QUESTIONS PRESENTED

1. Whether the trial court erred in denying Lamy's motion to dismiss the indictments pertaining to D.E., based on lack of sufficient evidence to establish that D.E. was 'born alive.'

Issue preserved by motion to dismiss, T3 203, and the trial court's ruling, T3 205.*

2. Whether the trial court erred in denying Lamy's motion for a mistrial based on juror misconduct.

Issue preserved by a hearing and voir dire of the jurors, T5 3-75, Lamy's motion for a mistrial, T5 58, 68, 70, the State's objection, T5 73, and the trial court's ruling. T5 74.

3. Whether, at sentencing, the trial court erred in inferring that Lamy lacked remorse in part from the fact that Lamy requested opportunity to shower at the jail during his five-day jury trial.

Issue raised as plain error pursuant to Supreme Court Rule 16-A.

*Citations to the record are as follows:
"T1" through "T5" refer to the transcript of the five-day long jury trial;
"TS" refers to the transcript of the sentencing hearing;
"NOA" refers to the Notice of Appeal;
"App." refers to the appendix to this brief.

STATEMENT OF THE CASE

A Hillsborough County Grand Jury brought eleven indictments against Joshua Lamy arising out of a motor vehicle collision between Lamy's Honda Civic and a Plymouth Voyager minivan at the intersection of Maple Street and Blodgett Street in Manchester in the early morning hours of February 18, 2006. The van's passenger, Sheila Moody, died as a result of the collision. Additionally, at the time of the collision, the van's driver Brianna Emmons (Emmons) was seven months pregnant with D.E., who was "subsequently born and thereafter died as a result of the injuries sustained in the collision." T1 7.

Two indictments charged Lamy with manslaughter for driving under the influence, speeding, and running a red light at that intersection, resulting in the collision that caused the deaths. T1 4, 7. Four negligent homicide indictments, two for each deceased victim, alleged that the speeding, driving under the influence, running a red light, or combinations thereof constituted criminal negligence. T1 5-6, 8.

Two second-degree assault indictments alleged that Lamy's reckless conduct caused serious bodily injury to Emmons and to Lamy's passenger, Anthony Brown. T1 8-9. Emmons sustained a "fractured pelvis and other injuries," and Brown sustained a serious head injury and an aneurism. T1 8-9. Finally, Lamy faced three counts of felony aggravated driving while intoxicated, based on the serious bodily injuries sustained by Emmons, Brown, and Lamy himself, who had two broken ankles. T1 8-11.

During jury deliberations, a juror reported that another juror had returned to the scene to make measurements in violation of the court's instructions. T5 3. After conducting

individual voir dire of the jurors, the court denied Lamy's motion for a mistrial, instead dismissing two jurors and instructing the jury to recommence deliberations. T5 74-75.

Subsequently, the jury convicted Lamy of all charges. T5 82-86. The court sentenced Lamy as follows: three and one half to seven years on the aggravated DWI indictments, concurrent to each other, TS 89-90; three and one-half to seven years on the second degree assault indictments, consecutive to each other and consecutive to the aggravated DWI sentences, TS 91-93; and fifteen to thirty years on each manslaughter indictment, consecutive to the other sentences. TS 94-96. Further, the court imposed fines totaling $3,000.00, ordered payment of restitution, and revoked Lamy's license or privilege to drive indefinitely. TS 90, 98. Thus, Lamy presently serves an aggregate sentence of forty and one-half to eighty-one years, which the court ran consecutive to a five to ten year sentence Lamy received for a probation violation based on the charges. TS 32, 90.

STATEMENT OF THE FACTS

On the night of February 17-18, 2006, over the course of several hours, Lamy socialized and consumed alcoholic beverages at a restaurant and nightclub in Manchester. T2 7-14, 21-23. A detail officer working at the club that evening, Sergeant John Dussault, and a civilian witness, Kellee Charron, observed signs that Lamy had become impaired by alcohol. T2 26, 29; T4 22.

Sometime after midnight, taxi driver Brianna Emmons received a dispatch to pick up a customer, Sheila Moody, who asked to be taken to an apartment complex. T1 60, 65, 68, 71. Their route took them to Blodgett Street, heading towards Maple Street, in Emmons's Plymouth Voyager minivan. T1 64, 72. At the time, Emmons was seven months pregnant with D.E. T1 62, 80.

Five witnesses testified that they saw a north-bound black Honda Civic speeding on Maple Street, providing estimates that ranged from 60 to over 100 miles per hour. T2 41, 59, 69, 78, 95. Lamy drove that car, with Anthony Brown as his passenger. T2 166, 176. Several of these witnesses testified that they watched the Civic go through red lights at three or more intersections, without noticeably slowing down. T2 41-42, 50, 57, 59, 65, 77, 89.

Emmons testified that she waited for a red light to turn green at the intersection of Maple and Blodgett, looked both ways, and then proceeded into the intersection. T1 73-76. She heard a "whoosh," saw nothing coming, and Lamy's car smashed into the passenger side of her van. T1 76; T2 74, 100, 119, 132.

Detective Timothy Chapel, the first officer on scene, testified that he found Lamy and

Brown unconscious, pinned inside the passenger compartment area of the Civic, which "had been crushed to approximately a three foot by three foot area...." T2 118-20. Chapel found Moody, also unresponsive, "partially hanging out of the window" of the right front passenger seat of the van. T2 119-20, 123. Emmons crawled out of the wreckage of the van and into the roadway. T1 76, 78; T2 46, 53, 61, 124.

Fire department personnel used the "jaws of life" to remove Lamy, Brown and Moody from their vehicles. T2 126-27, 153, 196. Moody subsequently died as a result of blunt impact injury to her head. T2 155; T3 77. The parties stipulated that Brown sustained a serious head injury, which caused "an aneurism resulting in complete memory loss of the collision and rendering him not capable of testifying. . . ." T3 9.

Chapel went to the Catholic Medical Center, where he found Lamy in a trauma room. T2 135-36. Chapel smelled "a strong odor of alcohol" coming from Lamy's person and breath, which did not lessen during the two to three hours that Chapel remained in the room. T2 136-37, 139. A blood sample drawn from Lamy at 2:15 a.m. revealed a blood alcohol concentration of 0.17 grams per one hundred milliliters. T2 240, T3 51.

Emergency medical personnel brought Emmons from the collision scene directly to the labor and delivery floor of the Elliott Hospital. T2 186-88. She sustained a complex fracture of her pelvis and other injuries, and experienced severe bleeding. T3 8, 95-96. As a result, D.E. was deprived of blood, causing his own heart rate to drop to just 50 beats per minute as measured upon arrival at the hospital. T3 96, 98. According to Chief Medical Examiner Dr. Thomas Andrew's testimony, normal fetal heart rates are from 100 to 110, and a heart rate of

50 "would not sustain a normal newborn." T3 98, 119. Physicians decided to perform an immediate C-section. T3 98.

When the physician delivered D.E., he was limp and pale, in cardiac arrest, with "no spontaneous breathing on his own, and no detectible heart rate." T3 98-99. Medical personnel could "hear nothing on the chest and they could feel no pulses when they felt the umbilical cord." T3 99. However, after about nine and one-half minutes of efforts to revive D.E. through cardio-pulmonary resuscitation, machines, and medication to stimulate the heart, medical personnel were able to restore breathing and a pulse. T3 99, 102.

Prior to restoration of a pulse, however, irreversible and profound brain damage had occurred. T3 99, 102. D.E. exhibited no meaningful brain functioning at any point in time including at the time of delivery. T3 112. Further, D.E. "never manifested the ability to breathe on his own." T3 116. Two weeks after the collision, Emmons made the decision to remove life support mechanisms. T1 81-82. D.E. was pronounced dead on March 4, 2006. T3 91. Dr. Thomas Andrew determined the cause of D.E.'s death to be "perinatal asphyxia resulting from maternal abdominal trauma." T3 91.

Manchester Police Officer and accident reconstructionist Paul Grugan conducted post-collision inspections ("vehicle autopsies") of the Civic and the van. T2 279. Grugan found nothing to suggest that any mechanical problem with the Civic or the minivan contributed to the accident. T2 293; T3 16.

Manchester Police Sergeant and accident reconstructionist Michael Hurley testified regarding his reconstruction of the collision based on his observations and measurements

made at the scene. T3 130-34. He calculated the post-impact speeds of the van and Civic to be 41.79 miles per hour and 38.65 miles per hour, respectively. T3 153-54. An eighty-nine foot skid mark left by the Civic's right front tire evidenced that Lamy applied the brakes prior to the impact. T3 138-39. From the available evidence, Hurley calculated the Civic's speed to be 107 miles per hour prior to braking, and 100.59 at the time of impact. T3 158. He calculated the van's pre-impact speed to be 10.7 miles per hour. T3 158-59. Hurley concluded that the cause of the collision was the driver running a red light at a high rate of speed, while under the influence of alcohol. T3 162.

On March 10, 2006, Manchester Police Officer Charles Piotrowski went to Lamy's home to transport him to the Hillsborough County House of Correction. T2 268-69. Lamy had to be brought out in a wheelchair and transported by ambulance, as he had casts on both legs. T2 270. Lamy told Piotrowski that he had broken both ankles, collapsed a lung, and almost died. T2 270. Further, Lamy spontaneously told Piotrowski during transport: "I didn't mean to hurt anyone." T2 271.

SUMMARY OF THE ARGUMENT

1. The trial court erred in denying Lamy's motion to dismiss the indictments relating to D.E., because the State did not prove that D.E. was "born alive." D.E. emerged from the womb lifeless, never exhibited higher brain functioning, and was completely dependent on life support mechanisms until they were disconnected. Accordingly, the State failed to meet the second prong of the "born alive" standard, that D.E. had the capacity of living a separate and independent existence, as this common law concept has been construed by the courts.

2. The trial court erred in denying Lamy's motion for a mistrial, based on evidence that a juror returned to the accident scene and commented on this to other jurors. Courts have uniformly condemned unauthorized views by jurors in criminal proceedings. This Court should presume prejudice, and hold that the State failed to meet its burden to rebut that presumption under the circumstances of this case.

3. The trial court erred in inferring that Lamy lacked remorse, in part from the fact that he requested opportunity to shower during his jury trial. Any person accused of a serious crime and facing public trial by jury would seek to present himself in the best possible light, by exercising basic hygiene during trial. The court's reliance on this inference in imposing a forty year minimum sentence was unfounded and unjust.

