IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 17-0085

THE STATE OF IOWA,

Plaintiff-Appellee,

vs.

LEE SAMUEL CHRISTENSEN,

Defendant-Appellant.

APPEAL FROM IOWA DISTRICT COURT FOR EMMET COUNTY
CASE NO. FECR010898
HONORABLE DAVID A. LESTER
THIRD JUDICIAL DISTRICT OF IOWA

APPELLANT'S BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

In accordance with Iowa R. App. P. 6.1101(3)(a), Appellant contends that this case involves the application of existing legal principles and may be transferred to the Court of Appeals.

STATEMENT OF THE CASE

Nature of the Case.

Appellant Lee Samuel Christensen appeals following his jury trial from a judgment of conviction and sentence for the crime of murder in the second degree, in violation of Iowa Code §707.3(1). The Honorable David Lester, judge of the Third Judicial District of Iowa, presided at his trial and sentencing.

Course of Proceedings.

On July 22, 2015, the State charged Christensen by trial information with murder in the first degree, alleging that on June 6, 2015, Christensen murdered Thomas Lee Bortvit in violation of Iowa Code §707.1 and 707.2(1)(a) or (b). (Trial Information; App. 5). Following his plea of not guilty, trial was set for February 16, 2016. (Order Fixing Dates After Arraignment; App. 7). After dismissal of the felony murder alternative (Order; App. 10), trial began on June 21, 2016, and on July 1, 2016, the jury

returned a verdict finding Christensen guilty of murder in the second degree (Verdict; App. 23). On August 15, 2016, Christensen filed a motion for a new trial (Motion for New Trial; App. 24) and on August 15, 2016, filed a motion for jury poll (Motion for Jury Poll; App. 29). Following hearing on the motions, the district court on December 2, 2016, overruled the Defendant's new trial motion (Ruling on Defendant's Motion for New Trial; App. 32). On December 21, 2016, Christensen was sentenced to an indeterminate term not to exceed 50 years. (Judgment and Sentence; App. 53)

On January 16, 2017, Christensen filed his notice of appeal (Notice of Appeal; App. 57).

STATEMENT OF THE FACTS

On June 6, 2015, 19-year-old Thomas Bortvit, a graduate of Estherville High School and a student at Iowa Lakes Community College (Trial Transcript Vol. I, hereinafter "TT I," p. 38 L17- p. 39 L12), was working in the meat department at the Fareway store in Estherville, scheduled to work from 11:00 in the morning until later that night. (TT I, p. 125 L16 – p. 126 L25). Bortvit had been dating Cayley Fehr, another Estherville High student who Lee Christensen had earlier befriended and at

times also dated. At some time during the afternoon of June 6, Christensen was seen purchasing meat at Fareway, although no one saw Christensen and Bortvit talking to one another. (TT I, p. 83 L21 – p. 85 L7). Christensen's truck was also seen in the Fareway parking lot. (Trial Transcript Vol. III, hereinafter "TT III," p. 174 L1-4).

At about 4:00 p.m., Bortvit took his ordinary afternoon break, telling fellow employees goodbye, waving and smiling. (TT I, p. 103 L10-25) Bortvit never returned to the store, nor was he seen alive thereafter.

During the afternoon Bortvit's girlfriend, Cayley Fehr, traveling by bus to a 4-H program in Washington, D.C., exchanged several text messages with Bortvit during which Bortvit indicated that he was with Christensen, who had asked Bortvit for a ride because Christensen's truck had broken down. (TT III, p. 282 L7 – p. 283 L4). Fehr was in part amused and surprised by this, knowing of the antipathy that Bortvit had expressed toward Christensen. (TT III, p. 288 L4 – p. 290 L20). Later in the day Fehr received another text message from Bortvit's phone stating that Bortvit no longer wanted to date or see Fehr, and that they should plan to see other people. (TT III, p. 282 L7 – p. 283 L4). She later received a text message from Christensen stating he had killed Bortvit. (TT III, p. 282 L7 – p. 283 L. 23)

Late in the afternoon, Bortvit's sister attempted to reach her brother by text message and cell phone calls. She received a text message from Bortvit indicating that he had taken the afternoon off to be with a friend "Alec," who Bortvit's sister knew was away at school. (TT I, p. 54 L19 – p. 58 L18). Bortvit's car was not in the Fareway parking lot where it ordinarily was parked, and efforts to locate him were unsuccessful. (TT I, p. 128 L4-16; p. 59 L23 – p. 61 L19).

Earlier in the day, Christensen and his family had attended a community celebration for cancer survivors, after which Christensen's parents, Dean and Denise, returned to their home in Estherville to prepare to attend a wedding later that evening. (TT III, p. 75 L4 – p. 76 L13; p. 103 L10-15). Christensen stayed downtown to spend time with his grandmother, herself a cancer survivor. (Trial Transcript Vol. V, hereinafter "TT V," p. 80 L10-22). At about 4:30 in the afternoon, both Christensen's mother and sister, Claire, texted Christensen to ask where he was and he responded that he was with his friend Dakota working on Dakota's motorcycle. (TT III, p. 109 L14-25; TT V, p. 59 L22 – p. 62 L16). Christensen arrived home around 5:00 or 5:30 wearing a soiled t-shirt and jeans. (TT V, p. 65 L1 – p. 66 L22). After showering, Christensen and his sister went to a downtown sandwich shop (TT V, p. 69 L7-25) where Christensen was observed to be

normal and cheerful. (TT V, p. 70 L8-24). Christensen and his sister returned home where they watched TV after which Christensen abruptly went upstairs to his room. (TT V, p. 75 L1-19).

Late that night, Bortvit's friends located his car parked and locked in a residential area of Estherville and police and community members began an area-wide search in an attempt to locate Bortvit. (TT I, p. 140 L9-15; p. 142 L4-18; p. 151 L3 – p. 152 L9; p. 226 L11 – p. 227 L25).

The following day, Christensen (a star high school track athlete) and his mother prepared to fly to Arizona for a long-planned trip for Christensen to attend a cross-country sports camp, and for his mother to visit friends she had known when she taught in the Phoenix area. (TT III, p. 40 L5 – p. 41 L10). Driving to Sioux Falls to catch their flight to Arizona, Denise Christensen learned from Facebook that Bortvit was missing. (TT III, p. 114 L22 – p. 115 L. 6). When she mentioned this to Christensen, he didn't respond but sat quietly. (TT III, p. 115 L21 – p. 116 L13). In the meantime, Christensen's father, Dean, was himself participating in the search to locate Bortvit. (TT III, p. 41 L23 – p. 42 L18).

