NEWS RELEASE

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FOR IMMEDIATE RELEASE

CONVICTION FOR SGT. GRAHAM'S KILLER UPHELD

SPRINGFIELD, Mo. – Greene County Prosecuting Attorney Dan Patterson announces that the Honorable Kelly Parker entered an order yesterday, July 10th, finding that Lance C. Shockley, of Van Buren, Missouri, received effective assistance of counsel at his trial for killing Missouri State Highway Patrol Sergeant Dewayne Graham.

On March 20, 2005, Sgt. Graham was killed outside of his home near Van Buren, Missouri. Evidence at trial established that Shockley killed Sgt. Graham because Sgt. Graham was investigating Shockley for involuntary manslaughter and leaving the scene of a fatality crash. Shockley was convicted of first degree murder and sentenced to death for taking the life of Sgt. Graham. The Greene County Prosecuting Attorney was appointed as Special Prosecutor to handle the post-conviction claim in which Shockley alleged he received ineffective assistance of counsel and was entitled to a new trial. Judge Parker entered a seventy-five page order denying all of Shockley's claims. (see attached order for more information) Shockley's conviction and death sentence stand.

Chief Assistant Prosecuting Attorney Todd Myers and Senior Assistant Prosecuting Attorney Emily Shook represented the State of Missouri in this case.

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IN THE CIRCUIT COURT OF CARTER COUNTY, MISSOURI

LANCE C. SHOCKLEY, Movant, vs. STATE OF MISSOURI, Respondent.	)))))) Case No. 14AK-CC00001))))	***FILED*** ***7/10/2017*** ***CARTER COUNTY CIRCUIT COURT***

JUDGMENT AND ORDER DENYING MOVANT'S
MOTION FOR RELIEF PURSUANT TO RULE 29.15

THIS CAUSE comes before the Court on Movant's Amended Motion to Vacate, Set Aside, or Correct the Judgment and Sentence Pursuant to Rule 29.15. Movant, Lance C. Shockley, timely filed his Motion under Rule 29.15 following his conviction after a jury trial in Carter County case number 05C2-CR00080-01, and his direct appeal SC 90286. Movant was convicted on one count of the Class A felony of Murder in the First Degree, and sentenced to death. Movant now alleges that he was denied effective assistance of counsel by both his trial counsel and his appellate counsel, and was thereby prejudiced.

On October 11-14, 2016 and continuing on January 27, 2017, an evidentiary hearing was held in which Movant was present and was represented by attorneys Jeannie Willibey and Pete Carter. Respondent was represented by Assistant Greene County Prosecuting Attorneys Emily Shook and Todd Myers, due to the appointment of the Greene County Prosecuting Attorney as Special Prosecutor for the purposes of the present action only. Following review of Movant's motion, the court's file, the trial transcript, the Supreme Court opinion following direct appeal, and the testimony and evidence presented at the evidentiary hearing, the Court finds Movant has failed to meet his burden of proof and the Court enters this Order denying Movant's motion based upon the following findings of fact and conclusions of law.

RULING ON OFFERS OF PROOF:

At the evidentiary hearing, Movant presented evidence on several offers of proof which the court ruled upon immediately after the conclusion of each offer of proof. Movant also presented evidence on seven (7) offers of proof which the court took under advisement. Counsel for Movant referenced the offers of proof as Offer of Proof 1through Offer of Proof 7. As to those offers of proof, the offers of proof are sustained and the court will consider the evidence presented and the court will give such evidence the weight and value the court feels such evidence deserves.

STATEMENT OF FACTS:

On the evening of November 26, 2004, Movant and his sister-in-law's fiancé, Jeffrey Bayless, went for a drive in Mr. Bayless' truck. On the drive back home, Movant lost control of the vehicle and crashed it into a ditch. Movant got out of the truck and walked to the nearby home of Ivy and Paul Napier. He informed the couple that he had been in an accident and needed help. Ivy noticed blood on Movant's hands and invited him inside. Mr. Napier accompanied Movant to the accident scene and found Mr. Bayless injured beyond help. The two returned to the Napier residence where Movant called his wife. Mr. Napier and Movant then left and Ms. Napier called 911. She then set out to the crash site, where she spotted the truck off the side of the road and found Mr. Bayless inside. She checked him for a pulse and found none. In the meantime, Movant joined Corree Shockley and her sister, Cindy Chilton, in their vehicle. During the drive, Movant told Ms. Chilton that her fiancé Mr. Bayless was dead. The women then left Movant at his house and joined Ms. Napier at the accident scene. By the time they arrived, Mr. Napier had returned to the scene as well. When local police and highway patrol officers arrived at the scene, they discovered Mr. Bayless' body slumped over in the passenger seat of the vehicle. They also discovered beer cans and a tequila bottle inside the truck and a

blood smear above the passenger-side wheel well on the outside of the truck. They instructed the three women and Mr. Napier to head home.

Highway Patrol Sergeant Carl DeWayne Graham, Jr. headed the investigation of the accident. The night of the accident he spoke with Movant at his home. Movant did not admit to being involved in the accident. Before leaving, Sergeant Graham consoled Ms. Chilton and gave her his business card. She made no mention of Movant's connection to the accident. Sergeant Graham then visited the Napiers. Although Movant had previously confessed to Ms. Napier that he had been driving the truck, she said she did not know who was involved in the accident.

Four months later, Sergeant Graham visited Ms. Napier again, this time at her place of work. When he falsely told her that Movant had admitted his involvement in the accident, Ms. Napier admitted to Sergeant Graham that Movant had showed up at her house and asked for help after he wrecked the truck. Later that afternoon, Ms. Napier spoke with Movant and learned that he actually had not confessed anything to Sergeant Graham about the accident. Later that day, Ms. Chilton's mother informed her that Sergeant Graham wanted to speak with her about the accident. Movant told Ms. Chilton that she did not have to talk to Sergeant Graham. Movant then obtained Sergeant Graham's home address from Ms. Chilton's stepfather, who was a friend of Sergeant Graham's landlord.

At approximately 12:20 p.m. the next day, March 20, 2005, Movant borrowed his grandmother's red 1995 Pontiac Grand Am. The car had a bright yellow sticker on the driver's side of the trunk. Between about 1:45 p.m. and 4:15 p.m. that afternoon, various witnesses noticed a red Pontiac Grand Am — with a bright yellow sticker affixed to the driver's side of the trunk — parked on the wrong side of the road a few hundred feet from Sergeant Graham's residence. Movant returned the Grand Am to his grandmother between 4:15 p.m. and 4:30 p.m. that same day. Investigators calculated that it took approximately 18 minutes to drive from Movant's grandmother's house to the location where the red Grand Am with the yellow sticker

had been parked near Sergeant Graham's house.

At 4:03 p.m. that day, Sergeant Graham had returned home, backed his patrol car into his driveway, and radioed dispatch that he was ending his shift. As Sergeant Graham exited his vehicle, he was shot from behind with a high-powered rifle that penetrated his Kevlar vest. The bullet severed his spinal cord at the neck, immediately paralyzing him. He fell backward and suffered fractures to his skull and ribs upon impact with the pavement. At this point, Sergeant Graham was still alive. The killer then approached Sergeant Graham and shot him twice more with a shotgun – into the face and shoulder. Sergeant Graham's body was discovered around 5:15 p.m. that day. The recovered rifle bullet was deformed, but ballistics experts determined that it belonged to the .22 to .24 caliber class of ammunition that would fit a .243 caliber rifle. Investigators later learned that around 7:00 p.m. on the evening of Sergeant Graham's murder, Ms. Shockley gave Movant's uncle a box of .243 caliber bullets and stated, "Lance said you'd know what to do with them."

That night, two Highway Patrol investigators went to the Shockley residence to interview Movant. They were accompanied by S.W.A.T. members, who concealed themselves in the woods around the property. Before approaching the door, the investigators called Movant on the telephone and informed him that they wanted to speak about the murder of Sergeant Graham. Movant refused to talk, stating that he was a busy man and that they should visit him at work.

After the telephone call ended, the investigators saw Movant walk out the front door of his house. They approached and identified themselves. Movant immediately denied killing Sergeant Graham and stated that he had spent all day working around his house with his neighbor Sylvan Duncan. Movant then told the investigators that the conversation was over and to get off of his property.

Shortly after the investigators departed but before all S.W.A.T. members had left, Movant saw a S.W.A.T. member and yelled at him. When the members of S.W.A.T. started to

leave, one S.W.A.T. member accidentally discharged his weapon while getting up off of the ground, injuring another S.W.A.T. member.

At about 11:30 a.m. the next day the two investigators with whom Movant had spoken the night before approached him outside his workplace, where he was sitting in his car eating lunch with his cousin. Movant told the officers he would speak with them when he finished eating. While the investigators waited by their car, Movant called his wife on his cousin's cell phone and asked whether she had spoken with the police. She said that she had told the police that Movant had been at home the day of the shooting until almost 5:45 p.m., when he went to his uncle's for a few minutes. Movant responded, "Okay, that will work, that will be fine."

Movant then met with the investigators and elaborated on the alibi he had given them the night before, claiming that he had spent the previous day visiting relatives, including his grandmother, and that he watched from his living room as his neighbor, Sylvan Duncan, pushed brush. He also said he knew Sergeant Graham was investigating him for the fatal truck accident and, without prompting, declared that he did not know where Sergeant Graham lived. Movant's parting words to the investigators were, "Don't come back to my house without a search warrant, because if you do there's going to be trouble and somebody is going to be shot."

Later that day, Movant visited his grandmother and instructed her to tell the police that he had been home all day on the day Sergeant Graham was murdered. When his grandmother told Movant she would not lie for him, he put his finger over her mouth and said, "I was home all day." He also told his cousin, who had overheard his lunch break telephone call with Ms. Shockley, not to say anything about it.

Police arrested Movant on March 23, 2005, for leaving the scene of the November 26, 2004 accident that resulted in Mr. Bayless' death. On March 29, the State charged Movant with leaving the scene of a motor vehicle accident, armed criminal action, and first-degree murder for the death of Sergeant Graham and sought the death penalty. The State proceeded to trial only on

the first-degree murder charge. The State's theory of the case was that Movant killed the sergeant to stop the investigation into the death of Mr. Bayless. Movant was represented at trial by Brad Kessler, David Bruns, and Molly Henshaw Frances. Movant's defense was that it would have been ridiculous for him to believe that simply by killing Sergeant Graham law enforcement would halt the investigation into the accident. The defense also argued that the police improperly directed all their investigative attention toward Movant, rather than pursuing other leads.

After a five-day guilt phase proceeding, the jury found Movant guilty of first-degree murder. The trial then proceeded to the penalty phase. The penalty phase instructions required the jury to answer three special interrogatories. The first required the jury to state whether it unanimously found beyond a reasonable doubt that at least one statutory aggravating circumstance existed. The State submitted four statutory aggravators: 1) that Sergeant Graham was a "peace officer" and the "murder was committed because of the exercise of his official duty," 2) That Movant was depraved of mind when he killed sergeant Graham and, "as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman," 3) that Sergeant Graham was murdered "for the purpose of avoiding… or preventing a lawful arrest," and 4) that Sergeant Graham was a "potential witness in [a] past or pending investigation … and was killed as result of his status as a … potential witness. §565.032.2.

In the event that the jury failed to find unanimously and beyond a reasonable doubt the existence of one or more statutory aggravators, the instructions directed it to return a verdict of life imprisonment without parole. If the jury did, however, find one or more statutory aggravators beyond a reasonable doubt, the instructions required the jury then to determine whether there were circumstances in mitigation of punishment sufficient to outweigh the aggravating circumstances. If the jury unanimously found that mitigating circumstances outweighed the aggravating circumstances, the instructions directed it to return a verdict of life

imprisonment without parole. But, if the jury found at least one statutory aggravator and failed to find unanimously that the mitigating circumstances outweighed the aggravating circumstances, then it was instructed to determine whether to impose a sentence of death or one of life imprisonment. §565.030.4.

The jury found the first, third and fourth statutory aggravators submitted by the State were proven beyond a reasonable doubt. It did not unanimously find that the circumstances in mitigation outweighed those in aggravation. As instructed, the jury then proceeded to the final question, whether to impose a sentence of death or life imprisonment, but the jury was unable to agree on which punishment to recommend.

Pursuant to §565.030.4, where the jury is unable to agree on punishment, the trial court "shall assess and declare the punishment at life imprisonment ... or death." Before declaring a punishment, the trial court must follow the same procedure that the jury undertook: (1) the court must first determine whether one or more statutory aggravating circumstances were proven beyond a reasonable doubt, (2) if so, the court must weigh the mitigating and aggravating evidence to determine whether the circumstances in mitigation of punishment outweigh the circumstances in aggravation, and (3) if not, the court must then decide whether to impose a sentence of life imprisonment or death.

In accordance with this procedure, the trial court noted that the jury unanimously found Movant guilty of first-degree murder beyond a reasonable doubt, that the jury unanimously agreed that three of the submitted statutory aggravators were present beyond a reasonable doubt, and that "the jury did not unanimously find that there are facts and circumstances in mitigation of punishment sufficient to outweigh facts and circumstances in aggravation of punishment." Following an independent review of the evidence and the findings of the jury, the trial court agreed with the jury that the State had proved three statutory aggravating circumstances beyond a reasonable doubt; further, the trial court found that the mitigating circumstances did not

outweigh those in aggravation. The court then determined the appropriate sentence to be death.

STANDARD:

Movant bears the burden of proving, by a preponderance of the evidence, that he received ineffective assistance of counsel. Rule 29.15(i). To establish ineffective assistance of counsel, Movant must show that: (1) counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney; and (2) counsel's poor performance prejudiced the defense. *State v. Hall*, 982 S.W.2d 675, 680 (Mo. banc 1998); *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Movant must prove each portion of this two-pronged performance and prejudice test in order to prevail on his ineffective assistance of counsel claim. *Sanders v. State*, 738 S.W.2d 856, 857 (Mo. banc 1987). To satisfy the first prong, Movant must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Movant can do this by pinpointing specific acts or omissions of counsel that resulted from unreasonable professional judgment, but the reviewing court must find these acts to be "outside the wide range of professionally competent assistance" for Movant to be successful. *Id.* at 690.

To satisfy the second prong of the test, that Movant was prejudiced due to the ineffective assistance of counsel, Movant must establish that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 669. Not only must Movant prove his allegations by a preponderance of the evidence, but Movant bears the heavy burden of overcoming the trial court's presumption that trial counsel's conduct was reasonable and effective. *Clayton v. State*, 63 S.W.3d 201, 2016 (Mo. banc 2001); *see also State v. Colbert*, 949 S.W.2D, 932, 940 (Mo. App. W.D. 1997). The second prong of the ineffective assistance of counsel test is met when Movant shows that this attorney's errors affected the judgment. *Strickland*, 466 U.S. at 691. Movant can prove that the judgment was affected when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different. *Strickland* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

APPLICATION OF LAW TO FACTS:

Claim 8A: Constitutional Violations Occurred During Jury Selection

A defendant has a right to a fair and impartial jury. U.S. Const. amends. VI, XIV, Mo. Const. art. I, §18(a). In cases where the death penalty may be imposed, "any veniremember who cannot be impartial is unfit to serve, whether the partiality is due to an aversion to the death penalty, an excessive zeal for death, or any other improper predisposition." *State v. Clark*, 981 S.W.2d 143, 148 (Mo. banc 1998). Failure to strike a juror who is unfit to serve because of such an improper disposition is structural error. See *Knese v. State*, 85 S.W.3d 628, 633 (Mo. banc 2002) (citing *Gray v. Mississippi*, 481 U.S. 648, 668 (1987).

