

**IN THE MISSOURI SUPREME COURT  
EN BANC**

<b>STATE EX REL. BARRY K. BAKER,</b>	)	
	)	
<b>APPELLANT,</b>	)	
	)	
<b>VS.</b>	)	<b>No. SC85653</b>
	)	
<b>THE HON. LARRY KENDRICK,</b>	)	
	)	
<b>RESPONDENT.</b>	)	

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**ON PRELIMINARY WRIT OF PROHIBITION  
FROM THE SUPREME COURT OF MISSOURI, EN BANC  
TO THE HON. LARRY L. KENDRICK,  
CIRCUIT JUDGE OF ST. LOUIS COUNTY,**

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**RELATOR'S REPLY BRIEF**

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## REPLY ARGUMENT

### I

(Replying to Respondent's Argument Point 1)

**Respondent, seeking to avoid, relitigate, or limit *Whitfield*, argues that a) because he did not make any factual findings or impose a death sentence, b) because his instructions (he claims) complied with *Ring v. Arizona*, and c) because Section 565.030.4 does not require a sentence of life, the Court should not prohibit him from ordering a new penalty phase trial and should not order him to sentence relator to life. Respondent's arguments fail because *Whitfield* applies fully to relator's case and requires respondent to sentence relator to life imprisonment without probation or parole (LWOPP). Neither respondent's instructions nor the fact that respondent made no findings and did not sentence relator to death change that result.**

Respondent commences his argument by whittling *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003), to the following holdings:

1. '[D]efendant's death sentence was "unconstitutional because it violated his right to be sentenced on determinations made by a jury,"'

Respondent's Brief at 7 citing *State v. Whitfield*, 107 S.W.3d 253, 271 (Mo.banc 2003).

Relator agrees that this was a holding of *Whitfield*.

2. 'Specifically... "defendant's death sentence was unconstitutional because the trial court entered a death sentence against the defendant where the jury did not explicitly find that aggravating circumstances existed, that the aggravating circumstances warranted death, or that mitigating circumstances did not outweigh aggravating circumstances,"' Respondent's Brief at 7-8 citing *Id.* at 261-62, 271.

Relator agrees that this, too, was a holding of *Whitfield*.

3. The Court in *Whitfield* limited 'its application of *Ring*<sup>1</sup> and its decision [*Whitfield*] to five listed cases, "only those few Missouri death penalty cases that are no longer on direct appeal and in which the jury was unable to reach a verdict and the judge made the required factual determinations and imposed the death penalty..." Respondent's Brief at 8.<sup>2</sup>

Relator disagrees. In his initial brief, relator addressed Respondent's

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<sup>1</sup> *Ring v. Arizona*, 536 U.S. 584 (2002).

<sup>2</sup> Respondent failed to cite to the opinion here; the quoted portions are taken from 107 S.W.3d at 268-69.

misunderstanding of *Whitfield's* retroactive application; to avoid repetition, relator respectfully refers the Court to Relator's Brief at 19-20.

d) The decision in *Whitfield* “[u]ltimately ... relied on MoRS Section 565.040.2 (2000)...” Respondent's Brief at 8.

Relator does not agree and replies to this, *infra*, at Reply Brief at 7-9.

Respondent omits critical portions of *Whitfield*. That opinion did not merely hold that the death sentence in that case ‘was “unconstitutional because it violated [the defendant's] right to be sentenced on determinations made by a jury”’ with regard to the three death-eligibility steps identified by the Court in that case. Respondent's Brief at 7-8. What respondent omits from his description of *Whitfield*, and of particular significance for the present case, is the opinion's holding regarding remedy.

Respondent ignores the fact that *Whitfield* expressly addressed, and rejected, the state's argument that a new penalty phase trial would be an adequate remedy where the jury hung at penalty phase and the judge imposed death:

Under the principles set out in *Ring*... [t]he only option was to impose a life sentence... .

