IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 18-1947

STATE OF IOWA,
Plaintiff-Appellee

vs.

Richard W. Leedom,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POWESHIEK COUNTY,
HONORABLE SHAWN R. SHOWERS

DEFENDANT/APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

This case presents several issues, one of which is an issue of first impression: whether an individual is entitled to an *ex parte* hearing in order to disclose trial strategy related information to establish a reasonable probability exculpatory evidence exists in confidential records thereby necessitating disclosure. This question is a substantial issue of first impression and should be retained by the Iowa Supreme Court. Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

Nature of the Case: Richard Leedom appeals following his conviction of two counts of second degree sexual abuse and

one count of Indecent Contact with a Child, in violation of Iowa Code Chapter 709. He was sentenced October 15, 2018. (App.257)

Procedural History: The State charged Leedom with two counts of Sexual Abuse in the Second Degree, in violation of Iowa Code §§ 709.1, 709.3(1)(b) and 903B.1, and one count of Indecent Conduct with a Child, in violation of Iowa Code §§ 709.12(1)(b) and 903B.2, alleging inappropriate contact from years earlier with his granddaughter, H.M. (App.6). Leedom pled not guilty. (App.9) Jury trial began June 26, 2018, concluding on June 29, 2018 with guilty verdicts on the charged offenses. (App.250-252)

Leedom filed post-trial motions seeking new trial. (App.253) The State resisted. (App.265).

New trial hearing was held date and the court denied the motion. (App.273).

After sentencing, Leedom timely appealed. (Notice, 11/8/18).

STATEMENT OF THE FACTS

H.M. was the focus of a contentious child custody modification case when H.M. made allegations against Leedom, her maternal grandfather. H.M. made clear she did not want to live with her mom, Teah, and wanted, instead, to reside full time with her dad. (Trial Tr. 6.27.18 172:12-16; 219:14 – 220:10). H.M. had initiated several DHS investigations against Teah. (App.131). However, in February 2016 a DHS investigation began against H.M.'s father, Rodney Morse. The investigation focused on an accident that took place due to erratic, reckless driving while Morse was impaired by alcohol, causing his truck to rollover with H.M. in the vehicle at the time. (DHS Records Vol. 4; Trial Tr. 6.27.18 211:3 – 214:20; Trial Tr. 6.28.18 104:25 – 106:8).

H.M. lied multiple times about the circumstances surrounding the accident. (Trial Tr. 212:22 – 214:20). She attempted to minimize the accident to deflect concern for her father's ability to parent and to advance her efforts for a change in custodial placement. She even enlisted the aid of her friend,

Brianna, to "lie through her teeth" if asked about the investigation. (Trial Tr. 6/29/2018, 69:18-19).

Following the DHS investigation against her father, H.M. further attempted to shift the department's focus from her father to her mother. H.M. contacted DHS alleging her mother physically abused her. (DHS Records Vol. 1; Trial Tr. 6.27.18 170:15-23). This was not the first allegation of physical abuse H.M. had made against her mother. (DHS Records Vol. 1). Previous DHS cases against her mother were started in 2015 alleging H.M. had been slapped across the face by her mother, and that her mother was providing inadequate supervision and as a result H.M. was self-harming and staying overnight with her boyfriend. (DHS Records Vol. 1, 2, 3). The two prior reports were made by parents of H.M.'s friends based on H.M.'s statements to her peers. (DHS Records Vol. 2, 3).

In April of 2016, H.M. turned up the heat on her mother. In the wake of the February 2016 DHS investigation against her father, H.M. alleged that her mother had choked her and called her derogatory terms. (DHS Records Vol. 1). During the DHS investigation which, again, focused on the supposed abusive

behavior of her mother, H.M. disclosed for the first time the alleged abuse by her mom's dad, Richard Leedom. (DHS Records Vol. 1). The allegations were all related to purported activity which happened several years earlier. Charges were filed against Leedom as a result of the report.

H.M. was deposed on November 8, 2017. (Dep. of H.M., 1; App.238). During that deposition H.M. stated for the first time she had confided in several counselors and mental-health professionals regarding the alleged sexual abuse charged in this matter. (Dep. of H.M. 76:8-19). Curiously, none of H.M.'s state-licensed counselors or therapists reported any abuse to law enforcement to initiate a DHS investigation. (App.131).

Leedom subsequently filed a § 622.10 Motion for Confidential Records and requested an *in-camera* review of H.M.'s records from those mental health providers. (App.14). Leedom argued all counselors and mental health providers within the State of Iowa are mandatory reporters. Because none of H.M.'s counselors or therapists ever reported any conduct to the authorities, it is axiomatic the records will rebut H.M.'s sworn testimony she disclosed these allegations to therapists

months or years earlier. As such, Leedom argued there was a reasonable probability the records contained exculpatory information. Leedom also argued an *in-camera* review would reveal mental instabilities existing at the time of the alleged assault, shed light on prior similar behavior, and demonstrate issues with H.M.'s perception and/or aggressiveness. As an alternative argument, Leedom asserted H.M. *had* in fact reported the conduct to therapists, the records would reveal inconsistencies in H.M.'s version of events. Because H.M.'s credibility was a central issue in the case, any exculpatory and/or impeachment evidence was essential to a favorable outcome to Leedom, especially from an objective source.

The State resisted Leedom's § 622.10 Motion and the matter was heard on March 1, 2018. Dr. Veronica Lestina, a clinical psychologist and licensed mental health counselor, testified at the hearing. (3/1/18 Hearing on Pending Mot.). Dr. Lestina confirmed that in her experience, if a child under twelve discloses abuse, she is required to report that conduct. (Id. at 13-16). She stated that in her own experience, if a child *over* twelve discloses abuse that occurred when the child was *under*

twelve, whether she reports depends on the circumstances of the disclosure. (Id. at 33). But in any event, she recognized a distinction between *reporting* abuse and *noting the disclosure* of reportable conduct in her own files. (Id. at 33-34).

On April 3, 2018, the Court concluded Leedom had failed to meet his initial threshold burden. "Whether a child abuse report was made by the therapist is not necessarily exculpatory in itself." (App.58). The court further reasoned, "The records sought to be disclosed were not created by [H.M.]," and that H.M "has been deposed and is subject to being called to testify at trial and undergoing the rigors of cross examination." (Id.)

Leedom moved for reconsideration. (App.62). Leedom urged he was entitled to an in camera inspection since H.M. waived privilege in her deposition and he was entitled to an *ex parte* hearing to disclose trial strategy information to meet the "reasonable probability" standard. Leedom also filed an offer of proof to support his request for the confidential records. (App.125).

At a hearing on the motion, H.M.'s mental health counselor, Jessica Schmidt, testified. (May 7, 2018 Hearing).

Schmidt testified she had been licensed to provide mental health counseling since 2013 and confirmed that mandatory reporting obligations placed on her as a mental health counselor apply to any child client she provides services for. (*Id.* at 30:19-21; 31:14-17). She further confirmed that she considers anyone under the age of eighteen as a child under the law. (*Id.* at 31:22-24). When questioned about her personal practice with reporting and documenting disclosures of sexual abuse by child clients, Schmidt testified she writes a progress note in the child client's file with details of what was shared in the session and if a report was made to the State. (*Id.* at 32:3-33:8). Schmidt also confirmed she does not make pacts with juvenile clients not to report and would report if she had no knowledge of an ongoing DHS investigation concerning the child's disclosure. (*Id.* at 38:18-39:11; 42:20-43:24).

The trial court never provided an ex parte proceeding on the day of the hearing and ultimately entered a written ruling on April 3, 2018 denying *in-camera* review and denying reconsideration. (App.218).

At trial, the State called four witnesses in its case in chief, the most relevant for appeal included H.M. and an expert in forensic interviewing, Ms. Colleen Brazil. The State elicited impermissible testimony at trial from Ms. Brazil who testified children are often abused by someone they know, such as a family member, elicited a detailed hypothetical grooming process that mirrored the statements made by H.M. earlier in the State's case in chief, stated that children often cannot remember precise times of an assault, and confirmed assaults can occur with others present which, again, mirrored the facts. (Trial. Tr. 6/28/2018 78:17-80:2; 81:8-82:10; 84:12-25). Particularly egregious was the State's line of questioning regarding delayed disclosure by a child due to fear of repercussions or fear of disbelief. (*Id.* at 78:2-10; 79:13-80:11; 85:1-87:14). The elicited Brazil testimony continued to mirror testimony already given by H.M. prior in the State's case in chief, serving as impermissible vouching for H.M.'s statement of events.

To place H.M.'s disclosures in proper context, Leedom called Brianna Gatlin, H.M.'s close friend. Gatlin was asked

about her recollection of events on the night of the truck rollover and H.M.'s alleged disclosures of abuse. (Trial Tr. 6/28/2018, 104:25–106:10; 107:6–23; 109:20–110:5; 112:24–114:1). She relayed the consumption of alcohol while driving recklessly in the truck, seeing firsthand how deep the ravine was where the truck flipped over, and the stricter rules at H.M.'s mom's house. (*Id.* at 104:25–106:10; 107:6–23; 109:20–110:5; 112:24–114:1; 115:17–116:14). Gatlin testified at trial that "[H.M.] told me that if DHS talked to me, to lie straight through my teeth." (Trial Tr. 6/29/2018, 69:18-19).