Argument

I. THE TRIAL COURT ERRED IN DENYING LAMY'S MOTION TO DISMISS THE MANSLAUGHTER AND NEGLIGENT HOMICIDE INDICTMENTS RELATING TO D.E., BECAUSE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT D.E. WAS 'BORN ALIVE.'

At the close of the State's case, Lamy moved to dismiss the manslaughter indictment and two negligent homicide indictments pertaining to D.E., contending that the State had failed to prove that D.E. had been "born alive" and therefore could be the subject of a homicide prosecution. T3 203. When the legislature enacted the homicide statutes, it left in place a centuries-old common law principle: No fetus can be the subject of a homicide prosecution unless the child is "born alive" and then dies as a result of injuries inflicted prior to its birth. See RSA 630:1, IV ("As used in this section and RSA 630:1-a, 1-b, 2, 3 and 4, the meaning of 'another' does not include a foetus."); 2 F. Wharton, Criminal Law § 116, p. 140 (15th Ed. 1994) ("If the child is born alive, despite an attack upon it and an injury to the mother while it was in the mother's womb, and the child thereafter dies as a result of the prenatal injury, a homicide has been committed."). D.E. was "born," but was not "born alive," because D.E. emerged from the womb lifeless, suffered irreversible brain death before the artificial inducement of breathing and a heart beat, and manifested no spontaneous life signs, only those stimulated and maintained by machines. Accordingly, the evidence did not meet the common law standard for being "born alive," and the trial court erred in denying the motion to dismiss.

As this issue raises a question of the sufficiency of the evidence, Lamy "carries the

burden of proving that no rational trier of fact, viewing the evidence [in the light] most favorable to the State, could have found guilt beyond a reasonable doubt." State v. Dugas, 147 N.H. 62, 66 (2001)(quotations omitted). "When the evidence presented is circumstantial, it must exclude all rational conclusions except guilt in order to be sufficient to convict." State v. Haycock, 146 N.H. 302, 303 (2001) (quotation omitted).

In Wallace v. Wallace, 120 N.H. 675 (1980), the Court described the origins of the "born alive" rule as follows:

> Although it is true that at common law, the existence of a child *en ventre sa mere* was recognized for some purposes, all such rights conferred were contingent upon live birth. The fetus took nothing and had no rights as a fetus. It was only the prospective child if born alive which could enforce and enjoy the rights. All such rights terminated if the fetus aborted or was stillborn.

Wallace, 120 N.H. at 677; see also Bonte v. Bonte, 136 N.H. 286, 289 (1992)(child born alive can sue mother for prenatal injury caused by mother's negligent conduct even if fetus not viable at time of injury); Bennett v. Hymers, 101 N.H. 483, 486 (1958)(holding that "an infant born alive can maintain an action to recover for prenatal injuries inflicted upon it by the tort of another even if it had not reached the state of a viable fetus at the time of injury"); Poliquin v. MacDonald, 101 N.H. 104, 107 (1957)(for wrongful death actions, abandoning the live birth requirement for injuries sustained by a viable fetus); cf. State v. McNab, 20 N.H. 160, 160-61 (1849)("To attempt or to accomplish a purpose like the one imputed in the indictment to the prisoner, was a misdemeanor at common law, but does not appear to have been treated as a felony, unless possibly in very ancient times, except in cases in which the child, actually born alive, had perished in consequence of the means used to cause the premature birth")(citing 1

Russell on Crimes 424, 552; 1 Hawk. Pl. Cr., ch. 31, sec. 16).

Judicial decisions defining "born alive" generally require the State to meet a two-prong test: 1) "the fetus must have been totally expelled from the mother," and 2) the fetus must "have shown clear signs of independent vitality. . . ." State v. Amaro, 448 A.2d 1257, 1259 (R.I. 1982); see also Hughes v. State, 868 P.2d 730, 731 (Okl. Cr. 1994)("Under the 'born alive' rule, '[a] child can not be the subject of homicide until its complete expulsion from the body of the mother, and must be alive and have independent existence.'")(quoting 1 O. Warren, Warren on Homicide § 55 (1938)); State v. Soto, 378 N.W.2d 625, 628 (Minn. 1985)("To become a human being within the meaning of homicide statutes at common law, a child had to be born alive and have an existence independent of and separate from its mother.").

Here, the evidence failed to satisfy the second part of the test, as D.E., brain-dead and maintained by machines, never "had the capacity and capability of living separate and apart from its mother upon being delivered out of the womb. . . ." State v. Dellatore, 761 A.2d 226, 230 (R.I. 2000)(quotations omitted).

Dellatore and other judicial decisions make clear that the 'born alive' rule requires proof of the capacity to live a meaningful life. Courts draw this line by requiring more than proof of a purely mechanical function, such as breathing on a ventilator, or a heartbeat stimulated and maintained by a machine that carries oxygen to a brain that has ceased to function in any meaningful sense.

> In the United States the 'born alive' requirement has come to mean that the fetus be fully brought forth and establish an 'independent circulation' before it can be considered a human being. ... 'Independent circulation' can be

> established by evidence of the fetus having breathed, but such proof usually is not conclusive in the absence of the evidence of life, such as crying.

