IN THE SUPREME COURT OF MISSOURI

No. SC 88942

STATE ex rel.

JOHN E. WINFIELD,

Petitioner,

vs.

DONALD P. ROPER,

Superintendent, Potosi Correctional Center,

Respondent.

Petitioner's Statement, Brief and Argument

Joseph W. Luby, # 48951
Sean D. O'Brien, # 30116
Public Interest Litigation Clinic
305 E. 63rd St.
Kansas City, MO 64113
816/363-2795

Counsel for Petitioner

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JURISDICTIONAL STATEMENT

John E. Winfield petitioned for habeas corpus after two jurors revealed that either the bailiff or the trial judge told the jury to keep deliberating despite a split or deadlocked vote on the issue of sentence. *See* Petition Ex. 1, 2. This Court has original jurisdiction because Petitioner is under a sentence of death. Rule 91.02(b). Habeas relief may issue when the prisoner's conviction or sentence violates the constitution or laws of Missouri or the United States. *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. banc 2001).

The Court has outlined three circumstances for granting the writ: (a) to correct a jurisdictional defect in the conviction or sentence at issue, (b) to remedy a "manifest injustice," or (c) to redress a claim for which the prisoner demonstrates "cause" for not asserting the matter on direct appeal or through Rule 29.15, and "prejudice" in that the error worked to the prisoner's "actual and substantial disadvantage." *State ex rel. Taylor v. Moore*, 136 S.W.3d 799, 801 (Mo. banc 2004); *State v. Norsworthy*, 71 S.W.3d 610, 611-12 (Mo. banc 2002); *Jaynes*, 63 S.W.3d at 215-16. "Cause" exists when, as here, the claim "was not known or reasonably discoverable" on appellate or post-conviction review. *Taylor*, 136 S.W.3d at 801. The record at trial, on direct appeal, and in Rule 29.15 proceedings provided no hint of the current claim, i.e., no basis for even inquiring whether court personnel told jurors to keep deliberating. *See* Trial Tr. 1108-09;

D.A.L.F. 1-283; PCR L.F. 1-314; Petition Ex. 9, ¶ 3.[1] That evidence was unknown until counsel and his assistants interviewed the trial jurors shortly after Respondent asked this Court to schedule an execution date. "Cause" depends not on whether a prisoner "could" have unearthed his claims through all-encompassing efforts, but rather, on whether the prisoner has made a "reasonable attempt, in light of the information available at the time, to investigate and pursue [his] claims." *Williams v. Taylor*, 529 U.S. 420, 435, 443 (2000) (equating "cause" standard with inquiry of whether a petitioner has "failed to develop the factual basis of a claim in State court proceedings" under 28 U.S.C. § 2254(e)(2)). Petitioner's claims are cognizable on habeas because he lacked reasonable notice for asserting them at trial, on direct appeal, or under Rule 29.15.

Mr. Winfield was additionally "prejudiced" by the circumstances described herein. Missouri law does not permit a "hammer" instruction to a capital sentencing jury. If the jury was indeed deadlocked, it ought to have been guided to the instructions and verdict forms saying so. *State v. Griffin*, 756 S.W.2d 475, 486-87 (Mo. banc 1988). And if the jury had declared itself unable to decide upon a sentence, Mr. Winfield would have been sentenced to life—either by the circuit court itself, or later by this Court under the rationale of *State v. Whitfield*, 107

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[1]Petitioner again asks the Court to take judicial notice of the files on his direct and post-conviction appeals, specifically, Case Nos. SC81165, SC84244.

S.W.3d 253 (Mo. banc 2003) (non-unanimous verdict requires life sentence, where record does not show point at which jurors disagreed). There is no question that a death sentence works to a petitioner's "actual and substantial disadvantage." *Taylor*, 136 S.W.3d at 802.

Petitioner filed for habeas corpus on November 19, 2007. The Court appointed Circuit Judge Gary Oxenhandler as Special Master on February 19, 2008. After an evidentiary hearing, Judge Oxenhandler issued a report with findings of fact and conclusions of law on September 10, 2008. (App. A1 - A9). Judge Oxenhandler reaffirmed his report on November 17, 2008, despite Petitioner's exceptions. The petition is now before the Court for briefing pursuant to Rule 84.24(i).

REQUEST FOR ORAL ARGUMENT

Because of the nature of this capital case and the complexity of the issues involved, Petitioner respectfully requests that the Court grant fifteen minutes of oral argument to each party.

STATEMENT OF FACTS

This case centers upon whether the bailiff told the jury—intentionally or unintentionally—to keep deliberating Mr. Winfield's fate when the jurors were at or near an impasse on the issue of punishment. The jurors fall into three rough categories: those who remember such a directive, those who deny such a directive, and those who do not remember either way or otherwise occupy a middle ground. Each group's testimony is summarized below, as is the testimony of trial judge Maura B. McShane and bailiff Ted Beeler.

A. Jurors Testifying in Support of the Petition

Juror Stephen Willey testified that the jurors decided they could not reach a verdict. (Hr. Tr. 57-58). Mr. Willey did not remember whether the jurors wrote a note to the bailiff or simply told him of the impasse, but the answer came back, "You need to deliberate more." (Hr. Tr. 58, 63). He could not remember whether this directive came orally from the bailiff, or whether the bailiff was reading from a note. (Hr. Tr. 58). He disclaimed that portion of his affidavit specifying that the judge herself gave the directive to keep deliberating. (Hr. Tr. 59; *see also* Exhibit 2 to Petition for Writ of Habeas Corpus).

Juror Kimberly Turner similarly recalled a deadlocked vote, "[A]t one time we did say we couldn't come to a complete agreement." (Hr. Tr. 24). Ms. Turner's testimony did not specify whether the jury communicated its vote orally

or through a note. (Hr. Tr. 24).[2] She said the bailiff told the jurors to keep deliberating, and like Juror Willey, she did not know whether the bailiff was speaking or reading a note from the judge. (Hr. Tr. 24).

Juror Jenny Daniels testified to like effect. The jury reported that it was "deadlocked," and Juror Daniels "believed" the jurors reported this fact with a note. (Hr. Tr. 70-71, 73-74). The bailiff then told the jurors to keep deliberating. (Hr. Tr. 71).

Juror Tina Tracy described the deliberations as "very intense" and said four jurors favored a life sentence at first. (Hr. Tr. 187). Although she did not remember the jury sending out a note about a split or deadlocked vote, Juror Tracy testified that the bailiff said, "Keep deliberating" or "Keep working on it" when he was delivering the jurors' dinner. (Hr. Tr. 188). She said the jurors did not tell the bailiff how they had voted on Mr. Winfield's sentence. (Hr. Tr. 190). Juror Tracy agreed with Respondent's counsel's description of the directive as "procedural," but she said the jurors understood the statement as a directive to keep deliberating. (Hr. Tr. 189-90; App. A13-A18).

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[2]A "note" is specified only in counsel's question, Hr. Tr. 24, which is not evidence. *See* MAI-Crim. 3d § 302.02.

B. Jurors Testifying Against the Petition

Jury foreperson Terry Nash denied sending a note indicating a deadlock and said the jury was "not in my opinion" unable to reach a verdict. (Resp. Ex. B, at 15-16, 18). He testified that the bailiff gave no communication on this issue and did not tell the jurors to keep deliberating. (*Id.* at 16). Juror Nash stated that the judge did not come into the deliberation room until after the verdict was announced in court. (*Id.* at 17, 39).

Juror Barbara Buscher likewise testified that the jurors were not unable to reach a verdict, and said the jurors did not discuss sending a note to indicate a split or deadlocked vote. (Hr. Tr. 154). She said the bailiff did not tell the jurors to keep deliberating, and that the judge did not come to the jury room until the end of the case. (Hr. Tr. 155-56).

Juror Carol Brown, the sister of Juror Buscher, testified that the jury was not deadlocked during sentencing phase deliberations, did not send out a note indicating a split or deadlocked vote, and was not told by the bailiff or the judge to keep deliberating. (Hr. Tr. 163-65). She, too, testified that the judge came to the jury room only after the trial. (Hr. Tr. 164).

Juror Craig Heller also testified that the jurors were not deadlocked and did not so inform the bailiff. (Hr. Tr. 148). He said the jurors were initially "roughly split" eight-to-four in favor of life, but the jurors did not discuss whether

to inform the court of their vote. (Hr. Tr. 148, 150). When asked if the bailiff told the jurors to keep deliberating, Mr. Heller responded, "Not that I can remember, sir, with all due respect." (Hr. Tr. 149).

C. Middle Ground Jurors

Juror Robert Forney at one point testified that the no jurors said they were deadlocked or discussed whether to tell the judge about a split vote. (Hr. Tr. 194). At another point, when asked whether he always believed the jury could reach a verdict, Juror Forney was less sure. (Hr. Tr. 195: "I don't really know. Maybe. Yeah. Yes."). Juror Forney did not remember the jury sending a note about a split vote, but when asked whether the bailiff told the jurors to keep deliberating, his response was ambivalent. (Hr. Tr. 194-95: "Probably, I don't remember . . . I can say it may have happened. I don't remember it happening or not happening.").

Juror Elaine Conradi said the jurors discussed whether to tell the judge they were divided, (Hr. Tr. 179), but she did not otherwise remember the dispositive events. She did not remember whether the jurors sent a note indicating a split vote, whether the jury received any response to such a note, or whether the bailiff told the jurors to keep deliberating. (Hr. Tr. 179-80).

Juror Barbara Edwards testified that she could not remember whether any jurors suggested contacting the judge about a split vote, although she said the jurors did not discuss a deadlock. (Hr. Tr. 184). Like Juror Conradi, Ms. Edwards

did not remember whether the jury advised the court of a split vote or whether the bailiff said to keep deliberating. (Hr. Tr. 184-85).

Juror Maureen Murphy said the jury was not deadlocked and did not discuss whether to inform the court of a split vote, but she acknowledged that she did not specifically remember whether the jury sent a note expressing "misgivings." (Hr. Tr. 171, 174-76). She testified that the judge came to the jury room only after the trial, and that she did not recall the bailiff telling the jurors to keep deliberating. (Hr. Tr. 171-72).

D. Other Witnesses

Circuit Judge Maura McShane said that if the jury had written a note indicating a split or deadlocked vote, the proper procedure would have been for the bailiff to deliver it to her, and then for her to summon counsel into the courtroom in order to discuss how the note should be handled. (Hr. Tr. 98, 107, 109-11, 123). She did not have a specific memory of the notes from Mr. Winfield's trial but testified that there was no note about a split or deadlocked vote. (Hr. Tr. 99, 114-15, 128-29). Judge McShane said it would have violated her bailiff's training for the bailiff to give any kind of oral instruction such as "Keep deliberating." (Hr. Tr. 110-12). Nevertheless, Judge McShane acknowledged that there are no set rules limiting the degree of "small talk" in which court personnel may engage when bringing food, pencils and other items to

the jurors. (Hr. Tr. 125-26).

Judge McShane also said that she never entered the jury room during deliberations, and that her practice is to approach the jurors after the trial in order to thank them for their service and answer any questions. (Hr. Tr. 112-13). Because Judge McShane's testimony in this regard was unrefuted, the parties agreed that she did not enter the jury room until after the verdict was announced. *See* Petitioner's Proposed Findings of Fact and Conclusions of Law, at 8 ¶ 11; Respondent's Proposed Findings of Fact and Conclusions of Law, at 12.

Bailiff Ted Beeler described essentially the same procedures as Judge McShane. The bailiff's duty was to take the note from the jury, make sure it was signed by the foreperson, and deliver it to chambers. (Hr. Tr. 134-35). Mr. Beeler said he would remember if these procedures had been violated, but he acknowledged that he did not remember the particulars of Mr. Winfield's trial, and did not specifically recall whether the jury sent out any notes. (Hr. Tr. 139, 143-44). He denied telling the jurors to continue deliberating. (Hr. 139). He did not recall being informed of a deadlocked vote, but also said he did not remember either way whether the jury informed him of a split in the vote. (Hr. Tr. 139, 144).

E. The Trial Record – The record contains only two notes from the penalty phase—one asking for a meal, and one asking to see Mr. Winfield's confession to the police. (Resp. Ex. D, E; D.A.L.F. 242-44; Trial Tr. 1108-09).

