

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI, )  
 )  
RESPONDENT, )  
 )  
VS. ) No. SC88181  
 )  
SCOTT A. MCLAUGHLIN, )  
 )  
APPELLANT. )

---

—

APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY,  
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 12,  
THE HONORABLE STEVEN H. GOLDMAN, JUDGE

---

—

APPELLANT'S REPLY BRIEF

---

—

DEBORAH B. WAFER, MO BAR NO. 29351  
ATTORNEY FOR APPELLANT  
OFFICE OF THE PUBLIC DEFENDER  
1000 ST. LOUIS UNION STN., STE. 300  
ST. LOUIS, MISSOURI 63103  
(314) 340-7662 – TELEPHONE  
(314) 340-7666 – FAX  
DEBORAH.WAFER@MSPD.MO.GOV

TABLE OF CONTENTS

<u>DESCRIPTION</u>	<u>PAGE</u>
TABLE OF AUTHORITIES .....	2-3
REPLY ARGUMENT	
As to Respondent’s Point One: The trial court .....	4-11
imposing a death sentence when the jury	
hangs violates the Constitution, <i>Ring</i> ,	
<i>Whitfield</i> , and Chapter 565	
As to Point Three: Refusing appellant’s felony .....	12-17
murder instruction was error	
CONCLUSION.....	18
CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULES.....	19

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Ring v. Arizona</i> , 536 U.S. 466 (2002) .....	4, 6, 7, 8, 11
<i>Schad v. Arizona</i> , 501 U.S. 624 (1991) .....	16-17
<i>State v. Duren</i> , 547 S.W.2d 476 (Mo.banc 1977).....	8
<i>State v. Whitfield</i> , 107 S.W.3d 253 (Mo.banc 2003).....	4-11
 <u>CONSTITUTIONAL PROVISIONS</u>	
Amend. VI, U.S. Const. ....	7-8
Amend. XIV, U.S. Const. ....	7-8
 <u>STATUTES</u>	
Chapter 565, RSMo.....	9
Section 565.002, RSMo.....	9
Section 565.020, RSMo.....	13
Section 565.021.1(1), RSMo .....	13-14
Section 565.021.1(2), RSMo .....	13-14
Section 565.025.2(1)(a), RSMo .....	14
Section 565.030.4, RSMo.....	4-10
Section 565.032, RSMo.....	9

Section 565.040..... 4, 7, 10

INSTRUCTIONS

MAI-CR3d 304.16 ..... 14-15

MAI-CR3d 314.06 ..... 15-16

MAI-CR3d 314.44 ..... 10

MAI-CR3d 314.48 ..... 10

OTHER AUTHORITIES

ALI, Model Penal Code § 210.2 (1980) ..... 17

2 W. LaFave & A. Scott, Substantive Criminal Law §7.5(1986) .... 17

Michael M. Lewis, *Moneyball* (2003) ..... 14

3 J. Stephen, History of the Criminal Law of England (1883)..... 17

## REPLY ARGUMENT

### Replying to Respondent's Point One:

Appellant has argued and maintains: Section 565.030.4<sup>1</sup> requires the trial court to make and use its own death-eligibility fact findings to determine punishment when the jury is unable to determine punishment. Section 565.030.4 therefore violates *Ring v. Arizona*<sup>2</sup>, provides an unconstitutional death penalty, and triggers application of §565.040 (App.Br.50-64).

Responding, the state claims that because the jury's verdict listed its findings regarding the death-eligibility steps of §565.030.4, there was no *Ring* violation even though the trial court made and relied on its own factual findings in imposing a sentence of death (Resp.Br. 24-28). According to respondent, "neither the procedure followed nor §565.030.4 [is] unconstitutional" because "all that *Ring* and *Whitfield*<sup>3</sup> require" is that the jury make the death-eligibility findings (Resp.Br. 30-32). Respondent asserts that *State v. Whitfield* did not find §565.030.4

---

<sup>1</sup> Unless otherwise noted, statutes cited are RSMo (Supp. 2006).

<sup>2</sup> 536 U.S. 466 (2002).

<sup>3</sup> 107 S.W.3d 253 (Mo.banc 2003).

unconstitutional; *Whitfield* only held the jury must make the death-eligibility findings.

But respondent glosses over the fact that *Whitfield's* holding was premised on the fact that §565.030.4's provision for judicial fact-finding violates *Ring*:

When a jury returns a verdict stating the jurors cannot decide upon punishment, section 565.030.4 requires the judge to decide punishment and provides that “[t]he court shall follow the same procedure as set out in this section [steps 1-4] whenever it is required to determine punishment for murder in the first degree.” *Sec. 565.030.4*. The statute required the judge to independently go through the four statutory steps and make his or her own determination whether the death penalty or life imprisonment should be imposed.

