

Case no. SC88942

IN THE MISSOURI SUPREME COURT

STATE EX REL. JOHN WINFIELD,

Petitioner,

v.

DON ROPER, Warden

Respondent.

Original Proceeding in Habeas Corpus

RESPONDENT'S STATEMENT, BRIEF, AND ARGUMENT

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Statement of Facts

In this habeas corpus action, John Winfield challenges his two death sentences.¹ He alleges that the trial judge and the bailiff gave the jury an unauthorized “hammer” instruction during the penalty phase of his trial without giving his attorneys notice of that instruction. Pet. at 1-2, 11.

I. The murders

Winfield was unhappy that his former girlfriend, Carmelita Donald, was seeing someone else. *State v. Winfield*, 5 S.W.3d 505, 508 (Mo. 1999). On the night of the murders, he twice went to her apartment to confront her. *Id.* at 508-509. He became more and more angry and knocked over furniture. *Id.* at 509. When Ms. Donald came home, Winfield pushed her into the street and confronted her. *Id.* Arthea Sanders, one of Ms. Donald’s roommates, then slashed Winfield’s tires. *Id.*

¹ Winfield does not challenge his convictions on two counts of first-degree assault and four counts of armed criminal action or the resulting consecutive sentences of life, life, and 315 years.

When Winfield discovered the damage to his car, he ran back into the apartment building. *Id.* He shot Arthea Sanders in the head, killing her. *Id.* He then shot Ms. Donald several times in the head; she survived and was permanently blinded. *Id.* He then fatally shot Shawnee Murphy, one of Ms. Donald's neighbors, in the head while she was begging for her life and trying to gather her children. *Id.* He then tried to kill Ms. Donald's sister Melody and her friend James Johnson, but he ran out of bullets. *Id.*

II. Winfield's appeals

This Court affirmed his convictions and sentences for two counts of first-degree murder, two counts of first-degree assault, and four counts of armed criminal action on direct appeal and affirmed the denial of post-conviction relief. *State v. Winfield*, 5 S.W.3d 505 (1999); *Winfield v. State*, 93 S.W.3d 732 (2002). The Eighth Circuit also affirmed the denial of federal habeas relief. *Winfield v. Roper*, 460 F.3d 1026 (8th Cir. 2006), *cert. denied* 127 S.Ct. 2256 (2007). The State's motion to set an execution date for Winfield is currently pending in this Court.

III. The habeas petition

In his current petition, Winfield makes three claims:

1. The trial court gave an unauthorized “hammer” instruction.
2. The jury did not make the required factual findings due to the unauthorized “hammer” instruction.
3. Winfield was denied counsel at a critical stage of trial because counsel was not consulted about the unauthorized “hammer” instruction.

Pet. at 11-15. After respondent filed suggestions in opposition, this Court assigned Judge Gary Oxenhandler of the Boone County Circuit Court as a special master. This Court ordered Judge Oxenhandler to conduct a hearing on Winfield’s claims and to issue findings of fact and conclusions of law.

Judge Oxenhandler conducted a hearing on June 30, 2008. *Report* at 1. At that hearing, Winfield presented the testimony of three jurors: Kimberly Turner, Steven Willey, and Jenny Daniels.² *Id.* The State

² Winfield also presented testimony from law students Erin Lawrence and Alexandra Hutchings. *Report* at 1. Judge Oxenhandler found their testimony irrelevant. *Id.* at 2.

presented the testimony of Judge Maura McShane, the trial judge; Ted Beeler the bailiff; jury foreman Terry Nash (by video deposition), and the other eight jurors. *Id.*

A. Winfield's evidence

Juror Kimberly Turner³ testified that the jury sent a note to the judge indicating that the jury “couldn’t come to a complete agreement” on punishment and that the bailiff told the jury to continue deliberating. Tr. 24. She did not remember whether the bailiff spoke to them or gave them a note. *Id.* Juror Turner wants Winfield’s death sentences “to be taken away.” *Id.* at 40. Judge Oxenhandler found that juror Turner’s testimony was “plausible” but noted her bias due to her opposition to the death penalty. *Report* at 2.

Juror Steven Willey testified that the jury “conveyed” to the judge that they could not reach a unanimous decision on punishment. Tr. 57-58. Someone, although Juror Willey cannot remember who, then told the jury to keep deliberating. Tr. 58. Juror Willey’s memory was very hazy about how the jury sent the note or how the court responded. Tr.

³ Juror Turner has married since the time of trial. Tr. 20. Her surname at the time of trial was Cheskev. *Id.*

57-58, 59-60, 64-65. Judge Oxenhandler found that juror Willey's testimony was plausible but that it was plagued by logical inconsistencies. *Report* at 2.

Juror Jenny Daniels testified that the jury sent a note to the judge stating that the jury was "deadlocked" on punishment. Tr. 70-71, 73-74. Like Juror Willey, Juror Daniels was vague about what the response to the note was, how the note was sent, and how any response was received. Tr. 70-71, 74. She remembered only that the bailiff said "something" and the jury continued deliberating. Tr. 71. Judge Oxenhandler found that her testimony was "plausible." *Report* at 3.

B. The respondent's evidence

Judge McShane, bailiff Beeler, and foreman Nash each testified that the jury did not send a note to the judge indicating that they were deadlocked. Tr. 107, 109, 138-139; Nash Depo. 15. Jurors Craig Heller, Barbara Buscher, and Maureen Murphy also testified that the jury did not send a note indicating that they were deadlocked. Tr. 148-149, 154-155, 171-172. Nine jurors testified that the jury was not deadlocked. Nash Depo. 14; Tr. 148, 153, 163, 171, 184, 187-188, 194.

Judge McShane testified that she did not give the jury an instruction to continue deliberating in the penalty phase and that she did not authorize the bailiff to give that instruction. Tr. 112. Bailiff Beeler testified that he did not give the jury any such instruction. Tr. 139, 140, 142. Foreman Nash testified that the bailiff did not give them any such instruction, Nash Depo. 16, as did jurors Heller, Buscher, and Murphy, Tr. 148-149, 154-155, 171-172. Judge Oxenhandler found all of these witnesses to be credible. *Report* at 3-6.

Juror Tina Tracy testified that the jury never informed the bailiff that there was a divided vote. Tr. 188. She also testified that the bailiff told the jury to continue deliberating when he brought them dinner. Tr. 188, 189-90. Juror Tracy further clarified that this statement was just a matter of procedure, not a substantive comment on the jury's deliberations. Tr. 189. Judge Oxenhandler found that juror Tracy was credible. *Report* at 6.

C. The master's findings and conclusions

First, Judge Oxenhandler found that the jury did not send a note to Judge McShane and that Judge McShane did not send any communications to the jury that were not on the record. *Report* at 7. He

relied on Judge McShane’s testimony about how she handles jury notes and her treatment of the three jury notes in Winfield’s trial. *Id.* He also relied on the testimony of eight jurors that there was not a split vote and that the jury was able to come to a unanimous decision. *Id.* He found further support from foreman Nash’s testimony that he did not sign such a note and from four other jurors’ similar testimony, as well as the court’s instruction that the foreman must sign all notes. *Id.*

Second, Judge Oxenhandler found that bailiff Ted Beeler did not tell the jury to keep deliberating. *Id.* He stated “I do not believe that Mr. Beeler accepted a note from the jury announcing a deadlock, failed to deliver it to the judge and then told the jury to continue their deliberations without authorization from the judge.” *Id.* at 8.

