IN THE
MISSOURI SUPREME COURT

LANCE SHOCKLEY,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC96633
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF
CARTER COUNTY, MISSOURI
THIRTY-SEVENTH JUDICIAL CIRCUIT
THE HONORABLE KELLY W. PARKER, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Because death was imposed, this Court has exclusive jurisdiction of this 29.15 appeal. Art. V, Sec.3, Mo. Const.

STATEMENT OF FACTS

Juror58 - Jury Selection

Jury selection occurred in Carter County March 18th-19th, 2009(29.15Tr.123).[1] Trial in Howell County (West Plains) occurred Monday, March 23rd - Saturday, March 28th, 2009(29.15Tr.123).

Respondent told death qualification Panel #2, Lance was charged with killing Highway Patrol Trooper Graham because Graham was investigating Lance's connection to Jeff Bayless' auto accident death(TrialTr.665). Juror58 testified he'd consider both punishments, even for a Trooper's death(TrialTr.685-87,701).[2]

Following a for cause strikes discussion (TrialTr.707-09), Juror58 approached the bench because he thought everyone would want to know his son was a Springfield, Missouri police officer and Juror58 was a "published author"(TrialTr.710-11). That exchange was:

THE COURT: All right. We're back on the record.

(At this time the jury panelist approached the bench, and the following proceedings were had:)

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[1] The record is: (1) Pretrial Transcript (PreTrialTr.); (2) Trial Transcript(TrialTr.); (3) Trial Legal File (TrialL.F.); (4) 29.15 Transcript (29.15Tr.); (5) 29.15 Legal File (29.15L.F.); and (6) 29.15 Exhibits (29.15Ex.#p.#).

[2] The names and corresponding numbers for all jurors and alternates appear at TrialTr.982-83.

THE COURT: Juror 58?

JUROR NO. 58: Sir, forgive me. I didn't mention it earlier but my son is also a cop in Springfield, Missouri.

THE COURT: Okay. In the next series of questions -- I'm glad you brought that up -- the attorneys can ask you about that some more.

JUROR NO. 58: And also I'm a published author.

THE COURT: Okay.

JUROR NO. 58: And so I thought maybe I should be coming out with fact [sic] as well.

THE COURT: All right. Thank you very much.

JUROR NO. 58: Thank you, sir.

THE COURT: All right. If you could bring in the rest of the remaining second panel.

(TrialTr.710-11).

During respondent's Panel #2 general voir dire, Juror58 indicated that even though this case involved an officer's death, because of his duties and Juror58's son was an officer, that he'd still be fair(TrialTr.742).

During a conference record, Judge Evans noted predecessor counsel requested that books and movies available to the jurors be limited to "G" rated materials(TrialTr.769-71). Trial counsel withdrew the "G" rated request, specifying though that "overt, like, crime stories" be forbidden(TrialTr.769-71).

Those selected to serve, including Juror58, were instructed they were to return on Monday, March 23rd and while not sequestered until then they weren't to discuss this case or listen to media about it(TrialTr.983,986). Judge Evans' directions included jurors could bring books and movies, but those items couldn't involve crimes or legal subject matters(TrialTr.988). Judge Evans stated:

> You will be able to bring books with you, even movies with you, to the trial. The cautionary note on there, the only one the attorneys ask that I mention, avoid **movies and books about trials**, particularly periodicals or legal documents. That's normally something, again, the law has to be supplied by the Judge, not due to your independent research and investigation. So general movies, avoiding **crime** shows and **issues of that nature**.

(TrialTr.988)(emphasis added).

Juror58 Trial And Book Content Matters

On Friday, March 27th, Lance was convicted of first degree murder and penalty phase began that day with all penalty evidence concluded that day(TrialTr.xiii-xv,2059,2061-2137,2146).

On Saturday, March 28th, court resumed with counsel making a lengthy record informing Evans that they'd learned only Friday night, after court was adjourned, about matters involving foreperson Juror58(TrialTr.2147-2208). Counsel informed the court that they'd obtained a copy of Juror58's book, "*Indian Giver*"(29.15Ex.1)(TrialTr.2148). Lance's aunt, Marcie Miller, became concerned about Juror58's book and helped counsel get a copy of it the very same night she

called it to their attention(29.15L.F.1248-49,1253-54,1348-49). Counsel read the book into the early morning hours(29.15L.F.1349-50). The book's content was "graphic"(29.15L.F.1349).

The book opens with the protagonist's[3] Native American mother being raped and murdered while he's a young boy and present(29.15Ex.1p.7-9). Counsel outlined Juror58's book's protagonist's wife is killed by an intoxicated driver(TrialTr.2147-61;29.15Ex.1p.107-114). After the defendant was treated leniently and placed on probation, the protagonist, kidnapped, tortured, and killed the driver(TrialTr.2147-61).

Juror58's book states the "jury" found "the killer guilty"(29.15Ex.1p.110). The book also states the "judge found him guilty of involuntary manslaughter" and imposed five years' probation, suspended his license for three years, and ordered community service(29.15Ex.1p.110).

The protagonist viewed the lenient sentence as the product of deception worked on the jury by the defendant's attorney presenting the defendant as remorseful, when he wasn't(29.15Ex.1p.109-10). The absence of remorse was punctuated when, after sentence was imposed, the defendant made comments to the protagonist that he wished that he'd had the opportunity to sexually assault the protagonist's wife(29.15Ex.1p.110-11). Additionally, the exploitation of the court system was underscored by the defendant driving away from the courthouse on the

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[3] Juror58's book doesn't appear to have assigned a name to its main character, thus "protagonist" is used.

wrong side of the road while drinking from a whiskey bottle and verbalizing his plans to do drugs and engage in sexually exploitative behavior(29.15Ex.1p.110-11). The protagonist's frustration with the court system was accentuated by "watching the punk receive congratulations from his friends. His lawyer beamed with pride."(29.15Ex.1p.110).

Juror58's protagonist intends to seek revenge against the system of laws that allowed his wife's killer such leniency(29.15Ex.1p.130-32,169). The protagonist kidnaps, slowly tortures his wife's killer (while forcing him to look at a photograph of the victim), and ultimately kills the drunk driver by inserting a sharpened wooden stick into his rectum and up into his body(29.15Ex.1p.111-14). *See* Brief's Appendix A-1-A-6 (Chapter 18) (29.15Ex.1p.109-14).

The protagonist, a retired Green Beret, steals nuclear material to seek justice against the criminal justice system for letting murderers go free(29.15Ex.1p.134,146-47,153,158-63). The protagonist's revenge included detonating around St. Louis a stolen atomic bomb from a plane(29.15Ex.1p.161,163,167-68,179). In carrying-out that bomb plot:

> There would widespread [sic] crime overnight. The weak and the timid would die. At the first sign of hunger, the fighting would begin. There'd be widespread looting and uncontrollable mobs. Vigilantes and militias of neighbors would form to fight and bring about a system of justice. Curfews, hangings, and firing squads would become normal. **Judges who passed soft sentences on criminals would have no effect on the new rules.** By the time

things began to return to normal, **America would see the need for making the punishment fit the crime**.

(29.15Ex.1p.163)(emphasis added).

The protagonist's son, who's alerted to his father's intentions believed his father was seeking revenge on the country that killed his wife(29.15Ex.1p.168-70). The son prevents his father from carrying-out his plan by shooting him as he boards the plane intended to carry-out his bomb plot(29.15Ex.1p.5-6,176-78).[4]

Juror58's book states that while it's fiction, parts mirror the author's life experiences(TrialTr.2159-61).

Counsel noted that during voir dire it was learned Juror58 was a "published author," but no other related information was obtained(TrialTr.2148). Counsel told the court Juror58 misled the court and the parties as to his ability to fairly serve(TrialTr.2149-50). Counsel urged that because the book stated that it was in part autobiographical that Juror58 had withheld biases favorable to respondent(TrialTr.2159-61,2170-71). Counsel urged that while Juror58 had informed the court he was a "published author," he had a duty to disclose the book's substance, but didn't(TrialTr.2159-61).

Counsel requested a mistrial(TrialTr.2161). Alternatively, counsel requested Juror58 be replaced with an alternate(TrialTr.2161-62). Counsel observed that while

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[4] The protagonist mistakenly believed his F.B.I. agent son was killed doing an F.B.I. surveillance investigation(29.15Ex.1p.127-31,161).

the jurors had been directed to avoid contact with crime themed materials while sequestered, Juror58 had authored a book with those very themes(TrialTr.2162). Counsel requested questioning be done of Juror58 as to why he didn't disclose the book's substance as well as questioning the other jurors about their exposure to the book(TrialTr.2162-63,2171,2173-75).

Evans didn't want to question Juror58 because that would taint Juror58 and require Juror58's removal or a mistrial(TrialTr.2162-63,2174-75). Evans also didn't want to question the other jurors because it could negatively impact their fairness(TrialTr.2173-74). Respondent argued Juror58 never made any statements suggesting he couldn't be fair and defense counsel could've inquired of Juror58 as to his book's contents(TrialTr.2163-69). Counsel Kessler stated that he had to "concede" ineffective assistance in failing to inquire with Juror58 about his book when he volunteered he was a "published author"(TrialTr.2170-72).

A mistrial was denied(TrialTr.2172-74). Evans stated that Juror58 indicated he'd be fair(TrialTr.2172-73). Evans remembered Juror58's approaching to disclose his son's officer employment and his book authorship(TrialTr.2172-73). Evans stated he remembered during voir dire Juror58 was dressed in green military camouflage(TrialTr.2172-73). Evans observed:

> I don't recall him being asked questions by any attorney, which the attorneys are permitted and by law **are duty bound to inquire**, follow up on the question of what books he had published, what were the content, things of that nature.

(TrialTr.2172-73)(emphasis added). Evans indicated counsel would have the opportunity to address this matter post-trial, including presenting evidence(TrialTr.2173-74,2196). Evans also denied the request to then question Juror58(TrialTr.2174).

Evans offered he was willing to substitute an alternate for Juror58(TrialTr.2175-77,2191-92). Based upon defense counsel's request to remove Juror58 and respondent's agreement not to oppose removal, an alternate was substituted(TrialTr.2198-2206,2210-11). That substitution was followed by the court reading the penalty instructions and respondent making its initial penalty argument(TrialTr.2211). When Evans discharged Juror58, he informed Juror58 that decision was based on matters associated with Juror58's book(TrialTr.2206-08). Evans informed Juror58 he could be subject to subpoena at a later date regarding these matters(TrialTr.2207).

Later, on Saturday, March 28th, the jury hung on punishment(TrialTr.xvi,2226-28;TrialL.F.1732-33).

Post-Trial Juror58 Matters

On Monday, March 30th, Judge Evans, on his own motion, entered an order on Juror58 matters(TrialL.F.1734). The order stated that an additional hearing that could include testimony, other evidence, and argument may be necessary(TrialL.F.1734). The order prohibited the jurors and anyone else from discussing or commenting on the case(TrialL.F.1734).

On April 22, 2009, counsel filed a new trial motion(TrialL.F.1737-42). It alleged the court's refusal to allow counsel to question Juror58 about his book and its refusal to allow all jurors to be examined about Juror58's actions was error(TrialL.F.1739-40).

On April 29, 2009, Judge Evans sent a letter to both parties(TrialL.F.1756). The letter inquired whether either party intended to subpoena any jurors to the new trial motion hearing and if they were, Evans wanted proposed questions in advance(TrialL.F.1756). Evans' letter noted that he'd been advised Juror58 gave a copy of his book to the court's bailiff sometime during trial(TrialL.F.1756).

On May 22, 2009, Evans took-up the new trial motion and imposed death(TrialTr.2231). Counsel indicated they'd already contacted the court to inform it they didn't intend to call any jurors(TrialTr.2231-32). Counsel also noted for the record that Evans had advised them that Juror58 had provided a copy of his book to court staff and counsel learned of that matter for the first time in Evans' letter after the motion for new trial was due and filed(TrialTr.2231-32;TrialL.F.1756). Evans stated that during trial his bailiff advised him Juror58 gave the bailiff a copy of his book(TrialTr.2232). Evans stated the bailiff brought the book in after the guilt verdict and during the sentencing phase and gave it to Evans' secretary(TrialTr.2232-33). Evans realized after guilt arguments that Juror58's book was with Evans' secretary(TrialTr.2232-33).

29.15 Case Juror58

The 29.15 motion alleged counsel, after learning Juror58 had authored a book, was ineffective for failing to conduct follow-up questioning of Juror58 in voir dire about his book's subject matter(29.15L.F.254-66). Such questioning would've established a basis for a cause strike of Juror58 based on Juror58's book's contents(29.15L.F.259-66).

The pleadings alleged counsel was ineffective for failing to investigate and call at the motion for new trial hearing the jurors, other court personnel, connected to Lance's trial (and Judge Evans after disqualifying him) to provide evidence to establish Lance was prejudiced through Juror58 serving(29.15L.F.430-51).

The pleadings alleged Evans "did not timely disclose" to counsel that Juror58 had his book with him and distributed it to others connected to the trial(29.15L.F.430,443-45,448-49).

The pleadings alleged Juror58 committed juror misconduct and violated the court's instruction for jurors not to bring with them books involving crimes(29.15L.F.430-51). *See*, TrialTr.988.

The pleadings alleged Evans, his court personnel, and the jurors who sat would be witnesses(29.15L.F.445-46). It was pled Juror58 gave his book to other jurors(29.15l.F.445-46,448).

Counsel testified acknowledging that Juror58 wasn't asked follow-up questions after he disclosed he was a "published author"(29.15L.F.1252). Counsel believed Juror 58's actions violated the court's instruction that the jurors not view anything crime related during trial(29.15L.F.1259). Counsel testified he believed the book's

contents establish Juror58 was dishonest about his ability to be fair(29.15L.F.1253,1259).

Counsel Kessler has never conceded ineffectiveness before, but stood by his trial statement he was ineffective here(29.15L.F.1256-58,1324). Kessler testified that had he uncovered the book's contents, he would've moved to strike Juror58 for cause and if denied would've used a peremptory(29.15L.F.1257-58). Kessler didn't call jurors or anyone else connected with the trial at the motion for new trial hearing because he wasn't aware of any judge ever imposing death when the jury hung(29.15L.F.1329).

Juror58 was the foreperson through guilt phase(29.15Ex.10p.5). Kirk House Publishers published Juror58's book(29.15Ex.1). Juror58 brought 4 copies of his book with him in his suitcase to the sequestered jury and gave those out(29.15Ex.10p.13-16).

Trial Ex.E (TrialTr.2165;TrialL.F.1661-63;29.15Ex.10p.25-26) contains documents posted on either Amazon's or Barnes and Noble's web sites about Juror58's book(29.15Ex.10p.7-8). Juror58 authored those pages(29.15Ex.10p.7-8)(TrialTr.2165;TrialL.F.1661). Juror58 wrote: "many of the chapters are filled with my own true life experiences or someone I had served with [in military Special Forces Green Beret]" (29.15Ex.10p.7-8)(TrialTr.2165;TrialL.F.1661)(TrialEx.E). The descriptive information about the book's content included that the protagonist's life

> changed when his wife of twenty five years was killed and her murderer set free. He sought and found **vengeance** for the first time in his life. When his

son was killed he resorted to his Indian heritage to seek justice. He would destroy the very foundation of America that had wronged him. **He would make them all pay for allowing murderers to be set free.**

(29.15Ex.10p.7-8)(TrialTr.2165;TrialL.F.1662)(TrialEx.E)(emphasis added). Juror58 also described his book as "a fictional autobiography"(29.15Ex.10p.7-8,26)(TrialTr.2165;TrialL.F.1662)(TrialEx.E).

Juror58 testified he gave an autographed copy to the juror coordinator, Michele Nigliazzo(29.15Ex.10p.11-13,16;29.15Ex.11p.9-11,16,21). Juror58 testified he gave court security Deputy Mike Wall an autographed copy(29.15Ex.10p.13,16). Juror58 gave a copy of his book to Juror3 "Ken," who served on the jury, and they discussed Juror58's book with Juror3 giving "feedback"(29.15Ex.10p.12-15;29.15Tr.191-95).

Juror58 testified that he didn't believe he violated the court's instruction because his book was "a love story"(29.15Ex.10p.24-25). Juror58 denied his book's plot included that the protagonist intended to make America pay for allowing murderers to go free until he was shown his book's Amazon/Barnes and Noble web posting which said exactly that(29.15Ex.10p.29-31;TrialL.F.1662). Juror58 denied he holds the views expressed in his book about the courts and criminal defendants(29.15Ex.10p.32-33).

The front page of the West Plains Daily Quill reported on the first day of trial in Howell County(29.15Ex.3p.1). The front page had a photo of an officer wearing a SWAT cap and carrying a camouflaged automatic assault rifle(29.15Ex.3p.1). The photo's caption indicated the security display stirred-up memories of the Timothy

McVeigh and Unabomber cases(29.15Ex.3p.1). Juror58 testified that after jury service concluded, there were "strange cars and vehicles" coming to his house and parking at the end of his driveway and driving down his road really slow(29.15Ex.10p.35).

When Juror58 was removed from the jury, he was kept in a courthouse room separated from other jurors(29.15Ex.10p.18). Juror58 rode back to Carter County with the other jurors once trial finished(29.15Ex.10p.19). Juror58 was upset because the West Plains newspaper published an article identifying him by name as a "tainted juror"(29.15Ex.10p.19-20). Because Juror58 was identified that way, he asked the deputy who drove them back to Carter County if it was "okay" for him to carry his pistol for awhile and the deputy told Juror58 to do whatever he needed(29.15Ex.10p.20).

Juror117 served on Lance's jury(29.15Tr.122). Juror117 and her husband owned a gift shop specializing in Native American items(29.15Tr.127). Juror58 had been to their gift shop a few weeks before trial and discussed with Juror117's husband about their store selling Juror58's book(29.15Tr.127). While Juror117 and her husband were waiting outside the Carter County Courthouse for the bus to transport the jurors to Howell County, Juror58 handed a copy of his book to Juror 117's husband, who then handed it to Juror117(29.15Tr.127,133). Juror117 put the book in her backpack and boarded the bus with it for Howell County/West Plains(29.15Tr.127-28). Juror117 didn't read the book's back cover when Juror58 handed it to her, but if she had, then she wouldn't have taken it with her to Howell

County because she would've regarded it as falling within the trial court's instruction not to bring books about trials or crimes(29.15Tr.128-33). Late one night while trial was in progress Juror117 skimmed Juror58's book(29.15Tr.128-29).

Juror3 ("Ken") served on Lance's jury(29.15Tr.2,191). After jury selection was completed, but during trial itself, Juror58 gave Juror3 his business card that said author "*Indian Giver*" with his phone number written on the back and showed Juror3 his book(29.15Tr.192-95). Juror3 read the back cover when Juror58 showed him the book(29.15Tr.195). After trial, Juror3 was looking for books and purchased Juror58's book(29.15Tr.195).

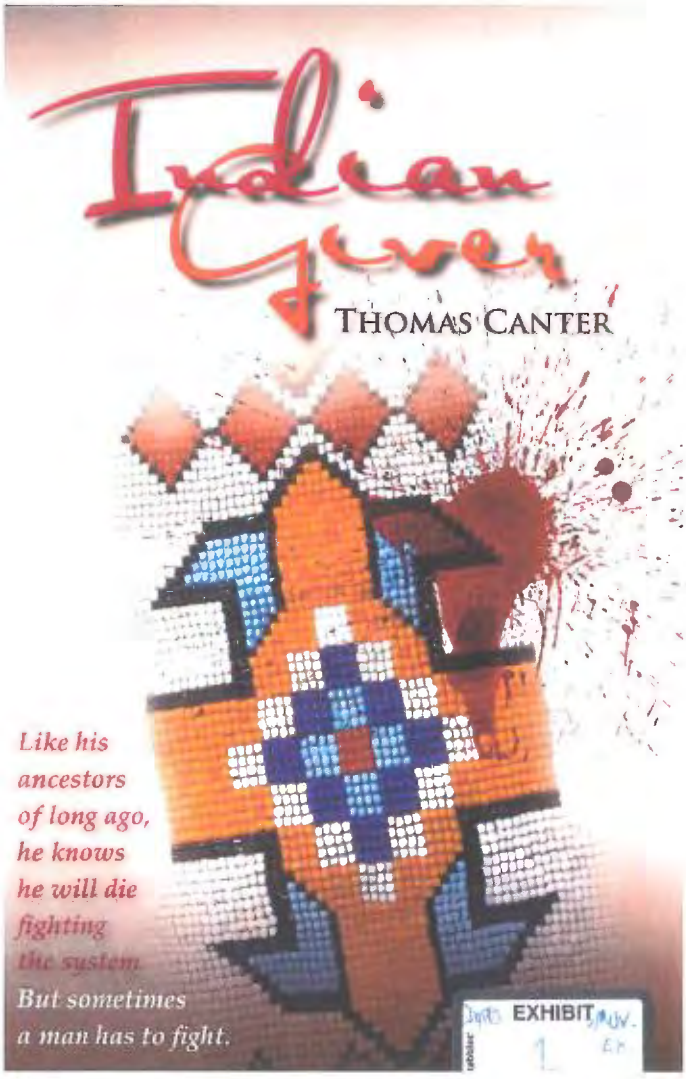
Juror50 served on Lance's jury(29.15Tr.198). Early in the evidentiary phase of trial, Juror58 gave Juror50 a copy of his book(29.15Tr.199-201). Juror 50 read a few pages and her reaction was the book was something she shouldn't be reading in order to abide by the sequestration rules and she gave it back to Juror58(29.15Tr.200,202).

Counsel Bruns remembered Juror58 disclosing he was a "published author"(29.15Tr.634). Juror58's book's contents were upsetting to counsel because the book's story line involved a drunk driving killing accident as being the motive for "brutal" acts that followed in the book(29.15Tr.636). Bruns recalled that Juror58's book's theme included the criminal justice system lets murderers off too easily(29.15Tr.636). There was no strategy reason for not questioning Juror58 about his book once he disclosed authorship(29.15Tr.639). Even though the court made available to counsel the opportunity to call jurors at sentencing counsel didn't because

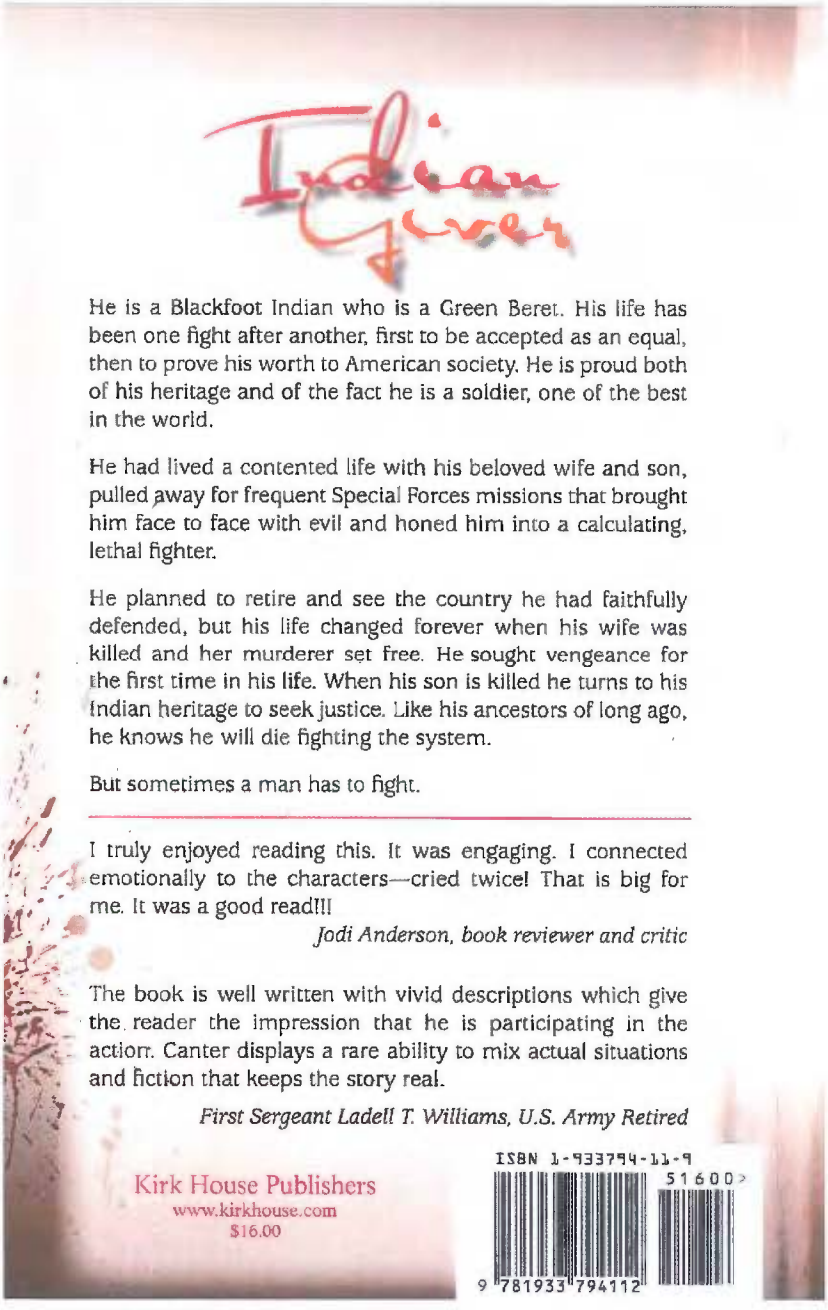
counsel "naive[ly]" believed there was "a better chance" to avoid death by not calling the jurors so as to avoid "open[ing] up that can of worms"(29.15Tr.643-46).

