasts and her left ear. The knife was also thrust into her back, lodged between her ribs and pulled laterally between the bones. It entered her chest cavity and punctured her left lung and blood vessels. She also had defensive-type lacerations on her hands and left forearm. Like her daughter, Sondra died from exsanguination.

State v. Mayes, 63 S.W.3d 615, 622-623 (Mo. banc 2001). Rufus James Ervin, whose initial death sentence this Court found proportionate to Taylor's, dragged a naked man out of his trailer by something tied around his neck, repeatedly struck his head with a brick, walked away, returned and then struck his head three or four times more before throwing his body into a fire. See State v. Ervin, 979 S.W.2d 149, 152-153 and 166 (Mo. banc 1998). Antonio Richardson, whose initial death sentence this Court also found proportionate to Taylor's, was convicted of murdering a young woman and her sister by throwing them off a bridge 70 feet above the Mississippi River. Evidence was also presented that Richardson had raped one of the sisters. See State v. Richardson, 923 S.W.2d 301, 307-308 (Mo. banc 1996); Taylor, 929 S.W.2d at 222. Keith Smith, whose death sentence this

Court found proportionate to Richardson's, choked a minister with his arm, then with an electrical cord, and then stabbed the minister to death before choking the minister's housekeeper and stabbing her to death with a pair of scissors. See State v. Smith, 944 S.W.2d 901, 909 and 925 (Mo. banc 1997). Kenneth Thompson beat both of his parents-in-law to death with a splitting maul handle, leaving his father-in-law's "brain visible," before raping his wife and then abducting her and their two children. State v. Thompson, 985 S.W.2d 779, 783 (Mo. banc 1999).

Second, Taylor's death sentence is disproportionate to the life sentences imposed upon conviction in other murder cases where the defendant had sexually assaulted the victim. Frankey Coday, for example, was sentenced to life imprisonment for raping and killing a teenage girl in concert with an accomplice:

There was a massive injury to the back of [Victim's] head, which caused a skull fracture, extensive brain injury and hemorrhage around her brain. The blow to the back of Victim's head also dislocated her spine. . . . Victim died a fairly slow death and may have lingered up to an hour after the mortal blow was struck. . . . Before Victim died, she was severely beaten. She had suffered at least 10, and probably more, fist-type blows to her head. . . . There were deep scratches on her inner thighs which were consistent with being "sawed on" with a briar.

These injuries were torture-type injuries designed to inflict pain. Victim's external genitalia were bruised and swollen, indicating forcible sexual intercourse. She was sexually assaulted numerous times, and sperm was found on swabs taken from Victim's vagina and rectum. The briar found in Victim's vagina was probably inserted after she was dead.

Coday v. State, 179 S.W.3d 343, 347-348 (Mo. App. 2005). See also State v. Ware, 872 S.W.2d 601, 603 (Mo. App. 1994) (affirming life sentence for 22-year-old defendant who, after raping 14-year-old victim, "used some steel cable he found by the alley, and [] hanged her from the side-view mirror on a nearby dump truck"); State v. Johnson, ___ S.W.3d ___, 2010 WL 4321600, at *1 (Mo. App. Nov. 2, 2010) (affirming life sentence for man who raped a woman and then "strangled [her] to death in her home").

Third, Taylor's death sentence is disproportionate to the life sentences imposed in the many cases where the defendant, unlike Taylor, committed *multiple* heinous murders. See, e.g., State v. Barriner, 210 S.W.3d 285, 293 (Mo. App. 2006) (affirming life sentence for man who abducted a woman and her grandmother, took them to the bank to cash a \$1,000 check drawn on the woman's account, and later "vaginally and anally violated" the woman before stabbing both her and her grandmother to death); State v. Futo, 990 S.W.2d 7 (Mo. App. 1999)

(affirming life sentence for man who fatally beat, strangled, stabbed and/or shot his mother, father and two younger brothers); State v. Rush, 872 S.W.2d 127, 128 (Mo. App. 1994) (affirming life sentence for man who “used an ice pick, several knives and boards to commit the felony of assault first degree on Robbie McLemore, and to murder her six and eight-year-old children, Robbie McLemore and Lekisha McLemore”); State v. Flear, 851 S.W.2d 582 (Mo. App. 1993) (affirming life sentence for man who drowned a three-year-old boy, and the boy’s 15-year-old babysitter, in a bathtub of scalding water); State v. Baskerville, 616 S.W.2d 839, 841 (Mo. 1981) (affirming life sentence for defendant who killed a man, his sister, and the sister’s “small child,” who “was attempting to hide under a table” when defendant shot him).

Compared to the life sentences ordered for these horrific crimes, Taylor’s death sentence is disproportionate and must be set aside. Several defendants, whose crimes are similar to Taylor’s, are now serving life terms for the very same reason – lack of jury fact-finding – that Taylor’s sentence is unlawful. Many other defendants, each guilty of one or more terrible murders, received a life sentence upon conviction. To execute Taylor despite sparing these others would not be “evenhanded, rational and consistent,” but rather a “freakish and wanton application of the death penalty.” Barton, 240 S.W.3d at 709.

CONCLUSION

“[T]he cornerstone of any civilized system of justice is that the rules are applied evenly to everyone, no matter how despicable the crime.” State v. Nunley, 923 S.W.2d 911, 927 (Mo. banc 1996) (Holstein, C.J., dissenting). Taylor is one of only three people left in Missouri whose death sentence is based on facts found by a judge rather than a jury. He asks only for the same relief already given to the 10 individuals once in his position: a life sentence.

WHEREFORE, Taylor respectfully requests that this Court grant him a permanent writ of habeas corpus ordering him imprisoned for life without eligibility for probation, parole or release, except by act of the governor, and order such other relief as may be just and proper.

DATED: November __, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Robert W. Lundt, hereby certify as follows:

The attached Brief of Petitioner Michael Anthony Taylor complies with the limitations contained in Missouri Supreme Court Rule 84.06(b). The brief was prepared using Microsoft Word, in 14-point Times New Roman font.

Excluding the cover page, signature block and this Certificate, there are 10,366 words in the brief according to Microsoft Word's word count program.

The CD-ROM filed with the attached brief contains a copy of the brief. The CD-ROM has been scanned for viruses, and is virus-free.

On this ___ day of November, 2010, a true and correct copy of the attached brief, and a CD-ROM containing a true and correct copy of the brief, were sent by Federal Express to:

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APPENDIX

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