IN THE SUPREME COURT OF IOWA
Supreme Court No. 19–2075

STATE OF IOWA,
Plaintiff-Appellant,

vs.

MARK BERNARD RETTERATH,
Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR MITCHELL COUNTY
THE HON. JAMES M. DREW, JUDGE

APPELLANT'S REPLY BRIEF

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RESPONSE TO APPELLEE'S ARGUMENT

I. Any argument that the district court was required to dismiss this conviction would be a cross-appeal from the rulings that denied Retterath's motions to dismiss. Retterath did not file a timely cross-appeal.

The first two divisions of Retterath's brief are asking for reversal of the trial court's rulings on his motions to dismiss. *See* Order Denying Motion to Dismiss (9/24/19); App. 26; Order (11/21/19); App. 40. Retterath needed to file a cross-appeal to challenge those rulings. This is different from arguing that this Court should affirm on a basis that was urged below, but not relied upon. Retterath is arguing that the district court *erred* by ruling that it was bound by the appellate court's remand order and could only affirm or grant a new trial, and *erred* by failing to vacate the conviction and dismiss the prosecution outright. *See* Order (9/24/19); App. 26; Order (11/21/19); App. 40. Retterath did not file a notice of cross appeal within 30 days of the ruling granting a new trial or within 10 days of the State's notice of appeal. *See* Iowa R. App. P. 6.101(2)(b). And his proof brief cannot be treated as a notice of cross appeal because that would be untimely. *See Stender v. Blessum*, 897 N.W.2d 491, 516–17 (Iowa 2017). Retterath's failure to file a cross-appeal waives all of his arguments that do not ask this Court to affirm.

II. Dismissal was not required. Inability to carry out a statutory duty—even one that "shall" be performed—does not automatically invalidate a prosecution.

Retterath is correct that "[t]he word 'shall' imposes a duty," and section 622.10(4)(a)(2)(b) states that the district court "shall conduct an in camera review" of privileged mental health records whenever its precondition is met (which is what the Iowa Court of Appeals found). *See* Def's Br. at 16–17 (quoting Iowa Code §§ 4.1(30), 622.10(4)(a)(2)). But the statement that "[w]hen a statute sets forth a mandatory duty, violation of the statute invalidates subsequent actions" is too broad and too simplistic. *See* Def's Br. at 20–21. Harmless error exists, and the appellate court recognized that *this* error may be harmless, if the *in camera* review would not have resulted in disclosure of information and could not impact the trial. *See State v. Retterath*, No. 16–1710, 2017 WL 6516729, at *11 (Iowa Ct. App. Dec. 20, 2017); *accord State v. Neiderbach*, 837 N.W.2d 180, 198 & n.3 (Iowa 2013). If Retterath were correct that a violation of section 622.10(4)(a)(2) invalidated all subsequent proceedings, then remand would have been unnecessary; the appellate court would have ordered all charges dismissed when it concluded that section 622.10(4) required a review that did not occur. Retterath's challenge is flatly foreclosed by the remand order itself.

Retterath cites *In re Detention of Fowler*, 784 N.W.2d 184, 187 (Iowa 2010), but that case does not support his sweeping claim that any failure to perform a mandatory duty that is described in a statute invalidates a prosecution. *Fowler* found that dismissal was required because the SVP speedy trial guarantee served the same purpose as a speedy trial guarantee in a criminal case, or any statute of limitations: "Every limitation statute sets up an arbitrary date after which certain actions cannot be brought or certain rights cannot be enforced." *See Fowler*, 784 N.W.2d at 190 (quoting *State v. Nelson*, 222 N.W.2d 445, 449 (Iowa 1974)). Dismissal was required because the legislature used language that mirrored other speedy trial rights and presumably intended to create an analogous right to a similar kind of remedy, and because the interest served by that speedy-trial statute could not be protected effectively by any other potential remedy. *See id.* at 187–91.

