IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. STANLEY LIGGINS, Defendant-Appellant.	)))))))))	S.CT. NO. 19-0945

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
HONORABLE MARLITA A. GREVE, JUDGE

APPELLANT'S BRIEF AND ARGUMENT
AND
REQUEST FOR ORAL ARGUMENT

MARTHA J. LUCEY
State Appellate Defender

MELINDA J. NYE
Assistant Appellate Defender
mnye@spd.state.ia.us
appellatedefender@spd.state.ia.us

STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX

ATTORNEYS FOR DEFENDANT-APPELLANT

CERTIFICATE OF SERVICE

On the 28th day of January, 2021, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Stanley Liggins, No. 1048544, Anamosa State Penitentiary, 406 N. St., Anamosa, IA 52205.

APPELLATE DEFENDER'S OFFICE

Melinda J. Nye
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
mnye@spd.state.ia.us
appellatedefender@spd.state.ia.us

MN/sm/8/20
MN/sm/1/21

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Authorities

State v. Tejeda, 677 N.W.2d 744, 749 (Iowa 2004)

State v. Watson, 620 N.W.2d 233, 237-38 (Iowa 2000)

U.S. Const. amend. VI

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Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, (1961)

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Mattox v. United States, 146 U.S. 140, 150, 13 S.Ct. 50 (1892)

State v. Christensen, 929 N.W.2d 646, 679 (Iowa 2019)

United States v. Corrado, 227 F.3d 528, 535-36 (6th Cir. 2000)

United States v. Davis, 177 F.3d 552, 556–57 (6th Cir.1999)

State v. Brown, 668 A.2d 1288, 1303 (Conn. 1995)

State v. Bigley, 202 N.W.2d 56, 58 (Iowa 1972)

ABA Standards Relating to Fair Trial & Free Press 3.5(f)) (Am. Bar Ass'n 1968))

ABA Standards Relating to Fair Trial & Public Discourse, 8.5-5(d) (found at https://www.americanbar.org/groups/criminal_justice/standards/crimjust_standards_fairtrial_blk/)

State v. Frank, 298 N.W.2d 324, 327 (Iowa 1980)

State v. Gathercole, 877 N.W.2d 421, 433 (Iowa 2016)

Mickens v. Taylor, 535 U.S. 162, 1245, 122 S.Ct. 1237, 1245, 152 L.Ed.2d 291, 302 (2002)

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State v. Einfeldt, 914 N.W.2d 773, 780 (Iowa 2018)

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State v. Shorter, 893 N.W.2d 65, 83 (Iowa 2017)

State v. Blackwell, 238 N.W.2d 131, 134-36 (Iowa 1976)

Iowa R. Crim. Proc. 2.27(1)

State v. Cuevas, 288 N.W.2d 525, 531 (Iowa 1980)

Smith v. Phillips, 455 U.S. 209, 217, 102 S.Ct. 940 (1982)

State v. Echols, 364 A.2d 225 (Conn. 1975)

State v. Henning, 545 N.W.2d 322, 324–25 (Iowa 1996)

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State v. Mann, 602 N.W.2d 785, 791 (Iowa 1999)

State v. Ambrose, 861 N.W.2d 550, 555 (Iowa 2015)

State v. Paredes, 775 N.W.2d 554, 560 (Iowa 2009)

State v. Newell, 710 N.W.2d 6, 18 (Iowa 2006)

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Iowa R. Evid. 5.802

Iowa R. Evid. 5.804(a)(4)

Iowa R. Evid. 5.804(b)(1)

Laurie Kratky Dore, 7 Ia. Prac., Evidence § 5.804:1 (2019)

State v. Newell, 710 N.W.2d 6, 17 (Iowa 2006)

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U.S. Const. amend. VI

U.S. Const. amend. XIV

Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 1067 (1965)

Iowa Const. art I, § 10

State v. Kennedy, 846 N.W.2d 517, 522 (Iowa 2014)

Crawford v. Washington, 541 U.S. 36, 53–54, 124 S.Ct. 1354, 1363 (2004)

State v. Schaer, 757 N.W.2d 630, 635 (Iowa 2008)

State v. Holland, 389 N.W.2d 375, 379 (Iowa 1986)

State v. Tompkins, 859 N.W.2d 631, 640 (Iowa 2015)

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State v. Brown, 656 N.W.2d 355, 361–62 (Iowa 2003)

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Gering v. State, 382 N.W.2d 151, 153-54 (Iowa 1986)

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State v. Tangie, 616 N.W.2d 564, 568–69 (Iowa 2000)

State v. Huston, 825 N.W.2d 531, 536 (Iowa 2013)

Iowa R. Evid. 5.403

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Liggins v. State, No. 12-0399, 2013 WL 5963013
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Authorities

State v. Tangie, 616 N.W.2d 564, 568–69 (Iowa 2000)

State v. Huston, 825 N.W.2d 531, 536 (Iowa 2013)

Iowa R. Evid. 5.403

State v. Doolin, 942 N.W.2d 500, 510, n. 4 (Iowa 2020)

State v. Campbell, 714 N.W.2d 622, 630 (Iowa 2006)

State v. Carney, 236 N.W.2d 44, 46 (Iowa 1975)

Ash v. Tyson Foods, Inc., 546 U.S. 454, 455, 126 S.Ct. 1195, 1197 (2006)

Russell D. Covey, Abolishing Jailhouse Snitch Testimony, 49 Wake Forest L. Rev. 1375, 1375 (Winter 2014)

The Innocence Project, Informing Justice: The disturbing use of jailhouse informants, available at innocenceproject.org/informing-justice/ (last visited July 21, 2020)

Arizona v. Fulminate, 499 U.S. 279, 296, 111 S.Ct. 1246, 1257-58 (1991)

State v. Schomaker, 303 N.W.2d 129, 130-131 (Iowa 1981)

Kansas v. Ventris, 556 U.S. 586, 594 n.*, 129 S.Ct. 1841, 1847 n.* (2009)

U.S. v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987)

Hoffa v. U.S., 385 U.S. 293, 311, 87 S.Ct. 408, 418 (1966)

Jeffrey S. Neuschatz et al., The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decisionmaking, 32 Law & Hum. Behav. 137, 142 (2008)

State v. Russell, 893 N.W.2d 307, 314 (Iowa 2017)

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Authorities

State v. Huston, 825 N.W.2d 531, 536 (Iowa 2013)

Iowa R. Evid. 5.403

State v. Doolin, 942 N.W.2d 500, 510, n. 4 (Iowa 2020)

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Perry v. New Hampshire, 132 S. Ct. 716, 738 (2012)

State v. Henderson, 27 A.3d 872, 907 (N.J. 2011)

Kenneth A. Deffenbacher et al., Forgetting the Once–Seen Face: Estimating the Strength of an Eyewitness's Memory Representation, 14 J. Experimental Psychol.: Applied 139, 142 (2008)

J. Wixted & G. Wells, The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis, 18 Psychol. Sci. In the Pub. Int. 10, 14, 19-20, 51-52 (2017)

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State v. Russell, 893 N.W.2d 307, 314 (Iowa 2017)

Watkins v. Sowders, 449 U.S. 341, 352, 101 S. Ct. 654, 661 (1981)

Elizabeth Loftus, Eyewitness Testimony 9 (1979)

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Authorities

State v. Neitzel, 801 N.W.2d 612, 621 (Iowa 2011)

State v. Dullard, 668 N.W.2d 585, 589 (Iowa 2003)

Iowa R. Evid. 5.807

State v. Veverka, 938 N.W.2d 197, 199 (Iowa 2020)

Iowa R. Evid. 5.803, 5.804 (2019)

Iowa R. Evid. 5.807

State v. Brown, 341 N.W.2d 10, 14 (Iowa 1983)

Iowa R. Evid. 5.807(a)(1)

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Laurie Kratke Dore, & Iowa Practice, Evidence § 5.807:1 (Nov. 2018)

Thomas D. Lyon, Interviewing Children, 10 Ann. Rev. L. & Soc. Sci. 73, 76 (2014)

State v. Dudley, 856 N.W.2d 668, 676 (Iowa 2014)

Iowa R. Evid. 5.807(a)(4)

Rojas, 524 N.W.2d at 663

Iowa R. Evid. 5.102

State v. Russell, 893 N.W.2d 307, 314 (Iowa 2017)

VII. Whether the district court abused its discretion when denying Liggins' motion for a new trial?

Authorities

State v. Maxwell, 743 N.W.2d 185, 193 (Iowa 2008)

State v. Ary, 877 N.W.2d 686, 705 (Iowa 2016)

State v. Reeves, 670 N.W.2d 199, 202 (Iowa 2003)

State v. Henderson, 27 A.3d 872, 888 (N.J. 2011)

J. Wixted & G. Wells, The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis, 18 Psychol. Sci. In the Pub. Int. 10, 14, 19-20, 51-52 (2017)

Kevin Krug, The Relationship Between Confidence and Accuracy: Current Thoughts of the Literature and a New Area of Research, 3 Applied Psychol. Crim. Just. 7, 31 (2007)

VIII. Whether under the circumstances of this case, where the State had withheld exculpatory evidence and Liggins was retried nearly thirty years after the crime and after his opportunity to present exculpatory evidence was lost due to the death of witnesses, the district court erred in denying his motion to dismiss?

Authorities

State v. Mitchell, 757 N.W.2d 431, 435 (Iowa 2008)

State v. Neiderbach, 837 N.W.2d 180, 190 (Iowa 2013)

State v. Lange, 531 N.W.2d 108, 111 (Iowa 1995).

U.S. Const. amend. VI

U.S. Const. amend. XIV

Iowa Const. art. I, § 9

United States v. MacDonald, 456 U.S. 1, 8, 102 S. Ct. 1497, 1502 (1982)

Morrissey v. Brewer, 408 U.S. 471, 481 (1972)

Brady v. Maryland, 373 U.S. 83, 87 (1963)

State v. Veal, 564 N.W.2d 797, 810 (Iowa 1997)

Liggins, No 12-0399, 2013 WL5963013 at *8

State v. Trompeter, 555 N.W.2d 468, 470 (Iowa 1996)

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Mark S. Cady, A Pioneer's Constitution: How Iowa's Constitutional History Uniquely Shapes Our Pioneering Tradition in Recognizing Civil Rights and Liberties, 60 Drake L. Rev. 1133, 1145 (2012)

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State v. Young, 863 N.W.2d 249, 256 (Iowa 2015)

State v. Booth-Harris, 942 N.W.2d 562, 600 (Iowa 2020)

State v. Olson, 528 N.W.2d 651, 654 (Iowa Ct. App. 1995)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issues raised involve a substantial issue of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c). Specifically, this appeal involves the question of when a district court has a duty to investigate juror misconduct and possible juror bias sua sponte. It also involves a question of when due process requires a dismissal of a prosecution as the only sufficient remedy for a Brady violation when the defense is unable to utilize the suppressed exculpatory evidence due to an extensive passage of time.

STATEMENT OF THE CASE

Nature of the Case. Stanley Liggins appeals from his conviction, judgment and sentence for first degree murder following a jury trial in the Scott County District Court.

Course of Proceedings. In 1992, Stanley Liggins was convicted of convicted of first-degree murder, willful injury, first-degree sexual abuse, and first-degree kidnapping. His

convictions were reversed on appeal, and his case was remanded for a new trial on the murder charge. State v. Liggins, 524 N.W.2d 181, 183 (Iowa 1994). Upon retrial, Liggins was convicted of first-degree murder, and his conviction was affirmed on appeal. State v. Liggins, 557 N.W.2d 263, 270 (Iowa 1996).

In a post-conviction relief action (LACE091830), Liggins sought a new trial alleging the State withheld exculpatory evidence and allowed witnesses to give false testimony. Liggins v. State, No. 99-1188, 2000 WL 1827164, at *1 (Iowa Ct. App. Dec. 13, 2000). A court-appointed special master reviewed the parties' files and concluded seventy-seven police reports had not been disclosed to the defense. Many of these reports contained exculpatory information, but some witnesses affiliated with the reports could not be located, including Theresa Held and Patricia Rhoads. Liggins focused on four reports (related to Sarah Bea, Daryl Sheese, Shawn Saunders, and Michael Armstrong) and argued he was entitled to a new

trial. The district court agreed the reports has been improperly withheld by the State but concluded they were not "material" and denied Liggins a new trial. (Ruling on PCR (LACE91830, pp. 8-14))(App. pp. 12-18). The court of appeals affirmed. Liggins v. State, No. 99-1188, 2000 WL 1827164, at *1-5.

In 2007, Liggins filed a second application for postconviction relief (PCCE107989), again alleging the State withheld exculpatory material—a critical State's witness, W.H., was a paid confidential informant. Again, the district court agreed that the information was suppressed by the State, but that it was not material to the outcome. (Ruling 1/25/12 (PCCE107989 p. 5)(App. p. 42). Liggins v. State, No. 12-0399, 2013 WL 5963013 at *1-2 (Iowa Ct. App., November 6, 2013). The court of appeals, however, reversed the district court and remanded Liggins' case for a new trial after considering all of the information that had been withheld by the State and concluding confidence in the outcome was undermined. Liggins v. State, No. 12-0399, 2013 WL 5963013 at *6-8.