As required by section 565.030.4, once the jury deadlocked on Mr. Whitfield's punishment, the trial judge independently went through each of the four statutory steps, independently determined each fact against Mr. Whitfield, and imposed a death sentence. As a result, the death sentence imposed on Mr. Whitfield was not based on a jury finding of any fact, but rather

was entirely based on the judge's findings that all four steps favored imposition of the death penalty. *See sec. 565.030.4.* This process clearly violated the requirement of *Ring* that the jury rather than the judge determine the facts on which the death penalty is based.

*Whitfield*, 107 S.W.3d at 261-62.

The “process” cited in the opinion as “clearly violat[ing] ... *Ring*” is §565.030.4’s requirement that “once the jury deadlock[s] on [defendant’s] punishment, the trial judge [must] independently [go] through each of the four statutory steps, and independently determine[] each fact against [defendant], [to] impose a death sentence.” *Id.*, at 261.

Because Mr. Whitfield had already been tried and sentenced when *Ring* was issued, it was too late for him to challenge the constitutionality of the statute to preclude it from being applied in his case. The opinion indicates Mr. Whitfield’s motion to recall the mandate alleged only that it violated *Ring* for the judge in his case make the death-eligibility fact-finders used to sentence him to death. *Id.*, at 256. In *Whitfield*, this Court had no occasion to expressly “hold” that §565.030.4 violated *Ring*.

Nevertheless, although not expressly addressed in *Whitfield*, the opinion leaves no doubt that §565.030.4’s provision for judicial fact-

finding violates *Ring* and is unconstitutional under the Sixth and Fourteenth Amendments. Appellant, charged after both *Ring* and *Whitfield* were issued, relied on those cases to argue before trial that the trial court would violate the constitution in sentencing appellant to death under §565.030.4. Appellant further argued that because judicial fact-finding under §565.030.4 violates *Ring* and is unconstitutional, §565.040 applies and that if the jury hung at his trial, he must be sentenced to life imprisonment:

Use of the present statute in a manner not violative of *Ring* and *Whitfield* requires a circuit court to (1) ignore large portions of the law that provide for the “trier” to be either a judge or jury, (2) empower the jury to make findings of aggravating circumstances in situations where the statute does not so provide (allowing a jury to list aggravators found when the jury hangs) and (3) ignore the provisions of that law that empower the court to find aggravating circumstances if the jury is unable to agree upon punishment. Use of the present statute in a manner not violative of *Ring* and *Whitfield* requires a circuit court to *sua sponte* add provisions to the statute which the legislature has not passed on, and also to ignore provisions in

the present statute which were passed by the Missouri legislature and then found to be unconstitutional by the United States Supreme court and the Missouri Supreme Court.

Until the legislature determines a new, constitutional procedure for sentencing in a case in which the death penalty has not been waived, the death penalty provided for in Chapter 565, RSMo (2000), is unconstitutional. Accordingly, under *Duren*<sup>4</sup> and Section 565.040.1, the state should not be allowed to seek a sentence of death in this cause....

(LF69).

Unlike Mr. Whitfield, appellant argues in this direct appeal that §565.030.4's requirement for judicial fact-finding when the jury is unable to determine punishment is unconstitutional and violates *Ring*. The unconstitutionality of §565.030.4, and the remedy for that unconstitutionality are squarely presented in this appeal, and the Court must find, consistent with *Ring* and *Whitfield*, that the statute violates the Sixth and Fourteenth Amendments and provides for an unconstitutional death penalty "when the jury is unable to decide or

---

<sup>4</sup> *State v. Duren*, 547 S.W.2d 476 (Mo.banc 1977).

agree upon punishment.”

With regard to the appropriate remedy, respondent does not address the fact that the trial court lacked authority to ignore and depart from the provisions of Chapter 565 in this case. These provisions are mandatory: “The provisions of [Chapter 565] **shall govern** the construction and procedures for charging, trial, punishment and appellate review of any offense defined in this chapter...” §565.002; emphasis added. Section 565.030.4 directs, “**If** the trier assess and declares the punishment **at death it shall**, in its findings or verdict, set out in writing the aggravating circumstance or circumstances listed in subsection 2 of section 565.032 which it found beyond a reasonable doubt” and “The court **shall** follow the same procedure as set out in this section [§565.030.4] whenever it is required to determine punishment for murder in the first degree.” (Emphasis added.)

But no provision authorizes the jury to set out in writing the findings it has made when it is unable to decide or agree upon the punishment, and no provision authorizes the trial court to forsake the statute and rely on the jury’s findings. As this Court put it in *Whitfield*, under §565.030.4, “when the jury deadlocks, the jury's findings simply disappear from the case and the court is to make its own independent

findings.” 107 S.W.3d at 271. Under no circumstances, not even if the result would be unconstitutional, does Chapter 565 authorize the trial court, if the jury “is unable to decide or agree upon the punishment,” to ignore §565.030.4’s requirement that the **court** make and use its own factual findings “to determine punishment.”