Contrast that with *In re Detention of Johnson*, 805 N.W.2d 750 (Iowa 2011), which also identified a relevant statutory duty that governed timelines in SVP cases and had not been complied with—but *Johnson* distinguished *Fowler* and did not grant the same remedy:

> After determining Johnson's final hearing should have commenced within sixty days, we must now determine what remedy Johnson is entitled to. Johnson's proper remedy is a matter of statutory construction.

> *Fowler*, 784 N.W.2d at 188–90. In ascertaining the legislature's intent, we look to the language of the statute, its nature and objects, legislative history, statutory context, and the consequences that would flow from each construction. *Id.* (discussing the history and development of Iowa's SVP act); *see also* [*Cox v. State*, 686 N.W.2d 209, 213 (Iowa 2004)] . . . .
>
> [. . .]
>
> Since post-civil commitment readjudication does not create the same threat to liberty deprivation as an initial civil commitment prosecution, there is less reason to believe the legislature intended section 229A.8(5)(e) to provide prophylactic due process protection through discharge or dismissal. Instead, we find chapter 229A's strict guidelines for releasing adjudicated SVPs, and the legislature's stated purpose in enacting chapter 229A, confirm the legislature did not intend for SVPs to be released when the court does not comply with section 229A.8(5)(e)'s sixty-day requirement.

Johnson, 805 N.W.2d at 755–56. Here, section 622.10(4)(a)(2) is like *Johnson*, and not like *Fowler*. Iowa courts recognize that similarity and have ordered remand for retrospective *in camera* review (instead of dismissal) in cases where it should have occurred before trial. *See State v. Leedom*, 938 N.W.2d 177, 188–89 (Iowa 2020); *Neiderbach*, 837 N.W.2d at 198 n.3. The Iowa Court of Appeals has even remanded after identifying specific pages of exculpatory records that were not produced upon *in camera* review; even *that* statutory violation does not automatically require retrial, much less dismissal. *State v. Barrett*, No. 17–1814, 2018 WL 6132275, at *3 (Iowa Ct. App. Nov. 21, 2018).

In another section of Retterath's brief, he discusses cases where evidence was suppressed and excluded at trial, based upon a finding that it was obtained in violation of a statute. *See* Def's Br. at 23–24 (citing *State v. Werner*, 919 N.W.2d 375, 380 (Iowa 2015); *State v. Hellstern*, 856 N.W.2d 355, 364 (Iowa 2014); *State v. Lukins*, 846 N.W.2d 902, 911 (Iowa 2014); *State v. Kjos*, 524 N.W.2d 195, 196 (Iowa 1995); *State v. McAteer*, 290 N.W.2d 924, 925 (Iowa 1980); *State v. Vietor*, 261 N.W.2d 828, 832 (Iowa 1978)). But if the claim in the first part of his brief were correct, those prosecutions would have been dismissed in their entirety upon finding a statutory violation—there would be no point in applying an exclusionary rule or granting suppression of evidence. *See Werner*, 919 N.W.2d at 380 (accepting the State's concession that "suppression is the appropriate remedy if Officer Glade lacked authority to make the stop and arrest"); *Hellstern*, 856 N.W.2d at 365 ("The remedy for such a violation of section 804.20 is suppression of the chemical test results."). And it would surely be impossible to find a violation of a statutory right to be harmless and affirm the conviction anyway. *See State v. Garrity*, 765 N.W.2d 592, 597–98 (Iowa 2009). Retterath's formalistic argument that dismissal is the remedy for every violation of a statutory duty is simply wrong.

III. Section 622.10(4)(a) creates a limited right to access privileged records to uncover evidence. The remedy for a violation would be retrial, but only if the error had an effect on the proceedings that required it.

