IN THE SUPREME COURT OF IOWA
Supreme Court No. 19–1697

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PATRICK BARRETT, JR.,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR CASS COUNTY
THE HONORABLE JEFFREY L. LARSON, JUDGE

APPELLEE'S BRIEF

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Authorities

Brady v. Maryland, 373 U.S. 83 (1963)
Hawaii Psych. Soc'y v. Ariyoshi, 481 F.Supp. 1028 (D. Haw. 1979)
Kyles v. Whitney, 514 U.S. 419 (1995)
Pennsylvania v. Ritchie, 480 U.S. 39 (1987)
United States v. Agurs, 427 U.S. 97 (1976)
United States v. Bagley, 473 U.S. 667 (1985)
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DeVoss v. State, 648 N.W.2d 58 (Iowa 2002)
Harrington v. State, 659 N.W.2d 509 (Iowa 2003)
Howard v. Porter, 35 N.W.2d 837 (1949)
Jasper v. State, 477 N.W.2d 852 (Iowa 1991)
Jones v. State, 479 N.W.2d 265 (Iowa 1991)
Jones v. Univ. of Iowa, 836 N.W.2d 127 (Iowa 2013)
Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
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People v. Boyette, 201 Cal.App.3d 1527 (Cal. Ct. App. 1988)
People v. Hammon, 938 P.2d 986 (Cal. 1997)
Slaughter v. Des Moines Univ. College of Oseteopathic, Med., 925 N.W.2d 793 (Iowa 2019)
State v. Barrett, No. 17-1814, 2018 WL 6132275 (Iowa Ct. App. Nov. 21, 2018)
State v. Cashen, 789 N.W.2d 400 (Iowa 2010)
State v. Compiano, 154 N.W.2d 845 (Iowa 1967)
State v. Cuevas, 288 N.W.2d 525 (Iowa 1980)
State v. Einfeldt, 914 N.W.2d 773 (Iowa 2018)
State v. Ford, No. 08-1190, 2010 WL 2925124

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State v. Garcia, 302 P.3d 111 (N.M. Ct. App. 2013)
State v. Hall, 297 N.W.2d 80 (Iowa 1980)
State v. Hallum, 585 N.W.2d 249 (Iowa 1998)
State v. Hanes, 790 N.W.2d 545 (Iowa 2010)
State v. Leedom, 938 N.W.2d 177 (Iowa 2020)
State v. Lynch, 885 N.W.2d 89 (Wis. 2016)
State v. Miles, 490 N.W.2d 798 (Iowa 1992)
State v. Neiderbach, 837 N.W.2d 180 (Iowa 2013)
State v. Parker, 747 N.W.2d 196 (Iowa 2008)
State v. Rademacher, 433 N.W.2d 754 (Iowa 1988)
State v. Retterath, No. 16-1710, 2017 WL 6516729 (Iowa Ct. App. Dec. 20, 2017)
State v. Romeo, 542 N.W.2d 543 (Iowa 1996)
State v. Thompson, 836 N.W.2d 470 (Iowa 2013)
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Struve v. Struve, 930 N.W.2d 368 (Iowa 2019)
Tausz v. Clarion-Goldfield Cmty. Sch. Dist., 569 N.W.2d 125 (Iowa 1997)
Iowa Code § 622.10(4)(a)(2)(d)
Iowa R. Evid. 5.103(a)
Iowa R. Evid. 5.608(a)
Iowa R. Evid. 5.611(a)
Laurie Kratky Doré, *Iowa Practice Series: Evidence* § 5.501:6(E)
Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 86 Or. L. Rev. 1 (2007)
Steven Johnson et al., *This is Your Brain on Video Games*, Discover (Sep. 19, 2007), https://www.discovermagazine.com/mind/this-is-your-brain-on-video-games

ROUTING STATEMENT

Barrett is correct that this case should be retained by the Iowa Supreme Court, because it should identify the standard that applies on remand when an appellate court determines that privileged records should have been reviewed or produced under section 622.10(4), and directs the lower court to "consider whether new trial is necessary." *See State v. Barrett*, No. 17–1814, 2018 WL 6132275, at *3 (Iowa Ct. App. Nov. 21, 2018). Retention is also appropriate because this record illustrates the consequences of the Iowa Supreme Court's decision in *State v. Leedom*, 938 N.W.2d 177, 188 (Iowa 2020), which equates all impeachment evidence with exculpatory evidence for purposes of section 622.10(4). Every vulnerability shown while receiving therapy or mental health treatment can be weaponized for arguments like this:

> [T]his backdrop — clinical backdrop that he's a liar and he can't remember and that he gets confused, he's suspecting other people, that he's not fully disclosing — these are all things that should have gone to the jury.

RemandTr. 13:18–14:1. This Court's approach to section 622.10(4) has subverted the legislature's intent to reject *Cashen* in favor of stronger protections for victims' privileged mental health records. *See State v. Thompson*, 836 N.W.2d 470, 480–81 (Iowa 2013). One look at this record will show this Court that a course correction is needed.

STATEMENT OF THE CASE

Nature of the Case

This is Patrick Barrett, Jr.'s appeal from a ruling that no retrial was necessary, on remand from his direct appeal from his conviction for second-degree sexual abuse, a Class B felony, in violation of Iowa Code sections 709.1(3) and 709.3(1)(b) (2017). Barrett was convicted of committing sex acts with A.F., before A.F. turned 12 years old.[1] A.F. was born in 2003, and he testified that Barrett initiated sex acts with him over the course of multiple visits to A.F.'s father's house, beginning when A.F. was seven or eight years old, using video games both to entice A.F. and to engineer situations where they were alone.

On Barrett's direct appeal from that conviction, the Iowa Court of Appeals determined that the district court erred by not ordering production of A.F.'s privileged mental health records after its review under section 622.10(4). It ordered production/disclosure of 75 pages of privileged records and remanded for the district court to "consider whether new trial is necessary." *See Barrett*, 2018 WL 6132275, at *3.

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[1] Barrett was acquitted on a charge of third-degree sexual abuse that arose out of alleged sexual contact with A.F. that occurred *after* A.F. turned 12 years old, after A.F.'s father had moved to Lewis, Iowa. *See* TrialTr. 159:23–160:7; TrialTr. 345:16–347:21. A.F. testified that he ended that encounter before any skin-to-skin contact occurred.

On remand, the parties gained access to those records and litigated the issue of whether new trial was necessary. Barrett argued that those records, if disclosed before trial, would have enabled him to impeach A.F. by showing that he did not disclose the sexual abuse to any of his therapists until July 2016. But the State pointed out that Barrett had already known that. He had cross-examined A.F. on that fact at trial, and A.F. had admitted it. Barrett also pointed to a series of references to A.F.'s older brother, Shawn Williams, and argued that access to these records would have enabled him to prove (or suggest) that Williams was the true perpetrator of this sexual abuse. The court considered Barrett's arguments and the privileged records identified by the Iowa Court of Appeals; it ruled that "each of the points were either already addressed during trial or do not carry enough weight sufficient to grant a new trial." *See* Ruling (9/30/19) at 4; App. 58.

In this appeal, Barrett argues that the district court erred in ruling that retrial was not necessary. Part of Barrett's argument is an attack on the standard that the district court applied for determining whether a new trial was necessary. He also attacks the district court's view of the significance of information contained in A.F.'s privileged mental health records, in relation to the evidence presented at trial.

Course of Proceedings

The State generally accepts Barrett's description of the relevant course of proceedings. *See* Iowa R. App. P. 6.903(3); Def's Br. at 12–16.

Facts

A.F.'s mother (Amanda) and his father (Chad) were divorced. *See* TrialTr. 174:5–175:5; TrialTr. 178:13–179:2. A.F. primarily lived with Amanda, but he stayed with Chad and his new partner (Manda) every other weekend, starting in 2010. *See* TrialTr. 179:3–181:6.

Barrett was A.F.'s cousin and Chad's nephew. *See* TrialTr. 181:19–182:1. Barrett was already an adult when A.F. started that visitation schedule with Chad in 2010. *See* TrialTr. 182:2–183:8. At that point, A.F. was seven or eight years old. *See* TrialTr. 173:12–15; TrialTr. 181:19–184:16; TrialTr. 190:12–192:8.

Barrett would come to Chad's house while A.F. was visiting to play video games and football with A.F. and A.F.'s older half-brother, Shawn Williams. *See* TrialTr. 182:2–184:16. Shawn lived with Chad while Chad still lived in Council Bluffs, and Shawn had a video game console in his room. *See* TrialTr. 370:2–372:17. At one point, A.F. was alone with Barrett in Shawn's room; they were playing video games. *See* TrialTr. 190:9–191:10. A.F. testified about what happened next:

> We were playing video games, and I don't remember exactly how everything started, but there was a gap, about a 2 foot by 3 foot gap at the end of the bed and had a bunch of clothes down there, and [Barrett] asked me to go there. . . . He asked me — he asked me to remove my pants and boxers.
>
> [. . .]
>
> He removed his [pants and boxers], and I didn't know exactly what was going on, but he told me to be quiet and not to say anything.
>
> [. . .]
>
> He asked me to put my knees to my chest, and he held my feet there. He had my knees to my chest and held my feet in place so they wouldn't move.

See TrialTr. 190:9–192:21. Barrett took his own penis and "tried to put it in [A.F.'s] butt." *See* TrialTr. 192:22–193:1. Barrett's penis touched A.F.'s anus, but it did not penetrate him. A.F. told Barrett "it hurt," and "told him that a few times, and he tried a few more times." *See* TrialTr. 193:2–10. Barrett stopped when he heard the floor creak, which indicated that A.F.'s sister was coming up the stairs (although Barrett had already locked the door). *See* TrialTr. 193:13–194:2. After Barrett had stopped, he told A.F.: "Don't say anything about this." *See* TrialTr. 194:11–18. A.F. said he was "7 or 8" years old and he "didn't know what [Barrett] was trying to do"—so A.F. "listened to [Barrett] and followed his directions." *See* TrialTr. 192:7–8; TrialTr. 194:3–10. A.F. did not tell anybody about this incident until July 2016.

