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 REPLY BRIEF

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ARGUMENT

This case involves an accusation against Leedom by his granddaughter, H.M. During trial, Leedom sought to show that H.M.'s accusations were not credible, by showing that she did not disclose the alleged abuse to her counsel, as she stated. Leedom's theory on H.M,'s therapist disclosure was that she concocted ts report to establish she made the disclosure prior to the roll-over accident, thus making her more believable. However, Leedom was denied access to H.M.'s counseling records as a source of impeachment and exculpatory evidence. Leedom contends the district court improperly denied his request for confidential counseling records and, as a result, denied him of his rights under the United States and Iowa Constitutions to present a defense, confront an accusatory witness, and to receive due process and a fundamentally fair trial. In its resistance, the State argues that Leedom did not make a proper showing of necessity to receive the records under Iowa Code § 622.10(4), asserting that impeachment evidence is not exculpatory and misstating the record as to whether the needed evidence would be contained within the sought files.

The State frames the issue in this case as protecting H.M.'s privacy out of respect for her status as a victim, and accuses Leedom of "perpetuating rape myths" in a case which ultimately comes down to the credibility of Leedom

and H.M.[1] However, there is a balance to be struck between protecting an alleged victim's rights and affording criminal defendants the full protections of the United States and Iowa Constitutions. Iowa Code § 622.10(4) strikes that balance by permitting disclosure of an alleged victim's confidential records in qualifying circumstances. The State's brief attempts to construe the balance embodied by § 622.10(4) out of existence, and for that reason, Leedom submits this reply.

To the extent that a reply is necessary on the remaining issues, Leedom reasserts the arguments and citations contained in his proof brief.

I. LEEDOM HAS MET THE STANDARD FOR DISCLOSURE UNDER IOWA CODE § 622.10(4)

Iowa Code § 622.10(4)(*a*)(2)(a) requires a defendant seeking access to confidential records to show:

> in good faith a reasonable probability that the information sought is likely to contain exculpatory information that is not available from any other source and for which there is a compelling need for the defendant to present a defense in the case.

Id. Leedom has made the required showing.

A. There is a reasonable probability that review of H.R.'s treatment records will contain the exculpatory information.

The "reasonable probability" prong was discussed extensively in Leedom's proof brief, at 24-28, and Leedom incorporates the arguments and

[1] *See* Appellant's Brief at 30-31 & n.1.

citations therein. However, it is necessary to respond to the State's assertion that "[t]he facts indicate H.M.'s therapist's records will not likely contain exculpatory evidence." *See* Appellant's br. at 27-29.

"Reasonable probability" has been defined by the Iowa Supreme Court to mean "a 'substantial,' not 'just conceivable' likelihood." *State v. Thompson*, 836 N.W.2d 470, 484 (Iowa 2013) (citation omitted). "Reasonable probability" is less than a "preponderance of the evidence" – Leedom is not required to show that it was more likely than not that the sought evidence – a lack of disclosure to her counsel – would be contained within H.M.'s treatment files, only that there was a substantial chance.

The State argues that H.M.'s records would not necessarily include disclosure of abuse, or that the absence of a disclosure would not be relevant, based on the testimony of a therapist that did not treat H.M., and who testified to having different practices from H.M.'s treating therapist, Jessica Schmidt. Schmidt testified that she documented what was shared in therapy, *including whether a client reported sexual abuse*. May 7, 2018 Tr. at 33 ln. 1-7. She further testified she is a mandatory reporter for abused children, which she considers to be anyone under the age of 18, *id.* at 31 ln. 22-25 and 32 ln. 1-2, and that she would not make a "pact" with a minor client to keep the abuse secret. *Id.* at 42 ln. 20-25 and 43 ln. 1-5.

H.M. testified during deposition that she told Schmidt about the abuse. Schmidt essentially testified that if such a claim was made it would be contained in her treatment notes and that she would have reported it to DHS. No DHS investigation took place. This evidence logically supports an inference that H.M. did not tell her therapist about the abuse. This impeachment evidence is critical to Leedom's defense, and the above testimony constitutes a "substantial likelihood" that the record will treatment records will contain the sought-after evidence. The evidence to the contrary cited by the State – from a therapist that did not work with Schmidt and did not treat H.M. – does not outweigh the remaining evidence in favor of disclosure. The State's argument to the contrary constitutes an attempt to raise the defendant's burden to uncover exculpatory information.

B. The information sought is, in fact, exculpatory.

The State next argues that Iowa Code § 622.10(4)(*a*)(2)(a) does not permit disclosure of confidential records solely for impeachment purposes, and that impeachment is not always exculpatory.[2] *See* Appellant's Br. at 29-36. Both of these positions are contrary to law and to the facts of this case.

[2] The State does not seriously argue that the fact that H.M. was possibly dishonest does not undermine her allegations against Leedom, or that impeachment would not be exculpatory in this case.

