THE MISSOURI SUPREME COURT

STATE OF MISSOURI

Respondent

vs.

LANCE C. SHOCKLEY

Appellant

No. SC 90286

Appeal from the Circuit Court of Carter County
Hon. David Evans, Circuit Judge

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

This Court has jurisdiction of Lance Shockley's appeal pursuant to Mo. Const. Art. V, § 3, because the appeal arises from a criminal prosecution in which a death sentence was imposed.

A jury found Mr. Shockley guilty of first degree murder on March 27, 2009. Legal File at 1704; Tr. at 2058-60. On March 28, 2009, the jury returned its verdict (1) unanimously finding the presence of aggravating circumstances and (2) failing to reach a unanimous finding that facts and circumstances in mitigation of punishment were sufficient to outweigh the aggravating circumstances. Legal File at 1727, 1774-75. The jury was unable to agree about whether Mr. Shockley should be put to death. Legal File at 1774-75; Tr. at 2226-28.

At the conclusion of proceedings on March 28, 2009, Mr. Shockley requested a total of 25 days within which to file his motion for a new trial, and the Circuit Court granted that motion. Tr. at 2230. Mr. Shockley filed his motion for a judgment of acquittal or a new trial on April 22, 2009. Legal File at 1776-81. The Circuit Court denied Mr. Shockley's motion on May 22, 2009. Tr. at 2231-33. The court noted its own finding "that the facts and circumstances in mitigation of punishment do not outweigh the facts and circumstances in aggravation," and sentenced Mr. Shockley to death. Id. at 2236; Legal File at 1775.

Mr. Shockley filed his notice of appeal on May 31, 2009. Legal File at 1770-71.

STATEMENT OF FACTS

A. The Murder of Sgt. Graham

Missouri Highway Patrol Sgt. Graham rented a house from Bobby Treadway. Tr. at 1187-88. Mr. Treadway operated a painting business on property across a woods from the residence. Tr. at 1186-87. Mr. Treadway testified that he and two of his employees had heard two gunshots at 4:15 p.m. on March 20, 2005. Id. at 1188, 1190. He recalled: "They were just seconds apart. I kind of . . . related it to like a pump shotgun, is how I related it to." Id. at 1190. Mr. Treadway said the shots sounded as though they had come from the rental property. Id. He testified that he had been working inside and outside at his shop "pretty much all afternoon" and had not seen anyone other than his employees in the area. Id. at 1193-94.

Judy Hogan, who lives in Winona, Missouri, saw Sgt. Graham's body near the patrol car in his driveway as she drove past the property at approximately 5:10 p.m. Id. at 1208-11; Ex. 12. She pulled into Sgt. Graham's driveway, looked at his body and determined that he was not alive, and called her husband to tell him to notify police. Tr. at 1210. Mrs. Hogan had driven past the property at approximately 4:20 p.m. but did not notice Sgt. Graham's body at that time. She had not seen anyone going down the road or through the woods during the time that she was in the area. Id. at 1212-14. Mrs. Treadway testified that the first law

enforcement officer to arrive was Tpr. Arty Torbeck of the Highway Patrol. Id. at 1211-12.

Tpr. Torbeck was dispatched to Sgt. Graham's home at 5:18 p.m. to respond to a report of shots having been fired. Id. at 1221-22. He found Mr. Treadway, Ms Hogan, and two other people standing near Sgt. Graham's body. Id. at 1225-26. Tpr. Torbeck testified that Sgt. Graham was lying on his back and appeared to have been shot in the face with a shotgun. Id. at 1226. He had no pulse. Id. at 1227. Tpr. Torbeck found the house locked and nothing disturbed, checked the perimeter of the property, and did not find any other people on the premises. Id. at 1227-28. Law enforcement officers who investigated the murder of Sgt. Graham never obtained a description of anyone seen shooting at him. Id. at 1557-58.

Dennis McSpadden, the coroner of Carter County, testified that the immediate cause of Sgt. Graham's death was the high-level trans-section of his spinal cord, and the secondary causes of death were a rifle gunshot in the upper back and a brain injury caused by his head striking the pavement when he fell. Id. at 1247, 1250-51.

Michael Zaricor, D.O., a pathologist employed at the Mineral Area Regional Medical Center in Farmington, Missouri, testified about the autopsy he performed on Sgt. Graham's body. Id. at 1254, 1258-79. He stated his opinion that the first wound had been a high-powered rifle shot striking Sgt. Graham in the back and severing his spinal cord at the neck. Id. at 1267. He then suffered

shotgun wounds to the face and shoulder. Id. at 1267-68. Dr. Zaricor testified that injuries from the first wound were "not consistent with life" and that he would not have survived those injuries. Id. at 1268. He identified the cause of Sgt. Graham's death as the rifle wound to his back. Id. at 1270.

B. Circumstantial Evidence of Mr. Shockley's Guilt

1. Sgt. Graham's Investigation

Mr. Shockley was involved in a single-vehicle accident on the night of November 26, 2004. Id. at 1038, 1043, 1089-90. His friend Jeff Bayless died in the accident. Id. at 1046-47. Mr. Shockley left the scene of the accident before police arrived. Id. at 1041-47, 1153-55. The law enforcement officer who eventually responded to an accident report was Sgt. Dewayne Graham of the Missouri Highway Patrol. Id. at 1047. Sgt. Graham later began investigating indications that Mr. Shockley had been driving at the time of the accident and had left the scene. Id. at 1048, 1131-40, 1312-16; Ex. 256. On March 19, 2005, Sgt. Graham interviewed or sought to interview several people as part of that investigation. Id. at 1048, 1065, 1113-14.

Paul Napier and Ivy Napier. Sgt. Graham interviewed Paul Napier and his wife, Ivy Napier, at their home. Id. at 1048, 1065. The Napiers lived near the accident scene. Id. at 1046. Mr. Shockley had come to their home for assistance after the accident and asked that they call for an ambulance and that Mr. Napier drive him home. Id. at 1045-47, 1061-62, 1069. He had been acquainted with Mrs. Napier since they both were high school students and was friendly with Mr.

Napier. Id. at 1041-42, 1060. Mr. Napier gave Mr. Shockley a ride and then met his wife at the accident scene to await police and medical personnel. Id. at 1046-47, 1061-63. When Sgt. Graham questioned her at her home later on the evening of the accident, Mrs. Napier denied knowing of anyone else involved in the accident. Id. at 1047-48.

The Napiers next heard from Sgt. Graham on the day before his own murder. Id. at 1049-50, 1065. He was investigating the fatal accident. Id. at 1066. Sgt Graham told Mrs. Napier that Mr. Shockley had confessed to having been driving the truck when it crashed and accused Mr. Napier of withholding information about the event. Id. at 1049-50, 1057, 1066. In fact there had been no confession. Id. Mrs. Napier told Sgt. Graham that Mr. Shockley had been driving when the Mr. Bayless was killed. Id. 1049-50.[1] Later that day Mrs. Napier told Mr. Shockley about the conversation. Id. at 1051-52. During cross-examination at trial, Mrs. Napier described Mr. Shockley's response:

> Q. And Lance, after you gave him that information, he didn't yell at you?
>
> A. Oh, no.
>
> Q. He didn't threaten you?

[1] At the time of trial, Mr. Napier was uncertain about whether he had implicated Mr. Shockley during his own conversation with Sgt. Graham on March 19, 2005. Id. at 1064-65.

A. No.

Q. He didn't tell you you did the wrong thing?

A. No.

Q. He just accepted it, correct?

A. Yes.

Id. at 1057-58.

Cynthia Chilton. Cynthia Chilton had been Mr. Bayless' fiancé. Id. at 1087. They had a child together. Id. She had encountered Mr. Shockley shortly after the accident and spent time with him before going to the accident. Id. at 1087-99. Ms Chilton testified that Sgt. Graham had come to her parents' home on March 19, 2005, to interview her regarding the accident in which Mr. Bayless was killed. Id. at 1113-14. She was not at home and had no conversation with Sgt. Graham. Id.

Ms Chilton testified that Mr. Shockley came to her home on the morning of March 20, 2005. Id. at 1118-19. She recalled: "He said, 'Cindy, you don't have to talk to [Sgt. Graham] if you don't want to.'" Id. at 1119, 1127-28. He told her that she should talk with Sgt. Graham if she wanted to do so, and did not threaten her or tell her to lie to Sgt. Graham. Id. Ms Chilton said that Mr. Shockley told her to take Sgt. Graham onto a porch if she did want to talk with him. Id. at 1119. She explained: "[H]e wanted me to take him out on the porch for the kids not to hear. It's not something they needed to hear." Id. Ms Chilton testified that her

mother told her later that day that Sgt. Graham had been murdered. Id. at 1121-22.

Mark Keeney. Mark Keeney, who was married to Ms Chilton's mother during March, 2005, testified about Mr. Shockley's visit to the Keeney home on the morning of Sgt. Graham's murder. Id. at 1151, 1156-60. Mr. Keeney said that Mr. Shockley told him that he wanted to talk with Sgt. Graham "about this thing." Id. at 1160-61, 1163. Mr. Shockley asked Mr. Keeney where Sgt. Graham lived, and Mr. Keeney said: "He lives out there in Treadway's old rent house out there on M Highway." Id. at 1160. Mr. Keeney testified that Mr. Shockley was calm and was not angry or upset during their conversation. Id. at 1161.

Sgt. MacDonald Brand, a Highway Patrol officer, testified that he had been involved in the investigation of Sgt. Graham's murder and in the continued investigation of the accident in which Mr. Bayless died. Id. at 1295-96, 1351. The following colloquy occurred during his cross-examination:

> Q. Okay. You are aware that the State is alleging that the motive for the death of Sgt. Graham is the fact that he supposedly was investigating Lance Shockley for this . . . leaving the scene of the accident, correct?
>
> A. Yes, sir.
>
> Q. Just because Sgt. Graham dies doesn't mean th[at] investigation ends . . . , does it?
>
> A. No, sir.

Q. In fact, it did continue because you were one of the people who continued the investigation, correct?

A. Yes, sir.

Id. at 1351.

2. Ballistic Evidence

a. Evidence Recovered During Autopsy

Dr. Zaricor described the results of the rifle shot that struck Sgt. Graham in the upper back:

> There is a pinpoint hole in the midline of the upper back in his shirt that penetrated the Kevlar vest and made a pinpoint hole as it went through the . . . outer part of the vest, and then it hit the Kevlar and apparently started spinning because it . . . left a big hole on the inside of the vest and a big hole . . . 12 inches below the top of the head in the midline of Sgt. Graham's back . . . [The bullet] took out the vertebrae on the left side in the midline of the cervical spine . . . , destroyed those on the spinal canal, and transected the spinal cord completely.

Id. at 1260-61. Dr. Zaricor testified that the bullet had been "flattened out" and "mushroom[ed]" by its passage through the Kevlar vest, and that he had recovered two fragments of lead and most of the jacket during the autopsy. Id. at 1262. He stated that the bullet had fragmented and that he had been unable to retrieve the remaining pieces. Id. at 1277-78; Ex. 175. Dr. Zaricor stated that he sometimes is

able to determine the caliber of rifle that caused a particular wound by "measuring the base," but that he was not able to identify the rifle caliber in this case. Id. at 1269-70.

b. Evidence From Shockley Family Homes

Sgt. Brand testified about an eight-day search of Mr. Shockley's home and its environs by officers of some 20 police departments. Id. at 1458-60, 1499. He explained that the search outside the residence was for "[c]asings or bullet fragments that would match the bullet fragment from Sgt. Graham's body." Id. at 1459-60, 1464. Sgt. Brand said that the Highway Patrol had been told that Mr. Shockley and his friends routinely shot their weapons into a sawdust pit near the house and across the property. Id. at 1462-63. The sawdust pile was "[p]robably 10 foot tall" and "as big as a football field." Id. at 1499-1500, 1504-06; Ex. 79. Police collected "bullets, ammunition components, and . . . shell casings" found during the search. Id. at 1461.[2] They seized nine rifles, four shotguns, and three pistols inside the house. Id. at 1502.

[2] The prosecution also called Mr. Shockley's step-father, George Beck, to testify about weapons and ammunition issues. Tr. at 1751-55. Mr. Beck recalled having seen people shoot their guns at the sawdust pile. Id. at 1756. Defense counsel asked how many different people he had seen shoot into the pile over the years, and Mr. Beck answered: "Oh, Lord." Id. at 1757. He added: "People shot there

Sgt. Brand testified that the law enforcement personnel were looking in particular for a .243 caliber rifle because officers at the Highway Patrol command post had been told that "Lance Shockley had a .243 and loved to shoot this .243." Id. at 1512. He acknowledged that he and other investigators had no report of Mr. Shockley having been seen with a .243 caliber rifle after January, 2005:

> Q. Had not been seen with his favorite gun, his favorite hunting rifle at any time after January, some two months prior to the time that Sgt. Graham was murdered, right?
>
> A. Correct.

Id. at 1513-14. Sgt. Brand testified that the officers had been told that the bullet recovered during Sgt. Graham's autopsy had been .243 caliber. Id. at 1515. He stated that he had not been told that the recovered bullet also could have been .22 or .223 caliber. Id. He said that police had found .243 casings during the search of the Shockley property "but not the rifle itself." Id. at 1512, 1546.

The prosecution called Mr. Shockley's uncle, Robert Shockley, to testify. Id. at 1384-85. During direct examination he said that he "liked to shoot," that Lance Shockley routinely used his credit card to purchase "lots" of ammunition from remote sellers for both of them, and that their purchases had been "in the

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for years before the house was even built." Id. When counsel suggested that "there have been a whole lot of people shooting a lot of different types of guns," Mr. Beck responded: "Long before I came along." Id.

thousands of rounds." Id. at 1386-87. Robert Shockley testified that Lance Shockley's wife left a full box of .243 caliber ammunition to his house on the evening of March 20, 2005. Id. at 1394-1400. He said that he did not own a .243 caliber rifle so he "just threw them in a drawer." Id. at 1396-97. He testified that Lance Shockley had owned a .243 rifle. Id. at 1404-05. Sgt. Brand testified that the box of .243 ammunition was full when he seized it from Robert Shockley's home and that no rounds were missing from the carton. Id. at 1523-24.

c. The Prosecution's Two Ballistics Experts

i. John Dillon

John Dillon was the first of two ballistics experts called by the prosecution. Id. at 1581. Mr. Dillon had been employed by the Federal Bureau of Investigation for 24 years. Id. at 1581, 1637. After five years of field work as a "street agent" in Chicago and New York, he worked for 19 years as a firearms examiner in the FBI laboratory. Id. at 1581-82. Mr. Dillon explained that he had graduated from the United States Naval Academy, that his curriculum had been "about 70 per cent engineering," and that he had been selected for the FBI laboratory in part because "the preferred background is in some kind of a physical science." Id. at 1583. He testified that he had written "a number of" training programs for ballistic examination. Id. at 1637.

Mr. Dillon stated that the prosecuting attorney had retained him to examine ballistic evidence associated with Mr. Shockley's prosecution after the Highway Patrol crime laboratory had concluded that bullets recovered from the Shockley

property had been fired from the same gun as the fragments recovered from Sgt. Graham's body. Id. at 1583, 1593-95, 1618, 1633-34. He said that "the classic investigation" for a firearms examiner would involve taking a a bullet known to have been fired through a seized weapon and "a suspect bullet"—such as one removed from a victim—and comparing the bullets under a microscope to determine whether both had been fired through the same gun. Id. at 1586. Mr. Dillon testified that in other cases where no gun has been found—such as the present case—"the objective would be to see if [two bullets] were fired from a single source . . . again based on the unique microscopic characteristics." Id. at 1587. In this case the bullet evidence consisted of the fragments recovered from Sgt. Graham's body and several other specimens recovered from a field at Mr. Shockley's home. Id. at 1595, 1597-98.

Mr. Dillon explained that a ballistic expert's examination is a two-tiered process, consisting first of identifying the "class" characteristics of the specimens and next of performing comparative microscopic examinations of bullets sharing class characteristics to determine whether they shared "unique individual marks that go beyond these simple class characteristics." Id. at 1589, 1593. He defined class characteristics as including the caliber or size of the bullet, the number of spiraled impressions left by lands and grooves machined into the barrel of the gun "to impart a spin to the bullet," the distance between the impressions, and the "twist"—clockwise or counter-clockwise—of those striations. Id. at 1588-89. Mr.

Dillon also explained the individual characteristics sought in microscopic comparisons:

> So those grooves that are machined inside the barrel, they're made with very, very hard steel tools . . . And the interesting thing about that is that these grooves pick up individual microscopic marks from the tools that are used to make them. And when a bullet is grabbed by those grooves and forced to spin, the surface can pick up these individual, unique and reproducible microscopic marks from inside the barrel. These are reproduced from shot to shot.

Id. He summarized the "two-tiered exam" process:

> Are the class characteristics consistent? And that's the gate that says, if they are, then we go forward and take a look at these microscopic marks to see if they're the same, and then draw your conclusions based on what those microscopic marks tell the examiner.

Id. at 1593. Mr. Dillon said that in order to conclude that bullets came from the same gun "you have to have sufficient microscopic marks corresponding back and forth between the two bullets." Id. at 1613.

Mr. Dilllon testified that "the first step in any examination between two bullets" is to determine whether they share class characteristics: "same direction of twist, the same widths of the land and groove impressions, the same number of land and groove impressions, the same caliber." Id. at 1590. Having identified

bullets that have the same class characteristics, the examiner must move on to determine whether the "unique individual marks" also match: "If they do, and the[re] are sufficient microscopic marks present, then the examiner can come to the conclusion that they were fired through the barrel of a single gun." Id. at 1590-91. Mr. Dillon added:

> If the[re] are no microscopic marks of value or there's been so much damage, you may not be able to make an identification. Even though a bullet is damaged, however, there may be marks of value present that are useful for comparison purposes on a case-by-case basis, depending on what survives the damage as far as the microscopic detail.

Id. at 1593.

Mr. Dillon described the specimens that he had received from the prosecution and examined:

> I received items of evidence that had been recovered during autopsy—a bullet and related fragments . . . And also a number of fired bullets and bullet components, fragments, metal fragments, lead fragments, copper fragments, that had been recovered from the execution of a search warrant at the residence of the defendant in this case.