Juror58's book's front and back covers contain blood spatter graphics(29.15Ex.1). The back cover states that the Green Beret protagonist is seeking "vengeance" because his wife was killed and "her murderer set free"(29.15Ex.1). The back cover also states in order for the protagonist "to seek justice" he will have to "figh[t] the system"(29.15Ex.1).

This is the front cover (color copied):



This is the back cover (color copied):



Indian Cover

He is a Blackfoot Indian who is a Green Beret. His life has been one fight after another, first to be accepted as an equal, then to prove his worth to American society. He is proud both of his heritage and of the fact he is a soldier, one of the best in the world.

He had lived a contented life with his beloved wife and son, pulled away for frequent Special Forces missions that brought him face to face with evil and honed him into a calculating, lethal fighter.

He planned to retire and see the country he had faithfully defended, but his life changed forever when his wife was killed and her murderer set free. He sought vengeance for the first time in his life. When his son is killed he turns to his Indian heritage to seek justice. Like his ancestors of long ago, he knows he will die fighting the system.

But sometimes a man has to fight.

I truly enjoyed reading this. It was engaging. I connected emotionally to the characters—cried twice! That is big for me. It was a good read!!!

Jodi Anderson, book reviewer and critic

The book is well written with vivid descriptions which give the reader the impression that he is participating in the action. Canter displays a rare ability to mix actual situations and fiction that keeps the story real.

First Sergeant Ladell T. Williams, U.S. Army Retired

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April Mayfield was Judge Evans' secretary(29.15Ex.8p.3). Mayfield didn't remember how or when Juror58's book got to her office, but it was before Saturday because she didn't work Saturday(29.15Ex.8p.5). Mayfield only glanced at the book and understood it involved a man who had a family member killed and that he then avenged that death(29.15Ex.8p.8). Mayfield recalled the content of the avenging was "graphic"(29.15Ex.8p.8).

Howell County Deputy Mike Wall handled security(29.15Ex.9p.3). The jury's hotel television was modified to limit viewing to Disney type movies(29.15Ex.9p.9). All televisions, radios, and telephones were removed from jurors' rooms(29.15Ex.9p.9). Wall monitored generally the jurors' reading materials(29.15Ex.9p.17).

One day after court, at the hotel, Juror58 approached Wall and told Wall he'd authored a book and gave Wall a copy(29.15Ex.9p.11-13,16). Wall read the book's synopsis back cover and thought it was "trash" and knew it had violent themes(29.15Ex.9p.11,23-24). Wall gave the book to Mayfield the day after Juror58 gave it to him as something Judge Evans ought to know about(29.15Ex.9p.14-19). An hour after Wall gave the book to Mayfield, Evans asked Wall where Wall got it(29.15Ex.9p.19).

Michele Nigliazzo was an attorney juror coordinator volunteer(29.15Ex.11p.5-9). Nigliazzo recalled that Judge Evans cautioned the jurors not to bring outside reading or viewing materials and such items would be provided for them and carefully screened(29.15Ex.11p.7). All of the jurors' personal reading materials were taken

away(29.15Ex.11p.14-15). Nigliazzo reviewed the content of all reading materials that she made available to the jurors(29.15Ex.11p.14-15). Likewise, if jurors wanted to bring in magazines Nigliazzo reviewed their contents(29.15Ex.11p.15-16). Jurors were allowed to bring their own reading materials, like quilting magazines, so long as they complied with Judge Evans' instruction(29.15Ex.11p.22). Before movies were shown to jurors, Nigliazzo reviewed their content(29.15Ex.11p.15-16).

Juror58 approached Nigliazzo, sometime during trial in Howell County, after jury selection in Carter County, asking her whether she liked to read and handed her a copy of his book(29.15Ex.11p.5-10). Nigliazzo was uncertain on which day Juror58 gave her his book at the hotel housing the jury, but it was early-on in the evidentiary portion of the trial(29.15Ex.11p.8-11). For Nigliazzo that contact was just a nuisance such that nothing stood out and she put the book in her bag without looking at it(29.15Ex.11p.9-11,16,21).

After the defense made its record on Saturday, Judge Evans had discussions with Nigliazzo about Juror58's book(29.15Ex.11p.12-14). Judge Evans questioned Nigliazzo about the jurors serving and the alternates and the status of their sequestration because he was concerned about contamination(29.15Ex.11p.13-14). Nigliazzo alerted Judge Evans that Juror58 gave her a copy of his book(29.15Ex.11p.13-14). Nigliazzo was unaware that Juror58 gave copies of his book to other jurors(29.15Ex.11p.12). If Nigliazzo had been alerted that Juror58 was disseminating anything crime related, then she would've intervened(29.15Ex.11p.16). Nigliazzo knew that all of the jurors were made aware it was critical that they not

have access to anything outside the evidence that could impact their verdicts because she'd expressly conveyed that sentiment to them(29.15Ex.11p.17). Juror58's actions were especially disconcerting to Nigliazzo because she and everyone connected with ensuring there weren't inappropriate influences on the jury were "Johnny on the spot the whole time"(29.15Ex.11p.20-21).

If Nigliazzo had been aware that Juror58's book had themes of lack of remorse or a criminal defendant being treated too leniently with the defendant being kidnapped and tortured by the protagonist, then Nigliazzo would've reviewed it and called it to Judge Evans' attention(29.15Ex.11p.17-18). All of the jurors, including Juror58, knew it was really important that they not have any inappropriate materials that would impact them because Nigliazzo had so cautioned them(29.15Ex.11p.17). The jurors were allowed to read materials as long as they complied with Evans' instruction and Nigliazzo gave them that same instruction(29.15Ex.11p.22).

Judge Evans testified he first saw the book Friday evening March 27th, but it was possible he'd seen the book earlier than Friday evening(29.15Ex.30p.9-10,12-13). Judge Evans' secretary, Mayfield, put the book on his desk Friday before she left for the day(29.15Ex.30p.12). That evening Judge Evans glanced at the book without reading it(29.15Ex.30p.13,18). Judge Evans decided he needed to discuss the matter with the attorneys the next day because the book's subject was a criminal case(29.15Ex.30p.13-14). A record about Juror58's book's content was made on Saturday, March 28th(29.15Ex.30p.14-15). Defense counsel learned about the book's contents on Friday, March 27th(29.15Ex.30p.15).

Trial Proceedings

Lance was convicted of the March 20, 2005 first degree murder shooting death of Highway Patrol Trooper Sergeant Graham(TrialTr.2058-60;TrialL.F.1704). The jury hung on punishment and Judge Evans imposed death(TrialTr.2226-28,2236;TrialL.F.1723,1765-66).

The Public Defender represented Lance for over three years commencing in May, 2005, through September, 2008, until private counsel Kessler, Bruns, and Henshaw-Frances entered(29.15Tr.476-77,513-14;29.15Ex.71). All case materials were transferred to them(29.15Tr.476-77;Ex.71).

On November 26, 2004, the day after Thanksgiving, at about 8:00 p.m., Lance was involved in a Carter County accident where his truck's passenger, Jeff Bayless, died(TrialTr.1039-47,1091-92,1110). Bayless was Cynthia Chilton's boyfriend and Cynthia was Lance's wife, Coree's sister(TrialTr.1086-89,1152).

Graham responded to the accident scene, prepared a report, and interviewed Lance(TrialTr.1070-71,1078,1101,1104-05). Lance's truck contained alcohol beverage containers(TrialTr.1074). Graham's investigation included contacting on March 19, 2005, individuals familiar with the accident's details, Ivy and Paul Napier(TrialTr.1047-49,1065,1093-95,1100).

On March 19, 2005, Graham also attempted to contact Cynthia Chilton about the accident(TrialTr.1114-16). Graham's computer contained a March 19th supplemental accident report which indicated Graham interviewed the Napiers and Coree's parents that same day(TrialTr.1133-40).

Mark Keeney was married to Sherry (Chilton) and Sherry is Coree Shockley's mother(TrialTr.1151-52). Graham came by Mark and Sherry's house on Saturday March 19th , and he said he needed to talk to Cynthia because Cynthia was a Bayless accident witness(TrialTr.1156-57).

On Sunday, March 20th at 8:00-9:00 a.m., Lance came by Mark's and Sherry's house(TrialTr.1159). Lance asked Mark where Graham lived and Mark told Lance that Graham lived in Darrin Treadway's M Highway rental(TrialTr.1160,1185-87,1294-1300).

On March 20th, Graham clocked-in at 7:55 a.m. and clocked-out at 4:03 p.m.(TrialTr.1164-70,1169,1367). At 5:17 p.m., Trooper McCallister received a Carter County Sheriff's dispatch call that Graham was shot on M Highway(TrialTr.1170).

A few minutes after 4:00 p.m., close to Highway M, Kraig Shomaker heard a rifle shot coming from around Graham's(TrialTr.1173-78). Shomaker heard two pump shotgun firings from the same area 5-15 minutes later(TrialTr.1178-80). Shomaker never saw Lance in the area(TrialTr.1181).

At 4:15 p.m. on March 20th, Treadway heard two pump shotgun shots fired seconds apart at Graham's(TrialTr.1185-87,1188-91,1294-1300). At about 5:15 p.m., Treadway and Judy Hogan found Graham lying on the ground next to his Patrol car(TrialTr.1192,1208-11). Treadway and Hogan didn't see Lance drive down the road in a red vehicle(TrialTr.1194,1213-14).

On the passenger side of the front seat of Graham's car there was paperwork relating to investigating Lance as to Bayless' death(TrialTr.1312-16). There was also paperwork involving a separate leaving the scene of an accident incident involving Roger Wade Darter(TrialTr.1365-66,1371-72). Because of information found on Graham's computer about the Bayless investigation and Bayless investigation materials found in Graham's Patrol car, Lance became a suspect(TrialTr.1346-47).

Lance's uncle, Robert Shockley, lived two miles from Lance(TrialTr.1384-85). Lance and Robert purchased bulk ammunition(TrialTr.1386-88). At 9:00 a.m. the day Graham was killed, Lance asked to borrow Robert's truck, but Robert refused(TrialTr.1389-91). Robert next saw Lance at about 4:00 p.m. when Lance woke him up(TrialTr.1392-93). That evening after 7:00 p.m., Lance's wife, Coree, gave Robert a full box of .243 caliber shells and told Robert that Lance said to give them to him(TrialTr.1396-1400).

The Highway Patrol tried to get Robert to testify that it was later than 4:00 p.m. when Lance woke him(TrialTr.1407-09). Robert told Trooper Rainey he saw Lance at 3:00 p.m. in Lance's truck, and not a red car, on March 20th(TrialTr.1764-66). The Patrol tried to persuade Robert to go wired to Lance's lawyer, Jasper Edmundson(TrialTr.1412-13). Initially, Robert refused, but after repeated Patrol pressure, Robert wore a wire to see Lance's attorney(TrialTr.1412). Robert also talked with Lance's wife, Coree, while wired(TrialTr.1413). The wired conversations didn't generate incriminating information(TrialTr.1413).

Melia (Mae) Shockley is Lance's grandmother(TrialTr.1800). Mae is hearing impaired(TrialTr.1800). Mae's mobile home was located between Lance's house and the house belonging to Sylvan and Carol Duncan(TrialTr.1801-02). Mae's house and Lance's were separated by 300-400 feet(TrialTr.1801).

When Graham was killed, Mae owned a two door red 1995 Pontiac Grand Am(TrialTr.1803). Mae's car had a support our troops yellow ribbon style sticker on its back(TrialTr.1804). Mae's license plate didn't contain an "L" or "M"(TrialTr.1818-19).

Mae testified Lance borrowed her car at 12:20(TrialTr.1803,1806-09). At 4:18 p.m., Mae saw her car drive by her house and on to Lance's(TrialTr.1809-11). Lance came inside Mae's house at 4:50 p.m. and left a little before 5:00(TrialTr.1811-13).

Mae testified there were incorrect police reports about conversations with her(TrialTr.1814-15). Mae didn't tell the police she told Lance she wouldn't lie for him and that Lance told her to stop talking(TrialTr.1815-16).

Trooper Stoelting testified Mae had previously told the police she hadn't loaned her car to Lance(TrialTr.1821-23). Stoelting testified Mae had reported Lance told her to be quiet when she told Lance she wouldn't lie(TrialTr.1825-26).

Trooper Torbeck had reports that Mae's red Grand Am was seen near Graham's(TrialTr.1221-22,1237,1243-46).

Rick Hamm noticed near the Johnson residence, around 4 p.m., parked on the wrong side of the roadway, a small two door red car that could've been a Pontiac Grand Am(TrialTr.1862-68,1879,1884).

Lisa Hart and her husband met a real estate agent to look at the Johnson residence(TrialTr.1886-90,1895). Lisa saw a 1990s red Grand Am with a yellow softball sized sticker parked on the wrong side of the road near Graham's between 1:45-3:30p.m.(TrialTr.1889-90,1892-94,1896-98,1911). On March 23rd, Lisa was at the local Patrol command center and identified a car there, Mae's, as the same one she saw on March 20th(TrialTr.1903-06,1909).

No red cars were seen speeding down the possible routes between Graham's and Lance's houses immediately following the shooting(TrialTr.1844-45). Trooper Brand didn't recall Mila Linn having told him the person she saw driving a red car wasn't Lance(TrialTr.1302-08,1336-37).

Troopers Heath and Kinder went to Lance's house on March 20th at 11:00 p.m. and woke him(TrialTr.1918-19,1921-22,1928). Heath told Lance he was investigating the Graham shooting and wanted to know what Lance was doing Sunday around 4:00-4:30(TrialTr.1929,1931). Lance didn't want to talk because he had to get up at 4:00 a.m. to get to a construction work site(TrialTr.1929).

Tyler Cleaver recounted that on Monday, March 21st, the day after Graham was killed, that Lance described to him an incident the night before involving Troopers at Lance's house(TrialTr.1771-75). Lance described confronting Troopers and ordering them off his property(TrialTr.1775-78). A Trooper's gun accidentally fired and struck another Trooper(TrialTr.1775-78). Lance told Cleaver he was late getting to work because he'd gone to the Trooper zone office to complain(TrialTr.1777-78). Later on Monday, two plain clothed troopers came to

Lance's construction site to talk(TrialTr.1779-80). When the troopers arrived, Lance called Coree who told him they'd been by their house asking where Lance was when Graham was shot(TrialTr.1786,1796).

Trooper Rainey arrested Lance on March 23rd as Lance was leaving his construction site(TrialTr.1759-60). Rainey was directed to arrest Lance on a warrant for leaving the scene of an accident, not murder(TrialTr.1758-59). When Rainey arrested Lance, he only told Lance that he was under arrest on a felony warrant without informing Lance the arrest was for leaving an accident(TrialTr.1760-61). After Lance asked Rainey three times what he was under arrest for and not being told what, Lance asked could it be related to Graham(TrialTr.1760-62,1766,1769).

Dr. Zaricor's autopsy showed Graham was first shot in the back of the neck with a high powered rifle(TrialTr.1262-64,1267-68). That was followed by a shotgun wound to his face(TrialTr.1262-64,1267-68). Cause of death was the rifle shot(TrialTr.1268,1270-71). Zaricor opined, as a doctor, not a ballistics expert, that the rifle shot was consistent with a caliber of .223, .22, and .243(TrialTr.1269-70).

Shooting into a sawdust pit, trees, and posts was done on Lance's property (TrialTr.1460,1462-63). Bullet fragments and shell casings for a .243 Winchester were found outside Lance's property(TrialTr.1465-71,1534,1548). There was no .243 caliber rifle either inside or outside Lance's(TrialTr.1548).

Remnants of two 12 gauge fired shotgun shells and overalls' metal clips were recovered from an exterior wood-burning stove at Lance's(TrialTr.1471-

72,1477,1500-02). Inside Lance's house there were seized rifles, shotguns, pistols, and ammunition(TrialTr.1479-80,1503-04).

Laura Smith and Lance lived together from 1994-2001 and have two children(TrialTr.1567-69). Lance only put wood in the wood-stove(TrialTr.1572-73).

During a phone call with Laura, Lance commented their daughters were smart, like Laura, but he'd done something stupid(TrialTr.1575-76,1580). Lance frequently traded guns and had owned a .243(Tr.1577-78). Laura testified the .243 had special sentimental value to Lance because it belonged to Lance's father, who died when Lance was young(TrialTr.1579).

Laura Smith's brother (Tom Chilton), Kenneth Towner, Angela Walker, George Beck, and Robert Shockley all testified about Lance having owned a .243 Browning similar to demonstrative Exhibit 257(TrialTr.1403-04,1731,1734-55). Tyler Cleaver similarly testified and reported Lance had a special attachment to such gun(TrialTr.1792-93).

Respondent called John Dillon, a private retained firearms examiner and former F.B.I. examiner(TrialTr.1581-85). Dillon determined the caliber of bullet removed from Graham (Exhibit 171) was between .22 and .24 based on its land and groove impressions and overall size and weight(TrialTr.1595-96,1599-1601,1624-25,1664-65). There was a range of calibers for the Graham bullet including .22, .223, and .243, while a single caliber couldn't be identified(TrialTr.1601-04).

Dillon was provided three bullets from Lance's fields to compare to fragments removed from Graham(TrialTr.1597-99). When Dillon compared the bullet removed

from Graham to those recovered from Lance's fields, Dillon found it was inconclusive whether any were fired from the same rifle because there were insufficient corresponding microscopic characteristics(TrialTr.1616-18,1620-21). The four bullets could've been fired from four different guns having the same class characteristics or could've been fired from the same gun(TrialTr.1642-43,1656). Dillon couldn't find any of the four was fired from a .243 to the exclusion of a .22 or a .223(TrialTr.1643).

When Dillon began his work he was aware Highway Patrol firearms criminalist Crafton had identified the bullet taken from Graham as fired from the same gun as three bullets recovered in Lance's fields(TrialTr.1618,1676-78). Crafton was unable to identify a specific caliber, only a range of .22 to .24 for the bullets examined(TrialTr.1681).

Crafton testified wadding components found around Graham's body were consistent with a 10 or 12 gauge shotgun, but those components couldn't be traced to a particular 10 or 12 gauge and weren't shown as tied to any weapon seized from Lance's(TrialTr.1704).

Crafton attended a meeting at "DDCC" headquarters (Division of Drug And Crime Control) to discuss the Graham investigation(TrialTr.1726-27). Crafton's work had never been the subject of such review(TrialTr.1726-27).

Trooper Weadon described the Patrol as "like a big family"(TrialTr.1141). Trooper Torbeck testified that there is a sense of family among troopers and

Graham's death was especially upsetting(TrialTr.1236-38). When Trooper Ponder arrested Lance, Ponder said it was a "pleasure" to arrest Lance(TrialTr.1383).

Pretrial, on September 25, 2006, respondent moved to prohibit evidence of Highway Patrol Trooper David Eads' letter sent Lance c/o the Carter County Sheriff's Office(TrialL.F.687-90;PreTrialTr.202-03,224-28).

Eads' letter stated that Lance didn't know who Eads was, but Lance was going to find out who all of Graham's "brothers" were because of what Lance did to their "family"(TrialL.F.689).

Eads' letter stated that he was going to outline "**YOUR LAST 24 HOURS**"(TrialL.F.689)(bold and capitals in original). Eads said Lance would get a new change of clothes and Lance shouldn't "urinate" on himself out of "fear"(TrialL.F.689). Eads wrote that Lance would be hooked-up to assorted medical devices used to execute him(TrialL.F.689). Eads wrote that as the execution began Lance wouldn't see his family and friends first because it would be "the State Troopers dressed in BLUE who will stand out"(underlying and capitals in original)(TrialL.F.689). Eads continued stating: "You will now be given a chance to speak your LAST and FINAL statement but why waist [sic] good air?"(TrialL.F.689)(capitals in original).

Eads continued stating that doctors "*think*" (italics and quotes in original) Lance won't feel pain, but that is "*not confirmed*"(italics in original)(TrialL.F.689). Eads continued that "Pancuronium bromide" will be administered to stop Lance's breathing "which is *suppose* [sic] to take effect within 3 minutes, wow, that's a long

time"(italics in original)(TrialL.F.689). Eads stated Potassium Chloride would be administered to stop Lance's heart and it "usually takes 5 to 18 minutes, will probably seem like eternity huh?"(TrialL.F.689). Eads asked: "Are you afraid of confined spaces? Hope not because then your body will be zipped up in a body bag" before an autopsy(TrialL.F.689).

Defense Case

Roger Hart and his wife Lisa went to look at the Johnson residence and saw a red car on the wrong side of the road(TrialTr.1993-94). Roger reported the car's license plate included an "L" and an "M"(TrialTr.1995). The license plate of the seized car (Mae's) in fact read "797SHV"(TrialTr.2007). Roger didn't report the presence of a yellow sticker on the red car(TrialTr.2004-05). At Roger's deposition, he testified that his reporting of the "L" and "M" was a "wild guess."(TrialTr.2000-01).

29.15 Proceedings

After a 29.15 evidentiary hearing relief was denied(29.15L.F.1381-1456). This appeal followed.

POINTS RELIED ON

I.

FAILURE TO QUESTION "PUBLISHED AUTHOR"

The motion court clearly erred in denying the claim counsel was ineffective for failing to voir dire Juror58 about his book's subject matters when Juror58 volunteered his "published author" status so as to uncover grounds to strike Juror58 for cause because Lance was denied his rights to due process, a fair and impartial jury, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel in response to the volunteered "published author" status would have questioned Juror58 about his book's subject matters and Lance was prejudiced as his book's contents and themes established he could not fairly serve and was required to be struck for cause.

Anderson v. State,196S.W.3d28(Mo.banc.2006);

Knese v. State,85S.W.3d628(Mo.banc2002);

Brecht v. Abrahamson,507U.S.619(1993);

U.S. Const. Amends. VI, VIII, and XIV.

II.

JUROR58's BOOK – INEFFECTIVE NEW TRIAL MOTION HEARING

The motion court clearly erred in denying the claim counsel was ineffective for failing to call as witnesses at the motion for new trial hearing jurors, court personnel, and Judge Evans (after disqualifying Judge Evans) to testify and support how Juror58's actions were prejudicial juror misconduct and in addition violated Evans' directive prohibiting recreational activities including crime or legal subject related materials when Evans through a series of actions invited counsel to present juror misconduct evidence because Lance was denied his rights to due process, a fair and impartial jury, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have called all these individuals and Lance was prejudiced as they would have established a new trial was required.

Irvin v. Dowd,366U.S.717(1961);

Kenley v. Armontrout,937F.2d1298(8th Cir.1991);

State v. Post,804S.W.2d862(Mo.App.,E.D.1991);

§547.020;

U.S. Const. Amends. VI, VIII, and XIV.

III.

JUDGE EVANS' NON-DISCLOSURE OF JUROR58'S BOOK

The motion court clearly erred in denying the claim Judge Evans failed to timely disclose that Juror58 brought his book to the sequestered jury because Lance was denied his rights to due process, a fair and impartial jury, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that Evans had an affirmative duty to timely apprise counsel of Juror58's misconduct of having brought his book to the sequestered jury and in failing to carry-out that duty Evans deprived counsel of the opportunity to develop prejudice warranting a mistrial or alternatively ordering a new trial.

McQuary v. State,241S.W.3d446(Mo.App.,W.D.2007);

Sheppard v. Maxwell,384U.S.333(1966);

State v. Fullerton,684S.W.2d59(Mo.App.,W.D.1984);

U.S. Const. Amends. VI, VIII, and XIV.

IV.

JUROR MISCONDUCT/COURT'S INSTRUCTION VIOLATED

The motion court clearly erred in denying the claim Juror58 committed juror misconduct as well as violated Judge Evans' instruction in bringing his book to the sequestered jury and sharing it with other jurors because Lance was denied his rights to due process, a fair and impartial jury, and to be free from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that Juror58's book prejudiced Lance's ability to get a fair trial because of its violent story line which espoused the need for "vengeance" because of a "too lenient" court system in its treatment of criminal defendants accused of homicide offenses.

McQuary v. State,241S.W.3d446(Mo.App.,W.D.2007);

State v. Post,804S.W.2d862(Mo.App.,E.D.1991);

Irvin v. Dowd,366U.S.717(1961);

§547.020;

U.S. Const. Amends. VI, VIII, and XIV.

V.

