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Interest of the Amici

The amici are former judges or prosecutors who care about the fair and even-handed application of the death penalty. The Honorable John C. Holstein was a member of this Court from 1989 to 2002, serving as Chief Justice between 1995 and 1997. The Honorable Stephen N. Limbaugh, Sr., was a United States District Judge from 1983 until 2008. He was also the prosecuting attorney for Cape Girardeau County between 1955 and 1958.

The Honorable Joan M. Burger was a circuit judge in the City of St. Louis between 1994 and 2008, and served as an assistant circuit attorney for the City of St. Louis before her tenure on the bench. The Honorable Susan E. Block was an associate circuit judge in St. Louis County between 1979 and 1997 and a circuit judge in St. Louis County between 1997 and 2007. The Honorable John L. Anderson was a circuit judge in Jefferson County between 1974 and 1998. The Honorable Floyd McBride was a circuit judge in the City of St. Louis from 1977 to 2000.

Dee Joyce-Hayes was the circuit attorney for the City of St. Louis between 1993 and 2000 and was an assistant circuit attorney between 1981 and 1992. Joe L. Moseley was the prosecuting attorney in Boone County between 1978 and 1992. Ronald S. Reed, Jr. was the United States Attorney for the Western District of Missouri between 1977 and 1980, and an assistant prosecuting attorney in Buchanan County between 1958 and 1960.

The amici do not share common views about the wisdom of the death penalty. Some amici believe passionately that a death sentence is a proper and measured response to the kinds of brutal murders that prompt such sentences. Other amici believe just as passionately that the death penalty is a relic of the past that should itself be buried.

All of the amici, however, are deeply committed to the United States Supreme Court's insistence that "capital punishment be imposed fairly, and with reasonable consistency, or not at all." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). We live in the richest and freest society ever known, and we do so because of the rule of law.

The rule of law is not a sometime thing. If it is not available to those people most despised by society – capital defendants – none of us can count on its availability if we should chance to need it. Michael Taylor has as much right to the rule of law as anyone else.

To date, he has not received it. Taylor was given a sentence of death based on facts found by a judge, not a jury, over his specific objection. Eight other inmates in Missouri who were sentenced in penalty-phase bench trials have had their sentences reduced to life in prison; unlike Taylor, most of them did not make a contemporaneous objection. Two other defendants obtained extraordinary writs from this Court prohibiting a bench trial in the penalty phase. It is absolutely unconscionable to treat Taylor differently. The Court should therefore grant the petition and reduce Taylor's sentence to life in prison.

Argument

I. Michael Taylor Has A Right To The Same Treatment As Other Capital Defendants Whose Rights To A Jury Trial Were Violated Before Ring.

The essence of the rule of law is that it treats similarly situated people in the same way; due process and equal protection require no less. Given the qualitative difference between the death penalty and a prison sentence, similar treatment of similarly situated persons becomes even more critical. To that end, § 565.035.3(3), R.S.Mo., requires this Court to assure that a capital sentence is not disproportionate. This Court has held, and the State has recently conceded, that proportionality review is a continuing obligation up until the sentence is carried out.

A. Due Process And Equal Protection Require The State To Treat Taylor In The Same Fashion As Similarly-Situated Defendants.

Courts have universally recognized that death is qualitatively different from other forms of punishment. There is "no graver or more important judicial function than deciding matters of life and death." Williams v. Armontrout, 912 F.2d 924, 942 (8th Cir. 1990), cert. denied, 498 U.S. 1129 (1991) (Arnold, J., dissenting in part). Both this Court and the Supreme Court of the United States have made it clear that, "because a death sentence is qualitatively different from any other form of punishment, there must be a heightened degree of reliability, in

the sentencing determination." State v. Thompson, 85 S.W.3d 635, 642 (Mo. banc 2002).

From the standpoint of due process, courts have insisted 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). It is "of vital importance to the defendant and to the community that any decision to impose the death penalty be, and appear to be, the consequence of scrupulously fair procedures." Sawyer v. Whitley, 505 U.S. 333, 361 (1992) (Stevens, J., concurring) (citations and internal punctuation omitted).

From the standpoint of equal protection, the basic rule is that "persons similarly situated in relation to a statute" must "be treated the same." State v. Stokely, 842 S.W.2d 77, 79 (Mo. banc 1992), citing Rinaldi v. Yeager, 384 U.S. 305, 309 (1966). The State "may not treat similarly situated persons differently unless such differentiation is adequately justified." Doe v. Phillips, 194 S.W.3d 833, 845 (Mo. banc 2006).

This Court has held that the right to a jury trial in the penalty phase of a capital case is "fundamental," and that "the stake is of the highest magnitude." State v. Whitfield, 107 S.W.3d 253, 267 (Mo. banc 2003). Thus, the Court must employ the most painstaking analysis to assure that any death sentence is fundamentally fair.