The State disagrees. It argues that, even if *Ring* applies

retroactively, the remedy is to remand for a new penalty phase trial, not to impose a sentence of life imprisonment... [because] on remand of *Ring* itself the Arizona Supreme Court held that new penalty phase trials are permissible... In Arizona, once a jury determined guilt, a judge determined punishment. Therefore, the defendant in *Ring* and in other Arizona death penalty cases never had the opportunity to have a jury consider penalty phase evidence and determine whether to impose a life sentence or death. It is therefore quite appropriate that the remedy the Arizona courts have ordered is that such a trial be held.

In Missouri, by contrast ... the jury must undertake four steps in determining defendant's sentence, the first three of which require factual findings. If the jury is unable to find each such fact favors death, then it must impose a life sentence. *Here, the record fails to show that the jury made these findings*, but does affirmatively show that the judge entered a judgment of death based on his own findings rather than those of the jury. As stated, under *Ring* and Missouri law, this was error that was not harmless. *Therefore, the judge's only option was to impose a sentence of life.* The

separate opinion of Judge Price suggests that ... the remedy will be to order a new trial and give the State a second opportunity to convince a different jury to find the facts necessary for imposition of the death penalty. *But, Missouri's statutes do not provide for this second bite at the apple...*

*Whitfield*, 107 S.W.3d at 269-70 (emphasis added).

In this circumstance, it is irrelevant whether one can presume from the deadlock that the jury acquitted defendant of the death penalty. Presumptions play no part in this case. The death sentence was unconstitutional, and, the judge was required to enter a sentence of life imprisonment. In this circumstance, *it would make defendant's victory a hollow one indeed if this Court were to hold that the remedy for the trial judge's failure to enter a life sentence is to remand to allow the State to seek the death penalty again at a new trial.* The remedy must be to correct the error by imposing the sentence the judge should have imposed – life imprisonment without the possibility of probation or parole except by act of the Governor...

*Id.* at 270, n. 20 (emphasis added).

This part of the opinion does more than hold that, under *Ring*, it was

improper for the judge in *Whitfield* to make the death eligibility findings required by 565.030.4(1), (2), and (3) and to sentence Mr. Whitfield to death on the basis of those findings: “Here, the judgment of death, based on the court’s findings, constituted constitutional error.” 107 S.W.3d at 271. The above-quoted portion of *Whitfield* – which respondent overlooks – is the opinion’s critical analysis of §565.030.4, *not §565.040.2*, its *rejection of a retrial of the penalty phase as a remedy for a hung jury*, and its *holding that a sentence of LWOPP was required*.

*Whitfield* holds this: when a jury returns a penalty phase verdict of “unable to decide punishment,” and the record does not show that the jury made the death eligibility findings required by §565.030.4(1), (2), and (3) for a sentence of death,<sup>3</sup> the judge must sentence the defendant to life because Missouri’s statutes do not provide for a retrial of the penalty phase to “give the State a second opportunity to convince a different jury to find the facts necessary for imposition of the death penalty.” 107 S.W.3d at 270.

Respondent also appears to argue that the decision in *Whitfield*,

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<sup>3</sup> “Here, the record fails to show that the jury made these findings... .” 107 S.W.3d at 270.

prohibiting a penalty phase retrial and ordering the defendant to be sentenced to life, was based on §565.040.2, and §565.040.2 does not preclude a new penalty phase trial in the underlying criminal case because respondent has not sentenced relator to death. Respondent's Brief at 9.

Respondent's argument ignores the fact that it is only *after* holding<sup>4</sup> that §565.030.4 does not provide for a retrial of the penalty phase, when the jury returns a deadlocked verdict, that *Whitfield* discusses §565.040.2. *See Id.* at 271-72. Indeed, the Court's discussion of §565.040.2 begins by referencing its previous holding – the “result of its

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<sup>4</sup> Shortly before discussing §565.040.2, the opinion reiterates that it is “holding” that a new trial is required:

In this circumstance, it would make defendant's victory a hollow one indeed if this Court were to hold that the remedy for the trial judge's failure to enter a life sentence is to remand to allow the State to seek the death penalty again at a new trial. The remedy must be to correct the error by imposing the sentence the judge should have imposed – life imprisonment without the possibility of probation or parole except by act of the governor. 107 S.W.3d at 270, n. 20.

analysis of §565.030.4: “This **result** is anticipated, and required, by section 565.040.2...” *Id.* at 271; emphasis added. Section 565.040.2 confirms that the Court reached the correct result, but the Court reached that result – its holding that the remedy must be a sentence of LWOPP – independently of §565.040.2.

