IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Appellant,	)	
v.	)	**Case No.: 62324**
	)	
MICHAEL WHITE,	)	
	)	
Respondent.	)	

APPELLANT'S MOTION TO RECALL THE MANDATE

COMES NOW appellant, Michael White, by and through counsel, and hereby moves this Court to recall its mandate issued October 13, 1981, and reopen this appeal in light this Court's subsequent decisions in *State v. O'Brien*, 857 S.W.2d 212 (Mo. banc 1993) and *Booker v. State*, 552 S.W.3d 522, 530 (Mo. banc 2018). In support of this motion, Mr. White respectfully states as follows:

I.

INTRODUCTION

This motion seeks reconsideration of a claim of instructional error involving Instructions No. 7 and No. 8, which instructed appellant's jury that the elements of deliberation required to convict him as an accessory of capital murder could be imputed to him based solely upon his co-defendant, triggerman's intent. The undisputed facts in the present case are virtually identical to the facts that this Court confronted in *O'Brien*.

As will be demonstrated below, this Court's decision rejecting Mr. White's claim of instructional error was explicitly overruled in *O'Brien* and *Booker* and Mr. White is entitled to relief from that judgment. This motion to recall the mandate is the appropriate vehicle to correct a clear error of law and remedy an egregious constitutional error that tainted Mr. White's capital murder conviction.

II.

STANDARD OF REVIEW

"'The Court of Appeals is constitutionally bound to follow the most recent controlling decision of the Supreme Court of Missouri.'" *State v. Brightman*, 388 S.W.3d 192, 199 (quoting *State v. Clinch*, 335 S.W.3d 579, 584 (Mo. App. W.D. 2011)). "While [the Missouri Supreme] Court has never fully delineated the scope of an appellate court's power to recall its mandate, it is well established that…'a mandate may be recalled in order to remedy a deprivation of the federal constitutional rights of a criminal defendant.'" *State v. Whitfield*, 107 S.W.3d 253, 264-265 (Mo. banc 2003) (quoting *State v. Thompson*, 659 S.W.2d 766, 768-769 (Mo. banc 1983)) (citations omitted). "Most commonly, this rule is applied…when defendant shows that appellate counsel was ineffective." *Whitfield*, 107 S.W.3d at 265. "As *Thompson* noted, however, another instance in which a mandate will be recalled is 'when the decision of a lower appellate court directly conflicts with a decision of the United States Supreme Court upholding the rights of the accused.'"

Whitfield, 107 S.W.3d at 265 (quoting *Thompson*, *supra*, 659 S.W.2d at 769) (citations omitted). A motion to recall the mandate may be employed in state post-conviction proceedings where the judgment of an appellate court impinges upon the federal constitutional rights of the accused, *Bridgewater v. State*, 458 S.W.3d 430, 436-441 (Mo. App. W.D. 2015) (quoting *Whitfield* and *Thompson*, *supra*), or when the judgment of an appellate court conflicts with a decision of the United States or the Missouri Supreme Court. *Whitfield*, *supra*; *see also Nash v. State*, WD74526 (order of 01/12/16) (citation omitted).

These cases establish that an appellate court's power to recall its mandate exists to protect the integrity of its own processes, as well as the procedural and substantive rights of the aggrieved party. Because this case involves a similar situation to the facts that this Court confronted in *Whitfield* and *Thompson*, the same result is warranted here.

III.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Relevant Facts

On February 4, 1979, co-defendant Hardy Bivens threatened Janice Thompson while the two were having a disagreement. (Tr. 80). The following day, Ms. Thompson received a phone call in her home at 8915 Halls Ferry Road, St. Louis, Missouri from Mr. Bivens. (Tr. 73, 80). Shortly after receiving this phone

call, Ms. Thompson and her stepsister Susie Hawkins walked to the store. (Tr. 74, 81-82). When Ms. Thompson was on the phone with Mr. Bivens, she told him that she was going to the store and would call him back when she got home. (Tr. 81).