The lesson from *Fowler* and *Johnson* is that Iowa courts will generally search for legislative intent to determine what remedies are available upon a violation of a particular statutory right or duty. *See Johnson*, 805 N.W.2d at 755–56; *Fowler*, 784 N.W.2d at 187, 190. The lesson from the suppression cases like *Hellstern*, *Lukins*, and *Garrity* is that the remedy for a violation of a statutory right affecting availability of evidence for trial is not automatic reversal or retrial; instead, such remedies are generally calibrated to undo the damage wherever possible without further effect on the controversy. *See, e.g.*, *Garrity*, 765 N.W.2d at 597 ("The exclusionary rule extends to the exclusion of breath tests, breath test refusals, and non-spontaneous statements obtained after unnecessary delay in allowing the person the statutory right to consult with an attorney or family member."). And *Garrity*, in particular, notes that a litigant who proves a violation of a statutory right "is not automatically entitled to a new trial," and should only receive one if they were "injuriously affected" by the error or if they "suffered a miscarriage of justice" as a result. *See id.* (quoting *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004)).

All of this suggests that the legislature intended a similarly calibrated remedy for an erroneous pretrial ruling that should have granted *in camera* review of privileged records: depending on what effect a *correct* ruling would have had on the proceedings, that error may require retrial, or it may not. Retterath wants to view the statute as an attempt to broaden protections for criminal defendants, "as a mechanism to prevent against wrongful conviction." *See* Def's Br. at 18–19. But the Iowa Supreme Court has already refused to ignore the historical context: this subsection was enacted to abrogate *Cashen* and replace it with something that divulges *fewer* privileged records to criminal defendants. *See State v. Thompson*, 836 N.W.2d 470, 481 (Iowa 2013); Iowa Code § 4.6(2) (explaining that, when construing ambiguous statutes, courts may consider "[t]he circumstances under which the statute was enacted"). Retterath claims that legislators acted on concerns that defendants needed a new right to protect their access to exculpatory information in privileged records. In reality, legislators acted to protect witnesses like Sellers from defendants like Retterath, while providing just enough access to review of privileged records to pass constitutional muster. Nothing about this law suggests an intent to bypass error analysis to punish those apply it incorrectly.

A statute creating a speedy trial right is different: it exists to protect defendants against burdensome pretrial delay, and it can only be given effect if the remedy for violation is harsh enough to deter the State and district courts from incurring the harms it aims to prevent. *See Fowler*, 784 N.W.2d at 187, 190. But this statute evinces an intent to err on the side of *non*-disclosure and *non*-production: the need for privileged records must be compelling, and the information must not be available from any other source. *See* Iowa Code § 622.10(4)(a)(2). If the legislature had intended to deter or penalize underinclusion, it would have used broader language to describe triggering conditions. It also would not have conditioned *in camera* review on a trial court's subjective and fact-specific evaluation of whether the probability that records contained exculpatory information was "reasonable." *See id.* For speedy-trial rules, a remedy that deters and penalizes violations makes sense because it is possible to calculate a deadline and know whether a given trial date vindicates or violates those rights. But here, district courts are performing an unfamiliar duty in uncertain waters, and unintentional errors are both understandable and inevitable. *Cf. Barrett*, 2018 WL 6132275, at *3 (predicting *in camera* review "might result in an underinclusive disclosure of exculpatory information").

Unlike a statute creating a speedy-trial right, section 622.10(4) does not intend to deter or penalize non-compliance. As such, it does not undermine the legislature's intent to affirm the conviction in a case where section 622.10(4) was violated, but where the outcome was unaffected. *E.g.*, *State v. Edouard*, 854 N.W.2d 421, 443 (Iowa 2014); *Neiderbach*, 837 N.W.2d at 198 n.3; *Barrett*, 2018 WL 6132275, at *3.

Retterath argues *State v. Moyer*, 382 N.W.2d 133 (Iowa 1986) establishes that a violation of a mandatory statutory duty has the effect of "invalidating proceedings" without a consideration of whether any prejudice resulted. *See* Def's Br. at 25–27. But Retterath is misreading and misapplying *Moyer*. The State had argued that Moyer was not prejudiced by the district court's failure to order a substance abuse evaluation before sentencing because "equivalent evaluation and treatment are provided for prison inmates." *See Moyer*, 382 N.W.2d at 136. The Iowa Supreme Court rejected the State's argument because the prejudice to Moyer was obvious: the sentencing court might have made a different sentencing decision if it had access to that substance abuse evaluation at sentencing, as the statute required. *See id.* What matters about *Moyer* is that the Iowa Supreme Court acknowledged that it *could* consider the issue of prejudice, and that it

might find the error was non-prejudicial if the sentencing court had "received equivalent information before imposing sentence." *See id.*[1] Retterath is wrong when he claims that a violation of a statutory duty requires reversal without any inquiry into the *effect* of that violation.

