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Gerry Spence's The Smoking Gun As A Teaching Tool

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GERRY SPENCE'S
THE SMOKING GUN
AS A TEACHING TOOL

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October 2003

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Let's Talk

All law professors have done it – looked out across the sea of blank faces, our law students staring back, their eyes glazing over in submission to the dull material we are trying to get across. Boredom is the enemy of teaching. How can we make otherwise dry and abstract principles come alive or at least have practical significance?

For three and a half years – from late November of 1985 until the middle of 1989 – famed attorney Gerry Spence represented a woman and her teenaged son in what appeared to be a hopeless murder case. The prosecutor had an eyewitness to the killing and a photograph of the accused woman at the scene holding a rifle with smoke erupting from the barrel – the proverbial smoking gun. In his most recent book, aptly titled *The Smoking Gun*, Spence takes the reader from the initial client meeting, through the trial and into the court of appeals – providing a felt sense of the obstacles, the strategy and the monumental effort involved in representing those charged with a serious offense. In telling the story, Spence has created a vehicle for many of the lessons we routinely teach in criminal law, criminal procedure, clinical practicum, ethics, evidence and trial advocacy.

Spence, a master storyteller, gives us an opportunity to engage our students and ourselves in a suspenseful and real life case told by the lawyer who lived it. *The Smoking Gun* will provide the factual context for enjoyable and ultimately productive classroom debate on a wide variety of topics.

I have summarized the book and outlined, chapter-by-chapter, the topics raised by Spence – the topics in bold face. But there is another benefit to this book – a separate and more important lesson than those found in the individual topics. There is an overriding message here – indeed a subtext to the book. Between the endless preparation, the soul-crushing setbacks and the unrelenting struggle to succeed, Spence conveys, unmistakably, the commitment, tenacity, courage and caring that is required to adequately represent a client. It is a lesson all of our students should learn.

I hope you enjoy the book and that you consider sharing it with your students.

Dana K. Cole*

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I would like to thank my friend and colleague, Margery Koosed, for her helpful suggestions.

CHAPTER-BY-CHAPTER SYNOPSIS OF THE BOOK AND THE ISSUES

CHAPTER ONE

“[A] trial lawyer without a murder case isn’t a real trial lawyer.”

The Lincoln County, Oregon prosecuting attorney not only has an eyewitness to the alleged murder, but also a photograph – the accused woman, Sandy Jones, depicted in full-color at the crime scene holding the murder weapon, smoke erupting from the barrel. The prosecutor will show the photograph to anyone who cares to see it and the reporters are anxious to oblige. The result is extensive **pretrial publicity** that potentially predisposes prospective jurors against Sandy.

Spence reveals the **fear inherent in representing a person charged with a serious offense** – the consequences of losing such a case described in such guttural language that the prospect of defeat becomes almost unbearable for a caring lawyer who undertakes the defense.

Sandy Jones, her husband, Mike Jones Sr., and their children, Mike Jr., and Shawn, lived on a rundown, 29-acre swamp bottom farm in Lincoln County, Oregon. The deceased, Wilfred Gerttula, was a small-time real estate developer who was in the process of establishing a subdivision. Gerttula wanted access to the planned subdivision via a dirt road that crossed the Jones’ property. Sandy denied Gerttula access to the road claiming the road was private and cut through a sacred Indian burial ground. Gerttula insisted the road was a public, county road. The conflict concerning the road provides the backdrop for an ongoing feud that culminated in the shooting death of Wilfred Gerttula.

Sandy Jones’ 15 year-old son, Mike Jr. was with Sandy when Gerttula was killed. Both were charged with murder – Mike Jr., in juvenile court. By the time Spence and his law partner, Eddie Moriarity, were asked to get involved in the case, Sandy had been held in jail without **bail** and had been separated from her children for four months. Spence candidly discusses the coercive effect of **pretrial incarceration**, the supposed **presumption of innocence**, and the reality of the **presumption of guilt**. As Spence puts it, “They’re twisting her for a guilty plea”. It is this perceived mistreatment of Sandy at the hands of the state that piques Spence’s interest in the case and

causes him to investigate. Sandy Jones needed him. But Spence also notes, “[A] trial lawyer without a murder case isn’t a real trial lawyer.” In other words, he needed her, too.

CHAPTER TWO

“Without anger a trial lawyer is just a mannequin mouthing meaningless legalisms.”

Spence takes us to the **initial client interview** in the Lincoln County jail. The squalid **jail conditions** are revealed in graphic detail – the barren cell, the damp, stale air and the sticky floors that smell of vomit. We meet the client – frail and disoriented from months in jail without proper medical attention. It is here that Spence decides to take the case (or, more accurately finds that he cannot refuse). “A lawyer needs to feel for his client,” Spence explains, and his obvious compassion for Sandy Jones compels him to represent her. In that first meeting Spence begins to forge a relationship with his new client by demonstrating that he is there to help. He does so with the simple but thoughtful gesture of demanding that she have a pair of warm socks for her cold bare feet. **The role of the lawyer** is not limited to legal representation.

We next meet the lawyers who have so far represented Sandy and Mike Jr. and who will remain involved to assist Spence and Moriarity. Michele Longo is the **court-appointed lawyer** assigned to represent Sandy after her arrest. Steve Lovejoy was court-appointed to represent Mike Jr. Spence describes the disadvantages the system imposes on court-appointed counsel – low pay and no budget pitted against the seemingly unlimited resources of the government in a trial before pro-prosecution judges.

As Longo and Lovejoy brief Spence and Moriarity over breakfast, we are privy to the conversation. We learn that Mike Jr. had been interrogated at his home by armed police officers on the day of the shooting and that he gave a statement without having first been advised of his **fifth amendment constitutional right against self-incrimination**. Longo filed a **motion to suppress** in juvenile court asking that the statement be excluded – the **exclusionary rule** revealed as the way in which the courts enforce the *Miranda* requirement that a person be advised of certain rights before a **custodial interrogation** begins. At the **evidentiary hearing**, the prosecutor, Josh Marquis, argued that the boy was not in custody and so no warnings were required. The defense lawyer conceded that Mike Jr. was not formally placed under arrest, but argued he was in **constructive custody**,

because a reasonable person in Mike Jr.'s position would not feel free to leave. After the **evidentiary hearing**, Juvenile Judge Gardner took the motion "**under advisement**".

Before the breakfast meeting is over, Spence is asked to read a letter written by his new client detailing her complaints about the treatment she received in jail – including the lack of medical treatment. She also describes the trouble she had with Gerttula leading up to the shooting and how the authorities would not help her. When Spence handed the letter back he was angry. As Spence notes, "Without anger a trial lawyer is just a mannequin mouthing meaningless legalisms."

CHAPTER THREE

"[M]eanness is contagious. The system has caught it."

Spence takes us into the juvenile courtroom of Judge Robert Gardner – the judge who is assigned the duty of first hearing Mike Jr.'s case in juvenile court and then presiding over the jury trial in criminal court in his mother's case. Spence decides to reveal his case to the court and the prosecutor pre-trial in the hope that the state would dismiss the case without a trial. In recounting his presentation, Spence reveals his case to us.

The weapon Mike Jr. had on the day Gerttula was shot was a Winchester thirty-thirty rifle, which holds seven cartridges. All seven cartridges were accounted for and none of them struck Gerttula. The forensic evidence established that Gerttula was shot with a pistol – not a thirty-thirty rifle. Since the state could not prove **beyond a reasonable doubt** that Mike Jr. shot Gerttula, Spence asked that the state dismiss the murder case against Mike Jr. The prosecutor, Josh Marquis, refused to dismiss the case, laughing at the suggestion. He added that he would have Mrs. Gerttula submit to a **polygraph examination** and, if they were satisfied she'd lied, they'd dismiss the case – a statement that would later be the subject of much debate.

Spence had **subpoenaed** Monica Gerttula, the decedent's wife, for a **discovery deposition**. The prosecutor moved to **quash the subpoena** and told Mrs. Gerttula she didn't have to appear for the deposition. The prosecutor argued that the **juvenile proceedings are akin to criminal proceedings** and **depositions are not permitted in criminal proceedings**. Judge Gardner agreed with the state and set aside the subpoena.

Spence countered by requesting a **jury trial**. Spence bolstered his argument by pointing out that in deciding the facts in Mike Jr.'s case, the judge would necessarily come to conclusions that would impact his **impartiality** in Sandy's case and that a jury deciding the facts in Mike Jr.'s case would help insulate him. The prosecutor argued that the **proceedings in juvenile court are not criminal proceedings** and, therefore, no constitutional right to a jury exists. Judge Gardner again agreed with the state and denied the request for a jury trial in juvenile court.

This exchange permits classroom discussion on the **hybrid nature of juvenile proceedings**, why **the constitutional right to a jury trial does not apply in juvenile proceedings** and the **limited discovery afforded in criminal cases** as compared with civil cases.

CHAPTER FOUR

“[There’s] something about a person who has the courage to stand up against power.”

The state offered Mike Jr., a **plea agreement**. He could admit to manslaughter and be incarcerated until age twenty-one. But his mother passed a message to Mike Jr. through his attorney Michele Longo: “[T]o plead guilty to something [you] didn’t do is wrong.” And so Mike Jr. rejected the offer. Sandy was also offered a plea agreement. She, too, could plead to manslaughter and if she refused, the prosecutor threatened to charge her with the additional charge of attempted murder. She rejected the offer. We learn in the next chapter that the prosecutor made good on his threat and added the charge of attempted murder.

The District Attorney’s office belatedly released the criminologist’s report to the defense lawyers. The report revealed that Mrs. Gerttula had gunshot residue all over her hands and face – enough to conclude that she likely shot a gun the day her husband was shot. But Mrs. Gerttula had said she didn’t shoot a gun that day. Recalling the prosecutor’s statement in court that he would have Mrs. Gerttula submit to a **polygraph examination** and, if they were satisfied she’d lied, they’d dismiss the case, Spence became very interested in learning whether Mrs. Gerttula submitted to a polygraph.

Back in court, Spence brought the polygraph issue to the attention of Judge Gardner, first wanting to know whether Mrs. Gerttula was given a polygraph examination. The prosecutor avoided the question arguing that **the results of a polygraph are not discoverable or admissible** in Oregon. Spence

pressed by insisting that the question is not whether the results as interpreted by the polygraph examiner are admissible, but whether Mrs. Gerttula had been given the test. Spence argued that while the results as interpreted by the examiner may not be admissible, **statements made by the witness to the polygraph examiner are discoverable and may be admissible**. The judge ordered that by one thirty that afternoon the prosecutor should advise Spence whether a polygraph examination had been given to Mrs. Gerttula. If one had been given, the judge further ordered the prosecutors to provide the name of the operator and any reports and notes generated as a result of the polygraph examination.

There was also a controversy concerning the presence of Mike Jr.'s parents in the courtroom. Deputies escorted Sandy, who was still incarcerated, to court in handcuffs. The prosecutor sought to **exclude all witnesses from the courtroom**, including Sandy and Mike, Sr., so they could not hear the testimony of other witnesses – an Oregon procedure analogous to **Federal Rule of Evidence 615**. However, Oregon law also provided that in a juvenile hearing, the parents have a right to be present. Judge Gardner permitted the parents to remain in the courtroom, but did not permit Sandy to speak with or touch her husband or children.

CHAPTER FIVE

“... I was only part of the legal machinery, the rattling, sometimes exploding, steam and noise. The machinery ground out case after case, day after day. The machinery had one purpose – to process the cases which usually meant to convict those accused.”

Mike Jr.'s trial begins in juvenile court with the **opening statements** – first by the prosecuting attorney. Here the reader sees, for the first time, the state's theory against both Mike Jr. and Sandy.

The Joneses' were in a feud with the Gerttulas over the county road that ran through the Jones' property. The Joneses had improperly blocked the road with a fence and gate. Earlier in the day, the Gerttulas, accompanied by two men, had cut across the Jones' property on this county road to their own property. Upon their return, the Gerttulas were confronted and threatened by Sandy Jones and Mike Jr. at the Joneses upper gate in the presence of the two men. Mike Jr., held his thirty-three rifle and Sandy a twenty-two rifle. Sandy reportedly said, “Don't come up here again or I'll shoot you.”

Later that day, Mr. and Mrs. Gerttula returned to the gate in their pick-up truck. Sandy and Mike Jr. were at the gate with their guns. Mrs. Gerttula got out of the passenger side of the truck to photograph Sandy and Mike Jr. with their guns when Sandy started shooting at Mr. Gerttula through the windshield. Sandy then attacked Mrs. Gerttula, beating her with the barrel of the twenty-two rifle. Mr. Gerttula got out of the pick-up truck to help his wife and Mike Jr. shot him in the chest with the thirty-thirty rifle. Dr. Vargo, an osteopath, would testify that the gunshot wound suffered by Mr. Gerttula was entirely consistent with being shot with a thirty-thirty rifle.

The **defense opening statement** follows and predictably details a much different version of the events. Spence starts not with the day of the shooting, but with Mike Jr. and his family.

Mike Sr. worked for four and a half years in Alaska to save up enough money for a down payment on the small twenty-acre farm. Sandy's aspiration was to do something good and decent for the Indian people. Mike Jr. was a loving boy who respected his parents. They were a simple family with simple goals. Mike Jr. was afraid of the Gerttulas. Spence detailed the long history of intimidation and harassment by Mr. Gerttula against the Jones family including the time when Mr. Gerttula knocked his father, Mike Sr., down with a pickup truck when Mr. Gerttula was driving through the property and Mike Sr. was not walking fast enough to get out of the way. His father had spent two weeks in the hospital – at first paralyzed. Mr. Gerttula was a mean and frightening man and the Jones family talked about it every night at the table. When his dad was away working, the responsibility fell to Mike Jr., to protect the family, the farm and the animals. Mike Jr. was a frightened fifteen year-old boy who tried to be brave.

On the day of the shooting, Mr. Gerttula tried to wrestle the twenty-two rifle away from Sandy. She was trying to hold onto her gun and was being hit over the back of the head with what she thought was a gun when she heard a blast. At first she thought she had been shot but soon realized it was Mr. Gerttula who had been shot.

Spence then goes into a common and recurring problem criminal defense lawyers face: **whether to call the accused as a witness**. If the accused is not called to testify, the finder of fact may think he is guilty or he would take the stand to deny the accusations. If he does take the stand he will be subject to cross-examination by a skilled prosecutor and may be perceived as lying to save himself. Spence deals with this by explaining the dilemma

very candidly and offering it as the reason he will not call his client as a witness.

CHAPTER SIX

“What elected judge ever turned anybody loose? He has to answer to the prosecutors. He has to answer to the voters. He has to answer to the good old boys. Only ones he doesn’t have to answer to is us.”

The prosecutor, Josh Marquis, called Mary Ross, the victim’s assistant in the District Attorney’s office to the stand. Sandy had gone to Ross for help in July just before Gerttula was killed. Mike Jr. was with Sandy when she met with Ross. Sandy told Ross that Gerttula had shot at her two children, Mike Jr. and Shawn. Sandy wanted the District Attorney’s office to do something about it – to protect her children from Gerttula. Ross was prepared to testify on **direct-examination** that Sandy said if she didn’t get some help, she would probably end up having to kill Gerttula herself.

Spence tried to have Ross’ testimony excluded as a witness on the basis of the **attorney-client privilege**. Ross worked for the District Attorney’s office. Spence argued that when Sandy sought help from Ross, she became a client of the District Attorney and anything she said was privileged. Spence also argued that any statement made by Sandy could not be attributed to Mike Jr.

The prosecutor argued that Sandy’s statement to Ross in Mike Jr.’s presence was admissible against Mike Jr. since Sandy and Mike Jr. were in this murder together (presumably as an **admission by a party opponent** pursuant to Oregon’s equivalent of Federal Rule of Evidence 801 (d)(2)(B) and/or (E)). Judge Gardner overruled Spence’s objection and permitted Ross to testify.

Having lost the battle to exclude Ross’ testimony, we now see how Spence mitigates the damage on **cross-examination** – using the witness to make the point that Sandy’s statement was likely one made out of frustration and was not to be taken seriously and that, in any event, Mike Jr. was a passive bystander.

Finally we see the use of **redirect-examination** to repair the damage done on cross – Marquis establishing Sandy’s angry tone when making the statement.

Judge Gardner decided to **visit the scene** of the homicide. As the judge and attorneys visit the scene, the reader learns more about the defense theory. Through Spence's descriptions we see Sandy at the gate on the day of the shooting. Mike Jr. is in a small clearing nearby. Mr. Gerttula threatens Sandy with the pickup truck – gunning and braking it again and again – the spinning tires leaving acceleration marks in the dirt road, the truck lurching menacingly toward Sandy. Mike Jr. begins to shoot at the back tires while Sandy shoots at the front tires. Mr. Gerttula gets out of the truck and tries to wrestle the twenty-two rifle away from Sandy while Mike Jr. screams, "Leave my mom alone." Then Spence asks, "And what about Monica Gerttula? What was she doing at this time?"

Before the trial resumed, Spence revisited the issue of Mrs. Gerttula's polygraph examination. The prosecutor had given Spence the list of questions, but not Mrs. Gerttula's answers or any notes or reports reflecting her answers. The prosecutor claimed there were no notes, reports or answers.

CHAPTER SEVEN

"It's a difficult thing for us to be engaged in a trial where the trier of fact is also the judge. ... It's hard to raise objections, to be a strong advocate for your client, to work out on the edge, where a lawyer should work, not back in some nice, safe place. It's hard to fully advocate for your client without placing yourself in a position where you may gather the wrath of the judge who is also your jury."

Spence discusses the difficulty of **bench trials** – where the judge rules on matters of law but is also the finder of fact.