In a state in which jurors make a sentencing recommendation in capital cases, a potential juror is not "impartial" if the juror will automatically vote for the imposition of the death penalty without regard to evidence or legal instructions, *Witherspoon v. Illinois*, 391 U.S. 510, 522, n. 21 (1968), or if the potential jurors' views would "prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths," *Wainright v. Witt*, 469 U.S. 412, 424, n. 5 (1985). To determine whether jurors are impartial in a death penalty case, the jurors must be asked a question designed to assure the defendant that the jury is not "organized to return a verdict of death," *id.* at 521, and second, the complementary question, designed to permit the state to test whether a venireperson's aversion to the death penalty would result in an automatic vote for a sentence of life without parole. *Lockhart v. McCree*, 476 U.S. 162, 180, 106 S.Ct. 1758, 1768–69 (1986). Together these questions are designed to produce "a jury that could impartially decide all of the issues in [a capital] case." *Id.*

The Missouri Supreme Court has held that a death penalty voir dire is sufficient if questions asked are sufficient to satisfy the *Witherspoon* and *Witt* standards outlined above. *See*

State v. Ramsey, 864 S.W.2d 320 (Mo. banc 1993). This Court has reviewed the transcript of voir dire in this case, and makes a finding that the necessary questions to determine the impartiality of the jurors as it related to the death penalty were asked, such that Movant and his counsel had adequate information of any disqualifying tendencies as well as nondisqualifying tendencies as it relates to the consideration and imposition of the death penalty. As such, the voir dire in the case was sufficient according to all legal standards for a death penalty case. Any claims related to the insufficiency of voir dire death penalty qualification of jurors are denied.

Aside from improper death penalty qualification of a jury, proper jury selection is trial court error that is not cognizable under Rule 29.15. *Smith v. State,* 684 S.W.2d 520 (Mo.App. 1984). However, improper jury selection may be advanced for the first time in a postconviction proceeding *if* the defendant shows that he had no knowledge of the improper jury selection process until after his trial. *Id.* To prevail on a claim of ineffective assistance of counsel during the jury selection process, the defendant must show that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances, and that he was prejudiced thereby. *Love v. State,* 670 S.W.2d 499, 501 (Mo. banc 1984). Here, the defendant was present for and participated in jury selection along with his counsel. His trial attorneys testified that he was actively involved in jury selection, and consented to the decision not to make additional inquiry of the jurors on the fourth panel. Thus, he was aware of the manner in which voir dire was conducted prior to his trial, and his claim is not cognizable on 29.15 review. Movant's claims about voir dire, to the extent they relate to matters other than punishment, are hereby denied.

In the interest of full analysis, the Court reviews the specific claims of Movant as follows, but notes the unavailability of caselaw which is specifically on-point with regard to the conduct of counsel in conducting voir dire (other than that relating to death penalty certification), since such claims are not cognizable in a 29.15 post-conviction action such as this one.

1) And 2) Failure to Conduct General Questioning of Panel 4

Movant has claimed that his trial counsel's failure to conduct questioning beyond the topics of hardships, familiarity with witnesses and other persons involved with the case, publicity, and residency was a structural error in jury selection and therefore constitutes ineffective assistance of counsel. As stated above, the court is required to consider both whether counsel was ineffective and whether the Movant was prejudiced by the manner in which voir dire was conducted. This Court finds that the decision not to conduct additional voir dire of those jurors in the fourth venire panel was reasonable on the part of trial counsel, and that counsel was not ineffective in so doing. This Court also finds that Movant cannot demonstrate that he was prejudiced by the failure of his counsel to ask additional questions.

During voir dire on this case, the Court had available seven venire panels from which the jury could be selected. The Court asked each of the first four panels a series of questions on the topics of hardships, familiarity with witnesses and other persons involved with the case, publicity, and residency. With regard to panels 1-3, the parties then took an opportunity to ask additional questions of the jurors. Some of these additional questions were on subject matter such as prior experiences with the criminal justice system, the instructions and the law in this case as it related to circumstantial evidence, the burden of proof, presumption of innocence, and determination of credibility of a witness. When the fourth venire panel was sworn, the voir dire proceeded in a similar fashion, but trial counsel suggested a way to avoid returning for an additional day of voir dire, which was to agree to strikes and terminate voir dire questioning because there were sufficient jurors from the other panels to make up a jury. Counsel for both parties agreed to terminate voir dire at that time.

In deposition and courtroom testimony, Movant's trial counsel testified that the decision not to ask additional questions of the final panel of potential jurors was strategic in nature. Trial counsel Bradford Kessler testified at his deposition that he recalled that he didn't want to lose

people in the last panel who were known to Movant and/or his family as people who were likely favorable to the Movant's position at trial. By not asking questions, Kessler believed that they would avoid "outing" people who were potentially favorable to Lance and his family to the State. Kessler stated that this voir dire strategy was utilized throughout voir dire, not just with the fourth panel. It was an intentional voir dire strategy of trial counsel not to ask questions that might reveal information known to Movant and his family because of the small community where the case was tried, but would likely not be known to counsel for the State. This Court finds that this strategy employed by trial counsel was reasonable.

To support his claim, Movant cites *Knese v. State*, a death penalty case where defense counsel failed to review jury questionnaires in which two of the jurors indicated strong views in favor of the death penalty, and the belief that the criminal justice system was too lenient to criminal defendants. *Knese*, at 632. The court in *Knese* observed that the responses to the jury questionnaires suggested that they would automatically vote to impose death after a murder conviction." *Id.* at 644. The Court found that this was a "complete failure in jury selection," by failing to review the jury questionnaires or examine the jurors about their questionnaire responses was a structural error and by itself established prejudice. *Id.* at 633.

In *Strong v. State*, 263 S.W.3d 636 (Mo. banc 2008), the Missouri Supreme Court clarified that the *Knese* decision was not without boundaries. Specifically, the Court said that a movant is entitled to a presumption of prejudice resulting from counsel's ineffective assistance during the jury selection process only if the movant can show that a biased venireperson ultimately served on the jury. *Id.* (quoting *Scott v. State*, 183 SW3d 244, 248 (Mo. App. E.D. 2005). Here, as in *Strong*, the movant has not demonstrated that any biased venireperson ultimately served on the jury as a result of the allegedly deficient voir dire examination. At best, Movant just raises a possibility that additional questioning of the venire panel may have revealed some juror bias on some subject related to the case. Movant fails to produce any evidence that a

juror who actually served on the jury had some bias that would have impacted the verdict. Parts I and II of Claim 8A are denied.

3) Inadequate Voir Dire of Panels 1, 2, and 3

Inadequate Voir Dire on Right not to Testify

Movant claims his attorneys were deficient by failing to ask the venirepersons whether "any member would draw an adverse inference if the Movant decided not to testify."

First, Movant cites several cases in support of this claim, but each of those cases relates to a different issue of law. The cases cited by Movant are not post-conviction cases, but instead address on direct appeal whether a trial court erred when ruling that a criminal defendant's counsel could not ask questions about whether a juror would draw an adverse inference from a defendant's failure to testify at trial such that the juror would not be able to follow the applicable instruction of the Court which states that no such inference may be drawn. The legal question as to whether it is appropriate for a trial court to rule that a defendant's counsel may not ask that question is distinct from Movant's claim here. Movant claims that his attorneys were deficient in failing to ask that question because Movant is somehow constitutionally entitled to the answers of the potential jurors, and his counsel is ineffective if the question is not posed.

Movant cannot cite a case on point since this is not a cognizable issue on a 29.15 claim. However, the Court notes that Movant's claim is inconsistent with well-established law that relates to the no-adverse-inference instruction. It is well established that the decision of whether to offer a no-adverse-inference instruction is a matter of sound trial strategy and cannot serve as the basis for post-conviction relief. *Barnett v.State*, 103 S.W.3d 765, 773 (Mo. banc 2003); *Knese v. State*, 85 S.W.3d 628, 635 (Mo. banc 2002). As the trial court in Barnett noted, a disagreement exists as to whether a no-adverse-inference instruction protects a defendant's right to not testify, or whether the instruction serves to highlight to the jury the fact that a defendant refused to testify. *See Barnett*, 103 S.W.3d at 773. Similarly, this Court finds that it is

a reasonable trial strategy not to ask potential jurors in voir dire about their opinions on the right not to testify for two reasons. First, as the cases above confirm, it is a reasonable strategy to avoid highlighting a failure by a criminal defendant to testify in his own defense. Second, if a defendant has not yet decided whether he will take the stand in his own defense, substantial discussion of his right not to do so might color the perspective of the jurors such that they now hear the bulk of the trial evidence with an assumption that the defendant will not testify, even if that is not actually the case.

Trial counsel Kessler confirmed that his strategy was consistent with the philosophical dichotomy outlined above. He testified that, in his experience: "if you spend a bunch of time saying, hey, you know, he has a right not to testify, et cetera, et cetera, and then you're going to put him on anyway, then what's the point of getting rid of someone who's going to hold it against him if he is in fact going to testify and then you end up in this sort of endless rabbit hole about these conversations. And then the jurors ask why wouldn't he testify and then someone's going to say well, if he's not guilty then he should – you know, and then it just – my experience is if you anticipate having someone testify, don't ask the question." Kessler confirmed that at the time of voir dire, even through the opening statement, he believed Movant would testify at the trial.

This Court finds that deciding not to ask this question during voir dire was a reasonable trial strategy and that the cases cited by Movant do not support the assertion that trial counsel is *per se* deficient if the no-adverse-inference question is not posed during voir dire. Moreover, this Court finds the no-adverse-inference instruction, which was given to the jurors who deliberated, accurately states the law as to Movant's right not to testify and the inferences which cannot be drawn from his decision not to testify. Jurors are presumed to have followed the instructions provided by the Court. Since the instruction not to draw any adverse inference from Movant's decision not to testify was given to the jurors, this Court will presume the instruction was

followed and Movant can therefore demonstrate no prejudice from the failure to voir dire on that topic.

Failure to Ask Follow-Up questions of Juror No. 3

Movant presented no evidence on the failure to ask follow-up questions of Juror No. 3, and any claim related thereto is hereby denied.

Failure to Ask Follow-Up questions of Juror No. 58

Movant claims that his counsel was ineffective for failing to ask "standard follow-up questions" of Juror 58 which would have uncovered bias of that juror.

When reviewing trial counsel's voir dire strategy, this Court will refrain from employing the benefit of hindsight when reviewing the conduct of counsel at trial. Trial counsel is allowed wide latitude in defending a client and should use his or her best judgment in matters of trial strategy. *State v. Williamson*, 877 S.W.2d 258, 262 (Mo.App.1994). "[C]ourts reviewing such claims should refrain from employing hindsight when reviewing counsel's conduct at trial." *Id.* In this instance, Juror No. 58 approached the court and all counsel in private and revealed two pieces of biographical information about himself—first that he had a son who was a police officer, and second that he was a published author. Juror No. 58 did not elaborate on the nature of the book(s) he had published or why he thought that was important to mention. The attorneys for both parties were given an opportunity to ask Juror No. 58 questions about his earlier revelations. Those questions focused on his relationship with his law enforcement officer son, which was reasonable under the circumstances, given that a close relationship with a person similarly situated to the victim in this case might logically give rise to some bias or impartiality.

In Juror No. 58's responses to those additional questions by counsel, he maintained that he could be impartial and answered every question posed to him by the attorneys. Neither party asked about his publication(s). This Court finds that it was reasonable for the attorneys there, who did not have notice of the nature of the book authored by Juror No. 58, to focus their

questions on his relationship with his son and the impact that might have on his ability to be a fair and impartial juror in this particular case. The Court notes that attorneys for both sides made the same strategic decision to disregard the book and focus on the more likely area of potential bias. Trial counsel Kessler specifically testified that the fact that the book was self-published is one of the reasons he didn't inquire about the book was because "in 2008, '09, '10, self-publishing just sort of meant that there's – you – it was a vanity project. You know, not – not a widely distributed anything." Further, the Court notes that, analyzing the decisions of counsel without the benefit of hindsight, the two parties were equally likely to learn something about the book that made them question whether Juror No. 58 would be a suitable juror for this case, yet both parties made the same strategic decision to focus on the part of the biographical information that Juror 58 had divulged which was most likely to give rise to some form of bias. Given the propensity of venire members to mention irrelevant facts during voir dire, which the attorneys have to disregard to keep the voir dire on course, it is not unreasonable or unexpected that the attorneys would not delve deeper into specific questions about the nature of the book written by Juror No. 58, but instead determine that it is a hobby or profession which is unlikely to have any bearing on the juror's suitability as a juror. In addition, Juror No. 58 was subjected to extensive questioning about any bias or impartiality and testified that he would follow the rules of the court, failing to exhibit any disqualifying predisposition or bias.

This Court finds no caselaw which dictates that trial counsel can be found ineffective for failure to ask enough questions about matters such as hobbies of the veniremembers or information about their professions, as this matter is not appropriate for a 29.15 action. Further, the Court finds that trial counsel is to be given wide latitude in the development and execution of effective voir dire. The Court finds that in the absence of hindsight analysis and speculation, it cannot be presumed that trial counsel was ineffective by failing to ask additional questions about the contents of the book(s) authored by Juror No. 58. Further, Movant fails to establish that he

was prejudiced due to Juror No. 58 serving on the jury for the guilt phase deliberations only, and the Court notes he was replaced for the purpose of deliberation on the issue of punishment.

Part 3 of Claim 8A is denied.

4) **Failure to Move to Strike for Cause Juror No. 3**

Movant claims that his trial counsel was ineffective for failing to move to strike Juror #3 for cause on the basis that he was not impartial as to punishment.

Counsel for the State of Missouri asked questions of Juror No. 3 about his ability to give meaningful consideration to both the death penalty and life imprisonment without parole, he responded that he could consider both sentencing options. Trial Transcript p. 563. He testified that even if he was asked to consider punishment for the "worst murder in the world," whatever he considered that to be, he could still give the same level of consideration to death as to a life sentence. Id. Juror No. 3 agreed that he would not automatically give *anyone* the death penalty. Id. (*emphasis added*).

Later, Movant's counsel addressed punishment again with Juror No. 3. Trial Transcript pp. 582-3. Juror No. 3 agreed that he wouldn't get to the point of giving meaningful consideration to both the death penalty and life without parole until finding Movant guilty of murder in the first degree. Id. Movant's counsel explained that if the Movant was found guilty of the murder, the jury would have necessarily found that Movant had killed a law enforcement officer. Id. Trial counsel stated that "one of the statutory aggravating circumstances that no question you'll be able to find beyond a reasonable doubt is that the victim was a law enforcement officer." Id. Trial counsel confirmed that the State would have to prove beyond a reasonable doubt that an aggravating circumstance existed during the second stage of the trial. Id. Juror No.3 stated that he respected law enforcement officers and would probably be more inclined to sentence someone to death for murdering a law enforcement officer because he felt that was more of a crime than just an average…. Id. The rest of Juror No. 3's sentence is not in

the record. Id. Trial counsel responded "Okay, and that's fair." Id. Trial counsel asked if Juror 3 found that Movant "did anything" and that what he did was murder a police officer, was Juror 3 more inclined to say that the murderer deserves the death penalty and therefore that's the only punishment Juror No. 3 would be able to meaningfully consider. Id. at 584. Juror No. 3 responded: "I can't say that I would be more inclined because it would bother me. I respect law officers, but, I mean, I could be impartial." Id. Trial counsel confirmed: So here's what I hear you saying. You would consider that as an aggravating circumstance, but it wouldn't automatically make you vote for the death penalty?" Id. and Juror No. 3 answered "No, it would not." Id.

This Court finds that it was reasonable trial strategy not to move to strike Juror No. 3. First, during voir dire, the juror was clear that he understood when punishment was to be assessed and that he could give meaningful consideration to the entire range of potential sentences. Juror No. 3 even stated that he would not automatically sentence someone to death for the "worst murder in the world." The record doesn't reflect whether Juror No. 3 thought that the murder of a law enforcement officer was the worst murder in the world, although Juror No. 3 did state that he considered murder of a law enforcement officer to be more of a crime than an average…. Counsel responded "that's fair," because Juror No. 3's statement mirrors the state of the law in Missouri which identifies the murder of a police officer as a statutory aggravator for the purpose of considering the death penalty. § 565.032. Juror No. 3 then confirmed that he would not automatically sentence someone to death for the murder of a police officer and that he could be impartial. There is no evidence in the record to suggest that a motion to strike Juror No. 3 would have been successful, because his voir dire testimony was clear that he could be impartial on the issue of punishment. Trial counsel Kessler reviewed the voir dire responses of Juror No. 3 during his deposition, at the request of Movant's present counsel, and concluded again that Juror No. 3 stated that he could be impartial, which is why Kessler did not move to

strike Juror No. 3 for cause. Trial counsel will not be found ineffective for failure to make a non-meritorious motion to strike a juror for cause. Similarly, because the record demonstrates that Juror No. 3 did not have any bias or impartiality which made him unqualified to serve as a juror in this case, and because the motion to strike him would have been denied on those grounds, Movant has not proven that he was prejudiced and Part IV of Claim 8A is denied.