Retterath's argument about *State v. Luckett*, 387 N.W.2d 298 (Iowa 1986) is similarly flawed. *See* Def's Br. at 27. In *Luckett*, the State failed to charge a firearm enhancement in the trial information, but Luckett received the enhanced sentence for using a firearm while participating in a forcible felony. *See Luckett*, 387 N.W.2d at 300–01. The prejudice that resulted from failure to comply with the rule was not merely a violation of a rule, but a real effect on the trial: "the jury was not given the special interrogatory demanded by the rule," which meant that Luckett's minimum sentence was increased by an element that was not proven beyond a reasonable doubt to a unanimous jury. *Id.* at 301; *see generally Alleyne v. United States*, 570 U.S. 99 (2013). Again, the *effect* of the statutory violation is what required reversal.

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[1] Of course, upon finding that the court's failure to carry out this mandatory statutory duty had an obvious and potentially prejudicial effect on the sentencing decision, *Moyer* held that it "must vacate the sentence entered, though not the judgment of conviction." *See id.* Retterath's argument for outright dismissal would have required the *Moyer* court to vacate the conviction, as well. *See* Def's Br. at 16–21.

Retterath argues "[t]he State's prejudice requirement would deprive [him] of his rights under the statute." *See* Def's Br. at 28–29. But every harmless-error analysis has that effect, on some level—and that does not prevent Iowa courts from concluding that a violation of a statutory right (or a constitutional right) that is not prejudicial does not create any need for reversal or retrial. *See State v. Williams*, 574 N.W.2d 293, 298 (Iowa 1998) ("Not all errors require reversal. To warrant reversal the error must have prejudiced the defendant."). This is not the rare exception to that general rule. The district court erred in failing to conduct that essential part of the analysis.

IV. Unavailability of Sellers's privileged records would not have required exclusion of his testimony. It did not make Retterath unable to cross-examine Sellers, and it would not have rendered Sellers unable to testify.

Retterath's best claim is that he was prejudiced because he did not receive a review to which he was entitled (which was impossible). In his view, if the district court had attempted to get those records for *in camera* review before trial and discovered that it was impossible, he could respond by moving to exclude Sellers from testifying at all—which means the admission of Sellers's testimony that described his solicitation to commit murder was, itself, prejudicial error. *See* Def's Br. at 22–25. He also wants to bar Sellers from testifying at his retrial.

Retterath cannot point to any part of the statute that creates a right to reversal, retrial, or exclusion of evidence if it is *not possible* to conduct *in camera* review of privileged mental health records. While he had a statutory right to have the district court perform that review, all parties agreed that the district court had no power to acquire them. *See* Def's Br. at 16; Transcript (9/3/19) at 3:17–9:8. Now, Retterath is asserting a different right: he asserts a right to exclude witnesses or dismiss prosecutions upon a finding that privileged records that may contain exculpatory information are unavailable. Section 622.10(4) does not create any such right, neither expressly nor by implication.

Retterath argues that "Iowa courts have consistently excluded evidence due to statutory violations," before providing a list of cases where evidence was suppressed because it was unlawfully procured or in order to penalize violations of statutory rights by police officers. *See* Def's Br. at 23–24 (citing *Werner*, 919 N.W.2d at 380; *Hellstern*, 856 N.W.2d at 364; *Lukins*, 846 N.W.2d at 911; *Kjos*, 524 N.W.2d at 196; *McAteer*, 290 N.W.2d at 925; *Vietor*, 261 N.W.2d at 832). None of those are analogous. The State did not discover Sellers by violating any of Retterath's rights, nor does section 622.10(4) provide a right that operates as a constraint on police conduct during investigations.