The record also reflects a question from guilt phase deliberations, when the jury asked to see photos and a "large floor plan drawing." (Resp. Ex. C; D.A.L.F. 244; Trial Tr. 1022). The notes regarding the confession and the drawing are described in the transcript, and the court summoned counsel to determine how to proceed. (Trial Tr. 1022, 1108-09). Jurors were allowed to see the drawing but not the confession, which was not in evidence. (Trial Tr. 1022-23, 1108-09).

PROCEDURAL HISTORY

In July 1998, Petitioner went to trial in St. Louis County on two counts of first degree murder and other crimes stemming from the fatal shootings of Arthea Sanders and Shawnee Murphy and the non-fatal shooting of Carmelita Donald on the night of September 9-10, 1996, in St. Louis County. *State v. Winfield*, 5 S.W.3d 505, 508-10 (Mo. banc 1999). The defense did not question who committed the shootings. Rather, counsel theorized that the killings were not premeditated, and asked for verdicts of second-degree murder. (Trial Tr. 998-1000, 1011-18). Supporting counsel's theory was the tumultuous "on-and-off relationship" between Petitioner and Ms. Donald. *Winfield*, 5 S.W.3d at 508. Petitioner believed that Ms. Donald had been dating another man, and he was repeatedly lied to by those at the scene. *Id.* at 508-09. He confronted Ms. Donald outside her apartment building, in a frantic state of mind. *Id.* at 509; Trial Tr. 665 ("[H]e couldn't – He was asking me all these questions. He couldn't stand still. He had to rub his hands, his head, his face, his stomach. He was just looking – He couldn't stay still. While he was talking to me he was walking – you know, walking back and forth like he just didn't know what to do[.]").

Victim Arthea Sanders came outside and slashed Petitioner's tires, and Petitioner became enraged and chased her back inside. *Id.* at 509. All within "a matter of minutes," *id.* at 514, the three victims had been shot at close range. Ms.

Sanders and Murphy died from their injuries, while Ms. Donald was blinded but survived. *Id.* at 509. Rejecting counsel's theory that "all of a sudden he just lost it," *Winfield v. State*, 93 S.W.3d 732, 738 (Mo. banc 2002), the jury convicted Petitioner of first degree murder.

Building on guilt phase counsel's theme, penalty counsel urged that his client was an otherwise "normal, law-abiding young man" who was "being lied to, deceived, [and] he spiraled up, snapped," that Mr. Winfield was impulsive rather than "evil," and that the unplanned homicides did not warrant a death sentence. (PCR Tr. 311-12; Trial Tr. 1098-1103). The defense also described Mr. Winfield's role as a "central figure in his family." (PCR Tr. 241-42). Counsel conveyed Petitioner's life history through his father (John Edmund), his stepmother (Marsha Edmund), his brother (David Winfield), and a family friend (Rosalie Bell). *Winfield*, 93 S.W.3d at 740. These witnesses described Mr. Winfield as a "man of the house" for whom family was "the center of his life," a "good father" who was "never apart" from his mother and grandmother, and the family's "rock" and "provider." (Trial Tr. 1055-76). On cross-examination by the defense, Ms. Donald testified that Petitioner loves his children, spent a lot of time with them, and kept in contact with them after his arrest. (Trial Tr. 1037-38). The State, for its part, relied on the aggravating circumstance that each murder was committed in the course of the other. (Trial Tr. 1090-91). The prosecutor described Mr.

Winfield as a "cold-blooded killer" and asked for the ultimate penalty. (Trial Tr. 1092, 1107-08). The jury eventually obliged after five and one-half hours of deliberation, (Trial Tr. 1108-09), including the communications at issue in this petition.

The circuit court sentenced Mr. Winfield to death plus 315 years imprisonment on September 18, 1998. (Sent. Tr. 5). Petitioner's appellate and post-conviction remedies were unavailing. *State v. Winfield*, 5 S.W.3d 505 (Mo. banc 1999), *cert. denied*, 528 U.S. 1130 (2000); *Winfield v. State*, 93 S.W.3d 732 (Mo. banc 2002). The federal courts thereafter denied habeas corpus relief. *Winfield v. Roper*, No. 4:03-cv-00192-DJS, 2005 WL 6112420 (E.D. Mo. Mar. 30, 2005), *aff'd*, 460 F.3d 1026 (8th Cir. 2006), *cert. denied*, 127 S. Ct. 2256 (2007). Petitioner later moved this Court to recall its mandate on his post-conviction appeal, (Case No. SC84244), urging that the case be reconsidered in light of the intervening precedents of *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Florida v. Nixon*, 543 U.S. 175 (2004). The Court overruled the motion June 26, 2007, and the United States Supreme Court denied certiorari. *Winfield v. Missouri*, 128 S. Ct. 661 (2007).

Following the denial of certiorari on federal habeas review, the federal district court appointed undersigned counsel to represent Petitioner in connection with executive clemency proceedings. (E.D. Mo., Case No. 4:03-cv-00192-DJS,

Order of May 25, 2007 (ECF Doc. 81)). Pursuant to that appointment, counsel and his assistants conducted interviews of Mr. Winfield's petit jurors in late June and July 2007. On June 9, 2007, the State moved this Court to set an execution date. The Court has not set an execution date and has not otherwise ruled upon the State's motion. Nevertheless, Petitioner remains under a sentence of death in the custody of respondent, Donald P. Roper, Superintendent of the Potosi Correctional Center in Mineral Point, Missouri.

Mr. Winfield petitioned for habeas corpus on November 19, 2007. Three months later, the Court appointed Circuit Judge Gary Oxenhandler as Special Master, ordering him to take evidence and issue findings of fact and conclusions or law. (Order of February 19, 2008). Judge Oxenhandler held an evidentiary hearing June 30, 2008, and took testimony from eleven of the jurors, the trial judge, and the bailiff. The twelfth juror, Foreperson Terri Nash, testified by video deposition in another state. (Hrg. Tr. 95). The parties filed opposing proposed findings of fact and conclusions of law. Largely adopting Respondent's proposed findings, the Master issued a Report on September 10, 2008, recommending that the petition be denied. (App. A1-A9). This brief follows.

POINTS RELIED ON

I. The Court should grant Mr. Winfield's petition for writ of habeas corpus, vacate his sentence of death, and re-sentence him to life imprisonment, because the death sentence was imposed in violation of the jury's sole prerogative to decide for itself whether it could reach a unanimous sentencing verdict under § 565.030.4, R.S. Mo. (1994), and also in violation of Petitioner's rights to due process of law and to the presence of counsel during a critical stage of trial, in that the evidence shows that the bailiff gave a counter-statutory, non-pattern, *ex parte*, and prejudicial instruction that the jury should continue deliberating at a time when the jurors were split in their vote and approaching an impasse.

State v. Griffin, 756 S.W.2d 475 (Mo. banc 1988)

§ 565.030.4, R.S. Mo. (1994)

II. The Court should decline to defer to the Report of the Special Master because the Report's findings and conclusions are based upon material and clear errors of fact and law, in that the Report finds that the directive described by Juror Tracy occurred during guilt phase deliberations despite the absence of evidence to support that finding; concludes that habeas relief must be denied if the bailiff did not specifically know of the jurors' divided or deadlocked vote, even though the bailiff could have interfered with the jury's statutory prerogatives without knowing or intending to do so; erroneously characterizes jurors who cannot remember whether the bailiff told the jury to keep deliberating as denying that such a directive occurred; imputes non-existent inconsistencies to the testimony of the jurors who said the bailiff was informed of an impasse and told the jury to keep deliberating; discounts Petitioner's evidence by finding that the jury did not issue a specific note to the bailiff, without adequately considering whether the jury verbally advised the bailiff of an actual or incipient impasse; fails to assess the witnesses' credibility in an even-handed and objective manner; and reaches ultimate findings that are otherwise disproven by the clear weight of evidence demonstrating the bailiff's instruction.

State v. Griffin, 756 S.W.2d 475 (Mo. banc 1988)

Walsh v. State, 166 S.W.3d 641 (Tenn. 2005)

III. The Court should vacate Mr. Winfield's death sentence and order a new sentencing trial under its continuing duty to ensure that a death sentence is not the result of any "arbitrary factor" under § 565.035.3, R.S. Mo., in that the evidence that multiple jurors understood the bailiff to say they should continue deliberating when the jurors were divided and near an impasse is sufficient to undermine the Court's confidence in the sentencing verdict—a determination the Court must make for itself and which cannot be delegated to a special master.

State ex rel. Amrine v. Roper, 102 S.W.3d 541 (Mo. banc 2003)

§ 565.035.3, R.S. Mo.

STANDARD OF REVIEW

A special 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. banc 1984). When this Court appoints a master in a case under its original jurisdiction, "We must find our own facts, draw our own conclusions, and make our own judgment." *Id.*; *In re Cupples*, 952 S.W.2d 226, 228 (Mo. banc 1997). Review of the Master's Report is therefore *de novo*, unlike the Court's review of a circuit court's findings. *Compare Ashcroft*, 673 S.W.2d at 38; Michael D. Murray, 12 Mo. Prac. § 5:163 ("Appointment of Special Masters"), *with, e.g., In re Competency of Parkus*, 219 S.W.3d 250, 255 (Mo. banc 2007) (deferring to circuit court's factual findings as to mental retardation of death-sentenced prisoner); *but see M.F.M. v. J.O.M.*, 889 S.W.2d 944, 956 (Mo. App. W.D. 1995) (stating, without discussing *Ashcroft*, that the Master's Report "should be accorded the weight and deference which would be given to a court-tried case by a reviewing court"). The Court may, as it sees fit, accept or choose to defer to the Master's findings and conclusions if it finds them persuasive. *Ashcroft*, 673 S.W.2d at 38; *State ex inf. Danforth v. Orton*, 465 S.W.2d 618, 620 (Mo. banc 1971).

Petitioner's first point argues that the evidence, if reviewed *de novo*, demonstrates that the jury received some variant of an illegal hammer instruction.

Nevertheless, because any Master's Report is advisory and helpful to the appointing Court and because Respondent might dispute the standard of review, Petitioner's second point argues that dispositive portions of the Master's Report are erroneous in law and against the weight of the evidence. *See Parkus*, 219 S.W.3d at 255 n.9 (standard of review for court-tried cases). Point three then asserts that the Court's ongoing duty to review the proportionality and reliability of death sentences requires relief if the evidence undermines the Court's confidence in Mr. Winfield's sentence—a determination that must rest solely with the tribunal entrusted with reviewing the sentence and not with the Special Master.

ARGUMENT

I.

A preponderance of the evidence demonstrates that one or more jurors were told by the bailiff—whether formally or informally, intentionally or unintentionally—to keep deliberating at a time the jurors were divided on the choice of sentence. The directive to keep deliberating pretermitted the *jury's* process of deciding solely for itself whether it could reach a unanimous verdict under § 565.030.4, R.S. Mo. (1994), and as described by this Court in *State v. Griffin*, 756 S.W.2d 475 (Mo. banc 1988). The Court must therefore vacate Mr. Winfield's death sentence, which is the product of counter-statutory guidance from outside the instructions and evidence at trial.

Although Petitioner bears the burden of proof, the Court must take a realistic view of evidence heard from jurors ten years after the events of trial. Petitioner need not establish his proof beyond all certainty; some inconsistencies and failures of memory are inevitable, particularly from lay jurors who may not recognize the legal significance of the facts they describe. Other courts in similar contexts have recognized these difficulties and have granted relief despite their inability to reconstruct the events with photographic precision. *See, e.g., Moore v. Knight*, 368 F.3d 936, 941, 943-44 (7th Cir. 2004) (habeas granted; record unclear as to whether bailiff told jurors that court could not answer question regarding

evidence supporting defendant's alibi, or whether bailiff also said there was no such evidence); *State v. Floyd*, 725 N.W.2d 817, 829 (Neb. 2007) ("Whether the bailiff in this case told jurors that they would be required to deliberate until they reached a unanimous verdict or whether she told them that there was no time limit to deliberations, either statement, combined with her statement that the jurors could be required to deliberate the rest of the week, was an improper communication."), *disapproved on other grounds by State v. McCulloch*, 742 N.W.2d 727 (Neb. 2007). We may not know the precise words exchanged between the jurors and the bailiff or even the means by which the discussion took place. *See, e.g.*, Hr. Tr. 65-66 (per Juror Willey: "I can testify that there was communication, but I can't tell you the form of that communication."). But the evidence shows that the ***jury*** did not decide for itself whether to keep deliberating, as the law requires. *See* § 565.030.4, R.S. Mo. (1994); *State v. Griffin*, 756 S.W.2d 475, 486-87 (Mo. banc 1988).