BROWNING BLR .243 AND 10 GAUGE

The motion court clearly erred denying counsel was ineffective for failing to call ballistics expert Steven Howard to testify a Browning BLR .243 Winchester rifle could not have fired the fatal shot and that the shotgun wadding recovered at the scene was 10 gauge because Lance was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have presented Howard's testimony to counter respondent's evidence Lance used a Browning BLR .243 Winchester rifle and a 12 gauge shotgun to shoot Graham. Lance was prejudiced because there is a reasonable probability the jury would not have convicted him.

Hutchison v. State,150S.W.3d292(Mo.banc2004);

Tisius v. State,183S.W.3d207(Mo.banc2006);

U.S. Const. Amends. VI, VIII, and XIV.

VI.

NO .243 INHERITANCE

The motion court clearly erred in denying the claim counsel was ineffective for failing to call Lance's grandfather, Gerald Sanders, to testify Lance did not inherit a .243 rifle from his deceased father because Lance was denied his rights to due process, a fair and impartial jury, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have called Gerald Sanders to testify there was no such inheritance and Lance was prejudiced because Sanders would have refuted Lance disposed of his special .243 only after shooting Graham.

Kenley v. Armontrout,937F.2d1298(8th Cir.1991);

State v. McCarter,883S.W.2d75(Mo.App.,S.D.1994);

U.S. Const. Amends. VI, VIII, and XIV.

VII.

DEMONSTRATIVE EXHIBIT 257

The motion court clearly erred denying counsel was ineffective for failing to object to respondent displaying Exhibit 257 a Browning BLR .243 Winchester because Lance was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have objected as Exhibit 257 was not claimed to be the gun used to shoot Graham and Lance was prejudiced because respondent used the unrelated weapon in questioning its witnesses and closing argument.

State v. Perry,689S.W.2d123(Mo.App.,W.D.1985);

State v. Grant,810S.W.2d591(Mo.App.,S.D.1991);

U.S. Const. Amends. VI, VIII, and XIV.

VIII.

LANCE IN HIS PICKUP

The motion court clearly erred denying counsel was ineffective for failing to call James Chandler and Sylvan and Carol Duncan to testify they saw Lance driving his pickup truck during the time he was alleged to be in his grandmother Mae's red Grand Am waiting nearby Graham's house to shoot Graham and then fleeing Graham's house because Lance was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have called them because they corroborated the defense Lance did not shoot Graham and there is a reasonable probability Lance would have been acquitted.

Foster v. State,502S.W.2d436(Mo.App.,St.L.D.1973);

Franklin v. State,655S.W.2d561(Mo.App.,E.D.1983);

Perkins-Bey v. State,735S.W.2d170,(Mo.App.,E.D.1987);

U.S. Const. Amends. VI, VIII, and XIV.

IX.

MILA LINN

The motion court clearly erred denying counsel was ineffective for failing to call Mila Linn to testify she saw a red car near Graham's during the relevant timeframe containing an unfamiliar white male and did not select Lance from a photo array as its driver because Lance was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have called Linn because she corroborated the defense Lance did not shoot Graham and there is a reasonable probability Lance would have been acquitted.

Foster v. State,502S.W.2d436(Mo.App.,St.L.D.1973);

Franklin v. State,655S.W.2d561(Mo.App.,E.D.1983);

U.S. Const. Amends. VI, VIII, and XIV.

X.

IMPEACH LISA HART - YELLOW STICKER

The motion court clearly erred in denying counsel was ineffective for failing to impeach Lisa Hart's trial testimony that she did not know where the yellow sticker was located on the car she saw near Graham's with her prior written and deposition statements she saw the sticker from the car's front because Lance was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have so impeached Lisa and Lance was prejudiced because respondent's theory was Lance borrowed Mae's car to shoot Graham and discrediting Lisa's identifying Mae's car as the one she saw near Graham's was critical.

Black v. State,151S.W.3d49(Mo.banc2004);

U.S. Const. Amends. VI, VIII, and XIV.

XI.

JUROR3 INCLINED FOR DEATH

The motion court clearly erred denying counsel was ineffective for failing to move to strike for cause Juror3 who was more inclined to impose death where this case involved the killing of a law enforcement officer because Lance was denied his rights to due process, a fair and impartial jury, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that Juror3 was substantially impaired as to his ability to consider life and reasonably competent counsel would have moved to strike Juror3 for cause and Lance was prejudiced because he did not have a full panel of jurors who could consider life and further prejudice is presumed.

State v. Smith,32S.W.3d532(Mo.banc2000);

Wainwright v. Witt,469U.S.412(1985);

U.S. Const. Amends. VI, VIII, and XIV.

XII.

VICTIM IMPACT

The motion court clearly erred denying counsel was ineffective for failing to object to respondent's victim impact evidence Trial Exs. 133 (church casket photo), 250 (video montage), and 254 (drawing) because Lance was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have objected because these exhibits individually and collectively were so inflammatory they injected passion, prejudice, and arbitrariness. Lance was prejudiced because there is a reasonable probability he otherwise would have been life sentenced.

Payne v. Tennessee,501U.S.808(1991);

State v. Hess,23A.3d373(N.J.2011);

U.S. Const. Amends. VI, VIII, and XIV.

XIII.

PROSECUTOR'S COMMENT ON SILENCE

The motion court clearly erred in denying counsel was ineffective for failing to object, request a mistrial, or a curative instruction when Lisa Hart testified she didn't know why Mae's car was parked near Graham's and the prosecutor commented "Someone does" because Lance was denied his rights to due process, freedom from cruel and unusual punishment, right to silence, and effective assistance of counsel, U.S. Const. Amends. V, VI, VIII, and XIV, in that effective counsel would have objected that this was a comment on Lance's right to silence and Lance was prejudiced as the comment said to the jury Lance knew why Mae's car was at Graham's.

State v. Storey,901S.W.2d886(Mo.banc1995);

Berger v. United States,295U.S.78(1935);

U.S. Const. Amends. V, VI, VIII, and XIV.

XIV.

VISIBLE POLICE PRESENCE

The motion court clearly erred in denying the claim counsel was ineffective for failing to object to the visible police presence in and around the courthouse during trial and at sentencing and for failing to object to judge sentencing with such police presence as permissible when the jury hung because Lance was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have objected to the visible police presence because of its message to convict Lance based on Graham's police affiliation and that Lance was an extremely dangerous person and would have objected to judge sentencing based on the electoral pressures to impose death as evidenced by the police presence at sentencing. Lance was prejudiced because he would not have been convicted or at minimum not death sentenced.

Holbrook v. Flynn,475U.S.560(1986);

Woods v. Dugger,923F.2d1454(11th Cir.1991);

U.S. Const. Amends. VI, VIII, and XIV.

XV.

APPELLATE COUNSEL INEFFECTIVE

The motion court clearly erred in denying the claim appellate counsel was ineffective for combining character and propensity grounds into the claim challenging the failure to grant a mistrial in response to Officer Heath testifying that on the night Graham was shot the police brought a SWAT team to Lance's to interview him because of Lance's violent history because Lance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would not have combined the two grounds thereby causing the claim to be reviewed for plain error and Lance was prejudiced because there is a reasonable probability that had Lance's claim been briefed as preserved in the trial court that a new trial would have been granted for failing to grant a mistrial.

Evitts v. Lucey,469U.S.387(1985);

Williams v. State,168S.W.3d433(Mo.banc2005);

U.S. Const. Amends. VI, VIII, and XIV.

XVI.

MITIGATION EVIDENCE

The motion court clearly erred denying counsel was ineffective for failing to call mitigation witnesses Velma Dowdy, Eugene George Jackson, and Butch Chilton because Lance was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have called them to highlight Lance was a good father and hard worker and how Lance's father's accidental vehicular death impacted Lance. Lance was prejudiced as there is a reasonable probability that had the jury heard these witnesses he would have been life sentenced.

Wiggins v. Smith,539U.S.510(2003);

Williams v. Taylor,529U.S.362(2000);

U.S. Const. Amends. VI, VIII, and XIV.

XVII.

BRADY VIOLATION

The motion court clearly erred finding respondent did not violate *Brady v. Maryland* when it failed to disclose data stored electronically and in other formats that Graham possessed relating to other possible suspects in the shooting of Graham including, but not limited to, Carter County law enforcement corruption being investigated because Lance was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that this material would have led to evidence supporting that someone other than Lance killed Graham.

Brady v. Maryland,373U.S.83(1963);

U.S. v. Bagley,473U.S.667(1985);

U.S. Const. Amends. VI, VIII, and XIV.

APPLICABLE STANDARDS

Throughout, there are repeating standards governing review. To avoid unnecessary repetition these standards are set forth now and incorporated by reference in their entirety into all briefed Points.

Appellate Review

Review is for whether the 29.15 court clearly erred. *Barry v. State*,850S.W.2d348,350(Mo.banc1993).

Ineffectiveness

To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would've exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984). A movant is prejudiced if there's reasonable probability but for counsel's errors the result would've been different. *Deck v. State*,68S.W.3d418,426(Mo.banc2002). A reasonable probability sufficiently undermines confidence in the outcome. *Id.*426. Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994); *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D.2003).

Eighth and Fourteenth Amendment

The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*,428U.S.280,305(1976); *Lankford v. Idaho*,500U.S.110,125(1991).

ARGUMENT

I.

FAILURE TO QUESTION "PUBLISHED AUTHOR"

The motion court clearly erred in denying the claim counsel was ineffective for failing to voir dire Juror58 about his book's subject matters when Juror58 volunteered his "published author" status so as to uncover grounds to strike Juror58 for cause because Lance was denied his rights to due process, a fair and impartial jury, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel in response to the volunteered "published author" status would have questioned Juror58 about his book's subject matters and Lance was prejudiced as his book's contents and themes established he could not fairly serve and was required to be struck for cause.

Lance was denied effective assistance of counsel when counsel failed to conduct follow-up voir dire questioning of Juror58 in response to him approaching the bench to inform the court he was a "published author." Reasonable counsel would've examined Juror58 about why he volunteered that information in the manner he did and learned his book's contents established Juror58 couldn't be fair and had to be struck for cause.

Juror58 Trial Proceedings

Following a discussion on for cause strikes (TrialTr.707-09), Juror58 approached the court and volunteered his son was a Springfield, Missouri police

officer and he was a "published author," which was something he thought everyone would want to know(TrialTr.710-11). That exchange was:

THE COURT: All right. We're back on the record.

(At this time the jury panelist approached the bench, and the following proceedings were had:)

THE COURT: Juror 58?

JUROR NO. 58: Sir, forgive me. I didn't mention it earlier but my son is also a cop in Springfield, Missouri.

THE COURT: Okay. In the next series of questions -- I'm glad you brought that up -- the attorneys can ask you about that some more.

JUROR NO. 58: And also I'm a published author.

THE COURT: Okay.

JUROR NO. 58: And so I thought maybe I should be coming out with fact [sic] as well.

THE COURT: All right. Thank you very much.

JUROR NO. 58: Thank you, sir.

THE COURT: All right. If you could bring in the rest of the remaining second panel.

(TrialTr.710-11).

When counsel learned the details of Juror58's book, after the guilt verdict, counsel urged that Juror58 had misled everyone about his ability to fairly

serve(TrialTr.2149-50,2159-62,2170-71,2174-75). Counsel "concede[d]" ineffectiveness in failing to inquire at all about Juror58's book(TrialTr.2170-72).

Judge Evans observed:

> I don't recall him being asked questions by any attorney, which the attorneys are permitted and by law **are duty bound to inquire**, follow up on the question of what books he had published, what were the content, things of that nature.

(TrialTr.2172-73)(emphasis added).

29.15 Evidence

Counsel

Counsel acknowledged Juror58 wasn't asked follow-up questions after he disclosed he was a "published author"(29.15L.F.1252). Counsel believed Juror58's actions violated the court's instruction that the jurors not view anything crime related during trial(29.15L.F.1259). Counsel believed the book's contents establish Juror58 was dishonest about his ability to be fair(29.15L.F.1253,1259).

Kessler has never conceded ineffectiveness before and stands by his trial concession he was ineffective here(TrialTr.2170-72;29.15L.F.1256-58,1324). Kessler testified that had he uncovered the book's contents, he would've moved to strike Juror58 for cause(29.15L.F.1257-58).

Bruns testified there was no strategy reason for not questioning Juror58 about his book once he volunteered authorship(29.15Tr.639).

Juror58

Juror58 testified he didn't believe he violated the court's instruction because his book was "a love story"(29.15Ex.10p.24-25).

Trial Ex.E (TrialTr.2165;TrialL.F.1661-63;29.15Ex.10p.25-26) contains documents that were posted on either Amazon's or Barnes and Noble's web sites about Juror58 and his book(29.15Ex.10p.7-8). Juror58 authored those pages(29.15Ex.10p.7-8)(TrialTr.2165;TrialL.F.1661). Juror58 wrote "many of the chapters are filled with my own true life experiences or someone I had served with [in military Special Forces Green Beret]" (29.15Ex.10p.7-8)(TrialTr.2165;TrialL.F.1661)(TrialEx.E). The descriptive information about the book's content included that the protagonist's life

> changed when his wife of twenty five years was killed and her murderer set free. He sought and found **vengeance** for the first time in his life. When his son was killed he resorted to his Indian heritage to seek justice. He would destroy the very foundation of America that had wronged him. **He would make them all pay for allowing murderers to be set free.**

(29.15Ex.10p.7-8)(TrialTr.2165;TrialL.F.1662)(TrialEx.E)(emphasis added). Juror58 also described his book as "a fictional autobiography"(29.15Ex.10p.7-8,26)(TrialTr.2165;TrialL.F.1662)(TrialEx.E).

Juror58 agreed that his book's plot included the drunk driver faked remorse, which caused the court to be too lenient in its punishment(29.15Ex.10p.30-31). Juror58 agreed that his book's plot included that the only way the protagonist felt he could obtain justice was through vigilantism and carrying-out his own punishment on

the drunk driver(29.15Ex.10p.31). Juror58 agreed that his book espoused the view the court system is too lenient in dealing with criminals, but professed he doesn't hold that view(29.15Ex.10p.32-33).

Findings

Counsel conducted sufficient voir dire to determine disqualifying tendencies(29.15L.F.1389-90). Proper jury selection is trial error(29.15L.F.1389-90).

A reasonable "strategic" decision was made to focus on Juror58 having a police officer son(29.15L.F.1395-96). Kessler testified the book was a self-published, "vanity project"(29.15L.F.1396). Juror58 testified at voir dire he could be fair(29.15L.F.1396). Counsel cannot be ineffective for failing to question about a hobby or profession unlikely to have any bearing on juror fitness(29.15L.F.1396). Prejudice wasn't established as to guilt and Juror58 was replaced for penalty(29.15L.F.1396-97).

Juror58 denied he held the views the court system treats criminal defendants leniently(29.15L.F.1441-43).

Counsel Was Ineffective

Counsel's failure to strike a juror who cannot fairly serve constitutes ineffective assistance. *Presley v. State*,750S.W.2d602,606-09(Mo.App.,S.D.1988). When counsel fails to strike such a juror, a movant isn't required to show as prejudice that there's a reasonable probability the outcome would've been different. *Id.*603-07. Instead, the circumstance is one under *Strickland*, where prejudice is presumed.

*Id.*607. *See, also, Johnson v. Armontrout*,961F.2d748,754-56(8thCir.1992)(prejudice presumed when counsel fails to move to strike biased venireperson).

In *Anderson v. State*,196S.W.3d28,39-42(Mo.banc.2006), this Court found counsel was ineffective for failing to strike an automatic death penalty and burden shifting juror on punishment, without showing prejudice, because that defect is structural error. In cases where there's structural error *Strickland* prejudice isn't required. *Id.* at 39-42. *See also, Brecht v. Abrahamson*,507U.S.619,629-30(1993)(structural errors in the constitution of the trial mechanism "require[e] automatic reversal of the conviction because they infect the entire trial process.").

In *Knese v. State*,85S.W.3d628(Mo.banc2002), this Court found counsel ineffective for failing to move to strike for cause two jurors. Knese's counsel failed to read two jurors' questionnaires. *Id.*632. Counsel testified in the postconviction case that had he read the two jurors' questionnaires then he would've moved to strike them for cause. *Id.*632. This Court noted that the two jurors' questionnaire responses "suggest--although not conclusively establishing--that they would automatically vote to impose death after a murder conviction." *Id.*633.

Knese's counsel's failure to read the two jurors' questionnaires and to question them on their death penalty views established counsel hadn't performed as reasonably competent counsel under *Strickland*. *Knese*,85S.W.3d at 633. Counsel's deficient performance resulted in "a structural error" in jury selection. *Id.*633.

Juror58 approached the bench on his own to inform the court of his "published author" status(TrialTr.710). When Juror58 made his "published author" status

statement he indicated he thought that was something the parties would want to know(TrialTr.710).

Reasonable counsel who had a juror approach to volunteer that he was a "published author" and that the parties would want to know that status would've followed-up by asking why Juror58 thought it was important the parties have that information. *See*, *Strickland* and *Knese*. That reasonable counsel would've so acted is established by Judge Evans' own statement that counsel was "**duty bound to inquire**" of Juror58 about his "published author" status and the subject of his publishing(TrialTr.2172-73)(emphasis added). Kessler, who never has conceded ineffectiveness, conceded both at trial and his 29.15 testimony that he was ineffective for failing to conduct follow-up questioning with Juror58(TrialTr.2170-72;29.15L.F.1256-58,1324).

Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994). Bruns testified it wasn't their strategy to fail to question Juror58 about his book after Juror58 volunteered his authorship(29.15Tr.639). It wasn't reasonable strategy for defense counsel to only be concerned about Juror58's son's police officer employment to the exclusion of failing to inquire about Juror58's "published author" status when Juror58 approached the bench volunteering that information because Juror58 thought the parties would want to know that(29.15L.F.1395-96). *See*, *McCarter*. That Kessler assumed Juror58's book was a self-published "vanity project" was unreasonable in light of Juror58's belief that the parties would want to know he was a "published author"(TrialTr.710).

In reality, the book was published by Kirk House Publishers(29.15Ex.1). Failing to question Juror58 about his "published author" status when he took the unusual action of approaching the bench to volunteer that status was no different than Knese's attorney's failure to read the two jurors' questionnaires, which contained disqualifying information. *See*, *Knese.*

Juror58 was a juror who couldn't fairly serve and his presence on the jury constituted structural error requiring a new trial. *See*, *Strickland*, *Presley, Knese,* and *Anderson.* Juror58 couldn't fairly serve because of his storyline's autobiographical graphic violent content coupled with its underlying backdrop of the drunken-driving death and views that the court system treats criminal defendants too leniently.

Juror58's book opens with the protagonist's Native American mother being raped and murdered while he is a young boy and present(29.15Ex.1p.7-9).

The storyline of Juror58's book is the protagonist's wife is killed by an intoxicated driver who walks away from the scene(TrialTr.2147-61;29.15Ex.1p.107-114). After the defendant was treated leniently and placed on probation, the protagonist, kidnapped, tortured, and killed the defendant(TrialTr.2147-61).

The protagonist viewed the lenient sentence as the product of deception worked on the jury by the defendant's attorney presenting the defendant as remorseful, when he wasn't(29.15Ex.1p.109-10). The lack of remorse was highlighted when, after sentence was imposed, the defendant made comments to the protagonist that he wished that he'd had the opportunity to sexually assault the protagonist's wife(29.15Ex.1p.110-11). Additionally, the exploitation of the court

system was underscored by the defendant driving away from the courthouse on the wrong side of the road while drinking from a whiskey bottle and verbalizing his plans to do drugs and engage in sexually exploitative behavior(29.15Ex.1p.110-11). The protagonist's frustration with the court system was accentuated by "watching the punk receive congratulations from his friends. His lawyer beamed with pride."(29.15Ex.1p.110). The defendant is repeatedly characterized as the "killer" of the protagonist's wife(29.15Ex.1p.109-10).

The protagonist intended to seek his own revenge against the system of laws that allowed his wife's killer such leniency(29.15Ex.1p.130-32,169). The protagonist kidnapped, slowly tortured his wife's killer (while forcing him to look at a photograph of the victim) and ultimately killed the drunk driver by inserting a sharpened wooden stick into his rectum and up into his body(29.15Ex.1p.111-14).

The protagonist, a retired Green Beret, steals nuclear material to seek justice against the criminal justice system for letting murderers go free(29.15Ex.1p.134,146-47,153,158-63). The protagonist's revenge included detonating around St. Louis a stolen atomic bomb from a plane(29.15Ex.1p.161,163,167-68,179). In carrying-out that bomb plot:

> There would widespread [sic] crime overnight. The weak and the timid would die. At the first sign of hunger, the fighting would begin. There'd be widespread looting and uncontrollable mobs. Vigilantes and militias of neighbors would form to fight and bring about a system of justice. Curfews, hangings, and firing squads would become normal. **Judges who passed soft**

sentences on criminals would have no effect on the new rules. By the time things began to return to normal, **America would see the need for making the punishment fit the crime**.

(29.15Ex.1p.163)(emphasis added).

The protagonist's son, prevents his father from carrying out his bomb plan by shooting him as he boards the plane he intends to use to carry-out his plot(29.15Ex.1p.168-70,176-78).

Juror58's book's front and back covers contain blood spatter graphics(29.15Ex.1). The back cover states that the Green Beret protagonist is seeking "vengeance" because his wife was killed and "her murderer set free"(29.15Ex.1). The back cover also states in order for the protagonist "to seek justice" he will have to "figh[t] the system"(29.15Ex.1).

Juror58's Amazon/Barnes and Noble web posting, that Juror58 wrote, states that his book reflects his own experiences(29.15Ex.10p.7-8)(TrialTr.2165;TrialL.F.1661)(TrialEx.E). That same posting continued describing Juror58's protagonist's intentions were: "He would destroy the very foundation of America that had wronged him. He would make them all pay for allowing murderers to be set free." (29.15Ex.10p.7-8)(TrialTr.2165;TrialL.F.1662)(TrialEx.E). Juror58 also described his book as "a fictional autobiography"(29.15Ex.10p.7-8,26)(TrialTr.2165;TrialL.F.1662)(TrialEx.E). Juror58 wrote that his protagonist would carry out his bomb plot so that "**Judges who passed soft sentences on**

criminals would have no effect on the new rules."(29.15Ex.1p.163)(emphasis added).

Juror58 acknowledged his protagonist was engaged in vigilantism, carrying-out his own punishment(29.15Ex.10p.31). Evans' secretary, Mayfield, only had to glance at the book to conclude the avenging was "graphic"(29.15Ex.8p.8). Deputy Wall concluded from reading Juror58's book's back cover that it had violent themes(29.15Ex.9p.14-19). Henshaw-Frances considered the book's content "graphic"(29.15L.F.1349). Juror117 knew the back cover's contents fell within the court's instructions not to bring books about trials or crimes(29.15Tr.128-33). Juror50 knew from reading a few pages of the book that it was something she shouldn't read to abide with the sequestration rules(29.15Tr.200,202). Jury administrator Nigliazzo indicated that had she known about the themes of lack of remorse or a criminal defendant being treated too leniently, then she'd have called it to Evans' attention(29.15Ex.11p.17-18).

The violent graphic autobiographical storyline linked to the opinion of the court system that it treats criminal defendant's too leniently meant Juror58 couldn't fairly serve. Juror58 wasn't excluded because of counsels' ineffectiveness in failing to follow-up his "published author" status with questioning that would've revealed his inability to fairly serve, based on his book's contents, and then moving to strike for cause. *See*, *Strickland*, *Presley*, *Knese*, and *Anderson*.

Juror58's protestations that his book was "a love story" (29.15Ex.10p.24-25) and he doesn't hold the view courts are too lenient with criminal defendant's

(29.15Ex.10p.32-33) doesn't mean he could fairly serve. Juror58 denied his book's plot included that the protagonist intended to make America pay for allowing murderers to go free until he was shown his book's Amazon/Barnes and Noble web posting that said exactly that(29.15Ex.10p.29-31;TrialL.F.1662). Juror58's protestations are in keeping with his post-trial anxiety with the West Plains newspaper casting him as a "tainted juror" (29.15Ex.10p.19-20) and his feelings of needing to carry his pistol in response to having been so publicly cast(29.15Ex.10p.20). Juror58's fears are underscored by his concerns about "strange cars and vehicles" parking around his house post-jury service(29.15Ex.10p.35). Juror58 knew his conduct had become the reason to void a conviction and sentence in a very serious and high profile case and he knew his conduct got him into embarrassing trouble when he asked the jury's Deputy driver if it was "okay" for him to carry his pistol(29.15Ex.10p.20).

Because Juror58 was a juror who couldn't fairly serve, counsel was ineffective, structural error occurred, and a new trial is required. *See*, *Strickland*, *Presley, Knese,* and *Anderson.*

II.

JUROR58's BOOK – INEFFECTIVE NEW TRIAL MOTION HEARING

The motion court clearly erred in denying the claim counsel was ineffective for failing to call as witnesses at the motion for new trial hearing jurors, court personnel, and Judge Evans (after disqualifying Judge Evans) to testify and support how Juror58's actions were prejudicial juror misconduct and in addition violated Evans' directive prohibiting recreational activities including crime or legal subject related materials when Evans through a series of actions invited counsel to present juror misconduct evidence because Lance was denied his rights to due process, a fair and impartial jury, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have called all these individuals and Lance was prejudiced as they would have established a new trial was required.

