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 Reply Brief

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I.

Petitioner has ample "cause" to overcome any procedural default, since he had no notice at trial, on appeal, or during Rule 29.15 proceedings that the bailiff told the jurors to keep deliberating at a time the jurors were divided on the choice of sentence – and thus, no reason to investigate that possibility or assert the present claims. (Reply in support of Petitioner's Statement of Jurisdiction)

Respondent takes the absurd position that Mr. Winfield should have asked the jurors, the judge and bailiff whether the jury was told to keep deliberating when it reported a split vote – even though petitioner and his attorneys had no factual basis to ask such a question. (Resp. Br. at 14-17). The State's view has staggering implications for trial and post-trial counsel alike, who enjoy limited time and resources to develop a defendant's claims.[1] The States cites no authority for the startling proposition that a defendant must immediately inquire of all possible illegalities that may have conceivably occurred, on pain of losing redress if an error is later discovered. Neither does the State cite any evidence placing Mr.

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[1] Missouri ranks 49th out of the 50 states in per capita spending on indigent defense services. *See* Mark Morris, *Appeals Court Says Missouri Public Defenders Cannot Refuse New Cases*, KANSAS CITY STAR, Apr. 15, 2009, at A4.

Winfield or counsel on notice of any irregularities in the verdict or instructions.

The Warden also mischaracterizes the holding in *Williams v. Taylor*, 529 U.S. 420 (2000) (Resp. Br. at 15-16). Contrary to Respondent's argument, the Supreme Court directly equated the pre-AEDPA "cause" and "prejudice" standard with the statutory question of whether a petitioner has "failed to develop" the facts underlying his or her claims, and thus, is ineligible for an evidentiary hearing under 28 U.S.C. § 2254(e)(2). *See id.* at 432-36, 444. The court explained that the statute codified the rule of *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), which adopted the "cause and prejudice" standard when a prisoner fails to develop material facts in state court. *See Williams*, 529 U.S. at 432-34; *Keeney*, 504 U.S. at 8. Whatever the terminology employed, the issue is the same: "The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts." *Williams*, 529 U.S. at 435.

More importantly, Williams himself established "cause" under circumstances closely resembling those present. *Id.* at 444 ("Our analysis should suffice to establish cause for any procedural default petitioner may have committed in not presenting these claims to the Virginia courts in the first instance."). During voir dire, a juror in Williams' case remained silent when asked whether any jurors were related to certain witnesses – including a deputy sheriff who was the juror's ex-husband. The same juror gave no response to the question

of whether any jurors had been represented by any attorneys in the courtroom – even though the prosecutor had represented her during the divorce. *Id.* at 440-43. Nothing at trial gave Williams any notice that the juror's silence was untruthful, and thus, Williams had no obligation to inquire. *Id.* at 443 ("Because of [the juror's] and [the prosecutor's] silence, there was no basis for an investigation into [the juror's] marriage history.").

To be sure, Williams' investigator on habeas review ultimately discovered the juror's deception, but only after two other jurors referred to the offending juror by her married name, and even then, only after checking public records to verify that the juror's ex-husband and the deputy were the same person. *Id.* at 443. The court squarely rejected Respondent's current argument that the prisoner should have earlier pursued whatever investigative efforts he later pursued:

> We should be surprised, to say the least, if a district court familiar with the standards of trial practice were to hold that in all cases diligent counsel must check public records containing personal information pertaining to each and every juror.

Id.

Likewise, it would be surprising – indeed, shocking – if a defendant were procedurally obligated to ask about juror or verdict irregularities without any reason to suspect them. If respondent's view were the law, Michael Williams

would now be dead. *See Williams v. True*, 39 Fed. Appx. 830 (4th Cir. 2002) (unpublished) (affirming grant of habeas relief on juror misconduct claim).

Federal courts applying the "cause" framework have thus reasoned that a claim has gone unasserted through "some objective factor external to the defense," *Murray v. Carrier*, 477 U.S. 478, 488 (1986), when the prisoner had no reason to investigate or present the claim earlier. *Also see Amadeo v. Zant*, 486 U.S. 214, 222 (1988), holding that "the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the [cause] requirement is met." Judicial bias is a straightforward example. A newly-discovered claim can be brought on habeas when the prisoner did not reasonably question the tribunal's impartiality at an earlier time. *Compare, e.g., Guest v. McCann*, 474 F.3d 926, 929-30 (7th Cir. 2007) (no sufficient notice to trial counsel, despite "scattered" news reports that judge was being investigated for corruption), *with Greer v. Minnesota*, 493 F.3d 952, 958 (8th Cir. 2007) ("Greer suspected judicial bias during the course of the trial").

