Missouri's Ring Tone: Jury Sentencing Rights in Death Penalty Cases

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I. INTRODUCTION

On October 20, 2010, Roderick Nunley was set to be executed for charges stemming from the 1989 rape and stabbing death of a fifteen-year-old girl. After he waived his right to a jury trial, a judge convicted Nunley and sentenced him to death in 1991. The Supreme Court of Missouri remanded Nunley’s case for re-sentencing after the trial judge recused himself, but Nunley was subsequently re-sentenced to death. Almost twenty years later, and two days before being put to death, the U.S. District Court for the Western District of Missouri granted Nunley a stay of his execution. The district court stated that Nunley’s constitutional claims had not been thoroughly addressed by the Missouri Supreme Court.

On January 5, 2011, the Missouri Supreme Court heard Nunley’s arguments that his death sentence violated his constitutional right to jury sentencing, which he asserted was recognized by the U.S. Supreme Court in Ring v. Arizona after his conviction and sentence, and which he contended should apply retroactively to him pursuant to the Missouri Supreme Court’s opinion in State v. Whitfield. On May 31, 2011, the court handed down its decision in his case, finding that Nunley waived jury sentencing “for strategic reasons because he was afraid that if he went before a jury, it might sentence

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1 State v. Nunley, 980 S.W.2d 290, 291 (Mo. 1998); Brief of Appellant at 5, State of Missouri v. Roderick Nunley, No. SC76981(Mo. Nov. 17, 2010).
3 State v. Nunley, 923 S.W.2d 911, 916 (Mo. 1996).
5 Id.
7 536 U.S. 584 (2002).
8107 S.W.3d 253 (Mo. 2003).
him to death.”9 The court held that Nunley’s original guilty plea and jury sentencing waiver remained valid after remand and re-sentencing, and because of that Ring v. Arizona and State v. Whitfield did not apply.10

Nunley’s case presented the following issues: (1) When a criminal defendant knowingly waived his/her right to a jury trial before the Ring/Whitfield rights were recognized, should the waiver still be effective post-Ring/Whitfield? (2) Does the fact that the criminal defendant attempted to withdraw his/her guilty plea and/or asked for jury sentencing, and such requests were denied, affect the answer to the first question? (3) Can one waive the right to a jury trial on guilt and yet preserve the right to jury sentencing?

This Note explores the relevant legal background to this case and its implications, focusing on U.S. and Missouri Supreme Court decisions as well as diverging state court opinions. This Note contends while the Missouri Supreme Court addressed the issues in Nunley’s case preliminarily, those issues were not thoroughly vetted.

II. LEGAL BACKGROUND

A. The United States Supreme Court Decisions

In the 1972 per curiam decision Furman v. Georgia,11 the United States Supreme Court reviewed three death sentences imposed for murder and rape.12 A jury determined the sentence in each case without legal guidance regarding the factors that should direct its sentencing decision and whether or not to impose the death penalty.13 The Supreme

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10 Id.
11 408 U.S. 238 (1972).
12 One defendant was convicted for murder and two defendants were convicted for rape. Furman, 408 U.S. at 240 (Douglas, J., concurring).
13 Id.
Court held that death sentences imposed through *unguided* jury discretion violate the Eighth Amendment’s ban on cruel and unusual punishment.\(^{14}\) Concurring opinions written by Justices White and Stewart, respectively, held that capital sentencing schemes providing no direction to juries in their consideration of death sentences present a constitutionally unacceptable risk of arbitrary and capricious results.\(^{15}\)

After *Furman*, at least 35 states, including Missouri,\(^{16}\) adopted new capital sentencing procedures that eliminated some of the previously conferred jury discretion.\(^{17}\)

In the 1976 case *Gregg v. Georgia*, the Supreme Court upheld against Eighth Amendment challenge three of these new state statutory schemes, each requiring the sentencer to consider certain specified aggravating and mitigating circumstances when deciding between life and death.\(^{18}\) In *Gregg*, the three-Justice opinion affirmed that the concurrences of Justices White and Stewart represented the central holding of *Furman*:

“[W]here discretion is afforded a sentencing body on a matter so grave as the

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\(^{14}\) *See Furman*, 408 U.S. 238. *See also Walton v. Arizona*, 497 U.S. 639, 657-61 (1990) (Scalia, J., concurring). In his concurring opinion in *Walton*, Justice Scalia explained that the brief *Furman* case gave no reasons for the Court’s decision. To uncover the reasons underlying the decision in *Furman*, Scalia observed that one must turn to the opinions of the five Justices forming the majority, each of whom wrote separately and none of whom joined any other’s opinion. Of these opinions, Justices Marshall and Brennan rested on the “broadest possible ground—that the death penalty was cruel and unusual punishment in all circumstances.” A third concurring opinion, that of Justice Douglas, rested on “a narrower ground—that the discretionary capital sentencing systems under which the petitioners had been sentenced were operated in a manner that discriminated against racial minorities and unpopular groups.” However, Scalia stated that the critical opinions in light of the subsequent development of the Court’s jurisprudence were those of Justices Stewart and White. 497 U.S. at 658-59 (Scalia, J., concurring).

\(^{15}\) According to Justice Scalia in his *Walton* concurrence, the *Furman* opinions of Justices White and Stewart focused on the infrequency and seeming randomness with which, under the discretionary state systems, the death penalty was imposed. In Justice White’s opinion, the death sentences under review violated the Eighth Amendment because “as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.” 497 U.S. at 658-59 (Scalia, J., concurring) (quoting 408 U.S. at 313 (White, J., concurring)). “[T]here is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not,” so that the death penalty constitutes a “pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes,” *Id.* (Scalia, J., concurring) (quoting 408 U.S. at 312 (White, J., concurring)).


\(^{17}\) *See Gregg v. Georgia*, 428 U.S. 153, 179 (1976) and *Walton*, 497 U.S. at 659 (Scalia, J., concurring).

determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”

In subsequent cases, the Court routinely read Furman as standing for the proposition that “‘channelling and limiting . . . the sentencer’s discretion in imposing the death penalty’ is a ‘fundamental constitutional requirement,’” and has insisted that states furnish the sentencer with “‘clear and objective standards’ that provide ‘specific and detailed guidance,’ and that ‘make rationally reviewable the process for imposing a sentence of death.’”