Around 5:30p.m., appellant received a telephone call from Charles White, his brother-in-law, who said he needed to see appellant that evening. (Tr. 194, 196). Appellant called Mr. Bivens to ask is he could drive him to Charles White's home. (Tr. 196). Mr. Bivens agreed and arrived at appellants house at between 8:30p.m. and 9:30p.m. (Tr. 197). Mr. Bivens asked appellant if he was ready to go over to Charles White's home, and appellant stated that he needed to change his clothes. While he was changing, Mr. Bivens suggested that they stop by the store on their way to Charles White's house. (Tr. 197). Appellant had a pistol with him, which he carried for self-protection after he had some trouble with boys at school and testified that he had no intention whatsoever that the gun would be used to hurt someone or on either of the girls. (Tr. 199).

When appellant got into the car, he placed the pistol on the front seat of the car so that he would not get charged for carrying a concealed weapon. (Tr. 200). The girls went into the store, and Mr. Bivens instructed appellant to park the car at the side of the store building. (Tr. 81, 199-200). Mr. Bivens got out of the car and followed the girls into the store. (Tr. 81, 199-200). Mr. Bivens returned to the car and told appellant to wait in the car for the girls. (Tr. 82, 200-201). When the girls

exited the store, Mr. Bivens told them to get inside the car and that he would give them a ride home. Ms. Thompson got into the car first, followed by her stepsister Ms. Hawkins. (Tr. 82, 201). Appellant did not know Ms. Hawkins, and only knew Ms. Thompson through school. (Tr. 201-202). Mr. Bivens got in the car last and started to drive. (Tr. 82, 201).

In the car, Mr. Bivens began to question Ms. Thompson about their telephone conversation the previous night. (Tr. 203). Mr. Bivens drove past the girls' home and stated that he was just going to turn back around. (Tr. 83). At this point, Ms. Thompson and Mr. Bivens got into an argument and he stopped the car. (Tr. 83, 204). Mr. Bivens told appellant to drive because he couldn't drive and talk to Ms. Thompson at the same time. (Tr. 204). Mr. Bivens told appellant to turn left on Old Halls Ferry Road and go down Broadway. (Tr. 205).

Mr. Bivens and Ms. Thompson got into an argument again, and Mr. Bivens picked up the pistol and shot both girls without saying anything to appellant. (Tr. 85-86, 204). At this point, appellant panicked. (Tr. 205). Mr. Bivens hung the gun over the seat, and pointed it toward appellant's neck and told him to "shut the f*** up and drive." (Tr. 205). Appellant thought that Mr. Bivens might hurt him and followed his directions out of fear. (Tr. 205). Appellant had never been convicted of a crime in his life. (Tr. 192). Mr. Bivens instructed both girls to get on the floor of the car and gave driving directions to appellant. (Tr. 87, 205). Appellant told the

girls that they were going to be taken to a hospital. (Tr. 88). However, Mr. Bivens overruled appellant and told the girls that they would instead be taken to a house from which they could call an ambulance. (Tr. Tr. 88).

Mr. Bivens told appellant to stop in front of a vacant house on 23rd and Howard and Mullanphy. (Tr. 206). When they got to the location, Mr. Bivens got out of the car, opened the door for Ms. Thompson and Ms. Hawkins, and instructed appellant to drive around the block. (Tr. 207). Mr. Bivens took the girls into the building and lead them to a small upstairs room. (Tr. 89). Ms. Hawkins tried to walk past the room, and Mr. Bivens threatened to "blow her head off" if she did not return to the room he told her to enter. (Tr. 89).

While appellant was driving around the block, Mr. Bivens instructed the girls to sit down on the floor. (Tr. 90). At this point, appellant had completed his trip around the block and returned to the building. (Tr. 207). Mr. Bivens demanded that appellant give him bullets but did not tell him what they were for. (Tr. 207-208). After receiving the bullets, Mr. Bivens ran upstairs as appellant drove around the block again. (Tr. 208). Mr. Bivens fired more shots which struck both girls in the arm. (Tr. 90).