At the close of the state's case we hear Spence's **Motion for Acquittal**. Spence argued that the evidence clearly suggests that Mrs. Gerttula accidentally shot her husband with a pistol and then threw that pistol into the nearby river. Spence argued that the state failed to disprove beyond a reasonable doubt that Mrs. Gerttula didn't shoot her husband. Spence next argued that the state failed to prove that Mike Jr. was guilty of murder or manslaughter **beyond a reasonable doubt**. Specifically, he argued that there is no evidence that Mike Jr. even shot Gerttula (no **act** that caused the prohibited social harm) and no evidence that he had the requisite **intent** to establish **murder** or **manslaughter**. Finally, Spence argued the state failed to prove that Mike Jr. was not acting in defense of his mother.

It is a great example of how these motions can and should be argued – identifying the element the state must prove and detailing how the state’s evidence failed to establish the element. Judge Gardner overruled the motion.

In the **defense case-in-chief**, Spence calls three witnesses: (1) the state’s expert from the crime lab to establish that the gunshot residue on Mrs. Gerttula’s hands and face establishes that it is likely she shot a firearm that day; (2) an engineer to establish that all of the shots from Mike Jr.’s thirty-thirty had been accounted for and none could have hit Mr. Gerttula; and (3) a medical doctor who said the bullet that killed Mr. Gerttula came from a pistol and not a rifle.

After the **closing arguments** (Spence gives us excerpts of the prosecutor’s closing argument interspersed with Spence’s rebutting commentary), the judge left the bench to make his decision while the lawyers and parties waited. We are given a felt sense of the anxiety that is peculiar to **waiting for a verdict** – the interminable wait, the second-guessing and the worry.

Finally Judge Gardner returns to the bench and announces his decision. He found Mike Jr. guilty of first-degree manslaughter and reserved **sentencing** until after Sandy’s trial.

Spence conveys the depth of **the pain that comes from losing** a case you thought you should win.

CHAPTER EIGHT

“You can worry about your case until you lose the thin thread of truth you must follow. But if you don’t worry, you don’t care. And if you don’t care, you’re already lost.”

Sandy Jones was still in jail and the defense lawyers once again tried to get her out pending trial. New evidence developed in Mike Jr.’s case served as the basis for another **bail hearing** – the defense lawyers arguing that the proof of Sandy’s guilt was weak. Dr. Vargo once again testified that Gerttula was not shot with a twenty-two rifle – the gun that Sandy carried. Richard Geistwhite, who’d taken gunshot residue swabs from Mrs. Gerttula’s hands and face, testified that it was likely that Mrs. Gerttula fired a gun that day.

The prosecutor, Ulys Stapleton, opposed the **Motion for Release** putting on evidence that Sandy threatened Gerttula the day he was killed and that Sandy had earlier told Ross from the victim's assistance office that she might have to kill Gerttula.

Judge Gardner had brought in another judge to rule on the request for release. The request was denied and Sandy remained in jail where things continued to get worse. Her health was deteriorating, the isolation from her children was growing unbearable and the guards continued to deny her basic privileges.

The defense lawyers began to consider a **Motion to Recuse** Judge Gardner based on his **conflict of interest**. The defense position would be that, having decided Mike Jr.'s case, Judge Gardner could no longer be impartial when ruling in Sandy's case. We see the reservation the defense lawyers have in considering filing such a motion. If they file it and lose, they run the high risk of alienating the judge who would then not only preside in Sandy's case, but also sentence Mike Jr.

We also get a preview of another battle. Judge Gardner had questioned whether Spence had a **conflict of interest in representing two people** (mother and son) charged with the same murder. The potential conflict is apparent. Mike Jr., who was still awaiting sentencing, could perhaps improve his situation by taking a legal and factual position detrimental to his mother – agreeing to testify against her. Sandy could perhaps improve her situation by taking a legal and factual position detrimental to her son – placing the blame on Mike Jr. Spence and his partner were representing *both* Sandy *and* Mike Jr.

The defense team filed the **Motion to Recuse** Judge Gardner. Judge Gardner promptly denied the motion citing judicial efficiency.

CHAPTER NINE

“If lawyers always follow the law like a blind man, sometimes the people the law's trying to protect get hurt worse.”

Citing a **conflict of interest**, the prosecutor in Sandy's case, Ulys Stapleton, made it explicit that if Spence filed his **appearance as attorney of record** for Sandy, he (Stapleton) would not only ask the trial court to **disqualify** Spence, but would lodge an **ethics complaint** against Spence with the Bar Association. To this point, only Michele Longo was listed as Sandy's

attorney of record although it was apparent that Spence planned to associate with Longo at trial. In the trial court, the prosecutor would argue that any conviction he might secure against Sandy would be vulnerable to a collateral attack that her trial lawyer had a conflict of interest. The threat of the ethics complaint made it clear that if Spence remained intent on defending Sandy, he would have to place himself personally at risk and first defend himself.

The prosecutor also provided **notice that he intended to call fifty-six witnesses** against Sandy at trial including Sandy's mother, brother, sister-in-law, and son. Spence saw this as more **intimidation tactics**.

Sandy's defense lawyers filed a **Petition for a Writ of Mandamus** asking the Supreme Court of Oregon for an order requiring Judge Gardner to remove himself from Sandy's case. Spence argued that having found Mike Jr. responsible for the death of Gerttula, Judge Gardner necessarily came to conclusions about Sandy's involvement and culpability. Sandy deserved an impartial judge. The defense lawyers also requested an order requiring Judge Gardner to release his sealed findings in Mike Jr.'s case.

The Supreme Court of Oregon granted the defense motion by issuing an **Alternative Writ of Mandamus** requiring Judge Gardner to step down from Sandy's case or appear before the Supreme Court to show why he should remain on the case. Judge Gardner filed his **certificate of compliance** and stepped down.

CHAPTER TEN

"When fear comes welling up, you decide how it will move you – to run or to charge. I always found it easier to charge."

The Supreme Court of Oregon also ordered Judge Gardner to release his findings in Mike Jr.'s case to the lawyers. Judge Gardner's findings were that Mike Jr. caused the death of Gerttula by shooting him in the chest with a bullet from a thirty-thirty rifle and that neither Mr. Gerttula nor Mrs. Gerttula had in their possession or fired a pistol or rifle. Spence planned an appeal to challenge the findings based on the argument that the findings were unsupported by the evidence.

Sandy's trial was fast approaching and it was time for Spence and his partner to finally decide whether to **file an appearance** on her behalf. Spence again questioned his motivation for getting involved in the case and we are privy to his musings. Sandra Jones was a difficult woman to

represent. She talked incessantly about the road Gerttula wanted to build through her property and across sacred Indian burial ground. She complained about how the county attorneys also represented Gerttula in frivolous lawsuits in which she had to defend herself because she had no money and how the judges deprived her of her rights. Spence described Sandy as a “wild-eyed, penniless client ... who had an Indian for her minister, who fought the town fathers and who kept her kids out of the public schools”. We see an odd and difficult woman who cannot reimburse expenses, let alone pay a fee. Besides, Spence missed his home – his wife, children and grandchildren. He had the perfect out – the alleged **conflict of interest**. He was also afraid – afraid of the **prospect of losing** and afraid of the threatened **ethics complaint**.

But Spence would stay. Why? He cared about Sandy and admired her courage. And he cared about Mike Jr. and the young lawyers, Michele Longo and Steve Lovejoy. And so Longo and Spence went to the jail to see Sandy – this time with a **court reporter**. Longo, as Sandy’s attorney, explained every conceivable conflict that could arise out of Spence’s representation of her and Mike Jr. Sandy’s response was to say. “You wouldn’t leave me now, would you, Spence?” **Sandy waived any conflict of interest** and asked Spence to please represent her.

Next, Longo, Spence, Mike Sr. and Mike Jr. met in the presence of a **court reporter** and the conflict was explained again. **Mike Sr., as the boy’s natural guardian, waived any conflict of interest**. The court reporter **transcribed the record and the transcripts were sealed and filed**.

Judge Harl Haas from Portland, Oregon was the new judge replacing the recently dismissed Judge Gardner. Judge Haas had accepted the assignment when the Chief Justice of the Oregon Supreme Court had asked the Portland judges if anyone wanted the case.

As promised, the first **motion by prosecuting attorneys Stapleton and Marquis was that Spence be removed from the case due to the conflict of interest**. Spence responded by relying on the waivers of both Sandy and Mike Jr. as reflected in the sealed transcript in the file. The waivers were sufficient for Judge Haas. Then Spence made his own **Motion for the Removal of Prosecutors Stapleton and Marquis** from the case.

CHAPTER ELEVEN

“I was letting it go, letting the words come up from the deep places where passion is stored and sorted and then emerges in civilized language.”

Chapter Eleven opens with the **evidentiary hearing** on Spence’s **Motion to Disqualify** Stapleton from serving as prosecutor in Sandy’s case. We see Spence’s **opening statement** to Judge Haas and hear Spence’s three grounds for the motion.

First, Spence argued that Stapleton waged a campaign of defamation and intimidation designed to force Spence from the case. Stapleton had been quoted in the press as claiming that it was unethical for Spence to represent Sandy. Stapleton had threatened to **file a complaint with the Bar Association** against Spence and suggested to Michele Longo that she, too, could be in jeopardy for having involved Spence when she knew he had a conflict. Spence argued that Stapleton failed to protect Sandy from the threats and intimidation of Gerttula and, now that Gerttula was dead, Stapleton prosecuted Sandy in an attempt to justify that failure. Sandy was a poor woman without resources. If Stapleton could get Spence off the case, Stapleton would “increase [the] chances of getting a conviction against [Sandy] in a case he knows is weak.”

Spence next argued that Stapleton had a **conflict of interest** because Sandy came to his office to seek protection from Gerttula through the Victim’s Rights Office. Spence argued that, even though the prosecutor’s office refused to help Sandy, once having engaged in **confidential attorney-client communications** concerning Gerttula, Stapleton’s office could not prosecute Sandy in connection with his death.

Finally, Spence argued that Stapleton was a **potential witness** in Sandy’s case. Stapleton had investigated the scene and told the police officers not to advise Mike Jr. of his rights. **An advocate cannot also serve as a witness.**

Spence’s motion allows us to consider the issue of **prosecutorial misconduct** and the **rules of ethics** regarding the **restraint lawyers must show in communicating with the press** and the **prohibition on an attorney serving as a witness.**

After Spence finished with his opening remarks, Stapleton **reserved his opening**, preferring to wait until Spence had put on his evidence before delivering his own statement. Spence comments on the practice in hearings

and trials of reserving the opening. "...I want to speak to the judge or the jury at the first opportunity – first impressions. I never want it to appear that I'm holding something back or playing some clever waiting game."

Spence called Michele Longo and then Steve Lovejoy as witnesses to establish that Stapleton's threats intimidated Longo. We are given enough of Spence's **direct-examinations** and the prosecution's **cross-examinations** to see good examples of each. Then Spence calls Stapleton to the witness stand.

CHAPTER TWELVE

"When judges make decisions, they reveal more about who they are than what the law is. Knowing the judge in a long case is like a marriage. You don't know your spouse until the honeymoon is over."

Ulys Stapleton took the witness stand. Spence described the moments before the questioning began in a way that allows us to feel the tension leading up to the confrontation. Spence writes: "I walked to the podium and gave Stapleton a long look. He glowered back as a fighter in the ring looks at an opponent just before they touch gloves."

Since Stapleton was clearly an adverse witness, Spence conducted the **direct-examination as on cross-examination** – that is he was permitted to use **leading questions**. Stapleton was forced to admit that it would be easier to get a conviction if Spence were not defending Sandy and that he told numerous people that he wanted Spence off the case. He also admitted telling a reporter from the *Oregonian*, the only statewide newspaper, that it would be unethical for Spence to represent Sandy and that Michele Longo could be disbarred for involving Spence. Since Stapleton was a member of the Ethics Committee, his opinions carried weight. After going through the potential adverse effects Stapleton's statements in the press might have on prospective jurors, Spence turned to Stapleton's own conflict – the fact that Sandy had consulted with the Victim's Rights Office concerning Gerttula. Finally, Spence tried to establish that Stapleton was a potential witness – that he was at the scene shortly after the shooting, had heard the questioning of Mike Jr. and had seen the thirty-thirty rifle, the bullet holes in the truck and Gerttula's body.

During the "cross-examination" by Marquis of his boss, Stapleton, Judge Haas at one point exercised his discretion under the Oregon equivalent of **Federal Rule of Evidence 611 permitting the judge to ask questions**.

Judge Haas was apparently most interested in learning Stapleton's motive for commenting to a reporter that Spence's representation of Sandy was unethical and that Longo could be disbarred. Judge Haas was concerned about the predictable effect such comments would have on prospective jurors.

On **redirect-examination** of Stapleton, Spence focused on Stapleton's enmity against Sandy. Stapleton admitted prosecuting Sandy on two separate misdemeanor complaints brought by Gerttula and that Sandy had been acquitted both times. Stapleton further admitted that he had refused to prosecute Gerttula when Sandy reported that Gerttula shot at her children.

Spence next called the reporter who spoke with Stapleton. The reporter at first refused to testify on the basis of the **newsgathering shield privilege**, but Judge Haas ordered her to answer the questions. She confirmed the conversation with Stapleton.

The **prosecutor's closing argument** turned into a dialogue between Judge Haas and Marquis – Judge Haas' questions revealing his leanings. Judge Haas remained most concerned about Stapleton's **comments in the press** and Stapleton's status as a **potential witness** and it became apparent that Judge Haas was considering barring the entire Lincoln County Prosecuting Attorney's Office from participating in the case.

CHAPTER THIRTEEN

“Genius in the courtroom is the product of endless hours of work in the lawyer's lonely office with the doors locked and the phone off the hook. I spend as much as ten hours in preparation for every hour in the courtroom”

Judge Haas entered his **order barring all Lincoln County prosecutors from participating in the Sandra Jones case** and requiring all attorneys to refrain from extra-judicial comments about the case – a so-called “**gag order**”. James M. Brown, the former Oregon Attorney General, was appointed **special prosecutor** to replace Stapleton and Marquis, and a new trial date was set.

The *Oregonian* filed a **Motion to Intervene** in the case and filed a **motion** with Judge Haas **for the release of Judge Gardner's findings** in Mike Jr.'s case. The Supreme Court of Oregon had previously required disclosure of those findings to the lawyers, but the findings were not part of the public record. Judge Haas denied the motion and told the *Oregonian* it was Judge

Gardner's decision to seal his findings and that they should take the matter to Judge Gardner. When the *Oregonian* approached Judge Gardner, he responded that he intended to seal the findings until future order of the judge in Sandy's case – in other words, Judge Haas. The *Oregonian* again approached Judge Haas who, once again, deferred the decision to Judge Gardner claiming that the sealed findings in Mike Jr.'s case were not part of Sandy's case and that he (Judge Haas) did not have jurisdiction to grant their motion. Judge Gardner countered by releasing the sealed findings to Judge Haas.

After this game of “judicial hot potato” the *Oregonian* filed a **Petition for a Writ of Mandamus** in the Supreme Court of Oregon requesting that the Court require Judge Gardner to release his findings to the newspaper in Mike Jr.'s case and for an order requiring Judge Haas to lift the “gag order”. The newspaper argued that the state constitution declared that “[n]o court shall be secret” and that the **First Amendment of the United States Constitution guaranteed a free press**. Judge Haas responded by immediately and voluntarily lifting the gag order.

Spence's concern was that the release of the findings in Mike Jr.'s case would have an adverse impact on the eventual jurors in Sandy's case. The prosecution would likely argue that Mike Jr. shot Gerttula at Sandy's urging. Spence would argue that Mike Jr. and Sandy were shooting at the truck tires and not at Gerttula, and that Gerttula was accidentally shot by Mrs. Gerttula. A judge's findings that Mike Jr. shot Gerttula with his thirty-thirty rifle could sway jurors to side with the prosecution's theory of Sandy's guilt. Spence filed a **Motion to Intervene** in the *Oregonian*'s case in the Supreme Court. Spence argued that release of the findings in Mike Jr.'s case would result in irreparable damage to Sandy's **right to a fair trial** anywhere in the State of Oregon. Spence argued for a delay in the release of the findings until Sandy's case was over.

The Supreme Court of Oregon ordered Judge Gardner to immediately release his findings. Spence promptly filed a **motion for an in-camera review** of the findings – a request that the Supreme Court of Oregon first look at what was in Judge Gardner's findings before requiring the release of the damaging material. The Supreme Court of Oregon denied the request and the findings were turned over to the press.

This debate between the *Oregonian* and Spence is an excellent vehicle to discuss the scope of the **First Amendment freedom of the press provision**.

CHAPTER FOURTEEN

“The power was in the caring. Caring is contagious. It caught hold of the judge. That power penetrated the lifeless law and gave the law life. And it had given us life.”

Judge Haas held a **bail hearing** for Sandy – her third. The new prosecutor, Brown, was there with an assistant – Doug Dawson, a lawyer Brown borrowed from the Oregon Attorney General’s Office. As Brown pointed out, nothing had changed since the first two bail hearings. The law was the same. The facts were the same. Only the judge was different. Judge Haas determined that Sandy was not a flight risk and that she belonged at home with her children.

Spence credits Sandy’s release to caring. He criticizes legal education and gives law professors a **lesson in caring**:

Caring! How strange that feeling is to the law. In that barren landscape called the classroom, professors stuff their students with empty legal didactics as if to suffocate them, as if to render them as dead as they. They who have never faced a jury, who have never given themselves the inimitable gift of caring for some voiceless wretch, they preach to their students, “As a lawyer you must avoid becoming emotionally involved in your cases.” I say nothing, nothing at all, is more void of feeling than the abstract law. But caring is the taproot of justice.

Sandy returned home but even after her release she stayed isolated from Mike Jr. By order of Judge Gardner, Mike Jr. was staying with his grandmother in Portland and was not permitted to return to the farm and Sandy was not permitted to leave Lincoln County.

Spence filed a **motion for a change of venue** – asking that the trial be moved from Lincoln to Portland because of the **pre-trial publicity**. Although much of the pretrial publicity was statewide, a move to Portland would provide a larger **jury pool** to choose from. Judge Haas granted the motion. The trial would take place in Portland.