Leedom also sought to call Teah Leedom to discuss the three separate assaults perpetrated against her in relation ongoing custody dispute involving H.M. (Trial Tr. 6/27/2018, 114:18-21). The assaults referenced the contentious custody battle taking place between H.M.'s father and mother, with the perpetrator telling her to back off from H.M. and her father. (*Id.* at 118:3-4) and occurred in close timing with court dates and Mother's Day. However, the trial court denied Leedom's request to introduce this testimony stating it prejudiced the State. (*Id.* at 119:3–120:10).

Leedom also sought to call Cassie McGee, the family's therapist, to testify about her observations and communications with Teah and H.M. following one of the attacks. However, the court excluded Teah's testimony about the assaults and further quashed subpoenas for both H.M.'s individual counselor (Schmidt), and the family therapist. (McGee).

Deprived of the exculpatory records and testimony, the jury returned a verdict on June 29, 2018 finding Leedom guilty as charged on all three counts. (Trial Tr. 6/29/2018, 147:10-20). Leedom filed a Motion for a New Trial on September 4, 2018 raising issues of prosecutorial misconduct and violations of the trial court's in limine ruling regarding the examination of Ms. Brazil that led to undue prejudice against him and ultimately deprived him of a fair trial. (App.253). The motion was denied by the district court on October 15, 2018. (App.273). Leedom was sentenced October 15, 2018 to, *inter alia*, 25-years imprisonment for both counts of sexual abuse in the second degree and two years for one count of indecent exposure. He timely appealed.

ARGUMENT

I. LEEDOM WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONT A WITNESS AND PRESENT HIS DEFENSE WHEN THE TRIAL COURT ERRED IN FAILING TO RELEASE PRIVILEGED RECORDS THAT CONTAINED EXCULPATORY AND IMPEACHMENT EVIDENCE.

Leedom contends on appeal the district court improperly denied his request for confidential counseling records and *ipso facto* deprived him of his constitutional rights to present a defense, confront an accusatory witness, and to receive due process and a fundamentally fair trial. *See* Iowa Const. art. I, §§ 9,10; Iowa R. App. P. 6.104(1)(d); Iowa Code Section 622.10(1).

Error Preservation. Leedom preserved error on this issue by moving for disclosure the records and including extensive authority to support his position in writing and during the hearing. The court denied the requests. (App.14; 53; 62; 76; 125; 131; 58; 218).

Standard of Review. The issue presented included mixed requests arising from challenges under governing statutory and constitutional authority. On the former, review is for abuse of

discretion. *State v. Neiderbach*, 837 N.W.2d 180, 190 (Iowa 2016)(Nonconstitutional challenges to discovery rulings are reviewed for abuse of discretion). Constitutional reviews – even those pertaining to discovery – are done *de novo*. *State v. Pearson*, 804 N.W.2d 260, 265 (Iowa 2011); *State v. Cashen*, 789 N.W.2d 400, 405 (Iowa 2010).

Argument. Iowa Code Section 622.10(1) codifies the general rule a qualifying mental health professional cannot disclose confidential information obtained through a professional relationship. A court cannot approve disclosure of confidential records unless at least one of two exceptions apply. First, release is authorized through a showing the patient waived the privilege. *Iowa Code § 622.10(4)(a)(1)*. Second, release is appropriate by "demonstrating in good faith, a reasonable probability" the privileged records contain exculpatory information not able to be obtained in another way "and for which [there exists] a compelling need [in order] for the defendant to present a defense in the case." *Iowa Code § 622.10(10(4)(a)(2)(a)*. Leedom, in fact, satisfied ***both*** of these exceptions. Leedom further preserved seeks appellate review of

the trial court's denial of his initial *ex parte hearing* to divulge trial strategy to support his request and also his request for a defense counsel review of the records subsequently raised in *State v. Barrett,* No. 17-1814, 2018 WL 6132275 at *3 (Iowa Ct. App. Nov. 21, 2018)..

A. Leedom Met the "Reasonable Probability" Standard of § 622.10(4)(a)(2)(a).

Leedom made the good faith showing of "reasonable probability" of exculpatory information triggering the court's obligation to conduct an *ex parte* review the records. Iowa Code § 622.10(4). The standard only requires Leedom to show he has an honest motive or purpose in seeking the records and that the records are likely to contain the exculpatory evidence sought. *State v. Thompson*, 836 N.W.2d 470, 484 (Iowa 2013). Exculpatory evidence is any evidence that tends to support a criminal defendant's innocence. *Barrett*, 2018 WL 6132275 at *3.

The "reasonable probability" standard of section 622.10(4) is incredibly fact-intensive and must be "given its definition through the application of facts on a case-by-case basis." *State*

v. Neiderbach, 837 N.W.2d 180, 220 (Iowa 2013) (Cady., C.J., specially concurring). "[T]his standard will continue to gain greater clarity in the future as additional cases continue to give it shape." *Id.* When making his request, Leedom recognized the precarious position a district court finds itself in when a 622.10 request is made.

Leedom sought H.M.'s counseling records to rebut her sworn deposition testimony she reported the allegations well in advance of the DHS investigation to her therapist. The timing of the disclosures was critical to his defense. Leedom's defense maintained the disclosures were made to deflect attention from her father's reckless and endangering behavior highlighted by the February 12, 2016 drunken one-vehicle roll-over accident with H.M. in the vehicle and also cast her mother as an unprotective and unfit parent. Defense counsel probed H.M. on the timing of her disclosure and she responsively testified she, in fact, had disclosed the purported sexual abuse to her therapist before the DHS investigation. Defense counsel maintains this revelation was designed to bolster the assault

allegations and discount any notion they were pretextually made.

After extensive discovery, including receipt of multiple DHS investigative reports, the defense noted no therapist ever reported the alleged sexual abuse to the Department of Human Services. Therapists are mandatory reporters. Iowa Code § 232.69. Further, the court granted a limited evidentiary hearing on disclosure request and the defense posed questions to H.M.'s counselor regarding her both reporting requirements and information triggering the reporting. In a hypothetical fashion, H.M.'s therapist testified to the law and her policy of reporting sexual abuse allegations to the department if they had not yet been reported (May 7, 2018 Hearing on Pending Motion 38:18-39:11). She further testified to not making "secret pacts" with patients obviating her reporting obligation (*Id.* at 42:20-43:24).

It stands to reason that if H.M's therapist received the information H.M. claims she reported, it would generate, at a minimum, a DHS investigation. Since no DHS investigation occurred, it is axiomatic H.M. did not report this information as

she testified. The omission of the disclosure is critical impeachment evidence the jury was deprived of hearing.

Iowa embraces a liberal view of what constitutes exculpatory evidence. *State v. Retterath*, No. 16-1710, 2017 WL 6516729, at *11 (Iowa Ct. App 2017) (rejecting any distinction between impeachment and exculpatory evidence). A long line of cases recognizes the vital importance of impeachment evidence in a he-said-she-said. *See State v. Redmond*, 803 N.W.2d 112, 125 (Iowa 2011) ("This case was a he-said-she-said case, and [the alleged perpetrator and alleged victim's] credibility were essential."); *Zimmerline v. Parker*, No. 05-1414, 2006 WL 470080, at *2 (Iowa Ct. App. Mar. 1, 2006) (finding "credibility determinations become particularly meaningful" in "he said/she said" cases); *Wentworth v. Hedson*, 493 F. Supp. 2d 559, 568 (E.D.N.Y. 2007) (considering the parties' deposition testimony in order to decide "a classic case of 'he said, she said'"). "[W]here the case boils down to a 'he said, she said' situation between two witnesses, with little evidence to tip the scale in either party's favor, each witness' credibility becomes critical to the outcome of the case."

B. The Trial Court Erred by Failing to Conduct an In Camera Review of the Records Confidential Records.

Recently, the Iowa Court of Appeals addressed privileged material in *State v. Barrett*. 2018 WL 6132275 at *3. Barrett was convicted of sexual abuse in the second degree and challenged the district court's denial to release the juvenile accuser's mental-health and counseling records. *Id.* at *1. The trial court conducted an *in camera* review, determined the records did not contain exculpatory evidence, and subsequently declined to grant the defendant's motion to conduct an *ex parte* hearing. *Id.* at *2. In finding that the trial court erred, the Court of Appeals recognized a court cannot know what is important to the defendant, which leads to an *in camera* review being "inherently deficient." By not allowing defense counsel to review the records with the court there is a risk of "underinclusive disclosure of exculpatory information [which] injects unreliability into the trial process and may infringe the defendant's right to due process." *Id.* at *3. Granting an *ex parte* hearing following the proper showing of reasonable probability is essential to

ensuring the defendant's right to a fair trial is adhered to. *See id.*

A judge is intended to be the neutral party within proceedings not an advocate for either side. *Id.* Charging the judge to decide what material is exculpatory to the defendant, absence defense counsel input regarding trial strategy and theory of the case, circumvents the role of defense counsel and unfairly denies an accused his guaranteed constitutional rights. The *in camera* review conducted by the trial court in *Barrett* was found insufficient to ensure the defendant's constitutional rights were not violated and the court urged the General Assembly to amend the statute to restore the *Cashen* protocol and have defense counsel, rather than the district court, conduct an in camera review of the relevant records. *Id.* at *4.

