

**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

**REPLY BRIEF OF PETITIONER
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INTRODUCTION

The first question this Court should ask the State at oral argument is to identify where, in the transcript of his 1991 guilty-plea hearing, Taylor knowingly surrendered the Sixth Amendment right to jury sentencing first recognized in Ring v. Arizona, 536 U.S. 584 (2002), and made retroactive in State v. Whitfield, 107 S.W.3d 253 (Mo. banc 2003). The State will be unable to do this for the same reason it fails to do so anywhere in its brief: such waiver never happened.

The State tries to fabricate a waiver of Taylor’s Sixth Amendment right by asserting that he “waived jury sentencing” in the course of pleading guilty. First, that is wrong: “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.” State v. Taylor, 929 S.W.2d 209, 217 (Mo. banc 1996). Second, any theoretical jury waiver in 1991 could have concerned only Missouri statutory law – the subject of the quotation above – not the Sixth Amendment right first recognized in 2002. As the cases make clear, that right is broader than Missouri statutory law because it does not depend on whether the State “agrees” to jury sentencing and remains available even to a defendant who pleads guilty.

Because Taylor never waived the Sixth Amendment right, which applies retroactively to his case, he is entitled to the same relief for its violation already given to 10 other capital defendants once in his position: a life sentence.

ARGUMENT

I. Taylor Never Waived His Sixth Amendment Right to Jury Sentencing

As the *judges and prosecutors* who appear in support of Taylor urge, his death sentence must be set aside for being in excess of that authorized by law. In response, the State does not dispute that Taylor was sentenced to die based on a judge's findings of fact, or that Missouri defendants have a retroactive Sixth Amendment right not to be so condemned because such findings must be made by a jury. Because the State cannot dispute these facts, it offers one – and only one – reason to take Taylor's life despite his Sixth Amendment right to jury sentencing not being honored: the State says Taylor "waived jury sentencing" when he pleaded guilty in 1991.

That is simply untrue. Because Taylor pleaded guilty to a homicide offense, Missouri statutory law automatically denied him jury sentencing unless the State agreed to it. See Section 565.006.2, RSMo. The State did not agree, and so Taylor was sentenced by a judge. There is a fundamental difference, which the State overlooks, between being *denied* a right and *waiving* a right. As this Court plainly held in 1996, "Taylor did not waive sentencing by a jury" because, by operation of statute, he was automatically denied any entitlement to jury sentencing that he could have waived. Taylor, 929 S.W.2d at 217.

The State notes this Court’s holding that Taylor did not waive jury sentencing, but fails to suggest why it might be wrong or inapplicable. In fact, it is neither. The Court reached its holding in the context of Taylor’s argument that his guilty plea “was not knowingly made because he was not informed a jury could sentence him if the State consented under section 565.006.2, RSMo.” Id. “As is obvious from the language of the statute,” this Court explained, “jury sentencing after a guilty plea is not a right for the defendant to waive, rather a privilege for the State to grant.” Id. Thus, with respect to a right to post-plea jury sentencing, “there was nothing of which to inform” Taylor. Id. Because a “knowing and voluntary plea does not require [a] defendant be told details irrelevant to the decision at hand,” the “[f]ailure to inform Taylor of the possibility of sentencing by a jury did not render his guilty plea unknowing or involuntary.” Id.

The State remarks that the holding “indicates Petitioner had no right to jury sentencing after his guilty plea.” (Br. at 26) Of course, the reason Taylor “had no right to jury sentencing” after pleading guilty was because, by statute, “he could only obtain jury sentencing if the State agreed to it. The State did not agree.” Taylor, 929 S.W.2d at 217. This was why Taylor “had no right” under Missouri statutory law to jury sentencing; it was not because he waived such sentencing. Because he pleaded guilty, Taylor “never obtained nor possessed the right to a jury for imposition of punishment.” Id. at 219. There is no reason to

conclude that this Court, in holding that “Taylor did not waive sentencing by a jury,” actually meant the opposite of what it said.

The State’s flatly wrong claim that Taylor “waived jury sentencing” permeates its brief, rendering equally wrong every argument based on that flawed premise.