After remand, the case was set for a new trial. (Order 2/12/14)(App. p. 50). Liggins waived his right to speedy trial. (Speedy Trial Waiver 2/20/14)(App. p. 52). In a pretrial hearing, the district court took judicial notice of the court files in Liggins' two PCR cases, Scott County LACE091830 and PCCE107989. (Ruling Second Motion/Dismiss 8/23/18)(App. p. 100).

Trial began on August 30, 2018. (2018 Tr. p. 1). A mistrial was declared on September 24, 2018, when the jury was unable to reach a verdict after three days of deliberations. (Jury Trial Order 9/24/18; 2018 Tr. p. 1479 L. 1 – p. 1481 L. 20)(App. p. 104).

Before the new trial began, the district court advised the parties that it would consider the previous "motions all to have been made in this trial again and with the same rulings," but offered to revisit any if necessary. (Order Setting Trial 11/1/18; 11/1/18 Hearing Tr. p. 8 L. 18 – p. 9 L. 2)(App. pp. 106-107).

Liggins' fourth trial began on March 12, 2019. (2019 Tr. p. 1). This time the jury returned a guilty verdict. (Verdict Forms)(App. pp. 124-125). The court sentenced Liggins to life in prison without the possibility of parole. (Sentencing Order)(App. pp. 127-128). Liggins filed a timely notice of appeal. (Notice of Appeal)(App. pp. 129-130).

Facts. On the evening of Monday, September 17, 1990, the body of nine-year-old J.L. was found near the Jefferson School in Davenport. (2019 Tr. p. 517 L. 5 – p. 523 L. 15). She had been strangled and sexually assaulted before her body was doused with gasoline and set on fire. (Ex. 510A p. 365 L. 13 – p. 377 L. 10)(Conf. App. pp. 200-212). The fire was first seen at 8:16pm, and the fire department responded at 9:07pm. (2019 Tr. p. 28 L. 24 – p. 30 L. 1; Ex. 522, p. 26 L. 4 – p. 30 L. 24; Ex. 514 p. 687 L. 5-9)(Conf. App. pp. 483-487; Ex. App. p. 42).

After school that afternoon, J.L. had been home with her step-father Joe Glenn, her mother, Sherri, and her infant baby

brother in their home in Rock Island. Around 5:30pm, J.L. left on her bicycle to play with neighborhood friends and was seen speaking to a man in a reddish car. When she returned home, the house was busy—a number of people were in and out of the house that afternoon, including Eddie Zapien, John Brown, Fred Gonzales, Nate Rhoden Sr., and Nate Rhoden, Jr., working on cars, playing foosball, and socializing with Joe Glenn. Stanley Liggins arrived about the same time J.L. came back from riding her bike. Shortly after, she told her mother that Liggins had given her a dollar to buy gum. She left the house on foot, headed to Mac's Liquor. (Ex. 517 p. 227 L. 23 – p. 304 L. 25; Ex. 516 p. 499 L. 2 – p. 505 L. 13; 2019 Tr. p. 167 L. 13 – p. 171 L. 15; p. 234 L. 1 – p. 236 L. 24; p. 255 L. 13 – p. 260 L. 20; p. 267 L. 17 – p. 269 L. 16; p. 1129 L. 12 – p. 1135 L. 1; p. 1138 L. 22 – p. 1145 L. 20)(Conf. App. pp. 363-390; pp. 278-284).

Mac's Liquor was just a few blocks from J.L.'s home, and the shopkeeper remembered her coming in about 6:30pm. (Ex.

507 p. 175 L. 14 – p. 177 L. 23)(Conf. App. pp. 181-183). According to the shopkeeper, no one else was in the store when J.L. was there, and J.L. told the shopkeeper she had a girlfriend waiting for her outside. (Ex. B, p. 10 L. 22-25; p. 13 L. 2 - p. 14 L. 10)(Conf. App. p. 500; pp. 503-504). She was not seen alive again after she left Mac's with her gum and her change.

Antonio Holmes testified that at about 5:30pm on September 17, 1990, he went to Mac's Liquor for beer. As he entered, he saw a black man standing outside the store. Inside the store, he saw J.L. getting change after buying gum. She left the store, and he bought his beer. When he left, there was no one outside the store. (2019 Tr. p. 449 L. 4 – p. 452 L. 25). About a week later, when he learned that J.L. had been killed, and he decided to report what he'd seen to the police. He was taken to the police station, interviewed and shown a photo lineup. He picked Liggins' photo as the person he'd seen outside Mac's. The next day, however, he called the police back and told them he'd been drunk the night before and wasn't

sure about his identification. He returned to the police station and was shown Liggins' photo—and only Liggins' photo—again. He said he couldn't be sure it was the person outside the store. (2019 Tr. p. 449 L. 4 – p. 452 L. 25; p.454 L. 14 – p. 457 L. 8; p. 470 L. 19 p. 474 L. 4; Ex. K; p. 1201 L. 8 - p. 1206 L 14). When he was deposed in 1992, he positively identified Liggins as the black male he saw outside Mac's. When asked about how he could be more sure after a two-year gap of time, he said it was because he was seeing him in the flesh and not a photo. (2019 Tr. p. 457 L. 13 – p. 462 L. 2).

Liggins' girlfriend, Brenda Adams, testified that in September 1990, she lived in an apartment in Milan, Illinois, and Stanley Liggins lived at the Hillside Inn, in Rock Island. She was not allowed to have long-term guests, so although Liggins would often stay with her, she would have to take him home early in the morning before the manager arrived. On September 17, 1990, Liggins had the car they jointly owned—a maroon Peugeot. She talked to him a couple times during the

day on the phone, and he came over to her apartment at about midnight. She thought he was quieter than normal and he seemed like he'd been drinking. However, she didn't notice an odor of gasoline on him, and when she went out to the car at 2:00am, she didn't notice an odor of gasoline in the car. The next morning, when she drove Liggins back to the Hillside Inn, she smelled gas fumes in the car. She had smelled gas fumes in the car before on occasion. (2019 Tr. p. 743 L 5 – p. 744 L. 24; p. 748 L. 18 – p. 754 L. 2; p. 761 L. 22 – p. 764 L. 9; p. 769 L. 1 – p. 772 L. 8).

Eddie Zapien, who had also been at the Glenn house the day J.L. was killed and left shortly after she went to Mac's, drove a red Chevy Impala. He also recalled seeing two black males in a brown Ford Escort near the Glenn house that day. (2019 Tr. p. 246 L. 5 – p. 249 L. 4).

W.H. testified she lived near the Jefferson School and had seen Liggins in the neighborhood before. (2019 Tr. p. 332 L. 24 – p. 338 L. 10). On September 17, 1990, she was at a

friend's house in the neighborhood and sometime after 9:00pm, she saw a large fire near the school. She also saw a car sitting at the corner near the school, and she noticed that one brake light was brighter than the other. (2019 Tr. p. 338 L. 11 – p. 345 L. 2; p. 347 L. 1-11; p. 349 L. 12 – p. 360 L. 7; p. 380 L. 17 – p. 381 L. 7). The left taillight on Liggins' Peugeot was brighter than the right. (2019 Tr. p. 586 L. 7-15).

Lloyd Eston [1] testified that on September 17, 1990, between 8:15 and 8:30pm, he noticed a medium-reddish car parked on the side of the road that runs along the Jefferson School. He saw a man standing behind the car with the trunk open. He couldn't discern the man's race and didn't see a fire anywhere. He was interviewed by the police a few days later and they showed him a photo of Liggins' Peugeot. He couldn't say for sure that was the car he saw, he only knew it was similar. He thought the car he saw was a medium red, four-

[1] Lloyd Eston was seventy-six years old at the time of Liggins' first trial. He became so confused on the stand that he was found to be unavailable to testify and his deposition was read into the record. Liggins, 557 N.W.2d at 269.

door car that looked foreign. (Ex. 513 p. 534 L. 24 – p. 545 L. 12; Depo p. 25 L. 2-15)[2](Conf. App. pp. 242-253; 265).

Donna Adkins testified that on the day after the murder, she was helping her boyfriend move out of the Hillside Apartments, which was adjacent to the Hillside Inn. A red car was parked in the parking space outside her boyfriend's apartment causing them to walk around it as they carried boxes out. She said the car reeked of gasoline, and she saw a gas can in the back seat. After she saw a news report showing the police seizing Liggins' car, she called the police to report what she'd seen. (Ex. 501A p. 1136 L. 8 – p. 1143 L. 12; Ex. 606)(Ex. App. pp. 32-39). Daryl Sheese did not recall seeing a maroon Peugeot on September 18 or on any other date. Instead, he remembered seeing a similar-looking car—a brown Mustang—in the parking lot. (Ex. MG)(Ex. App. p. 4). Shawn Saunders and Michael Armstrong confirmed they parked a brown

[2] Exhibit 513 consists of both Lloyd Eston's 1993 trial testimony and his 1992 deposition. The deposition portion of the exhibit does not have visible page numbers, so the citation is to the page of the PDF file.

Mustang in the parking lot that day. (Ex. MI, MH)(Ex. App. pp. 5-6).

Police interviewed Liggins on September 19, 1990. They met him at his apartment, and Liggins cooperated fully with the officers. He consented to a search of his person, including the submission of hair, blood and saliva samples, his apartment, Brenda Adams' apartment, and the Peugeot. He also agreed to speak to the officers. During his interview, Liggins told the officers that at 3:00pm on September 17, 1990, he picked up his friend and drove him to Davenport to cash a check, then they hung out at a bar and played pool. They left at about 5:30pm, and he took his friend home, then went to the Glenn house about 6:00pm. While he was there, he asked if anyone had gum and no one could find any, so offered J.L. a dollar to get some for him. He waited fifteen minutes or so and then left to go back to his apartment because he was expecting a call. He called the Glenn house at about 7:45pm to see if J.L. had ever come back home. He stopped by their house at about

8:45pm and learned she still wasn't home, so he suggested they call the police. (2019 Tr. p. 892 L. 24 – p. 898 L. 22)(Ex. 505 p. 1161 L. 2 – p. 1167 L. 24)(Exs. 97, 98, 99, 100)(Conf. App. pp. 163-169; Ex. App. pp. 27-30).

Liggins told the officers that he went back to his own apartment for a while before he went to his girlfriend's apartment to watch Arsenio Hall. When asked if he'd seen J.L. anywhere but at her house, Liggins initially denied it. However, after a few minutes he admitted that he spoken with J.L. in the street before he arrived at the Glenn house at 6:00pm. He acknowledged he kept a gas can in the trunk of the Peugeot, but said he hadn't used it in months. (Ex. 505 p. 1167 L. 25 – p. 1170 L. 13)(Conf. App. pp. 169-172).

Frank Reising testified that he shared a jail cell with Liggins for a while in 1992. He testified that they saw a newscast about Liggins' case, and Liggins told Reising, "I may have done it, but they'll never catch me." That was the only time they spoke. (2019 Tr. p. 428 L. 6 – p. 430 L. 25).

Remnants of a garbage bag were found under J.L.'s body. Police found a garbage bag in an alcove under an outside stairway of the Hillside Inn. The garbage bags were analyzed and determined to be similar but not identical. (2019 Tr. p. 713 L. 25 – p. 722 L. 3, p. 987 L. 13 – p. 993 L. 23, p. 601 L. 13 – p. 602 L. 18).

Despite extensive analysis of hair, fingerprints, DNA, bodily fluids, and fibers found in Liggins' property and J.L.'s body, no physical evidence linked Liggins to J.L. (2019 Tr. p. 591 L. 10 – p. 619 L. 18; p. 546 L. 7 – p. 551 L. 2).

ARGUMENT

I. Liggins' rights to a fair trial under the Sixth and Fourteenth Amendments to the U.S. Constitution and article I, section 9 of the Iowa Constitution were violated by juror misconduct and the district court's failure to investigate the issue.

A. Error Preservation. Error was preserved when the trial court was notified of juror misconduct during jury deliberations by the court attendant. (2019 Tr. p. 1280 L. 8 – p. 1288 L. 19). Cf. State v. Tejeda, 677 N.W.2d 744, 749 (Iowa 2004) (when question is whether the trial court had a duty to

inquire into conflict between defendant and counsel, error is "preserved" when trial court was alerted to possible conflict between defendant and trial counsel); State v. Watson, 620 N.W.2d 233, 237-38 (Iowa 2000) (even though no objection made at trial, when the trial court knew or should of known of a conflict between defendant and counsel, court had a duty to inquire into conflict and appellate must reverse if the court fails to do so).

B. Standard of Review. Allegations of constitutional violations are reviewed de novo. Watson, 620 N.W.2d at 235.

C. Discussion. The jury began deliberating at 12:58pm on April 1, 2019. At 3:26pm, the jury submitted a question to the judge. After consulting with both sides, the court issued a response and the jury resumed deliberations at 3:29pm. Court was dismissed for the day at 4:30pm. (2019 Tr. p. 1277 L. 24 – p. 1279 L. 12).

When the court attendant released the jurors for the day, "an issue [came] to light regarding a juror." (2019 Tr. p. 1280

L. 8-9). The court contacted the attorneys "so they could think about it overnight." (2019 Tr. p. 1280 L. 9-10). Liggins himself was not notified until shortly before court opened the next morning. (2019 Tr. p. 1282 L. 20-22).