There was another surprising development. Spence received a letter from Brown advising him that the Lincoln County Sheriff’s Detective Ronald Peck, the lead detective in Sandy’s case, had been suspended from duty and may be indicted for mishandling evidence.

CHAPTER FIFTEEN

“Judges long for lawyers to tell them the truth. A lawyer should become a reliable guide. Trials are like wandering through strange woods, and the judge needs to rely on someone he can trust to show him the way.”

The trial date had arrived and Spence gives trial lawyers advice in often-overlooked areas of **trial advocacy**. Sandy was **plainly dressed** and would arouse no jealousy or sexual desire on the part of jurors. According to Spence, if jurors are jealous of or attracted to your client, you’ll have trouble. The defense lawyers, too, were **plainly and professionally dressed**. “Dress should never become an issue. Too many other issues to deal with in a murder trial – in any trial.”

Spence also had to deal with Sandy’s temper. When, from Sandy’s perspective, witnesses testified untruthfully, an angry reaction from her could easily be misconstrued and she could be seen as an angry woman capable of murder. Spence addressed this very candidly with Sandy, and then assigned Longo the task of **client control** in this regard.

Next we see a variety of issues brought before the court pretrial. Sandy was charged with murder and attempted murder. In the course of Mike Jr.’s case, the state came to the conclusion that Mike Jr. and not Sandy had fired the shot that struck Gerttula. Since Sandy didn’t fire the fatal shot, the murder charge against her had to rest on the theory of **aiding and abetting murder**. The problem was that Mike Jr. had been found responsible for **manslaughter (a reckless killing)** and not **murder (an intentional killing)**. **How could Sandy possibly be found guilty of aiding Mike Jr. in an intentional killing, when Mike Jr. hadn’t intended to kill?** The judge took the issue under advisement and reserved his ruling until the close of the prosecution case-in-chief.

Spence did convince Judge Haas to **sever the attempted murder charge and the murder charge** – that is to separate them and require them to be tried separately. The murder charge would be tried first. Longo, at least initially, disagreed with this tactical decision. If the prosecutor lost the murder case, he could try Sandy again on the attempted murder charge. Spence defended his strategy saying, “You win these cases one at a time.”

Brown, once again, raised the issue of Spence’s **conflict of interest**. Spence had listed Mike Jr. as a potential defense witness. This time, instead of arguing that Spence should step down as Sandy’s lawyer, Brown argued that

Mike Jr. should have **independent counsel**. Brown pointed out that Mike Jr. had yet to be sentenced and argued that Mike Jr.'s testimony in Sandy's case might negatively affect his sentencing in the juvenile court. Spence looked past the benevolent façade – the prosecutor's feigned concern over Mike Jr. – and argued that Brown did not have Mike Jr.'s interest at heart, but simply wanted a lawyer to instruct Mike Jr. not to testify. Brown wanted to eliminate one of only three witnesses to the shooting. Spence also pointed out that Steve Lovejoy represented Mike Jr. and would be present to protect him.

Spence, once again, brought up Mrs. Gerttula's **polygraph**. He informed Judge Haas of Marquis' promise to dismiss if Mrs. Gerttula failed the test. Spence wanted the test results so he could have them examined by a defense expert. He argued he had a right to try to enforce the agreement. Spence also asked for any notes that were in the polygraph examiner's file arguing that they might lead to exculpatory evidence. Judge Haas said he would look at the polygraph notes and then decide whether the defense could see them.

Next, Spence urged the judge to **exclude the testimony** of a prosecution expert because of **discovery abuses**. Four months earlier, the state, through Stapleton, ordered that its criminologist Terry Bekkedahl perform additional tests. The purpose of the tests was to continue to explore possible explanations for the gunpowder residue found on Mrs. Gerttula's hands and face. Spence had not been provided the notes from the testing and, therefore, the defense expert could not review the notes and assist Spence in confronting Bekkedahl. Judge Haas reserved ruling on the motion to exclude, but did order that Bekkedahl's testimony be deferred until after the state produced the notes and the defense expert reviewed them. The state was also ordered to pay the fees associated with the defense expert's review.

The judge next heard arguments on a **motion to quash a subpoena**. Spence had subpoenaed as a defense witness Judy Pinckney, a reporter for the *Oregonian* newspaper. The *Oregonian* filed the motion to quash citing Oregon's shield law. Pinckney interviewed Mrs. Gerttula at her home two days after the shooting. Only moments after the interview concluded, Trooper Geistwhite arrived. Trooper Geistwhite had twice before interviewed Mrs. Gerttula. When the autopsy findings were available, Geistwhite knew something was seriously wrong with Mrs. Gerttula's statement. The autopsy proved Mr. Gerttula had been not been shot with a twenty-two, contrary to Mrs. Gerttula's previous statement wherein she stated that Sandy shot Mr. Gerttula point blank with a twenty-two. During

the third Geistwhite interview (only moments after the Pinckney interview), Mrs. Gerttula changed her statement. If Spence could get the statement Mrs. Gerttula had given to Pinckney only moments before, presumably he could **impeach the credibility** of Geistwhite and Mrs. Gerttula by showing that Geistwhite manipulated Mrs. Gerttula into renouncing her earlier statement.

Judge Haas was confronted with yet another motion. Spence at one time had considered using Dr. Vincent DiMaio as an expert on gunshot wounds. Spence sent him materials to review and, based on the material, Dr. DiMaio concluded that Gerttula's wound was consistent with a bullet from a rifle. Spence decided to go with another expert who concluded otherwise. The prosecutors then named Dr. DiMaio as their expert. Spence objected because of the **confidential matters** he had shared with DiMaio.

The defense next argued that the testimony of Mary Rose, the DA's victim's rights representative, should be stricken on the basis of privilege. Judge Haas overruled the motion finding that Sandy did not have an attorney-client relationship with the DA's office.

Finally, the defense argued that Judge Haas should exclude the testimony of Rocky Marrs – a convicted felon and police informant. Brown claimed Marrs would testify that several years before the shooting of Gerttula, Sandy had pointed a gun at Marrs' head and said, "The next time Gerttula comes up here, I'm going to blow him away." The prosecution's justification for the **prior bad act** evidence was that it shows motive pursuant to Oregon's equivalent of Federal Rule of Evidence 404 (b). Spence argued the incident, if it happened at all, was too remote to be relevant. Judge Haas overruled the defense motion.

The judge recessed for the day taking the undecided motions under advisement.

CHAPTER SIXTEEN

"As I walked toward the courtroom, I thought, thank God for juries. Give me twelve good, ordinary people. Give me, at last, people who speak my language, people I can trust. I trusted juries, and so long as I remained trustworthy, they had most often trusted me."

The **animosity between the prosecution and defense counsel** continued. We see squabbling about the propriety of the state's investigator trying to interview Mike Sr. and Michele Longo. We hear allegations of continued

harassment of Mike Sr. by Trooper Geistwhite, one of the officers involved in the case. Trooper Geistwhite apparently stopped Mike Sr. in his car while Mike Sr. was en route to his grandmother's funeral. Mike Sr. was slammed against the car, arrested at gunpoint and held in jail overnight for the relatively minor offense of driving with a suspended license. The complaints flowed in both directions. Brown accused Spence of intentionally bumping his assistant, Stafford, causing Stafford to spill hot coffee. The judge felt compelled to speak with the lawyers about **professionalism**.

After confirming with Mike Sr. that Spence represented the entire family, Judge Haas ordered the prosecutors to instruct their investigator not to speak with Mike Sr. or attempt to contact defense counsel. Judge Haas was also ready to rule on another motion. He **denied the motion to quash the subpoena of Oregonian reporter Judy Pinckney**. He also ordered that when Pinckney appeared as a witness that she bring with her the notes she took during the interview of Mrs. Gerttula. Judge Haas planned to review the notes and determine at that time if her testimony would be as relevant as Spence supposed. Judge Haas found that Oregon's shield law applied, but also noted that the **privilege was not absolute**. Judge Haas ruled that Sandy's **constitutional right to a fair trial took precedence over the shield law**. Spence comments on the **political power the press typically wields over elected officials** and he recognized the courage inherent in Judge Haas' decision. Spence feared the notes would disappear and asked the judge to take possession of them. But the *Oregonian's* lawyer, Wallace Van Valkenburg, assured the court that he would maintain the notes. The judge accepted Van Valkenburg's representation noting, "There must be some honor remaining in the profession."

The time to begin the trial had finally arrived.

CHAPTER SEVENTEEN

"A courtroom is a place of both wonder and horror. It is one of the few arenas in which a human being can speak on behalf of another human being about issues critical to life and death. It is also a place where the voices of the poor and terrorized are muted by the grinding machine of injustice and by the snarl and hiss of hate and revenge."

Spence describes the courtroom in vivid detail and in doing so transports us there. We feel the tension the trial lawyer feels in the moments before the start of a serious case as the enormity of responsibility is fully realized. We

can hear the rap of the gavel and the immediate reaction of all to stand as the judge enters and takes the bench. Spence then gives us a lesson in how to conduct **voir dire**.

Spence first gives us the opportunity to consider **the goal of jury selection**. Is it to pick those who will be fair to both sides, or is it to pick those who will favor your case?

After preliminary questioning by the judge, Spence approached the podium and addressed the prospective jurors. We see a lawyer speaking openly and honestly to them about his fear – as a way to begin to “break the ice”. We see him seamlessly move into substantive questioning. We see not only his **choice of topics** to raise with them, but we also see his thought process, interpretation and reaction to the various responses of prospective jurors. We see why he selected the topics he did and **the difference the answers made** in deciding who to exclude when the time comes to make **peremptory challenges**.

Spence gives us simple but profound keys to effective jury selection:

When I ask jurors to reveal to me parts of their personal lives, I must first do the same. It was only fair. They want the lawyer to reveal his own feelings first, which gives them permission to reveal theirs.

We get Spence's insights and philosophy about jury selection interspersed with examples from the case. **The objective is to create a safe and open environment that will permit jurors to be forthcoming and candid.**

Every answer a juror gives, even an adverse one, is a gift, something that will help me decide if the juror will be open to my case.

He deals with such substantive issues as the **jurors' right** to be excused from a case they feel they cannot fairly hear, their **attitude about and willingness to judge others**, and the psychological impact of **multiple charges** giving the impression of guilt by the sheer number of allegations. We see the contrasting styles between Spence and Brown and the timely objections by both.

Judge Haas recessed at the end of the day with jury selection not yet complete. Before leaving the courtroom, Brown gave Spence six hundred pages of information dealing with the indictment of Investigative Officer

Ronald Peck. Since the **information might contain or lead to exculpatory evidence**, the disclosure was required under *Brady v. Maryland*.

CHAPTER EIGHTEEN

“[T]o go forward with this case would make a mockery of the judicial process.”

The next morning and while the prospective jurors waited for jury selection to resume, Spence made an oral **Motion to Dismiss** the case based on the material Brown had given him the day before. Spence had contended all along that a gun was missing and that Monica Gerttula had fired it inadvertently shooting her husband. Ronald Peck, the lead investigator on Sandy’s case, had been caught stealing evidence from the sheriff’s evidence locker during the time he had been investigating Sandy’s case. The police reports alleged that Peck stole guns and drugs. Spence speculated that Peck might have stolen the missing gun in Sandy’s case. Brown argued that there is no missing gun and that the state could prove Sandy’s guilt without Peck’s testimony. Judge Haas wanted a formal, written motion. He dismissed the jury until Friday (it was now Wednesday) and ordered the lawyers back the following morning.

Spence, Moriarity and Longo spent the day preparing the **written motion to dismiss** and by next morning were back in court to argue the motion. The motion detailed the extensive list of responsibilities Peck had in Sandy’s investigation and detailed his failures. Spence speculated that perhaps Peck was under the influence of the drugs he stole while investigating Sandy’s case. He ended by saying, “This case has been so stained, tainted, and contaminated by the conduct of the state through its agent, Peck, that a reliable and credible body of evidence cannot be presented to the jury and the case must be dismissed.”

By agreement, Peck was in court to establish that he would refuse to answer questions on the ground that his answers may tend to incriminate him – as was his **Fifth Amendment** constitutional right.

Spence argued that the state should grant Peck **immunity** so he would be required to testify. Spence figured he would have the advantage either way. If the state granted Peck immunity and Peck had to testify, the cross-examination would be devastating to the state’s case. If the state refused to grant Peck immunity and Peck was, therefore, unavailable as a witness, the court would dismiss the case. Judge Haas decided to take evidence on the

issue of whether the accused could receive a fair trial without Peck's testimony. He ordered the attorneys back in court the following morning to make whatever record they intended to make.

CHAPTER NINETEEN

"The state takes the Fifth!"

The next morning brought a fresh issue. Lawyers who were in the courtroom to watch the voir dire overheard one of the jurors say, "We could save a lot of time if we just took 'em out and hung 'em." Spence asked that the juror be interviewed in chambers about the alleged statement. Not surprisingly, the juror denied making the statement, but Spence still asked that he be **dismissed for cause**. The judge responded by **dismissing the entire venire**. It was obvious the **evidentiary hearing on the motion to dismiss** would take too much time to keep the prospective jury waiting.

Spence first called prosecutor Josh Marquis to the stand to establish Peck's role in the investigation of Gerttula's death -- how Peck had coordinated the police work at the scene, collected key evidence and interviewed crucial witnesses. Spence established that Sandy gave her first statement to Peck and made exculpatory statements to him. It was Spence's goal to establish Peck was so intimately and extensively involved in the investigation that his testimony was necessary to Sandy receiving a fair trial. Since Peck refused to testify, Spence argued that dismissal was required. Spence also used Marquis to establish the extent of Peck's wrongdoing in other cases to undermine confidence in the evidence collected by Peck in Sandy's case.

Spence also established through Marquis that Peck had made critical mistakes in his investigation. Since Peck would refuse to testify, Spence argued the only remedy was to dismiss the case.

Marquis was a difficult witness and only grudgingly admitted the facts Spence wanted to establish. We see how Spence patiently and persistently handled the **reluctant witness** -- drawing attention to the witness' unwillingness to answer questions candidly and undermining the witness' credibility.

Spence's next witness was Stephen Toliver -- the polygraph examiner who administered the polygraph test to Monica Gerttula. When Spence began to question the witness about the results of the polygraph, Dawson objected. The argument over the propriety of Spence questioning Toliver under oath

ended with an agreement that Spence could interview Toliver. The judge left the bench and Spence immediately conducted his interview.

CHAPTER TWENTY

“This trial business was the historical remnant of men killing each other in the pits. Now we slaughter each other with words in the courtroom. I saw the prosecutors as bad men. But that’s how you see your opponent, your eyes looking up from the depths of your gut where your feelings are.”

Toliver had confirmed that Monica Gerttula was deceptive when she denied having shot a handgun at the scene. Why would the prosecutors not dismiss the case when their eyewitness not only fails the polygraph but also has gunpowder residue on her hands and face in sufficient quantities for the state’s criminologist to conclude she shot a firearm that day? Spence asked, “Are these prosecutors evil men, or what?” Spence’s wife, Imaging, who was visiting her husband over the Memorial Day weekend, provided her insight: “These guys believe in their case. ... They believe Monica, that’s all.”

And what about Mrs. Gerttula? If she shot her own husband, why would she blame Sandy? Imaging’s theory was that Mr. Gerttula gunned the pickup truck at Sandy. Sandy and Mike Jr. defended by shooting – trying to disable the truck. Mr. Gerttula got out of the truck and began wrestling Sandy for the gun. Mrs. Gerttula panicked, grabbed the pistol and shot in an attempt to defend her husband. When she accidentally shot him instead of Sandy, she denied it – even to herself. “You can never make yourself believe you shot your own husband. You’re in deep denial. You will not believe it. [You tell yourself] Sandy was the one who shot him.” Imaging added, “And later, if you find out you made a mistake, it doesn’t make any difference. If she and her outlaw kid hadn’t been there with their guns, everybody would be alive today. It was Sandy Jones who caused the death of your husband. And that’s the way you are going to tell it.”

By **visualizing the case from the vantage point of the opponent** – the prosecutors and Mrs. Gerttula – Imaging was able to explain that they were not evil, lying people. They simply had human motivation to see the case the way they saw it. According to Imaging, everybody in the case was doing what they thought was right. Her insight would change the way Spence saw and tried the case.

CHAPTER TWENTY-ONE

“As I stepped up to the podium, I could feel the sword of ancient times in my hands and I wanted to swing it – hard.”

Monica Gerttula had been deceptive when she denied firing a handgun at the scene according to Toliver, the state’s polygraph examiner. Spence was back in Judge’s chambers ranting. He argued that the case should be dismissed because the state’s only eyewitness had lied during the polygraph examination, because the state had agreed to dismiss if she lied, and because of the **prosecutorial misconduct** in not voluntarily disclosing the results of the polygraph examination.

The prosecutors argued the polygraph results were invalid because Mrs. Gerttula was upset at the time. The judge seemed unimpressed with this argument. He said, “Who picked the time and place for the polygraph ... [t]he prosecutors?” ...[A]pparently ... they indicated enough reliance on the test that they’d dismiss it if she failed”

The judge ordered Josh Marquis to retake the witness stand. The evidentiary hearing on Spence’s **Motion to Dismiss** resumed.

CHAPTER TWENTY-TWO

“This isn’t the way the trial of a case is supposed to go. ...Lawyers are supposed to be open. People’s lives are at stake. Those prosecutors have all that power, and they can destroy innocent people with it. They are supposed to protect the innocent. ...It’s not just my cases. It’s how the system works. Ethics are just rules to get around. Justice is an empty word. The prosecutors want to win. They want scalps. They want to be reelected.”