A. The evidence shows the jurors were told to keep deliberating when they were divided and near an impasse, and it does not explain how numerous jurors could recall these events if they did not occur.

Keeping in mind the realistic view with which the Court must assess the evidence, Mr. Winfield's death sentence is problematic indeed. Jurors Kimberly Turner, Stephen Willey and Jenny Daniels testified that the jury reported it was deadlocked or unable to reach a unanimous verdict, and that the bailiff told the jurors to continue deliberating. (Hr. Tr. 24, 36, 57-58, 64-66, 70-71, 73-74). These jurors were not certain whether the bailiff was reading from a note or speaking extemporaneously when he gave this directive. (Hr. Tr. 24, 58, 64). Also uncertain was whether the jury formally sent a note to the bailiff or simply told him it could not reach a unanimous verdict. Jurors Turner and Willey said they did not know whether the jury's communication was oral or in writing. (Hr. Tr. 24, 58, 63, 65-66). Ms. Daniels "believed" the jury sent a note. (Hr. Tr. 70-71).

The testimony of Jurors Turner, Willey and Daniels may not have been unassailable, but other jurors corroborated it in critical respects. Tina Tracy testified that the bailiff said, "Keep deliberating," or "Keep working on it" as he was delivering dinner. (Hr. Tr. 188; App. A15). She did not remember the jury telling the bailiff of a deadlock but said she understood the bailiff's statement as a

directive to continue deliberations. (Hr. Tr. 188-90; App. A16-A17). Robert Forney said the bailiff "probably" told the jurors to keep deliberating, although he later disclaimed clear memory. (Hr. Tr. 194-95). Elaine Conradi recalled that the jury discussed whether it should send a note to the judge to indicate a divided vote, but did not remember whether it actually did so. (Hr. Tr. 179). It is exceedingly unlikely that so many jurors would independently remember an impasse and/or a hammer instruction if these events did not actually occur in some fashion.

Other circumstantial evidence additionally supports Petitioner's claim of an impasse or near-impasse and a directive to keep deliberating. Most jurors testified that the jury was not unanimous when deliberations began, and some described an initial vote to that effect. (Hr. Tr. 22-23, 56, 69-70, 148, 150, 156, 166, 171, 179, 184, 187; Nash Depo. (Resp. Ex. B), at 13, 19-20). Several described the deliberations as emotional or spirited, with one or more jurors crying. (Hr. Tr. 157, 166-67, 172-73; 187; Resp. Ex. B, at 15). Further evidence suggested that small talk from the bailiff could have crossed the line into an informal hammer instruction. Judge McShane explained there are no set "rules" governing the extent of small talk or explanation in which bailiffs may engage when delivering instructions, evidence, food, or other items to jurors. (Hr. Tr. 125-26). No specific guidelines prevent a bailiff from explaining, "Here is your food," or

asking if jurors need anything else or are otherwise "doing okay." (Hr. Tr. 126). The bailiff acknowledged that such statements could have occurred. (Hr. Tr. 141).

Petitioner acknowledges the contrary testimony Jurors Buscher, Brown, Nash and Heller, who said that no deadlock note or hammer instruction occurred, so far as they remembered. (Hr. Tr. 148-49, 153-55, 164-65; Resp. Ex. B, at 15-16). While these jurors may have been testifying truthfully about their memory of the deliberations, their recollections are less likely to be accurate than those who specifically remember an actual or incipient impasse and a directive to keep deliberating. On one hand, it is difficult to explain how numerous jurors could independently remember these events if they did not occur. On the other, one or more jurors may well ***forget*** that such things occurred ten years after the fact and might have no memory of them. (Hr. Tr. 149 ("Not that I can remember, sir, with all due respect."), 155 ("not that I recall"), 165 ("Not that I remember"); Resp. Ex. B at 48 ("As certain as I can be ten years later.")). An impasse or a hammer may not resonate as significant events to jurors untrained in the law.

Furthermore, Jurors Brown, Buscher, Nash and Heller were no better positioned than their fellow jurors to remember what occurred during deliberations, and their memories of relevant events were no more accurate than those of their colleagues. Foreperson Nash, for example, reviewed the instant habeas petition and the jury notes before testifying, but he recalled that the jury

requested Mr. Winfield's confessions during the guilt phase, even though the record shows the request took place during the penalty phase. (Resp. Ex. B at 8, 28, 41-42; Resp. Ex. D; Trial Tr. 1108-09). He recalled that the jury was given the confessions, even though it was not. (Resp. Ex. B at 8, 28-29; Trial Tr. 1108-09). He recalled that the jury requested photographs and a crime scene diagram during the penalty phase, even though it actually did so during the guilt phase. (Resp. Ex. B at 9-10, 14, 26-27; Resp. Ex. C; Trial Tr. 1022). He acknowledged that the jury could have sent out additional notes without his remembering them. (Resp. Ex. B at 31). Juror Brown, for her part, did not remember the jury sending out any notes the entire trial. (Hr. Tr. 168). These lapses are unremarkable in the abstract, but they militate against crediting the testimony of Jurors Brown, Buscher, Nash and Heller over the more abundant testimony of their fellow jurors.

Still other jurors displayed an understandable lack of memory on the dispositive factual issues. Juror Murphy did not remember whether the jury sent out a note on expressing misgivings, but did not recall an instruction to keep deliberating. (Hr. Tr. 172, 175-76). Jurors Edwards and Conradi could not remember whether either event occurred. (Hr. Tr. 179, 184-85). And Juror Forney denied that the jurors discussed whether to tell the judge about a split vote, but he was not sure whether he thought the jurors were always able to reach a unanimous verdict and whether the bailiff told them to keep deliberating. (Hr. Tr.

194-95: "Probably, I don't remember. It may have happened. I don't remember it happening or not happening.")).

The trial judge and bailiff, meanwhile, shed little light on the critical issues. Judge McShane could not see or hear the jury room from her chambers, and, in any event, she did not independently remember the jury notes from Mr. Winfield's trial. (Hr. Tr. 114-15, 121, 125 ("I was never there")). Bailiff Ted Beeler described the court's procedures for handling questions from the jury. (Hr. Tr. 134-38). But he was less clear on the particular events of Petitioner's trial. He denied telling the jurors to continue deliberating and said he did not recall being informed of a deadlock, but he could not recall either way whether he was informed of a split vote. (Hr. Tr. 139, 142, 144). Mr. Beeler acknowledged that his memory of these events was procedural in nature; he knew the procedures for handling juror questions and said he would remember if those procedures had been violated. (Hr. Tr. 143-44). Yet, he did not remember whether Petitioner's jury sent out any notes. (Hr. Tr. 139). He has served in many jury trials since Petitioner's. During the seven years of Mr. Beeler's service in which Judge McShane presided over jury trials, the judge averaged between eight to fifteen trials per year, including a separate death penalty trial shortly only six weeks after Mr. Winfield's. (Hr. Tr. 117-18, 127, 142-43). If Mr. Beeler told the jury to "keep at it" or "keep going" when he brought them dinner, we would not expect him to

remember this event after ten years and scores of other trials.

Even under the most innocent reading of the record, an informal hammer instruction occurred as described by Juror Tracy; i.e., the bailiff delivered the jurors' dinner and encouraged them to continue in their efforts, which the jurors understood to mean that they must keep deliberating—and at a time that numerous jurors recall having an impasse. (Hr. Tr. 24, 57-58, 70-71, 188-90). What court personnel may intend as casual conversation may readily be taken as authoritative by jurors. *Cf. Walsh v. State*, 166 S.W.3d 641, 649 (Tenn. 2005) ("In reviewing the facts of this case, we see no ill intent by the court officer in making the statement to the jury. It was apparently no more than an 'off the cuff' remark given during a short exchange with a juror, without any thought of its possible effect on the jury.").

B. The directive to keep deliberating squelched the jurors' authority to determine for themselves whether to continue deliberating or to pronounce themselves unable to agree on a sentence.

The directive to keep deliberating was a non-pattern and counter-statutory instruction. Non-pattern instructions are strongly disfavored and "shall constitute error." Rule 28.02(f); *State v. Isa*, 850 S.W.2d 876, 902 (Mo. banc 1993). The MAI does not contain or authorize a "hammer" instruction during a capital

sentencing phase. *State v. Griffin*, 756 S.W.2d 475, 486-87 (Mo. banc 1988) (rejecting defendant's claim that court should have "hammered" jury when verdict stated that jury could not agree on sentence). More importantly, the capital punishment statute effectively forbids such an instruction. *Id.*; § 565.030.4, R.S. Mo. (1994). Section 565.030.4 required the jury to be instructed that the court will determine a sentence if the jury cannot. *See also* L.F. 171,183 (so instructing Mr. Winfield's jury). The statute therefore "empowers the jury to determine for itself when it is deadlocked to such an extent that a decision cannot be reached." *Griffin*, 756 S.W.2d at 486-87. Neither a court nor its agents may intrude upon the jury's discretion by ordering further deliberations. *Id.*

Even under the most innocuous reading of the evidence, the bailiff's directive pretermitted the jury's process of deciding whether to reach a unanimous verdict. Whether or not the bailiff knew that the jurors were split or deadlocked, he issued a statement that multiple jurors understood as a directive to continue deliberating. (Hr. Tr. 24, 58, 71, 189-90). He did so on the heels of the jurors' discussions on whether to notify the court of their split or deadlocked vote, and indeed, numerous jurors testified that the jury *had* communicated a deadlock either orally or in writing to the bailiff. (Hr. Tr. 24, 58, 70-71, 73-74). But regardless of any ill intent, the jurors were urged by the court's agent to reach a unanimous verdict—in violation of their absolute right to make that decision for themselves.

Griffin, 756 S.W.2d at 486-87.

The bailiff's communication violated a broad array of Mr. Winfield's rights. First, as explained above, the directive violated the procedure set forth by statute, as well as the pattern instructions. Second, the instruction was issued *ex parte* and without affording Mr. Winfield the opportunity to weigh in on what the jurors should have been told. Due process guarantees a defendant's right to be present at any proceeding "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." *United States v. Gagnon*, 470 U.S. 522, 526 (1985); *Moore v. Knight*, 368 F.3d 936, 940 (7th Cir. 2004). Third and relatedly, Mr. Winfield had the right to be heard through counsel, who was also absent from the discussion. *United States v. Cronic*, 466 U.S. 648, 659 & n. 25 (1984). Follow-up jury instructions are a "critical stage" for purposes of the Sixth Amendment, at least when such instructions convey new and additional directives beyond the original instructions. *Compare Caver v. Straub*, 349 F.3d 340, 349-50 & n.8 (6th Cir. 2003); *French v. Jones*, 332 F.3d 430, 438-39 (6th Cir. 2003); *Baugh v. Swenson*, 279 F. Supp. 642, 644-46 (W.D. Mo. 1968) (all granting habeas relief when counsel were absent from such instructions), *with Hudson v. Jones*, 351 F.3d 212, 217-18 (6th Cir. 2003) (court's mere repetition of previously read instruction not a "critical stage" of trial).

C. The error was not harmless, and the Court should re-sentence Mr. Winfield to life imprisonment.

As the beneficiary of trial error, the State bears a heavy burden of proving the error harmless. "Any deviation from the approved instructions is presumed prejudicial unless the contrary is clearly shown." *State v. Petary*, 781 S.W.2d 534, 542 (Mo. banc 1989), *vacated and remanded on other grounds*, 494 U.S. 1075 (1990). Instructional error in general "will be held harmless only when the court can declare its belief that it was harmless beyond a reasonable doubt." *State v. Ferguson*, 887 S.W.2d 585, 587 (Mo. banc 1994). The same test applies to most errors of constitutional magnitude. *State v. Whitfield*, 107 S.W.3d 253, 262 (Mo. banc 2003), citing *Chapman v. California*, 386 U.S. 18, 24 (1967).