The court attendant described her interactions with the jury the night before.

> COURT ATTENDANT GOBLIRSCH: As I was dismissing the jurors last night, a juror, Shirley Buehler, asked me if she could talk to me privately. I said sure, and I took her out in the hallway. And she proceeded to tell me that her son's friend was on the last jury and that he told her that the jury was hung. And I said, "Who did you tell that to?" And she said, "Teresa." She mentioned by name Teresa as a juror, and then she said, "The two big guys at the end of the table." She thought a Brent, and the other one had the red shirt on. The one in the red shirt is Aaron Wilson. I asked her again to repeat exactly what she told them, and she did. She said her son's friend was on the last jury and told her that it was a hung jury. The only question I asked her is, "What was your son's friend's name?" And she said, "Christy." And again I asked her, "Who knows about it in the jury room?" And she just mentioned those three. After that, I went back in the jury room. I was releasing them. Another juror approached me in the next opening out there, and it was Teresa, and she asked to talk to me in private as well. And she looked at me, and she said, "Do you know what this is about?" And I said, "I might." And she said,

> "Well, Shirley had just said in there that the last jury was hung." And I said, "Who all knows about it, of the jurors?" And she said, "Everyone." And I said, "Everyone?" I said, "She said it loud enough for everyone to hear?" And she said, "Yes, she did." And I said, "Okay. Thank you." And, "Goodnight."
>
> THE COURT: And that happened when Pat had taken in the overnight instruction to them for the foreperson to read, which was going to release them for the night until we come back tomorrow.

(2019 Tr. p. 1280 L. 19 – p. 1281 L. 24).

Liggins' attorney told the court that they were not going to ask for a mistrial. Given the "limited amount of information that was relayed to the other jurors, we don't think that that's enough to ask -- or believe that that will change anything as far as it relates to the deliberations of the jury, simply because that speculation would have been out there anyway, given the odd procedural history of this case." (2019 Tr. p. 1282 L. 19 – p. 1284 L. 3). The State also argued that a mistrial was not necessary. (2019 Tr. p. 1284 L. 5 – 15).

The court, despite never having heard directly from Juror Buehler or the other jurors, concluded "we have not reached the level of a mistrial yet. I do believe Mr. Liggins can still get a fair

trial in terms of the jury deliberating this fairly." (2019 Tr. p. 1285 L. 14-17).[3]

The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 9 of the Iowa Constitution guarantee a criminal defendant the right to a trial by an impartial jury. See U.S. Const. amends. VI, XIV; Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, (1961)("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." (internal quotation marks omitted)); Iowa Const. art I, § 9; State v. Webster, 865 N.W.2d 223, 233 (Iowa 2015) ("It is a bedrock component of our system of justice that an accused charged with a criminal offense receives a fair trial before an unbiased decision-maker.").

> In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before

[3] The parties ultimately agreed on an instruction to give the jury. (2019 Tr. p. 1285 L. 18 – p. 1288 L. 19)(Jury Instr. No. 47)(App. p. 123).

> 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.

Remmer v. United States, 347 U.S. 227, 229, 74 S. Ct. 450, 451 (1954); see also Mattox v. United States, 146 U.S. 140, 150, 13 S.Ct. 50 (1892) ("Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear."). "[I]n determining fair trial issues, one improperly influenced juror is sufficient to require reversal." State v. Christensen, 929 N.W.2d 646, 679 (Iowa 2019).

In Remmer, the district court learned that an outside person contacted a juror. The court notified the prosecution but did not contact the defendant. The FBI investigated and submitted a report which was considered by the prosecution and the court. No further action was taken by the court. Remmer, 347 U.S. at 228, 74 S.Ct. at 450-51. The U.S. Supreme Court held that when the district court becomes aware

of outside communications with a juror, the trial court has a duty to "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." Remmer, 347 U.S. at 230, 74 S.Ct. at 451. Because no such hearing was held and the Supreme Court could not determine if Remmer was prejudiced by the communications, the case was remanded for an appropriate hearing. Remmer, 347 U.S. at 230, 74 S.Ct. at 452; see also United States v. Corrado, 227 F.3d 528, 535-36 (6th Cir. 2000) (despite defendant's failure to request a hearing, the court "abused its discretion by failing to conduct an adequate evidentiary hearing into the allegations of extraneous influences on the jury pursuant to the holding in Remmer"); United States v. Davis, 177 F.3d 552, 556–57 (6th Cir.1999) (holding that the emergence of a credible claim of extraneous influence on a jury imposed a duty on the district court to conduct a Remmer hearing despite the fact that the defendants had not expressly requested such a hearing below);

State v. Brown, 668 A.2d 1288, 1303 (Conn. 1995) ("a trial court must conduct a preliminary inquiry, on the record, whenever it is presented with any allegations of jury misconduct in a criminal case, regardless of whether an inquiry is requested by counsel.").

The Iowa Supreme Court has not addressed when a district court must, in the absence of a request from one of the parties, conduct a Remmer-type hearing when allegations of juror misconduct are brought to the court's attention. However, when addressing the analogous situation involving the possibility of jury exposure to prejudicial material in the press during trial, the court held that " '[i]f it is determined that material disseminated during the trial goes beyond the record on which the case is to be submitted to the jury and raises serious questions of possible prejudice, *the court may on its own motion* or shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material.' " State v. Bigley, 202 N.W.2d 56, 58 (Iowa 1972)

(quoting ABA Standards Relating to Fair Trial & Free Press 3.5(f))[4] (Am. Bar Ass'n 1968)) (emphasis added). Later, the Supreme Court reaffirmed that the district court is bound to question the jury about potentially prejudicial midtrial publicity when requested by the defendant, and without such a request, "the matter rests in the sound discretion of the trial court." State v. Frank, 298 N.W.2d 324, 327 (Iowa 1980). In Frank, the court ultimately concluded the articles were not "of sufficient magnitude to establish a substantial likelihood of probable jury prejudice" and that the court's failure to poll the jury was not an abuse of discretion. Frank, 298 N.W.2d at 328. Although the Iowa Supreme Court has stopped short of requiring a district court to poll jurors in response to midtrial publicity, the Court has encouraged trial courts to "resolve

[4] The ABA Standards have been updated since 1968, but the current applicable standard continues to suggest the court question each juror about the potential for exposure when there is a serious question of prejudice. See ABA Standards Relating to Fair Trial & Public Discourse, 8.5-5(d) (found at https://www.americanbar.org/groups/criminal_justice/standards/crimjust_standards_fairtrial_blk/).

doubts" "in favor of granting a poll." State v. Gathercole, 877 N.W.2d 421, 433 (Iowa 2016).

However, in related contexts, where the district court becomes aware of an issue implicating a defendant's constitutional trial rights, the Iowa Supreme Court has held the trial court is obligated to investigate. For example, "[a] trial court has the duty sua sponte to inquire into the propriety of defense counsel's representation when it knows or reasonably should know that a particular conflict exists." State v. Watson, 620 N.W.2d 233, 238 (Iowa 2000); see also Mickens v. Taylor, 535 U.S. 162, 1245, 122 S.Ct. 1237, 1245, 152 L.Ed.2d 291, 302 (2002). Similarly, when a reasonable trial judge would experience sufficient doubt of the defendant's mental capacity, implicating his competency to stand trial, the trial court "has an absolute responsibility to order a hearing sua sponte." State v. Mann, 512 N.W.2d 528, 531 (Iowa 1994); see also State v. Einfeldt, 914 N.W.2d 773, 780 (Iowa 2018); Iowa Code § 812.3 (2019).

A defendant's right to a fair trial by an unbiased jury is no less critical than other trial rights triggering a trial court's duty to inquire with or without a request from the defendant. As the Iowa Supreme Court explained in Watson:

> If the trial court knows that a particular conflict exists and fails to conduct an inquiry, it should not matter what the source of the court's knowledge is. Regardless of how the trial court becomes aware of the conflict, the defendant has been denied his right to independent counsel. It is only in cases of uncertainty, where the record shows the mere *possibility* of a conflict, that the additional requirement of an adverse effect on counsel's performance is required to establish an *actual* conflict.

Watson, 620 N.W.2d at 237–38.

In this case, the court was aware of juror misconduct, of information outside the record reaching various members of the jury, and of the potential for juror bias. Under these circumstances, the court had a duty to inquire further into Juror Buehler's conversations with her son and her son's friend, the former juror, as well as what she disclosed to the other

current jurors.[5] "The presiding judge is not a mere functionary present only to preserve order and lend ceremonial dignity to the proceedings." State v. Cuevas, 288 N.W.2d 525, 531 (Iowa 1980)

Specifically, the court knew that Juror Buehler had violated the court's admonition by speaking with her son and possibly a former juror about the case. (2019 Tr. 1280 L. 19 – p. 1281 L. 24). The jurors had been advised repeatedly, at the beginning of the proceedings and every time the jury recessed, not to communicate with anyone about the case nor to do any research about the case on their own—at least fifty-three times between voir dire and trial. (Prelim. Jury Instr. 1; 2019 Voir

[5] As well, the court's contact with the attorneys outside the presence of the defendant raises statutory and constitutional concerns. Clearly the court communicated enough information about the "problem with the juror" to allow the attorneys to do research and to allow them to reach a conclusion about how to proceed. However, "a criminal defendant has the right to be personally present at every stage of the trial." State v. Shorter, 893 N.W.2d 65, 83 (Iowa 2017); State v. Blackwell, 238 N.W.2d 131, 134-36 (Iowa 1976); Iowa R. Crim. Proc. 2.27(1).

Dire p. 1 L. 23 – p. 3 L. 23; p. 10 L. 19 – p. 12 L. 7; p. 176 L. 24 – p. 177 L. 3; p. 390 L. 25 – p. 391 L. 9; p. 511 L. 3 – 6; p. 618 L. 1 – p. 619 L. 21; 2019 Tr. p. 5 L. 1-6; p. 34 L. 10-12; p. 86 L. 12-15; p. 121 L. 7-10; p. 164 L. 16-18; p. 173 L. 20-21; p. 192 L. 11-12; p. 208 L. 24 – p. 209 L. 3; p. 266 L. 11-19; p. 281 L. 5-11; p. 329 L. 23 – p. 330 L. 2; p. 363 L. 13-16; p. 393 L. 6-10; p. 419 L. 2-5; p. 442 L. 12-16; p. 473 L. 12-15; p. 486 L. 5-8; p. 509 L. 15-18; p. 519 L. 24 – p. 520 L. 1; p. 540 L. 2-5; p. 581 L. 6-9; p. 621 L. 25 – p. 622 L. 4; p. 666 L. 18-21; p. 709 L. 24 – p. 710 L. 1; p. 732 L. 18-21; p. 774 L. 24 – p. 775 L. 3; p. 786 L. 21 – 787 L. 1; p. 794 L. 6-9; p. 804 L. 3-10; p. 877 L. 13-18; p. 899 L. 10-13; p. 902 L. 9-10; p. 915 L. 19-21; p. 917 L. 11-16; p. 925 L. 12-14; p. 929 L. 13-18; p. 955 L 3-6; p. 1031 L. 22-24; p. 1066 L. 19-22; p. 1099 L. 8-11; p. 1151 L. 16-17; p. 1158 L. 10-19; p. 1165 L. 13-18; p. 1167 L. 24 – p. 1168 L. 1; p. 1176 L. 8-13; p. 1226 L. 9-12; p. 1275 L. 12-17; Final Instr. No. 42)(App. pp. 120-122). The court was further aware that Juror Buehler had shared some portion of the information she

learned from the outside sources with at least three other jurors, and likely with all the jurors, again in violation of the court's admonition. (2019 Tr. 1280 L. 19 – p. 1281 L. 24).

The information gained by the court attendant was incomplete and raised as many questions as it answered. The court attendant's questions to Juror Buehler were deliberately limited in scope and the court attendant only spoke with two jurors, although she knew at least four (and maybe all) jurors were involved.

It was unclear from the court attendant's report whether Juror Buehler only spoke with her son or whether she also spoke directly with the former juror. At one point the court attendant said that Juror Buehler's son told her that the prior jury was hung ("her son's friend was on the last jury and *he* told her that the jury was hung." (2019 Tr. p. 1280 L. 22-24). Later, the court attendant implies that Juror Buehler spoke with the former juror directly ("She said her son's friend was on the last jury and told her that it was a hung jury." (2019 Tr. p.

1281 L. 5-6). The court attendant reported that Juror Buehler's son's friend was named "Christy." However, a review of the juror list for the 2018 trial does not reveal a "Christy" or a variation of "Christy" on the list. (2018 Jury List)(Conf. App. pp. 97-132). This raises a host of questions—did the court attendant get the name of the friend wrong? Did Juror Buehler mistakenly name her son's friend? Or was someone involved in these conversations—Buehler, her son, or the friend—deliberately misrepresenting the name of the former juror? And why?

Notably, during voir dire, a similar issue arose when a potential juror disclosed that that he had heard about the previous trials from coworkers.

> THE COURT: I understand you expressed some concerns today to the court attendant.
>
> PROSPECTIVE JUROR: Yeah.
>
> THE COURT: What were those concerns?
>
> PROSPECTIVE JUROR: I had a coworker start talking about the case today. He told me that his girlfriend's dad is the deputy that drove him down,

and told me that the case has already been tried and convicted twice, and it's been a hung jury the last couple times.