B. This Court Has A Continuing Duty To Review The Sentence To Assure That it Is Not Disproportionate To Similarly Situated Defendants.

In addition to the constitutional requirements for a valid death sentence, § 565.035.3(3), R.S.Mo., requires this Court to determine if the sentence is disproportionate to the sentences imposed on similarly situated defendants. While no court has held that such review is constitutionally required,[1] the Court has a statutory duty continually to review the sentence until it is carried out.

The leading case is State ex rel. Amrine v. Roper, 102 S.W.3d 541 (Mo. banc 2003). While the Court split on the proper result in Amrine, there was no disagreement on the continuing duty to review the proportionality of the death sentence. Judge Teitleman's opinion for the majority held that the "obvious purpose" of § 565.035.3 was "to avoid wrongful convictions and executions," so that the Court's duty was "just as obviously, a continuing one." 102 S.W.3d at 547. Judge Wolff's concurrence stressed that "it is particularly true in death penalty cases that the duty to assess the strength of the evidence is an ongoing one." Id. at 550 (Wolff, J., concurring). Judge Price's dissent argued that

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[1] But see State v. Wolfe, 13 S.W.3d 248, 277 (Mo. banc), cert. denied, 531 U.S. 845 (2000) (Wolff, J., dissenting) (if due process requires review of proportionality of punitive damage awards, "can we justify a lesser standard where the defendant faces a punishment that requires not a loss of money but his life?").

§ 565.035.3 imposed "a continuing duty that must be addressed in the light of new evidence." Id. at 552 (Price, J., dissenting).

Until recently, the State has taken the position that this duty is a continuing one only when the defendant's innocence is at issue, although none of the opinions in Amrine so limited the duty. Indeed, Judge Price prefaced his remarks by stating that Amrine "need not, however, prove actual innocence for relief from his sentence of death." 102 S.W.3d at 552 (Price, J., dissenting).

In oral argument in State ex rel. Winfield v. Roper, 292 S.W.3d 909 (Mo. banc 2009), cert. denied, ___ U.S. ___, 176 L.Ed.2d 732 (2010), the State explicitly conceded that the Court has a "continuing obligation to examine the evidence in death penalty cases" but argued that the obligation was satisfied because "there's no reason to have any doubt because the alleged constitutional violation never occurred" and "there's no question as to guilt here."

The Court's opinion in Winfield confirmed as much. Because Winfield had failed to prove the alleged constitutional violation, "there is no basis to conclude that the Court's confidence in the punishment imposed is undermined." 292 S.W.3d at 911 n.4. If the duty to determine proportionality were not a continuing one, there would have been no occasion for that footnote.

Four judges of this Court have also held that, in considering proportionality review, the Court must include cases that produced a life sentence instead of death. In State v. Anderson, 306 S.W.3d 529, 2010 WL 796990 (Mo. banc 2010), Judge Breckenridge's concurring opinion stated that § 565.035.3 requires this

Court to consider "other factually similar cases, including those that resulted in a sentence of life imprisonment." 2010 WL 796990 at *13 (Breckenridge, J., concurring). Judge Wolff's dissent, on behalf of himself and Judges Stith and Teitelman, agreed with Judge Breckenridge that the Court "must look at cases in which life imprisonment was imposed" in conducting proportionality review. Id. at *17.

Thus, the Court has a continuing obligation to assess the proportionality of Taylor's death sentence against other, similarly-situated defendants, including those whose death sentences were reduced to life in prison because the penalty was based on facts found by a judge, rather than a jury.

II. Michael Taylor's Death Sentence Is Disproportionate To The Life Sentences Imposed On Other Defendants Who Were Deprived Of Their Right To A Jury Trial In The Penalty Phase.

When this Court reviewed Taylor's sentence in 1996, it held that he had "no constitutional right to have a jury assess punishment." State v. Taylor, 929 S.W.2d 209, 219 (Mo. banc 1996), cert. denied, 519 U.S. 1152 (1997). At the time, that was an accurate statement of the law.

In 2002, that all changed. The Supreme Court of the United States held, in Ring v. Arizona, 536 U.S. 584 (2002), that it violates the Sixth Amendment for a court "sitting without a jury, to find an aggravating circumstance necessary for the imposition of the death penalty." 536 U.S. at 609.

As a matter of federal law, Ring does not apply retroactively. As a matter of Missouri law, it does. In Whitfield, this Court held that Ring applied to cases no longer subject to direct appeal when, as here, "the judge made the required factual determinations and imposed the death penalty." 107 S.W.3d at 268-69. While Whitfield's "preliminary review" identified only five such cases, the Court has made clear that it "did not purport to deny review if, on further review, it was also determined that Whitfield also applied to a limited number of additional cases on collateral review." State ex rel. Baker v. Kendrick, 136 S.W.3d 491, 494 n.2 (Mo. banc 2004).