The error in this case cannot be considered harmless under any test. At the time of the bailiff's instruction, the jurors had either communicated an impasse to him or were about to do so. (Hr. Tr. 24, 58, 70-71, 73-74, 179). If such a note had reached Judge McShane, it must be presumed that she would have guided the jury to its instructions. *See State v. Roll*, 942 S.W.2d 370, 374 (Mo. banc 1997) ("This Court presumes that the trial judge knew and followed the law."). The instructions, in turn, would have told the jury (a) to sentence Mr. Winfield to life if it could not unanimously find an aggravating circumstance or unanimously conclude that the aggravating circumstances warrant the death penalty, or (b) to

sign the verdict form indicating that it could not agree upon a punishment even though it unanimously made the two findings described above. (L.F. 170-71,182-83).

Petitioner would have been sentenced to life under either of the two above possibilities. Obviously, a life verdict would have compelled the court to impose a life sentence. On the other hand, if the jury had signed a verdict indicating it could not choose a sentence, then Mr. Winfield would have been sentenced by the court. In that instance, the court would have lacked the authority to impose death. *See State v. Whitfield*, 107 S.W.3d 253, 269-70 (Mo. banc 2003); § 565.030.4, R.S. Mo. Even if Judge McShane had entered a death sentence, this Court would have later reduced the sentence to life imprisonment pursuant to *Whitfield*. Under *Whitfield*, a death sentence following a hung jury must be reduced to life unless the record proves that the jury made all three factual findings necessary for the sentence: at least one aggravating circumstance, sufficient aggravating circumstances and evidence to warrant the death penalty, and insufficient mitigating circumstances to outweigh the aggravating circumstances. 107 S.W.3d at 262-64, 270. If not for the bailiff's interference with jury's impasse, Judge McShane would have lacked the jury findings to authorize a death sentence. *Id.*; *accord State ex rel. Baker v. Kendrick*, 136 S.W.3d 491, 491 (Mo. banc 2004) ("[W]here, as here, the jury was unable to agree on punishment and the record fails

to show that the jury found all facts necessary to impose a sentence of death, the trial court's only authority was to enter a sentence of life imprisonment without possibility of probation or parole."). Petitioner would have been sentenced to life, either that day or at some other point after *Whitfield.*

The error at Petitioner's trial differs from the one found in *Whitfield*, but the Court's reasoning sheds light on the proper remedy. In fashioning a remedy, the Court in *Whitfield* relied on § 565.040.2, R.S. Mo., which provides that a defendant shall be sentenced to life imprisonment if his or her death sentence is adjudged unconstitutional. *See* 107 S.W.3d at 271-72. The Court distinguished sentences that are "held to be unconstitutional" from those that reflect an extrinsic constitutional error, such as prosecutorial misconduct or the defendant being shackled. *Id.* at 271 & n.23. Whitfield was re-sentenced to life because the trial court's very entry of his death sentence violated the Constitution. *Id.* Petitioner's case is similar in that the error is not *extrinsic* to the imposition of sentence. Mr. Winfield's jury either attempted to communicate a deadlock or was on the cusp of doing so; that deadlock effectively ***was*** the verdict and would have been so if not for interference from the court's agent. For all practical purposes, the court, through its agent, refused the jury's attempted verdict until a different one was reached. Its very entry of a death sentence was unconstitutional.

Whitfield aside, only a life sentence will make Petitioner whole, since that is

what he would have received if not for the unauthorized instruction. "[H]abeas corpus is, at its core, an equitable remedy." *Schlup v. Delo*, 513 U.S. 298, 319 (2005). It strives to restore a prisoner to the position he occupied before the constitutional error occurred. *See, e.g., Satterlee v. Wolfenbarger*, 453 F.3d 362, 368-70 & n.7 (6th Cir. 2006); *Nunes v. Mueller*, 350 F.3d 1045, 1056-57 (9th Cir. 2003); *Lewandowski v. Makel*, 949 F.2d 884, 889 (6th Cir. 1991) (all holding that when counsel fails to communicate a plea offer and defendant is thereafter tried, convicted and sentenced, the proper remedy is to reinstate plea offer rather than grant new trial). That position is a life sentence, which would have been the inevitable result of the jury's deadlock or soon-to-be-deadlock. If Mr. Winfield were subjected to a second penalty trial, he would be considerably worse off than he was before the bailiff hammered the jury. Such an unjust result would create a windfall for the prosecution and a "mulligan" to which it is not entitled. *See* Rule 84.14 ("Unless justice otherwise requires, the court shall dispose finally of the case.").

II.

The Master's Report reflects clear and material errors of fact and law, and the Court should not defer to its findings and conclusions.

Even if the Master's Report were subject to deference, the Court could decline to sustain it if "there is no substantial evidence to support it," if "it is against the weight of the evidence," if "it erroneously declares the law," or if "it erroneously applies the law." *In re Competency of Parkus*, 219 S.W.3d 250, 255 n.9 (Mo. banc 2007). This is not a case in which the facts depend on the witnesses' demeanor or other intangible aspects of their in-person testimony. The Master's findings instead reflect fundamental misreadings of the testimony as well as the governing law. The resulting errors are readily apparent from the testimony—for example, the Report's misreading of several jurors' lack of memory as a denial of the events described by Jurors Turner, Willey, and Daniels. (Section C, below). The Court need not make credibility determinations in order to recognize the Report's clear errors.

A. The record does not support the Report's finding that the comment described by Juror Tracy, in which the bailiff told the jurors to "keep deliberating" or to "just keep working at it," occurred during guilt phase deliberations rather than penalty phase deliberations.

Juror Tracy testified that the bailiff said to keep deliberating when he brought the jurors their dinner. (Hr. Tr. 188). The Report observes that the judge authorized the bailiff to discuss dinner arrangements with the jurors during guilt phase deliberations, and it reasons that the comment must have surfaced then. (App. A8, citing Trial Tr. 1024: "[T]he comment by the bailiff, if made, referred to a procedural matter: letting the jury know that he would provide food and that the jury should continue deliberating while he made the arrangements for dinner.").

The record provides no support for the Master's speculative finding. For one thing, Juror Tracy was clearly and plainly speaking about penalty phase deliberations when she described the bailiff's directive.[3] (Hr. Tr. 187-89; App. A14-A16). The questions preceding her statement all related to the penalty phase, *id.*, and the notion that the events occurred during the guilt phase is absent from the record until Respondent's proposed findings. If Respondent believed Juror

[3]Juror Tracy's testimony is reproduced in the Appendix at pp. A13-A18.

Tracy was talking about the guilt phase, counsel should have asked her. (Hr. Tr. 187-89; App. A14-A16).

For another, nothing is proved by the fact that the bailiff was authorized to discuss the issue of dinner during guilt phase deliberations. (App. A8, citing Trial Tr. 1024). Juror Tracy testified that the bailiff made his comment when he was ***delivering*** dinner, not when he was taking orders or otherwise arranging for the meal to occur. (Hr. Tr. 188; App. A15).[4] The "procedural" exchange described by the Report is flatly contradicted by Ms. Tracy's testimony and could not have occurred when the bailiff was "letting the jury know that he would provide food." (App. A8).

Neither were guilt phase deliberations the only time the bailiff entered the jury room to facilitate or deliver meals. Juror Turner testified that "Food was

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[4]Tr. 188: Q: Did the bailiff ever instruct you to keep deliberating or continue deliberating or other words, phrases of that type?

A: I mean, I think they, you know, said, Keep deliberating, you know, that type of thing, you know, take your time. You know, they brought us dinner and that type of thing, so just keep working on it and --

Q: So it was - how would you character -- was that ***when he brought the food***, did he say that?

A: Yeah, like dinnertime.

always being served." (Hr. Tr. 39). Judge McShane said her normal practice was to direct the bailiff to bring the jurors menus when they request food. (Hr. Tr. 105-06). We also know that penalty phase deliberations coincided with dinnertime. The jury returned its death verdict at about 7 p.m., (Trial Tr. 1108-09), and Juror Turner recalled that the death verdict "did not come long after" the bailiff told the jurors to keep deliberating. (Hr. Tr. 50). Properly understood within the context of all the evidence, Juror Tracy's account strongly supports Mr. Winfield's claims.

B. Contrary to the Report's analysis, the bailiff need not have known the jurors' sentencing votes in order for his directive to interfere with the jurors' sole decision of whether to keep deliberating or declare themselves unable to reach a verdict.

The Report concludes that Mr. Winfield cannot prevail on his claims if Mr. Beeler was not informed of a split or deadlocked vote. (App. A6: "Further, Tracy indicated that the bailiff was not aware of whether or not a split vote or deadlock existed. Therefore, the bailiff couldn't have logically given a hammer."). Likewise, the Report implies that the bailiff must have ***intentionally*** influenced or mis-instructed the jury in order for Mr. Winfield to prevail. (App. A8: "Assuming, *arguendo*, that it occurred in the penalty phase (as argued by the Petitioner), the comment would not be determinative of the outcome in this matter

because the comment by the bailiff, if made, referred to a procedural matter: letting the jury know that he would provide food and that the jury should continue deliberating while he made the arrangements for dinner.").

These holdings are erroneous. Due process entitles a defendant to a verdict based solely on the evidence, arguments and instructions presented in court. "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). Even if Mr. Beeler intended to be talking about dinner, at least four jurors took his remarks as a directive to keep deliberating despite a split or deadlock of the vote. (Hr. Tr. 24, 58, 71, 189-90). Mr. Beeler's remarks influenced one or more jurors to keep deliberating at a time those jurors believed the jury to be at or near a deadlock. The remarks therefore interfered with the ***jury's*** sole discretion to decide whether and when to pronounce itself unable to render a unanimous life or death verdict. *State v. Griffin*, 756 S.W.2d 475, 486-87 (Mo. banc 1988) ("[T]he statute empowers the jury to determine for itself when it is deadlocked to such an extent that a decision cannot be reached").

Respondent and the Report have cited no authority that such interference must be intentional in order to violate the law. The directive remains an unauthorized *ex parte* communication reflecting an extrinsic influence upon the

jury—even if the bailiff was acting in good faith. Mr. Beeler's statement to "keep deliberating" or "keep at it" may well have been an "'off the cuff' remark given during a short exchange with . . . juror[s], without any thought of its possible effect on the jury."

Walsh v. State, 166 S.W.3d 641, 649 (Tenn. 2005). But that possibility does not extinguish the injury suffered by Petitioner: a sentence issued by jurors who received erroneous extra-judicial guidance. Whether the false guidance was intentional is beside the point.

C. By counting those witnesses who did not remember or see the relevant events as testifying *against* the existence of an informal hammer instruction, the Report greatly exaggerates the evidence disputing the testimony of Jurors Turner, Willey and Daniels, as well as Juror Tracy.

The Report's ultimate finding is that the testimony of the judge, bailiff, foreman and the "other eight jurors" carries "more weight" than the testimony of Jurors Turner, Willey and Daniels. (App. A8). But the Master's scale reflects a defective balancing of the evidence. Time and again, the Report logs a witness's failure to remember whether an event occurred (i.e., "I don't remember") as a denial of that event (i.e., "Not to my knowledge"). But there is a plain and obvious difference between the two, and the Report's accounting of evidence is

erroneous.

Juror Edwards – The Report states that Juror Edwards "does not remember sending a note to the judge indicating that the jury was split." (App. A6). This summary implies that Ms. Edwards was denying that such a note was sent, as if to say, "Not to my knowledge." In fact, Ms. Edwards specifically answered, "I can't remember," to the questions of whether any jurors suggested contacting the judge about a split vote, whether the jury sent a note advising the judge of a split vote, or whether the bailiff told the jurors to continue deliberations. (Hr. Tr. 184-85). The Report therefore erred in placing Ms. Edwards among the jurors who contradict the testimony of Jurors Turner, Willey and Daniels. (*See* App. A8: "This Court finds that the testimony of Judge McShane, bailiff Beeler, foreman Nash . . . and the other eight jurors has more weight than the testimony of these three jurors.").