Police officers, having learned that Bortvit had been with Christensen, went to the Christensen home and informed Christensen's sister that they wanted to speak with Lee. (TT I, p. 77 L16-20; p. 164 L6-25). Claire, in

turn, conveyed this request by text to her mother who learned about it when she and Christensen landed in Arizona. (TT III, p. 119 L1-19). When she asked Christensen if he had seen Bortvit, Christensen replied that "Thomas didn't say much," and that Bortvit had given him a ride to Christensen's grandfather's farm because Christensen's truck would not start. (TT III, p. 120 L16 – p. 121 L18). After asking her son for more details about his encounter with Bortvit, Denise became suspicious and confronted her son about what had happened. (TT III, p. 126 L24 – p. 127 L4). Christensen replied that he and Bortvit had gotten into a fight, Christensen had gotten scared and hit Thomas with a rock. (TT III, p. 127 L20 – p. 128 L25).

Dean Christensen, engaged in the search for Bortvit, also learned that police were attempting to contact Lee and himself sent a text to either his son or Denise. (TT III, p. 42 L12 – p. 43 L17). After speaking with his mother, Christensen called his father from the airport and told his father that he knew where Bortvit was. (TT III, p. 130 L4-21). Waving down Estherville police officers, and still while on the phone with his son, Dean informed officers that he knew where Bortvit was and that his son had killed him. (TT I, p. 229 L25 – p. 231 L9). Dean got into a patrol car with police and, using directions he was receiving from his son, drove to a quarry outside of town where Bortvit's body was located in a pasture. (TT I, p. 231

L1 – p. 235 L2). Christensen had told his father over the phone that he had shot Bortvit with a gun at the farm and that the gun was in his room at home. (TT III, p. 47 L3 – p. 48 L10; p. 58 L8-18; p. 52 L16-23). Christensen's mother made immediate plans to fly back home, with the quickest flight getting them to Minneapolis. (TT III, p. 130 L22 – p. 131 L9). Upon landing in Minneapolis early in the morning of June 8, 2015, Christensen was arrested by airport security and police without incident. (TT I, p. 196 L10-17; p. 215 L14 – p. 216 L2).

Investigators executing a warrant at the Christensen residence located a .45-caliber pistol, ammunition, clothing and Bortvit's wallet in Christensen's room and bloodstained boots in the lower level of the residence. (Trial Transcript Vol. II, hereinafter "TT II," p. 48 L2-22; p. 51 L23-25; p. 52 L15 – p. 53 L9; p. 54 L5-19; p. 56 L12 – p. 57 L24). A search of the Christensen farm yielded three .45-caliber cartridge cases and three slugs. (TT II, p. 39 L9-20). The trunk of Bortvit's car contained clothing and other paraphernalia covered with blood. (TT II, p. 70 L1 – p. 71 L17). Bortvit's autopsy revealed that he had died from multiple gunshot wounds and that his body exhibited bruising and abrasions that could have been inflicted in a fight. (TT II, p. 135 L16 – p. 137 L5; p. 171 L2-13; p. 188 L25 – p. 189 L11). A projectile retrieved from Bortvit's body was traced to the

pistol found in Christensen's room, as were the shell casing recovered at his grandfather's farm. (TT II, p. 140 L14 – 141 L7; p. 164 L5-12; Trial Transcript Vol. IV, hereinafter "TT IV," p. 81 L5-14; p. 86 L11 – p. 88 L3; p. 197 L23 – p. 98 L4). Forensic testing of the firearm revealed Bortvit's (but not Christensen's) DNA on the grip of the gun, although examiners did not screen the gun for the presence of blood or test for other biologic sources of the DNA. A journal Christensen left at Cayley Fehr's home sometime before he left for Arizona showed that he had been deeply depressed and suicidal. (TT III, p. 187 L2 – p. 188 L21).

Christensen did not testify at trial in his own defense.

Further facts will be developed in the course of Christensen's argument.

ARGUMENT

I. THE TRIAL COURT ERRED IN OVERRULING CHRISTENSEN'S MOTION FOR NEW TRIAL BASED ON JURY MISCONDUCT AND JURY BIAS

A. Standard of Review and Preservation of Error. The Court reviews a denial of a motion for new trial based upon juror misconduct or juror bias for an abuse of discretion, *State v. Webster*, 865 N.W.2d 223, 231 (Iowa 2015); *State v. Hendrickson*, 444 N.W.2d 468, 472 (Iowa 1989) (juror misconduct and bias), although when constitutional issues are involved the

Court has reviewed fact-finding de novo. *Webster* at 231 n.4. An abuse of discretion occurs when the court's action is exercised on grounds or for reasons clearly untenable or unreasonable under the circumstances. *State v. Cullen*, 357 N.W.2d 24, 27 (Iowa 1984); *State v. Harrington*, 349 N.W.2d 758, 761 (Iowa 1984).

Christensen preserved error by moving during trial for removal of a juror deemed biased (TT V, p. 14 L20 – p. 17 L2), and by moving for a new trial based on the trial court's denial of the motion. (Motion for New Trial, App. 24). He further preserved error in his motion for new trial on grounds that the jury had engaged in misconduct. (Motion for New Trial; App. 24).

B. Legal Principles

1. **Motion for New Trial**. Iowa R. Crim. P. 2.24(2)(b)(9), provides that the court may grant a new trial when "the defendant has not received a fair and impartial trial." Likewise, Iowa R. Crim. P. 2.24(2)(b)(2) provides that the court may grant a new trial if "the jury has received any evidence…not authorized by the court." A new trial may also be granted when the jury "has been guilty of any misconduct tending to prevent a fair and just consideration of the case." Iowa R. Crim. P. 2.24(2)(b)(3).

2. **Juror Misconduct and Juror Bias**. Juror misconduct and juror bias are related, overlapping, but analytically distinct concepts.

Juror misconduct ordinarily relates to actions of a juror, often contrary to the court's instructions or admonitions, which impair the integrity of the fact-finding process at trial. Typical acts of misconduct include communication with others outside the jury about the case, independently investigating the crime or accident scenes outside of judicial oversight, or engaging in independent research about questions of law or fact. **Juror bias**, on the other hand, focuses on the ability of a juror to impartially consider questions raised at trial. A biased juror is simply unable to come to a fair decision in a case based upon the facts and law presented at trial. A juror may be biased without engaging in any kind of misconduct. Conversely, an impartial and fair-minded juror may nonetheless engage in juror misconduct. *State v. Webster*, 865 N.W.2d 223, 232 (Iowa 2015) (internal citations omitted) (emphasis added).

> In order to be entitled to a new trial based upon juror *misconduct*, the (1) evidence from the jurors must consist only of objective facts as to what actually occurred in or out of the jury room bearing on misconduct; (2) the acts or statements complained of must exceed tolerable bounds of jury deliberations; and (3) it must appear the misconduct was calculated to, and with reasonable probability did, influence the verdict.