THE COURT: All right. Mr. Walton or Ms. Walton, any questions on that?

MR. WALTON: No, Your Honor.

MR. HAWBAKER: None from us.

THE COURT: All right. Why don't you wait in the hallway for a second, and I'll be right with you.

PROSPECTIVE JUROR: Okay.

(Prospective Juror Jeremy Whitehead left the jury room.)

THE COURT: All right. I want to ask him why he bothered to listen, but I'm not going to go there, I guess.

MR. HAWBAKER: I would move to strike. He knows about the disposition of the other trials.

MR. WALTON: Afraid so.

MR. HAWBAKER: Can we ask him when we let him go, though, make sure that he hasn't talked to anybody else here?

THE COURT: Yes.

(2019 Voir Dire p. 394 L. 14 – p. 396 L. 25). The court's reaction to similar behavior by a potential juror demonstrates

its recognition of the seriousness of the conduct and the potential for harm raised by the potential juror's action of simply listening to others talk about the case.

"Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences *and to determine the effect of such occurrences when they happen.*" Smith v. Phillips, 455 U.S. 209, 217, 102 S.Ct. 940 (1982) (emphasis added). "In a criminal trial, the judge is more than a mere moderator of the proceedings. It is [the judge's] responsibility to have the trial conducted in a manner which approaches an atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding." Brown, 668 A.2d at 1303 (quoting State v. Echols, 364 A.2d 225 (Conn. 1975)).

Under the circumstances in this case, the district court had a duty to inquire into the extent and content of the communications between Juror Buehler and her son and her son's friend about this case and the prior trial. The court was

also bound to inquire with the rest of the jury about what, exactly, they had heard from Juror Buehler.

D. Conclusion. Because the district court failed to appropriately inquire into the extent of the juror misconduct and the possibly juror bias, Liggins' conviction should be vacated and his case remanded for a hearing to "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." Remmer, 347 U.S. at 230, 74 S. Ct. at 452. Absent proof that the private communication between the third parties and the juror and the relaying of the information to the other jurors was harmless, Liggins should be granted a new trial. State v. Henning, 545 N.W.2d 322, 324–25 (Iowa 1996); Mattox, 146 U.S. at 150.

II. The district court erred by admitting the former testimony of Donna Adkins in violation of the hearsay rule and Liggins' confrontation rights.

A. Error Preservation. Liggins moved to exclude Donna Adkins' testimony pursuant to Iowa R. Evid. 5.403. (Defense 1st Motion-Limine 4/4/14)(Conf. App. pp. 10-11). The State

resisted. (State's Response 10/16/15)(App. pp. 55-56). The State moved separately to admit Adkins' prior trial testimony pursuant to rule 5.804(b)(1) because she was deceased. (State's Motion-Former Testimony 4/1/15)(App. pp. 53-54). Liggins resisted, arguing he did not have the same motive and opportunity to cross-examine Adkins in the first two trials. (Def. Resistance 4/22/16)(App. pp. 69-75). The motions were argued at the February 20, 2017, hearing, where Liggins additionally argued that allowing Adkins' former testimony would violate his confrontation rights. (2/20/17 Tr. p. 65 L. 1-4). The court denied Liggins' motion and granted the State's motion. (2/20/17 Tr. p. 48 L. 7 – p. 79 L. 6; Ruling/First Motion-Limine 3/17/17; Ruling/State's Motion-Former Testimony 3/17/17)(Conf. App. p. 49; App. pp. 80-87). Because the issues were raised and argued in the district, and the district court ruled definitively in favor of admitting the prior testimony of Donna Adkins, error has been preserved. State v. Mann, 602 N.W.2d 785, 791 (Iowa 1999).

If the court concludes error was not preserved for any reason, Liggins asserts his trial counsel was ineffective. Ineffective assistance of counsel claims are an exception to the usual requirement of error preservation. State v. Ambrose, 861 N.W.2d 550, 555 (Iowa 2015).

B. Standard of Review. Decisions to admit or exclude evidence are reviewed for an abuse of discretion. However, hearsay claims are reviewed for correction of errors at law. State v. Paredes, 775 N.W.2d 554, 560 (Iowa 2009). The district court has no discretion to admit hearsay if it does not fall within an exception. State v. Newell, 710 N.W.2d 6, 18 (Iowa 2006). "Inadmissible hearsay is considered to be prejudicial to the nonoffering party unless otherwise established." Id. Constitutional claims are reviewed de novo. Ambrose, 861 N.W.2d at 555.

C. Discussion. Donna Adkins testified at Liggins' first two trials in 1993 and 1995. In summary, she testified that on September 18, 1990, the day after the murder, she had been

helping her boyfriend, Daryl Sheese, move out of his apartment in the Hillside Apartments. She testified she saw Liggins' maroon Peugeot in the parking lot while they were moving Sheese's belongings out and that the car smelled strongly of gasoline. She also testified that she saw a gasoline can in the back seat of the car. (Ex. 501A p. 1136 L. 8 – p. 1143 L. 12; Ruling on PCR (LACE91830) 6/21/99 p. 10)(Ex. App. pp. 32-39; App. p. 14).

In 1999, in Liggins' first PCR action, a court-appointed special master identified seventy-seven police reports that had not been previously disclosed to the defense. (Ruling on PCR (LACE91830) p. 3, 9)(App. pp. 7, 13). Three of these reports involved police interviews on September 25, 1990, with Daryl Sheese, Shawn Saunders, and Michael Armstrong. (Ruling on PCR (LACE91830) p. 9)(App. p. 13). According to the reports, Sheese did not recall seeing a maroon Peugeot on September 18 or on any other date. Instead, he remembered seeing a similar-looking car—a brown Mustang—in the parking lot. (Ex.

MG)(Ex.App. p. 4). Shawn Saunders told the detective she owned a brown Mustang that was parked in the parking lot on September 18, 1990. She denied owning a gas can. She recognized the Peugeot and said she had seen it in the lot before. (Ex. MI)(Ex. App. p. 6). Michael Armstrong did not recognize the Peugeot, but said he did have use of the brown Mustang. He agreed they parked the Mustang in the parking lot and that they didn't have a gas can in it. (Ex. MH)(Ex.App. p. 5).

1. Donna Adkins' previous trial testimony did not fall under the hearsay exception for prior testimony because Liggins did not have the same motive and opportunity to cross-examine Adkins regarding the suppressed information from Sheese, Armstrong and Saunders. Although hearsay is generally inadmissible, an exception exists for the former testimony of an unavailable witness. Iowa R. Evid. 5.802, 5.804(a)(4), 5.804(b)(1). In relevant part, to qualify for the exception, the former testimony must be "given as a witness at a trial" and must be offered against a party who had "an opportunity and similar motive to

develop it by direct, cross-, or redirect examination." Iowa R. Evid. 5.804(b)(1). "The scope and nature of the prior proceeding must be examined to determine if there was a full and fair opportunity to conduct a meaningful examination." Laurie Kratky Dore, 7 Ia. Prac., Evidence § 5.804:1 (2019). Death renders a witness "unavailable." Iowa R. Evid. 5.804(a)(4).

Although Donna Adkins was deceased and unavailable, because of the suppressed police reports, Liggins did not have a full and fair opportunity to cross-examine Adkins as required by 5.804(b)(1), and her former testimony should have been excluded as hearsay.

Although Liggins conducted a cross-examination of Adkins during the first two trials, he did not have the benefit of the police reports showing that Sheese did not remember seeing the Peugeot in the parking lot that day and instead recalled seeing a brown Mustang, as well as confirmation from two other people that their brown Mustang was in the parking lot that

day. Had Liggins had those reports, his opportunity to cross-examine Adkins would have been very different than what he had during the previous trials. Specifically, he could have asked Adkins about Sheese's contradictory statement and he could questioned her on whether she might have mistakenly identified Liggins' car.

Under these circumstances, the State failed to establish that Liggins had the full and fair opportunity to meaningfully cross-examine Adkins in the earlier trials, and her former testimony was inadmissible. "Inadmissible hearsay is considered to be prejudicial to the nonoffering party unless otherwise established." State v. Newell, 710 N.W.2d 6, 17 (Iowa 2006). Prejudice and harm is discussed below.

2. *The admission of Donna Adkins former testimony violated Liggins' right to confront the witnesses against him.* The Sixth Amendment to the United States Constitution guarantees a defendant the right to confront the witnesses against him. U.S. Const. amend. VI. The federal

confrontation right is obligatory in state prosecutions. U.S. Const. amend. XIV; Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 1067 (1965). Article I, section 10 of the Iowa Constitution also protects confrontation rights. Iowa Const. art I, § 10; State v. Kennedy, 846 N.W.2d 517, 522 (Iowa 2014).

To satisfy the both the Iowa and the federal confrontation clauses, testimonial statements may be admitted in subsequent proceedings only if the declarant is unavailable to testify and the defendant had a prior chance to cross-examine. Crawford v. Washington, 541 U.S. 36, 53–54, 124 S.Ct. 1354, 1363 (2004); Kennedy, 843 N.W.2d at 522. While the confrontation clause and hearsay rules serve similar and overlapping purposes, the confrontation clause may prohibit the admission of evidence even where a hearsay exclusion or exception applies. Crawford, 541 U.S. at 60-61, 124 S.Ct. at 1369-70. When a defendant challenges the admissibility of a hearsay statement under the confrontation clause, the burden of establishing compliance with the constitutional standard lies with the State.

See State v. Schaer, 757 N.W.2d 630, 635 (Iowa 2008); State v. Holland, 389 N.W.2d 375, 379 (Iowa 1986).

The confrontation clause guarantees " 'an *opportunity* for effective cross-examination.' " State v. Tompkins, 859 N.W.2d 631, 640 (Iowa 2015) (quoting United States v. Owens, 484 U.S. 554, 559, 108 S.Ct. 838, 842, (1988) (emphasis in original). In this case, Liggins did not have an opportunity for meaningful cross-examination because the police reports with critical impeachment evidence had not been disclosed to him at the time of the first two trials. He was unable to cross-examine Adkins about Sheese's inconsistent observations that day or Saunders and Armstrong's confirmation of the presence of their brown Mustang in the area. Critically, this inability to cross-examine Adkins about the conflicting statements was not a deliberate choice on the Liggins' part. Instead the reason he could not effectively cross-examine Adkins was because the State had improperly withheld those exculpatory reports. (Ruling on PCR (LACE91830) p. 3, 9) (App. pp. 7, 13).

3. *Prejudice and harmless error.* "Inadmissible hearsay is considered to be prejudicial to the nonoffering party unless otherwise established." Newell, 710 N.W.2d at 17.

The admission of evidence in violation of the confrontation clause does not mandate reversal if the State can establish the error was harmless beyond a reasonable doubt. Id. The appropriate inquiry is whether the guilty verdict actually rendered was "surely unattributable to the error." Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081 (1993). In assessing whether error was harmless, a reviewing court considers:

> "[T]he importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross examination otherwise permitted, and, of course, the overall strength of the prosecution's case."

State v. Brown, 656 N.W.2d 355, 361–62 (Iowa 2003) (citation omitted).

The State's evidence against Liggins was purely circumstantial. No physical evidence linked Liggins or his

property to J.L. The fact that the 2018 trial resulted in a hung jury demonstrates how close this case is. Donna Adkins' testimony was a significant piece of the State's circumstantial case against Liggins. She was one of several key witnesses whose observations linked Liggins' car to some aspect of the crime.

Adkins' testimony that Liggins' car reeked of gasoline the day after the murder and a gas can was in the back seat was a crucial link in the State's circumstantial case. Her testimony connected Liggins to the efforts made to conceal the crime by burning the body and tied up the testimony from other witnesses that a car with similar characteristics to Liggins' car was seen near the scene of the crime. Liggins was prejudiced by its admission. The district court erred when it permitted Donna Adkins' prior testimony to be admitted to Liggins' most recent trial. His conviction should be vacated and his case remanded for a new trial.

4. *Ineffective Assistance of Counsel.* Criminal defendants are guaranteed the effective assistance of counsel by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, section 10 of the Iowa Constitution. State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006). Generally, to prevail on a claim of ineffective assistance of counsel, a defendant must establish, by a preponderance of evidence, that trial counsel failed to perform an essential duty and that the defendant was prejudiced by counsel's failure. Id. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. Gering v. State, 382 N.W.2d 151, 153-54 (Iowa 1986). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Liggins' counsel had a duty to properly preserve error on Liggins' hearsay and confrontation clause arguments. As argued above, the issues are meritorious and, if not sufficiently

raised in the district court, counsel was ineffective for failing to do so.

Further, Liggins' was prejudiced by counsel's failure. As discussed above, Liggins was prejudiced by the admission of Donna Adkins' testimony. Her testimony was critical to the State's circumstantial case, and without it, there is a reasonable probability of a different outcome in Liggins' trial.

D. Conclusion. Because the Adkins prior testimony was inadmissible hearsay and violated Liggins' confrontation clause rights, and because the error was not harmless, Liggins' conviction should be vacated and his case remanded for a new trial.

III. W.H.'s testimony should have been excluded pursuant to Rule 5.403 because its probative value was outweighed by the risk of undue prejudice.