Juror Conradi – As with Juror Edwards, the Report states that Juror Conradi "does not remember sending such a note and further does not remember receiving a response." (App. A6). This summary is mistaken for the same reason: Ms. Conradi actually testified "I don't remember" in response to the questions of whether the jury sent a note and whether the bailiff instructed the jurors to keep deliberating. (Hr. Tr. 179). If anything, Juror Conradi should be placed on Petitioner's side of the ledger, based on her testimony that the jury discussed whether to tell the judge about its divided vote during penalty phase deliberations.

(Hr. Tr. 179).

Juror Forney – The Report's description of Juror Forney's testimony is incomplete. (App. A6). There is no mention of Mr. Forney's statement that the bailiff "probably" told the jury to continue deliberating, or of his later statement that he simply did not remember whether the bailiff gave such a directive. (App. A6; Hr. Tr. 194-95). As with Jurors Edwards, and Conradi, it is unsound for the Court to log Mr. Forney's testimony as contradicting Petitioner's contentions and evidence. (App. A8).

Juror Murphy – The Report's summary of Juror Murphy's testimony is likewise incomplete. (App. A5). The Report states that Ms. Murphy "testified that she 'thinks' she would remember if the jury sent out a note indicating that there was a split vote." (App. A5). Yet, the Report does not mention Ms. Murphy's later testimony that she simply does not remember "either way" whether the jury sent such a note, nor her earlier statement to that effect when speaking with counsel's interns. (Hr. Tr. 175-76). That statement was unaccompanied by any external doubt that she would remember the statement if it occurred, and Ms. Murphy adopted her earlier statement on cross-examination. (Hr. Tr. 176: "Right. And I don't remember."). The Report similarly overlooks the fact that Ms. Murphy did not remember any jury notes during the entire trial, other than a note asking what Mr. Winfield did for a living (which note does not appear in the

record or transcript). (Hr. Tr. 171, 173-74). Ms. Murphy, then, "remembered" a note that did not occur, while failing to remember numerous notes that did occur. Given the understandable failures of her memory, it is unsound to credit her *lack* of memory as evidence that the jury did not communicate a split vote. The Report therefore errs by tallying Ms. Murphy's account as favoring Respondent.

Juror Tracy – Far from belonging to the group of the "other eight jurors" allegedly contradicting the testimony about an informal hammer instruction, (App. A8), Juror Tracy testified that the bailiff told the jurors to keep deliberating when he brought them dinner. (Hr. Tr. 188; App. A15). The jurors understood this statement as a directive to continue their deliberations. (Hr. Tr. 189-90; App. A16-A17). To be sure, Juror Tracy contradicted the testimony of Jurors Turner, Willey and Daniels by denying that the jurors told the bailiff how they had voted. (Hr. Tr. 190; App. A17). But her overall account of events is hardly in Respondent's favor.

Judge McShane – The trial judge admitted that she could not see or hear the jury room from her chambers. (Hr. Tr. 120-21, 125). She did not and could not personally witness the communications between the bailiff and the jurors. Neither party maintains that any note about a deadlock or split vote reached Judge McShane. *See* Petitioner's Proposed Findings of Fact and Conclusions of Law, at 8 ¶ 11; Respondent's Proposed Findings of Fact and Conclusions of Law, at 12.

Because the judge cannot know what the bailiff told the jurors, her testimony about the court's procedures does not directly refute the testimony of Jurors Turner, Willey, Daniels, and Tracy concerning their interactions with the bailiff. Indeed, the judge acknowledged that the court has no specific rules limiting the degree of "small talk" when the bailiff delivers food or other items to the jurors. (Hr. Tr. 124-26).

The Report's Accounting of Witnesses – The Report therefore errs by balancing the testimony of Jurors Turner, Willey and Daniels as against that of Judge McShane, Bailiff Beeler, foreman Nash, and "the other eight jurors." (App. A8). The more appropriate balance is the testimony of Jurors Turner, Willey, Daniels and Tracy as against that of Jurors Nash, Brown, Buscher and Heller as well as the bailiff. So balanced, the evidence does not explain why four jurors would remember being told to keep deliberating if such an event never occurred. The evidence does, however, explain why four lay jurors might fail to remember such an event ten years later, particularly when the evidence reveals objective errors in these jurors' memories. *See* Tr. 163, 168 (Brown remembers no notes); Tr. 154, 158 (Buscher remembers only a single note asking for clarification of testimony, which note does not appear in the record); Tr. 150 (Heller describes an eight-to-four split in favor of life, contrary to the testimony of all other jurors); Nash Depo. (Resp. Ex. B) at 8, 10, 14, 26-29, 41-42; Resp. Ex. D; Trial Tr. 1022,

1108-09 (Nash reviewed the notes and the habeas petition before his video testimony, but wrongly remembered the jury being given Petitioner's confession and placed the jurors' notes within the wrong phases of the trial).

The evidence similarly explains why the bailiff would not remember telling the jurors to "keep working on it" ten years after doing so. (Hr. Tr. 188). Mr. Beeler is particularly likely to forget the comment if he made it in good faith and without knowledge of the jurors' vote or of his effect upon the minority jurors who then favored life. The problem is that a number of jurors believed the jury was split and at or near a deadlock, believed the bailiff knew so, and took his comment as an official directive to keep deliberating. (Hr. Tr. 24, 58, 71, 189-90).

D. The Report ascribes non-existent inconsistencies to the testimony of Jurors Turner, Willey and Daniels, all of whom said that the jury reported a split vote and that the bailiff told them to keep deliberating.

Contrary to the Report, Jurors Turner, Willey and Daniels were not "at odds" regarding the bailiff's response to the jury's report of a split or deadlocked vote. (App. A8). All three testified the jurors were told to continue deliberating. (Hr. Tr. 24, 58, 71). It is unremarkable that these three jurors did not specifically remember whether the bailiff was reading from a piece of paper when he spoke. (Hr. Tr. 24, 58, 71; App. A8 ("They do not know whether this response came from

Judge McShane or the bailiff.")). The bailiff's directive was but a few words: "Keep deliberating" or "Keep working on it." The jurors were likely to take the bailiff's words as authoritative whether or not they thought he was reading from a note.

Likewise, these three jurors were not "at odds" about what the jurors communicated to the bailiff. (App. A8). Juror Turner said the jury reported "we couldn't come to a complete agreement." (Hr. Tr. 24). Juror Willey testified that the jurors reported an inability to reach a unanimous decision. (Hr. Tr. 57-58). Juror Daniels said she "believed" that the jury sent out a note saying the jurors were not unanimous, but on cross-examination, she clarified that the jury reported a "deadlock." (Hr. Tr. 70-71, 73-74).

Perhaps most troubling is the short shrift given to Juror Daniels' testimony. The Report mistakenly states that Juror Daniels "remembered only that the bailiff said 'something' and the jury continued deliberating." (App. A3). In fact, Ms. Daniels clarified that the bailiff told the jury to keep deliberating, as she said before the hearing. (Hr. Tr. 71).[5] At the very least, the Report's summary of the

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[5]Tr. 71: Q: Do you remember exactly what the bailiff said?

A: No.

Q: Was it -- but he said something?

A: Yeah.

evidence is incomplete, and its findings omit consideration of highly relevant testimony. It characterizes the evidence as "vague" (App. A8), but without considering the totality of that evidence.

E. The Report misinterprets the testimony of Jurors Turner, Willey and Daniels as specifying that the jury wrote a *note* reflecting its divided vote, and it therefore exaggerates the significance of the evidence tending to disprove such a note.

The Master's findings overstate the importance of whether the jury communicated its split or deadlocked vote through a note, as opposed to orally. (App. A7: "The crux of this case is whether the jury sent a note to Judge McShane advising that they were split or deadlocked . . ."; App. A8: "This court recognizes that Jurors Turner, Willey and Daniels testified that the jury did send a note

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Q: Okay. And as a result of that, did the jury stop or did the jury keep deliberating?

A: We kept going. If I can recall, we kept going.

Q: Do you remember telling me when we met a couple of weeks ago that the bailiff told the jury to keep deliberating?

A: Uh-huh.

Q: Is that your memory today?

A: Yes.

announcing that there was a split vote and that they received a response."). Contrary to the Report's finding, Jurors Turner and Willey did not specify whether the jury's communication was oral or in writing. (Hr. Tr. 24, 58, 63, 65-66). Ms. Daniels "believed" the jury sent a note. (Hr. Tr. 70-71).

The point is not merely academic. By misreading Petitioner's evidence as specifying a "note," the Report overstates the evidence to the contrary in its overall balancing of the testimony:

> This Court finds that the testimony of Judge McShane, bailiff Beeler, foreman Nash (the three witnesses most attuned to the procedural aspects of the trial), and the other eight jurors has more weight than the testimony of these three jurors.

(App. A8). Judge McShane was not privy to any ***oral*** communications in the jury room, by her own admission. (Hr. Tr. 120-21, 125). Likewise, Mr. Beeler said he did not recall whether he was told of a divided vote. (Hr. Tr. 144). And, as stated above, Jurors Conradi, Edwards, Murphy and Forney should be removed from the equation based upon their acknowledged failure to remember the relevant events.

F. The Report reflects an uneven and state-slanted assessment of the credibility and consistency of the witnesses.

Even though Petitioner bears the burden of proof, the trier of fact must assess all the witnesses even-handedly and through the same measure. This the

Report fails to do. The Report discounts Juror Turner's credibility because Ms. Turner now believes that Mr. Winfield should be sentenced to life. (App. A2). But it is at least equally significant that the other jurors continue to believe their verdict was just; indeed, two such jurors testified in favor of Mr. Winfield's allegations. (Hr. Tr. 66 (Willey), 75 (Daniels)). The Court should no more doubt Juror Turner for having a motive to undermine the sentence than it should doubt Respondent's jurors for having a motive to uphold it. Since jurors will tend to protect their verdicts, the remarkable fact is that four jurors gave accounts that would undo it. There remains no satisfactory explanation why Jurors Turner, Willey, Daniels, and Tracy would remember the events as they did, unless they are telling the truth.

G. The weight of all the evidence strongly supports Petitioner's showing that the bailiff told the jurors to keep deliberating.

The evidence as a whole more provides strong support of an extrinsic influence upon the jurors' deliberations, and relatively weaker support for the Report's more innocent reading of events. It is undisputed that the jury took over five hours to reach a verdict, and some jurors voted for a life sentence in the initial rounds of voting. There is no evidence remotely suggesting that the jury was unanimous at the time the bailiff delivered dinner. The "small talk" which the bailiff engaged in, and which he was never trained to avoid, very probably

included one or more jurors telling him that the jury was still divided, or that they had not yet decided the case, or that their task was a a heavy one and remained unfinished, and he responded with encouragement: "Just keep working on it." (Hr. Tr. 188; App. A15). Whether or not the bailiff's directive reflected knowledge of the jurors' vote—and thus, whether it was a "hammer" in the traditional sense of the term—it ***still*** interfered with the jury's statutory power to decide how long to deliberate. § 565.030.4, R.S. Mo. (1994); *State v. Griffin*, 756 S.W.2d 475, 486-87 (Mo. banc 1988). That, anyway, is how multiple jurors interpreted it. (Hr. Tr. 24: "I can't remember if it was a note or he told us we were to continue."; *Id.* at 58: "And the answer came back, You need to deliberate more.").

It is flatly implausible that four different jurors, completely independently of one another, would fabricate a memory of this event if it had not occurred. On the other hand, it is likely that some jurors did not hear or remember this casual exchange, or did not accord the bailiff's comments the same significance that other jurors apparently gave it. Viewing the record as a whole, it is unsupportable and against the considerable weight of the evidence to conclude that absolutely nothing happened.

III.

This Court has an ongoing statutory duty to ensure that a death sentence is proportional, reliable and not the result of any "arbitrary factor." It should vacate Mr. Winfield's death sentence because the record provides sufficient evidence to undermine the Court's confidence in the verdict, i.e., the sworn testimony of multiple jurors that the bailiff told the jury to keep deliberating when the jurors were divided.