Id. at 1595; Ex. 171, 218.[3] Mr. Dillon testified that he had found sufficient class characteristics in common among the materials recovered from Sgt. Graham's body and that recovered "from the field of the defendant's house" to warrant further microscopic examination. Id. at 1599-1609, 1615. Although the precise caliber or diameter of the specimens could not be determined, Mr. Dillon concluded that they were between .22 and .24 caliber. Id. Most had—or once had—six land and groove impressions and clockwise twists. Id. He was asked whether the common class characteristics found between the specimens implicated "millions and millions of possible firearms," and he answered: "Absolutely." Id. at 1628. He

Mr. Dillon found insufficient correspondence in the microscopic comparisons to identify the various specimens as having been fired from the same gun. Id. at 1610-19, 1626. His microscopic examination had consumed some 20 hours. Id. at 1633, 1653. He summarized his conclusion: "I could neither identify them as . . . having come from . . . a single firearm or exclude them." Id. at 1617. The prosecuting attorney asked: "And that's because, based on your training and your experience and your judgment, you felt there weren't enough of those individual marks?" Id. And Mr. Dillon answered: "That's correct. Yes." Id. at 1617, 1620. During cross-examination he added: "I have to make my

[3] The prosecution represented that the latter specimens had been retrieved from "the field of the defendant's house." Tr. at 1597, 1605.

evaluation based on the presence of microscopic characteristics, and they're simply insufficient, in my opinion." Id. at 1621. He explained:

> [T]he point to remember is that you take any two bullets that you know . . . have been fired from two different guns and somewhere there's likely to be some limited area of correspondence. But the test is to continue, and if it's not there, then that was just a random, tiny area of correspondence. That's the caution.

Id. at 1631. Mr. Dillon stated the following opinion "based upon a reasonable degree of scientific certainty": "I could not make any identifications between these various sets of bullets." Id. at 1631, 1653.

ii. Jason Crafton

The state also called Jason Crafton as a firearms expert. Id. at 1657-58. Mr. Crafton testified that he had been working in the firearms section of the Missouri State Highway Patrol crime laboratory for four or five years when he examined the ballistics evidence in this case. Id. at 1709. Although the other firearms examiners employed in the Highway Patrol crime laboratory at that time both had more experience and seniority than him—the supervisor, Mr. Garrison, had been a firearms examiner for 21 years and a co-worker, Ms Green, had been an examiner for 12 years—the job of analyzing ballistics evidence in the murder of a Highway Patrol officer was assigned to Mr. Crafton. Id. at 1709-10.

Mr. Crafton said he had been given the same fragmentary bullet evidence that Mr. Dillon had analyzed and that the examination processes he had used were

similar to those utilized by Mr. Dillon: "It is a process that our association that we both belong to uses." Id. at 1660-63. Mr. Crafton characterized Mr. Dillon as "a very qualified, good examiner," described him as "one of the most experienced firearms examiners,"and testified that he respected Mr. Dillon "and his abilities, his reputation." Id. at 1680, 1716.

Mr. Crafton came to the same conclusion as Mr. Dillon with respect to the broad "class" characteristics of several samples, including specimens recovered during the autopsy and others retrieved from the Shockley property. Id. at 1665-72. He concluded: "All the class characteristics were consistent between all four of these specimens." Id. at 1672. But Mr. Crafton testified that he disagreed with Mr. Dillon's microscopic analyses of the specimens. Id. at 1680. He said: "All four of these bullets, bullet jackets and/or fragments, they were all fired from the same firearm . . . That is my expert, scientific opinion." Id. at 1677.

Mr. Dillon and Mr. Crafton both had their analyses peer reviewed. Id. at 1619-20, 1677-79. Mr. Dillon explained: "[I]f I have an unresolvable difference of opinion, I reach out and have a colleague of mine in my presence take a look and see what he sees." Id. at 1619. During cross-examination he said that peer review is "just a wise idea" particularly in a case in which his own opinion has differed from that of another firearms examiner retained in the same case. Id. at 1632. Mr. Dillon's peer review in this case was performed by "[a] colleague with similar background and experience" who conducted his own microscopic analysis of the specimens and determined that there was not sufficient correspondence

between them to make an identification. Id. at 1619-20. The Highway Patrol had Mr. Crafton's analysis reviewed by Mr. Garrison and Ms Green, both of whom endorsed Mr. Crafton's conclusion. Id. at 1677-79.

3. Evidence Regarding Mrs. Shockley's Automobile

a. Robert Shockley and Melia Mae Shockley

Robert Shockley testified that his nephew had called him at approximately 9:00 a.m. on March 20, 2005, and asked to borrow his pick-up truck. Id. at 1389-90. He refused the request. Id. at 1390-91. Shortly after noon that day, Mr. Shockley walked into the home of his grandmother, Melia Shockley, and asked to borrow her automobile. Id. at 1807-09. She gave him her keys. Id. Mrs. Shockley testified that her automobile was a red 1995 Pontiac Grand Am with a yellow political sticker affixed to the driver-side of its trunk. Id. at 1803-04. She did not know what time Mr. Shockley left with the automobile but did know that he returned between 4:15 p.m. and 4:20 p.m. Id. at 1809-10.

b. Rick Hamm

The state called a Van Buren resident named Rick Hamm to testify about a red automobile that he had seen near Sgt. Graham's home. Tr. at 1854. Mr. Hamm recalled that he had been watching stock car racing on television on the afternoon of the murder. Id. at 1862. He said that he drove to a grocery store between 3:45 and 4:00 p.m. to purchase food to grill for dinner. Id. at 1863-65, 1869. As he returned home, Mr. Hamm he noticed "a little red car" parked on an unmarked side road. Id. at 1865-66. The car was located near the residence of a

family named Johnson and "several hundred feet" from Sgt. Graham's residence. Id. at 1084, 1859-60, 1865-68.

Mr. Hamm saw only the front end of the car. Id. at 1875-76. He testified: "To the best of my knowledge I thought it was a Pontiac or Oldsmobile because my daughter had had a white one similar to this." Id. at 1866, 1868. The prosecuting attorney then said: "Okay." Id. Whereupon Mr. Hamm added: "And I thought it was a Grand Am when I gave my statement [to police]." Id.

When the prosecuting attorney displayed a photograph of the Grand Am automobile owned by Mr. Shockley's grandmother, Mr. Hamm testified: "It's similar to that, yes." Id. at 1877. The prosecuting attorney then asked: "And to the best of your knowledge is that the car you saw that day on that road?" Id. And Mr. Hamm responded: "I can't say it's that car, but I said it was a car similar to that." Id. at 1877, 1884-85.[4]

[4] Mr. Hamm testified that police investigators had shown him an array of automobile photographs after Sgt. Graham's murder and that he had identified a photograph of Mrs. Shockley's red Pontiac Grand Am as the picture most nearly resembling the car that he had observed. Tr. at 1880-83. Mr. Hamm recalled that all of the other vehicles in the photographs were four-door models. Id. at 1882-83. He testified that Mrs. Shockley's automobile was "the only car that looked . . . remotely close." Id. at 1885.

The vehicle was still there when Mr. Hamm drove by on his way home from the grocery store 20 minutes later. Id. at 1870-71. Mr. Hamm drove past the parked automobile again five to ten minutes later on a return trip to the grocery store. Id. at 1872-73. He had to go back to the store to purchase an item that he had forgotten on the first trip, and he made better time on the second drive. Id. at 183.

Mr. Hamm did not recall having seen the car on his second drive home from the store:

> Q. And as you pass . . . this cutoff road, did you see the red Grand Am at that time?
>
> A. I didn't notice it the last trip.
>
> Q. You believe it was gone?
>
> A. To the best of my knowledge, yes.
>
> Q. It's something you would have seen. You saw it each time you went by and you didn't notice it.
>
> A. I didn't notice it on the way back home.

Id. at 1874. Counsel for the state soon pressed Mr. Hamm again:

> Q. Three times and you didn't see it the last time you came back?
>
> A. I did not see it the last time, no. Like I said, the last time I was –
>
> Q. Coming back?

A. Coming back and I was in a hurry.

Id. at 1878.[5]

c. Lisa Hart

Lisa Hart also testified about the automobile parked near Sgt. Graham's home. Id. at 1886. She lived in Van Buren by the time of trial in 2009, but had resided in House Creek during 2005. Id. at 1886, 1888. Mrs. Hart and her husband, Roger Hart, had become interested in purchasing the Johnson residence and made plans to meet a real estate agent at that property on the afternoon of the murder. Id. at 1888-89. Mr. Hart drove his pick-up truck to the house and Mrs. Hart rode in the passenger seat of the truck. Id. at 1890-91.

Mrs. Hart testified that her husband turned onto the gravel lane shortly before 2:00 p.m. Id. at 1889. As soon as they were on the lane she saw a red Pontiac Grand Am parked on the her side of the road and facing their vehicle: "[I]t was parked on . . . the wrong side of the road." Id. at 1893. The prosecuting

[5] In his opening statement the prosecutor told jurors: "The fourth time [Mr. Hamm] goes by . . . that area, the car is gone." Tr. at 1018. The prosecutor characterized that fact as "important" because Highway Patrol records established that Sgt. Graham arrived home at 4:03 p.m., other evidence would establish that Mr. Shockley shot him three times over the next few minutes, and "[a]t that point in time, he leaves there." Id. at 1018-20.

attorney asked Mrs. Hart what she saw as they approached the parked car, and she answered:

> I saw a red Pontiac Grand Am. It was in good condition. The windows were halfway rolled down. I didn't see any kind of scrapes or anything. For some unknown reason there was a yellow fist to softball-sized sticker that stuck out.

Id. at 1892.

Mrs. Hart testified that she took no note at the time of "exactly where" the sticker was affixed to the car. Id. at 1896-97. The prosecutor asked: "What sticks out in your mind about this yellow sticker, this yellow thing you saw?" And Mrs. Hart answered: "Well, yellow on red just sticks out and that's what I saw." Id. at 1897. She testified that she and Mr. Hart remained at the Johnson property until 3:00 or 3:30 p.m., and that the red Grand Am was parked in the same location when they drove back down the road. Id. at 1896-97.

During cross-examination, Mrs. Hart testified:

> Q. So when you drove down the dirt road, you would have been on the side of the [parked] vehicle; is that correct?
>
> A. Correct.
>
> Q. So you got a really good look at it?
>
> A. Yes.
>
> Q. And one of the first things you noticed was this soft-ball sized yellow fist—you know, whatever words you used to describe it?

A. Yes.

Id. at 1907.[6]

d. Roger Hart

Roger Hart was the only witness called to testify for the defense. Id. at 1993. He agreed that he and Mrs. Hart had turned onto the gravel lane at 1:45 p.m. Id. at 1993-94. Mr. Hart recalled:

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[6] Mrs. Hart had testified as follows during a deposition in October, 2007:

Q. And what did you notice about the car at that time as you were going past, if anything?

A. I noticed it was a clean red Grand Am . . . the windows were probably halfway down. I noticed a yellow—I could not tell you where, but yellow stuck out in my mind—about a fist size . . .

Q. [D]id you notice all of these things at that time when you first went past the red car on the way to the Johnson house?

A. Yes . . .

Q. [A]s you went past it, did you turn around and look at it behind you?

A. No.

L. Hart Dep. at 13-14. She had no recollection of where the sticker might have been affixed to the automobile. Id. at 22.

> As we drove past . . . and seen that car it just struck me as being suspicious the way it was parked on the wrong side of the road . . . I just kind of observed and looked the car over. I think I even kind of looked around to see if there was anybody around in the approximate area of the vehicle . . . Didn't see anyone.

Id. at 1994. Mr. Hart also testified that the automobile was parked in the same place when he and Mrs. Hart left the Johnson property at approximately 3:15 p.m. Id. at 1994-95. Mr. Hart did not see a yellow sticker on the Grand Am. Id. at 2004-05, 2007. He recalled having reported to police investigators soon afterward that the automobile had a Missouri license plate and that the license might include an L and an M. Id. at 1995, 2000-01. Mrs. Shockley's license plate read 7-9-7-S-H-V. Id. at 2007-08.

e. Evidence Regarding Other Vehicles Seen in the Area

Sgt. Joseph Weadon, a Highway Patrol supervisor who was involved in the investigation of Sgt. Graham's murder, testified that the Highway Patrol never received a report of Mr. Shockley having been seen in the area of the murder on March 20, 2005. Id. at 1131, 1148. Sgt. Weadon stated that there were no reports of Mr. Shockley having been seen in a red car or any other car on that date. Id. at 1148. He agreed that the Highway Patrol had received descriptions of several other vehicles seen near the murder scene. Id. at 1148-49. A woman named Mila Linn told Highway Patrol officers investigating the murder that she had seen two men in a red automobile in the vicinity. Id. at 1336. She was shown

a photograph of Mr. Shockley and said that he was not one of the people in that car. Id. at 1336-37.

C. Character and Propensity Evidence

1. Testimony Regarding Purported Violent History of Defendant

Sgt. Heath testified for the prosecution during a motion hearing prior to trial. Id. at 192.[7] The principal concern of his testimony at that hearing was the series of conversations he had with Mr. Shockley shortly after Sgt. Graham's murder. Id. at 193-223. Sgt. Heath described his initial telephone and face-to-face conversations with Mr. Shockley, which occurred near midnight on March 20, 2005. Id. at 194-200. He explained that he and Corp. Kinder had driven to Mr. Shockley's residence and that he had placed a telephone call from the gravel road outside the home. Id. at 194-97. The following exchange occurred between counsel for the state and Sgt. Heath:

> Q. And I hadn't asked you about this, but there were other officers out there that night?

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[7] Mr. Shockley was represented by attorneys from the State Public Defender's office at that hearing. Id., following Vol. 1 cover. After a change of counsel within the Public Defender's office, the attorneys from that office withdrew from the case and were replaced by Mr. Shockley's eventual trial counsel approximately six months later. Legal File at 1343, 1354-56.

A. Yes.

Q. And can you describe for the Judge why those officers were out there that night?

A. A decision was made by the command post, the officers in charge—I would guess would be the sheriff, and probably the ranking Highway Patrol officials, and I don't know if the prosecutor was there or not at the time. But Lance Shockley had a history of being violent with law enforcement, and a decision was made that they'd send more than just a criminal investigator and a uniformed officer out there.

Id. at 200.

Sgt. Heath was the final prosecution witness at Mr. Shockley's trial. Id. at 1918. The prosecuting attorney established through preliminary questioning that he and Corp. Kinder had been sent to interview Mr. Shockley at his home late on the night of Sgt. Graham's murder. Id. at 1921-22. Then the prosecutor led Sgt. Heath through the following exchange:

Q. Before going out there were you made aware that your superiors wanted some additional people to go along as—I'll use the term "backup"?

A. Yes, sir.

Q. And who was that . . . and what role were they supposed to play?

A. It was the Sikeston . . . SWAT team, if you will.

Q. And why were they going out with you?

A. A decision was made by my bosses, if you will, that due to Lance Shockley's violent history, that—

MR. KESSLER: Your honor, I object.

THE WITNESS: —police should—

MR. KESSLER: Excuse me, sir.

THE WITNESS: —the SWAT team should go with me.

THE COURT: Hold on.

MR. KESSLER: Excuse me, sir.

Id. at 1922-23.

Defense counsel stated the following objection: "I object to the introduction of his history. This goes to character. It's only offered for that purpose, period. I object." Id. at 1923. The prosecutor argued that Sgt. Heath's testimony about Mr. Shockley's purported "violent history" and the decision to send a SWAT team to his home "goes to explain why they're out there." Id. The trial court sustained the objection and subsequently told the jury: "The jury is instructed to disregard any comment made by the witness regarding any character or reputation of the defendant and it should not be considered as evidence in this case." Id. at 1925.

Defense counsel moved for the declaration of a mistrial, explaining to the court:

> I believe that was a statement that was asked for and responded to that apparently Mr. Zoellner knew he was going to ask the question and knew why he was going to introduce it. Those purposes were improper. Now it's put something to the jury that they had no information about. This is the first time and it's the last witness. It's been done solely to prejudice [Mr. Shockley] in the eyes of the jury . . . We ask for a mistrial . . . because I don't believe there's any way to cure the prejudice that's occurred.

Id. at 1924-25. The court denied that motion. Id. at 1925.

2. Repeated Display of Photograph of Defendant Wearing Prisoner Clothing

At the beginning of Sgt. Heath's trial testimony, counsel for the state projected a photograph of Mr. Shockley for the witness to identify and offered the photograph into evidence. Id. at 1919; Ex. 2. Defense counsel objected:

> Exhibit 2 is a photo of [the defendant] obviously in an orange jumpsuit and in front of him [is] an identification chart. It clearly has nothing to do with when [the witness] would have met him. He would have met him before he ever was arrested. There's no reason to put it to this jury.

Tr. at 1919. Mr. Shockley was present in the courtroom throughout his trial and counsel for the state never had shown Exhibit 2 to any prior witness for identification. The prosecuting attorney acknowledged that the photograph

depicted Mr. Shockley in an orange jumpsuit and assured the court: "I wasn't going to refer to the clothing other than to say this photo shows him and it's fair and accurate to how it appeared back then." Id. at 1919-20. The trial court sustained the objection. Id. at 1920.

Counsel for the state projected the photograph again during his subsequent examination of Sgt. Heath. Id. at 1925-26. A bench conference ensued immediately. Id. at 1926-27. The prosecuting attorney apologized and suggested that his second display of the photograph, to which the trial court had sustained objection, had been inadvertent. Id. at 1926. The court told jurors: "The jury is instructed to disregard, if you saw, the last picture that was on the screen. The Court had sustained the objection to that exhibit and it should be disregarded by the jury for any reason." Id. at 1927.

3. Reference to Prior Crime During Summation

During his closing argument, counsel for the state reminded jurors of Mr. Shockley's alleged criminal responsibility for another death and his purported attempt to avoid punishment for that crime: "A man was killed that night, too. Another felony was committed. He left the scene, another felony." Id. at 2051. Defense counsel objected: "It is improper and prejudicial to argue that because someone committed another crime they would have the propensity to commit this." Id. The prosecutor responded: "Judge, that's not what I'm arguing. I'm talking about all his—comparing lies in this case." Id. The trial court then stated: "I agree with the defense's comments." Id. Defense counsel requested a remedial

instruction, and the court told jurors: "I will further instruct you that the jury should not consider past conduct as an indication or propensity to commit the present offense." Id. at 2052-54.