Counsel was ineffective for failing to call jurors, court personnel, and Judge Evans (after disqualifying him) at the motion for new trial hearing to establish Juror58's prejudicial juror misconduct.

Motive Theory

Respondent's evidence was that Lance was involved in an alcohol related accident in November, 2004 where his passenger, Bayless, died(TrialTr.1039-47,1074,1091-92,1110). Graham was actively investigating the circumstances of

Bayless' death at the time he was shot(TrialTr.1047-49,1065,1070-71,1078,1093-95,1100-01,1104-05,1133-40,1151-52,1156-57,1312-16).

Juror58 Trial Proceedings

During a conference record, Judge Evans noted predecessor counsel requested that books and movies available to the jurors be limited to "G" rated materials(TrialTr.769-71). Trial counsel withdrew the "G" rated request, specifying though that "overt, like, crime stories" be forbidden(TrialTr.769-71).

When jury selection was completed, the court instructed the jurors they were allowed to bring books and movies, but those shouldn't involve crimes or legal matters(TrialTr.988). In particular the court stated:

> You will be able to bring books with you, even movies with you, to the trial. The cautionary note on there, the only one the attorneys ask that I mention, avoid **movies and books about trials**, particularly periodicals or legal documents. That's normally something, again, the law has to be supplied by the Judge, not due to your independent research and investigation. So general movies, avoiding **crime** shows and **issues of that nature**.

(TrialTr.988)(emphasis added).

On Friday, March 27th, the jury convicted Lance of first degree murder and penalty phase evidence was presented(TrialTr.xiii-xv,2059,2061-2137,2146). Counsel obtained a copy of Juror58's book on Friday night and made a detailed record the next day, Saturday, March 28th, about the book's prejudicial contents(TrialTr.2147-2208).

Counsel urged that Juror58 had misled everyone about his ability to fairly serve(TrialTr.2149-50,2159-62,2170-71,2174-75). Counsel requested questioning be done of Juror58 as to why he didn't disclose the book's substance as well as questioning the other jurors about their exposure to the book(TrialTr.2162-63,2171,2173-75).

Counsel "concede[d]" ineffectiveness in failing to question Juror58 about his book when he volunteered he was a "published author"(TrialTr.2170-72).

The court indicated counsel would have the opportunity to address this matter post-trial, including the opportunity to present evidence(TrialTr.2173-74,2196).

When the court replaced Juror58 with an alternate, it told Juror58 that he could be subpoenaed at a later time about what he did(TrialTr.2207).

Post-Trial Juror58 Matters

On Monday, March 30, 2009, the court, on its own motion, entered an order on Juror58 matters(TrialL.F.1734). The order stated that an additional hearing that could include testimony, other evidence, and argument may be necessary(TrialL.F.1734). The order prohibited the jurors and anyone else from discussing or commenting on the case(TrialL.F.1734).

On April 22, 2009, counsel filed a motion for new trial(TrialL.F.1737-42). It alleged as error the trial court's refusal to allow counsel to question Juror58 about his book and its refusal to allow all jurors to be examined about Juror58's actions(TrialL.F.1739-40).

On April 29, 2009, Judge Evans sent a letter to both parties(TrialL.F.1756). The letter inquired whether either party intended to subpoena any jurors to the motion for new trial hearing and if they were, Evans wanted proposed questions in advance(TrialL.F.1756).

At the May 22, 2009, motion for new trial hearing, counsel indicated that they had already contacted the court to inform it that they didn't intend to call any jurors(TrialTr.2231-32).

29.15 Evidence

Kessler believed that Juror58's actions violated the court's instruction that the jurors not view anything crime related during trial(29.15L.F.1259).

Kessler and Counsel Henshaw-Frances testified Lance's aunt, Marcie Miller, became concerned about Juror58's book and helped counsel get a copy of it the very same night she called it to their attention(29.15L.F.1248-49,1253-54,1348-49). The book's content was "graphic"(29.15L.F.1349).

Trial Ex.E (TrialTr.2165;TrialL.F.1661-63;29.15Ex.10p.25-26) contained documents posted on either Amazon's or Barnes and Noble's web sites about Juror58's book(29.15Ex.10p.7-8). Juror58 wrote: "many of the chapters are filled with my own true life experiences or someone I had served with [in military Special Forces Green Beret]"(29.15Ex.10p.7-8)(TrialTr.2165;TrialL.F.1661)(TrialEx.E). The descriptive information about the book's content included that the protagonist's life

> changed when his wife of twenty five years was killed and her murderer set free. He sought and found **vengeance** for the first time in his life. When his

son was killed he resorted to his Indian heritage to seek justice. He would destroy the very foundation of America that had wronged him. **He would make them all pay for allowing murderers to be set free.**

(29.15Ex.10p.7-8)(TrialTr.2165;TrialL.F.1662)(TrialEx.E). Juror58 also described his book as "a fictional autobiography"(29.15Ex.10p.7-8,26)(TrialTr.2165;TrialL.F.1662)(TrialEx.E). Juror58 gave an autographed copy to the juror coordinator, Michele Nigliazzo(29.15Ex.10p.11-13,16;29.15Ex.11p.9-11,16,21).

Juror58 testified that his protagonist felt the court system was too lenient on the drunk driver(29.15Ex.10p.26-27). Juror58 testified that he didn't believe he violated the court's order because his book was "a love story"(29.15Ex.10p.24-25).

Juror117 served on Lance's jury(29.15Tr.122). Juror117 and her husband owned a gift shop specializing in Native American items(29.15Tr.127). Juror58 had been to their gift shop a few weeks before trial and discussed with Juror117's husband about their store selling Juror58's book(29.15Tr.127). While Juror117 and her husband were waiting outside the Carter County Courthouse for the bus to transport the jurors to Howell County, Juror58 handed a copy of his book to Juror117's husband, who then handed it to Juror117(29.15Tr.127,133). Juror117 identified 29.15 Exhibit 1 as the same book that Juror58 gave to her(29.15Tr.127-28). Juror117 put the book in her backpack and boarded the bus with it for Howell County/West Plains(29.15Tr.127-28). Juror117 didn't read the book's back cover when Juror58 handed it to her, but if she had, she wouldn't have taken it with her to Howell County

because she would've regarded it as falling within the trial court's instruction not to bring books about trials or crimes(29.15Tr.128-33). Late one night while trial was in progress Juror117 skimmed Juror58's book(29.15Tr.128-29).

Juror3 ("Ken") served on Lance's jury(29.15Tr.191). After jury selection was completed, during trial, Juror58 gave Juror3 his business card that said author "*Indian Giver*," with his phone number written on the back and showed Juror3 his book(29.15Tr.192-95). Juror3 read the back cover, during trial, when Juror58 showed him it and Juror3 gave Juror58 "feedback"(29.15Ex.10p.14-15;29.15Tr.195). After trial, Juror3 purchased Juror58's book(29.15Tr.195).

Juror50 served on Lance's jury(29.15Tr.198). Early in the trial's evidentiary phase, Juror58 gave Juror50 a copy of his book(29.15Tr.199-201). Juror50 read a few pages and her reaction was the book was something she shouldn't be reading in order to abide by the sequestration rules and she returned it to Juror58(29.15Tr.200,202).

Bruns recalled that Juror58's book's theme included the criminal justice system lets murderers off too easily(29.15Tr.636). Even though the court made available to counsel the opportunity to call jurors at sentencing, counsel didn't because counsel "naive[ly]" believed there was "a better chance" to avoid death by not calling jurors so as to avoid "open[ing] up that can of worms"(29.15Tr.643-46). Kessler testified he was unaware of any judge giving death when the jury hung(29.15I.F.1329).

Juror58's book's front and back covers contain blood spatter graphics(29.15Ex.1). The back cover states the Green Beret protagonist is seeking

"vengeance" because his wife was killed and "her murderer set free"(29.15Ex.1). The back cover also states in order for the protagonist "to seek justice" he will have to "figh[t] the system"(29.15Ex.1).

April Mayfield was Judge Evans' secretary(29.15Ex.8p.3). Mayfield didn't remember how Juror58's book got to her(29.15Ex.8p.5). Mayfield believed Juror58's book was in her office early during the week of trial Monday, March 23, 2009 through Friday, March 27, 2009, because she didn't work that Saturday(29.15Ex.8p.5). Mayfield only glanced at the book and understood it involved a man who had a family member killed and that he avenged the death(29.15Ex.8p.8). Mayfield recalled the content of the avenging was "graphic"(29.15Ex.8p.8).

Howell County Deputy Mike Wall was responsible for security(29.15Ex.9p.3). The jury's hotel television was modified to limit viewing to Disney type movies(29.15Ex.9p.9). All televisions, radios, and telephones were removed from jurors' rooms(29.15Ex.9p.9). Wall monitored generally the jurors' reading materials(29.15Ex.9p.17).

One day after court at the hotel, Juror58 approached Wall and told Wall he'd authored a book and gave Wall a copy(29.15Ex.9p.11-13,16). Wall read the book's synopsis back cover and thought it was "trash" and knew it had violent themes(29.15Ex.9p.11,23-24). Wall gave the book to Mayfield as something Judge Evans ought to know about(29.15Ex.9p.14-19). An hour after Wall gave the book to Mayfield, Evans asked Wall where Wall got it(29.15Ex.9p.19).

Judge Evans testified he first saw the book Friday evening, March 27, 2009(29.15Ex.30p.9-10,12-13). Judge Evans testified that it was possible that he'd seen Juror58's book earlier than Friday evening(29.15Ex.30p.12-13). Judge Evans' secretary, Mayfield, had put the book on his desk before she left for the day on Friday(29.15Ex.30p.12). That evening, Judge Evans glanced at the book without reading it(29.15Ex.30p.13,18). Judge Evans decided he needed to discuss the matter with counsel the next day because the subject of the book was a criminal case(29.15Ex.30p.13-14).

Michele Nigliazzo was an attorney volunteer who served as jury coordinator(29.15Ex.11p.5-9). Nigliazzo recalled Judge Evans had cautioned the jurors not to bring outside reading or viewing materials and such items would be provided for them and carefully screened(29.15Ex.11p.7). All of the jurors' personal reading materials were taken away(29.15Ex.11p.14-15). Nigliazzo reviewed all reading materials' content that she made available to the jurors(29.15Ex.11p.14-15). Likewise, if jurors wanted to bring magazines Nigliazzo reviewed them(29.15Ex.11p.15-16). Jurors were allowed to bring their own reading materials, like quilting magazines, so long as they complied with Evans' instruction(29.15Ex.11p.22). Before movies were shown to jurors, Nigliazzo reviewed their content(29.15Ex.11p.15-16).

Juror58 approached Nigliazzo asking her whether she'd like to read his book and handed her a copy(29.15Ex.11p.9). That contact was just a nuisance such that

nothing stood out and she put the book in her bag without looking at it(29.15Ex.11p.9-11,16,21).

After the defense made its Saturday record, Judge Evans discussed with Nigliazzo Juror58's book(29.15Ex.11p.12). Evans questioned Nigliazzo about the jurors serving and the alternates and the status of their sequestration because he was concerned about contamination(29.15Ex.11p.13-14). Nigliazzo alerted Judge Evans that Juror58 gave her a copy of his book(29.15Ex.11p.13-14). Nigliazzo was unaware Juror58 gave copies of his book to other jurors(29.15Ex.11p.12). If Nigliazzo had been alerted that Juror58 was disseminating anything crime related, then she would've intervened(29.15Ex.11p.16). Nigliazzo knew that all of the jurors had been made aware that it was critical they not have access to anything outside the evidence that could impact their verdicts because she'd expressly conveyed that requirement to them(29.15Ex.11p.17). Juror58's actions were especially disconcerting to Nigliazzo because she and everyone connected with ensuring there were no inappropriate influences on the jury had been "Johnny on the spot the whole time"(29.15Ex.11p.20-21).

If Nigliazzo had been aware that Juror58's books had themes of lack of remorse or a criminal defendant being treated too leniently with the defendant being kidnapped and tortured by the protagonist, then Nigliazzo would've looked at it and called it to Evans' attention(29.15Ex.11p.17-18). All of the jurors, including Juror58, knew it was really important that they not have any inappropriate materials that would impact them because Nigliazzo had so cautioned them(29.15Ex.11p.17). The jurors

were allowed to read materials as long as they complied with Evans' instruction and Nigliazzo gave them that same instruction(29.15Ex.11p.22).

Findings

Not all jurors got a copy of the book, distribution was "minimal"(29.15L.F.1435-36). Judge Evans' admonitions as to what materials were permitted weren't MAI instructions, instead were like the court pamphlet provided jurors in *State v. Storey*,901S.W.2d886(Mo.banc1995)(29.15L.F.1436). Judge Evans' admonitions on prohibited materials "was not an instruction of the court concerning the law of the case."(29.15L.F.1436).

Juror58's actions didn't reflect "intentional misconduct," but "at most a miscommunication about what the court intended."(29.15L.F.1440). Juror58's testimony was he didn't intend to violate the court's instructions(29.15L.F.1440-43). Juror58 denied he held his book's views the court system treats criminal defendants leniently(29.15L.F.1441-43). Judge Evans' crime show admonition was specific to movies and limited to precluding books about trials(29.15L.F.1442). Evans' comments were intended for the jury to follow the law and prohibited independent research(29.15L.F.1442-43).

Counsel wasn't ineffective for failing to investigate juror misconduct after Evans' April 29, 2009, letter because that letter was received after the time for filing the motion for new trial and it couldn't be amended(29.15L.F.1446-47). No prejudice was shown(29.15L.F.1443,1446-47).

Counsel Was Ineffective

The right to a jury trial guarantees a fair trial by a panel of impartial, indifferent jurors. *Irvin v. Dowd*,366U.S.717,722(1961).

Lack of diligent investigation and preparation isn't protected by a presumption in favor of counsel and cannot be justified as strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8th Cir.1991). Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994).

In *State v. Post*,804S.W.2d862,862(Mo.App.,E.D.1991), the defendant was granted a new trial because of juror misconduct during a sequestered jury trial. While Post's appeal was pending, he filed a motion to remand based on newly discovered evidence of juror misconduct. *Id.*862. The case was remanded where the trial court held a hearing and found juror misconduct warranting a new trial. *Id.*862. The conduct involved deputies partying with and having sex with sequestered jurors. *Id.*862-63.

The *Post* trial court found the jury was denied the opportunity and ability to act as a sequestered jury as guaranteed under §547.020(2) so that they were distracted from due and fair consideration of the facts. *Post*,804S.W.2d at 863. The trial court also found the verdict didn't command confidence and was replete with suspicion of improper bias. *Id.*863.

Reasonable counsel here would've called jurors, court personnel, and Judge Evans at the motion for new trial hearing to establish prejudicial juror misconduct.

On Saturday, March 28th, when counsel made their detailed record about what they'd learned the night before about Juror58's book (TrialTr.2147-2208), Judge

Evans told counsel he'd give them the opportunity to address Juror58's actions post-trial, including the opportunity to present evidence(TrialTr.2173-74,2196). When Evans discharged Juror58, he cautioned Juror58 he could be subpoenaed later(TrialTr.2207).

On Monday, March 30th, Judge Evans, on his own motion, entered an order that provided an additional hearing could include testimony, other evidence, and argument on Juror58's actions(TrialL.F.1734). Everyone was ordered not to discuss the case(TrialL.F.1734).

The April 22, 2009, motion for new trial alleged as error the trial court's refusal to allow counsel to question Juror58 about his book and its refusal to allow all jurors to be examined about Juror58's actions(TrialL.F.1739-40).

On April 29th, Judge Evans wrote to both sides asking whether anyone intended to subpoena any jurors, and if they were, he wanted proposed questions in advance(TrialL.F.1756).

At the May 22, 2009, motion for new trial hearing, counsel indicated that they had already contacted the court to inform it that they didn't intend to call any jurors(TrialTr.2231-32).

Reasonable counsel who'd wanted to question Juror58 and the other jurors during trial (TrialTr.2162,2171,2174-75) would've called the jurors and court personnel at the motion for new trial hearing. Reasonable counsel who'd vociferously expressed outrage at trial about Juror58's "published author" status(TrialTr.2147-2208) and complained in their motion for new trial about having been prohibited from

questioning all the jurors (TrialL.F.1739-40), would've called all the jurors, court personnel, and Judge Evans as witnesses at the motion for new trial hearing. That reasonable counsel would've so acted is shown by Judge Evans' having **invited and encouraged** counsel to take that action through the following: (1) Saturday, March 28th stating counsel would have the opportunity to present evidence post-trial(TrialTr.2173-74,2196) and advising Juror58 he could be subpoenaed to testify (TrialTr.2207); (2) March 30th order authorizing a hearing providing evidence could be presented and prohibiting discussion about the trial(TrialL.F.1734); and (3) April 29th letter inquiry whether the parties intended to subpoena jurors and asking for proposed questions(TrialL.F.1756). *See*, *Strickland*, *Kenley*, *McCarter*, and *Post*. Judge Evans wanted to get to the bottom of whether Lance was prejudiced by Juror58's actions, but counsel didn't avail themselves of proving that prejudice.

The decision in *Stotts v. Meyer*,822S.W.2d887(Mo.App.,E.D.1991), a case where juror misconduct resulted in a new trial, exemplifies how reasonable counsel on notice of juror misconduct proceeds and proves it up. There the offending juror was subpoenaed and testified at the motion for new trial hearing and that testimony was the basis for granting a new trial. *Id.*888,891.

Counsels' reason for not investigating and calling the jurors at the motion for new trial hearing was they "naive[ly]" believed there was "a better chance" to avoid judge imposed death by not calling the jurors so as to avoid "open[ing] up that can of worms"(29.15Tr.643-46) and counsel was unaware of any judge imposing death when the jury hung(29.15L.F.1329). Not calling witnesses wasn't reasonable strategy - it

was an abdication of counsels' duty to investigate. *See*, *Strickland*, *Kenley*, *McCarter*, and *Post*. Moreover, there is an extensive history of judges imposing death where juries hung. *See*, *e.g.*, *State v. Sandles*,740S.W.2d169(Mo.banc1987); *State v. Walls*,744S.W.2d791(Mo.banc1988); *State v. Griffin*,756S.W.2d475(Mo.banc1988); *State v. McMillin*,783S.W.2d82(Mo.banc1990); *State v. Wacaser*,794S.W.2d190 (Mo.banc1990); *State v. Powell*,798S.W.2d709(Mo.banc1990); *State v. Six*,805S.W.2d159(Mo.banc1991); *State v. Shurn*,866S.W.2d447(Mo.banc1993); *State v. Whitfield*,939S.W.2d361(Mo.banc1997) and *State v. Whitfield*,107S.W.3d253 (Mo.banc2003); *State v. Taylor*,944S.W.2d925(Mo.banc1997); *State v. Ervin*,979S.W.2d149(Mo.banc1998); *State v. Morrow*,968S.W.2d100(Mo.banc1998) and SC79112 order of October 28, 2003; *State v. Barriner*,34S.W.3d139 (Mo.banc2000); *State v. Thompson*,85S.W.3d635(Mo.banc2002); *State v. Thompson*,134S.W.3d32(Mo.banc2004); *State v. McLaughlin*,265S.W.3d257 (Mo.banc2008).

Contrary to the findings, the motion for new trial didn't need out-of-time (29.15L.F.1446-47) amending because it already alleged as error denial of the opportunity to question all the jurors(TrialL.F.1739-40). Additionally, in *Post*, the case was remanded from the Eastern District for a juror misconduct hearing based on a motion filed in the Eastern District - long after the time for filing a motion for new trial. *See*, *Post*, *supra*. *Cf. Stotts*, *supra*.

Moreover, reasonable counsel would've called Judge Evans (after disqualifying). *Strickland*. Evans and his court personnel had knowledge of the

circumstances surrounding how Juror58's book came to Evans' and other court personnel's attention. *Strickland*.

On direct appeal, this Court rejected multi-pronged challenges to Juror58's book because there was no evidence, and only assumption, that Juror58 shared his book with other jurors. *State v. Shockley*,410S.W.3d179,200(Mo.banc2013). This Court's analysis included rejecting the complaint Evans bore responsibility for lack of a factual record because Evans' April 29th letter afforded both sides the opportunity to present evidence and defense counsel expressly waived that right. *Id*.201.

The 29.15 evidence established *Strickland* prejudice because there was evidence Juror58 shared his book with other jurors, which was what this Court found lacking on direct appeal. Juror117 skimmed Juror58's book one night and wouldn't have taken it from Juror58 had she read the back cover because she felt the book violated Evans' instruction not to bring books about trials or crimes(29.15Tr.128-33). Juror3 read the book's back cover and gave Juror58 "feedback"(29.15Ex.10p.14-15;29.15Tr.192-95). Juror50 read a few pages and stopped reading because she thought it violated Evans' sequestration directives and returned Juror58's book to Juror58(29.15Tr.200,202). Juror58's book's dissemination required a new trial under §547.020 because documents the court had prohibited reached jurors and prevented fair and due consideration of Lance's case. *See*, *Post*.

Respondent's motive theory was Lance killed Graham because of Lance's involvement in Bayless' drunken driving death(TrialTr.665,1039-49,1065,1070-71,1074,1078,1091-95,1100-01,1110,1133-40,1151-52,1156-57,1312-16). Juror58's

protagonist's actions were motivated by his perception of a too lenient court system in dealing with the drunken driver who killed his wife(TrialTr.2147-61;29.15Ex.1p.107-14;29.15Ex.10p.26-27). That parallel takes on added significance when Juror58's book's content is considered. The book's front and back covers' have blood spatter graphics(29.15Ex.1). The back cover summary about the protagonist seeking "vengeance" for his wife when "her murderer [was] set free," and his need "to seek justice" by "fighting the system," is a wide ranging condemnation of how justice is dispensed in criminal cases(29.15Ex.1). The Amazon/Barnes and Noble description states the protagonist "sought and found **vengeance.**"(29.15Ex.10p.7-8)(TrialTr.2165;TrialL.F.1662)(TrialEx.E)(emphasis added). In particular, the book's entire story line is directed at seeking violent revenge in response to a too lenient court system's handling of the protagonist's wife's death(29.15Ex.1p.130-32,169,29.15Ex.10p.26-27). Moreover, the book opens with the protagonist's mother being raped and murdered while he was present as a young boy(29.15Ex.1p.7-9).

Respondent's motion to exclude Trooper Eads' letter to Lance recounting what Lance would experience immediately before and during his execution urged that Eads' letter was "completely irrelevant," didn't establish any material issues, was extremely prejudicial, and would distract the jury from issues it had to resolve; this argument is especially relevant to Juror58's actions(TrialL.F.687-88;PreTrialTr.225-26). Eads' letter stated that Lance didn't know who Eads was, but Lance was going to find out who all of Graham's "brothers" were because of what Lance did to their "family"(TrialL.F.689). Eads' letter was about "vengeance," not only for Graham

and Graham's immediate family, but also the entire Highway Patrol. Respondent didn't want the jury to hear about Eads' call for "vengeance," and likewise, Lance's jurors shouldn't have been exposed to Juror58's violent book calling for "vengeance" because of a court system that treated criminal defendants too leniently.

Additionally, Juror58's book was upsetting to counsel because of the drunk driving parallels and its theme that the criminal justice system lets killers off too easily(29.15Tr.636). This Court's direct appeal opinion said Lance's case differed from the defendant in Juror58's book, who obtained leniency for his drunken driving homicide, because the issue here wasn't whether to punish Lance for drunken driving associated with Bayless' death, but whether he was guilty of shooting Graham. *Shockley*,410S.W.3d at 201 n.12. Juror58's book espoused the view that the disposition of the drunk driving homicide was reflective of a larger dysfunctional, "too lenient" court system. In Lance's case, the alleged motive for shooting Graham was Lance's role in Bayless' drunken driving associated death. Juror58's "too lenient" court system theme was prejudicial because Lance's jury was, as a practical matter, considering whether Lance was to be treated "too leniently" for two homicides, one of which was drunken driving, like in Juror58's book, and the other Graham's death.

Like the jurors, Evans' secretary, Mayfield, only had to glance at the book to conclude the avenging was "graphic"(29.15Ex.8p.8). Deputy Wall concluded from reading the back cover Juror58's book had violent themes and Wall gave it to Mayfield because he thought Judge Evans ought to know(29.15Ex.9p.14-19). Judge

Evans only had to glance at the book without reading to know its subject was a criminal case requiring discussion with counsel(29.15Ex.30p.13-14). Attorney juror coordinator Nigliazzo meticulously screened personal reading materials and movies to avoid improper influences(29.15Ex.11p.7,14-16,22) and would've intervened to address Juror58's actions had she been alerted to them(29.15Ex.11p.12,16-17,20-21). Mayfield, Wall, Evans, and Nigliazzo all immediately recognized that Juror58's book was at odds with Evans' directive to avoid prejudicial matters that the jurors weren't to have through access to books and movies involving crimes or legal matters. The juror misconduct here is like that in *Post*, the verdicts don't command confidence and the results are replete with suspicion of improper bias.