This Court occupies a central role not only in reviewing death sentences, but administering Missouri's system of capital punishment. The attorney general may seek an execution date against a prisoner, but the Court is solely responsible for deciding whether to set one. The Court must "inquire into the facts" and ascertain whether "legal reasons exist against the execution of sentence." § 546.710, R.S. Mo. The Court is also required to ensure that the ultimate punishment is fairly and reliably imposed. Section 565.035.3, R.S. Mo., requires the Court to determine whether the sentence "was imposed under the influence of passion, prejudice, or any other arbitrary factor" and also whether it is "excessive or disproportionate to the penalty imposed in similar cases." Upon either finding, the Court must vacate the death penalty and either re-sentence the defendant to life imprisonment or order a new sentencing hearing. § 565.035.5, R.S. Mo. These determinations are necessarily for the Court and not a special master.

The Court's duties under section 565.035.3 are ongoing. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 547 (Mo. banc 2003) (principal opinion); *id.* at 549-50 (Wolff, J., concurring); *id.* at 552 (Price, J., dissenting). The petitioner in *Amrine* presented clear evidence that he was innocent, after all three of the witnesses who testified against him at trial recanted. In granting habeas relief, the Court relied on its ongoing duty to assess the proportionality of a death sentence in light of the "strength of the evidence." *Id.* at 547, citing § 565.035.3. The Court held that habeas is appropriate when a death-sentenced inmate "produce[s] sufficient evidence of innocence to undermine the habeas court's confidence in the underlying judgment." *Id.* In dissent, Judge Price disagreed with vacating Amrine's conviction, but agreed with vacating the death sentence. Judge Price reasoned that the majority's "loss of confidence standard" applied to the question of sentence under section 565.035.3, which imposes "a ***continuing duty*** that must be addressed in light of new evidence." *See id.* at 552 (Price, J., dissenting) (emphasis added). He concluded that Amrine's sentence should be set aside. *Id.*

Importantly, none of the separate *Amrine* opinions limit the Court's ongoing review to the strength of the evidence underlying the conviction. The majority opinion, Judge Wolff's concurrence, and Judge Price's dissent all cited § 565.035.3 *in toto* when recognizing the Court's continuing obligations. *See Amrine*, 102 S.W.3d at 547, 549, 552 ("The Supreme Court of Missouri is charged

under section 565.035.3 with determining whether the death penalty is excessive or is disproportionate considering, among other things, 'the strength of the evidence.'"). Under *Amrine* and a fair reading of the statute, the Court's ongoing review encompasses the entirety of section 565.035.3. The Court must therefore consider whether Mr. Winfield's sentence "was imposed under the influence of passion, prejudice, or any other arbitrary factor." § 565.035.3(1). The question is whether the evidence presented undermines the Court's confidence in the verdict and judgment sentencing Petitioner to death. *See Amrine*, 102 S.W.3d at 547 (majority opinion); *id.* at 552 (dissent).

The finality of the death penalty necessitates "reliability in the determination that death is the appropriate punishment in a specific case," *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), but the evidence now before the Court is troubling. Three jurors have testified that the jury informed the bailiff of an impasse, and that the bailiff told them to keep deliberating. (Hr. Tr. 24, 58, 71). A fourth juror confirmed the directive to keep deliberating, even though she denied that the bailiff knew of a split or deadlocked vote. (Hr. Tr. 188-90; App. A15-A17). The evidence does not explain why multiple jurors would describe these events if they did not occur.

Even crediting the honesty and forthrightness of jurors who testified against Petitioner's allegations, there remains the strong likelihood that Mr. Winfield's

sentence resulted from a critical misunderstanding by one or more jurors. The misunderstanding was that ***some*** jurors believed they were obligated to keep deliberating rather than exercise their sole authority to declare themselves unable to reach a verdict. (*E.g.*, Tr. 58: "And the answer came back, You need to deliberate more."). The ultimate punishment cannot stand where, as here, we cannot be confident that it was imposed in accordance with our statutes. *See* § 565.030.4, R.S. Mo. (1994); *State v. Griffin*, 756 S.W.2d 475, 486-87 (Mo. banc 1988). Petitioner would have received a life sentence if even a single juror declined to vote for death. The evidence reveals a tangible possibility that one or more jurors lengthened their deliberations on account of the bailiff's directive. At the very least, the circumstances justify a new sentencing trial with proper observance of the law.

CONCLUSION

For all the foregoing reasons, Petitioner urges that the Court grant his petition for writ of habeas corpus, vacate his sentences of death, and either re-sentence him to life imprisonment or order a new sentencing trial.

Respectfully submitted,

Joseph W. Luby, Mo. Bar # 48951
Public Interest Litigation Clinic
305 East 63rd Street
Kansas City, Missouri 64113
(816) 363-2795
FAX (816) 363-2799

Sean D. O'Brien, Mo. Bar. # 30116
Public Interest Litigation Clinic
305 East 63rd Street
Kansas City, Missouri 64113
(816) 363-2795
FAX (816) 363-2799

Attorney for Petitioner

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 13,075 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 10 software,

2. That the disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free,

3. That a true and correct copy of the attached brief, and a disk containing a copy of this brief, were mailed, postage prepaid, this 18th day of March, 2009, to:

Andrew W. Hassell
Office of the Attorney General
P. O. Box 899
Jefferson City, MO 65102

JOSEPH W. LUBY, Mo. Bar # 48951
Public Interest Litigation Clinic
305 East 63rd Street
Kansas City, MO 64113
816-363-2795 • Fax 816-363-2799

Attorney for Petitioner

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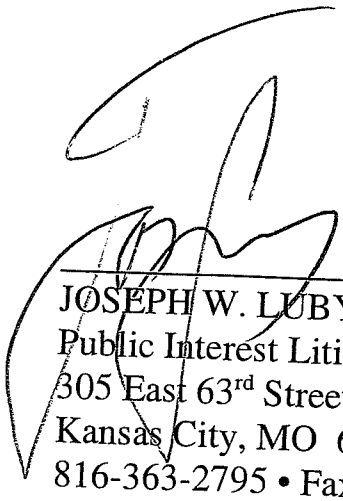

JOSEPH W. LUBY, Mo. Bar # 48951
Public Interest Litigation Clinic
305 East 63rd Street
Kansas City, MO 64113
816-363-2795 • Fax 816-363-2799

Attorney for Petitioner

APPENDIX – Table of Contents

IN THE MISSOURI SUPREME COURT

STATE EX REL. JOHN WINFIELD,	)	
Petitioner,	)	
v.	)	**Case no. SC88942**
DON ROPER,	)	
Respondent.	)	

Special Master's Report
With Court's Findings of Fact and
Conclusions of Law

The Missouri Supreme Court appointed the undersigned judge to serve as a special master to hold an evidentiary hearing and issue findings of fact and conclusions of law on Petitioner Winfield's claim for relief.

Mr. Winfield contends that in the penalty phase of the trial that the jury sent a note or verbal communication to the trial judge indicating that the jury was split between death and life imprisonment (or was "hung" or "deadlocked" on the alternatives); that trial judge, Judge McShane, did not inform Mr. Winfield's attorneys about the alleged note or communication; and that Mr. Winfield was, therefore, denied counsel during a critical stage of trial.

Mr. Winfield further contends that in the penalty phase of the trial that the trial judge or the bailiff, after being advised of a split between death and life imprisonment (or being advised that the jury was "hung" or "deadlocked" on the alternatives), ordered the jury to continue their deliberations and that such an instruction was contrary to Missouri law.

Evidence Adduced At The Hearing

On June 30, 2008, I conducted an evidentiary hearing. Petitioner Winfield presented five witnesses: jurors Kimberly Turner, Steven Willey, and Jenny Daniels; and law students Erin Lawrence and Alexandra Hutchings. Respondent Roper presented eleven witnesses: Judge Maura McShane, who presided over Mr. Winfield's trial; Ted Beeler, the trial bailiff; and jurors Craig Heller, Barbara Buscher, Carol Brown, Maureen Murphy, Elaine Conradi, Barbara Edwards, Tina Tracy, and Robert Forney. Foreperson Nash testified by video deposition.

Petitioner's Evidence[1]

Juror Kimberly Turner

Juror Turner testified that during the penalty phase deliberations, the jury sent a note to the judge indicating that the jury "couldn't come to a complete agreement." Tr. 24. The bailiff then told the jury to continue deliberating. Id. Juror Turner did not remember whether the bailiff told them to continue deliberations orally or in writing. Id. The jurors continued deliberating and eventually returned a unanimous verdict for death. Id. The judge did not speak with the jury until after the trial concluded. Tr. 25. Juror Turner testified that all notes had to go through the foreperson. Tr. 39.

Juror Turner also testified that she does not now support the death penalty for Mr. Winfield based on information that she learned after the trial ended. Tr. 40-42.

I perceived Juror Turner's testimony as plausible, however, it was clear that after the trial she experienced a philosophical change in belief with regard to the appropriateness of death as a penalty.

Juror Steven Willey

Juror Willey testified that during the penalty phase deliberations, the jury decided that they could not reach a unanimous decision and "conveyed" that message to the judge. Tr. 57. The jury was then informed that they needed to continue to deliberate. Tr. 58. Juror Willey does not remember how they communicated with the judge or how they received a response from the court. Tr. 57-58, 59-60, 64-65. Juror Willey testified that any communication went through the jury foreman. Tr. 63. Juror Willey made it clear that he was working on a "weak recollection" as to various aspects of his testimony. Tr. 56, Tr. 62. Specifically, "I mean this occurred ten years ago and I could not tell you any factual thing about what somebody said or – even who said things . . . I couldn't even tell you names of the jurors." Tr. 62-63.

I perceived Juror Turner's testimony as plausible; however, on hand one he expresses confidence that in some fashion the judge communicated to the jury to continue deliberating, but on hand two, he didn't recall whether the judge did it personally, whether the bailiff did it, whether it was communicated in writing or verbally or whether it was in writing but read to the jury by the bailiff. Tr. 60, Tr. 64-65. At the same time, Juror Turner testified that all communications to the judge went through the bailiff. Tr. 63.

[1]This Court finds the testimony of Erin Lawrence and Alexandra Hutchings to be irrelevant to the questions presented here and will not address that testimony further.

Juror Jenny Daniels

Juror Daniels testified that the jury sent a note to the judge at some point during the penalty phase deliberations. Tr. 70-71. The note indicated that the jury was "deadlocked." Tr. 73-74. 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" and the jury continued deliberating. Tr. 71. The jury foreman signed all the notes that were sent to the judge. Tr. 73-75.

Juror Daniels' testimony was plausible.

Respondent's Evidence

Judge Maura McShane

Judge McShane was the trial judge. Tr. 99. She has been a circuit court judge for fourteen years and has presided over numerous jury trials. Tr. 97-98, 115-117. Before becoming a judge, she was an assistant prosecutor in St. Louis County and tried approximately sixty-five criminal cases to a jury.

Judge McShane testified that when the jury sends her a note during deliberations, her practice is to summon the attorneys, read them the note and discuss what the proper response should be. Tr. 98. She then puts the response on the record, shows the attorneys the response, asks for objections, signs the response and sends it to the jury through the bailiff. Id.

Judge McShane testified that she followed this practice with regard to two notes that the jury sent in Mr. Winfield's trial. Tr. 99-105; Resp. Ex. C and D; Trial Tr. 1022-24, 1108-1109. In a third note, the jury asked for food. Tr. 105; Resp. Ex. E. Judge McShane testified that she did not discuss this procedural matter with the attorneys on the record because she had already discussed that issue with them. Tr. 105-106; Trial Tr. 1024. She testified that there would not have been any other types of notes about which she did not inform the attorneys. Tr. 107.

Judge McShane testified that she did not receive a note from the jury indicating that they were "deadlocked" or that there was a split vote. Tr. 107, 109, 112. She further testified that in her years on the bench, she has never received a jury note regarding deliberations and not put it on the record. Tr. 110. She did not tell the jury to continue deliberating during the penalty phase and did not authorize her bailiff to give them such an instruction. Tr. 112. If she had received such a note, she would have discussed it with the attorneys and put it on the record. Tr. 129.

Judge McShane also testified that she spoke with the jury in the jury room only after they returned the death sentences and had been dismissed. Tr. 112-113. She did so in order to thank the jury and to answer any questions that they might have. Id.

Judge McShane was credible.