Respondent’s second argument, that “neither *Whitfield* nor *Ring* nor [§565.030.4] prohibit Respondent from ordering a new penalty phase trial or require Respondent to sentence the defendant to [LWOPP] when a jury hangs as to punishment because the Respondent’s Instructions complied with *Ring*,”<sup>5</sup> repeats arguments previously rejected in *Whitfield*. Specifically, as to Instruction 17, addressing “step 2” or the “warrant” step, respondent argues:

Instruction 17 informed the jury that if they did not “unanimously find from the evidence that the facts and circumstances in aggravation of punishment warrant the imposition of death as defendant’s punishment,” they must return a verdict of life imprisonment. (A29). Accordingly, the fact that the jury did not return a verdict of life imprisonment signifies that it unanimously found that the circumstances in

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<sup>5</sup> Respondent's Brief at 9.

aggravation of punishment warranted the death penalty.

Respondent's Brief at 10.

Respondent fails to cite any authority for this argument and, more importantly, fails to mention that *Whitfield* considered and rejected a similar argument put forth by the state in that case: that because the jury did not return a verdict of life imprisonment, it must be presumed that the jury found that the aggravating circumstances warranted death. 107 S.W.3d at 263. The Court in *Whitfield* declined to apply a presumption to a factual finding required for a sentence of death. Of particular importance to the present case, the Court noted that §565.030.4 “does not permit a trial judge to presume, based on the jury’s deadlock, that the jury has decided any particular steps against defendant”. *Id.*

Respondent's argument with regard to step 3 – whether the mitigating circumstances are sufficient to outweigh the aggravating circumstances – again echoes the argument made by the state in *Whitfield* as to that step. Although respondent uses the word “signifies” instead of the word “presumption,” respondent is arguing that it may be “presumed” from the verdict that “each juror determined” that the mitigating circumstances did not outweigh the aggravating circumstances:

Instruction 18 stated that “it is not necessary that all jurors agree upon the facts and circumstances in mitigation of punishment,” and if each juror determined “that there are facts and circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment,” the jury must return a verdict of life imprisonment. (A30-31). Accordingly, the fact that the jury did not return a verdict of life imprisonment signifies that each juror determined that there were not facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment.

Respondent’s Brief at 10-11.

As before, respondent’s argument is unsupported by citation to authority and never mentions that *Whitfield* considered and rejected this argument:

Unlike for step 2, however, the jury was *not* told in regard to step 3 that it had to return a verdict of life imprisonment if it could not unanimously agree whether the mitigating facts outweighed the aggravating facts. Sec. 565.030.4; *see also*

MAI-CR3d 313.48; *Thompson*, 85 S.W.3d at 639.<sup>6</sup> Under the instruction, if even one juror, but not all, determined “there is evidence in mitigation of punishment ... which is sufficient to outweigh the evidence in aggravation of punishment...,” the jurors would be unable to agree on punishment and, under the instructions, the jury would be deadlocked and would return a verdict form so stating.

107 S.W.3d at 264. The same is true in the underlying criminal case here. Mr. Baker’s jury was not instructed, in Instruction 18 or in Instruction 20, or in any other instruction, that it must return a verdict of life imprisonment “if it could not unanimously agree whether the mitigating facts outweighed the aggravating facts.” 107 S.W.3d at 264.

Respondent asks this Court to indulge in the presumptions that it rejected in *Whitfield*. But “[t]his Court, and any court, can only act on the record, and the record” in this case “does not show” any more than did the record in *Whitfield* “that the jury deadlocked after rather than before it made the requisite finding under step 3. *Id.* The Court must reject respondent’s argument.