The findings assert that because Judge Evans' admonition prohibiting crime and legal related materials wasn't part of an official MAI instruction it was like the Missouri Bar's generalized juror informational pamphlet found not to be an improper instruction in *State v. Storey*,901S.W.2d886,892(Mo.banc1995)(29.15L.F.1435-40). To find Judge Evans' admonition wasn't an official MAI instruction, and therefore, Juror58's actions didn't violate Lance's right to a fair trial demeans and trivializes the rule of law. MAI Instruction #1 directed the jurors it was their duty to determine the facts only from the evidence presented in court(Trial L.F.1670). Judge Evans' admonition about crime and legal materials was a precautionary admonition intended to ensure compliance with MAI Instruction #1. Judge Evans' actions were geared towards maintaining the integrity of the jury's deliberations like Deputy Wall's actions of modifying the hotel's televisions, radios, and telephones (29.15Ex.9p.9)

and Nigliazzo's screening of materials(29.15Ex.11p.14-16,22). Moreover, when Juror117 and Juror50 familiarized themselves with Juror58's book, they concluded it violated Judge Evans' instruction about not having materials relating to crimes or trials(29.15Tr.128-33,200,202).

To narrowly construe Evans' admonition to encompass only movies involving crimes and only books about trials does similar disservice to what MAI Instruction #1 seeks to guard as to trial integrity and what Judge Evans intended to accomplish(29.15L.F.1442). In any event, Juror58's book includes the rendering of the trial of the person responsible for the drunken driving death of the protagonist's wife (29.15Ex.1 p.109-11), so even applying the 29.15 findings' narrow reading of Judge Evans' admonition to books about trials, that is what Juror58's book involved.

When trial counsel withdrew the "G" movie rated request, he specified though that "overt, like, crime stories" be forbidden(TrialTr.769-71). Juror58's crime story has two homicides - the murder and rape of the protagonist's mother in his presence as a young boy and the drunken driving prosecution for the killing of the protagonist's wife(29.15Ex.1p.7-9,110).

That all jurors weren't exposed to Juror58's book misses the mark(29.15L.F.1435-36). Exposing even one juror to the parallel of respondent's alleged motive involving Bayless to Juror58's protagonist's vengeful and homicidal actions and the book's theme of a "too lenient" criminal court system was prejudicial.

Likewise, it is irrelevant whether Juror58's actions constituted intentional misconduct or an intent to violate the court's instructions(29.15L.F.1440-43). In *Post*,

it was the sexualized party atmosphere which called into question the fair consideration of the facts §547.020 required without any showing of intentional misconduct. Here, the misconduct was more egregious than *Post* because of Juror58's book's "vengeance" theme(29.15Ex.10p.7-8)(TrialTr.2165;TrialL.F.1662)(TrialEx.E)(29.15Ex.1 back cover).

Lance was prejudiced by counsels' ineffectiveness in failing to call at the motion for new trial hearing jurors, court personnel, and Judge Evans to prove Juror58's juror misconduct that denied him a fair trial. *Strickland*.

A new trial is required.

III.

JUDGE EVANS' NON-DISCLOSURE OF JUROR58'S BOOK

The motion court clearly erred in denying the claim Judge Evans failed to timely disclose that Juror58 brought his book to the sequestered jury because Lance was denied his rights to due process, a fair and impartial jury, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that Evans had an affirmative duty to timely apprise counsel of Juror58's misconduct of having brought his book to the sequestered jury and in failing to carry-out that duty Evans deprived counsel of the opportunity to develop prejudice warranting a mistrial or alternatively ordering a new trial.

Judge Evans had an affirmative duty to timely disclose to Lance's counsel Juror58 brought his book to the sequestered jury. That failure to disclose to counsel what Juror58 did deprived counsel of the opportunity to establish the prejudice to Lance of Juror58's actions supportive of a mistrial or granting a new trial.

I. Pleadings

The pleadings alleged Evans failed to "timely disclose" to counsel that Juror58 had brought his book with him to the sequestered jury(29.15L.F.430,448-49).

II. Timing of Learning Juror58's Books' Contents And Hearing Record On Juror58

On Friday, March 27th, Lance was convicted of first degree murder and penalty phase began that day with all penalty evidence concluded that day(TrialTr.xiii-xv,2059,2061-2137,2146).

On Saturday, March 28th, counsel made a lengthy record informing Evans what they had learned the night before (Friday, March, 27th) as to Juror58's book's contents(TrialTr.2147-2208). Counsel requested a mistrial(TrialTr.2161). Alternatively, counsel requested Juror58 be replaced with an alternate(TrialTr.2161-62). Counsel requested questioning be done of Juror58 as to why he didn't disclose the book's substance as well as questioning the other jurors about their exposure to the book(TrialTr.2162-63,2171,2173-75).

Juror58 was only replaced with an alternate after the guilt phase verdict was rendered(TrialTr.xiii-xvi,2059,2198-2206,2210-11). The substitution was immediately followed by the Court reading the penalty instructions and respondent making its initial penalty argument(TrialTr.2211). Thus, Juror58 was the foreperson for guilt, but removed from serving in penalty(TrialTr.2201;29.15Ex.10p.5).

III. Counsel

A. Kessler

Kessler testified that he apprised Judge Evans that Juror58 had written a book whose contents gave reason to believe Juror58 hadn't truthfully answered voir dire questions about whether he could be fair and impartial at the Saturday hearing after Friday evening's discovery of the contents of Juror58's book(29.15L.F.1255,1259). Evans didn't disclose that Evans knew Juror58 brought his book to the sequestered

jury when the Saturday record was made(29.15L.F.1255,1258-59). Had Evans disclosed the book's presence with the jury, then there would've been additional grounds to examine Juror58, besides those that were argued at the Saturday morning record(29.15L.F.1258-59,1262). Those additional grounds of inquiry would've included Juror58 having violated the court's order not to bring or watch anything involving crimes or trials(29.15L.F.1259).

Evans never told counsel at the Saturday hearing or during trial that he had a copy of the book that he'd reviewed(29.15L.F.1259). Evans didn't apprise counsel before the motion for new trial was filed on April 22, 2009, that Juror58 had given his book to the bailiff(29.15L.F.1259-60). Only after the motion for new trial was filed, did counsel get notice from Evans in his April 29, 2009, letter that Juror58 had given a copy of his book to the court's bailiff(TrialL.F.1756;29.15L.F.1259-60). Further, Kessler would've raised additional issues in the motion for new trial had he been aware that Evans had a copy of the book(29.15L.F.1263). The additional issues would've included Juror58 gave his book to other jurors(29.15L.F.1263).

Kessler testified that Judge Evans "withheld information" from them about Juror58(29.15L.F.1326). If Evans had allowed Kessler to question Juror58, the motion for new trial would've included what they would've learned(29.15L.F.1326). If Kessler had known the bailiff had a copy of Juror58's book and known Juror58 gave his book to other jurors, then those would've been included in the motion for new trial(29.15L.F.1326). Evans' "withholding" of information prevented counsel from including matters in the motion for new trial(29.15L.F.1326).

Kessler testified that he didn't conduct any investigation efforts from the time of the verdicts until the filing of the motion for new trial because Evans' Monday, March 30th order precluded them from talking to the jurors(29.15L.F.1326-27;TrialL.F.1734).

B. Bruns

Bruns testified when they learned of the contents of Juror58's book that Judge Evans already had received the book through his bailiff and reviewed it(29.15Tr.640). Judge Evans and his staff never informed defense counsel prior to the filing of the motion for new trial that Juror58 brought copies of his book to the trial and supplied those copies to other jurors(29.15Tr.640-41). After the motion for new trial was filed, counsel received an April 29, 2009 letter from Judge Evans that Juror58 gave a copy of his book during trial to the bailiff(29.15Tr.641-42;TrialL.F.1756). At sentencing, counsel wasn't aware Juror58 had given a copy of his book to the Juror Coordinator(29.15Tr.644-45). Bruns' expectation was that both sides should've known everything there was to know about Juror58's actions(29.15Tr.723).

IV. Court Personnel/Judge Evans

Juror58 gave a copy of his book to court security officer Wall at the motel one day after court(29.15Ex.9p.3,11-13,16-17). Wall gave the book to Evans' secretary, Mayfield, the next morning as something Evans ought to know about(29.15Ex.8p.3;29.15Ex.9p.14-19). Evans testified he first saw the book Friday evening March 27, 2009, but it was possible he'd seen the book even earlier than Friday evening(29.15Ex.30p.9-10,12-13).

Besides Evans' testimony that he saw the book Friday, Mayfield's testimony that she did not work on Saturday (29.15Ex.8p.5) and Wall's testimony that one hour after Wall gave the book to Mayfield Evans asked Wall where Wall got the book (29.15Ex.9p.19) established Evans was aware by at least Friday that Juror58's book was with the jury. Thus, at the time of the Saturday hearing Evans knew Juror58's book was with the sequestered jury.

V. Jurors Who Got Juror58's Book

Juror117 was given a copy of Juror58's book and wouldn't have taken it had she first read the back cover because she would've regarded it as falling within Evans' instruction not to bring books about trials or crimes(29.15Tr.128-33). Juror117 skimmed the book's contents one night after court(29.15Tr.128-29).

Juror3 received a copy of the book and read the back cover during trial and gave Juror58 "feedback"(29.15Ex.10p.14-15;29.15Tr.195).

Juror50 received a copy and read a few pages and her reaction was the book was something she shouldn't be reading in order to abide by the sequestration rules and she returned it to Juror58(29.15Tr.200,202).

VI. Findings

There was no "judicial misconduct" for having "ex parte" contacts(29.15L.F.1443-46). The "ex parte" communications took place between a court security officer and Juror58, not Evans(29.15L.F.1446). *Rushen v. Spain*,464U.S.114(1983), was discussed to reject Lance's "ex parte" claim(29.15L.F1444-46).

VII. Evans' Failure To Make Timely Disclosure

Judge Evans' failure to timely disclose to counsel Juror58's bringing his book to the sequestered jury is a cognizable, reviewable claim on 29.15.

Generally trial errors are outside the scope of post-conviction actions. *McQuary v. State*,241S.W.3d446,452-53(Mo.App.,W.D.2007). However, there's an exception to that rule where the errors alleged are constitutional violations involving fundamental fairness and exceptional circumstances are shown which justify not raising the constitutional grounds on direct appeal. *Id.*452-53. When a party hasn't had the prior opportunity to litigate his claim of juror misconduct, it can be brought on 29.15. *Id.*450-54. Judge Evans' failure to timely disclose he knew at the Saturday record hearing that Juror58 brought his book to the sequestered jury is a situation involving constitutional violations impacting fundamental fairness and couldn't have been raised on direct appeal. *McQuary*.

The right to a jury trial guarantees a fair trial by a panel of impartial, indifferent jurors. *Irvin v. Dowd*,366U.S.717,722(1961). The "purpose" of due process is "to prevent fundamental unfairness." *State v. Snipes*,478S.W.2d299,303(Mo.1972). *See*, *also*, *Ake v. Oklahoma*,470U.S.68,76(1985)(essence of Fourteenth Amendment's due process clause is guarantee of fundamental fairness).

Judges have a duty to act affirmatively to safeguard a defendant's right to a fair trial. In *Sheppard v. Maxwell*,384U.S.333,335,356-63(1966), the defendant's conviction was reversed because the trial court failed to take affirmative steps that

ensured the press' courtroom conduct and reporting didn't compromise the defendant's Due Process fair trial right. Those actions included the trial court on its own raising the need for a sequestered jury. *Id.*363.

In other contexts, judges have an affirmative obligation to disclose matters peculiarly within their knowledge that potentially impact the fairness of the proceedings and that a party would be expected to want to know. *See*, *State v. Fullerton*,684S.W.2d59,62(Mo.App.,W.D.1984)(under former Judicial Canons, a judge had affirmative duty to disclose to all parties the judge's familial relationship to anyone acting as an attorney on a case over which judge presided); *Berry v. Berry*,765So.2d855,858(Fla.Ct.App.,5th Dist.2000)(judge had affirmative duty to disclose attorney representing one of the parties in dissolution action judge presided over also represented the judge in judge's own dissolution action); and *Barnes v. Keller*,62A.3d382,387,388(Super.Pa.2012)(judge had affirmative duty to disclose that one party was being represented by the judge's attorney wife's firm).

Evans' affirmative obligation to disclose Juror58 brought his book to the sequestered jury is even more compelling than those affirmative obligations presented in *Sheppard, Fullerton, Berry*, and *Barnes*. "[E]xecution is the most irremediable and unfathomable of penalties; that death is different." *Ford v. Wainwright*,477U.S.399,411(1986)(relying on *Woodson v. North Carolina*,428U.S.280,305(1976)). Because death is different Evans had the affirmative obligation at least by the time of the Saturday record hearing to apprise counsel Juror58 brought his book to the sequestered jury when Evans knew of that

behavior by Friday evening. That the *Sheppard* judge, *supra*, had the affirmative duty to provide for a sequestered jury imposed on Evans the affirmative duty to timely disclose he knew Juror58 brought his book to the sequestered jury, so that counsel could fully address at Saturday's hearing that conduct as it impacted the jury's integrity.

There was no prior opportunity for Lance to present his claim in the manner counsel would've done had Evans satisfied his affirmative duty to apprise counsel that Evans knew Juror58's book had gone with Juror58 to the sequestered jury. *Cf. Sheppard, McQuary, Berry, Barnes,* and *Fullerton.* That Lance didn't have a prior opportunity to present his claim is clear because Evans didn't disclose his knowledge that Juror58 brought his book to the sequestered jury until after the time for filing the motion for new trial in his April 29, 2009, letter that Juror58 had given the bailiff a copy of his book during trial(TrialL.F.1756). The prejudice to Lance was counsel was unable to develop the record in the ways counsel testified they would've done knowing Juror58 brought his book to the sequestered jury as a basis for granting a mistrial or ordering a new trial premised on matters that would've been added to the motion for new trial(29.15L.F.1258-60,1262-63,1326-27).

Lance's claim isn't based on any allegation of improper "ex parte" contact. Instead, it is one where due process fundamental fairness imposed on Evans the affirmative duty of timely disclosing Evans knew that Juror58 brought his book to the sequestered jury. *See, Sheppard, Snipes, Ake, Berry, Barnes,* and *Fullerton, supra.* Had Evans timely disclosed Juror58 brought his book to the sequestered jury, then

counsel would've had the opportunity to develop grounds for a mistrial or included matters in the motion for new trial which required granting a new trial. Those additional matters would've included Juror58 bringing his book to the sequestered jury and Juror58 sharing it with other jurors.

A new trial is required.

IV.

JUROR MISCONDUCT/COURT'S INSTRUCTION VIOLATED

The motion court clearly erred in denying the claim Juror58 committed juror misconduct as well as violated Judge Evans' instruction in bringing his book to the sequestered jury and sharing it with other jurors because Lance was denied his rights to due process, a fair and impartial jury, and to be free from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that Juror58's book prejudiced Lance's ability to get a fair trial because of its violent story line which espoused the need for "vengeance" because of a "too lenient" court system in its treatment of criminal defendants accused of homicide offenses.

Lance was denied a fair trial because of Juror58's juror misconduct in bringing his book to the sequestered jury and sharing it with other jurors.

29.15 Evidence

Juror58 gave a copy of his book to court security officer Wall one day after court(29.15Ex.9p.3,11-13,16).

Juror117 was given a copy of Juror58's book and wouldn't have taken it had she first read the back cover because she would've regarded it as falling within Judge Evans' instruction not to bring books about trials or crimes(29.15Tr.128-33). Juror117 skimmed the book's contents one night after court(29.15Tr.128-29).

Juror3 got a copy of the book and read the back cover during trial and gave Juror58 "feedback"(29.15Ex.10p.14-15;29.15Tr.195).

Juror50 got a copy and read a few pages and her reaction was the book was something she shouldn't be reading in order to abide by the sequestration rules and she returned it to Juror58(29.15Tr.200,202).

To avoid unnecessary duplication Juror58's book's violent story line which espoused the need for "vengeance" because of a "too lenient" court system in its treatment of criminal defendants accused of homicide offenses as contained in the Statement of Facts and Points I-III is incorporated here.

Findings

Juror misconduct is trial error(29.15L.F.1434-35). Not everyone on the jury got Juror58's book and distribution was "minimal"(29.15L.F.1435-36).

The trial court's admonitions on prohibited materials "was not an instruction of the court concerning the law of the case."(29.15L.F.1436).

Juror58's 29.15 testimony shows he didn't intend to violate the court's instructions and he denied holding the views his book espoused(29.15L.F.1440-43). Judge Evans' admonition was specific to movies and books about trials(29.15L.F.1442). Prejudice wasn't shown(29.15L.F.1443).

Juror58's Actions Violated Lance's Right to A Fair Trial

For the reasons discussed in Point III, and incorporated here, this claim is cognizable under *McQuary v. State*,241S.W.3d446,450(Mo.App.,W.D.2007).

The right to a jury trial guarantees a fair trial by a panel of impartial, indifferent jurors. *Irvin v. Dowd*,366U.S.717,722(1961). The "purpose" of due process is "to prevent fundamental unfairness." *State v. Snipes*,478S.W.2d299,303(Mo.1972). *See, also, Ake v. Oklahoma*,470U.S.68,76(1985)(essence of the Fourteenth Amendment's due process clause is guarantee of fundamental fairness).

In *State v. Post*,804S.W.2d862,862-63(Mo.App.,E.D.1991), the defendant was granted a new trial because of juror misconduct involving improper influences during a sequestered jury trial. *See* detailed discussion of *Post* in Point II. In the same way the juror misconduct was prejudicial in *Post*, Juror58's actions here were prejudicial to Lance because jurors were exposed to Juror58's violent story line which espoused the need for "vengeance" because of a "too lenient" court system in its treatment of criminal defendants accused of homicide offenses.

Lance's response to the findings that Judge Evans' instruction wasn't MAI, all the jurors weren't exposed to Juror58's book, Juror58's actions were unintentional, Juror58's denial he holds the views his book espoused, and the narrow construction of Evans' instruction as set forth in Points I-III are incorporated here.

Juror58's actions of bringing his book to the sequestered jury and sharing it with other jurors was prejudicial juror misconduct. Additionally, it violated Judge Evans' instruction about what the jury could have access to.

A new trial is required.

V.

BROWNING BLR .243 AND 10 GAUGE

The motion court clearly erred denying counsel was ineffective for failing to call ballistics expert Steven Howard to testify a Browning BLR .243 Winchester rifle could not have fired the fatal shot and that the shotgun wadding recovered at the scene was 10 gauge because Lance was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have presented Howard's testimony to counter respondent's evidence Lance used a Browning BLR .243 Winchester rifle and a 12 gauge shotgun to shoot Graham. Lance was prejudiced because there is a reasonable probability the jury would not have convicted him.

Respondent's evidence was the guns used to kill Graham were a Browning BLR .243 Winchester rifle and a 12 gauge shotgun. Howard would've testified that a Browning BLR .243 Winchester rifle couldn't have fired the shot that killed Graham and shotgun remnants found at the crime scene were 10 gauge, not 12.

I. Respondent's Trial Ballistics

A. Dillon

When Dillon compared the bullet removed from Graham to those bullets recovered from Lance's fields, Dillon found it was inconclusive whether any were fired from the same gun(TrialTr.1616-18). Dillon compared the bullet removed from Graham to three bullets found in Lance's fields and Dillon also compared each of the

four bullets to one another and he was unable to say any were fired from the same rifle(TrialTr.1626). The four bullets could've been fired from four different guns having the same class characteristics or could've been fired from the same gun(TrialTr.1642-43,1656). Dillon couldn't find any of the four bullets was fired from a .243 to the exclusion of a .22 or a .223(TrialTr.1643).

Dillon determined the caliber of bullet removed from Graham's body (Exhibit 171) was between .22 and .24 based on land and groove impressions and overall bullet size and weight(TrialTr.1599-1601). Dillon couldn't say whether the Graham bullet is a .22, a .223, or a .243(TrialTr.1601-02).

B. Crafton

Respondent also called Highway Patrol criminalist Jason Crafton to testify all four bullets were fired from the same gun, and therefore, constituted an identification(TrialTr.1676-78). Crafton was unable to identify a specific caliber, only a range of .22 to .24 for the bullets examined(TrialTr.1681).

II. Lance's .243 And Shotgun Ownership

Exhibit 257 was a Browning .243(TrialTr.1733-34). When respondent first displayed Exhibit 257, the prosecutor made a record that it wasn't a gun recovered at Lance's house and was only being used demonstratively and counsel had no objection(TrialTr.1732-33).

Trooper Brand testified Lance at some indeterminate time owned a .243(TrialTr.1513-14).

Laura Smith testified Lance owned a .243 with special significance to him because it was his father's and his father died when Lance was young(TrialTr.1579).

Laura Smith's brother (Tom Chilton), Kenneth Towner, Angela Walker, George Beck, and Robert Shockley all testified about Lance having owned a .243 Browning similar to demonstrative Exhibit 257(TrialTr.1403-04,1731,1734-55). Tyler Cleaver similarly testified and reported Lance had a special attachment to such gun(TrialTr.1792-93).

Lance's wife gave Robert a full box of .243 shells the night Graham was killed(TrialTr.1396-1400).

Remnants of two 12 gauge fired shotgun shells were recovered from an exterior wood burning stove at Lance's(TrialTr.1471-72,1477).

III. 29.15 Evidence

A. Counsel Marshall

In August, 2008, Public Defender Marshall filed a motion to exclude from evidence as irrelevant a Browning .243 lever action and to prohibit respondent from using such gun as a demonstrative aid or referencing such a gun during all trial phases(TrialL.F.1228-32;29.15Tr.521-22). Marshall sought exclusion of such use because the ballistics evidence couldn't determine the rifle caliber used to shoot Graham and while deposing Crafton he disclosed respondent had obtained a Browning .243 for testing(29.15Tr.516-17,521-22,529-30;TrialL.F.1228-32).

Crafton had excluded on land and groove width all the rifles seized at Lance's house as being responsible(29.15Tr.531). At Crafton's deposition, Crafton testified

the groove width for the fragment removed from Graham was significantly different from the groove width for the Browning .243 General Rifle Characteristics(29.15Tr.531-32;29.15Ex.61 Part 3 at 372-73).

At Marshall's Crafton deposition, Crafton testified the shotgun used to shoot Graham was more consistent with a 10 gauge than a 12(29.15Tr.520-25;29.15Ex.61 Part 3 at p.349-50,361).

Marshall retained Steven Howard to review ballistics(29.15Tr.523,553). Exhibits 36 and 37 are Marshall's notes from a June, 2008 phone conversation with Howard(29.15Tr.523;29.15Exs.36,37). Howard informed Marshall, as reflected in Marshall's notes, that the shotgun wadding recovered at the scene was 10 gauge(29.15Tr.523-24;29.15Ex.37). Marshall's notes reflected Howard's opinion was that a Browning BLR .243 didn't fire the bullet recovered from Graham(29.15Ex.37;29.15Tr.525). Marshall indicated it was established from Howard that the land and groove widths for a Browning BLR .243 didn't match the land and grooves for the bullet removed from Graham(29.15Tr.532). Marshall's notes (29.15Exs.36,37) were part of the file transferred to replacement counsel(29.15Tr.524-25;29.15;29.15Ex.71).

At Crafton's deposition, he had eliminated a Browning .243 Winchester A-Bolt as having fired the fatal bullet(29.15Tr.532-33;29.15Ex.61 Part 2 at p.250-52).

B. Howard

Howard is a Michigan bar practicing attorney with a gunsmithing associate's degree and a trained gun and rifle maker(29.15Tr.299-301). Howard also has a

Criminal Justice Bachelor's degree with investigator training(29.15Tr.299). Howard has built guns(29.15Tr.302-04).

Howard is a certified firearm and toolmark examiner in fourteen states, but isn't Association of Firearm and Toolmark Examiners (AFTE) certified(29.15Tr.318). Howard, however, subscribes to all AFTE's protocols(29.15Tr.318). Firearm and toolmark identification was included in his Bachelor's degree education(29.15Tr.322-23). Howard relied on Crafton's measurements in his analysis here, along with the FBI's data, which supersedes the AFTE(29.15Tr.322-24).

Marshall asked Howard to determine whether the fatal bullet could've been fired from a Browning lever action rifle(29.15Tr.325). Howard was looking to compare the class characteristics of a Browning BLR .243 Winchester to the bullet removed from Graham(29.15Tr.326-27).

Rifling class characteristics can be used to eliminate a particular gun as having fired a bullet(29.15Tr.313,316). Class characteristics discernible from a fired bullet include the number and width of lands and grooves and whether there's a left or right turn(29.15Tr.314-15).