Bailiff Ted Beeler

Ted Beeler was the bailiff in Mr. Winfield's trial. Tr. 133. Mr. Beeler testified that he remained outside the door of the jury room while the jury was deliberating. Tr. 135. When the jury gave him a note, he briefly reviewed it to ensure that the foreman had signed it. Tr. 134. He then delivered the note to the judge. Tr. 135. While the judge was considering the note, he would watch the jury room from the hall. Tr. 135-136. After the judge had determined what the proper response would be, he delivered the written response (and any exhibits) to the jury. Tr. 136-137. He also 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 when he presented a note to Judge McShane, she would put the note on the record after consulting with both attorneys and before giving him a response to take to the jury. Tr. 138. He was not aware, in the ten years that he was Judge McShane's bailiff, of any time in which the judge received a note and did not notify the attorneys. Tr. 138-139.

Mr. Beeler testified that he never told the jury that they needed to continue penalty-phase deliberations. Tr. 139, 142. The jurors never informed him that there was a split vote. Tr. 140. Mr. Beeler testified 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. 144.

Bailiff Beeler was credible.

Jury Foreman Terry Nash

This Court received Mr. Nash's testimony via a video deposition. Resp. Ex. A and B. Mr. Nash was the jury foreman in Mr. Winfield's trial. Tr. 6. He had the responsibility to sign all notes or other communications with the court and deliver them to the bailiff. Tr. 6-7, 46-47. When the jury wanted to send a note, one of the jurors would write it, Mr. Nash would sign it and they would deliver it to the bailiff. Tr. 7. The jury followed this process with regard to three separate notes. Tr. 7-11; Depo. Ex. 1, 2, and 3; Resp. Ex. C, D, and E.

Mr. Nash does not recall any communications with the bailiff other than handing him the notes. Tr. 11. The bailiff did not communicate with the jury about the case other than giving them food, requested trial exhibits or responses from the court. Tr. 11. The bailiff did tell them where the restrooms were. Id. He also told the jury that the court was ready for them and asked if they were ready to go into the courtroom. Tr. 11, 16. The bailiff did not tell the jury to continue deliberating. Tr. 16. He also did not make any comments about the substance of the case. Id.

Mr. Nash does not remember any of the jurors stating that they could not vote for the death penalty or life imprisonment. Tr. 14. He also does not remember any jurors stating that they were deadlocked. Id. Mr. Nash does not remember considering signing a note to the judge indicating that the jury was deadlocked. Tr. 15.

From the video deposition, I perceived Foreman Nash as credible.

Juror Craig Heller

Juror Heller testified that when the jury sent notes to the judge, the jury handwrote the notes. Tr. 148. The notes went to the foreman, the bailiff, and then to the judge. Tr. 148.

Juror Heller testified that the jury was not deadlocked during the penalty phase deliberations. Tr. 148. The jury did not consider advising the judge that there was a split vote. Tr. 148. The jury did not send a note to the court stating that there was a split vote or that the jury was deadlocked. Tr. 148. The bailiff did not tell the jury to continue deliberating. Tr. 149.

Juror Heller was credible.

Juror Barbara Buscher

Juror Buscher testified that the jury did not believe that they were deadlocked or that they could not reach a verdict. Tr. 153. She does not remember hearing any jurors use the term "hung jury." Tr. 153. She testified that the jury did not discuss sending a note to the judge indicating that there was a split vote, Tr. 154, and that the bailiff never told the jury to keep deliberating, Tr. 155.

Juror Buscher was credible.

Juror Carol Brown

Ms. Brown testified that the jury never considered itself deadlocked. Tr. 163. She testified that there was no point at which the jury felt that they could not arrive at a verdict and that she never heard the words "hung jury" during deliberations. Tr. 163. She does not remember sending a note to the judge stating that the jury was deadlocked or that there was a split vote. Tr. 164. She does not remember the judge or the bailiff ever telling the jury to continue their deliberations. Tr. 165.

Juror Brown was credible.

Juror Maureen Murphy

Ms. Murphy testified that, during the penalty phase deliberations, no jurors stated that there was a "hung jury" or that they were deadlocked. Tr. 171, 176. She testified that the jury did not discuss informing the judge that there was a split vote. Tr. 171. She testified that the bailiff did not inform them to keep deliberating during the penalty phase. Tr. 172. She testified that she "thinks" she would remember if the jury sent out a note indicating that there was a split vote. Tr. 174.

Juror Murphy was credible.

Juror Elaine Conradi

Juror Conradi testified that the jury considered sending a note to the judge stating that they were "divided." Tr. 179. She does not remember sending such a note and further does not remember receiving a response. Tr. 179.

Juror Conradi was credible.

Juror Barbara Edwards

Juror Edwards testified that no jurors discussed being "deadlocked," a "hung jury" or a "split vote" during the penalty phase. Tr. 184. She does not remember sending a note to the judge indicating that the jury was split. Id.

Juror Edwards was credible.

Juror Tina Tracy

Juror Tracy testified that she does not remember sending a note to the judge indicating that the jury was deadlocked or that there was a split vote. Tr. 188. She testified that no one on the jury was opposed to changing their votes. Tr. 187. She testified that they never told the bailiff that there was a split vote. Tr. 188-189. She testified that the bailiff told them once to keep deliberating when he brought them food. Tr. 188. She characterized that comment as "procedural" and reiterated that they had not informed the bailiff of a split vote. Tr. 188-89, 190. The parties are at odds regarding the timing of Tracy's testimony about when the food was delivered and, in turn, when the bailiff's comment to "keep deliberating" was made[2]: the State argues it occurred in the guilt, the Petitioner argues it occurred in the penalty phase. Notwithstanding when it occurred, it appears to have been a non substantive comment. Further, Tracy indicated that the bailiff was not aware of whether or not a split vote or deadlock existed. Therefore, the bailiff couldn't have logically given a hammer.

Juror Tracy was credible.

Juror Robert Forney

Juror Forney testified that none of the jurors indicated that there was a "hung jury" or that they were "deadlocked." Tr. 194. He does not remember any jurors suggesting that they advise the court about a split vote. Tr. 194. He does not remember sending such a note to the judge. Tr. 194.

Juror Forney, though credible, didn't remember a lot.

---

[2] After the initial briefing in this case was completed, Petitioner sought and was granted leave to file a reply addressing the issue of whether Juror Tracy's recollections of the "keep deliberating" comment occurred in the guilt or penalty phase of trial. Respondent was given leave to file a surreply.

Findings Of Fact

The crux of this case is whether the jury sent a note to Judge McShane advising that they were split or deadlocked, whether Judge McShane sent back a reply ordering the jury to keep deliberating and whether bailiff Ted Beeler told the jury to continue deliberating.

I find that the jury did not send such a note to Judge McShane. In so finding, I credit Judge McShane's testimony about how she responds to jury notes and how she places them on the record. Judge McShane is an experienced trial judge and was a prosecutor for ten years prior to becoming a judge. I find that she understood the seriousness of the case against Mr. Winfield. The trial transcript reflects that Judge McShane sought to ensure that Mr. Winfield's trial was fair.

The trial transcript shows that the jury sent three notes to Judge McShane. Two of those notes were substantive, one asking for Mr. Winfield's confession and one asking for trial exhibits and the third asked for dinner. Judge McShane initialed all of these notes. She put the notes on the record, discussed them with counsel on the record and put her response on the record. Trial Tr. 1022-24, 1108-1109. She discussed the substance of the third note regarding ordering dinner for the jury with counsel on the record. Tr. 1024.

I find no reason to believe that Judge McShane would not have followed this same procedure with a note informing her that the jury was deadlocked. Thus, I conclude that the jury did not send such a note to Judge McShane. Further, I conclude that Judge McShane did not send any communications to the jury that were not on the record and that are not contained in the trial transcript.[3]

The jurors' testimony supports this conclusion. Eight jurors (Mr. Nash, Mr. Heller, Ms. Buscher, Ms. Brown, Ms. Murphy, Ms. Edwards, Ms. Tracy, and Mr. Forney) testified that the jury was not deadlocked, "hung," or irreparably divided. They all testified that, although some jurors were initially opposed to the death penalty, the jury was able to come to a unanimous decision through the deliberative process. Thus, I find that there would have been no need for the jury to inform Judge McShane that they were deadlocked or had a split vote.

Further, Juror Nash, the foreman, testified that he did not send such a note. His testimony is supported by the record. The trial transcript shows that Judge McShane instructed the jury to notify the court by a note from the foreman if they wanted any exhibits. Trial Tr. 1022. Juror Nash testified that he was required to sign any notes to the judge. Jurors Turner, Heller, Willey, and Daniels also testified that all notes had to go through the foreman. This testimony supports the finding that no note was presented to Judge McShane.

Next, I find that bailiff Beeler did not instruct the jury to keep deliberating. I credit Mr. Beeler's testimony that he did not do so. I also credit the testimony from Mr. Beeler and Mr. Nash that the bailiff had no communications of that type

[3] The Court also finds that Judge McShane visited with the jury in the jury room and answered their questions only after the jury returned the death sentences in open court and was discharged.

with the jury. 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. That conclusion is at odds with the practice established by Beeler and Judge McShane and at odds with how Beeler handled the three notes referenced in the trial transcript.

Juror Tracy testified that bailiff Beeler told the jury to "keep deliberating." She testified that it occurred when the bailiff brought food to the jury. Petitioner argues it occurred in the penalty phase; Respondent in the guilt phase. The record reflects that the bailiff was authorized to discuss the issue of dinner with the jury during the guilt phase deliberations. Trial Tr. 1024. This Court believes that this comment, if made, occurred in the guilt phase (and not the penalty phase). Assuming, *arguendo,* that it occurred in the penalty phase (as argued by the Petitioner), the comment would not be determinative of the outcome in this matter because the comment by the bailiff, if made, referred to a procedural matter: letting the jury know that he would provide food and that the jury should continue deliberating while he made the arrangements for dinner. This Court recognizes that jurors Turner, Willey, and Daniels testified that the jury did send a note announcing that there was a split vote and that they received a response. This Court finds that the testimony of Judge McShane, bailiff Beeler, foreman Nash (the three witnesses most attuned to the procedural aspects of the trial), and the other eight jurors has more weight than the testimony of these three jurors. Jurors Turner, Daniels, and Willey did not remember how or when the note was sent or how or when a response came back. They do not know whether the response came from Judge McShane or the bailiff. All three of these jurors are at odds about what the note said and what the response to that note was. 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.

Conclusions Of Law

In reaching my conclusions of law, I determined whether or not Mr. Winfield proved his claims by a preponderance of the evidence. Rule 29.15 (i); Cole v. State, 152 S.W.3d 267, 268 (Mo. 2004); Nicklasson v. State, 105 S.W.3d 482, 484 (Mo. 2003). I applied the Rule 29.15 standard because this proceeding is functionally equivalent to a Rule 29.15 proceeding. Further, the parties agreed on the record to such being the proper standard for review.

Mr. Winfield contends that in the penalty phase of the trial that the jury sent a note or verbal communication to the trial judge indicating that the jury was split between death and life imprisonment (or was "hung" or "deadlocked" on the alternatives); that Judge McShane did not inform Mr. Winfield's attorneys about the alleged note or communication; and that Mr. Winfield was, therefore, denied counsel during a critical stage of trial. I find by a preponderance of the credible evidence that there was no such note. Further, I find by a preponderance of the credible evidence that there was no such verbal communication.

Mr. Winfield further contends that in the penalty phase of the trial that the trial judge or the bailiff, after being advised of a split between death and life imprisonment (or being advised that the jury was "hung" or "deadlocked" on the alternatives), ordered the jury to continue their deliberations and that such an instruction was contrary to Missouri law. I find by a preponderance of the credible evidence that the jury did not advise the trial judge or bailiff of a split between death and life imprisonment (or that the jury was "hung" or "deadlocked" on the alternatives), that neither the trial judge nor the bailiff ordered the jury to continue their deliberations and, in turn, no such instruction was given.

Therefore, I find that there were no errors. I find that Mr. Winfield's claims are without merit.

Recommendation

The undersigned special master recommends that the Missouri Supreme Court deny Mr. Winfield's habeas petition as being without merit.

Gary Oxenhandler
Special Master

9/10/18
Date

(b) Involuntary manslaughter under subdivision (1) of subsection 1 of section 565.024.