For example, the State tries to distinguish Blakely v. Washington, 542 U.S. 296 (2004), which makes plain that defendants who plead guilty retain the Sixth Amendment right to jury sentencing, by saying that “was not a case in which a defendant deliberately waived jury sentencing.” (Br. at 27) Neither is this case. Like Blakely, Taylor pleaded guilty, did not waive jury sentencing, and received an enhanced penalty based on facts found by a judge. Writing for the Court, Justice Scalia explained that Blakely’s sentence had to be vacated because it was based on judge-found facts, and “every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essentially to the punishment.” 542 U.S. at 313 (emphasis in original). “If appropriate waivers are procured,” he explained, “States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty.” Id. at 310. But no such waiver was procured from Blakely, and neither was one obtained from Taylor. Both men were sentenced in violation of their Sixth Amendment right.

The State also relies on its faulty premise that Taylor “waived jury sentencing” in attempting to distinguish Halbert v. Michigan, 545 U.S. 605 (2005). Rejecting the claim that Halbert impliedly waived a then-unrecognized right to appointed appellate counsel because he entered a plea of *nolo contendere* at a time when the courts of his state routinely denied such counsel to such defendants, the Supreme Court explained: “At the time he entered his plea, Halbert . . . had no recognized right to appointed appellate counsel he could elect to forgo.” Id. at 623. The same is true here, as Taylor had no recognized Sixth Amendment right to jury sentencing when he pleaded guilty in 1991: the Supreme Court was then 11 years from recognizing that right in the 2002 Ring decision.

The State says “the right was well known and protected in Missouri well before Ring” (Br. at 25), but that is wrong. Before Ring, Missouri’s provision for jury sentencing in capital cases was the statutory requirement that a defendant convicted after a jury trial be sentenced by a jury unless the defendant, state and court all agreed to judicial sentencing. See Section 565.006.3, RSMo. For those who decided to plead guilty, however, jury sentencing was not a right: it was available only with the State’s consent. See Section 565.006.2, RSMo. As this Court decided in Whitfield, the Ring decision confers a retroactive Sixth Amendment *right* on Missouri capital defendants not to be executed based on the factual findings of a judge.

Taylor has that right even though he pleaded guilty. Blakely holds that a judge may not find the facts essential to punishment simply because, as in Taylor’s case, the defendant pleaded guilty and state law authorized judicial sentencing. Moreover, Whitfield applies to defendants, like Taylor, who plead guilty and are automatically denied – and thus do not waive – jury sentencing. Whitfield did not turn on whether the defendant had contested or admitted guilt, but whether a judge or a jury had found the facts to order capital punishment. Because a judge had done so, it was “the very entry of the death sentence that [was] held to be unconstitutional, since made without the very jury findings required for imposition of the death penalty.” Whitfield, 107 S.W.3d at 271 n.23. Such a death sentence is unconstitutional regardless of whether a jury finds guilt or the defendant admits it: the sentence is unlawful because the factual findings required to authorize it were made by a judge.

Taylor’s is just such a sentence. It “is unconstitutional because it violates his right to be sentenced on determinations made by a jury.” Id. at 271. Such error is not harmless, id. at 264, and Taylor must “be resentenced to a term of life imprisonment.” Id. at 272 (citing Section 565.040.2, RSMo). See also State v. Thompson, 134 S.W.3d 32, 33 (Mo. banc 2004) (“In cases where a defendant is sentenced to death by a judge in violation of the Sixth Amendment, the only possible sentence is life imprisonment.”).

Nothing in Missouri law says that a defendant's Sixth Amendment right is waived by operation of the statute denying jury sentencing to those who plead guilty. Indeed, such a ruling is precluded by the fact that state and federal rights are separate: waiving one does not automatically waive the other, even when the two concern the same subject matter. See Halbert, 545 U.S. at 623 n.7 (“[W]hether *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). This applies with special force in Taylor's case, where the state and federal rights in question are not congruent. Even if this Court were to reverse itself and hold that Taylor waived a state right to jury sentencing by pleading guilty, that would not – and could not – mean that he thereby waived his broader, then-unrecognized Sixth Amendment right.