Chad's family eventually moved to Spencer, and then to Griswold. Barrett did not visit them in Spencer, but he visited frequently while they lived in Griswold. *See* TrialTr. 182:5–23. Around that time, A.F. was "9, 10 or 11-ish" and Barrett would visit or stay the night "roughly around three times a month." *See* TrialTr. 195:2–196:12. Shawn no longer lived with Chad's family, and the family did not own a video game system. When Barrett visited, he brought a console and set it up in A.F.'s bedroom. *See* TrialTr. 184:2–185:6; TrialTr. 195:21–196:23. Barrett used video games to entice A.F. into sex acts:

> My dad always had a curfew. Like, no electronics or anything after 8:30, 9:00 because it was around school time. Even in the summer it was 9:00-ish. And when that time was up around 8:30, [Barrett] would stop the game and ask me if I wanted more time to play on the system —
>
> [. . .]
>
> He would ask me if I wanted more time because he knew I loved playing Black Ops and all that stuff. So I would agree to him most of the time, and he would either touch me on my penis or make me touch him on the penis.
>
> [. . .]
>
> He would kind of — he would pull — he would open his pants, so he would pull his zipper down or unbutton them and pull them down a little bit and bring his penis out and grab my hand and put it on there.
>
> [. . .]
>
> There would be times where he would make me lay on the bed with my shirt halfway up and my pants or shorts or boxers halfway down, and then he would grab it and start moving around me.

See TrialTr. 196:24–197:20. If A.F. touched Barrett or let Barrett touch him, Barrett would let A.F. continue playing video games. *See* TrialTr. 198:5–13; TrialTr. 235:17–236:14 ("I really loved the game, so I would do anything to play the game."). Barrett also performed oral sex on A.F. while A.F. was laying down on the bed—A.F. said that Barrett would put A.F.'s penis "[i]nside his mouth" and "move it up and down." *See* TrialTr. 199:2–22. A.F. said that felt "uncomfortable but at the same time good." *See* TrialTr. 199:15–200:1. Barrett also made A.F. perform oral sex on him. *See* TrialTr. 200:2–203:2. And A.F. also remembered another occasion where Barrett put his penis into A.F.'s anus, which was "painful." *See* TrialTr. 203:3–25.

A.F. had issues with anger management and PTSD throughout his childhood, and he had been seeing therapists since an incident of reported physical abuse where Chad saw a fight between A.F. and his twin sister, chased A.F. down, and "kicked [A.F.] in [his] side and left a big bruise on [his] side." *See* TrialTr. 212:23–215:3; *see also* TrialTr. 209:15–211:15. In July 2016, A.F. disclosed to his current therapist (Chad Richter) that he experienced both "physical and sexual abuse"—but he was not ready to talk about the sexual abuse in detail because he had been "hiding it for quite a few years once [he] realized what

was actually happening." *See* TrialTr. 186:2–187:10. Before that disclosure to Richter in July 2016, A.F. had not told anyone about his sexual contact with Barrett, including any therapists. Barrett had told A.F. not to tell anyone, and A.F. was embarrassed and ashamed. *See* TrialTr. 187:1–189:19; TrialTr. 239:1–12.

Richter notified the sheriff's office. They arranged an interview for A.F. at Project Harmony. *See* TrialTr. 296:2–298:4. Even during that interview, A.F. was nervous about disclosing—he did "try and tell [the interviewer] the full answer" to each question, but that was made difficult for A.F. because he was still so uncomfortable "thinking of all the stuff that happened to [him] and bringing up all the memories." *See* TrialTr. 188:21–190:6; *see also* TrialTr. 231:14–232:8; TrialTr. 239:4–12. A.F. went back for a second interview at Project Harmony, because he remembered more instances of sexual contact that he had not remembered or described during his first interview. *See* TrialTr. 217:9–219:17. Partial disclosure is quite common; Project Harmony sees a child for a second interview about "[a] couple times a month." *See* TrialTr. 270:3–13; *accord* TrialTr. 255:11–256:16.

Sarah Cleaver conducted a physical examination of A.F. at Project Harmony. When she asked what type of contact occurred, A.F.

reported "penis to anus, mouth to penis"—and when Cleaver asked what direction he meant, A.F. said "[e]verything to me." *See* TrialTr. 326:19–329:15. A.F. said that penis-to-anus contact occurred when he was 11 years old. *See* TrialTr. 336:5–14. Cleaver asked how that contact felt, and A.F. said it was "[u]ncomfortable," but he also said: "I don't think he went all the way in because I forced him to stop because it was hurting me a little bit." *See* TrialTr. 329:16–330:1. Cleaver asked if Barrett's penis went into A.F.'s mouth, and A.F. said: "[h]e tried to force me to, and I didn't, as far as I can remember." *See* TrialTr. 330:2–18; *cf.* TrialTr. 342:9–23. A.F.'s exam results did not confirm his account, nor disprove it. *See* TrialTr. 330:21–335:3.

After A.F.'s interview at Project Harmony, Cass County Sheriff Darby McLaren called Barrett to schedule an interview—but he did not tell Barrett what it would be about. *See* TrialTr. 300:1–301:12. They met on August 2, 2016. Barrett had selected the time for the interview, but he told Sheriff McLaren that "he had 15 minutes and he had to leave for work." *See* TrialTr. 301:13–303:10. This was a tactic that Sheriff McLaren had seen before:

> Potentially when people are going to get interviewed, they want to know what information I have, so they set up a time when they can't answer questions and can just get information from me and not give me any information.

See TrialTr. 303:11–19. Sheriff McLaren told Barrett about A.F.'s allegations, and Barrett denied them. *See* TrialTr. 303:20–304:11. Subsequently, on both August 4 and August 15, Barrett had agreed to come in for another interview at a date and time he chose, and then did not show up because he said he was sick or had migraines. *See* TrialTr. 304:14–308:1. On August 16, at the scheduled time for their third rescheduled interview, Barrett called Sheriff McLaren and said that he was in the parking lot, but "he was nervous and just didn't want to come in." *See* TrialTr. 308:2–309:2; *see also* TrialTr. 316:18–317:1.

Sheriff McLaren went outside and talked to Barrett in the parking lot—Barrett did not appear to be ill, did not appear to have any trouble walking, and was communicating coherently. *See* TrialTr. 309:2–24. Sheriff McLaren managed to convince Barrett to come inside for the scheduled interview. *See* TrialTr. 309:2–310:5; *see also* TrialTr. 319:12–19 ("It was gentle coaxing."). Pottawattamie County Sheriff's Deputy Jim Doty conducted that interview with Barrett. *See* TrialTr. 273:6–274:17. As the interview turned to A.F.'s allegations, Deputy Doty noticed that Barrett "began to become really silent and shaky and wouldn't really respond to the questions." *See* TrialTr. 277:1–15; TrialTr. p.278:1–11. Then, Barrett left the interview room,

knocked over a file cabinet, stumbled over a chair, and vomited onto the floor. *See* TrialTr. 279:7–280:3. Officers called for medics, and Barrett was taken to the hospital. *See* TrialTr. 280:4–11.

Sheriff McLaren was watching the interview on closed circuit and had wondered "why he was acting so strangely when at first he acted so normally." *See* TrialTr. 310:3–23. The next day, Sheriff McLaren went to the hospital to speak with Barrett, to ask him about what happened and to see if they could schedule another interview. *See* TrialTr. 311:2–10. Sheriff McLaren spoke with Barrett, and Barrett told Sheriff McLaren "he had taken a handful of Tylenol PM in an attempt to hurt himself." *See* TrialTr. 311:11–22.

Deputy Doty interviewed Barrett again, eight days later, on August 24, 2016. Barrett said that, before the previous interview, he had taken Tylenol to deal with his migraines and had overdosed. *See* TrialTr. 280:12–282:15. Barrett specifically denied that he had taken Tylenol in an attempt to hurt himself. *See* TrialTr. 281:24–282:15. Again, Barrett denied A.F.'s allegations. But he also admitted that he had babysat A.F., "every couple weeks" while A.F.'s father lived in Council Bluffs and "every couple months" while he lived in Lewis. *See* TrialTr. 283:17–284:20; TrialTr. 288:10–289:5.

Barrett testified in his own defense, and A.F.'s father (Chad) also testified in Barrett's defense. Chad testified that, while his family lived in Griswold, Barrett visited to play video games with Shawn—although on some occasions, Barrett and A.F. were there and Shawn was not. *See* TrialTr. 409:21–410:10. But Barrett testified that Shawn was *always* there, in the room, for the entire duration of his visits. *See* TrialTr. 434:13–435:3. Chad also testified that their family did not normally have video games in the house, and that A.F. was always excited about staying up past his curfew to play video games when Barrett came over. *See* TrialTr. 424:14–425:20. Manda, Chad's new partner, also testified that Barrett would bring video games to play with A.F., and she remembered that A.F. would stay up past curfew playing video games with Barrett. *See* TrialTr. 384:2–387:17.

Chad testified A.F. had anger problems and behavioral issues. *See* TrialTr. 403:8–404:13. On one occasion, while they lived in Council Bluffs, A.F. "was grabbing his private parts as the girls were sitting on the floor and thrusting his private parts in their face." *See* TrialTr. 404:5–11. Chad said he had no idea where A.F. learned that, and A.F. "shut down" when they asked. *See* TrialTr. 422:2–15. Chad testified about custody and visitation modification actions, which he

thought were A.F.'s motive for fabricating allegations of sexual abuse. *See* TrialTr. 412:10–417:10; Def. Ex. A; CApp. 6. Chad also testified about a therapy session where Chad, Amanda, and A.F. were present, when a therapist asked A.F. if he had ever been sexually abused. Chad said that A.F. just "looked at his mother and turned white as a ghost." *See* TrialTr. 405:8–20; TrialTr. 422:16–423:6.

The last interaction with Barrett that A.F. described took place sometime after the summer of 2015, when A.F. was 13 years old. *See* TrialTr. 204:1–208:11. Barrett successfully moved for judgment of acquittal on the second-degree sex abuse charge for that incident; that charge was reduced to third-degree sex abuse, and charged as occurring sometime in January 2016. *See* TrialTr. 345:3–347:21; Jury Instr. 18; App. 26. A.F.'s description of that last incident was not neatly confined to January 2016, nor did it involve a completed sex act. A.F. said Barrett found him during a game of hide-and-seek with other family members, touched A.F. over his clothes, and told A.F. to strip—but A.F. refused and left. *See* TrialTr. 205:10–208:5. The jury acquitted Barrett on that count, but it convicted him of second-degree sexual abuse for committing sex acts with A.F. while A.F. was younger than 12 years old. *See* Jury Instr. 17; App. 25.