A few years later, the Court addressed whether capital defendants have a Sixth Amendment right to be sentenced by a jury rather than a judge. In the 1984 case Spaziano v. Florida, the Court assessed the constitutionality of Florida’s scheme in which a judge had the power to sentence a defendant to death after a jury-recommended life sentence. However, the Court explained that although the sentencer, whether a jury or a judge, has a constitutional obligation to evaluate the unique circumstances of the individual defendant in its determination of the appropriate punishment to be imposed, the Sixth Amendment “never has been thought to guarantee a right to a jury determination of that issue.” Further, the majority emphasized, “there certainly is nothing in the safeguards necessitated by the Court’s recognition of the qualitative difference of the death penalty that requires that the sentence be imposed by a jury.”

19 Id. at 189.
21 Id. (Scalia, J., concurring) (quoting Godfrey v. Georgia, 446 U.S. 420, 428 (1980)).
23 Id.
24 Id. at 459.
25 Id. at 460.
Throughout the 1980s and early 1990s, the Court continually affirmed not only that there is no right to a jury determination on the ultimate sentence, but also that a capital defendant does not have an absolute right to jury trial on the statutory aggravating factor or factors that render him or her death-eligible.\textsuperscript{26} The role of an aggravating factor in death penalty cases is to channel the sentencer’s discretion by narrowing the class of the death-eligible according to factors the legislature has deemed relevant.\textsuperscript{27} In the 1990 case \textit{Walton v. Arizona}, the United States Supreme Court held that a judge could determine the aggravating facts necessary to impose the death penalty once a jury convicted a defendant of first-degree murder.\textsuperscript{28}

Even though a defendant has a right to a jury determination on every element of the crime charged, \textit{Walton} implied that an aggravating factor that renders a defendant death-eligible is not an element of a crime (such as the crime of “capital murder”).\textsuperscript{29} However, in the 2000 case \textit{Apprendi v. New Jersey}, the Court declared a new holding regarding what must count as an element of a crime.\textsuperscript{30} It held that any fact that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt.\textsuperscript{31} The Court invalidated New Jersey’s use of “sentencing factors,” such as evidence that a shooting was motivated by racial bias, which could be found by a judge to “enhance” a sentence after a jury determination that did not include an assessment of the hate crime evidence.\textsuperscript{32} The majority declared that these facts were actually elements of a crime, mislabeled as mere sentencing factors, that

\textsuperscript{27} \textit{Walton}, 497 U.S. at 664-66 (Scalia, J., concurring).
\textsuperscript{28} \textit{Id.} at 649.
\textsuperscript{29} \textit{Id.}
\textsuperscript{30} \textit{Apprendi v. New Jersey}, 530 U.S. 466 (2000).
\textsuperscript{31} \textit{Id.} at 476.
\textsuperscript{32} \textit{Id.} at 492-495.
a jury must hear before the defendant can be exposed to a punishment greater than that
authorized by the jury’s original verdict.33

Some courts read *Apprendi* as inconsistent with *Walton*.34 Two years later, in *Ring v. Arizona*, the Supreme Court agreed with them, overruling *Walton* and explicitly holding
that an aggravating factor is, in fact, an element of a crime.35 The Court reasoned that,
“[c]apital defendants, no less than non-capital defendants . . . are entitled to a jury
determination of any fact on which the legislature conditions an increase in their
maximum punishment.”36 Further, the Court invalidated Arizona’s practice of labeling
aggravating circumstances as sentencing factors rather than as elements of the offense of
capital murder, which permitted a judge to determine the presence of aggravating factors
required by Arizona law for imposition of the death penalty after a jury adjudication of a
defendant’s guilt of first-degree murder.37

In the 2004 case *Blakely v. Washington*, the Supreme Court extended *Ring* by
applying the Sixth Amendment right to jury sentencing even where a defendant pleaded
guilty under certain circumstances.38 The defendant in *Blakely* pleaded guilty to
kidnapping, and the facts admitted in his plea hearing supported a maximum sentence of
53 months under Washington state law.39 However, the judge imposed a 90-month

33 *Id.*
34 *See, e.g.*, State v. Ring, 25 P.3d 1139 (Ariz. 2001); United States v. Promise, 255 F.3d 150, 159-60 (4th
Cir. 2001) (en banc) (calling the continued authority of *Walton* in light of *Apprendi* “perplexing”);
Hoffman v. Arave, 236 F.3d 523, 542 (9th Cir. 2001) (“*Apprendi* may raise some doubt about *Walton.*”);
greater constitutional protections to noncapital, rather than capital, defendants, the Court has endorsed this
precise principle, and we are in no position to second-guess that decision here.”)
36 *Id.* at 589.
37 *Id.* at 609.
39 *Id.* at 298.
sentence after independently finding that the defendant acted with “deliberate cruelty.”\textsuperscript{40}

Relying on \textit{Apprendi}, the Court held that the sentence violated the defendant’s Sixth Amendment rights because the judge’s enhancement was neither admitted by the defendant nor found by the jury.\textsuperscript{41} However, the Court explained, “nothing prevents a defendant from waiving his \textit{Apprendi} rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding.”\textsuperscript{42}

On the same day it decided \textit{Blakely}, the Court also attended to the fact that \textit{Ring} did not address whether its holding would be applied retroactively to sentences that had already become final on direct review. The Court determined that issue in \textit{Schriro v. Summerlin}.\textsuperscript{43} In that case, the defendant was convicted of first-degree murder and sentenced to death under Arizona’s pre-\textit{Ring} capital sentencing scheme.\textsuperscript{44} While the defendant’s habeas petition was pending in the Ninth Circuit, the Supreme Court decided \textit{Ring}.\textsuperscript{45} The Ninth Circuit invalidated the trial court’s death sentence, holding that \textit{Ring} applied retroactively even to cases that had become final on direct review before \textit{Ring} was decided.\textsuperscript{46} The Supreme Court, though, reversed and reinstated the death sentence, holding that “\textit{Ring} announced a new procedural rule that does not apply retroactively to cases already final on direct review.”\textsuperscript{47} The Court explained that new substantive rules resulting from a Supreme Court decision apply retroactively to convictions that are already final only in limited circumstances, such as “watershed rules of criminal

\textsuperscript{40} \textit{Id.} at 299-300.
\textsuperscript{41} \textit{Id.} at 303-05.
\textsuperscript{42} \textit{Id.} at 310.
\textsuperscript{44} \textit{Id.} at 350.
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.} at 351.
\textsuperscript{47} \textit{Id.} at 358.
procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding,'”\textsuperscript{48} that “without which the likelihood of an accurate conviction is seriously diminished.”\textsuperscript{49} The Court stated that, in contrast, new procedural rules generally do not apply retroactively, and that \textit{Ring}'s holding is thus properly classified as procedural because it only altered the method of determining whether the defendant engaged in specified conduct rather than the range of the conduct or the class of persons subject to the death penalty in Arizona.\textsuperscript{50} Further, the Court said that \textit{Ring} did not announce a watershed rule of criminal procedure because judicial fact-finding does not likely seriously diminish accuracy.\textsuperscript{51}