Claim 8B: Trial Counsel was Ineffective for Failure to Call Witnesses Regarding Red Car

A decision not to call a witness is presumed to be trial strategy unless it is clearly shown to be otherwise. *Winfield v. State*, 93 S.W.3d 732, 739 (Mo. banc 2002). In order to show ineffective assistance of counsel for failure to call a witness, the Movant must show: "1) trial counsel knew or should have known of the existence of the witness, 2) the witness could be located through reasonable investigation, 3) the witness would testify, and 4) the witness' testimony would have presented a viable defense." *Hutchison v. State*, 150 S.W. 3d 292, 304 (Mo. banc 2004). Even then, to receive relief, he must show that had the witness testified, the outcome may have been different at trial and trial counsel's failure to call the witness was something other than trial strategy. *White v. State,* 122 S.W.3d 118, 120 (Mo.App. S.D.2003). It is virtually impossible to challenge a decision not to call a witness to testify as a matter of trial strategy. *Payne v. State,* 21 S.W.3d 843, 845 (Mo.App. E.D.1999).

Movant claims that the testimony of Sylvan and Carol Duncan would have shown that Movant was not with or near the "red car" that was located near the victim's home at the time of the murder. Movant states that Carol Duncan would also place the Movant's grandmother's car at Movant's grandmother's home at the time that the "red car" was located near the victim's home. Information obtained during the course of the Highway Patrol's investigation and also in deposition testimony of Sylvan and Carol Duncan would have made their testimony valuable to the State's case. Additionally, trial counsel Kessler testified that he did not believe that the testimony of the Duncans would have held up to cross-examination. As such, it was reasonable

trial strategy not to call them as witnesses.

In addition, this Court finds that the testimony of the Duncans would have been of substantial benefit to the State's case. Mr. and Ms. Duncan made documented statements to law enforcement officers about Lance Shockley's whereabouts on the day of the murder. They were also deposed by Movant's public defenders. Transcripts of those depositions were admitted at the evidentiary hearing by Movant's counsel and considered by this Court. Mr. Duncan had stated that Movant was drunk on the date of the murder. He said that Movant would shoot into a sawdust pile where investigators ultimately recovered bullet fragments that the State argued linked Movant to the murder. Mr. Duncan testified at deposition that Movant did not help him move trees on the date of the murder, which contradicted Movant's statements to law enforcement when he said that he was with Mr. Duncan on the date of the murder. Instead, Mr. Duncan stated that Movant was supposed to come help him and didn't show up. Mr. Duncan said that Movant came to the Duncans' home after the Duncans had spoken to law enforcement and said he heard that they told law enforcement that Movant wasn't home around 1400 or 1430 hours. The Duncans agreed that they made that statement to investigators, because it was true. Movant responded that they couldn't know what time he left because they don't always look at their watch.

According to Mr. and Ms. Duncan, Movant talked to the Duncan's about Sgt. Graham's murder, telling Mr. Duncan that Sgt. Graham was shot in the face with a shotgun. Movant further described the injury, stating "you could take and pick up the side of [Graham's] face here and just lay it over sideways and lay it back over," while making a hand gesture to demonstrate. Mr. Duncan said something to Movant about how a shooter would have to be pretty close to do that damage, and Movant responded "Not if you used turkey loads."

Attorney Kessler testified that "there was a hole in [Movant's] alibi." Kessler stated that the testimony of the Duncans left a gap in the timeline of when the murder occurred, and did not

provide a perfect alibi at his deposition. Kessler explained that after speaking with the Duncans, he felt that Mrs. Duncan would make statements about being unsure about the details, which would lead him to call an officer to impeach his own witness. Kessler described that line of questioning as a potential "rabbit hole." Given the statements of the Duncans to law enforcement, and Kessler's testimony about his concerns about their potential testimony, it is clear that the testimony of the Duncans did not provide Defendant a clear defense, and this Court finds that it was reasonable that trial counsel decided not to call them as witnesses when the State declined to do so. This Court finds that the testimony of Mr. and Ms. Duncan was potentially harmful to the Movant and would have been beneficial to the State's case against him. Trial counsel should have expected that if Mr. and Ms. Duncan testified, their testimony would be consistent with prior sworn testimony and statements to law enforcement.

In fact, the testimony of Mr. and Ms. Duncan was so strongly in the favor of the State's theory of the case that it was reasonable for defense counsel to expect that the State would call them to testify, and also that their testimony was so significant as to warrant a reference during Movant's opening argument. The mention of their expected testimony, combined with the decision not to call them as witnesses is consistent with the reasonable strategic analysis that the testimony of Mr. and Ms. Duncan was more harmful than helpful to Movant. Because their testimony supported the State's position, it was reasonable trial strategy not to call them as witnesses.

Movant also claims that the testimony of James Chandler provided him with a defense. Kessler testified that he and his co-counsel did not speak with Chandler in preparation for trial, because his statement would have left a period of 20 minutes of the Movant's time unaccounted for, which would be "highlighting for the jury that there's this time frame where something could have happened" and that cross examination of Chandler would have highlighted "the hole in the imperfect alibi."

When defense counsel believes a witness' testimony would not unequivocally support his client's position, it is a matter of trial strategy not to call him, and the failure to call such witness does not constitute ineffective assistance of counsel. *Winfield v. State*, 93 S.W.3d 732, 739 (Mo. 2002). This Court does not find that the testimony of the Duncans and/or Chandler would have provided Movant with a viable alibi defense, and finds instead that it was a reasonable trial strategy on the part of trial counsel not to call them to testify at trial. Claim 8B is denied.

Claim 8C: Trial Counsel was Ineffective for Failure to Call Mila Linn and Zachary Linn

Movant presented no evidence on Claim 8C, which has been abandoned and is therefore denied.

Claim 8D:

Movant presented no evidence on Claim 8D, which has been abandoned and is therefore denied.

Claim 8E: Trial Counsel was Ineffective for Failure to Impeach Lisa Hart

Generally, counsel's decision "not to impeach a witness with a prior inconsistent statement is a matter of trial strategy and cannot be the basis for finding ineffective assistance of counsel." *Reynolds v. State*, 87 S.W.3d, 381, 385 (Mo. App. S.D. 2002); see also *State v. Mahoney*, 165 S.W.3d 563, 568 (Mo. App. S.D. 2005) ("Subjects covered during cross-examination are generally matters of trial strategy and left to the judgment of counsel.") "The mere failure to impeach a witness does not entitle a movant to post-conviction relief." *Fry v. State*, 244 S.W.3d 284, 287 (Mo.App. S.D. 2008). To prevail, Movant must show that counsel's failure to present the impeachment evidence was unreasonable and outside the realm of trial strategy." *Id.* at 288. Trial strategy decisions may only serve as a basis for ineffective assistance of counsel if they are unreasonable. *Zink v. State*, 278 S.W.3d 170, 176 (Mo. banc 2009). Reasonableness is evaluated in the light of the circumstances of the case, defense, and trial happenings. *See Francis v. State*, 183 S.W.3d 288, 300-01 (Mo.App. W.D. 2005).

The Court finds that trial counsel's failure to impeach Lisa Hart with her prior statements about the location of the yellow sticker on Movant's grandmother's red car, as well as the time at which she saw the sticker on the red car, was reasonable trial strategy, and therefore is not a basis for ineffective assistance of counsel. Further, the Court finds that the failure to impeach Ms. Hart as to these two matters, even if it had been unreasonable trial strategy, did not prejudice Movant in light of the testimony of other witnesses about the red car and also Ms. Hart's statements that she did not make a mental note of where the sticker was located, and that she was "one hundred percent positive" that the vehicle she saw was Movant's grandmother's red car. Tr. 1897, 1906, 1913-1914. Finally, this Court notes that trial counsel called the husband of Ms. Hart as a witness for the purpose of pointing out discrepancies in Ms. Hart's testimony. Impeachment of Lisa Hart's testimony with prior statements would not have provided Movant with a viable defense, in that regardless of whether she saw the yellow sticker when approaching the red car or leaving it, she was consistent that she saw the red car at that location at that time. Movant's claim 8E is denied.

Claim 8F: Trial Counsel was Ineffective for Failure to Investigate and Call Records Custodian from NASCAR and Make a Time Line Chart

Movant presented no evidence on Claim 8F, which has been abandoned and is therefore denied.

Ballistics and Firearms Claims

Several of Movant's claims (Claims 8(G), 8(I), 8(J), and 8(K)) address various aspects of the ballistics and firearms evidence presented at trial. Most of these claims are related and will be analyzed together. However, Claim 8(G) will be considered separately.

Abandoned Claim - 8(G)

In Claim 8(G), Movant makes several allegations of ineffective assistance premised on the proposition that Mr. Carl Rone should have been called as a ballistics expert. Movant alleged

that Mr. Rone would have advised trial counsel on the requirements of the Association of Firearms and Toolmark Examiners (AFTE) as it relates to photographs. Movant alleged that Mr. Rone would have been able to show that the bullet fragments did not match based upon the photos. Movant alleged that trial counsel failed to conduct an appropriate investigation and present expert testimony from Mr. Rone that the bullet fragments were not a match, but instead "inconclusive." Mr. Rone was not called as a witness at the post-conviction hearing. Mr. Howard, Movant's expert at the post-conviction hearing, did not testify to anything as it relates to photographs, AFTE requirements, or any independent examination of the bullet fragments. In fact, Mr. Howard testified that he relied on the testing of Mr. Jason Crafton and did not do any of his own analysis. Claim 8(G) is denied as Movant did not present evidence to support any of the allegations in this claim.

Analyzed Claims

Claims 8(I), 8(J), and 8(K), are all related to the ballistics evidence regarding the Browning BLR .243 rifle. Claim 8(I) is a failure to object claim. Claim 8(J) and Claim 8(K) are failure to investigate claims. The Missouri Supreme Court in *Barton v. State*, 432 S.W.3d 741, 749 (Mo. en banc 2014) set forth the standards to evaluate claims such as Movants.
"In order to prove that his counsel was ineffective, a movant must show that his counsel's performance did not conform to the degree of skill, care and diligence of a reasonably competent attorney and that movant was thereby prejudiced." *Barton* at 749 quoting, *Johnson* 333 S.W.3d at 463. "To demonstrate prejudice, a movant must show, that but for counsel's poor performance, there is a reasonable probability that the outcome of the court proceeding would have been different." *Barton* at 749. The court is to presume that counsel acted professionally and it is not ineffective assistance of counsel to pursue one reasonable trial strategy to the exclusion of another reasonable trial strategy. "Where counsel has investigated possible

strategies, courts should rarely second guess counsel's actual choices." *Barton* at 749 quoting *Anderson v. State*, 196 S.W.3d 28. "Ineffective assistance of counsel will not lie where the conduct involves the attorney's use of reasonable discretion in a matter of trial strategy, and it is the exceptional case where a court will hold a strategic choice unsound." *Barton* at 749 quoting *State v. White*, 798 S.W.2d 694, 698 (Mo. banc 1990).

For proper analysis of these ballistic and firearms claims as to any ineffective assistance of counsel, it is important to understand what trial counsel knew, what actions trial counsel considered, what strategy trial counsel pursued, and what actually occurred at trial. Since these facts will be relevant to each of the claims, the Court will set forth the following facts as it specifically relates to these claims.

It is clear that everyone who represented Movant recognized the significance of the ballistics evidence. The initial trial team of Mr. Marshall and Ms. Zembles conducted an extensive investigation into the evidence. Mr. Marshall testified that he conducted multiple depositions of Jason Crafton and the deposition of John Dillon. Mr. Marshall understood that John Dillon, the more experienced certified AFTE firearm and toolmark examiner did not agree with Crafton's conclusion that there was an identification between the bullets. Additionally, Marshall sought expert assistance from several people including: Gene Gietzen, Skip Palenik, Gary Rini, John Cayton, Steve Howard, and Dr. Draper. Mr. Marshall testified that he filed a Motion in Limine to Exclude Browning .243 Caliber Lever Action Rifle.

Mr. Kessler and his team of Mr. Bruns and Ms. Henshaw also recognized the significance of the ballistics evidence. Mr. Kessler and his team reviewed the entire file provided by Mr. Marshall and Ms. Zembles including the ballistics information. Mr. Kessler, Mr. Bruns, and Ms. Henshaw, discussed various trial strategies for handling different aspects of the case. Mr. Kessler handled the ballistics and firearms evidence. Mr. Kessler testified that he has tried cases in which ballistics evidence was key. Mr. Kessler testified that his staff conducted ballistics

research and that he routinely updates his ballistics information. Mr. Kessler testified that he was familiar with Mr. John Cayton and that Mr. Cayton had been previously "debunked as an expert." Mr. Kessler testified that he has previously tried cases in which defense ballistics experts did not hold up on cross examination. Mr. Kessler explained that trial strategies were discussed with Movant. Mr. Kessler explained that Movant was involved in these discussions and was actively involved in the trial. Mr. Kessler testified that if Movant testified, he was going to admit ownership of a .243 rifle. Mr. Kessler testified that a trial strategy was developed which would be consistent with any testimony of Movant if Movant decided to testify. Mr. Kessler explained that he had a very specific trial strategy for combating the State's ballistics evidence. Mr. Kessler wanted to pit the two State's ballistics experts at odds with each other because Mr. Crafton and Mr. Dillon reached different results. Mr. Kessler, through his cross-examination, magnified the discrepancies and argued that Mr. Dillon, the more experienced firearm and toolmark examiner, should be believed. If Mr. Dillon was believed, then reasonable doubt existed. The trial transcript establishes that Mr. Kessler and the defense team executed this strategy from opening statement, through the cross examinations of Mr. Crafton and Mr. Dillon, and the arguments made in closing.

Claim 8J

This Court will analyze Claim 8J and 8K, the failure to investigate claims, first because Claim 8I is premised on the assertions in these claims. In Claim 8J, Movant alleges that trial counsel, Mr. Kessler, and his team did not reasonably investigate the possibility of using Mr. Howard as an expert witness. Movant claims that Mr. Kessler and his team did not look at the work completed by Ms. Zembles and Mr. Marshall. Movant claims Mr. Kessler should have called Mr. Howard as a witness because Mr. Howard's testimony would have established that Browning BLR .243 as a class of rifles could not have fired the bullet which killed Sergeant

Graham.

First as to Claim 8J, this Court finds the testimony of Mr. Kessler, Ms. Henshaw, and Mr. Bruns credible that the entire file of Ms. Zembles and Mr. Marshall was reviewed. Movant failed to present any evidence that his trial counsel failed to review all of the work by the public defender attorneys.

Second as to Claim 8J, this Court finds that Mr. Kessler had a reasonable trial strategy for not calling Mr. Howard as a witness. "'The selection of a witness and the introduction of evidence are questions of trial strategy and are virtually unchallengeable.' *Johnson*, 333 S.W.3d at 463-64. '[D]efense counsel is not obligated to shop for an expert witness who might provide more favorable testimony.'" *Barton* at 755.