Respondent argues that §565.030.4 “does not prohibit Respondent

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<sup>6</sup> *State v. Thompson*, 85 S.W.3d 635 (Mo.banc 2002).

from ordering a new penalty phase trial. Respondent's Brief at 12. Respondent's argument misses the mark: the problem with respondent's ordering a new trial is not that §565.030.4 "prohibits" respondent from ordering a new trial; the problem is that §565.030.4 does not authorize that action.

Respondent tries reinterpreting §565.030.4; he argues:

a trier may sentence a defendant to life imprisonment... **only** if it affirmatively decides not to impose death. Here, the jury, by failing to agree on punishment, could not agree on the decision to *not* impose death. Therefore, §565.030.4 does not require Respondent to sentence Relator to life imprisonment without eligibility for probation or parole, and Respondent's ordering of a new penalty phase trial was proper.

Respondent's Brief at 12.

Respondent has rewritten the statute. Absolutely NO PLACE does §565.030.4 state – or even infer – that 'a trier may sentence a defendant to life imprisonment without eligibility for probation or parole "only" if it affirmatively decides not to impose death.'

What the §565.030.4 does say is: "The trier *shall* assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor...[the statute here sets

out steps 1-4]. Respondent evidently reads the word “only” into §565.030.4, thusly: “The trier shall [**only**] assess and declare the punishment at life imprisonment... What does the use of the term “shall assess” mean in the context of this statute? It means that there are four situations – as specified by §565.030.4 (1), (2), (3), and (4) – when the jury *must* assess punishment at life imprisonment; life is required in these situations. Respondent’s argument that life may never otherwise be imposed is an aberration.

Respondent’s final claim under this first part of his argument is that because there was error in the verdict forms under *Whitfield*, a new penalty phase trial is an appropriate remedy. Respondent cites *State v. Mayes*, 63 S.W.3d 615 (Mo.banc 2001) and *State v. Storey*, 986 S.W.2d 462 (Mo.banc 1999) in support of this claim.

*Mayes* and *Storey* are inapposite. The juries in those cases made the requisite findings for a sentence of death and returned verdicts assessing the punishment at death. The defendants in *Mayes* and *Storey* were willing to give the state a second chance to seek death.

In *Mayes* and *Storey*, the defendants asked for, and received, a new penalty phase trial. Mr. Baker is not seeking a new penalty phase trial. “In this circumstance, it would make defendant’s victory a hollow one indeed if this Court were to hold that the remedy for the trial

judge's failure to enter a life sentence is to remand to allow the State to seek the death penalty again at a new trial." *Whitfield*, 107 S.W.3d at 270, n. 20. "The remedy must be to correct the error by imposing the sentence the judge should have imposed – life imprisonment without the possibility of probation or parole except by act of the governor." *Id.*

## II

### (Replying to Respondent's Argument Point 2)

**Respondent's argument – that he could order a new penalty phase trial because there was no penalty phase verdict, he still had jurisdiction, and had authority to do so *sua sponte* by relying on *Whitfield* – must fail because 1) there was a penalty phase verdict, 2) Rules 29.13(b) and 29.11(g) both apply but respondent failed to comply with them, 3) "*sua sponte*" or otherwise, respondent's order of a new penalty phase trial occurred after he no longer had jurisdiction, and 4) *Whitfield* neither supports, nor imparts jurisdiction for, respondent's action in ordering a new penalty trial.**

Respondent claims: there was no penalty phase verdict; he had jurisdiction; Rules 29.13(b) and 29.11(g) don't apply; and in any event,

he could rely on *Whitfield*, not the Rules of Court, to support his “*sua sponte*” order of a new penalty phase trial. Respondent is incorrect.

