**IN THE SUPREME COURT FOR THE STATE OF IOWA**
**NO. 19-2075**

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**STATE OF IOWA,**
**Plaintiff-Appellant**

**vs.**

**MARK BERNARD RETTERATH,**
**Defendant-Appellee.**

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**APPEAL FROM THE IOWA DISTRICT COURT**
**FOR MITCHELL COUNTY,**
**HONORABLE JAMES DREW**

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# APPELLEE'S FINAL BRIEF

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## ROUTING STATEMENT

In this case, the unavailability of a witness's records made the in camera review required by Iowa Code § 622.10(4)(a)(2)(b) impossible. That statute thus was violated. This case requires the Court to determine, for the first time, what the remedy is when the district court does not conduct the in camera review required by § 622.10(4)(a)(2)(b). Mr. Retterath agrees that this case presents a substantial issue of first impression. The case thus should be retained by the Iowa Supreme Court. *See* Iowa R. App. P. 6.1101(2)(c).

## CASE STATEMENT

On August 19, 2016, a jury found Mr. Retterath guilty of Count I, Sexual Abuse in the Third Degree; Count II, Attempt to Commit Murder; and Count III, Solicitation to Commit Murder. Mr. Retterath appealed those convictions.

Count III rested on allegations that Mr. Retterath had solicited J.R. or Aaron Sellers to murder C.L. Both J.R. and Sellers testified against Mr. Retterath at trial. *See State v. Retterath*, 912 N.W.2d 500 at *3 (Iowa Ct. App. 2017). Prior to trial, Mr. Retterath asked the court to conduct an in camera review of mental-health records belonging to J.R. and Sellers. *Id.* at *11. The district court declined. *Id.*

On appeal, Mr. Retterath argued that the district court erred by failing to conduct that in camera review. *Retterath*, 912 N.W.2d 500 at *10–11. Mr. Retterath asserted he had made "a showing of a reasonable probability that the privileged records sought may likely contain exculpatory information that is not available from any other source" and therefore was entitled to an in camera review of J.R. and Sellers' records. *See* Iowa Code § 622.10(4)(a)(2)(b). The State's position was that Mr. Retterath had established only that J.R. and Sellers' records might contain "impeachment" evidence, as opposed to "exculpatory" evidence. *Retterath*, 912 N.W.2d 500 at *11.

The Iowa Court of Appeals agreed with Mr. