ELECTRONICALLY FILED AUG 08, 2019 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-1947

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICHARD WAYNE LEEDOM,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POWESHIEK COUNTY
THE HONORABLE SHAWN R. SHOWERS, JUDGE (TRIAL)
THE HONORABLE CRYSTAL S. CRONK (DISCOVERY)

# APPELLEE'S BRIEF

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Authorities

*Ake v. Oklahoma*, 470 U.S. 68 (1985)
*Brady v. Maryland*, 373 U.S. 83 (1963)
*Clay v. Woodbury Cty., Iowa*, 965 F.Supp.2d 1055 (N.D. 2013)
*Montana v. Egelhoff*, 518 U.S. 37 (1996)
*Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)
*United States v. Bagley*, 473 U.S. 667 (1985)
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*Burns v. City of Waterloo*, 187 Iowa 922, 173 N.W. 16 (1919)
*Commonwealth v. Jeter*, 416 A.2d 1100 (Pa. Super. 1979)
*Commonwealth v. Mitchell*, 831 N.E.2d 890 (Mass. 2005)
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*Meier v. Senecaut*, 641 N.W.2d 532 (Iowa 2002)
*Meinders v. Dunkerton Cmty. Sch. Dist.*, 645 N.W.2d 632 (Iowa 2002)
*Miller v. Continental Ins. Co.*, 392 N.W.2d 500 (Iowa 1986)
*People v. Stanaway*, 521 N.W.2d 557 (Mich. 1994)
*Squealer Feeds v. Pickering*, 530 N.W.2d 678 (Iowa 1995)
*Staff Mgmt. v. Jimenez*, 839 N.W.2d 640 (Iowa 2013)
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*State v. Cashen*, 789 N.W.2d 400 (Iowa 2013)
*State v. Clark*, 814 N.W.2d 551 (Iowa 2012)
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*State v. DiPrete*, 698 A.2d 223 (R.I. 1997)
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*State v. Effler*, 769 N.W.2d 880 (Iowa 2009)
*State v. Green*, 646 N.W.2d 298 (Wis. 2002)
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*State v. Neiderbach*, 837 N.W.2d 180 (Iowa 2013)
*State v. Peterson*, 219 N.W.2d 665 (Iowa 1974)
*State v. Piper*, 663 N.W.2d 894 (Iowa 2003)
*State v. Randle*, 484 N.W.2d 220 (Iowa Ct. App. 1992)
*State v. Retterath*, S.Ct. No. 16-1710, 2017 WL 6516729 (Iowa Ct. App. Dec. 20, 2017)
*State v. Russell*, 897 N.W.2d 717 (Iowa 2017)
*State v. Smith*, 522 N.W.2d 591 (Iowa 1994)
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Iowa Supreme Court Supervisory Order ("In the Matter of the Prohibition Against *Ex Parte* Communications) (filed Mar. 27, 2018)
Black's Law Dictionary p. 566 (6th ed. 1990)
Caroline K. Bettis, *Adding Insult to Injury: How the* Cashen *Protocol Fails to Properly Balance Competing Constitutional Interests of Iowans*, 60 Drake L.Rev. 1151 (2012)
Deidre M. Smith, *An Uncertain Privilege: Implied Waiver and the Evisceration of the Psychotherapist-Patient Privilege in Federal Courts*, 58 DePaul L. Rev. 79 (Fall 2008)
Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 86 Or. L. Rev. 1 (2007)
William Safire, *On Language; He-Said, She-Said*, The New York Times Magazine (April 1, 1998), https://www.nytimes.com/1998/04/12/magazine/on-language-he-said-she-said.html
Tyler J. Buller, *State v. Smith Perpetuates Rape Myths and Should Be Formally Disavowed*, 102 IOWA L. REV. ONLINE 185 (2017)
Kimberly J. Winbush, *Right of Indigent Defendant In State Criminal Prosecution to an* Ex Parte In Camera *Hearing on Request for State—Funded Expert Witness*, 83 A.L.R.5th 541 (2000)

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Authorities

*Montana v. Egelhoff*, 518 U.S. 37 (1996)
*Taylor v. Illinois*, 484 U.S. 400 (Iowa 1988)
*Chung v. Legacy Corp.*, 548 N.W.2d 147 (Iowa 1996)
*Johnson v. Interstate Power Co.*, 481 N.W.2d 310 (Iowa 1992)
*Quad City Bank & Trust v. Jim Kircher & Assoc., P.C.*, 804 N.W.2d 83 (Iowa 2011)
*State v. Alberts*, 722 N.W.2d 402 (Iowa 2006)
*State v. Brown*, 569 N.W.2d 113 (Iowa 1997)
*State v. Clark*, 814 N.W.2d 551 (Iowa 2012)
*State v. Daly*, 623 N.W.2d 799 (Iowa 2001)
*State v. Dudley*, 856 N.W.2d 668 (Iowa 2014)
*State v. Griffey*, 457 N.W.2d 13 (Iowa 1990)
*State v. Langley*, 265 N.W.2d 718 (Iowa 1978)
*State v. Mahoney*, 515 N.W.2d 47 (Iowa 1994)
*State v. Miller*, 229 N.W.2d 762 (Iowa 1975)
*State v. Myers*, 382 N.W.2d 91 (Iowa 1986)
*Twyford v. Weber*, 220 N.W.2d 919 (Iowa 1974)
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Authorities

*Lamasters v. State*, 821 N.W.2d 856 (Iowa 2012)
*Leaf v. Goodyear Tire & Rubber*, 590 N.W.2d 525 (Iowa 1999)
*Meier v. Senecaut*, 641 N.W.2d 532 (Iowa 2002)

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Authorities

*Montana v. Egelhoff*, 518 U.S. 37 (1996)
*United States v. Newman*, 476 F.2d 733 (3rd Cir. 1973)
*United States v. Nixon*, 418 U.S. 683 (1974)
*Lamasters v. State*, 821 N.W.2d 856 (Iowa 2012)
*State v. Peterson*, 532 N.W.2d 813 (Iowa Ct. App. 1995)
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Authorities

*Butler v. State*, 830 S.W.2d 125 (Tex. Ct. Crim. App. 1992)
*Harris v. State*, 784 S.W.2d 5 (Tex. Ct. Crim. App. 1989)
*Nichols v. State*, 754 S.W.2d 185 (Tex. Ct. Crim. App. 1988)
*Payton v. State*, 572 S.W.2d 677 (Tex. Ct. Crim. App. 1978)
*State v. Chidester*, 570 N.W.2d 78 (Iowa 1997)
*State v. Critelli*, 237 Iowa 1271, 24 N.W.2d 113 (Iowa 1946)
*State v. Hobson*, 284 N.W.2d 239 (Iowa 1979)
*State v. Ostrander*, 18 Iowa 435 (1865)
Iowa Code § 607A.6
Vernon Ann. Texas C.C.P. Art. 35.16(2), (3), (4) Art. 35.19
Iowa R. App. P. 6.903(3)
Iowa R. Crim. P. 2.18(3)

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Authorities

*Chatman v. State*, 334 N.E.2d 673 (Ind. 1975)
*Keefe v. Bernard*, 774 N.W.2d 663 (Iowa 2009)
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*State v. Blum*, 510 N.W.2d 175 (Iowa 1993)
*State v. Brewer*, 247 N.W.2d 205 (Iowa 1976)
*State v. Burkett*, 357 N.W.2d 632 (Iowa 1984)
*State v. Carey*, 165 N.W.2d 27 (Iowa 1969)
*State v. Effler*, 769 N.W.2d 880 (Iowa 2009)
*State v. Hardy*, 492 N.W.2d 230 (Iowa Ct. App. 1992)
*State v. Wallis*, 439 N.W.2d 590 (Wis. 1989)
U.S. Const. amend. VI
Iowa Const. art. I, § 10
Iowa R. App. P. 6.903(3)
Iowa R. Evid. 1.503(3)
Erwin S. Barbre, *Prosecuting Attorney as a Witness in a Criminal Case*, 54 A.L.R.3d 100 (orig. 1973)

## ROUTING STATEMENT

The Supreme Court should retain this case. Iowa R. App. P. 6.1101(2).

## STATEMENT OF THE CASE

### Nature of the Case

Richard Leedom was convicted of two counts of second-degree sexual abuse, a Class B felony, and a single count of indecent contact with a child, an aggravated misdemeanor. *See* Iowa Code §§ 709.1, 709.3(1)(*b*), 709.12(1)(*b*), 903B.1, 903B.2. He asserts six claims: that the district court improperly denied his motion to release privileged counseling records, that it erred to refuse to let him call the victim's therapist, that the prosecutor committed misconduct, that the court should have allowed him to call the prosecutor to testify, that the district court was wrong to dismiss three jurors who had work obligations, and that the cumulative effect of these errors denied him a fair trial.

The Honorable Crystal Cronk presided over the defendant's motion for release of privileged records. The Honorable Shawn Showers presided over the trial and posttrial motions.

**Course of Proceedings**

The State accepts the defendant's statement of the procedural history of the case. Iowa R. App. P. 6.903(3).

**Facts**

Richard Leedom is H.M.'s grandfather. Tr. (June 27, 2018) p. 161, l. 23-p. 162, l. 3. She was born in 2001. *Id.* p. 162, ll. 6-7. H.M. and her younger brother would often spend the night with Leedom at his home at Lake Ponderosa. *Id.* p. 162, l. 8-p. 163, l. 23, p. 163, ll. 2-23.

When H.M. was "9 or 10" years old, she was sleeping in Leedom's bed with him. *Id.* p. 174, l. 8-p. 175, l. 3, p. 226, ll. 4-6. She woke with her pajamas unzipped and Leedom's finger running from her vagina to the small of her back. *Id.* p. 174, l. 8-p. 175, l. 3. He would lick his finger and repeat. *Id.* After a time, she went to the bathroom, trying there to clean herself. *Id.*

"And then I went back into the bed, because I didn't know what else to do." *Id.*

He "kept calling me 'Susan,'" the name of his girlfriend, later wife. *Id.* p. 162, ll. 22-23, p. 169, ll. 23-24, p. 175, ll. 1-4.