State v. Cullen, 357 N.W.2d 24, 27 (Iowa 1984). Iowa R. Evid. 5.606(b) allows the court to consider statements by jurors regarding extraneous prejudicial information or outside influence that was brought to bear on the

jury, but excludes evidence of internal deliberations of the jury. *Ryan v. Arneson*, 422 N.W.2d 491, 495 (Iowa 1988) (clarifying the first *Cullen* prong to exclude evidence of internal deliberations of the jury); *Webster* at 234. Communication with third parties about the merits of the case outside the confines of jury deliberations is a form of misconduct. *Webster* at 236.

Juror *bias* may be actual or implied. Actual juror bias occurs when the evidence shows that a juror, in fact, is unable to lay aside prejudices and judge a case fairly on the merits. Implied bias arises when the relationship of a prospective juror to a case is so troublesome that the law presumes a juror would not be impartial. *Webster* at 236. "[A] jury consisting of eleven impartial jurors and one actually biased juror is constitutionally infirm without any showing that there was juror misconduct which was 'calculated to, and with reasonable probability did, influence the verdict.'" *Id.* at 237 (quoting *Cullen* at 27). As the Court made clear in *Webster*, a juror who violates the admonitions of the court and communicates with another through social media about the case "certainly raises questions about [the juror's] ability to be an impartial juror." *Webster* at 239 (trial juror "liked" comment by victim's stepmother on Facebook prior to guilty verdict).

It is hornbook law that conduct by the jury that raises the spectre of outside influence on the jury's deliberations threatens a defendant's right to

a fair trial before an unbiased decision-maker as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 10, of the Iowa Constitution. *Parker v. Gladden*, 385 U.S. 363, 364, 87 S. Ct. 468, 470, 17 L.Ed.2d 420, 422 (1966); *Webster* at 233.

C. <u>Presumption of prejudice</u>. The United States Supreme Court highlighted in *Remmer v. United States*, 347 U.S. 227, 229, 74 S. Ct. 450, 451, 98 L.Ed.2d 654, 656 (1954),

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

The United States Court of Appeals for the Fourth Circuit observed in *United States v. Lawson*, 677 F.3d 629, 643 (4th Cir. 2012), that the Second, Seventh, Ninth, Tenth, and Eleventh Circuits continue to apply the *Remmer* presumption in cases involving external influences on jurors, while the Fifth, Sixth, Eighth, and District of Columbia Circuits have largely departed from use of the presumption. *See also*, Fredrickson, "Conformity in Confusion: Applying a Common Analysis to Wikipedia-Based Jury Misconduct," 9 *Wash. J. L. Tech. & Arts* 19, 24 (2013).

Both the United States Courts of Appeal for the Ninth and Eighth Circuits have recognized, however, that the *Remmer* standard is applicable where there is tampering or third-party communication which injects itself into the jury process. In *United States v. Dutkel*, 192 F.3d 893, 897-898 (9th Cir. 1999), the court held that a prima facie showing of jury tampering triggered the presumption of prejudice and compelled an inquiry into whether the intrusion had an adverse effect on the jury's deliberations. More particularly, the court instructed that in determining whether there was a possibility of prejudice a court should consider "whether the intervention interfered with the jury's deliberations by distracting one or more of the jurors, or by introducing some other extraneous factor into the deliberative process." As that court also recognized in *United States v. Rutherford*, 371 F.3d 634, 644 (9th Cir. 2004), "the appropriate inquiry is whether the unauthorized conduct 'raises a risk of influencing the verdict,' or 'had an adverse effect on the deliberations.'" (Internal citations omitted).

Likewise, in *United States v. Tucker*, 137 F.3d 1016, 1030 (8th Cir. 1998), in determining whether a defendant was entitled to a hearing to prove that a trial juror was subjected to outside influence during trial, the court observed,

> Our circuit does not apply the presumption shifting the burden of proof to the government if the contact pertained to outside

> legal advice, not extraneous facts. . . . However, the type of contact suggested by the record is neither outside legal advice nor exposure to extraneous facts, but private communication, contact, or tampering. Tampering was exactly the sort of contact involved in *Remmer I*, in which the Supreme Court stated the presumption rule. . . . But whether the presumption shifts the burden of proof to the government or not, the ultimate question is the same: "Did the intrusion affect the jury's deliberations and thereby its verdict?"

In gauging whether a defendant is prejudiced by outside influence, the court emphasized that the question depends on whether "there is any reasonable chance that the jury would have been deadlocked or would have reached a different verdict but for the fact that *even one reasonable juror* was exposed to prejudicial extraneous matter." 137 F.3d at 1031 (quoting *United States v. Hall*, 116 F.3d 1253, 1255 (8th Cir. 1997) (emphasis added). Further detailing the insidious nature of outside influence, the court differentiated such jury exposure from the impact of improper *factual* information brought before the jury.

> Contamination of a different kind occurs when, rather than being exposed to a fact not in evidence, a juror is subjected to psychological pressure by an outsider trying to coopt that juror's vote. In such a case, the effect on the particular juror is intense and can be harmful to the litigants, even though the rest of the jury remains unaware of the impropriety and even though no extraneous evidence is admitted.

Id. at 1032. In reaching this conclusion, the court cited *United States v. Cheek*, 94 F.3d 136 (4th Cir. 1996), in which that court granted habeas relief

when *one* juror, exposed to a bribery attempt, was "devastated and fearful" after the incident.

While this court has not yet adopted this burden-shifting presumption of prejudice, *Doe v. Johnston*, 476 N.W.2d 28, 35 (Iowa 1991)[1], Christensen respectfully requests that it now do so, especially given the heightened scrutiny given to jury misconduct in criminal cases.

D. **Heightened Scrutiny in Criminal Cases**. The Iowa Supreme Court has long recognized that

> [i]n order that the institution of jury trials be preserved and its usefulness continued, its deliberations and pronouncements must be kept pure, and untainted, not only from all improper influences, but from the appearance thereof. It is often said that the jury trial is one of the bulwarks of our liberty, but it will remain so only as long as public confidence in the institution prevails.

Daniels v. Bloomquist, 258 Iowa 301, 306, 138 N.W.2d 868, 871 (1965). In recognizing that precept in *State v. Carey*, 165 N.W. 2d 27, 30 (Iowa 1969), the Court emphasized that allegations of jury misconduct are to be afforded heightened scrutiny in criminal cases. "Our anxiety to protect the jury from any conduct which would lessen public confidence in our judicial system

[1] "Plaintiffs urge us to retreat from this standard and adopt, instead, a rule whereby prejudice is presumed to result from the introduction of extraneous material. We decline the invitation to do so."

should be even greater in a criminal trial." In *Carey*, the Court ruled that a sign in the jury room noting that coffee was furnished by the county clerk and the county attorney represented a "practice fraught with danger, one that is calculated to bring the administration of justice into disrepute." Although the Court also found the conduct to be innocent, it nevertheless concluded that "[t]he effect upon the jury and upon any member of the public who might become familiar with it was the same as if it had been an intentional attempt to secure favor with those persons who were even then in the process of passing upon the guilt or innocence of a man accused of a serious crime." 165 N.W.2d at 30. Coupled with other errors, the court granted the defendant a new trial.