Barrett appealed. His challenge to the district court's ruling on his weight-of-the-evidence claim was rejected on appeal. *See Barrett*, 2018 WL 6132275, at *5–7. But the Iowa Court of Appeals found that Barrett's challenge to the district court's ruling on his pretrial motion for disclosure/production of A.F.'s privileged mental health records had merit, because "the district court also abused its discretion in concluding no exculpatory information needed to be disclosed under the statutory balancing test." *See id.* at *3. It listed 75 pages of records that should have been disclosed before trial under section 622.10(4). It instructed the district court on remand to order production of those specific records to attorneys for both parties, and then to "consider whether new trial is necessary." *See id.* This opinion did not contain any explanation of *how* information in those records was exculpatory, other than stating that it read the term "exculpatory information" in section 622.10(4) to include any information that could be used to impeach a witness for the State in a way that "tends to establish a criminal defendant's innocence." *See id.* (quoting *State v. Retterath*, No. 16–1710, 2017 WL 6516729, at *11 (Iowa Ct. App. Dec. 20, 2017)). The State's application for further review was denied, and the case was remanded to the district court.

On remand, the district court initially ordered the State to produce those records. But the State did not have them—it never did. *See* Order (1/23/19); App. 10; Motion to Clarify Ruling (1/30/19); App. 43. The district court subsequently produced the records by lowering the security level of sealed exhibits that were already on file. *See* Order (5/13/19); App. 45. Barrett's counsel put those 75 pages identified by the Iowa Court of Appeals into an appendix, and argued that those records contained "the following exculpatory evidence":

> a. That A.F. denies repeatedly he had been sexually abused.
>
> b. That A.F. had reported a relative [Shawn Williams] had entered his room at night. A.F. reported other problems with this individual. This individual who will be identified later was later prosecuted for sexual abuse against a minor.
>
> c. The reports indicate A.F.'s father and stepmother felt A.F. was being molested at his mother's house.
>
> d. The documents disclose the child was tested psychologically and the results impeached the child's recollection and his ability to recall events.
>
> e. The reports indicate the following sentence: [A.F.] did not say someone touched him in an inappropriate way but does include a now young male in his 20's that would often be at his father's house.

Motion for New Trial (6/28/19) at 4–5; App. 50–51; *see* Exhibit 102A; C-App. 39. Barrett's summary of the exculpatory information in those once-privileged records only referenced 20 pages of records, out of 75 pages that were disclosed/produced. *See* Exhibit 103; App. 55.

Almost all of the records were from A.F.'s therapy sessions, before he disclosed abuse. This list may assist this Court in reading these records in chronological order and identifying their author:

Date of record	CA Opinion designation	Location in Exhibit 102	Author of record
7/22/10	Exhibit 1, pages 9–25	Exhibit 102A, pages 1–17	Shelie Leighter (all info provided by Chad/Amanda)
1/22/11	Exhibit 1, pages 157–58	Exhibit 102A, pages 18–19	Shelie Leighter (info from call with school counselor)
2/7/11	Exhibit 1, page 155	Exhibit 102A, page 23	Shelie Leighter (record from call with Amanda)
2/9/11	Exhibit 1, page 154	Exhibit 102A, page 22	Shelie Leighter
2/15/11	Exhibit 1, page 153	Exhibit 102A, pages 21	Shelie Leighter (record from call with Amanda)
2/16/11	Exhibit 1, page 151	Exhibit 102A, page 20	Shelie Leighter
9/29/11	Exhibit 1, pages 39–46	Exhibit 102B, pages 13–20	Rosanna Jones-Thurman
10/6/11	Exhibit 1, pages 110–11	Exhibit 102B, pages 1–2	Shelie Leighter (all info provided by Chad/Manda)
10/7/11	Exhibit 1, pages 108–09	Exhibit 102A, pages 24–25	Shelie Leighter
6/4/12	Exhibit 1, pages 29–38	Exhibit 102B, pages 3–12	Gina Ruma (report from DHS)

2/18/15	Exhibit 2.3, pages 52–53	Exhibit 102B, pages 21–22	Chad Richter
3/11/15	Exhibit 2.3, pages 45–46	Exhibit 102B, pages 23–24	Chad Richter
11/10/15	Exhibit 2.2, pages 119–20	Ex. 102B, p. 25 Ex. 102C, p. 1	Chad Richter
11/17/15	Exhibit 2.2, pages 115–16	Exhibit 102C, pages 2–3	Chad Richter
12/8/15	Exhibit 2.2, pages 111–12	Exhibit 102C, pages 4–5	Chad Richter
12/15/15	Exhibit 2.2, pages 102–08	Exhibit 102C, pages 6–12	Checklists from A.F. and one parent
4/5/16	Exhibit 2.2, pages 76–77	Exhibit 102C, pages 13–14	Chad Richter
4/19/16	Exhibit 2.2, pages 50–51	Exhibit 102C, pages 15–16	Chad Richter
7/27/16 (disclosure occurs)	Exhibit 2.2, pages 17–19	Exhibit 102C, pages 17–19	Chad Richter
7/28/16	Exhibit 2.2, pages 13–14	Exhibit 102C, pages 20–21	Chad Richter
1/17/17	Exhibit 2.1, page 18	Exhibit 102C, page 24	Chad Richter
2/7/17	Exhibit 2.1, page 14	Exhibit 102C, page 22	Chad Richter
2/14/17	Exhibit 2.1, page 15	Exhibit 102C, page 23	Chad Richter
2/23/17	Exhibit 2.1, page 19	Exhibit 102C, page 25	Chad Richter

The State resisted the motion for new trial and argued that similar evidence was already introduced at trial through Barrett's cross-examination of A.F. and through testimony from A.F.'s father, Chad. *See* Resistance (8/27/19); App. 53. Additionally, it noted that evidence involving Shawn Williams and his subsequent conviction for sexual abuse of a female minor "is not exculpatory" and was "in no way related to the present case." *See id.* at 1; App. 53. At the hearing on the motion for new trial, Barrett's argument was a scattershot attack on A.F.'s credibility on multiple theories: that A.F. was lying, that A.F. could not tell fiction from reality, and that it must be Shawn Williams who committed the sexual abuse that A.F. described in his testimony. *See* RemandTr. 10:3–14:20. The State argued that similar information was already presented at trial, through Chad's testimony and through A.F.'s admissions in direct examination and on cross-examination, and therefore "a new trial is not warranted." *See* RemandTr. 15:15–18:24. In a rebuttal, Barrett's counsel discussed the applicable standard and proposed using the same formula for "newly discovered evidence" that "is familiar to the court," while treating the appellate court opinion as preclusive on the material-and-not-cumulative prong. *See* RemandTr. 19:2–20:2; *cf. State v. Jefferson*, 545 N.W.2d 248, 249 (Iowa 1996).

The district court noted that the Iowa Court of Appeals cited to *State v. Neiderbach* in giving its direction on proceedings on remand. Ruling (9/30/19) at 2; App. 59 (citing *Barrett*, 2018 WL 6132275, at *3 (citing *State v. Neiderbach*, 837 N.W.2d 180, 198 (Iowa 2013))). It read *Neiderbach* to imply that *Ritchie* "held that the defendant was entitled to have a new trial if the records 'contain information that probably would have changed the outcome of his trial.'" *See id.* at 3; App. 60 (quoting *Neiderbach*, 837 N.W.2d at 198 & n.3 (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 (1987))). Upon reviewing the records, the district court found nothing that "would probably have changed the outcome of the trial." *See id.* at 3–4; App. 60–61.

> [E]ach of the points were either already addressed during trial or do not carry enough weight sufficient to grant a new trial. For instance, evidence of the victim denying having been sexually abused was introduced at trial through testimony. Evidence of other potential perpetrators or the location of perpetration was also included in the exculpatory evidence, but this evidence was certainly available to be presented during trial through questioning the already available witnesses and it does not discredit the evidence that was already presented. Despite some minor inconsistencies in the victim's reports of abuse, the victim's testimony was constant in that defendant sexually abused the victim multiple times over a long period of time.

See id. at 4; App. 61. Based on that, it declined to grant a new trial.

Additional facts will be discussed when relevant.

ARGUMENT

I. The district court did not err in ruling that its prior failure to order production of these specific pages of A.F.'s privileged mental health records before trial does not necessitate a new trial.

Preservation of Error

Error was preserved for Barrett's challenge on the merits of the ruling that denied a new trial. The district court's ruling considered and rejected his arguments about the importance of these records and the need for a new trial. *See* Motion for New Trial (6/28/19) at 4–5; App. 51–52; RemandTr. 10:3–14:20; *accord Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012). But Barrett invited the district court to apply the familiar standard for newly-discovered-evidence claims. *See* RemandTr. 19:2–20:2. Barrett never argued that any other standard was applicable—instead, he argued "if [he] can get this information to the jury and impeach A.F.'s credibility, then he'll be found innocent." *See* RemandTr. 14:17–20. Barrett has waived any arguments seeking application of more stringent standards, including his argument for the applicability of any harmless-error standard (either constitutional or non-constitutional). *See* Def's Br. at 69–73. *accord Jasper v. State*, 477 N.W.2d 852, 856 (Iowa 1991) ("Applicant cannot deliberately act so as to invite error and then object because the court has accepted the

invitation."); *contra State v. Ford*, No. 08–1190, 2010 WL 2925124, at *2 n.2 (Iowa Ct. App. July 28, 2010) (rejecting argument that Ford "'invited error by specifying an incorrect standard at the hearing on the new trial motion," because "the district court was not led astray by defense counsel's statements" after Ford cited the correct rule and the State's resistance provided the correct standard).

If Barrett had framed a dispute over the applicable standard, the court would have resolved it. But in the absence of such advocacy and in the face of his invitation to apply this familiar standard (which aligned with *Ritchie*), the district court had no reason to rule on any claim that any other standard applied. *See* Ruling (9/30/19) at 2–3; App. 59–60. While this Court may take this opportunity to identify the correct standard, error from adopting and applying Barrett's standard would be invited error, which Barrett cannot use to obtain reversal.