Other people were sleeping outside the bedroom. *Id.* p. 177, ll. 5-6. (Boys did not sleep in Leedom's bed or in his room, that H.M. could recall. *Id.* p. 176, l. 25-p. 177, l. 4.)

"Why didn't you yell or scream?" *Id.* p. 177, l. 7.

"I mean, it wasn't someone that I didn't know. It was my grandpa. I didn't know what to do." *Id.* p. 177, ll. 8-9.

She did tell her mother, Teah. *Id.* p. 177, ll. 12-13. Teah said it would stop but did not. *Id.* p. 177, ll. 16-17.

The next time it occurred, H.M. was sleeping on the outside of the bed near a cabinet, Leedom was in the middle, and Susan was against the wall. *Id.* p. 177, l. 23-p. 178, l. 4.

"And this time I was facing him, and my pants were down, and his hand – I don't even know what to use to describe it. He was just playing with me." *Id.* p. 178, ll. 2-9.

As before, she went to the bathroom to clean herself. *Id.* 178, ll. 15-18. But, instead of returning to bed, she laid on the couch. *Id.*

"And then Papa came out and asked if I was okay what [sic] happened." *Id.*

Asked later why she did not tell Susan, H.M. said

> I don't know. It didn't even really cross my mind at all. Again, it was Papa. I didn't really

> know what to do or if it was wrong or – I don't know. My mom told me it was okay the first time, so ...

*Id.* p. 179, ll. 14-19.

When H.M. was 11 or 12 years old, she was laying on cushions on the floor next to Leedom's bed. *Id.* p. 179, ll. 22-24. (She refused to sleep in the bed. *Id.* p. 180, ll. 1-2.). While appearing to pray, Leedom reached over, rubbed and squeezed her buttocks over her clothing. *Id.* p. 180, ll. 15-23. He jumped when she moved. *Id.* p. 181, ll. 6-10.

Asked why she did not wake Susan, who was in the bed, H.M. said, "It's Papa. It's my grandpa." *Id.* p. 181, ll. 15-16.

H.M. disclosed the abuse in April 2016 as part of a DHS investigation into claims that Teah had been violent with her. *Id.* p. 170, l. 15-p. 171, l. 11, p. 183, ll. 2-7. (Teah admitted it. Tr. (June 29, 2018) p. 33, l. 19-p. 34, l. 13.)

Leedom claimed H.M. falsely accused him to improve her chances of living with her father, Rodney, who was more permissive. *See, e.g.*, *id.* p. 146, ll. 6-15, p. 221, l. 1-p. 223, l. 17, p. 241, ll. 14-18. Leedom cross-examined H.M. over a February 2016 vehicle rollover accident. *Id.* p. 212, l. 1-p. 213, l. 25. In a deposition, she minimized

the extent of the accident and the drive's purpose. *Id.* But she corrected her testimony later in the deposition. *Id.* p. 186, ll. 6-8; Tr. (June 28, 2018) p. 58, l. 17-p. 59, l. 20. And she had correctly informed DHS of its details shortly after the event. Tr. (June 28, 2018) p. 58, l. 21-p. 59, l. 244. She lied in the deposition because defense counsel was intimidating her. Tr. (June 27, 2018) p. 238, l. 15-p. 239, l. 24; *see*, *e.g.*, Ex. 2 (filed June 28, 2018) pp. 22-24, 97-98, 100, 197, 199 (containing H.M.'s pleas that defense counsel stop yelling at her, the prosecutor's request for same, and defense counsel's response that he was not.)

Colleen Brazil, a forensic interview program manager for Project Harmony in Omaha and an expert for the State, testified that people often harbor misconceptions about child sexual abuse. Tr. (June 28, 2018) p. 75, l. 24-p. 76, l. 9, p. 76, l. 21-p. 77, l. 18. How children disclose abuse, for example, is more commonly a delayed process, often taking weeks, months, or years. *Id.* p. 77, l. 19-p. 78, l. 16. Reasons for delay include that the perpetrator is a family member, the abuse is presented as a "special time," the child is threatened, or the child is worried about getting in trouble or not being believed. *Id.* p. 78, ll. 17-25, p. 79, ll. 1-12, p. 81, ll. 12-17.

Sometimes a delay occurs because other people were nearby at the time, leading children to believe the abuse was permitted or others knew of it. *Id.* p. 79, l. 13-p. 80, l. 11. Part of a grooming process may include assertions that others know and approve. *Id.*

Children "don't like what's happening, but they don't know what to do about it, because they're children." *Id.* p. 82, ll. 1-10.

Children lack the capacity to say when or how often something has happened. *Id.* p. 83, l. 12-p. 84, l. 25.

Once disclosure does occur, it is often not an event, but a process. *Id.* p. 85, ll. 6-19. They may reveal a portion to see if they are believed, supported, or punished. *Id.* Sometimes a child makes an accidental disclosure. *Id.* p. 86, ll. 5-14. It is not uncommon for children to give additional details after an initial disclosure. *Id.* p. 86, ll. 15-19.

Brazil made no findings or conclusions in this case. *Id.* p. 88, ll. 1-10, p. 91, l. 15-p. 92, l. 2. She did not know H.M. *Id.* p. 88, ll. 11-13. Neither did she know the facts or circumstances. *Id.* She was aware that she was prohibited from giving an opinion on whether abuse occurred in this case. *Id.* p. 91, l. 15-p. 92, l. 2.

Leedom called H.M.'s friend, B.G., to testify about the circumstances of the rollover accident. She testified that Rodney was drinking and driving, scaring her. *Id.* p. 106, l. 6-p. 107, l. 23. H.M. and Rodney left, returning after the truck went into a ravine and rolled over. *Id.* p. 109, l. 6-p. 110, l. 3, p. 112, ll. 18-23, p. 113, ll. 14-16.

B.G. did not think H.M. told her to lie about beer and the event. *Id.* p. 118, l. 25-p. 119, l. 7. On reviewing her deposition, B.G. thought it more likely that H.M. had told her to lie to DHS about the drinking. Tr. (June 29, 2018) p. 71, ll. 22-25. B.G. did recall that H.M. had told her in the past about Leedom touching her. Tr. (June 28, 2018) p. 120, ll. 18-20.

On rebuttal, the State called Meagan See, a child protection worker with DHS. *Id.* p. 32, l. 21-p. 33, l. 2. See was involved with an investigation following the February vehicle accident. *Id.* p. 33, ll. 3-16. And, she was involved in April and May investigations concerning allegations that Teah was violent with H.M. *Id.* p. 33, l. 19-p. 34, l. 15. Teah admitted she was. *Id.*

The jury convicted Leedom on all three counts. *Id.* p. 147, ll. 1-20; Forms of Verdict pp. 1-3; App. 250-52.

## ARGUMENT

### I. The district court properly declined to divulge the victim's confidential medical records.

#### Preservation of Error

The district court rulings preserve whether: 1) the district court abused its discretion to refuse to disclose the victim's counseling records, 2) Leedom was entitled to an *ex parte* hearing, and 3) the victim waived confidentiality of mental health records. Ruling (filed Apr. 3, 2018); Ruling (filed May 11, 2018); App. 58-61, 220-23; *Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012); *see Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (ruling on merits required to preserve error). Briefing does not preserve error. *Lamasters*, 821 N.W.2d at 863.

#### Standard of Review

The State accepts the defendant's statement of the nature of review. Iowa R. App. P. 6.903(3).

#### Merits

Leedom contended the victim fabricated allegations against him so that she could live with her father. The district court properly determined that Leedom had not shown a reasonable likelihood that H.M.'s therapist's records would contain exculpatory evidence nor

shown a waiver of confidentiality. Neither was an *ex parte* hearing appropriate.

### A. The facts indicate H.M.'s therapist's records will not likely contain exculpatory evidence.

In a defense deposition, H.M. was asked "who is the first person that you told about this other than your claim that you told your mom, so someone who wasn't your mom?" Mot. Rel. Prvd Records Ex. A, p. 46; App. 40. "I did tell Jessica [Schmidt]," H.M. replied. *Id.*; App. 40. She said she told Schmidt that she had already informed someone else so that Schmidt need not report it. *Id.* pp. 75-77; App. 41-42. H.M. believed this occurred in August of 2015. *Id.*; *see also* Tr. (June 28, 2018) p. 224, l. 1-p. 225, l. 10 (H.M. testifying under cross-examination that she told an adult of the abuse in 2015 when she was a freshman).

The State called Dr. Veronica Lestina, a clinical psychologist. She opined that medical records would not necessarily show the patient disclosed abuse. Tr. (Mar. 1, 2018) p. 27, l.13-p. 29, l. 17. If a child twelve or less years of age discloses abuse, then she would be required to report it. *Id.* p. 17, ll. 12-20. If the child was over twelve, reporting was discretionary. *Id.* Whether to report abuse depended

the level of detail the patient provided or if they had already reported it. *Id*. p. 18, l. 8-p. 19, l. 12.

A therapist's records would not necessarily include disclosure of abuse. *Id*. p. 24, l. 7-p. 25, l. 10. In initial sessions, depending on the focus of the treatment, a disclosure may be documented vaguely or not at all. *Id*. So, a review of a therapist's records would not be conclusive of whether the patient disclosed abuse. *Id*. p. 27, ll. 13-17, p. 29, l. 17. (Lestina would make a note if a twelve- to sixteen-year-old disclosed that she was abused by a person responsible for her care. *Id*. p. 35, l. 16-p. 36, l. 16, p. 38, ll. 12-22.)

The Court denied the motion and Leedom sought reconsideration. Ruling re: Mot. Order Rel. (filed Apr. 3, 2018); Rule 1.904(2) Mot. (filed Apr. 13, 2018); App. 58-61, 62-75. Leedom asked for an *ex parte* hearing. *Id*.; App. 58-61, 62-75. He argued that H.M. waived confidentiality when she "voluntarily gave up that she told this therapist, Jessica Schmidt." Tr. (May 7, 2018) p. 18, ll. 9-19, p. 19, ll. 1-5.

Schmidt testified that she documents what is shared in therapy and whether she made a report to the State. *Id*. p. 33, ll. 7-8. In the absence of any other information, she would not make a "pact" to

refrain from making a report. *Id.* p. 41, ll. 18-21, p. 42, l. 20-p. 43, l. 5. But, if an investigation had already begun or the matter had already been "taken care of," she might not make a report. *Id.* p. 38, l. 20-p. 39, l. 4. "[I]t just kind of depends on what is happening in the session at that moment." *Id.*

Leedom posits that "[s]ince no DHA investigation occurred, it is axiomatic [that] H.M. did not report this information as she testified." Appellant's Pr. Br. p. 27. To the contrary, Drs. Lestina and Schmidt's testimony reveals at least four reasons why. First, H.M. was over twelve when she disclosed the abuse, so reporting was discretionary. Second, H.M. indicated that she had "already told somebody" so Schmidt would not make a report. Mot. Rel. (filed Jan. 4, 2018), pp. 76-77; App. 42-43. Third, if the disclosure lacked detail or the treatment program had another focus, a therapist may not document or report abuse. Finally, there is the possibility that H.M. made a detailed disclosure and Schmidt failed to report it.

### B. The Court correctly found Iowa Code § 622.10(4)(*a*) prohibits disclosure.

In criminal prosecutions, the Code has established an "absolute" privilege of confidentiality for mental health treatment.

Iowa Code § 622.10(4)(*a*). The Code permits breach of the privilege when the defendant,

> files a motion demonstrating 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.* § 622.10(4)(*a*)(2).

The Court of Appeals has defined the term "'exculpatory' broadly." *State v. Barrett*, S.Ct. No. 17-1814, 2018 WL 6132275, *3 (Iowa Ct. App. Nov. 21, 2018); *State v. Retterath*, S.Ct. No. 16-1710, 2017 WL 6516729, *11 (Iowa Ct. App. Dec. 20, 2017). It has done away with "any distinction between impeachment evidence and exculpatory evidence." *Retterath*, S.Ct. No. 16-1710, 2017 WL 6516729 at *11. Leedom's appeal embraces this, proposing that impeachment evidence is especially important in "he-said-she-said"[1]

[1] The phrase "he said, she said," implies the truth is undiscoverable. William Safire, *On Language; He-Said, She-Said*, THE NEW YORK TIMES MAGAZINE (April 1, 1998), https://www.nytimes.com/1998/04/12/magazine/on-language-he-said-she-said.html. It also harks to Lord Hale's chestnut that rape is a charge easily made and hard to disprove, playing on a myth that rape victims—females, in particular—cannot be trusted. *See* State v. Smith *Perpetuates Rape Myths and Should Be Formally Disavowed*,

cases. Appellant's Pr. Br. p. 27. Section 622.10(4)(*a*)(2) does not support doing away with the distinction between exculpatory and impeachment evidence.

Before Iowa Code section 622.10(4)(*a*) there was *State v. Cashen*, 789 N.W.2d 400, 408 (Iowa 2013). *Cashen* established, among other things, that a defendant could subpoena a witness' confidential documents upon a "reasonable basis to believe the records are likely to contain exculpatory evidence tending to create a reasonable doubt as to the defendant's guilt." *Cashen*, 789 N.W.2d at 407. Relying on *Pennsylvania v. Ritchie*, *Cashen* held, "[a] defendant need only advance some good faith basis indicating how the records are relevant to the defendant's innocence." *Id.* (citing U.S. Const. amend. VI; Iowa Const. art. I, § 10; *Pennsylvania v. Ritchie*, 480 U.S. 39, 59-60 (1987)).

But *Cashen* outran *Ritchie*. *Compare Cashen*, 789 N.W.2d at 409 (if records are produced, defense counsel must be permitted to review them because an "*in camera* review … by the court is insufficient … only the attorneys … know what they are looking for")

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Tyler J. Buller, 102 IOWA L. REV. ONLINE 185, 196, n.96 (2017), https://ilr.law.uiowa.edu/assets/Uploads/ILR-102-Buller-revised.pdf

*with Ritchie*, 480 U.S. at 59-60 ("There is no general constitutional right to discovery in a criminal case" and a defendant is not entitled to "the benefits of an 'advocate's eye'" when reviewing documents). *Cashen* also generated a dissent forecasting that the only way victims could secure confidentiality would be to not report abuse. *Cashen*, 789 N.W.2d at 417 (Cady, C.J., dissenting). And, it sparked academic criticism of its adoption of "one of the weakest tests known to the law." *Id.*; Caroline K. Bettis, Note, *Adding Insult to Injury: How the* Cashen *Protocol Fails to Properly Balance Competing Constitutional Interests of Iowans*, 60 Drake L.Rev. 1151 (2012).

The Iowa Legislature responded with Iowa Code section 622.10(4)(*a*). *State v. Dahl*, 874 N.W.2d 348, 351 (Iowa 2016). It was intended to "[restore] protection for the confidentiality of counseling records while also protecting the due process rights of defendants." *State v. Thompson*, 836 N.W.2d 470, 481 (Iowa 2013).

The *Thompson* court left analysis of "compelling need" to the factual record of each case. *Id.* at 484-85. But, in upholding section 622.10(4)(*a*), the Court relied on several cases that hold impeachment evidence is not sufficient to justify disclosure. *Id.* at 485 (citing *Goldsmith v. State*, 651 N.W.2d 866, 876 (Md. Ct. App.

1995) (holding assertion that records may contain "evidence useful for impeachment is insufficient"); *People v. Stanaway*, 521 N.W.2d 557, 576 (Mich. 1994) (assertion that sex abuse victim's records may contain evidence useful for impeachment insufficient); *State v. Green*, 646 N.W.2d 298, 310 (Wis. 2002) (requiring a defense showing that the evidence sought is "necessary to a determination of guilt or innocence"). *Stanaway* specifically recognized a difference between impeachment and exculpatory evidence. 521 N.W.2d at 664.

*Retterath* and *Barrett* misread *State v. Edouard* to hold section 622.10(4)(*a*) includes impeachment evidence. 854 N.W.2d 421, 442 (Iowa 2014), *overruled on other grounds by Alcala v. Marriott Intern., Inc.*, 880 N.W.2d 699, 708 n.3 (Iowa 2016). In *Edouard*, the State needed to prove that each victim "was then receiving mental health services from the defendant" when the charged acts of sexual abuse occurred. *Edouard*, 854 N.W.2d at 433. The counseling records in *Edouard* were sought for their potential exculpatory value, and not impeachment. *Id.* at 439 (quoting Iowa Code § 709.15(1)(*d*)). They (arguably) would have shown the victim had no dysfunction or was not seeing Edouard for treatment and exonerated him. *Id.* at 441–42.

Something of the same emerges from *State v. Neiderbach*, 837 N.W.2d 180 (Iowa 2013), decided the same day as *Thompson*. Neiderbach sought the mental health records of a co-defendant, "Jherica," both on trial for the death of her infant. *Neiderbach*, 837 N.W.2d at 196. She had a history of mental illness and behaved strangely after the baby's death. *Id.* Neiderbach sought the records to show "whether certain injuries may have been inflicted by Jherica instead of him." *Id.* Presumably, this means he expected a reasonable probability that Jherica admitted her own guilt, exonerating him. As such, the Court determined the district court should conduct an *in camera* review. But, again, the evidence sought was not for impeachment, but exculpation.

"Impeachment evidence" covers more than "exculpatory evidence."

> 'Impeachment' is the word given to denote the technique for calling into question the veracity of a witness. Fundamental evidence law recognizes five surviving lines of attack upon the credibility of a witness. The first, perhaps the most effective and certainly the most frequently employed, is to prove a witness, on a previous occasion, has made statements inconsistent with his present testimony. A second alternative is to show the witness is biased, by reason of emotional influences such as kinship for one party or a hostility to

> another, or motives of pecuniary interest, whether legitimate or corrupt. A third alternative is to attack the character of the witness. The fourth recognized line of attack upon a witness's credibility is to show a defect in his capacity to observe, remember or recount the matters testified about. The fifth, and final surviving alternative, is to prove by other witnesses that material facts are otherwise than as testified to by the witness under attack.

*State v. Peterson*, 219 N.W.2d 665, 671 (Iowa 1974), *superseded on other grounds by* Iowa R. Crim. P. 2.13(1). Some impeachment evidence may be exculpatory. But not all impeachment evidence is exculpatory.

Exculpatory evidence "tends to justify, excuse or clear the defendant from alleged fault or guilt," in the sense that it "[e]xtrinsically tends to establish innocence … as differentiated from that which although favorable, is merely collateral or impeaching." Black's Law Dictionary p. 566 (6th ed. 1990) (citing *Commonwealth v. Jeter*, 416 A.2d 1100, 1102 (Pa. Super. 1979)).

"Impeachment" evidence in the possession of the State is one thing. *See DeSimone v. State*, 803 N.W.2d 97, 105 (Iowa 2011) (including impeachment evidence with exculpatory evidence under *United States v. Bagley*, 473 U.S. 667, 676 (1985) and *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). But a defendant's right to

exculpatory evidence does not trump all—or defendants could routinely pierce lawyer-client privilege for witnesses and co-defendants alike. *Neiderbach*, 837 N.W.2d at 195.

Thus, the Legislature's omission of "impeachment evidence" from section 622.10(4)(*a*) tells the story. *See Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 649 (Iowa 2013) (quoting *Meinders v. Dunkerton Cmty. Sch. Dist.*, 645 N.W.2d 632, 637 (Iowa 2002)) ("[L]egislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned"). Section 622.10(4)(*a*) does not embrace impeachment evidence.

Whether Schmidt properly or improperly declined to report does not exonerate Leedom. *See* Ruling (filed Apr. 3, 2018); App. 59-60. Whether H.M. talked to Schmidt differently (or not at all) about the abuse than she did at the deposition does not extrinsically exonerate. *See* Ruling (May 11, 2018); App. 218. Whether H.M. had her own motives for reporting the abuse does not mean she was lying. The district court did not abuse its discretion to conclude that the motion to obtain records for impeachment purposes was insufficient.