When Ms. Thompson realized that Mr. Bivens was returning, she ran upstairs and jumped out of a second story window just as Mr. Bivens entered through the door. (Tr. 81). As Ms. Thompson fled, she heard shots coming from

the apartment building. (Tr. 91). Mr. Bivens returned the car and told appellant that Ms. Thompson had gotten away. (Tr. 208). Mr. Bivens told appellant to throw Ms. Hawkins' bags out of the vehicle. (Tr. 2018). Mr. Bivens told appellant to "follow him", and the two went back to look for Ms. Thompson. Mr. Bivens said, "come on, let's go" when police sirens started and the two left the house. (Tr. 208).

Mr. Bivens and appellant drove first to the home of Mr. Bivens' friend, then to Charles White's home where Mr. Bivens scrubbed the blood off of his car seat without help from appellant. (Tr. 209). Ms. Thompson had fled to a nearby liquor store where an ambulance and police arrived. (Tr. 120-121). Ms. Thompson directed the ambulance to the vacant apartment building at 23rd and Cass. (Tr. 24). Officer Riley entered the building and found the body of Ms. Hawkins. (Tr. 24).

Late that same evening, Mr. Bivens was picked up in connection with the murder of Ms. Hawkins. (Tr. 130). Mr. Bivens was arrested in a green 1972 Chevrolet. Later on, appellant was asked if he was willing to give a statement, but told that if he refused, he would be arrested. (Tr. 209). Appellant went with police voluntarily. (Tr. 209).

On February 6, 1976, appellant was released after he agreed to make a video-taped statement about what happened. (Tr. 153-154, 210-211). Appellant was living at his parent's house at the time and had not been hiding from police. (Tr. 212). After hearing that police were looking for him, appellant turned himself

in on March 5, 1979, and was rearrested. (Tr. 211). Appellant was subsequently charged in an indictment with one count of capital murder and one count assault in the first degree. (Tr. 50). Based upon the foregoing facts indicating his co-defendant was the triggerman, Mr. White was charged and tried as an accomplice.

B. Procedural History

On October 20, 1980, appellant proceeded to jury trial before the Honorable P.F. Palumbo of the Circuit Court of the City of St. Louis, Missouri. (Tr. 1). At trial, appellant was represented by Richard Rodemyer, and the state by Thomas Dittmeier. (Tr. 1). The jury found appellant guilty of capital murder § 565.001 R.S.Mo. (1984) by aiding one who committed capital murder with the requisite intent of reflecting coolly and fully upon the matter by the jury in Cause No. 791-00762 for the February 5, 1979, death of Ms. Hawkins. On June 20, 1980, appellant was sentenced to life imprisonment without the possibility of parole under § 565.008 R.S.Mo. (1978). (Tr. 375-376).

Thereafter, on June 27, 1980, appellant filed a notice of appeal to this Court. This Court affirmed petitioner's conviction on October 13, 1981. *State v. White*, 622 S.W.2d 939 (Mo. banc 1981). However, Judge Seiler, joined by Judge Bardgett, dissented on the instructional error raised in this motion.

IV.

REASON FOR GRANTING THE MOTION

A. This Court's Opinion Directly Conflicts with its Subsequent Decisions in *O'Brien* and *Booker*.

In *State v. O'Brien*, 857 S.W.2d 212, 218 (Mo. banc 1993), this Court held that a jury must find three elements to convict an accomplice or accessory of first degree murder: (1) that the accomplice committed acts that aided the murderer in the killing, (2) that it was the accomplice's conscious object that the victim be killed, and (3) *that the accomplice committed the acts after coolly deliberating on the victim's death for some amount of time, no matter how short. Id.* at 218, (emphasis added).

O'Brien makes clear that while the act of homicide may be imputed to an accessory, deliberation may not. *Id.* Instead, to convict on a theory of accomplice liability, the state must prove that the accomplice himself deliberated on the killing. *Id.* This is required because deliberation is what differentiates first degree murder from all lesser forms of homicide: "[o]nly first degree murder requires the cold blood, the unimpassioned premeditation that the law calls deliberation. Only where the defendant himself harbors this most despicable mental state does society inflict its severest punishments." *Id.* at 218.