Third, Judge Oxenhandler found that juror Tracy’s testimony that the bailiff told the jury to “keep deliberating” occurred in the guilt phase because the jury ate dinner during guilt phase deliberations. *Id.* at 8. Even if the comment occurred in the penalty phase, Judge Oxenhandler found that the comment referred only to a procedural matter—what to do while waiting for dinner—and was not a comment on the substance of the deliberations. *Id.*

Fourth, Judge Oxenhandler found that the testimony from Judge McShane, bailiff Beeler, foreman Nash, and the eight other jurors “has more weight” than the testimony of Jurors Turner, Willey, and Daniels: “their vague and at times contradictory testimony lacks probative force when compared to both the quantity and the quality of the testimony of the trial judge, the bailiff, the foreman, and the other jurors. *Id.*

Judge Oxenhandler’s finding that the jury did not inform the court that they were deadlocked and that neither the judge nor the bailiff told the jury to keep deliberating led to his conclusion of law: that Winfield’s claims lacked a factual basis. *Id.* at 9. Judge Oxenhandler recommended that this Court deny the petition. *Id.*

Argument

I. Winfield cannot overcome his procedural default

Winfield procedurally defaulted on this claim by not raising it on direct appeal or in his Rule 29.15 motion, *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. 2001), and Winfield admits as much, Pet. at 8-10. In order to receive review of his procedurally defaulted claims on their merits, Winfield must show a jurisdictional defect, cause and prejudice, or a manifest injustice. *Brown v. State*, 66 S.W.3d 721, 731 (Mo. 2002). He does not allege that a manifest injustice occurred in this case.

D. Winfield cannot show cause for not raising this claim sooner

Winfield first argues that he can show cause for his default because the factual basis for his claims were not reasonably discoverable at the time of his direct appeal or his PCR. Pet. at 8-9. He is wrong.

“The existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.” *Coleman v. Thompson*, 501 U.S. 722, 753

(1991), *quoting Murray v. Carrier*, 477 U.S. 478, 488 (1986); *State ex rel. Taylor v. Moore*, 136 S.W.3d 799, 801 (Mo. 2004); *Jaynes*, 63 S.W.3d at 215. “A showing that the factual or legal basis for a claim was not reasonably available to counsel ... would constitute cause under this standard,” *Coleman*, 501 U.S. at 753; *Murray*, 477 U.S. at 488. In other words, the default must be “something that cannot fairly be attributed” to the defendant. *Coleman*, 501 U.S. at 753.

The factual and legal bases for Winfield’s claim in here were reasonably available to Winfield’s counsel. Winfield has not shown that the information was hidden, that the jurors refused to talk with his attorneys after trial, or that any impediment prevented him from talking with juror Turner or juror Willey prior to filing his Rule 29.15 motion. Winfield could have discovered this claim much sooner (assuming the claim to be valid) if counsel had merely asked the jurors, the bailiff, or the judge about it.

Winfield bases his argument for “cause” near-exclusively in the Supreme Court’s decision in *Williams v. Taylor*, 529 U.S. 420 (2000). He alleges that he can show cause under *Williams* if he had made a reasonable attempt to investigate his claims in a prior action.

Winfield reads too much into *Williams*. That case dealt with an issue not present here: “whether [28 U.S.C.] §2254(e)(2) precludes [petitioner Williams] from receiving an evidentiary hearing on his claims.” *Williams*, 529 U.S. at 429. The Supreme Court did not mention cause or procedural default in answering that question. *Williams* therefore does not help Winfield.

Winfield may also contend that he can show cause because he was prohibited from contacting petit jurors at all times after his trial and during his Rule 29.15 proceeding under St. Louis County Circuit Court Local Rule 53.3. His attorneys’ recent acts are contrary to this theory. Their decision to contact jurors in this post-conviction proceeding demonstrates that, notwithstanding Local Rule 53.3, a party’s attorneys may contact petit jurors during post-conviction proceedings. If Winfield and his attorneys were able to contact petit jurors as part of this state habeas proceeding (without any court’s permission), they could have done so before or during his Rule 29.15 post-conviction relief proceeding without the court’s permission as well.

Further, Local Rule 53.3(2) allows for contact with petit jurors by leave of court. Winfield could have filed a motion in the Rule 29.15 court

to interview jurors. *See Strong v. State*, 263 S.W.3d 636, 643 (Mo. 2008); *State v. Jones*, 979 S.W.2d 171, 183 (Mo. 1998). He did not do so. He cannot show that the circuit court would have denied such a motion or that he would not have discovered the facts underlying his current claim at that time. Thus, he cannot show cause to overcome his default.