D. Issues Pertaining to First Jury Foreman

Thomas Canter was referred to as Juror 58 during the voir dire examination of prospective jurors. Tr. at 685; Ex. E. The following exchanged occurred between counsel for the state and the venireman:

> MR. ZOELLNER: . . . Now you've . . . already decided that , yes, the State has proven a statutory aggravating circumstance beyond a reasonable doubt. Okay. And that you've taken the bad evidence and you've compared to whatever good evidence you found in the case and you've determined gain as a jury that the . . . bad evidence outweighs the good. If you're at that point in time . . . can you give meaningful consideration to a sentence of death?
>
> JUROR NO. 58: I would have to.
>
> MR. ZOELLNER: I'm sorry, sir?
>
> JUROR NO. 58: I may not want to, but I still have to.

Tr. at 685. The prosecutor subsequently asked whether he "could still give meaningful consideration to a life sentence" if he decided that the defendant had committed "the worst murder that you can imagine," and the venireman answered: "Yes." Id. at 686-87. He reiterated that answer in response to questioning by defense counsel. Id. at 701.

During the next break in proceedings, Mr. Canter approached the bench and engaged in the following exchange with the trial court:

> 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 . . . 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 as well [sic].

Id. at 710. Neither the prosecuting attorney nor defense counsel ever questioned the venireman about what he had authored. During his examination of the venire panel, counsel for the state also asked whether "anybody here, you yourself, a close friend or a close family member, have ever been a victim of some sort of crime." Id. at 748. The record reflects responses from several prospective jurors but none from Juror No. 58. Id. at 748-52.

Mr. Canter served as jury foreman throughout the guilt phase of trial and the presentation of evidence in the penalty phase. Tr. at 2200-02, 2226; Legal File at 1704. Prior to closing arguments and jury instruction in the penalty phase, defense counsel notified the trial court that he had received a copy of the book that the juror had written and requested the declaration of a mistrial based on its content and the author's published description of his work. Tr. at 2147-62; Ex. E.

The protagonist of the book is a former special forces soldier whose son is an FBI agent. Id. The protagonist's wife is killed in a traffic accident caused by an intoxicated teenaged driver, who subsequently is convicted of involuntary manslaughter. Id. After a judge places the teenager on probation, the protagonist kidnaps him, secretes him "in a remote spot in the forest," tortures him as punishment for "murdering" his wife, and finally kills him by. Id. Defense counsel read portions of the torture description into the record, including the following brief passage:

> First his jaw was broken . . . The man had casually walked by and kicked him. When he came to his senses he couldn't talk. His jaw hung to the left side of his face at an impossible angle. His head had been tied to the tree . . . The third day his feet were crushed and his elbows broken with the aid of a small hammer. The blows smashed his ankles with one exact stroke on each foot. The elbows were even more painful. A precise blow to the very tip of the bone smashed the fragments deep into his useless arms . . . This morning he had been scalped. The knife flashed so quickly above his head. Only when he felt the powerful tug and heard the sickening pop that followed did he realize what was happening to him . . . A glowing stick from the fire was held against his groin . . . His testicles had suffered the most from the hot stick. They were now just blackened shards of melting flesh.

Id. at 2155-56; Ex. E. When the "murderer" is near death, the protagonist completes his execution by lowering him rectum-first onto a four-foot-long punji stick. Id.

An author's note describes Mr. Canter as "part Blackfoot, part Cherokee, and part Caucasian, and a former "Army Green Beret." Id. at 2159; Ex. E.[8] Mr. Canter acknowledged during the examination of prospective jurors that his own son was a law enforcement officer. Tr. at 710. In a published author's note, Mr. Canter described his book as "a fictional autobiography." Id. at 2160; Indian Giver, http://www.amazon.com/Indian-Giver-ThomasCanter/dp/1933794119/ref=tmm_pap_title_0?ie=UTF8&qid=1306795223&sr=8-1 (last visited May 30, 2011). The author states: "Although this is a book of fiction, many of the chapters are filled with my own true life experiences or someone I had served with." Tr. at 2160.

Defense counsel requested the declaration of a mistrial on the basis of juror misconduct. Id. at 2161-62. Counsel directed the trial court's attention to the

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[8] The trial court subsequently recalled that Mr. Canter had worn "a green camouflage . . . military-type uniform" when he appeared in court for jury duty. Tr. at 2172-73. The publisher summarizes the story line of Mr. Canter's book as a story of "a Blackfoot Indian who is a Green Beret" and who seeks "justice" after "his wife [is] killed and her murderer set free." Thomas Canter, Indian Giver, back cover (2008).

venireman's assurance during voir dire examination that he could be fair and impartial as a member of the jury in a murder trial:

> [H]ad someone asked [about the content of his book], I guess then he would have told us that it was his wife or a fictional wife who had been killed, about someone he had kidnapped or a fictional person that he had kidnapped, who he had tortured to death for a crime which in the state of Missouri carries a range of punishment of a day to a year [in a county jail] or two to seven years in the Missouri Department of Corrections . . . and/or a fine of up to $5,000.

Id. at 2160-61. Defense counsel also requested that Mr. Canter and the other members of the jury be questioned regarding the possibility of contamination by exposure to the author's ideas and possibly the actual content of his book:

> [H]ere's a person that actually wrote a book and we don't have any idea if he's discussed this with people here or not. We don't know if he has discussed with them his autobiography . . . or his fictional autobiography or what effect that has.

Id. at 2162. Counsel stated: "It's our position that the process has been tainted, it's been infected and there's no way to clean the infection. We would ask . . . that the Court make inquiry of him and make him answer as to why he did not disclose this." Id. at 2162. And: "This is the foreperson. This is the person in the position most likely to influence the other jurors in the first part of the trial." Id. at 2171.

The trial court denied Mr. Shockley's request for the declaration of a mistrial. Id. at 2172, 2174. The court noted that it shared defense counsel's concerns about the juror and his book but concluded: "[A]t this point there's not sufficient evidence to support a mistrial of this case on that issue." Id. at 2173-74.[9] The court also denied defense counsel's request "to inquire of a specific juror or potential jurors" because of its belief that such inquiry "would irreparably taint further proceeding" and necessitate the declaration of a mistrial. Id. at 2174. The court assured Mr. Shockley that it would provide "the opportunity to address these issues further after trial and have additional inquiry, if necessary." Id.

The trial court ultimately granted defense counsel's request for the removal of the juror and the substitution of the remaining alternate juror. Id. at 2200-10. Four weeks after the conclusion of trial the court wrote to counsel for the state and for Mr. Shockley:

> Since the trial and on two separate occasions, I have directed the attorneys to confer and arrange a telephone conference with the court, but no arrangements for such conference has been made. As discussed at the end of trial, I want to determine whether the state or the defendant will be requesting (or subpoenaing) any juror in this case to testify about any issue raised at trial or in pending motions.

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[9] The court would later note that Mr. Canter "gave a copy of his book during the week of trial to the court bailiff." Legal File at 1756.

If so, we need to plan that process, and I will probably request that both sides submit proposed questions for the inquiry.

Legal File at 1756. There is no record of a response by counsel to that correspondence or of any further inquiry into the concerns noted by defense counsel and the trial court.

E. Sufficiency of Transcript

Mr. Shockley filed his notice of appeal on May 31, 2009. Legal File at 1770-75. His appointed counsel filed a motion in this Court on August 26, 2009, requesting that the filing deadline for the record on appeal be extended through December 3, 2009. On August 27, 2009, this Court granted the motion and provided in its order that no further extension of the filing deadline would be granted. On December 4, 2009, having been unable to obtain the transcript, counsel filed the nine-volume legal file and requested a further extension of the filing deadline with respect to the transcript. The Court's online records reflect no further order or other recorded activity during the ensuing five months. The transcript was filed with leave of this Court on May 3, 2010.

On October 13, 2010, this Court remanded Mr. Shockley's case to the Circuit Court to determine whether the transcript of proceedings in that court was sufficient for appellate review of the judgment and death sentence. Mr. Shockley had filed a motion in this Court on October 5, 2010, suggesting that a proceeding conducted in an auxiliary courtroom and on the record had been omitted from the trial transcript. The motion filed in this Court was supported by the affidavits of

Bradford Kessler and David Bruns, who had represented Mr. Shockley in the trial court.

The Circuit Court conducted a hearing pursuant to this Court's order on December 22, 2010. Supp. Tr. Dec. 22, 2010 at 2.[10] The trial court examined its court reporter, Andrea Moore, and allowed further examination of Ms Moore by counsel for Mr. Shockley and for the state. Then trial counsel for both parties made statements as officers of the court with respect to their recollections of trial court proceedings.

1. Testimony of Court Reporter

Ms Moore identified herself as the certified court reporter for the 37th Judicial Circuit. Id. at 3. She was the reporter in attendance at Mr. Shockley's trial. Id. at 3, 7. She testified that she was sick on Saturday, March 28, 2009, the last day of that trial: "Saturday I had bronchitis, I was coughing a lot." Id. at 19. Bronchitis is an infection of the lungs. National Heart Lung and Blood Institute, Diseases and Conditions Index, http://www.nhlbi.nih.gov/health/dci/Diseases /brnchi/brnchi_signs.html (retrieved Jan. 11, 2011). The condition "usually develops after you already have a cold or the flu." *Id.*

Ms Moore testified that she records proceedings by repeating courtroom conversation into a mask connected to a computerized recording device. Supp. Tr.

[10] References to the transcript of proceedings on December 22, 2010, are indicated by the citation "Supp. Tr. Dec. 22, 2010."

Dec. 22, 2010 at 7, 13. The computer has a microphone that records all sounds made in the courtroom. Id. at 8. Ms Moore also places two microphones at remote locations within the courtroom to obtain additional recordings of courtroom sound. Id. at 8, 13. Her computer has a time stamp that operates every time she goes on and off the record. Id. at 9. Her equipment records on a variety of electronic media: "It's all digital. Some of the recorders have built-in memory, some of the recorders have a small SD card, like a camera. My computer itself, everything's put on a hard drive." Id. at 13-14.

Ms Moore also has a "portable mask" that she can use as an alternative to her courtroom setup. Id. at 24. She testified: "The only time I've ever used the portable is in the anteroom." Id. at 25. And she identified the anteroom as "a small room, hallway," between the trial judge's entry to the main courtroom and her own office. Id. at 21. The court described the anteroom as "a little side room next to the courtroom." Id. at 5-6.

Ms Moore testified that she set her recording equipment up in the main courtroom at 8:14 a.m. on Saturday, March 28, 2009. Id. at 30. At the Court's direction, she began preparing a transcript of voir dire responses by Juror No. 58 9:24 a.m. Id. at 24, 32. She recalled having become "horribly nervous" after completing that assignment. "I wanted to make sure the judge advised [the attorneys] that that was a rough draft transcript and couldn't be relied on." Id. at 22.

The trial court asked Ms Moore whether she had set up her equipment in another courtroom at any time on Saturday, and she answered: "I believe I did [set up in] a smaller courtroom." Id. at 6. When counsel for the sate asked the same question again, Ms Moore answered again: "I believe I set up in there." Id. at 10. Later she testified: "I'm hung up on whether I was truly set up in there or not." Id. at 22. She subsequently stated again that she was not sure she had set her equipment up in the small courtroom. Id. at 30-31.

Ms Moore testified that she did not record any proceedings in the small courtroom. Id. at 5-6. She said she did not think the judge had gone into the small courtroom that day. Id. at 22-23. Ms Moore did recall having made a record outside of the main courtroom at one time on Saturday: "Mr. Shockley [was] being advised about something in the anteroom." Id. at 21. She later added:

> The conversation in the anteroom, that file references a question that was from the jury regarding if they needed to continue deliberations, because they were unable to reach a verdict regarding punishment.
>
> It was two minutes and eleven seconds long.

Id. at 27. Ms Moore stated that she would have used her portable mask to record a proceeding in that room and that the conversation involving Mr. Shockley had occurred between 3:22 pm. and 6:30 p.m.—i.e., while the jury was deliberating. Id. at 24, 33.

2. Statements of Counsel

Mr. Kessler's affidavit had memorialized his recollection of a proceeding in the small courtroom on March 28, 2009, that was conducted on the record. The trial court allowed Mr. Kessler to make a statement in narrative form at the hearing on December 22, 2010. Id. at 35. Mr. Kessler recalled the gathering of all counsel and Mr. Shockley in the small courtroom on the morning of March 28, 2009. Id. at 36-37. He stated:

> The issue as to whether or not we did something on the record in the courtroom is based on I know we did something outside the main room that was on the record. I know that for a fact. If it was what was in the anteroom and I'm just misremembering the time and the place, then so be it. But I do know we did something on the record that was not in the main courtroom. I think it was something more significant than that the jury deliberations were somehow deadlocked, because that would not have come until much later.
>
> And I recall it being prior to the time that I went to call an attorney.

Id. at 39.

Mr. Bruns also described the gathering in the small courtroom on the morning of March 28, 2009. Id. at 40-45. He testified that he believed a record had been made in the small courtroom but that he did not recall the specifics of that proceeding. Id. at 40. Mr. Bruns subsequently stated: "[T]he judge said we

were going in the small courtroom . . . And, I mean, I think it was to make a record." Id. at 43.

Kevin Zoellner, one of the prosecuting attorneys at trial, recalled that the conversation between the court and counsel had included the court's "flow charting" the issues that had arisen regarding Juror No. 58 and Mr. Kessler's disinclination to proceed in the case if the court did not remove that juror in response to his challenge for cause. Id. at 45-46. Mr. Zoellner told the court: "I believe . . . when we were in chambers [I] suggested to you that when you got ready to deal with these issues, that they should be done in private because of this juror, his name, and those sorts of things." Id. at 46. Mr. Zoellner added: "Whether we were going to take anything up on the record back there or not, it was my impression that I wanted you to, but you didn't want to because of all these issues." Id. at 47.

Mr. Zoellner stated that he remembered the trial judge coming into the small courtroom after a conversation in chambers and after having taken "some time to do the research . . [and] consider [his] options." Id. at 46-47. He recalled: "And instead of flow charting it like we did before, by this time . . . my impression was you had made up your mind, depending on how things went, what you were going to do. And you . . . came in and kind of said, "Hey, am I clear?" Id. at 47. Mr. Zoellner added: "[A]t that point you were basically saying, "If you're going to do this, Brad, I want you to know this is what I'm going to have to do. I don't

like doing it." Id at 47-48. He also stated his feeling that the colloquy he was describing was not conducted on the record. Id. at 47.

Mr. Zoellner recalled that the conversation between the court and counsel in the small courtroom had lasted "four [or] five minutes at most," and that everyone then returned to the trial courtroom. Id. at 48. He said that Mr. Kessler "finally says, '[W]e're asking that [the juror] now be removed. We agree that he can now be removed.'" Id. Juror No. 58 then was brought into the courtroom and dismissed by the court. Id.

3. Evidence Regarding Transcript Preparation

Ms Moore's testimony established that the Circuit Court had found it necessary to direct the Office of State Courts Administrator to prepare the trial transcript when she was unable to do so. Id. at 4. While being examined by counsel for the state, she acknowledged that she "ultimately had trouble preparing a transcript . . . because of issues in [her] own life." Id. at 8. In response to questions by counsel for Mr. Shockley, Ms Moore stated that some of the issues that kept her from being able to prepare the transcript were "work-related" and others were family matters. Id. at15. She recalled having provided her audio and text filed to the OSCA staff. Id. at 4-5, 8-0. Ms Moore stated her opinion that her recordings had been accurate and agreed with Mr. Zoellner that "any other court reporter . . . would have been able to produce a fair and accurate transcript." Id. at 9.

Ms Moore acknowledged difficulties that the OSCA staff had encountered with her recordings from the outset of their work on the transcript. Id. at 15-18. The problems had included issues of equipment incompatibility and of difficulty comprehending particular portions of her recordings. Id. at 15-17. Ms Moore testified that one OSCA supervisor "would ask me questions occasionally" and "send down like a list of words it sounded like this, what was the word really, or something like that." Id. at 15-16.[11] She recalled having found it necessary to go to the OSCA office and assist a staff member who had difficulty with her digital files: "And I made a trip to Jefferson City after we weren't able to just mail files back and forth. And I made a trip up there and sat with her." Id. at 16. Ms Moore said: "[I]t would be [hard] for anybody. But my system, you know, there's so many different files there, it's hard to put it all together . . . for somebody that isn't computer savvy to a certain degree." Id. at 17-18. She stated her opinion that the OSCA personnel were able to understand her files "once we could all sit there and talk." Id. at 18.

Ms Moore testified that she received a copy of the trial transcript during November, 2010. Id. at 9, 18-19. She said that she had "looked at portions" of the

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[11] Many of the problems encountered by OSCA personnel who processed Ms Moore's recordings were memorialized in email messages, at least some of which Ms Moore produced for the trial court and counsel several weeks after the hearing on December 22, 2010. Supp. Tr. Dec. 22, 2010 at 49; App. at _____.

transcript and had seen no problems with the transcription. Id. at 9, 19. She stated that she had examined specifically the final part of the transcript. Id. at 19. Ms Moore testified that she had prepared that portion of the transcript before being succeeded by the OSCA personnel in the transcription process, explaining: "I worked from the back forward, mostly because I was sick." Id. She added:

> I knew that the tings that were being raised had been on the record, that I had already produced that portion of the transcript. And I needed to make sure that that was included, because—because I'd done it. So—and that was what I looked at, and it was there.

Id. at 19. Ms Moore recalled that she had been "coughing a lot" and that her "voice recognition files were not good." Id.

Pages 2161 through 2227 of Volume IV of the trial transcript contain all of the proceedings of March 28, 2009, that were included in that document transcribed by OSCA pursuant to the Circuit Court's order. There are three court reporter certificates bound into the back of the volume. Ms Moore is not one of the signatories. The transcript does not contain any proceeding that might have been held on the record in the small courtroom. It also does not contain a proceeding at any time on March 28, 2009, in which Mr. Shockley was advised about a question from jurors or that the jurors were deadlocked. It contains no proceedings at all that might have been conducted in the anteroom.