3. No instruction on a lesser included offense shall be submitted unless requested by one of the parties or the court.

(L. 1983 S.B. 276, A.L. 1984 S.B. 448 § A—effective 10-1-84)

Effective 10-1-84

565.030. Trial procedure, first degree murder.—1. Where murder in the first degree is charged but not submitted or where the state waives the death penalty, the submission to the trier and all subsequent proceedings in the case shall proceed as in all other criminal cases with a single stage trial in which guilt and punishment are submitted together.

2. Where murder in the first degree is submitted to the trier without a waiver of the death penalty, the trial shall proceed in two stages before the same trier. At the first stage the trier shall decide only whether the defendant is guilty or not guilty of any submitted offense. The issue of punishment shall not be submitted to the trier at the first stage. If an offense is charged other than murder in the first degree in a count together with a count of murder in the first degree, the trial judge shall assess punishment on any such offense according to law, after the defendant is found guilty of such offense and after he finds the defendant to be a prior offender pursuant to chapter 558, RSMo.

3. If murder in the first degree is submitted and the death penalty was not waived but the trier finds the defendant guilty of a lesser homicide, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. No further evidence shall be received. If the trier is a jury it shall be instructed on the law. The attorneys may then argue as in other criminal cases the issue of punishment, after which the trier shall assess and declare the punishment as in all other criminal cases.

4. If the trier at the first stage of a trial where the death penalty was not waived finds the defendant guilty of murder in the first degree, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. Evidence in aggravation and mitigation of punishment, including but not limited to evidence supporting any of the aggravating or mitigating circumstances listed in subsection 2 or 3 of section 565.032, may be presented subject to the rules of evidence at criminal trials. Such evidence may include, within the discretion of the court, evidence concerning the murder victim and the impact of the crime upon the family of the victim and others. Rebuttal and surrebuttal evidence may be presented. The state shall be the first to proceed. If the trier is a jury it shall be instructed on the law. The attorneys may then argue the issue of punishment to the jury, and the state shall have the right to open and close the argument. The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:

(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 section 565.032; or

(2) If the trier does not find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating circumstances listed in subsection 2 of section 565.032, warrants imposing the death sentence; or

(3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which 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.

If the trier is a jury it shall be so instructed. If the trier assesses 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. If the trier is a jury it shall be instructed before the case is submitted that if it is unable to decide or agree upon the punishment the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death. The court shall follow the same procedure as set out in this section whenever it is required to determine punishment for murder in the first degree.

(L. 1983 S.B. 276, A.L. 1984 S.B. 448 § A—effective 10-1-84, A.L. 1993 H.B. 562)

565.032. Evidence to be considered in assessing punishment in first degree murder cases for which death penalty authorized.—1. In all cases of murder in the first degree for which the death penalty is authorized, the judge in a

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, RSMo;

(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 murder was committed for the purpose of concealing or attempting to conceal any felony offense defined in chapter 195, RSMo;

(16) The murder 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, RSMo;

(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.

3. 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 under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the murder in the first degree committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the crime.

(L. 1983 S.B. 276, A.L. 1984 S.B. 448 § A, A.L. 1989 S.B. 215 & 58, A.L. 1993 H.B. 562)

(1992) Trial court violated the Eighth Amendment by refusing to give the mitigating-circumstance instruction that defendant requested — "The defendant has no significant history of prior criminal activity." Missouri statutes prohibit the introduction of a defendant's juvenile record for any purpose. Lashley v. Armontrout, 957 F.2d 1495 (8th Cir.).

(1997) The offense must be a felony to be considered a serious assaultive offense. State v. Whitfield, 939 S.W.2d 361 (Mo.banc).

565.035. Supreme court to review all death sentences, procedure — powers of court — assistant to court authorized, duties. — 1. Whenever the death penalty is imposed in any case, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the supreme court of Missouri. The circuit clerk of the court trying the case, within ten days after receiving the transcript, shall transmit the entire record and transcript to the supreme court together with a notice prepared by the circuit clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report by the judge shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Missouri.

2. The supreme court of Missouri shall consider the punishment as well as any errors enumerated by way of appeal.

3. With regard to the sentence, the supreme court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant.

4. Both the defendant and the state shall have the right to submit briefs within the time pro-

vided by the supreme court, and to present oral argument to the supreme court.

5. The supreme court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the supreme court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and resentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor; or

(3) Set the sentence aside and remand the case for retrial of the punishment hearing. A new jury shall be selected or a jury may be waived by agreement of both parties and then the punishment trial shall proceed in accordance with this chapter, with the exception that the evidence of the guilty verdict shall be admissible in the new trial together with the official transcript of any testimony and evidence properly admitted in each stage of the original trial where relevant to determine punishment.

6. There shall be an assistant to the supreme court, who shall be an attorney appointed by the supreme court and who shall serve at the pleasure of the court. The court shall accumulate the records of all cases in which the sentence of death or life imprisonment without probation or parole was imposed after May 26, 1977, or such earlier date as the court may deem appropriate. The assistant shall provide the court with whatever extracted information the court desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant. The court shall be authorized to employ an appropriate staff, within the limits of appropriations made for that purpose, and such methods to compile such data as are deemed by the supreme court to be appropriate and relevant to the statutory questions concerning the validity of the sentence. The office of the assistant to the supreme court shall be attached to the office of the clerk of the supreme court for administrative purposes.

7. In addition to the mandatory sentence review, there shall be a right of direct appeal of the conviction to the supreme court of Missouri. This right of appeal may be waived by the defendant. If an appeal is taken, the appeal and the sentence review shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

(L. 1983 S.B. 276, A.L. 1984 S.B. 448 § A)

Effective 10-1-84

(1995) The word "arbitrary" is to be read narrowly to describe rogue factors like passion and prejudice that a jury should not deliberate upon when it imposes a sentence of death. Oxford v. Delo, 59 F.3d 741 (8th Cir.).

565.040. Death penalty, if held unconstitutional, resentencing procedure. — 1. In the event that the death penalty provided in this chapter is held to be unconstitutional, any person convicted of murder in the first degree shall be sentenced by the court to life imprisonment without eligibility for probation, parole, or release except by act of the governor, with the exception that when a specific aggravating circumstance found in a case is held to be unconstitutional or invalid for another reason, the supreme court of Missouri is further authorized to remand the case for resentencing or retrial of the punishment pursuant to subsection 5 of section 565.036.

2. In the event that any death sentence imposed pursuant to this chapter is held to be unconstitutional, the trial court which previously sentenced the defendant to death shall cause the defendant to be brought before the court and shall sentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor, with the exception that when a specific aggravating circumstance found in a case is held to be inapplicable, unconstitutional or invalid for another reason, the supreme court of Missouri is further authorized to remand the case for retrial of the punishment pursuant to subsection 5 of section 565.035.

(L. 1983 S.B. 276, A.L. 1984 S.B. 448 § A)

Effective 10-1-84

565.050. Assault, first degree, penalty. — 1. A person commits the crime of assault in the first degree if he attempts to kill or knowingly causes or attempts to cause serious physical injury to another person.

2. Assault in the first degree is a class B felony unless in the course thereof the actor inflicts serious physical injury on the victim in which case it is a class A felony.

(Witness excused.)

MR. HASSELL: The Respondent calls Tina Tracy.

THE COURT: Please step forward, raise your right hand and be sworn.

(THE WITNESS WAS SWORN BY THE COURT.)

* * *

THE COURT: Please take the stand, and when you take the stand, please state and spell your name for the reporter.

THE WITNESS: Tina Tracy, T-I-N-A, T-R-A-C-Y.

* * *

TINA TRACY,

being first duly sworn, testified as follows:

* * *

DIRECT EXAMINATION

BY MR. HASSELL:

Q. Miss Tracy, what is your occupation?

A. Medical assistant.

Q. And, Miss Tracy, did you serve on the criminal jury in the case of *State of Missouri v. John Winfield*?

A. Yes, I did.

Q. And what -- and, Miss Tracy, what do you remember you as a jury having to determine during the course of that trial?

A. If it was first-degree murder and then if it was up

for the life in prison or the death sentence.

Q. And did you make both of those determinations together or did you make them separately?

A. You mean as a group or --

Q. Yes.

A. As a group, yes.

Q. Okay. Did you decide the question of guilt first and then punishment, or did you decide that together?

A. Guilt first and then punishment, yes.

Q. And in that punishment phase or the penalty phase, do you remember, what was the tone of those deliberations?

A. I mean, very intense and a lot of questions and comments going on and just some, you know, deliberations and --

Q. Did you -- did any jurors ever announce that they were -- that the jury was deadlocked?

A. I mean, at the -- when you first -- when we first did the first time -- what do you call it -- the deliberation, it might have been, like, eight to four or something like that. It wasn't a total twelve yet, so we asked for more, you know, evidence and talked more about it, that type of thing.

Q. And as you did that, did any jurors state that they wouldn't change their vote or couldn't change their vote?

A. Not that I recall, no.

Q. And did you ever hear the phrase "hung jury"?

A. No.

Q. Do you remember sending a note to the judge indicating that the jury was deadlocked?

A. No, I do not. I just remember asking for evidence that the bailiff brought in.

Q. Okay. Do you remember sending a note to the judge, advising there was a split vote?

A. No.

Q. Did the bailiff ever instruct you to keep deliberating or continue deliberating or other words, phrases of that type?

A. I mean, I think they, you know, said, Keep deliberating, you know, that type of thing, you know, take your time. You know, they brought us dinner and that type of thing, so just keep working on it and --

Q. So it was -- how would you character-- was that when he brought the food, did he say that?

A. Yeah, like, dinnertime.

Q. And he said something of the phrase of, Just keep working?

A. Right, because it was still early in the evening, so we were just to keep up as long as we needed to take to get our -- you know, our answer.

Q. Had anybody told the bailiff that there was any

sort of split vote at that time?

A. Not that I recall.

Q. And was -- how would you characterize the bailiff's statement to you? Was it more of a statement on your deliberations or a -- just a matter of procedure about when you were going back to the hotel?

A. Yes, just procedure.

Q. The jury was unanimous on the death penalty on both counts?

A. Yes.

Q. Did you ever have any personal interaction with the judge?

A. No.

Q. Did the judge ever come to the jury room?

A. Not that I recall, no.

Q. Did the judge ever speak to the jury during deliberations?

A. No. Just afterwards.

MR. HASSELL: I have nothing further at this time.

THE COURT: Cross.

* * *

CROSS-EXAMINATION

BY MR. LUBY:

Q. Miss Tracy, the bailiff said to keep working on it?

A. (Witness nodded head.)

Q. That was about the time he brought in dinner?

A. Yeah, like around four or five, I believe.

Q. And when he said, Keep working on it, you took that to mean keep working on your task of deliberating the case?

A. Yes.

MR. LUBY: Thank you.

Those are all of my questions.

MR. HASSELL: Brief redirect, Your Honor.

THE COURT: Yes, sir.

* * *

REDIRECT EXAMINATION

BY MR. HASSELL:

Q. When the bailiff told you, Keep working on it, did you take that as a response to any question that you had asked the bailiff?

A. No.

Q. Was -- was it -- had you discussed -- had you or the other members of the jury discussed with the bailiff that the vote -- that one of the votes had been split?

A. No.

Q. Did you have -- did any members of the jury leave the jury room during deliberations?

A. Not that I recall.

Q. Were you together as best you recall the entire time for deliberations?

A. Yes.

MR. HASSELL: Nothing further, Your Honor.

THE COURT: Mr. Luby?

MR. LUBY: Nothing further from me, sir.

THE COURT: May this witness be finally excused, counsel?

MR. HASSELL: Yes, Your Honor.

MR. LUBY: Yes.

THE COURT: Ma'am, you are finally excused. You are admonished, though, not to discuss your testimony with anyone until I've made my final order in this matter, and that's going to be some time down the road. However, you can track this case through the internet on Case.net if you want to.

THE WITNESS: Okay. Thank you.

THE COURT: Thank you, ma'am.

(Witness excused.)

THE COURT: Call your next witness.

MR. HASSELL: The Respondent calls Robert Forney.

THE MARSHAL: What's the name?

MR. HASSELL: Forney.

This will be the last witness the State is calling.

THE COURT: Please raise your right hand.

(THE WITNESS WAS SWORN BY THE COURT.)

* * *