Retterath cites *State v. Trammell*, 435 N.W.2d 197 (Neb. 1989) and *State v. Esposito*, 471 A.2d 949 (Conn. 1984) for the proposition that exclusion of all testimony from a witness is the proper remedy when that witness refuses to waive privilege to permit examination of mental health records. *See* Def's Br. at 22–23. But neither Nebraska nor Connecticut will strike or exclude a witness's testimony based on an assumption that cross-examination was affected, nor do they ask whether privileged records are likely to contain exculpatory evidence. Instead, a defendant must make "a showing that there is reasonable ground to believe that the failure to produce the information is likely to impair the defendant's right of confrontation such that the witness' direct testimony should be stricken." *See Trammell*, 435 N.W.2d at 142 (quoting *Esposito*, 471 A.2d at 179); *accord State v. Podrazo*, 840 N.W.2d 898, 921 (Neb. Ct. App. 2013) (distinguishing *Trammell* where the defendant could not "make a showing that the failure to produce the privileged information [was] likely to impair [his] ability to effectively cross-examine the witness claiming the privilege"). That requirement exists because those courts are uninterested in excluding otherwise relevant testimony on the basis of refusal to waive privilege for *in camera* review unless a defendant establishes a *likelihood* that,

without those records, permitting any testimony from that witness will violate the defendant's constitutional right to an opportunity for meaningful and effective cross-examination. *See Trammell*, 435 N.W.2d at 141–42; *Esposito*, 471 A.2d at 956–57. This resembles the State's comparison to *Brady* materiality, which *Neiderbach* seemed to endorse for this purpose. *See Neiderbach*, 837 N.W.2d at 198 & n.3 (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 (1987) and *State v. Johnson*, 272 N.W.2d 480, 485 (Iowa 1978)). Retterath labels the call for him to show some sort of materiality "nonsensical" and states that "[i]f he could do so, he wouldn't need the records to begin with." *See* Def's Br. at 28–29. But that *ex ante* requirement exists in cases that Retterath urges this Court to apply. *See* Def's Br. at 22–23. Without a showing of materiality or likely impact on cross-examination, there is no basis for any claim that unavailability of those privileged records makes it unfair to allow Sellers to testify.

Assuming that Retterath could convince a court to look past the non-existence of any statutory authority for such a remedy, he would still be unable to show that his ability to cross-examine Sellers was impaired by the unavailability of those privileged records. Somehow, the Iowa Supreme Court has found information in privileged records

can still count as "not available from any other source," even when the witness admits all of those facts—and those admissions can establish the "reasonable probability" that the witness's privileged records will contain the same information. *See, e.g.*, *Edouard*, 854 N.W.2d at 442; *Neiderbach*, 837 N.W.2d at 197–98. But this inquiry is different, and it is important to look at the impact on Retterath's cross-examination of Sellers to determine whether inability to access those records makes it unfair for Sellers to testify—and Sellers's willingness to admit facts about his mental health would mitigate any potential unfairness that would otherwise arise from a lack of evidence that could be used to impeach false denials of facts in his mental health history. Here, it matters that Sellers admitted to Retterath's counsel that he was an alcoholic who had spent years in federal prison, and was presently on full disability for a diagnosis that included PTSD. *See* Motion Ex. A (4/14/16) at 7–9, 14. Sellers had also admitted to Retterath that he "smoked pot a lot" during the pendency of this case. *See* Motion Ex. A (4/14/16) at 33. Already, that is a substantial amount of admissions from Sellers that would have meaningful impeachment value if Sellers repeated them on the stand, or that could be used to impeach him by contradiction if he denied those facts on cross-examination.