4. Report of the Circuit Court

The Circuit Court filed its report in this Court on February 10, 2011. That court found that two conferences between itself and trial counsel in the anteroom during trial had been omitted from the trial transcript. The court related that it had ordered the OSCA transcription pool to prepare a supplemental transcript containing those proceedings and certified the trial transcript as supplemented to be accurate record of the trial. That supplemental transcript was filed in this Court on February 10, 2011. Both of the omitted portions occurred on March 28, 2009, and would have been included in Volume IV of the trial transcript. Supp. Tr. Feb. 10, 2011 at 2, 7. The starting points of the two proceedings included in the transcript would have been separated by 455 pages if they had been included in the original transcript prepared by OSCA typists. *Id.*

POINTS RELIED ON

I.

The Circuit Court erred in finding that the transcript is complete and accurate and in certifying the transcript as sufficient for appellate review of Mr. Shockley's capital murder conviction and death sentence, because that finding is against the weight of the evidence and the evidence is insufficient to establish the reliability of the transcript as a matter of law, and the certification would limit Mr. Shockley to incomplete and unreliable appellate review in violation of his right to due process under U.S. Const. amend. XIV and Mo. Const. Art. I, § 10, and to meaningful appellate review under Mo. Rev. Stat. § 565.035, in that (1) the evidence established that the trial court reporter was impaired at the time of trial and afterward and was unable to prepare a transcript despite being afforded many months to do so; (2) the portion of the transcript prepared by the court reporter is known to have omitted specific recorded proceedings even after the court reporter's sowrn post-trial testimony that she had examined that portion of the transcript and found it complete; (3) the remote Office of State Courts Administrator typists who completed the bulk of the transcript encountered ongoing difficulty interpreting the sound files and other materials from which their transcription was done; (4) all trial counsel agreed that a mid-trial challenge to the competence of the jury foreman and material associated issues were discussed by the trial court and counsel in an auxiliary courtroom on the final

day of trial and both defense attorneys indicated their belief that the proceeding was conducted on the record, but the proceeding is not included in the transcript; and (5) the cumulative bases for doubting the completeness and accuracy of the transcript, together with the heightened need for reliability in determining the appropriateness of executing a particular defendant, make reliance on the present transcript unconscionable.

Woodson v. North Carolina, 428 U.S. 280 (1976)

Douglas v. California, 372 U.S. 353 (1963);

State v. Middleton, 995 S.W.2d 443 (Mo. 1999)

Mo. Rev. Stat. § 565.035

II.

The Circuit Court erred in failing to provide the jury with a remedial instruction or declare a mistrial *sua sponte* when counsel for the state commented on Mr. Shockley's failure to testify, because counsel's remark violated the defendant's right to refrain from testifying as provided in U.S. Const. amend. V and XIV and Mo. Const. Art. I, § 19, and the absence of remedial action by the court resulted in prejudice to Mr. Shockley, in that the statement (1) suggested to the jury that Mr. Shockley could explain the purported presence of his grandmother's automobile near the site and at the time of Sgt. Graham's murder, (2) insinuated that counsel for the state had knowledge of that explanation and that it inculpated the defendant, (3) imposed a penalty upon the defendant for exercising his constitutional right,

and (4) resulted in prejudice by encouraging the jury to find that Mr. Shockley was concealing guilty knowledge and making it more likely that a guilty verdict would ensue.

Griffin v. Illinois, 351 U.S. 12 (1956)

State v. Arnold, 628 S.W.2d 665 (Mo. 1982)

U.S. Const. amend. V

Mo. Const. Art. I, § 19

III.

The Circuit Court erred in refusing to declare a mistrial after the prosecuting attorney and Sgt. Heath combined to inform jurors of Mr. Shockley's purported history of violence because Sgt. Heath's statement violated Mr. Shockley's rights to a fair trial and due process under U.S. Const. amend. XIV and Mo. Const. Art. I, § 10, and to be tried for the offense with which he was charged under Mo. Const. Art. I, §§ 17-18, in that the purpose and effect of the statement was to impugn Mr. Shockley's character and to make jurors more prone to find him guilty of the offenses charged in this case because of a propensity to engage in violent criminal behavior.

Old Chief v. United States, 519 U.S. 172 (1997)

State v. Voorhees, 248 S.W.3d 585 (Mo. 2008)

State v. Burns, 978 S.W.2d 759 (Mo. 1998)

Mo.Const. Art. I, § 17

IV.

The Circuit Court erred in denying Mr. Shockley's motion for a new trial based on the cumulative prejudicial effect of propensity and character evidence and argument adduced by the prosecution, because that evidence and argument violated Mr. Shockley's rights to due process under U.S. Const. amend. XIV and Mo. Const. Art. I, § 10, and to be tried for the offense with which he was charged under Mo. Const. Art. I, §§ 17-18, in that (1) the prosecuting attorney intentionally elicited Sgt. Heath's testimony that Mr. Shockley had a "violent history" prior to the murder of Sgt. Heath, repeatedly projected of a photograph of Mr. Shockley in jail clothing for viewing by the jury, and in summation encouraged the jury to find similarities between Mr. Shockley's purported commission of prior felonies in connection with a fatal automobile accident and his purported shooting of Sgt. Graham, and (2) the purpose and effect of all of that information was to impugn Mr. Shockley's character and to make jurors more prone to find him guilty of the offenses charged in this case because of a supposed propensity to engage in criminal behavior.

Old Chief v. United States, 519 U.S. 172 (1997)

State v. Voorhees, 248 S.W.3d 585 (Mo. 2008)

State v. Burns, 978 S.W.2d 759 (Mo. 1998)

Mo.Const. Art. I, § 17

V.

The Circuit Court erred in submitting penalty phase Instruction 14 to the jury and in failing to instruct the jury that the prosecution bore the burden of proving beyond a reasonable doubt that aggravating circumstances had a weight equal to or greater than mitigating circumstances, because the omission of clear instruction to that effect relieved the prosecution of its constitutional and statutory burden of proof, gave the jury a roving commission to find an element of capital murder without holding the state to that burden, and violated Mr. Shockley's rights to due process under U.S. Const. amend. XIV and Mo. Const. Art. I, § 10, in that (1) a finding of aggravating factors carrying at least as much weight as mitigating factors is a prerequisite for imposition of a death sentence under Mo. Rev. Stat. § 565.030.4, (2) determining the relative weight of aggravating and mitigating circumstances under § 565.030.4 is a fact-finding process, (3) due process precludes conviction of any crime, including capital murder, unless the prosecution has proved every factual element of the crime beyond a reasonable doubt and § 565.030.4 complies with that requirement, and (4) penalty phase Instruction 14 and the instructions as a whole failed to apprise the jury that the prosecution bore that burden of proof with respect to the weighing of aggravating and mitigating circumstances and in fact suggested that the defendant bore that burden.

Ring v. Arizona, 536 U.S. 584 (2002)

Apprendi v. New Jersey, 530 U.S. 466 (2000)

State v. Whitfield, 107 S.W.3d 253 (Mo. 2003)

State v. Taylor, 238 S.W.3d 145 (Mo. 2007)

VI.

The Circuit Court erred in submitting penalty phase Instruction 16 to the jury and in informing jurors that the court would fix Mr. Shockley's punishment if they failed to agree on a punishment, and Mo. Rev. Stat. § 565.030.4(4) should be declared unconstitutional for requiring such an instruction, because the instruction and the statute violated Mr. Shockley's right to due process under U.S. Const. amend. XIV and Mo. Const. Art. I, § 10, to a jury trial under U.S. Const. amend. VI and XIV and Mo. Const. Art. I, § 22(a), and to freedom from cruel and unusual punishment under U.S. Const. amend. VIII and XIV and Mo. Const. Art. I, § 21, in that informing capital case jurors prior to the commencement of penalty phase deliberation that they can leave the responsibility for determining punishment to the trial judge (1) diminishes the responsibility of jurors to reach a decision regarding the appropriateness of a death sentence and (2) deprives the defendant of the opportunity to have the question of whether his life should be taken determined by properly instructed and fully responsible lay members of his community.

Caldwell v. Mississippi, 472 U.S. 320 (1985)

Woodson v. North Carolina, 428 U.S. 280 (1976)

Ring v. Arizona, 536 U.S. 584 (2002)

McCleskey v. Kemp, 481 U.S. 279 (1987)

VII.

The Circuit Court erred in sentencing Mr. Shockley to death after the jury had weighed aggravating and mitigating factors and failed to reach unanimous agreement with respect to punishment, because the imposition of that enhanced sentence, and the provision of § 565.030.4 that purported to authorize the imposition of a death sentence by the trial court when the jury was unable to agree upon punishment, violated Mr. Shockley's rights to due process under U.S. Const. amend. XIV and Mo. Const. Art. I, § 10, a jury trial under U.S. Const. amend. VI and XIV and Mo. Const. Art. I, § 22(a), and freedom from cruel and unusual punishment under U.S. Const. amend. VIII and XIV and Mo. Const. Art. I, § 21, in that (1) a finding of aggravating factors carrying at least as much weight as mitigating factors is a prerequisite for imposition of a death sentence under Mo. Rev. Stat. § 565.030.4, (2) determining the relative weight of aggravating and mitigating circumstances under § 565.030.4 is a fact-finding process, (3) due process precludes conviction of any crime, including capital murder, unless the prosecution has proved every factual element of the crime beyond a reasonable doubt to the

satisfaction of a jury, and (4) the death sentence imposed in this case necessarily depended upon—and § 565.030.4 in fact required—the substitution of affirmative fact-finding by the trial court with respect to the element of aggravating factor weight.

Ring v. Arizona, 536 U.S. 584 (2002)

Apprendi v. New Jersey, 530 U.S. 466 (2000)

State v. Whitfield, 107 S.W.3d 253 (Mo. 2003)

Mo. Rev. Stat. § 565.030.4

VIII.

The Circuit Court erred in denying Mr. Shockley's request for the declaration of a mistrial, and in refusing his request to inquire of Juror No. 58 and other jurors during trial and failing to conduct such an inquiry sua sponte after the conclusion of trial, because those rulings and that failure to take remedial action sua sponte deprived Mr. Shockley of his right to a fair trial and due process under U.S. Const. amend. XIV and Mo. Const. Art. I, § 10, in that (1) the available information about Juror No. 58 and his book demonstrated that he had misrepresented his capacity to be fair to the defendant in a capital murder trial, (2) the available information about the juror's experiences and beliefs, together with his service as foreman, made it probable under all of the circumstances known to the trial court that other jurors had been exposed to that information and influenced by it, and (3) if

the available information was not sufficient to require such findings, the trial court was aware of the need for a record for its own evidence-based determination of whether the jury had been tainted and for appellate review of the question and failed to conduct the inquiry required for adjudication and review of the issue.

Montana v. Egelhoff, 518 U.S. 37 (1996)

United States v. Wood, 299 U.S. 123 (1936)

IX.

This Court should set aside the sentence of death imposed upon Mr. Shockley because the sentence is excessive and disproportionate to penalties imposed in similar cases, and thus violates Mr. Shockley's right to proportionate sentencing under Mo. Rev. Stat. § 565.035.3 and to proportionate sentencing, fundamental fairness, and due process under U.S. Const. amend. VI, VIII, and XIV, and Mo. Const. Art. I, §§ 10, 18(a), and 21, in that (1) there was no direct evidence of Mr. Shockley's culpability for the murder of Sgt. Graham and the circumstantial evidence might have failed to convince a fair-minded juror of the defendant's guilt or of the appropriateness of taking his life, (2) the jury's inability to reach agreement regarding the appropriate punishment for this defendant despite the brutality of the crime is consistent with lingering doubt about Mr. Shockley's guilt, (3) the sole additional finding made by the trial court in support of its decision to

impose a sentence of death was that court's substitute determination that the evidence of mitigating circumstances did not outweigh aggravating circumstances, and (4) alternative sentencing to imprisonment for life without the possibility of release has been applied in other cases with similar limitations of evidence and findings.

Mo. Rev. Stat. § 565.035

State v. Chaney, 967 S.W.2d 47 (Mo. 1998)

State v. Barton, 240 S.W.3d 693 (Mo. 2007)

State v. Deck, 303 S.W.3d 527 (Mo. 2010).

ARGUMENT

Preface: The Evidence of Guilt Was Not Overwhelming

This was a close case for the prosecution. There was no witness to the shooting of Sgt. Graham. Mr. Shockley certainly never confessed to that crime. The evidence of Mr. Shockley's guilt was circumstantial. And the circumstances that evidence suggested hardly compelled any juror to be persuaded beyond a reasonable doubt of his responsibility for the murder. That limitation is implicit in the jury's inability to reach agreement on his punishment. And those circumstances have a profound bearing on the level of scrutiny required for proper appellate review of several points raised in this brief. Of course even marginal doubt left by the evidence of guilt is a compelling and statutorily mandated component of the Court's proportionality review.

A. Key Circumstantial Evidence

Red automobile. The state's evidence purporting to connect Mr. Shockley to the red automobile observed by Mr. Hamm, Mr. Hart, and Mrs. Hart established that Mr. Shockley drove his grandmother's red Grand Am all afternoon and returned it at between 4:15 and 4:20 p.m. Tr. at 1807-10. That was approximately the same time that that Mr. Treadway heard gunfire coming from Sgt. Graham's property. Id. at 1188, 1190. Nobody reported seeing Mr. Shockley afoot in the vicinity or in a car on the road at or after the time of the shooting. Tr. at 1131, 1148. Mrs. Shockley's automobile had a prominent yellow sticker *on the driver's side of its trunk.* Id. at 1803-04. Only Mrs. Hart claimed to have seen the sticker

at all, and she testified twice that she saw it as she approached the parked automobile *from the front.* Id. at 1892, 1907. Her husband thought the license plate code of the car parked near Sgt. Graham's home might contain and L and an M. Id. at 1995, 2000-01. Mrs. Shockley's license plate had neither an L nor an M. Id. at 2007-08. According to Mr. Hamm's testimony, the automobile might have been a Pontiac or an Oldsmobile, and, despite the prosecutor's best efforts to get his own witness to say otherwise, it might still have been parked on the gravel lane as late as 4:30 p.m.—some time after the prosecution's evidence showed that Mr. Shockley had returned home in his grandmother's car. Id. at 1817-10, 1863-78.[12]

The presence of a red Grand Am automobile of indeterminate vintage at a given location and a given time is not definitive proof of anything at all. "Between 1992 and 1999 Grand Ams . . . consistently placed in the top ten cars in the U.S. and [were] among GM's top sellers." John Gunnel, 75 Years Of Pontiac: The Official History11 (2000); *see also* Pontiac Grand Am (stating that "Grand Am became Pontiac's best-selling car after its reintroduction in 1985), *available at*

[12] Ryan Houf, a conservation agent employed by the Missouri Department of Conservation, testified for the prosecution that he had driven several alternate routes between the location of the red automobile and Mrs. Shockley's home. Tr. at 1070, 1080-84. The shortest route covered 14.4 miles. Id. at 1082. It took Mr. Houf almost 19 minutes to drive that route. Id.

http://en.wikipedia.org/wiki/Pontiac_ Grand_Am (last visited May 21, 2011). Every twenty-fifth automobile sold in the United States during 1993 and 1994 was a Pontiac Grand Am. Gunnel, supra, at 155. The 1995 Grand Am owned by Mrs. Shockley was the seventh best-selling car in the country throughout its model year. Id. at 160. Pontiac sold almost 300,000 copies of the 1995 Grand Ams before the year was over. Id. at 222. "Red Grand Am" may well have been the most common single description of an automobile in Carter County for years preceding the instant crime.

Ballistics evidence. One of the state's ballistics experts, the "most junior" examiner in the Highway Patrol crime laboratory, testified that the bullet fragments recovered during Sgt. Graham's autopsy had been fired from the same gun as damaged bullets found on Mr. Shockley's property. Tr. at 1657-58, 1677, 1709-10. The state's other expert, a firearms examiner at the FBI crime laboratory for 19 years and a private consultant for many more, was firmly convinced that no such conclusion could be drawn from the evidence. 1581-82, 1610-26, 1637.[13]

[13] No 12 jurors empaneled during the Spring of 2009 could have been unaware of or uninfluenced by widely known problems with law enforcement crime laboratories. As Justice Scalia was to write in *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527 (2009), less than two months after the conclusion of Mr. Shockley's trial:

> Nor is it evident that what respondent calls "neutral scientific testing" is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, "[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency." National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward 6-1 (Prepublication Copy Feb. 2009) (hereinafter National Academy Report). And "[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency." *Id.*, at S-17. A forensic analyst responding to a request from a law enforcement official may feel pressure-or have an incentive-to alter the evidence in a manner favorable to the prosecution.

129 S.Ct. at 2536.

Further, the damaged ammunition evidence seized from an enormous sawdust pile on the Shockley property had been deposited there by countless people over a period of many years. Id. at 1462-63, 1499-1506, 1756-57. Both firearms examiners agreed that the rifle bullet that killed Sgt. Graham could have been anywhere from .22 caliber through .24 caliber, implicating "millions and millions" of guns. Id. at 1599-1609, 1665-72. Sgt. Brand testified that the officers of 20 law enforcement agencies who searched the Shockley premises for eight days were looking for a .243 caliber rifle in particular only because someone at the Highway Patrol command post had been told that Mr. Shockley owned one and liked it. Id. at 1512. The officers conducting the search were not told that the murder weapon could have been any gun that fired ammunition between .22 and .24 caliber. Id. at 1515, 1628. No rational juror could have failed to recognize the uncertainty of evidence regarding the caliber of the weapon used to kill Sgt. Graham or the failure of the prosecution to produce that weapon in evidence.

Motive. Mr. Shockley acknowledges that the desire to stop a police officer's engagement in the investigation of a particular crime could serve as a motive for murder. But no further concession regarding the prosecution's motive theory is in order: the evidence did not begin to suggest a basis for believing that this defendant was the sort of moron who might believe that killing Sgt. Graham would terminate any investigation that he had been conducting. In fact Sgt. MacDonald testified that the Highway Patrol had continued the inquiry. Id. at 1351.