First, as the State admits, the Iowa Court of Appeals has defined the term exculpatory broadly. In *State v. Retterath*, No. 16-1710, 2017 WL 6516729 (Iowa Ct. App. Dec. 20, 2017), the Iowa Court of Appeals explicitly rejected the State's argument distinguishing between impeachment and exculpatory evidence:

> Legislative drafters used the term "exculpatory" repeatedly in section 622.10(4) but did not define it. Exculpatory evidence tends to "establish a criminal defendant's innocence." *Exculpatory Evidence*, Black's Law Dictionary (10th ed. 2014).
>
> On appeal, Retterath argues that in a "he said/he said" case like this, impeachment evidence is the only exculpatory evidence available. In response, the State cautions that we must construe section 622.10(4) with the realization that the legislative purpose was to supersede the test from *Cashen*, 789 N.W.2d at 417, with "a protocol that restores protection for the confidentiality of counseling records," *see Thompson*, 836 N.W.2d at 841. Under the State's logic, "If impeachment evidence qualified as 'exculpatory' under section 622.10(4), then every conceivable mental health record could be discoverable," and the legislature's aim to protect confidentiality would be undermined.
>
> We disagree with the State's narrow reading of "exculpatory." In the context of discovery for *Brady* purposes, the United States Supreme Court has rejected any distinction between "impeachment" evidence and "exculpatory" evidence. *See United States v. Bagley*, 473 U.S. 667, 676 (1985). Likewise in *State v. Edouard*, our supreme court remanded for an in camera review of a witness's counseling records because information in the records "could have significantly undermined [that witness's] testimony." 854 N.W.2d 421, 442 (Iowa 2014), *overruled on other grounds by Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699 (Iowa 2016); *see also Neiderbach*, 837 N.W.2d at 226 (stating "all that is required is some plausible theory founded in demonstrable fact that suggests the information in the mental health records might well prove helpful to the defense").

> Retterath established that Sellers and J.R. each had a history of psychiatric conditions that could impact his reliability as a witness. The defense made a plausible showing (1) exculpatory evidence could be unearthed in their mental health records and (2) the critical information was not available from another source. *See Neiderbach*, 837 N.W.2d at 220.

Id. at *11.

The State argues that *Retterath* was wrongly decided in light of the statutory history of § 622.10(4), and the fact that this court in *Thomas* "relied on [three] cases that hold impeachment evidence is not sufficient to justify disclosure." *See* Appellant's Br. at 32-33 (citing *Goldsmith v. State*, 651 N.W.2d 866 (Md. Ct. App. 1995); *People v. Stanaway*, 521 N.W.2d 557 (Mich. 1994); *State v. Green*, 646 N.W.2d 298 (Wis. 2002)). However, none of the cases cited by the State actually hold that impeachment evidence *generally* cannot be used to compel disclosure of confidential record.

In *Goldsmith*, the defendant sought *pre-trial* production of the victim's privileged files, before the victim had given any testimony. The defendant "did not establish that discovery of the records would likely lead to relevant information," rather he baldly asserted that he needed "some latitude in obtaining information that may enable him to confront his accuser in some meaningful way." 651 A.2d at 874. Under these circumstances, "[t]here was *no* showing of any likelihood of obtaining information relevant to the defense in the records." *Id.* Thus, *Goldsmith* is distinguishable on the facts, and

Goldsmith does not stand for the proposition that impeachment evidence is not exculpatory evidence. Unlike the defendant in *Goldsmith*, Leedom is not engaging in a fishing expedition for *anything* to impeach H.M.'s credibility, rather he seeks targeted information – that H.M. either did or did not report the abuse to her therapist.

Stanaway is similarly distinguishable from Leedom's case, because the defendant in *Stanaway*, like the defendant in *Goldsmith*, was engaging in an obvious fishing expedition: "The defendant argued that the records might contain inconsistent statements or might lead to exculpatory evidence, but admitted he had no basis for a good-faith belief that it was probable that such information was to be found." 521 N.W.2d at 562. Further, each of the Michigan statutes at issue in *Stanaway* were distinguishable from Iowa Code § 622.10(4) in a critical respect – they did not include any comparable exceptions permitting the defendant to access the evidence, and some of the records had already been destroyed pursuant to the statutes.

Finally, *Green* simply does not go as far as the State asserts. *Green* held that the defendant did not make a sufficient showing that the privileged records were likely to contain contradictory statements, it did not hold that impeachment evidence would never be sufficient to justify disclosure. ("At the pretrial hearing, Green merely argued that N.W.'s counseling records

could contain statements from N.W. that were inconsistent with her statements provided to the police and to social services. The mere assertion, however, that the sexual assault was discussed during counseling and that the counseling records may contain statements that are inconsistent with other reports is insufficient to compel an in camera review."). 646 N.W.2d at 310-11. The test in *Green* is ultimately very similar to the test under Iowa Code § 622.10(4): "the preliminary showing for an in camera review requires a defendant to set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant." *Id.* at 310.