Similarly, in *State v. Cullen*, 357 N.W.2d 24, 27 (Iowa 1984), the Court again cited *Carey* in recognizing that, in criminal cases involving "manipulation of the jury by outsiders," a court is required to apply a "stricter rule, designed to keep the jury above suspicion."

E. **Fear of Public Violence**. While Federal Rule of Evidence 606(b) [Iowa R. Evid. 5.606(b)] prohibits juror testimony regarding the affected juror's mental processes in reaching the verdict, the court may consider the effect of extraneous information or improper contacts on a juror's "general fear and anxiety following an incident [of improper

contacts]" including a fear of retaliation for voting a certain way.[2] *United States v. Rutherford*, 371 F.3d 634, 644 (9th Cir. 2004) (inquiry ordered into jurors' concerns of possible IRS retaliation if jurors voted to acquit in tax evasion case).

Under somewhat different circumstances, courts in other jurisdictions have found that the potential for public violence stemming from a jury's verdict can itself create an "unacceptable risk . . . of impermissible factors coming into play" in a jury's deliberations. *Lozano v. State*, 584 So.2d 19, 22 (Fla. 1991); *Musedinovic v. State*, 2013 WL 5758232 (Iowa App. 2013) (citing *Estelle v. Williams*, 425 U.S. 501, 505, 96 S. Ct. 1691, 1693, 49 L.Ed.2d 126, 131 (1976). In *Lozano*, the Florida Court of Appeals held that the trial court had erred in failing to grant a change of venue in a police shooting case that had gained extensive media coverage and had prompted a Miami neighborhood to erupt into civil disturbances. The record in that case showed that several of the jurors were affected by "fears of violence," and

[2] Research has shown that all jurors who serve on murder cases may experience significant stress and extreme emotional setbacks because of their jury service. 77% of female and 23% of male jurors in capital murder cases report fear of reprisal from the defendant, the defendant's family or friends, or the victim's family or friends. Jurors returning a verdict of life-rather-than-death feared reprisal from the victim's friends. Antonio, "Stress and the Capital Jury: How Male and Female Jurors React to Serving on a Murder Trial," 29 *The Justice System Journal* 396, 399-400, 404 (2008).

several had heard from friends or relatives that there might be a riot if the defendant was found not guilty. 584 So.2d at 22, n. 5. The court, in granting a new trial based on the trial court's failure to grant a change of venue observed,

> Surely, the fear that one's own county would respond to a not guilty verdict by erupting into violence is as highly "impermissible [a] factor" as can be contemplated. Surely too, there was an overwhelmingly "unacceptable risk" of it having adversely affected Lozano's – and every citizen's – most basic right under our system: the one to a fair determination of his guilt or innocence based on the evidence alone.

584 So.2d at 22 (internal citations omitted).

In a similar case involving the trial of white police officers charged with assaulting an African-American man, the California Court of Appeal, mandating a change of venue, noted that in addition to news coverage mentioning the possibility of riots, the court itself had received a document "which can be construed only as a threat of community violence if the case is transferred to another venue." *Powell v. Superior Court*, 232 Cal. App.3d 785, 801 (1991). Although the court found that the threat of community violence had not yet influenced the "ultimate determination of guilt or innocence," it nonetheless concluded that "we must draw the inevitable inference about the possibility of threats which would surface during the trial itself. Such unacceptable attempts to influence the judicial proceedings at

this early stage add another impermissible factor into the boiling cauldron surrounding this case, making it imperative to take every step possible to ensure that an impartial unbiased jury be seated." 23 Cal. App. 3d at 801.

F. <u>Juror Communication with Third Parties</u>. While jury misconduct typically relates to actions of a juror which "impaired the integrity of the fact-finding process at trial," "[j]uror bias on the other hand, focuses on the ability of a juror to impartially consider questions raised at trial." *Webster* at 232. "Actual juror bias occurs when the evidence shows that a juror, in fact, is unable to lay aside prejudices and judge a case fairly on the merits. Implied bias arises when the relationship of a prospective juror to a case is so troublesome that the law presumes a juror would not be impartial." *Webster* at 236 (citations omitted). As the Court noted in *Webster*,

> The United States Supreme Court has held that when a juror is seated who deliberated concealed bias that would have required he or she be dismissed for cause, reversal of any subsequent conviction is required. The theory is that a jury consisting of eleven impartial jurors and one actually biased juror is constitutionally infirm without any showing that there was juror misconduct which was "calculated to, and with reasonable probability did, influence the verdict."

865 N.W.2d at 237 n. 7. (citations omitted).

As the Court also observed, "There can be no question that communications with third parties about the merits of a case outside the confines of jury deliberations is a species of misconduct." *Webster* at 236. The trial court has broad discretion in determining whether such misconduct warrants removal of the juror, and whether the misconduct mandates the grant of a new trial. *State v. Piper*, 663 N.W.2d 894, 910 (Iowa 2003). However, that discretion has limits. *Tucker*, 137 F.3d at 1029. A juror's own assurances that he or she can be impartial "are often overly optimistic." *Webster* at 249 (Hecht, J. dissenting) (citing studies). *See also Kirk v. Raymark Industries, Inc.* 61 F.3d 147, 153 (3rd Cir. 1995), *cert. denied* 516 U.S. 1145, 116 S.Ct. 1015, 134 L.Ed.2d 95 (1996) ("[T]he district court should not rely simply on the jurors' subjective assessment of their own impartiality"); *Government of the Virgin Islands v. Dowling*, 814 F.2d 134, 139 (3rd Cir. 1987) (juror's insistence on own impartiality should not be credited if other facts indicate the contrary).

G. **Analysis**. Christensen's trial jurors violated the trial court's repeated and specific admonitions to refrain from accessing social media and to avoid discussing the case. The heightened scrutiny demanded in *this* criminal case compels a finding that the trial was tainted by both jury

misconduct and bias sufficient to undermine confidence in the jury's verdict.