Standard of Review

A district court's ruling on a motion for new trial that evaluates the impact of additional evidence is reviewed for abuse of discretion. *See State v. Weaver*, 554 N.W.2d 240, 244 (Iowa 1996), *overruled on other grounds by State v. Hallum*, 585 N.W.2d 249, 254 (Iowa 1998)); *accord State v. Romeo*, 542 N.W.2d 543, 551 (Iowa 1996).

Barrett agrees, but he argues that "to the extent the challenge raises constitutional claims, review is de novo." *See* Def's Br. at 41. But this is not a review of a ruling on a constitutional claim. There was no such ruling: no constitutional claim was raised or decided below. *See* Motion for New Trial (6/28/19) at 3–5; App. 49–51; RemandTr. 7:21–14:20; RemandTr. 19:2–20:2; Ruling (9/30/19); App. 58. Again, if there was a constitutional claim, Barrett needed to present it and get a ruling on it to preserve error for review. *See Lamasters*, 821 N.W.2d at 864; *DeVoss v. State*, 648 N.W.2d 58, 60–61 (Iowa 2002).

Merits

Although he failed to preserve error on this issue, Barrett is correct that the Iowa Supreme Court has not specified a standard to apply in ruling on these claims following remand to the district court to order production of privileged mental health records that should have been identified by the court under section 622.10(4)(a)(2) and produced before trial, and to determine whether that error makes it necessary to order a new trial. *See* Def's Br. at 10–11. The State will identify approaches that make sense and defend them against Barrett's new arguments for a harmless-error standard. *See* Def's Br. at 69–73. Moreover, under any standard, the lower court's ruling was correct.

A. A new trial should only be granted if disclosure of this information before trial would probably have changed the result, or if it would have created a reasonable probability of a different result.

A newly-discovered-evidence claim must establish that evidence was unknown to the claimant, could not have been discovered before trial through the exercise of due diligence, was not merely cumulative, and would probably have changed the result of the trial. *See Weaver*, 554 N.W.2d at 246; *Romeo*, 542 N.W.2d at 550. A *Brady* claim must establish that evidence was suppressed, that it was favorable, and that it was material to the determination of guilt. *See DeSimone v. State*, 803 N.W.2d 97, 103 (Iowa 2011) (quoting *Harrington v. State*, 659 N.W.2d 509, 516 (Iowa 2003)). That materiality element requires the claimant to establish "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *See DeSimone*, 803 N.W.2d at 105 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). This Court should choose either the fourth prong of the newly-discovered-evidence framework or the materiality prong of *Brady* as the standard for analyzing these claims on remand. Both apply in closely analogous situations and are appropriately calibrated to post-verdict counterfactuals. If not, the last remaining possibility is a non-constitutional harmless-error standard.

1. *Even without invited error, it would have been correct to import the newly-discovered-evidence standard referenced in* Neiderbach *and* Ritchie.

In *Ritchie*, the United State Supreme Court affirmed the part of the Pennsylvania Supreme Court's decision that had ordered the district court, on remand, to review the privileged file and "determine whether it contains information that probably would have changed the outcome of [Ritchie's] trial"—and it remarked that "[i]f it does, he must be given a new trial." *See Ritchie*, 480 U.S. at 58. In *Neiderbach*, the Iowa Supreme Court referenced *Ritchie* in describing the inquiry to be performed on remand. *See Neiderbach*, 837 N.W.2d at 198 n.3. This is the standard that the district court identified and applied, at Barrett's invitation. *See* RemandTr. 19:2–20:2; Ruling (9/30/19) at 2–3; App. 59–60. This resembles the fourth prong of the standard for newly discovered evidence. *See Weaver*, 554 N.W.2d at 246; *Romeo*, 542 N.W.2d at 550. This also aligns with the New Mexico case that was cited in *Neiderbach*, where the remand order stated that retrial would only be necessary if, upon review, the district court found that "exclusion of the records was prejudicial to Defendant." *See State v. Garcia*, 302 P.3d 111, 121 (N.M. Ct. App. 2013). Most importantly, this is how Iowa courts analyze erroneous rulings on privilege. *See,*

e.g., *Tausz v. Clarion-Goldfield Cmty. Sch. Dist.*, 569 N.W.2d 125, 129 (Iowa 1997) (finding error in court's ruling on privilege, but affirming because it was not "sufficiently prejudicial to warrant reversal").

Barrett may argue that this is an inappropriately heavy burden to impose when a timely request for production of records was denied in violation of the defendant's rights under section 622.10(4). But as a general rule, Iowa courts "do not presume the existence of prejudice based on an erroneous discovery ruling." *See Jones v. Univ. of Iowa*, 836 N.W.2d 127, 140 (Iowa 2013). In other contexts where claimants seek reversal based on an erroneous pretrial ruling on the scope of an applicable privilege, "it is [the claimant's] burden to establish *how* the evidence sought could have altered the outcome." *See id.* at 141 & n.5; *accord Struve v. Struve*, 930 N.W.2d 368, 378 (Iowa 2019) (quoting *Jones*, 836 N.W.2d at 140) ("The burden rests upon the appellant not only to establish error but to further show that prejudice resulted."). Barrett presented evidence and cross-examined A.F. about a variety of non-privileged matters; then, a jury weighed all of the evidence and decided it still *believed* A.F.'s testimony about Barrett's sexual abuse. If Barrett cannot show how access to A.F.'s privileged records would have changed that outcome, there is no point to ordering a retrial.

2. *If "exculpatory" in section 622.10(4) is read to mirror "favorability" under* Brady*, then a similar "materiality" requirement should apply: retrial should only be required if a defendant establishes a reasonable probability of a different result.*

Iowa courts have adopted a view of the term "exculpatory" in section 622.10(4)(a)(2) that includes all impeachment evidence by drawing an analogy to *Brady* cases. *See Leedom*, 938 N.W.2d at 188 (quoting *Bagley*, 473 U.S. at 676; *DeSimone*, 803 N.W.2d at 105). But the expansive reach of the "favorability" prong of *Brady* is limited by the "materiality" prong. A *Brady* violation can only exist "when the favorable, suppressed evidence is material to the issue of guilt." *See DeSimone*, 803 N.W.2d at 105. This requires the defendant to prove "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *See id.* (quoting *Bagley*, 473 U.S. at 682); *accord Kyles v. Whitney*, 514 U.S. 419, 435 (1995) (explaining that *Brady* materiality is satisfied by showing the evidence could "put the whole case in such a different light as to undermine confidence in the verdict"). In the *Brady* context, this supplants the constitutional harmless-error standard. *See Kyles*, 514 U.S. at 435–36. Here, too, materiality should supplant any otherwise applicable test for determining whether a new trial is "necessary."

To be sure, section 622.10(4) and *Brady* are very different. Unlike section 622.10(4), *Brady* is constitutionally required by the Due Process Clause. *See Brady v. Maryland*, 373 U.S. 83, 85–86 (1963). The Iowa legislature enacted section 622.10(4) in response to the decision in *State v. Cashen*, which invented a protocol for requests for privileged records that "g[ave] the defendant more power than necessary to protect the right to a fair trial." *See State v. Cashen*, 789 N.W.2d 400, 411–12 (Iowa 2010) (Cady, J., dissenting). That erosion of privilege led Iowans "to supersede the *Cashen* test with a protocol that restores protection for the confidentiality of counseling records" while offering defendants enough access to avoid unconstitutionality. *See Thompson*, 836 N.W.2d at 481. The confidentiality interests that lay at the heart of section 622.10(4) are not implicated by *Brady*.

But there is one key similarity: *Brady* defines a minimum level of disclosures that must be made to vindicate due process concerns. That matches the strength and reach of the analogous protections that the Iowa legislature intended to create within section 622.10(4): the absolute minimum required to avoid constitutional infirmity. *See id.* at 486–87 (noting review of privileged records by defense counsel is not constitutionally required, and section 622.10(4)'s procedure for

in camera review was "*constitutionally* sufficient" under *Ritchie*); *cf. Slaughter v. Des Moines Univ. College of Oseteopathic Med.*, 925 N.W.2d 793, 802 (Iowa 2019) (noting that section 622.10 is intended to protect the statutorily enumerated privileges, and Iowa courts will "construe section 622.10 liberally to carry out this purpose"). Thus, it makes sense to import the *Brady* materiality standard to determine whether a violation of section 622.10(4) necessitates a new trial.

The United States Supreme Court rejected materiality standards for *Brady* that resembled a harmless-error analysis, out of reluctance to create any constitutional rule that would require all prosecutors in every state to adopt open-file policies to avoid post-verdict reversal. *See, e.g.*, *United States v. Agurs*, 427 U.S. 97, 108–09 (1976) (rejecting materiality standard that would effectively mean that "the prosecutor has a constitutional obligation to disclose any information that might affect the jury's verdict" because "[w]hether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much"); *accord Bagley*, 473 U.S. at 680 (noting that *Agurs* "rejected a harmless-error rule" because it would have "impos[ed] on the prosecutor a constitutional duty to deliver his entire file to defense counsel"). Similarly, the Iowa legislature had no

desire to enact a rule that incentivized Iowa district court judges to disclose every privileged record that is *arguably* exculpatory, in the hopes of avoiding reversal and retrial. Adopting a harmless-error standard would have the same effect identified in *Agurs* and *Bagley*—but its impact would be far worse. The consequences of incentivizing a "wide net" approach to these motions would fall entirely upon those victims who rely on confidentiality to build a safe space where they can reflect authentically about trauma and recovery, without judgment. *See McMaster v. Iowa Bd. of Psychol. Examiners*, 509 N.W.2d 754, 758 (Iowa 1993) (quoting *Hawaii Psych. Soc'y v. Ariyoshi*, 481 F.Supp. 1028, 1039 (D. Haw. 1979)) ("The possibility that the psychotherapist could be compelled to reveal those communications to anyone . . . can deter persons from seeking needed treatment and destroy treatment in progress."); *accord Thompson*, 836 N.W.2d at 488 (quoting Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 86 OR. L. REV. 1, 33 (2007)) ("The lawyers in the case may have every confidence that defense counsel has adhered and will adhere to the rules. To the witness, by contrast, this may provide little comfort compared to the sense of betrayal, humiliation, and exposure she is likely to experience.").