### C. Neither section 622.10(4)(*a*) nor various constitutional provisions require an *ex parte* hearing.

There is no constitutional basis for pre-trial discovery in criminal cases. *State v. Russell*, 897 N.W.2d 717, 730-34 (Iowa 2017); *State v. Clark*, 814 N.W.2d 551, 561 (Iowa 2012). A host of authorities have concluded that a right to pre-trial discovery does not flow from the right to present a defense, due process, compulsory process, or effective assistance of counsel. *See, e.g.*, *Russell*, 897 N.W.2d at 733 (quoting *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) that "[t]here is no general constitutional right to discovery in criminal cases, and *Brady* did not create one").

Rules of discovery promote fairness, eliminate "trials by ambush," and reveal the truth. *Whitley v. C.R. Pharmacy Serv., Inc.*, 816 N.W.2d 378, 386 (Iowa 2012); *State ex rel. Hager v. Carriers Ins. Co.*, 440 N.W.2d 386, 389 (Iowa 1989). "The 'sporting' theory of justice resulting from concealment and surprise is no longer the rule." *State v. Cole*, 295 N.W.2d 29, 34 (Iowa 1980). Rules of evidence—including privilege—temper the right to offer evidence. *Montana v. Egelhoff*, 518 U.S. 37, 41-42 (1996). Rules of criminal procedure do not support an unfettered right to a secret trial strategy. *See, e.g.*,

Iowa R. Crim. P. 2.11(11) (requiring notice of certain defenses); 2.14(2)(b) (requiring disclosure by the defense under certain conditions). Finally, *ex parte* communications are generally inconsistent with legal advocacy, undermine fairness, and can create an appearance of bias or partiality. *See*, *e.g.*, Iowa Supreme Court Supervisory Order ("In the Matter of the Prohibition Against *Ex Parte* Communications) (filed Mar. 27, 2018); *see also* Iowa Code Jud. Cond. 51:2.9 (governing *ex parte communications*).

In *State v. Dahl*, the Iowa Supreme Court considered an indigent defendant's request for an *ex parte* hearing to support his application for funds to hire an investigator under Iowa Code section 815.7. 874 N.W.2d at 349-50. He was concerned that giving additional detail might reveal "defense counsel's trial strategy or thought processes." *Id.* p. 352. The Court allowed *ex parte* hearings in the "rare circumstances" when the State objects to the appointment. *Id.* p. 353.

Leedom notes Iowa Code section 620.10(4) uses "reasonable probability" and Iowa Code section 815.7 uses "reasonably necessary" as a standard. But a defendant seeking privileged records must show a compelling need whereas one seeking an investigator need only

show necessity in the interest of justice. *Compare* Iowa Code § 620.10(4) *with* § 815.7. A request for privileged records impacts a third person; a request for funds the public fisc. *See Addison v. State*, 917 A.2d 1200, 1208 (Md. Ct. Spec. App. 2007) ("In the expert funding cases, no privacy rights of third parties are implicated."). In short, there is less at stake in funding cases. That arguably makes an *ex parte* hearing less odious.

A defense attorney is a zealous advocate. She may rightfully emphasize facts helpful to the client's cause and give short-shrift to those she believes are unhelpful or unimportant. Defense counsel may be unaware of facts impacting her motion, but which the privilege holder or the state's prosecutor do know.

*Ex parte* hearings carry inherent deficiencies. The movant may abbreviate factual or legal contentions given the absence challenge from the opponent. *Kling v. Sup. Ct. Ventura Cty.* 239 P.3d 670, 677-78 (Cal. 2010). The court's order may then sweep more broadly than necessary. *Id.* Legal and factual contentions from diverse perspectives can be essential to a court's decision. *Id.*

No wonder that Iowa Code section 622.10(4)(*a*) contains no provision for *ex parte* hearings. It protects a third-party's interests,

ones felt more keenly than the public interest in the general fund. The district court correctly concluded that section 622.10(4)(*a*) does not permit an *ex parte* hearing after an initial application for release of medical records has fallen short.

As a fallback position, Leedom lists numerous federal and state constitutional provisions for his claim, "including but not limited to": fair trial, due process, right to present a defense, effective assistance of counsel, confrontation, and compulsory process. *See* Appellant's Pr. Br. pp. 40-43; U.S. Const. amend. V, VI, XIV; Iowa Const. art. I, §§ 9, 10. He further states the court must apply a more favorable standard and afford him greater rights under the Iowa Constitution. Appellant's Pr. Br. pp. 41-42 (citing *State v. Cline*, 617 N.W.2d 277, 285 (Iowa 2000) and *State v. Wickes*, 910 N.W.2d 554, 575 (Iowa 2018) (Appel, J., concurring specially)).

The defense brief contains no authority beyond the list. "In raising a constitutional claim under the state constitution, counsel should do more than simply cite the correct provision of the Iowa Constitution." *State v. Effler*, 769 N.W.2d 880, 895 (Iowa 2009) (Appel, J. specially concurring); *see Addison*, 917 A.2d at 1208 ("Appellant has cited no case that authorized *ex parte* hearings

regarding a defendant's proposed pretrial use of records."). When such occurs, the Court declines to undertake the party's research. *State v. Piper*, 663 N.W.2d 894, 913-14 (Iowa 2003) (overruled on other grounds by *State v. Hanes*, 790 N.W.2d 545 (Iowa 2010)).

A fractured body of law addresses obtaining a prosecution witness's confidential health or medical treatment records. *See* Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 86 Or. L. Rev. 1 (2007) (discussing the several constitutional theories invoked and the various state approaches). None address or suggest a right to an *ex parte* hearing.

The nearest-related topic concerns defendants seeking state funding for an investigator or an expert. *See Addison*, 917 A.2d at 1208 (noting appellant only provided authority on that topic); Kimberly J. Winbush, *Right of Indigent Defendant In State Criminal Prosecution to an* Ex Parte In Camera *Hearing on Request for State—Funded Expert Witness*, 83 A.L.R.5th 541 (2000) (collecting cases). But there, the question is often whether the indigent must reveal their strategy when the better-heeled do not. *Ake v. Oklahoma*, 470 U.S. 68, 76-77 (1985); *State v. Coker*,

412 N.W.2d 589, 592 (Iowa 1987). Federal legislation may suggest *ex parte* hearings should be allowed. *See Dahl*, 874 N.W.2d at 352 (noting 18 U.S.C. § 3006A(e)(1) permits *ex parte* applications for defense services by the indigent). Even then, *ex parte* actions for documents are usually permitted only on a showing 1) that notice would furnish the State incriminating evidence it would not otherwise be entitled to or 2) would result in destruction or alteration of evidence by the person holding the documents. *Commonwealth v. Mitchell*, 831 N.E.2d 890, 900 (Mass. 2005); *State v. DiPrete*, 698 A.2d 223, 227-28 (R.I. 1997).

None of these considerations are at play, other than Leedom's desire to keep his strategy secret. None of the twelve or more constitutional provisions the defense brief lists require an *ex parte* hearing under section 622.10(4).

### D. Acknowledging that one has discussed sexual abuse with a therapist does not waive confidentiality.

Generally, waiver may be express or implied. *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 684 (Iowa 1995) (abrogated on other grounds by *Wells Dairy, Inc. v. American Indus. Refrigeration, Inc.*, 690 N.W.2d 38, 44 (Iowa 2004)). An implied waiver occurs when a

litigant asserts an issue that puts a communication in play. *Id.* Asserting insanity or diminished capacity impliedly waives the psychotherapist privilege. *Cole*, 295 N.W.2d at 35. An implied waiver must be very clear; even asserting wrongful death in a civil case does not impliedly waive confidentiality in a criminal case. *State v. Heemstra*, 721 N.W.2d 549, 560 (Iowa 2006).

An express waiver, on the other hand, occurs when a privilege holder "voluntarily discloses the content of privileged communications." *Squealer Feeds*, 530 N.W.2d at 684 (citing *Miller v. Continental Ins. Co.*, 392 N.W.2d 500, 504 (Iowa 1986)). In criminal cases, Iowa Code § 622.10(4)(*a*)(1) permits the disclosure of a therapist's records in criminal cases where the "privilege holder voluntarily waives the confidentiality privilege." That is, in criminal cases, the Code permits disclosure only on express, not implied, waivers. *See Thompson*, 836 N.W.2d at 481 (discussing origin of section 622.10(4); *cf. Heemstra*, 721 N.W.2d at 560 (in pre-622.10(4)(*a*)(1) case discussing and rejecting implied waiver from the filing of a wrongful death lawsuit).

Leedom draws from several cases which discuss principles of waiver. Appellant's Pr. Br. pp. 44-49 (citing *Clay v. Woodbury Cty.*,

*Iowa*, 965 F.Supp.2d 1055, 1060 (N.D. 2013); *State v. Demaray*, 704 N.W.2d 60, 66 (2005); *Brandon v. West Bend Mut. Ins. Co.*, 681 N.W.2d 633, 642-43 (Iowa 2004); *Miller*, 392 N.W.2d at 504-05; *Cole*, 295 N.W.2d at 35; *Heemstra*, 721 N.W.2d at 562). The effort, however, detaches principles from context or holding, diminishing their value here.

In *Miller*, the plaintiffs introduced affidavits (and gave the same information in a later deposition) containing their attorney's advice on the statute of limitations. 392 N.W.2d at 501-02, 504. The Court found voluntary waiver of attorney-client privilege. *Id.* at 505. Plaintiffs' acknowledgment that they consulted with their attorney did not waive the privilege; disclosing the advice did. This would be a different case if H.M. relayed the therapy she received.

*Demaray* states voluntary disclosure destroys confidentiality. 704 N.W.2d at 66. But Demaray executed a written release for an officer to obtain medical records to assess blood alcohol content. To *Demaray*, one might add *State v. Randle*, 484 N.W.2d 220, 221-22 (Iowa Ct. App. 1992) where the victim executed a written waiver authorizing release of medical records to the DCI. If H.M. had executed a written release, this would be a different case.