In this case, trial counsel, Mr. Kessler, was asked specifically about any strategy he had in regards to the possibility of calling Mr. Steven Howard as a defense witness. Mr. Kessler stated:

> I don't think I ever considered calling somebody else because I had two people on the same side that I could cross-examine that disagreed with each other. I have had, in the past, bad experiences with our own ballistic experts in cross-examinations. And I would refer you specifically to a case I tried. John David Brown, in which we called a supposed national expert named Fasnacht, F-a-s-n-a-c-h-t. I remember this because my co-counsel Steve Ryals at the time, when we tried John David Brown[1] back in the – I think '88 maybe, we went over and over with him and we were certain he was going to be the perfect guy. And then on cross-examination it was

[1] For more information regarding this case, see State v. John David Brown, 867 S.W.2d 530 (Mo. App. W.D. 1993). This was a death penalty case in which the defendant was convicted and sentenced to life without parole. It is interesting to note the following comment made by the court regarding Mr. Kessler. "Appellant's trial counsel was an experienced criminal attorney who had been engaged in the practice of law since 1983 and had tried over 100 jury criminal trials. He had tried 9 cases wherein the death penalty was sought. Nothing in the record indicates that the appellant was in any way prejudiced by trial counsel's conduct of this trial." *Brown* at 538

> just terrible and it's because he – they got to cross-examine him about all sorts of things. And I would rather have been in a position of cross-examining two guys on the same side and get them to contradict each other then have my own 'hired gun.'
>
> (Kessler transcript p56 - 57 lines 17 – 9)

Mr. Kessler's concern regarding how a ballistics expert would withstand cross-examination is a reasonable and appropriate concern for trial counsel. At the post-conviction hearing, Mr. Steven Howard testified for Movant. During the direct and cross-examination, it became clear that Mr. Howard was not as experienced and knowledgeable as the State's experts on the issues in this case. Mr. Howard's expertise is not in firearm and toolmark identification.[2] Mr. Howard admitted he did not view the evidence in this case, but relied solely on the examinations of Mr. Jason Crafton. Mr. Howard claimed that the Browning BLR .243 should be eliminated based upon the lands and groove widths as published in the General Rifling Characteristics (GRC) database and his testing of a similar Browning BLR .243 he purchased for testing. Mr. Howard obviously did not understand how information in the GRC database was obtained and maintained and he failed to consider that a specific firearm may intentionally, or through excessive use, be modified, altered, or changed after its original purchase. The evidence from Mr. Crafton, Mr. Garrison, and the GRC File instructions (Respondent's Exhibit I) clearly explained that the GRC cannot be used as an all-inclusive list which can provide definitive results. It is clear that any firearm may be intentionally modified, altered, or changed after its original purchase in a way which would change the lands, grooves, and twist from the original factory specifications. Furthermore, it is clear that any firearm, through excessive use, may have

[2] The trial transcript sets out the qualifications of Mr. Dillon and Mr. Crafton. Both of these examiners had very extensive resumes regarding firearms and toolmark identification. Mr. Howard's claim that he was "certified in fourteen states" and did not need to be certified to make his analysis creates serious doubts that any jury would give his testimony more weight than the experts called at trial.

its lands and grooves changed from the original factory specifications. Such a modified, altered, or changed firearm could, if tested, produce results outside of the parameters of the GRC rifling measurements and different from results obtained by testing a similar, but unmodified, unaltered, and unchanged firearm. Therefore, Mr. Howard's reliance on the GRC rifling measurements and his testing of a firearm similar to the untested Browning BLR .243 owned by Movant to eliminate all Browning BLR .243 rifles is misplaced. While the GRC rifling measurements may aid investigators and testing of a similar firearm may show rifling measurements for that similar firearm only, there is nothing to support Mr. Howard's broad claim that a specific untested firearm can be excluded based upon the GRC rifling measurements or by testing a firearm similar to the untested firearm. This Court finds the testimony of Mr. Crafton and Mr. Garrison compelling and credible that a specific firearm cannot be excluded unless that individual firearm is specifically tested.

In Claim 8J, Movant alleged that Mr. Howard would also testify about the type of shotgun used based upon the wading found at the crime scene. Mr. Howard did not testify at all in this regard. Therefore, there is no evidence for the Court to consider on this portion of the claim.

This Court finds that the decision not to call Mr. Howard as a witness involves trial counsel's use of reasonable discretion in a matter of trial strategy. "Reasonable choices of trial strategy, no matter how ill-fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance of counsel." *Barton* at 749. Movant failed to prove that trial counsel was ineffective in failing to call Mr. Howard and that he was prejudiced by this decision. Claim 8(J) in its entirety is denied.

Claim 8K

In Claim 8K, Movant alleges that trial counsel was ineffective for failing to investigate

and present evidence that Movant did not inherit a .243 rifle from his father. Movant's Amended Motion indicates that trial counsel should have called Karen Briston, Movant's step-mother, Erica DeWolf, Movant's half-sister, and Gerald Sanders, Movant's grandfather. Movant did not present the testimony of Ms. Briston or Ms. DeWolf. Since their testimony was not presented, this Court has no evidence to consider and denies Claim 8(K) as to Ms. Briston and Ms. DeWolf.

Gerald Sanders testified at the post-conviction hearing that Movant did not inherit a .243 rifle from his father. Therefore, this Court will analyze whether trial counsel was ineffective in not calling Gerald Sanders to testify to this fact.

"In terms of an attorney's duty to investigate, an investigation need only be adequate under the circumstances, and the 'reasonableness of a decision not to investigate depends upon the strategic choices and information provided by the defendant.' *Ringo v. State*, 120 S.W.3d 743, 748 (Mo. en banc 2003). "The selection of witnesses and the introduction of evidence are questions of trial strategy and the mere choice of trial strategy is not a foundation for finding ineffective assistance of counsel." *Ringo* at 748.

Mr. Kessler was aware of Mr. Sanders and testified that he spent a lot of time with Mr. Sanders. (Kessler depo pg 66 line 12) The question posed to Mr. Kessler in his deposition about failing to ask Mr. Sanders about the inherited gun encompassed both the guilt phase and the penalty phase of trial. (Kessler depo pg 66 line 1-11). However, Mr. Kessler's answer focused on the penalty phase. Mr. Kessler explained that there would not be a reason to challenge the facts about the rifle during the penalty phase because that would be challenging the jury's verdict which would undermine the attorney's credibility during the penalty phase. This is a valid trial strategy reason for not asking Mr. Gerald Sanders about the .243 rifle in the penalty phase.

Mr. Kessler also had reasonable trial strategy reasons for not calling Mr. Gerald Sanders as a witness in the guilt phase of the trial. Specifically, Mr. Kessler developed a trial strategy

which allowed for the possibility of Movant to testify in his own behalf. If Movant testified, he was prepared to admit that he owned a .243 rifle. (Kessler depo pg. 75). Mr. Kessler also commented in his testimony that Movant received a .243 rifle as a gift from his dad. (Kessler depo pg 54). It was reasonable for Mr. Kessler to pursue a defense strategy which would not undermine the credibility of Movant if he chose to testify. At trial, the State presented individuals who knew Movant and knew he had inherited the rifle. At the post-conviction hearing, Movant called Joby Sanders. Joby Sanders was the best man in Movant's wedding. During cross-examination, Joby Sanders testified that Movant owned two .243 rifles, one of which was inherited from his father. Movant also called his friend, Tony Towner, as a witness at the post-conviction hearing. On cross-examination Tony Towner was confronted with statements that he told MSHP investigators that Movant inherited a .243 rifle. Mr. Towner denied making these statements. However, Mr. Towner was also aware that these statements had been attributed to him. Defense counsel had all of the information from the reports and would have known about these witnesses.

At best, Movant's evidence at the post-conviction hearing was conflicting on the issue of Movant inheriting a .243 rifle. Trial counsel expressly pursued a strategy which avoided this conflict and left open the possibility that Movant would testify in his own defense. Trial counsel is not ineffective for failing to call Gerald Sanders. Claim 8K is denied.

Claim 8I

In Claim 8I, Movant alleges that trial counsel should have objected to the use of a Browning BLR .243 rifle as a demonstrative exhibit. Specifically, Movant alleges: "If Movant's trial counsel had objected to the introduction of the firearm at trial as a demonstrative exhibit, the trial judge would have sustained the objection. If Movant's trial counsel had objected to the state's closing argument, linking Movant to the crime through demonstrative evidence in a circumstantial evidence case, the trial judge would have sustained the objection. If the judge had

sustained either of the objections, the outcome of the trial would have been different and Movant would not have been convicted of the crime in the guilt phase and would not have been sentenced to death in the penalty phase." Movant's allegation is premised on the fact that no one saw Movant with a Browning BLR .243 at the time of the shooting and the testimony of Steven Howard that the GRC rifling measurements and his testing of a similar Browning BLR .243 excluded all Browning BLR .243 rifles.

The issue of ineffective assistance of trial counsel for failing to object was examined by the court in *Cornelious v. State*, 351 S.W.3d 36 (Mo. App. W.D. 2011). The court noted:

> "Ineffective assistance of counsel is rarely found in cases where trial counsel has failed to object." *Bradley v. State*, 292 S.W.3d 561, 564 (Mo.App. E.D.2009) (citing *Williams v. State*, 205 S.W.3d 300, 305 (Mo.App. W.D.2006)). "The movant must prove that a failure to object was not strategic and that the failure to object was prejudicial." *Goudeau v. State*, 152 S.W.3d 411, 418 (Mo.App. S.D.2005) (internal quotation omitted). "If trial counsel's failure to object is based on reasonable trial strategy, the movant cannot demonstrate counsel was ineffective." *Bradley*, 292 S.W.3d at 564–65. "The failure to object to closing argument constitutes ineffective assistance only when the comment was of such a character it resulted in a substantial deprivation of defendant's right to a fair trial." *Olds v. State*, 891 S.W.2d 486, 491 (Mo.App. E.D.1994).
>
> *Cornelious* at 44.

Additionally, counsel cannot be deemed ineffective for failing to make or preserve a nonmeritorious objection. See *Sidebottom v. State*, 781 S.W.2d 791 (Mo. en banc 1989) *Baumruk v. State*, 364 S.W.3d 518, 539 (Mo. banc 2012); *McLaughlin*, 378 S.W.3d at 357; *Johnson v. State*, 406 S.W.3d 892, 902–03 (Mo. 2013).

During Mr. Kessler's testimony, he testified he did not recall his trial strategy reason for not renewing the previously filed Motion in Limine to Exclude Browning .243 Caliber Level Action Rifle. Movant's post-conviction counsel then asked several questions premised on facts which were developed through Mr. Howard's testimony regarding Mr. Howard's opinion that the Browning .243 rifle as a class had to be excluded. The transcript shows that through a series of confusing questions and answers, Mr. Kessler indicates he would have considered renewing the motion in limine and making an objection if the facts were consistent with counsel's questions. However, as the questioning on the subject continues, Mr. Kessler makes it very clear that he had a trial strategy reason for not contacting and/or using Mr. Howard. (Kessler depo pgs 51-58)

This Court has already analyzed Mr. Kessler's decision not to use Mr. Howard and that decision was a reasonable trial strategy. This Court has reviewed the trial transcript and evidence from the post-conviction hearing. There is no basis to support the claim that the trial judge would have sustained an objection to the use of the Browning .243 BLR as a demonstrative exhibit.

A trial court has wide discretion in admitting evidence. *State v. Freeman,* 269 S.W.3d 422, 426 (Mo. banc 2008). Demonstrative evidence may be admissible as long as it is both logically and legally relevant. *State v. Brown,* 337 S.W.3d 12, 15 (Mo. banc 2011). "Logical relevance refers to the tendency 'to make the existence of a material fact more or less probable.'" Id. (quoting *State v. Anderson,* 306 S.W.3d 529, 538 (Mo. banc 2010)). Legal relevance weighs the probative value of the evidence against "unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." *Freeman,* 269 S.W.3d at 427 (quoting *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. banc 2002)). "Therefore, when assessing the relevance of demonstrative evidence, a court must ensure that the evidence is a fair representation of what is being demonstrated and that it is not inflammatory, deceptive or misleading." *Brown,* 337 S.W.3d at 15. *Johnson v. State,* 406 S.W.3d 892, 902 (Mo. 2013).

Here, the evidence established that Movant was known to own two different .243 rifles. One of these rifles was similar to the demonstrative exhibit, a Browning BLR .243. The other .243 rifle was inherited by Movant from his father. Both of these rifles were unaccounted for during the police searches of Movant's property and, therefore, were not available to be tested. As previously stated, this court is persuaded that neither of these specific untested rifles can be excluded based upon the GRC rifling measurements or testing and measurements made with similar rifles. The GRC rifling measurements and measurements made with one Browning BLR .243 cannot be used to eliminate all Browning BLR .243 rifles. A specific Browning BLR .243 may only be excluded if has been properly tested. Additionally, there was testimony from Robert Shockley that Movant's wife inexplicably delivered a box of .243 shells on the night Sgt. Graham was murdered. It is also interesting to note, that had trial counsel called some of the witnesses post-conviction counsel now suggests should have been called, there would have been additional evidence of Movant's possession of a .243 rifle. During trial, the purpose of the demonstrative exhibit was clearly set forth and the jury was explicitly told that the demonstrative gun was not the murder weapon.

This Court cannot find that trial counsel's failure to object to the use of the demonstrative exhibit during the trial was ineffective assistance of counsel. The demonstrative exhibit arguably satisfied both the logical relevance prong and the legal relevance prong. Trial counsel is not ineffective for failing to make a non-meritorious objection. Additionally, trial counsel had a reasonable trial strategy and that strategy was applied throughout the case.

Movant's objection to the use of the demonstrative exhibit as it relates to the closing argument is without merit. There is nothing in the trial transcript of the closing argument relating to the use of the demonstrative exhibit. The prosecutor in closing reviews the evidence and argued reasonable inferences, but there is nothing to suggest the defendant's attorney should have objected to the use of a demonstrative exhibit in closing. There is no evidence to suggest

that trial counsel's failure to object resulted in a substantial deprivation of defendant's right to a fair trial. Claim 8I is denied.

Claim 8H: Trial Counsel was Ineffective for Failure to Object

Movant asserts a series of claims relating to trial counsel's failure to object to specific evidence, testimony or argument during the course of trial. Decisions concerning whether or when to make objections are left to the judgment of counsel. *Lewis v. State*, 767 S.W.2d 49, 53 (Mo. App. W.D. 1989). Moreover, ineffective assistance of counsel is not to be determined by a "post-academic determination that counsel could have successfully objected to evidence in a given number of instances." *Id.* at 53. Even the failure to object to objectionable evidence does not establish ineffective assistance of counsel unless the evidence resulted in a substantial deprivation of the accused's right to a fair trial. *Id.* A strong presumption exists that counsel's failure to object is a sound trial strategy. *Butler v. State*, 108 S.W.3d 18, 25 (Mo. App. W.D. 2003).

Part One-- Trial Security

Movant alleges that his trial counsel were ineffective for failing to object to the presence of security during his trial.

This Court finds that the jury members were sequestered throughout the proceedings and no evidence has been presented to suggest that any of the jurors actually had contact with officers who were present for the purpose of providing trial security. Although several jurors testified at the evidentiary hearing and deposition, none testified that they observed substantial security personnel present at the time of trial, or that the presence of any security personnel influenced their opinion of Movant or the facts of the case. Trial counsel Kessler testified that when the Movant was in front of the jury he did not have handcuffs or a bulletproof vest on his person. Kessler also recalled that the jury did not come through a group of uniformed persons to get in and out of the courthouse, and that Movant was not present outside when the jury was

being transported to and from the courthouse. Kessler confirmed that if he thought the jury would have seen something like an officer with an assault rifle, he would have brought that to the attention of the court.

Moreover, the need for security in the courthouse and for the trial is important for the trial court to consider. The state's interest in maintaining a safe courtroom and surroundings has to be balanced with the defendant's right to a fair trial. Here, evidence was presented during the sentencing phase of the trial that demonstrated that Movant had made threatening statements to law enforcement officers both during the investigation of the death of Sgt. Graham, as well as during the time he was incarcerated awaiting trial and sentencing. In addition, the very nature of a case where a person is not only charged with a violent murder but facing the death penalty or life incarceration without the possibility of parole warrants the presence of additional security beyond that which is typical in a rural county courthouse, such as the one where this trial was held. Trial counsel Molly Henshaw testified at deposition that she recalled that she understood at the time of the trial that security personnel were present to protect Movant from threats to his personal safety. She also stated that she observed that security personnel had placed Movant in a bulletproof vest during transport to protect him.

Finally, this Court has reviewed a motion filed by Movant's counsel requesting that the trial court limit the presence of law enforcement officers. That motion was denied by the Court, but shows that the Court was aware of the concerns of Movant's counsel regarding the presence of law enforcement officers in the courtroom. *See State v. Clover*, 924 S.W.2d 853, 856 (Mo. banc 1996). The trial court was on notice from the prior objection and in the best position to determine whether the law enforcement presence at the trial was distracting or had the potential to improperly influence the jurors. This court will defer to the trial court's judgment and perception given that there is no evidence which clearly demonstrates that the courtroom lacked the appearance of neutrality necessary to afford the Movant a fair trial such that trial counsel

should have made an objection or that the objection would have been sustained had it been made at trial. Because Movant has not met his burden by providing that evidence, Part One of Claim 8H is denied.