For Leedom, the trial court should have conducted an in-camera review of the privileged records. Upon a showing of reasonable probability that the privileged records may contain exculpatory evidence that is not available elsewhere the court shall conduct an in-camera review of the records to evaluate whether the exculpatory evidence sought is contained within.

Iowa Code § 622.10(4)(a)(2)(b). Leedom made a showing to the court in his motion and during the pretrial hearings that there was a reasonable probability exculpatory evidence would be found in her counseling records. The failure of the trial court to at a minimum conduct an in-camera review violated Iowa Code § 622.10 and violated the role of the trial court in conducting "a full and fair review of the privileged records to determine whether the privileged records contain exculpatory information." *Barrett*, 2018 WL 6132275 at *3.

The need for disclosure of privileged records under Iowa Code § 622.10 has been recognized in similar circumstances. In *Neiderbach*, the defendant's trial strategy in a child-endangerment case "included raising reasonable doubt whether certain injuries may have been inflicted by [another person] instead of him." 837 N.W.2d at 197. This Court reversed the trial court's denial of access and concluded that the mental-health records "*may very well* have enabled defense counsel to more effectively cross-examine her at trial or assisted counsel's preparation for her deposition." *Id.* at 198 (emphasis added).

As in *Neiderbach*, the trial court here erred because the court did not properly apply the statute's initial "reasonable probability" standard. 837 N.W.2d at 196. The trial court rejected Leedom's request in part because H.M. would be subject to cross-examination at trial. However, this Court expressly rejected such a rationale, and noted the importance of objective records:

> Jherica may have made admissions to a mental health counselor that she would forget or deny in an adversarial interrogation. Statements memorialized by a neutral therapist would likely be more credible than Jherica's self-serving assertions as a hostile witness. Indeed, noted commentators have recognized that "[e]ven the taking of a deposition from a hostile witness may not provide the substantial equivalent of the information the witness has given to a party to whom he or she is not hostile." *Her records may very well have enabled defense counsel to more effectively cross-examine her at trial or assisted counsel's preparation for her deposition.*

Id. at 197–98. This Court similarly rejected the rationale in *State v. Edouard* finding the trial court erred in denying a request for an in-camera review of counseling records. 854 N.W.2d 421, 442 (Iowa 2014). In finding the error this Court stated, "Information in the counseling records could have significantly undermined [the accuser's] testimony. We do not

know." *Id.* It was recognized that the trial court could not know for certain what was contained in the privileged records, and the lack of knowledge was precisely why an in-camera review should be conducted if a reasonable probability is presented by the defendant. *See id.* If exculpatory evidence is found it could change the outcome at trial, which supports the rationale for the defendant having access to the evidence. *Id.* at 443. In Leedom's case we know what H.M. stated in her deposition, and a compelling reason why Leedom believes her statements to be inaccurate. An in-camera review was therefore justified.

Here, Leedom had already deposed H.M., and created a logical and compelling case her mental-health records would not support her sworn testimony. If the mental health records made no notation or reference to abuse, it supported the conclusion H.M. lied during her sworn deposition. The "secret pact" testimony is in itself unbelievable, given the therapist's reporting obligations duties under state law. Nonetheless, this provides even further support for H.M's untruthfulness.

Leedom was accused by H.M. of committing certain criminal violations, and his request for the release of privileged

records was not a reckless request, but rather a necessary one to ensure his right to present his defense and receive fair trial. H.M. claimed that she told this same information to someone in 2015, who is required to report and/or notate that information. Leedom is simply asking to ensure whether or not she did, in fact, tell therapists that information. If H.M. did not disclose that information, she is fundamentally less credible. If the information was in the possession of a prosecutor, Leedom would be entitled to it under *United States v. Bagley.* 473 U.S. 667, 676 (1985) ("Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule."). It should be no different when the court, acting through in-camera review, holds potential access to the information. *See Iowa Code § 622.10(4)(a)(2)(b).*

Notably, if Leedom satisfies the "reasonable probability" standard, it is the court, not Leedom, which first conducts an in-camera review. *See id.* If the court reviews the records and finds notations to reportable conduct and discussion between the therapist and H.M., arguably Leedom could not be entitled to review the records himself. However, to close off the issue by

determining there is no "reasonable probability" for access denies Leedom's rights to present a defense and confront his accuser, H.M. It denies him the right to effective assistance of counsel and generally deprives him the right to a fair trial. Review of the mental health records is essential to determine whether H.M. was being truthful during her November 2017 deposition. Leedom's constitutional right to present a defense and receive a fair trial hinge on the ability to confront H.M. with evidence that she falsified a claim that she reported sexual abuse to a state-licensed counselor and/or therapist. This issue was the heart of Leedom's defense—that her claims of sexual abuse were unfounded.

C. The Trial Court Erred by Denying Leedom an Initial *Ex Parte* Hearing to Divulge Trial Strategy and Bolster His Argument for Disclosure Under the "Reasonable Probability" Standard.

In the wake of enacting Section 622.10(4), ongoing questions confound defense counsel across the state. One issue which arose concerned revealing trial strategies to support the "reasonable probability" showing. More precisely, the question is: what if disclosure is warranted, but those reasons give away

valuable trial strategy if the State is privy to the information during at the time of the request? Section 622.10(4) must therefore necessarily include access to an initial ex parte hearing conducted in concert with defense counsel wherein counsel is allowed to discuss trial strategies as part of the good faith showing.

1. *Iowa Code Section 622.10 Must be Interpreted to Include an Ex Parte Hearing on the "Reasonable Probability" Showing.*

Our appellate courts established that they "may implement protocols to protect the rights of criminal defendants." *State v. Dahl*, 847 N.W.2d 348, 351 (Iowa 2016). In *Dahl*, the defendant moved for a private investigator at state expense, but further requested that the prosecutor not be present when he provided a basis for that appointment in court, because otherwise "the prosecutor's presence would permit the State a window into his trial strategy to which it was not entitled and violate his due process rights." *Id.*; *see* Iowa Const. art. I, § 10; U.S. Const. amend. VI. The district court refused to grant an ex parte hearing, and defense counsel refused to tip his hand to the prosecutor. *Id.* The trial court concluded that "Dahl was

required to disclose specific information [in the State's presence] concerning what the private investigator would do during the course of his investigation and how the information obtained might be exculpatory." *Id.* at 350–51.

The Supreme Court unanimously sided with the defendant. *Id.* Recognizing the defendant had raised both a statutory and constitutional argument for the ex parte hearing, the Court construed the applicable statutes in that case—sections 815.7(1) and (5)—in a way to avoid any constitutional infirmities. "[T]he issue we will decide is whether we can construe the procedure required under section 815.7 to allow for an ex parte hearing and avoid any constitutional issues that may arise under the statute if construed in a contrary fashion." *Id.* at 351.

The Court realized the dilemma facing Dahl, first recognizing that "disclosure of the defense counsel's trial strategy to the State impairs an indigent defendant's right to effective assistance of counsel." *Id.* at 352. At the same time, the Court recognized it may be practically impossible to meet the applicable statutory standard in § 815.7 standard to

without disclosing that trial strategy.[1] *Id.* Accordingly, this Court articulated a protocol to appropriately balance the statutory right of the defendant to have an investigator against his burden to present sufficient information to support the granting of an application for that investigator. The easy solution, the Court held, was to interpret the statute in a way that allowed for an ex parte hearing. *Id.* at 353.

Under the Court's protocol, a defendant must first file a timely application for investigator. *Id.* Second, the State must be given an opportunity to resist the application. *Id.* "If the State resists the application, the prosecutor should have the right to appear and participate in a hearing regarding the application and the State's resistance." *Id.*

The *Dahl* protocol is analogous to this case, and Leedom should have been granted an initial ex parte hearing under

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[1]Under section 815.7, the State must pay for "reasonably necessary defense services for which indigent defendants demonstrate a need in order to ensure such defendants receive effective assistance of counsel." *Dahl*, 874 N.W.2d at 352 (citing *English v. Missildine*, 311 N.W.2d 292, 293–94 (Iowa 1981); *see also* U.S. Const. amend. VI; Iowa Const. art. I, §§ 9, 10.

§ 622.10(4). The standard Leedom was required to meet in this case, "reasonable probability," is similar to the standard in *Dahl*—"reasonably necessary." Iowa Code § 622.10(4)(*a*)(2)(a); *id.* § 815.7. Both standards are necessarily fact-intensive. *See Neiderbach*, 837 N.W.2d at 220 (Cady, C.J., specially concurring). Leedom's initial Motion was timely, the State filed a resistance, and the State was permitted to attend the proceeding on March 1, 2018. Leedom requested an ex parte hearing on the basis that there were additional facts and/or arguments to believe disclosure is required under § 622.10; however, that those facts should not be presented to the Court in the State's presence. (App.76). Pursuant to *Dahl*, and in order to avoid any constitutional infirmities, Iowa Code § 622.10(4) must be construed to require an ex parte hearing before a review of confidential records even occurs.