*Clay* concerned a civil—not criminal—action for an allegedly improper strip search at a jail. 965 F.Supp.2d at 1057; *see* Iowa Code § 622.10(2). After asserting emotional distress, releasing medical records, describing in a deposition her treatment, and designating her psychiatrist as a witness, the plaintiff withdrew the claim. *Clay*, 965 F.Supp.2d at 1057-59. Relying on *Demaray* and *Miller*, the court concluded the plaintiff's earlier waivers did not reinstate the privilege. This would be a different case if H.M. had released her therapist's records then wanted them back.

*Cole* considered implied waiver by the assertion of a mental-capacity defense. 295 N.W.2d at 35-36. *Cole* relied on Wigmore, an "authority notably opposed to the wide recognition of evidentiary privileges." Deidre M. Smith, *An Uncertain Privilege: Implied Waiver and the Evisceration of the Psychotherapist-Patient Privilege in Federal Courts*, 58 DePaul L. Rev. 79, 91 (Fall 2008). *Cole* predated section 622.10(4)(*a*)(1), though, diminishing the value of Wigmore's critical view. This would be a different case if H.M. asserted some mental infirmity. *See also State v. Smith*, 522 N.W.2d 591, 594 (Iowa 1994) (finding a *Cole* implied-waiver did not occur when a victim testified she did not agree to a sex act).

*Brandon* concerned waiver of attorney-client privilege in an action by an insured against her insurance company that hired outside counsel. 681 N.W.2d at 642. The Court rejected "the notion that a person waives a privilege by verifying the accuracy of answers to interrogatories or by participating in the framing of answers." Instead, the content of the answers determines the scope of waiver. *Id.* This would be a different case if H.M. had detailed her therapy with Schmidt.

Finally, *Heemstra* answers a different question than Leedom poses. The Court found no voluntary waiver. 721 N.W.2d at 560. Instead, it held privilege could yield under the following conditions: the defendant faced life in prison, the privilege holder was dead, and some of the information was in the public domain in a civil suit. *Id.* at 563. This would be a different case if Leedom faced life in prison, if H.M. was not alive, and she released some of the information in an action against Leedom. Even then, it would not show waiver.

Answering an opponent-attorney's question whether one discussed a matter with a therapist conveys slim evidence of voluntary waiver. *See Burns v. City of Waterloo*, 187 Iowa 922, 173 N.W. 16, 16 (1919) (holding voluntary introduction of testimony

may waive privilege, but "cross-examination is not deemed voluntary" and "is not effective as a waiver"). Even in the context of civil litigation—which permits implied waivers—the "mere act of denying the existence of an element or factor of an adversary's claim does not fall within the statutory language" for waiver. *Chung v. Legacy Corp.*, 548 N.W.2d 147, 150 (Iowa 1996).

> There are few cases in which an imaginative lawyer could not make the opposing party's physical or mental condition at least a factor in the case. If such tactics were sufficient to trigger the exception, there would be little left of the privilege.

*Id.* at 151.

Privileges do impede fact-finding. But "[w]ere we to carve out an exception to the privilege whenever it inhibited the fact-finding process, [the privilege] would quickly become eviscerated." *Id.*

The district court correctly determined Leedom did not prove a voluntary waiver of the therapist privilege.

### E. A remedy, if any, is a conditional affirmance, not a new trial.

If the court erred, the conviction shall be conditionally affirmed. *Neiderbach*, 837 N.W.2d at 198; *Barrett*, S.Ct. No. 17-1814, 2018 WL 6132275 at *7; *Retterath*, S.Ct. No. 16-1710, 2017 WL 6516729 at *11.

The case would be remanded to the district court to review the disputed records. Only if they contain exculpatory evidence would Leedom be entitled to a new trial.

The district court did not err. Leedom did not establish a reasonable likelihood that H.M.'s confidential records contained exculpatory evidence, that H.M. waived the privilege, or that he was entitled to an *ex parte* hearing.

## II. Leedom wished to introduce rebuttal evidence by H.M.'s therapists to show she did not report her allegations and substantive evidence that H.M.'s mother had been assaulted under mysterious circumstances. He has not proven the district court denied him admissible evidence.

### Preservation of Error

A ruling sustaining a motion in *limine* does not generally preserve error. *Quad City Bank & Trust v. Jim Kircher & Assoc., P.C.*, 804 N.W.2d 83, 89 (Iowa 2011). It merely adds a procedural step. *Johnson v. Interstate Power Co.*, 481 N.W.2d 310, 317 (Iowa 1992). The proponent of the disputed evidence must offer it at trial outside the presence of the jury in an offer of proof. *Twyford v. Weber*, 220 N.W.2d 919, 923 (Iowa 1974). Otherwise, the matter is waived. *State v. Alberts*, 722 N.W.2d 402, 406 (Iowa 2006). This is because the error occurs—if at all—when the evidence is offered at

trial and is either admitted or refused. *Quad City*, 804 N.W.2d at 90 (citing *State v. Langley*, 265 N.W.2d 718, 720 (Iowa 1978).

The only exception occurs when the district court leaves no doubt that its ruling is final—the evidence will or will not be admitted—and then counsel need not renew an objection. *Alberts*, 722 N.W.2d at 406; *State v. Miller*, 229 N.W.2d 762, 768 (Iowa 1975). For example, counsel asks the court if the ruling is final and the court answers, "yes." *State v. Daly*, 623 N.W.2d 799, 800 (Iowa 2001). It is not final when the court's order prohibits reference to certain evidence unless counsel seeks the court's permission outside the presence of the jury. *Johnson*, 481 N.W.2d at 316-17. Neither is it preserved when the party fails to make an offer of proof. *State v. Griffey*, 457 N.W.2d 13, 15 (Iowa 1990) (holding error not preserved where proponent failed to make offer of proof).

Casie McGee and Jessica Schmidt filed motions to quash defense subpoenas. Mot. Quash (McGee) (filed June 21, 2018); Mot. Quash (Schmidt) (filed June 21, 2018); App. 224-36. They asserted privilege. *Id.*; App. 224-36. The district court concluded that Leedom could not call them unless the State opened the door. Tr. (June 27, 2018) p. 125, l. 2-p. 138, l. 9.

When Leedom insisted the victim had opened the door or the district court's earlier ruling permitted the testimony, the district court indicated it would have to look at the motion hearing transcript. It replied, "I'm hearing two entirely different things" from the defense and prosecution. *Id*. p. 136, ll. 3-5; *see also id*. p. 137, ll. 17-19 (to defense counsel, "Stay away from it in opening. I don't have the transcript in front of me. I don't know what it says."); Ct. Ex. 1 (May 7, 2018 Hg. Transcript). The Court agreed, "yes," it would "take this up before [the defense] would ever try to bring someone in and put them on the stand." Tr. (June 27, 2018) p. 138, ll. 4-6.

Leedom rested without calling any witnesses or providing an offer of proof of McGee or Schmidt's testimony. "Accordingly, Ms. Schmidt and Ms. McGee are not required to attend trial to testify," the district court ruled. Order Quashing Subpoenas (filed June 28, 2018); App. 236-37.

Leedom's brief asserts several errors in this division. He first complains the court prevented him from "examining [H.M.'s] counselors about communications during sessions." Appellant's Pr. Br. p. 51. If that is the extent of it, the preceding division addresses

the matter. If the question is whether Leedom could offer rebuttal evidence, then the Court's ruling was preliminary.

The district court did not bar Schmidt or McGee from testifying. It wished to review the record. It indicated it would entertain an offer of proof before the witnesses were called. The Court only quashed the subpoenas after Leedom elected to rest without calling the witnesses.

Leedom's second challenge concerns evidence that H.M.'s mother, Teah Leedom, sustained three assaults by unknown persons. *Id.* p. 49. The State moved to preclude the defense from referring to any of the three assaults on Teah, which occurred after she lost custody of H.M. Hg. Tr. (May 7, 2018) p. 90, l. 4-p. 91, l. 15. It argued the evidence was speculative and irrelevant. *Id.* But the district court's subsequent ruling did not touch on the point, which the State had asserted in Paragraph 5(c) of its Motion in Limine. State Mot. Lim. (filed Jan. 8, 2018); Ruling re: Mots. Lim. (filed May 11, 2018), p. 1-2; App. 49, 220-21.

Before trial, however, the defense revisited the topic. Tr. (June 27, 2018) p. 114, l. 18-p. 123, l. 4. The Court asked, "[i]f these are attacks that we don't know who the perpetrator was, why am I admitting it in a sexual abuse trial involving Mr. Leedom where he's

alleged to have abused his granddaughter?" *Id.* p. 117, ll. 20-24; *see Id.* p. 119, ll. 1-4 ("there's no way I'd let it in" if the State offered it). Without knowing who committed the assaults, "I just can't fathom any reason that this evidence would be admissible at trial." *Id.* p. 120, ll. 9-11. "I still don't know who the person is, and it's far more prejudicial than it is probative. It's not even close." *Id.* p. 121, ll. 8-10. Still, the Court permitted the defense to "make a record at some point if you'd like." *Id.* p. 122, ll. 6-7. "I'll allow you to make the offer at whatever point is appropriate." *Id.* p. 123, ll. 3-4.

The State can agree that the Court appeared convinced the evidence of Teah's assault appeared irrelevant and unfairly prejudicial. But it did not refuse an offer of proof.

Leedom did not preserve error.

**Standard of Review**

The State does not contest the nature of review. Iowa R. App. P. 6.903(3).

**Merits**

Leedom asserts that the inability to present the testimony of Casie McGee, Jessica Schmidt, and Teah Leedom violated his right to present a defense in violation of the Sixth and Fourteenth

Amendments to the United States Constitution and Article I, sections 9 and 10 of the Iowa Constitution. Appellant's Pr. Br. pp. 50-56; *see Clark*, 814 N.W.2d at 560 (considering denial of a continuance as it impacted due process, fair trial, and right to present a defense). This is properly considered a Due Process Clause challenge. *Clark*, 814 N.W.2d at 561 (quoting *State v. Simpson*, 587 N.W.2d 770, 771 (Iowa 1998). Defendants, of course, enjoy a fundamental right to present a complete defense. *See, e.g.*, *State v. Mahoney*, 515 N.W.2d 47, 50 (Iowa 1994) (stating defendant entitled to "meaningful opportunity to present a defense").