Part Two – Statement of Prosecutor During Testimony of Lisa Hart

Movant claims that his counsel should have objected, requested a mistrial, or requested a curative instruction based on a statement by Prosecutor Bellamy during the testimony of witness Lisa Hart. The relevant portion of the trial transcript follows:

Q. Did you know Mae Shockley?

A. No.

Q. Do you know why her car would be across from where Sergeant Graham was murdered –

A. No.

Q. – on March 20, 2005?

A. No.

MR. BELLAMY: Someone does.

THE COURT: Keep the comments to yourself.

(Trial Transcript p. 1914).

This Court finds, consistent with the Missouri Supreme Court in this case, that the comment by the prosecuting attorney was not a direct comment on Movant's failure to testify and also that Movant has not demonstrated that the comment had a decisive effect on the jury. As the Supreme Court noted, by the time Prosecutor Bellamy made that statement, the question of who had parked the red car on the cutoff road near Sergeant Graham's street, and whether that red car was the grandmother's car, was already a central issue in the case at trial. The single statement that someone had to know why it was there, which could have referred to many people in addition to the defendant, did not change that focus or add to it. Further, the prosecutor was

immediately told to keep his comments to himself, and the comment was never repeated or emphasized. This Court concludes, consistent with the Supreme Court that this comment could not have caused a miscarriage of justice.

Movant suggests that the ruling of the Supreme Court as to whether the failure by the trial court to grant a mistrial *sua sponte* was plain error is a different question from whether trial counsel was ineffective by failing to object to the admission of the evidence at trial. While the standard on direct appeal is not identical to the standard in the post-conviction case, the two inquiries are not completely dissimilar. This Court does not find that an objection, request for mistrial, or a request for a curative instruction would have been granted if requested, as the statement by the prosecuting attorney was not a direct reference to Movant's failure to testify. The jurors were instructed that the questions and arguments of counsel are not evidence. The prosecuting attorney was admonished by the Court without prompting from trial counsel. This court finds that an objection at that point, even with a curative instruction, would have drawn further attention to the statement by the prosecuting attorney, and that to avoid that additional attention it would have been reasonable for trial counsel to refrain from making such an objection at this point. Finally, this Court does not find that Movant can demonstrate prejudice from that statement such that a substantial deprivation of the Movant's right to a fair trial occurred.

Part Two of Claim 8H is denied.

Part Three – Testimony of MSHP Trooper Warren Wiedemann

Movant alleges that he was prejudiced because trial counsel failed to object to the testimony of Trooper Warren Wiedemann, who stated during the trial that he wouldn't expect there to be blood spatter on the person of the shooter in this case.

Kessler testified that he recalled that Weidemann testified as a trooper, but not as a blood spatter expert. Kessler stated that it was his strategy not to object to the testimony of

Wiedemann on direct examination, because he knew that on cross-examination he could flip Wiedemann's testimony in Movant's favor, confirming that while the shooter wouldn't have blood spatter on his or her clothing, neither would an individual who was not the shooter. Specifically, Kessler wanted to use the Trooper's testimony to demonstrate that the lack of evidence in Movant's home, car, and on his clothing was consistent with him not being the person who killed Trooper Graham, which he was able to do on cross-examination because he allowed Wiedemann's testimony to come into evidence.

This Court finds that trial counsel had a specific, reasonable trial strategy for allowing Weidemann's testimony to be admitted without objection and that Movant has demonstrated that the failure to object deprived him of his right to a fair trial. Part Three of Claim 8H is denied.

Part Four – Testimony of MSHP Trooper Arty Torbeck

Movant alleges that he was prejudiced by testimony of Trooper Arty Torbeck, who testified at the beginning of direct examination that he was friends with Sergeant Graham. Movant alleges that this was not relevant and that he was prejudiced because the testimony was somehow designed to elicit an emotional response from the jury. To the contrary, Kessler testified at his deposition that he didn't consider the testimony of Trooper Torbeck regarding his personal relationship with Sergeant Graham to be prejudicial in nature. This Court agrees, and even extends that logic further to assume that some jurors might have perceived that the testifying Trooper had some sort of underlying bias in his testimony about the offense because of a personal connection to the victim.

In addition, Kessler stated that objecting to things that "aren't going to make a difference" makes it appear to the jury that counsel is trying to hide something. As such, declining to object to evidence that isn't prejudicial is a matter of trial strategy. As prior courts have held, when and whether to object is presumed to be a matter of sound trial strategy and this claim underscores the logical purpose of the law being what it is in that regard. It is extremely

subjective what might help or hurt an accused's case, and any possible objection or failure to object must be considered by trial counsel in the context of his or her personal style, the timing, the likelihood of the objection being successful, the overall case strategy, and the possibility that the jurors might be annoyed or offended by the objection itself. For these reasons, courts are to give wide latitude to trial attorneys in terms of allowing them to make these strategic decisions in the moment without second-guessing them except in the most extreme of circumstances.

This Court does not find that Kessler's trial strategy was unsound, nor does it find that Movant was deprived of his right to a fair trial by the failure to object to this foundational testimony by Trooper Torbeck. Part Four of Claim 8H is denied.

Part Five – Testimony of Laura Smith

Movant claims that his trial counsel was ineffective for failing to object to the testimony of his ex-wife Laura Smith about how Movant dressed and that he had previously stated that only wood should be placed in his wood stove because what was burned in the wood stove was "coming into the house." Smith testified that Movant was always careful to burn trash in a burn bin and never in the wood stove used to heat the house. Movant claims his attorneys should have objected that the testimony of Ms. Smith was irrelevant because approximately four years had passed since the conclusion of her relationship with Movant and the information she shared with the jury was too dated to be relevant.

The concept of legal relevance relates to admissibility of evidence. Admissibility requires relevance. The general rule in Missouri is that relevance is two-tier: logical and legal. *State v. Smith,* 32 S.W.3d 532, 546 (Mo. banc 2000); *State v. Sladek,* 835 S.W.2d 308, 314 (Mo. banc 1992) (Thomas, J., concurring). Evidence is logically relevant if it tends to make the existence of a material fact more or less probable. *Smith,* 32 S.W.3d at 546. Logically relevant evidence is admissible only if legally relevant. Legal relevance weighs the probative value of the evidence against its costs—unfair prejudice, confusion of the issues, misleading the jury, undue

delay, waste of time, or cumulativeness. *Sladek*, 835 S.W.2d at 314. Thus, logically relevant evidence is excluded only if its costs outweigh its benefits. *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. 2002).

Here, the evidence of Movant's habits and routines was clearly relevant to the trial, as it helped the jury understand the significance and meaning of key evidence in the case – the overalls and the use of the wood stove. Movant argues, in fact, that the prejudicial value of the admission of Smith's testimony is a result of just how relevant the testimony was. Movant argues that it was prejudicial if the jury used the evidence for the very purpose that it was admitted. The age of the witness's observations and knowledge might also be relevant for the purpose of arguing that her testimony should not be given weight, but this Court notes that the issue of how much weight should be given to evidence is distinct from the issue of whether that evidence is admissible. This Court does not find that the prejudicial value of the testimony of Ms. Smith outweighs its probative value such that an objection to its admissibility would have been sustained by the trial court. Similarly, this Court does not find that the admission of Laura Smith's testimony deprived the Movant of his right to a fair trial. Part Five of Claim 8H is denied.

Part Six – Testimony of Jason Crafton re: peer review,
and
Part Seven – Testimony of Jason Crafton re: shotgun waddings

Movant alleges that the State adduced testimony from Forensic Examiner Jason Crafton to which his trial attorneys should have objected. First, in Part Six, Movant suggests that Crafton testified about the peer review and confirmation process at the Crime Lab with regard to his examination of bullet fragments, which Movant argues was objectionable.

Trial counsel Kessler testified that he did not consider objecting to this testimony by Jason Crafton because there was already a difference of opinion among the State's ballistics experts in this case, because John Dillon would testify that no identification could be made upon

review of the bullet fragments. As the Court has previously discussed, trial counsel adopted a clear strategy from opening, through witness examination, and also through closing of discounting any testimony that there was a "match" or identification made of the bullet fragments when compared to fragments taken from the sawdust pile that Movant had shot into. The testimony by State's witness Crafton that there was a "match" was directly contradicted by the testimony of State's witness Dillon. Trial counsel explicitly argued that Dillon was more experienced and qualified than Crafton, and that this discrepancy in the State's evidence gave rise to reasonable doubt. In addition, Crafton's testimony about supervisor and peer review and confirmation within the Crime Lab was a reasonable and appropriate description to the jury of the scientific process and demonstrated that he adhered to the policies and practices of the Lab and other scientists in the field of firearm and toolmark identification.

Second, in Part Seven, Movant suggests that his trial counsel was ineffective by failing to object to testimony from Jason Crafton about shotgun waddings. Movant failed to develop this claim through evidence adduced at the evidentiary hearing and did not meet his burden to do so, thereby abandoning this portion of the claim such that it cannot be considered on its merits.

This Court finds that trial counsel's strategy as it related to the testimony of Jason Crafton about ballistics evidence was sound and Movant was not denied a fair trial when his counsel failed to object to evidence when that failure to object was consistent with the sound trial strategy of relying on the testimony of State's Expert Dillon to undermine the credibility of witness Crafton's testimony about the ballistics evidence in the case. Parts Six and Seven of Claim 8H are denied.

Part Eight and Part Nine – Closing Argument

Movant makes two claims relating to trial counsel's failure to object during the State's closing argument.

First, Movant claimed that the prosecutor made an improper reference to Movant's wife, Coree Shockley's failure to testify. As no evidence was adduced at the evidentiary hearing relating to this claim, the Court does not consider it on its merits and it is denied.

Second, Movant alleges that the prosecutor improperly referenced the Movant's failure to testify when he stated that evidence about the presence of the Movant's grandmother's vehicle near the scene of the murder was uncontroverted and that no explanation was offered other than that Movant had driven the car to that location when he committed the murder. Trial counsel Kessler testified that he did not consider the statements to that effect improper, as it was true that the evidence that the car was there was not directly controverted, and the jurors are permitted to draw logical inferences from evidence presented. If the jurors believed that the car was present at or near the location of the murder at the time of the murder, it was one logical inference that Movant had driven the car there.

Merely stating that evidence is not contradicted or that an accused has failed to offer evidence is not a direct and certain reference to a defendant's failure to testify. *State v. Gardner*, 743 S.W.2d 472, 473 (Mo.App., E.D. 1987). The statement that there was no other logical inference that could be drawn from the evidence was proper argument in that it was the state's position. The jurors were instructed that the argument by the attorneys are not evidence, but that the jurors should recall the evidence presented. This Court finds that the statement was neither a direct, nor indirect, reference to the Movant's failure to testify. As such, the objection is without merit and Part Nine of this claim is denied.

Claim 8L: Trial Counsel was Ineffective for Failure to Object and Preserve Issues for Appeal

Movant claims that his counsel was ineffective for failure to properly object and preserve for appellate review: 1) evidence adduced relating to all the highway patrol officers killed in 2004 and 2005, 2) a disc containing a photomontage displayed at the victim's funeral, and 3)

photos of the people at the victim's funeral, 4) a drawing made by the victim's son depicting his death, 5) the presence of uniformed officers at the sentencing proceeding, 6) the imposition of the death penalty by Judge Evans, an elected official. Movant asserts that his conviction and sentence would have been reversed on direct appeal if the objections had been made and the objections had been made and properly preserved.

To prevail on this claim, Movant must show that his counsel's objections would have been upheld if made and that the failure to object resulted in a substantial deprivation of his right to a fair trial. *State v. Clemons*, 946 S.W.2d 206, 228 (Mo. banc 1997). Movant has failed to meet this burden.

Parts One through Four – Victim Impact Evidence

The evidence referred to in points 1-4 of Claim 8L is all victim impact evidence. Victim impact evidence is admissible under the United States and Missouri Constitutions. *State v. McLaughlin*, 265 S.W.3d 257, 273 (Mo. banc 2008). A trial court has broad discretion to admit whatever evidence it determines may be helpful to the jury in assessing punishment. *State v. Bowman*, 337 S.W.3d 679, 691 (Mo. banc 2011). The state is permitted to show the victims are individuals whose deaths represent a unique loss to society and to their family and that the victims are not simply faceless strangers. *State v. Gill*, 167 S.W.3d 184, 195 (Mo. banc 2005); *see also McFadden,* 391 S.W.3d at 423 ("Victim impact evidence, and related argument about the impact of the crime upon the victim and victim's family, is admissible in the penalty phase."). Victim impact evidence violates the constitution if it is "so unduly prejudicial that it renders the trial fundamentally unfair." *State v. Forrest,* 183 S.W.3d 218, 225 (Mo. banc 2006). Clearly, victim impact statements are admissible to illustrate the loss to the family. *Gill*, 167 S.W.3d at 195. Further, admission of photographs is not *per se* prejudicial to a defendant.

Trial counsel for the Movant stated that it is their preferred strategy not to object during the penalty phase of the trial for two reasons: First, because the jury might be offended when the

attorneys for Movant try to restrict the family and friends of a murder victim to speak about the extent of their grief. Second, objecting too much may encourage the State's attorneys to object more to evidence that the Movant wants to admit, which could be damaging to the Movant's case and argument. The Court finds both of these explanations compelling and affirms that they constitute reasonable trial strategy on the part of counsel.

This Court finds that the victim impact testimony presented during the penalty phase of Movant's trial served to illustrate the victim's value to the community and the widespread impact of his death on his friends, family, and co-workers. Movant has not demonstrated that the evidence presented was prejudicial and rendered the trial fundamentally unfair as required by law. As such, trial counsel is not deemed ineffective for failing to make an objection this Court finds would have been without merit.

Part Five – Presence of Uniformed Officers

Movant claims that his trial counsel was ineffective for failure to object to the presence of uniformed police officers who were present at his trial. Movant claims that the presence of the officers showed a "strong police presence and solidarity with the victim thereby sending a strong message to the jury to convict" and conveyed "the message that Movant was a very dangerous person, necessitating a number of armed guards." Movant also alleges that the security measures taken at trial were beyond "normal security measures."

A trial court has wide discretion in determining whether to take action to avoid an environment for trial in which there is not a "sense or appearance of neutrality." *State v. Baumruk*, 85 S.W.3d 644, 650 (Mo. banc 2002). In this case, the trial judge denied a motion filed by Defense Counsel Tom Marshall to restrict the presence of uniformed officers in the courtroom, but warned that the officers present in the courtroom to be careful, as the presence of too many uniformed officers in the courtroom could "send the wrong message." This demonstrates that the trial court judge was aware of the potential for an issue relating to the

presence of uniformed officers in the courtroom. Because the judge who presided over the trial was actually present at trial, he is in the best position to determine whether the actual circumstances at the time of the trial and sentencing somehow prejudice a defendant at trial. *See State v. Clover*, 924 S.W.2d 853, 856 (Mo. banc 1996). Moreover, when private counsel entered the case, a stipulation "As to the Proper Dress of Police Officers Not Testifying in the Trial" was entered into by the parties, and is part of the court record. That stipulation specified that all police officers not testifying but wishing to view the trial should be out of uniform with no visible sidearms.

Movant fails to demonstrate specific facts which would warrant relief. There is no evidence that any members of the sequestered jury came into contact with law enforcement officers in the courthouse during the trial. The law enforcement officers who were present were there either as victims in that they were friends and co-workers of the victim, or as security. Private counsel worked to ensure minimal impact of the presence of law enforcement personnel on the perception of the jury by drafting a stipulation by the parties that officers who were not security or witnesses at the trial would dress in a manner such that it would not be apparent that they were law enforcement during the trial itself. Additional security beyond what is "normal" for the rural county courthouse where this trial was held is to be expected given the nature of this case. Further, Movant fails to present any fact that would support the ultimate conclusion that the presence of law enforcement officers at trial and as trial security could have influenced the outcome of Movant's trial. The Court finds that there is no evidence, beyond speculation, that any impermissible influence reached the jury such that Movant was not provided with a fair trial.

Part Six – Judge

Movant claims that trial counsel was ineffective for failure to object to Judge Evans, an elected official, imposing the death penalty. Movant suggests that the death penalty, as practically applied in most Missouri jurisdictions, is inherently unconstitutional in that it violates

Movant's right to be free from cruel and unusual and arbitrary punishment, as guaranteed by the 8th Amendment of the United States Constitution and Article I, §21 of the Missouri Constitution.