E. The alleged error is not jurisdictional

Winfield's jurisdictional argument relies heavily on the fact that the trial court allegedly gave the jury an improper instruction that tainted the verdicts. He overstates the concept of jurisdiction. There are only two types of jurisdiction: subject-matter jurisdiction and personal jurisdiction. *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 252 (Mo. 2009). The court below had personal jurisdiction over Winfield because Winfield was present in the State of Missouri and the murders occurred in the State of Missouri. *Id.* at 252-253. The circuit court had subject-matter jurisdiction to try the murder case because murder is a felony and circuit courts have the power to try felonies. *Id.* at 253-254; Mo. Const., Art. V, §14 (as amended 1976); Mo.Rev.Stat. §565.020.2 (2000). Thus, the circuit court had both personal jurisdiction over

Winfield and subject-matter jurisdiction over Winfield's case. Winfield therefore cannot demonstrate a jurisdictional defect.

Winfield's argument to the contrary relies heavily on the fact that the alleged "hammer" instruction violated Mo.Rev.Stat. §565.030.4 (1994). This Court unanimously held just over one month ago that statutory restrictions, such as the one at issue here, do not affect a court's subject-matter jurisdiction and are not "jurisdictional" by themselves. *Wyciskalla*, 275 S.W.3d at 254. This Court's directive was explicit: "the courts of this state should confine their discussions of circuit court jurisdiction to constitutionally recognized doctrines of personal and subject matter jurisdiction." Winfield therefore does not advance a jurisdictional claim. He presents a claim alleging trial court error.

Winfield's reliance on *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003), Pet. at 10, is merely a continuation of his jurisdictional argument over §565.030.4. The main flaw in this argument, other than the fact that Winfield does not advance a jurisdictional claim, is that the jury in Winfield's case was not deadlocked. In *Whitfield*, the jury could not agree on punishment. 107 S.W.3d at 261. The judge then went through

the four-step process and imposed the death penalty. 107 S.W.3d at 261. This Court found error in the judge-pronounced death penalty. 107 S.W.3d at 261-62.

Here, in contrast, the jury did not formally tell the trial court that they could not agree on punishment. Judge Oxenhandler found that the jury was never deadlocked. *Report* at 7, 9. In fact, the jury returned two verdicts of death and thus completed the entire four-step process.

Whitfield therefore is not applicable.

II. The jury did not send a note to the trial court announcing that the jury could not come to a unanimous decision on punishment and neither the trial judge nor the bailiff gave the jury a “hammer” instruction

Winfield contends that this Court must be resentenced to life imprisonment because the bailiff, without the knowledge of the trial judge, told the jury to continue their penalty-phase deliberations even when the jury announced that they were deadlocked. The special master found that the jury never made such an announcement and that the bailiff never gave the jury such an instruction. The master’s

findings are supported by the record and therefore are not clearly erroneous. This Court therefore should deny Winfield's petition.

F. This Court reviews the master's findings of fact and conclusions of law just as this Court would review a judge-tried case

When this Court referred this case to Judge Oxenhandler as a special master, this Court requested that Judge Oxenhandler prepare findings of fact and conclusions of law. *See* Rule 68.03(f). Judge Oxenhandler issued, as part of his report, findings of fact and conclusions of law. This Court give a master's findings of fact and conclusions of law "the weight and deference given to trial courts in court-tried cases." *State ex rel. Busch by Whitson v. Busch*, 776 S.W.2d 374, 377 (Mo. 1989); *State v. Griddine*, 75 S.W.3d 741, 742 (Mo.App. W.D. 2002); *In re R.C.P.*, 57 S.W.3d 365, 371 (Mo.App. S.D. 2001); *M.F.M. v. J.O.M.*, 889 S.W.2d 944, 956 (Mo.App. W.D. 1995); *Matter of C.W.B.*, 578 S.W.2d 610, 612 (Mo.App. S.D. 1979); *Matter of W.K.M.*, 537 S.W.2d 183, 186 (Mo.App. K.C.D. 1976).