Indeed, the *Brady* materiality standard may set the bar too low. Lower thresholds for materiality in the *Brady* context are intended to incentivize prosecutors to err on the side of disclosure. *See Kyles*, 514 U.S. at 439 (noting that "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence," which "is as it should be"); *Agurs*, 427 U.S. at 108 ("Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure."). But that was *not* the Iowa legislature's aim in enacting section 622.10(4). It recognized a "compelling interest in protecting the psychological and emotional needs of crime victims" and attempted to advance that interest "by limiting the disclosure of their mental health records." *See Thompson*, 836 N.W.2d at 489. Using a toothless standard to determine if erroneous non-disclosure requires a retrial would *encourage* disclosure in close cases—which is the opposite of what the legislature intended.

Barrett seems to endorse the analogy to *Brady* cases. *See* Def's Br. at 73–78. His discussion focuses on *DeSimone*, which involved non-disclosure of a timecard that would have contradicted a witness

whose testimony had minimally corroborated the victim's description of running to Hy-Vee to report her rape. *See* Def's Br. at 74–78 (citing *DeSimone*, 803 N.W.2d at 103–06). *DeSimone* illustrates how lenient *Brady*'s materiality element can be, at its outer limits. That timecard had no relationship to the victim's testimony about being raped, or even to her testimony about ending up at Hy-Vee—it was undisputed that she called 911 from that Hy-Vee at 3:06 a.m. that morning and was taken directly to the hospital for a sexual assault examination, and a Hy-Vee employee testified about her "appearance and actions at the Hy-Vee store she ran to for help." *See DeSimone*, 803 N.W.2d at 100–01. All the timecard meant was that the witness who had seen a woman run across that street had to have seen someone else (perhaps on a different evening). And yet, the Iowa Supreme Court found that timecard passed the test for *Brady* materiality, because it might have caused the jury to believe that the victim's testimony that DeSimone raped her was all part of a conspiracy against him. *See id.* at 105–06. After *DeSimone*, it is impossible to argue that *Brady* materiality is an unfairly high standard for reversal on the basis of failure to disclose evidence that may impeach a witness in a sexual abuse prosecution. Again, *Brady* materiality may set the standard too *low*.

Barrett may argue that materiality is not applied in *Brady* cases as a metric for when reversal is required, and instead acts as a criterion for identifying when information must be disclosed (or for identifying when failure to produce information gives rise to a *Brady* claim). But *Kyles* explains that *Brady*'s materiality requirement serves *both* an error-identifying function and an error-weighing function: it identifies when suppression of favorable material is constitutionally significant, *and* it supplants any otherwise applicable harmless-error analysis. *See Kyles*, 514 U.S. at 434–36. This is clearest when *Kyles* states that the materiality of suppressed evidence must be "considered collectively, not item by item," in the final analysis of whether *Brady* violations undermine the validity of a conviction. *See id.* at 436–37 & n.10.

All of the Iowa cases that construe the term "exculpatory" in 622.10(4) to include impeachment evidence are deliberately giving it a meaning that tracks *Brady*'s favorability element. *See, e.g.*, *Leedom*, 938 N.W.2d at 188; *Retterath*, 2017 WL 6516729, at *11. For this to make any analytical sense, and to give effect to the legislature's intent, there must be a corresponding materiality requirement that is *at least* as demanding as *Brady* materiality—if not in defining the scope of the required production, then in assessing the impact of non-disclosure.

3. At worst, errors in rulings on the applicability of a statutory privilege would be analyzed under a non-constitutional harmless-error standard.

It is possible to conceptualize the issue like this: Barrett was entitled to disclosure of these 75 pages of privileged records under section 622.10(4), and any violation of a trial right that arises from a statute or rule is presumed prejudicial unless the record affirmatively establishes otherwise. *See, e.g.*, *State v. Hanes*, 790 N.W.2d 545, 550–51 (Iowa 2010). That would make some sense, although it would ignore the unique problem that section 622.10(4) meant to solve and the interests that it aims to promote. It would also ignore the fact that importing *Brady*'s favorability standard to encompass impeachment without also importing its materiality standard would undermine the legislature's intent to enshrine the minimum level of protections that pass constitutional muster and then *stop there*, without requiring any further disclosures, creating any additional remedies, or placing any more burdens on victims (or courts). *See Thompson*, 836 N.W.2d at 481, 486–90. Finally, it would diverge from the standard analysis for errors in pretrial discovery rulings about the scope of a privilege. *See Struve*, 930 N.W.2d at 378; *Jones*, 836 N.W.2d at 14–41 & n.5. If not for any of that, a non-constitutional harmless-error standard would fit.

But Barrett takes it a step further—he demands a *constitutional* harmless error standard. That means swapping out the part of the claim about his right arising "under section 622.10(4)" and replacing it with a statement that his right to access A.F.'s privileged mental health records is constitutional in nature. *See* Def's Br. at 69–73. This was not the claim that Barrett advanced below, nor was it ruled upon by the district court; this new version of his claim cannot be raised for the first time on appeal. *See* Motion for New Trial (6/28/19) at 3–5; App. 49–51; RemandTr. 7:21–14:20; RemandTr. 19:2–20:2; Ruling (9/30/19); App. 58. Moreover, *Thompson* specifically rejected the notion of "a general due process right to obtain otherwise privileged evidence." *See Thompson*, 836 N.W.2d at 489–90. Barrett cannot leverage a finding that his *statutory* rights were violated to demand reversal under the harmless-error standard that applies to violations of *constitutional* rights—that is the whole point of separate standards "based on whether the alleged error is of a constitutional magnitude." *See Hanes*, 790 N.W.2d at 550–51. All of Barrett's arguments about exercises of constitutional rights that are affected by an erroneously underinclusive ruling under section 622.10(4) would eliminate the nonconstitutional harmless-error standard in criminal prosecutions

by linking every single evidentiary ruling, instructional dispute, and scheduling order to the defendant's constitutional right to a fair trial. *See* Def's Br. at 70–71. The fact that a ruling affected a criminal trial does not mean any challenge to that ruling is constitutional in nature.

For example, Barrett argues that he was unable to cross-examine A.F. about his privileged mental health records, and "denial of effective cross-examination is a constitutional error of the first magnitude." *See* Def's Br. at 71–72 (quoting *Neiderbach*, 837 N.W.2d at 235 (Appel, J., specially concurring)). But a trial error can impact cross-examination without becoming a constitutional error. Challenges to rulings that control the scope of cross-examination are ordinarily reviewed for abuse of discretion, and error must be prejudicial to substantial rights to require reversal. *See* Iowa R. Evid. 5.611(a); Iowa R. Evid. 5.103(a); *State v. Parker*, 747 N.W.2d 196, 207–09 (Iowa 2008); *State v. Hall*, 297 N.W.2d 80, 91 (Iowa 1980); *State v. Cuevas*, 288 N.W.2d 525, 530–33 (Iowa 1980). Barrett cannot graft the analytical framework from a constitutional claim onto this challenge alleging violation of a statutory provision governing pretrial discovery, which was always non-constitutional in nature. *See Barrett*, 2018 WL 6132275, at *1 ("Barrett's challenge raises a non-constitutional claim.").

Barrett cites *Cockerham v. State*, where the Alaska Supreme Court discussed using a harmless-error standard to assess the effect of failure to produce a witness's juvenile records—but that was about a due-process right to evidence in the State's possession (like *Ritchie*), not a witness's privileged records possessed by a third party. *See Cockerham v. State*, 933 P.2d 537, 541–44 (Alaska 1997). And the discussion of harmless error was dicta, because the defendant "failed to make a sufficient showing that the records he requested would contain relevant impeachment evidence, and subsequently failed to cross-examine the witness on any matter relating to credibility," so there was no infringement of any constitutional right. *Id.* at 543–44. Barrett also cites *People v. Boyette*, where the California Court of Appeals ordered *in camera* review on remand and stated that reversal would be required unless the failure to conduct *in camera* review was "harmless beyond a reasonable doubt." *See People v. Boyette*, 201 Cal.App.3d 1527, 1534 (Cal. Ct. App. 1988). Again, those records were in the possession of "county offices"—so, like *Ritchie* and *Cockerham*, there were *Brady* concerns. And *Boyette* was overruled and mooted by *People v. Hammon*, where the California Supreme Court "declin[ed] to extend the defendant's Sixth Amendment rights of confrontation

and cross-examination to authorize pretrial disclosure of privileged information." *See People v. Hammon*, 938 P.2d 986, 989–93 (Cal. 1997). Barrett does not provide any authority for his assertion that proving an erroneous application of this statutory provision requires analysis under a constitutional harmless-error standard, especially where records are held by a third party. *See generally State v. Lynch*, 885 N.W.2d 89, 101 (Wis. 2016) (plurality opinion) ("*Ritchie*—a case concerning confidential records . . . held by the very agency charged with investigating the offense and therefore soundly rooted in *Brady*—never should have been stretched to cover privileged records held by agencies far removed from investigative and prosecutorial functions.").

4. The district court's findings should receive some amount of deference on appeal.

Any discussion of traditional harmless-error review is missing a key ingredient that became available on remand (which was probably the reason for ordering remand in the first place): the district court's view of the significance of this new evidence in the context of the trial, which it observed firsthand. Iowa cases on newly discovered evidence recognize that this firsthand experience helps the trial court assess the likely effect of additional material on the trial proceedings. *See Romeo*, 542 N.W.2d at 550–51 ("Because the trial judge sat through

the trial, he is in a superior position to decide whether the information on the tapes would have changed the result of the trial. Consequently, we give weight to his conclusion that the result would not have been altered had the tapes been available for use at trial."); *State v. Miles*, 490 N.W.2d 798, 799 (Iowa 1992) ("From its closer vantage point the presiding trial court has a clearer view of this crucial question, and we generally yield to its determination."); *State v. Compiano*, 154 N.W.2d 845, 849 (Iowa 1967) ("The trial court is generally in a better position than we to determine whether evidence, newly discovered, would probably lead to a different verdict upon retrial, and we have often said we will not interfere with its ruling unless it is reasonably clear that such discretion was abused."). So when the trial court explained that the privileged material "does not discredit the evidence that was already presented," that finding should receive some level of deference because the trial court saw A.F.'s testimony firsthand, and it did not find A.F.'s testimony less credible after considering the arguments that Barrett made from these privileged records. *See* Ruling (9/30/19) at 4; App. 61. No matter what substantive framework applies, findings from the trial court on the enduring credibility of A.H.'s testimony are entitled to some level of deference on appellate review.