Sellers was not willing to talk to Retterath's counsel about his mental health diagnosis that led to his PTSD diagnosis and disability status. *See* Motion Ex. A (4/14/16) at 14. But Retterath already knew what that diagnosis was, and had sworn testimony from Sellers to prove that it was schizophrenia. *See* Motion Ex. B (4/14/16) at 27–29. Retterath also knew that Sellers admitted in his deposition that he used to experience schizophrenia-related auditory hallucinations, and that he took medicine to stop them from recurring—but the medicine made him "loopier" if he drank alcohol. *See* Motion Ex. B (4/14/16) at 27–29. And Retterath knew that Sellers admitted he had an OWI in "May or June 2014," and had relapsed during the timeframe when he was friends with Retterath. *See* Motion A (4/14/16) at 14–15, 72–73.

To be sure, Sellers also said things in his depositions that offset the impeachment value of those other admissions. Retterath knew that police searched Sellers's entire house for anything Retterath may have given him, and they found nothing illegal. *See* Motion Ex. A (4/14/16) at 56–58. And Retterath knew that Sellers had successfully avoided alcohol-related relapse for "[o]ver a year," which included the most relevant period that encompassed Retterath's solicitations. *See* Motion Ex. A (4/14/16) at 10–11. That might be why Retterath did not

mention *any* of this in his cross-examination of Sellers, including the admitted schizophrenia diagnosis that Retterath already knew about. *See* TrialTr. 458:18–465:17. Still, Retterath should not argue that an inability to review privileged records for impeachment material made it unfair to let Sellers testify and warranted this extraordinary remedy, when he declined to use any of the substantial impeachment material relating to Sellers's mental health that he actually *had* during trial.

Retterath argues that *in camera* review of Sellers's records would have helped to "uncover any impeachment evidence for cross-examination." *See* Def's Br. at 24. He might be right, or he might not; there might not have been anything meaningful left to be uncovered. Retterath continues on to declare that "[c]ross-examination is a right essential to a fair trial." *See* Def's Br. at 24 (quoting *Gibb v. Hansen*, 286 N.W.2d 180, 186 (Iowa 1979)). Retterath is quoting a case that is about *the State's* right to cross-examination, which was "strengthened substantially by the additional interest the court has in seeing that all material facts, necessary to guarantee that the law is enforced through reasoned and informed decisions, are presented before the fact finder at trial." *See Gibb*, 286 N.W.2d at 186–89. That case undermines his argument that the best remedy is to bar Sellers from testifying at all.

In any event, Retterath is correct that he had a right to an opportunity for effective cross-examination—but that right was fully vindicated, and it does not extend beyond what Retterath received at trial:

> The opinions of this Court show that the right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination. . . . The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. Normally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses. In short, the Confrontation Clause only guarantees "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."

Ritchie, 480 U.S. at 52–53 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)). As such, it is not surprising that Retterath frames section 622.10(4) as an effort to codify due process protections that go beyond what is constitutionally required. *See* Def's Br. at 21; Def's Br. at 28 n.2. But that undermines his effort to argue for remedies that section 622.10(4) does *not* expressly describe, or even imply. *Trammell* and *Esposito* endorsed exclusion as a remedy for a claim that unimpeached testimony would violate the Confrontation Clause. *See Trammell*, 435 N.W.2d at 141–42; *Esposito*, 471 A.2d at 956–57. But this statute creates *new* rights, and exclusion is not one of them.

See Iowa Code § 622.10(4)(a)(2). That omission must be given effect, and implying an exclusion remedy out of whole cloth would subvert the legislative intent to stop defendants like Retterath from using the spectre of extraordinary remedies to pressure witnesses into waiving statutory privileges and exposing their private thoughts and struggles to be weaponized in adversarial proceeedings. *See State v. Doe*, 927 N.W.2d 656, 665 (Iowa 2019) (quoting *Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 649 (Iowa 2013)) ("[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."); *accord Thompson*, 836 N.W.2d at 488 ("The cost of second-guessing the legislature's sound policy choices in section 622.10(4) would be high.").

Retterath characterizes the State's concerns with his exclusion and dismissal remedies as "wildly overblown," and argues that "this situation will rarely arise." *See* Def's Br. at 32–33. But here he is now, trying to leverage this sequence of events into retrial (or dismissal) on his conviction for solicitation to commit murder, where he selected Sellers to receive those solicitations based on Sellers's time in prison for federal crimes, and after driving Sellers to doctors' appointments. *See* Motion Ex. A (4/14/16) at 46–47, 72–73; TrialTr. 445:23–450:21.