That right can be waived, but Taylor did not waive it and Halbert holds that his plea cannot be deemed, two decades later, to have waived it implicitly. The State says that, “in contrast to Halbert, Petitioner's waiver was not ‘implicit.’ It was explicit, as detailed on the record by the plea court.” (Br. at 27) Again, that is simply wrong.

There is no mention of the Sixth Amendment right in Taylor's guilty-plea transcript, let alone an informed decision of his to give it up. Although the State quotes extensively from the transcript, it shows only that Taylor understood

he would be sentenced by a judge because he was pleading guilty. In 1991, that is precisely what the law prescribed. Taylor thus was not informed of, or asked to waive, any right to post-plea jury sentencing.

Halbert instructs that Taylor's mere knowledge of the automatic consequence of his guilty plea – sentencing by a judge – cannot be used years later to pretend that he made an intelligent, deliberate choice to surrender his then-unknown Sixth Amendment right. Just as in People v. Montour, 157 P.3d 489 (Colo. banc 2007), because Taylor's "guilty plea automatically forfeited his right to a jury trial on his sentence," he was denied the very entitlement the State says he waived. Id. at 500. Such denial is not a waiver even if, unlike here, "the record is awash with advisements by the district court and statements of waiver." Id.

The State tries to distinguish Montour by claiming that, unlike the defendant there, Taylor pleaded guilty "because he wanted to avoid jury sentencing." (Br. at 31) Indeed, the State suddenly makes much of the post-conviction relief hearing that occurred after imposition of Taylor's 1991 death sentence. The State claims it shows that Taylor pleaded guilty "for the purpose of avoiding being sentenced by a jury because [h]e thought a jury would certainly sentence him to death" (Br. at 17) or that "he thought a jury was more likely to sentence him to death than the judge to whom he pleaded guilty." (Br. at 28)

The State opts not to provide a copy the PCR transcript. But even if its characterization of what Taylor said were correct – it is not – the PCR hearing does the State no good.

First, the hearing occurred *after* Taylor pleaded guilty and thus offers no support for the State’s unsubstantiated claim that he waived his jury right *when* he pleaded guilty. Waiver of that right cannot be inferred after the fact, but “must appear from the record with unmistakable clarity.” State v. Bibb, 702 S.W.2d 462, 466 (Mo. banc 1985). See also Fuentes v. Shevin, 407 U.S. 67, 95 (1972) (A “waiver of constitutional rights in any context must, at the very least, be clear.”). In an opinion citing Bibb, Judge Breckenridge explained that because the record “shows no written or oral waiver by [the defendant] of his right to a jury trial . . . , there is no basis in the record to determine that [he] knowingly, intelligently, and voluntarily waived his right to trial by jury.” State v. Freeman, 189 S.W.3d 605, 610 (Mo. App. 2006). What was true in Freeman is true here: “the record fails to show any affirmative waiver of the right to a jury.” Id. at 612.

Second, because the PCR hearing concerned only Taylor’s 1991 death sentence, which this Court set aside in 1993, it has no bearing on the question in this case: whether Taylor’s 1994 death sentence is constitutional. It thus is irrelevant that, at his 1991 sentencing, Taylor “did not complain about the lack [of] jury sentencing.” (Br. at 28) Moreover, neither Joseph Whitfield, nor

Antonio Richardson, nor Keith Smith – all of whose death sentences were affirmed on direct appeal before Ring, just like Taylor’s – evidently objected on Ring grounds when they were initially sentenced based on judge-found facts. Yet they all got the benefit of Ring. In any case, even if Taylor’s now-moot 1991 death sentence were at issue, his “failure to object when his case proceeded to [sentencing] without a jury is insufficient to constitute a knowing, voluntary, and intelligent waiver of his right to a jury.” Freeman, 189 S.W.3d at 611.

Taylor is not arguing, as the State wrongly claims, that he waived jury sentencing by pleading guilty but that the “waiver was vacated when the case was remanded for sentencing before a new judge.” (Br. at 32) That is emphatically *not* Taylor’s position. He argues instead that no waiver of his Sixth Amendment right ever occurred – under either Missouri or federal law – and thus that the State has failed to prove its one and only argument for carrying out his unconstitutional death sentence.