1. **Denial of Christensen's Motion to Remove Juror Budach**. Midway through trial, news media personnel informed the court staff that during a noon recess an individual handed the news personnel a note [Court's Exhibit 1A; Confidential App. 5] indicating that a juror had been heard during a weekend family gathering expressing the juror's opinion that Christensen was guilty and that nothing was going to change the juror's mind.[3] In response to this incident, and after examining the newspeople, the court determined that the note referred to Juror Budach, who was brought into chambers and questioned about whether the juror had attended an out-of-town family function, made comments about the juror's participation as a juror, or whether the juror expressed an opinion about Christensen's guilt. Still under the oath administered at the beginning of trial, the juror confirmed the report that she had been at a family celebration. Asked if she had spoken with anyone about the case, she replied, "I don't *believe* I did. I think I said I

[3] The county sheriff determined that the author of the note was employed at a café acrosss the street from the courthouse. Both in an interview conducted by the sheriff and in a sworn statement [Court's Exhibit 1B; Confidential App. 6], the writer confirmed that he'd written the note, and attested that the juror's family members, who had attended the family event, told him "that Mrs. Budach kept on talking about the trial and that Lee Christensen was guilty & was going to find him guilty no matter what."

was a juror maybe, you know, or they knew I was a juror." Questioned about whether she expressed an opinion about Christensen's guilt or innocence, she responded that she didn't because she didn't know. Pressed to specifically deny that she made *any* statements about Christensen's guilt, she stated, "I don't *believe* I did. I don't *think* I ever said anything about his guilt or innocence." Expressing concern that the juror said she didn't "think" she'd said anything, the court asked Budach if she was *certain*. Her response: "I'm trying to think. I don't remember making any statements about the guilt or innocence because I do not know." Still later: "No, I don't believe I did, no, no, because I do not know. I do not know at this point." (TT V, p. 11 L21 – p. 13 L25). Although the juror indicated, "I don't know how I'm going to vote," the critical essence of the information about the reported comments was not firmly repudiated. Absent an unequivocal denial, Christensen moved for removal of the juror, which the court overruled. (TT V, p. 14 L11 – p. 16 L 23). The court erred in doing so. As this Court long ago observed in a related context,

> We have said, and have repeated it often, that trial courts should use the utmost caution in overruling challenges for cause in criminal cases when there appears to be a fair question as to their soundness.... "Although a ruling may be technically right, if it must be so doubtful as to raise a fair question as to its correctness, it is far better to give the accused the benefit of the doubt, to the end that all men may be satisfied that his rights have not been invaded."

State v. Beckwith, 242 Iowa 228, 238-39, 46 N.W.2d 20, 26 (1951) (quoting *State v. Teale*¸154 Iowa 677, 682, 135 N.W. 408, 410 (1912)). Christensen was entitled to a jury free of bias and – equally important – a juror free from the apparent impropriety of the juror commenting about the trial, opining about the defendant's culpability, and having formed an opinion before the case was submitted.

2. **Jurors' Exposure to Threats of Civic Unrest**. Both in its preliminary instructions to the panel during jury selection (Jury Selection Transcript, Volume I, hereafter "JS I", p. 6 L16 – p. 7 L8; p. 98 L17 – p. 100 L15; p. 183 L7-11; p. 192 L11-24; Jury Selection Transcript, Volume II, hereafter "JS II", p. 70 L20 – p. 171 L6; p. 182 L17 – p. 183 L18), and in final instruction number 38, the court admonished the jurors not to communicate with anyone about the case before reaching their verdict, and not to use social media to obtain any information about the case, the law or any of the people involved. Once the jurors were sworn, the court specifically stated,

> You are admonished not to listen to, view, or read any form of media while this case is in progress…. This includes as I mentioned earlier the full gamut of social media, the internet, cell phone communications, Instagram, Twitter. Just for the next few days, I need to have you disconnect from that if you're involved at all. Do not report to anybody on Facebook or any of those that have been selected as a juror because they may send you something inadvertently, and we don't want them to

> do that because you may read it and get a piece of information you're not supposed to have.

(JS II, p.270 LL3-23). Cell phones would be taken away from jurors during deliberations. (JS II, p. 264 L14-21).

The court reminded the jurors at the close of each trial day to heed the admonition it had given them previously. The case was submitted to the jury on June 30, 2016, and it deliberated well into the evening of June 30. Also on June 30, a Facebook post by "E'ville Amy" [Defendant's Motion for Jury Poll Exhibit A; App. 60] noted that rumors were circulating in Estherville that a riot might occur if Christensen was not convicted of first degree murder. On the morning of July 1, the jurors resumed their deliberations and in the afternoon informed the court by a note from the foreperson that the jury was "stuck between two verdicts and need[ed] to know what our options are." [Court's Exhibit 1H; Confidential App. 9]. The court replied that the jurors should continue their deliberations if they believed that it would be productive in reaching a unanimous verdict. Without submitting further questions to the court, the jury announced in mid-afternoon that they had reached a verdict, and found the Defendant guilty of the lesser-included offense of murder in the second degree. Only after the verdict had been pronounced did Christensen learn of the E'ville Amy Facebook post and that jurors may have been exposed to it or other

information suggesting that civic unrest might arise based on the outcome of the jury's decision. The court having sustained the Defendant's motion for jury poll (Motion for Jury Poll; App. 29) the trial jurors were summoned to testify about their exposure to the Facebook posting or other outside influences.

Testimony at the hearing on Christensen's motion to poll the jurors revealed that there were *two* sources of extraneous threats to the jurors considering Christensen's fate. First, it was startling clear that jurors had disobeyed the court's repeated admonition to refrain from using social media during the trial.[4] Juror Walter testified that, *prior to the jury reaching and announcing its verdict*, two female jurors had seen on Facebook that people were threatening ***the jury*** depending on what decision was made. (Jury Poll Transcript, hereafter "JPT", p. 7 L21 – p. 8 L16; p. 9 L6; p. 9 L21; p. 10 L7-24). Walter further testified that these threats had an impact on the jurors' concerns for their safety and, once the verdict was announced, led to the request for police presence as the jurors walked to their cars. (JPT p. 10 L7-24). One juror was sufficiently alarmed that she asked the sheriff to patrol

[4] Even mid-trial, Juror Hinshaw reported to the court that after logging onto Facebook during a lunch break she learned that she had apparently "friended" a possible Christensen relative. (TT V, p. 18 L2-24).

her home after the conclusion of the trial (JPT p. 10 L7-15). Because jurors were not permitted to have cell phones in the jury room[5], this Facebook information must have been learned *before* a verdict was reached.

Juror Sander recalled that a juror had been told by the juror's granddaughter that the threat was "all over Facebook" (JPT p. 14 L8 – p. 15 L1), and that this threat was the reason jurors were led out of the courthouse (JPT p. 12 L6-13). Importantly, Sander stated that the comments about the threat were made *a few days* before the verdict was announced and *before* the conclusion of the evidence. (JPT p. 12 L14 – p. 13 L5; p. 15 L13-22). Sander finally recalled that this threat was mentioned to all of the jurors. (JPT p. 14 L16-18). Juror Lobato (JPT p. 21 L19 – p. 23 L2), Juror Arneson (JPT p. 24 L9 – p. 25 L8) and Hinshaw (JPT p. 35 L13 – p. 36 L14) likewise heard in the jury room that another juror had heard that if the jurors did not vote for first degree murder that people were going to be mad or outside the courthouse, or that there would be a riot. While Juror Lobato did not remember if these comments occurred during deliberations (JPT p. 22 L2-5) or, as Juror Arneson recalled, after the verdict but before it was announced, it is clear that the information was conveyed to some of the jurors before

[5] After the jury was sworn, the trial court ordered cell phones would be taken from the jurors and not permitted in the jury room during deliberations. (JS II, p. 264 L14-21).