\textbf{B. The Missouri Supreme Court Decisions}

Before delving into the relevant case law, a brief discussion of Missouri’s statutory scheme regarding the death penalty is necessary. Missouri Revised Statutes Sections 565.020 and 565.030 set out the requirements for imposition of the death penalty.\textsuperscript{52} Section 565.020 provides that:

1. A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.
2. Murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor . . .\textsuperscript{53}

Section 565.030.2 requires that, in cases in which the state seeks the death penalty, the case must be tried in two phases.\textsuperscript{54} In the first phase, the jury (assuming the right to

\textsuperscript{48} \textit{Id.} at 352 (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)).
\textsuperscript{49} \textit{Id.} (quoting Teague v. Lane, 489 U.S. 288, 313 (1989)).
\textsuperscript{50} \textit{Id.} at 352-53.
\textsuperscript{51} \textit{Id.} at 356.
\textsuperscript{53} § 565.020.
\textsuperscript{54} § 565.030.2.
jury trial was not waived) determines guilt.\textsuperscript{55} If the jury finds the defendant guilty of murder in the first degree, the second stage of trial proceeds.\textsuperscript{56} In the second stage, the only issue is the punishment to be assessed and declared.\textsuperscript{57} In this “penalty” phase, the jury must be instructed to follow the four-step process for imposing life imprisonment instead of the death penalty: (1) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of this section; or (2) If the trier does not find that the evidence in aggravation of punishment warrants imposing the death sentence; or (3) If the trier concludes that there is evidence in mitigation of punishment that is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or (4) If the trier decides under all of the circumstances not to assess and declare the punishment at death.\textsuperscript{58}

However, if the jury imposes the death penalty, it must set out in writing the aggravating circumstances, including but not limited to those listed in section 565.032, which it found beyond a reasonable doubt.\textsuperscript{59} If the jury is unable to decide or agree upon the punishment, then the court will impose life imprisonment.\textsuperscript{60} The court also must follow the same four-step procedure as described above whenever it is required to determine punishment for murder in the first degree.\textsuperscript{61}

\begin{footnotes}
\textsuperscript{55} Id.
\textsuperscript{56} § 565.030.4.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\end{footnotes}
Next, section 565.032 explains what evidence must be considered in assessing punishment in first-degree murder cases where the death penalty may be imposed. The judge in a jury-waived trial must consider, or s/he must instruct the jury to consider:

(1) Whether a statutory aggravating circumstance or circumstances enumerated in subsection 2 of this section is established by the evidence beyond a reasonable doubt; and (2) If a statutory aggravating circumstance or circumstances is proven beyond a reasonable doubt, whether the evidence as a whole justifies a sentence of death or a sentence of life imprisonment without eligibility for probation, parole, or release except by act of the governor. In determining the issues enumerated in subdivisions (1) and (2) of this subsection, the trier shall consider all evidence which it finds to be in aggravation or mitigation of punishment . . .

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62 § 565.032.
63 Id. Seventeen statutory aggravating circumstances and seven mitigating circumstances are listed within this section. Aggravating factors: (1) The offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions; (2) The murder in the first degree offense was committed while the offender was engaged in the commission or attempted commission of another unlawful homicide; (3) The offender by his act of murder in the first degree knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person; (4) The offender committed the offense of murder in the first degree for himself or another, for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another; (5) The murder in the first degree was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, assistant prosecuting attorney or former assistant prosecuting attorney, assistant circuit attorney or former assistant circuit attorney, peace officer or former peace officer, elected official or former elected official during or because of the exercise of his official duty; (6) The murderer caused or directed another to commit murder in the first degree or committed murder in the first degree as an agent or employee of another person; (7) The murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind; (8) The murder in the first degree was committed against any peace officer, or fireman while engaged in the performance of his official duty; (9) The murder in the first degree was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; (10) The murder in the first degree was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another; (11) The murder in the first degree was committed while the defendant was engaged in the perpetration or was aiding or encouraging another person to perpetrate or attempt to perpetrate a felony of any degree of rape, sodomy, burglary, robbery, kidnapping, or any felony offense in chapter 195; (12) The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as a witness or potential witness; (13) The murdered individual was an employee of an institution or facility of the department of corrections of this state or local correction agency and was killed in the course of performing his official duties, or the murdered individual was an inmate of such institution or facility; (14) The murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance; (15) The murderer was committed for the purpose of concealing or attempting to conceal any felony offense defined in chapter 195; (16) The murderer was committed for the purpose of causing or attempting to cause a person to refrain from initiating or aiding in the prosecution of a felony offense defined in chapter 195; (17) The murder was committed during the commission of a crime which is part of a pattern of criminal street gang activity as defined in section 578.421. § 565.032.2.

Statutory mitigating circumstances shall include the following: (1) The defendant has no significant history of prior criminal activity; (2) The murder in the first degree was committed while the defendant was
Finally, Section 565.035 provides that whenever the death penalty is imposed in any case, and upon the judgment becoming final in the trial court, the Supreme Court of Missouri shall review the sentence on the record.\(^\text{64}\) Such were the circumstances in the Missouri Supreme Court case *State v. Whitfield.*\(^\text{65}\)

In 1994, a jury convicted Joseph Whitfield of first-degree murder but could not agree on punishment during the penalty phase, voting 11 to 1 in favor of life imprisonment.\(^\text{66}\) The court then undertook the four-step process required by Missouri’s capital sentencing statute.\(^\text{67}\) It found that there were statutory and non-statutory aggravating circumstances,\(^\text{68}\) determined that those circumstances warranted death, considered whether there were mitigating circumstances, found they did not outweigh the circumstances in aggravation, and decided under all the circumstances to impose a death sentence.\(^\text{69}\) The Supreme Court of Missouri affirmed the conviction and sentence and denied post-conviction relief en banc in 1997.\(^\text{70}\) Whitfield then filed a motion to recall the Supreme Court’s mandate affirming his conviction in 2003, after *Ring* had been decided the previous year.\(^\text{71}\) He contended that his rights under the Sixth and Fourteenth Amendments as set out in *Ring* were violated because the judge, rather than the jury,

\(^{64}\) § 565.035.

\(^{65}\) *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003).

\(^{66}\) *Id.* at 256.