In summary, H.M. claimed under oath that she reported abuse to her therapist, and it is known that the therapist did not report the abuse to authorities, despite a legal obligation to do so. It is therefore reasonably probable that the therapist's records contain compelling evidence for Leedom's case. Iowa

Code § 622.10(4)(*a*)(2)(a). However, the Court noted that this information "is not necessarily exculpatory in itself." (App.58). Further, we know that mental-health records can be material in the form of impeachment evidence, because those records cast doubt on the accuracy of a witness' testimony. *See East v. Scott*, 55 F.3d 996, 1003 (5th Cir. 1995). However, the trial court noted that any impeachment evidence "is not sufficient in this case." (App.58). Leedom submits that, with additional information submitted in an ex parte proceeding, the trial court would have had reason to allow *in-camera* access to H.M.'s records.

2. *If Leedom is Not Entitled to an Ex Parte Hearing under Section 622.10, the Iowa Constitution Requires One.*

Assuming arguendo a trial court is not required to grant a threshold ex parte hearing based on the language of § 622.10(4), Leedom submits that the denial of an ex parte proceeding under these circumstances violates his rights as guaranteed by the Iowa Constitution.

A defendant's ability to discover exculpatory information in otherwise confidential records implicates a bevy of constitutional rights, including but not limited to:

a. Leedom's right to a fair trial, as guaranteed by the Fifth Sixth and Fourteenth Amendments to the United States Constitution and article I, section 9 of the Iowa Constitution;

b. his right to due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 9 of the Iowa Constitution;

c. his right to present a defense, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and article I, section 9 of the Iowa Constitution;

d. his right to effective assistance of counsel, as guaranteed by the Fifth, Sixth, and Fourteen Amendments to the United States Constitution and article I, sections 9 and 10 of the Iowa Constitution;

e. his right to confront witnesses, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and article I, sections 9 and 10 of the Iowa Constitution; and

f. his right to compulsory process, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and article I, sections 9 and 10 of the Iowa Constitution.

The failure to grant an *ex parte* hearing infringes upon each of these rights.

Importantly, this Court has a duty to interpret Leedom's rights under the Iowa Constitution in a wholly independent manner from those rights protected by the United States Constitution. *See State v. Cline*, 617 N.W.2d 277, 285 (Iowa 2000) ("[O]ur court would abdicate its constitutional role in state government were it to blindly follow federal precedent on an issue of state constitutional law."). Leedom maintains that the right to an *ex parte* hearing under these circumstances is indeed guaranteed by the United States Constitution. However, the rights protected by the federal constitution may oftentimes "be diluted by the lowest-common-denominator pressures of federalism, considerations wholly absent when [Iowa courts] consider questions under the Iowa Constitution." *State v. Wickes*, 910 N.W.2d 554, 575 (Iowa 2018) (Appel., J., concurring specially). A different substantive standard applies under each provision of the Iowa Constitution raised by Leedom. To be clear, Leedom does not presume that any prevailing federal standards provide the proper approach in this case—and there should be no adoption of any prevailing federal standard as such. *Id.* at 576. The relevant standards under

the Iowa Constitution must give actual, meaningful fairness to his ability to present a defense, have the effective assistance of counsel, and effectively and fairly confront witnesses, to wit, the alleged victim in this case. He is fundamentally disadvantaged by forecasting his entire strategy to opposing counsel, the State as prosecutor, in exchange for discoverable information that assists in his defense.

Leedom respectfully asserts that this Court should engage an independent analysis under the Iowa constitutional provisions cited above and thereafter adopt and use the basic framework approach articulated in *State v Dahl*, and conclude that offering an *ex parte* hearing outside the presence of the prosecution on a transcribed record - but sealed kept away from the prosecution - is required to comply with Leedom's rights pursuant to the Iowa and United States Constitutions. The ex parte hearing would allow defense counsel to offer trial strategy related reasons to bolster the argument as to why the confidential records are necessary without tipping the strategies to the prosecution. A new trial implementing this standard is necessary.

D. The Trial Court Erred By Concluding H.M. Had Not Voluntarily Waived Her Confidentiality Privilege.

Leedom alternatively argued H.M. voluntarily waived her privilege. (Sealed Memorandum 5/7/17). He therefore was entitled to her confidential records where she purported to speak about the allegations with her therapist. Iowa Code § 622.10*(4)(a)(1)*.

H.M. testified extensively at her deposition on November 8, 2017 regarding her discussions with mental health professionals, specifically, with her therapist. Indisputably—and voluntarily—H.M. testified to the following under oath:

> (1) She had seen several therapists or counselors in the past.
>
> (2) One of those therapists was Jessica Schmidt.
>
> (2) She disclosed sexual abuse allegations regarding Leedom, to Jessica Schmidt, *sometime in 2015*.
>
> (3) She discussed a "pact" between her and Jessica Schmidt, in which Schmidt promised not to report the sexual abuse allegations because H.M. had already disclosed the allegations to others.

Once a person consents to the disclosure of information, i.e., by voluntarily discussing that information, confidentiality is "*destroyed*." *State v. Demaray*, 704 N.W.2d 60, 66 (Iowa

2005)("When Demaray consented to the hospital's release of his medical records to Deputy Miller, he destroyed the confidentiality between him and his doctor by allowing the information to be communicated to a third party.") Although a person always retains the right to *revoke* the consent to disclose at any time, a revocation does not "reinstate the privilege for the records already disclosed." *Id.* In other words, once information is out in the open—it is out in the open.

The purpose of the privilege favors a finding of waiver in this case. The Supreme Court has recognized the fundamental unfairness of allowing a person to testify to one thing (say, in a deposition) and then later claim that a privilege should protect communications on the same subject matter.

> By any other conclusion the law practically permits the plaintiff to make a claim somewhat as follows: "I tender witnesses A, B and C, who will openly prove the severe nature of my injuries. But I object to the testimony of witness D, a physician called by the opponent to prove that my injury is not so severe as I claim, because it is extremely repugnant to me that my neighbors should learn the nature of my injury"!

State v. Cole, 295 N.W.2d 29, 35 (Iowa 1980) (quoting Wigmore's *Evidence in Trials at Common Law* § 2388, at 855). Based on

that logic, the Court held that if a defendant raises a diminished-capacity defense, the defendant generally waives privilege as to his or her mental-health records—"for the simple reason it would be incongruous to allow a party to put a matter in issue and then deny access of an opposing party to relevant information concerning it." *Id.* at 35.

The scope of waiver is important. Here, H.M. has waived privilege to any communications or records related to the allegations against Leedom. "[V]oluntary disclosure of the content of a privileged communication constitutes waiver as to *all other communications on the same subject*." *Miller v. Continental Ins. Co.*, 392 N.W.2d 500, 504–05 (Iowa 1986)(emphasis supplied). As explained in a well-recognized treatise,

> [W]hen [the privilege holder's] conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.

Id. at 505 (quoting 8 J. Wigmore, *Evidence* § 2327 at 636 (McNaughton rev. 1961)). This is consistent with the Court's

recognition that a waiver occurs when the person holding a privilege discloses privileged matters for purposes of discovery. *Brandon v. West Bend Mut. Ins. Co.*, 681 N.W.2d 633, 642–43 (Iowa 2004); *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 684–85 (Iowa 1995)).

H.M.'s extensive testimony at the November 2017 deposition regarding her communications with therapist Schmidt destroyed the confidentiality of those communications. This case is no different than *Clay v. Woodbury County, Iowa*, in which the district court concluded deposition testimony may waive privilege of communications with a professional. 965 F. Supp. 2d 1055, 1060 (N.D. Iowa 2013). The court highlighted the person in that case "testified in detail about her sessions with [the physician assistant]. *It is far too late for [her] to change her mind and reinstate the physician-patient privilege between herself and [the physician assistant].*" *Id.* (emphasis added).

The law also favors a finding of waiver in this case because, if not, Leedom's constitutional rights are violated. *See State v. Cole*, 295 N.W.2d 29, 36 (Iowa 1980) (recognizing several

constitutional dimensions to waiver of confidential records). In conclusion, the court should take guidance from the Supreme Court's rationale in *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006):

> [P]rivileges must be tempered by defendants' constitutional right to present a defense. The defendant points to *Davis v. Alaska* in urging this court to engage in a balancing test. *Davis* involved an Alaska statute that provided for confidentiality of a juvenile's offense record. The Supreme Court held that the rights of a criminal defendant who sought to introduce a juvenile witness's record could override the statutory confidentiality in order to effectively cross-examine the juvenile. The Court stated that:
>
> > We do not and need not challenge the State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender.... Serious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry. In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to [the witness] or his family by disclosure of his juvenile record ... is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.
> >
> > ... [W]e conclude that the State's desire that [the witness] fulfill his public duty to testify free from embarrassment and with his reputation

> unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself.
>
> The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness.