Whatever the State says Taylor “wanted” in 1991, the fact is that no *waiver* of his right to post-plea jury sentencing appears in the record. The guilty-plea transcript simply is bereft of an unmistakably clear statement of Taylor’s constituting a knowing, voluntary and intelligent waiver of a known Sixth Amendment right to jury sentencing.

What the State is really arguing is that Taylor *would have waived* that right because he supposedly “wanted to avoid jury sentencing.” But that argument concedes that Taylor did not *actually* waive the right. And it is “clearly incorrect” to excuse the lack of a jury waiver on the pretense that no injustice occurred simply because a defendant does not somehow prove in a later proceeding that he “would have insisted on a jury” if timely informed of his right to one. Freeman, 189 S.W.3d at 611. In any event, there can be no clearer proof of Taylor’s desire for a sentencing jury than his asking for one before being given his extant sentence. It is Taylor’s second death sentence that is at issue, and there is no doubt that he asked for a jury prior to a judge condemning him in 1994.

The only right that Taylor clearly waived was his right to *trial* by jury, which did not simultaneously waive his separate Sixth Amendment right to a *sentence* based on the findings of a jury “rather than a lone employee of the State.” Blakely, 542 U.S. at 314. See also Montour, 157 P.3d at 497 (“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.”).

Because Taylor did not waive his Sixth Amendment right, and specifically asked for a jury before being sentenced to death, his case differs materially from the non-Missouri decisions on which the State relies. (Br. 29-33) See Colwell v. State, 59 P.3d 463, 466 and 474 (Nev. 2002) (pre-Blakely decision

where defendant “ asked that he be put to death” and court “express[ed] no opinion on the effect Ring might have if applied in a case where a capital defendant pleaded guilty but unsuccessfully sought to have a jury determine his sentence.”); State v. Downs, 604 S.E.2d 377, 379 (S.C. 2004) (“When the judge asked if Appellant wanted to impanel a jury, admit guilt, and ask the jury to decide the sentence, Appellant answered in the negative.”); Leone v. State, 797 N.E.2d 743, 750 (Ind. 2003) (pre-Blakely decision, affirming life sentence, where judge had “questioned Leone several times to ensure that he understood his rights and was fully aware that he waived those rights”); People v. Altom, 788 N.E.2d 55, 61 (Ill. App. 2003) (pre-Blakely decision, affirming 50-year sentence, where court rejected Ring argument without elaboration “because [defendant] pleaded guilty”); State v. Piper, 709 N.W.2d 783, 806 and 809 (S.D. 2006) (“Piper specifically asked to be sentenced by the circuit court” and “expressly declin[ed] the circuit court’s offer to empanel a jury to consider his sentence.”).

This is a case where “the stake is of the highest magnitude— the defendant’s life.” Whitfield, 107 S.W.3d at 267. For all the State’s speculation as to what it thinks Taylor “wanted” in 1991, the fact is that it has not identified any actual waiver – let alone an unmistakably clear one – of Taylor’s fundamental Sixth Amendment right.

Ours is not a system of justice that should put a man to death based on

a collective suspension of disbelief or a prosecutor's guess of what the man might have done 20 years ago – *but did not do* – if circumstances had been different. The State has asserted waiver without actually identifying one. That should be the end of the matter.

II. The State Offers No Valid Reason to Execute Taylor Despite the Violation of his Fourteenth Amendment Rights

Unable to identify a waiver of Taylor's Sixth Amendment right, the State likewise identifies no reason to execute him despite his death sentence also violating the Fourteenth Amendment.

A. Taylor's Death Sentence Violates the Equal Protection Clause

The State devotes two sentences to responding to Taylor's equal-protection argument, saying that Taylor is not similarly situated to the 10 capital defendants who also faced death based on judge-found facts because "each of the ten individuals cited by Petitioner had not waived jury sentencing." (Br. at 34)

Taylor did not waive jury sentencing either. He is in precisely the same position as the 10 others with regard to the Sixth Amendment violation: none of these men waived the constitutional right to jury sentencing, but all of them faced execution based on facts found by a judge. To spare the 10 while condemning Taylor would deny him "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) (internal quotation marks and citations omitted).