The only provision addressing what **shall** be done if “the death penalty provided in this chapter is held to be unconstitutional” or if “any death sentence imposed pursuant to this chapter is held to be unconstitutional” is §565.040. That statute required the trial court, when the jury hung, to impose a sentence of life imprisonment; it requires this Court to order Scott to be resentenced to life imprisonment now.

Respondent also claims that Instructions 24 and 26, MAI-CR3d 314.44 and 314.48, implementing the “weighing step” of §565.030.4, were consistent with that statute – even though they inserted a non-statutory requirement of unanimity – because they “tracked the applicable MAI[’s]” which are “presumptively valid” (Resp.Br. 36-377). And, respondent says, “the logical conclusion” from the statutory phrase, “if the trier concludes,” is that no less than “the jury as a whole” “must conclude that mitigating evidence outweighs aggravating evidence” (Resp.Br. 37-38).

But the term “conclude” does not imply, by any means, that the group of people “concluding” must be unanimous. An obvious example: a majority of appellate judges may “conclude” or determine an issue. A simple majority – not unanimity – is all that is necessary. *See e.g., Whitfield*, 107 S.W.3d at 272 (Price, J., concurring in part and dissenting in part with four-judge majority; noting, “The majority decision concludes that *Ring v. Arizona*,..., requires separate jury determinations concerning the first three steps of section 565.030.4....”)

This Court’s statement in *Whitfield*, that “had [the] case been tried after *Ring*, the proper course of action for the judge to follow would have been to sentence defendant to life imprisonment,” *Id.*, at 271, explains what should have happened in this case. For this and the foregoing reasons, and for all the reasons put forth in appellant’s initial brief, respondent’s arguments are not persuasive and must fail. The Court must reverse the death sentence imposed by the trial court and resentence Scott to life imprisonment without probation or parole.

### Replying to Respondent's Point Three:

Respondent appears to concede that failing to give the jury Scott's Instruction B on the lesser offense of felony murder might have been error but asserts it "was harmless in light of Appellant's conviction for first degree murder rather than for conventional murder in the second degree" (Resp.Br. 49). It is harmless, respondent claims, because Missouri courts have said so for a long time (Resp.Br. 49-50).

More specifically, respondent relies on the fact that the courts have always held that a "conventional second degree murder instruction sufficiently tests the jury's belief that the defendant met all the elements for first degree murder" (Resp.Br. 50). Respondent says that because Scott's jury was instructed on both first degree and conventional second degree murder and convicted him of first degree murder instead of second degree murder, there was no prejudice from failing to submit the felony murder instruction.

But this argument is necessarily predicated on conventional second degree murder and felony murder being identical in their elements and operation. If, however, conventional second degree murder and felony murder function differently, then respondent's argument is suspect.

In fact, by function and operation, first degree murder and conventional second degree murder are the same offense except that conventional second degree murder lacks the element of deliberation. *Cf.*, §§565.020.1 (knowingly causing the death of another person after deliberation) and §565.021.1(1) (knowingly causing the death of another person). Accordingly, conventional second degree murder certainly does test the element of deliberation.

But in Missouri, felony murder operates on a completely different paradigm. Felony murder occurs when, in the commission or attempt to commit any felony, someone is killed. §565.021.1(2). Felony murder is like first degree murder or conventional second degree murder only because someone is killed.

The offense of felony murder is, in fact, an alternative to both first degree and second degree murder. To use an imperfect analogy, the distinction between the first degree/second degree murder paradigm and the felony murder paradigm is like choosing a computer. The difference is not whether, if you need a computer, you buy a PC computer with Windows Vista or Windows XP; it is whether you buy a PC or a Mac. Or to use a sports analogy: if you own a baseball team and you want to find players who will win more games, the distinction is not whether you send

out 2 scouts or 5 scouts to watch minor league players: it is whether you evaluate potential players by using scouts who watch players for one or two games and file a report or, instead, you use the “Moneyball” method of statistics to pick your players.<sup>5</sup> (see *Moneyball* by Michael Lewis).

Respondent attempts to support the “conventional-second-degree-murder-prevents-prejudice!” rule by arguing that “under the instructions, the jury has to have found the defendant not guilty of first degree murder and then not guilty of conventional second degree murder before it can even consider felony murder” and, therefore, if the jury convicts of first degree murder, there can be no prejudice. (Resp.Br. 50). This argument too, is flawed, because the statute does not make second degree felony murder a lesser-offense of conventional second degree murder. To the extent that the instructions do not allow juries to consider felony second degree murder until after they have considered conventional second degree murder, the instructions are contrary to the law, §§565.021.1 and .2 and 565.025.2(1)(a), and must be revised.