In a court tried case, this Court affirms the judgment below "unless there is no substantial evidence to support it, unless it is

against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976). This standard “does not stand for the proposition that if ‘substantial evidence’ and the ‘weight of the evidence’ could support an alternative judgment the judgment must be reversed .” *Dorman v. Dorman*, 91 S.W.3d 167, 169 (Mo.App. W.D. 2002), *quoting* *Dixon v. Dixon*, 62 S.W.3d 589, 594 (Mo.App. W.D. 2001); *Scruggs v. Scruggs*, 161 S.W.3d 383, 394-395 (Mo.App. W.D. 2005); *Herigon v. Herigon*, 121 S.W.3d 562, 567 (Mo.App. W.D. 2003); *McDonald v. Burch*, 91 S.W.3d 660, 665 (Mo.App. W.D. 2002). Rather, this Court views the evidence in the light most favorable to the decision below and disregards all facts and inferences to the contrary. *Walton v. City of Berkeley*, 223 S.W.3d 126, 128 (Mo. 2007); *Mund v. Mund*, 7 S.W.3d 401, 403 (Mo. 1999).

Respondent acknowledges that this Court has held that a “Master’s findings of fact and conclusions of law constitute recommendations and are not binding on this Court.” *State ex inf. Ashcroft v. Alexander*, 673 S.W.2d 36, 38 (Mo. 1984); *State ex inf. Danforth v. Orton*, 465 S.W.2d 618, 620 (Mo. 1971). However, those

cases were decided prior to *State ex rel. Busch by Whitson v. Busch*, 776 S.W.2d 374, 377 (Mo. 1989), in which this Court, in a habeas action, held that it would give a master’s findings of fact and conclusions of law “the weight and deference given to trial courts in court-tried cases.” *Id.* This Court’s latest ruling on the proper standard should be binding in this case.⁴ *Cf. State v. Burgin*, 203 S.W.3d 713, 717 (Mo.App. E.D. 2006).

Further, it makes practical sense to defer to the factual findings of this Court’s master when the master conducted an evidentiary hearing, heard the testimony of the witnesses, and balanced that testimony. For example, the master here made credibility findings. This Court has recognized that “the trial court has the ‘superior opportunity to determine the credibility of witnesses.’” *State v. Johnson*, 207 S.W.3d 24, 44 (Mo. 2006), *quoting State v. Rousan*, 961 S.W.2d 831, 845 (Mo.

⁴ This Court has held that “in a disciplinary proceeding the Master’s findings, conclusions, and recommendations are advisory in nature.” *In re Kazanas*, 96 S.W.3d 803, 805 (Mo. 2003); *Matter of Cupples*, 952 S.W.2d 226, 228 (Mo. 1997). This is not a disciplinary proceeding. Those cases are inapposite.

1998). Put another way, deference recognizes “the ability of the trial court to see, hear, and judge the witnesses in person, rather than from the cold record with which we are left on appeal.” *State v. Shaw*, 847 S.W.2d 768, 779 (Mo. 1993).

Judge Oxenhandler had the same “superior opportunity” and “ability” to see, hear, and judge the witnesses in this case that he would have had if he had heard Winfield’s claims as a circuit court judge. There is no dispute that Judge Oxenhandler’s findings would be entitled to deference if this were a Rule 29.15 case. There is no good reason to second-guess Judge Oxenhandler’s factual findings simply he was appointed to hear this case by this Court instead of hearing the case as a post-conviction action under Rule 29.15. His factual findings should be entitled to deference whether he is acting as this Court’s master in a

habeas proceeding or whether he is acting as a circuit court judge in a Rule 29.15 action.⁵

G. The master’s findings of fact were correct

1. The findings were supported by substantial evidence

Judge Oxenhandler found that the jury did not send a note to the judge or orally inform either the judge or the bailiff that there was a hung jury. *Report* at 7. That finding is supported by the evidence.

