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 REPLY BRIEF

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I.

FAILURE TO QUESTION "PUBLISHED AUTHOR"

Counsel was ineffective for failing to voir dire Juror58 about his book's contents because the 29.15 record established Juror58 was biased in that:

(A) he disavowed his book's themes until confronted with his Amazon/Barnes and Noble web postings, after the West Plains newspaper identified him by name as a "tainted juror," and he asked the Sheriff if it was "okay" for him to carry his pistol for safety and because of his fears based on "strange cars and vehicles" parking and driving "really slow" around his house;

(B) he refused to concede he was present for Judge Evans' admonition not to bring crime-themed materials, and, despite that admonition, saw no problem passing-out his book despite its contents, and calls for vengeance;

(C) he downplayed his book's "too lenient" criminal court system theme as his own casting his book as a "love story" and his theme as "a small minor part of the book" when Judge Evans had told him that he was discharged on "fairness" grounds and could expect to be subpoenaed due to his book because his fairness was in question; and

(D) the 29.15 court's findings deferred to Juror58's own self-serving assessment about his bias without independently examining him, thus, requiring this Court's more searching review and not "blind deference."

The motion court and respondent rely on Juror58's self-serving assertions that he could be fair as a basis to reject the claim counsel was ineffective in failing to follow-up on Juror58's volunteering he was a "published author"(Resp.Br.19-21). The 29.15 record, however, convincingly establishes Juror58 couldn't fairly serve.

Juror58 wrote a book highly critical of our justice system and any attempt to show mercy. He glorifies, through his protagonist, vigilante justice. Juror58 defied the trial court's instruction to not bring crime related materials to court while serving on the jury. This juror not only brought the book to court, but shared it with other jurors and court personnel. Against this backdrop, respondent wants this Court to defer to this juror's own assessment of his fairness and impartiality. This Court should reject this argument and reverse.

In finding that Juror58 was fair and impartial, the 29.15 court merely reproduced pages of Juror58's 29.15 testimony where he disavowed his book's views of the legal system and professed fairness(29.15L.F.1441-43). Respondent does the same reproducing Juror58's self-serving fairness assertions(Resp.Br.19-21). The 29.15 record, unlike the trial record, convincingly establishes the court clearly erred. This juror was biased.

A defendant is entitled to a full panel of qualified jurors. *State v. Stewart*,692S.W.2d295,298(Mo.banc1985). A trial court has broad discretion in determining prospective jurors' qualifications. *State v. Lingar*,726S.W.2d728,733(Mo.banc.1987). In assessing a venireperson's qualifications, the "critical question" is whether "on the whole" the venireperson's

responses indicate the ability to fairly serve. *Id.*734. "Absence of an independent examination by the trial court justifies a more searching review by an appellate court of the challenged juror's qualifications." *Id.*734.

On the qualification of jurors, the trial court should always err on the side of caution - to sustain the challenge. *Stewart,*692S.W.2d at 298-99. "Trial judges should sustain challenges to jurors whose responses make questionable their impartiality." *Id.*299.

Respondent selectively quotes an excerpt from Kessler's 29.15 testimony in which Kessler conceded there were things about Juror58's military background and familiarity with guns that potentially could've made him desirable on ballistics evidence(Resp.Br.21-22 relying on 29.15L.F.1325). But respondent ignores that at trial, Kessler emphatically argued to remove Juror58 and for a mistrial because of Juror58's book's contents(TrialTr.2147-2208). At trial and the 29.15 hearing, Kessler admitted he was ineffective for failing to question Juror58 about his book when Juror58 volunteered he was a "published author"(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). That there might've been qualities about Juror58 that potentially could've made him a desirable juror didn't make it reasonable for counsel to fail to question Juror58 about his book when he approached the bench to inform everyone he was a "published author." *See, Strickland v. Washington,*466U.S.668(1984).

The book's front and back covers, presented for the first time on the 29.15, drip with blood spatter. Orig.Br.16-17. 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).

The Amazon/Barnes and Noble descriptive information Juror58 authored 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). The protagonist viewed the lenient sentence as the product of deception worked on the jury by the defendant's unscrupulously dishonest attorney presenting the defendant as remorseful, when he wasn't(29.15Ex.1p.109-11). The protagonist got his vengeance by kidnapping, slowly torturing his wife's killer (while forcing him to look at a photograph of the victim) and ultimately killing the drunk driver by inserting a sharpened wooden stick into his rectum and up into his body(29.15Ex.1p.111-14). Not satisfied with having tortured and killed the drunk driver, the protagonist pursued a course of action intended to detonate a stolen atomic bomb in St. Louis as:

> 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).

From start to finish, the protagonist's focus was directed at getting "vengeance." Getting "vengeance" meant killing the drunk driver and detonating an atomic bomb on St. Louis. In his view, the court system was "too lenient," and judges in particular, improperly allowed the drunk driver, a homicide defendant, responsible for his wife's death, to go unpunished.

Juror58 wouldn't concede he must've been present when Judge Evans gave the admonition (TrialTr.988) not to bring books or movies involving crimes or legal subjects(29.15Ex.10p.22-25). Despite Judge's Evans' admonition, Juror58 testified he saw no problem in passing-out his book about criminal justice and vigilante justice, instead referring to his book as a "love story"(29.15Ex.10p.22-24).

When Juror58 was asked why he passed-out his book during trial when it contained themes that the court system was too lenient towards criminal defendants, and in particular homicide defendants, he downplayed it saying he saw nothing wrong

because that "was such a small minor part of the book."(29.15Ex.10p.33). Juror58's characterization of his book as "a love story" (29.15Ex.10p.24-25) rather than a condemnation of a judicial system that treats criminal defendants too leniently, in particular homicide defendants, strains credulity. The protagonist's entire motive was revenge against a court system that was too lenient and set murderers free.

A simple glance at his book shows Juror58 cannot assess his own fairness. Judge Evans' secretary, April Mayfield, said that she 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).

Judge Evans testified he first saw the book Friday evening, March 27, 2009(29.15Ex.30p.9-10,12-13). 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).

Juror58 gave Howell County Deputy Wall a copy of his book(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 was rightfully concerned and gave the book to Mayfield the day after Juror58 gave it to him(29.15Ex.9p.14-19). Wall knew it was something Judge Evans ought to know about(29.15Ex.9p.14-19).

Juror117 didn't read the book's back cover when Juror58 first handed it to her(29.15Tr.128-33). If she had, then she wouldn't have taken it with her to Howell

County because she thought it fell within the trial court's instruction not to bring books about trials or crimes(29.15Tr.128-33).

Early in the evidentiary phase of trial, during guilt, Juror58 gave Juror50 a copy of his book(29.15Tr.199-201). Juror50 read a few pages and her reaction was she shouldn't be reading it(29.15Tr.200,202). She knew it violated the sequestration rules and she gave it back to Juror58(29.15Tr.200,202).

Juror Coordinator Nigliazzo testified that had she 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).

Judge Evans' secretary, Deputy Wall, Juror117, Juror50, and Juror Coordinator Nigliazzo all recognized this book was violent crime related. It was at odds with Judge Evans' admonition not to bring books or movies involving crimes or legal subjects(TrialTr.988). None of them considered Juror58's book a "love story."

Juror58 initially disavowed his book's plot that the protagonist intended to make America pay for allowing murderers to go free. But when he was confronted with his book's Amazon/Barnes and Noble web postings he authored (29.15Ex.10p.7-8)(TrialTr.2165;TrialL.F.1661) that said exactly that(29.15Ex.10p.29-31;TrialL.F.1662), he had to admit the plot. Juror58's testimony included:

Q Now, would you agree that part of the plot of the book, and if you don't agree, that's fine, would you agree that part of the book says that the protagonist intends to make America pay for allowing murderers to go free?

A **No, absolutely not**.

Q Okay. All right. I want you to read some of this [Amazon/Barnes and Noble web posting], yeah, I've got that right over there.

A. Yeah.

Q Do you agree that the plot of your book includes that the drunk driver fakes remorse in court and that the Court therefore is too lenient with the drunk driver?

A Yes.

(29.15Ex.10p.29-30)(emphasis added).

This juror wanted to be seen as fair. He was upset that the West Plains newspaper cast him as a "tainted juror" and identified him by name(29.15Ex.10p.19-20). That disclosure upset Juror58 because he lived near the other jurors(29.15Ex.10p.20). On the drive from Howell County back to Carter County, the Deputy driver called the Sheriff and Juror58 asked the Sheriff if it was "okay" to carry his pistol for a while(29.15Ex.10p.20). The Sheriff told Juror58 "do what you have to do"(29.15Ex.10p.20).[1] Juror58 testified that because of having been publicly

[1] Undersigned counsel apologizes, the original brief mistakenly attributed the advice given Juror58 to do whatever was needed to the Deputy driver, when it was actually

identified by name as the "tainted juror," he feared for his family's safety(29.15Ex.10p.19-21). Juror58 was anguished by "having people, strange cars and vehicles coming to my house and parking at the end of my driveway or driving down the road really slow and what-not."(29.15Ex.10p.35).

After the detailed trial record was made on Saturday, March 28th, about what was then known about Juror58's book and the decision was made to discharge Juror58, Judge Evans summoned Juror58 to advise him of that decision(TrialTr.2207). Judge Evans told Juror58 that "[o]ut of fairness" he was discharging Juror58 and that he might later be subpoenaed(TrialTr.2207). Juror58 asked Evans whether he was being discharged because of his book(TrialTr.2207-08). Judge Evans told Juror58:

> THE COURT: There were fairly **lengthy discussions and arguments** and I don't think it can be easily answered in a single short response. It involves **that book and your participation in it and your participation as a juror.**

(TrialTr.2207-08)(emphasis added)

It is up to the trial judge, not the juror, to decide the juror's ability to fairly serve. *State v. Thompson*,541S.W.2d16,18(Mo.App.,K.C.D.1976). Appellate courts shouldn't "give blind deference" to a trial judge's exercise of discretion in

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the Sheriff giving that advice to Juror58 on a call that the Deputy had placed to the Sheriff(Orig.Br.14,60).

determining whether a juror can fairly serve. *Id.*18. *See, also, State v. Roark*,784S.W.2d 194,197(Mo.App.,W.D.1989)(conviction reversed "blind deference" applied); *State v. King*,746S.W.2d120,122(Mo.App.,S.D.1988)(reversing conviction "blind deference" applied); *State v. Kayser*,637S.W.2d836,837-38(Mo.App.,E.D.1982) (conviction reversed "indiscriminate assent" to trial court's exercise of discretion on juror's qualification not required). Thompson's conviction was reversed because the trial court's basis for overruling the for cause challenge was the venireperson's profession that he could fairly serve. *Thompson*,541S.W.2d at 18. Reversal was required because the venireperson's impartiality "was so highly suspect that it cannot be lightly ignored." *Id.*18.

Like *Thompson*, Juror58's assertions of impartiality are "so highly suspect" that they cannot be ignored in light of his:

- Getting called out by name by the West Plains newspaper as the "tainted juror" causing him to fear for his family's safety
- Fearing "strange cars and vehicles" parking and driving "really slow around his house"
- Refusing to concede he was present for Judge Evan's cautionary admonition not to bring crime themed materials when the record showed otherwise
- Passing-out his book, contrary to the court's instruction, characterizing it as a "love story", even though everyone else who saw it recognized it as about the criminal justice system and vigilante justice

- Asserting that his attack on the court system that it is too lenient was "a small minor part of the book"
- Knowing from Judge Evans he was discharged on fairness grounds because of his book and could expect to be subpoenaed
- Disavowing his book's theme until confronted with his own words posted on the Amazon/Barnes and Noble web sites
- Requesting the Sheriff's permission to carry his gun

Respondent relies on Juror58's self-serving testimony that his book had no bearing on his decision or anyone else's decision(RespBr.28 relying on 29.15Ex.10p.33). This Court should not give "blind deference" to findings that simply reproduced Juror58's self-serving assertions he was able to fairly serve and where the 29.15 court didn't conduct an independent examination(29.15L.F.1441-43). *See*, *Thompson* and *Lingar*. Such deference is particularly inappropriate where Judge Evans' secretary, Deputy Wall, Juror117, and Juror50 immediately recognized the violent nature of the book and that it was brought to court contrary to Evans' instruction. Juror58's assertion that passing-out his book didn't impact other jurors isn't something Juror58 gets to decide, rather that is for this Court to decide based on the evidence. *See, Thompson*.

In *State v. Holliman*,529S.W.2d932,935-36(Mo.App.,St.L.D.1975), the defendant was convicted of the first degree murder shooting death of an on-duty police officer. That conviction was reversed for refusing to strike for cause a venireperson on the grounds that he was a friend of the deceased officer and the

deceased officer's father and the venireperson's son was a police officer in the same district as the deceased officer. *Id.*937-38, 940. The trial court refused to strike that venireperson for cause because he had said that he could be fair and impartial. *Id.*938. In ruling, the *Holliman* trial judge stated:

> Well, [Defense Counsel], I appreciate that this man has a background that he might well not be a good juror in this case, but I as the Court don't feel that I can strike him for cause when he indicated in the questions asked by [The Prosecutor] and yourself that he could be a fair and impartial juror. Now, I can't look into his mind and say that he is saying that deliberately and I can only be governed by his answers and under the circumstances I am going to have to deny your Motion[.]

Holliman,529S.W.2d at 938.

The *Holliman* Court in reversing noted: "The decision of the judge should be based on facts stated by the juror not on conclusions of the juror himself as to his ability to act impartially . . . ." *Holliman*,529S.W.2d at 939,943. Where "an independent factual determination" by the trial judge is lacking, then "a more searching consideration by the appellate court" is required in determining whether a juror should've been stricken for cause. *Id.*939-40. *See, also*, *State v. Wolff*,701S.W.2d777,778(Mo.App.,E.D.1985)("more searching consideration" required). In reversing, the *Holliman* Court concluded that under "the cumulative circumstances" the venireperson should've been struck for cause. *Id.*941.

A "more searching" independent consideration of the "cumulative circumstances" show Juror58 couldn't fairly serve. Those "cumulative circumstances" also show why Juror58's impartiality is "highly suspect" under *Thompson*, *supra*.

This 29.15 claim isn't based on the same assumptions raised in the direct appeal(Resp.Br.23). Instead, the factual record shows Juror58 had the strong views espoused in his book, tried to hide those from the court, violated the court's order not to bring such material to court, and distributed his book to other jurors. The overwhelming evidence shows Juror58 couldn't fairly serve.

The neutral witnesses who encountered Juror58 and his book, Judge Evans' secretary, Judge Evans, Deputy Wall, Juror117, Juror50, and Juror Coordinator Nigliazzo recognized his book shouldn't have been with the jury. They knew Juror58 had violated the court's instruction and orders. The book is disturbing. The thought that its author served as the jury's foreperson is outrageous. This Court should be left with only one conclusion – the motion court clearly erred in denying a new trial.

A new trial is required.

II.

JUROR58's BOOK – INEFFECTIVE NEW TRIAL MOTION HEARING

Counsel was ineffective for failing to call as witnesses at the motion for new trial hearing jurors, court personnel, and Judge Evans to testify and support how Juror58's actions were prejudicial juror misconduct because the evidence showed the jury was subject to improper influences.

Trial counsel was on notice of juror misconduct, but failed to present readily available evidence when invited by Judge Evans to do so at the motion for new trial hearing. The record shows the jury was subject to prejudicial improper influences.

The book's front and back covers drip with blood spatter(29.15Ex.1). The back cover states the 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).

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 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).

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).

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).

Despite all this evidence, respondent asserts that prejudice was not established(Resp.Br.38). According to respondent all that was proven is that Juror58's book was shared with other jurors, but prejudice wasn't shown(Resp.Br.38).

Juror misconduct requires a new trial when the misconduct prevented fair and due consideration of the case. *State v. Chambers*,891S.W.2d93,101(Mo. banc1994). "Juror misconduct during trial requires a new trial 'unless the state affirmatively shows that the jurors were not subject to improper influences.'" *Chambers*,891S.W.2d at 101(quoting *State v. Babb*,680S.W.2d150,151(Mo. banc 1984)).

Respondent refers to Juror58's testimony that he didn't discuss his book's themes with other jurors(Resp.Br.relying on 29.15Ex.10p.17,21). Juror58 didn't have to discuss those themes with other jurors because they were exposed to those themes because of the book's covers. Here, every single juror who saw Juror58's book saw the blood spattered covers and the "too lenient" to murderers message about the court system. These jurors were exposed first hand to Juror58's violent story line which espoused the need for vigilante justice for "vengeance." The book criticized leniency and mercy for criminal defendants accused of homicide offenses. The jurors' exposure to Juror58's book's views calls into question the reliability of the entire deliberation process at guilt and punishment.

The book's message was improper preventing fair and due consideration of Lance's case. *See*, *Chambers*. Jurors 117 and 50 immediately recognized that the book was contrary to the court's instructions(29.15Tr.128-33,200,202). Similarly, Juror3's reading the back cover and giving Juror58 "feedback" about the book(29.15Ex.10p.14-15;29.15Tr.195) established fair and due consideration of Lance's case was destroyed. That failure to give fair and due consideration means there is a reasonable probability of a different result and *Strickland* prejudice was proven.

Jurror58's book injected unfairness and improper bias into Lance's case. The book authored by Lance's foreperson espoused the view that the criminal court system was too lenient and allowed individuals charged with homicide offenses to

escape justice. Lance's conviction and death sentence cannot stand given this misconduct and counsels' failure to expose it.

A new trial is required.

III.

JUDGE EVANS' NON-DISCLOSURE OF JUROR58'S BOOK

Judge Evans failed to timely disclose that Juror58 brought his book to the sequestered jury because the claim briefed and pled are the same.

Faced with evidence that Judge Evans failed to timely disclose to trial counsel that he knew Juror58's book was with the jury, respondent resorts to making a procedural argument that the 29.15 pleadings' record expressly refutes. The amended motion included allegations that Judge Evans didn't timely disclose his knowledge before guilt phase deliberations (29.15L.F.430) and when ruling on the requests regarding Juror58 during the sentencing phase and at the motion for new trial hearing(29.15L.F.448-49). Thus, those pleadings cover all possible times for when the non-disclosure happened.

Non-disclosure Timing

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 trial counsel making a lengthy record informing Judge Evans that they'd learned only Friday night, after court was adjourned, about matters involving foreperson Juror58(TrialTr.2147-2208). Counsel requested a mistrial(TrialTr.2161).

Evans testified he first saw the book Friday evening March 27th, but it was possible he'd seen the book even earlier than Friday evening(29.15Ex.30p.9-10,12-13).

Respondent's Pleading Argument

Respondent asserts the claim briefed is different than the one pled(Resp.Br.39 relying only on 29.15L.F.430). According to respondent, they're different because the pleadings stated Judge Evans didn't timely disclose he knew that Juror58's book was with the jury before guilt phase deliberations (Resp.Br.39 relying on 29.15L.F.430). Respondent asserts Evans' testimony didn't support he knew about the presence of the book with the jury before guilt deliberations(Resp.Br.39 relying on 29.15L.F.430). In fact, Evans testified that it was possible he'd seen the book even earlier than Friday evening(29.15Ex.30p.9-10,12-13) and thus is in keeping with what was pled at 29.15L.F.430 - that Evans knew the book was with the jury before guilt deliberations.

Moreover, absent from respondent's brief are other allegations in the pleadings that set forth that **whenever Evans learned about the book's presence with the jury** that Evans failed to timely disclose his knowledge when the Saturday, March 28th record was made that sought a mistrial. Other pages from the pleadings specifically included:

> **In addition to the above**, after Juror No. 58 gave a copy of his book, a prohibited item, to the bailiff at the hotel, the bailiff turned the book over the next morning to the Judge's secretary, Ms. Mayfield, to make the judge aware

> of the book, as the bailiff was somewhat concerned about it and the circumstances of his receipt of the book were out of the ordinary. Within approximately one hour, the judge saw the book and questioned the bailiff regarding his receipt of the book. **The judge did not make a record of this and did not timely disclose this to the parties. The judge later had to rule on the defense requests concerning Juror No. 58, both during the sentencing phase and at the motion for new trial proceedings. The judge denied the defense requests, including the defense request to question Juror No. 58.** Yet the judge did so without having completely and timely disclosed to the parties the factual information he had received outside of the courtroom.

(29.15L.F.448-49)(emphasis added). This portion of the pleading expressly alleged that Judge Evans failed to timely disclose his knowledge of the book being with the jury when the Saturday March 28th hearing and request to question Juror58 occurred. This is exactly what was briefed to this Court. *See,* Orig. Brief at 81-89.

This Court has required that 29.15 pleadings contain reasonably precise factual allegations demonstrating an injustice. *DePriest v. State*,510S.W.3d331,341(Mo.banc2017). The claim briefed is identical to the one pled and complies with *DePriest*. There was no pleading defect.

In *McLaughlin v. State*,378S.W.3d328,340(Mo.banc2012) (Resp.Br.39), the claim pled was counsel was ineffective for failing to present psychiatric testimony. The claim briefed was counsel was ineffective for failing to investigate the

psychiatrist retained. *Id.*340. The *McLaughlin* claim briefed differed from what was pled. Unlike *McLaughlin*, the claim briefed is identical to the claim pled.

Judge Evans' Non-disclosure Was Prejudicial

Respondent asserts Judge Evans' non-disclosure wasn't prejudicial because counsel was afforded the opportunity to question Juror58 at the motion for new trial hearing, but didn't(Resp.Br.39-40). Kessler explained the prejudice in the trial judge's failure to timely disclose what he knew at the Saturday, March 28th hearing. Kessler testified that had Evans disclosed that the book was with the jury, then they would've had 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.1259,1262).

This Court should reject respondent's pleading arguments because the record expressly shows that the claim briefed is the same pled.

A new trial is required.

IV.

JUROR MISCONDUCT/COURT'S INSTRUCTION VIOLATED

Juror58 committed juror misconduct and violated Judge Evans' instruction in bringing his book to the sequestered jury and sharing it with other jurors because prejudice was proven as Jurors 117, 3, and 50 all were exposed to the front and back blood spattered covers and its back cover which advocated "venegeance" for the killing of the protagonist's wife resulting in "her murderer set free" and in order "to seek justice" he will have to "figh[t] the system" and these jurors read portions of Juror58's book.

The 29.15 evidence established Lance was prejudiced by Juror58's passing-out his book to other jurors. Respondent's brief fails to fully and accurately recount the 29.15 testimony of jurors who testified(Resp.Br.37).

Book's Covers

Juror58's book's front and back covers are blood spattered(29.15Ex.1). The back cover states the 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).

Jurors' Testimony

Juror117

Respondent's brief states Juror117 testified that she didn't read the book and that it didn't influence her(Resp.Br.37 relying on 29.15Tr.129,131). 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).

Juror117 didn't testify that she was uninfluenced as a juror by the book in Lance's case(Resp.Br.37). Rather, she testified that in looking at the book she reviewed it from the perspective of whether it would be an appropriate item she would consider for sale in her native American gift shop(29.15Tr.129-31). But she recognized it was improper to read based on the cover and wouldn't have taken it with her to the trial proceedings(29.15Tr.128-33). This hardly shows the book didn't influence her as respondent argues.

Juror3

Respondent's brief states Juror3 testified that Juror58 showed him a copy of his book, but did not actually give it to him(Resp.Br.37 relying on 29.15Tr.194-95). Also, respondent's brief states that Juror3 didn't read the book during trial(Resp.Br.37 relying on29.15Tr.195-96). Significantly, respondent ignores Juror3 read the back cover during trial.

The complete record shows Juror3 was exposed to improper evidence at trial and discussed that improper evidence as the testimony of Juror58 and Juror3 showed the following. 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).

Juror3 testified as follows:

Q. You say [Juror58] had the book?

A. He had a book yes.

Q. Okay.

A. And I looked at it, I saw I'll be darn and that's **I read the back cover** about it and I didn't read the book or anything, but that's was about it with that. (29.15Tr.195)(emphasis added).

Juror58 testified as follows:

Q You said one juror was [Juror3] and you may have given it to another juror. Did any of them give you feedback on your book like, "It's really good," or "I enjoyed it"?

A **[Juror3]** and [the court's security deputy] **gave me feedback on it.** It was funny, **I gave the book to [Juror3]** but he didn't realize **I was the author and he read it and talking about it** and we talked a little bit about Viet Nam [sic] days and what-not but he didn't realize at first that I had been the one to write the book. And [the court's security deputy] was our night security there I guess on the floor, what-not, and I probably talked to him later at night and what-not and just, you know, in the conversation I gave him a book and I think

he went home and read it in one day's time, something like that, I'm not, I know he had some positive comments on it.

(29.15Ex.10p.15)(emphasis added).

Juror50

The trial transcript identified the names and the corresponding numbers of the jurors who served(TrialTr.982-83). There was no juror designated #49(TrialTr.982-83). Respondent's brief states the following: "Juror No. 49 testified that she read only two or three pages before giving the book back to Juror No. 58. (PCR Tr. 200)." *See*, Resp.Br.37. The testimony that appears at 29.15Tr.200 corresponds to Juror50(*See*, TrialTr.982-83 and 29.15Tr.198-202). What respondent's brief omits is that based on what she read Juror50 determined 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).

Lance Was Prejudiced

The jurors' testimony established prejudice. All the jurors exposed to Juror58's book saw the blood spattered covers and the covers' views of the court system. The jurors' reactions establish the prejudice. These jurors were exposed first hand to Juror58's violent story line which espoused the need for "vengeance." They were exposed to the story line that the court system is "too lenient" with criminal defendants accused of homicide offenses. Juror117 and Juror50 knew it was improper and that it violated the court's instruction. The author, also the foreperson, injected prejudicial information that rendered unreliable the deliberation process at

both guilt and punishment. The book was contrary to the court's instruction. These jurors knew it. Respondent refuses to acknowledge it, but the record proves it.

Respondent's Cognizability Argument

Respondent argues that counsel "had the opportunity prior to the motion for new trial hearing to uncover potential juror misconduct by questioning Juror 58 and other jurors, and presenting evidence at that hearing."(Resp.Br.35 citing to TrialL.F.1756 - Judge Evans' April 29, 2009 letter). From that respondent asserts the factual basis for the juror misconduct claim would've been discovered in time to raise on direct appeal(Resp.Br.35).

Respondent ignores that the trial judge denied the opportunity to question Juror58 or any other jurors prior to the motion for new trial hearing. On Saturday, March 28, 2009, the jury hung on punishment(TrialTr.xvi,2226-28;TrialL.F.1732-33). On Monday, March 30th, Judge Evans entered an order on his own motion prohibiting contacting the jurors(TrialL.F.1734).

Judge Evans' letter of April 29th (Trial L.F.1756) didn't set aside his March 30th order prohibiting juror contact. Evans' April 29th letter was only an inquiry whether either party intended to call jurors, whom they were prohibited from contacting and interviewing, at the motion for new trial hearing, and if they did, then he wanted to discuss in advance the process to be followed(TrialL.F.1756). For respondent to suggest counsel should've violated Judge Evans' order cannot withstand scruntiny. Rule 4-3.5(c)(1) prohibits counsel communicating with a juror after discharge of the jury where that communication is prohibited by court order.

Should this Court reject this claim of juror misconduct on cognizability grounds, counsel must've been ineffective, as set forth in Point II of the original and reply briefs, for not calling at the motion for new trial hearing jurors, court personnel, and Judge Evans to testify about the distribution of Juror58's book to the jury.

Bringing His Book - Not Misconduct

Respondent asserts that Juror58 bringing his book to the sequestered jury wasn't juror misconduct(Resp.Br.36). Respondent maintains that bringing the book didn't fall within Judge Evans' instructions to the jury(Resp.Br.36). To support these assertions respondent relies on Juror58's protestations that he believed he complied with Judge Evans' admonition about materials that were prohibited from being with the jury(Resp.Br.36 relying on29.15Ex.10p.24-25). Just as a juror does not get to decide whether they are qualified to serve, they do not get to decide whether they committed juror misconduct. *See*, Reply Point I.

Respondent attempts to justify Juror58 bringing the book to the sequestered jury as not in violation of Evans' admonition because Juror58 wasn't bringing his book to read since he authored it(Resp.Br.37). Evans' admonition wasn't confined to reading, it was directed at crime related materials being brought to the jury that would inject prejudice into the deliberative processes(TrialTr.988). Evans' admonition was intended to ensure the integrity of the trial's deliberative process. Contrary to Juror58's testimony was the testimony of Judge Evans' secretary, Deputy Wall, Juror117, Juror50, and Juror Coordinator Nigliazzo. They recognized Juror58's writing was an extremely violent crime book that was at odds with Judge Evans'

admonition (TrialTr.988) not to bring books or movies involving crimes or legal subjects. *See*, Reply Point I discussion.

Juror Coordinator Nigliazzo testified that all of the jurors were on notice 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). Besides Judge Evans having put Juror58 on notice of what was prohibited, Nigliazzo did the same.

Concerned that sharing book violated Court's order	**Sharing book was appropriate**
Judge Evans Judge Evans' Secretary Deputy Wall Juror 117 Juror 50 Juror Coordinator Nigliazzo	Juror 58

Respondent wants this Court to rely on Juror58's self-serving statements and ignore all the other witnesses' testimony. This Court should decline to do that and should order a new trial.

V.

BROWNING BLR .243 AND 10 GAUGE

Counsel was ineffective for failing to call ballistics expert Steven Howard to testify that 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 respondent's experts, Dillon and Crafton did not have conflicting opinions on the shotgun gauge used to shoot Graham such that it was unreasonable to fail to present through Howard the wadding recovered at the scene was 10 gauge when Lance never owned a 10 gauge and respondent's evidence was Lance used a 12 gauge.

Trial counsel failed to present exculpatory ballistic evidence without a reasonable strategy for failing to do so. Respondent argues it was reasonable strategy to not call Howard because counsel's strategy was to pit respondent's two experts Dillon's and Crafton's different opinions against one another(Resp.Br.49-50).

While this Court defers to strategic decisions, that deference is only appropriate where counsel's strategy is objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994); *Butler v. State*, 108 S.W.3d18,25(Mo.App.,W.D.2003). Here, the so-called strategy wasn't reasonable.

Dillon didn't express any opinions about the gauge of the shotgun wadding recovered at the crime scene(TrialTr.1581-1657). Crafton testified that remnants of two 12 gauge fired shotguns recovered from Lance's wood burning stove were 12 gauge and were consistent with the wadding recovered near Graham(TrialTr.1471-

72,1477,1702-03). Yet, respondent relies on Kessler's erroneous testimony that Dillon and Crafton had conflicting opinions on the gauge of shotgun used (Resp.Br.44). That testimony is flatly refuted by the record because Dillon never testified about the gauge of shotgun used(TrialTr.1581-1657). The failure to call Howard to testify that the recovered wadding was consistent with a 10 gauge was unreasonable since Dillon and Crafton didn't have any conflicting opinions on the gauge of the recovered wadding. *See*, *McCarter* and *Butler*. Further, reasonable counsel would've called Howard because Crafton's deposition testimony was that the shotgun used to shoot Graham was more consistent with a 10 gauge than a 12 gauge(29.15Tr.520-25;29.15Ex.61 Part 3 at 349-50,361). *See*, *McCarter*.

Respondent argues that Howard didn't testify about his conclusions about the shotgun wadding(Resp.Br.50). This argument ignores that original trial counsel Marshall testified that 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 noted there was no evidence Lance ever owned a 10 gauge(29.15Tr.524). Reasonable counsel would've called Howard to testify to his exculpatory evidence 10 gauge conclusions. *See*, *McCarter* and *Butler*.

The need to challenge Crafton's opinions are underscored by his inconsistent groove width testimony(Resp.Br.45 relying on 29.15Tr.271-72,274-75). Respondent recounts that Crafton's 29.15 testimony was that he contacted Browning Rifle to obtain gun specifications for the Model 81 BLR Browning lever action(Resp.Br.45). Respondent continues that Crafton concluded that the groove width Browning

provided was smaller than the measured bullets, but Crafton opined the difference wasn't significant(Resp.Br.45). At Crafton's pretrial deposition, however, he testified that difference was significant(29.15Ex.61 Part 3 at 369-73).

Respondent asserts there was no prejudice in failing to call Howard because Crafton didn't testify the bullets were fired from a .243 Browning rifle and limited his testimony to the bullets were in the .22 to .24 caliber class(Resp.Br.50). This argument fails, because at trial respondent combined Crafton's testimony with multiple witnesses to maintain Lance used a Browning BLR .243 Winchester rifle to shoot Graham. *See*, Orig.Br. at 94-95. Respondent's Exhibit 257 was a Browning .243. *See*, Orig.Br. at 94-95. Respondent called witnesses to testify that Lance had owned a .243 Browning similar to Exhibit 257. *See*, Orig.Br. at 94-95. Crafton's testimony combined with these other witnesses were the basis for respondent's closing arguments that Lance used a Browning BLR .243 Winchester rifle to shoot Graham. *See*, Orig. Br. at 103 setting out respondent's closing arguments. Thus, counsel's failure to produce exculpatory evidence refuting respondent's ballistics was unreasonable and prejudicial. *See*, *McCarter* and *Butler*.

Moreover, Howard was critical because, as counsel Marshall highlighted, 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). Pitting Dillon and Crafton against one another didn't exculpate Lance; it didn't exclude a Browning BLR .243 as the responsible weapon,

whereas Howard provided that exclusion. Not calling Howard was unreasonable and Lance was prejudiced. *See*, *McCarter* and *Butler*.

In deciding prejudice from counsel's ineffectiveness, this Court evaluates the totality of the evidence. *Hutchison v. State*,150S.W.3d292,306(Mo.banc2004)(relying on *Wiggins v. Smith*,539U.S.510,536(2003)). Counsel failed to present multiple pieces of evidence supporting Lance did not commit this offense and when considered in their totality establish prejudice. *See*, Points V, VI, VIII, IX, and X.

A new trial is required.

VIII.

LANCE IN HIS PICKUP

Counsel was ineffective for failing to call James Chandler and Sylvan and Carol Duncan to testify because these witnesses placed Lance in his pickup at the same time respondent's evidence purported to place Lance in a car resembling Lance's grandmother's car nearby Graham's, and Lance could not have been in both vehicles at the same time.

Chandler and the Duncans placed Lance in Lance's pickup truck at the same time Lisa Hart reported seeing a red car nearby Graham's home. Lance couldn't have been in his pickup and in his grandmother Mae's red car nearby Graham's at the same time. Counsel unreasonably failed to call Chandler and the Duncans to contradict respondent's inculpatory red car evidence. *See*, *State v. McCarter*, 883 S.W.2d75, 78 (Mo.App.,S.D.1994); *Butler v. State*,108S.W.3d18,25(Mo.App.,W.D.2003).

James 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 Duncan 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).

Sylvan Duncan 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).

These witnesses would've called into question respondent's evidence against Lance at trial. Respondent's witness Lisa Hart testified that she 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).

Respondent claims that what Chandler and the Duncans would've provided was an "imperfect" and not a "true" alibi, and therefore, it was reasonable not to call these witnesses(Resp.Br.60,69). Respondent ignores that these three witnesses would've refuted respondent's theory, based on Lisa Hart, that Lance drove his grandmothers red car to wait outside Graham's.

Respondent relies on *Eldridge v. State*,592S.W.2d738(Mo banc1979), *Leisure v. State*,828S.W.2d872(Mo.banc1992), and *Wren v. State*, 313 S.W.3d 211(Mo.App.,E.D.2010)(Resp.Br.67-68). In *Eldridge*, the potential alibi witness was investigated and said he didn't want to testify and if called "'wouldn't remember anything."' *Eldridge*,592S.W.2d at 740-41. In *Leisure*, counsel investigated the alibi witnesses and found them incredible and failed to account for the defendant's whereabouts for "a significant period of time on the day" in question. *Leisure*,828S.W.2d at 875. *Wren* is also a case where counsel concluded the alibi witness was incredible and failed to account for the defendant's whereabouts at the critical time. *Wren*,313S.W.3d at 215.

Unlike respondent's cases, Chandler and the Duncans placed Lance in his pickup truck, and not his grandmother's car, during the timeframe Lisa Hart reported seeing a red car that resembled Lance's grandmother's car nearby Graham's. Placing

Lance in his pickup during the time Lisa Hart reported she saw a red car near Graham's is a "true" alibi, not an "imperfect" one. Chandler and the Duncans would've "unqualifiedly" supported Lance didn't commit this offense, and therefore, this case is distinguishable from *Collings v. State*,543S.W.3d1,15(Mo.banc2018). *See*, Resp.Br.69. Thus, it was unreasonable to fail to call Chandler and the Duncans. *See*, *McCarter* and *Butler*.

A new trial is required.

XII.

VICTIM IMPACT

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 the record expressly reflects these exhibits were submitted to the 29.15 court for its consideration and it took judicial notice of the entire underlying trial record.

Respondent asserts Trial Exs. 133 (church casket photo), 250 (video montage), and 254 (drawing) weren't introduced into evidence at the 29.15 and Lance's claim should be rejected on that grounds(Resp.Br.91). The record refutes this assertion.

At the beginning of the 29.15 evidentiary hearing, the 29.15 court took judicial notice of the entire underlying criminal case(29.15Tr.109-10).

When the movant rested, there was a detailed discussion for the record about Trial Exhibits 133, 250, and 254(29.15Tr.869-74). The 29.15 prosecutor informed the court that he had brought all the trial photographic exhibits to court for it to consider(29.15Tr.869-71).

The 29.15 prosecutor then asked to make a record as to respondent's trial exhibits the movant was offering - Trial Exhibits 133, 250, and 254(29.15Tr.871-74). The prosecutor told the court that he was leaving a copy of Ex. 250 because the original video disc got broken(29.15Tr.871). Lance's 29.15 counsel made a record that respondent was tendering Trial Exhibits 133, 250, and 254 for the 29.15 court to consider(29.15Tr.871-74). The 29.15 prosecutor provided additional detail about

Trial Exhibits 133, 250, and 254(29.15Tr.871-72). Lance's 29.15 counsel stated that she believed it was necessary for Judge Parker to view Trial Exhibits 133, 250, and 254 because he wasn't the trial judge(29.15Tr.872).

The record refutes respondent's assertions that Trial Exhibits 133, 250, and 254 weren't presented to the 29.15 court and this claim is fully and properly before this Court.

A new penalty phase is required.

CONCLUSION

For the reasons discussed in the original brief and this reply brief 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 2016, 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 7,647 words, which does not exceed twenty-five percent of the 31,000 words (7,750) allowed for an appellant's reply brief.

The brief has been scanned for viruses using a Symantec Endpoint Protection program, which was updated in August, 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 24th day of August, 2018, on Assistant Attorney Daniel McPherson at dan.mcpherson@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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