The existence or absence of motive can be "an important evidentiary fact," but motive is not an element of the crime. *State v. King*, 433 S.W.2d 825, 827 (Mo. 1968). Its existence or non-existence is definitive proof of nothing. State v. Miller, 204 S.W. 6, 8 (Mo. 1918). Mr. Shockley was not free to present evidence that others might have had motive for the murder of Sgt. Graham: "Evidence that another person had [a] motive for committing the crime for which the defendant is being tried is not admissible without proof that such other person committed some act directly connecting him with the crime." *State v. Schaal*, 806 S.W.2d 659, 669 (Mo. 1991).

Further, a succession of prosecution witnesses testified that Mr. Shockley's response to news that Sgt. Graham had set out to interview people about the fatal truck accident was level-headed. Mrs. Napier made it perfectly clear that Mr. Shockley's response to her disclosure was rational and accepting. Tr. at 1057-58. Ms Chilton said that Mr. Shockley had suggested that she talk with Sgt. Graham on the porch so that her children would not have to hear a conversation about their father's death. Id. at 1121-22. And Mr. Keeney said that Mr. Shockley had expressed a determination to talk with Sgt. Graham and had exhibited no upset or anger in the process. Id. at 1160-63. In short, the prosecution's theory of motive was logical but hardly binding on the jury and, to say the least, its evidence about Mr. Shockley's conduct demeanor on the day of Sgt. Graham's murder did not paint a compelling picture of a man bent on committing a savage murder.

B. Significance of Limited Evidence Proving Guilt

The effect of improper influences upon the jury is different in a close case than in a prosecution supported by overwhelming evidence of guilt. That is true when review is for harmless Constitutional error. *State v. Storey,* 986 S.W.2d 462, 466 (Mo. 1999). It is true when the review is for error in the admission or exclusion of evidence. See, e.g., *State v. Barriner,* 111 S.W.3d 396, 401 (Mo. 2003). It also is true when review is for plain error. *State v. Presberry,* 128 S.W.3d 80, 102-03 (Mo.App.E.D. 2003). In short: error committed in a criminal case generally is presumed to be prejudicial, and error that might be deemed harmless when the evidence of guilt is strong will nonetheless require reversal in a close case. *State v. Caudill,* 789 S.W.2d 213, 216-17 (Mo.App.W.D. 1990).

Further, the absence of overwhelming proof is a matter of primary importance in this Court's statutory proportionality review. "[T]he strength of the evidence" is one of three considerations specified by § 565.035 as a basis for finding a particular death sentence excessive or disproportionate. Mo. Rev. Stat. § 565.035.3(3). Missouri is almost alone among the states in requiring that the strength of the evidence be included in proportionality review. *State v. Chaney,* 967 S.W.2d 47, 60 (Mo. 1998). As Judge Holstein wrote in *Chaney:*

> It is clear from this mandate that the legislature intended for this Court, when reviewing the imposition of the death penalty, to go beyond a mere inquiry into whether the evidence is sufficient to support a conviction.

Id.

The evidence of guilt in this case was strictly circumstantial and hardly overwhelming. The limitations of the evidence require the closest scrutiny of the trial court rulings challenged in this appeal. Those limitations also must inform this Court's proportionality review pursuant to § 565.035.

I.

The Circuit Court erred in finding that the transcript is complete and accurate and in certifying the transcript as sufficient for appellate review of Mr. Shockley's capital murder conviction and death sentence, because that finding is against the weight of the evidence and the evidence is insufficient to establish the reliability of the transcript as a matter of law, and the certification would limit Mr. Shockley to incomplete and unreliable appellate review in violation of his right to due process under U.S. Const. amend. XIV and Mo. Const. Art. I, § 10, and to meaningful appellate review under Mo. Rev. Stat. § 565.035, in that (1) the evidence established that the trial court reporter was impaired at the time of trial and afterward and was unable to prepare a transcript despite being afforded many months to do so; (2) the portion of the transcript prepared by the court reporter is known to have omitted specific recorded proceedings despite the court reporter's post-trial testimony that she had examined that portion of the transcript and found it complete; (3) the remote Office of State Courts Administrator typists who completed the bulk of the transcript encountered ongoing difficulty interpreting the sound files and other materials from which their transcription was done; (4) all trial counsel agreed that a mid-trial challenge to the competence of the jury foreman and material associated issues were discussed by the trial court and counsel in an auxiliary courtroom and both defense attorneys indicated their belief that the proceeding was conducted on

the record, but the proceeding is not included in the transcript; and (5) the cumulative bases for doubting the completeness and accuracy of the transcript, together with the heightened need for reliability in determining the appropriateness of executing a particular defendant, make reliance on the present transcript unconscionable.

Standard of review: The judgment of a trial court on an issue tried before the court as fact-finder should be reversed if it is against the weight of the evidence or is based on an erroneous application of governing law. *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. 1976).

The United States Supreme Court has stressed the heightened need for reliability and rationality in determining whether an individual should be put to death. *See, e.g., Woodson v. North Carolina,* 428 U.S. 280, 305 (1976) (opinion of Stewart, J.); *Lockett v. Ohio,* 438 U.S. 586, 604 (1978). This Court also has recognized that requirement in its review of capital cases. *See, e.g., Deck v. State,* 68 S.W.3d 418, 430 (Mo. 2002). That need is incapable of being met when the accuracy and completeness of the trial transcript is in doubt. The transcript in this case is redolent of doubt. This Court should recognize that reliable appellate review cannot be had on the basis of that record, and reverse the judgment and vacate the sentence of the trial court for that reason.

Although there is no explicit federal or state constitutional right to an absolutely accurate trial transcript, where a state provides a statutory right to appeal that right must meet the constitutional requirements of due process.

Douglas v. California, 372 U.S. 353, 356-57 (1963); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). Missouri provides by statute for appellate review of any judgment of conviction in a capital case and of the proportionality of any sentence of death imposed in such a case. Mo. Rev. Stat. § 565.035. One essential component of due process is the opportunity for the meaningful opportunity to be heard and to present a defense. *In re Oliver*, 333 U.S. 257, 273-74 (1948). Every person who appeals from any judgment of conviction in a Missouri court "is entitled to a full and complete transcript for the appellate court's review." *State v. Middleton*, 995 S.W.2d 443, 466 (Mo. 1999). It is impossible to satisfy that constitutional and statutory entitlement in this case.

The shortcomings of the present transcript are patent: the official court reporter was unable to complete the transcript because of her own disability; the typists of the State Courts Administrator staff encountered repeated difficulty interpreting her digital audio records and record-keeping methodology; a minimum of two proceedings that concededly were conduct on the record were omitted from the transcript; after reviewing the very portion of the transcript from which those proceedings were omitted, the court reporter testified that the transcript was complete; that plainly unreliable testimony, together with uncontroverted evidence of the court reporter's serious illness during the latter part of the trial and the significant evidence of her lack of capacity to prepare a transcript—or, for all one can tell from the record, to work on the preparation of a transcript at all—for many months after the conclusion of trial render the rendition

of appellate review on the basis of the present record untenable in a death penalty case. Statement of Facts, *supra*, at 43-51.

The following matters of record demand that conclusion:

• The court reporter testified that she was very sick by the final morning of trial. Supp. Tr. Dec. 22, 2010 at 19. She reported being "horribly nervous" about a matter—whether the trial court had advised counsel that her emergency transcription of portions of the jury selection proceedings "was a rough draft and couldn't be relied on"—that ought not to evoke such an emotional reaction. Id. at 22.

• She testified that the only proceeding she had recorded outside the main courtroom was an encounter between the court, counsel, and Mr. Shockley in the "anteroom" on the final day of trial, that she had reviewed the transcript of that day's proceedings and determined that nothing was omitted from that volume. Id. at 9, 18-19, 21, 24, 27, 33. In fact the anteroom proceeding that she recalled was not in the transcript. Neither was a subsequently discovered second proceeding in the anteroom. Rep't of Circuit Court, Feb. 10, 2011, at 1-2.

• Theh court reporter testified that she had been unable to prepare the transcript in this case, despite this Court's preemptive order for completion, "because of issues in [her] own life." Supp. Tr. Dec. 22, 2010 at 8.

• The OSCA transcription staff encountered ongoing difficulties interpreting and processing her recorded materials and computerized filing protocols and memorialized those difficulties in a series of email exchanges with

the court reporter. Id. at 15-18; App. at A12-A39. The court reporter "made a trip" to Jefferson City and "sat with" an OSCA typist in an attempt to alleviate those problems. Supp. Tr. Dec. 22, 2010 at 16-18.

The transcript that resulted is replete with "indiscernible" annotations and unattributed venire-person responses throughout the jury selection proceeding. The point, of course, is not what the transcript does contain, but rather what it does not. It is an unmistakable fact that at least two proceedings were omitted from the transcript. The official court reporter's sworn testimony that this portion of the transcript was complete based on her own review is a chilling assurance that reliance on the transcript by this Court would be fraught with danger. It is impossible to determine what else happened on the record and did not make its way into the transcript.

Reliance upon the present transcript in this capital appeal inevitably would build conjecture and uncertainty into this Court's reviewing process. It is not possible to reconcile appellate review so limited with the heightened need for reliability and rationality in capital cases. *See, e.g., Woodson*, 428 U.S. at 305. This Court should vacate the death sentence imposed by the trial court, reverse the judgment of conviction, and remand the case for a new trial because of the impossibility of meaningful appellate review.

II.

The Circuit Court erred in failing to provide the jury with a remedial instruction or declare a mistrial *sua sponte* when counsel for the state commented on Mr. Shockley's failure to testify, because counsel's remark violated the defendant's right to refrain from testifying as provided in U.S. Const. amend. V and XIV and Mo. Const. Art. I, § 19, and the absence of remedial action by the court resulted in prejudice to Mr. Shockley, in that the statement (1) suggested to the jury that Mr. Shockley could explain the purported presence of his grandmother's automobile near the site and at the time of Sgt. Graham's murder, (2) insinuated that counsel for the state had knowledge of that explanation and that it inculpated the defendant, (3) imposed a penalty upon the defendant for exercising his constitutional right, and (4) resulted in prejudice by encouraging the jury to find that Mr. Shockley was concealing guilty knowledge and making it more likely that a guilty verdict would ensue.

Standard of review: This Court has discretion to review claims of error that were not preserved in the trial court "when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Mo. R. Crim. P. 30.20. Error likely to have affected the outcome of the defendant's trial warrants relief under this rule. *State v. Armentrout*, 8 S.W.3d 99, 110 (Mo. 1999).

The Fifth Amendment states: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Missouri Constitution guarantees an identical right. Mo. Const. Art. I, § 19; *State v. Hutchinson,* 458 S.W.2d 553, 556 (Mo. 1970). Those constitutional provisions forbid any comment by the prosecution on the silence of a criminal defendant at trial. *Griffin,* 380 U.S. at 615; *State v. Arnold,* 628 S.W.2d 665, 668 (Mo. 1982); *see also* Mo. Rev. Stat. § 546.270 and Mo. R. Crim. P. 27.05(a) (both prohibiting prosecuting attorneys from referring to a defendant's silence). The prosecuting attorney violated that prohibition in this case. Tr. at 1914. His comment on Mr. Shockley's silence was flagrant and prejudicial. Through that comment and its insinuation of prosecutorial knowledge regarding what would have been a pivotal fact in the case, the state obtained unfair advantage and the defense suffered prejudice: it became more likely that the jury would believe that Mr. Shockley murdered Sgt. Graham. This Court should reverse the judgment of conviction because of that constitutional violation.

The comment on Mr. Shockley's refusal to testify was flagrant: counsel highlighted Mr. Shockley's failure to offer an explanation for a red Pontiac Grand Am being parked near Sgt. Graham's home at the time of his murder, and suggested to the jury without equivocation that the defendant was withholding that knowledge. *Id.* The purported and unexplained presence of Mrs. Shockley's automobile at that time and place was the linchpin of the state's case. Insinuating prosecutorial knowledge that Mr. Shockley could provide the explanation—and

that it would inculpate him—was a prosecutorial cheat that this Court should not abide.

The United States Supreme Court has held: "[I]t is appropriate to presume that a defendant's silence [at trial] is an exercise of his constitutional privilege and to prohibit any official comment that might deter him from exercising that privilege." *Jenkins v. Anderson*, 447 U.S. 231, 242 (1980). "For comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws." *Id.* at 614 (quoting *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964) (citations omitted). Allowing such comment by government counsel in a criminal trial would impose a judicial "penalty . . . for exercising a constitutional privilege" and "cut[] down on the privilege by making its assertion costly." *Griffin*, 380 U.S. at 614. The prosecutorial comment in this case consisted of only two words, but its intention and unavoidable effect were to make it costly for Mr. Shockley to exercise his right to silence.

Reversal may be required whether the prosecutorial comment on a defendant's silence is "direct" or "indirect." *State v. Neff*, 978 S.W.2d 341, 344 (Mo. 1998). "A direct reference to an accused's failure to testify is made when the prosecutor uses words such as 'defendant,' 'accused' and 'testify' or their equivalent." *Id.* (quoting *State v. Lawhorn*, 762 S.W.2d 820, 826 (Mo. 1988)). "An indirect reference is one reasonably apt to direct the jury's attention to the defendant's failure to testify. *Id.; see also Arnold*, 628 S.W.2d at 669 (defining "indirect reference" as one that "highlighted" the defendant's silence); *State v.*

Rothaus, 530 S.W.2d 235, 239 (Seiler, C.J., dissenting) (recognizing that "[t]here are more ways of calling to a jury's attention the failure of the defendant to testify than actually blurting out, 'Look, he did not testify')).

The prosecutor's remark in this case was a direct reference to Mr. Shockley and his purported capacity to explain the presence of a red automobile similar to that owned by his grandmother near the scene of Sgt. Graham's murder. In *State v. Shuls*, 44 S.W.2d 94 (Mo. 1931), this Court said:

> That it was in effect a pointed reference to the fact that defendant had not testified is too plain for controversy, and that it was so intended and necessarily so understood by the jury does not admit of doubt. The evidence showed clearly and without dispute that there were but three persons present or who witnessed the holdup, the two girls who testified and the defendant who did not. The attorney said that there were three present, "and these two girls were the only ones that testified." The reference to the defendant's failure to testify could not have been more obvious had he been called by name and the fact baldly stated that he had not taken the witness stand and denied the testimony of the girls.

Id. at 252. No eye witness placed Mr. Shockley near the crime scene and there was of course no confession of guilt. The very essence of the state's position in this case was that he had parked his grandmother's car near Sgt. Graham's home and proceeded to commit the murder. The purpose and effect of the prosecuting

attorney's remark in this case—to make a point of Mr. Shockley's silence and assure jurors that he could choose to tell them why the automobile was parked where it was—was just as clear, improper, and calculated to instill prejudice as the prosecutorial argument in *Shuls*. Even if the Court chooses to characterize the remark in this case as an indirect reference to testimony by Mr. Shockley, it still was an unambiguous assurance to the jury that the defendant knew why the automobile was parked near the scene of Sgt. Graham's murder and it surely "highlighted" and was "apt to direct the jury's attention" to his ultimate silence. *Neff*, 978 S.W.2d at 826; *Arnold*, 628 S.W.2d at 669.

The record leaves no reasonable room to doubt that the prosecutor's comment on Mr. Shockley's silence was intentional. Counsel set up his improper comment by asking Mrs. Hart whether she knew Mr. Shockley's grandmother. Tr. at 1914. When the witness answered that she did not, the prosecutor asked a follow-up question that would be utterly illogical except for the scripted comment that was to follow:

> Q. Do you know why her car would be across from where Sgt. Graham was murdered . . . [o]n March 20, 2005?
>
> A No.
>
> MR. BELLAMY: Someone does.

Id. Even an indirect comment on a defendant's silence is especially egregious if it amounts to a "'pointed reference'" to that silence or "demonstrates a 'calculated intent' to magnify a defendant's decision not to testify." *State v. Hamilton*, 847

S.W.2d 198, 200-01 (Mo.App.E.D. 1993) (quoting *State v. Johnson,* 811 S.W.2d 411, 416 (Mo.App.E.D. 1991), and *State v. Robinson*, 641 S.W.2d 423, 426 (Mo. 1982)). This was a capital trial that in fact resulted in a sentence of death. There should be no tolerance in any case—but especially not in a capital case—for cheap shots that violate fundamental constitutional rights and tilt the scales in favor of the state and execution.

The United States Supreme Court has made clear its expectation that "appellate courts, by proper exercise of their supervisory authority," should "discourage prosecutorial misconduct. *Donnelly v. DeChristoforo*, 416 U.S. 637, 648 n. 23 (1974). An earlier opinion specified:

> [A prosecutor] may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88-89 (1935). This Court has endorsed and enforced that condemnation of prosecutorial excess. *State v. Storey,* 901 S.W.2d 886, 900-01 (Mo. 1995). There can be no doubt, of course, that a defendant's right to a fair trial and due process is violated when a prosecuting attorney's remarks penalizes the exercise of his Fifth Amendment right to remain silent before the jury. *Donnelly,* 416 U.S. at 643 (citing *Griffin,* 380 U.S. at 614).

The blow struck by a prosecutor's direct comment on the failure of a criminal defendant to testify is a foul one, all the more dangerous when coupled with the insinuation of prosecutorial knowledge of just what the accused could say. This Court has recognized repeatedly that "[a] prosecuting attorney may not express an opinion implying awareness of facts not available to the jury." *Grubbs v. State*, 760 S.W.2d 115, 119 (Mo 1988). And the Court has explained:

> Cases are to be decided upon the facts presented by the evidence. Especially in criminal cases, where life or liberty is at stake, juries should not be invited, directly or by implication, or permitted, to infer from statements made . . . by counsel for the state that there are facts, known to such counsel, tending to prove the defendant's guilt, which are not shown by the evidence.

State v. Moore, 428 S.W.2d 563, 565 (Mo. 1968). The duration of this instance of prosecutorial misconduct was brief, as surgical strikes are wont to be. But only guesswork could support a conclusion that counsel's statement failed to affect the jury's assessment of whether the automobile parked near Sgt. Graham's home at the time of his murder was Mrs. Shockley's red Grand Am.