\(^{67}\) *Id.*

\(^{68}\) The statutory aggravating circumstances included Whitfield’s previous convictions for second-degree murder and manslaughter, while the non-statutory aggravating circumstances included Whitfield’s other, less serious crimes. *Id.*

\(^{69}\) *Id.* at 256.

\(^{70}\) *Id.*

\(^{71}\) *Id.*
made the factual determinations on which his death sentence was predicated.\textsuperscript{72} The court agreed, specifying that section 565.030.4 requires the trier of fact to engage in a four-step process in determining whether a death sentence shall be imposed.\textsuperscript{73} The court found that in this case the jury deadlocked, and, as required by section 565.030.4, the judge rather than the jury made the requisite factual findings for imposition of a sentence of death.\textsuperscript{74} The court found that this violated Whitfield’s right under Ring to have a jury determine the facts rendering him eligible for death.\textsuperscript{75}

The court then concluded that Ring must be applied to all future death penalty cases and to those not yet final or still on direct appeal.\textsuperscript{76} Further, the court held that Ring applied to Missouri death penalty cases that were no longer on direct appeal at the time, and in which the jury was unable to reach a verdict and the judge made the required factual determinations and imposed the death penalty.\textsuperscript{77} Thus, Ring was applicable to only six cases with these particular characteristics on collateral review in 2003, including Whitfield’s.\textsuperscript{78} It therefore recalled its mandate affirming his conviction, and set aside the sentence of death.\textsuperscript{79} The court resentenced the defendant to life imprisonment without eligibility for probation, parole, or release, except by act of the Governor.\textsuperscript{80}

Since Whitfield, the Missouri Supreme Court has not expanded its retroactive application of Ring, and the court declined an invitation to do so this year.

III. \textsc{Recent Developments}

\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 268.
\textsuperscript{77} Id. at 268-69.
\textsuperscript{78} Id. at 269.
\textsuperscript{79} Id. at 272.
\textsuperscript{80} Id.
Roderick Nunley pleaded guilty in Jackson County Circuit Court to first-degree murder, armed criminal action, kidnapping, and forcible rape over twenty years ago.\textsuperscript{81} These charges arose from the 1989 stabbing death of Ann Harrison, a fifteen-year-old girl who was abducted by Nunley and his accomplice, Michael Taylor, while she waited for the school bus.\textsuperscript{82} At his plea hearing, Nunley testified that he understood he had a constitutional right to a jury trial, and nonetheless waived it.\textsuperscript{83} Nunley also testified that he understood he was waiving any right he had to be sentenced by a jury.\textsuperscript{84} The circuit court originally sentenced Nunley to death on May 3, 1991, and Nunley was resentenced to death by a judge in 1994.\textsuperscript{85} Although Nunley disputed that he had waived his right to a

\textsuperscript{81} State v. Nunley, 980 S.W.2d 290, 291 (Mo. 1998).
\textsuperscript{82} Id.
\textsuperscript{83} State v. Nunley, 923 S.W.2d 911, 923 (Mo. 1996). The following Missouri statutes and rules pertain to waiver of a jury trial for a homicide offense and the requirements to impose the death penalty for first-degree murder. Section 565.006 of the Missouri Revised Statutes provides for waiver of a jury trial for a homicide offense:

\textbf{1.} At any time before the commencement of the trial of a homicide offense, the defendant may, with the assent of the court, waive a trial by jury and agree to submit all issues in the case to the court, whose finding shall have the force and effect of a verdict of a jury. Such a waiver must include a waiver of a trial by jury of all issues and offenses charged in the case, including the punishment to be assessed and imposed if the defendant is found guilty.

\textbf{2.} No defendant who pleads guilty to a homicide offense or who is found guilty of a homicide offense after trial to the court without a jury shall be permitted a trial by jury on the issue of the punishment to be imposed, except by agreement of the state. . . .” § 565.006.

Additionally, Missouri Supreme Court Rule 27.01 provides for waiver of a jury trial in a criminal case:

“(a) All issues of fact in any criminal case shall be tried by a jury to be selected, summoned and returned in the manner prescribed by law, unless trial by jury be waived as provided in this Rule.

(b) The defendant may, with the assent of the court, waive a trial by jury and submit the trial of any criminal case to the court, whose findings shall have the force and effect of the verdict of a jury. In felony cases such waiver by the defendant shall be made in open court and entered of record.” Mo. Sup. Ct. R. 27.01.

\textsuperscript{84} State v. Nunley, 923 S.W.2d 911, 923 (Mo. 1996).
\textsuperscript{85} State v. Nunley, No. SC 76981, 2011 WL 2139007, *4 (Mo. May 31, 2011). In 1994, the judge considered these mitigating factors when sentencing Nunley: testimony from a psychologist that Nunley has a dependent personality disorder; testimony from witnesses that Nunley’s use of cocaine affected his judgment; testimony of Nunley’s regret; testimony from Nunley’s girlfriend and family members regarding his troubled childhood and drug use; testimony regarding discrimination in past homicide cases; and expert testimony regarding racial discrimination within the legal justice system. Id. Pursuant to section 565.032, the judge also found the following statutory aggravators: the offense was committed for the purpose of receiving money from the victim; the murder was outrageously or wantonly vile, horrible and inhuman, and involved depravity of mind; the murder was done for the purpose of avoiding the lawful arrest and confinement of the defendant; the murder was done while the defendant was engaged in the perpetration of the kidnapping; the murder was done while the defendant aided another person in raping the victim; the
jury trial in two separate appeals to the Supreme Court of Missouri, each en banc proceeding concluded that Nunley had knowingly waived both his right to a jury trial and any possible right to jury sentencing.86

In its discussions of Nunley’s claims, the court found Missouri Supreme Court Rule 27.01(b) provides that a criminal defendant may waive the right to trial by jury and submit the case to the court with its assent.87 Under Rule 27.01(b), the defendant’s waiver and the court’s assent “must appear from the record with unmistakable clarity,”88 which the court found was indisputably evidenced by Nunley’s own testimony and the trial judge’s subsequent ruling.89 Nunley testified regarding this particular issue in his 1994 hearing:

Q: Last time, you put all of your eggs in one basket with the judge, the judge sentenced you to death, and now this time you want to try a different approach, correct?
A: Yes.

Q: Okay, in fact you had a number of discussions with your attorneys before you entered your plea, didn’t you?
A: Yes.

Q: In fact, you told [your attorneys] right off the bat, you said, “Hey, I’m guilty,” didn’t you?
A: Yes, sir.

Q: And they in essence told you the evidence against you was overwhelming, didn’t they?
A: Yes.

Q: And that was something you took into consideration when you entered your plea of guilty, wasn’t it?
A: Yes.