During questioning by Spence, Marquis admitted that it was his decision to have Mrs. Gerttula submit to a polygraph and that he had agreed to turn over any exculpatory material that might be generated as a result of the test and even dismiss the case if he learned Mrs. Gerttula lied. Marquis also admitted later refusing to divulge the polygraph results to Spence and not advising the court. His excuse was his belief that the test results were invalid. On cross-examination by Brown, Marquis explained that Mrs. Gerttula was very upset before and after the polygraph examination. But Judge Haas wanted to know why she was not retested. Marquis offered that Mrs. Gerttula was not in a good mental state to be retested.

Stapleton testified next. During questioning by Spence, he admitted he has confidence in polygraph examinations and that he used them routinely to satisfy himself that witnesses are telling the truth before he presents them to a court, **petit jury** or **grand jury**. He had Mrs. Gerttula tested for this very reason. Stapleton admitted he wanted the judge to know that Monica Gerttula was being subjected to a polygraph examination and if she were deceptive, he would dismiss the case. But Stapleton denied that keeping the test results secret and going forward with the case could give the court the clear impression she had been truthful. Stapleton acknowledged that he instructed Toliver not to create a report so Stapleton wouldn't have to produce a report if defense counsel requested it.

Regarding the lead investigator, Peck, Stapleton testified that Peck had a drug problem, was to be charged with forty-six counts, and had possibly planted evidence in a drug case. Stapleton admitted that the same kind of moral deprivation that would cause a person to plant evidence in a drug case, could cause the person to plant evidence in a non-drug case. Despite these admissions, Stapleton said he wouldn't hesitate to present Peck as a truthful witness.

Stapleton disclosed that Gerttula had come into possession of three handguns through Peck. Raymond Gerttula, Wilfred Gerttula's brother, was a convicted felon. Raymond had been cited for a parole violation for illegal possession of firearms – a .38 Special, a .357 Magnum, and a .380 semiautomatic pistol. Stapleton testified that Peck had taken possession of the handguns seized from Raymond and delivered them to Wilfred Gerttula.

Regarding the handgun Spence claimed was fired by Mrs. Gerttula at the scene, Stapleton said he considered ordering the river dredged, but never did.

Spence also questioned Stapleton about the **intimidation of a witness**. John Amish, a chemist from the state crime lab, voluntarily met with Spence and freely discussed the excessive gunpowder residue on Monica Gerttula's hands and his opinion that Mrs. Gerttula fired a handgun that day. After Stapleton learned of the meeting, he lodged a complaint with Amish's boss. Amish was required to prepare a written report explaining his conduct as if meeting with defense counsel was misconduct. Stapleton denied that it was his intention to intimidate Amish.

The hearing was not going well for the prosecution. Prosecutor Brown offered a compromise. He offered to **stipulate** that the judge, at trial, could instruct the jury that Peck, the state's lead investigator, if called as a witness to testify, would refuse by asserting his Fifth Amendment right against self-incrimination. Without this stipulation, defense counsel could only point out that Peck was absent, but not tell the jury why he was absent. The judge urged Spence to think about it.

CHAPTER TWENTY-THREE

"...[T]he DA's polygraph operator, hearing the blessed words 'I have no further questions,' bundled himself up and escaped for good from that tortuous chair called the witness stand, which, over the centuries, has proven to be the best lie detector of all."

Spence discovered that the handguns seized from Raymond Gerttula and delivered to Wilfred Gerttula by Peck had been retrieved by the police before Wilfred Gerttula was shot. But one of the three handguns, the .380 semiautomatic, was unaccounted for. Spence requested and Judge Haas ordered that Brown produce the third handgun.

The evidentiary hearing on Spence's **Motion to Dismiss** resumed with the recalling of Stephen Toliver, the polygraph examiner. His earlier testimony had been interrupted and Spence was permitted to interview him. Now it was time to get Toliver under oath and on the record. Through Toliver's examination, we are educated about **how polygraph examinations work**.

The examination of Toliver established that Toliver worked for the District Attorney's Office and could be fired at the displeasure of Stapleton. He knew this was a big case for Stapleton and Marquis and that they were nervous about Spence's involvement in the case. This was the first time the prosecutors had instructed Toliver not to make a report. The polygraph examination was very important to them. But the test unexpectedly gave a strong indication of Mrs. Gerttula's deception on the critical question of whether she fired a handgun that day. Toliver was well aware that if Mrs. Gerttula fired a handgun that day and lied about it, it would be devastating to Stapleton's case. Toliver declared the test invalid for the reason that Mrs. Gerttula was too upset for the results to be valid. Toliver claimed he knew she was too upset for a valid test *before* he gave her the test but gave it to her anyway. He shouldn't have given it to her, he said. Spence argued that the polygraph was set up so the prosecutors could claim the test was invalid if there were indications of deception, but valid if it indicated she was being

truthful. Toliver denied Spence's suggestion, but Spence had made the point. In Spence's view, Toliver was covering for the prosecutors and taking the blame – perhaps to save his job.

CHAPTER TWENTY-FOUR

“...[W]e strap murderers in the gas chamber for their crimes, but when the state fails to deliver justice and the innocent suffer or die, we shrug our shoulders and say that the system isn't perfect.”

Spence wanted to establish that Peck's refusal to testify destroyed Sandy's defense. Steve Lovejoy was called to the witness stand to testify in this regard. **Lovejoy testified as a criminal law expert** that the cross-examination of Peck was essential to Sandy receiving a fair trial. Peck's involvement tainted every aspect of the case and, while the state may be able to make a case without him, the defense could not. Not only did the defense want to demonstrate through the cross-examination of Peck that the investigation was mishandled and infected with doubt throughout, Peck's testimony was needed as the **evidentiary foundation** for defense witnesses. For example, Lovejoy testified that an engineer hired in Mike' Jr.'s case was able to show that from the area where Mike Jr. was standing when Gerttula was shot, Mike Jr. would have had to have been on a twenty-foot ladder to account for the path of the bullet as established by the autopsy. If Gerttula had been bending over at an angle sufficient to create the path the bullet took, he would have been shielded from Mike Jr. by the pickup truck. Peck's testimony was necessary to lay the foundation for the engineer's expert opinion testimony.

Lovejoy also served to rebut the suggestion that Stapleton wouldn't subject a person to the polygraph if the subject were emotionally distraught. Lovejoy's personal experience suggested otherwise. One of Lovejoy's clients was so emotionally distraught he had to be on lithium. He submitted to a polygraph examination at Stapleton's insistence. The test results indicated the witness was being deceptive. Stapleton relied on the results.

Brown called a witness to dispel the mystery of the missing .380 semiautomatic pistol taken from Raymond Gerttula and delivered by Peck to Wilfred Gerttula. The witness claimed the gun had been stolen from him and was returned to him by the police. The judge ordered the witness to bring the gun to court on Monday. The court recessed for the weekend.

CHAPTER TWENTY-FIVE

“If citizens lie, they get prosecuted for perjury. If some poor wretch charged with murder lies, they’ll hang him by his scrawny neck. There are more men languishing on death row not for the murders they may have committed, but for having lied about them. Jurors detest liars. But when the state steps over the edge, well, it is only ‘in search of the truth’ as it strolls with all rectitude down the imperious road to justice – as in some prosecutors’ perennial argument ‘What’s a little “loose usage of the language” compared to murder?’”

The owner of the third firearm taken from Raymond Gerttula and given by Peck to Wilfred Gerttula did as he was ordered to do. He brought the gun to court and satisfied all that it was the gun taken from Raymond Gerttula. The serial number matched.

Back in chambers, Dawson ignited another controversy. Dawson revealed that, according to Stapleton, Judge Gardner was under the impression that Monica Gerttula’s polygraph was inconclusive (not invalid, but inconclusive). Brown and Dawson were apparently trying to establish that Judge Gardner was not misled into believing that Mrs. Gerttula had passed the polygraph when the state proceeded with the case after promising to dismiss if Mrs. Gerttula was found to be deceptive. Spence had been arguing all along that proceeding with the case and remaining silent about the polygraph would give Judge Gardner the false impression that Mrs. Gerttula was found to be truthful. But where would Judge Gardner get the impression that Mrs. Gerttula’s polygraph was inconclusive? As Spence was beginning to react to this latest provocation, Dawson escalated the controversy by divulging that the state’s investigator was to interview Judge Gardner about the polygraph. Spence was livid. Mike Jr.’s case was still pending before Judge Gardner. Mike Jr. hadn’t been sentenced yet. Now the state was going to interview Judge Gardner – according to Spence, a forbidden **ex parte communication**. Spence erupted with anger and frustration. He accused Dawson of interfering in the disposition in Mike Jr.’s case. Spence then asked Dawson to stop the interview. Dawson refused. Spence asked Judge Haas to order Dawson to stop the interview. Before Judge Haas could respond, Spence then asked Dawson to determine if the interview had already taken place. Dawson again refused. Spence now had the clear impression that the interview had already taken place and that Dawson knew it. Spence established the time in the record as 10:19 a.m. The judge took a long lunch recess – presumably to allow the tempers to subside.

After lunch, Dawson reported that the interview of Judge Gardner took place after the recess and before noon. Spence doubted it. Spence believed the interview had already taken place when Dawson told them about it earlier that morning. In response to questions by Spence, Dawson revealed that investigator Gary Stafford conducted the interview of Judge Gardner by telephone, and that the conversation was tape-recorded *without Judge Gardner's knowledge that he was being recorded*. Judge Haas was visibly upset that a judge's conversation would be recorded by the state without the judge's knowledge and consent. He began to question Dawson about it. But it was Dawson's turn to go on the offensive. He accused Spence of **obstruction of justice** for attempting to interfere with the state's ability to procure a witness and evidence. He was referring to Spence's request that Judge Haas order Dawson to call off his investigator. Spence, in turn, accused Dawson of **unethical conduct** for trying to intimidate him (Spence) with an allegation of criminal conduct. Judge Haas, disbelieving, shook his head.

CHAPTER TWENTY-SIX

"In the heavy, gray hours of dawn we'd prepared another motion to dismiss. By now the sides had been reversed – we'd become the prosecutors, the accusers charging the state with a litany of misdeeds."

Brown would call witnesses to try to **rebut** the defense contention that Sandy Jones' defense had been prejudiced. One of those witnesses was Fox – the polygraph examiner who tested Lovejoy's client. Fox had a different recollection of Lovejoy's client than the emotional wreck Lovejoy described. Fox remembered a very pleasant and calm person. On **cross-examination**, Spence used Fox for his own purposes. Fox testified that it was good practice to produce a report after every polygraph examination. He also said that if a subject did not appear to be emotionally fit to be tested, he wouldn't do it. Spence's examination is a good example of a **constructive cross-examination** where, instead of trying to **destroy the witness' credibility**, the witness is used to **affirmatively advance the position of the cross-examiner**.

Something seemed wrong with Spence's copy of the Gardner tape. Not only did the recording start after Stafford's interview of Judge Gardner began leaving out the dialogue that occurred at the beginning, but it was also as if something had been dubbed-in over part of the interview. Spence requested that Judge Haas require the **production of the original tape** pursuant to the

so-called **best evidence rule**. Judge Haas ordered that the original tape be placed into evidence. Spence had contacted an expert who could try to determine if the tape had been altered, but the expert needed the tape machine used by Stafford to record the tape. Judge Haas ordered the prosecutors to bring the tape machine to court. Brown resisted producing the tape recorder on a number of benign theories leading Spence to be more suspicious about the tape. After every proffered excuse designed to avoid producing the tape recorder, Judge Haas responded, “Bring the machine.” Judge Haas also ordered that Stafford be present in court the following morning.

There would be another witness on the issue of the taped interview. Spence handed Judge Haas a subpoena requiring Judge Gardner’s appearance.

CHAPTER TWENTY-SEVEN

“Our energy reservoir, like a water well drained dry in a hostile desert, seemed to replenish itself during the night. One day at a time. If only we had the staying power, I thought we’d find a way to win.”

Brown called Detective Gary Stafford to the witness stand. Stafford testified that the Gardner tape had not been altered, that every word on the tape was in the order in which it had originally been recorded and that the beginning of his conversation with Judge Gardner had been cut off because he simply forgot to turn on the tape recorder.

On cross-examination, Spence wanted to discover whether Dawson had misled the court and counsel two days earlier when he said he did not know whether Judge Gardner had been interviewed. Spence had established the time at 10:19 a.m. Spence wanted to prove that the interview had taken place and that Stafford had reported that fact to Dawson before 10:19 a.m. Stafford admitted speaking with Dawson twice that morning – the conversations only a couple of minutes apart – one taking place before the interview with Judge Gardner and the other taking place after the interview. In fact, Dawson had been placed on hold immediately before the second conversation because Stafford was still interviewing Judge Gardner when Dawson called. Spence then established that the first call to Dawson took place about 9:00 a.m. If the second call had taken place a few minutes later, it would have occurred well before 10:19 a.m., and Spence had it. Unwittingly, Stafford had all but confirmed that Dawson had lied to the court and counsel. Prompted by Dawson, Brown intervened by objecting and asking if he could **voir dire the witness** – a procedure to ask questions

of the witness in aid of an objection. After asking a few cumulative questions, Brown abandoned his objection but gratuitously added, “Your honor, my recollection of the witness' testimony is that the conversations [with Dawson] are occurring between *eleven* and *twelve*.” This kind of **speaking objection** or **coaching** is obviously an inappropriate method lawyers use to supply the desired answer to the witness. Spence predictably reacted very strongly, but the damage had been done.

Judge Haas called a recess – again to let tempers subside – but before doing so and at Spence’s request, the Judge instructed Stafford not to have any conversations with counsel or other witnesses until the cross-examination was complete. After the recess it came to light that Stafford had accompanied Brown to Brown’s office during the recess and that they were talking. Brown weakly explained that he only told Stafford he was doing a good job (despite the fact that Stafford was performing so poorly Brown felt compelled to intervene). Judge Haas threatened in the future to hold any witness in **contempt of court** if that witness failed to abide by the court’s instructions.

Back on the stand, Stafford predictably changed his testimony. The two conversations with Dawson were not minutes apart but much longer. His second conversation with Dawson (after the taped interview of Gardner) did not take place a few minutes after nine as he previously suggested, but between 10:30 a.m. and 11:00 a.m.

Brown next called John Amish – the state criminologist who found gunshot residue on Mrs. Gerttula’s hands in sufficient quantities to conclude that she fired a gun the day her husband was shot. Amish had voluntarily met with Spence. He was later required to prepare a report detailing his contacts with defense counsel. Brown wanted to establish that Amish did not feel intimidated by Stapleton. But on cross, Amish admitted he could “feel some stress”.

Brown called Trooper Geistwhite – the officer who arrested Mike Sr. for driving under suspension while Mike Sr. was on his way to his grandmother’s funeral. Spence had argued that this was one of many incidents orchestrated by the state to harass the Jones family. Geistwhite testified he stopped Mike Sr. for failing to dim his bright lights and did not know it was Mike Sr. he was stopping. Geistwhite denied any abusive treatment of Mike Sr. On cross-examination, Geistwhite admitted that he does not stop every car that fails to dim bright lights and that he might go months without stopping such a car. He explained that it was a coincidence

that he stopped Mike Sr.'s car for this offense. Geistwhite was aware of Mike Sr.'s pleas that he needed to get to his grandmother's funeral, but it didn't matter to him.

Monica Gerttula would be Brown's next witness.

CHAPTER TWENTY-EIGHT

"...[J]udges are human beings, too. Although their decisions are couched in legalistic terms, their decisions are first made at the level of their emotions. Justice, to be sure, is only an emotion. We do not know what it is. We only feel it when we experience it and deeply feel its loss when we are shorn of it."

Brown called Monica Gerttula to the stand. She is described in sad compassionate terms. We are made to feel sorry for her sitting on the stand "like a small animal trapped in an inescapable cage." Brown's position was the polygraph was inconclusive because Mrs. Gerttula was so upset. But in answering his questions, Mrs. Gerttula established said she didn't think she was nervous and wanted to take the test. After the test, *Toliver told her* she was quite upset. Mrs. Gerttula asked to take the test again, but Toliver said, "No, I don't think that will be necessary." Finally, Brown elicited testimony helpful to his position. Mrs. Gerttula testified that she has an aversion to guns and can't even bear to watch portrayals of gunfire on television – it makes her nauseous.

As Spence began his **cross-examination**, he felt compassion for Mrs. Gerttula. He remembered Imaging's opinion that if she had mistakenly shot her husband, she could never admit it, but would be in deep denial. **Spence approached her softly, not as an enemy to be destroyed, but as a human being whose human motivation is to be revealed.** In soft tones he had her admit that she owned guns and had shot wild animals – moose with her rifle, and pheasants, ducks and crows with her shotgun. She admitted that it didn't make her nauseous to shoot these animals, but added that that was before the death of her husband. All Spence needed was her admission that she felt comfortable handling a gun up to the day her husband was shot – but there was more. In gentle tones, he had her admit that she carried a loaded pistol loaned to her by a neighbor after her husband died. She had it in her possession as recently as the preceding Saturday when she returned it to her neighbor. Mrs. Gerttula left the stand and Spence wondered why Brown called her in the first place.

The following morning, after three weeks of taking evidence, the lawyers would give their **closing arguments** on the defense **Motion to Dismiss**. Spence sets the scene in the courtroom – “a dull heaviness in the air, a nagging anticipation”. The courtroom was filled with lawyers who came to watch the arguments. Spence notes, “A lawyer does better with an audience.”

Spence reveals to us his **strategy**. He knew Judge Haas respected Brown. Judge Haas had involved Brown in this case in the first place and was reluctant to conclude that Brown was unethical. Spence would not attack Brown directly, but would paint the picture that Brown was in a difficult position having inherited and now having to defend the misconduct of others – Stapleton, Marquis, Peck, Stafford, Toliver and even Dawson. Spence gives the case a name – the **theme** for his closing argument: “The state takes the fifth.” He focused on Peck and the devastating effect Peck’s absence would have on the defense – referring to Peck as the state’s “hub witness”. Spence argues that the state could require Peck to testify with a grant of immunity, but they won’t. Why? Because they know that a competent cross-examination of Peck would be devastating to the state’s case. Spence also relies on the polygraph that revealed Mrs. Gerttula lied about shooting a gun and the gunshot residue on her hands that corroborates the polygraph results. He ends with a dramatic plea for justice – full of passion and righteous indignation. Spence handled this argument no different than a **jury argument** because, as he says, “Judges are human beings, too.”