Mr. Winfield had no such notice of his claim during earlier proceedings. Nothing could have made him suspect that the bailiff gave an illegal instruction to the jurors, whether on purpose or in good faith. Indeed, "There is a presumption that public officials have rightfully and lawfully discharged their official duties until the contrary appears." *Dittmeier v. Missouri Real Estate Commission*, 316

S.W.2d 1, 5 (Mo. banc 1958). The "contrary" did not appear until Jurors Stephen Willey and Kimberly Turner presented it during the summer of 2007, following the State's motion for an execution date and the federal court's appointment of counsel to develop a clemency petition. Mr. Winfield brought his claim the ensuing November. It is properly before this Court.

Finally, Respondent's discussion of the circuit court's local rule is a red herring. (Resp. Br., at 16-17). Trial counsel and Rule 29.15 counsel had no reason to ask permission to interview the jurors, because they didn't reasonably suspect the *ex parte* discussion at issue. (Habeas Pet'n Ex. 3, 11-15). Federal habeas counsel, who were appointed to conduct a clemency investigation, also lacked reason to seek permission under the rule. The rule's terms make clear that it applies only when the circuit court has jurisdiction over the case. Local Rule 53.3(2); *Cole v. Roper*, 579 F. Supp. 2d 1246, 1270 n.11 (E.D. Mo. 2008) (so construing the rule). The rule provides that the circuit court will entertain requests to contact petit jurors, and may then investigate any colorable issues of juror misconduct. Yet, no such authorization or fact development can occur within a court that lacks jurisdiction over the subject matter. The circuit court lost such jurisdiction after it denied Mr. Winfield's Rule 29.15 motion. If Respondent is trying to imply that counsel acted improperly by interviewing the jurors, that implication is wrong.

II.

Whatever deference is due the Master's report on the question of whether the jury issued a *de facto* life verdict, there remains troubling and unexplained testimony that the bailiff told the jurors to keep deliberating when their vote was distinctly split – and when any single juror could have sentenced Mr. Winfield to life. That evidence is sufficient to undermine the Court's confidence in the sentence through its ongoing statutory review of whether an "arbitrary factor" influenced the verdict. That determination rests with the Court and not a master, and it justifies a new sentencing trial. (Reply in support of Petitioner's Point III)

Respondent does not address two critical principles underlying the appropriateness of relief under § 565.035.3. First, notwithstanding the Warden's defense of the Master's report, there remains no explanation of why four jurors would swear to being told to continue deliberating if this event did not occur. Even a single holdout vote would have resulted in a life sentence, and there remains cogent evidence that the bailiff interfered with the jury's power to decide whether to continue deliberations or stop. Second, Respondent does not dispute that the issue of whether the evidence undermines the Court's confidence in the sentence is "necessarily for the Court and not a special master." (Pet. Br. at 27, 29, 60).

With these principles established, Respondent challenges only the Court's

power to act upon them. This challenge is without merit.

A. The Court's ongoing review under § 565.035.3 is not limited to questions of guilt or innocence. Any such limitation would create an inconsistency within the statute specifying the criteria for the Court to consider when reviewing a death sentence.

Seeking to distinguish *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003), Respondent argues that Mr. Winfield's claim does not concern his guilt or innocence. (Resp. Br. at 34-35). This distinction is not persuasive. The various opinions in *Amrine* relied on § 565.035.3, which lists the "strength of the evidence" among other considerations. Nothing in *Amrine* suggests that guilt or innocence is the ***only*** consideration. *See* 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.'") (emphasis added).

Unsupported by *Amrine*, Respondent's view finds even less support in the statute. Section 565.035.3 states that the Court "shall determine" the following issues when reviewing a sentence:

(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.

We know from *Amrine* that the court's consideration of the "strength of the evidence" is ongoing. It would be strange to impute an ongoing temporal scope to one phrase of the statute but not the others. Respondent's view would make the statute internally inconsistent, which courts strive to avoid when interpreting statutes. "When the same or similar words are used in different places within the same legislative act and relate to the same or similar subject matter, then the statutes are in *pari materia* and should be construed to achieve a harmonious interpretation of the statutes." *Citizens Bank and Trust Co. v. Director of Revenue*, 639 S.W.2d 833, 835 (Mo. banc 1982).