In the years since Whitfield, this Court has repeatedly held that death sentences based on facts found by a trial court rather than a jury are unconstitutional:

- Rufus James Ervin. In State v. Ervin, 979 S.W.2d 149 (Mo. banc 1998), cert. denied, 525 U.S. 1169 (1999), this Court initially affirmed both the conviction and the sentence. In Ervin v. State, 80 S.W.3d 817 (Mo. banc 2002), on appeal from denial of habeas relief, the Court remanded so the trial court could "consider the application of Ring." 80 S.W.3d at 827. The trial court then set aside the death sentence. See Ervin v. Puckett, 2007 WL 2782332 (E.D. Mo. 2007) at *1.
- Deandra Buchanan. In State v. Buchanan, 115 S.W.3d 841 (Mo. banc 2003), on direct appeal, the Court set aside a death penalty

imposed by a trial court. Buchanan "correctly claims that a jury rather than a judge is required to determine each fact on which the legislature conditioned an increase in the maximum punishment." 115 S.W.3d at 842.

- Antonio Richardson. This Court originally affirmed the conviction and the sentence in State v. Richardson, 923 S.W.2d 301 (Mo. banc), cert. denied, 519 U.S. 972 (1996). On October 29, 2003, the Court issued an order recalling the mandate and remanding with instructions to set aside the death sentence and to resentence Richardson to life in prison.
- Andre Morrow. This Court affirmed Morrow's conviction and sentence on direct appeal in State v. Morrow, 968 S.W.2d 100 (Mo. banc), cert. denied, 525 U.S. 896 (1998), and it rejected his habeas claims. Morrow v. State, 21 S.W.3d 819 (Mo. banc 2000), cert. denied, 531 U.S. 1171 (2001). On October 28, 2003, the Court recalled the mandate, set aside the death penalty, and ordered Morrow resentenced to life in prison.
- Keith Smith. In State v. Smith, 944 S.W.2d 901 (Mo. banc), cert. denied, 522 U.S. 954 (1997), this Court affirmed Smith's conviction and sentence, specifically rejecting Smith's argument that the trial court improperly sentenced him after the jury deadlocked. 944 S.W.2d at 919-20. On October 28, 2003, the Court recalled the

mandate, vacated the death sentence, and ordered Smith resentenced to life in prison.

- Kenneth Thompson. In State v. Thompson, 134 S.W.3d 32 (Mo. banc 2004), this Court granted Thompson's motion to recall the mandate on his direct appeal. The Court set aside a death sentence imposed by the trial court because, under Whitfield, "a judge is not authorized to impose the death penalty if the jury did not find the facts necessary to impose the death penalty." 134 S.W.3d at 33.
- Barry Baker. In State ex rel. Baker v. Kendrick, 136 S.W.3d 491 (Mo. banc 2004), the jury deadlocked on punishment and the trial court proposed to conduct a new penalty phase hearing. This Court granted an extraordinary writ of prohibition, because the trial court's "only option was to impose a sentence of life." 136 S.W.3d at 494.
- Bobby Joe Mayes. In State ex rel. Mayes v. Wiggins, 150 S.W.3d 290 (Mo. banc 2004), the jury deadlocked on punishment and the trial court proposed to conduct a new hearing. This Court again granted an extraordinary writ of prohibition, reiterating that the trial court's "only option would be to impose a life sentence." 150 S.W.3d at 291.
- Andrew Lyons. In State v. Lyons, 951 S.W.2d 584 (Mo. banc 1997), cert. denied, 522 U.S. 1130 (1998), this Court affirmed the judgment and a death sentence for a murder on which the jury had

deadlocked. In Lyons v. State, 39 S.W.3d 32 (Mo. banc), cert. denied, 534 U.S. 976 (2001), the Court rejected Lyons' state habeas claims. In August 2007, however, the Court set aside that sentence. See State ex rel. Lyons v. Lombardi, 303 S.W.3d 523, 252 n.2 (Mo. banc 2010).

Taylor's case stands in precisely the same procedural posture as those of Whitfield, Richardson, Morrow, Smith and Lyons. In each of those cases, as here, the direct appeal and the initial state habeas review were long since over. Whether the Court corrects the injustice via recall of the mandate, as in Whitfield, or on habeas review, as in Ervin, the Court still must act.

Indeed, Taylor has a more compelling case than did Whitfield, Richardson, Morrow or Lyons. None of those inmates challenged the propriety of the trial court's action in replacing the jury in either their direct appeal or their original habeas claims. Here, Taylor has been complaining of the denial of a jury from the very beginning.