By contrast we see Brown approach the Judge in an intellectual way as lawyers might approach an **appellate oral argument**. He started by saying, “Counsel’s argument is a splendid ... moving ... persuasive jury argument, but the point is ... that’s where it should be made.” Brown pointed out that the defense failed to demonstrate that there is a missing gun or that Peck was under the influence of drugs when he investigated this case. Brown argued that **the transcript of Peck’s testimony from Mike Jr.’s case (including the cross-examination) could be read to the jury** if his testimony was so essential. Brown offered to waive any hearsay objection to reading the testimony. As for the polygraph, Brown argues that the **polygraphs results are simply not admissible**. Brown took a low-key methodical approach concluding that much has been made of very little.

The **contrasting approaches** provide a good vehicle for discussion. Which approach is best? Do the differing approaches serve different purposes for the two lawyers?

Judge Haas recessed until the following morning at which time he would announce his decision.

CHAPTER TWENTY-NINE

“Now the time had come for this kindly, troubled man to take on the role of the judge, the godly role, to look down upon us and pass judgments. Fear boiled in our bellies. What must Sandy feel?”

Judge Haas took the bench and, reading from a note pad, announced his decision. He **dismissed the indictment** against Sandy **with prejudice** on the ground that Peck’s unavailability as a witness denied the defendant fundamental fairness in that it deprived her of **the right to confront and subpoena witnesses**. The state had put Peck in charge of the investigation in this case, chose to indict him when they did, and chose not to grant him immunity. Brown immediately requested that the **order be expedited** and announced his intention to **appeal**. We see the joy that the defense might have experienced dampened by the prospect that it was not yet over.

Within days, Brown filed a **Motion for Reconsideration** arguing that Peck’s trial might soon be over and he would be able to testify. But Judge Haas found that Peck’s Fifth Amendment right against self-incrimination would exist through the appellate process and it might be years before he was available. Judge Haas denied the Motion for Reconsideration.

Judge Haas had ordered Stapleton to personally appear in court the day of the oral arguments on Brown’s Motion for Reconsideration. Judge Haas wanted to make a record of his assessment of Stapleton’s conduct and to hear Stapleton’s explanation before initiating any action against him. Stapleton appeared and was represented by counsel.

Judge Haas expressed his concern about the way Amish, the state criminologist, had been treated. Judge Haas quoted from the **ABA standards**: “**A prosecutor should not obstruct communication between prospective witnesses and defense counsel**. It is unprofessional conduct to advise any person not to give information to the defense.”

Judge Haas expressed his concern about how the polygraph was handled. He reiterated the facts. Judge Gardner, who would be the finder of fact in Mike Jr.’s case, was told Monica Gerttula would be required to submit to a polygraph and that, if the test demonstrated that she was deceptive, the case would be dismissed. Only after the test did the state declare the test invalid

on the basis of Mrs. Gerttula's pre-test condition. The state went to great lengths to **hide the test results** from the court and defense counsel by instructing the polygraph examiner not to prepare a report, by proceeding with the case without disclosing the results, resisting all efforts to disclose the results when they were requested, and even leaving out information about the polygraph when the file was transferred to the special prosecutor. Judge Haas then quoted the **Canons of Ethics**: "**Intentionally deceiving opposing counsel is grounds for discipline**". He quoted from the commentary to the **ABA Standards for Criminal Justice, the Prosecution**: "It is fundamental that in his relations with the Court, **the prosecutor must be scrupulously candid and truthful with the Court.**" With regard to the prosecutions' refusal to retest Mrs. Gerttula despite her repeated requests that they do so, Judge Haas quoted from **ABA Standard 3-11 (c)**: "**It is unprofessional conduct for a prosecutor intentionally to avoid the pursuit of evidence because he believes it will damage the prosecutor's case or aid the accused.**"

Judge Haas expressed his concern about Stapleton's statements in the press and considered them an intentional attempt to influence public opinion.

Stapleton's lawyer took the position that the decisions Stapleton made were unwise, but did not amount to **prosecutorial misconduct**. Judge Haas was unconvinced.

The discussion then turned to the Gardner tape with Spence requesting that the tape be tested for tampering and Dawson opposing the request. Judge Haas ordered that "in fairness to the Attorney General and to the defense" the tape should be tested to "clear the air".

CHAPTER THIRTY

"Trials are wars. Wars bring on retribution. That all of us, the prosecutors included, were good, decent persons was lost in the war. We shed our sensitivity for the enemy, and to that extent we forfeited our own humanity."

With the charges against Sandy dismissed, Judge Gardner thought it time to render his **disposition (the juvenile court equivalent of the sentence)** in Mike Jr.'s case. The Lincoln County prosecutors filed a **Motion to Disqualify** Spence from further representing Mike Jr. citing once again the **conflict of interest** of Spence representing both Mike Jr. and Sandy. Spence, in turn, filed a **Motion to Disqualify** the Lincoln County prosecutors citing misconduct and abuse including the polygraph fiasco –

the same grounds that resulted in their dismissal by Judge Haas in Sandy's case. Judge Gardner denied both motions.

Spence had to decide whether to also seek the removal of Judge Gardner from Mike Jr.'s case. There were competing factors to consider and we see the lawyer agonize with the decision. The state investigator, Stafford, had contacted Judge Gardner and at least part of their conversation had not been recorded. What was communicated to Judge Gardner and how would that impact on his judgment about what to do with Mike Jr.? If Spence confronted Judge Gardner about the **ex parte communication**, it might infuriate him. Spence had managed to get Judge Gardner removed from Sandy's case – a potentially embarrassing and demeaning incident that Judge Gardner did not likely forget. Could Judge Gardner separate his animosity toward Spence from his decision about Mike Jr.?

Spence asked Judge Gardner to step down. Judge Gardner refused. Spence filed a **Petition for a Writ of Mandamus** asking the Supreme Court of Oregon to remove Judge Gardner on the basis that he (Judge Gardner) had become a witness to the state's misconduct when the state, through its investigator, had ex parte communications with him and surreptitiously recorded the conversation. **The Supreme Court of Oregon denied the request.** Now Spence was stuck with Judge Gardner and the prosecutors. As Spence puts it, "What calm good will was left for an innocent child when all of us were engaged in this holy war against each other?"

Spence moved for **dismissal or, in the alternative, for a new trial.** Judge Gardner scheduled a hearing. Spence laid out many of the same facts that had been before Judge Haas. Spence notes: "That Haas would hold one way on these facts while Gardner would hold the opposite underlined a truth about the law – that it is a pea pod floating in the ocean moved by whatever wave happens to grab it."

Marquis argued that Mike Jr. should be incarcerated because he **violated the terms of his release** when he traveled to Lincoln County with his mother to visit a friend in the hospital. Spence expressed incredulity that a prosecutor would be so harsh.

Marquis also argued that the Mike Jr. should be required to undergo **psychological testing** and discuss the facts of the shooting. Spence's reaction to this request is that Mike Jr. should not be required to give up his Fifth Amendment rights by being required to tell a psychologist what happened in order to save himself from the threat of incarceration.

Judge Gardner would deny the **Motion to Dismiss** and the **Motion for a New Trial**.

CHAPTER THIRTY-ONE

“No one can define truth or justice. They are beliefs. We take a side, and if we are worth a damn, we fight with all we can muster for it. In the courtroom lawyers play word games they would not otherwise play. They make desperate arguments. They flail at their opponents. It is not a sign of evil or unethical lawyers. It is a sign of lawyers who care about themselves and their clients, and who, at last believe.”

Judge Haas filed an **ethics complaint** against Stapleton and Marquis **with the Oregon State Bar Association**. Judge Haas’ complaint against Stapleton focused on Stapleton’s comments to the press that Spence would be disbarred for claimed unethical conduct in representing both Sandy and Mike Jr. These statements were made, according to Judge Haas, “to influence public opinion against the defendant and to frighten the defense from the case”. Judge Haas also set forth the facts concerning the polygraph and accused the prosecutors of making false statements to the court and defense counsel by indicating that Mrs. Gerttula had passed the polygraph.

In the meantime, Marquis filed an **ethics complaint** against Judge Haas **with the Judicial Fitness Commission**. **Complaints against judges are confidential** and so the exact nature of Marquis’ complaint has not been disclosed. Marquis would later claim that Judge Haas filed his complaint in retaliation for Marquis’ complaint and that Judge Haas had backdated his complaint to make it appear that he (Judge Haas) had filed first.

Judge Gardner held a **disposition hearing** for Mike Jr. Judge Gardner ordered that Mike Jr. be **committed to the custody of the Children’s Services Division for a period not to exceed his twenty-first birthday** – in other words, **incarceration at a secure facility for juveniles**. Judge Gardner then **suspended the commitment** and placed Mike Jr. on **probation** under certain **conditions**. Mike Jr. would not be allowed to return to his home in Lincoln County except for short visits, and only then with special permission from Children’s Services. He was required to stay with his grandmother in Portland. Mike Jr. was also ordered to undergo counseling that touched on his involvement with the death of Gerttula.

While Spence tried to look on the bright side (the fact that Mike Jr. was not going to be incarcerated) he saw injustice in preventing Mike Jr. from going home to his mother and father and in requiring him to speak to a counselor about the events of the day Gerttula was shot before his mother's case was finally over.

CHAPTER THIRTY-TWO

“The court [of appeals] gave each side only fifteen minutes to argue what had taken more than a year to fill thousands of pages of transcripts. The judges were busy. Fifteen minutes is all they'd spare.”

Stapleton and Marquis filed **ethics complaints** against Spence, Michele Longo and Steve Lovejoy. The complaint against Spence alleged, among other things, that he had violated the rules when, *before* he agreed to represent Sandy and Mike Jr., he was quoted in the press as saying he was investigating the case and if he found that they were innocent he would ask the Oregon courts if he could be admitted **pro hac vice** to defend them. Stapleton and Marquis claimed this statement violated the **prohibition on lawyers expressing their personal opinion on the guilt or innocence of a client** and that the statement was made to influence public opinion. They also raised again the claim that Spence had a **conflict of interest** in representing both Sandy and Mike Jr.

Stapleton and Marquis claimed that Spence and Lovejoy issued a “false process” when subpoenaing Monica Gerttula for a deposition in connection with Mike Jr.'s case. They claimed that since juvenile court proceedings are criminal in nature, no such process exists. Spence points out that Marquis had argued that juvenile proceedings are not criminal proceedings when Spence was arguing for a jury trial.

Stapleton and Marquis had an independent charge against Longo. Longo at one time represented Raymond Gerttula, Wilfred Gerttula's brother. Wilfred Gerttula came into possession of three large caliber handguns belonging to Raymond Gerttula. The whereabouts of the guns was an issue Spence brought to the attention of Judge Haas when Sandy's case was pending in the trial court. Stapleton and Marquis alleged that Longo must have revealed **confidential client information** in disclosing that Raymond owned the guns. The truth was that Lovejoy discovered this information by checking the records at local gun stores and public courthouse records.

Spence, Longo and Lovejoy filed their joint response setting out their defenses to each allegation. Stapleton and Marquis filed a reply attacking the defenses requiring further explanation by Spence, Longo and Lovejoy. The file grew voluminous and the same process was occurring in the complaint against Judge Haas.

The Judicial Fitness Commission wrote Judge Haas advising him that after completing their review they were **terminating the complaint** against him. That's all they would say since **complaints against judges are confidential**. Marquis responded by filing another complaint against Judge Haas, this time with the Oregon Bar Association. His excuse for doing so was that Harl Haas was not only a judge, but also a lawyer subject to the same code of ethics as other lawyers. Of course the complaint with the Bar Association was not confidential. Spence saw this as a disingenuous circumventing of the rule requiring confidentiality in filing ethics complaints against judges.

Spence's response to the ethics complaint had been so thorough, he had hoped for a **summary dismissal**. Instead, the whole matter was sent to the Multnomah County Local Professional Responsibility Commission to investigate. E. Joseph Dean, a lawyer from Portland, was named special investigator.

Brown had appealed Judge Haas' decision to dismiss the indictment in Sandy's case. After the **briefs** were filed, the **Court of Appeals** set the matter for **oral argument**. Michele Longo handled the argument for the defense. Months later, the Court of Appeals issued its written decision. The Court found that while Peck's indictment by the state was the reason Peck asserted his **Fifth Amendment privilege against self-incrimination**, the state did not act with the purpose of depriving the defense of Peck's testimony. Since Peck would not testify, Sandy had no right to confront him – there was no **Confrontation Clause** violation. The Court further held that since Brown had offered to stipulate that the transcript of Peck's testimony from Mike Jr.'s trial could be read to the jury in Sandy's trial, the defense had lost no evidence and could not successfully claim a **lack of due process**. Judge Haas' decision was **reversed** and the case was **remanded for trial**.

The defense filed a **Petition for Review** in the Oregon Supreme Court asking the high court to hear the appeal from the Court of Appeals' decision. The Oregon Supreme Court denied the request.

CHAPTER THIRTY-THREE

“When a lawyer faces the stark reality of a trial and sees the specter of prison bars across the face of his innocent client, his heart sometimes weakens. ... I felt the gripping fear I always felt before I walked into a courtroom – maybe I couldn’t convince a jury, maybe I’d stumble and fall in the trial”

Another attempt was made at **plea negotiations**. Michele Longo asked Brown to consider letting Sandy plead guilty to an **amended charge** – a misdemeanor. Brown refused. Despite Judge Haas’ attempts to mediate an agreement, Brown would agree to nothing short of a felony with Sandy doing some time in the penitentiary. The amount of time would be left to the Judge, but Brown insisted that the deal require some period of incarceration. The parties did not reach an agreement.

The adverse publicity generated in Sandy’s case had an impact on Stapleton’s political career. A **recall petition** failed to garner enough signatures to remove him as District Attorney, but it became the basis for the campaign against him. Stapleton was defeated in the November election by Dan Goyle who made a campaign issue of Stapleton’s mishandling of Sandy’s case. Spence was hopeful that if the trial was postponed until after the first of the year, perhaps the **new District Attorney** would dismiss the case or at least let Sandy plead to a minor offense. But the case was ripe for trial and Judge Haas would not grant a continuance.

On the first day of trial Spence filed yet another **motion to dismiss** – this time arguing that the ethics complaints created a **conflict of interest** for the defense attorneys involved in the case (Spence and Longo). In choosing which strategy to follow, the defense lawyers would not only have to consider what was in Sandy’s best interest, but also how they might protect themselves. He argued that the vindictive acts of Stapleton and Marquis were time consuming and distracting and deprived Sandy of **effective assistance of counsel**. Spence also cited the adverse publicity generated by the ethics complaints and comments Marquis continued to make in the press as **influencing public opinion** and interfering with his ability to pick an **unbiased jury**.

In support of his Motion to Dismiss Spence again called Marquis to the stand and cross-examined him about his continuing obsession with the case, and the effect his ethics complaints and comments to the press might have on the prospective jurors. Spence called other witnesses to establish that

Marquis went to great lengths to attempt to remain involved in the case despite his office having been removed from the case. Spence next called Stapleton as a witness to establish Marquis' animosity against Judge Haas and his desire to get Judge Haas removed from the case.

Spence called Michele Longo to the stand to establish that the ethics complaints had interfered with her ability to prepare a defense for Sandy because she had to answer the ethics complaint while she was working on the appeal in Sandy's case. Longo also testified about how distracting and disturbing the ethics complaints and adverse publicity had been.

After the testimony was complete, Spence and Brown made their final arguments on the Motion to Dismiss. Judge Haas would render his decision the following morning.

CHAPTER THIRTY-FOUR

"I've always maintained that people who want to pass judgment on others ought not to be allowed to do so."

Judge Haas acknowledged that there was an attempt by the former prosecutors to interfere with the case. He was tempted to again dismiss the case, but wouldn't.

Spence requested that the state not be permitted to call Monica Gerttula as a witness. He reasoned that the state had knowledge that she was lying through the method they chose to test her veracity – the polygraph. Since, according to the **Canons of Ethics**, "[i]t is unprofessional conduct for a prosecutor knowingly to offer false evidence," Mrs. Gerttula should be **disqualified from testifying**. Judge Haas denied the request. Judge Haas announced that jury selection would begin the following morning.

The next morning Spence filed a **Motion to Quash the entire jury panel**. The **master jury list** consisted of registered voters. Spence argued the list should come from a broader base like licensed drivers and other sources. He called the jury supervisor as a witness in support of his motion. She admitted that she routinely excused many persons from jury duty: mothers with small children, the elderly, nurses, doctors, pharmacists, lawyers, ministers, priests, blind people, people with certain religious beliefs, the self-employed, people who earn their living by commission sales, people with planned vacations, people not reimbursed by their employer for jury service, and people with any kind of medical problem. Spence argued that

the jury supervisor was, in effect, selecting the jury and only those who wanted to serve remained. Spence had long held the view that those who wanted to judge others should not be allowed to do so.

Judge Haas overruled the **Motion to Quash** and in frustration said, “We’re going to try this case”, and recessed for the weekend. By Monday morning Judge Haas was having second thoughts on the jury issue. Spence asked for time to go to the Supreme Court of Oregon on a **Petition for a Writ of Mandamus**. Judge Haas gave him two days – until Wednesday.

Spence filed the **Petition for a Writ of Mandamus** with the Oregon Supreme Court requesting that the Court order Judge Haas to **quash the jury panel**. But Spence also requested that the Oregon Supreme Court take **supervisory control of the case** and **stay the proceedings** until the ethics complaints against counsel and the judge had been resolved. The petition was denied.