Ultimately, the State's argument depends not on the law, but on a finding that impeachment evidence is not exculpatory. In *State v. Neiderbach*, 837 N.W.2d 180 (Iowa 2013), decided the same day as *Thomas*, this court held that where "credibility is a central issue in the case," in camera review of the co-defendant's mental health records was essential to raise doubt as to the state's case. *Id.* at 197-98. Implicit in this holding is the fact that impeachment evidence *is* exculpatory, particularly in cases with little or no physical evidence. *Id.* (requiring in camera review under § 622.10(4)). This is such a case: there is no physical evidence, and the jury must decide guilt or innocence

by making a credibility determination between H.M. and Leedom. As a result, and in this case in particular, impeachment evidence is exculpatory. The district court's ruling and the State's interpretation of § 622.10(4) have the potential to deprive the jury of essential information related to that finding.

C. Denying Leedom access to H.M.'s records consistent with Iowa Code § 622.10(4) results in constitutional harm.

The State argues that the wrong caused by denying Leedom access to H.M.'s records does not have a constitutional dimension because there is no constitutional basis for pre-trial discovery in criminal cases. *See, e.g. State v. Russell*, 897 N.W.2d 717, 733 (Iowa 2017). However, the harm in this case was not limited to a discovery dispute.

Leedom's Confrontation Rights under the Sixth Amendment to the United States Constitution and Article I § 10 of the Iowa Constitution were violated by the limitations on his ability to impeach H.M. As the United States Supreme Court stated in *Ritchie*, "[t]he constitutional error . . . was *not* that [the State] made this information confidential; it was that the defendant was denied the right 'to expose to the jury facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" 480 U.S. at 54 (citing *Davis v. Alaska*, 415 U.S. 308, 318 (1974)). To make any inquiries as to whether H.M. had falsely accused Leedom effective, it was necessary to demonstrate not only her motive to lie, but the fact that she had

actually lied about reporting the abuse. Prohibiting Leedom from accessing the necessary documents to impeach H.M. limited his right of effective cross-examination under *Ritchie* and *Davis.*

Further, as this Court found in *State v. Cashen*, 789 N.W.2d 400 (Iowa 2010), *superseded by statute* Iowa Code § 622.10(4)(a)(2), withholding privileged information from cross examination taints the fundamental fairness of the proceedings in violation of the requirements of the Sixth Amendment.

> The purpose of providing a defendant with the privileged records of a victim is to lessen the chance of wrongfully convicting an innocent person. Society shares this interest. In fact, the Federal and Iowa Constitutions include numerous safeguards to prevent the wrongful conviction of the innocent. *See, e.g. U.S. Const. amend. VI* (guaranteeing an accused the right to a speedy and public trial by an impartial jury, to be informed of the accusations against him or her, to confront witnesses, to have compulsory process, and to have the assistance of counsel in a criminal prosecution); Iowa Const. art. I., § 10 (same).

Id. at 408.

This Court's goal in *Cashen* was "to articulate a standard that judges can consistently apply to identify those circumstances when the defendant's right to a fair trial outweighs the victim's right to privacy." *Id.* Although the *test* in *Cashen* was replaced by § 622.10(4)(a)(2), the fact that the legislature included exceptions to the otherwise absolute privilege against disclosing confidential records in criminal cases highlights the importance of these

records to a fair trial under the United States and Iowa Constitutions. *See Ritchie*, 480 U.S. at 51-52 (recognizing that impeachment evidence like that at issue in this case and in *Ritchie* "can make the difference between conviction and acquittal," (citation omitted)). Here, Leedom was not given the opportunity to uncover evidence necessary for a fair trial, in spite of complying with the requirements of § 622.10(4).

D. Conclusion

Leedom is not asking this Court to expand Iowa Code § 622.10(4) beyond its bounds, or to recognize broader constitutional rights than those guaranteed in *Ritchie*. 480 U.S. 39. The primary error in the District Court's ruling below is in how it applied the facts of this case to the statute, and the related refusal to hold an *in camera* review of the requested records. The conclusion reached by the District Court was contrary to this Court's ruling in *Neiderbach*. 837 N.W.2d at 220 ("[A]ll that is required is some plausible theory founded in demonstrable fact that suggests the information in the mental health records might well prove helpful to the defense."). This Court should reverse the District Court's ruling denying Leedom's motion to an *in camera* review of H.M.'s mental health records and remand the case for proceedings consistent with Iowa Code § 622.10(4)(a)(2) including but not limited to a new trial.

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CERTIFICATE OF FILING

I hereby certify that I e-filed the Defendant-Appellant's Final Reply Brief with the Electronic Document Management System with the Appellate Court on August 9, 2019. The following individuals will be served by Electronic Document Management System.

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