But respondent is incorrect about the instructions. MAI-CR3d 304.16 indicates that the instructions for conventional second degree murder

---

<sup>5</sup> Michael M. Lewis, *Moneyball* (2003).

and felony murder stand on an equal footing; it does not provide that felony murder should **only** be considered if the jury does not find the defendant guilty of conventional murder second degree.

MAI-CR-3d 304.16, which applies when there are “alternative submissions under the same count” and “one verdict” provides, “The following instructions numbered \_\_\_\_ and \_\_\_\_, which I am about to read to you, submit the offense of [*name of offense from verdict director*]. These instructions are in the alternative and set forth different ways of committing [*name of offense from verdict director*].” And Note 2 of the Notes on Use to MAI-CR3d 304.16 provides: “This instruction is to be used when under one count one offense of the same degree is submitted by alternative instructions. For example, murder in the second degree-conventional and murder in the second degree-felony.”

Further evidence that the instructions do not require the jury to find the defendant not guilty of conventional second degree murder **before** considering felony murder is found in the last paragraph of MAI-CR3d 314.06, the felony murder instruction: “However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of murder in the second degree (under this instruction, but **you must then consider**

***whether he is guilty of murder in the second degree under Instruction*** No. \_\_\_\_).” Finally, Note 7 of the Notes on Use to MAI-CR3d 314.06 state:

7. Murder in the second degree – felony is specifically denominated a lesser degree offense of murder in the first degree. See Section 565.025.2(1)(a), RSMo 2000. While it is not a lesser degree offense of murder in the second degree – conventional, murder in the second degree – felony can be submitted as an alternative means of finding second degree murder.

Attempting to muster support for Missouri’s conventional-second-degree-murder-prevents-prejudice! rule, respondent contends that *Schad v. Arizona*, 501 U.S. 624 (1991) supports this “well established rule” (Resp.Br. 50-51). Although *Schad* is not helpful to respondent, because the lesser offenses sought in that case were non-homicide offenses, *Schad’s* description of felony murder illustrates appellant’s argument that felony murder is a true alternative to first degree murder:

Arizona's equation of the mental states of premeditated murder and felony murder as species of the blameworthy state of mind required to prove a single offense of first-degree murder finds substantial historical and contemporary echoes. At common law,

murder was defined as the unlawful killing of another human being with “malice aforethought.” The intent to kill and the intent to commit a felony were alternative aspects of the single concept of “malice aforethought.” See 3 J. Stephen, *History of the Criminal Law of England* 21-22 (1883). Although American jurisdictions have modified the common law by legislation classifying murder by degrees, the resulting statutes have in most cases retained premeditated murder and some form of felony murder (invariably including murder committed in perpetrating or attempting to perpetrate a robbery) as alternative means of satisfying the mental state that first-degree murder presupposes. See 2 W. LaFare & A. Scott, *Substantive Criminal Law* § 7.5, pp. 210-211, and nn. 21, 23, 24 (1986); ALI, *Model Penal Code* § 210.2, p. 32, and n. 78 (1980).

501 U.S. 624, 640-41 (1991).

For the foregoing reasons, and for all the reasons presented in appellant’s initial brief, respondent’s arguments that the failure to submit a felony murder instruction was not prejudicial error fail. The Court must reverse the trial court’s judgment and remand for a new trial.

## CONCLUSION

Wherefore, for the foregoing reasons, as requested in appellant's initial brief, the Court must reverse and remand for a new trial or, in the alternative, vacate his conviction of rape, or in the alternative, resentence Scott to life imprisonment without probation or parole.

Respectfully submitted,

---

Deborah B. Wafer, Mo. Bar # 29351  
Attorney for Appellant  
Office of the Public Defender  
1000 St. Louis Union Station  
Grand Central Building; Suite 300  
St. Louis, Missouri 63103  
(314) 340-7662; ext. 236 - Phone  
(314) 340-7666 - Fax

## CERTIFICATE OF COMPLIANCE AND SERVICE

I, the undersigned attorney, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rules 84.05 and 84.06. The brief comprises 3,187 words according to Microsoft word count.

The CD Rom 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.

This 11th day of January, 2008, a true and correct copy of the attached brief and a CD Rom containing a copy of this brief were mailed, first class postage pre-paid, to the Office of the Attorney General, Supreme Court Building, P.O. Box 899, Jefferson City, Missouri 65102, and an email with this brief attached was sent to [Roger.Johnson@ago.mo.gov](mailto:Roger.Johnson@ago.mo.gov).

---

Attorney for Appellant