On Wednesday, and as the prospective jurors filed into the courtroom, Brown made another **offer**. He would agree to Sandy pleading guilty to **second-degree manslaughter**. Whether she would be incarcerated would be left solely to the discretion of Judge Haas. Spence guessed that Judge Haas would probably give her no more than two years. At least then the case would be over. On the other hand, if the jury compromised and found her guilty of **first-degree manslaughter**, the **maximum penalty would be thirty years**. Even if they won the case, the prosecutor could always try her again on the severed attempted murder charge. Spence explained it all to Sandy. After saying again that she didn’t shoot anybody and didn’t ask Mike Jr. to shoot anybody, she asked Spence, “What do you think I should do?” The reader gets a felt sense of the **awful responsibility of advising a client with such a profound decision**.

CHAPTER THIRTY-FIVE

“My job was to release the jurors of their natural hesitancy to speak out, to get past the masks we wear every day. ...I’d broken through the wall that often separates lawyers and jurors. ...I grew to know some of the jurors better than some folks I had known a lifetime. That’s what should happen in a good voir dire. A lawyer ought not to be required to put his client in the hands of strangers.”

The time for **jury selection** had again arrived. Like the first aborted attempt (described in Chapter Seventeen), Judge Haas asked standard, **preliminary questions** before turning the questioning over to the lawyers.

Spence first performs the simple task of introducing the court personnel to the prospective jurors. He was immediately establishing himself as **guide** – creating the idea that if the prospective jurors wanted valid and useful information, they should look to him.

We again see a **lawyer speaking openly** to the prospective jurors. *Before he expected the prospective jurors to be open and revealing to him, he was first open and revealing to them.* For example, he spoke about his own anxiety in fulfilling his responsibilities in the trial *before* asking them about their own anxiety concerning their responsibilities. This is an obvious pattern we see throughout Spence’s questioning.

We then see him begin to address **issues specific to the case**. He discussed with them the concept of the **presumption of innocence** – soliciting from them their ideas about what it means. He would later return to this concept. They had been talking about **prejudice** when Spence abruptly said, “I’d like you to be prejudiced on behalf of my client.” “I’m sure you would,” one prospective juror responded, and they all laughed. “I think I’m entitled to have your prejudice,” Spence said. “Sandy is presumed innocent.” The prospective jurors nodded their agreement. By considering the presumption of innocence from a fresh perspective, the jurors gained a deeper understanding of the concept.

He spoke with them about the **perception television gives us about police officers** – how they are typically portrayed as being correct in their judgment. He asked them to be open to the possibility that police officers make mistakes.

Spence asked the prospective jurors how they might cope with **fear**. They offered their stories of when they had felt fear. Spence was discovering their attitudes about **guns, self-defense** and **bullies**. Since he would later claim that Sandy was afraid, he was also positioning the prospective jurors to **identify with his client**.

We see **the lawyer as a teacher** – explaining concepts that are critical to his side of the case. For example, he asked them to see the requirement of a **unanimous verdict** as the power of each individual juror to stop a verdict of guilty. He asked each of them if they had the **courage to stand alone** if

they thought Sandy was not guilty. He also asked them if they would **respect the judgment of one standing alone**.

We then see Spence masterfully **diffuse troublesome issues in the case**. Spence spoke about the choices we make in interpreting facts – we can interpret the same fact in an innocent way or a guilty way. He used the example of a spouse coming home late and what interpretations could be given that fact. Would you greet your spouse in a caring way assuming there's an innocent explanation, or in an accusatory way assuming a sinister reason? Spence and the prospective jurors had a lively and enjoyable exchange using this example. Spence then applied this concept to the facts of the case. He told them they would hear that Sandy had threatened Gertula. They could conclude she was evil or frightened.

He covered with them the fact that his **client would not testify** as a witness and his concern that the natural response might be that if she were truly innocent she would want to take the stand to deny her guilt. He explored other reasons she might not testify and, by the end of the discussion, the jurors understood that not taking the stand was not a commentary on her guilt or innocence.

One of the prospective jurors was a retired master sergeant. His former profession might suggest that he would be a law and order, pro-prosecution juror. But Spence felt a rapport with him. Besides, the sergeant understood firearms, ballistics and the difference between entry wounds and exit wounds. In the end, Spence trusted his **instincts**.

When it was Brown's turn to question the jurors, we again see the **contrasting styles** between Spence and Brown. Brown's approach was more of an effort to **condition the prospective jurors to his side of the case**. Spence's approach is more of an open, candid conversation where the expression of honest opinion is encouraged – whether or not the opinion is consistent with Spence's purposes. Spence's goal was not to try to convince the prospective jurors to abandon their opinions - an impossible task. He was simply trying **to gather truthful information so he could intelligently exercise his preemptory challenges**.

We also see how Spence plays off of the questions asked by Brown – often correcting him or deepening the discussion. For example, Brown questioned the prospective jurors about how they would feel about Peck in light of his criminal convictions. Brown asked them if they thought Peck's conviction would be “distracting” to them. When it was Spence's turn

again, he pointed out that the question is not whether it would be *distracting*, but whether Peck could *be believed*.

We see the **process of exercising preemptory challenges**, then the resumption of voir dire with the prospective jurors called to take the place of the ones dismissed and finally the exercising of the last of the preemptory challenges.

In short, we get an excellent primer on how to conduct a successful voir dire replete with helpful examples and insights. We not only see the topics Spence selected in advance, but we also see how he spontaneously reacts to the prospective jurors' answers. Perhaps most importantly, he reveals his thought process with us.

At one point, jury selection was interrupted so the court could deal with the Pinckney matter. Judy Pinckney was the *Oregonian* newspaper reporter who interviewed Mrs. Gerttula. Mrs. Gerttula had previously stated that she saw Sandy shoot Mr. Gerttula point blank with the twenty-two rifle. Presumably, she recounted that version of the events in her interview with Pinckney. But during the Pinckney interview and in giving her previous statement, Mrs. Gerttula was unaware that the autopsy revealed that Mr. Gerttula was shot with a large caliber handgun and not a twenty-two rifle. Only moments after the Pinckney interview, Trooper Geistwhite arrived to take another statement from Mrs. Gerttula in light of the autopsy findings. After the Geistwhite interview, Mrs. Gerttula's story changed. Now her recollection of seeing Sandy shoot Mr. Gerttula disappeared. Spence wanted to reveal the substance of the Pinckney interview. The timing of the two interviews (only moments apart) would likely demonstrate that Geistwhite manipulated Mrs. Gerttula into renouncing her earlier statement. This information would **impeach the credibility** of Mrs. Gerttula – the state's only eyewitness to the shooting. *Oregonian's* lawyer, Wallace Van Valkenburg, resisted the request by Spence that the notes be immediately produced and maintained in the Court's file. He assured Judge Haas that he would maintain the notes and produce them when ordered. Van Valkenburg was now ordered to produce the notes.

Rather than **produce the notes**, Van Valkenburg appeared in court to explain that his law partner, Charles Hinkle, thought the case was over when Judge Haas dismissed the indictment and so Hinkle returned the notes to the *Oregonian* where they were **destroyed**. Spence cross-examined Van Valkenburg, Hinkle and Judd Randall, the assistant managing editor of the *Oregonian*. The cross-examinations were punishing, but the fact remained –

the notes were gone. Van Valkenburg admitted reading the notes but claimed no recollection of what they said. Pinckney, who had left the newspaper, was located and interviewed in a conference call from Judge Haas' chambers. Her memory also failed. She claimed only a vague recollection of the interview. Judge Haas took Spence's motion to hold Van Valkenburg in **contempt of court** under advisement.

Spence again requested that Judge Haas **dismiss** the case. This time, Spence argued that the Court's own agent was responsible for the **destruction of evidence** critical to the Defense. Dawson argued that we don't know what was in the notes and so we can't know that the notes were critical to the defense. Judge Haas overruled the motion.

In yet another twist, Michele Longo learned that E. Joseph Dean, the Portland lawyer assigned the task of investigating the ethics complaints on behalf of the Multnomah County Local Professional Responsibility Commission, was in the same firm with Van Valkenburg and Hinkle. Judge Haas agreed to call the Bar Association to have the ethics files transferred.

Brown's offer to let Sandy plead guilty to **second-degree manslaughter** was still pending. It was a very difficult decision. Sandy and her lawyers met in the courtroom to finally decide. Sandy had prayed about it and said God told her to flip a coin – heads she would go to trial – tails she would take the offer. Sandy insisted that Spence flip the coin. After resisting making such a decision on the flip of a coin, Spence flipped the coin. It was heads. Sandy rejected the offer.

The lawyers then argued **motions in limine** – each side requesting a pretrial ruling excluding certain evidence. Spence wanted evidence of the shot to the windshield of Gerttula's pickup truck excluded arguing that it was **relevant** only to the attempted murder charge that had been severed. Judge Haas overruled the motion agreeing with the prosecution that it was relevant to show **motive**.

CHAPTER THIRTY-SIX

“A trial is only a story. It has heroes and villains. It has drama, human emotion, and conflict, and how that conflict was resolved would be up to the jury. We hoped for a happy ending.”

Spence takes us back to the courtroom for the **opening statements**. He intersperses his descriptions of the opening statements with direct quotes

from the trial transcript. Through it all we get a feel for the atmosphere in the courtroom and the tone, inflection and volume of the speaker. He describes the **prosecution opening statement** by Brown in pejorative terms and gives us **lessons on what not to do**. For example, Brown's opening statement was, according to Spence, "without **word pictures that might excite the senses**". He faults Brown for spending more time describing the geography than the facts of the alleged murder. "When he got to the story of the shooting, he sounded as if he were reading a report on a corporate stock." Brown only briefly mentioned some of the problems he had in the case – Mrs. Gerttula's contradictory statements, Peck's convictions and the gunshot-residue on Mrs. Gerttula's hands. His opening statement took no more than half an hour. Brown admitted that Sandy did not shoot Gerttula and then concluded by saying, "We expect to show you beyond a reasonable doubt that the defendant, Sandra Jones, is responsible for the death of Will Gerttula by intentionally committing acts herself that, under the laws of Oregon, render her as responsible for the murder of Will Gerttula as if she herself had pulled the trigger."

After Brown's opening, Spence, back in chambers, renewed his **motion for dismissal**. This time the motion to dismiss was based on the argument that Brown failed to state a single act that Sandy performed that would cause a reasonable person to conclude that she knew that whatever she did would result in Gerttula's death. Judge Haas overruled the motion.

Judge Haas planned to bus the jury to the scene. Spence objected on the basis that it had been three and half years since the shooting and **the scene had changed**. The shooting took place in summer. There were leaves on the trees that cast shadows certain witnesses would testify about. On the day of the **jury view**, it would be winter and the trees barren – the shadows would be different. Besides, the house had fallen into disrepair and Spence would worry that the jury would think the Joneses were not only poor, but also lazy. Judge Haas overruled the objection. The jury would view the scene after the opening statements.

After lunch, Spence began the **defense opening statement**. First we see how Spence attempts to **preempt objections**. He told the jury he had given Mr. Brown the opportunity to present his case without interruption and that he (Spence) had not objected once. Spence said he hoped for the same courtesy from Mr. Brown.

Spence then gives us the story of the case from the defense perspective. He starts by announcing that it is a story about two families. He started with

Sandy and her family – Mike Sr., and the children, Mike Jr. and Shawn. We see, among other things, their financial struggle to buy the farm, Sandy’s concern for Medicine Rock – the sacred Indian burial ground on the property – and her concern for the environment that prompted her to take on the “good old boys” about an illegal landfill that would change the course of the river that flowed through her property. Spence presented Sandy as an unusual, but decent person – a little person. Spence tells us why he spent so much time in the opening statement introducing Sandy. “This jury would never acquit Sandy unless they knew her, understood her, empathized with her, and ... grew to care about her.”

Spence next introduces Wilfred Gerttula and his wife. We see the motive Gerttula had to harass Sandy. Gerttula had bought a tract of land to develop a subdivision and he began selling lots. The Planning Commission issued a cease and desist order in part because there was no public access to the planned subdivision. People who had purchased lots began to complain. That’s when Gerttula tried to force a road through the Joneses’ property claiming that the trail that wound through their property was a public road. Sandy resisted his attempts in part because of the sacred Indian burial ground across which the road would run. The battle over the road would be protracted. According to Spence, Gerttula began a campaign to harass and frighten Sandy – to wear her down and to force her to give up her battle.

Spence tells us of Gerttula’s many connections with what he calls “the good old boys” in power in Lincoln County. We hear numerous stories in rich detail of frivolous lawsuits and criminal charges orchestrated by Gerttula, of Gerttula and those sent by him coming onto the Joneses’ property to harass them, and even of Mike Sr. being run down on the trail by a truck driven by Gerttula. In the end, Gerttula is presented as the villain of Spence’s story, and Sandy and her family as frightened but courageous people who refused to surrender to intimidation.

At a break, Spence wondered what Sandy thought of the defense opening statement so far. Michele Longo told Spence, “Well, honestly, Gerry, she thinks you’ve got her **motive for killing** Gerttula laid out pretty well.” Spence explained his **strategy**: “If they think Gerttula had it coming, they’ll find a way to acquit her. If I can make them care enough about her, they’ll never let Brown haul her off to the pen.”

After the recess Spence told the jury about the shooting. Fifteen year-old Mike Jr. had called Sandy at work, fear in his voice. Gerttula had left the gate open and the ponies were out. Mike Jr. had heard shooting. Sandy left

work for home to find out what the shooting was about. She arrived home and told Mike Jr. to stay there. She went to the upper gate and Mike Jr., against Sandy's instructions, followed. He was carrying the thirty-thirty rifle. He was frightened and crying and had followed out of concern for his mother. Mr. and Mrs. Gerttula soon arrived in the pickup truck. Mr. Gerttula said to his wife, "Now we're going to have some fun." Mr. Gerttula gunned his pickup truck spinning the tires on the dirt road, threatening to run over Sandy. Sandy began to shoot at the truck's tires with the twenty-two rifle. Gerttula got out of the pickup truck knowing Sandy would never shoot him. He had in his hand a tape-recorder he often carried in his repeated attempts to get Sandy on tape saying something he might use against her. Mr. Gerttula began to wrestle Sandy for the rifle, throwing Sandy around. In the process, he dropped his tape-recorder. "[Sandy] was hanging on to the rifle for dear life," Spence said. Then he added, "What do you suppose Mrs. Gerttula is doing all this time?"

Spence explained that in his defense of Sandy, he would also defend Mike Jr. If he was guilty of nothing, she couldn't be guilty of aiding and abetting him. He explained that Mike Jr. had also tried to shoot out the tires using the thirty-thirty rifle. Spence informed the jury that every shot from the thirty-thirty was accounted for and none had hit Mr. Gerttula.

The court recessed at 5:30 pm. Spence would conclude his opening the following morning.

When he again resumed his opening statement, Spence talked about the gunpowder residue found on Mrs. Gerttula's hands and of the prosecutors' unsuccessful efforts to demonstrate that Mrs. Gerttula didn't shoot a gun that day. He told them about their failed attempts to duplicate the gunpowder residue on dummies. In doing so he demonstrated by having Michele Long sit in a chair in front of the jury to pose as a test dummy. Spence **showed the jury** what happened – he didn't just *tell* them.

Spence told them about Monica Gerttula's inconsistent statements and the Pinckney interview and how the *Oregonian* had destroyed the notes from the interview. Then he asked this **rhetorical question**: "Where's the gun that, according to our position, was in the hands of Monica Gerttula?" Then he supplied an explanation. In one of her statements, Mrs. Gerttula said she picked up the tape recorder and dumped it behind the seat of the pickup truck. However, the tape recorder was found over on the side of the road just short of the river. Spence suggested that Mrs. Gerttula tried to dispose of the tape recorder and that she may have done the same with that gun. We

see an important dynamic in the courtroom. Spence was saying, “They’ve known for years that the position we’ve taken is that there was that gun.” As Spence said these words, he looked at Brown and Brown was smiling. Spontaneously, Spence pointed at Brown and said, “He smiles.” Then Spence added, “To this day there has not been anybody from the state to go look in that river.” Spence was **putting the state on trial** and Brown represented the state – literally and figuratively.

Spence spoke of Peck’s convictions and how he had failed to perform even elemental measurements at the scene. Spence undermined Dr. Vargo’s anticipated testimony, telling the jury this was the first autopsy he had ever performed on a person shot with a gun.

We then see Spence’s dramatic conclusion – empowering the jury.

At the conclusion of this trial I’m going to ask you to do what nobody else has ever done for Mrs. Jones. I’m going to ask you *to protect her* as a citizen under the Constitution. I’m going to ask you at the conclusion of this case not to leave her any longer at the mercy of the state.

We see an opening statement that tells a **complete story** in graphic **word pictures**, with **appropriate gestures** and **demonstration** – all designed to give the jury a **felt sense of being there** and an empowering **stake in the outcome**. It had **heroes** and **villains**, **drama**, **human emotion** and **conflict**.

After the opening statements, the jury was bussed to the scene.

CHAPTER THIRTY-SEVEN

“Was I being too harsh on the woman? No matter how successful the cross-examination had been, it could all dissolve into a puddle at my feet if at some point the jury felt that I was being unfair to a poor, abused, perhaps confused widow who thought she’d seen her husband murdered in cold blood, and that my cross examination was merely the tool of a crafty attorney plying his weapon unfairly.”

The next morning, the state would begin to put on its **case-in-chief**. Stapleton, with only a few weeks remaining in office, and knowing Michele Longo was in trial in Sandy’s case, subpoenaed her to appear before the grand jury in another case. Judge Haas quashed the subpoena.

In chambers Brown asked the judge for permission to do a **demonstration** during Mrs. Gerttula's direct examination. He wanted to require Sandy Jones to stand beside Mrs. Gerttula to show the jury that Sandy was bigger. Spence objected. The judge didn't want to take the chance that something might happen requiring a **mistrial**. He denied the request.