O'Brien cemented the importance of basing premeditation only on the acts of the accessory himself in Missouri's patterned jury instructions. *Id*. at 217; *State*

v. Ervin, 835 S.W.2d 905 (Mo. banc 1992), *cert. denied*, 507 U.S. 954, 113 (1993). "A first-degree murder instruction premised on accessory liability *must ascribe deliberation to the defendant*." *Id.* at 217 (emphasis added).

In no uncertain terms, this Court announced the effect that *O'Brien* had on its earlier decision in this case, *See State v. White*, 622 S.W. 2d 939 (Mo. banc 1981). The Court wrote: "…to the extent that *White* has been read to require less than proof of the defendant's own premeditation in every case, it too was overruled. *O'Brien*, 857 S.W.2d at 218 (Mo. banc 1993). More recently, in *Booker v. State*, 552 S.W.3d 522, 530 (Mo. banc 2018), this Court again recognized that *White* was abrogated by *O'Brien*.[1] The Court wrote: "…to be found guilty as an accomplice, one must have the culpable mental state to have acted with the purpose of promoting the particular underlying offense. *State v. White*, 622 S.W.2d 939, 945 (Mo. banc 1981), *overruled on other grounds by State v. O'Brien*, 857 S.W.2d 212 (Mo. banc 1993)." *Booker*, 552 S.W.3d at 530. Appellate has received no form of relief for over thirty years despite the fact that his trial was tainted by the same reversible error that the Court confronted in *O'Brien*.

[1] This Court's decision in *White* is flagged on Westlaw with a "red flag" signifying that the case is no longer good law for at least one of the points of law it contains. *What are Keycite status flags—what do they mean?* Thomson Reuters, https://legal.thomsonreuters.com/blog/westlaw-tip-of-the-week-checking-cases-with-keycite/ (last visited Mar. 15, 2022).

Appellant's jury was expressly directed in Instruction No. 7, submitted by the state, that it could find appellant guilty as an accessory based on Mr. Biven's premeditation and not his own. Instruction No. 7 reads in pertinent part:

> If you find and believe from the evidence beyond a reasonable doubt. . . [*I]n that Hardy Biven* with the aid or attempted aid of the defendant considered taking the life of Susie Hawking and *reflected upon this matter coolly and fully before doing s*o. . . *then you will find the defendant guilty of capital murder*. (Exh. 1) (emphasis added).[2]

In direct conflict with the holding of *O'Brien*, Instruction No. 7 allowed appellant's jury to find him guilty as an accomplice of capital murder if Mr. Bivens alone coolly reflected on Ms. Hawkins' death. (Exh. 1). The mandate in *White* should be recalled to rectify this error.

Like Instruction No. 7, Instruction No. 8 (a converse instruction) also reinforced in the jury's collective minds that it could convict Mr. White as an accomplice based solely upon Mr. Biven's intent. Instruction No. 8 read:

> *If you do not find and believe* from the evidence beyond a reasonable doubt *that Hardy Bivens* with the aid or attempted aid of the defendant did consider taking the life of Susie Hawkins and *did reflect upon this matter coolly and fully before doing so, you must find the defendant not guilty of capital murder*. (Exh. 2) (emphasis added).

Recognizing a problem with this jury instruction, defense counsel proposed Instruction B to be used in place of or in addition to instruction No. 8, but the instruction was rejected by the trial court. Instruction B would have clarified to the

[2] Instruction No. 7 was derived from MAI-CR2.12 (derived from § 562.041, R.S.Mo. (1978)) and combined with MAI-CR2d 15.02.

jury that appellant could be found not guilty of capital murder as an accessory if he did not coolly deliberate upon the crime himself. Instruction B reads as follows:

> *If you do not find and believe* from the evidence beyond a reasonable doubt *that Defendant* did consider taking the life of Susie Hawkins and *did reflect upon the matter coolly and fully before doing so, you must find the Defendant not guilty of Capital Murder*. (Exh. 3) (emphasis added).