Id. at 562 (citation omitted) (quoting *Davis v. Alaska*, 415 U.S. 308, 319–20 (1974)). Thus, H.M.'s medical records were required to be disclosed under the "waiver" exception of Iowa Code § 622.10(4)(a)(1) and a new trial is warranted with directions to release the confidential records.

II. LEEDOM WAS DENIED HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHEN THE TRIAL COURT IMPROPERLY REJECTED ADMISSIBLE EVIDENCE.

The trial court also violated Leedom's constitutional right to present a defense by excluding critical testimony related to his theory of the defense. First, the trial court excluded testimony from H.M.'s therapists who were expected to rebut H.M.'s disclosure claim. Alternatively, H.M.'s therapist was expected to discuss her general professional reporting obligations. The trial court also excluded this broader approach.

The second witness the defense intended to call was Teah Leedom. Teah was attacked on three separate occasions, suspiciously at times relevant to her relationship with H.M. However, the trial court excluded her testimony about these attacks.

Error Preservation. Leedom preserved his constitutional right to present a defense and submit this evidence by presenting these arguments to the trial court through in limine filings and obtaining a ruling from the court. (Ruling TT___; App.113).

Standard of Review. When a ruling impacts the right to present a defense, it implicates the notions of due process and review is de novo. *State v. Clark*, 814 N.W.2d 551, 560-61 (Iowa 2012). Similary, rulings on in limine matters are generally reviewed for an abuse of discretion unless the ruling involves constitutional matters, then it is de novo. *State v. Eliott*, 806 N.W.2d 660, 667 (Iowa 2011).

Argument. The right to present a defense is essential to a fair trial, stemming from the Sixth Amendment of the United States Constitution, *State v. Simpson*, 587 N.W.2d 770, 771

(Iowa 1998); incorporated in the Due Process Clause of the Fourteenth Amendment, *State v. Fox*, 491 N.W.2d 527, 531 (Iowa 1992); and set out in Article I, §§9 and 10 of the Iowa Constitution. *State v. Clark*, 814 N.W.2d 551, 560 (Iowa 2012). Due process mandates criminal defendants be afforded the opportunity to present a complete defense. *Gilmore v. Taylor*, 508 U.S. 333, 343 (1993) (*quoting Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (in the context of exclusion of evidence, "We have previously stated that 'the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."'"); *California v. Trometta*, 467 U.S. 479, 485 (1984) ("[C]riminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense."); *State v. Mahoney*, 515 N.W.2d 47, 50 (Iowa 1994) (stating a defendant is required to be given "a meaningful opportunity to present a complete defense"); *State v. Stone*, No. 07-1009, 2008 WL 4724865, at *2 (Iowa Ct. App. Oct. 29, 2008) ("The right to present a defense is so fundamental and essential

to a fair trial that the Supreme Court has accorded it the status of an incorporated right in the due process clause of the Fourteenth Amendment.").

A. The Trial Court Erred in Excluding Testimony from Therapists to Rebut H.M.'s Credibility.

In the wake of refusing to disclose H.M.'s confidential counseling records, it also prevented Leedom from examining her counselors about communications during sessions. (App.236). However, Leedom sought to present testimony from H.M.'s therapist to the jury generally discussing her professional reporting obligations. If the defense was able to present testimony from the therapist confirming she was a mandatory reporter and receiving information about past sexual assaults would trigger that reporting requirement, Leedom could salvage his defense by arguing to the jury that no DHS report was generated from a source other than H.M. and, thus, she lied under oath when she testified about disclosing to her therapist. The Court, however, ruled this therapist could not even be called as a witness. (*Id.*).

Second, Leedom intended to call Cassie McGee who was expected to testify about the injuries and demeanor she observed when meeting with Teah following the assaults.

Finally, the State sought to bar the defendant from presenting any evidence from any expert witness as to whether or not children lie or do not lie about sexual abuse allegations. The trial court erred and granted this overbroad request debilitating yet another avenue necessary for Leedom to present vital evidence needed to undermine the credibility of H.M. in a case that relied on her account of events. This error by the trial court prevented Leedom from receiving a fair trial

Leedom agreed in his resistance to the State's motion in limine that no expert witness can testify regarding whether H.M.'s allegations against him are credible. *See State v. Jaquez*, 856 N.W.2d 663, 666 (Iowa 2014) (expert testimony permissible when about how certain demeanors may be displayed by child abuse victims in general, but impermissible when about how a specific child's demeanor or symptoms are consistent with abuse); *State v. Myers*, 382 N.W.2d 91, 97 (Iowa 1986) (expert opinions as to the truthfulness of a witness is not admissible).

The error of the trial court was in excluding permissible testimony by the expert witness that was not in violation of the rules of evidence when it granted the overbroad motion of the State.

The State sought to prohibit Leedom from eliciting any expert testimony regarding whether false allegations of child sexual abuse occur, and what demeanors or actions may generally appear in such instances. Such evidence may be allowed so long as it is generalized and does not closely track the specific circumstances of the case as to personalize them to the child. *Compare State v. Pitsenbarger*, No. 14–0060, 2015 WL 1815989, at *8 (Iowa Ct. App. 2015) (where "testimony via statistics, reports, and opinions" methodically address "every purported and disputed fact, including behaviors and out-of-court statements as being consistent with the statistics and reports", the testimony was improper); *with State v. Lusk*, No. 15–1294, 2016 WL 4384672, at *4 (Iowa Ct. App. Aug. 17, 2016) (Danlison, C.J., concur) (expert testimony "concerning delayed reporting and if perpetrators commit sexual abuse when others are present" permissible where it was left to the jury "to

determine if the victims were telling the truth, unlike in *Pitsenbarger*, where the jury only had to insert the name of the alleged victim into the series of hypothetical questions to determine credibility.") The evidence Leedom sought to present fell on the permissible side of the thin line regarding expert testimony.

B. The Trial Court Erred by Excluding Evidence of Three Assaults Perpetrated on Teah Leedom.

The defense sought to present evidence that Teah was attacked on three separate occasions in her home during her contentious child custody battle with Rodney Morse. These assaults were suspiciously committed around times related to custody.

This evidence strongly supported the defense theory that H.M. was willing to go to extreme lengths to secure desire to live with her father. Evidence is relevant whenever it "has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." Iowa R. Evid. 5.401. Relevance of evidence must be considered in light of the theory of the

defense. *See State v. Nelson*, 480 N.W.2d 900, 907 (Iowa Ct. App. 1991) (*citing State v. Wilson*, 19 N.W.2d 232 (Iowa 1945)) ("The defendant is entitled to present evidence relevant to his theory of defense.") Substantial evidence exists demonstrating H.M.'s mother has been the victim of multiple assaults by an unknown assailant, including having been stabbed in the side, stabbed through the check, beaten all over her body, and set on fire. Each time this has occurred it has either been in close temporal proximity to hearings regarding H.M.'s custody. (H.M. 186:25-187:25, 189:14-190:3.) The timing of (and threats made during) these assaults suggests a connection between the assaults and legal proceedings involving H.M. While it is true H.M.'s mother has at times withheld information about the assaults, this is due to her attacker's having threatened to go after her son if she said anything. This is all information the jury can assess in weighing this evidence. *See State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006) (*quoting State v. Blair*, 347 N.W.2d 416, 420 (Iowa 1984) ("The function of the jury is to weigh the evidence and 'place credibility where it belongs.'").

However, the trial court excluded this evidence. Leedom sought an offer of proof, however, that too was denied. Leedom respectfully asserts it was legal error for the trial to both exclude the testimony but also refuse an offer of proof. On appeal, Leedom has been deprived of his opportunity to present a meaningful record of the assaults to advance this appeal point. *State v. Buchanan*, 800 N.W.2d 743, 752 (Iowa Ct. App. 2011)("Purpose of an offer of proof is to give the district court a more adequate basis for its evidentiary ruling and to provide a meaningful record for appellate review; purposes of an offer of proof are important because they are necessary to preserve error.")(internal citations omitted). Should this Court be unable to determine the contents of the offer of proof, then the trial court's refusal constitutes reversible error. *State v. Lange*, 531 N.W.2d 108, 115 (Iowa 1995).

III. LEEDOM WAS DENIED A FAIR TRIAL AS A RESULT OF SEVERAL INSTANCES OF PROSECUTORIAL MISCONDUCT THAT PREJUDICED THE PROCEEDINGS.

Multiple instances of prosecutorial misconduct infected the trial and ultimately prejudiced Leedom's right to a fair trial.

A. The State Elicited Impermissible Testimony from Colleen Brazil that Mirrored the Facts and Vouched for the Testimony and Credibility of H.B. which Prejudiced Leedom's Right to a Fair Trial.