Judge Maura McShane, the trial judge, testified that when the jury sends her a note during deliberations, she has an informal conference with the attorneys to discuss the note. Tr. 98. She then reads the note and the response into the record, asks for objections, and sends it to the jury through the bailiff. *Id.* She followed this practice with the

⁵ An original habeas action in this Court is essentially a substitute for a Rule 29.15 post-conviction relief action. The standard of review for a Rule 29.15 action is clear error: “Findings and conclusions are clearly erroneous only if a full review of the record definitely and firmly reveals that a mistake was made.” *Edwards v. State*, 200 S.W.3d 500, 509 (Mo. 2006), *quoting Morrow v. State*, 21 S.W.3d 819, 822 (Mo. 2000). This standard is roughly similar to the *Murphy v. Carron* standard.

substantive notes that she received during Winfield's trial. Tr. 99-105; Resp. Ex. C and D; Trial Tr. 1022-24, 1108-1109. She did not inform counsel about a note in which the jury asked for food because it was merely a logistical question and because she had already discussed that matter with the attorneys. Tr. 105-106; Trial Tr. 1024.

Judge McShane testified that did not receive a note from the jury indicating that there was a hung jury, Tr. 107, 109, 112, that she did not tell the jury to continue deliberating during the penalty phase, Tr. 112, and that she did not authorize her bailiff to give the jury such an instruction, Tr. 112. Judge Oxenhandler found that Judge McShane was a credible witness. *Report* at 3.

Ted Beeler, the bailiff in Winfield's trial, testified that his communications with the jury were limited to statements such as "here is the judge's response." Tr. 137. Mr. Beeler testified that he never told the jury that they needed to continue penalty-phase deliberations, that the jury never informed him that there was a split vote, and that he did not give the jury any instructions that the judge did not approve and that the judge did not put on the record. Tr. 139, 140, 142 Judge Oxenhandler found that Mr. Beeler was a credible witness. *Report* at 4.

Terry Nash, the jury foreman, signed all the jury's notes and gave them to the bailiff. Nash Depo. 6, 7-11. He testified that the bailiff did not tell the jury to continue deliberating and that the bailiff did not make any comments about the substance of the case. *Id.* at 16. Mr. Nash does not remember considering signing a note to the judge indicating that the jury was deadlocked. *Id.* at 15. Judge Oxenhandler found that Mr. Nash was a credible witness. *Report* at 5.

Juror Craig Heller testified that the jury was not deadlocked, that the jury did not send a note to the judge indicating that they were deadlocked, and that the bailiff never told the jury to keep deliberating. Tr. 148-149. Juror Barbara Buscher testified that the jury never sent a note to the judge indicating that there was a deadlock and that the bailiff never told the jury to keep deliberating. Tr. 154-155. Juror Maureen Murphy testified that the bailiff did not tell them to continue their deliberations during the penalty phase and that the jury did not discuss informing the judge that there was a split vote. Tr. 171-172. Judge Oxenhandler found that all of these witnesses were credible. *Report* at 5.

This Court defers to Judge Oxenhandler's credibility findings. *State v. Johnson*, 207 S.W.3d 24, 44 (Mo. 2006); *State ex rel. Busch by Whitson v. Busch*, 776 S.W.2d 374, 377 (Mo. 1989). This testimony from Judge McShane, bailiff Beeler, and the four jurors provides substantial evidence to support Judge Oxenhandler's findings.

Winfield principally relies on the testimony of three jurors (Kimberly Turner, Steven Willy, and Jenny Daniels) to show that there was a note and that the bailiff told the jury to keep deliberating. This Court, however, views the evidence in the light most favorable to the master's report and disregards all evidence to the contrary. *Walton v. City of Berkeley*, 223 S.W.3d 126, 128 (Mo. 2007); *Mund v. Mund*, 7 S.W.3d 401, 403 (Mo. 1999). Winfield thus cannot rely on this evidence to show that Judge Oxenhandler erred.

Further, Winfield ignores the testimony from Judge McShane and bailiff Beeler. Their credible testimony is fatal to his case and demonstrates that the jury did not send a note to the judge, that the jury did not inform the bailiff that they were deadlocked. and that the bailiff did not tell the jury to continue deliberations after learning that they were deadlocked. The testimony of jurors Edwards, Willey, and

Daniels at most supports a different result in this case. It does not mandate a different result under the *Murphy v. Carron* standard. *Dorman v. Dorman*, 91 S.W.3d 167, 169 (Mo.App. W.D. 2002).