Due process does not, however, guarantee the right to introduce all relevant evidence. *Egelhoff*, 518 U.S. at 42. Such a notion is "simply indefensible." *Id.* An accused does not have "an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Id.* (quoting *Taylor v. Illinois*, 484 U.S. 400, 410 (1988)).

Thus, as to H.M.'s therapists, the issue—had it been preserved—collapses to whether their testimony was admissible. The preceding division discusses the nature of the patient-therapist privilege and need not be repeated. The record does not show what injuries or

demeanor H.M.'s therapists observed—or if they could relate such without violating her confidence. Finally, expert testimony whether children lie or do not about sexual matters is not helpful to a jury and thus not admissible. *State v. Myers*, 382 N.W.2d 91, 97 (Iowa 1986); *accord State v. Dudley*, 856 N.W.2d 668, 676-77 (Iowa 2014) (holding same with respect to expert testimony touching on whether the victim was credible).

As to Teah Leedom, the issue—had it been preserved—does not tilt in Leedom's favor. He believes there is a connection between the assaults and the custody dispute. Appellant's Pr. Br. p. 55. The evidence is speculative, irrelevant, and unfairly prejudicial.

> Evidence is relevant … "when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.'" Evidence is relevant if a reasonable person might believe the probability of the truth of the consequential fact to be different if the person knew of the challenged evidence.

*State v. Brown*, 569 N.W.2d 113, 116 (Iowa 1997).

It is unknown who committed the assaults. Tr. (June 27, 2018) p. 120, ll. 23-25. Assuming it is true they were related to the custody dispute, there is no way to know if H.M. or her father had any hand in

them. If someone assaulted Teah, that does not say much about whether Leedom assaulted H.M.

The issue is unpreserved, and the district court did not err in its *limine* ruling.

## III. The district court found no violation of its *limine* ruling or error in closing arguments and, therefore, no prosecutorial misconduct. Leedom has not shown the court abused its discretion.

### Preservation of Error

The district court's ruling preserves the issue Leedom raises now. Ruling (filed Oct. 15, 2018); Tr. (Oct. 15, 2018) p. 51, l. 25-p. 54, l. 7; *Lamasters*, 821 N.W.2d at 862-63; *Meier*, 641 N.W.2d at 537-38.

The State preserved an additional ground that Leedom could not raise objections to testimony or closing arguments for the first time in a motion to dismiss. State's Resist. Def. Mot. New Trial (filed Oct. 15, 2018); App. 265-72; *State v. DeVoss*, 648 N.W.2d 56, 60-63 (Iowa 2002).

### Standard of Review

The Court reviews rulings on prosecutorial error or misconduct for abuse of discretion. *State v. Coleman*, 907 N.W.2d 124, 134 (Iowa 2018). In this, trial courts enjoy "broad discretion." *State v. Thornton*, 498 N.W.2d 670, 676 (Iowa 1993); *see also State v.*

*Greene*, 592 N.W.2d 24, 31 (Iowa 1999) (same). The Court will reverse only if the lower court has acted "on grounds clearly untenable or to an extent clearly unreasonable." *Coleman*, 907 N.W.2d at 134. Prejudice, not misconduct itself, determines whether a defendant should have received a new trial. *State v. Wilkins*, 693 N.W.2d 348, 352 (Iowa 2005); *see State v. Boggs*, 741 N.W.2d 492, 508-09 (Iowa 2007) (discussing factors related a showing of prejudice).

**Merits**

Leedom contends the State committed three acts of prosecutorial misconduct: eliciting testimony from Colleen Brazil "vouching" for the victim, arguing jury nullification, and referring to certain statements his ex-wife, Terri Leedom, made. Appellant's Pr. Br. pp. 57-71. The district court ruled, however, that the State had not violated *limine* ruling in with respect to Brazil, had not committed misconduct in arguing the reasonable doubt instruction, and had not improperly argued Terri Leedom's testimony to the jury. Ruling (filed Oct. 15, 2018); App. 273-75. The ruling was reasonable.

### A. The State elicited proper expert testimony on delayed disclosure of child sexual abuse.

Leedom argues from *State v. Pitsenbarger*, S.Ct. No. 14-0060, 2015 WL 1815989 (Iowa Ct. App. Apr. 22, 2015) that four pieces of Colleen Brazil's testimony constituted improper vouching. He made no objection at the time. The matter arises in a challenge to the district court's order refusing to grant him a new trial. The district court properly found no error, thus no misconduct.

Iowa permits expert testimony to "assist the trier of fact to understand the evidence or determine a fact in issue." Iowa R. Evid. 5.702. "Iowa has long been a leader in the liberal use of expert witnesses presenting opinion evidence." *Myers*, 382 N.W.2d at 94; *Leaf v. Goodyear Tire & Rubber*, 590 N.W.2d 525, 532 (Iowa 1999) (reaffirming "broad interpretation" of the rule). "Expert testimony in child sexual abuse cases," the Court has said, "can be very beneficial to assist the jury in understanding some of the seemingly unusual behavior child victims tend to display." *Dudley*, 856 N.W.2d at 767 (citing Veronica Serrato, *Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses*, 68 B.U. L. Rev. 155, 163 (1988)).

On the other hand, an expert may not opine on the credibility of a witness. *Myers*, 382 N.W.2d at 97. There is, therefore, a line.

Proper opinion testimony "explain[s] relevant mental and psychological symptoms present in sexually abused children." *State v. Payton*, 481 N.W.2d 325, 327 (Iowa 1992) (quoting *Myers*, 382 N.W.2d at 97). Improper "expert testimony … either directly or indirectly renders an opinion on the credibility or truthfulness of a witness." *Id.* The difference is between testifying about abused children and testifying about *this* abused child.

Accordingly, the Court has reversed where a doctor testified both that it is rare for children to lie about sexual abuse and that he believed the victim. *State v. Tracy*, 482 N.W.2d 675, 678 (Iowa 1992). The Court has permitted expert testimony of the "typical symptoms exhibited by a person after being traumatized." *State v. Gettier*, 438 N.W.2d 1, 6 (Iowa 1989). And it has allowed expert testimony on why child victims may delay reporting their sexual abuse. *Payton*, 481 N.W.2d at 327.

The Court of Appeals followed suit in *State v. Seevanhsa*, 495 N.W.2d 354, 355 (Iowa Ct. App. 1992) where it upheld expert testimony on Child Sexual Abuse Accommodation Syndrome, even though it "coincided with many of the specifics" of the victim's testimony. The witness explained symptoms common to abused

children. *Id.* p. 357. She did not testify that she believed the child had been sexually abused or that she found the child credible. *Id.*

In 2014, the Court considered three child sex abuse cases: *Dudley*, 856 N.W.2d at 677; *State v. Jaquez*, 856 N.W.2d 663, 665 (Iowa 2014); and *State v. Brown*, 856 N.W.2d 685, 689 (Iowa 2014).

*Dudley* reversed where one expert testified that "*B.O.'s* physical manifestations and symptoms were consistent with a child dealing with and suffering from sexual abuse trauma." 856 N.W.2d at 677 (emphasis added). Another expert in *Dudley* recommended that B.O. "receive therapy and cease all contact" with the defendant." *Id.* at 678. *Jacquez* reversed where the expert testified "*M.M.'s* demeanor was 'completely consistent with a child who has been traumatized, particularly multiple times.'" 856 N.W.2d at 665 (emphasis added). And *Brown* reversed where the expert's report stated, "*[A.T.]'s* history is detailed and clear. … This expert agrees this disclosure is significant and an investigation is warranted." 856 N.W.2d at 688 (emphasis added.

The Court of Appeals has not applied *Myers* and *Dudley* evenly. In *State v. Pansegrau*, 524 N.W.2d 207, 211 (Iowa Ct. App. 1994), the Court of Appeals reversed where the expert—though not referring to

the child—nevertheless answered a hypothetical that outlined all the events of the rape.

Something similar occurred in *Pitsenbarger*. The Court of Appeals found indirect vouching in expert testimony that only five percent of children falsify a sexual abuse claim. S.Ct. No. 14-0060, 2015 WL 1815989 at *6-7. It also found improper bolstering where,

> the expert testified to every significant purported and disputed fact, including behaviors and out-of-court statements as being consistent with the statistics and reports and [corroborated] T.P.'s testimony and [lent] credence to it.

*Id*. at *8.

Some of *Pitsenbarger* and *Pansegrau* took hold in *State v. Tjernagel*, S.Ct. No. 15-1519, 2017 WL 108291, *6-7 (Iowa Ct. App. Jan. 11, 2017). *Tjernagel* found it proper to opine on the rate of delayed disclosure and that young children are not accurate with dates and time. S.Ct. 15-1519, 2017 WL 108291 at *6. But *Tjernagel* followed *Pitsenbarger* and *Pansegrau* in finding "mirroring" objectionable. That is, where the expert's testimony closely follows the victim's, an expert crosses the line. But it is possible that *Tjernagel* reversed because the two experts referenced the victim's story with their research or experience.

For example, the Court of Appeals thought one expert's "statement that *L.K.* was able to give 'unique' or 'out of the ordinary details' crosses the line." *Tjernagel*, S.Ct. No. 15-1519, 2017 WL 108291 at *6 (emphasis added). Likewise, the other expert bolstered where she "convey[ed] opinions regarding *L.K.*'s behaviors, actions, and statements as being consistent with" that of child sex abuse victims. *Id.* at *7 (emphasis added).

More troubling, however, is *Simpson v. State*, S.Ct. No. 15-1529, 2017 WL 1735615, * 5-8 (Iowa Ct. App. May 3, 2017). The expert there testified hypothetically to several grooming behaviors and the rate at which victims delay reporting. *Simpson*, S.Ct. No. 15-1529, 2017 WL 1735615 at *2-3. Recognizing nearly one dozen cases would allow such testimony, the Court of Appeals nevertheless concluded the testimony "crossed the 'fine line'" articulated by *Dudley*. *Id.* at * 5-8.