Friday morning, July 1. Juror Hinshaw remembered, as did Juror Sander, that a juror had been called by a family member *before the jury returned to the courthouse on Friday* to resume deliberations and told that there was going to be a possible riot *at the courthouse* if a certain verdict was not reached. (JPT p. 35 L22 – p. 36 L20; p. 37 L3-9).

Although Juror Fontenot believed that the comment she heard was after the jurors had made their decision and announced the verdict (but before jurors left the courthouse) (JPT p. 28 L18-25), Juror Johnson recalled that it was Juror Fontenot who had heard of the threat and became very emotional and upset (JPT p. 40 L7-22). As did other jurors, Juror Fontenot believed that something had been posted on Facebook (JPT p. 29 L4-12) and that it prompted safety concerns among the jurors (JPT p. 28 L22 – p. 29 p. 3). Although he did not recall whether the comment had occurred before or after the verdict was reached (JPT p. 31 L3-8), Foreperson Schmidt was certain that the jurors' safety concerns prompted the sheriff being contacted (JPT p. 31 L9-15) and that when he asked the jurors about their concerns for their personal safety, *most* raised their hands (JPT p. 31 L20 – p. 32L8).

Unlike the jurors who had themselves seen threats on Facebook, or had Facebook threats conveyed to them by others, Juror Kirchner overheard

talk in the community – while the trial was going on – of a riot if Christensen was not found guilty (JPT p. 18 L1 - p. 19 L1; p. 19 L22).

Importantly, *nine* of the twelve[6] jurors were aware of comments in the community – either through social media or statements overheard in conversation – that public disorder could occur if Christensen was not found guilty. The comments were sufficiently disturbing that one juror became emotionally upset, most jurors were concerned for their safety, law enforcement was contacted to escort jurors from the courthouse, and one juror asked to have her home patrolled for days after the verdict.

There can be no doubt that the exposure of one or more jurors to Facebook postings or conversations with family members about the possibility of a riot or danger to the jurors in the event Christensen was not found guilty of murder constitutes misconduct. At least some of the jurors were exposed to this information as early as *days* before deliberation, and certainly before a verdict was rendered. Representing a clear violation of the court's repeated admonitions, jurors learned of the threat of a civil

[6] Juror Gregori testified that she did not hear "it" before the verdict was reached (JPT p. 4 L15 – p. 5 L11), but also testified that she did not believe there was even a possibility "that somebody else had said something in the juror room." (JPT p. 5 L12-21). While it appears that Gregori heard something relating to a threat, it is uncertain what she heard. Jurors Budach and Diekmann stated that neither they themselves or from other jurors heard about any threats.

disturbance or violence through social media or conversations with others and shared that information with others in the jury room. Contrary to the trial court's finding that not until *after* the verdict was the possibility of a riot or violence discussed (Ruling on Defendant's Motion for New Trial, p. 13; App. 44), the juror testimony clearly revealed that the prospect was brought up as early as days before deliberation. Likewise, the trial court's consideration of juror comments made after deliberations that the threats were deemed "ridiculous" or "fairly dismissed" (Ruling on Defendant's Motion for New Trial, p. 13; App. 44) was impermissible under Iowa R. Evid. 5.606(b) and the plain dictates of the jury misconduct cases. Unlike the click of a mouse representing a Facebook "like" deemed misconduct insufficient to require a new trial in *Webster*, 865 N.W.2d at 239-240, the juror actions in this case exceeded tolerable bounds of jury deliberation.

Of particular importance is the nature of the intrusion into the jury's deliberations. Although it is unclear what specific Facebook rumors were viewed by jurors,[7] or what Facebook posting a juror's relative may have

[7] Although the E'ville Amy Facebook posting of June 30, 2016, referred to civic unrest, juror Walter recalled that two female jurors mentioned that they had seen on Facebook threats *against the jury*. Walter also testified that these Facebook posts may have originated from other than the Estherville Daily News. (JPT. p. 8 L14; p. 9, L25 – p. 10 L15).

viewed and reported to that juror by phone, community sentiment of potential unrest was confirmed in part by Juror Kirchner who overheard a conversation on the street that buttressed the Facebook information. The threat of possible violence unless Christensen was found guilty was just the sort of psychological pressure "bound to impress the juror and very apt to do so unduly," *Remmer*, 347 U.S. at 229, and clearly of the sort deemed presumptively prejudicial.

It is equally evident that juror exposure to media accounts or actual conversations concerning possible violence constituted misconduct that was calculated to, and with reasonable probability did, influence the verdict. Unlike extraneous facts not in evidence, the potential for verdict-inciting violence in the community, or against the jurors themselves, threatened the very integrity of the jury function and was of a sort that justified the stricter rule designed to keep the jury above suspicion of manipulation by outsiders. *See Carey*, 165 N.W.2 at 29. The trial court was plainly wrong in concluding that any comments about potential violence were made *after* the jury reached a verdict or, if before, they were not made during deliberations. (Ruling on Defendant's Motion for New Trial, pp. 14-15; App. 45-46).

Although the effect on Christensen's jurors was more than hypothetical and injected actual bias into the jury's deliberations[8], the impact of the misconduct is to be judged objectively to determine whether the extraneous information would prejudice a typical juror. *State v. Henning*, 545 N.W.2d 322, 325 (Iowa 1996) (citing *Doe v. Johnston*, 476 N.W.2d 28, 35 (Iowa 1991)). "[T]he trial court may 'examine the claimed influence critically in light of all the trial evidence, the demeanor of the witnesses and the issues presented before making a common-sense evaluation of the alleged impact of the jury misconduct.'" *State v. Johnson*, 445 N.W.2d 337, 342 (Iowa 1989) (quoting *State v. Christianson*, 337 N.W.2d 502, 506 (Iowa 1983). As noted above, and contrary to the district court's finding that there was no likelihood of implied bias (Ruling on Defendant's Motion for New Trial, p. 17; App. 48), two jurors saw Facebook posts threatening the jurors themselves. Moreover, a star athlete and member of a well-known family in small town Estherville, Christensen was accused of killing a popular college student whose disappearance

[8] Significantly, the threat of violence provoked in one juror a graphic emotional response, and prompted in several jurors sufficient fear for their *personal* safety that they requested law enforcement escorts to their cars and even (in one instance) police patrols of their personal residence after the trial.

launched a search by hundreds of townspeople. Seasoned police officers who knew both young men testified about being themselves overcome by the emotion of the tragedy. The heightened community awareness and sentiment was itself reflected in the jury selection process[9]. A typical juror in this environment could not help but be prejudiced by the risk of community violence that hinged on her vote.[10]

Finally, the trial court was wrong in concluding that the verdict was evidence of the jury's impartiality. (Ruling on Defendant's Motion for New Trial, p. 19; App. 50). That Christensen was found guilty of the lesser-