For these reasons, the Court has an ongoing duty to ensure that Mr. Winfield's sentence was not "imposed under the influence of passion, prejudice, or any other arbitrary factor." § 565.035.3(1). The term "arbitrary factor" includes a misunderstanding by at least ***some*** jurors that 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.").

B. Petitioner agrees with Respondent that the proper remedy under § 565.035.3 is a new sentencing trial.

Respondent need not fear a "magic bullet" that instructional error will automatically require a life sentence on habeas review. (Resp. Br. at 35). Petitioner's brief did not ask for Mr. Winfield to be sentenced to life under the Court's ongoing *statutory* review. (Pet. Br. at 63-64). The question of remedy depends on the factual evidence believed and the legal injury suffered. On the one hand, the Court may choose to sustain Petitioner's constitutional claims by crediting the testimony that the jury sent a note that it was deadlocked and was told to keep deliberating. If that is what happened, then the jury's note was a *de facto* verdict of life imprisonment; under those circumstances, it would be unfair to subject Mr. Winfield to another trial. *State v. Whitfield*, 107 S.W.3d 253, 269-70 (Mo. banc 2003). On the other hand, if the Court does not fully credit the constitutional claims or believes itself bound by the Master's findings, it must nevertheless vacate any death sentence if the evidence of an "arbitrary factor" under § 565.035.3 undermines the Court's confidence in the verdict. The tangible possibility that one or more jurors lengthened their deliberations on account of the bailiff's directive is such an "arbitrary factor." It justifies a new and fair trial on the question of penalty.

III.

Even under the standard of review proposed by Respondent, the Master's findings reflect critical misreadings of the evidence that cannot be characterized as credibility determinations. (Reply in support of Petitioner's Point II)

The Warden does not explain why the Master's "superior opportunity . . . to see, hear and judge the witnesses" immunizes clear errors from review. (Resp. Br. at 22-23). The errors described in Petitioner's opening brief are not questions of credibility. (Pet. Br. at 44-58). They are plain and simple instances of misreading the record, such as logging a juror's statement that "I don't remember" whether the jury issued a note as a statement that no such note was issued. (*E.g.*, regarding Juror Conradi: Hr. Tr. 179; App. A6, A8).

These types of errors are routinely recognized even under the "clearly erroneous" standard to which Respondent likens review under *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). (Resp. Br. 23-24 & n.5). For example, in *State v. McFadden*, 191 S.W.3d 648 (Mo. banc 2006), the Court reviewed the trial court's denial of the defendant's *Batson* objection for clear error. *Id.* at 651. The trial court accepted the State's explanations for several strikes against African-American venirepersons, but this Court noted a number of plain misreadings of the record. Three such errors in *McFadden* include (1) there was "no support" for the

proposition that venireperson M.B. had trouble with the concept of acting in concert; (2) M.B. did not have a "close involvement" with the family of a witness, bur rather, merely had a niece who had dated someone with the same last name as the witness; and (3) venireperson W.S. was not "agitated and confused" about his role as a juror, but rather, was initially confused until the prosecutor explained the proceedings. *Id.* at 654-57.

Similar misreadings of the record have formed the basis for relief in post-conviction appeals. In *Gardner v. State*, 96 S.W.3d 120 (Mo. App. 2003), the circuit court assumed that trial counsel was aware of the statute governing the scope of cross-examination and interpreted the statute in a reasonable way. This finding was error, since counsel did not know about the statute. *Id.* at 127. To similar effect is *Carmons v. State*, 26 S.W.3d 382 (Mo. App. 2000). The circuit court in *Carmons* declined to set aside the prisoner's guilty plea to first degree child endangerment, finding that she "understood the charges against her and was pleading guilty voluntarily." *Id.* at 383-84. The Court of Appeals reversed based on the objective words of the plea colloquy. The record simply did not establish any specific acts of Carmons that created a "substantial risk to [the child's] life, body or health." *Id.* at 385-86. The circuit court's ruling to the contrary was clearly erroneous. *Id.* The Report in Mr. Winfield's case reflects similar objective errors.

A. The factual errors arise from the transcript's plain language.

The Court need not probe the jurors' demeanor, tone, or manner of speaking in order to ascertain the Report's errors.