A sampling of other cases from the Court of Appeals show better adherence to *Myers* and *Dudley*. In *State v. Barnhardt*, the Court approved expert testimony which did not reference the victim on child victims' ability to relate to time (they don't have calendars or watches); fear, guilt, shame, and family relationships as reasons for

delayed disclosure; the process of disclosure; and the tentativeness or testing nature of disclosure. S.Ct. No. 17-0496, 2018 WL 2230938, *1-3 (Iowa Ct. App. May 16, 2018). Even though it tracked the victim's testimony, it was proper because it was general. *Id.* at *3.

Similarly, *State v. Lusk* approved testimony "whether child victims of sexual abuse sometimes delay reporting abuse and whether sexual abuse of a child could occur when other people were in the room." S.Ct. No. 15-1294, 2016 WL 4384672, *3 (Iowa Ct. App. Aug. 17, 2016). Such did not cross the line by indirectly vouching for the two child victims who delayed reporting and who claimed abuse occurred with others in the room.

Other authorities hold that expert testimony on numerous points relevant to the case is proper so long as it does not refer to the victim herself or claim her story is consistent with their research or experience. *See, e.g.*, *State v. Beloved*, S.Ct. No. 14-1796, 2015 WL 8390222, *5 (Iowa Ct App. Dec. 9, 2015) (not uncommon for children to continue to wish to be with perpetrator); *State v. Huffman*, S.Ct. No. 14-1143, 2015 WL 5278980, *5-7 (Iowa Ct. App. Sept. 10, 2015) (typical for children to be unable to separate incidents and the victims here used developmentally appropriate language); *State v.*

*Royce*, S.Ct. No. 12-0574, 2013 WL 5508428, *9 (Iowa Ct. App. Oct. 2, 2013) (expert explained dynamics of delayed reporting citing factors including estimation whether child thought would be believed, effect on the family, relationship with perpetrator, and threats or power and control issues…noting expert did not interview "R.R.", did not opine on R.R.'s truthfulness, did not testify whether abuse occurred, and did not testify if allegations are generally true).

On balance, *Pitsenbarger*, *Smith*, and—to an extent—*Tjernagel* stray from *Myers* and *Dudley*. They ought to be corrected. Under *Myers*, *Dudley*, and the balance of authorities, the testimony here was unobjectionable.

The challenged testimony emerges from the following:

> Q. And in the research, is it kind of almost split between kids who delay and kids who don't, or is it pretty heavily on one side?
>
> A. Pretty heavily that there's a delay. It's very common for there to be a delay. Probably not as common for the delay to go until adulthood, but often there is a delay.
>
> Q. Now, in regards to this delayed disclosure, are there some reasons, generally in the research, that have been reported to be reasons why that would happen?
>
> A. Yes.
>
> Q. What are those?

A. So children often are victims of abuse by someone that they know. It's often someone that may be part of a family, a family friend, so it's not a stranger that might be doing things to the child. So that complicates things for the child.

Sometimes the abuse is put to them in the time of -- form of special time, attention, a way to show affection, in the form of a game. Often children are told, "Don't tell about things," and if they're told not to tell, they often won't tell.

They often see that it's someone they have a relationship with, either within their family or someone in their family has a relationship with. So they're worried that people may be upset if they talk about things or that someone may get into trouble. Sometimes they're told that they will be in trouble if they tell about things. Often children are worried that they may not be believed if they talk about things, because it is someone the family knows.

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.

Tr. (June 28, 2018) p. 78, l. 11-p. 80, l. 11.

Q. And I think you mentioned "grooming," so just generally what does that mean?

A. So grooming is just part of that process for someone to be able to continue to have access to a victim. So it's sort of a gradual process where they're slowly talking that child into what they want to do to them. So it's spending time with them; it's gradually talking with them about -- maybe about sex kinds of things; sometimes it might be showing pornography; building that relationship so that when something does happen, the child is less likely to tell, because they have that relationship developed.

Q. Now, is there any difference between, say, a stranger -- in the research, a stranger that's trying to do this to a child versus maybe a family member?

A. Yes.

Q. What's that?

A. So the research is very clear that part of the reason for children to delay as well as have difficulty talking about things is because it's often someone that the child knows, and so they have a relationship. If it was a stranger, it would be much easier for a child to tell about what happened.

Q. Do you also find that there's this, kind of, misconception that we can tell by how a child acts around their perpetrator that there's something going on?

A. Yes.

Q. Is that true?

A. No.

*Id*. p. 80, l. 22-p. 81, l. 23.

Q. And that brings us to part of your job is to know, kind of, child development issues; right?

A. Yes.

Q. What does that mean in -- specifically in your field?

A. So understanding child development is very important as an interviewer, because we need to understand what children can do at various ages. Specifically with their language, and that has to do with how a child, then, is able to give us a history about something that may have happened.

So we have to understand how children use and process language at different ages so that we're asking questions to gather a history from the child in a developmentally appropriate manner.

Q. Do you find that there's sometimes a misconception, and adults kind of view children as mini adults?

A. Yes. And I was actually training on that yesterday.

Q. And so tell us a little bit more about that.

A. So children don't use and process language like adults, but they come off sometimes much more sophisticated in their language than what they really are. So we have to understand what children are able to do with their language at various ages to ask appropriate information. So asking children about time or numbers of times that things have happened is not developmentally appropriate, because children have not developed that skill until later in high school. And even some of those children struggle with that.

Q. So let's talk a little bit more about time. Is that -- you said it's not something that is -- typically, for a general -- the general population of children, is not something that they are able to do?

A. Correct.

Q. Can you explain that a little bit more?

A. So if we think about how we as adults sort of manage time, we use things like calendars and things like that to be able to look back at dates

and times. Children don't operate that way. Often children have adults that are telling them, "Hey, today is a school day." "Hey, today is Saturday." "It's time to get ready for school." And so that skill doesn't develop until after about 12 or 13 where children manage time a little bit better, because they have adults helping them manage time.

But as adults, we often, like I said, use calendars. Asking someone for a number of times something has happened, again, is also not helpful. Especially if something has happened many times over time. Even as adults, we would struggle to say how many times something happened. But asking a younger child that is just not appropriate developmentally.

Q. And when you talk about asking a younger child that, what about asking an older child to go talk about something that happened when they were younger and give dates and times and ages?

A. Well, one of the things we have to keep in mind is that when the event happened, that age is when the memory was encoded for the child. So that's when the memory was put into the brain, and so that's the age at which the child is going to put the memory in. Even if they're older as they're recalling, it's still going in at that time. And so understanding how memory works is important as part of our training, as interviewers, in gathering that information. So that would be difficult to go back and do that.

*Id.* p. 82, l. 15-p. 84, l. 20.

Brazil did not use H.M.'s name. She did not reference H.M. She did not treat H.M. She did not opine on H.M.'s truthfulness. She did not suggest H.M.'s behavior was consistent with any of the behaviors she described. She did not tie H.M.'s experience to research.

The testimony was general: the fact of and reasons for delayed disclosure, the grooming process, a child's inability to recall specific dates, and the possibility that others could be nearby when abuse occurs. *Myers*, *Dudley*, part of *Tjernagel*, *Lusk*, *Huffman*, and *Royce* all support admission of this testimony.

The district court may be affirmed on an additional ground. A party may not challenge testimony for the first time in a motion for new trial. *State v. Henderson*, 268 N.W.2d 173, 181 (Iowa 1978). The district court informed Leedom that it expected him to object if Brazil began to vouch. Tr. (June 26, 2018) p. 23, l. 12-p. 23, l. 8. He did not object. His challenge in the motion for new trial came too late.

In any event, the district court did not clearly abuse its discretion to deny the motion for new trial.

### B. The State did not urge jury nullification when trying to explain the difference between two seemingly inconsistent instructions.

Jury Instruction 7 provided, among other things, that "reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act." Jury Instr. No. 7; App. 247. "Proof beyond a reasonable doubt," it continued, "must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it." *Id.*; App. 247.

Instruction 29, on the other hand, directed the jury, "[d]uring your deliberations, do not hesitate to re-examine your view and change your opinion if convinced it is wrong." Jury Instr. No. 29; App. 249.

The prosecutor, looking at both, argued to the jurors that "you are supposed to hesitate" during deliberations. Tr. (June 29, 2018) p. 104, l. 16-p. 105, l. 5. Following an unsuccessful objection, the State continued, "[i]f you think that hesitation means 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.* p. 105, ll. 6-24; *see* Tr. (Oct. 15, 2018) p. 47, ll. 6-7 (court stating, "I did overrule the objection....").

The district court concluded that "the State maybe unartfully attempted to describe some inconsistencies with reasonable doubt versus 'do not hesitate to re-examine your views if information changes those.'" *Id.* p. 52, ll. 14-17. The district court noted it had overruled Leedom's objection and the State did not commit misconduct. Ruling Def. Mot. New Trial (filed Oct. 15, 2018); App. 273-75.

Jury nullification is the jury's "right to *acquit* a defendant even if its verdict is contrary to the law and evidence." *State v. Hendrickson*, 444 N.W.2d 468, 472 (Iowa 1989) (emphasis added). "Nullification" is off point.

Neither did misconduct occur. At the outset, the State notes the Court has struck a distinction between prosecutorial error (which is based on human error or poor judgment) and misconduct (which is reckless disregard of a duty or intentional statements in violation of an obvious obligation, standard, or rule). *Coleman*, 907 N.W.2d at 138 (citing *State v. Schlitter*, 881 N.W.2d 380, 393 (Iowa 2016)). Leedom makes the latter claim.

The "hesitate to act" language in Instruction 7 is a somewhat recent, alternative definition for reasonable doubt. *State v. Tabor*,

S.Ct. No. 10-0475, 2011 WL 238427, *2 (Iowa Ct. App. Jan. 20, 2011). The standard for reasonable doubt remains as required by *State v. McFarland*, 287 N.W.2d 162, 163 (Iowa 1980) which does not include the "hesitate to act" language.

Instruction 8 required the jury to consider all instructions together. Jury Instr. No. 8; App. 248. Instruction 7 equated reasonable doubt with the hesitation to act. Instruction 29 informed jurors they should not hesitate to re-examine their views. That is, they should hesitate to convict or acquit on their first pass-through. Thus, some tension exists between Instruction 7 and 29.