Monica Gerttula took the stand. She was no longer the dowdy widow Spence remembered. She was now "smartly dressed". When they got to the road dispute, Mrs. Gerttula testified that the county had maintained the road for thirty years by sending a road grader through the property just beyond the house. Then Mrs. Gerttula added, "...Sandy Jones run the grader off with a pistol." Spence calmly stood, objected and asked the court for a **curative instruction**. Judge Haas sustained the objection and instructed the jury to disregard Mrs. Gerttula's answer. Spence thought Brown might have prepared Mrs. Brown to volunteer the statement. Mrs. Gerttula had **no personal knowledge** of Sandy threatening the grader with a pistol. Mrs. Gerttula was, at best, repeating something she had been told. Her statement was rooted and grounded in **hearsay**.

In chambers, Spence moved for a **mistrial** arguing that Brown was trying to force Sandy to give up her Fifth Amendment right against self-incrimination. Only Sandy could refute Mrs. Gerttula's statement that she had "run the grader off with a pistol." Judge Haas overruled the motion for a mistrial, but **admonished Mrs. Gerttula in chambers to refrain from volunteering information and to answer only the question asked**. Back in open court, Judge Haas again instructed the jury to disregard Mrs. Gerttula's statement and Brown resumed the direct-examination.

Mrs. Gerttula testified that when she and her husband approached the gate and saw Sandy Jones, he said, "You better get a picture of this." Mrs. Gerttula said she got out of the truck to take a picture of Sandy when Sandy shot the rifle. Brown had her **authenticate** the so-called smoking-gun photograph depicting Sandy shooting the rifle with the barrel pointing downward, smoke coming out of the barrel. Mrs. Gerttula said she turned to also take a photograph of Mike Jr., but she forgot to advance the film in the camera. She said it was then that Sandy Jones struck her in the head from behind. Mrs. Gerttula said Sandy struck her on the side of the head with the rifle knocking her glasses off and that she (Mrs. Gerttula) tried to ward off the blows with one hand while she stooped to grope for her glasses with the other. She said that when she recovered her glasses and looked across the cab of the truck, she saw her husband leaning on the driver's door with a speck of blood on his face. She said by the time she got around to the

driver's side, her husband had collapsed onto the driver's seat. Mrs. Gerttula told the jury she tried to move her husband so she could drive the pickup truck and take him for help, but that Sandy instructed Mike Jr. to get the keys. She described Mike Jr. prying her fingers from the keys that were still in the ignition. Mrs. Gerttula said that after Mike Jr. removed the keys, Sandy taunted her with them, insisting that Mrs. Gerttula give up the camera in exchange for the keys. She said that Sandy finally dragged her out of the pickup truck by her hair and got into the driver's seat. Mrs. Gerttula said she then got into the passenger seat beside her husband and that Sandy drove the pickup truck. She told the jury that when they arrived at another gate, Sandy ordered her out of the truck and told her to open the gate. When she complied, Sandy drove off with her husband, leaving Mrs. Gerttula standing at the gate. Mrs. Gerttula said she later found the pickup truck at the home of Sandy's neighbor. An ambulance had been called but her husband was already dead.

Mrs. Gerttula wept while she testified – so much so the clerk handed her a box of tissues and, at one point, the judge called a recess to permit her to compose herself. Some of the jurors had tears in their eyes, too. Spence worried.

Spence gives us a detailed account of the **cross-examination**. He spoke to Mrs. Gerttula in a kind tone of voice. But this woman who had cried so easily on direct-examination now fought stubbornly – resisting giving a straight answer to even the most obvious questions. Spence **revealed her reluctance** to the jury – maintaining his patience, permitting the witness to continue to resist giving the simple answer and then asking the question again. At one point after Mrs. Gerttula repeatedly gave Spence a **non-responsive answer**, he said, “You’ve said that three times, but you haven’t answered my question. If you don’t want to answer the question, just tell me, and we’ll go on.” She replied, “Okay let’s go on.” Spence looked at the jury and read their body language. **Her reluctance to answer fair questions was doing a great deal to undermine her credibility.**

Spence used Mrs. Gerttula to establish his own case – **he told his story through the cross-examination of the prosecution witness**. For example, he got Mrs. Gerttula to admit that the problems began when her husband sold lots prior to the Planning Commission’s approval of the subdivision. Spence had the witness set out many of the details of Gerttula’s harassment of the Joneses after Sandy resisted Gerttula’s attempt to put an access road through her property.

Spence brought out **prior statements** Mrs. Gerttula had given that were **inconsistent with her trial testimony**. Mrs. Gerttula fought back, at times changing the testimony she had just given on direct-examination.

Spence went through the details logically – revealing that **her version of the events was inconsistent with normal human behavior**. For example, Spence pointed out that, according to Mrs. Gerttula, her husband had just been shot and Sandy and Mike Jr had attacked her – and yet, according to her, the first thing she did was to pick up the tape-recorder her husband dropped and place it in the back of the pickup truck. (It was Spence’s position that after Sandy drove off with Mr. Gerttula, Mrs. Gerttula walked back to the scene and disposed of the evidence, including the tape recorder that was later found by the river and the gun that was never recovered).

Spence revealed Mrs. Gerttula’s **motive** for lying. Mrs. Gerttula admitted that she believed that any shooting, even an accidental shooting, would result in criminal charges.

Spence revealed **inconsistencies between the witness’ testimony and the physical evidence**. For example, Mrs. Gerttula testified that her husband was at the driver’s door when he was shot, but blood on the truck revealed that he was forward of where Mrs. Gerttula’s testimony would place him. Mrs. Gerttula testified that Mike Jr. hid behind a stump, but Spence demonstrated that there was no stump.

In short, the cross-examination is replete with examples of virtually every method that can be used **to impeach the witness’ credibility**.

There was another development. The testing of the Judge Gardner interview tape was complete and the expert had concluded that a portion of the tape had been intentionally obliterated.

CHAPTER THIRTY-EIGHT

“My strategy – to prove our case on cross-examination so that we wouldn’t have to call witnesses of our own who would then be cross-examined and their credibility impugned”

The trial was recessed for Christmas and we see Spence at home with his family but distracted. “It was hard to be joyous when we knew at the moment we were hugging our own kids, our families safe, that another family we’d grown to care about was in peril.”

When the trial resumed, Brown called a series of witnesses. **On cross-examination, Spence used each prosecution witness to tell his own story.**

Brown called Officer Robert Longley to the stand to testify that he had accompanied the body from Sandy's neighbor's house to the hospital to be x-rayed, and then to the funeral home where the autopsy was performed. The direct-examination took ten minutes. Spence would cross-examine the witness the rest of the day.

Longley had been the officer who investigated a complaint by Sandy that Gerttula had placed a dead raccoon in her cistern. Sandy's kids heard what they thought was the cistern lid slamming shut. Then they saw a pickup truck like Gerttula's driving away. When they looked into the cistern, they found the dead raccoon floating. Officer Longley didn't follow-up on the complaint because the kids could not articulate the difference between the cistern lid slamming shut and the slamming of a truck door. Spence conducted **a demonstration as part of the cross-examination.** He first dropped a coffee pot lid on the table and then his glasses. Yes, the officer could hear the difference. No, the officer could not articulate the difference.

Spence used Longley to establish that the autopsy began and the bullet fragment had been removed *before* Dr. Vargo, the state's expert, had arrived. Spence established through the witness what Spence characterized as the "circus" atmosphere of the autopsy with many people present who had no official business being there. Spence also questioned Longley about Peck stealing and using drugs from the evidence locker while being responsible for many people going to prison for narcotics. Spence noted, "Like everybody else, jurors have a hard time with hypocrisy."

Brown called Jack Dick and then Dale Nye – the two men Sandy allegedly confronted at her gate and threatened at gunpoint. On cross-examination Dick testified that Mrs. Gerttula had intentionally left Sandy's gate open. He admitted that Sandy told him her son had heard gunshots and that it would distress him, too, if someone were shooting at his kids. Dick concluded, "This woman really wasn't up there to do harm but to protect her children. If I had been in her shoes, I'd be scared and mad." On cross-examination Nye admitted that Mrs. Gerttula left the gates open and that the livestock get out of open gates. He testified that he heard the gunshots and, with the history of Gerttula shooting at Sandy's kids, he understood what Sandy was doing and had a lot of sympathy for her.

Brown called Sandy's 84 year-old neighbor, Mr. Ferris. After the shooting Mrs. Gerttula went on foot to Ferris' house and asked for a ride to find out where Sandy took her husband. Mr. Ferris and Mrs. Gerttula found Mr. Gerttula in his truck at the Clevelands' house. Mr. Cleveland was a former mortician and knew dead bodies when he saw them. He told Mr. Ferris that Gerttula was dead.

On cross-examination Spence established through Ferris that the time between Gerttula's truck going by and Mrs. Gerttula's arrival was twenty to thirty minutes. Spence would establish through another prosecution witness that the distance between the gate where Mrs. Gerttula claimed she was left by Sandy and Ferris' house could be covered in a three to four minute walk. This twenty to thirty minute gap of time left unexplained by Mrs. Gerttula supplied the basis for Spence's suggestion that the events did not happen in the sequence described by Mrs. Gerttula. Spence suggested that Mrs. Gerttula had ample time to dispose of evidence – specifically the tape-recorder and the gun.

Prosecution witness after prosecution witness, Spence told his story on cross-examination. He used one witness to establish how Mrs. Gerttula might have sustained a bump on her head when Sandy was trying to get her out of the way to take Gerttula for medical attention. He used another to establish that Sandy was herself in serious pain but still expressed concern for Gerttula.

Spence used yet another prosecution witness to establish that fifteen to thirty cases had to be reinvestigated, dismissed or compromised because of Peck's criminal activity, that Sandy Jones' case had not been reinvestigated, that innocent people could go to prison if evidence is not gathered properly and that Peck had failed to take basic measurements at the scene.

Spence's cross-examinations were not flawless. He points out where his questions are sometimes objectionable and why they are objectionable – whether Brown objected or not. Spence concludes the chapter with this good advice: **“There's always a time when a good cross-examination should end, when one more question would ruin it.”**

CHAPTER THIRTY-NINE

“I think more people are in prison today because of snitches who lie on the stand and who seek some kind of favor from the state for their lies than from any other cause.”

After a holiday break the trial resumed. **Spence continued his tactic of using prosecution witnesses to prove his own case.** Spence was cross-examining a Detective Groat. Spence used Groat to identify several potential handguns that might have been the handgun Mrs. Gerttula used to accidentally shoot her husband. At one point he mentioned Groat's interview of Gerttula's first wife, Mrs. Castle. Mrs. Castle had told Groat that Gerttula had two handguns and that one was a German Luger – a World War I relic Gerttula treasured. She was sure Gerttula would have still had that gun.

On re-direct examination, Brown asked Groat, "Do you know of any reason why Mrs. Castle wouldn't be available as a witness in this case?" Spence quickly walked to the bench, gestured for Brown to approach and **moved for a mistrial.** Brown's question had suggested that the defense should call Mrs. Castle as a witness and, of course, the accused has no obligation to prove anything. Brown defended himself by claiming that Spence was using the **hearsay** statement of Mrs. Castle to generate an issue about a missing gun that, according to Brown, didn't exist. But Brown hadn't objected in the basis of hearsay. The issue was not whether Mrs. Castle's statement was hearsay, but whether Brown's question was an **impermissible comment on the defendant's obligation to call witnesses.** Judge Haas overruled Spence's motion for a mistrial, but immediately **instructed the jury that the defense has no obligation to produce any witnesses or evidence and that the prosecution bore the sole responsibility of producing evidence.**

Brown's next witness was Rocky Marris – an ex-con who always seemed available to the prosecution as a witness. Marris testified that three weeks before Gerttula's death, Marris was clearing brush for Gerttula near Sandy's property. He said Sandy pointed a gun at him (Marris) and said, "Next time he comes down here, I'll blow him away" – referring to Gerttula. Brown showed Marris Sandy's thirty-eight caliber revolver and asked if it looked like the gun Sandy pointed at him. Marris couldn't say for sure.

Spence would not convert this witness into a defense witness. He took a different tact. He would destroy the credibility of this witness. Spence had him admit his previous conviction for burglary and that he had learned that if you help the police you will get favorable treatment. Spence established that Marris had helped the police on several cases. Marris admitted he had told the investigator that the gun Sandy supposedly pointed at him was chrome with a four-inch barrel. Spence held Sandy's gun up and

forced Marrs to admit that her gun was blued with a two-inch barrel. The gun he described to the investigator did not look like the gun Brown showed him.

Spence pointed out other **inconsistencies** in his testimony. For example, Marrs testified alternately that the color of the Honda motorcycle Sandy was riding that day was maroon, purple, brown or red. On direct-examination, Marrs had fixed the time of the alleged threat as being three weeks before Gerttula's death. On cross-examination he changed his testimony. The incident now happened in early spring and then late fall and from 1985 to 1984. By the end, it became apparent Marrs simply could not be believed.

Brown called another witness to say Sandy had threatened Gerttula. Donald Buford told the jury about a conversation he had with Sandy. Sandy had told Buford about Gerttula running over Mike Sr. with a pickup truck. She added that if they didn't win in court, she'd have to kill Gerttula. When Gerttula was killed, Buford went to the police to report the threat.

Spence could not aggressively cross-examine this witness the way he had Marrs. As Spence put it, "I didn't dare attack the man. The jury liked him. **I had to turn him into our witness.**" Spence gently led Buford to admit that he hadn't known all that Sandy had been through. He didn't know that Gerttula had shot at the kids and put a dead raccoon in the cistern and that the authorities had failed to protect her. He admitted that, perhaps, he would need those facts to correctly interpret Sandy's comment.

Then came the critical moment in the cross-examination. Spence described it like this: "Sometimes **a wee voice in the subconscious, without saying the reason, tells me to ask a certain question.** Suddenly I asked, 'Did you ever threaten to injure somebody severely?'" After a long thoughtful silence, Buford admitted that he had. There had been an argument in a feed store and Buford had threatened to stab a man with a pitchfork. It didn't mean he would do it. It didn't mean he was evil. But if the man was found dead the next day, Buford recognized that he would be the prime suspect. And if someone came into court to testify about the threat, Buford would not know how he could make people understand that he didn't kill the man.

Brown called Delores Baxter – yet another witness who would testify that Sandy made threatening comments. Baxter was a bank teller and Sandy was a bank customer. Baxter testified that Sandy was in the bank complaining about certain events that had taken place and that Sandy lifted her jacket revealing a leather holster and said, "If I can't stop them, this will." She

didn't see a gun – only the leather holster – but the event frightened her. In describing the cross-examination that followed, Spence said:

I did what lawyers ought not do. I was taken in by my own distaste for the witness. To me she seemed the sanctimonious sort and displayed a haughty air. I launched a frontal attack where a more gentle cross might have been better.

Spence forced Baxter to admit she didn't know when the incident at the bank occurred. She didn't even know the year. It could have been 1984 or even 1983.

The following morning, Brown called Ronald Peck to the witness stand. Spence had made such an issue of Peck's absence, Brown probably thought he had to call him as a witness. In his own trial, the jury convicted Peck of three misdemeanors: second-degree theft, possession of a controlled substance and official misconduct. The jury also found him not guilty on eight counts and was unable to agree on twenty-one remaining charges. Facing the threat of a retrial on the twenty-one charges, Peck pleaded guilty to one or two charges and was placed on probation. His case having been finally resolved, Peck was **no longer in jeopardy** and could, therefore, be **compelled to testify**.

Brown wisely had Peck admit his convictions to **diffuse** that part of **the anticipated cross-examination**. Peck then took the jury through his investigation. Peck was subdued and humble.

Spence worried that having characterized Peck as the hub of the investigation, a great deal was riding on the cross-examination. Spence's goal "was to convert this man from a wounded officer who was seeking redemption for his misdeeds into an unreliable, amoral conveyor of half-truths." Spence started by forcing Peck to acknowledge that he admitted his crimes only *after* he had been caught. Spence then went through the details of Peck's crimes – stealing the drugs from the evidence locker and replacing some of the drugs with different drugs. Spence established that Peck was committing these crimes during a period of time that included his investigation in Sandy's case. Spence then went through all of the failures in his investigation in Sandy's case – his failure to take numerous critical measurements, to order certain tests, and to take gunpowder residue swabs from the hands of the decedent. Spence had Peck admit sending the thirty-three rifle to the crime lab with a live shell in the chamber – a blatant and dangerous error. Spence chronicled every error and interspersed questions

about emotional instability and drug and alcohol abuse. Through his questioning, Spence leaves the jury with the clear impression that Peck's failures in the investigation were directly related to emotional instability and drug and alcohol abuse. This examination is a great example of how the juxtaposition of two lines of questioning leaves an impression that they are causally connected.

CHAPTER FORTY

"In the courtroom, there's no way to measure the knowledge, the truthfulness, the final conclusion, of any expert witness except by cross-examination, and most often that merely reveals the skill of the cross-examiner pitted against the skill of the witness."

Brown's next witness was John Amish – the lab technician who, after performing the gunshot residue tests on Mrs. Gerttula's hands and face, concluded that she shot a gun the day her husband was killed. Dawson conducted the direct-examination. Spence believed that the direct-examination was intended solely to confuse the jury about Amish's opinion.

On cross-examination, Spence clarified Amish's testimony with a **demonstration**. Michele Longo sat in a chair in front of the jury – her face and body covered in Saran Wrap. Spence took out a can of baby powder, opened it and smacked the bottom in the direction of Longo. The baby powder shot out toward Longo and stuck to the Saran Wrap. Amish testified that this was the mechanics of the test Terry Bekkedahl had performed on test dummies in the state lab. Bekkedahl shot Mike Jr.'s thirty-thirty in the direction of test dummies and, like the baby powder to the Saran Wrap, the gunshot residue stuck to the test dummies. Bekkedahl was trying to prove that Mrs. Gerttula got gunshot residue on her hands and face as a result of her close proximity to Mike Jr.'s thirty-thirty rifle. However, there was a problem. The gunshot residue on Mrs. Gerttula contained both barium and antimony. Bekkedahl could not duplicate the high level of barium found on Mrs. Gerttula, even when he held the rifle so close to the dummies that the blast knocked them over, and he could find no antimony. Amish steadfastly maintained his opinion that it's more probable than not Monica Gerttula fired a gun that day.