People v. Guthrie, 293 N.W.2d 775, 777 (Mich. App. 1980), appeal den., 334 N.W.2d 616 (emphasis added).

A single breath outside the mother may establish birth under the "born alive" standard. People v. Greer, 402 N.E.2d 203, 207 (Ill. 1980)("If the fetus survives long enough to be born and take a single breath, the defendant committed homicide."). However, it must be a breath of life, not the artificially-induced circulation of air by a machine. For example, in Commonwealth v. Edelin, 359 N.E.2d 4 (Mass. 1976), the plurality opinion approvingly cited the accused's proffered legal definition of "[l]iveborn infant" that required more than evidence of "several transient cardiac contractions" or "fleeting respiratory efforts or gasps" to establish its "independent existence." Id. at 16 (quotations omitted). In fact, the opinion characterized this definition as "less exacting of proof and therefore more favorable from the Commonwealth's viewpoint than the standard that has been applied in practice around the country in manslaughter cases involving newborns." Id.; see, e.g., Montgomery v. State, 44 S.E.2d 242, 243-44 (Ga. 1947)(reversing manslaughter conviction involving newborn, where physician testified that victim breathed, but this testimony alone insufficient to establish that victim had an independent and separate existence from its mother); Shedd v. State, 173 S.E. 847, 848 (Ga. 1934)("But it must be proven that the child had been born in the world in a living state; the fact that it had breathed for a moment is not conclusive proof thereof.")(quotations omitted).

Further, the fact of a beating heart is not necessarily sufficient to prove that the fetus was "born alive." In Hughes, 868 P.2d 730, the "fetus did have a weak heartbeat" when delivered, but was "brain dead according to the doctor to whom it was handed immediately upon delivery." Id. at 731, 732. The Court stated: "We are not prepared to hold that a brain dead fetus was alive when born simply because its heart was beating weakly." Id.

From cases holding that neither breathing nor a beating heart necessarily establishes that the fetus was born alive, one must infer that the standard contemplates the birth of a human being capable of existence in a meaningful sense, not merely capable of exhibiting core circulatory functions. Accordingly, the Dellatore Court approved of a trial court's instruction that an infant cannot be said to have been "born alive" unless it "lived separate and apart without artificial means, such as an incubator or special extraordinary drugs or something of that nature. . . ." 761 A.2d at 230 (emphasis added). The Court held that the trial court correctly "set this out as a conjunctive proposition: the baby had to have both the capacity and capability to live outside the mother's womb and the baby actually must have done so. The former without the latter would have been insufficient." Id. at 230-31.

Applying these standards "in the context of all the evidence, not in isolation," Haycock, 146 N.H. at 303 (quotations omitted), the State did not prove the element that D.E. was born alive. Dr. Andrew described the delivery of D.E. as follows:

> [W]hen he came out, he was limp, pale, had no spontaneous breathing on his own, and no detectible heart rate. They could hear nothing on the chest and they could feel no pulses when they felt the umbilical cord.

T3 99. Andrew explained that D.E. had a depressed heart rate in the womb, causing him to be "profoundly ... asphyxiated," and with the additional stress of the C-section, D.E. came out in cardiac arrest. T3 99. Andrew acknowledged that with fetal monitors typically removed several minutes before the C-section, there is no way of knowing whether D.E.'s heart stopped beating during extraction or several minutes prior to extraction. T3 119-20.

Medications and mechanical stimulation acted as a "trigger" to start D.E.'s heart beating, and machines supported D.E.'s respirations during that entire fourteen day period. T3 116-17, 120. D.E. never manifested the ability to breathe on his own. T3 116.

More importantly, the evidence was undisputed that D.E. exhibited no higher brain functioning from the time of emergence from the womb, to the disconnection of life support mechanisms. T3 102 (Andrew testifies that D.E. "never showed any evidence of neurological function from the beginning"); see also T3 112 (no brain functioning at time of delivery), 122 (Andrew agreed that D.E., post-delivery, never would have experienced "consciousness."). The parties stipulated that D.E "was examined by Dr. Brian Kossak, a pediatric neurologist, and that the testing performed on [D.E.] on two occasions showed no evidence of brain function." T4 5.

Indeed, based on the nine-and-one-half minute minimum period that D.E. exhibited no heart rate, Andrew agreed that any infant would have experienced brain damage and would be "ventilator dependent until they ultimately pass away." T3 121. Further, absent what Andrew described as "heroic resuscitative efforts," there was no possibility that D.E. would have spontaneously regained a heart beat, breathing, or brain function following the C-section.

T3 99, 113-14. While D.E.'s brain stem retained enough electrical activity to allow an existence of sorts through the intervention and continuous maintenance of modern medical technology, D.E. did not survive long enough to be born and take a breath of life.