B. Under any applicable standard or framework, the district court did not err in determining that a new trial was not necessary.

It is important for this Court to identify the applicable standard to provide guidance for lower courts facing this situation in the future. But the correct outcome in this case is clear, under any standard: the records do not contain anything that would have made a difference during Barrett's trial, and Barrett cannot show the district court erred in denying his motion for new trial.

1. The Court of Appeals opinion that identified these privileged records and ordered their disclosure has no preclusive effect on arguments on whether the information they contain is new or important.

There are points throughout the argument where the State must note that certain records have no impact for reasons that should have prevented their production in the first place. Many of these records are not exculpatory at all, under any definition—which is why Barrett's filing that catalogued exculpatory material in the produced records only referenced 20 of those 75 pages. *See* Exhibit 103; App. 55. And some of the records only contain the same information that Barrett had already leveraged during trial, *before* these records were produced on remand. In assessing the need for new trial, those observations help to show that the trial was not unfair and that its outcome would

have been unchanged if the district court had ruled as the Iowa Court of Appeals did. Barrett might respond by claiming that the State is estopped from arguing that any of these records are not exculpatory because that finding is inherent in the opinion that resolved the claim on direct appeal, which is now law of the case. *See Barrett*, 2018 WL 6132275, at *3. Additionally, Barrett might also claim that the State may not argue that certain records only contain information that he already leveraged during trial, because of the appellate court's finding that those same records met the "compelling need" requirement and passed the final balancing test. *See* Iowa Code § 622.10(4)(a)(2)(d). Indeed, he argues: "by ordering their disclosure, the Court of Appeals already determined that the records contained material evidence for which the defense had a compelling need." *See* Def's Br. at 69.

Does the opinion that resolved the prior appeal preclude this Court from finding that a particular record had no exculpatory value or contained information that was already available for Barrett's trial? It cannot, for two reasons. First, the State could never have made arguments explaining why specific pages of privileged records were not exculpatory or were cumulative until production on remand—it had no idea what they contained. Remand was the State's first chance to

litigate the impact of non-disclosure of these records on the trial, and it would be unfair to deem those arguments "dead on arrival" before the State's first chance to make them. Second, these arguments were the whole point of remand: to allow parties to make *new* arguments (potentially supported by new record) on the question of whether a new trial was necessary. *See Barrett*, 2018 WL 6132275, at *3. That remand order necessarily contemplates arguments on the question of whether non-disclosure of these records *mattered*, which includes arguments about how they related to the disputed factual issues and to evidence already presented at trial. *See State v. Rademacher*, 433 N.W.2d 754, 758 (Iowa 1988) (rejecting claim that findings of fact exceeded scope of remand order, because "[t]he language employed in the order for limited remand was not intended to discourage the district court from fully setting forth those circumstances which prompted it to make the ultimate finding"). And the district court could not abdicate its duty to weigh evidence from the trial record to answer the question that the remand order had directed it to answer, even if that involved noticing parts of the trial record that must have escaped the appellate court's notice during its own review. *See* Ruling (9/30/19) at 4; App. 61 (finding that "evidence of the victim denying

having been sexually abused was introduced at trial" and was "already addressed during trial," and also concluding that "[e]vidence of other potential perpetrators" was "available to be presented during trial through questioning the already available witnesses"). Indeed, the appellate court probably expected that arguments from the parties on remand could establish that its list of records that had to be disclosed was overinclusive, as it readily recognized a corresponding potential for "underinclusive disclosure." *See Barrett*, 2018 WL 6132275, at *3.

The State is not relitigating the merits of the prior appeal or challenging the order compelling production and disclosure—those became final on procedendo, and those disclosures cannot be undone at this stage anyhow. But the remand order directed the district court to determine whether failure to order those disclosures before trial necessitates a new trial. The appellate court left that question open, and did not consider or rule upon arguments about the specific value of each page of records in establishing any need for new trial (indeed, the parties had no way to make such arguments, because they did not know what information those privileged records contained). All of the State's arguments are directed at that question, which was answered by the district court in the first instance, and is properly before this

Court in this appeal. *See Barrett*, 2018 WL 6132275, at *7 (explaining "nothing in this opinion is intended to comment on the determination of whether Barrett is entitled to a new trial following the disclosure of the exculpatory records set forth above," and "[t]hat determination is for the district court in the first instance"). The State is not precluded from making these arguments by the opinion in the prior appeal.

2. *Evidence of A.F.'s delayed disclosure (and his partial disclosures) was already presented at Barrett's trial. Production of records showing A.F.'s initial unwillingness to disclose could not undermine his credibility or change the result.*

At trial, A.F. testified that he had been in therapy since he was about six years old, after an incident where Chad kicked him. *See* TrialTr. 209:15–213:23; TrialTr. 219:18–22; *see also* TrialTr. 402:7–403:11. A.F. testified that he told Richter that he was sexually abused in a therapy session in July 2016, but he did not say Barrett's name or give details about the abuse until his interview at Project Harmony. *See* TrialTr. 186:2–190:8. Barrett cross-examined A.F. about the delay in his initial disclosure. *See* TrialTr. 221:7–15; TrialTr. 223:3–225:1; TrialTr. 237:24–238:7. It was central to Barrett's defense. *See* TrialTr. 475:25–476:13; TrialTr. 479:16–481:9. Barrett also cross-examined A.F. about the details that he included in his testimony but omitted

from his earliest disclosures. *See* TrialTr. 231:14–235:12; *accord* TrialTr. 328:24–329:15. The State responded with expert testimony about delayed disclosure and partial disclosure. *See* TrialTr. 253:17–256:16; TrialTr. 258:9–259:12; *accord* TrialTr. 270:3–13 (noting that Project Harmony sees a child for a second interview about "[a] couple times a month"). A.F. explained it himself—he delayed disclosure to avoid "thinking of all the stuff that happened to [him] and bringing up all the memories," which was uncomfortable because "[he] was hiding it for quite a few years." *See* TrialTr. 186:2–189:19. And his earliest attempts were only partial disclosures because "it was still very, very uncomfortable" to talk about that sexual abuse in detail. *See* TrialTr. 231:18–232:8; *accord* TrialTr.239:4–12.

Barrett's first argument about the need for new trial is that "[i]nformation in the mental health records contained impeachment evidence" that would diminish A.F.'s credibility. *See* Def's Br. at 46. Then, he spends five pages on evidence about A.F.'s delayed disclosure, partial disclosures, and A.F's credibility that *was presented* at trial. *See* Def's Br. at 47–51. Barrett is trying to show that A.F.'s credibility was a close question and that additional tidbits from his privileged records could have tipped the balance. But it has the opposite effect:

everything in the privileged records that duplicates the same attacks on A.F.'s credibility that were deployed at trial would be cumulative and unlikely to affect the result. *See, e.g.*, *Hammon*, 938 P.2d at 993 (noting that error in failing to review or produce records before trial is harmless when "[t]he jury learned about the victims' psychological history through other evidence"). Indeed, by copy-pasting the same credibility attacks from the brief that he filed in his previous appeal, Barrett demonstrates the cumulative nature of the privileged records on delayed disclosure and partial disclosures. *Compare* Def's Br. at 47–51, *with State v. Barrett*, No. 17–1814, Def's Final Br. at 57–62. Many of his assertions are false; the State already responded to this same flurry of misrepresentations and mischaracterizations. *See State v. Barrett*, No. 17–1814, State's Final Br. at 32–41. More importantly, because information in A.F.'s privileged records on delayed disclosure was cumulative, producing it would have had no effect on the trial.

Barrett argues "while it is true that at trial A.F. did admit that he had been in therapy during the entire time the sexual abuse was occurring and that he did not inform his therapist of the abuse, it was not clear from his testimony that his therapist had specifically questioned whether he had been sexually abused as early as 2011."

See Def's Br. at 51–52. The first half of this sentence is a substantial admission that most of the records that related to delayed disclosure are cumulative. The second half of his sentence is technically true—A.F. did not testify about any therapist's concerns that he was being sexually abused as early as 2011. But Chad *did* testify about that: he said he was present when A.F. was asked if he was sexually abused, and "[A.F.] looked at his mother and turned white as a ghost," but "did not disclose anything." *See* TrialTr. 405:8–25. This establishes that the evidence is cumulative, *and* that there was another source—both Chad and Amanda could have testified about that question and A.F.'s denial (and Barrett could have cross-examined A.F. about it). Chad also testified about behaviors from A.F. that made him think that A.F. had been sexually abused, like "grabbing his private parts as the girls were sitting on the floor and thrusting his private parts in their face." *See* TrialTr. 404:5–11; TrialTr. 422:2–15. Those were the concerns the records documented. They confirmed Chad and Manda had voiced those concerns, and that A.F. denied any abuse occurred. *See, e.g.*, Exhibit 102A, at 25; C-App. 63; Exhibit 102B, at 1; C-App. 64. Chad knew *all* of this, and Barrett knew what Chad knew—he elicited that testimony from him without any need for these records. This also

blocks Barrett from arguing that these records informed him of other relevant evidence that he could have found and used at trial. Barrett's cross-examination questions about A.F.'s "dragons" gave it away: Chad already told Barrett everything he could remember about A.F.'s mental health history, down to the metaphor A.F. used for his anger. *See* TrialTr. 214:15–215:3; *cf.* TrialTr. 418:10–17; TrialTr. 421:2–18.

Taking a step back, evidence of contemporaneous concerns about sexualized behavior from A.F. that gave rise to suspicions that A.F. was being sexually abused is not exculpatory for Barrett. Instead, it is damning: it corroborates A.F.'s testimony that, during this time, Barrett was sexually abusing him. *Compare* TrialTr. 190:9–192:8 (describing the first incident of sexual abuse, when A.F. was "7 or 8"), *and* TrialTr. 173:12–13 (stating he was born in 2003); *with* Exhibit 102A, at 25; C-App. 63, *and* Exhibit 102B, at 1; C-App. 64 (noting that, in October 2011, Chad and Manda "voiced concerns that [A.F.] had possibly been exposed to some type of sexual behavior" based on his sexualized behavior). Producing these records would have stymied Barrett's defense that A.F. fabricated these allegations, by showing that the allegations match contemporaneous notes about A.F.'s behavior. There is no way they could have made an acquittal more likely.