Howard obtained class characteristic information for the Browning BLR .243 Winchester from both the F.B.I.'s and Browning's databases(29.15Tr.325-26). Browning indicated the class characteristics were: 6 land, 6 groove, right hand twist, with lands .036 to .038 and grooves .088 to .090(29.15Tr.329). When a bullet passes through a gun's barrel, these class characteristics are imparted into the bullet by the barrel(29.15Tr.329-30). The AFTE and FBI allow for a variability deviation

"tolerance" of .005 of an inch from the standard range for a gun's lands and grooves(29.15Tr.216,330-31). Crafton used a .005 GRC (General Rifling Characteristics) "tolerance"(29.15Tr.272,333,768). Even applying the .005 tolerance to the land and groves of the bullet fragments Crafton tested, they didn't fall within the accepted standardized range for a Browning BLR .243 Winchester(29.15Tr.333-34). Howard concluded it was physically impossible for a Browning BLR .243 Winchester to have fired the fatal round(29.15Tr.334).

Howard indicated that Crafton's pretrial deposition reflected Crafton eliminated the Browning A-Bolt as the gun used to shoot Graham(29.15Ex.61 Part 2 at p.250-52;29.15Tr.334-36). By eliminating the Browning A-Bolt as the responsible gun, Crafton also effectively eliminated the Browning BLR .243 Winchester because the A-Bolt and lever action use the same barrel and it's the barrel which is responsible for a fired bullet's class characteristics(29.15Tr.334-36).

Howard acknowledged a gun can be modified so as to substitute a barrel different than the one it got at manufacture so that the class characteristics on bullets fired from it would be altered(29.15Tr.346-47).

C. Crafton

On September 14, 2016, Crafton informed the prosecutors representing respondent on the 29.15 that he had been reviewing sub-class characteristics in Lance's case(29.15Tr.256-57). In an offer of proof, Crafton testified that he had come to the conclusion that based on sub-class characteristics that he could no longer declare a match between the bullet removed from Graham and those bullets found on

Lance's property(29.15Tr.257-71). Crafton testified that following further consultation with colleagues he then returned to his original match conclusion(29.15Tr.257-71). Those consultations included Crafton's supervisor, Evan Garrison, and other colleagues(29.15Tr.257-71).

Crafton indicated that the General Rifling Characteristic (GRC) database contains bullet class characteristics(29.15Tr.284). Whether a Browning fired a bullet would depend on whether someone provided measurement information to the GRC after the bullet was fired in a controlled environment and isn't based on manufacturer measurements(29.15Tr.285,296-97). Crafton never said the gun responsible for firing the shot that killed Graham was a .243(29.15Tr.285-86). Crafton only placed the gun responsible for killing Graham within the .22 to .24 caliber class(29.15Tr.286).

The Browning BLR didn't appear in the GRC database(29.15Tr.286-87). For purposes of the GRC database Crafton uses a .005 + or - "tolerance" for damaged bullets and used that here(29.15Tr.290-93).

D. Garrison

In rebuttal, respondent called Crafton's supervisor, Evan Garrison(29.15Tr.733-34,773). The GRC is an investigative aid or tool, but isn't an all-inclusive list of firearms with particular rifling characteristics(29.15Tr.755,762). For that reason, Garrison wouldn't make an exclusion based on GRC information(29.15Tr.762-63,769). Garrison searched the FBI's GRC database in 2017 and didn't find any data for a Browning BLR .243 Winchester(29.15Tr.763).

IV. Counsel

Counsel testified respondent's two ballistics experts contradicted one another, and therefore, there was no need to call a defense expert(29.15L.F.1274-75,1323). Counsel felt they were better positioned by cross-examining respondent's witnesses than if they called their own expert(29.15L.F.1274-75). Counsel also testified that he'd had bad experiences with using his own experts and how they were cross-examined(29.15L.F.1295-96).

Counsel testified that if Lance had testified, then he would've admitted to owning a .243 rifle and he was responsible for Bayless' accidental death(29.15L.F.1314).

V. Findings

Counsel testified that if Lance testified, then he would've admitted owning a .243 rifle(29.15L.F.1406). Counsel's strategy was to pit respondent's experts Crafton and Dillon against one another(29.15L.F.1406). Howard wasn't called because of this strategy(29.15L.F.1406-07,1409).

Howard's expertise isn't firearm and toolmark identification(29.15L.F.1408). Howard relied on the GRC while Crafton and Garrison explained why the GRC isn't all-inclusive and the GRC is an aid(29.15L.F.1408-09). A firearm's barrel can be modified so as to change its lands and grooves and twist from its original specifications and excessive use can do the same(29.15L.F.1408-09).

Howard didn't testify about shotgun wadding(29.15L.F.1409).

VI. Counsel Was Ineffective

A. .243

To prevail on a claim of ineffective assistance for failing to retain expert testimony, a movant is required to show such expert existed at the time of trial, the expert could've been located through reasonable investigation, and the expert would've benefited the defense. *Tisius v. State*,183S.W.3d207,213-14(Mo.banc2006).

In *Hutchison v. State*,150S.W.3d292,307(Mo.banc2004), counsel was ineffective for failing to do a thorough, comprehensive expert presentation. Even though counsel in *Hutchison* called in penalty a mental health expert and the defendant's parents, counsel was ineffective because they failed to investigate and present evidence of Hutchison's neuropsychological deficits and brain damage, learning disabilities, school difficulties, history of mental illness, and abuse. *Id.*304-08. This Court indicated, when assessing reasonableness of attorney investigation, a court is required to consider not only the quantum of evidence already known, but also whether the known evidence would lead reasonable counsel to investigate further. *Id.*305. Hutchison's counsel was ineffective in limiting the investigation's scope. *Id.*307-08.

Counsel's strategy choices must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994).

Counsel didn't act reasonably here. Counsel was on notice that respondent's intended centerpiece of its case was Lance shot Graham with a Browning .243. Marshall had filed a motion to prohibit respondent from using a Browning .243 demonstratively both because respondent's ballistics evidence couldn't determine the

rifle caliber used to shoot Graham and during Crafton's deposition Crafton disclosed respondent had obtained a Browning .BLR .243 for testing(29.15Tr.521-22,529-30;TrialL.F.1228-32). Counsel's strategy of setting up a conflict between Crafton and Dillon only showed that there was disagreement between respondent's experts as to whether the bullet recovered from Graham and those recovered from Lance's property were fired from the same gun or that couldn't be determined. That strategy never addressed a centerpiece of respondent's case - that the responsible gun was a Browning BLR .243. *See*, *McCarter*. That failure is like what happened in *Hutchison* where counsel presented some expert testimony, but failed to present other critical expert testimony. *See*, *Hutchison* and *Strickland.* Knowing from Marshall's motion to exclude use of a Browning .243 and Crafton's deposition testimony about respondent having obtained one for testing (29.15Tr.521-22,529-30;TrialL.F.1228-32) reasonable counsel would've pursued expert testimony to address respondent's Browning .243 theory. *See*, *Hutchison, McCarter,* and *Strickland*. That expert testimony was at counsels' fingertips because Marshall's memos about his communications with Howard(29.15Exs.36 and 37), transferred to counsel (29.15Ex.71), showed Howard's opinion was that the land and groove widths for a Browning BLR .243 didn't match the land and grooves for the bullet removed from Graham and that a Browning BLR .243 didn't fire the fatal bullet(29.15Tr.524-25,532). Howard's testimony would've "alter[ed] the entire evidentiary picture" regarding the murder weapon. *Strickland*,466U.S. at 695-96. Moreover, counsel testified if Lance had testified he would've said he'd owned a .243 (29.15L.F.1314),

which made it that much more incumbent upon counsel to address respondent's .243 evidence.

Moreover, it was unreasonable to fail to discredit respondent's claim a .243 was involved because Laura Smith and Tom Chilton both testified Lance often traded guns(TrialTr.1577-78,1734-36). Presenting Howard's evidence a .243 couldn't have been used was consistent with Lance's gun trading and supported Lance not owning a .243 when Graham was shot, but having owned one previously. *See*, *McCarter*.

Lance was prejudiced in multiple ways. The jury heard from many witnesses Lance had owned a Browning BLR .243 with special sentimental value for him and had possessed .243 shells(29.15Tr.1396-1400,1403-04,1513-14,1579,1731,1734-49,1751-55,1790-94).

Respondent's initial guilt closing argument repeatedly urged Lance used a .243 as follows. That Lance had a .243 in his grandmother's car when he did the shooting(TrialTr.2027). Lance had his wife give Robert Shockley a box of .243's the night Graham was shot(TrialTr.2028,2031,2034). Lance had owned two .243s within two months of Graham's death(TrialTr.2029). The jury needed to consider all the witnesses who testified about Lance's having owned a .243(TrialTr.2031). Lance's .243 was just like Exhibit 257 except his had a scope(TrialTr.2031). Respondent argued the jury heard from Tyler Cleaver and his former girlfriend that the .243 had special sentimental value because it was his father's, and therefore, wouldn't have disposed of it, if he wasn't guilty(TrialTr.2031).

Howard would've testified that it was physically impossible for a Browning BLR .243 Winchester to have fired the fatal round(29.15Tr.334). Howard also would've testified that Crafton's pretrial deposition testimony reflected Crafton effectively eliminated the Browning BLR .243 when Crafton eliminated the Browning A-Bolt because both have the same barrel and it's the barrel that's responsible for class characteristics(29.15Ex.61p.250-52;29.15Tr.334-36). The jury's not hearing Howard's testimony was prejudicial. *See*, *Hutchison* and *Strickland*. While the findings criticize Howard as being not as well qualified as respondent's experts, for utilizing GRC data in ways respondent's experts wouldn't, and a gun's barrel can be modified (29.15L.F.1408-09), that was a matter for the jury to weigh and Howard's CV shows he was well qualified(29.15Tr.299-304,318,322-23;29.15Ex.62). There's a reasonable probability that had the jury heard Howard's testimony Lance wouldn't have been convicted. *See*, *Hutchison* and *Strickland*.

B. 10 Gauge vs. 12

Counsel was also ineffective in failing to call Howard to testify about his shotgun gauge conclusions.

Respondent's evidence included that remnants of two 12 gauge fired shotgun shells were recovered from an exterior wood-burning stove at Lance's(TrialTr.1471-72,1477). Respondent's initial closing argument also included that Graham was shot with a 12 gauge and that two burned 12 gauge shells were recovered at Lance's(TrialTr.2032,2034).

Howard had told Marshall that the shotgun wadding recovered at the scene was 10 gauge(29.15Tr.523-24;29.15Ex.37). Marshall testified there was no evidence Lance ever owned a 10 gauge(29.15Tr.524). Reasonable counsel who had access to Howard's 10 gauge findings from Marshall's investigation (29.15Tr.523-24;29.15Ex.37) would've called Howard to rebut respondent's reliance on 12 gauge shells having been recovered from Lance's stove(TrialTr.1471-72,1477). *See, Strickland, McCarter*. Further, reasonable counsel would've called Howard because at Marshall's Crafton deposition, Crafton testified the shotgun used to shoot Graham was more consistent with a 10 gauge than a 12(29.15Tr.520-25;29.15Ex.61 Part 3 at 349-50,361). *See, Strickland, McCarter*.

Lance was prejudiced because respondent was allowed to create the impression, and argue to the jury, that Lance tried to dispose of shotgun shells that were the gauge used to shoot Graham (12), when in fact they were 10. *See, Strickland*.

VII. Conclusion

A new trial is required because counsel was ineffective in failing to present ballistic evidence that contradicted critical pieces of respondent's case - that a Browing BLR .243 and 12 gauge were used.

VI.

NO .243 INHERITANCE

The motion court clearly erred in denying the claim counsel was ineffective for failing to call Lance's grandfather, Gerald Sanders, to testify Lance did not inherit a .243 rifle from his deceased father because Lance was denied his rights to due process, a fair and impartial jury, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have called Gerald Sanders to testify there was no such inheritance and Lance was prejudiced because Sanders would have refuted Lance disposed of his special .243 only after shooting Graham.

Counsel was ineffective for failing to call Lance's grandfather, Gerald Sanders, to testify Lance hadn't inherited a .243 from his deceased father.

Respondent's Guilt Evidence

Laura Smith testified Lance frequently traded guns and had owned a .243(TrialTr.1577-78). Laura testified the .243 had special sentimental value to Lance because it belonged to Lance's father, who died when Lance was young(TrialTr.1579).

Laura Smith's brother, Tom Chilton, testified Lance often traded guns(TrialTr.1734-36).

Tyler Cleaver reported Lance had owned a Browning .243 lever action, similar to Exhibit 257, and Lance had a special attachment to it(TrialTr.1790-94).

Trial Defense Case

After Roger Hart testified about license plate lettering on a red Grand Am he saw (TrialTr.1993-96,2007-08), counsel informed Judge Evans the defense rested(TrialTr.2009).

A record was made on Lance's decision to not testify(TrialTr.2010-11,2019). Evans apprised Lance that he'd allow the defense case to be reopened any time(TrialTr.2010,2019). Counsel informed Evans the defense didn't wish to reopen(TrialTr.2020).

Respondent's Guilt Closing Argument

In respondent's initial guilt argument, the jury was told that after shooting Graham and between 5:00-6:00 p.m., Lance got rid of two .243's that he owned within two months of the shooting(TrialTr.2027-29). Evidence Lance traded and sold guns didn't refute Lance shot Graham because the defense would've called the witnesses who traded or bought Lance's .243s(TrialTr.2029-31). Multiple witnesses testified the Ex.257 demonstrative gun was just like what they saw Lance with except Lance's had a scope(TrialTr.2030-31). Respondent's witnesses described Lance's special attachment to an "heirloom" .243 that was his "baby" because it belonged to Lance's deceased father(TrialTr.2031). Lance's grandfather ultimately gave the special .243 to Lance(TrialTr.2030-31). Lance wouldn't have disposed of his .243s unless he was covering-up shooting Graham(TrialTr.2030-31).

Gerald Sanders

Gerald Sanders is Lance's grandfather and only testified at penalty(29.15Tr.585-86,616). Lance came to live with Gerald when he was thirteen, which was 2-3 months after his father died(29.15Tr.616). Lance didn't have a Browning BLR gun that belonged to Lance's father that Lance inherited(29.15Tr.616).

Counsel

Kessler testified Gerald was called as the last penalty phase witness because his testimony was emotionally powerful, causing the jurors and others in the courtroom to get teary-eyed(29.15L.F.1329-31). Kessler testified he wouldn't have presented evidence Lance didn't inherit a gun from his father because that would've appeared to challenge the guilt verdict(29.15L.F.1305-06).

Bruns considered it tenuous to call Sanders to testify Lance hadn't inherited a gun from his father(29.15Tr.687).

Findings

Counsel testified that if Lance had testified, then Lance would've testified he owned a .243(29.15L.F.1411 relying on 29.15L.F.1314). Counsel commented that Lance received a .243 as a gift from his father(29.15L.F.1411 relying on 29.15L.F.1293). Counsel had a valid strategy reason for not calling Gerald Sanders in guilt which was to avoid undermining Lance's credibility had Lance testified(29.15L.F.1410-11).

At the 29.15 hearing, Joby Sanders testified Lance had owned two .243 rifles and one was inherited from Lance's father(29.15L.F.1411). At the 29.15 hearing,

Tony Towner denied having told the police Lance had inherited a .243(29.15L.F.1411).

The 29.15 evidence was conflicting on whether Lance inherited a .243(29.15L.F.1411).

Counsel Was Ineffective

Lack of diligent investigation and preparation isn't protected by a presumption in favor of counsel and cannot be justified as strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8th Cir.1991). Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994).

Counsel didn't investigate calling Gerald Sanders to testify Lance hadn't inherited a .243 Sanders transferred to him. *Kenley*. Contrary to the 29.15 findings (29.15L.F.1410-11), failing to call Sanders wasn't reasonable because when the defense rested they knew Lance wasn't going to testify and Evans said that he'd allow the defense to reopen its case, if they wanted and they could've called Gerald(TrialTr.2010-11,2019-20). *Strickland* and *McCarter*. Further, contrary to the findings counsel's comment Lance had gotten a .243 as a gift from his father (29.15L.F.1411 relying on 29.15L.F.1293) didn't demonstrate reasonable performance because the comment reflected counsel merely adopted respondent's witnesses' reporting without investigating. *Kenley*.

Lance was prejudiced because Gerald Sanders, the witness who counsel testified was so credible in penalty that he brought jurors to tears (29.15L.F.1329-31), could've testified Lance hadn't inherited a .243 with special sentimental value and

refuted respondent's arguments Lance disposed of that .243 immediately after shooting Graham. *Strickland* and *McCarter*. It is irrelevant that there was 29.15 testimony from Joby Sanders and Tony Towner about Lance having inherited a gun belonging to his father (29.15L.F.1411) because that was just more inaccurate reporting, like respondent presented at trial(TrialTr.1577-79,1734-36,1790-94).

Gerald Sanders, the person who Lance lived with starting at thirteen years old (29.15Tr.616), would've testified Lance didn't have a gun that belonged to Lance's father and that Lance inherited (29.15Tr.616) and expressly refuted respondent's argument Gerald gave Lance the "heirloom" .243 that was Lance's "baby" that Lance's father had wanted Lance to have(TrialTr.2030-31). Sanders' testimony wouldn't have been tenuous (29.15Tr.687) because respondent relied on the purported inheritance in closing argument(TrialTr.2030-31).

A new trial is required.

VII.

DEMONSTRATIVE EXHIBIT 257

The motion court clearly erred denying counsel was ineffective for failing to object to respondent displaying Exhibit 257 a Browning BLR .243 Winchester because Lance was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have objected as Exhibit 257 was not claimed to be the gun used to shoot Graham and Lance was prejudiced because respondent used the unrelated weapon in questioning its witnesses and closing argument.

Counsel was ineffective for failing to object to respondent relying on Ex.257, a Browning BLR .243 Winchester, because it was an unrelated weapon witnesses testified about and respondent relied on it in closing argument.

Pre-Trial Motion And No Objection

Public Defender counsel deposed respondent's ballistics experts, Crafton and Dillon, and learned respondent had a Browning .243 lever action it intended to use demonstratively(TrialL.F.1228-31). They moved to prohibit such use because respondent's experts were unable to say a .243 fired the fatal bullet(TrialL.F.1228-31). The motion urged that displaying such an unconnected weapon was highly prejudicial(TrialL.F.1228-31).

When respondent stated at trial it intended to use Ex.257 demonstratively, counsel had "no objection"(TrialTr.1732-34).

Counsel

Counsel acknowledged prior Public Defender counsel moved to prohibit respondent from displaying a Browning .243 rifle which wasn't the rifle used to shoot Graham(29.15L.F.1290-91;TrialL.F.1228-54). On March 23, 2009, Judge Evans entered an order that all pending motions not otherwise ruled on were denied(TrialL.F.1390). Counsel recalled the motion wasn't taken up and Evans indicated that as to all motions not called-up they were deemed denied(29.15L.F.1290-91). Counsel didn't know why the Browning .243 motion wasn't taken-up(29.15L.F.1290-92).

Counsel testified the motion to prohibit respondent from displaying a Browning .243 rifle should've been renewed if it could've been established a gun of that type couldn't have fired the fatal shot(29.15L.F.1293-95).

Findings

Counsel's testimony the motion should've been renewed was premised on Howard's findings that a Browning BLR .243 Winchester couldn't have fired the shot killing Graham, but counsel had a strategic reason for not calling Howard so Howard's findings wouldn't have been available for counsel to rely on(29.15L.F.1413). There's no reason to believe the trial court would've sustained the motion(29.15L.F.1413).

There was evidence Lance had owned two .243 rifles(29.15L.F.1414).

Counsel Was Ineffective

Failure to make timely proper objections can constitute ineffectiveness. *State v. Storey*,901S.W.2d886,900-03(Mo.banc1995).

Admitting evidence of weapons unrelated to an offense lacks probative value and their admission is inherently reversible prejudicial error. *State v. Perry*,689S.W.2d123,125(Mo.App.,W.D.1985). *See, also*, *State v. Grant*,810S.W.2d591,592(Mo.App.,S.D.1991)(relying on *Perry*). Lethal weapons unrelated to an offense have prejudice seldom attached to other evidence. *Perry*,810S.W.2d at 592.

Reasonable counsel would've renewed the motion to prohibit using Ex.257 as a demonstrative exhibit and objected at trial to respondent using Ex.257 as a demonstrative exhibit because respondent's experts were unable to conclude a Browning BLR .243 Winchester shot Graham. *Strickland*. While respondent called witnesses to say Lance had owned a .243, that didn't justify displaying an unrelated demonstrative gun because of the extreme inherit prejudice unrelated weapons inject. *Perry* and *Grant*.

Lance was prejudiced because during multiple witnesses' testimony respondent displayed Ex.257 and had them testify it was similar to a gun Lance had owned(TrialTr.1733-36,1736-42,1742-49,1751-55,1790-94). *Strickland, Perry,* and *Grant*. Further, respondent's use of Ex.257 was prejudicial because respondent used Ex.257 during closing argument to tell the jury it needed to consider all the witnesses who said the gun they saw Lance with was similar to Ex.257(TrialTr.2031). *Strickland, Perry,* and *Grant*.

A new trial is required.

VIII.

LANCE IN HIS PICKUP

The motion court clearly erred denying counsel was ineffective for failing to call James Chandler and Sylvan and Carol Duncan to testify they saw Lance driving his pickup truck during the time he was alleged to be in his grandmother Mae's red Grand Am waiting nearby Graham's house to shoot Graham and then fleeing Graham's house because Lance was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have called them because they corroborated the defense Lance did not shoot Graham and there is a reasonable probability Lance would have been acquitted.

Counsel failed to call James Chandler and Sylvan and Carol Duncan to testify they saw Lance driving his pickup truck when he's alleged to be in his grandmother Mae's red Grand Am waiting nearby Graham's to shoot Graham and fleeing Graham's. Their testimony would've corroborated the defense Lance didn't shoot Graham.

I. Respondent's Theory

Respondent's case was built around Lance borrowing his grandmother Mae's red Grand Am, parking it nearby Graham's house after Mae returned from church at 12:20, waiting for Graham, and shooting Graham as Graham just ended his shift at 4:00 p.m.(TrialTr.1169,1173-80,1188-91,1803,1806-13,1367). It was critical that the

jury heard Lance was seen in his pickup truck during respondent's alleged timeframe and not in Mae's red Grand Am.

II. Defense Opening

In Opening Statement, counsel Henshaw-Frances told the jury the evidence would show Mae's red car was nowhere near Graham's when Graham was shot(TrialTr.1033). Henshaw-Frances told the jury Carol and Sylvan would testify that Mae's red car was at Mae's at the time respondent claimed Lance was waiting in it to shoot Graham(TrialTr.1035-36). Henshaw-Frances also told the jury that while walking Carol and Sylvan saw Lance in his pickup during the timeframe when respondent alleged Lance was fleeing Graham's(TrialTr.1035-36).

III. Uncalled Witnesses

A. James Chandler

1. Pre-Trial Deposition

Public Defender counsel deposed Chandler, but he wasn't subpoenaed for trial(29.15Tr.187;29.15Ex.68).

Chandler knew Lance for 15 years(29.15Ex.68p.12-14). Chandler testified that on the day Graham was shot that he saw Lance drive by Chandler's house on Highway C at 2:00-2:30 p.m. in Lance's pickup truck(29.15Ex.68p.66-68). Chandler testified he actually saw Lance driving the pickup and didn't just assume Lance was driving(29.15Ex.68p.66-68). Chandler saw Lance was alone in the pickup(29.15Ex.68p.66-68). Chandler saw Lance because Chandler was out in his

yard working and he waved at Lance(29.15Ex.68p.66-69). Lance was driving North on Highway C and turned right onto Highway F(29.15Ex.68p.66-69).

Defender Marshall's file notes stated Chandler saw Lance at 2:30 in Lance's pickup on the other side of the County from Graham's house(29.15Tr.536-37;29.15Ex.39p.1).

2. 29.15 Testimony

On March 20, 2005, Chandler was outside in Chandler's yard and saw Lance driving his maroon Chevy pickup on Highway C about 2:00-2:30 p.m.(29.15Tr.184-85). Lance was driving North in the direction of his uncle Robert's(29.15Tr.186). Chandler spoke to the police shortly after Graham was shot and reported seeing Lance in his pickup truck at 2:00-2:30(29.15Tr.186).

B. Carol Duncan

1. Pre-Trial Deposition

Public Defender counsel deposed Carol(29.15Ex.67).

Carol recounted that she and Sylvan went for a walk at 4:30 the day Graham was shot and because Sylvan needed to as he recently had a heart attack(29.15Ex.67p.15-16). They saw Lance on the road at 4:45 and Lance was in Lance's pickup truck(29.15Ex.67p.18,61).

Mae's red Grand Am was at Mae's house at 2:00-2:30 p.m.(29.15Ex.67p.21-22). Carol didn't observe Mae's red Grand Am gone later(29.15Ex.67p.90).

2. 29.15 Testimony

Carol recounted that in March, 2005, she lived with her husband Sylvan on County Road 213A, which is off Highway C at Eastwood(29.15Tr.134-35,150). Lance and his wife lived on the same roadway, a quarter mile away(29.15Tr.135-36). Lance's grandmother, Mae, lived a little ways to the right of the Duncans in a trailer(29.15Tr.136).