This claim is not cognizable within the current action. Post-conviction relief under Rule 29.15 is not a substitute for direct appeal or to obtain a second chance at appellate review. *Zink v. State*, 278 S.W.3d 170 (en banc). Claims challenging the constitutionality of the death penalty are for direct appeal and are not cognizable on a motion for post-conviction relief. *See Jones,* 979 S.W.2d at 181. Movant has not identified any reason that the Missouri Supreme Court's review of the death penalty as applicable to this case is somehow insufficient. *See State v. Shockley*, 410 S.W.3d 179 (Mo. en banc.). In support of this claim, Movant cited only the dissenting opinion written by Justices Sotomayor and Breyer from the United States Supreme Court's denial of a petition for writ of certiorari in *Woodward v. Alabama*, 571 U.S. -- (November 18, 2013). This Court notes that this dissent is not an opinion of the Supreme Court, it is not law, and it is not binding on this Court in any way.

Finally, even if this issue were to be considered by the Court as part of Movant's 29.15 claims, Movant cannot demonstrate prejudice, as the Missouri Supreme Court has consistently upheld Missouri's death penalty scheme as constitutional, suggesting that any objection to the imposition of the death penalty in a manner consistent with Missouri law would not have been sustained by the trial court or upheld on appeal. See *State v. Carter*, 955 S.W.2d 548, 562 (Mo. banc 1997).

Movant's claim 8L is denied.

Claim 8M: Trial Counsel was Ineffective for Failure to Investigate, Subpoena, and Call Additional Mitigation Witnesses; and

Claim 8N: Failure to Investigate and Present Evidence of a Sawmill Business

In Claims 8(M) and 8(N), Movant alleges that trial counsel was ineffective for failing to investigate and present additional mitigation witnesses and evidence. While it is possible for

counsel to be ineffective during the penalty phase of a capital case, the determination of effectiveness is not based solely on who or how many witnesses were called to testify. The United States Supreme Court applying *Strickland* set forth the standard of review and appropriate analysis of this issue in *Wiggins v. Smith*, 539 U.S. 510 (2003).

Wiggins was convicted of murder and sentenced to death. He sought habeas review of the death sentence on the grounds that trial counsel was ineffective in the presentation or lack thereof of mitigation evidence. The United States Supreme Court provided both general and specific guidance on this issue. Generally:

> "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, ***522** applying a heavy measure of deference to counsel's judgments." *Wiggins, quoting Strickland* at 690-691

When considering this standard and analyzing the mitigation case presented, the United States Supreme Court provided this analysis for courts to utilize:

> In light of these standards, our principal concern in deciding whether Schlaich and Nethercott [trial counsel] exercised "reasonable professional judgmen [t]," *id.,* at 691, 104 S.Ct. 2052, is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable. Ibid.* Cf. *Williams v. Taylor, supra,* at 415, 120 S.Ct. 1495 (O'CONNOR, J., concurring) (noting counsel's duty to conduct the "requisite, diligent" investigation into his client's background). In assessing counsel's investigation, we must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," *Strickland,* 466 U.S., at 688, 104 S.Ct. 2052, which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time," *id.,* at 689, 104 S.Ct. 2052 ("[E]very effort [must] be made to eliminate the distorting effects of hindsight").
> *Wiggins* at 523.

The evidence presented at the post conviction trial establishes that Movant's counsel conducted

an in-depth investigation into Movant and potential mitigation evidence. This investigation included hiring experts to evaluate the defendant's mental health, hiring mitigation experts to help develop the defendant's life story, collecting various documents regarding the defendant's past, and interviewing individuals who knew and were familiar with the defendant.

While the evidence establishes that an extensive investigation into potential mitigation was conducted, it is also incumbent upon this Court to determine whether trial counsel's strategy with regards to mitigation evidence was reasonable. In *Wiggins* and other death penalty cases, the United States Supreme Court has used references such as the American Bar Association's publication of Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases (Revised Edition 2003) to help determine what is reasonable in the death penalty context.(http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines) These guidelines set forth what evidence should be considered in mitigation. The guidelines suggest effective counsel will consider things such as:

- Presenting evidence as to what caused the defendant to commit the offense, such as a mental health issue;
- Impact of execution on the defendant's family;
- Client's family history;
- Client's lack of future dangerousness through evidence such as the jail staff;
- The possibility of the client testifying and requesting mercy; but
- Counsel must not open the door to additional prosecution evidence.

Trial counsel knew that once the jury found Movant guilty, there was no credible evidence which could be presented to explain a mitigating "cause" for Movant's actions. Movant had a history of assaulting law enforcement and not respecting authority. The State presented this evidence in the sentencing phase through the certified record of the prior conviction for assault on a law enforcement officer (State's trial exhibit #252) and the testimony of Deputy Chester Brewer. (trial transcript p2089). The jury's verdict essentially found that Movant's decision to kill Sgt. Graham was motivated by covering up Movant's criminal liability for involuntary manslaughter and leaving the scene of a fatality collision. Trial evidence

established Movant was a danger to anyone who crossed him. Movant compounded the argument of his dangerousness by his own actions while in pretrial custody. Howell County Jail Administrator Lynn Rhoads testified that Movant threatened him by saying, "I will kill you" and "fuck me in the ass and come on my face." (trial transcript p2094). Movant's own actions made it impossible to argue that Movant was not a future danger.

Trial counsel discussed with Movant his right to testify during the sentencing phase. Movant chose not to testify in his own behalf during the sentencing phase. However, it would not have been a good strategy for Movant to testify. If Movant chose to testify and request mercy without admitting guilt, he potentially opened up the door to testimony regarding his alleged admission that he killed Sgt. Graham to his prior attorney, Ms. Zembles. This strategy could potentially inflame the jury and act as an aggravator if the jury thought Movant was lying to them. In addition, it would have given the jury confession evidence to consider along with the appropriate sentence for the Movant, which might have made some of the jurors more comfortable suggesting the imposition of the death penalty.

Counsel was aware of the mental health of Movant. Trial counsel had the benefit of working closely with Movant and knew Movant did not suffer from any mental health deficiencies which would be mitigating. Trial counsel also realized that pursuing an expert in mitigation regarding mental health would potentially open the door to a State examination. This could potentially create a situation in which the jury would become aggravated at an attempt to argue a non-existent mitigating factor. The trial transcript establishes that trial counsel was aware of these issues. When the possibility of the court instructing the jury on retardation was discussed, Mr. Kessler explained that it was not in Movant's best interest to submit an instruction on retardation when there was no evidence of retardation. Mr. Kessler feared that the jury could believe Movant was making an unreasonable request and hold it against him. (trial transcript page 2138).

Trial counsel chose a reasonable and accepted mitigation strategy. Movant's counsel presented some evidence regarding the defendant's life but focused primarily on the impact a death verdict would have on the defendant's family. Movant's grandfather spoke about how Movant's father died and he lived with his grandparents from that time forward. His grandfather also expressed his love for Movant and that he would visit him as long as possible. Movant's cousin testified about how he was a good man and she did not want him to die. Movant's ex-wife and the mother of his daughters testified about how difficult this was on his daughters.

Trial counsel also performed reasonably in his argument requesting mercy and a sentence of life without parole. The ABA standards explain that the closing argument must be personal and evoke empathy. It must be pro-mercy and counsel should object if any instructions are improperly stated. In this case, trial counsel did all of the above. Trial counsel testified that careful consideration was given to who should be called to testify at the mitigation phase of trial. Attorney David Bruns specifically testified that his objective in the mitigation phase of trial was to call witnesses who had good stories about the Movant and who could tell about the impact of Movant in their own lives. It was important that these be witnesses the jury would care about. Bruns confirmed that he would not have called witnesses who had negative stories to tell about Movant, including anyone who was with him when he was committing other uncharged criminal offenses, or family members with whom his relationship was not always positive.

Movant called several witnesses at his post-conviction evidentiary hearing to show what their testimony would have been during the mitigation phase of the initial trial if they had been called. This Court heard their testimony, and recalls that several of them had stories to share about the Movant which were not entirely positive. For example, witness Tony Towner testified that he had been out drinking and driving with Movant and reports provided by law enforcement indicated that he had been asked by Movant to call if he saw law enforcement headed toward Movant's home around the time of the offense. Towner would not have been an entirely positive

witness. Joby Sanders testified that he was a friend of Movant, but confirmed that Movant had a temper and liked to shoot guns. He testified that Movant once shot a cat and got in trouble for it. Joby Sanders testified that he had been out drinking and driving with the Movant and also stated that he believed that Movant was growing marijuana.

Other witnesses, like Billy Morgan, had limited interaction with Movant as an adult. Morgan testified that he played basketball with Movant and saw him around town. He said that his only interaction close in time to the offense was in passing or at sporting events. His relationship with Movant was not close. Similarly, Butch Chilton testified that he coached Movant in sports when Movant was a child and was familiar with Movant's family. He was not able to add any recent and specific stories about interaction with Movant and mostly just knew of his family relationships, which was cumulative to evidence adduced through the testimony of Gerald Sanders. Witness Susan Green testified that she was Movant's teacher in elementary school and that he was a typical young boy. She couldn't recall disciplinary actions that Movant said he was subjected to (including corporal punishment) while in elementary school for misbehaving. Her entire experience with Movant in his adult life was limited to seeing him in passing around town. Attorney Kessler confirmed at his deposition that it was not a good mitigation strategy to call witnesses who would say things like that the accused seemed to be a good guy at sporting events or was good with sports, presumably because that kind of testimony from people who were not intimately familiar with the person and character of the accused would not be as moving as testimony of people who deeply loved and cared for him.

Movant called family member Velma Dowdy who was unable to remember specific individuals in the Movant's family but who was also noted in trial counsel files as being someone that the Movant had identified as "crazy" and therefore unreliable. It was reasonable for trial counsel to decide not to call her as a witness, but to call the grandfather of the Movant, whose testimony was more predictable.

Movant did not call Barb Sanders, Erika DeWolf, Mae Shockley, Jim Newton, William Price, or Terri Horstman at the evidentiary hearing, and therefore did not meet his burden to show that they were available to testify at trial or what their testimony would have been if called to testify. Therefore the court doesn't consider the merits of any claims related to them.

Attorney Kessler confirmed in his testimony that during the mitigation phase of the trial, he and other trial counsel decided to stop calling any mitigation witnesses or presenting any mitigation evidence during the testimony of Gerald Sanders for a clear reason. He recalled that Sanders' testimony had the Movant, Sanders, and even some of the jurors in tears. Kessler recalled that in his experience, it was a strategic decision to call witnesses who would evoke an emotional reaction from the jurors during the mitigation phase of trial, and then stop.

Upon review of the entire case file, this Court notes that the mitigation arguments of counsel were somewhat effective, in that the jury did not decide unanimously to impose the death penalty, even after finding multiple statutory aggravators that would have made the offense that the Movant was found guilty of death penalty eligible. While it is impossible for a judge to review in hindsight every decision of who to call and who not to call during this phase of the trial, it is clear from the record that trial counsel conducted a thorough investigation of the potential mitigation evidence by reading the extensive files and notes of the public defender's mitigation specialist, speaking with individuals who knew Movant, and speaking with Movant about the mitigation strategy, all of which was confirmed during the testimony of trial counsel. While Movant has presented several witnesses and additional evidence which may have been presented in mitigation, it is not clear that presenting that testimony would have changed the outcome at trial in any way. This Court finds that a thorough investigation was conducted and the mitigation evidence and argument were reasonable. These claims are denied.

Claim 8O: Denied Fair and Impartial Jury/Judge

Movant's Claim 8(O) makes several different allegations all surrounding Juror #58.

Movant claims that there was juror misconduct, judicial misconduct, and trial counsel ineffectiveness as it relates to the discovery that Juror #58 wrote a book titled Indian Giver. While Movant provides several theories for relief, this Court will not grant a new trial on a theory that something may have been done differently. As the United States Supreme Court expressed in *Strickland*, hindsight review must be done very cautiously and focus on the reasonableness of the decision under the facts and circumstances at the time the decision was made. *Strickland v. Washington,* 466 U.S. 668, 689 (1984).

CLAIM 8(O) Part I – Juror Misconduct

First, this Court is reluctant to consider the juror misconduct allegation in this post conviction setting. Movant has failed to cite any law that suggests a Rule 29.15 post conviction remedy is appropriate for this claim. Movant cites *State v. Taylor*, 917 S.W.2d 222 (Mo. App. W.D. 1996) for the general proposition that a new trial is required if there is prejudicial juror misconduct when the jury considers information not presented at trial. Movant also cites *State v. Babb,* 680 S.W.2d 150 (Mo. en banc 1984) as authority on how to analyze any alleged improper influence on the jury. Both of these cases deal with a direct appeal. The one Missouri post conviction case cited by Movant, *Maynard v. State*, 87 S.W.3d 865 (Mo. en banc 2002) does not provide any guidance on analyzing Part I or Part II of this claim. *Maynard* deals with an allegation that defense counsel's failure to raise an issue regarding potential juror misconduct created ineffective assistance of counsel. Movant also references *State ex rel Koster v. McElwain*, 340 S.W.3d 221 (Mo. App. W.D. 2011), which addresses the analysis of a habeas corpus claim wherein the jurors allegedly received improper evidence during deliberations.

Missouri post conviction cases dealing with the issue of juror bias or misconduct are rare. The primary cases provide little guidance on the analysis to apply and were decided under Rule 27.26, the predecessor to Rule 29.15. In *Pickett v. State*, 690 S.W.2d 826 (Mo. App. E.D. 1985), the trial court heard evidence on the issue juror bias and/or misconduct in a Rule 27.26 post

conviction hearing. The trial court denied the motion. The Eastern District Court of Appeals affirmed this ruling and held, "Juror bias or misconduct constitutes trial error and is outside the scope of Rule 27.26 proceedings. Rule 27.26(b)(3)." *Pickett* at 826. In *Forbes v. State*, 627 S.W.2d 58 (Mo. App. W.D. 1981) at an evidentiary hearing on a Rule 27.26 motion, Movant alleged that there was juror misconduct because a juror ate lunch with his wife during the lunch break and probably discussed his prior convictions. The appellate court affirmed the trial court's findings of fact and conclusions of law which held that "there was no juror misconduct but said alleged misconduct is not cognizable under Rule 27.26." *Forbes* at 60. While these cases indicate that juror misconduct is not cognizable in a post conviction claim, both trial courts heard evidence on the alleged misconduct. Therefore, this Court will receive and analyze evidence on this claim.

Movant's allegation of juror misconduct is premised on the position that Juror #58's possession of the book during sequestration and distribution of his book violated the trial court's instructions. As this claim is analyzed, it is important to note that not everyone on the jury was given this book. Based upon the testimony of Juror #58, the book, Indian Giver, was given to the jury coordinator (Michelle Nigliazzo) (Cantor deposition testimony p12 line 2), a juror named Ken (Cantor deposition testimony p12 line 8), the security officer (Mike Wall) (Cantor deposition testimony p13 line 20), and to one other juror (Cantor deposition testimony p13 line 12). The books given to juror Ken and the other female juror were returned to Juror #58 (Cantor deposition testimony p16 lines 7, 17). Officer Wall testified that he did not read the book but instead gave it to April Mayfield, Judge Evans' secretary, so the Judge could see the book because it was out of the ordinary for a juror to have written a book. (Wall deposition testimony p 17). Officer Wall also testified that he never saw the book until he was provided a copy and never heard anyone discussing writing the book, publishing the book, or anything about the book. (Wall deposition testimony p17 line 25, p24 lines 16-22, p25 line 13.) This Court finds

that distribution of this book was minimal.

Movant's allegation that the trial court's instructions were not followed is not supported by the evidence. First, the trial court read Missouri Approved Instruction, Criminal, 300.04, to the jury. (see below) This instruction expressly prohibits jurors from hearing, reading, or seeing any news stories about the trial. The instruction expressly prohibits communications with the jury by parties and instructs the jurors not to discuss the case with anyone. After reading this instruction, the trial court had the jurors, including Juror #58, take an oath not to violate the Instruction. (see trial transcript 986) There is no allegation that this mandated instruction was violated.