Error Preservation. Before trial, Leedom sought an order that no testimony be admitted that vouches for or mirrors the testimony of the alleged victim. (4/30/2018 Motion ¶ 2(c)). In an order dated May 11, 2018, the trial court granted this request and excluded any reference to such statements during trial. (5/11/2018 Order, Part G). He filed a second pretrial motion on the matter. (6/18/2018 Motion ¶ 2(d)). The court took that motion up before trial and added further clarification. Importantly, the parameters of the court's restrictive ruling did not authorize the State to mirror its theory by eliciting expert testimony about a child sexual assault victim being assaulted with others in the room. Because the court's ruling was definitive and went to the admissibility of such evidence, Leedom was not required to object at trial, in front of the jury, if the State violated the court's admonition. *State v. Huser*, 894 N.W.2d 472, 494 (Iowa 2017); *State v. O'Connell*, 275 N.W.2d 197, 202 (Iowa 1979).

Standard of Review. This Court will review the admission of testimony for an abuse of discretion and prejudice. *State v. Myers*, 382 N.W.2d 91, 93 (Iowa 1986). Claims of prosecutorial misconduct are examined for an abuse of discretion. *State v. Krogmann*, 804 N.W.2d 518, 523 (Iowa 2011).

Argument. The State called Colleen Brazil as an expert, and Brazil's testimony largely mirrored the facts of this case. The prosecutor lulled the courtroom by stating she was "going to talk generally about child sexual abuse dynamics" with Brazil. (Trial Tr. 6/28/2018, 77:17-18). However, as the prosecutor's examination progressed, the 'general' questions asked of Brazil were strikingly similar to the circumstances surrounding H.M.'s claims of abuse against Leedom. For example, the prosecutor first elicited testimony that it was "very common" for a delay in reporting, similar to that of H.M.'s reports. (*Id.* at 78:14–16). Such delayed disclosure is brought on, according to Brazil, by the fact that "children are often victims of abuse by someone that they know," *such as a family member*. (*Id.* at 78:22–25). Brazil then testified to the "grooming process," which was mirrored part of the State's argument

against Leedom. (*Id.* at 80:4–81:23). Brazil was next asked about whether a child can accurately state a precise time of an assault, which checked yet another box in the State's argument against Leedom. (*Id.* at 82:15–84:20). Finally, and perhaps most concerning, the prosecutor asked:

> Q. Now, when you talk about that and, kind of, this idea of a child fearing certain things and repercussions, or what you just testified to, is there also kind of a misconception about whether or not other people may be able to be around when this sexual abuse happens?
>
> A. Yes.
>
> Q. And what is that?
>
> A. So often children will tell me when they talk about something happening that others were around, sometimes even within the same room. Family members will talk about -- generally will say things like, "He was never -- this person was never alone with the child, and they couldn't have had opportunity to do that." But often we see that there's small, sort of, pieces of time, or things happen even within -- with others in the room.
>
> Q. Does that also go into delayed disclosure; why a child may not tell?
>
> A. Sure. Especially with younger children, they may think, "Boy, this is happening with people right there, how do they not know about that," or that it's okay. Sometimes as part of the grooming process, perpetrators will tell children that adults do know about it and that it's okay. And so children like this

> person, they don't like what's happening, and they don't know what to do about it.

(*Id.* at 79:13–80:11).

A prosecutor cannot knowingly elicit evidence during trial she knows is impermissible and subject to a pretrial motion in limine. The prosecutor was on clear notice that the evidence was impermissible based on the same caselaw and precedent cited in Leedom's Motion in Limine. Nonetheless, other cases make clear that the prosecutor's methodical questioning of Brazil—who had no personal knowledge or information about this case—was improper and resulted in vouching evidence.

For example, the vouching in this case is strikingly similar to the vouching found in *State v. Pitsenbarger*—a case in which Susan Krisko was also the prosecutor. No. 14–0060, 2015 WL 1815989 (Iowa Ct. App. Apr. 22, 2015). Just as in *Pitsenbarger*, Brazil's testimony reinforced H.M.'s story point-by-point. The testimony rebutted weak aspects of the State's case. The State knew its strategy of the case—which hinged on H.M.'s credibility—and shaped its examination of Brazil around that

strategy. This misconduct ignores justice and secured a conviction.

Leedom was prejudiced as a result of the State's misconduct. All parties recognize the importance of H.M.'s credibility in this type of a case—the State's theory rises and falls on it. It is no surprise the jury believed H.M.'s account of the allegations once an expert witness vouched for her credibility. Yet just to be sure, the State highlighted Brazil's vouching during closing argument:

> So what happens -- *and you heard from an expert in this case, because there's all these myths out there; right*? Kids will tell right away. There will be physical findings or DNA. There will be -- oh my gosh, if there's other people around, there's no way this could have happened. You need so much more than just [H.M.], because I can't make a decision if it's just one person.
>
> . . . .
>
> In addition, we don't require kids to tell right away. Makes sense; right? *And I even pointed out or asked our expert witness, Ms. Brazil, is there any difference between a family member and a nonfamily member?* And of course there is. I mean, some of you I talked to about taking kids for shots. Right? I mean, your child -- if you have that bond with them, if you have been their caretaker -- is going to accept an awful lot from you. They're going to accept when you take them to a doctor and get them a shot and they

> get hurt and you say, "Sorry, I know it hurts, but you have to have this done." They're going to accept that because of that relationship.
>
> . . . .
>
> *And our expert told you this can happen with other people in the room*. She has seen it not only from the research but from her hundreds and hundreds of reports of sexual abuse. It happens, ladies and gentlemen. Because you can do something -- I mean, I could probably come up with 10 examples right now and ask you about stuff that has happened in this courtroom while you've been seated in here. If there's something exciting happening up here, I bet you can't tell me who was coughing or blowing their nose back here.

(Transcript, 6/28/2018, 10:14–21; 11:8–20; 13:1–10)(emphasis supplied).

Through the testimony of Brazil's impermissible vouching, evidence was presented to the jury and was a driving force in finding Leedom guilty. If the prosecution wanted to wander outside those boundaries, for example questioning Brazil as to abuse when other family members were present, she should have presented the issue to the Court before beginning a line of questioning regarding those impermissible matters. Instead, prosecutors in this case sprang those issues on the court and parties at trial. The State decided to ring a bell the Court had

already instructed could not be played. The prosecutor's violation of the defendant's motion in limine granted by the trial court deprived Leedom of the right to a fair trial

B. The State Argued Jury Nullification During Closing Argument as to Instruction 7, Which Prejudiced Leedom's Right to a Fair Trial.

Standard of Review. On this issue, the court must review the nullification argument made at trial and determine, when viewed cumulatively, whether the prejudice resulted and a different result would have likely occurred in the absence of the misconduct. *Baysinger v. Haney*, 155 N.W.2d 496, 499 (Iowa 1968). The scope of closing argument is reviewed as an abuse of discretion. *State v. Melk*, 543 N.W.2d 297, 301 (Iowa Ct. App. 1995).

Error Preservation. Error was preserved through a timely objection and ruling. (TT).

Argument. The parties discussed the proposed jury instructions prior to closing arguments. As agreed upon, Instruction 7—the uniform reasonable doubt instruction—provided in part:

> A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

(Instruction No. 7). During closing argument, the prosecutor pointed out Instruction No. 7 to the jury and stated:

> [T]he part that strikes me the most is we have this idea that if you hesitate to act, if this information would make you hesitate to act, but yet you're going to be instructed -- and I think it's No. 26, but you will see that also -- that when you deliberate, you're supposed to hesitate.

(T.T, 6/29/2018, 24:7–12). The prosecutor was referencing Instruction 29—another uniform instruction—which provided in part:

> During your deliberations, do not hesitate to re-examine your view and change your opinion if convinced it is wrong. But do not change your opinion as to the weight or effect of the evidence just because it is the opinion of the other jurors, or for the mere purpose of returning a verdict.

(Instruction No. 29).

Defense counsel was forced to object during the State's closing argument and informed the Court the prosecutor was attempting to dilute the clear language of the reasonable doubt instruction. (T.T., 6/29/2018, 24:13–15). Undeterred from the bench conference, the prosecutor repeated:

> MS. KRISKO: As I was saying, that instruction -- and if you look at the other instruction, and its number, so I make sure, is 29. And it tells you when you go into the jury deliberation -- into your jury deliberation, you are supposed to hesitate.

(*Id.* 24:16–20). Defense counsel again objected. (*Id.* 24:21–23). Ultimately, the prosecutor attempted to clarify its position:

> Just like inconsistent statements, just because we use a word does not mean that our use of it in the legal term is the same that you would have in your day-to-day life. If you were to think that hesitation means that you stop and think, that's not what they're telling you in reasonable doubt. And we know that, because you're told that you're supposed to stop and think.

(*Id.* 25:9–16).

A prosecutor is entitled to some latitude during closing argument when analyzing the evidence or arguing reasonable inferences. *State v. Graves*, 668 N.W.2d 860, 874 (Iowa 2003).

However, a prosecutor is not entitled to incorrectly instruct the jury on the law during closing argument—or tell the jury to ignore the law entirely. Such conduct amounts to jury nullification, i.e., permitting the jury to determine the law and the facts, which Iowa has rejected. *State v. Hamann*, 285 N.W.2d 180, 184 (Iowa 1979).

As this Court recognized over forty years ago, "It is one thing to recognize jurors have the power not to do their duty and quite another to tell them they have a right not to do their duty." *State v. Willis*, 218 N.W.2d 921, 924 (Iowa 1974).