A gravel road ran between the Duncan's, Lance's, and Mae's(29.15Tr.136). The gravel road ended at Lance's(29.15Tr.136). To get to Lance's a person had to drive by the Duncan's and Mae's(29.15Tr.136-37). The gravel road ran in front of the Duncan's(29.15Tr.137).

The Duncans were able to see from their kitchen Mae's red Grand Am when it was parked outside Mae's trailer(29.15Tr.137-38).

On Sunday, March 20, 2005, Carol got home from church a little after 12:00 noon(29.15Tr.144). Sylvan said Lance asked him for some help, which required using Sylvan's tractor(29.15Tr.144).

Sometime during the afternoon, Carol looked out and saw Mae's car between 1:30-2:00 p.m.(29.15 Tr.144-45). Carol never saw Mae's car leave again that day(29.15Tr.145).

At 4:30 p.m., Carol and Sylvan took a walk(29.15Tr.145). Carol and Sylvan walked all the way down the gravel road and saw Lance in his pickup(29.15Tr.145-46). Lance thanked Sylvan for doing the tractor tree work and apologized for missing helping(29.15Tr.146). It was about 5:00 p.m. when the Duncans spoke with

Lance(29.15Tr.146). Lance appeared normal, not out of breath or anxious, and didn't have any guns(29.15Tr.146-47).

Carol was subpoenaed to trial, but received a call she didn't need to attend(29.15Tr.149).

Lance came to the Duncan's and told them that Graham was shot in the face such that the skin could be pulled over Graham's face(29.15Tr.154). Sylvan or Carol commented that to cause that kind of injury the shooter would've had to have been very close to Graham(29.15Tr.155). Lance responded that wasn't necessarily true, if turkey loads were used(29.15Tr.155).

C. Sylvan Duncan

1. Pre-Trial Deposition

Public Defender counsel deposed Sylvan(29.15Ex.66). On the day Graham was shot, Sylvan heard and saw Lance's truck tear out at 2:00-3:00p.m(29.15Ex.66p.30-33,74-75). While Sylvan didn't actually see Lance at the wheel, the truck was driven the way Lance drove - too fast(29.15Ex.66p.30-33). No one else, besides Lance drove fast or tore-out in the neighborhood(29.15Ex.66p.30-33).

Sylvan told Trooper Johnson that he and Carol saw Lance on the road at 5:15 p.m.(29.15Ex.66p.75-76).

Sylvan testified that Lance said that skin on Graham's face could be pulled up, but that was something Lance said that he'd "heard" and Lance commented such injury was possible if turkey load were used(29.15Ex.66p.57-58,96,98).

Defender Marshall's file notes stated Sylvan saw Lance at 4:45(29.15Tr.536-37;29.15Ex.39p.1).

2. 29.15 Testimony

Sylvan recounted they could see Lance's house from theirs(29.15Tr.162).

Sylvan saw Lance before they went to church and Lance asked for help with treetop branches on Mae's property(29.15Tr.166-67). Sylvan told Lance that he could after church and Sylvan did that(29.15Tr.166-67).

Sylvan saw Lance leave around 2:00-2:30 in his truck because he heard the truck's loud pipes(29.15Tr.168).

Sylvan and Carol took a walk at about 4:30 p.m. and saw Lance about 4:45 p.m. in his gray and red pickup truck and he didn't have any guns(29.15Tr.169-70). Lance appeared normal with no signs he'd been running or out-of-breath(29.15Tr.170).

Sylvan was subpoenaed to trial, but received a call saying he wasn't needed(29.15Tr.171).

Sylvan reported Lance had said that a flap of skin could be pulled away from Graham's face(29.15Tr.174). Sylvan or Carol said the shooter would've had to have been very close to Graham and Lance said that wasn't the case if turkey loads were used(29.15Tr.174-75).

IV. Counsels' Testimony

A. Bruns

Counsel had the Duncans' depositions (29.15Exs.66,67) and Chandler's deposition(29.15Ex.68)(29.15Tr.650-51).

Bruns went through the police reports(29.15Tr.654).

In a police interview (29.15Ex.98), Sylvan reported Lance left the neighborhood between 2:00-3:00 p.m. driving Lance's red and gray pickup truck(29.15Ex.98). In another police interview, Sylvan reported he saw Lance's truck leave and knew it was 2:00-2:30 because Lance's truck was loud and traveling fast(29.15Ex.99). Carol told the police they typically hear Lance's truck coming and going because it's loud and Lance drives fast(29.15Ex.99). Sylvan and Carol told the police they saw Lance at about 4:45-5:00 p.m.(29.15Ex.99).

Bruns testified they considered calling Sylvan, but he didn't know why they didn't(29.15Tr.655-57).

Bruns testified he wouldn't have ruled-out calling the Duncans even though they could've been questioned about Lance making a statement about how skin appeared on Graham's face(29.15Tr.712-13).

B. Kessler

Kessler testified the car witnesses were Henshaw-Frances' responsibility(29.15L.F.1318-19).

Kessler didn't call Sylvan because he didn't know whether Sylvan would hold up on cross-examination(29.15L.F.1267-68). Kessler testified that as presented at trial Lance had an "imperfect alibi" defense because the entire time in question wasn't accounted for(29.15L.F.1267-69).

Kessler couldn't provide a specific reason for not calling Carol, speculating she might've been unsure about what happened(29.15L.F.1269).

Kessler didn't specifically recall James Chandler(29.15L.F.1270). Kessler speculated that Chandler couldn't account for the entire time in question(29.15L.F.1270-71).

C. Henshaw-Frances

Molly Henshaw-Frances testified she was responsible for the red car issue(29.15L.F.1344-45). The defense theory was Lance wasn't responsible for Graham's death(29.15L.F.1347,1368). Henshaw-Frances didn't know why the Duncans and Chandler weren't called(29.15L.F.1354-56).

V. Findings

The Duncans' testimony would've helped respondent and hurt Lance(29.15L.F.1399-1401).

Kessler testified he didn't think the Duncans' testimony would've held-up on cross-examination(29.15L.F.1399). Kessler testified there was a hole in Lance's alibi timeline, not a "clear defense"(29.15L.F.1400-02).

The Duncans could've testified about Lance's comment about how the skin on Graham's face appeared and use of turkey loads(29.15L.F.1400).

The Duncans' testimony "was so strongly in the favor of the State's theory of the case that it was reasonable for defense counsel to expect that the State would call them to testify, and also their testimony was so significant as to warrant a reference during Movant's opening argument"(29.15L.F.1401). The opening statement

reference of intending to call the Duncans, but then not calling them, was consistent with a reasonable strategy that the Duncans' testimony was more harmful than helpful(29.15l.F.1401).

VI. Counsel Was Ineffective

Counsel's duty is to call witnesses who corroborate the defense theory. *Foster v. State*,502S.W.2d436,438(Mo.App.,St.L.D.1973). To establish counsel was ineffective for failing to call a witness who could've accounted for the defendant being somewhere other than the crime scene, a movant is required to establish the witness could've been located through reasonable investigation, the witness would've testified if called, and their testimony would've provided a viable defense. *Franklin v. State*,655S.W.2d561,566(Mo.App.,E.D.1983). Chandler and the Duncans would've corroborated Lance didn't shoot Graham.

It was unreasonable for Henshaw-Frances to tell the jury in opening statement they'd hear Carol and Sylvan account for Lance not having Mae's car during the timeframe alleged he shot Graham, and seeing Lance in his pickup when respondent claimed he was fleeing Graham's, and to not then call Sylvan and Carol(TrialTr.1035-36). *See*, *Strickland*. Kessler and Henshaw-Frances both testified that the red car issue was Henshaw-Frances' responsibility (29.15Tr.1318-19,1344-45), and therefore, all of Kessler's speculative assertions about ability to handle cross-examination(29.15L.F.1267-68,1399) and "imperfect alibi" for failing to account for the entire timeframe between 12:20 through 5:00 p.m.(29.15L.F.1267-71,1400-02) are completely irrelevant.

Counsel inherited Chandler's, Sylvan's, and Carol's depositions putting them on notice all three could've placed Lance in his pickup, and not Mae's Grand Am, during the timeframe respondent alleged Lance was waiting near Graham's house to shoot him and when it was alleged Lance was fleeing(29.15Ex.68p.66-69;29.15Ex.67p.21-22,90;29.15Ex.66p.30-33,74-75). Thus, all three were easily located and would've testified if called and all three testified at the 29.15. *See, Franklin.*

The Duncans and Chandler would've provided a viable defense for Lance because their testimony refuted respondent's theory Lance waited in Mae's car near Graham's to shoot him and also placed Lance in his pickup during the time it was alleged Lance was fleeing.

Chandler would've testified he actually saw Lance as the driver of Lance's pickup truck at 2:00-2:30 p.m. driving on Highway C(29.15Ex.68p.66-69;29.15Tr.184-85).

Carol would've testified Mae's Grand Am was at Mae's house at 1:30-2:30 p.m. and Carol didn't see it gone after 2:30(29.15Ex.67p.21-22,90;29.15Tr.137-38,145). Carol would've testified they saw Lance in his pickup at 5:00 p.m. and he appeared normal, not out of breath or anxious(29.15Tr.146-47).

Sylvan would've testified he saw and heard Lance's pickup tear-out at 2:00-3:00 p.m. with its loud pipes(29.15Ex.66p.30-33,74-75;29.15Tr.168;29.15Exs.98,99). Sylvan would've testified they saw Lance in his pickup at 4:45 p.m. and he appeared normal with no signs of being out-of-breath(29.15Tr.170;29.15Ex.99).

The statement attributed to Lance about how the skin on Graham's face could be pulled up wasn't damaging, if explained in context(29.15L.F.1400). Sylvan testified the shooting of Graham was being covered by the news and the subject of rumor and gossip(29.15Ex.66p.96). Sylvan testified that the day after Graham was shot, Lance stopped by(29.15Ex.66p.57). Lance and the Duncans were talking about Graham's being shot and Lance said that he'd **"heard"** about Graham's face(29.15Ex.66p.57-58,96,98). Carol commented that for Graham's face to have been injured in the way described, the shooter would've had to have been very close with a shotgun(29.15Ex.66p.57-58). Only in response to Carol's or Sylvan's comment, did Lance then volunteer that wouldn't be true with turkey load(29.15Ex.66p.57-58,98;29.15Tr.155). Lance was merely relaying what he'd "heard" and only made the turkey load comment in response to Carol's or Sylvan's statement questioning how Graham could've been injured in the manner described by a shotgun. Moreover, there was no evidence from respondent's ballistics experts, Crafton and Dillon, that turkey load was used to shoot Graham.

The findings simply are factually wrong in stating that the Duncans' testimony was favorable to respondent and that it could be reasonable strategy for defense counsel to promise in opening statement the defense would call the Duncans to discredit Lance having his grandmother's car during the timeframe alleged and to support they saw Lance in his truck when he was alleged to be fleeing Graham's (TrialTr.1035-36) and to then not call the Duncans(29.15L.F.1401).

The findings also state Sylvan testified Lance wasn't home around 2:00-2:30 p.m. and Lance made a statement the Duncans couldn't say when he left because the Duncans didn't always check their watches(29.15L.F.1400). Sylvan's 29.15 testimony actually reflects that Lance said to Sylvan that he (Lance) doesn't always look at his watch so that Lance didn't know what time he left in his pickup and Sylvan likely was correct in having reported seeing Lance leaving in Lance's truck at 2:00-3:00 p.m. (29.15Ex.98) as Sylvan similarly couldn't be expected to always be looking at his watch(29.15Tr.176-77).

Counsel's strategy choices must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994); *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D.2003). Counsel's strategy here was unreasonable because the jury was told they'd hear from the Duncans and didn't. The Duncans, and Chandler as well, would've supported Lance didn't have Mae's red car and he was in his pickup during the timeframe he's alleged to have been waiting on Graham and fleeing Graham's. The Duncans and Chandler would've corroborated Lance didn't shoot Graham. *See*, *Foster*, *supra*.

In *Perkins-Bey v. State*,735S.W.2d170,170,172(Mo.App.,E.D.1987), counsel was ineffective for failing to present testimony accounting for the defendant not being at the crime scene in a case where identification testimony wasn't overwhelming. Respondent's case against Lance was entirely circumstantial and the jury hung on punishment. *Cf. Perkins-Bey*. Lance was prejudiced by the failure to call the Duncans and Chandler. *See*, *Strickland*.

A new trial is required.

IX.

MILA LINN

The motion court clearly erred denying counsel was ineffective for failing to call Mila Linn to testify she saw a red car near Graham's during the relevant timeframe containing an unfamiliar white male and did not select Lance from a photo array as its driver because Lance was denied effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have called Linn because she corroborated the defense Lance did not shoot Graham and there is a reasonable probability Lance would have been acquitted.

Counsel was ineffective for failing to call Mila Linn who would've testified she saw a white male, other than Lance, in a red car near Graham's during the relevant timeframe, and thereby, corroborated Lance didn't shoot Graham.

29.15 Evidence

Mila Linn told the police that at 3:40 p.m. she saw a red car hanging around Graham's and the driver was a white male with brown shaggy hair and sunken face(29.15Ex.73;29.15Tr.658-60). Linn had lived in the area a long time and knew the local people, but this male was unfamiliar(29.15Ex.73).

Linn viewed a photo array that included Lance(29.15Ex.74;29.15Tr.658-60). Linn didn't identify anyone in the array as the car's driver(29.15Ex.74).

Public Defender counsel deposed Linn(29.15Ex.75;29.15Tr.658-60). Linn didn't recognize the person she saw in the car near Graham's(29.15Ex.75p.11). She saw the car at 3:40 p.m.(29.15Ex.75p.25).

Counsel

Counsel didn't know why Linn wasn't called(29.15Tr.658-60).

Trial Matters

Trooper Brand was cross-examined about Linn(TrialTr.1333). Brand had no memory of Linn(TrialTr.1336). Brand recalled being involved with showing someone a lineup, but didn't recall what the person said(TrialTr.1336). Brand couldn't recall anything about there being a report of a red Grand Am(TrialTr.1337). In preparing to testify, Brand refreshed his recollection with police reports he authored, but none that included red car Grand Am matters(TrialTr.1337-38).

In closing argument, defense counsel told the jury Brand testified that Linn told the police there was a red car containing two men, she was shown a lineup that included Lance, and Linn told the police Lance wasn't one of the two(TrialTr.2037). Counsel continued arguing that Linn said the car she saw wasn't Mae's car(TrialTr.2037). Counsel argued respondent didn't call Linn to which respondent objected he wasn't permitted to argue an adverse inference(TrialTr.2037-38). Evans overruled the objection and directed counsel move on(TrialTr.2037-38).

In rebuttal, respondent argued the jury "shouldn't believe" counsel's version about Linn because Linn hadn't seen a red car at the relevant time(TrialTr.2048-49). When defense counsel objected, the court stated: "Stick to the evidence. Let's move

on."(TrialTr.2048-49). Respondent then argued if Linn had something helpful for the defense, then it would've called her(TrialTr.2048-49). Counsel objected that respondent could've called Linn and Evans directed the jury be guided by the evidence and told respondent move on(TrialTr.2048-49).

Findings

There was no evidence, the claim was abandoned(29.15L.F.1402).

Counsel Was Ineffective

Counsel's duty is to call witnesses who corroborate the defense theory. *Foster v. State*,502S.W.2d436,438(Mo.App.,St.L.D.1973). To establish counsel was ineffective for failing to call a witness who could've accounted for the defendant being somewhere other than the crime scene a movant is required to establish the witness could've been located through reasonable investigation, the witness would've testified if called, and their testimony would've provided a viable defense. *Franklin v. State*,655S.W.2d561,566(Mo.App.,E.D.1983).

Counsel had the police reports (29.15Exs.73,74) and Linn's deposition prior counsel took(29.15Ex.75), and therefore, Linn was locatable and would've testified. *See*, *Franklin*. Lance was prejudiced because Linn's testimony would've supported the defense theory Lance didn't commit this offense by using his grandmother's red Grand Am and providing evidence someone other than Lance was seen driving a red car near Graham's. *Strickland*. Further, Lance was prejudiced because counsel's attempt to inject what Linn reported to the police through Brand failed to elicit any helpful evidence. *Strickland*. Moreover, Lance was prejudiced when counsel tried to

argue what Linn would've said if called, respondent objected to counsel's argument, and respondent countered with its own argument that counsel could've called Linn leaving the jury to infer what Linn would've said as being harmful. *Strickland.*

A new trial is required.

X.

IMPEACH LISA HART - YELLOW STICKER

The motion court clearly erred in denying counsel was ineffective for failing to impeach Lisa Hart's trial testimony that she did not know where the yellow sticker was located on the car she saw near Graham's with her prior written and deposition statements she saw the sticker from the car's front because Lance was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have so impeached Lisa and Lance was prejudiced because respondent's theory was Lance borrowed Mae's car to shoot Graham and discrediting Lisa's identifying Mae's car as the one she saw near Graham's was critical.

Counsel was ineffective for failing to impeach Lisa Hart's trial testimony that she was uncertain where a yellow sticker on the car she saw near Graham's was located with her prior written statement and deposition testimony that she could see the sticker from looking at the front of the car.

Lisa's Written Statement

Lisa's written statement from March 23, 2005, reported the red car had a yellow sticker about fist size visible when viewing the car from its front(29.15Ex.70).

Lisa's Deposition

Lisa was deposed and reported the red car was parked on the wrong side of the road, and therefore, facing them and she was able to see the yellow sticker(29.15Ex.69p.9-10,13-14,22,40).

Mae's Trial Testimony

Mae Shockley testified at trial that her car had a support our troops yellow ribbon style sticker on its back(TrialTr.1804).

Lisa's Trial Testimony

At trial, Lisa testified she saw on the wrong side of the road a late 1990s red Grand Am in good condition with un-tinted windows rolled halfway down with a yellow softball sized sticker(TrialTr.1892-94,1896-97,1911). Lisa testified she hadn't noted where on the red car the yellow sticker was displayed(TrialTr.1897,1911).

Counsel

Henshaw-Frances cross-examined Lisa(TrialTr.1906). Henshaw-Frances couldn't say whether she considered impeaching Lisa with her pre-trial reporting the yellow sticker was on the front of the car because she didn't remember much about the yellow sticker trial testimony(29.15L.F.1356-57,1359).

29.15 Findings

Counsel's strategy was to not impeach Lisa with her prior statements(29.15L.F.1402-03). Even if not reasonable strategy, Lance wasn't prejudiced because other witnesses provided identifying testimony about the red car and Lisa was positive in her identification of the car she saw as the one that belonged

to Mae(29.15L.F.1402-03). Further, counsel called Lisa's husband, Roger, to highlight discrepancies in Lisa's identification(29.15L.F.1402-03).

Counsel Was Ineffective

In *Black v. State*,151S.W.3d49,55-58(Mo.banc2004), counsel was ineffective for failing to impeach state witnesses through cross-examining them about prior inconsistent statements. Counsel was ineffective in *Black* because the subject of the impeachment went to the central controverted issue of whether Black acted with deliberation or a fit of rage out of self-defense. *Id.*56,58.

Similarly, a central controverted issue in Lance's case was whether Lance used his grandmother Mae's car to wait for Graham to return home to shoot Graham. Respondent's theory and argument was Lance waited in Mae's car for Graham to arrive home to shoot Graham(*See,e.g.*,TrialTr.2023,2025,2027,2034,2048,2050-51). The defense theory was Mae's car was misidentified(TrialTr.1995,2004-05,2007). Impeaching Lisa's trial testimony of being unable to say where she saw the yellow sticker on the car (TrialTr.1892-94,1896-97,1911) with her written statement (29.15Ex.70) and deposition (29.15Ex.69p.9-10,13-14,22,40) went to the reliability of her identifying the car she saw as Mae's(TrialTr.1903-06,1909). Moreover, impeaching Lisa in this way was critical because Mae testified her car had a yellow sticker on its back (TrialTr.1804), and therefore, it wasn't visible from its front.

Roger's testimony didn't go towards impeaching Lisa. Roger was called to testify that he'd reported the red car's license plate included and "L" and an "M" when Mae's license plate didn't include those letters(TrialTr.1995,2007).

Counsel's strategy choices must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994). Because of the importance attached to Lisa's identifying Mae's car as being at Graham's, it was unreasonable strategy to fail to impeach Lisa with her prior inconsistent statements. *McCarter, Strickland.*.

A new trial is required.

XI.

JUROR3 INCLINED FOR DEATH

The motion court clearly erred denying counsel was ineffective for failing to move to strike for cause Juror3 who was more inclined to impose death where this case involved the killing of a law enforcement officer because Lance was denied his rights to due process, a fair and impartial jury, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that Juror3 was substantially impaired as to his ability to consider life and reasonably competent counsel would have moved to strike Juror3 for cause and Lance was prejudiced because he did not have a full panel of jurors who could consider life and further prejudice is presumed.

Counsel was ineffective for failing to move to strike Juror3 who was more inclined to impose death because this case involved a law enforcement officer's death.

Trial Record

When the first panel was questioned about its punishment views, Juror3 indicated that because this case involved a law enforcement officer's death that he was "more inclined" to impose death(TrialTr.582). When Juror3 was asked if the status of being a law enforcement officer meant "the only appropriate punishment" was death he responded: "Well, I mean I respect law officers and what they have to do. I guess I would feel that's more of a crime than just an average--"(TrialTr.583).

On further questioning, Juror3 stated the status of being a law enforcement officer wouldn't cause him to be "more inclined" to impose death and he could be

"impartial"(TrialTr.584). Juror3 stated the status of being a law enforcement officer wouldn't cause him to "automatically" vote death(TrialTr.584).

Counsel

Counsel didn't know whether they considered moving to strike Juror3 for cause(29.15L.F.1264-66;29.15Tr.648-49).

Findings

The findings state no evidence was presented(29.15L.F.1395)

Counsel Was Ineffective

Venirepersons are excludable "when their views would prevent or substantially impair the performance of their duties as jurors in accordance with the court's instructions and their oaths." *State v. Smith*,32S.W.3d532,544(Mo.banc2000)(relying on *Wainwright v. Witt*,469U.S.412,424(1985)). A for cause challenge should be sustained if "it appears that [a] venireperson cannot 'consider the entire range of punishment, apply the proper burden of proof, or otherwise follow the court's instructions in a first degree murder case.'" *State v. Smith*,32S.W.3d at 544(quoting *State v. Rousan*,961S.W.2d831,839(Mo.banc1998)). A prospective juror's qualifications "are not determined conclusively by a single response, 'but are made on the basis of the entire examination.'" *State v. Clayton*,995S.W.2d468,475 (Mo.banc1999)(quoting *State v. Kreutzer*,928S.W.2d854,866(Mo.banc1996)). A ruling on a venireperson's ability to follow the law is reviewable for an abuse of discretion. *Rousan*,961S.W.2d at 839.

To be qualified to serve as a juror in a capital case, a juror must be able to consider imposing a punishment other than death. *Morgan v. Illinois*,504U.S.719,728-29(1992). A juror who'd automatically vote death isn't qualified to serve because that juror cannot consider mitigating circumstances as required by the instructions. *Id.*729.

The entire examination here considered in context indicated Juror3 couldn't fairly serve because he couldn't consider the entire range of punishment based on this case involving a law enforcement officer's death. *See*, *Wainwright*, *Morgan*, *Clayton*. Juror3 stated that he was "more inclined" (TrialTr.582) to impose death for a law enforcement officer's death because it's "more of a crime than just an average--" (TrialTr.583).

In *Knese v. State*,85S.W.3d628(Mo.banc2002), this Court found counsel ineffective for failing to move to strike for cause two jurors. Knese's counsel failed to read jurors Gray's and Maloney's questionnaires. *Id.*632. Counsel testified in the postconviction case that had he read the two jurors' questionnaires then he would've moved to strike them for cause. *Id.*632. This Court noted that the two jurors' questionnaire responses "suggest--although not conclusively establishing--that they would automatically vote to impose death after a murder conviction." *Id.*633.

Knese's counsel's failure to read the two jurors' questionnaires and to question them on their death penalty views established counsel hadn't performed as reasonably competent counsel under *Strickland*. *Knese*,85S.W.3d at 633. Counsel's deficient performance resulted in "a structural error," in jury selection. *Id.*633.

Reasonable counsel would've moved to strike Juror3 for cause here because he was substantially impaired as to his ability to fairly serve. *See*, *Wainwright*, *Morgan*, *Knese*. The failure to move to strike Juror3 meant Lance didn't have a full panel of jurors who could fairly serve and he was prejudiced. *Knese*. Further, the failure to strike #3 was structural error. *Knese*.

A new penalty phase is required.

XII.

VICTIM IMPACT

The motion court clearly erred denying counsel was ineffective for failing to object to respondent's victim impact evidence Trial Exs. 133 (church casket photo), 250 (video montage), and 254 (drawing) because Lance was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have objected because these exhibits individually and collectively were so inflammatory they injected passion, prejudice, and arbitrariness. Lance was prejudiced because there is a reasonable probability he otherwise would have been life sentenced.