A. Error Preservation. Liggins moved to exclude W.H.'s testimony pursuant to rule 5.403. (Def. 1st Motion/Limine; 2/20/17 Hearing p. 119 L. 6 – p. 127 L. 25)(Conf. App. pp. 11-13). The district court denied the motion. (Ruling-First Motion/Limine)(Conf. App. pp. 49-50). Accordingly, error was

preserved. State v. Tangie, 616 N.W.2d 564, 568–69 (Iowa 2000)(definitive ruling on motion in limine preserves error).

B. Standard of Review. Evidentiary rulings are reviewed for an abuse of discretion. State v. Huston, 825 N.W.2d 531, 536 (Iowa 2013).

C. Discussion. Relevant evidence may be inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. Huston, 825 N.W.2d at 537; Iowa R. Evid. 5.403.

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Iowa R. Evid. 5.403. To determine if evidence should be excluded pursuant to 5.403, the court weighs the probative value of the evidence "against the danger of its prejudicial or wrongful effect upon the triers of fact." Huston, 825 N.W.2d at 537. Inherently unreliable evidence may be excluded pursuant

to this balancing test. State v. Doolin, 942 N.W.2d 500, 510, n. 4 (Iowa 2020).

W.H.'s story evolved over the years, from the time she first spoke with police in 1990 through her deposition in 1992 and her testimony in the first two trials, gradually becoming more beneficial to the State. She was interviewed by police on October 2, 1990, because she made an anonymous tip that the suspect in the J.L. case had been "in and out" of an abandoned house at 1301 Vine Street. (Ex. MS; Ex. EEE, FFF)(Conf. App. pp. 31-34; 515-516; 517). Even though she was clearly familiar with the case and presumably interested in being helpful to the investigation, she never told police that she saw the fire that night or that she saw a car similar to Liggins' car driving near the school at during the fire. (Ex. MS)(Conf. App. pp. 31-34). Two years later, during her deposition, she revealed for the first time that she had not only seen the fire that night but also saw a car with square taillights driving nearby. (Ex. MS)(Conf. App. pp. 31-34). In her 1993 trial

testimony, she indicated that the left taillight was brighter than the right taillight, but she thought that was because her view was obscured by bushes. (Ex. MT)(Conf. App. pp. 35-39). However, by 1995, in the second trial, she testified that her view was not obscured and was sure that the taillights varied in their brightness. (Ex. MU)(Conf. App. pp. 40-43).

W.H. was a confidential informant, first for the Metropolitan Enforcement Group from May 1992 until December 1992. She later became a confidential informant for the Davenport Vice/Narcotics from May 1993 through January 1995. (EX. MY)(Conf. App. pp. 44-45). Notably, her recollection of seeing the fire and the square taillights first occurred during this time frame—during her deposition in September 1992. The additional memory also came just five days after another key witness for the State, Lloyd Eston, was deposed and was unable to definitively identify Liggins' car near the Jefferson School on the evening of J.L.'s death. (2/20/17

Tr. p. 255 L. 7 – p. 256 L. 21; Ex. 513 p. 25 L. 2 – p. 26 L. 22)(Conf. App. pp. 254; 265-266).

The discrepancies in her story and the suspicious timing of her recollection of seeing the fire and the distinctive taillights render the probative value of her testimony minimal.[6] When balancing the probative nature of her testimony against the risk for prejudicial effect, the risk heavily outweighs any probative value.

This was a four-week long trial, involving fifty-four witnesses, regarding events that took place nearly thirty years in the past. Twenty-two witnesses were deceased or otherwise unavailable and their prior testimony was read into the record. (2019 Tr. Index of Witnesses). Certainly, the proceedings under these circumstances were tedious and would strain the ability of any juror to remain focused. In fact, the court had repeated problems with jurors falling asleep and ultimately had

[6] Indeed, the district court itself ultimately concluded W.H. was "a bit all over the map" and discounted her testimony when ruling on Liggins' motion for new trial. (Sent. Tr. p. 26 L. 15-19).

to dismiss one juror. (2019 Tr. p. 667 L. 1 – p. 669 L.4; p. 775 L. 6 – p. 776 L. 3). There was a legitimate risk that the jury would not fully perceive the cross-examination highlighting the inconsistencies of her story over time. Or more critically, even though the jury might decide to discredit her testimony, by the end of a month of testimony, the jury might not remember who testified to what. Indeed, even the district court made this error when it ruled on Liggins' motion for new trial—mistakenly attributing W.H.'s testimony to another witness. (See Section VII below.)

When a nonconstitutional error occurs in the admission of evidence, prejudice is presumed and the court will reverse unless the record affirmatively establishes a lack of prejudice. State v. Russell, 893 N.W.2d 307, 314 (Iowa 2017)(harmless error standard). The record does not establish a lack of prejudice.

The case was close, as demonstrated by the hung jury in 2018. W.H.'s testimony was critical to the State's

circumstantial case against Liggins—her testimony established that Liggins was familiar with the neighborhood where J.L.'s body was found. Her testimony also placed his car at the scene of the fire while it was occurring. Although Lloyd Eston saw a medium reddish car near the school, he did not see a fire and did not notice anything distinctive about the taillights of the car. Further, he exhibited significant memory issues during his testimony. Thus, W.H.'s testimony, placing Liggins' car at the scene, was essential to the State's case. See Liggins, No. 12-0399, 2013 WL5963013 at *4-6.

D. Conclusion. Because the district court erred in admitting W.H.'s testimony, and because Liggins was harmed by the error, his conviction should be vacated and his remanded for a new trial.

IV. The district court erred in failing to exclude the testimony of Frank Reising Jr., a jailhouse informant, pursuant to rule 5.403 because his clear animus toward Liggins and the crime at issue rendered the probative value of his testimony outweighed by the risk of undue prejudice.

A. Error Preservation. Liggins moved in limine to exclude the testimony of Frank Reising, Jr., pursuant to Iowa

Rule of Evidence 5.403. (Def. 1st Motion-Limine; 2/20/17 Hearing Tr. p. 128 L. 1 – p. 132 L. 17)(Conf. App. p. 13). The district court denied his motion. (Ruling/1st Motion-Limine)(Conf. App. p. 50). Accordingly, error was preserved. State v. Tangie, 616 N.W.2d 564, 568–69 (Iowa 2000)(definitive ruling on motion in limine preserves error).

B. Standard of Review. The court will review evidentiary rulings for abuse of discretion. State v. Huston, 825 N.W.2d 531, 536 (Iowa 2013).

C. Discussion. Relevant evidence may be inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. Huston, 825 N.W.2d at 537; Iowa R. Evid. 5.403.

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Iowa R. Evid. 5.403. To determine if evidence should be excluded pursuant to 5.403, the court balances two factors—

the probative value of the evidence and "the danger of its prejudicial or wrongful effect upon the triers of fact." Huston, 825 N.W.2d at 537. Inherently unreliable evidence may be excluded pursuant to this balancing test. State v. Doolin, 942 N.W.2d 500, 510, n. 4 (Iowa 2020).

A criminal defendant has a constitutionally-protected interest in showing the bias of a witness against him. State v. Campbell, 714 N.W.2d 622, 630 (Iowa 2006). Generally, this right is protected by the defendant's ability to cross-examine a witness about his bias or animus toward the defendant. State v. Carney, 236 N.W.2d 44, 46 (Iowa 1975). However, in this case, Reising's clear animus toward Liggins, based on both Liggins' race and the nature of the crime he was charged with, coupled with Reising's status as a jailhouse informant, rendered his testimony so unreliable that it should have been excluded altogether pursuant to Iowa R. Evid. 5.403.

In the 1993 trial, Reising testified that he shared a cell with Stanley Liggins from October 1992 to December 1992. He

didn't know anything about Liggins or his charges. Liggins didn't trust him and wouldn't talk to him because he thought he was a "snitch" and was working for the cops. However, sometime around the end of November, he had several conversations with Liggins, in which Liggins disclosed the facts of his case and told Reising that "I did it, and they ain't going to get me for it." (1993 Tr. Vol. III, p. 858 L. 4 – p. 861 L. 4; p. 846 L. 20 – p. 847 L. 10). He explained that when he reported his conversation with Liggins to the guards, he was hoping to get some sentencing concessions for his pending charges. He claimed he did not get any consideration; however, he also explained that he did get a plea deal in which the State agreed to not pursue habitual offender enhancements and agreed to concurrent sentences rather than consecutive. Although he was prosecuted by a different assistant county attorney, within an hour of his sentencing, he met with the prosecutors in Liggins' case. (1993 Tr. Vol. III p. 863 L. 18 – p. 865 L. 2).

In 1995, Reising testified that he never expected to get a break in sentencing or any sort of deal for reporting to the authorities. He also admitted that he has lied to the police before to benefit himself, particularly when he was caught doing something wrong. He testified that before he spoke with Liggins, he had seen reports about the case, so he knew some details of the case. At one point, he was "flipping some garbage" about Liggins' case, "about what I thought about it" and Liggins got agitated and responded that "I did it and I wouldn't get caught for it." (1995 Tr. P. 1148 L. 2 – p. 1151 L. 6). He acknowledged that Liggins didn't trust him and thought he was a snitch because he was able to wear his wedding ring in jail. He denied, however, that Liggins told him any details of the case. Instead Reising insisted that the only thing of substance Liggins ever said to him was his "confession" and that Reising's knowledge of the underlying facts had been learned from the news. (1995 Tr. p. 1151 L. 11 – p. 1158 L. 4). Reising said that the reason he came forward with his story is

because Liggins "is a sick son-of-a-bitch." (1995 Tr. p. 1158 L. 22-23).

In Liggins' first PCR hearing, at the conclusion of Reising's testimony, as he left the stand he said, unprompted, "you lucky, boy" as he passed Liggins. (Ex. MV)(Ex. App. pp. 13-15).[7] See Ash v. Tyson Foods, Inc., 546 U.S. 454, 455, 126 S.Ct. 1195, 1197 (2006)(acknowledging term "boy" is racially discriminatory term).

Reising's testimony demonstrates his animosity toward Liggins, based both on race and the nature of the crime Liggins was facing. Further, though, Reising's status as a jailhouse informant calls his testimony into question.

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[7] His testimony at the 2018 and 2019 trials further confirmed his hostility toward Liggins. In 2018, he testified that "If I had my way about it, he wouldn't be sitting here in that chair to this day." (2018 Tr. p. 1000 L. 15-23). In 2019, he testified he didn't talk to Liggins because after finding out what crime he was charged with, "I didn't have no use for him"; testified he was surprised they put him in a cell with a "chimo"; and admitted he didn't like Liggins, but insisted "it's nothing to do with his skin color, it's what he what he was in the county jail for"; and acknowledged he "absolutely" referred to Liggins as "boy." (2019 Tr. p. 429 L. 5-16; p. 434 L. 3-11; p. 435 L. 18 – p. 436 L. 2).

> Jailhouse snitch testimony is arguably the single most unreliable type of evidence currently used in criminal trials. Snitches are deeply unreliable witnesses. Many are con artists, congenital liars, and practiced fraudsters. As compensated witnesses, all snitches have deep conflicts of interest. What is worse, jailhouse snitch testimony as a class is not only the least credible type of evidence, but it is also among the most persuasive to jurors because jailhouse informants typically allege to have personally heard defendants confess their guilt to the crimes charged. Introduction of a defendant's confession, from any source, radically changes the complexion of a case, particularly one lacking other evidence that directly implicates the defendant in the crime. Research studies demonstrate that jurors are simply ill equipped to evaluate the credibility of jailhouse informant testimony and consistently give such testimony far more weight than is due even if they are aware of the incentives jailhouse snitches receive or expect in exchange for their testimony. The prejudicial effect of unreliable jailhouse snitch testimony is magnified by the context in which the evidence is presented to the jury. Jailhouse snitches are States' witnesses, and the credibility of their testimony is likely substantially bolstered as a result.

Russell D. Covey, Abolishing Jailhouse Snitch Testimony, 49 Wake Forest L. Rev. 1375, 1375 (Winter 2014).

The consequences of using unreliable jailhouse informant testimony are being seen in studies showing such testimony is a significant contributing factor in wrongful convictions.

According to the Innocence Project, jailhouse informant testimony played role in "nearly one in five of the 367 DNA-based exoneration cases." The Innocence Project, Informing Justice: The disturbing use of jailhouse informants, available at innocenceproject.org/informing-justice/ (last visited July 21, 2020).

A significant problem with jailhouse informant testimony is that it usually involves a confession or admission by the defendant. Covey, Abolishing Jailhouse Snitch Testimony at 1390. Both courts and commentators have acknowledged the unique power of a defendant's confession. Id.; Arizona v. Fulminate, 499 U.S. 279, 296, 111 S.Ct. 1246, 1257-58 (1991); State v. Schomaker, 303 N.W.2d 129, 130-131 (Iowa 1981).

Courts assume jurors can weigh the reliability of jailhouse informant testimony, just as they do with other evidence. See, e.g, Kansas v. Ventris, 556 U.S. 586, 594 n.*, 129 S.Ct. 1841, 1847 n.* (2009); U.S. v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987); Hoffa v. U.S., 385 U.S. 293, 311, 87 S.Ct. 408,

418 (1966).