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[9] Of the 60 prospective jurors, 57 had heard about the case through the media (many through Facebook), 36 had also heard about it from friends or others, and at least 24 had formed a fixed opinion based on what they heard. There were 24 challenges for cause sustained. (JS I, p. 16 L17 – p. 18 L16; p. 137 L21 – p. 138 L10; JS II, p. 4 L11 – p. 5 L3; p. 33 L7 – p. 34 L7; p. 52 L10 – p. 53 L4; Jury Challenge and Strike Document; App. 13)

[10] The district court cited *Wallace v. United States*, 412 F.2d 1097 (D.C. Cir 1969) and *State v. Napulou*, 936 P.2d 1297 (Hi. Ct. App. 1997), as support for the proposition that threats of violence directed at a juror or the community do not necessarily foment juror partiality sufficient to warrant a new trial. Neither case is germane. In each, reports of possible threats to the jurors arose *before* verdicts were reached. Jurors were interviewed separately in chambers to determine the impact of the information and to obtain satisfactory assurances that each could render verdicts impartially and unimpeded by the reports. 412 F.2d at 1102; 936 P.2d at 1304. While such a procedure may be permissible before a verdict, it would not *after* a verdict. *See State v. Gouveia*, 384 P.2d 846, 856 (Hawaii 2016) ("[T]he communication in *Napulou* occurred *prior* to the verdict, and thus the court could rely on the jurors self-assessment as to whether they could remain impartial.) (Emphasis in original).

included offense of second degree murder does not in any way diminish the conclusion that this extraneous riot information affected the jury's deliberations. At the very least, the misconduct proven here raises the *appearance* that the jury's deliberations were tainted by improper influences, *Carey* at 30, and undermines confidence in the outcome. As the United States Supreme Court made abundantly clear in *Parker v. Gladden* – and equally applicable here – a criminal defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." 385 U.S. at 366.

II. THE COURT ERRED IN DENYING CHRISTENSEN'S MOTIONS FOR MISTRIAL BASED ON PROSECUTORIAL MISCONDUCT; THE COURT'S CURATIVE INSTRUCTION AND ADMONITIONS WERE INSUFFICIENT.

A. <u>Standard of Review and Preservation of Error</u>. Denial of a mistrial based on prosecutorial misconduct is reviewed for an abuse of discretion, *State v. Greene,* 592 N.W.2d 24, 31 (Iowa 1999), as is a denial of a motion for new trial. *State v. Dixon*, 534 N.W.2d 435, 439 (Iowa 1995). To the extent that a claim of prosecutorial misconduct raises an issue of due process, review is *de novo*. *State v. Piper*, 663 N.W.2d 894, 904-905 (Iowa 2003).

Christensen preserved error by moving for a mistrial based on the prosecutor's questioning of criminalist Tara Scott, and during the

examination of DCI investigator Peter Wagner. The trial court denied the motions for mistrial. In his motion for a new trial, Christensen contended that the court had erred in denying the motions for mistrial and that the court's curative instructions and admonitions were insufficient. The trial court denied his motion for a new trial. (Ruling on Defendant's Motion for New Trial; App. 32).

B. Legal Principles. The court may grant a new trial "[w]hen the prosecuting attorney has been guilty of prejudicial misconduct." Iowa R. Crim. P. 2.24(2)(b)(5). Prosecutorial misconduct that denies a defendant a fair trial is a violation of due process, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Constitution of the State of Iowa. *State v. Graves*, N.W.2d 860, 867 (Iowa 2003). The initial requirement for a due process claim based on prosecutorial misconduct is a proof of misconduct. *State v. Piper*, 663 N.W.2d 894, 913 (Iowa 2003). "Evidence of the prosecutor's bad faith is not necessary, as the trial can be unfair to the defendant even when the prosecutor has acted in good faith." *Graves* at 869. In the event misconduct is shown, the second required element is proof that the misconduct resulted in prejudice to the extent that a defendant was denied a fair trial. *Piper* at 913. In determining prejudice, the court examines "within the context of the

entire trial" (1) the severity and pervasiveness of the misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the state's evidence; (4) the use of cautionary instructions or other curative measures; and (5) the extent to which the defense invited the misconduct. *Graves* at 869 (citing cases). Underlying the analysis of misconduct is the principle that a prosecutor "is not an advocate in the ordinary meaning of the term," and that the prosecutor's duty to the accused is to "assure the defendant a fair trial" by complying with "the requirements of due process throughout the trial." *Graves* at 870 (citing *DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002). In gauging whether misconduct deprived the defendant of a fair trial, the court must determine whether there is a reasonable probability the prosecutor's misconduct "prejudiced, inflamed or misled the jurors so as to prompt them to convict the defendant for reasons other than the evidence introduced at trial and the law as contained in the court's instructions." *Graves* at 877. It is beyond dispute that a prosecutor's use of false testimony prevents a fair trial and violates due process. *DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002).

As the Iowa Supreme Court made clear in *State v. Hanes*, 790 N.W.2d 545, 556 (Iowa 2010),

> The State bears the burden of proof in criminal cases. It is improper for the State to shift the burden to the defense by

> suggesting the defense could have called additional witnesses. "'It is generally improper for a prosecutor to comment on a defendant's failure to call a witness. Such comment can be viewed as impermissibly shifting the burden of proof to the defense.'"

(Citations omitted). The impropriety of such a burden-shifting comment derives from well-recognized principle that a prosecutor is forbidden from commenting on a defendant's failure to testify, and that such comments violate the self-incrimination clause of the Fifth Amendment of the United States Constitution. *Griffin v. California*, 380 U.S. 609, 612-15, 85 S. Ct. 1229, 1232-33, 14 L.Ed.2d 106, 109-10 (1965); *State v. Taylor*, 336 N.W.2d. 721, 727 (Iowa 1983). Prior to *Hanes*, the "correct rule" regarding a prosecutor's comment on a defendant's failure to call witnesses was "[a] prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, so long as it is not phrased to call attention to the defendant's own failure to testify." *State v. Craig*, 490 N.W.2d 795, 797 (Iowa 1992). *Hanes* represented a departure from this "correct rule" and narrowed the prohibition to any inference on the defense's failure to call witnesses or to present evidence. *See State v. Singh*, 2011 WL 538729 at *4 (Iowa App. 2011); *Musedinovic v. State*, 2013 WL 5758232 at *1 (Iowa App. 2013).

Although a curative instruction is, in most circumstances, sufficient to enable the jury to complete its task without being improperly influenced by otherwise prejudicial testimony, a mistrial is necessary when the evidence was so prejudicial its effect on the jury could not be erased by an admonition. *State v. Williamson*, 570 N.W.2d 770, 771 (Iowa 1997); *State v. Jackson*, 587 N.W.2d 764, 766 (Iowa 1998). Only in extreme cases will a cautionary instruction be deemed inadequate to remove the danger of prejudice. *State v. Plaster*, 424 N.W.2d 226, 232 (Iowa 1988); *State v. Hamby*, 210 Iowa App. LEXIS 308 at *14-15 (Iowa App. 2010).