The trial court noted the prosecuting attorney's remark and admonished counsel to "[k]eep the comments to yourself," but gave the jury no instruction that might preclude any reliance upon his outburst. By thus drawing the jury's attention further to the prosecutor's comment and Mr. Shockley's silence and yet failing to tell jurors what they must and must not make of the mess, the court

augmented the harm done by the counsel for the state. *See State v. Snyder*, 82 S.W.12, 32 (Mo. 1904) (noting that the remarks of the trial court "accentuated the allusion" to the defendant's failure to testify); *cf. Neff*, 978 S.W.2d at 346.

Any suggestion that the prosecuting attorney's comment was harmless would be indefensible. The evidence purporting to connect Mr. Shockley to the automobile observed by Mr. Hamm, Mr. Hart, and Mrs. Hart was hardly overwhelming. See pp. 25-32, 63-65, *supra*. But it was the cornerstone of the state's circumstantial case and the *first* evidence brought to the attention of jurors in the prosecuting attorney's summation. Tr. at 2023-24. Striking a foul blow to increase the likelihood that the jury would connect Mr. Shockley to the automobile was especially pernicious because the state was seeking to take the defendant's life.

This Court has discretion to review claims of error that were not preserved in the trial court "when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Mo. R. Crim. P. 30.20. Error likely to have affected the outcome of the defendant's trial warrants relief under this rule. *Armentrout*, 8 S.W.3d at 110. It would be preposterous to suggest that the state did not depend heavily upon persuading jurors that the red car seen near Sgt. Graham's home near the time of his murder was Mrs. Shockley's Grand Am, or that the prosecuting attorney's remark was not intended to bolster the legitimate evidence regarding that issue. Convictions obtained with the help of prosecutorial excess chip away at the legitimacy of the criminal justice system. When the

excess consists of intentional and inexcusable violation of a defendant's fundamental constitutional right, and the transgression is so plainly intentional and likely to result in prejudice, the chip becomes a wedge.

Allowing such intentional and gratuitous leave-taking by the state to result in the execution of one of its citizens would be ever so wrong. Even if the offending statement consisted of two words, spoken once. This Court should reverse the judgment of conviction because of the likelihood of prejudice that attended the prosecutor's comment.

III.

The Circuit Court erred in refusing to declare a mistrial after the prosecuting attorney and Sgt. Heath combined to inform jurors of Mr. Shockley's purported history of violence because Sgt. Heath's statement violated Mr. Shockley's rights to a fair trial and due process under U.S. Const. amend. XIV and Mo. Const. Art. I, § 10, and to be tried for the offense with which he was charged under Mo. Const. Art. I, §§ 17-18, in that the purpose and effect of the statement was to impugn Mr. Shockley's character and to make jurors more prone to find him guilty of the offenses charged in this case because of a propensity to engage in violent criminal behavior.

Standard of review: This Court generally reviews a trial court's refusal to declare a mistrial for abuse of discretion. *Holt v. State*, 433 S.W.2d 265, 269 (Mo. 1968). "[W]hen the issue is primarily legal, no deference is warranted and appellate courts engage in de novo review." *State v. Taylor*, 298 S.W.3d 482, 492 (Mo. 2009). The question of whether a defendant's constitutional rights were violated is a question of law to be reviewed de novo. *State v. March*, 216 S.W.3d 663, 665-66 (Mo. 2007).

There was zero guilt-phase evidence that could have supported a finding that Mr. Shockley was known or believed to be violent prior to March 20, 2005. Sure of exactly what Sgt. Heath's response would be—because Sgt. Heath had given the same response to the same question during a pretrial hearing under

questioning by the same prosecutor—counsel for the state asked the Highway Patrol officer whether he and Corp. Kinder had been accompanied by other law enforcement personnel when they went to interview Mr. Shockley at his home late that night. Tr. at 192, 200, 1922. Both defense counsel and the trial court tried to cut off Sgt. Heath's response, to no avail:

> A. A decision was made by my bosses, if you will, that due to Lance Shockley's violent history, that—
>
> [DEFENSE COUNSEL]: Your honor, I object.
>
> THE WITNESS: —police should—
>
> [DEFENSE COUNSEL]: Excuse me, sir.
>
> THE WITNESS: —the SWAT team should go with me.
>
> THE COURT: Hold on.
>
> [DEFENSE COUNSEL]: Excuse me, sir.

Id. at 1922-23.

In that blatantly scripted exchange, an Assistant Attorney General and a sergeant in the Highway Patrol struggled to tell the jury that the individual whom the state sought to have executed for the brutal murder-from-ambush of another Highway Patrol officer had a propensity for violence. They succeeded. Bearing in mind that there was no legitimate evidence in the guilt phase of this trial that could have lent rational support to a finding of that fact, it surely is impossible for this Court to be satisfied beyond a reasonable doubt that a brief remedial instruction actually returned all 12 jurors to neutrality regarding Mr. Shockley's

character and supposed propensity to hurt people. The judgment of conviction should be reversed and the sentence of death vacated because of that prosecutorial and police outrage.

The United States Supreme Court has recognized the inherent unfairness of "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily." *Old Chief v. United States*, 519 U.S. 172, 181 (1997). The Court relied upon an earlier opinion of then-Judge Breyer for explanation:

> Although . . . 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance.

Id. (quoting *United States v. Moccia,* 681 F.2d 61, 63 (1st Cir. 1982)). This Court also has recognized the "well-established general rule" that evidence of prior, uncharged misconduct "is not admissible unless such proof has some legitimate tendency to directly establish the defendant's guilt of the charge for which he is on trial." *State v. Voorhees,* 248 S.W.3d 585, 587 (Mo. 2008) (quoting *State v. Reese,* 274 S.W.2d 304, 307 (Mo. 1954)). In *Voorhees* the Court explained: "The rationale underlying this rule is grounded in the view that '[e]vidence of other crimes, when not properly related to the cause on trial, violates defendant's right

to be tried for the offense for which he is indicted.'" 248 S.W.3d at 587-88 (quoting *State v. Sladek*, 835 S.W.22d 308, 311 (Mo. 1992)).[14] Again, the rule is animated by concern that "such evidence 'may encourage the jury to convict the defendant because of his propensity to commit such crimes without regard to whether he is actually guilty of the crime charged." *State v. Burns*, 978 S.W.2d 759, 761 (Mo. 1998). Desire to create exactly that prejudice in the jury is the only explanation for the intentional elicitation of Sgt. Heath's characterization of Mr. Shockley.

A defendant's right to due process is violated by "the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236 (1941); *see also State v. Simmons*, 944 S.W.2d 165, 186 (Mo. 1997) (stating that the test of a due process violation is whether the defendant's trial was rendered fundamentally unfair). The prosecution's injection of an unrelated and unproven "violent history" into this case, in which jurors should have had to think carefully about whether the defendant before them was

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[14] The danger was compounded in this case by the direct and obvious involvement of the prosecuting attorney in presenting the "fact" of Mr. Shockley's purported violent history. This Court has recognized that "the jury believes—properly—that the prosecutor has a duty to serve justice, not merely to win the case," and thus jurors have particular trust for information delivered to them by the prosecution. *Storey*, 901 S.W.2d at 901 (citing *Berger*, 295 U.S. at 88).

capable of the brutal crime charged against him, was a cheat from which there was no way for Mr. Shockley to recover. Surely that rendered his trial fundamentally unfair. Further, criminal defendants in Missouri enjoy a state constitutional right to be tried solely for the offense charged against them. Mo.Const. Art. I, § 17; *see Burns*, 978 S.W.2d at 760 (recognizing that "[e]vidence of uncharged crimes, when not properly related to the cause on trial, violates a defendant's right to be tried for the offense for which he is indicted").

Nor should this Court acquiesce in the notion that the harm done by Sgt. Heath's statement could be undone by a remedial instruction. Sgt. Heath was the anchor of the state's case, the prosecution's final witness in the effort to convict Mr. Shockley and see him sentenced to death. The jury saw this law enforcement officer relentlessly conclude his characterization of Mr. Shockley as a person so violent that police could not go to his home to question him without a SWAT team to ensure their safety. Tr. at 1922-23.

The United States Supreme Court has recognized that remedial instruction cannot always be counted upon to save a defendant from highly improper and inherently prejudicial evidence:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.

Bruton v. United States, 391 U.S. 123, 135 (1968). This is such a case. There was profound incongruity between the evidence of Sgt. Graham's savage and deliberate murder and the dearth of evidence of *personal history* suggesting that Mr. Shockley was a person capable of such depraved violence. The state introduced Sgt. Heath to the jury as the veteran Highway Patrol criminal investigator who had taken the lead in investigating Mr. Shockley and in fact had interviewed him on four separate occasions. Tr. at 1918-65. Sgt. Heath's testimony that Mr. Shockley's history of violence necessitated SWAT team backup for a home interview was intended to paint a picture in the mind of every juror. The trial court's instruction "to disregard any comment made by the witness regarding any character or reputation of the defendant" was not likely to remove that image or avoid its impact as a supplement to the prosecution's legitimate evidence.

This Court should reverse the judgment of conviction and vacate the sentence in this case because Sgt. Heath's gratuitous and insistent announcement of his purported "violent history" denied Mr. Shockley his right to a fundamentally fair trial and to be tried only for the crimes charged against him.

IV.

The Circuit Court erred in denying Mr. Shockley's motion for a new trial based on the cumulative prejudicial effect of propensity and character evidence and argument adduced by the prosecution, because that evidence and argument violated Mr. Shockley's rights to due process under U.S. Const. amend. XIV and Mo. Const. Art. I, § 10, and to be tried for the offense with which he was charged under Mo. Const. Art. I, §§ 17-18, in that (1) the prosecuting attorney intentionally elicited Sgt. Heath's testimony that Mr. Shockley had a "violent history" prior to the murder of Sgt. Heath, repeatedly projected of a photograph of Mr. Shockley in jail clothing for viewing by the jury, and in summation encouraged the jury to find similarities between Mr. Shockley's purported commission of prior felonies in connection with a fatal automobile accident and his purported shooting of Sgt. Graham, and (2) the purpose and effect of all of that information was to impugn Mr. Shockley's character and to make jurors more prone to find him guilty of the offenses charged in this case because of a supposed propensity to engage in criminal behavior.

Standard of review: This Court generally reviews a trial court's refusal to declare a mistrial for abuse of discretion. *Holt*, 433 S.W.2d at 269. "[W]hen the issue is primarily legal, no deference is warranted and appellate courts engage in de novo review." *Taylor*, 298 S.W.3d at 492. The question of whether a defendant's

constitutional rights were violated is a question of law to be reviewed de novo. *March*, 216 S.W.3d at 665-66.

The prosecuting attorneys repeatedly injected information suggesting the violent character and criminal propensity of Mr. Shockley into the case. All of that evidence and innuendo was bound to influence jurors and make them more inclined to find the defendant guilty of Sgt. Graham's murder, despite the incapacity of any of the information to actually prove a fact at issue in the case. The ongoing introduction of those matters throughout the proceedings served no legitimate purpose, inevitably increased the likelihood of conviction, and thus deprived Mr. Shockley of a fair trial and of his right to be tried solely for the offense charged against him. The trial court thus erred in refusing to grant a mistrial based on the cumulative effect of that prosecutorial and police misconduct. Reversal is required for that reason.

Again, it is inherently unfair for the prosecution to invoke a defendant's purported history of bad acts, generalize the specter of that conduct into the impression of generally bad character, in order to parlay information that is historical at best and utterly bogus at worst into a force that inclines the jury toward present conviction. *Old Chief*, 519 U.S. 172, 181 (1997); *Voorhees*, 248 S.W.3d at 587. And, again: "The rationale underlying this rule is grounded in the view that '[e]vidence of other crimes, when not properly related to the cause on trial, violates defendant's right to be tried for the offense for which he is

indicted.'" 248 S.W.3d at 587-88 (quoting *State v. Sladek*, 835 S.W.22d 308, 311 (Mo. 1992)).

By the time Mr. Shockley's trial was over, Sgt. Heath's gratuitous and singularly improper assault on the defendant's character had become just one in a series of insults to the requirement of fairness and the prohibition of propensity and character evidence:

• Counsel for the state showed jail identification photograph of Mr. Shockley to the jury in the course of having Sgt. Heath demonstrate his ability to identify the defendant who was sitting at the counsel table in front of him. Tr. at 1919; Ex. 2. After the trial court had sustained defense counsel's objection to the photograph, the prosecuting attorney displayed it before the jury again. Id. at 1925-27.

• When defense counsel asked Highway Patrol investigator Warren Weidemann about an apparently accidental gunshot that had been fired by a law enforcement officer outside the Shockley residence on the night of March 20, 2005, Mr. Weidemann gratuitously expressed his personal belief that Mr. Shockley had shot Sgt. Graham: "I don't believe his shots were accidental." Id. at 1560.

• In his final argument, counsel for the state suggested that Mr. Shockley's departure from the scene of the fatal truck accident during November, 2004,

showed character traits consistent with those suggested by the murder of Sgt. Graham several months later. Id. at 2051.[15]

This was a close case and the prosecution needed all the help it could get. *See* pp. 63-70, *supra.* Counsel for the state, together with Sgt. Heath and Mr. Wiedemann, each took a turn at traducing Mr. Shockley's character. Their suggestions of criminal propensity and, in the case of Mr. Weidemann, flat-out statement of belief in Mr. Shockley's guilt—from a police investigator who had helped comb the premises of both Sgt. Graham and Mr. Shockley and whom the jury might suspect of knowing more than he could say—rendered the trial unfair. Mr. Shockley thus was denied his right to due process of law. *Lisenba,* 314 U.S. at 236; *Simmons,* 944 S.W.2d at 186. That collection of improper statements by representatives of the state also deprived Mr. Shockley of his right to be tried solely upon evidence relating to the murder charged int his case. Mo.Const. Art. I, § 17; *Burns,* 978 S.W.2d at 760.

The trial court thus erred in denying Mr. Shockley's motion for a new trial on the basis of the singular and cumulative effects of those wrongs. This Court should vacate the sentence of death and reverse the judgment of conviction because of that error.

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[15] After defense counsel objected to the improper invocation of misconduct unrelated to that on trial and the prosecutor denied culpability, the trial court stated its agreement with defense counsel's contention and sustained his objection. Id.

V.

The Circuit Court erred in submitting penalty phase Instruction 14 to the jury and in failing to instruct the jury that the prosecution bore the burden of proving beyond a reasonable doubt that aggravating circumstances had a weight equal to or greater than mitigating circumstances, because the omission of clear instruction to that effect relieved the prosecution of its constitutional and statutory burden of proof, gave the jury a roving commission to find an element of capital murder without holding the state to that burden, and violated Mr. Shockley's rights to due process under U.S. Const. amend. XIV and Mo. Const. Art. I, § 10, in that (1) a finding of aggravating factors carrying at least as much weight as mitigating factors is a prerequisite for imposition of a death sentence under Mo. Rev. Stat. § 565.030.4, (2) determining the relative weight of aggravating and mitigating circumstances under § 565.030.4 is a fact-finding process, (3) due process precludes conviction of any crime, including capital murder, unless the prosecution has proved every factual element of the crime beyond a reasonable doubt and § 565.030.4 complies with that requirement, and (4) penalty phase Instruction 14 and the instructions as a whole failed to apprise the jury that the prosecution bore that burden of proof with respect to the weighing of aggravating and mitigating circumstances and in fact suggested that the defendant bore that burden.

Standard of review: "This Court reviews *de novo,* as a question of law, whether a jury was properly instructed.' *Harvey v. Washington*, 95 S.W.3d 93, 97 (Mo. 2003). "The construction of a statute is a question of law reviewed *de novo."* *State v. Deck,* 303 S.W.3d 527, 533 (Mo. 2010).

Section 565.030.4 prohibits the imposition of a sentence of death absent a factual finding that aggravating factors in the case are not outweighed by mitigating factors. Because the punishment of death cannot be imposed unless that fact of sufficient relative weight is found, the fact is an element of the crime of capital murder. The prosecution bears the burden of proving every element of the charged offense beyond a reasonable doubt. Further, § 565.030.4 does not purport to allocate any burden of proof with respect to the relative weight of aggravating and mitigating factors to the defendant.

The jury in this case was not instructed that the prosecution bore the burden of proving the relative weight of aggravating factors beyond a reasonable doubt. The sentence of death ultimately imposed on Mr. Shockley must be vacated because it resulted from a trial in which the jury may have believed incorrectly—in fact was likely to believe—either that the state's burden of in that weighing process was less than proof beyond a reasonable doubt or even that Mr. Shockley bore the burden of proof.

There can be no mistake that the relative weight of aggravating circumstance evidence—that aggravating circumstances weigh at least as heavily

as mitigating circumstances—is the "functional equivalent" of an element of capital murder in Missouri. *See Ring v. Arizona*, 536 U.S. 584, 608-09 (2002) (holding that when imposition of a death sentence is conditioned upon the finding of an aggravating factor, that requirement is the "functional equivalent of an element" of the capital offense).[16] The legislature has conditioned eligibility for the death penalty in Missouri upon a factual determination that aggravating circumstances attending the predicate murder have at least as much weight as mitigating circumstances:

> The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release . . .
>
> (3) [i]f the trier concludes that there is evidence in mitigation of punishment . . . which is sufficient to outweigh the evidence in aggravation of punishment found by the trier.

Mo.Rev.Stat. § 565.030.4. A sentence of death is permitted by the statute if the fact-finder determines that the weight of aggravating circumstances is equal to or

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[16] The Arizona statute at issue in *Ring* recognized "the finding of an aggravating circumstance" to be the element that "expose[d] 'the defendant to a greater punishment" than a first degree murder conviction alone would have allowed. 536 U.S. at 613 (Kennedy, J., concurring). Under § 565.030.4, a defendant cannot be sentenced to death absent factual findings of both the existence and the relative weight of aggravating factors.

greater than the weight of mitigating circumstances. Otherwise such a sentence is prohibited.