This Court should not defer to Dr. Andrew's opinion that, despite the above, D.E. was "born alive," T3 102, or the facts that a birth certificate and death certificate were issued for D.E. T3 91, 97. Andrew based his opinion on the fact that D.E. had a fetal heart rate of 50 beats per minute up until the time of delivery, experienced respiration on a ventilator, and manifested a heart beat after stimulation by medicine and cardio-pulmonary resuscitation. T3 102. However, the issue of whether D.E. was "born alive" ultimately is a question of law, not an issue for which medical opinion or bureaucratic decree (the issuance of birth certificate) can be dispositive. Montgomery, 44 S.E.2d at 244 (physician opinion testimony alone, insufficient to establish that infant "born alive"); People v. Hayner, 90 N.E.2d 23, 25 (N.Y. 1949)(despite opinion testimony of medical expert witnesses that victim "born alive," reversing murder conviction for lack of sufficient evidence on that element); cf. Wallace, 120 N.H. at 678-79 (in the context of a wrongful death lawsuit, the "born alive" threshold is not a philosophical inquiry into when "life begins," but simply a line drawn by the courts for when causes of action begin). Thus despite Andrew's testimony, the legal definition of "born alive" excludes the circumstances of this case where the infant had no higher brain functions, no spontaneous breathing or heart beat, and never manifested any ability to survive without the continuous maintenance of machines.

An opinion of the Supreme Judicial Court of Massachusetts, Com. v. Golston, 366 N.E.2d 744 (Mass. 1977), provides persuasive support for the contention that machine-maintained circulatory functions, alone, do not establish that the victim is "alive" for purpose of homicide statutes. In Golston, the Court held that the element of causing the death of another is met by causing the "brain death" of the victim. Id. at 748. Massachusetts then adhered to the common law rule that "to constitute homicide the victim of the assault must die within a year and a day of the infliction of the mortal wound." Id. at 749 (quotations omitted). The victim's family had removed the victim from life support less than a year after the assault. Id. at 748. Seizing on this fact, the accused argued that he could not be prosecuted for murder because the victim may have lived for longer than a year and a day if left connected to life support machines. Id. The Court rejected that argument, and upheld the trial court's instruction defining life to mean more than mere circulatory function:

> 'Brain death occurs when, in the opinion of a licensed physician, based on ordinary and accepted standards of medical practice, there has been a total and irreversible cessation of spontaneous brain functions and further attempts at resuscitation or continued supportive maintenance would not be successful in restoring such functions.'

Id. at 747-48 (quoting jury instruction). Further, in response to the accused's reliance on a definition of "death" found in Black's Law Dictionary, the Court stated that the dictionary definition's "references to respiration and pulsation must be taken to refer to spontaneous rather than artificially supported functions. . . ." Id. at 748. If the victim in Golston were properly considered to be deceased because of brain-death and absolute dependence on artificial life support mechanisms, the victim in this case was never alive outside the womb.

The 'born alive' rule draws an arbitrary line that can yield harsh and seemingly unjust results. E.g., Keeler v. Superior Court, 470 P.2d 617, 627 (Cal. 1970)(Court retains the born alive rule, while noting that in its extreme application, "it is not murder to kill a child before it be born, even though it be killed in the very process of delivery.")(quotations omitted). Indeed, the rule has received criticism, and has been judicially overturned in several jurisdictions. E.g., Hughes, 868 P.2d at 731, 736 (abolishing the doctrine, and allowing a homicide prosecution for prenatal injuries that resulted in the death of a viable fetus, but reversing conviction because new rule only applies prospectively); Com. v. Cass, 467 N.E.2d 1324, 1329-30 (Mass. 1984)(same); Guthrie, 293 N.W.2d at 778, 780 (Court "agrees that the 'born alive' rule is outmoded, archaic and no longer serves a useful purpose," but retains rule because its "abolition ... is a matter for action by the Legislature"). Our legislature, however, has retained the 'born alive' rule, and under that rule, Lamy's convictions for the manslaughter and negligent homicide of D.E. must be vacated.

II. THE TRIAL COURT ERRED IN DENYING LAMY'S MOTION FOR A MISTRIAL, BASED ON JUROR MISCONDUCT THAT TAINTED THE JURY DELIBERATIONS.

After several hours of deliberations, see T4 111-115, Juror #3 advised a court officer that Juror #9 had told the jury that he had "returned to the scene and had made some of his own measurements." T5 3. The court immediately had a court officer instruct the jury to temporarily cease deliberations, and removed Juror #9 from the jury deliberation room. T5 3. The court then convened a hearing. T5 3-76.

First, the court questioned Juror #9, who denied returning to the scene and denied making any such comment to other jurors. T5 9. He explained that he did make a visual estimate of distances during the jury view, used that estimate to calculate how many seconds the van's driver would have to perceive another driver proceeding toward her at 103 miles per hour, and shared his findings with other jurors during deliberations. T3 10-11.

However, the juror who initially reported the problem to the court officer, along with two other jurors, told the court that Juror #9 did say during deliberations that he had returned to the scene on his own. T5 14, 19 (Juror #3: "His first sentence was, I went back to the scene"); T5 34-35 (Juror #6 tells court that Juror #9 told other jurors that he "went back" to the scene in an "automobile" to see how far down the road a person could see from the stop sign); T5 37 (Juror #7 tells court that Juror #9 told other jurors he "went back to the scene" to examine it from "different angles" at some point "after the view").

Three jurors told the court they heard Juror #9 refer to observations he made at the scene, but it was unclear if he was referring to his own personal investigation or the official jury view. T5 22-25 (Juror #2); T5 28-29 (Juror #4); T5 31-32 (Juror #5). The remaining five jurors

told the court that they did not hear Juror #9 make any such comment. T5 22, 39, 40, 41; 44. None of the jurors told the court that Juror #9 claimed to have made measurements at the scene.