86 State v. Nunley, 923 S.W.2d 911, 923 (Mo. 1996); State v. Nunley, 980 S.W.2d 290, 292-93 (Mo. 1998). See also infra n.96.
87 923 S.W.2d at 923.
88 923 S.W.2d at 923 (quoting State v. Bibb, 702 S.W.2d 462, 466 (Mo. 1985)).
89 Id.
Q: And you knew you had the right to a jury trial?
A: Yes, sir.

Q: And you were explained how the State would present aggravating circumstances and your attorneys would be presenting mitigating circumstances, correct?
A: Yes, sir.

Q: Well let me ask you this, sir, based upon the discussions you had with your attorneys, your review of all the evidence, and the fact that you were guilty, you understood there was a strong likelihood that if you went before a jury, they were going to sentence you to death, weren’t you, sir?
A: Yes, sir.

Q: And so then you started discussing your other options. You said, well, one option would be to go before a judge, right?
A: Yes.

Q: But in order to go before a judge, you would have to waive all of your constitutional rights and you would have to plead guilty and that judge would sentence you, correct?
A: Yes.

Nunley also claimed that although he may have waived his right to a jury trial, he did not knowingly waive any right he may have had to be sentenced by a jury. The court rejected this claim because Nunley had specifically testified that he knew the circuit court would be sentencing him instead of a jury. Further, the court stated that “defendant did not have a statutory right to a jury trial for sentencing except by agreement with the State and the court . . . There is also no constitutional right to have a jury assess punishment.”

Additionally, Nunley appealed the sentencing judge’s decision to reject his motion to withdraw his guilty plea, arguing he was entitled to be sentenced by a judge to whom he

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91 Id.
92 Id.
93 § 565.006.2.
94 923 S.W.2d at 923.
95 Nunley had filed a motion to withdraw his guilty plea pursuant to Missouri Supreme Court Rule 29.07(d), which provides that “A motion to withdraw a plea of guilty may be made only before sentence is imposed or when imposition of sentence is suspended; but to correct manifest injustice the court after
originally plead guilty. The Missouri Supreme Court first noted that this argument was not the one he originally made in his motion to withdraw the guilty plea to the sentencing judge, and then discussed his position. The court stated, “it is preferable for the judge to whom defendant pleads guilty to also sentence defendant. The reason for this preference is to ensure the judge who heard the evidence at the plea hearing will sentence defendant based upon the circumstances established at the time of the plea.” However, the court also stated that a judge could be considering sentencing for dozens of defendants who pleaded guilty, particularly in Missouri judicial circuits with criminal bulk divisions, and that “[c]ourts must continue to function despite the unavailability of a particular judge . . . a defendant should not be permitted under all circumstances to withdraw a guilty plea when the original judge is unavailable for sentencing.” The court emphasized that the dispositive factor should be whether the sentencing judge is familiar with the prior proceedings to permit an informed sentencing decision. After finding that the second sentencing judge was sufficiently familiar with the prior

sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.” Mo. Sup. Ct. R. 29.07(d).

96 Id. After Nunley pleaded guilty in his first trial and the trial judge subsequently sentenced him to death for the murder count, Nunley filed a motion for post-conviction relief, alleging that the trial judge had been drinking during the sentencing hearing and the day defendant was sentenced. The trial judge recused himself, and another circuit judge on transfer denied Nunley’s motion. Nunley appealed to the Missouri Supreme Court, and it entered a summary order vacating the first trial judge’s judgment and remanding for a new penalty hearing, imposition of sentence, and entry of new judgment. During the second penalty phase, Nunley filed a motion with the second sentencing judge to withdraw his guilty plea, which the judge denied. This second judge then sentenced Nunley to death again for the murder count. Nunley filed another motion for post-conviction relief, which the second judge overruled, causing Nunley to appeal again to the Missouri Supreme Court. In that appeal, he raised the argument that he was entitled to sentencing by the judge to whom he originally plead guilty (the one who recused himself based on Nunley’s allegations that he had been drinking). Id. at 916-17.

97 923 S.W.2d at 920.
98 Id. at 921.
99 Id.
100 Id.
proceedings and that his decision was thus informed, the court rejected Nunley’s argument.\textsuperscript{101}

In early 2000, Nunley filed a petition for a writ of habeas corpus, challenging his state conviction for first-degree murder and his death sentence, in the U.S. District Court for the Western District of Missouri.\textsuperscript{102} In June 2002, the United States Supreme Court handed down \textit{Ring}.\textsuperscript{103} Nunley tried to file a supplemental brief raising a claim under \textit{Ring} during his habeas corpus proceedings, but the district court refused to allow Nunley to do so and instead issued an order denying him relief on June 5, 2003.\textsuperscript{104} However, on December 4, 2003, after noting that the United States Supreme Court had granted certiorari in a Ninth Circuit case to address questions regarding the retroactivity of \textit{Ring}, the district court issued a Certificate of Appealability on whether Nunley was entitled to have a jury determine the facts necessary for the imposition of his death sentence.\textsuperscript{105}

In Nunley’s subsequent appeal to the Eighth Circuit, the court found it was bound by \textit{Summerlin} (which had been decided in 2004 while Nunley’s appeal was pending), and that Nunley’s \textit{Whitfield} claims were not within its jurisdiction.\textsuperscript{106} The court stated:

\begin{quote}
We do not dispute the proposition that Missouri may “provide greater protections in [its] criminal justice system than the Federal Constitution requires.” . . . But Nunley has chosen the wrong forum in which to seek those “greater protections.” The issue he raises should, in this case, be addressed in the first instance—if at all—by a state court. Under federal law, which we are bound to follow, \textit{Ring} is not retroactive on collateral review.\textsuperscript{107}
\end{quote}

\textsuperscript{101} Id. at 922.
\textsuperscript{103} Id. at *2.
\textsuperscript{104} Id. On June 17, 2003, the Missouri Supreme Court handed down \textit{State v. Whitfield}. Id.
\textsuperscript{105} Id.
\textsuperscript{106} Nunley v. Bowersox, 394 F.3d 1079 (8th Cir. 2005).
\textsuperscript{107} Id. at 1081 (quoting California v. Ramos, 463 U.S. 992, 1014 (1983)).
The Eighth Circuit then affirmed the district court’s denial of Nunley’s petition for habeas relief in January 2005.\textsuperscript{108} Nunley next filed for certiorari with the United States Supreme Court, but his petition was denied in October 2005.\textsuperscript{109}