Because fundamental rights are at stake, the State must explain why executing Taylor while sparing the 10 others is “necessary to accomplish a compelling state interest.” Id. It has not even tried to do so. Indeed, there is no good reason to ignore the unconstitutionality of Taylor’s death sentence – and the relief given to others in the same position – and just put him to death anyway.

B. Taylor’s Death Sentence Violates the Due Process Clause

The State says not a word about Hicks v. Oklahoma, 447 U.S. 343 (1980), nor does it try to explain why that decision and those applying it do not require Taylor’s death sentence to be set aside on due-process grounds. This Court’s holding in Whitfield – that capital defendants in Missouri have a retroactive Sixth Amendment right not to be executed based on judge-found facts – created for Taylor a constitutionally “substantial and legitimate expectation” not to be executed under such circumstances either. Hicks, 447 U.S. at 346. To take his life anyway 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 (8th Cir. 1996) (finding federal due-process violation where defendant had received consecutive sentences under statute that Missouri Supreme Court later interpreted to permit concurrent sentences).

Next is the problem that Taylor's death sentence is "disproportionate to the penalty imposed in similar cases," Section 565.035.3(3), RSMo, which Taylor raised in his May 2010 petition and has maintained throughout this case. (Petition at 33-39; Habeas Brief at 36-42) The State says the "validity of the Ring - Whitfield claim does not make petitioner's murder more or less horrendous." (Br. at 34) But that is not Taylor's argument. It is that, "[w]hether 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." (Habeas Brief at 38) That is why Taylor's death sentence has been compared to the many life sentences imposed where the *facts* of the crime were equally heinous, if not more so. (Habeas Brief at 38-42)

This is not an argument, as the State sees it, that "no death sentence can stand if the facts of the case are not more aggravated tha[n] those in a case where the jury selected life imprisonment." (Br. at 36) It is an argument that, compared specifically to the life sentences imposed in the horrific cases cited – none of which the State bothers to address – Taylor's death sentence is "disproportionate in light of the crime [and] the defendant." State v. Davis, 318 S.W.3d 618, 643-644 (Mo. banc 2010) (citation omitted).

Concerning Davis, in which this Court explained that proportionality review “requires consideration of all factually similar cases . . . including those resulting in a sentence of life imprisonment,” 318 S.W.3d at 643 (citation omitted), the State says Taylor “does not assert or demonstrate the decision applies retroactive[ly].” (Br. at 35)

He does not have to. This Court has a continuing duty to conduct proportionality review, see State ex rel. Amrine v. Roper, 102 S.W.3d 541, 547 (Mo. banc 2003), which obviates the need for retroactive application of Davis. In fact, this Court’s holding – that proportionality review must consider both life and death sentences – marked a “return to this Court’s original jurisprudence.” Davis, 318 S.W.3d at 644. See also State v. Bolder, 635 S.W.2d 673, 684-685 (Mo. banc 1982) (“Our inquiry would be unduly slanted were we to compare only those cases in which the death penalty has been imposed.”).

Although the State notes Taylor’s “seven prior felony convictions” (Br. at 37), it omits to mention that those convictions – six for burglary and one for tampering – apparently all stemmed from closely related activity in 1984, when Taylor turned 17 years old. (Exhibit A to Petition ¶ II.A) Considering Taylor’s atrocious childhood of physical and sexual abuse, his mental health, the fact that he committed his crime at the age of 22 under the influence of drugs, and his decision

to *admit his guilt* rather than deny what he had done (Habeas Brief at 3-5), all of which the State ignores, he is not a defendant deserving of execution.

Compare Taylor to Frankey Coday. After raping, torturing and killing his victim, Coday boasted at parties that he “would like to ‘do’ another young girl,” that “if [he] had another chance, [he] would do it again” and that “he could kill people and get away with it.” Coday got a life sentence. Coday v. State, 179 S.W.3d 343, 348-349 (Mo. App. 2005). Consider also David Ware. Like Taylor, he was 22 years old at the time he raped and killed a teenage girl. Also like Taylor, there was evidence that he had been under the influence of drugs at the time of his actions. Unlike Taylor, he got a life sentence. State v. Ware, 872 S.W.2d 601, 602-603 (Mo. App. 1994). Or take Harry Rush. An adjudicated prior and persistent offender, he used “an ice pick, several knives and boards” on his ex-girlfriend and then killed her six- and eight-year-old children “to eliminate eye witnesses to the assault” before stealing her car so he could sell it “to secure funds to purchase cocaine.” State v. Rush, 872 S.W.2d 127, 128 (Mo. App. 1994). He, too, got a life sentence.