Curiously, having acknowledged in his Statement of Facts that the jury returned a penalty phase “verdict” in the underlying criminal case, respondent begins his argument that Rule 29.13(b) does not apply by claiming, “there was no penalty phase verdict.” Respondent’s Brief at 14; see, e.g., Respondent’s Statement of Facts at 4 (“On March 24, 2003, the same jury returned a verdict stating that it had unanimously found four statutory aggravating circumstances beyond a reasonable doubt but was unable to agree on punishment...”). Respondent cites no authority for his claim that the jury’s penalty phase verdict was not a verdict.

This is not surprising since relator’s research indicates that a penalty phase verdict of “unable to agree on punishment” is a verdict. See, e.g., *State v. Whitfield, supra*, 107 S.W.3d at 264 (“Here, the jury returned a verdict stating that it was unable to agree on punishment...”); *State v. Thompson, supra*, 85 S.W.3d at 636-37 (Mo.banc 2002) (“The jury was given three verdict forms for each count, one for a verdict of life imprisonment without possibility of probation or parole ... one for a verdict of death, and one for a verdict of inability to agree upon the punishment (commonly known as the “deadlocked”

verdict)... On both counts, the jury gave verdicts indicating they were unable to decide upon punishment...'); *State v. Smith*, 944 S.W.2d 901, 919 (Mo.banc 1997) (“The jurors cannot return a verdict announcing that they cannot agree on a sentence if they have not agreed on at least one statutory aggravating factor...”).

Moreover, even assuming, for the sake of argument, that the verdict in this case was not a verdict, neither Rule 29.11(g) nor any other Rule preclude a defendant from filing a motion for new trial. Rule 29.11(g) sets the last possible date for ruling on the motion for new trial based on the date the motion for new trial was filed; its time limitations do not depend on a verdict.

Respondent’s next argument – which incorrectly claims relator’s points are inconsistent and further incorrectly claims that relator’s Point 2 posits that respondent should have ignored *Whitfield* – appears to be based on a combination of the fact that *Whitfield* was issued only “after the thirty-day period had run” plus respondent’s erroneous belief that *Whitfield* supports respondent’s action in ordering a new penalty phase trial. Respondent’s Brief at 14-15. Again, respondent is incorrect. Relator’s points and arguments are not inconsistent with each other or with *Whitfield*. Nor, by any stretch of the imagination, do relator’s points and arguments suggest that respondent should have

ignored *Whitfield*. In both points, relator argued that respondent's only option was to sentence relator to LWOPP: in his first point and accompanying argument relator relied on *Whitfield*; and in his second point and corresponding argument relator relied on Rules 29.11(g) and 29.13(b) as well as *Whitfield*.

Respondent then argues, it appears, that he should not be bound by Rule 29.13(b), because 'if this Court had issued *Whitfield* during the initial thirty-day time period, Respondent would have been powerless under Rule 29.13(b) to order a new trial because Relator, as demonstrated by his motions pursuant to *Whitfield*, would not have "consented" to the ordering of a new penalty phase trial.' Respondent's Brief at 15. Respondent offers no authority for his argument that Rule 29.13(b) should not apply because it would have rendered him unable to give effect to his erroneous interpretation of *Whitfield*. Respondent is correct about one thing: relator 'would not have "consented" to the ordering of a new penalty phase trial.'

Turning to Rule 29.11(g), respondent appears to argue, first, that this Rule is inapplicable because it only applies when the trial court's ruling is in response to a "filed motion." Respondent's Brief at 16. That, respondent argues, did not happen here, since respondent (who "had not exhausted his jurisdiction because there was no final

judgment”) “prudently” made his ruling “*sua sponte*” based on *State v. Whitfield*. Respondent’s Brief at 16.

Not only does respondent fail to cite any authority in support of his argument that he could act “*sua sponte*” without regard to the Rules, his theory is dangerous because it renders the Rules of Court ineffectual, irrelevant, and meaningless. Under respondent’s theory, a trial court may, at any time, ignore the Rules and claim that he is acting *sua sponte* in reliance on case law to support whatever action, order, or ruling he desires to make.