The trial court's rejection of Instruction B, and the use of Instruction No. 7 and Instruction No. 8 directly conflicts with this Court's clear ruling in *O'Brien* which prohibits the imputation of the deliberation element in a capital murder case from the principal to an accomplice who did not personally kill the victim.

Judges Seiler's dissent in this appeal highlights serious and compelling concerns with appellant's jury instructions which led the jury to convict him of capital murder as an accessory without finding that appellant personally deliberated on Ms. Hawkins' eventual death:

> Michael White as an inactive participant was charged with and convicted of capital murder in the death of Susie Hawkins under § 565.001, RSMo 1978 which provides that "[a]ny person who unlawfully, willfully, knowingly, deliberately, and which premeditation kills or causes the killing of another human being is guilty of the offense of capital murder." The principal opinion sets forth the evidence that the state introduced to support a conviction of capital murder. *There was, however, conflicting evidence from which the jury, **if properly instructed,** could have found the defendant not guilty or guilty of a lesser offense*. . . By definition, capital murder is committed by one who "unlawfully, willfully, knowingly, deliberately, and with premeditation kills" another. Section 565.001. Beyond question it requires a culpable mental state, and evil intent. This necessarily must be true of one who aids in a capital murder as

> well as of the one who actually does the killing. ***It is unthinkable that it would require less in the way of a culpable mental state to be convicted as an aider in capital murder, where the death penalty is possible, than it does to be convicted as the principal***.

State v. White, 622 S.W. 2d 939, 949 (Mo. banc 1981) (Seiler, J., dissenting, joined by Bardgett, J.) As the dissent notes, had appellant's jury been properly instructed, evidence existed from which the jury could have found appellant not guilty as charged:

> The defendant, who had no prior convictions, testified that he did not know that Hardy Bivens intended to shoot the girls; he testified that he carried the gun because of trouble in school; he testified that he placed the gun on the seat of the car because he did not want to get arrested for carrying a concealed weapon; he testified that he obeyed Hardy Bivens in driving around the block and giving him bullets because of fear, that Bivens threatened him with the weapon several times. Furthermore, Janice Thompson testified that Hardy Bivens, not Michael White, was the person who threatened and ultimately shot her and killed Susie Hawkins, her step-sister.
>
> The defendant did not know Susie Hawkins and knew Janice Thompson only through Hardy Bivens and school. There was no evidence of any motive for Michael White to kill the girls, other than that White and Bivens were friends. Michael White did not kill Susie Hawkins; Hardy Bivens killed Susie Hawkins.

Id. Appellant is serving life imprisonment without the possibility of parole for fifty years. It cannot be overemphasized that appellant would likely be a free man had this jury been properly instructed.[3]

[3] Ironically, co-defendant Hardy Bivens, because he was under eighteen, was resentenced on September 26, 2019, to life imprisonment for second degree murder and released on parole. *State of Missouri v. Bivens*, 22791-00709-01.

The jury instructions in Mr. White's case allowed his jury to find him guilty as an accessory to capital murder even if it believed that his account of the crime was true. When Mr. White got in the car with Mr. Bivens, he thought he was getting a ride to his brother-in-law's home. Through a terrible turn of events, he ultimately was convicted as an accomplice to capital murder based solely upon the acts and intent of Hardy Bivens. Because this Court's opinion directly conflicts with *O'Brien* and *Booker*, Mr. White is entitled to relief from that erroneous judgment under *Whitfield* and *Thompson*.

CONCLUSION

For all of the foregoing reasons, this Court should sustain this motion, recall its mandate, adjudicate Mr. White's claim of error on the merits, and reverse and remand this case for a new trial, and grant such other and further relief the Court deems fair and just under the circumstances.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2022, the foregoing was filed via case.net, which sends notice to all counsel of record.

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