This assumption is unsupported. Mock jurors provided with confession evidence convict defendants at significantly higher rates than mock jurors who are not given such evidence. Jeffrey S. Neuschatz et al., The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decisionmaking, 32 Law & Hum. Behav. 137, 142 (2008). The results do not change when mock jurors are specifically given information that the witness to the confession received a benefit for testifying. Id. Jurors simply accept the testimony "at face value." Covey, Abolishing Jailhouse Snitch Testimony at 1392.

> Juror insensitivity to the increased unreliability of incentivized witness testimony is magnified by two additional factors. First, as discussed above, typical jurors almost certainly do not understand how easy it is for jailhouse snitches to manufacture detailed false confessions. If jailhouse snitches testify about details that seem like they could only have been learned if the perpetrator had actually confessed to the snitch, but were actually gathered through the variety of approaches that snitches like Sidney Storch have admitted to using, then jailhouse snitch testimony will often be viewed as more credible than it should be.

> Second, many jurors might perceive jailhouse snitch testimony as worthy of enhanced credence because of implicit or explicit prosecutorial bolstering of the witness's credibility. The mere fact that a prosecutor calls a jailhouse informant to serve as a State's witness suggests that the prosecutor has already determined the witness to be credible and truthful. Although the amount of presumptive credit the jury extends to State's witnesses will vary depending on both the local community's and the individual juror's views regarding prosecutorial honesty and integrity, in many jurisdictions the State begins with the benefit of the doubt.

Id. at 1393-1394.

Thus, Reising's status as a jailhouse informant calls his testimony into question. Reising admitted he hoped to get a benefit from his testimony, even if it did not pan out. (1993 Tr. Vol. III p. 863 L. 18 – p. 865 L. 2). Further, Reising's race-based animus combined with the nature of the crime Liggins was charged with gave Reising even more motivation to fabricate and stick to his story that Liggins confessed. These circumstances leave his testimony so unreliable as to have virtually no probative value. The risk of undue prejudice from this sort of testimony is extremely high, and clearly outweighs

the probative value. As described above, jurors give jailhouse informant testimony more credit than its due, even when they learn the informant has received a benefit for the testimony. Evidence of a confession is unmatched. Thus, Reising's testimony should have been excluded pursuant to rule 5.403.

Prejudice in this situation is presumed and the appellate court will reverse unless the record affirmatively establishes a lack of prejudice. State v. Russell, 893 N.W.2d 307, 314 (Iowa 2017). The record does not establish a lack of prejudice. This was an extremely close case, as demonstrated by the hung jury after the 2018 trial. Evidence of a confession is extremely persuasive to a jury. Reising's testimony that Liggins confessed was the glue that held all the other circumstantial evidence together. Even if the jury wasn't convinced by the other testimony that a car similar to his was seen near the fire, his "confession" could resolve all those doubts in favor of a conviction.

D. Conclusion. Because the district court erred in admitting Reising's testimony, and because Liggins was prejudiced by the error, Liggins' conviction should be vacated and his case remanded for a new trial.

V. The district court erred in failing to exclude the testimony of Antonio Holmes pursuant to rule 5.403 because the probative value was outweighed by the risk of undue prejudice.

A. Error Preservation. Liggins moved to exclude the testimony of Antonio Holmes pursuant to Rule 5.403 as so unreliable that its probative value was outweighed by the risk of undue prejudice. (Def. 1st Motion-Limine; 2/20/17 Hearing tr. p. 107 L. 9 – p. 116 L. 9)(Conf. App. p. 7-8). The district court denied the motion. (Ruling/Def. 1st Motion-Limine)(Conf. (App. pp. 48-49).

B. Standard of Review. Evidentiary rulings are reviewed for an abuse of discretion. State v. Huston, 825 N.W.2d 531, 536 (Iowa 2013).

C. Discussion. Relevant evidence may be inadmissible if its probative value is substantially outweighed by the danger

of unfair prejudice. Huston, 825 N.W.2d at 537; Iowa R. Evid. 5.403. To determine if evidence should be excluded pursuant to 5.403, the court must balance the probative value of the evidence "against the danger of its prejudicial or wrongful effect upon the triers of fact." Huston, 825 N.W.2d at 537. Inherently unreliable evidence may be excluded pursuant to the balancing test of rule 5.403, particularly unreliable eyewitness identifications. State v. Doolin, 942 N.W.2d 500, 510, n. 4 (Iowa 2020).

Holmes' identification of Liggins as the man standing outside Mac's Liquor store while J.L. was inside buying gum was so unreliable it should have been excluded pursuant to Iowa R. Evid. 5.403 because its prejudicial value substantially outweighed its probative value.

Holmes testified he had been at Mac's Liquor at the same as J.L. on September 17, 1990. He saw a black man standing outside the store as he walked in. When he later learned that J.L. had been killed, he decided to report to the police what he'd

seen. (2/20/17 Tr. p. 107 L. 9–24; 1993 Tr. vol. I, p. 257 L. 25–p. 265 L. 9; 1995 Tr. vol. II, p. 548 L. 4–p. 550 L. 25; 2019 Tr. 449 L. 4–p. 454 L. 4). During his interview at the police station on September 21, 1990, he was shown a photo lineup. He picked Liggins' photo. (1993 Tr. vol. I, p. 266 L. 6–p. 267 L. 25; 1995 Tr. vol. II, p. 551 L. 14–p. 552 L. 5; 1995 Tr. p. 1200 L. 25 – p. 1202 L. 19; 2019 Tr. p. 455 L. 5–p. 456 L. 6; p. 1201 L. 8–p. 1206 L. 14). By the time Holmes was shown the photo lineup, Liggins' photo had already been in the news. (Ex. ML; MM)(Conf. App. pp. 16-22; 23-30). But most critically, Holmes was intoxicated, having consumed two 40-ounce bottles of beer before he went to the police station. It was clear to the officer who interviewed him that he was intoxicated. (1993 Tr. vol. IV p. 995 L. 21–p. 996 L. 13; 1995 Tr. vol IV p. 554 L. 7-13; 1995 Tr. vol IV p. 1202 L. 20 – p. 1203 L. 14; Ex. ML; Ex. MM)(Conf. App. pp. 16-22; 23-30).

The next day, Holmes called the police and said he wasn't sure of his identification because he'd been drinking. (Ex. ML;

MM; 1993 Tr. vol. IV p. 996 L. 14-p. 998 L. 5; 1995 Tr. vol. IV p. 1204 L. 5-19; 2019 Tr. p. 1201 L. 8 – p. 1206 L. 14)(Conf. App. pp. 16-22; 23-30). Back at the station, the officers showed him Liggins' photo several more times, but he couldn't say for sure that was the man he saw outside Mac's. (1995 Tr. vol. IV p. 1206 L. 10-14; 2019 Tr. p. 456 L 8 - p. 457 L. 8; p. 470 L. 19 -p. 474 L. 4; Ex. K).

Two years later, in his deposition, Holmes positively identified Liggins as the man outside Mac's. He said that once he saw him in person, he recognized him without doubt. (2019 Tr. p. 457 L. 13 – p. 462 L. 2). He also identified him in court during the 1993 and 1995 trials. (1993 Tr. vol I p. 267 L. 13-24; 1995 Tr. vol II p. 551 L. 25 – p. 552 L. 5).

At the time Holmes reported to police that he had a seen a man standing outside Mac's, he had a pending theft charge. (1993 Tr. p. 268 L. 3-16). At the time he testified in the 1993 trial, he had pending charges for which he ultimately received a plea deal. He was released shortly after he testified. One of

the terms of the plea agreement was that he would testify truthfully in Liggins' trial. (1993 Tr. p. 249 L. 16-19; Ex. MO; Ex. MN)(Ex. App. pp. 12; 7-11).

Eyewitness identifications are notoriously problematic and unreliable.

> Studies have shown the primary cause for the conviction of innocent people in our criminal justice system is mistaken eyewitness identification. Gary L. Wells, Eyewitness Identification Evidence: Science and Reform, 29 Champion 12 (2005). DNA exoneration cases show the conviction of approximately seventy-five percent of innocent persons involved mistaken eyewitness identification. Id.

State v. Folkerts, 703 N.W.2d 761, 763-65 (Iowa 2005).

> Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by post-event information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy; and that suggestiveness can stem from sources beyond police-orchestrated procedures.

Perry v. New Hampshire, 132 S. Ct. 716, 738 (2012) (Sotomayor, J., dissenting).

The research shows that memory never improves and memory decay is irreversible. The more time that passes, the more likely memory retention will weaken. State v. Henderson, 27 A.3d 872, 907 (N.J. 2011); Kenneth A. Deffenbacher et al., Forgetting the Once–Seen Face: Estimating the Strength of an Eyewitness's Memory Representation, 14 J. Experimental Psychol.: Applied 139, 142 (2008).

Studies have also established that, in most cases, the certainty of the witness does not correlate with accuracy. Confidence in identification correlates with accuracy only "in cases in which the eyewitness-identification test procedures were pristine." J. Wixted & G. Wells, The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis, 18 Psychol. Sci. In the Pub. Int. 10, 14, 19-20, 51-52 (2017).

"Nationwide, more than seventy-five percent of convictions overturned due to DNA evidence involved eyewitness misidentification." Henderson, 27 A.3d at 886. Even outside

the DNA exoneration context, scientific research "reveals a troubling lack of reliability in eyewitness identifications." Id. at 888. This is so despite the fact that "eyewitnesses generally act in good faith" and misidentifications are typically "not the result of malice." Id.

Holmes' identification of Liggins raises a host of concerns. First, his initial identification of Liggins was made four days after an unremarkable and brief encounter with a man outside Mac's Liquor. Further, he was intoxicated when he made the identification, and he had likely been exposed to Liggins' image through the media. Holmes himself questioned his identification and decided the next day that he couldn't be sure about it.

Although two years later, at his deposition, Holmes said he was sure it was Liggins, studies show that memories do not improve with time and a witness's level of certainty does not equate to the accuracy of the identification. As well, the setting of a deposition is an overly-suggestive one-man show-up. See

Folkerts, 703 N.W.2d at 765 ("The seating of a defendant next to … counsel at the deposition of an eyewitness is so clearly suggestive as to be impermissible."). Certainly, by the time of the deposition, Holmes had been exposed to Liggins' image in the media coverage of this high-profile case in addition to the two times he'd seen his photo at the police station. See Kenneth A. Deffenbacher et al., Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference, 30 Law & Hum. Behav. 287, 299 (2006) (describing prejudicial effect of prior viewing of mugshots on later identification); Gunter Koehnken et al., Forensic Applications of Line–Up Research, in Psychological Issues in Eyewitness Identification 205, 218 (Siegfried L. Sporer et al. eds., 1996) (describing "mugshot conviction" where witness reaffirms prior misidentification in later lineup even where true target is present). By the time of the 1993 trial, Holmes was under additional pressure to testify

"truthfully" to satisfy his plea agreement. By this point, Holmes identification of Liggins was hopelessly tainted.

Given this course of events, twenty-five years later, there is no way to know who Holmes really saw outside Mac's Liquor in 1990. Because his identification of Liggins was so unreliable, its probative value outweighed by its risk of undue prejudice and should have been excluded.

When a nonconstitutional error occurs in the admission of evidence, prejudice is presumed and the court will reverse unless the record affirmatively establishes a lack of prejudice. State v. Russell, 893 N.W.2d 307, 314 (Iowa 2017)(harmless error standard). The record in this case does not establish a lack of prejudice.

"[T]here is almost *nothing more convincing* [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!' " Watkins v. Sowders, 449 U.S. 341, 352, 101 S. Ct. 654, 661 (1981) (Brennan, J.,

dissenting) (quoting Elizabeth Loftus, Eyewitness Testimony 9 (1979)) (emphasis in original).

This was a close case, resulting in a hung jury the first time it was tried after the remand in 2013. The State's circumstantial case against Liggins rested on the testimony of several key witnesses—Holmes was one of them. His identification of Liggins outside Mac's Liquor at the time J.L. was inside buying gum makes him the last person seen with J.L. alive. Without any physical evidence linking Liggins to J.L., Holmes testimony was clearly critical to the State's case.

D. Conclusion. Because the district court erred in admitting the testimony of Antonio Holmes and because Liggins was prejudiced by the error, Liggins' conviction should be vacated and his case remanded for a new trial.

VI. The district court erred in excluding the hearsay statements of J.L. to Judy Gonzales.

A. Error Preservation. Liggins sought to admit hearsay statements of J.L. through the testimony of J.L.'s friend, Judy Gonzalez, pursuant to Iowa Rule of Evidence 5.807. (Notice

Re: Residual Hearsay 7/5/18)(App. pp. 92-93). The State resisted. (MIL Re: Residual Hearsay 8/17/18)(Conf. App. pp. 85-92). The district court determined an offer of proof was necessary before making a decision. (Ruling Re: Residual Hearsay 8/23/18)(App. pp. 100-103).

During the 2018 trial, Liggins made an offer of proof, calling both Judy Gonzalez and her therapist. (2018 Tr. p. 1257 L. 14 – p. 1270 L. 19). After argument from both sides, the court determined Gonzalez's testimony did not satisfy the requirements of rule 5.807 and deemed it inadmissible. (2018 Tr. p. 1270 L. 20 – p. 1276 L. 19).