This Court has recognized that the weighing of aggravating and mitigating circumstances in order to determine the sufficiency of aggravating circumstance evidence is a fact-finding process. *State v. Whitfield*, 107 S.W.3d 253, 261 (Mo. 2003); *see also State v. McLaughlin*, 265 S.W.3d 257, 262 (Mo. 2008) (characterizing the § 565.030.4 weighing determination as a "specific factual finding" and the outcome of that process as a "fact," equivalent to the determination of aggravating factors). The United States Supreme Court recognized in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum . . . must be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 476; *see also State v. Taylor*, 238 S.W.3d 145, 148 (Mo. 2007) (recognizing that "the state must prove beyond a reasonable doubt 'every fact necessary to constitute the crime with which [the defendant] was charged") (quoting *State v. Erwin*, 848 S.W.2d 476, 481 (Mo. 1993)). *Ring*, decided two years after *Apprendi*, held that the "aggravating factors" required to make a defendant eligible for the death penalty were "the functional equivalent of an element of a greater offense" and must be proved beyond a reasonable doubt to the satisfaction of a jury. 536 U.S. at 608-09 (2002). There is no basis for doubting that a Missouri prosecutor seeking a sentence of death bears the burden of establishing the relative weight of aggravating circumstances beyond a reasonable doubt.

In *State v. Johnson*, 284 S.W.3d 561 (Mo. 2009), this Court rejected an argument that an instruction like the present Instruction 14 impermissibly shifted the burden of proving that fact. *Id.* at 587-89. The Court disposed of Mr. Johnson's contention by reference to *Kansas v. Marsh*, 548 U.S. 163 (2006). There the United States Supreme Court had held:

> So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.

548 U.S. at 170-71, *quoted in Johnson*, 284 S.W.3d at 588-89.[17]

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[17] In *Marsh*, as in *Walton v. Arizona*, 497 U.S. 639 (1990), overruled on other grounds, *Ring v. Arizona*, 536 U.S. 584 (2002), and in *Ring* itself, the Supreme Court identified the element of capital murder that was in question as "the existence of aggravating circumstances." 548 U.S. at 170-72; 497 U.S. at 650. *Marsh* observed that both the Kansas and Arizona statutes "place[] the burden of proving the existence of aggravating circumstances on the State, and both . . . require the defendant to proffer mitigating evidence." 548 U.S. at 172.). The Supreme Court found it important that under the Kansas statute "the State always has the burden of demonstrating that mitigating evidence does not outweigh

This Court's resolution of Mr. Johnson's challenge assumed that the failure of the weighing instruction to impose a burden of proof beyond a reasonable doubt upon the state was consistent with the statutory allocation of that evidentiary burden. The Court was confronted with a similar instruction argument in *State v. Anderson*, 306 S.W.3d 529 (Mo. 2010). Mr. Anderson contended that § 565.030.4 "impermissibly shift[ed] the burden of proof" with respect to the relative weight of aggravating and mitigating factors, and that the trial court's instructions in turn erroneously required jurors to hold him accountable for proving sufficient mitigating circumstances. Id. at 539. The Court rejected the instruction challenge, noting that "the legislature has imposed a balancing procedure that is reflected in the [challenged] instructions" and that "[the] statutory scheme, and the instructions in this case, comply with [Marsh's] mandate." *Id.* at 539-40.

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aggravating evidence." 548 U.S. at 178-79. As argued, *infra*, this Court should recognize that the relevant statutory element under § 565.030.4 is not merely the existence of an aggravating factor but the existence of an aggravating factor having the weight specified by the legislature. This Court's interpretation of a Missouri statute is the governing construction. *See Memorial Hospital v. County*, 415 U.S. 250, 256 (1973) (stating that "[i]t is not our function to construe a state statute contrary to the construction given it by the highest court of a State"), quoted in *Sours v. State*, 603 S.W.2d 592, 600-01 (Mo. 1980).

It may be implicit in *Anderson* that § 565.030.4 allocates some burden of proof with respect to the relative weight of aggravating and mitigating circumstances to the defendant in a capital case. Mr. Shockley does not challenge the constitutionality of § 565.030.4 with respect to the allocation of evidentiary burdens. But that is because Missouri's statutory death penalty scheme makes the presence of aggravating factors having a specific minimum weight an element of capital murder and imposes upon the state the burden of proving that element beyond a reasonable doubt. An implication or suggestion that the statute assigns a burden of proof to capital defendants would be incorrect.

In *Anderson* the Court did not find occasion to address the absence from § 565.030.4 of any language allocating any burden of proof to the defendant. The statute conditions death eligibility upon the presence of aggravating circumstances having a particular relative weight and makes no reference, direct or indirect, to the burden of proving the existence of that fact. Section 565.032 requires the finder of fact to "consider all evidence" bearing on aggravation or mitigation, "including evidence received during the first stage of the trial and evidence supporting any of the statutory aggravating or mitigating circumstances." Those provisions surely cannot be construed as an allocation to the defendant of any burden of proof at all.

"The primary rule of statutory interpretation is to effectuate legislative intent through reference to the plain and ordinary meaning of the statutory language." *State v. Graham*, 204 S.W.3d 655, 656 (Mo. 2006). The statutory

language makes no mention of the defendant being required to prove anything with regard to the relative weight of aggravating and mitigating circumstances. The legislature surely was capable of drafting a statute that assigned the burden of proving mitigating cirucmstances to the defendant in a capital case. *See Metro Auto Auction v. Director of Revenue,* 707 S.W.2d 397, 401 (Mo. 1986) (stating that "[t]his Court must be guided by what the legislature said, not by what the Court thinks it meant to say").

In the first instance the state bears the burden of proving every element of a crime beyond a reasonable doubt. *State v. Seeler*, 316 S.W.3d 920, 925 (Mo. 2010). The legislature must be presumed to have been aware of that constitutional requirement when it enacted § 565.030: that presumption of legislative knowledge is a basic tenet of this Court's statutory construction jurisprudence, *see, e.g., Smith v. Coffey*, 37 S.W.3d 797, 799 (Mo. 2001), and the reasonable doubt standard has been a part of the bedrock of due process since "at least . . . our early years as a Nation." *In re Winship,* 397 U.S. 358, 362 (1970). The notion that the legislature intended to impose the burden of proof with respect to an element of a capital crime on the defendant but neglected to say so is uniquely untenable. Given the failure of the legislature to specify that the defendant in a capital murder prosecution bears any burden of proof with respect to this element of the crime charged against him, it would be unreasonable to read such an intention into the statute.

There is no ambiguity in § 565.030 or § 565.032 about the burden of proving the relative weight of aggravating factors in a capital murder prosecution. Because a sentence of death is impermissible absent a finding that aggravating factors carry at least as much weight as mitigating factors, that relative weight determination is at least the "functional equivalent" of an element of the crime of capital murder. *Ring*, 536 U.S. at 608-09; *State v. Clark*, 197 S.W.3d 598, 601 (Mo. 2006).[18] Even if the governing statute was ambiguous with respect to allocation of the burden of proof regarding the relative weight of aggravating circumstances, that ambiguity would have to be resolved by a construction allocating this burden to the state. "Under the rule of lenity, an ambiguity in a penal statute will be construed against the government . . . and in favor of persons on whom [criminal penalties] are sought to be imposed." *Graham*, 204 S.W.3d at 656. Finally, if § 565.030.4 was susceptible to an alternative construction under which the state was relieved of the burden of proving the relative weight element

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[18] In *Clark* this Court noted that "statutory aggravating circumstances" are "the functional equivalent of elements of offenses." 197 S.W.3d at 601. But §§ 565.030 and 565.032 require a second factual finding—that aggravating circumstances weigh at least as heavily as mitigating circumstances—as a condition of death eligibility. The "functional" element under Missouri law is the presence of aggravating circumstances of at least the particular relative weight specified by the death penalty statutes.

of capital murder beyond a reasonable doubt, the Court would be bound to reject that interpretation. *See State ex rel. State Highway Commission v. Paul*, 368 S.W.2d 419, 422 (Mo. 1963) (stating that "[i]t is a cardinal rule of statutory construction that where a statute is fairly susceptible of a construction in harmony with the Constitution it must be given that construction by the courts").

Instruction No. 13 directed Mr. Shockley's jurors to determine whether one or more of four specified aggravating factors were present in the case. Legal File at 1715. The jury was told: "You are further instructed that the burden rests upon the state to prove at least one of the [aggravating] circumstances beyond a reasonable doubt." Id. Instruction No. 14 then informed the jury:

> If you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No. 13 exists, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment.
>
> In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of trial, including evidence presented in support of the statutory aggravating circumstances submitted in Instruction No. 13, and evidence presented in support of mitigating circumstances submitted in this instruction.

You shall also consider any facts or circumstances which you find from the evidence in mitigation of punishment.

It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the facts or curcumstances in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

Id. at 1716.

Instruction No. 14 neither specified the degree of proof required for a finding of the relative weight element nor designated the party bearing that evidentiary burden. The omission of that guidance was likely to lead jurors to distinguish between the finding required by Instruction No. 13, which specified the stringent burden of proof beyond a reasonable doubt and assigned it to the state, and that required by Instruction No. 14. An instruction that fails to provide jurors with guidance regarding a rule of law governing their decision invites the jury "to roam freely through the evidence and choose any facts which suit its fancy or its perception of logic," and thus creates a "roving commission" to reach a verdict that is not constrained by that rule of law. *Scanwell Freight Express STL, Inc. v. Chan,* 162 S.W.3d 477, 482 (Mo. 2005). That is part of the harm done in this case.

That the jury was likely to construe the latter instruction as imposing some unspecified burden of proof regarding the relative weight issue upon Mr. Shockley seems well established by this Court's assessment of like instructions in *Anderson* and *Johnson*. *Anderson*, 306 S.W.3d at 539; *Johnson*, 284 S.W.3d at 587-88. It is well established that a criminal defendant's due process rights are violated by an instruction that shifts to him or diminishes the burden of proof with respect to an offense element. *Mullaney v. Wilbur*, 421 U.S. 684, 214 (1975).

That constitutional harm was realized in this case. Only rank speculation could support conclusions that Mr. Shockley's jurors held the state to a burden of proof beyond a reasonable doubt in the weighing process, that their weighing would have been the same had they been properly instructed, or that properly instructed they still would have failed to reach agreement with respect to punishment. This Court should vacate the sentence of death imposed on Mr. Shockley because of that due process violation and the uncertainty that attends it.

VI.

The Circuit Court erred in submitting penalty phase Instruction 16 to the jury and in informing jurors that the court would fix Mr. Shockley's punishment if they failed to agree on a punishment, and Mo. Rev. Stat. § 565.030.4(4) should be declared unconstitutional for requiring such an instruction, because the instruction and the statute violated Mr. Shockley's right to due process under U.S. Const. amend. XIV and Mo. Const. Art. I, § 10, to a jury trial under U.S. Const. amend. VI and XIV and Mo. Const. Art. I, § 22(a), and to freedom from cruel and unusual punishment under U.S. Const. amend. VIII and XIV and Mo. Const. Art. I, § 21, in that informing capital case jurors prior to the commencement of penalty phase deliberation that they can leave the responsibility for determining punishment to the trial judge (1) diminishes the responsibility of jurors to reach a decision regarding the appropriateness of a death sentence and (2) deprives the defendant of the opportunity to have the question of whether his life should be taken determined by properly instructed and fully responsible lay members of his community.

Standard of review: "This Court reviews *de novo*, as a question of law, whether a jury was properly instructed.' *Harvey v. Washington*, 95 S.W.3d 93, 97 (Mo. 2003). "The construction of a statute is a question of law reviewed *de novo.*" *State v. Deck*, 303 S.W.3d 527, 533 (Mo. 2010).

Penalty phase Instruction No. 16 informed jurors that the trial court would determine whether Mr. Shockley was to be executed or imprisoned for life if they were unable to make that decision. Legal File at 1718.[19] That instruction provided assurance for each juror from the beginning of the deliberative process that he or she did not have to reach a verdict as to punishment. The jury had just found Mr. Shockley guilty of assassinating a local Highway Patrol officer by shooting him in the back with a high-powered rifle and again in the face and torso with a shotgun. For some jurors, choosing life no doubt portended a measure of disapprobation—perhaps worse—in their community and among the officer's law enforcement colleagues. The instruction and § 565.030.4(4), the statute that required it, allowed any such juror whose conscience inclined toward sparing Mr. Shockley to avoid responsibility for a punishment decision. That invitation to duck out and leave sentencing to an elected judge deprived Mr. Shockley of his right to be sentenced by his peers, fully charged with their responsibility to him and to their community, and increased the likelihood that he would be sentenced to death.

In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the United States Supreme Court reiterated "the Eighth Amendment requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case," and found that the prosecuting attorney's assurance that a recommendation

[19] The instruction is set out in its entirety in the appendix.

of death would be subject to judicial review "present[ed] an intolerable danger that the jury will in fact choose to minimize the importance of its role." Id. at 333. The Court explained:

> A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community.

Id. *Caldwell* concluded that causing jurors to have a diminished view of their role in the capital sentencing procedure was "fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" 472 U.S. at 340 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion)). Penalty phase Instruction 16 invited jurors to opt out of the singularly difficult civic duty of fixing punishment in a capital case—and one arising from the slaughter of a local Highway Patrol officer at that. Like the prosecutor's comment in *Caldwell*, that instruction necessarily diminished the weight of responsibility that should have been felt by each of Mr. Shockley's jurors from the beginning of his trial to the end.

Caldwell focused particularly on the risk that jurors "reluctant to invoke the death sentence" would give in based on the reassurance that the sentence would be reconsidered by judges. Id. The particular concern in the present case can be

distinguished: Mr. Shockley contends that telling jurors in advance of their deliberations that they can hand their responsibility off to a judge diminishes the chance that the jury will reach any sentencing decision at all. But that is a distinction without a constitutional or practical difference.

In *Ring* the Court stressed the critical role of the jury in all criminal trials: "'The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered.'" 536 U.S. at 609 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968)); *see also Ex parte Milligan*, 4 Wall. 2, 123 (1866) (recognizing that "the inestimable privilege of trial by jury . . . is a vital principle, underlying the whole administration of criminal justice"); *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (observing that "it is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system") (quoting H. Kalven & H. Zeisel, *The American Jury* 498 (1966)). In *Caldwell* the Court said that its capital punishment jurisprudence always has been premised "on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'" *Caldwell*, 472 U.S. at 341. And in *McCleskey* the court stated: "Specifically, a capital sentencing jury representative of a criminal defendant's community assures a 'diffused impartiality' in the jury's task of 'express[ing] the conscience of the community on the ultimate question of life or death.'" 481 U.S. at 310 (quoting *Taylor v.*

Louisiana, 419 U.S. 522, 530 (1975), and *Witherspoon v. Illinois,* 391 U.S. 510, 519 (1968)).

Any suggestion that a capital defendant might be better off with punishment chosen by his trial judge would fly in the face of common sense and experience. The framers of our Constitution "knew from history and experience that it was necessary to protect . . . against judges too responsive to the voice of a higher authority." *Duncan v. Louisiana,* 391 U.S. 145, 156 (1968), *quoted in Harris v. Alabama,* 513 U.S. 504, 519 (1995) (Stevens, J., dissenting). Justice Stevens observed in *Harris:*

> The "higher authority" to whom present-day capital judges may be "too responsive" is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty.

Id. Justice Stevens recognized that "[n]ot surprisingly, given the political pressures they face, judges are far more likely than juries to impose the death penalty," and that "this has long been the case." Id. at 521 (citing H. Zeisel, Some Data on Juror Attitudes Towards Capital Punishment 37-50 (1968)).

Perhaps the most important function of the jury in a capital case "is to maintain a link between contemporary community values and the penal system," and thus to ensure that death penalty decisions "reflect 'the evolving standards of decency that mark the progress of a maturing society.'" *Witherspoon v. State of Illinois,* 391 U.S. 510, 519 n.15 (1968); *see also Harris,* 513 U.S. at 518-19

(observing that "[a] jury verdict expresses a collective judgment that we may fairly presume to reflect the considered view of the community"). Penalty phase Instruction No. 16 invited the present jury "to minimize the importance of its role," *Caldwell,* 472 U.S. at 333, by inviting jurors to bail out of the remarkably difficult decision that was their duty and Mr. Shockley's hope.

In fact the jury left Mr. Shockley's punishment to the trial court. The instruction, and the statute that required it, violated Mr. Shockley's right to a jury trial, freedom from punishment constrained by those "evolving standards of decency" that a jury knows best, and the due process of law that can come only from a full and fair trial. This Court should declare the statutory requirement unconstitutional and vacate Mr. Shockley's death sentence.

VII.

The Circuit Court erred in sentencing Mr. Shockley to death after the jury had weighed aggravating and mitigating factors and failed to reach unanimous agreement with respect to punishment, because the imposition of that enhanced sentence, and the provision of § 565.030.4 that purported to authorize the imposition of a death sentence by the trial court when the jury was unable to agree upon punishment, violated Mr. Shockley's rights to due process under U.S. Const. amend. XIV and Mo. Const. Art. I, § 10, a jury trial under U.S. Const. amend. VI and XIV and Mo. Const. Art. I, § 22(a), and freedom from cruel and unusual punishment under U.S. Const. amend. VIII and XIV and Mo. Const. Art. I, § 21, in that (1) a finding of aggravating factors carrying at least as much weight as mitigating factors is a prerequisite for imposition of a death sentence under Mo. Rev. Stat. § 565.030.4, (2) determining the relative weight of aggravating and mitigating circumstances under § 565.030.4 is a fact-finding process, (3) due process precludes conviction of any crime, including capital murder, unless the prosecution has proved every factual element of the crime beyond a reasonable doubt to the satisfaction of a jury, and (4) the death sentence imposed in this case necessarily depended upon—and § 565.030.4 in fact required—the substitution of affirmative fact-finding by the trial court with respect to the element of aggravating factor weight.

Standard of review: Challenges to the constitutionality of a statute are reviewed de novo. *F.R. v. St. Charles County Sheriff's Department*, 301 S.W.3d 56, 61 (Mo. 2010). The question of whether a defendant's constitutional rights were violated is a question of law to be reviewed de novo. *March*, 216 S.W.3d at 665-66. Whether a jury was properly instructed is a question of law that this Court reviews de novo. *Harvey v. Washington*, 95 S.W.3d 93, 97 (Mo. 2003).