•**Juror Tracy and the bailiff's dinnertime directive** – The Master found that when Ms. Tracy heard the bailiff say to keep deliberating, the bailiff was simply "letting the jury know that he would provide food and that the jury should continue deliberating while he made the arrangements for dinner." (App. A8). Respondent somewhat elaborates, arguing that the comment meant, "I'll place your order for food. Keep deliberating until the food comes." (Resp. Br. at 31, citing Hr. Tr. 189). But Ms. Tracy said no such thing, and the question has nothing to do with any juror's credibility:

> 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.

(Hr. Tr. 188) (emphases added).

There is simply no support in the record for Report's benign reading of Ms. Tracy's testimony. She did *not* say that the bailiff told the jury to keep deliberating until the food came. Rather, the bailiff spoke ***when*** the food came, and he said to keep deliberating for "as long as we needed . . . to get . . . our answer." (Hr. Tr. 188).

•**The tallying of the jurors, and Respondent's about-face** – 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 describing a note and a response to keep deliberating. (App. A8). But this finding reflects the erroneous logging of a jury's lack of memory as the juror's denial of the event. Petitioner's opening brief explained that Jurors Edwards, Conradi, Forney, and Murphy must be tallied as not remembering. (Pet. Br. at 50-52; Hr. Tr. 175-76, 179, 184, 194-95). Petitioner therefore urged that the proper balance on the issue of a reported split/deadlock and a response would be the testimony of Jurors Turner, Willey, Daniels and Tracy as against that of Jurors

Nash, Brown, Buscher and Heller as well as the bailiff.[2] (Pet. Br. at 49-54). Incredibly, the Warden concedes the point in his brief despite proposing the very finding at issue. *Compare* Resp. Br. at 29-30 ("Judge McShane, bailiff Beeler, foreman Nash, ***and four jurors*** agree that no note was sent and no instruction to continue deliberating was given."); Resp. Br. at 33 ("In light of the credible testimony from the judge, the bailiff, the foreperson, ***and four other jurors***, this testimony is not sufficiency strong to mandate relief for Winfield."); *with* Respondent's Proposed Findings at 16 ("This Court finds that the testimony of Judge McShane, bailiff Beeler, foreman Nash, ***and the other seven [sic] jurors*** has more weight than the testimony of these three jurors") (emphases added).

Respondent cannot soundly invoke the Master's superior ability to observe the evidence if he concedes that the Master erred in his ultimate finding. The Master may well have reached a different finding under an accurate portrayal of the evidence rather than one Respondent recommended and has since disavowed. To uphold a death sentence under these circumstances would be anomalous, to say the least.

•**The bailiff's statement versus the pattern "hammer"** – Respondent does

[2]Petitioner does not contend that the jury's note or other communication reached the judge, who admitted that she did not witness the conversations between the bailiff and the jurors. (Hr. Tr. 120-21, 125).

not explain why the bailiff needed to know about a divided vote in order for his directive to interfere with the jury's sole decision of whether to keep deliberating. *State v. Griffin*, 756 S.W.2d 475, 486-87 (Mo. banc 1988). The question is of law, not credibility. The Warden instead seeks to distinguish the bailiff's comment from the pattern "hammer" instruction. (Resp. Br. at 31). But the "hammer" instruction means what the bailiff said: "keep deliberating." At least four jurors understood it that way. (Hr. Tr. 24, 58, 71, 190). Any one of those four could have sentenced Mr. Winfield to life by deciding ***not*** to "keep deliberating."

•**The allegedly "vague" and "inconsistent" testimony of Jurors Willey, Turner, and Daniels** – Petitioner showed that Jurors Willey, Turner, and Daniels said essentially the same thing: the jury reported a split or deadlocked vote, and the bailiff said to keep deliberating either on his own or by reading from a note. (Pet. Br. at 54-56; Hr. Tr. 24, 57-58, 70-71, 73-74). Respondent does little more than repeat the Master's finding and the incomplete evidence underlying it. For example, the Warden states that Juror Daniels "remembered ***only*** that the bailiff said 'something.'" (Resp. Br. at 29, citing Hr. Tr. 71). In fact, she testified that the bailiff said to keep deliberating:

Q. Do you remember exactly what the bailiff said?

A. No.

Q. Was it -- but he said something?

A. Yeah.

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 weeks ago that the bailiff told the jury to keep deliberating?