B. Standard of Review. An appellate court will review rulings on the admission of hearsay for correction of errors at law. State v. Neitzel, 801 N.W.2d 612, 621 (Iowa 2011). The general rule is that "a district court has no discretion to deny the admission of hearsay if the statement falls within an enumerated exception, subject, of course, to the rule of relevance under rule 5.403, and has no discretion to admit

hearsay in the absence of a provision providing for it." State v. Dullard, 668 N.W.2d 585, 589 (Iowa 2003).

C. Discussion. Liggins sought to enter the testimony of Judy Gonzalez pursuant to the residual hearsay exception. See Iowa R. Evid. 5.807. Specifically, Liggins proposed Gonzalez would testify that she lived near J.L. in Davenport in the late 1980's when they were in early elementary school. She was a year younger than J.L., who was friends with her sister. One time, J.L. told her that when her mom was gone "bad things happen to her." Gonzalez asked her if she had told an adult about the bad things, and J.L. said that she had tried to tell her mother, but her mother dismissed her, telling her that they were moving to Rock Island and that when they did, Joe Glenn would become her stepfather. Gonzalez did not remember exactly how old she was when this conversation took place, but remembered it was during the summer between second and third grade. (2018 Tr. 1258 L. 1 – p. 1261 L. 11). Gonzalez explained that she never told anyone about the conversation

because she "pinky promised" J.L. that she wouldn't. The guilt stayed with her as she grew up, and she eventually confided in her therapist. A few years later, in 2017, she contacted police to tell her story. She explained that she finally come forward because she had prayed for a sign—and the next day she took her mother to the grocery store and her mother saw Gonzalez's third grade teacher. Gonzalez took the encounter as the sign she had asked for and went to the police with her story. (2018 Tr. p. 1261 L. 12 – p. 1265 L. 15).

Liggins also offered testimony from Gonzalez's therapist, Mary Schnack. Schnack testified that she had been providing therapy to Gonzalez since January 2013 and that Gonzalez first discussed her conversation with J.L. in late 2013. Schnack also believed Gonzalez may have made an anonymous phone call to Liggins' previous attorney in 2013. Schnack testified that Gonzalez is diagnosed with posttraumatic stress disorder, unspecified anxiety disorder and unspecified depressive

disorder. Gonzalez completed high school through the special education program. (2018 Tr. p. 1266 L. 1 - p. 1269 L. 19).

Hearsay is admissible only if it falls under one of the limited exceptions. State v. Veverka, 938 N.W.2d 197, 199 (Iowa 2020); Iowa R. Evid. 5.803, 5.804 (2019). The "residual" exception is one such exception. Iowa R. Evid. 5.807. This exception is "rarely used" and should be reserved for "exceptional circumstances." Veverka, 938 N.W.2d at 199 (quoting State v. Brown, 341 N.W.2d 10, 14 (Iowa 1983)). Five requirements must be met before hearsay will be allowed under this exception: (1) trustworthiness; (2) materiality; (3) necessity; (4) notice; and (5) service of the interests of justice. Veverka, 938 N.W.2d at 200; Iowa R. Evid. 5.807.

In this case, necessity and notice were not at issue. (2018 Tr. 1274 L. 14-19). The district court, however, excluded the testimony, relying heavily on its conclusion that Gonzalez's recollection of her conversation with J.L. wasn't trustworthy, but also expressing doubt about the materiality of the

statements and concluding justice would not be served by its admission. (2018 Tr. 1275 L. 5 – p. 1276 L. 19).

Trustworthiness. To determine if the proposed testimony is trustworthy, the court will consider whether it has "circumstantial guarantees of trustworthiness." Iowa R. Evid. 5.807(a)(1). The "guarantees of trustworthiness must be drawn from the totality of the circumstances that surround the making of the statement and that render the *declarant* particularly worthy of belief." State v. Rojas, 524 N.W.2d 659, 663 (Iowa 1994) (emphasis added).

> Factors identified as useful in the trustworthiness analysis include items relating to declarant, such as declarant's propensity to tell the truth, whether the statement was under oath, assurance of declarant's personal knowledge, declarant's mental or physical condition, time lapse between the event and the statement, and motivations of declarant to make the statement. Additional circumstances to consider include reaffirmation of or recanting the statement by declarant, credibility of the witness reporting the statement, and availability of declarant for cross-examination.

Laurie Kratke Dore, & Iowa Practice, Evidence § 5.807:1 (Nov. 2018)(citations omitted).

Gonzalez's story that young J.L. confided in her that her stepfather did bad things to her and her reluctance to tell an adult about the behavior has the ring of truth about it. See, e.g, Thomas D. Lyon, Interviewing Children, 10 Ann. Rev. L. & Soc. Sci. 73, 76 (2014)(describing how victims of sexual abuse are reluctant to disclose the abuse out of fear of not being believed and shame, particularly when it's perpetrated by a close family member).

The district court expressed concern about Gonzalez's trustworthiness and the length of time between her conversation with J.L. and her report to police. However, these matters relate to Gonzalez's credibility, not J.L.'s. Any concerns about Gonzalez's credibility could be resolved by the State's cross-examination regarding the significant delay in coming forward with her story. Whether her explanation of the pinky-promise and the sign of seeing her third-grade teacher was believable should be left to the jury. State v. Dudley, 856 N.W.2d 668, 676 (Iowa 2014)("Our system of justice vests the

jury with the function of evaluating a witness's credibility.")

Materiality. Gonzalez's testimony about J.L.'s description of abuse by her stepfather went to a material fact—the identity of her killer—as required by Iowa R. Evid. 5.807(a)(2). J.L. was sexually abused before her death. If her stepfather were abusing her, it implicates him in her murder.

Interests of justice. To be admissible, the hearsay evidence must serve the interests of justice. Iowa R. Evid. 5.807(a)(4). Admitting evidence serves the interests of justice where "[t]he appropriate showing of reliability and necessity were made, and admitting the evidence advances the goal of truth-seeking expressed in Iowa Rule of Evidence 5.102." Rojas, 524 N.W.2d at 663; see also Iowa R. Evid. 5.102 ("These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly

determined."). In this case, the interests of justice would be served by the admission of Gonzalez's testimony.

Prejudice. When a nonconstitutional error occurs in the admission of evidence, prejudice is presumed and the court will reverse unless the record affirmatively establishes a lack of prejudice. State v. Russell, 893 N.W.2d 307, 314 (Iowa 2017)(harmless error standard). The record in this case does not establish a lack of prejudice. The State's case against Liggins was not overwhelming, as evidenced by the fact that his trial in 2018 resulted in mistrial because the jury deadlocked. (Jury Trial Order 9/24/18; 2018 Tr. p. 1479 L. 1 – p. 1481 L. 20)(App. p. 104). Because of the lack of physical evidence, the State's case against Liggins hinged on the testimony of five witnesses: Donna Adkins, W.H., Lloyd Eston, Antonio Holmes and Frank Reising. W.H. and Lloyd Eston identified a car with similar qualities to Liggins' Peugeot near the scene of the fire. However, as described above, there were significant problems with each of the testimony of each of these witnesses. Liggins

defended the case on the theory that someone else, one of the many other men who had been in or near the Glenn's household, was the real killer. Testimony that J.L.'s stepfather was sexually abusing her and would have likely tipped the scales and resulted in a not guilty verdict.

D. Conclusion. Because the district court erred in excluding the testimony of Judy Gonzalez and the error was not harmless, Liggins' conviction should be vacated and his case remanded for a new trial.

VII. The district court abused its discretion when denying Liggins' motion for a new trial.

A. Error Preservation. Liggins moved for a new trial pursuant to Rule 2.24(2)(b)(6) and (9), arguing the verdict was contrary to the weight of the evidence. (Motion-New Trial 5/15/19)(App. p. 126). The district court denied the motion. (Sent. Tr. p. 27 L. 11-14). Error was preserved. See State v. Maxwell, 743 N.W.2d 185, 193 (Iowa 2008).

B. Standard of Review. A district court's ruling that a verdict was not contrary to the weight of the evidence is

reviewed for an abuse of discretion. State v. Ary, 877 N.W.2d 686, 705 (Iowa 2016). While the court has broad discretion in ruling on a motion for new trial, it is not unlimited. State v. Reeves, 670 N.W.2d 199, 202 (Iowa 2003). To establish an abuse of discretion, the appellant "must show that the district court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Id. The appellate court is slower to interfere with the grant of a new trial than with its denial. Id. at 202–03.

C. Discussion. The district court abused its discretion when it denied Liggins' motion for new trial. Although the court expressly found W.H. not credible, the court relied on facts testified to by W.H. to conclude the weight of the evidence supported the verdict. Further, the court relied on Holmes' identification of Liggins, concluding Holmes was "truthful," but never concluding that Holmes' identification was accurate.

In its ruling, the court concluded W.H. was not credible and discounted her testimony: "Now, [W.H.] was a little bit all

over the map. I'm not sure how important her testimony was or was not because there was, clearly, other people who saw this car in the area at the time that [J.L.'s] body was burning." (Sent. Tr. p. 26 L.15-19). There was, in fact, only one other person who testified he saw a car similar to Liggins' car in the vicinity of the fire—Lloyd Eston. The other witnesses who were in the area that night only saw a fire and did not observe a car. (2019 Tr. p. 28 L. 24 - p. 30 L. 15—Christina Olsen saw a fire at 8:16pm from her car as she drove by); (Ex. 522, p. 26 L. 4 – p. 32 L. 8—school custodian ran to scene of fire at 9:00pm and discovered J.L.'s body)(Conf. App. pp. 483-489).

Seventy-six-year-old Eston testified that at about 8:15 or 8:30pm on September 17, 1990, he was driving along the road near Jefferson school when he saw a man standing behind a car parked along the road. He described the man as about six-foot tall and medium build. He could not identify the race of the man. The man was standing behind the car with the trunk open and the taillights on. He said the car was medium

reddish in color, looked foreign and had four doors. The police showed him a photo of the Peugeot, and he testified it was similar and that he remembered seeing the photo before, but he couldn't be sure that the car in the photo was the same one he saw on the road that night. During his deposition he wavered on whether it was the same car:

> Q: Can you state with any degree of certainty whether the car that they showed you is the car that you saw parked along the road?
>
> A. I would say it was.
>
> Q. Are you positive that it was, or is it simply a case where it looked similar --
>
> A. I wouldn't say positive now because – I say similar because that kind of be stretching it to say, you know, just exactly positive.
>
> …
>
> Q. And [the police] took you I think to probably a police garage?
>
> A. Yes.
>
> Q. And showed you a car?
>
> A. Uh-huh.

> Q. And what did you tell the police officers when you saw that car?
>
> A. Well, I told 'em it looked like the one that I seen that night.
>
> Q. You were pretty sure that that was the car?
>
> A. Was pretty sure, yes.

(Ex. 513 p. 25 L. 7-15; p. 29 L. 19 – p. 30 L. 5)(Conf. App. pp. 265; 269-270). He did not see the license plate and he specifically did not remember anything distinctive about the taillights. He also did not see a fire. (Exhibit 513, p. 534 L. 24 – p. 536 L. 11; p. 542 L. 1 – p. 544 L. 13; p. 545 L. 8-12; p. 18 L. 25- p.27 L. 25)(Conf. App. pp. 242-244; 250-252; 253; 258-267).

Although the court found W.H. not reliable, the court relied on her testimony, in part, by attributing it to Lloyd Eston.

> Defendant was familiar with the area where [J.L.'s] burning body was found. He had been in that area; has relatives living in that area. His car, which does have distinctive taillights, that the jury was able to view, was seen in the neighborhood near the time that [J.L.'s] body was on fire. I don't remember the name of that man. I think Mr. Walton just mentioned it. Mr. Eston was the man who saw a person -- or a car similar to the red -- or the maroon Peugeot, and, in fact, when shown the picture, he

> identified that as the car. He was not able to identify Defendant because it was dark, and he couldn't even say if the man was white or black, which lends to his credibility because if he wanted to really point the finger to Defendant, he could have said more about who he thought it was, and he did not. He did not know Defendant, and he had no reason to lie about what he saw.

(Sent. Tr. p. 22 L. 17 – p. 23 L. 7).

However, the court misstates Lloyd Eston's testimony—Eston did not testify that Liggins was familiar with the area or identify Liggins' distinctive taillights. The witness who did testify to these important facts was W.H., whom the court concluded was not reliable. W.H. testified she lived in the neighborhood near the Jefferson school and had seen Liggins in the neighborhood, both at a local pool hall and at Billy Davis's house. (2019 Tr. p. 332 L. 24 - p. 335 L. 21; p. 337 L. 7 - 338 L. 10). She testified that on the evening of September 17, 1990, she observed a fire near the school. As she watched the fire, she saw a car pause for a long time at a stop sign. She noticed that the left taillight was brighter than the right. (2019 Tr. p. 338 L. 11 – p. 345 L. 2).