The defendant in a capital murder trial cannot be sentenced to death absent a finding of aggravating circumstances that weigh at least as much as mitigating circumstances. Mo. Rev. Stat. § 565.030.4. In *Whitfield* this Court resolved any doubt that might exist about whether that relative weight determination is a matter of fact: it is. 107 S.W.3d at 259-261. After Mr. Shockley's jury became deadlocked on the question of punishment, § 565.030.4 required the trial court to follow the exact procedure that the jury had followed in order to determine the defendant's punishment. That necessarily meant that the trial court's own determination of the relative weight element of capital murder became the factual basis for its imposition of a death sentence.[20] This Court should vacate the

[20] The judgment of the trial court made it perfectly clear that this is exactly what happened in the present case:

sentence because it violated the constitutional principles articulated in *Ring* and *Apprendi,* as well as correlative principles under the Missouri Constitution.

Section 565.030.4 requires the trial court to "follow the same procedure [that the jury was told to follow] whenever it is required to determine punishment for murder in the first degree." *Whitfield* recognized that the jury's determination of the relative weight of aggravating and mitigating circumstances is a fact-finding process. 107 S.W.3d 259-61. Thus § 565.030.4 requires the trial court to make a factual determination of the relative weight of aggravating and mitigating circumstances as a predicate for the selection and imposition of punishment. *Ring* held that a death sentence arrived at through judicial fact-finding violates the defendant's rights under the Sixth and Eighth Amendments.

It is a fiction to say that a capital jury deadlocked on punishment has nonetheless done all the fact-finding necessary to authorize a death sentence under § 565.030.4. In *McLaughlin* this Court observed:

> The court agrees with the jury's findings on the statutory aggravating circumstances, and the jury's findings are certified by the court. *The court further finds* that there are not facts and circumstances in mitigation of punishment that outweigh facts and circumstances in aggravation of punishment . . . For the crime of murder in the first degree, defendant is sentenced to death.

Legal File at 1765-66 (emphasis added).

> *Whitfield* did not hold that a judge could not consider the facts and make a determination whether to impose death once a jury had found the facts necessary to make a defendant eligible for a death sentence under section 565.030.4, and such a procedure does not violate *Ring*.

265 S.W.3d at 264. Section 565.030.4 does not merely allow a trial court to "consider the facts" and then make a sentencing decision. It *requires* the judge to go through the exact procedure that the deadlocked jury went through—a fact-*finding* process—and authorizes the judge to impose a death sentence only if his or her factual *finding* makes the defendant death-eligible. One can call the *weighing determination* required of the judge in a deadlocked case *"consideration"* of the facts until the cows come home and start paying the cable bill, but it always will be true that a death sentence determined under the process mandated by § 565.030.4 after jury deadlock—the death sentence imposed in this case—was reached on the basis of a judge's *finding* of the fact that authorizes the enhanced sentence. That *does* violate *Ring*.

In *Apprendi* the Court had specified that "the relevant inquiry is one not of form, but of effect." 530 U.S at 494. In *Ring* the Court recognized: "In effect, 'the required finding [of an aggravated circumstance] expose[d] Ring to a greater punishment than that authorized by the jury's guilty verdict.'" 536 U.S. at 604. In § 565.030.4 the legislature mandated that, in the event of a jury's deadlock on the question of punishment, the trial judge *repeat the fact-finding process* and only then decide the appropriate sentence. In that statutory scenario, to say that the

deadlocked *jury's* relative weight finding is the operative factual determination authorizing a death sentence is to elevate form above effect: the jury's factual findings would have authorized a sentence of death but the statutory sentencing process stalled; new factual findings by the court were required under the unambiguous language of § 565.030.4 to reanimate the possibility of subjecting the defendant to execution.

"The primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute." *State ex rel. Young v. Wood*, 254 S.W.3d 871, 872-73 (Mo. 2008). "When the statute's language is unambiguous, a court must give effect to the legislature's chosen language." *Id.* at 873. "'A court may not add words by implication to a statute that is clear and unambiguous.'" Id. (quoting *Asbury v. Lombardi*, 846 S.W.2d 196, 202 n.9 (Mo. 1993)). Section 565.030.4 is unambiguous in its requirement that the trial court *repeat* the fact-finding processes that the jury previously executed, and that the court make *its own* factual determinations with respect to the existence and relative weight of aggravating factors. Without those judicial findings of fact, the defendant cannot be sentenced to death under § 565.030.

In *McLaughlin* the Court violated "the primary rule of statutory interpretation" by re-characterizing the trial court's mandatory post-deadlock procedure as "consider[ing] the facts and mak[ing] a determination whether to impose death." 265 S.W.3d at 264. Section 565030.4 does not say anything about considering facts. It requires the jury to make the factual determinations that are a

prerequisite to death eligibility and, when the jury cannot complete the sentencing process, it requires the trial court to start over and "follow the same procedure" to arrive at a sentence.

Section 565.030.4 purports to authorize the imposition of a sentence of death based on a judge's finding of the facts constituting an element of the capital offense. To that extent the statute is unconstitutional. So is the death sentence imposed in this case. That sentence should be vacated for those reasons.

VIII.

The Circuit Court erred in denying Mr. Shockley's request for the declaration of a mistrial, and in refusing his request to inquire of Juror No. 58 and other jurors during trial and failing to conduct such an inquiry sua sponte after the conclusion of trial, because those rulings and that failure to take remedial action sua sponte deprived Mr. Shockley of his right to a fair trial and due process under U.S. Const. amend. XIV and Mo. Const. Art. I, § 10, in that (1) the available information about Juror No. 58 and his book demonstrated that he had misrepresented his capacity to be fair to the defendant in a capital murder trial, (2) the available information about the juror's experiences and beliefs, together with his service as foreman, made it probable under all of the circumstances known to the trial court that other jurors had been exposed to that information and influenced by it, and (3) if the available information was not sufficient to require such findings, the trial court was aware of the need for a record for its own evidence-based determination of whether the jury had been tainted and for appellate review of the question and failed to conduct the inquiry required for adjudication and review of the issue.

Standard of review: In reviewing the refusal of a trial court to declare a mistrial on the basis of the jury's exposure to unauthorized information under § 547.020, the function of an appellate court is to determine "whether the incident resulted in prejudice to the

> defendant such that, as a matter of law, the court abused its discretion in refusing to grant [the] requested relief." *State v. Viviano*, 882 S.W.2d 748, 751 (Mo.App.E.D. 1994); *see also State v. Parker*, 476 S.W.2d 513, 515-16 (Mo. 1972). The standard of review for a matter of law is de novo. *Kidde America, Inc. v. Director of Revenue*, 242 S.W.3d 709, 711 (Mo. 2008). This Court has discretion to review claims of error that were not preserved in the trial court "when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Mo. R. Crim. P. 30.20. Error likely to have affected the outcome of the defendant's trial warrants relief under this rule. *Armentrout*, 8 S.W.3d at 110.

The trial court noted without equivocation that it shared defense counsel's concern about the threat to jury integrity posed by exposure to the beliefs and values expressed in Juror No. 58's "fictional autobiography." Tr. at 2160-62, 2171-74. Those concerns were well-founded: by the author's own published account, the book told a story of "justice" consisting of the uniquely brutal vigilante torture and execution of a teenager whose crime would have been punishable under Missouri law by no greater sentence than seven years' imprisonment. The identity between the author and his "fictional" avatar was unmistakable, and the author had been serving as the jury's foreman. The trial court's refusal to declare a mistrial on the basis of that concern and the probability

of prejudice that attended it was an abuse of discretion requiring the reversal of Mr. Shockley's conviction and death sentence.

The basis for the concern shared by defense counsel and the court was enhanced by the court's own discovery that Juror No. 58 had brought at least one copy of his book to court during the trial and given the book to the courtroom bailiff even as the case was being presented. Legal File at 1756. The likelihood that the author-foreman had brought the values and beliefs expressed in his autobiographical novel into the jury's conversations and deliberations was palpable at that point. The trial court's failure to take remedial action sua sponte—at least by conducting its own inquiry into whether extraneous information or prejudicial material was made a part of the deliberative process—precludes meaningful appellate review and renders the verdict of guilt and the sentence of death unsustainable.

Section 547.020 authorizes a trial court to grant a new trial "[w]hen the jury has received any evidence, papers or documents [] not authorized by the court," or when juror misconduct "tend[s] to prevent a fair and due consideration of the case." Further, the essential component of due process is "the right to a fair opportunity to defend against the State's accusations," *Montana v. Egelhoff*, 518 U.S. 37, 61-62 (1996), and the integrity of the jury is essential to that opportunity. *See United States v. Wood*, 299 U.S. 123, 143 (1936) (recognizing that "the importance of safeguarding the complete integrity of the jury in the full sense of the Constitution is not to be gainsaid").

The book written by the foreman of Mr. Shockley's jury purports to tell a story of justice consisting of the breathtakingly brutal torture and execution of a teenager for causing a death through drunken driving and perhaps for being obnoxious. The record does not establish whether the author gave copies of his "fictional autobiography" to other members of the jury or advocated the values and beliefs expressed through the book's protagonist as jury foreman. But the foreman's delivery of a copy of his book to the courtroom bailiff surely must have added to the concern for jury integrity that the trial court already had expressed. Legal File at 1756. This case resulted in a sentence of death. It would be preposterous to entertain any reasonable semblance of certainty that the jury's role in the process of conviction and sentencing was uninfluenced by the chilling justice construct that its foreman is known to have spread around the courtroom during trial.

Under § 547.020, this Court must determine whether the denial of Mr. Shockley's initial motion for the declaration of a mistrial resulted in prejudice "as a matter of law." *Viviano*, 882 S.W.2d at 751. The standard of review for a matter of law is de novo. *Kidde America*, 242 S.W.3d at 711. Because the trial court conducted no hearing into the facts attending Juror No. 58's influence upon other jurors, the due process question raised in this point also is a matter of law to be reviewed de novo. *See State v. Werner*, 9 S.W.3d 590, 595 (Mo. 2000) (recognizing that "the standard of review requires the reviewing court to defer to

the trial court's factual findings and credibility determinations, but to examine questions of law de novo").

The voir dire transcript and other matters of record suggest at the very least an agenda on the part of Juror No. 58 that cannot be reconciled with fairness or any inclination to keep values and beliefs extraneous and inimical to the principles that must guide factfinding in a criminal trial. When he was asked by counsel for the state whether he could consider imposing a sentence of death after finding a capital defendant of the most heinous murder imaginable, and after making the particular relative weight finding required for death eligibility under § 565.030.4, the juror who had written Indian Giver answered: "I would have to . . . I may not want to, but I still have to." Tr. at 685. It is more reasonable still to find that response disingenuous: this venireman was the author of a book that he described as "fictional autobiography" and that purported to illustrate justice through an incomprehensibly unjust self-help execution for crime. The notion that this father of a police officer would only reluctantly give consideration to the option of execution for someone whom he and eleven fellow jurors had found guilty beyond a reasonable of a uniquely heinous murder is unbelievable.

The trial court abused its discretion as a matter of law by not granting Mr. Shockley's motion for a mistrial or his motion for a new trial after the discovery that the jury foreman had given a copy of his book to the courtroom bailiff during trial. The judgment of conviction and sentence of death should be reversed for that reason. Alternatively, the same relief should be granted because of the

absence of a record sufficient to allow meaningful appellate review of the issue. *See Oliver*, 333 U.S. at 273-74 (holding that the opportunity for meaningful appellate review is an essential component of due process); *Middleton*, 995 S.W.2d at 466 (recognizing that the defendant in a criminal appeal "is entitled to a full and complete transcript for the appellate court's review").

IX.

This Court should set aside the sentence of death imposed upon Mr. Shockley because the sentence is excessive and disproportionate to penalties imposed in similar cases, and thus violates Mr. Shockley's right to proportionate sentencing under Mo. Rev. Stat. § 565.035.3 and to proportionate sentencing, fundamental fairness, and due process under U.S. Const. amend. VI, VIII, and XIV, and Mo. Const. Art. I, §§ 10, 18(a), and 21, in that (1) there was no direct evidence of Mr. Shockley's culpability for the murder of Sgt. Graham and the circumstantial evidence might have failed to convince a fair-minded juror of the defendant's guilt or of the appropriateness of taking his life, (2) the jury's inability to reach agreement regarding the appropriate punishment for this defendant despite the brutality of the crime is consistent with lingering doubt about Mr. Shockley's guilt, (3) the sole additional finding made by the trial court in support of its decision to impose a sentence of death was that court's substitute determination that the evidence of mitigating circumstances did not outweigh aggravating circumstances, and (4) alternative sentencing to imprisonment for life without the possibility of release has been applied in other cases with similar limitations of evidence and findings.

Standard of review: Under § 565.035 this Court "simply reviews the sentence and, while giving due deference to the factual determinations reached below, decides whether the sentence is

disproportionate as a matter of law." *State v. Deck,* 303 S.W.3d 527, 551 (Mo. 2010). The statute requires the vacation of a death sentence that is not rational or is inconsistent with the punishment imposed in similar cases. Id. Alternatively, § 565.035 requires the correction of "aberrant death sentences." *Id.* at 554-55 (Breckenridge, J., concurring). It is Mr. Shockley's position that § 565.035 mandates review by this Court of *all* "other similar cases," including cases in which a sentence of death was possible but a life sentence resulted, in order to determine whether a particular death sentence is disproportionate. *Id.,* at 555 (Stith, J., concurring).

The legislature has mandated that every death sentence imposed in Missouri be reviewed by this Court for proportionality. Mo. Rev. Stat. § 565.035. This Court has recognized that requirement as a measure "designed by the legislature as an additional safeguard against arbitrary and capricious sentencing and to promote the evenhanded, rational and consistent imposition of the death sentence." *State v. Barton,* 240 S.W.3d 693, 709 (Mo. 2007) (quoting *State v. Ramsey,* 864 S.W.2d 320, 328 (Mo. 1993)); *see also Amrine v. Roper,* 102 S.W.3d 541, 547 (Mo. 2003) (recognizing that one of the purposes of § 565.035.3 "is to avoid wrongful . . . executions"). That safeguard serves the "heightened standard of reliability" required at every step of a capital case, and is "[the] natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." *Ford v. Wainwright,* 477 U.S.

399, 411 (1986), Because the evidence of Mr. Shockley's guilt was circumstantial and not overwhelming, and especially because the jury could not reach agreement upon the appropriateness of his execution, the death sentence imposed in this case should not survive this Court's statutory proportionality review.

"[T]he strength of the evidence" is one of the three factors that this Court must consider in its proportionality review. Mo. Rev. Stat. § 565.035.3(3). The Missouri legislature stands almost alone in requiring consideration of the weight of the evidence in the determination of whether a particular death sentence is excessive or disproportionate. *Chaney*, 967 S.W.2d at 60. The United States Supreme Court has recognized "the simple truism" that lingering doubt regarding the guilt of the defendant convicted in a capital case necessarily "will inure to the defendant's benefit" in a state that "allow[s] defendants to capitalize on 'residual doubts.'" *Franklin v. Lynaugh*, 487 U.S. 164, 173 (1988). Section 565.035.3 does not merely *allow* a defendant to invoke the specter of lingering doubt among jurors: it *requires* this Court to consider the strength of the evidence of his guilt in its mandatory proportionality review.

The jury's indecision with respect to punishment in this case should have weighed heavily on the trial court's own sentencing choice. That uncertainty, together with the limitations of the evidence tending to prove Mr. Shockley's guilt, should be a determining influence upon this Court's statutory proportionality review. In *Chaney* the Court recognized a legislative mandate "to go beyond a

mere inquiry into whether the evidence is sufficient to support a conviction." 967 S.W.2d at 60. In this case, as in *Chaney*, there was "no eyewitness, confession, admission, document, fingerprint or blood evidence directly pointing to the defendant." *Id.* And *Chaney* concluded that "this case falls within a narrow band where the evidence is sufficient to support a conviction, but not of the compelling nature usually found in cases where the sentence is death." Id.

Counsel for the state reminded the jury in summation: "[Y]ou promised us . . . that you would give meaningful consideration sentencing Mr. Shockley to death if I met my burdens." Tr. at 2216. It would be unreasonable to doubt that each juror did precisely that. The lack of overwhelming evidence against Mr. Shockley resonates in the failure of the jury as a whole to agree on execution as the appropriate punishment for Mr. Shockley. The murder of Sgt. Graham was barbarous and unforgivable: as the prosecutor said later, urging the trial court to choose capital punishment: "If not him, who? If not now, when?" The jury's collective answer was: "We're not so sure." That lack of resolve from the "conscience of the community on the ultimate question of life or death," *Witherspoon v. Illinois*, 391 U.S. 510, 519 (!968), despite the horrendous nature of the crime, should bear most heavily on this Court's proportionality review.

That review must be based on "the whole record" and is to be "independent of the findings and conclusions of the judge and jury." *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo. 1993); *see also State v. Bowman.* ___ S.W.3d ___ 2011 WL 2078532 at *12 (Mo. April 12, 2011) (Wolff, J., concurring and dissenting)

(recognizing that "§ 565.035.3 requires this Court *independently* to assess the strength of the evidence against the defendant in assessing whether a sentence of death is warranted") (emphasis in original). Judge Wolff noted in his *Bowman* opinion: "Someday the state may find out who killed Velda Rumfelt if it is someone other than Bowman. If that happens, it will be better if the state has not already executed Gregory Bowman." Id. at *17. The evidence of guilt in this case was circumstantial, the jury found it sufficient to warrant conviction but not sufficient to allow agreement on the appropriateness of execution, and the possibility necessarily remains here as in *Bowman* that someday the state may find out that someone else did the killing. It is reasonable to assume that at least some members of Mr. Shockley's jury think it will be better then if the man now convicted of that crime has not been put to death.

CONCLUSION

The Court should vacate the sentence of death imposed upon Mr. Shockley, reverse the judgment of conviction, and remand the case to the Circuit Court for a new trial or resentencing for the reasons set forth in this brief. On the basis of its proportionality review under Mo. Rev. Stat. § 565.035, the Court should vacate the sentence of death and resentence Mr. Shockley to imprisonment for life.

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CERTIFICATE OF COMPLIANCE AND SERVICE

This brief contains the information required by Mo.R.Civ.P. 55.03 and complies with the limitations contained in Mo. R. Civ. P. 84.06. The brief contains 30,251 words as determined by the software application Microsoft Word for Macintosh version 2111. The compact disk filed with this brief bears a copy of the brief and has been scanned for viruses and is virus-free.

Two copies of this brief and the accompanying appendix, and one diskette bearing a copy of the brief, were sent by first class mail on June 1, 2011, to:

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