In this case Instruction No. 7 stated with particularity that if the jury, acting reasonably, hesitates in finding Leedom guilty beyond a reasonable doubt, it must acquit on all charges. The prosecutor diluted this instruction to such an extent that it told the jury to "hesitate" doesn't actually mean to "hesitate." *Id.* 25:9–16 ("If you were to think that hesitation means that you stop and think, that's not what they're telling you in reasonable doubt."). At a minimum the prosecutor was attempting to confuse the jury as to the interaction between Instructions 7 and 29. But at its core, the prosecutor was attempting to lower

the bar, i.e., its burden of proof, by telling the jury to keep looking for guilt if innocence was the proper result. In other words, the prosecutor was more focused on obtaining a conviction, not furthering its obligation to seek justice. *Graves*, 668 N.W.2d at 873.

The prosecutorial misconduct in this case strikes to the core of any criminal proceeding: the State's burden of proof. This is certainly misconduct as to "the central [issue] in the case." *Id.* at 869. The State's evidence in this case was weak, which largely centered on H.M.'s credibility. Telling the jury it was not required to return a not-guilty verdict upon hesitation was therefore incredibly prejudicial to the ultimate fairness of this proceeding. Leedom certainly did not invite this misconduct, *id.*, and the court took no curative or remedial measures to correct the prosecutor's misleading and confusing explanation of the term "hesitate" used throughout the instructions. A new trial is appropriate.

C. <u>The State impermissibly referred to statements from Terri Leedom in closing argument that were prohibited by the rule against hearsay and an in limine ruling, which prejudiced Leedom's right to a fair trial.</u>

Error Preservation. Leedom preserved error by raising this issue through a motion in limine and obtaining a ruling (App.218)

Standard of Review. Hearsay violations should be considered for errors at law. *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998). The standard for prosecutorial misconduct is identified, *supra.*

Argument. The testimony of Terri Leedom was closely circumscribed and subject to *two* pretrial motions in limine. (App.87; 105). Ultimately, the jury heard no evidence from Ms. Leedom regarding her conversations with police or the content of those conversations. Nonetheless, in closing argument, the prosecutor stated:

> So let's talk a minute about Terri Leedom. She, obviously, came in here, and she talked about some of the general stuff. But some of the really important stuff about Terri Leedom -- that's Teah's mom -- is that knowing that promise that you had, Terri came in here and said, "After I was called and gave evidence" – or not evidence, I'm sorry, "After I was called and gave an interview to the police and told the police things, my daughter cut myself out of -- cut me out of her life. I don't have a relationship with my daughter or my granddaughter" -- I'm sorry -- "my

> daughter or my grandson." That's after she talks to the police.
>
> *You can infer, especially from the lack of Teah coming in here and talking to you, that Teah didn't like what she had to tell the police*. Teah talked to her mother about the charges, but Hailey never talked to her mother about the specifics.
>
> So, again, a lot of evidence that you have, you have to follow the evidence, and you have to see how it fits together for you. If you have a problem with this -- with this idea that, you know, Teah talks to her mom *and, obviously, talks about something*, because she did talk to her mom about the charges, and [H.M.] doesn't talk to her mom about specifics, [H.M.] must not have really -- or Terri must not really have had much to tell the police in regards to [H.M.].

(T.T., 6/29/18, p.p. 98-99)(emphasis supplied). The State's "inferences" is tenuous as it is fundamentally improper.

The prosecutor's primary interest "should be to see that justice is done, not to obtain a conviction." *Graves*, 668 N.W.2d at 870. However, as the Iowa Supreme Court "unfortunately" recognized in *Graves*, "even though prosecutors should keep in mind their obligation to the accused at every stage of the proceeding, too often, they do not." *Id.* During closing arguments, a prosecutor must confine his or her arguments to

the evidence, and is prohibited from making inflammatory or prejudicial statements. *Id.* at 874.

In *State v. Carey*, the Iowa Supreme Court reasoned that although the prosecutor's comments were "sarcastic and snide," the comments in that case at least were "based on a legitimate assessment of the evidence." 709 N.W.2d 547, 555 (Iowa 2006). Here, the prosecutor's discussion of Leedom's statements to police were not in evidence and were *far* too much of a stretch to be a rational, reasonable inference from the evidence. Although *State v. Huser* was not a closing-argument case, the Court recognized the form of a particular question "did not literally require the jury to infer the subject matter," but the question "was designed to encourage the jury to make the connection. 894 N.W.2d at 497–500. The Court came down strongly against this type of prosecutorial questioning. *Id.* at 500 (noting that it does not "sanction or encourage the hide-the-ball approach of the State in this case"). Prosecutors are

> not permitted by means of the insinuation or innuendo of incompetent and improper questions to plant in the minds of the jurors a prejudicial belief in the existence of evidence which is otherwise not

> admissible and thereby prevent the defendant from having a fair trial.

Id. at 497 (quoting *State v. Carey*, 165 N.W.2d 27, 32 (Iowa 1969)). The same holds true in closing argument. There was no legitimate purpose to injecting Terri Leedom's interaction with police into closing statements. Leedom was prejudiced as a result of the prosecutor's closing arguments, and reversal is appropriate.

IV. THE DISTRICT COURT ERRED BY PREVENTING LEEDOM TO CALL THE PROSECUTOR AT THE HEARING ON THE MOTION FOR NEW TRIAL TO DEVELOP HIS CLAIMS FOR NEW TRIAL

Error Preservation. To support his efforts to secure a new trial, Leedom subpoenaed the prosecutor citing his constitutional right to, *inter alia*, compulsory process. Four of his new trial claims related to prosecutorial misconduct. The State subsequently moved to quash the subpoena which the trial court ultimately quashed (App.273).

Standard of Review. Ordinarily, the standard of review for quashing a subpoena is an abuse of discretion. *Morris v. Morris*, 383 N.W.2d 527, 529 (Iowa 1986). However, as here,

when constitutional rights are implicated, review is de novo. *Rhiner v. State*, 703 N.W.2d 174, 176 (Iowa 2005).

Argument. The right to compulsory process to compel the attendance of witnesses—including a prosecutor, given the claims raised by Leedom—is a fundamental constitutional right. Leedom invoked his right to compulsory process by subpoenaing for Ms. Krisko for testimony on the claims raised in the Motion for New Trial. As recognized by the United States Supreme Court long ago,

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

United States v. Nixon, 418 U.S. 683, 709 (1974).

The right to compulsory process (through subpoena) is "fundamental and essential to a fair trial." *Washington v. Texas*, 388 U.S. 14, 17 (1967). As the Iowa Supreme Court has

recognized, "[c]oncern for the fair administration of criminal justice, [has] usually been held to be needs compelling enough to override a claim of testimonial privilege in criminal matters." *Lamberto v. Bown*, 326 N.W. 2d 305, 307 (Iowa, 1982) (internal citations omitted). The Court reasoned,

> The need for every person's evidence is so compelling, in fact, that even those privileges rooted in the federal constitution must give way in some circumstances, *Herbert v. Lando, 441 U.S. 153, 175, 99 S. Ct. 1635, 1648, 60 L. Ed. 2d 115, 133 (1979)*; and *a narrow application of privilege is advocated*. *See* 8 Wigmore, *supra* § 2192, at 73 ("The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion of these [testimonial] privileges. They should be recognized only within the narrowest limits required by principle.")

Id. at 307 (emphasis added).

Quashing the lawful subpoena issued violated fundamental compulsory process guaranteed under article I, section 10 of the Iowa Constitution, and the Sixth Amendment to the United States Constitution. Leedom proposed an independent framework in Iowa, under this constitutional provision, whereby the right to compulsory process applies to *all criminal proceedings, including hearings outside the presence*

of a jury at trial—such as hearing on motions to suppress, preliminary hearing, and hearings on motions for new trial.

An important case on this issue is *State v. Wallis*, 439 N.W.2d 590, 592 (Wis. 1989). In that case, the Wisconsin Supreme Court addressed the reasons for calling, or the need to call, a prosecutor as a witness in a non-trial, non-jury hearing. The Wisconsin Supreme Court reasoned that the "compelling need" test approach (in terms of the "need" for the prosecutor's testimony, used by many courts) is not necessary when it involves issuing a subpoena to a prosecutor for testimony at a non-jury, non-trial hearing, where there would be no "role confusion" *because there is no jury present*. *See id.* at 592. In such a scenario (where the subpoena was for testimony from a prosecutor at non-jury, non-trial hearing), the Wisconsin Supreme Court stated:

> The issue, therefore, is not whether Wallace has shown a compelling need for the testimony, but *whether there is a reasonable probability that the testimony 'will lead to competent, relevant, [and] material' evidence favorable to his position at the hearing*.

Id. at 592-593 (emphasis added).

Quashing the subpoena deprived Leedom the opportunity to present relevant testimony to prove prosecutorial misconduct in support of a new trial. This is reversible error and the case should be remanded with an order to allow the subpoena and an evidentiary hearing on the new trial request.