Moreover, any procedural differences in these cases are quite irrelevant to the substance. Michael Taylor occupies precisely the same legal position as the other inmates: his death sentence rests on facts found by a judge, not a jury. Under the plain terms of Whitfield, that sentence is unconstitutional. The Court cannot in good conscience set aside (or prohibit) ten other death sentences on that ground but allow Taylor's to stand.

To amici's knowledge, there are only two other inmates currently on death row based on facts found by a judge rather than a jury: Michael Worthington and Roderick Nunley. Worthington clearly waived his right to a jury at sentencing and Nunley's opinion is unclear as to whether he did. State v. Nunley, 923 S.W.2d 911, 923 (Mo. banc 1996), cert. denied, 519 U.S. 1094 (1997). Taylor, by contrast, has consistently demanded a jury.

Amici do not deny the brutality of the rape and murder to which Taylor pleaded guilty. But his actions were morally no worse than those of other inmates whose sentences were set aside. Antonio Richardson, for example, participated in multiple rapes of the two victims; personally pushed them off a bridge 70 feet above the river; and was the mastermind behind the whole scheme. 923 S.W.2d at 307-08. Bobby Joe Mayes was guilty of multiple prior sex crimes; stabbed his wife and stepdaughter multiple times; and sodomized the girl. State v. Mayes, 63 S.W.3d 615, 622-23 (Mo. banc 2001).

Amici believe that Whitfield alone requires the Court to grant habeas relief. If the Court prefers, however, its continuing obligation to conduct proportionality review offers another avenue for relief. Under Whitfield, in sentencing Taylor to death "without a jury finding" on aggravating and mitigating factors, the court "imposed a sentence in excess of that permitted by law." 107 S.W.3d at 269 n.19. By definition, a sentence in excess of one the law permits is disproportionate.

Moreover, in light of the various holdings in Anderson, the Court must independently revisit the proportionality analysis it undertook on Taylor's direct

appeal. It is crystal clear that the Court considered only cases in which a death sentence had been imposed and affirmed, at least initially. 929 S.W.2d at 222-23. It did not consider comparable cases where the sentence was life in prison.

Finally, in approving Taylor's sentence, the Court relied on comparable cases in which the death sentence was subsequently set aside. It relied on the original opinion in Richardson, which this Court subsequently set aside. 929 S.W.2d at 222. It also relied on State v. Shurn, 866 S.W.2d 447 (Mo. banc 1993), cert. denied, 513 U.S. 837 (1994). The Eighth Circuit subsequently set aside that sentence, Shurn v. Delo, 177 F.3d 662 (8th Cir.), cert. denied, 528 U.S. 1010 (1999), and Shurn is now serving a life sentence.

Richardson's and Mayes' cases, described above, alone establish that Taylor's sentence is disproportionate. If the violation of their right to a jury warrants life sentences for them, despite their terrible crimes, the same constitutional violation warrants a life sentence for Taylor.

Since Ring, this Court has set aside or prohibited the entry of death sentences in no less than 10 cases where the jury did not make the factual findings necessary to sustain the penalty. To amici's knowledge, it has yet to sustain any such sentence post-Ring when asked to do so, whatever the procedural posture of the case. There can be no legitimate reason for treating Taylor's case any differently.

Amici believe that the law and the facts are sufficiently clear that the Court can dispense with further briefing and argument and simply issue the writ. State

ex rel. Central Institute for the Deaf v. Burger, 949 S.W.2d 126 (Mo. App. 1997). At the very least, the Court should order the case briefed and argued. A man's life is at stake following a proceeding that this Court has plainly held to be unconstitutional.

Conclusion

For these reasons, amici respectfully pray that the Court issue its writ of habeas corpus and/or recall its mandate; set aside the death sentence; and resentence Taylor to life in prison.

Respectfully Submitted,

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Certificate of Compliance

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03 and (2) contains 3,889 words, exclusive of the sections exempted by Rule 84.06(b)(2), based on the word count that is part of Microsoft Word 2002 SP-3. The undersigned counsel further certifies that the compact disc has been scanned and is free of viruses.

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Certificate of Service

I certify that one copy of this brief and one copy on compact disc, as required by Missouri Supreme Court Rule 84.06(g), were served on counsel identified below on this 2nd day of June, 2010:

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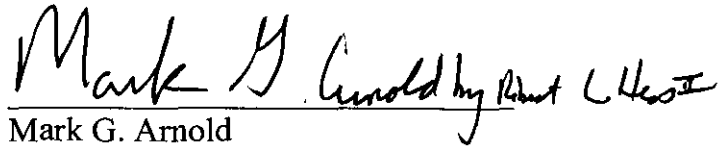

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