3. A.F.'s struggle with recall was already apparent in A.F.'s testimony and in his earlier disclosures. Barrett tried to use that to prove A.F. was lying. Evidence of A.F. struggling to recall events in other contexts is not impeaching—it is bolstering.

Barrett argues that "[t]he records also suggest that A.F. was not a reliable witness" for a variety of reasons; he focuses primarily on a pair of dissociative checklists, which were used to screen A.F. for a dissociative disorder in 2015. *See* Def's Br. at 53–55 (citing Exhibit 102C, at 6–12; C-App. 94–100). A.F. scored below the range for that disorder, but Barrett argues that answers to specific checklist items are "directly relevant and material to the question of whether A.F.'s recollection, pretrial statements, and trial testimony were accurate and truthful." *See* Def's Br. at 53–55. Only one of the checklist items bears on truthfulness (to be discussed in the next section). The other items that Barrett identifies are about A.F.'s ability to recall events.

Barrett would not benefit from presenting these checklist items to impeach A.F.'s ability to recall facts and events in a *general* sense, because his strategy was to show that A.F.'s inability to recall details about *these specific incidents* meant they were mere fabrications. *See* TrialTr. 473:24–474:14; TrialTr. 481:14–482:4; TrialTr. 486:18–487:16; *accord* TrialTr. 231:14–235:12; TrialTr. 328:24–329:15. Showing that

A.F. was known to forget facts/events that he could recall later would only bolster the State's case by showing that A.F.'s omission of facts in his earlier disclosures was caused by generalized struggles with recall, and not some by-product of fabrication. *See* Exhibit 102C, at 6; C-App. 94 (parent indicating A.F. sometimes "does not remember or denies traumatic or painful experiences that are known to have occurred"); Exhibit 102C, at 12; C-App. 100 (A.F. indicating that he sometimes "feel[s] like [his] past is a puzzle and some of the pieces are missing"); *accord* Exhibit 102B, at 16; C-App. 79 (noting "[A.F.] denies any issues of abuse or neglect" even when it was already established that Chad had kicked him, triggering an investigation); Exhibit 102B, at 14; C-App. 77 ("[A.F.] denied any past history or current occurrence of physical or sexual abuse although there has been physical abuse.").

Barrett was much better off sticking with his trial strategy of impeaching A.F. with prior inconsistent statements about the abuse, specifically. And the fact that he *did* impeach A.F. with disclosures that were inconsistent or incomplete minimizes the need for retrial based on the unavailability of other impeachment evidence. *See, e.g.*, *Aguilera v. State*, 807 N.W.2d 249, 254 (Iowa 2011) ("[W]hen a witness's testimony has been otherwise impeached with prior

inconsistent statements, we are less likely to find the impeaching statements would have impacted the outcome of the trial."); *Cornell v. State*, 430 N.W.2d 384, 386 (Iowa 1988) (holding that suppression of evidence that would impeach a witness's testimony failed the test for *Brady* materiality because that witness "was otherwise impeached because of several inconsistent statements"). This record would hurt Barrett's defense, and producing it before trial would change nothing.

4. References to a school program on sexual abuse prevention education before 2011 do not impeach A.F.'s testimony that he did not really grasp that he had been sexually abused until sixth grade.

Barrett places special emphasis on two pages of these records, mentioning that Barrett's school "provided an educational program on recognizing sexual abuse sometime prior to January of 2011." *See* Def's Br. at 51–53 (citing Exhibit 102A, at 18–19; C-App. 56–57). To Barrett, this proves that A.F. was lying when he testified that he did not understand Barrett's acts were really *wrong* until sixth grade. *See* TrialTr. 187:11–188:12. But it is common knowledge that presenting material to schoolchildren on one occasion does not guarantee they will understand, internalize, and remember it. A.F. might not have understood the message, or might not have been paying attention—that was a frequent problem for him. *See* Exhibit 102B at 18; C-App. 71

(noting that A.F. exhibited symptoms of ADHD, and summarizing impact of ADHD symptoms on learning); Exhibit 102C, at 6; C-App. 94 (parent marking checklist item stating that A.F. sometimes "has a difficult time learning from experience, e.g. explanations . . . do not change his or her behavior"). And even if the message got through and A.F. could already identify a "bad touch" in general terms, A.F. could have viewed Barrett's sexual acts in a different light; after all, that is the entire point of grooming. *See, e.g.*, TrialTr. 261:9–262:10 (explaining that grooming enables abuse by "making the child feel like they were sort of willing to go along with it, so it makes it more complicated for the child to tell"). A.F. may have understood that these were "bad touches" that were not allowed, but he may not have understood *why* they were bad—until his sixth-grade peers made the kind of jokes about sexual abuse that sixth-grade boys typically make, treating male-on-male abuse as defiling and emasculating the victim. No educational program for seven-year-olds would present A.F. with crass jokes to match his sexual experiences with Barrett—but that was apparently what it took for A.F. to get it. *See* TrialTr. 187:23–188:12.

Before that moment, A.F. would have been keeping this secret at Barrett's insistence, for about three years. *See* TrialTr. 187:1–188:12;

TrialTr. 194:3–18. A.F. testified that Barrett purchased his complicity by providing access to video games, during incidents that post-dated that educational program. *See* TrialTr. 195:2–198:13. A.F. was a child who did not yet experience sexual abuse as a violation with an impact that outlasted temporary physical sensations—and video games were such a powerful draw that he "would do anything to play the game." *See* TrialTr. 235:17–236:14.[2] Even knowing Barrett could be punished

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[2] This should not be dismissed with a snort about "kids today and their video games." Researchers have shown that playing video games "triggers dopamine release in the brain," with effects on behavior that can go far beyond the measurable results from brain imaging:

> Before Vorderer and Weber even looked at any of the brain scans, they were surprised by the behavior of the dozen or so adults who volunteered for the test. Participating in an fMRI study involves lying for extended periods of time in an extremely confined and loud space. Even a mild claustrophobic will invariably find the experience intolerable, and most people need a break after 20 minutes. But most of the *Tactical Ops* players happily stayed in the machine for at least an hour, oblivious to the discomfort and noise because they were so entranced by the game.
>
> [. . .]
>
> It's likely those *Tactical Ops* players in an fMRI machine were able to tolerate the physical discomfort of the machine because the game environment so powerfully stimulated the brain's dopamine system.

Steven Johnson et al., *This is Your Brain on Video Games*, DISCOVER (Sep. 19, 2007), https://www.discovermagazine.com/mind/this-is-your-brain-on-video-games.

for touching him would only *strengthen* A.F.'s motivation to keep Barrett's secret: reporting it would mean that Barrett would stop bringing video games straight into A.F.'s bedroom. And A.F. was more than willing to break rules to play video games; after all, A.F. knew that staying up past curfew was also forbidden. *See* TrialTr. 235:17–236:14; TrialTr. 384:2–385:7; TrialTr. 424:17–425:7.

A.F. needed to develop into early adolescence before he could grasp that sexual abuse was different from staying up past curfew to play video games: not just against the rules, but intrinsically *wrong*. But by then, in his mind, he was complicit. This fits the pattern that Brazil described, in her expert testimony on delayed disclosure:

> Older kids start to understand that something is wrong. But especially if it's been happening over time, they start to feel like they might be in trouble or that they've done something wrong because they've been going along with what's happened, and so they don't want to tell because of fear of being in trouble, fear that the person that they care about might be in trouble as well as shame and embarrassment that often happens with older kids.

TrialTr. 254:1–255:10; *see also* TrialTr. 251:21–252:6 (explaining that 13-year-olds are typically at a developmental point where "shame and embarrassment or fear" will "complicate their disclosure"); *accord* Exhibit 102C, at 20; C-App. 108 (noting Richter told Chad that A.F. was concerned he would be "in trouble [for] not telling his father").

That understanding that abuse is *wrong*—not just against the rules—is something that A.F. needed time to achieve, and whatever was said during that school program was apparently not enough to propel A.F. through those later developmental stages, far ahead of schedule.

The fact that A.F.'s school presented a "sexual abuse school education program" does not prove A.F. knew that Barrett's acts were intrinsically *wrong*—at best, it could help to prove he knew they were not allowed, and could be reported. That would not disprove any part of his testimony; it would not affect his credibility; and it would not contradict his testimony that he only realized the true wrongfulness of Barrett's abuse in a flash of insight, during sixth grade. Barrett argues that "[i]f the defense had the information contained in these records, it could have investigated the program the school presented to the children and directly contradicted A.F.'s assertion that he did not know the sexual abuse was wrong until 2014 or 2015, thus damaging his credibility." *See* Def's Br. at 53. But Barrett would not need these records to investigate whether A.F.'s schools presented sexual abuse prevention education programs—the fact that a school presents this program or an analogous program cannot be privileged, and Barrett could have contacted teachers or school administrators to find out

whether/what/how they teach kids about identifying and reporting sexual abuse (and Barrett knew A.F.'s entire educational history, so he would know which schools to call). *See* TrialTr. 219:20–221:9. And no matter how Barrett's investigation was affected, presenting this kind of information would not meaningfully impeach A.F.'s testimony that he needed to develop and mature before he could understand why he should care that Barrett exploited him for sexual gratification. *See* TrialTr. 187:1–188:12; TrialTr. 230:23–231:13.

5. The DHS note that implied A.F. was a liar would have been irrelevant and unfairly prejudicial.

The investigation into Chad kicking A.F. was memorialized in a DHS report, which included one DHS employee's 2012 opinion that A.F. was "a good manipulator" and "an attention seeker." *See* Exhibit 102B, at 5; C-App. 68. At that point, A.F. was only nine years old. When he disclosed the abuse, he was 13 years old. The basis for this note is unclear, and its staleness diminishes its relevance to A.F.'s veracity as a witness and victim. *Accord State v. Einfeldt*, 914 N.W.2d 773, 784 (Iowa 2018) (upholding exclusion of character evidence of witness's violent conduct during adolescence, years ago, because "an adolescent's character is frequently not formed, and such adolescents often develop into adults with completely different characters").