Counsel was ineffective for failing to object to respondent's victim impact evidence - Trial Exs. 133 (church casket photo), 250 (video montage), and 254 (drawing). Those exhibits individually and collectively injected passion, prejudice, and arbitrariness.

Victim Impact Evidence

Respondent's penalty evidence included a photo of Graham's casket leaving church (TrialEx.133;TrialTr.2104) and Graham's son's fifth birthday drawing depicting what his son described as Lance shooting Graham(TrialTr.2123-24;TrialEx.254).

Respondent's last item of penalty evidence the jury heard was a four minute disc photo montage set to music from Graham's life that was played at Graham's

funeral(TrialTr.2102-03,2127;TrialEx.250). The montage begins with Graham in Trooper uniform, moves to pictures of him as a toddler, and then through all phases of his life. A repeated lyric is: "I sure miss you. Life will never be the same with you not here. Each passing day has brought much pain. With God's grace my strength remains. I sure miss you, but heaven's sweeter with you there."(TrialEx.250).

Counsel

Counsel didn't think this evidence was objectionable(29.15Tr.678-82;29.15L.F.1299-1302).

Findings

Counsels' strategy not to object was reasonable(29.15L.F.1424-25).

Counsel Was Ineffective

The decision to impose death must be and appear to be based on reason rather than caprice or emotion. *Gardner v. Florida,*430U.S.349,358(1977).

In *Payne v. Tennessee*,501U.S.808,827(1991), the Court held if a state chose to admit victim impact during penalty, the Eighth Amendment didn't per se bar such evidence. Victim impact evidence that is so unduly prejudicial it renders the trial fundamentally unfair violates due process. *Id.*825(relying on *Darden v. Wainwright*,477U.S.168,179-83(1986)). This Court has indicated the issue is whether the victim impact evidence or prosecutor's remarks so infected the sentencing proceeding so as to render it fundamentally unfair, and thereby, violate due process. *State v. Knese*,985S.W.2d759,772(Mo.banc1999).

Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994). Here it wasn't reasonable.

In *State v. Hess*,23A.3d373,376,382,391-92(N.J.2011), the defendant shot and killed her police officer husband and pled guilty to aggravated manslaughter and had her sentencing hearing before the plea judge, not a jury. The plea was vacated because of counsel's ineffectiveness on multiple grounds, including victim impact. *Id.*388,391.

Hess' counsel was ineffective for failing to object to a video set to music that consisted of a montage of still photos of the deceased officer starting from childhood through adulthood. *Hess*,23A.3d at 381,392-94. The video included a television segment that covered the officer's funeral. *Id.*381,393.

At Hess' sentencing, an officer colleague harshly attacked Hess and referred to the deceased officer as "part of a larger fraternal family, a police 'brotherhood.'" *Hess*,23A.3d at 381.

In addressing the state's video and the colleague officer's statement, the *Hess* Court noted the prejudice of such evidence is "less pronounced" when a judge rather than a jury is imposing sentence. *Hess*,23A.3d at 392. The *Hess* Court, however, noted that judges, like jurors, "are susceptible to the wide range of human emotions that may be affected by irrelevant and unduly prejudicial materials." *Id.*392. The *Hess* Court found defense counsel should've objected to the video and the failure to do so was neither reasonable nor strategic. *Id.*393-94. Such matters had the "great

capacity to unduly arouse or inflame emotions." *Id.*393-94. The plea court also was directed to re-examine the propriety of the colleague officer's statements. *Id.*394.

Reasonable counsel would've objected to Trial Exs. 133 (church casket photo), 250 (video montage), and 254 (drawing) because each exhibit individually, as well as the three considered collectively, injected passion, prejudice, and arbitrariness. *See*, *Payne*, *Hess*, *Knese*, and *Strickland*. Each item individually and collectively rendered the penalty phase fundamentally unfair. *Payne, Knese*. The prejudice of these items was only compounded by the jury having heard Troopers in guilt testify about the Patrol's collegial familial sense of loss Graham's death had (TrialTr.1141,1236-38) and special satisfaction Lance's arrest had for the Patrol(TrialTr.1383). *Cf. Hess*. Lance was prejudiced because there's a reasonable probability he'd have otherwise been life sentenced. *See*, *Payne*, *Hess*, *Knese*, and *Strickland*.

A new penalty phase is required.

XIII.

PROSECUTOR'S COMMENT ON SILENCE

The motion court clearly erred in denying counsel was ineffective for failing to object, request a mistrial, or a curative instruction when Lisa Hart testified she didn't know why Mae's car was parked near Graham's and the prosecutor commented "Someone does" because Lance was denied his rights to due process, freedom from cruel and unusual punishment, right to silence, and effective assistance of counsel, U.S. Const. Amends. V, VI, VIII, and XIV, in that effective counsel would have objected that this was a comment on Lance's right to silence and Lance was prejudiced as the comment said to the jury Lance knew why Mae's car was at Graham's.

Counsel was ineffective for failing to object, request a mistrial, or a curative instruction when Lisa Hart testified she didn't know why Mae's car was parked near Graham's and the prosecutor commented: "Someone does." That statement was a comment on Lance's right to silence.

Pleadings

It was alleged counsel was ineffective for failing to object, request a mistrial, or a curative instruction when Lisa Hart testified she didn't know why Mae's car was parked near Graham's and the prosecutor commented: "Someone does"(29.15L.F.374-79 relying on TrialTr.1913-14). The prosecutor's comment told the jury Lance knew that Mae's car was parked at Graham's and highlighted Lance exercising his right to silence(29.15L.F.374-79).

Counsel

Lisa Hart was Henshaw-Frances' witness, so it was her responsibility to object (29.15L.F.1280-81;29.15Tr.668). Henshaw-Frances testified she didn't remember the prosecutor's comment, and therefore, didn't know whether any consideration was given to moving for a mistrial or requesting a curative instruction(29.15L.F.1361).

Findings

The prosecutor's comment wasn't a direct comment and it didn't have a decisive effect(29.15L.F.1417-18). This Court already found no plain error(29.15L.F.1417-18).

Counsel Was Ineffective

Failure to make timely proper objections can constitute ineffectiveness. *State v. Storey*,901S.W.2d886,900-03(Mo.banc1995)(counsel ineffective failing to object to penalty arguments asserting facts outside record). The *Storey* argument was improper and counsel was ineffective because "[a]ssertions of fact not proven amount to unsworn testimony by the prosecutor." *Id.*901. A prosecutor presenting facts outside the record is highly prejudicial "because the jury is aware of the prosecutor's duty to serve justice, not just win the case." *Id.*901(relying on *Berger v. United States*,295U.S.78,88(1935)).

Reasonable counsel would've objected, requested a mistrial, or a curative instruction to the prosecutor's statement because it commented on Lance's exercising his right to silence. *Storey*, *Strickland*. Lance was prejudiced as the statement

commented on Lance's right to silence and told the jury Lance knew why Mae's car was at Graham's. *Storey*, *Strickland*.

A new trial is required.

XIV.

VISIBLE POLICE PRESENCE

The motion court clearly erred in denying the claim counsel was ineffective for failing to object to the visible police presence in and around the courthouse during trial and at sentencing and for failing to object to judge sentencing with such police presence as permissible when the jury hung because Lance was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that reasonable counsel would have objected to the visible police presence because of its message to convict Lance based on Graham's police affiliation and that Lance was an extremely dangerous person and would have objected to judge sentencing based on the electoral pressures to impose death as evidenced by the police presence at sentencing. Lance was prejudiced because he would not have been convicted or at minimum not death sentenced.

The motion court clearly erred in denying the claims counsel was ineffective for failing to object to the visible police presence in and around the courthouse during trial and at sentencing and for failing to object to judge sentencing when the jury hung as permissible because of the visible police presence.

Counsel

Counsel testified there was a large, armed, clear police presence inside and outside the Howell County courthouse at trial and sentencing(29.15L.F.1279,1302,1359-60;29.15Tr.664-65). Counsel was told the

police presence was necessary because of threats directed at everyone(29.15L.F.1369;29.15Tr.664-65).

Counsel didn't discuss objecting to the visible trial police presence and there was no strategy reason for not objecting(29.15L.F.1360-61;29.15Tr.666).

There was no sentencing objection to the police presence because sentencing was judge sentencing(29.15L.F.1303;29.15Tr.682).

Courthouse Conditions

Lance's aunt, Marcia Miller, attended trial(29.15Tr.373-74). Miller observed 50-60 uniformed officers inside and outside the courthouse for jury selection in Carter County(29.15Tr.374-76). In Howell County for trial each day, there were 75-100 uniformed officers inside and outside that courthouse(29.15Tr.377-78). There were officers armed with big guns(29.15Tr.377-78). Officers surrounded Lance when he was brought into the courthouse(29.15Tr.381;29.15Ex.6).

The front page of the West Plains Daily Quill reported on the first day of trial in Howell County(29.15Ex.3p.1). The front page had a photo of an officer wearing a SWAT cap and carrying a camouflaged automatic assault rifle(29.15Ex.3p.1). The photo's caption indicated the display of security had stirred-up memories of the McVeigh and Unabomber trials(29.15Ex.3p.1).

Findings

The police presence served necessary courthouse security(29.15L.F.1416). The officers present were entitled to be present as security based on the case's

seriousness or as victims(29.15L.F.1426). Challenges to judge sentencing aren't cognizable and this Court's upheld it(29.15L.F.1427).

Counsel Was Ineffective

The right to a jury trial guarantees a fair trial by a panel of impartial, indifferent jurors. *Irvin v. Dowd*,366U.S.717,722(1961).

When a courtroom security arrangement is challenged as inherently prejudicial the test is "not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play.'" *Holbrook v. Flynn*,475U.S.560,570(1986)(quoting *Estelle v. Williams*,425U.S.501,505(1976)).

In *Woods v. Dugger*,923F.2d1454,1455-58(11th Cir.1991), the defendant was sentenced to death for killing a correctional officer in a small rural Florida county. The killing garnered intense local attention and outcries for death for those who kill prison guards. *Id.*1458. During trial, half of the spectators were off-duty uniformed prison guards. *Id.*1458. In reversing Woods' conviction, the Court relied on the fact that the guards were present to show solidarity with the killed guard and to communicate the message that Woods be convicted and death sentenced. *Id.*1459-60. The *Woods* Court concluded that the "jury could not help but receive the message" and prejudice was presumed. *Id.*1460-61.

The number of armed uniformed Troopers present during Lance's trial and sentencing created the unacceptable risk of impermissible factors coming into play as to guilt and punishment. *See*, *Holbrook* and *Woods*.

It is recognized that the use of a trial to enhance a judge's electability can, in a clear case, warrant granting a convicted petitioner relief. *See, Brown v. Doe*,803F.Supp.932,946(S.D.N.Y.1992), *aff'd*., *Brown v. Doe*,2F.3d1236(2ndCir.1993) and *Harris v. Alabama*,513U.S.504,518-22(1995)(Stevens, J., dissenting)(attributing Alabama trial judges' overrides of more than nine juries' life recommendations for every vetoed death recommendation to a political climate that requires judges subject to election to constantly profess fealty to capital sentencing).

In *Woodward v. Alabama*,134S.Ct.405,405(2013), Justices Sotomayor and Breyer dissented from the denial of certiorari in a capital case where the trial judge overrode the jury's decision not to impose death. Granting certiorari was warranted to address evidence that cast a cloud of illegitimacy over the criminal justice system that Alabama judges elected in partisan elections had succumbed to electoral pressures with their judicial overrides imposing death. *Id.*408-09. Those same electoral pressures are at play when an elected Missouri judge, like Judge Evans, chooses to impose death when a jury cannot agree that death is warranted and the victim is a Highway Patrol Trooper.

Reasonable counsel would've objected to the visible armed police presence at trial and sentencing and to judge sentencing under such circumstances. *Strickland.* Lance was prejudiced because there's a reasonable probability he wouldn't have been convicted or at minimum not death sentenced. *Strickland.*

A new trial is required. At minimum, this Court should order Lance sentenced to LWOP.

XV.

APPELLATE COUNSEL INEFFECTIVE

The motion court clearly erred in denying the claim appellate counsel was ineffective for combining character and propensity grounds into the claim challenging the failure to grant a mistrial in response to Officer Heath testifying that on the night Graham was shot the police brought a SWAT team to Lance's to interview him because of Lance's violent history because Lance was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV, in that reasonably competent counsel would not have combined the two grounds thereby causing the claim to be reviewed for plain error and Lance was prejudiced because there is a reasonable probability that had Lance's claim been briefed as preserved in the trial court that a new trial would have been granted for failing to grant a mistrial.

Appellate counsel was ineffective in combining character and propensity evidence grounds into the claim challenging the failure to grant a mistrial in response to Officer Heath testifying that on the night Graham was shot the police brought a SWAT team to Lance's house to interview him because of Lance's violent history. Combining character and propensity caused the claim to be unpreserved. There's a reasonable probability that had the failure to grant a mistrial been briefed, so as to raise the claim as preserved in the trial court, that this Court would've granted a new trial.

29.15 Pleadings

Trial counsel requested a mistrial in response to Trooper Heath testifying that on the night Graham was shot the police brought a SWAT team to Lance's to interview him because of Lance's violent history(29.15L.F.462-65 relying on TrialTr.1922-25)). Trial counsel's objection was to improper bad character evidence(29.15L.F.462-65). An instruction to disregard any evidence of Lance's character or reputation was given(29.15L.F. relying on TrialTr.1925).

The denial of a mistrial was challenged on appeal on the grounds that Heath's evidence was improper propensity evidence(29.15L.F.466-67). The pleadings alleged appellate counsel was ineffective because this Court found the briefed propensity grounds unpreserved and subjected Lance's claim to only lesser plain error review because the trial objection was improper bad character evidence(29.15L.F.466-67).

Appellate Counsel's Testimony

Michael Gross referenced his brief as having raised this matter as impugning Lance's character causing jurors to convict based on a propensity to engage in violent behavior(29.15Tr.489;29.15Ex.34p.85,91). Gross recalled this Court deemed propensity as unpreserved because this Court considered propensity and character different(29.15Tr.490-91). In light of this Court's treatment of the issue, Gross would've briefed the claim differently(29.15Tr.491-92). Gross thought propensity fit into character(29.15Tr.492).

Direct Appeal Opinion

On direct appeal, this Court stated: "Character and propensity evidence are distinct from one another." *State v. Shockley*,410S.W.3d179,193(Mo.banc2013). Because counsel's objection was on character grounds, not propensity, the claim as briefed was unpreserved and subject to lesser plain error manifest injustice review. *Id.*191-94. This Court ruled no manifest injustice occurred from Heath referencing Lance having a violent history to explain why so many officers were brought to Lance's. *Id.*194.

Findings

The findings analyzed the claim from the perspective of why a mistrial wasn't required, rather than how appellate counsel briefed the issue which resulted in lower plain error, manifest injustice, unpreserved error review(29.15L.F.1448-53). The findings concluded a curative instruction was given which was adequate relief and Lance wouldn't have obtained direct appeal relief(29.15L.F.1453).

Counsel Was Ineffective

A defendant is entitled to effective assistance of appellate counsel. *Evitts v. Lucey*,469U.S.387,396-97(1985). To be entitled to relief on a claim appellate counsel was ineffective, a movant must establish competent and effective appellate counsel would've raised the error and there's reasonable probability that if the claim had been raised, the appeal's outcome would've been different. *Williams v. State*,168S.W.3d433,444(Mo.banc2005).

In *Deck v. State*,68S.W.3d418,422-24(Mo.banc2002), defense counsel submitted two given defective penalty phase mitigating circumstances instructions

that were given to the jury. On direct appeal, this Court rejected the defective instructions constituted plain error. *Id.*424-25.

In *Deck,* counsel was ineffective because the defective instructions went to a "critical issue" and the errors were "sufficiently egregious." *Deck,*68 S.W.3d at 429. The missing paragraphs were "pivotal" to the defense offered. *Id.*430. Thus, under *Deck*, a finding of no plain error on direct appeal as to a claim doesn't foreclose finding counsel was ineffective in their handling of that same matter.

Reasonable appellate counsel raising a challenge based on trial counsel's character grounds objection wouldn't have combined the concepts of character and propensity, and thereby, avoided this Court applying the lesser plain error manifest injustice standard of review. *See*, *Evitts* and *Williams*. Lance was prejudiced because there's a reasonable probability that had Lance's claim been briefed as presented in the trial court and subject to preserved error review that a new trial would've been granted for failing to grant a mistrial.

A new trial is required.

XVI.

MITIGATION EVIDENCE

The motion court clearly erred denying counsel was ineffective for failing to call mitigation witnesses Velma Dowdy, Eugene George Jackson, and Butch Chilton because Lance was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have called them to highlight Lance was a good father and hard worker and how Lance's father's accidental vehicular death impacted Lance. Lance was prejudiced as there is a reasonable probability that had the jury heard these witnesses he would have been life sentenced.

Counsel was ineffective for failing to present available mitigation evidence.

Defense Penalty Evidence

Laura Smith testified she has two daughters with Lance and how important it was to them Lance still be in their lives(TrialTr.2128-30). Lance's cousin, Rachel Shockley, testified about how Lance had looked-out for her and cared for their grandparents(TrialTr.2131-32). Lance's grandfather, Gerald Sanders, recounted how Lance's father was killed in a car accident, when Lance was eight, and that Lance then lived with them(TrialTr.2132-37). Gerald highlighted the joy Lance brought to his life(TrialTr.2132-37).

Counsel

Bruns had ultimate responsibility for mitigation(29.15Tr.683;29.15L.F.1303-04,1365). Bruns had no strategy reason for not investigating witnesses he was questioned about(29.15Tr.693).

Uncalled Witnessses

Velma Dowdy's granddaughter, Laura Chilton (Smith), lived with Lance and together they had two daughters together, Summer and Morgan(29.15Tr.413,416). Lance was a good father taking care of his daughters and a hard worker(29.15Tr.414-15,417-18).

Eugene George Jackson and Lance were lifelong good friends(29.15Tr.460-61,463). In the early 1990s, Lance's father was killed in an accident where a truck's load fell on his vehicle which caught fire(29.15Tr.462). Lance was well liked by peers(29.15Tr.463-64).

Butch Chilton coached Lance in Little League(29.15Tr.504-06). Lance was a good child growing-up(29.15Tr.506). Lance lived with Chilton's niece, Laura, and they had two children, Summer and Morgan(29.15Tr.504-05). Butch knew Lance's father, Steve Shockley, who was killed in an auto accident where some lumber fell off a truck and killed him(29.15Tr.505,507-08). Butch knew Lance's father's accidental death was very painful for Lance(29.15Tr.508-09).

Findings

Counsel conducted appropriate mitigation investigation and exercised reasonable strategy(29.15L.F.1427-33). The mitigation case concluded with Gerald Sanders because Sanders brought a tearful reaction to some jurors(29.15L.F.1433).

Counsel Was Ineffective

Counsel are obligated to discover and present all substantial, available mitigating evidence. *Wiggins v. Smith*,539U.S.510,524-25(2003); *Williams v. Taylor*,529U.S.362,395-96(2000); *Hutchison v. State*,150S.W.3d292,302(Mo.banc2004). That mitigating evidence includes: "'medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences.'" *Hutchison*,150S.W.3d at 302(quoting *Wiggins*,539U.S. at 524)(italics in *Wiggins*). "Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Tennard v. Dretke*,542 U.S.274,285(2004)(quoted in *Hutchison v. State*,150S.W.3d292,304(Mo.banc2004) and *Glass v. State*,227S.W.3d463,468(Mo.banc2007)). Relevant mitigating evidence "is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *Tennard*,542U.S. at 284.

Failing to interview witnesses relates to preparation and not strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8th Cir.1991). Lack of diligent investigation isn't protected by a presumption in favor of counsel and cannot be justified as strategy. *Id.*1304. Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994).

Reasonable counsel would've investigated and called Velma Dowdy, Eugene George Jackson, and Butch Chilton to highlight Lance was a good father and hard

worker and how Lance's father's accidental vehicular death impacted Lance. *Kenley* and *Strickland*. Lance was prejudiced as there's a reasonable probability that had the jury heard these witnesses he would've been life sentenced. *Strickland*.

A new penalty phase is required.

XVII.

BRADY VIOLATION

The motion court clearly erred finding respondent did not violate *Brady v. Maryland* when it failed to disclose data stored electronically and in other formats that Graham possessed relating to other possible suspects in the shooting of Graham including, but not limited to, Carter County law enforcement corruption being investigated because Lance was denied his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that this material would have led to evidence supporting that someone other than Lance killed Graham.

Respondent failed to disclose data stored electronically and in other formats that Graham possessed relating to other possible suspects in the shooting of him. Those matters included, but not limited to, on-going investigations into Carter County law enforcement corruption.

29.15 Evidence And Proceedings

During 29.15 discovery proceedings, 29.15 counsel indicated there was reason to believe Graham had maintained investigative files relating to criminal wrongdoing on the part of some Carter County law enforcement personnel(29.15Tr.73-74). There was evidence Carter County Sheriff Greg Melton was a participant in drug trafficking and Graham was investigating Melton(29.15Tr.75-76;29.15L.F.57-58,809,812). There was reason to believe Graham was investigating former Water Patrol Officer Scott Sayler for methamphetamine dealing(29.15Tr.77). There was evidence Melton

and Sayler were dealing drugs together(29.15Tr.77-78). Melton gave pretrial deposition testimony that methamphetamine charges against Scott Sayler, a person of interest in Graham's death, were dismissed shortly after Graham's death(29.15L.F.59,812,814). Melton was found shot to death and 29.15's counsel's understanding was Melton's death was ruled suicide, but there's evidence he was murdered(29.15L.F.60,810,814;29.15Tr.80-81).

A 2003 Graham authored memo was obtained showing Melton was seizing guns Melton had no authority to seize(29.15Tr.82-83;29.15L.F.809). The Highway Patrol had been investigating Melton and his successor Tommy Adams(29.15Tr.82-83). In 2011, Carter County Sheriff Adams, Deputy Stephanie Kearbey, Richard Kearbey, and Gary Bender were charged with arson, Medicaid Fraud, trafficking in drugs, and guns(29.15Tr.81,83-85,97). There were investigations into Carter County law enforcement corruption(29.15Tr.83-85,97).

The parties stipulated 29.15 counsel sought mirror images of Graham's computer drives including a zone office work computer, a mobile computer, and a home computer(29.15Tr.477-78). Graham's zone office computer was a shared unit(29.15Tr.477-78). A disc was provided to 29.15 counsel(29.15Tr.478). The original drive was put back into service and eventually retired, so was no longer available(29.15Tr.478). Respondent informed 29.15 counsel Graham's mobile and home hard drives were no longer accessible(29.15Tr.478). Movant's 29.15 computer expert was permitted to examine Graham's mobile and home computer hard drives, but was unable to access them(29.15Tr.478).

Jeanne Kingree testified that Graham's fiancé, Kathy Crowley/Kathy Runge, had said Graham kept files on Troopers he supervised(29.15Tr.403).

Carly Carter testified she and Kathy Crowley/Kathy Runge were close friends(29.15Tr.428-29). Kathy Crowley/Kathy Runge told Carter that Graham was then investigating accusations involving Sheriff Melton(29.15Tr.430-32).

Krista Kingree testified Kathy Crowley/Kathy Runge is her aunt and both stayed at Krista's in-laws, Michael and Jeanne Kingree's house, after Graham was killed(29.15Tr.435-36). Krista recalled Kathy Crowley/Kathy Runge mentioned within a couple of weeks of Graham's death that Graham maintained files with unfavorable materials on other Troopers(29.15Tr.436-37,439,442-43).

Findings

There was no evidence respondent suppressed evidence favorable to Lance(29.15L.F.1453-55).

***Brady* Violation**

The prosecution must disclose favorable evidence material either to guilt or punishment. *Brady v. Maryland*,373U.S.83,87(1963). For purposes of due process, no distinction between exculpatory and impeachment evidence exists. *U.S. v. Bagley*,473U.S.667,676-78(1985). Nondisclosure of *Brady* evidence violates due process "irrespective of the good faith or bad faith of the prosecution." *Brady*,373U.S. at 87.

Respondent failed to disclose *Brady* material stored electronically and existing in other formats that Graham possessed relating to other possible suspects in the

shooting of him. That *Brady* material would've led to evidence supporting someone other than Lance killed Graham.

A new trial is required.

CONCLUSION

For the reasons discussed this Court should: (1) order a new trial – Points I through X, XIII through XV, and XVII; and (2) a new penalty phase – points XI, XII, XIV, and XVI.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, William J. Swift, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 30,908 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The brief has been scanned for viruses using a Symantec Endpoint Protection program, which was updated in April, 2018. According to that program the brief is virus-free.

A true and correct copy of the attached brief with brief appendix have been served electronically using the Missouri Supreme Court's electronic filing system this 26th day of April, 2018, on Assistant Attorney General Shaun Mackelprang at Shaun.Mackelprang@ago.mo.gov at the Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

/s/ William J. Swift
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