A. Uh-huh.

Q. Is that your memory today?

A. Yes.

(Hr. Tr. 71).

•**The jury's use or non-use of a "note," and the question of a "deadlock" versus a "split"** – Respondent joins the Report in artificially raising the evidentiary bar. But just as the Report erred by specifically requiring proof of a "note," so too does Respondent. Jurors Turner and Willey did not specify whether the jury's communication was oral or in writing. (Hr. Tr. 24, 58, 63, 65-66). Juror Daniels "believed" the jury sent a note. (Hr. Tr. 70-71). The Warden nevertheless insists that Petitioner cannot prevail unless the Court finds "that the bailiff was given a note by the jury announcing they were deadlocked, that the bailiff refused to take that note to the judge, and that the bailiff chose to orally instruct the jury." (Resp. Br. at 32). This misreading of Mr. Winfield's arguments is inaccurate, just

as it was when Respondent proposed it to the Master.[3] It is also unrealistic to expect such precision ten years after trial. A court need not ascertain chapter-and-verse of an illicit communication's form and content in order to grant relief. *See*, *e.g.*, *Moore v. Knight*, 368 F.3d 936, 941-44 (7th Cir. 2004); *State v. Floyd*, 725 N.W.2d 817, 829 (Neb. 2007).

Neither is Petitioner required to prove that the jurors were, in fact, "deadlocked." (Resp. Br. at 32). The jurors need not have "deadlocked" in order for the bailiff to interfere with their decision of whether to keep deliberating. The fact that three jurors described a "deadlock," and that a fourth testified that the jury discussed whether to inform the judge of their split vote, shows that the jurors were distinctly divided when the bailiff said to keep deliberating. Whether or not the jurors were at or near a impasse, the bailiff's directive violated the jury's sole power to decide how long to debate Mr. Winfield's sentence. *State v. Griffin*, 756 S.W.2d 475, 486-87 (Mo. banc 1988).

The circumstances strongly suggest a contested deliberation. The jurors deliberated for five and a half hours. (Trial Tr. 1108-09). They were initially split

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[3] *See* Respondent's Proposed Findings, at 12 ("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.")

somewhere between 8-4 in favor of life and 10-2 in favor of death. (Hr. Tr. 23, 70, 150, 187). The process was "extremely" emotional and "very intense." (Hr. Tr. 157, 187). Some of the jurors were crying, and at least one juror called Mr. Winfield an "animal" – which helped another juror vote for death. (Hr. Tr. 157, 167). *Cf. Jackson v. State*, 772 A.2d 273, 278-79 (Md. 2001) (noting racial overtones of this epithet). Even under the best of intentions, a directive to keep deliberating was dangerous in the extreme.

B. Although relief is justified under <u>any</u> standard for reviewing the Master's findings, the deference proposed by Respondent overlooks this Court's unique role in administering Missouri's death penalty.

The Warden's proposed standard of review is problematic in any event. (Resp. Br. at 20-24). Respondent urges that *State ex rel. Busch by Whitson v. Busch*, 776 S.W.2d 374 (Mo. banc 1989), was a habeas case. It nominally was. But the Court did not rely on this fact in announcing the standard of review. *Id.* at 377. More importantly, the case was a family dispute in which a mother petitioned for custody of her child. Custody cases involve uniquely delicate and sensitive fact-finding procedures. Indeed, this Court gives "even more deference to the judgment of the trial court in a custody matter than in other matters." *Suffian v. Usher*, 19 S.W.3d 130, 136 (Mo. banc 2000).

Respondent's attempt to distinguish attorney discipline proceedings is also unpersuasive. (Resp. Br. at 22 n. 4: "This is not a disciplinary proceeding."). Attorney discipline and the death penalty share a common thread: this Court plays a unique role in administering both regimes. §§ 546.710, 565.035, R.S. Mo.; Mo. Sup. Ct. R. 30.18. When presented with such a case in its exclusive original jurisdiction, the Court therefore recognizes the need to reach its own independent findings. *In re Cupples*, 952 S.W.2d 226, 228 (Mo. banc 1997). Even more than in the *Busch* case, "This Court, not the master, is the adjudicator." *Busch*, 776 S.W.2d at 380 (Blackmar, C.J., concurring).

CONCLUSION

For the foregoing reasons, Petitioner renews his prayer 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,

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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 5,051 words, excluding the cover and this certification, 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 20th day of April, 2009, to:

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