At the time, the district court reminded the jury that arguments of counsel were not evidence. After trial, the district court determined the State's effort was not misconduct. The conclusion was not clearly unreasonable.

### C. The State properly discussed Terri Leedom's unobjected-to testimony.

Terri Leedom testified that before speaking with police, she was at least on speaking terms with H.M.'s mother, Teah. Tr. (Sept. 27, 2018) p. 164, l. 4-p. 165, l. 5. That changed after police interviewed Terri. *Id.* Leedom did not object to the testimony. In closing argument, the State observed the defense had promised H.M.'s

mother would testify. Tr. (June 29, 2018) p. 98, ll. 2-22. Then, it argued that Terri Leedom testified she did not have a relationship with her daughter after speaking police. *Id*. p. 98 l. 23-p. 99, l. 10. "You can infer," the State argued, "especially from the lack of Teah coming in here and talking to you, that Teah didn't like what [Terri] had to tell police." *Id*. p. 99, ll. 7-9.

The district court noted an appropriate objection, at least during closing, might have been "facts not in evidence." Tr. (Oct. 15, 2018) p. 52, ll. 8-14. Still, the district court found no misconduct. Ruling Def Mot. New Tr. (filed Oct. 15, 2018) p. 1; App. 273-75.

Counsel enjoy some latitude in closing arguments to draw inferences from the evidence, but they may not create or misstate the record. *State v. Carey*, 709 N.W.2d 547, 554 (Iowa 2006). Failure to object at the time waives error. *State v. Phillips*, 226 N.W.2d 16, 18-19 (Iowa 1975). There are various ways a prosecutor might engage in misconduct, primarily by inflaming the passions or fears of the jury. *See State v. Shanahan*, 712 N.W.2d 121, 140 (Iowa 2006) (listing examples). But so long as the prosecutor draws reasonable inferences from the evidence, no misconduct occurs. *Id.*

Terri testified that she talked with police. Thereafter, her relationship with Teah deteriorated. One reasons could be that Teah did not like what Terri discussed with police. Arguing an inference from testimony about what was said to police is generally allowable. *See Phillips*, 226 N.W.2d at 18 (affirming where prosecutor argued from police officer's testimony what the defendant said to him).

The issue was untimely. The district court's ruling was not clearly unreasonable.

## IV. The prosecutor acted appropriately. The district court properly quashed the subpoena for her to testify.

### Preservation of Error

The district court quashed Leedom's subpoena for the prosecutor. Ruling Def Mot. New Tr. and State's Mot. Quash (filed Oct. 15, 2018). The State does not contest error preservation. Iowa R. App. P. 6.903(3); *Lamasters*, 821 N.W.2d at 862.

### Standard of Review

The State will presume review is *de novo* given that Leedom asserts a compulsory process claim. *State v. Peterson*, 532 N.W.2d 813, 816 (Iowa Ct. App. 1995).

**Merits**

Leedom subpoenaed Assistant Attorney General Susan Krisko. He wished to prove she committed misconduct for eliciting expert testimony that "mirrored" the facts of the case, impermissibly referred to Terri Leedom's testimony during closing argument, and improperly urged jury nullification with respect to the reasonable doubt instruction. Br. Supp. Mot. New Trial. (filed Sept. 21, 2018). He proposes a federal compulsory process right to do so, as well as a novel independent state constitutional right. Appellant's Pr. Br. pp. 71-75; *see* U.S. Const. amend. VI, XIV; Iowa Const. art. I, § 10. The district court denied the claim. Tr. (Oct. 15, 2018) p. 52, ll. 18-21.

Reference to the relevant state constitutional provision alone offers poor scaffolding. *Effler*, 769 N.W.2d at 895 (Appel, J. specially concurring). The Court need not address it.

The Court may consider the incontestable notion that a defendant enjoys a right of compulsory process. *See United States v. Nixon*, 418 U.S. 683, 709 (1974). The right does not extend, however, past the rules of evidence. *Id.*; *see Egelhoff*, 518 U.S. at 41-42 (observing no right to privileged evidence). "It is elementary that

counsel is not ordinarily subject to call to the witness chair." *Chatman v. State*, 334 N.E.2d 673, 682 (Ind. 1975). At best, whether to permit or compel a prosecutor to testify is "a matter within the sound discretion of the trial court." *State v. Brewer*, 247 N.W.2d 205, 212 (Iowa 1976); *accord* Erwin S. Barbre, *Prosecuting Attorney as a Witness in a Criminal Case*, 54 A.L.R.3d 100 (orig. 1973) (collecting cases). A court may "refuse to allow the defense to call a prosecutor if it does not believe that 'he possesses information vital to the defense.'" *United States v. Newman*, 476 F.2d 733, 738 (3rd Cir. 1973).

It may be one thing to call a prosecutor as a fact witness to testify to something that was said to her. *See State v. Wallis*, 439 N.W.2d 590, 591-92 (Wis. 1989) (permitting defendant to call prosecutor who interrogated defendant in hearing on motion to suppress). It is another to call the prosecutor to elicit testimony of what she was thinking.

Leedom thought Attorney Krisko was not adhering to cases or rules he thought controlled. All he could do was ask why she thought she could do what she did. Mental impressions are protected

attorney work product. Iowa R. Evid. 1.503(3); *Keefe v. Bernard*, 774 N.W.2d 663, 674 (Iowa 2009).

Because the testimony and argument were proper, there was no misconduct. Because there was no misconduct, it was not necessary to call the prosecutor to testify. The testimony would surely embrace work product. The district court did not abuse its discretion.

## V. The district properly excused three potential jurors with work commitments.

### Preservation of Error and Standard of Review

The State does not contest error preservation or the nature of review. Iowa R. App. P. 6.903(3). The Court reviews for clear abuse of discretion. *State v. Critelli*, 237 Iowa 1271, 1281, 24 N.W.2d 113, 118 (Iowa 1946).

### Merits

Trial commenced June 26 but with holidays and other scheduled matters was expected to conclude as late as July 9, 2018. Tr. (June 26, 2018) p. 46, ll. 15-20. One juror indicated, "I'm to start a new job in one hour, and I take care of my disabled husband." *Id.* p. 47, ll. 20-21. A second had a work trip on Monday July 9th. *Id.* p. 48, ll. 10-11. A third was "covering for two physical therapists at

their locations." *Id.* p. 48, ll. 14-16. The Court dismissed them for the reasons they gave. *Id.* p. 52, ll. 1-7.

A district court judge may defer a person's jury service "upon a finding of hardship, inconvenience, or public necessity." Iowa Code § 607A.6; *State v. Chidester*, 570 N.W.2d 78, 83 (Iowa 1997). A violation of this statute only requires reversal if there was a "material departure from the statutory requirements for drawing or returning the jury," that is something of "real importance or great consequence." Iowa R. Crim. P. 2.18(3); *Chidester*, 570 N.W.2d at 84.

Courts should exercise careful discretion, but when there is no abuse of it that affect a party's substantial rights, there shall be no reversal. *State v. Ostrander*, 18 Iowa 435, 447-48 (1865). People should not be excused for "mere inconvenience," but employment hardship is a valid basis for excusing a juror. *State v. Hobson*, 284 N.W.2d 239, 241 (Iowa 1979).

Leedom, however, relies on two cases from Texas for the proposition that a court cannot *sua sponte* excuse a potential juror unless "absolutely disqualified." *Nichols v. State*, 754 S.W.2d 185, 193 (Tex. Ct. Crim. App. 1988); *Payton v. State*, 572 S.W.2d 677, 678-79 (Tex. Ct. Crim. App. 1978). *Nichols* and *Payton* do not

help. They were inapposite to begin with and have been overruled since.

"Absolute disqualification" occurs in Texas when a juror is ineligible to serve because of a conviction, indictment, or insanity. Vernon Ann. Texas C.C.P. Art. 35.16(2), (3), (4) Art. 35.19. In *Harris v. State*, the Texas Court of Criminal Appeals recognized a different provision—Art. 35.03—confers discretion on judges to excuse jurors for a variety of reasons including travel, work, and weddings. 784 S.W.2d 5, 18-19 (Tex. Ct. Crim. App. 1989). More recently, *Butler v. State* upheld the release of a juror because she was apprehensive over being away from work. 830 S.W.2d 125, 127-28, 132 (Tex. Ct. Crim. App. 1992).

There is little law, in Texas or Iowa, for the rule Leedom proposes. The district court was directly informed of the conflicts each of the three potential jurors faced. Inasmuch as they were facially legitimate, the court did not clearly abuse its discretion to release them.

## VI. No reversible error occurred. Cumulative effect analysis is not necessary.

### Preservation of Error

The district court concluded Leedom received a fair trial despite his argument that he was cumulatively prejudiced by the errors he asserted. Ruling Def Mot. New Tr. and State Mot. Quash Sub. (filed Oct. 15, 2018); App. 273-75. The State will presume this preserves error. *Lamasters*, 821 N.W.2d at 862.

### Standard of Review

The State does not contest the nature of review. Iowa R. App. P. 6.903(3).

### Merits

Leedom argues that a weak case, inadmissible evidence, misconduct, and improper argument over instructions cumulatively prejudiced him and necessitate a new trial. Appellant's Pr. Br. pp. 82-83 (citing *State v. Carey*, 165 N.W.2d 27, 36 (Iowa 1969); *State v. Hardy*, 492 N.W.2d 230, 235-36 (Iowa Ct. App. 1992) (concerning judge who lost temper); *see also State v. Blum*, 510 N.W.2d 175, 180 (Iowa 1993) (combined effect of attorney's errors and judge's hostility leading court to conclude defendant did not receive a fair hearing).

Because there is no merit to the individual assignments, there can be no cumulative prejudicial effect. *State v. Burkett*, 357 N.W.2d 632, 638 (Iowa 1984).

## CONCLUSION

The judgment and sentence should be affirmed.

## REQUEST FOR NONORAL SUBMISSION

The State asks to be heard only if the Court grants the defendant's request for oral argument.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **12,695** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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