Moreover, the record refutes respondent’s claim that he was ruling “*sua sponte*” and was not ruling on the motion for new trial. On September 11, 2003, respondent began the proceedings by stating, “We’re here today for the Court’s rulings on four motions ... defendant’s April 16, 2003, motion for judgment of acquittal or, in the alternative, motion for new trial; June 12, 2003, supplemental motion for new trial; defendant’s June 17th, 2003, second supplemental motion for judgment of acquittal or, in the alternative, motion for new trial or motion for the trial court to sentence Barry Baker to life without probation or parole, and June 19th, 2003, amended second supplemental motion for the trial court to sentence Barry Baker to life in prison without the possibility of probation and parole” (A3-A4).

Respondent then ruled on the motions: “As to defendant’s April 16, 2003, motion for judgment of acquittal or, in the alternative, motion for new trial, and June 12, 2003, supplemental motion for new trial, it’s hereby ordered, adjudged, and decreed that those motions are hereby denied” (A4). As to the two motions relator filed subsequent to *Whitfield* – which the state concedes,<sup>7</sup> ‘despite the title ... specifically cited *Whitfield* and requested Respondent, pursuant to that contemporaneous opinion, to sentence [relator] “to life in prison without the possibility of probation or parole”’ – respondent “enter[ed] its order, judgment, and decree that a new trial is granted herein as to the penalty phase only” (A4).

Respondent, to bolster his claim that he had jurisdiction to enter his “*sua sponte*” order, cites *Simmons v. White*, 866 S.W2d 443 (Mo.banc 1993), and *State ex rel. Wagner v. Ruddy*, 582 S.W.2d 692 (Mo.banc 1979), and argues that he “had not exhausted his jurisdiction [when he ordered a new trial] because there was no final judgment.” Respondent’s Brief at 16. Although it is not entirely clear, respondent’s reliance on *Simmons v. White* and *State ex rel. Wagner v. Ruddy*, both of which hold that the trial court loses jurisdiction after sentencing,

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<sup>7</sup> Respondent’s Brief at 5.

suggests respondent may be arguing that he could only lose jurisdiction by entering judgment and sentence against relator and because he had not sentenced relator, he had not lost jurisdiction.

Respondent overlooks *State ex rel. Parks v. Barker*, 567 S.W.2d 130 (Mo.banc 1978), cited by this Court in *Wagner v. Ruddy*, *supra*, 582 S.W.2d at 694, and cited and discussed in relator's initial brief. See Relator's Brief at 25. In *Parks v. Barker*, this Court held that the trial court's action in ordering a new trial "was beyond the time given the trial court for such action, the action was beyond the court's jurisdiction and prohibition [was] a proper remedy." *Id.* at 133. *Parks v. Barker* refutes respondent's argument.

Second, respondent appears to argue that Rule 29.11(g) does not apply since, at the time respondent ruled on September 11, 2003, there was no motion for new trial "because Relator effectively withdrew his motion for a new penalty phase trial by filing his June 17 Motion and June 19 Motion pursuant to Whitfield." Respondent's Brief at 16. Respondent cites no authority to support this argument. Relator has previously addressed the fact that an out of time motion is a nullity and is of no effect. See Relator's Brief at 26. Respondent's argument is unfounded and fails.

## **CONCLUSION**

For the foregoing reasons, respondent's arguments fail. The Court must issue the writ of prohibition to which relator Barry Baker is entitled ordering Judge Kendrick to comply with *Whitfield*, to not proceed with a new penalty phase trial, and to sentence relator to life imprisonment without the possibility of probation or parole.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I, the undersigned attorney, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b). According to the "Word Count" function of Microsoft "Word," the brief contains a total of 4,393 words.

The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses by a McAfee VirusScan program and according to that program is virus-free.

A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were mailed this \_\_\_ day of \_\_\_\_\_, 20\_\_\_, to Joseph S. Dueker, Office of the Prosecuting Attorney of St. Louis County, 100 South Central, Clayton, Missouri 63105 (314) 615-2000.

\_\_\_\_\_  
Attorney for Appellant