C. <u>Analysis: Prosecutorial Misconduct in Examination of State's Witness Tara Scott</u>. Throughout the trial, the Defendant contended that the State's investigation of the circumstances surrounding Thomas Bortvit's death – and the investigation of the crime scene and physical evidence – was inadequate. More particularly, he contended that the investigation was skewed by the assumption that no fight had taken place between Christensen and Bortvit (as Christensen told his parents), and that a more thorough forensic examination of critical evidence could have bolstered his defense. During the testimony of criminalist Tara Scott, Scott testified that Bortvit's DNA was detected on the grip of State's Exhibit 6, the handgun considered to be the murder weapon, that it was not screened

for blood, and that further forensic testing was not conducted at the DCI Laboratory to determine if the source of the DNA was Bortvit's skin or perspiration (indicating that Bortvit may have held the gun). (TT II, p. 196 L3 – p.197 L23; p. 199 L3-9; p. 211 L3 – p. 213 L9). Importantly, scrapings from beneath Bortvit's fingernails were not tested for the presence of Christensen's DNA because Scott had been told by DCI investigator Keri Davis that "no struggle was indicated." (TT II, p. 213 L1 – p. 214 L20). On redirect examination, Scott was asked if the physical evidence was available for testing by others, to which she answered that it was. (TT II, p. 215 LL3-11). Defense counsel objected and moved for a mistrial contending that the question and ensuing answer improperly implied that the Defendant had a duty to prove his own innocence in direct contravention of his due process and testimonial protections. (TT II, p. 215 L12 – p. 219 L9). The court denied the mistrial motion but admonished the jury to disregard both the question and answer, ruling that both were improper. (TT II, p. 219 L13 – p. 220 L18). Christensen respectfully contends that this was the "extreme case" in which a curative instruction was insufficient to purge the prejudicial effect of Scott's testimony. Other than Christensen, there were no other witnesses to the fatal encounter between him and Bortvit. The only account of the event precipitating the shooting came from

Christensen's parents, who had been told that there was a fight, Christensen got scared, and Bortvit was shot. The integrity of the State's scientific investigation was critical. Where, as here, the defendant did not testify, the implication of the prosecutor's question was that Christensen had an opportunity to prove his own innocence but passed at the chance. As urged in his motion for new trial, Christensen was thereby denied his rights under the Fourteenth Amendment and Article I, Section 9 of the Iowa Constitution to due process and a fair trial.

D. Analysis: Prosecutorial Misconduct in Presentation of False Testimony. Consistent with the defense theme that the technical investigation of Bortvit's death was inadequate, defense counsel cross-examined crime scene investigator Peter Wagner concerning Wagner's testimony that, in examining the Christensen's farm, investigators employed a metal detector to search for shell casings in an effort to approximate the location where Bortvit's fatal injuries were inflicted. (TT II, p. 84 L17 – 23). After acknowledging on cross-examination that he had testified in a pretrial deposition that he couldn't recall if investigators had used metal detectors or not, and that investigator Keri Davis had testified before trial that one had *not* been used, Wagner said that a metal detector had been used. (TT II, p. 85 L2 – p. 87 L4).

On redirect examination, Wagner testified that during a court recess he had called crime scene investigator Keri Davis about the crime scene investigation, and she told him that investigators *did* use a metal detector, even though she had testified in a deposition that a detector was *not* used. He also said under oath that Davis told him her deposition testimony was incorrect. (TT II, p. 95 L9-20). Defense counsel subsequently contacted Davis, who verified that she had spoken with Wagner, but confirmed that investigators had not used a metal detector, that it was taken out of the crime scene van, but because the middle rod of the detector was missing, that was the reason it was not used. (TT IV, p. 2 L4 – p. 25 L19).

Thereafter, counsel moved for a mistrial contending that Wagner's testimony was false and that its consideration by the jury deprived the Defendant of his state and federal rights to a fair trial and due process. (TT IV p. 7 L3 – p. 8 L3). The trial court was sufficiently concerned about Wagner's credibility (both about use of a metal detector *and* his recess conversation with Davis) that it ordered that Davis be made available for testimony. (TT IV, p. 14 L22 – p. 25 L19). During a telephone inquiry with Davis in chambers, she verified that a metal detector was not used, and that she did not believe she had told Wagner that her earlier deposition testimony was incorrect. (TT IV, p. 36 L12 – p. 41 L23; p. 46 L14 – p. 47 L13). The

parties and the court debated whether Davis should be compelled to testify, either in person or remotely.

Wagner was summoned back to court and in testimony in chambers endeavored to explain his conversation with Davis, his earlier trial testimony, and that he had not intended to perjure himself on the witness stand. (TT IV, p. 209 L13 – p. 222 L11).

Based on this record, the court implicitly overruled the motion for mistrial, and concluded that Wagner should be recalled to testify, finding that his testimony though not false "bordered on reckless." (TT IV, p. 222 L12 – p. 223 L24). The court admonished the jury that Wagner's testimony was misleading and afforded him an opportunity to "clarify" his testimony. (TT IV, p. 228 L4 – p. 229 L2)

The Defendant contends that Wagner's testimony, both about the use of a metal detector *and* his conversation with Davis, was knowingly false, misleading and calculated to suggest to the jury that the State's technical investigation – a central issue in the trial – was more thorough and accurate than it actually was. Given the critical importance of the government's technical investigation – and the integrity of the State's evidence – Wagner's "spin," uninvited by the defense, constituted misconduct and – even in the absence of prosecutorial bad faith –

warranted the granting of a mistrial. The trial court erred in overruling Christensen's motion.

CONCLUSION

While no criminal defendant – Lee Christensen included – is entitled to a perfect trial, he is without question entitled to a fair trial. Lee Samuel Christensen respectfully asserts that the errors detailed above, either individually or given their cumulative effect, so deprived him of fundamental fairness that he is entitled to a new trial.

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REQUEST FOR ORAL ARGUMENT

Upon submission of this matter to the Court, counsel for Appellant Lee Samuel Christensen requests that he be permitted to be heard in oral argument.

CERTIFICATE OF FILING AND PROOF OF SERVICE

I certify that on October 20, 2017, I electronically filed the foregoing brief with the Clerk of the Supreme Court of Iowa using the Electronic Data Management System (EDMS). Participants in the case who are registered EDMS users will be served by the EDMS system. The brief was scanned for viruses using Security Manager AV Defender.

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CERTIFICATE OF COST

The undersigned certifies that the actual cost of printing the foregoing Appellant's Brief was $0.00.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 9,341 words, excluding the parts of the brief exempted by Iowa R. App. P.

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14.

October 20, 2017
Date

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