Subsequently, the court brought back Juror numbers 2, 3, 4, 6, 7 and conducted voir dire on the issue of whether, given Juror #9's comments, they could decide the case based on the evidence presented alone. T5 45-52. Juror #3 said that Juror #9's comments affected her ability to be a fair and impartial juror. T5 47. The other five jurors told the court that juror #9's comment did not affect their ability to remain fair and impartial, and decide the case based on the evidence alone. T5 49, 51, 53-54, 55-56, 57-58. The court excused Jurors #3 and 9. T5 47.

Subsequently, Lamy moved for a mistrial, on the basis that Juror #9's conduct and comments to other jurors "impugned the deliberative process in this case." T5 58, 68, 70. Lamy argued that Juror #9 introduced extraneous information which was "clearly factual in nature," and that his comments to others caused prejudice. T5 72. The State objected. T5 73.

The court denied the motion. T5 74. First, the court noted that it could not "conclude after talking to the jury that there even exists juror misconduct." T5 74. Second, the court determined because it had removed Jurors #3 and 9, and because the remaining jurors had not been tainted, the mistrial should be denied. T5 74-75. The court reconstituted the remaining jurors and two alternate jurors as a panel and instructed them to begin deliberations anew. T5 76. The court erred.

"It is a fundamental precept of our system of justice that a defendant has the right to be tried by a fair and impartial jury." In re Mello, 145 N.H. 358, 361 (2000)(quotation omitted). Further, "'[i]t is a fundamental rule that jurors may not receive evidence out of court.'" State v. Cook, 148 N.H. 735, 742 (2002)(quoting Brigham v. Hudson Motors, 118 N.H. 590, 595 (1978)); Parker v. Gladden, 385 U.S. 363, 364 (1966).

Based on these principles,"courts have uniformly condemned unauthorized views by jurors in criminal proceedings. . . ." Annotation, *Unauthorized view of premises by juror or jury in criminal case as ground for reversal, new trial, or mistrial*, 50 A.L.R.4th 995 (1986); State v. Bell, 731 P.2d 336, 341 (Mont. 1987)("it is universally held throughout the country that unauthorized views by one or more jurors constitutes misconduct").

A. Legal Standards and Standard of Review.

When a party makes a "colorable claim that a jury may be biased or tainted by extrinsic contact or communication," the trial court "must undertake an adequate inquiry to determine whether the alleged incident occurred and, if so, whether it was prejudicial." State v. Bader, 148 N.H. 265, 279 (2002) (quotations omitted), cert. denied, 538 U.S. 1014 (2003); State v. Rideout, 143 N.H. 363, 365 (1999); State v. Brown, 154 N.H. 345, 348 (2006); cf. Brigham, 118 N.H. at 595-96 (in civil case, Court states: "'[I]nsofar as alleged tests or experiments carried out by the jury during deliberations have the effect of introducing new evidence out of the presence of the court and parties, such tests and experiments are improper and, if the new evidence in question has a substantial effect on the verdict, prejudicial.'")(quoting Annotation,

95 A.L.R.2d 351, 355 (1964)). "The trial court has broad, though not unlimited, discretion to determine the extent and nature of its inquiry." Rideout, 143 N.H. at 365. Accordingly, to prevail on appeal, Lamy must demonstrate that the court unsustainably exercised its discretion in denying his motion for a mistrial.

Here, Lamy does not contest the adequacy of the procedure fashioned by the trial court to determine whether misconduct occurred and ascertain whether it was prejudicial. Lamy contends, however, that the trial court unsustainably exercised its discretion in its resolution of these questions.

B. The Evidence Supported a Finding that Misconduct Occurred, which was Prejudicial.

Although the evidence was conflicting, the hearing nevertheless produced evidence that misconduct occurred. Three out of the twelve jurors heard Juror #9 say he "went back" to the scene. T5 19, 35, 37. While other jurors were less clear on what they heard, only a minority of jurors, five out of twelve, were able to say unambiguously that they heard no improper comment from juror #9. T5 44. Juror #3 was not only certain about what she heard, but felt that her ability to decide the case impartially had been tainted as a result. T5 46-47. Unlike in Palmer v. State, 65 N.H. 221 (1890), where a similar claim that a juror took an unauthorized second view was "not supported by any evidence," here there was evidence to support a finding that misconduct occurred. Accordingly, this Court should move beyond the threshold issue and determine whether any misconduct prejudiced the defense.

Preliminarily, this Court should presume prejudice in a case where a juror made an unauthorized second view, and place the burden on the State to prove that the prejudicial effect of the juror's misconduct was harmless beyond a reasonable doubt. While this Court has not established the burden of proof for claims of prejudice as a result of independent evidence gathering by jurors, its precedents in analogous juror misconduct situations support allocating the burden of proof in this manner. Compare Brown, 154 N.H. at 348 (prejudice presumed, and State carries burden to prove harmlessness beyond a reasonable doubt, "when there are communications between jurors and individuals associated with the case or when the juror's unauthorized communications with others are about the case") with State v. Bathalon, 146 N.H. 485, 488 (2001)(where juror misconduct does not involve any "extrinsic influence," but only the "less serious" problem of "intrajury misconduct," the burden of proving prejudice rests with the defendant).