Five years lapsed, and in August 2010, the Supreme Court of Missouri set Nunley’s execution date for October 20, 2010.\textsuperscript{110} On September 30, 2010, Nunley filed a motion to recall the mandate in the Supreme Court of Missouri, and also moved to have his execution stayed.\textsuperscript{111} The court overruled the motion to recall the mandate in a brief order issued on October 12, 2010, stating, “[a]ppellant’s motion to recall the mandate having been considered on the merits, said motion is overruled. Appellant’s motion to stay execution overruled as moot.”\textsuperscript{112} On October 18, 2010, Nunley filed a supplemental petition for writ of habeas corpus in the U.S. Western District and an application to stay his execution, pending the disposition of his habeas petition.\textsuperscript{113} He argued that this was not a second or successive habeas claim because his claim had just become ripe for review and he could not have raised it before.\textsuperscript{114} In order to file a claim within the district court’s purview, Nunley stated that he was raising it based on \textit{Hicks v. Oklahoma},\textsuperscript{115} alleging that he has a state-created liberty interest under \textit{Whitfield} to have a

\begin{footnotesize}
\begin{enumerate}
\item[108] Id.
\item[110] Brief of Appellant at 5, State of Missouri v. Roderick Nunley, No. SC76981(Mo. Nov. 17, 2010).
\item[111] Bowersox, 2010 WL 4272474, at *2.
\item[112] Id.
\item[113] Id.
\item[114] Id. The State argued that because Nunley inexplicably waited five years after his 8th Circuit appeal to file this claim in the Western District, this was indeed a second or successive habeas claim. However, the court did not address these arguments directly. \textit{Id.}
\item[115] In \textit{Hicks}, the U.S. Supreme Court held that where “a State has provided for the imposition of criminal punishment in the discretion of the trial jury . . . [t]he defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.” \textit{Hicks v. Oklahoma,} 447 U.S. 343 (1980).
\end{enumerate}
\end{footnotesize}
jury determine the facts necessary for the imposition of the death penalty. He also claimed that the Supreme Court of Missouri’s denial of his motion to recall the mandate was “legally incorrect.”

The Western District found that there was an issue requiring further development: “If the right to have a jury determine his punishment did not exist when petitioner was originally sentenced to death, but this right was subsequently established by Ring and found to be retroactive by the Missouri Supreme Court in Whitfield, is petitioner’s waiver still valid?” The district court stated that there is no question that under Missouri law as it existed at the time, petitioner did not have a right to have a jury determine his sentence after he pled guilty. However, the question that remained, according to the district court, is whether the retroactive application of Ring to cases in Missouri via Whitfield granted petitioner a right that did not exist before.

The court stated that it was unable to say whether the Supreme Court of Missouri’s October 12, 2010 decision was unreasonable. As such, the court held Nunley was entitled to a stay of his scheduled execution pending the disposition of this issue by the Supreme Court of Missouri. The district court stayed Nunley’s execution two days before it was to take place, and the State filed a motion to vacate the stay in the Eighth Circuit. In a per curiam opinion, a panel of the Eighth Circuit denied the motion.

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116 Bowersox, 2010 WL 4272474 at *2.
117 Id.
118 Id. at *3. It is interesting that the Western District framed the issue in this way, as Ring did not establish a “right to jury sentencing.” It instead more specifically recognized a right to have a jury find the statutory factors rendering a criminal defendant death-eligible. See supra Part II.A.; see infra Part IV.
119 Id. at *4.
120 Id.
121 Id.
122 Id.
123 Brief of Appellant at 7, State of Missouri v. Roderick Nunley, No. SC76981(Mo. Nov. 17, 2010).
124 Id.
The court also denied the State’s later petition for a rehearing en banc. The State applied to the United States Supreme Court to vacate the stay of execution, which was denied. While the State was seeking to vacate the stay of execution in the federal courts, it also filed a motion in the Supreme Court of Missouri to modify the court’s order overruling Nunley’s motion to recall the mandate. In response, the Supreme Court of Missouri issued an order on October 20, 2010 directing the parties to brief the issues raised in Nunley’s motion to recall the mandate and the State’s motion for modification.

On January 5, 2011, the parties appeared before the court for oral argument, and the court handed down its opinion May 31, 2011. The court affirmed that in Missouri, the general rule is that “a guilty plea waives all nonjurisdictional defects, including statutory and constitutional guarantees,” and that *Ring* does not apply to defendants who plead guilty and waive their right to jury sentencing. The court observed that since *Whitfield*, *Ring* has been retroactively applied in nine cases. However, the court emphasized that

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125 Id.
126 Id.
127 Id.
128 Id.
130 Id. at *7 (quoting Feldhaus v. State, 311 S.W.3d 802, 804 (Mo. banc 2010); Ross v. State, 335 S.W.3d 479, 481 (Mo. banc 2011) (“a guilty plea ‘voluntarily and understandably made waives all non-jurisdictional defects and defenses’”)).
131 Id. (citing Colwell v. State, 59 P.3d 463, 473 (2002) (“*Ring* is not applicable to [a defendant’s] case [when], unlike Ring, [the defendant pleads] guilty and waive[s] his right to a jury trial.”); Moore v. State, 771 N.E.2d 46, 49 (Ind. 2002) (By pleading guilty, defendant forfeited his right to “have a jury recommend to the trial court whether or not a death penalty should be imposed . . .”); South Carolina v. Downs, 604 S.E.2d 377, 380 (2004) (“*Ring* did not involve jury-trial waivers and is not implicated when a defendant pleads guilty.”); State v. Piper, 709 N.W.2d 783, 806-07 (S.D. 2006) (The “*Ring* analysis is inapplicable when a defendant waives the right to jury sentencing.”); Sanchez v. Superior Court, 102 Cal.App.4th 126, 126 Cal.Rptr.2d 200 (2002) (after *Ring*, a defendant may validly waive his or her right to have the jury determine the degree of murder)).
132 Id. at *6 (citing State ex rel. Lyons v. Lombardi, 303 S.W.3d 523, 525 n.2 (Mo. banc 2010); Ervin v. Purkett, 2007 WL 2782332 (E.D.Mo. 2007) at *1; State v. Thompson, 134 S.W.3d 32, 33 (Mo. banc 2004); State ex rel. Baker v. Kendrick, 136 S.W.3d 491, 494 (Mo. banc 2004); State ex rel. Mayes v. Wiggins, 150 S.W.3d 290, 291 (Mo. banc 2004); State v. Buchanan, 115 S.W.3d 841, 842 (Mo. banc 2003); State v.
none of those cases “involved a situation where a defendant strategically pled guilty and waived jury sentencing because he was afraid a jury would sentence him to death, as Nunley did in this case.”