2. The findings are not against the weight of the evidence

Winfield cannot show that the weight of the evidence compels a different result. Three jurors testified that there was some form of communication telling them to continue their deliberations during the penalty phase. Judge Oxenhandler considered that evidence. He found that jurors Turner, Willey, and Daniels did not agree among themselves about how the note was sent, who the response came from, what the note said, and what the response to the note was. *Report* at 8. That finding is supported by the record.

Juror Turner testified that the jury sent a note to the judge through the foreperson indicating that the jury “couldn’t come to a complete agreement.” Tr. 24, 39. According to her, the bailiff told the jury to continue deliberating, but Juror Turner could not remember whether he did so orally or in writing. Tr. 24. Judge Oxenhandler found that this testimony, although plausible, was tainted by Juror Turner’s belief that Winfield should not receive the death penalty. *Report* at 2.

Juror Willey testified that the jury “conveyed” to the judge that they did not have a unanimous verdict and that the judge told them to continue deliberating. Tr. 58. He did not remember how the jury communicated with the judge or how they received a response from the court. Tr. 57-58, 59-60, 64-65. Judge Oxenhandler found that Juror Willey’s testimony was plausible but that it was lacking in essential details. *Report* at 2.

Juror Daniels testified that the jury sent a note to the judge stating that the jury was “deadlocked.” Tr. 71-72, 73-74. Like Juror Willey, she was unsure about when the note was sent, how the note was sent, and how any response was received. Tr. 70-71. She remembered only that the bailiff said “something.” Tr. 71. Judge Oxenhandler found that this testimony was plausible. *Report* at 3.

This testimony is weak. These jurors, while agreeing that they somehow were told to continue deliberation, are vague on any details about how that communication occurred. In contrast, Judge McShane, bailiff Beeler, foreman Nash, and four jurors agree that no note was sent and no instruction to continue deliberating was given. The weight of the evidence thus supports Judge Oxenhandler’s findings.

The only other piece of evidence that might support Winfield's position is the testimony of Juror Tracy. Juror Tracy testified that the that the jury never informed the bailiff that there was a divided vote. Tr. 188. She also testified that the bailiff told the jury to continue deliberating when he brought them dinner. Tr. 188, 189-90. Juror Tracy further clarified that this statement was just a matter of procedure, not a substantive comment on the jury's deliberations. Tr. 189.

Judge Oxenhandler found that this comment occurred during the guilt phase. *Report* at 8. That conclusion is supported by the evidence. The trial transcript demonstrates that the jurors asked for dinner during guilt-phase deliberations. Trial Tr. 1024. The trial transcript is silent as to whether they asked for dinner during the penalty phase. Thus, it was reasonable for Judge Oxenhandler to find that the comment was made during the guilt-phase deliberations. The bailiff's comment during the guilt-phase deliberations cannot constitute a penalty-phase "hammer" instruction.

The comment was unobjectionable even if it occurred during the penalty phase. Juror Tracy explicitly stated that the comment was procedural and meant nothing more than "I'll place your order for food.

Keep deliberating until the food comes.” Tr. 189. That comment is not a “hammer” instruction. MAI-CR 3d 312.10, commonly referred to as a “hammer,” states that

You should make every reasonable effort to reach a verdict, as it is desirable that there be a verdict in every case. Each of you should respect the opinions of your fellow jurors as you would have them respect yours, and in a spirit of tolerance and understanding endeavor to bring the deliberations of the whole jury to an agreement upon a verdict. Do not be afraid to change your opinion if the discussion persuades you that you should. But a juror should not agree to a verdict that violates the instructions of the Court, nor should a juror agree to a verdict of guilty unless he is convinced of the defendant's guilt beyond a reasonable doubt.

The innocuous comment that Juror Tracy remembers is not even close to being a “hammer instruction.” It therefore does not help Winfield’s case.