Several other jurisdictions place the burden of proof on the State when addressing the prejudice arising from an unauthorized jury view, test or experiment. See State v. Coburn, 724 A.2d 1239, 1241 (Me. 1999)("When a defendant demonstrates that a juror was subjected to extraneous information and that the information is sufficiently related to the issues presented at trial, a presumption of prejudice is established, and the burden of proof shifts to the State to demonstrate by clear and convincing evidence that the information did not cause prejudice to the defendant."); Bell, 731 P.2d at 341; but see id. (according to Montana court, "most states" place burden on the defendant).

The State did not meet its burden to prove that the prejudicial effect of juror misconduct in this case was harmless beyond a reasonable doubt. The record supports the conclusion that Juror #9 returned to the scene and made a comment or comments about his investigation heard by at least three jurors. Other courts examining the prejudicial effect of a juror's visit or return to the scene of the crime have examined a number of factors, including whether the circumstances of the unauthorized view demonstrate it to be inadvertent or intentional;[**] whether the scene viewed was the subject of conflicting evidence,[***] whether the jury relied on the extraneous evidence to assess witness credibility,[****] and whether the jurors who did not participate in unauthorized view were able to confine their deliberations to the admissible evidence.[*****]

[**] E.g., Coburn, 724 A.2d at 1243 (reversing where juror intentionally visited scene and drew conclusion contrary to trial counsel's argument that circumstances of intersection made it necessary for accused drunk driver to make a "wide turn").

[***] E.g., Crowell v. City of Montgomery, 581 So.2d 1130, 1133 (Ala. Cr. App. 1990)(reversing where juror drove to accident scene to examine road conditions, which defense had blamed for erratic driving); but see Ex parte Potter, 661 So.2d 260, 261-62 (Ala. 1994)(reversing conviction where three jurors went to scene to assess width of street, even though width of street was not disputed issue at trial).

[****] Pendleton v. State, 734 P.2d 693, 696 (Nev. 1987)(juror's visit to scene prejudicial where as a result he rejected defendant's account of incident and related same to other jurors); People v. Staggs, 740 P.2d 21, 23 (Colo. App. 1987)(reversing conviction where juror drew conclusions from unauthorized view that contradicted alibi witness testimony).

[*****] E.g., Chadwick v. State, 296 S.E.2d 398, 399 (Ga. App. 1982)(no reversible error where one juror went to scene night before verdict reached, but all jurors testified that "the verdict was based entirely on the evidence adduced at trial and uninfluenced by any extrajudicial information").

Several of these factors support reversal in this case. The unauthorized view, at least as described by three of the jurors, appears to have been intentional, not inadvertent. The principle element of the offenses disputed by Lamy at trial was that of mental state, whether he acted recklessly or with a less culpable mental state. T1 48-51 (Opening statement). Issues such as line of sight, visibility of other drivers, and time needed to drive from one point to another at the intersection where the collision occurred were relevant to the jury's determination of the accused's mental state. Accordingly, the defense explored issues such as line of sight and objects that may have obstructed visibility at the intersection during the testimony of several witnesses. E.g., T1 101-103; T2 112-13; T3 168-69. Lamy acknowledges that the remaining jurors testified that their deliberations would be unaffected by the issue, but questions the ability of a reasonable juror to do so under the circumstances. Under all of the circumstances, the trial court erred in denying the motion for a mistrial, and this Court must reverse.

III. THE TRIAL COURT ERRED IN DRAWING THE INFERENCE AT SENTENCING THAT LAMY LACKED REMORSE IN PART FROM HIS REQUEST TO SHOWER DURING HIS FIVE-DAY JURY TRIAL.

At the end of the second day of the jury trial, counsel approached and informed the trial court that the Hillsborough County House of Corrections was not affording Lamy an opportunity to shower during his jury trial, which ultimately lasted five days. T2 296. Counsel explained that after Lamy was transported back to the jail at the end of the prior day's testimony, he was held in booking for four hours, with the result that he missed any opportunity to shower. T2 297. The court told defense counsel that it had "no jurisdiction whatsoever on that issue," and that ended the discussion. T2 297-98. Counsel never brought it up again.

Nearly three months later, at the sentencing hearing, the court pointed to Lamy's request to shower before the third day of his jury trial as a central part of its asserted justification to impose a forty year minimum sentence for the charges arising out of this motor vehicle collision:

> You cannot begin to fathom the damage that you have caused because nothing haunts you, and I've also taken into account that you've shown really no remorse, and as point in fact I would put on the record that on the second day of trial, after hours of grueling testimony about the human wreckage at the accident scene, your concern at the end of that day was to dispatch your attorney up to the bench to point out that you want to get back to the House of Corrections in time to be able to take your shower.

TS 88. The court also drew the inference of lack of remorse based upon its perception that Lamy was "looking around every time a door was opened" during the sentencing hearing, as if

he were "bored." TS 89. Regardless of whether that latter inference was justified, the court unsustainably exercised its discretion when it inferred a lack of remorse from Lamy's desire to bathe during his jury trial, and Lamy is entitled to a new sentencing hearing.