The court further found that despite Nunley’s argument that he should have had a “fresh slate” making his original guilty plea and jury waiver ineffective after his case was remanded for re-sentencing, both remained valid. The court pointed out that it had already ruled such in 1996 when it held that “not permitting defendant to withdraw his plea does not result in manifest injustice or a miscarriage of justice,” and that the order to remand the case “did not reverse the plea. This is demonstrated by this Court specifically remanding for a new penalty hearing and imposition of sentence but not a new plea hearing.”

The court was also unpersuaded by Nunley’s argument that section 565.006.2 is unconstitutional under Ring because it precludes his right to have a jury determine the requisite facts to impose the death penalty. Though Nunley cited Whitfield in support of his contention, the court found that Whitfield was inapposite because, unlike Whitfield,
Nunley pled guilty and waived his right to jury sentencing.\(^\text{137}\) Thus, the court affirmed the constitutionality of section 565.006.2.\(^\text{138}\)

However, the majority noted that there were two issues highlighted by the dissent in this case and the U.S. Western District Court in \textit{Nunley v. Bowersox}, which Nunley did not raise or mention.\(^\text{139}\) First, the dissent asserted that the majority was in error because the sentencing court violated \textit{Blakely v. Washington}.\(^\text{140}\) Second, in Nunley’s application to stay his execution, the U.S. Western District Court asked the court:

If the right to have a jury determine his punishment did not exist when petitioner was originally sentenced to death, but this right was subsequently established by \textit{Ring} and found to be retroactive by the Missouri Supreme Court in \textit{Whitfield}, is petitioner’s waiver still valid?\(^\text{141}\)

The dissent also posed the district court’s question and concluded that Nunley waived his statutory right to jury sentencing but not his Sixth Amendment right to jury sentencing.\(^\text{142}\) Though the majority observed that because Nunley never made an argument “regarding any issue that resembles this question,” or the issue regarding \textit{Blakely}, the issues were not subject to the court’s review.\(^\text{143}\) However, the court discussed them nonetheless “in gratis to the dissent and the district court.”\(^\text{144}\)

The majority held that Nunley’s case was distinguishable from \textit{Blakely} because:

\(^{137}\) \textit{Id.} at *9.
\(^{138}\) \textit{Id.} The court additionally noted that other courts hold that “guilty pleas and waivers are valid even if the underlying sentencing scheme explicitly and unequivocally precludes the defendant from receiving a jury sentence.” State v. Piper, 709 N.W.2d at 807 (S.D. 2006); \textit{Colwell}, 59 P.3d at 473 (the Nevada Supreme Court upheld a statutory scheme that unequivocally eliminated the right to a jury at sentencing because the defendant pled guilty and validly waived his right to a jury trial); \textit{Moore}, 771 N.E.2d at 49 (the Indiana Supreme Court upheld state statutes that unequivocally foreclosed the right to jury sentencing after a guilty plea because the guilty plea waived any entitlement to argue the statutory scheme violated the federal and state constitutions by depriving the defendant of a jury determination of the aggravating circumstances).
\(^{140}\) \textit{Id.}
\(^{141}\) \textit{Id.}
\(^{142}\) \textit{Id.}
\(^{143}\) \textit{Id.}
\(^{144}\) \textit{Id.}
The defendant in Blakely was surprised when his sentence was judicially enhanced, whereas Nunley strategically pled guilty in order to avoid jury sentencing. Nunley knew that the sole issue for trial was whether he would be sentenced to death or life in prison. He had already admitted to all of the facts of the crime and the statutory aggravators required by section 565.030.4(1). He wanted a judge, not a jury, to make all further determinations in reaching his sentence. . . . Ultimately, he wanted a judge to determine whether mercy should be exercised and the sentence reduced to life imprisonment pursuant to 565.030.4(4). Nunley was not surprised by the process, the statutory steps of the process, or the decision maker. He got what he asked for in these regards. He was only surprised by the result, when the trial judge decided to impose the death sentence. Blakely does not extend Sixth Amendment protections to defendants who strategically plead guilty and purposefully waive jury sentencing.\textsuperscript{145}

Next, the majority turned to the district court’s (and the dissent’s) question, finding that it “misconstrue[d] the record of this case” because Nunley’s waiver remained valid.\textsuperscript{146} The court stated that:

\begin{quote}
The key fact is Nunley’s knowledge of the ability to be sentenced by a jury. Neither Apprendi, Ring, nor Blakely created a right to be sentenced by a jury that Nunley did not already have or understand, it just provided the United States Constitution as an additional source of this right. The fact that Ring provided an additional source of this right after Nunley pled guilty does not make Nunley’s waiver “unknowing.” Moreover, as noted above, Nunley testified that he was giving up “constitutional rights” by pleading guilty.\textsuperscript{147}
\end{quote}

Thus, in conclusion, the court held Ring, Whitfield, and Blakely do not apply to Nunley because he pled guilty and knowingly waived a jury trial and jury sentencing, choosing instead, for strategic reasons, to be sentenced by a judge.\textsuperscript{148} Finally, Nunley’s original waiver remained valid after his case was remanded for sentencing, and section 565.006.2 is constitutional.\textsuperscript{149}

\section*{IV. \textsc{Discussion}}

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\begin{itemize}
\item \textsuperscript{145} \textit{Id.} at *12.
\item \textsuperscript{146} \textit{Id.} at *13.
\item \textsuperscript{147} \textit{Id.} at *14.
\item \textsuperscript{148} \textit{Id.} at *10.
\item \textsuperscript{149} \textit{Id.}
\end{itemize}
Interpretation and application of *Ring* by lower courts has led to diverging results. Some courts, including the Missouri Supreme Court, have held that a guilty plea waives all non-jurisdictional defects, including statutory and constitutional guarantees, and that guilty pleas and waivers are valid even if the underlying sentencing scheme explicitly and unequivocally precludes the defendant from receiving a jury sentence. These courts have also held that while the existence of statutory factors may be a question of fact for the jury, the actual weighing of the factors is a question of law for the court. However, some courts have instead found that a statute linking the waiver of a jury trial on punishment to the waiver of a jury trial on guilt makes such a waiver unconstitutionally automatic, so criminal defendants must waive both separately and knowingly.

150 *See supra* nn.131, 138.