In regards to Antonio Holmes' testimony, the court concluded:

> At the same time that [J.L.] was at Mac's Liquor Store buying the gum, Antonio Holmes stopped there to buy some beer. Prior to going into that store, Holmes testified that he saw a black male standing outside the store. He later identified that black male as the defendant when he was shown a lineup. Mr. Holmes was able to identify the physical characteristics of [J.L.] and described some clothing she was wearing.
>
> He had learned a few days later from the news that that little girl had been murdered, and at that point he decided to call the police and tell them what he had seen. Holmes did not know Mr. Liggins and had never seen him before that day.
>
> There were a lot of efforts to undermine the credibility of Mr. Holmes, both in motions made before the Court, as well as on the witness stand. He was subjected to vigorous cross-examination. Despite all of that, I found he was a credible witness. He went to the police on his own with this information, and even went back the next day saying he wasn't sure that it was Defendant that he saw but he thought it was. There were no pending charges against Mr. Holmes at that time that related to any plea agreements that he eventually got. Apparently, there were a couple minor misdemeanors, but nobody even remembered that those were against Mr. Holmes at the time. And Mr. Holmes didn't go to the Scott County police department, he -- the Davenport City Police Department, he went to Rock Island. It wasn't until two years later, or more, that he had

> charges that he got a plea agreement for from the State.
>
> So I'm convinced there was nothing improper with that plea agreement, and the greater weight of the credible evidence was that *Holmes was telling the truth* when he said he saw Defendant outside the store when [J.L.] was inside that store.

(Sent Tr. p. 20 L. 16 – p. 21 L. 25)(emphasis added).

The court's conclusion that Holmes was "telling the truth" when he testified he saw Liggins outside Mac's Liquor does not answer the pertinent question when a factfinder is evaluating the testimony of an eyewitness. Although the court may conclude Holmes was not intentionally lying to gain the benefit of a plea agreement, whether Holmes sincerely believes his own testimony is not relevant to the determination of whether his identification of Liggins is accurate. "[E]yewitnesses generally act in good faith" and misidentifications are typically "not the result of malice." Henderson, 27 A.3d at 888. However, a witness's confidence in his own identification has little to no correlation to the accuracy of the identification. J. Wixted & G. Wells, The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis, 18 Psychol. Sci. In

the Pub. Int. 10, 14, 19-20, 51-52 (2017); Kevin Krug, The Relationship Between Confidence and Accuracy: Current Thoughts of the Literature and a New Area of Research, 3 Applied Psychol. Crim. Just. 7, 31 (2007).

The district court abused its discretion when it attributed facts testified to by W.H. to another witness after expressly discounting W.H.'s reliability and when it relied on Holmes' truthfulness alone when crediting his eyewitness identification of Liggins.

D. Conclusion. Because the district court abused its discretion when ruling on Liggins' motion for new trial, Liggins' case should be remanded for a new hearing on the motion for new trial wherein the court can consider the motion under with an accurate understanding of the record. See Reeves, 670 N.W.2d at 203.

VIII. Under the circumstances of this case, where the State had withheld exculpatory evidence and Liggins was retried nearly thirty years after the crime and after his opportunity to present exculpatory evidence was lost due to the death of witnesses, the district court erred in denying his motion to dismiss.

A. Error Preservation. After the case was remanded for a new trial, Liggins filed a motion to dismiss, arguing that retrial under the circumstances constituted a violation of his due process rights under both the Iowa and the United States Constitutions. (Motion to Dismiss 4/8/16)(App. pp. 57-68). The motion was denied. (Ruling on Motion to Dismiss 3/15/2017)(App. pp. 76-79). Liggins renewed the motion throughout the course of the proceedings as new information came to light. (Renewed Motion to Dismiss 5/18/18; Second Renewed Motion to Dismiss 8/6/18; Fourth Renewed Motion to Dismiss 2/28/2019; Motion for New Trial 5/15/2019)(Conf. App. pp. 53-60; 61-73; 97-132). Each time it was denied. (Ruling-Renewed Motion to Dismiss 6/25/2018; Ruling-Second Renewed Motion to Dismiss 8/23/2018; Ruling-Fourth Renewed Motion to Dismiss 3/7/2019; Sentencing Order

5/30/2019; Sent. Tr. p. 27 L. 15-24)(App. pp. 88-91; 94-99; 109-119; 127-128). Error has been preserved. State v. Mitchell, 757 N.W.2d 431, 435 (Iowa 2008) (issue will be reviewed on appeal if raised and ruled on by the district court).

B. Standard of Review. Review of a motion to dismiss is for correction of errors at law. State v. Neiderbach, 837 N.W.2d 180, 190 (Iowa 2013). However, claims of constitutional violations are reviewed de novo. State v. Lange, 531 N.W.2d 108, 111 (Iowa 1995).

C. Discussion. The Fifth and Fourteenth Amendments to the United States Constitution and article I, section 9 of the Iowa Constitution guarantee a defendant a right to due process of law. U.S. Const. amends. VI, XIV; Iowa Const. art. I, § 9. The due process clause, as well as statutes of limitations, serve "to prevent prejudice to the defense caused by passage of time." United States v. MacDonald, 456 U.S. 1, 8, 102 S. Ct. 1497, 1502 (1982). "[D]ue process is flexible and calls for such

procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

As well, the suppression of exculpatory evidence by the prosecution "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963); see also State v. Veal, 564 N.W.2d 797, 810 (Iowa 1997).

In this case, the combination of withheld exculpatory evidence, including police reports and the information that a key witness was a paid confidential informant, and the length of time between Liggins' first two trials and the remand for retrial in 2014 violated Liggins' due process rights and denied him a fair trial. His case should have been dismissed.

Generally the remedy for a Brady violation is a new trial. Liggins was granted that remedy in 2013. See Liggins, No 12-0399, 2013 WL5963013 at *8. However, given the extensive passage of time and Liggins' resulting inability to thoroughly

investigate and present a defense, the typical Brady remedy was insufficient and does not comport with due process. Instead, the court should analogize this situation to a speedy trial violation. The considerations at play in a speedy trial violation are more akin to the situation Liggins faced, given the substantial time lapse.

Under a Fifth Amendment speedy trial claim, the defendant can establish a violation if "(1) the delay was unreasonable; and (2) the defendant's defense was prejudiced by the delay." State v. Trompeter, 555 N.W.2d 468, 470 (Iowa 1996). Under this test, the defendant must show prejudice, and the court balances the length of the delay and any valid reason for it against the resulting prejudice to the defendant. Id.

In this case, the delay was unreasonable because it was due to the suppression of material evidence by the State in violation of Brady principles. See Liggins, No. 12-0399, 2013 WL 5963013 at * 8.

As well, Liggins' defense was concretely harmed by the delay. Because of the gap in time, several important witnesses had died before the 2018 and 2019 trials. Specifically, as described above in section II, both Donna Adkins and Daryl Sheese were deceased. Accordingly, Liggins lost the ability to present evidence from Sheese who was with Donna Adkins but saw a different car in the Hillside Apartment parking lot the day after J.L.'s death. As well, Liggins was unable to cross-examine Adkins about either Sheese's contradictory observations or the confirmation by Armstrong and Saunders that their brown Mustang was in the parking lot.

Because Theresa Held had died, Liggins was unable to present her testimony. She told police she heard Joe Glenn describe his wish to videotape himself engaging in sexual acts with J.L. Liggins was also unable to cross-examine Joe Glenn about Theresa Held's statements, because Joe Glenn was missing and presumed dead. (2018 Tr. p. 1024 L. 13 – 24; Def.

Second Motion/Dismiss; Ruling Second Motion to Dismiss)(Conf. App. pp. 61-73; App. pp. 94-99).

Liggins was unable to effectively cross-examine W.H., the State's key witness who was the reason he was granted a new trial in 2013. W.H. was not deceased, but her memory and vision by the time of the 2019 trial was severely impaired. (2019 Tr. p. 349 L. 8 – p. 350 L. 20 (denying that she made the anonymous call to police and unable to remember her previous testimony to that fact); p. 353 L. 3 – p. 360 L. 7 (unable to point out the house from which she viewed the fire because her eyesight was failing, unable to remember her prior testimony about where she was when she saw the fire, and unable to read her previous testimony to refresh her recollection); p. 361 L. 1 – p. 363 L. 6 (failing to recall her initial interaction with police and explaining that she's diabetic and has suffered a stroke, affecting her memory); p. 381 L. 1 – p. 383 L. 1 (unable to remember how long after she noticed the fire before emergency vehicles responded and denying that she previously testified she

had never seen a fire there before); p. 383 L. 2 – p. 386 L. 15 (denying that she ever testified it was dark out when she saw the fire and explaining that she was having a "diabetic crash" so she "can't think fast" to answer questions). Ultimately, in fact, W.H. was unable to remember her initial interview with police and denied that she initially called in the anonymous tip to police, despite having acknowledged it in prior testimony. Liggins was unable to attempt to refresh her recollection because her vision was too poor to allow her to read her prior testimony and the court would not allow him to refresh her recollection with the appropriate police report because the police officer was deceased and could not "vouch" for his report. (2019 Tr. p. 363 L. 22 – p. 379 L. 5)(Ex. EEE)(Conf. App. pp. 515-516). Thus Liggins' ability to cross-examine W.H. was crippled due to the passage of time.

The four-week long trial involved events occurring nearly thirty years in the past. Twenty-two of the fifty-four witnesses had died and their testimony was read into the record. (2019

Tr. Index of Witnesses). This means Liggins lost the opportunity to cross-examine the State's witnesses live in front of the jury. It is crucial to the jury's assessment of credibility to assess the demeanor and attitude of the witness. A prime example of this loss is in the testimony of Lloyd Eston. Eston was elderly when he observed a reddish car on the road near the Jeffereson School. He expressed confusion during his deposition and by the time of his trial testimony in 1993, he was so disoriented that he was declared unavailable and his deposition testimony was read to the jury. When Eston's trial and deposition testimony was read into the record, the jury did not get to see Eston's demeanor and confusion. A cold transcript cannot convey the disorientation Eston exhibited. Even more unfair, the jury would likely assess the demeanor and attitude of the person reading the transcript for the record and inappropriately attribute it to Eston. This would be true of all the missing witnesses.

Under these circumstances, Liggins was entirely unable to have a fair trial. His defense was affirmatively harmed by the delay in time. Accordingly, dismissal is the only appropriate remedy to cure the Fifth Amendment violation.

The Iowa Supreme Court has the discretion to construe the Iowa Constitution to provide "greater protection for [its] citizens' rights." Schmidt v. State, 909 N.W.2d 778, 793 (Iowa 2018). "Our Iowa Constitution . . . was designed to be the primary defense for individual rights, with the United States Constitution Bill of Rights serving only as a second layer of protection . . . ." Mark S. Cady, A Pioneer's Constitution: How Iowa's Constitutional History Uniquely Shapes Our Pioneering Tradition in Recognizing Civil Rights and Liberties, 60 Drake L. Rev. 1133, 1145 (2012). "Historically the Iowa Constitution has been, and continues to be, a vital check on government encroachment of individual rights." Schmidt, 909 N.W.2d at 881 (Mansfield, J., dissenting). Accordingly, the court has "found the due process clause of article I, section 9 enforceable

in a wide variety of settings.'" Godfrey v. State, 898 N.W.2d 844, 879 (Iowa 2017); see, e.g., Schmidt, 909 N.W.2d at 790–95 (recognizing the right of a post-conviction applicant to assert a freestanding claim of actual innocence under article I, section 9 despite the applicant's guilty plea); State v. Cox, 781 N.W.2d 757, 769 (Iowa 2010)(finding a statute permitting the admissions of prior bad acts against an individual other than the victim violated a defendant's due process rights under the Iowa Constitution). "Iowa courts have ensured . . . that 'the right given may be enjoyed and protected.' " Godfrey, 898 N.W.2d at 879 (citation omitted). "The Iowa constitutional provision regarding due process of law is thus not a mere hortatory command, but it has been implemented, day in and day out, for many, many years." Id.

Article I, section 9 protects a defendant's right to fundamental fairness in judicial proceedings. See State v. Young, 863 N.W.2d 249, 256 (Iowa 2015). To provide the protections of the clause, the court "must adjust and

incorporate what we know to best facilitate a system that is fair and seeks justice." Booth-Harris, 942 N.W.2d 562, 600 (Iowa 2020) (Appel, J., dissenting).

Even if the court declines to find dismissal is necessary to remedy the violation of Liggins' rights under the federal constitution, it should do so under the Iowa Constitution. As described above, the State's actions in this case violated Liggins' right to due process by suppressing favorable evidence. The resulting lapse in time before Liggins discovered the suppressed evidence and won a new trial effectively eliminated his ability to use the exculpatory evidence. Due process guarantees seek to prevent "the impairment of the accused's defense due to diminished memories and loss of exculpatory evidence." State v. Olson, 528 N.W.2d at 654 (citation omitted). "This form of prejudice is actually considered the most serious since the inability of an accused to adequately prepare his or her case 'skews the fairness of the entire system.'" Id. Accordingly, the only effective remedy at this point is dismissal.

D. <u>Conclusion</u>. Because it is impossible for Liggins to receive a fair trial after the substantial lapse of time between his initial trials and his retrial due to the suppression of exculpatory evidence by the State, the district court erred in denying Liggins' motion to dismiss. Liggins' conviction should be vacated and his case remanded for dismissal.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $8.77, and that amount has been paid in full by the Office of the Appellate Defender.

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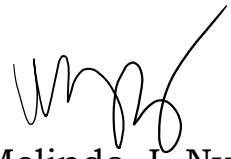

Dated: 1/28/21

Melinda J. Nye
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
mnye@spd.state.ia.us
appellatedefender@spd.state.ia.us