Lamy relies on this Court's plain error rule, as he did not contemporaneously object to the trial court's statement of reasons for imposing its sentence. Supr. Ct. R. 16-A. Under that rule, this Court "consider[s] the following elements: (1) there must be error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings." State v. Henderson, 154 N.H. 95, 96 (2006).

Here, there was error, which is plain, because the judge relied on an impermissible justification for its sentence. "'Although a sentencing judge has broad discretion to choose the sources and types of evidence upon which to rely in imposing sentence, that discretion is not unlimited.'" State v. Burgess, 156 N.H. 746, 751 (2008)(quoting State v. Lambert, 147 N.H. 295, 295-96 (2001)). The court exceeded the bounds of its discretion, because while a lack of remorse is a permissible sentencing factor, State v. Hammond, 144 N.H. 401, 408 (1999), the court must adhere to basic principles of due process in the manner in which it draws that inference. Burgess, 943 A.2d at 733-34.

The Burgess appeal focused on the right against self-incrimination as it relates to the drawing of inferences regarding the accused's lack of remorse, but the opinion also stands for a broader proposition, which is that the trial court may not infer a lack of remorse based upon an impermissible justification in a manner that violates fundamental due process. See id. at 754

("'To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.'")(quoting Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)).

Here, Lamy sought opportunity to bathe during his five-day jury trial, after two days of proceedings, during which the jail had processed him in a manner that prevented him from doing so. Any person accused of a crime - guilty or innocent, remorseful or spiteful, wealthy or poor, incarcerated or free on bail prior to trial - would want to present himself or herself in a positive light to the judge and jury by engaging in basic human hygiene during his trial. Lamy, incarcerated pretrial and dependent upon the State for access to shower facilities, requested assistance from the court in this regard. He did so at a reasonable time, at the end of the court day, when it would not interrupt or delay the proceedings. "[T]he theoretical grounds for considering [remorse or lack thereof] are that it may reflect upon a defendant's character and be pertinent in determining whether rehabilitation efforts would be successful.") (quotations omitted). See Burgess, 156 N.H. at 754. Lamy's request to shower did not reflect negatively on his character or raise a reasonable inference that rehabilitation efforts would be unsuccessful.

Moreover, Lamy expressed remorse during the sentencing proceeding. He told the court, before it drew the adverse inference from his desire to bathe during jury trial, the following:

> I've been locked up for about two years now so I've had plenty of time to think about this. I'd trade places with your loved ones without a question. There isn't a day that goes by that I don't wish God took me instead. I can only imagine the pain you guys

> have been through. I had to learn how to walk again in jail, but I also have had to live with the fact that innocent people died due to poor decisions. I don't expect anyone to forgive, but I just want you to understand that I'm not heartless, I'm not a monster and it was an accident. So for what it's worth I'm very sorry that this had to happen.

TS 79. Lamy made this statement after listening to several devastating victim impact statements from the victims' family members, and from Brianna Emmons. TS 55-63. Moreover, Lamy had declined to testify during trial, and presented his mental state defense mostly through argument alone. T4 38, 52, 58 (closing argument concedes Lamy was "going very fast" and makes no denial of negligent conduct). Accordingly, his expression of remorse at sentencing did not ring hollow in the context of his trial defense. Cf. Burgess, 156 N.H. at 760 ("where a defendant admits to committing the acts underlying the charged crime, but disputes whether he had the requisite mental state for the crime, or offers a legal justification for committing those acts, the defendant's silence at sentencing might, in certain instances, legitimately be considered as a lack of remorse.").

The trial court's error affected substantial rights, as the court relied in part on its inference from Lamy's request to shower during trial, in imposing a forty-year minimum sentence for general intent offenses arising out of a motor vehicle collision. In practical effect, the court sentenced this twenty-five year old man, twenty-three at the time of the collision, TS 69, to spend the remainder of his life in prison. The court explained this sentence as based in part on its conclusion that Lamy lacked remorse and therefore was not worthy of an effort to facilitate his rehabilitation. This Court has applied the plain error rule to

situations where a court's error resulted in the defendant serving additional time in prison or under supervision. State v. Matey, 153 N.H. 263, 266 (2006); State v. Edson, 153 N.H. 45, 49-50 (2005). The rule should apply here.

Finally, the court's error "seriously affect[ed" the "fairness" and "public reputation" of judicial proceedings. After Lamy expressed his feelings of remorse to the sentencing court, it was unfair and unjust to tell him, the victims, and the world that his desire to present himself in his best light to the jury evidenced his lack of remorse. Accordingly, this Court should vacate Lamy's sentences and remand for a new sentencing hearing.

CONCLUSION

WHEREFORE, Mr. Lamy respectfully requests that this Honorable Court vacate the conviction in 2006-S-0670, 2006-S-0671, and 2006-S-0672 as based on insufficient evidence; reverse and remand for a new trial based on the second issue on appeal; or, based upon the third issue on appeal, vacate Lamy's sentences and remand for a new sentencing hearing.

Undersigned counsel requests 15 minutes oral argument.

Respectfully submitted,

By_____

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to the Office of the Attorney General, 33 Capitol Street, Concord, New Hampshire 03301, this 15th day of August, 2008.

_____
Theodore Lothstein

DATED: August 15, 2008