6. Parental opinions about A.F.'s character for truthfulness were already available to Barrett.

Barrett also highlights an item on the dissociative disorder checklist, where A.F.'s parent marked that he sometimes "continues to lie or deny misbehavior even when the evidence is obvious." *See* Def's Br. at 54 (quoting Exhibit 102C, at 6; C-App. 94). The parent's opinion about A.F.'s character for truthfulness would have likely been admissible to impeach A.F.'s testimony. *See* Iowa R. Evid. 5.608(a). But that would open the door to rehabilitating A.F. with evidence of truthful character—which Barrett seemed to want to avoid. Barrett asked Chad to give an assortment of opinions about A.F. and elicited descriptions of events that differed greatly from A.F.'s testimony, but never asked Chad for his opinion on A.F.'s character for truthfulness. This particular checklist item is cumulative with opinion testimony that Barrett could have presented from Chad, but that he declined to present—and there is no reason to believe Barrett would have made a different choice with this record in hand. *Cf. Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991) (rejecting newly-discovered-evidence challenge because defendant knew "the general nature of the testimony" at trial and presented testimony from other witnesses on the same facts that rendered the new testimony cumulative).

The State must emphasize: Chad was part of many of A.F.'s therapy sessions, and he testified about them without concern for privilege. *See* TrialTr. 402:7–404:13; TrialTr. 420:19–423:6. This included his testimony that Dr. Thurman asked A.F. if he had been sexually abused, and also informed Chad that A.F. had mentioned "talking to dragons" as a metaphor for controlling his anger. *See* TrialTr. 405:8–22; TrialTr. 418:10–15. And Chad specifically testified that he knew dragon-related details from Dr. Thurman's report. *See* TrialTr. 421:2–18. Chad also testified about the DHS investigation, including the result of the investigation. *See* TrialTr. 394:10–395:23. Chad was a ready, defense-friendly source for all of this information, and Barrett's cross-examination of A.F. shows that he made use of it. The point of this is not to dispute the prior finding that these records contained information that was not available from any other source. Rather, it shows that giving Barrett access to the information in these records would not have changed the outcome of trial, because Barrett already had access to all of this information through Chad. *See Jones*, 479 N.W.2d at 274; *accord* Ruling (9/30/19) at 4; App. 61 (finding that "this evidence was certainly available to be presented during trial through questioning the already available witnesses").

7. The records do not provide new ammunition for Barrett's defense that A.F. fabricated allegations to influence a custody/visitation dispute between Amanda and Chad. That defense made no sense.

Barrett argues that records where A.F. discusses his feelings towards Chad "provided significant corroboration from a neutral source—A.F.'s mental health providers—as to the defense's theory on why A.F. accused [him] of sexual abuse." *See* Def's Br. at 55–58. But A.F. testified to animosity between himself and Chad, even if he also wished that Chad would have put more effort into reconciliation. *See* TrialTr. 226:25–230:22 ("It was for a good year I talked to my mom and my therapist about it because things started getting more rough between me and my dad, and I just didn't feel safe there anymore."); TrialTr. 186:6–25; TrialTr. 222:14–223:2; TrialTr. 418:18–419:1.

These records are consistent with A.F.'s testimony, the records from the modification, and most of Chad's testimony. A.F. wanted to live with his mother and disliked his time at Chad's house. *See* TrialTr. 226:25–230:22; Exhibit 102B, at 21–25; C-App. 84–88. But Amanda's request for modification did not try to cut Chad out of A.F.'s life—she tried to keep their informal alternate-weekend-visitation arrangement. *See* Def's Ex. A, at 1–3; C-App. 6–8; TrialTr. 227:12–228:5. Chad responded by demanding full custody of A.F.'s twin sister, which

made A.F. angry. *See* TrialTr. 228:2–25; TrialTr. 412:18–413:25; *accord* Exhibit 102C, at 16; C-App. 104. Then, in July 2016, A.F. disclosed Barrett's abuse—which had no effect on the modification, other than postponing eventual resolution by agreement of the parties. *See* TrialTr. 229:1–18; TrialTr. 414:1–7; Def's Ex. A, at 7–9; C-App. 12–14. In that agreement, Chad gave up all visitation with A.F., which was a result that A.F. wanted—but it is also understandable that A.F. had wanted Chad to *want* contact with him, and was hurt when Chad bargained away visitation with A.F. in exchange for more time with his sister. *See* TrialTr. 229:7–230:22; TrialTr. 414:16–416:12. This means the February 2017 record is consistent with A.F.'s testimony that, when the modification was finalized in January 2017, he "didn't want to see [Chad] anymore"—but it also did not contradict A.F.'s testimony that, at some earlier point, he had "wanted to hold on and try and work with it at least once a month, but [Chad] actually kind of kicked [him] off." *See* TrialTr. 229:7–15; Exhibit 102C, at 23; C-App. 101; *accord* TrialTr. 414:16–415:3. So the records proving that A.F. was often angry at Chad, did not like visiting his house, and eventually decided that he wanted Chad out of his life were all cumulative, and could not have been used for any impeachment purpose.

Even if these records contained new information that revealed that A.F. had secretly despised Chad, it would not help Barrett because this defense theory never made any sense. A.F. did not weaponize the allegations to end contact with Chad, and he still visited Chad after disclosing Barrett's abuse. *See* TrialTr. 229:1–6; TrialTr. 412:10–17; TrialTr. 414:1–15. And if A.F. hated Chad so much, he could accuse *Chad* of abuse (just like he did after Chad kicked him)—that would actually affect Chad's custody/visitation directly, instead of having some indirect impact through a relative who occasionally visited. *See* TrialTr. 499:23–500:15. And A.F. would not have buried the matter in a reference to "two types of abuse," then demurred when Richter asked him to name the person—if this allegation was fabricated as a weapon, A.F. would have been ready to wield it. *See* TrialTr. 186:2–188:20; TrialTr. 208:19–25; Exhibit 102B, at 18–21; C-App. 81–84.

8. This was not a whodunit. None of the references to Shawn Williams contradict, impeach, or affect A.F.'s testimony that Barrett sexually abused him.

Barrett focuses extensively on references to Shawn Williams, A.F.'s half-brother, who pled guilty to third-degree sexual abuse by committing a sex act with a minor female in October 2015. Barrett argues that these records establish that "there was another possible

defense to the allegations: that A.F. was in fact sexually abused, but that the perpetrator was actually [Shawn]." *See* Def's Br. at 58–65. This is nonsense. A.F. never alleged that Barrett abused him while he was asleep, while the lights were out, or while wearing a mask—it was during waking periods, while A.F. was fully conscious. *See* TrialTr. 190:9–203:25. Shawn did not even live with Chad's family after they moved to Griswold, which is where many incidents of sexual abuse occurred—and where Barrett had even more power over A.F., because Shawn took his video game console when he moved out, which meant A.F. relied on Barrett for access to video games. *See* TrialTr. 401:7–14; TrialTr. 424:22–425:20. Barrett and Shawn were not strangers to A.F. and there is no reason to believe A.F. could not tell them apart.

There are notable snippets: when A.F. was seven years old, he said that he knew something "embarrassing" about Shawn that he did not want to share. *See* Exhibit 102A, at 20; C-App. 58. Around then, he said that Shawn "does come in his room at night, sometimes while [he] is asleep." *See* Exhibit 102A, at 25; C-App. 63. But A.F. *always* denied that Shawn touched him—even when he unburdened himself by disclosing Barrett's abuse, and even after he learned about Shawn's sexual abuse conviction. *See* Exhibit 102C, at 20–25; App. 108–113.

Even if Shawn abused A.F., that would not help prove that Barrett did not *also* abuse A.F. It would only foreclose Barrett's claim that A.F. fabricated allegations to impact visitation—he would already have had a *non*-fabricated story of abuse under Chad's roof. All of this would be irrelevant at best, and harmful to Barrett's defense at worst.

The only part of Barrett's argument that posits any other theory of relevance is his argument that "after witnessing some aspects of what happened to [Shawn], A.F. realized the seriousness of sexual assault accusations and their damaging nature," and fabricated his allegations against Barrett to influence the visitation dispute. *See* Def's Br. at 65. But the timing does not work: A.F. discovered that Shawn faced "sexual abuse charges" sometime in February 2017, which was more than six months after A.F.'s disclosure and after his interview where he described Barrett's sexual abuse. *See* Exhibit 102C, at 25; C-App. 113; *accord* Exhibit 102C, at 5; C-App. 93 (noting [A.F.] had not been told "the specific reason" for Shawn's absence from Chad's house, as of December 2015). Moreover, the fact that Shawn was convicted of sexual abuse in 2015 did not seem to have any impact on the visitation dispute in 2016—so Shawn's conviction would not lead A.F. to think allegations against Barrett would matter.

9. *These records are less helpful to Barrett's defense than inferences he urged jurors to draw about the probable contents of A.F.'s mental health records. Disclosure of these records would have hampered Barrett's defense by foreclosing those arguments.*

Beyond the fact that Barrett would gain nothing (or very little) from access to these records, this Court should recognize that Barrett would have lost access to an inference that he urged jurors to draw: that A.F.'s privileged communications with therapists, if investigated, would have proved A.F. was lying. *See* TrialTr. 483:16–485:11. This is an impermissible comment, but Barrett made it anyway. *See* Laurie Kratky Doré, *Iowa Practice Series: Evidence* § 5.501:6(E) (updated Nov. 2019) (citing *Howard v. Porter*, 35 N.W.2d 837, 838–40 (1949)). The net effect of producing these records would have been detrimental to Barrett's defense, and retrial is not required under any standard.

CONCLUSION

Under section 622.10(4), a defendant's compelling need for exculpatory information that is otherwise unavailable supersedes privilege. Outside of that exception, privilege supersedes relevance. Within this hierarchy, a more expansive view of what is "exculpatory" and what is a "compelling need" is counterproductive in the search for truth, because any additional disclosures are inherently lopsided and relevant records that could refute defense-friendly insinuations still remain privileged, even when they have superior probative value. Expansive approaches to discovery and production are appropriate in most contexts, where more facts can help paint a clearer picture. But here, that expansive approach just gives defendants more paint and a blank canvas for wild, abstract smears. This Court should take note of the consequences of its approach in *Leedom*, and it should take the next opportunity to explain that some evidence may be impeaching without also being "exculpatory" within the meaning of 622.10(4).

The State respectfully requests that this Court reject Barrett's challenges and affirm the order denying his motion for new trial.

REQUEST FOR ORAL ARGUMENT

The State requests oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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