151 *Id.*

152 United States v. Sampson, 486 F.3d 13, 32 (1st Cir. 2007) (“As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found.”); United States v. Purkey, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as “the lens through which the jury must focus the facts that it has found” to reach its individualized determination); Higgs v. United States, 711 F.Supp.2d 479, 540 (D. Md. 2010) (“Whether the aggravating factors presented by the prosecution outweigh the mitigating factors presented by the defense is a normative question rather than a factual one.”); State v. Fry, 126 P.3d 516 (N.M. 2005) (“[T]he weighing of aggravating and mitigating circumstances is thus not a ‘fact that increases the penalty for a crime beyond the prescribed statutory maximum.’”); Commonwealth v. Roney, 866 A.2d 351, 360 (Pa. 2005) (“[B]ecause the weighing of the evidence is a function distinct from fact-finding, *Apprendi* does not apply here.”); Ritchie v. State, 809 N.E.2d 258 (Ind. 2004) (“In *Bivins v. State*, 642 N.E.2d 928, 946 (Ind. 1994), we concluded, as a matter of state law, that ‘[t]he determination of the weight to be accorded the aggravating and mitigating circumstances is not a ‘fact’ which must be proved beyond a reasonable doubt but is a balancing process.’ *Apprendi* and its progeny do not change this conclusion.”); Brice v. State, 815 A.2d 314 (Del. 2003) (*Ring* does not apply to the weighing phase because weighing “does not increase the maximum punishment.”); Nebraska v. Gales, 658 N.W.2d 604, 629-30 (Neb. 2003) (“We do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury”); Oken v. State, 835 A.2d 1105, 1158 (Md. 2002) (“the weighing process never was intended to be a component of a ‘fact finding’ process”); *Ex parte* Waldrop, 859 So.2d 1181, 1190 (Ala. 2002) (“*Ring* and *Apprendi* do not require that a jury weigh the aggravating circumstances and the mitigating circumstances.”).

In *Colorado v. Montour*, the defendant pled guilty and the plea automatically waived his right to have a jury determine his sentence. The Colorado Supreme Court held Colorado’s death penalty statute could not deprive the defendant of his Sixth Amendment jury trial right on the facts essential to the death penalty eligibility determination when a defendant pleads guilty. The Court stated “[o]nce 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. A court must procure the appropriate waiver after a guilty plea or finding of guilt before judicial fact-finding in sentencing is permissible.”

Similarly, in *State v. Piper*, the dissent noted that defendants who pled guilty have no right to have a jury determine their punishment, and that “the waiver of a substantive right presupposes the existence of the right in the first place. The language of the statute expressly limits the fact-finding role to the judge in non-jury cases . . . the judge . . . had no authority to offer jury sentencing once [the defendants] pleaded guilty.” Thus, the dissent concluded that “under these circumstance, the aggravating factors have to be admitted by the defendant or found by a jury, not the judge, and the penalty of death was unconstitutionally imposed.”

Having noted the differing opinions among some of the lower courts, the Missouri Supreme Court declined to change its case law regarding *Ring*, despite Nunley’s suggestions that it do so. The court specifically rejected the opportunity to fully review the constitutionality of section 565.006.2, stating that even if it “were unconstitutional as

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155 *Id.* at 498.
156 *Id.*
158 *Id.* at 822.
applied to others, it is constitutional as applied to Nunley.”\textsuperscript{159} The court also specifically found that “[n]either Apprendi, Ring, nor Blakely created a right to be sentenced by a jury that Nunley did not already have or understand, it just provided the United States Constitution as an additional source of this right. The fact that Ring provided an additional source of this right after Nunley pled guilty does not make Nunley’s waiver ‘unknowing.’”\textsuperscript{160} Though in dissent Justice Stith found that “a waiver of the statutory right to jury trial simply is a separate issue from whether there is a valid waiver of the constitutional right to jury trial,” she agreed with the principal opinion that “if one can waive a constitutional right to a jury determination of the facts necessary to punishment before that right has been recognized, then Mr. Nunley’s concession in his brief, and in his post-conviction plea hearing . . . is sufficient to establish that he did so.”\textsuperscript{161}

The fact that Nunley so unequivocally waived all of his constitutional rights regarding jury factfinding in his plea of guilty led the court to also decline to address in detail the circumstances under which failure to allow a defendant to withdraw a guilty plea might be unconstitutional. Traditionally, Missouri courts have allowed criminal defendants to withdraw their guilty pleas either pursuant to Missouri Supreme Court Rule 29.07(d) or because the defendant was “misled or induced to enter a plea of guilty by fraud, mistake, misapprehension, coercion, duress or fear.”\textsuperscript{162} Nunley did not offer evidence rising to the level of Latham; in fact, the record in his case’s procedural history indicates that he knowingly chose his particular trial strategy that included waiving all phases of jury adjudication. Although Nunley argued that pursuant to Hicks the Whitfield

\textsuperscript{159} 2011 WL 2139007 at *9.
\textsuperscript{160} Id. at *14.
\textsuperscript{161} Id. at *18-*19.
\textsuperscript{162} Latham v. State, 439 S.W.2d 737, 739 (Mo. 1969).
holding gave him a “state-created liberty interest” protected under the Fourteenth Amendment from arbitrary deprivation by the State, what occurred in Nunley’s case was neither arbitrary nor was it deprivation, as the court discussed above.

However, it may be that in the future that the Missouri Supreme Court specifically recognizes a separate right to jury adjudication of statutory factors in death penalty cases, which cannot be automatically waived upon a criminal defendant relinquishing his/her right to a jury trial by pleading guilty. Though the fact pattern in Nunley’s case did not necessarily provide the court with the occasion to consider in depth whether capital defendants who plead guilty should nonetheless be entitled to jury assessment of statutory factors, it may have the opportunity to do so in the future. Nunley’s case did raise compelling issues concerning these basic rights that have not been thoroughly vetted. However, the Missouri Supreme Court has turned down the opportunity to systematically address those issues for the present time.

V. CONCLUSION

It is clear under existing federal and Missouri law that current and future criminal defendants in homicide cases where the State seeks the death penalty have a right to jury assessment of all elements and factors required to impose the death sentence. It is also clear under existing federal and Missouri law that this right only applies retroactively to past convictions and sentences not declared final on direct review. This right also has been further applied under existing Missouri law to a limited number of cases on collateral review under specific circumstances.

A decision to grant the relief requested by Nunley and Taylor would have been inconsistent with both federal and Missouri state established law. However, the Missouri
Supreme Court could still remain consistent with *Ring/Whitfield* by choosing to further spell out those rights in its holdings in future death penalty cases before them. Indeed, it would be beneficial for the court to further illuminate these issues—not only will clarification help to conserve precious judicial resources, but future criminal defendants and law-abiding citizens alike will be made more aware of their very fundamental constitutional rights.

JACKIE WHIPPLE