The strength of the evidence against Taylor is not at issue given that he admitted his guilt. Considering the facts of his life and his crime as compared to those of unrepentant defendants spared execution for similar or worse acts, Taylor’s death sentence is disproportionate.

Taylor has a constitutionally “substantial and legitimate expectation that the Missouri Supreme Court’s proportionality review [will] be a thorough and meaningful one.” Wilkins v. Bowersox, 933 F. Supp. 1496, 1525 (W.D.Mo. 1996) (citing Hicks). In the years since this Court found Taylor’s death sentence proportionate in 1996, several defendants guilty of similar or worse crimes have received life sentences. To execute Taylor despite sparing those others would not be “evenhanded, rational and consistent,” but a “freakish and wanton application of the death penalty.” State v. Barton, 240 S.W.3d 693, 709 (Mo. banc 2007).

C. Taylor’s Habeas Petition is Proper

This Court has not adjudicated the constitutionality of Taylor’s death sentence in light of Whitfield. Taylor has filed one habeas petition – this one – seeking relief under that decision, which states that a defendant is “entitled to the same remedy in habeas corpus” as was given to Whitfield in recalling the mandate because his death sentence was based on judge-found facts. Whitfield, 107 S.W.3d at 269 n.19.

Taylor previously sought relief in two motions to recall the mandate, each of which was denied in a one-sentence order stating in full: “Appellant’s motion to recall the mandate overruled.” (Exhibits P and Q to Petition) Alluding to those orders, the State asks this Court to “deny the petition because the Ring issue has been raised and rejected twice.” (Br. at 17)

But “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 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). The State complains that Breck was a civil case (Br. at 16-17), but does not explain why it does not mean what it says. Anyway, the rule stated in Breck appears in criminal cases that preceded and followed it. See, e.g., State v. Dodson, 556 S.W.2d 938, 945 (Mo. App. 1977); State v. Nolan, 418 S.W.2d 51, 53 (Mo. 1967); Ex parte Clark, 106 S.W. 990, 996 (Mo. banc 1907).

The writ of habeas corpus can be abused, but it has not been here. In a similar case, the defendant brought a second habeas petition – alleging that his sentence was unlawfully based on facts not alleged in the information – after his first petition on that ground was denied ““for failure to state a claim upon which relief may be granted.”” Nolan, 418 S.W.2d at 53 (quoting order). Citing the “prevailing view” that “proceedings in habeas corpus, not disposed of on the merits, are not res adjudicata,” this Court held that its one-sentence denial of Nolan’s first petition did not preclude his second: “If the infirmity in the information existed . . . at the time of the [first] habeas corpus application, and was not disposed of, it still exists, and it constitutes a ground for collateral attack.” Id. The same is true here, as the Sixth Amendment infirmity in Taylor’s death

sentence existed at the time of his motions to recall the mandate, but “was not disposed of” and thus warrants habeas relief.

The “privilege of the writ of habeas corpus shall never be suspended,” Mo. Const. art. I § 12, and the need for its enforcement is especially compelling where, as here, a man’s life hangs in the balance. Taylor asks in his habeas petition only for what Whitfield says is available in habeas. His petition is proper.

CONCLUSION

The State identifies neither a waiver of Taylor's Sixth Amendment right nor any valid reason to ignore his unconstitutional sentence and execute him anyway. Taylor is virtually the only person left in Missouri still under a death sentence based on judge-found facts, and all that he asks for is the same life sentence already given to 10 other people once in his position. Several judges and prosecutors support his request, including a former Chief Justice of this Court. Taylor's petition should be granted.

DATED: December 17, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Matthew B. Larsen, hereby certify as follows:

The attached Reply 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 5,257 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 17th day of December, 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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