V. LEEDOM WAS DENEIED HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL FAIR AND IMPARTIAL JURY AND FIFTH AMENDMENT RIGHT TO DUE PROCESS WHEN THE COURT ERRONEOUSLY EXCLUDED THREE QUALIFIED JUROR VENIRE MEMBERS OVER OBJECTION OF DEFENDANT

Error Preservation. Leedom preserved error by objecting to the exclusion of three prospective jurors from the venire. (TT p. 49-52).

Standard of Review. The standard of review for constitutional violations is de novo. *State v. Finnel*, 515 N.W.2d 41, 43 (Iowa 1994).

Argument. During jury selection, eight prospective jurors indicated, generally, concerns they had about serving on the jury because of work or other personal scheduling conflicts. (TT, p. 49-52). The State urged dismissal of all eight. (TT, p. 50). Defense counsel requested a formal record. (TT, p. 49).

Defense counsel did not object to dismissal of five of these venire members because the record had reflected legitimate justification for excusing them because of a funeral, a scheduled doctor's appointment, a scheduled surgery, a long-planned and out-of-town vacation. (TT, p. 49-51) However, defense counsel objected to excusing of three of these prospective jurors because there was not record of any legitimate or specific reason for why they had a conflict, nor was there a record for why they should be excluded. (TT, p. 49-52) Regarding the idea of excusing prospective jurors, in general, defense counsel stated, "there's a discernible difference between someone who has, like, a doctor's appointment or scheduled surgery and a funeral or an out-of-town long-planned vacation versus those that just say they want to work. The presumption is that everybody wants to be at work or needs to be at work." (TT, p. 49) Regarding the first of these three prospective jurors, defense counsel stated, "She said she had a new job. I don't see that as any different than anyone who has an ongoing job, Your Honor, so we would object to the removal of her, at least at this time, without any more unique information about the unique

nature of her job or hardship, et cetera." (TT, p. 50) Regarding the second prospective juror, he indicated an apparent need for work travel on July 9.[2] Defense counsel stated, "Mr. Johnston indicated he had work Monday, July 9, so I don't – we would object to that as a reason or justification. *** Perhaps we could find out a little bit more about it before just summarily agreeing [to the excusing]. So at this time we would object without further information of the unique nature of the trip or the reasons, et cetera, because that's a work-related thing." (TT, p. 51). The third prospective juror indicated a perceived belief that it was important for her to be at work, because she apparently works with physical therapists. After objecting to the exclusion of the two prior jurors for the above-mentioned reasons, defense counsel stated the following regarding the third erroneously-excluded juror, "Same with Ms. Fisk. I don't know the circumstances of the therapy office or her – the indispensable nature. Without more information on the indispensable nature,

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[2] It should be noted that trial ended on July 2, one full week before this July 9 date on which this juror said it was important for him to work because of some vaguely referenced "travel."

we would indicate that there might be further information that could come from Ms. Fisk that may indicate the indispensable nature of her need for the community, et cetera. I don't think there's enough of a record to do that yet, so we object at this time, but maybe we can make a record." (TT, p. 51). Defense counsel then urged the Court to be able to question these prospective jurors individually. (TT, p. 51). In response to this, the State offered absolutely no argument, or showing on the record, which would support exclusion of these three prospective jurors. The State simply stood upon earlier urging stating, "I'm fine with dismissing all the people that had issues." (TT, p. 50) The Court then simply summarily dismissed all three of these prospective jurors without allowing defense counsel to question them, and without letting counsel even engage in any voir dire of these three jurors. (TT, p. 52). This violated Defendant's Sixth Amendment right to a fair trial and a fair jury, as well as his Fifth Amendment right to due process.

In *Payton v. State*, 572 S.W.2d 677 (Tex. Cr. App., 1978), the Texas Court of Criminal Appeals Stated, "The trial court should not excuse a venireman on grounds that do not

constitute an absolute disqualification. It was error to rule that Beck was absolutely disqualified under the law. *** We must determine whether this error is reversible." *Id.* at 678-679.(internal citation omitted). The Texas Court proceeded to address. "[T]he appropriate test in cases where the trial court erroneously excludes a qualified juror." *Id.* at 679. The Court stated,

> "Since the harm to the accused differs according to whether the erroneous ruling is an improper denial of his challenge for cause, or an improper exclusion of a qualified juror, the test for reversible error should also be different. *** What is the harmful effect upon the accused of an erroneous exclusion sua sponte or on challenge for cause by the State? If the prospective juror is not subject to disqualification, and if the defendant objects to the trial court's erroneous exclusion of the venireman, then the effect, from the perspective of the defendant, is the same as if the State had been given an extra peremptory challenge. On this reasoning, harm would be shown if the State exercised all of its peremptory challenges on other veniremen."

Id. at 680.

Subsequently in *Nichols v. State*, 754 S.W.2d 185 (Tex. Cr. App., 1988), the Texas Court of Criminal Appeals addressed a nearly similar issue where, "the trial court erred by excusing prospective juror Terry Hurzler on its own motion where such

juror was not subject to absolute disqualification." *Id.* at 192. In the *Nichols* case, the trial judge excused a prospective juror who said, "I'm one of two men in a two-man office here in Houston which is very busy at present. I'm also planning to be married on February the 14th." *Id.* at 192. Defense counsel in that case noted that trial was not scheduled to start until February 15, the day *after* the venireman's scheduled wedding, and thus objected to the court's excusing of that prospective juror. *Id.* at 192. The Texas Court of Criminal Appeals stated, "It is axiomatic that a trial judge should never *sua sponte* excuse a prospective juror unless the juror is absolutely disqualified from serving on a jury." *Id.* at 193. The Court further stated, "[T]he trial court erroneously excluded prospective juror Hurzeler on its own motion because the juror was so preoccupied by his wedding and work that he was incapable or unfit to serve. Such an exclusion does not constitute an absolute disqualification…" *Id.* at 193. "Voir dire plays a critical function in assuring the criminal defendant that his [s]ixth [a]mendment right to an impartial jury will be

honored." *Rosales–Lopez v. United States,* 451 U.S. 182, 188 (1981).

In the present case, the State used and exhausted all of its peremptory challenges, in removing additional prospective jurors, ***in addition to*** *the three jurors which the trial court erroneously excluded*. The Texas Court of Criminal Appeals has stated, "If the trial court erroneously excludes a qualified juror, then the State has in effect received the benefit of an additional peremptory strike." *Mize v. State*, 754 S.W.2d 732, 741 (TX App. 1988). The refusal of the trial court to allow defense counsel to engage voir dire questioning of these three prospective jurors before excusing them is a denial of Leedom's right to due process. Because the State of Iowa *exhausted all of its peremptory rights*, and because the trial court erroneously excused three otherwise qualified prospective jurors, *in addition to* the exhausted use of all of its other peremptory challenges, the *State of Iowa effectively received the unfair benefit of three additional peremptory strikes (meaning three more than the Defendant*). Harm has thus been shown, and reversal is required.

VI. THE CUMULATIVE EFFECT OF THE EVIDENTIARY AND CONSTITUTIONAL ERRORS VIOLATED LEEDOM'S RIGHT TO A FAIR TRIAL AND DUE PROCESS.

Error Preservation. This issue was raised in the Motion for New Trial which was denied. (App.253; 273).

Standard of Review. The appellate court consider the whole record to determine whether the cumulative effect of errors deprived a defendant of fair trial. *State v. Carey*, 165 N.W.2d 27, 36 (Iowa 1969); *State v. Hardy*, 492 N.W.2d 230, 236 (Iowa Ct. App. 1992).

Argument. The effect of the errors discussed above denied Leedom a fair and impartial trial. Stated *supra,* the State's case was weak, inadmissible testimony pervaded the trial, prosecutorial misconduct prejudiced Leedom, and the jury was improperly instructed by the prosecutor in closing argument. The cumulative and synergetic effect of the errors is far from harmless. A new trial must be granted. Iowa R. Crim. P. 2.24(2)(b)(6); *Carey*, 165 N.W.2d at 36 ("We find some merit in each of defendant's assigned errors. Perhaps none alone is sufficient to require a new trial but upon a careful consideration

of the whole record, we are convinced the cumulative effect has been to deprive defendant of a fair trial."); *Hardy*, 492 N.W.2d at 236 ("We do not believe the jurors in this case were as adept as a court at weighing the unfairly prejudicial aspects of each item of evidence in an isolated fashion and, thus, ignoring the cumulative and synergic effect. We believe Hardy's trial was injected with several doses of unfair prejudice which, on their own, may not have warranted a new trial, but when combined, denied Hardy a fair trial."); *see also Blum v. State*, 510 N.W.2d 175, 180 (Iowa Ct. App. 1993). The cumulative effect of the errors identified herein warrant a new trial.

CONCLUSION

For all the aforementioned reasons, the district court erred in denying Leedom a new trial. He prays this court reverse the district court, vacate his criminal conviction, and order a new trial be granted.

REQUEST FOR ORAL ARGUMENT

Counsel requests oral argument.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) (no more than 14,000 words); excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, statement of the issues, and certificates. This brief contains 13,767 words.

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P.6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in font size 14, Bookman Old Style.

___/S/ Brandon Brown_____

Dated: August 9, 2019
Brandon Brown