Instead of claiming that an approved instruction was violated, Movant focuses on general comments of the court regarding how the trial and sequestration would work and what types of items could be brought for the trip by the jurors. The court's general comments do not have the same legal significance as the Missouri Approved Instructions. In *State v. Storey*, 901 S.W.2d 886 (Mo. en banc 1995), Storey alleged that the jury was provided improper instruction when the circuit court mailed a routine pamphlet to all potential jurors with generalized statements of law. The Missouri Supreme Court held:

> A jury instruction is a 'direction given by the judge to the jury concerning the **law of the case**.' *Black's Law Dictionary 856 (6th ed. 1990).* The informational pamphlet is not a jury instruction. Jurors are presumed to follow actual instructions – those received from a judge in court."
> *Storey* at 892. *See Zafiro v. United States*, 506 U.S. 534 (1993) (**emphasis added)**.

Storey's claim was also denied on the grounds that he could not prove any prejudice based upon the information in pamphlet. *Storey* at 892.

A review of the trial judge's complete comments clearly establishes that this was not an instruction of the court concerning the law of the case. Instead, the trial court is making general comments about the trial and sequestration. The full comment is as follows:

Starting Trial Transcript p 984 line 14.

THE COURT: Please be seated.
All right. We're back on the record. There are 12 individuals that have returned, for the record, to the courtroom. It's a little after 6:00 on the 19th. These12 individuals, I now will inform you have been selected to be on the jury in this case. There are three other individuals that we tried to contact and we're not going to make you all wait for them to come in, one of which we know is working in another town on the night shift, so it's really hard to get them. They will be brought in and the same information I'm about to discuss with you will be also discussed with them.

I'm going to go ahead and read you the instruction. You've heard this before, but I'll repeat it now again as I told you I would because it is now even more important.

It is the Court's duty to instruct you now upon a matter about which you will be reminded at each recess or adjournment of court. Until this case is given to you to decide, you must not discuss any subject connected with the trial among yourselves, or form or express any opinion about it and, until you are discharged as jurors., you must not talk with others about the case, or permit them to discuss it with you or in your hearing, or read, view or listen to any newspaper, radio or television report of the trial.

The bailiff and other officers of the court are not permitted to talk to you about any subject connected with the trial, and you are not permitted to talk to them about it. And that also includes, as I'll explain in just a minute, we have some volunteer jury coordinators, who are just good citizens that have agreed to assist the jury during this sequestration process, and they cannot talk to you about the case either, and have been so advised.

The attorneys representing the State and the defendant are under a duty not to do anything that may seem improper. Again, therefore, at recesses and adjournments they will avoid saying anything to the jury except, perhaps, something like "Good morning" or "Good afternoon." In doing that, they do not mean to be unfriendly, but are simply doing their best to avoid even an appearance that might be misunderstood that they or you are doing anything improper.

The same applies to witnesses and to the defendant. They have been or will be instructed to avoid all contacts with the jury, even to talk about matters wholly unrelated to the case.

Again, at the start of this jury selection process, I did not know and the attorneys did not know how long it would take. Again, I've been very impressed with you and other citizens here in Carter County willing to take on a very difficult job. I acknowledge that, I know that, and appreciate that, as does everybody in this room. We had plam1ed for the possibility of -- of instead of two days, at least three and a half to four days. It's now completed in the end of two days later, early in the evening.

Again, we can avoid having to sequester the jury now only with the understanding and agreement with each of you that you will follow

that instruction. If you do not believe you can, then we'll start the sequestration process now. But certainly the attorneys have agreed, and I believe it's the best thing to do, to allow everybody to go about their normal business as long as you can and avoid that additional inconvenience. I acknowledge and understand it is an additional inconvenience, so if everybody's willing to agree to that -- to that instruction, I'm just going to repeat a part of that now and ask here in open court, you're under your oath, and if you will follow that instruction and agree particularly not to discuss or permit others to discuss it in your hearing – this case.

So if each of you would agree to that, and this is the same oath that the other three will be required to sign, unless they wish to be sequestered now.

If you would stand, please, raise your right hand, and I'll read this, and if you agree to it, just answer, "I will," at the end.

I understand and agree to follow the oral instruction of the Court -- that I just gave. I will report for jury duty 9:00am on Monday, March 23. That will be here at the courthouse. Until further order or instruction. of the Judge, I will not talk with anyone about the case or permit them to discuss it with me or in my hearing, or read, view or listen to any newspaper, radio or television report of the trial.

If you so agree, state, "I will."

THE JURORS: I will.

THE COURT: Anybody not agree to that? All right. Just have a seat for a minute.

Short recap. And Michele Nigliazzo, the nice lady in the back, again is one of our jury coordinators, the main one. There will also be - That's just a fancy term. She's a volunteer kind of like a candy striper, but a good person that has agreed to help out, but also an officer of the court, more important perhaps than a candy striper. She works for me. She's a liaison between me and directly with the jury, under the same rules I have, cannot discuss the case with you, but will be assisting you in getting meals, meeting any needs each of you may have during this trial, dealing with any emergencies, assisting in arranging contact with family.

I will be approving phone contact. It will have to be somewhat limited. At this point, there will be some limited phone contact in the evening, we'll try to work out possibility of early morning. But this is the problem. There's 15 individuals, even a five-minute call, that takes over an hour and 15 minutes, even if we had short of a call, so we're going to have to limit the time and the length.

You will be reporting Monday morning at 9:00 a.m. here. Again, we'll have two transport vans, you'll be taken to Howell County. My plan then is to meet-- I'm not sure if I'll be in court or be able to meet with you, but briefly get a tour of the courthouse just to get the lay of the land-- you know, it's not any -- too much bigger than this courthouse, view the jury room, facilities there, get back in, go back to the hotel, unpack your bags, get settled there. It'll be about lunchtime roughly then, go to lunch, then we're planning-- if we can do it a few minutes early, fine, but roughly 1:30 Monday start with opening statements and evidence after that.

Because most -- I think you probably will -- At this point, we're planning on starting up then each day at 8:30 -- normally it's at 9:00, but to try to move things along as quickly as possible - and plan to stop roughly between *5* :00 and 5:30 each day. Sometimes we may have to go a little later depending on. witnesses and maybe sometimes even a few minutes early, again depending on witnesses and where the case stands at that point. If we need to, on occasion we might have to go later.

It sounds like, you know, an easy thing to sit there in the abstract for eight hours a day and listen to testimony, but that -- because this is a very important case, can be a very intense experience by itself because each of you will be very closely, intently listening to the evidence, and I've been in this business a long time and you can get dog tired by very closely and intently listening to evidence sometimes as much or more as working out in the hot sun all day long because you are concentrating and expending a lot of mental energy in that effort. So it's not something - nor I -- I, quite frankly, after eight or nine hours, even after I've been doing it 18 years, get -- it becomes difficult to concentrate very intently on the evidence and I've got to take a break. So we don't plan on too much longer than that because it's just a hard job, it really is.

You will be going, again, transported back and forth for meals and to the hotel. Michele has arranged for certain activities. Again, these are things you do not have to do. I'm the kind of guy that is a bookworm and could hole up in a cave somewhere and read a book for three or four days and would be content as possible. Most people, including my wife who complains about that, are not cut from that same -- same fabric, so we will have some optional activities available. You will be able to bring books with you, even movies with you, to the trial. The cautionary note on there, the only one the attorneys ask that I mention, avoid movies and books about trials, particularly periodicals or legal documents. That's normally something, again, the law has to be supplied by the Judge, not due to your independent research and investigation. So general movies, avoiding crime shows and issues of that nature.

And I invite Michele up now just briefly. She has a jury questionnaire. This is something that is optional. The one sheet that I would like for you to fill out is the emergency contact information. We will give -- She actually has a form in there that we will hand out to your family that can tell them how to get ahold of us and get ahold of you as well. There's an optional medical form in there. If you have medical issues and you want to tell us about them in case that we need to assist you in getting medical care, we ask you to fill that out as well. These forms will be destroyed after this trial and will be kept confidential.

There is an optional form in there for activities. If you're the kind of person like me that may not participate in all those, don't fill it out, and don't feel uncomfortable about doing that. If you have some suggestions that-- again, this is an optional thing that we came up with just to help the jury through this experience and have something to do during the evening, but completely optional.

And again, she's volunteering as well as two others. We'll have two people stay with the jury at night, not literally in your room. You'll have

> your own separate hotel room, each of you. There will be a couple there at night for emergencies. They can be reached at night if we need to get calls to you, a male and a female, so if there are female or male issues, you wish to talk separately and get their attention, you can do that as well. Michele, go right ahead.
>
> END of Judge Evans' remarks – Trial transcript p 989 line 20

The evidence does not establish any intentional misconduct on the part of Juror #58, but at most a miscommunication about what the court intended. An analogous situation arises when there is unintentional non-disclosure during voir dire. When analyzing juror non-disclosure in voir dire, the court considers whether the non-disclosure is intentional or unintentional. "Unintentional non-disclosure involves an insignificant or remote experience, misunderstanding the question, or disconnected information." *State v. Lane*, 415 S.W.3d 740, 755 (Mo. App. S.D. 2013), *See also, State v. Miller*, 250 S.W. 3d 736, 743. "If unintentional, a new trial is not warranted unless the party can show the non-disclosure may have influenced the verdict[.]" *Lane* at 755.

This Court reviewed all of Juror #58's statements in reaching its decision that there is no intentional misconduct. Throughout voir dire, Juror #58 expressed his ability to be fair and impartial. In fact, Juror #58 volunteered information that he was an author and his son was a police officer because he thought that might be important. Juror #58 was questioned under oath during this litigation. A review of his testimony, establishes that there is no indication Juror #58 intended to violate any of the court's directions or instructions. Some of the most relevant portions of his testimony read as follows:

(Cantor deposition testimony p21 lines 12 – 25)

> Question: Okay, I'm going to show you, do you recall on March 19th, back here (indicating), 2009, when you were told by the Court go home, pack your bags, do you recall being given an instruction not to bring certain materials, and what do you recall

about that?

Answer: Let's see. If I remember correctly, no tape recorders, no notebooks, no keeping notes of the trial or anything in your room.

Question: Okay. Now do you recall being, the judge telling you and other jurors to avoid bringing any books about trial and crimes and things of that nature?

Answer: No ma'am.

(Cantor deposition testimony p 23, p 24 lines 20-25, p 25 line 1)

Counsel reads into the record a large portion of Judge Evans directions to refresh Juror #58 as to what Judge Evans stated. Juror #58 then responds:

Answer: So based on what you read, I complied, you know, my book is not about jury trials or transcripts and stuff like that, it's a love story, basically, you know, but there was

Question: (By Ms. Willibey) It's a love story?

Answer: There was one chapter or so in there, I believe chapter about the court.

Movant's counsel was not satisfied with Juror #58s answers and challenged him on several points.

(Cantor deposition testimony p31 line 22 – p33 line 25)

Question: When you wrote the book, did you intend to convey a message to your readers?

Answer: Yes, the message I wanted to convey to my readers is that, you know, life goes on and if you read the book, the very last page, the very last chapter, it sets everything right, you know.

Question: Some of the things that I just asked you about with some of the themes or parts of the plots of the book, do you share some or any of those viewpoints expressed in your book?

Answer: No ma'am, I don't share, I'm not, I served my country for 20 years, I love this

country. Like I say, I obey all the laws that I can, you know. If you want to get into political discussions, things like this here, I love a good debate but I trust our government and I trust the country to do what's right. The pendulum will swing one way, then it swings the other.

Question: It wasn't really, it's not really a political viewpoint, it's more that, you know, some people feel that our court system lets criminals or people charged with crimes get off too easily or it's too lenient, I mean there's that general sort of viewpoint. Democrats and Republicans, I don't know that it's isolated politically, so that's kind of what I was getting at with that viewpoint which is, I mean do you agree that your book expresses that?

Answer: My book expresses that for the story. It's not my expression and my belief in that, I don't. Do we have people going to jail, you know, that maybe shouldn't? Yes. Do we have some that get out that shouldn't? Yes, you know. But I didn't use or relate to any of that writing the book, that wasn't the, that was to make the story, it wasn't my personal belief there that our court systems are no good or our judges are no good or anything like that.

Question: But did you think it problematic to pass out a book that did have some of those viewpoints during the trial?

Answer: Honestly I did not give it a thought about that at all, ma'am, because that was such a small minor part of the book there that it never came across. My first book, I was excited you know, and had I to do it over again, no, I would not take the book with me, you know, but it had no bearing on my decision and had no bearing as far as I know on anybody else's decision there.

Judge Evans directions to Juror #58 and the other jurors could easily be understood as not having any books specifically about trials. The reference to crime shows was specific to movies.

Additionally, Judge Evans indicated the purpose of his comment was so the jury would follow the law as the court instructed and not do independent research.

Even though Juror #58's actions were not a violation of the trial court's instructions, this Court will still analyze the facts to see if there could be any constitutional prejudice. "Missouri courts have held that the mere fact that the jury has seen improper evidence does not automatically entitle the defendant to a new trial." *State v. Taylor*, 917 S.W.2d 222, 226 (Mo. App. W.D. 1996) In *Taylor*, the jury foreman went to the library and consulted statutes regarding the range of punishment for the offense and shared that information during deliberations. The trial court evaluated the nature of the non-evidentiary material which the jury was exposed to as well as the circumstances surrounding that exposure when determining the probability of jury prejudice. *Taylor* at 226.

Movant has not presented any evidence that Juror #58's book affected the verdict of guilt in this case. All Movant has established is that two jurors were given Juror #58's book. At most, this is a case where potentially two jurors had access to a book written by Juror #58. Movant does not have a Constitutional right to forbid jurors to have any books with a chapter about a court trial. There is no evidence that the book had any influence on them individually. There is no evidence that the book had any influence on deliberations. This Court will not speculate that jurors may have been prejudiced because they may have read a book. Movant has failed to meet his burden on this claim. Claim 8(O) Part I is denied.

PART II

Movant's second allegation of Claim 8(O) is that the trial judge's action of not timely disclosing when the Indian Giver book was given to his bailiff was judicial misconduct resulting in a constitutional violation. The United States and Missouri Constitution guarantee a criminal defendant an impartial tribunal. *State v. Taylor*, 929 S.W.2d 209 (Mo. en banc 1996). However, "There is a presumption that a judge acts with honesty and integrity and will not preside over a

trial in which he or she cannot be impartial." *Worthington v. State*, 166 S.W.3d 566, 579 (Mo. en banc 2005).

The United States Supreme Court addressed a similar issue in *Rushen v. Spain*, 464 U.S. 114 (1983). Spain was one of six inmates involved in a 1971 San Quentin prison escape that resulted in the deaths of three prisoners and three corrections officers. *Rushen* at 115. During voir dire, prospective jurors were asked to reveal their associations with groups such as the Black Panthers and any violent crime that they were closely associated with. *Rushen* at 115. A juror, Fagan, indicated she did not have any association with the Black Panthers and had no personal knowledge of violent crimes. *Rushen* at 115. During the 17 month long trial, evidence was presented by the defense regarding an informant named Pratt. *Rushen* at 115. The evidence regarding Pratt triggered Fagan's memory that he had murdered a childhood friend. *Rushen* at 116. Based upon this realization, juror Fagan went to the trial judge's chambers on two separate times to discuss her relationship with the murdered victim. *Rushen* at 116. The trial judge asked her if her ability to be fair and impartial would be affected and she assured she could be fair. *Rushen* at 116. The trial judge did not make any record of these conversations nor did he inform the defense counsel.

Defense counsel eventually learned of the conversations between juror Fagan and the trial judge. *Rushen* at 116. At that time, defense counsel moved for a new trial. *Rushen* at 116. During the hearing on the motion for new trial, it was discovered that Fagan told other jurors that she personally knew Pratt's murder victim during deliberations. *Rushen* at 116. The motion for new trial was denied by the trial judge which found the *ex parte* communications lacked any significance. *Rushen* at 116. California courts affirmed the decision because the jury's deliberations as a whole were unbiased. *Rushen* at 117.