And this may not remain "exceedingly rare" if Retterath prevails and if it becomes common knowledge among criminal organizations that any person whose mental health records are held by federal agencies can be kept off the witness stand—this "remedy" could be exploited by anyone who took care in selecting their accomplices and victims, just as Retterath did. *Cf. State v. Heard*, 934 N.W.2d 433, 444 (Iowa 2019) (refusing to allow defendants to place witnesses on stand for purpose of arguing inferences from invocations of Fifth Amendment privilege, in part because that "stratagem" would be easily exploitable).

Sellers testified and was already subject to cross-examination at Retterath's trial; Retterath's constitutional rights to a fair trial and to confront adverse witnesses were fully vindicated, and there are no other constitutional rights at issue. *See Thompson*, 836 N.W.2d at 489 (rejecting idea "that a criminal defendant has a general due process right to obtain otherwise privileged evidence"). There is no basis for a wholesale-exclusion remedy, which would have to be fabricated out of whole cloth. Retterath's statement that "[i]t is not [a court's] function to rewrite the statute" is correct, and it forecloses his request for this unsupported exclusion remedy. *See* Def's Br. at 33 (quoting *State v. Wedelstedt*, 213 N.W.2d 652, 656–67 (Iowa 1973)).

V. Other than the court's late attempt to access Sellers's inaccessible records and Reterrath's claim that he was entitled to wholesale exclusion of Sellers's testimony, Retterath has not identified any prejudicial effect from the district court's erroneous pre-trial ruling.

Here's what's not in Retterath's brief: any explanation of how a different ruling by the district court *before* trial could have changed what happened at trial, short of an unauthorized remedy like barring Sellers from testifying. When Retterath says he has a statutory right that was violated and accuses the State of ignoring the plain language of the statute, he means that he has found a loophole—a problem that the State and the trial court were powerless to fix from the moment that Sellers flipped on Retterath and reported Retterath's attempts to get him to help murder C.L. But section 622.10(4) does not contain any provisions about barring witness testimony or automatic retrials, nor does it exist in a space where similar remedies would be implied (like the speedy-trial statute at issue in *Fowler*). Once those claims that threaten to evade typical error/materiality analysis are resolved, there is nothing left but one simple fact: if the district court had tried to review Sellers's records and had discovered they were unobtainable *before* trial, the ensuing trial would have been entirely unchanged—which proves error was harmless and forecloses any need for retrial.

Retterath suggests that it should be the State's burden to show that error was harmless, and remarks that "[h]ow the State could carry this burden without knowing what is in the records is anyone's guess." *See* Def's Br. at 30–31. But the State addressed this in its initial brief. *See* State's Br. at 21–24; *State v. Anderson*, 410 N.W.2d 231, 234 (Iowa 1987). Retterath has no remark on the caselaw that guides analogous inquiries in the *Brady* context, where the allegedly suppressed evidence was subsequently destroyed and where its exact contents are unknowable. And it does not actually matter what is in Sellers's privileged records: information that could never have been obtained simply cannot have any effect on the outcome of the trial.

Retterath is insisting that as long as Sellers refuses to waive privilege (which, as far as the State knows, there is no way to force Sellers to do), the State cannot use testimony from Sellers about the existence of a murder plot that Retterath asked Sellers to help with. Retterath demands a remedy that section 622.10(4) does not create by express language or by implication, and he disclaims any need to establish some likelihood that his trial could have ended differently if not for the erroneous pre-trial ruling that required this remand. This Court should recognize the danger and reject Retterath's arguments.

CONCLUSION

Maybe J.R.'s privileged records will contain something new—but Sellers's unavailable records cannot be the basis for ordering a new trial. The State respectfully requests that this Court vacate the district court's ruling that granted Retterath's motion for a new trial, and remand for further proceedings consistent with that order.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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