H. The weight of the evidence does not support Winfield's claim

In order to find that the weight of the evidence supports Winfield's claim, this Court would have to make a number of conclusions. First, this Court would have to conclude that the bailiff was given a note by the jury announcing they were deadlocked, that the bailiff refused to take that note to the judge, and that the bailiff chose to orally instruct the jury. Bailiff Beeler denied each and every one of those accusations, as did Foreman Nash. Judge Oxenhandler found those two men to be credible witnesses. Thus, in order to find for Winfield, this Court would have to second-guess Judge Oxenhandler's credibility findings. Such an action would defeat any purpose of having Judge Oxenhandler make those credibility findings in the first place. This Court should decline that invitation.

Second, this Court would have to determine exactly how the communication occurred. Jurors Turner and Daniels allege that it was a note. Juror Willey can't remember how the communication was sent. Juror Turner testified that the bailiff, either in writing or orally, told them to continue their deliberations. Juror Willey testified that that instruction came from the judge. Juror Daniels can't remember how

they were told to continue deliberating. This testimony simply does not create a cogent picture of what occurred. It is not particularly strong evidence. In light of the credible testimony from the judge, the bailiff, the foreperson, and four other jurors, this testimony is not sufficiently strong to mandate relief for Winfield. His claim to the contrary fails.

I. Winfield cannot prevail

All of Winfield's claims share the same factual basis: that the jury was deadlocked in the penalty phase and that the trial court told the jury, either through a note or through the bailiff, to continue deliberating. As demonstrated above, and as Judge Oxenhandler found, no such instruction was given. *Report* at 7-8. Thus, there is no factual basis for Winfield's claims. *Report* at 8-9. Winfield therefore cannot prevail.

III. Winfield is not entitled to relief under §565.035.3 or §546.710

Winfield contends that this Court should resentence him to life imprisonment because of the possibility that the "hammer" instruction was given. This Court should decline that invitation, which essentially asks this Court to find that the proper remedy for any error in the penalty phase of a capital trial is resentencing to life imprisonment.

Mo.Rev.Stat. §546.710 (2000) requires this Court to inquire into the facts and legal reasons underlying a death sentence before setting an execution date. This statute does not give this Court power to resentence Winfield. Section 546.710 is not relevant to this case.

Mo.Rev.Stat. §565.035.3 (2000) sets out this Court's continuing duty to analyze both the sufficiency and the strength of the evidence supporting a death sentence. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 547 (Mo. 2003). *Amrine* was a case in which the petitioner presented recantations from all of the witnesses who testified against him at trial. *Id.* at 548. Here, in contrast, there is no challenge to any of the evidence of Winfield's guilt. The evidence of his guilt is substantial and includes his trial testimony confessing to the murders. His claim of instructional error, by its nature, does not affect the strength or the sufficiency of the evidence. Thus, §565.035.3 provides no basis to set aside Winfield's death sentences.

If Winfield is correct that there was instructional error in this case, the remedy is reversal of the sentences and a remand for a new penalty-phase trial. *State v. Storey*, 986 S.W.2d 462, 463-65 (Mo. 1999); *State v. Ferguson*, 887 S.W.2d 585, 587 (Mo. 1994). Instructional error

should not be a habeas “magic bullet” that automatically negates a death sentence. That would be a perverse result because defendants then could get more relief in habeas than they could receive on direct appeal, thus providing defendants with a handy excuse to wait to file their instructional error claims until after their direct appeals end. That excuse for delay directly contradicts this Court’s pronouncement that habeas corpus is part of a “a timely review of criminal convictions.” *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. 1993). Thus, the only relief that Winfield would be entitled to here is a penalty-phase retrial.

Conclusion

For these reasons, this Court should adopt the master's report and this Court should deny Winfield's habeas petition.

Respectfully submitted,

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Certificate Of Compliance And Service

I hereby certify that the attached brief complies with the limitations contained in Rule 84.06(b) of the Supreme Court of Missouri and contains _____ words, excluding the cover and this certification, as determined by Microsoft Word 2003 software; that the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses, using Norton Anti-virus software, and is virus-free; and that a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, on March 23, 2009, to:

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Respondents' Addendum

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