A federal district court granted a habeas claim and concluded that the conviction must be vacated because of the trial court's failure to hold a contemporaneous hearing about or make a

contemporaneous record of the *ex parte* communication. *Rushen* at 117 . The 9th Circuit Court of Appeals affirmed the district court. *Rushen* at 117. However, the United States Supreme Court disagreed and wrote:

> We emphatically disagree. Our cases recognize that the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant. At the same time and without detracting from the fundamental importance of [these rights], we have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice. Cases involving [such constitutional] deprivations are [therefore] subject to the general rule that the remedies should be tailored to the injury suffered… and should not unnecessarily infringe on competing interests. In this spirit, we have previously noted that the Constitution 'does not require a new trial every time a juror has been placed in a potentially compromising situation… [because] it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.' There is scarcely a lengthy trial in which one or more jurors do not have the occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial. The lower federal courts conclusion that an unrecorded *ex parte* communication between trial judge and juror can never be harmless error ignores these day-to-day realities of courtroom life and undermines society's interest in the administration of criminal justice. *Rushen* at 118. (internal citations omitted)

The United States Supreme Court went on to hold that the prejudicial effect of any non-disclosed *ex parte* communication between the court and a juror can be adequately addressed in a post-trial hearing. *Rushen* at 119. The error may be harmless if deliberations are not biased. *Rushen* at 121. In *Rushen,* the *ex parte* communication was innocuous and did not discuss any fact in controversy or applicable law. *Rushen* at 121. The United States Supreme Court affirmed the state court's finding that the alleged constitutional error was harmless beyond a reasonable doubt. *Rushen* at 121.

In *Rushen* the *ex parte* communication which was the basis of the allegations occurred between the judge and the juror. The *ex parte* communication involved the juror's failure to provide information when directly asked in voir dire. The information the juror had potentially affected the evidence in the case – the credibility of a potential defense witness of whom the juror had actual knowledge. Counsel for defendant was never told about the conversations and

the juror's unique knowledge was told to the entire jury during deliberations. All of these facts which resulted in harmless error seem to be more egregious than what occurred in Movant's trial.

Here, the *ex parte* communication does not involve a juror's failure to disclose information when directly asked. The *ex parte* communication did not directly involve the judge and juror. Here, a discussion occurred between a sequestered juror and a court security officer at the hotel. The juror had no inclination that anything improper had been done and did not intend to create any issues. Judge Evans only received the book when Officer Wall felt that it was sufficiently out of the ordinary that he should make the court aware. Judge Evans never spoke directly with Juror #58 and never read the book. He explained that at the end of the long day in court, he discovered the book on his desk and glanced at the book. Judge Evans explained that he intended to discuss it with counsel the next morning. Judge Evans testified that the book was sitting on his desk when counsel had discussions about Juror #58 the next morning in chambers.

The United States Supreme Court has held that post trial hearings can be adequately tailored to determine if there has been a constitutional violation regarding juror and judicial communication. Here, Movant has had an opportunity to develop the evidence and make his case that there was a constitutional violation. At best, Movant's evidence establishes that the trial court had the ability to know about the book prior to defense counsel addressing the issue. Movant has not proven any misconduct or prejudice on the part of, or created by, Judge Evans that affected Movant's constitutional right to a fair trial. Claim 8(O) part II is denied.

PART III

Movant's third allegation of Claim 8(O) is that trial counsel was ineffective for failing to investigate juror misconduct after the trial court's letter dated April 29, 2009. Trial counsel received the trial court's letter after the deadline for filing a Motion for New Trial. (see Rule 29.11). Trial counsel would not be permitted to amend or modify the Motion for New Trial after

the deadline. *State v. Yates* 982 S.W.2d 767 (1998). Trial counsel cannot be ineffective for failing to investigate alleged misconduct that would have to be addressed in a post-trial hearing. Additionally, the United States Supreme Court held in *Rushen v. Spain*, 464 U.S. 114 (1983) that post-trial hearings can adequately address juror and judicial misconduct claims. Based upon the analysis of Claim 8(O) Part I and Part II, trial counsel never would have been able to establish that there was constitutional error. Therefore, Movant is unable to prove that trial counsel's actions were unreasonable and resulted in prejudice. Claim 8(O) part III is denied.

Claim 8P: Appellate Ineffective Assistance of Counsel

To prove that he was deprived of effective assistance of counsel on appeal, movant has the burden to show: 1) the actions of the appellate attorney were outside the wide range of professionally competent assistance, 2) that counsel's errors were so severe that counsel was not functioning as counsel guaranteed to Movant by the 6th Amendment, and 3) that counsel's deficient performance resulted in prejudice. *Franklin v. State,* 24 S.W.3d 686, 691 (Mo. en banc 2000). Counsel has no duty to raise every possible issue on appeal. *Mallett v. State,* 769 S.W.2d 77, 83 (Mo. banc 1989). Strong grounds must exist showing that counsel failed to assert a claim of error which would have required reversal had it been asserted, and which was so obvious from the record that a competent and effective lawyer would have recognized it and asserted it. *Franklin* at 691.

Movant claims that appellate counsel erred by failing to raise the following issues on direct appeal:

1) **Trial Court abused its discretion and plainly erred in failing to conduct general questioning of Jury Panel Number 4 or to require parties to conduct general questioning of Panel Number 4.**

The purpose of voir dire is to determine which persons harbor bias or prejudice against either party which would make them unfit to serve as jurors. *State v. Antwine,* 743 S.W.2d 51, 60

(Mo. banc 1987), *cert. denied*, 486 U.S. 1017, 108 S.Ct. 1755, 100 L.Ed.2d 217 (1988). The trial court is vested with wide discretion in the conduct of voir dire. *State v. Ramsey,* 864 S.W.2d 320, 335 (Mo. banc 1993), *cert. denied*, 511 U.S. 1078, 114 S.Ct. 1664, 128 L.Ed.2d 380 (1994). *Id.* An appellate court will review the trial court's actions for abuse of discretion. *State v. Gray,* 887 S.W.2d at 382. Where appellant claims the trial court abused its discretion, appellant has the burden of showing "a real probability that he was thereby prejudiced." *Id.*

Here, the trial court's responsibility to ensure that the Defendant had a jury of impartial jurors who could hear the evidence and consider the entire range of punishment was met. Every one of the jurors was asked questions that related to punishment, publicity, whether any of the witnesses had a relationship with a witness, residency, and familiarity with the victim. Movant goes on to claim that because some jurors were stricken for cause after being asked additional "general questions" which uncovered bias, it can be presumed by this Court that some of the jurors in panel four would have been stricken for similar reasons and that shows that the Movant was prejudiced by the manner in which voir dire was conducted. This Court finds that the trial court was not responsible for demanding that the parties ask any additional questions on voir dire. The Court is charged with making sure that jurors are qualified to sit for trial and the Court did not err when it allowed the parties to waive additional "general questioning" of venire members who counsel reasonably believed would not be on the jury. Part one of Movant's claim is denied.

2) **Trial Court abused its discretion in failing to grant a mistrial when Sgt. Heath told Jury that a SWAT team was employed when police initially went to Movant's Home due to Movant's past history of violence.**

Movant claims that he was prejudiced when the trial court abused his discretion and refused to grant a mistrial after Highway Patrol Officer Sgt. Heath testified that the SWAT team was employed when the police initially went to the Movant's home due to a history of violent

behavior by the Movant.

The challenged comment regarding Movant's history of violence occurred during the State's direct examination of Sergeant Heath. The interaction between counsel, Sergeant Heath, and the court was as follows:

> Q. Now, when you became involved in this investigation it was the evening or night that Sergeant Graham was murdered?
>
> A. Yes, sir. March 20, 2005.
>
> Q. And sometime that evening it was decided that you and another officer should go out and interview [Lance Shockley], correct?
>
> A. Yes, sir.
>
> ....
>
> Q. It was late at night?
>
> A. Yes.
>
> Q. It was dark?
>
> A. Yes, sir.
>
> ....
>
> 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 that was going to go out there and what role were they supposed to play?
>
> A. It was the Sikeston Department of Public Safety's 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.

THE COURT: You wanted to approach?

MR. KESSLER: Yes.

(At this time counsel approached the bench, and the following proceedings were had)

MR. KESSLER: I object to any introduction of his history. This goes to character. It's only offered for that purpose, period. I object.

MR. ZOELLNER: Judge, I'm not going into his violent history. It goes to explain why they're out there. They've been beating on these people and they had to open this door as why they went out there and why it happened. It goes to explain this.

MR. KESSLER: Judge, it doesn't—

MR. ZOELLNER: And I wasn't going into his history.

THE COURT: All right. Hold on. I'm going to sustain the objection. Are you requesting the instruction from the Court?

MR. KESSLER: Yes, Judge. As I understand it the objection has been sustained as this goes to character and that it's not been introduced because our client hasn't testified and introduced his character. That was our whole objection.

THE COURT: And what do you wish me to instruct the jury?

MR. KESSLER: I ask that the jury be instructed to disregard that statement....

THE COURT: I'll sustain that. I intend on so instructing.

...

MR. KESSLER: All right, Judge, we'd ask for a mistrial. 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 they had no information about. This is the first time and it's the last witness. It's been done solely to prejudice my client in the eyes of the jury. There w[ere] no questions ever about—you know put from us to anybody about why they were out there. It was because he was safe or it was a decision at highway patrol to send these people out there. What ended up happening has been the subject, not necessarily cross-examination.

It was introduced by the State as early as their opening statement, and every chance they've had to talk about it, they've characterized it as a silly little incident, that it was an accident, that it was something that just happened. They introduced it into the case, not us. We ask for a mistrial, Judge, because I don't believe there's any way to cure the prejudice that's occurred.

THE COURT: *All right. That request is overruled and denied.*

(Proceeding returned to open court.)

THE COURT: *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.*

The appellate court's standard of review for a trial court's refusal to grant a mistrial is abuse of discretion. *State v. McGowan*, 184 S.W.3d 607, 610 (Mo.App.2006). This is because the trial court has observed the complained of incident that precipitated the request for a mistrial and is in a better position than is the appellate court to determine what prejudicial effect, if any,

the incident had on the jury. *Id.* "We will find that a trial court abused its discretion when its ruling is clearly against the logic of the circumstances before it and when the ruling is so arbitrary as to shock [this Court's] sense of justice and indicate a lack of careful consideration." *Id.* " 'Granting a mistrial is a drastic remedy and should be exercised only in extraordinary circumstances where the prejudice to the defendant cannot be removed any other way.' " *State v. Albanese,* 9 S.W.3d 39, 51 (Mo.App.1999) (quoting *State v. Wyman,* 945 S.W.2d 74, 77 (Mo.App.1997)). This court will presume, absent some extraordinary circumstances, that the jury obeyed the trial court's directions and followed its instructions. *See Boone v. State,* 147 S.W.3d 801, 808 (Mo.App.E.D.2004); *see also, e.g., State v. Forrest,* 183 S.W.3d 218, 229 (Mo. banc 2006).

"There are cases in which the prosecutor's remarks are so egregious or the trial court's admonition so ineffective that a new trial is the only sufficient remedy." *Tolliver,* 101 S.W.3d at 317. This is not one of those cases. Here, there was substantial evidence to support the jury's finding of guilt, as reflected in the Missouri Supreme Court's determination that the death penalty was appropriate and based on substantial evidence. The Supreme Court summarized the strength of the evidence against the Movant as follows:

> Here, the circumstantial evidence was strong. Knowing that Sergeant Graham was investigating his involvement in the accident that killed Mr. Bayless, for several months Movant concocted a series of lies to conceal the fact that it was he who drove the truck into the ditch. He also encouraged others to lie for him about his participation in the accident, including putting his finger over his grandmother's mouth when she said she would not lie for him. Once Movant learned that Sergeant Graham had verified his involvement, he obtained Sergeant Graham's home address. The day of Sergeant Graham's murder, Movant borrowed his grandmother's car, and witnesses testified to seeing the car near Sergeant Graham's house during the estimated time of the murder. Movant returned the car to his grandmother within thirty minutes of the shooting. The bullet that penetrated Sergeant Graham's Kevlar vest belonged to the .22 to .24 caliber class of ammunition. Although never found in his possession, Movant was known to own a .243 rifle, and investigators discovered a single empty slot in Movant's gun cabinet. On the night of the murder, Ms. Shockley took a box of .243 ammunition to Movant's uncle and stated that

> "Lance said you'd know what to do with them." After learning that Movant previously had fired his .243 rifle on his uncle's property, investigators searched the grounds and discovered a .243 shell casing. The investigators also recovered several .243 shell casings on Movant's field as well as several bullet fragments. Three highway patrol ballistics experts compared the fragments found on Movant's property to the slug pulled from Sergeant Graham's body. All concluded that, in their expert scientific opinion, the three bullet fragments recovered from Movant's field were fired from the same firearm as the one used to shoot the bullet into Sergeant Graham. In addition to the .243 rifle, Movant owned numerous other guns, including three shotguns. A ballistics expert testified that a shotgun wadding discovered on Movant's property was consistent with the wadding found near Sergeant Graham's body. The evidence was sufficient to support the imposition of a death sentence considering the strength of the evidence.
>
> *State v. Shockley*, 410 S.W.3d 179, 203 (Mo. 2013).

The fact that there was a curative instruction given, admonishing the jury not to consider the statement by Sgt. Heath, combined with substantial evidence of guilt, relates directly to the potential prejudice of the remark by Sgt. Heath. Considering all relevant factors, this Court cannot find that the single comment by Sgt. Heath played a decisive role in the verdict or that any impact that the statement might have had on the jury was not cured by the instruction given by the Court. For this reason, Movant makes no showing that the appellate court would have been compelled to reverse Movant's conviction based on this argument, and Movant cannot prove that he was prejudiced. Part two of Movant's Claim 8P is denied.

Claim 8Q: Brady Violations

Movant claims that he was prejudiced because the State failed to satisfy its Brady obligations by failing to produce computer files that were allegedly on the victim's home computer.

Under *Brady v. Maryland*, due process is violated if the State suppresses evidence that is favorable to a defendant and material to either the guilt or penalty phase of the trial. 373 U.S. at 87, 83 S.Ct. 1194. A *Brady* violation contains three components: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that

evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene,* 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). In order for prejudice to result from a Brady violation, the evidence suppressed must be material, meaning that it would provide the defendant with plausible and persuasive evidence to support a theory of innocence or would have enabled the defendant to present a plausible, different theory of innocence. *State v. Parker*, 198 S.W.3d 178, 180 (Mo. App. 2006).

The evidence adduced at the evidentiary hearing was that the computer hard drive from the victim's home was taken into evidence in the course of the investigation of this murder. That hard drive remains in evidence even as of the date of this Order. The trial attorneys in this case were provided access to all of the evidence seized in order to investigate potential defenses and evaluate the State's evidence against the Movant. The trial attorneys in this case did review that evidence and all law enforcement reports, which included reports that related to the examination and seizure of the victim's computer hard drives, according to their hearing and deposition testimony. Although, as the parties herein have stipulated, the hard drives are no longer accessible due to the passage of time and other factors, there is no evidence that the State, either with or without intent, withheld the files on the computer hard drive. Thus, the element of Brady requiring that the State must have suppressed the evidence in question is not met.

Even if the hard drive had not been made available to Movant, he cannot prove that he was prejudiced due to lack of access to specific computer files. The testimony of witnesses about the contents of the home computer is vague and speculative at best. There is no evidence before the court that the contents of any files on the computer hard drive constituted evidence which is material to issues of the Movant's own guilt and punishment. At most, the Court is considering speculative statements about what the victim's former fiancée assumed could be on the computer due to the nature of the victim's employment, but never once saw for herself. Movant has not demonstrated through evidence the presence of any exculpatory or mitigating

information on the hard drive of the victim's home computer. He cannot establish that he was prejudiced because he cannot present evidence beyond mere speculation and conjecture about the contents of that hard drive, and this Court cannot find that there was anything on the Movant's home computer that would have been admissible at trial, much less material that would have impacted the jury's ultimate verdict. Movant's claim is denied.

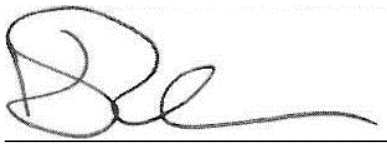
Claim 8R:

Movant presented no evidence on Claim 8R, which is therefore denied.

JUDGMENT

WHEREFORE, the Court overrules Movant's Amended Motion to Vacate, Set Aside, or Correct Judgment and Sentence following an evidentiary hearing and Movant's claims are DENIED.

DONE AND ORDERED THIS 9th DAY OF July, 2017.



Kelly Parker, Circuit Court Judge

cc: Jeannie Willibey and Peter Carter, Attorneys for Movant
Todd Myers and Emily Shook, Attorneys for Respondent