Brown next called Lieutenant N. Michael Hurley to testify that according to the most recent data published in the literature, the cutoff levels for positive gunshot residue had been lowered. Dawson handled the direct-examination. Both Hurley and Dawson acted as if this testimony somehow undermined

Amish's opinion. Spence pointed out that if Amish was using a higher cutoff level for antimony and barium than the one Hurley would use, that would mean Mrs. Gerttula had more, not less, gunshot residue on her hands than was required to establish she'd shot a gun.

Hurley also testified on direct-examination that, according to recent data in the literature, gunshot residue from the bullet's primer travels farther than unburned gunpowder. Hurley's testimony disintegrated on cross-examination. Hurley was forced to produce the literature he claimed made him more knowledgeable than Amish. Not only was the literature old, none of it remotely supported Hurley's opinion.

Once again we see a string of **prosecution witnesses that Spence uses to tell the defense story**. Brown called Trooper Richard Geistwhite to testify about his participation in the investigation. On cross-examination, Spence used Geistwhite to establish the inconsistencies in Mrs. Gerttula's testimony – in particular how she repeatedly said she saw Sandy shoot Mr. Gerttula point blank in the chest with a twenty-two rifle until she learned from Geistwhite that the autopsy would contradict her.

Brown called victim assistance employee Mary Ross to testify that Sandy had threatened to kill Gerttula in the presence of Mike Jr. But on cross-examination Spence painted Ross as Stapleton's uncaring surrogate who refused to protect Sandy from Gerttula. Spence used Ross to establish that Sandy's fear and desperation were reasonable.

Brown called Tom Cleveland to testify that that Sandy drove Gerttula to his house after the shooting. Spence used Cleveland to portray the investigation as chaotic. According to Cleveland, it took the police forty-five minutes to get there and, when they did, there were as many as twenty-five of them running around asking questions. Cleveland said Gerttula's body sat in the pickup truck for eight hours with the outside temperature reaching one hundred degrees before the body was finally removed.

Brown called Gerttula's sister to testify that she had come into possession of Raymond Gerttula's guns, but that the police later retrieved them from her. Spence used her to establish that Monica Gerttula was knowledgeable about guns.

Brown next called Terry Bekkedahl to establish that he had performed gunshot residue tests on dummies in an attempt to demonstrate that the gunshot residue found on Mrs. Gerttula did not mean she had shot a gun.

But Bekkedahl admitted on cross-examination that he could not come close to matching the residues, even when he fired the thirty-thirty so close to the dummies the blast knocked them over.

Brown next called Dr. Cushman – the pathologist who performed the autopsy. Dr. Cushman’s testimony, according to Spence, was “burdened with the virtually meaningless vocabulary of his profession.” On cross-examination, Cushman admitted that he performed the autopsy two days after the body had been embalmed – a less than ideal circumstance. Cushman was unaware that the body had been in high temperatures for eight hours in the pickup truck. He said the trajectory of the bullet was downward which was consistent with Gerttula being shot while in a bending position – as if he were wrestling Sandy for the twenty-two rifle. Dr. Cushman found no copper particles from a copper-jacketed bullet – the usual rifle bullet. He admitted that he was not qualified to say if Gerttula was shot with a rifle or a pistol.

Brown called Dr. John Vargo to the witness stand and, again, Dawson handled the questioning. Dr. Vargo was to establish that Gerttula was shot with a rifle and not a pistol. But on cross-examination, Dr. Vargo admitted that he was not a pathologist and had never once performed an autopsy. Dr. Vargo actually approved the embalming of Gerttula’s body before the autopsy had been performed. Spence demonstrated Dr. Vargo’s ignorance of guns. During questioning, Dr. Vargo even became embarrassingly confused on basic human anatomy.

The following morning Dawson called to the witness stand Dr. Reay, the chief medical examiner from Seattle, Washington. He was a forensic pathologist with extremely impressive credentials. Dr. Reay testified on direct-examination that the damage to tissue and bone is indicative of a high-velocity bullet consistent with a rifle.

On cross-examination, Dr. Reay admitted that Spence’s expert, Dr. Brady, is a man of great stature in the profession. Since Dr. Brady and Dr. Reay came to opposite conclusions, Dr. Reay admitted that one of them must be wrong and he conceded the possibility that it was he (Dr. Reay) who could be wrong. Dr. Reay admitted that embalming could make the wounds more pronounced and decomposition from sitting in the heat for eight hours could affect the way the wound appears.

When Dr. Reay left the stand, Brown announced, “The state rests.”

CHAPTER FORTY-ONE

“[W]hen I am afraid, I am more likely to attack than run. The lion, afraid, charges. And we kill the lion. On the other hand, when we are afraid, we sometimes hide. But we do not trust those who hide, who evade, who run. They must be guilty. Fear is the witness’ enemy in the courtroom. ... The witness has little experience in dealing with fear in the courtroom. And often, too often, fear defeats the witness, especially the innocent.”

At the conclusion of the state’s case-in-chief, Spence **moved for a judgment of acquittal**. Spence argued that the evidence was insufficient to sustain a conviction. He argued, among other things, that there was **no evidence of aiding and abetting**. Even if you assume Mike Jr. shot Gerttula, Sandy made no command to the boy. Brown argued that the threats made by Sandy against Gerttula in the presence of the boy, the fact that they were together a half hour before the fatal shooting, and the fact that they were set up waiting for Gerttula in a crossfire position is enough evidence for the jury to conclude they were acting in concert. Judge Haas, **viewing the evidence in a light most favorable to the state** as he was required to do in ruling on this motion, overruled the motion. The defense case-in-chief, if there was one, would begin would begin the following morning.

Spence had to decide **whether to call witnesses**.

It is one thing to shoot down the case of your opponent. It’s another to put on your own defense and lay it all out there for the prosecutors to get their hands into, to sort through it, to finger it and rip it apart until it can no longer be recognized as anything human, anything decent. I had mauled their witnesses and torn apart their case. Sometimes I shook them like a terrier does a rat in its mouth. Sometimes I played with their witnesses like a cat with its catch. Now I had to decide whether I would give the prosecution the same chance at our witnesses. I could always rest our case and put no evidence on at all. I had done that many times in a career, and successfully.

He especially wrestled with **whether to call his client**, Sandy, to testify. If he didn’t call her, there might be those who’d think she must be guilty or she’d take the stand and proclaim her innocence. Besides, she wanted to testify and it was her right. If Spence talked her out of testifying and she was convicted, she’d always believe if she had testified she would have won.

On the other hand, if she did testify there would be those who would think she's lying to save herself. Brown would cross-examine her. If she lost her temper, which was likely, the jury might see her as an angry killer.

We see Spence debate the issue, make a decision and then discuss it with Sandy. They agreed she would *not* testify.

Late that night, Spence would be awakened by the bedside telephone in his hotel room. An extremely excited Michele Longo was calling to report that she had received a telephone call from a Newport Police Officer. Laughing, she reported. "We have a new witness."

CHAPTER FORTY-TWO

"The arguments filled the room, the jangling cacophony of months of passion unloosed. ... We couldn't stop the arguments, the melee over every word, each side afraid the jury might focus on that one word in the instructions and then all could be lost – on a single word. It happens many times."

Spence called only two witnesses in the **defense case-in-chief**. The first was Robert Wheeler – a man Spence met for the first time that very morning. Spence first established that Wheeler had spoken with the prosecutors. Spence wanted the jury to know that the prosecutors already knew what they were about to find out.

Robert Wheeler was a police officer. He was also Gerttula's second cousin and they had been close friends. Wheeler began working for Gerttula in the summer of 1972 when Wheeler was only twelve years old. He was employed by Gerttula every summer thereafter through 1985 – the summer Gerttula was killed. Wheeler recognized the photograph of Gerttula's 1978 blue pickup truck. In fact, Wheeler had driven that same pickup truck many times. He had looked in the glove compartment several times between 1978 and 1985 and distinctly remembered the firearm that Gerttula kept there – a small automatic-type pistol. After a benign cross-examination, Spence established that Mrs. Gerttula had the same access to the glove compartment as Wheeler. Spence finally had proof of the existence of the missing gun. He imagined it rusted and lying in the river where Spence believed Mrs. Gerttula threw it.

Spence's second and final witness was Dr. William Brady. As he had done with his first witness, Spence established that Dr. Brady's testimony was no surprise to the prosecution.

Spence went through Dr. Brady's impressive **qualifications**. Dr. Brady was a Harvard trained forensic pathologist who was formerly the director of the Oregon State Medical Examiners Office and was now a full professor on the clinical faculty at the University of Oregon. Dr. Brady testified about the physical damage that is caused when a person is shot with a high-speed rifle bullet. He described such a bullet as a "spinning eggbeater" that would have ripped a hole in the tissue on entry and created a gaping hole on exit. Dr. Brady expressed an **expert opinion** based on "**reasonable medical certainty**" that the entry wound and exit wound suffered by Mr. Gerttula was not caused by a bullet from a high-speed rifle as the state claimed.

Dawson's **cross-examination** consisted primarily of criticizing Dr. Brady for oversimplifying a formula for kinetic energy in a book he had authored for prosecutors and physicians doing death investigations. Dr. Brady explained that mathematics becomes exceedingly complex and he was trying to explain basic concepts.

On **redirect-examination** Spence established that the formulas Dawson seemed so concerned with had nothing to do with the case. Spence then had Dr. Brady repeat his opinion that Gerttula was shot with a low-velocity missile characteristic of a handgun and not a thirty-thirty rifle. The defense rested.

The lawyers went into chambers where they argued about **jury instructions** well into the evening. Closing arguments would be next.

CHAPTER FORTY-THREE

"Lawyers with words, like artists with paint, can take the same words, the same paint, and end up with different pictures. A lawyer can paint one of innocence or one of guilt. And if a defense attorney fails to answer a strong argument, one that captures the eyes of the jurors' minds, at that moment his case can be lost. If, on the other hand, he lets the prosecutor drag him into the prosecutor's case instead of arguing his own, he can also lose. I sat back, closed my eyes, and tried to relax. I had to trust my mind's ear to sort out what I needed to rebut and what I needed to ignore."

Judge Haas found that there was no evidence to suggest that Sandy had **aided and abetted a negligent or reckless act**. He would instruct the jury that in order to find her guilty of **murder**, the state had to prove beyond a reasonable doubt that Mike Jr. **intentionally caused the death** of Gerttula, that Sandy **aided and abetted him in the commission of that intentional act**, and that **neither** Mike Jr. nor Sandy **were acting in the lawful defense of themselves or one another**.

Once the jury was assembled, the judge read the **jury instructions** to them. We are given a synopsis of the jury instructions. Brown then approached the podium to give the **prosecution closing argument**.

Spence describes Brown's argument in unflattering terms. According to Spence there was a long and rambling preamble and a reluctance to delve into the argument. Spence saw the jurors' eyes starting to glaze over. Brown eventually warmed to the argument. He spoke of the several witnesses who heard Sandy threaten to kill Gerttula. He then painted a picture of a mother and son who, armed, staked out a position of crossfire along the road where Gerttula would have to stop so they could ambush him.

Brown went through the evidence explaining the **guilty connotations** that could be drawn. He often referred to Sandy as "**the defendant**" – **a technique designed to dehumanize the accused**. He **dealt with many of the problems** that plagued his case including the inconsistent statements of Mrs. Gerttula and the opinion of the state criminologist that Mrs. Gerttula fired a gun that day. Then he dealt with the core question: What did Sandy Jones do that aided and abetted Mike Jr. in intentionally causing the death of Gerttula?

She made the threat [that she would have to kill Gerttula] in front of that boy two or three weeks before this occurred. She communicated to the boy in the presence of a witness, in a public place, her feeling, her antagonism. ...[S]he's placed loaded weapons in that boy's possession. And she, together with that boy, are pointing those weapons at people

Brown concluded by asking the jury to find the defendant guilty of the crime of murder.

CHAPTER FORTY-FOUR

“Words were the weapon. Only words, which dissolve into the atmosphere, the distant echoes of which will leave only a shadow of themselves on the memory of the mind.”

The **defense closing argument** would come after lunch – according to Spence this is **the worst time to give a closing**. “The jury was already tired and nature’s anesthesia had likely set in, the noonday meal, which casts all the world except America, into siesta.” Spence gives us his thoughts on closing arguments:

I knew if the case hadn’t been won by the time of the final argument that rarely could a lawyer win it at that stage. Yet the case could easily be lost in the final argument.

Spence vividly reveals the initial moments of the closing argument when fear of failure seizes the mind and the words do not come easily. As he begins to share his feelings with the jury about what it is like to be there and to have the awesome responsibility of delivering this argument we see him begin to relax.

Spence’s **closing argument is not a repackaged version of his opening statement**. It is not a reiteration of the facts of the case set out in chronological order. It is a true **argument**. He draws **logical, compelling inferences from the facts** – very often showing the jury how the state’s evidence proved Sandy’s innocence. For example, the smoking-gun photograph proves she did not shoot Gerttula. She was holding a twenty-two rifle and Gerttula wasn’t shot with a twenty-two. Spence seamlessly **incorporated the jury instructions** into his closing argument and criticized the prosecution for not doing the same.

Much of the closing argument is quoted for us from the trial transcript. It is interspersed with Spence’s observations about what was going on in the courtroom at the time and his thought process as he reacted to the dynamic situation. He was particularly **sensitive to the reactions of the jurors** and used to his great advantage the reactions of opposing counsel.

Spence puts **the state on trial** in his closing argument – from the good old boy system of Lincoln County to the special prosecutors, Brown and Dawson. It was **not a defensive speech but an offensive, accusatory speech full of passion and righteous indignation**. Spence removes the

focus of judgment from Sandy and puts it on the state – asking the jury to judge whether the state has been fair with her. For example he accuses the state of failing to protect Sandy and her family when she asked for their help, but then they blame her when, in her frustration, she tells them she'll have to protect herself. Spence then **empowers the jury** to right the wrong. At one point he told the jury there might be additional charges against Sandy for attempted murder and that the harassment by the state might never end. He asked the jurors not only to find her not guilty, but also to write on the bottom of the verdict form, "Please leave her alone. Let her go home."

After Spence's closing argument Brown delivers his **rebuttal closing argument**. Spence describes it in unflattering terms. At one point Spence says, "Once more there was no emotion in his voice, his voice like a rock falling on pavement". Brown finally makes the argument Spence had been anticipating – that the harassment Sandy Jones suffered at the hands of Gerttula supplies the **motive for her to kill** him. According to Brown, Sandy Jones and Mike Jr. were unequal partners engaged in an ambush with the dominant partner being Sandy Jones.

When Brown finished, judge recessed until the next morning. Spence had hoped the case would be submitted to the jury that night and that the jury would return a quick verdict. It would have to wait another day.

CHAPTER FORTY-FIVE

"Fear gripped my chest. I could not force it out. I suffered from it every time I waited for a jury's verdict. It's the loss of control. It's putting the life of your client and your own life as a lawyer into the hands of someone else. It's a test of who you are. Have you been competent? Will you lose the case because of who you are? Would your client have done better with another lawyer?"

At 9:00 a.m. Judge Haas read the **instructions to the jury**. One of the instructions was that a guilty verdict must be **unanimous** while a not guilty verdict required the agreement of ten of the twelve – an anomaly under Oregon law. Judge Haas **dismissed the alternate jurors**.

The prosecutors had **objected to some of the instructions**. Spence was unconcerned about their objections. If the jury acquitted Sandy, **the constitutional prohibition against double jeopardy would prevent a retrial on the same charges**.

Spence gives us a felt sense of the special **agony that is peculiar to waiting for a jury's verdict**. Then **the jury sent out a note**. "We, the jury, would now like to add an addendum to our verdict. We'd like to know that this matter will finally be put to a close and that our verdict will mean something." Spence thought he knew what that meant. He had told them there might be additional charges and had asked them to write a note on the bottom of the verdict form, "Please leave her alone. Let her go home." The judge did not want to take any chances. He simply told them to designate their verdict on the form he gave them – no addendum. A few minutes later the jury was ready. Judge Haas brought them into the courtroom to deliver their verdict.

As the jurors filed in, we see Spence trying to read their **body language**. "If they look over at us, we're okay. If they don't, we're in deep." The judge asked, "Who is the **foreperson**?" In response a juror raised her hand. "Have you reached a verdict?" "Yes, we have," she said and handed the **verdict form** to the bailiff who, in turn, handed it to Judge Haas. Judge Haas slowly unfolded the verdict form and began reading – first the caption and then the preamble. Finally, after what must have felt like an interminable period of time, he got to the verdict – "not guilty"!

We see the celebration erupt – many of the assembled crowd cheering, the lawyers and client hugging and the judge banging his gavel. After the crowd quieted, the judge **polled the jury**. The verdict was unanimous.

AFTERWORD

After the jury acquitted Sandy, Brown and Dawson continued to pursue her. She was tried on the previously severed charges of the attempted murder of Wilfred Gerttula and assault of Monica Gerttula. Sandy waived her right to a jury and the case was tried before Judge Haas without calling any witnesses. Both sides **stipulated** to the facts that had been presented to the jury in the previous trial. Judge Haas found Sandy not guilty on both charges.

The Oregon Court of Appeals **reversed** Judge Gardner's conviction of Mike Jr. The Court of Appeals had authority to review juvenile cases *de novo* and it entered a **judgment of acquittal**.

One of the lot owners in Gerttula's planned subdivision brought another suit against Sandy to have the road through the Jones' property declared a public

road. Sandy represented herself. The Circuit Court of Lincoln County found that the county had never accepted the road as a public road and that the road was not continuous but contained a ten-to-twenty-foot gap. The court held the road was not a public road.

All charges made before the Oregon Bar against all the lawyers and Judge Haas were dismissed.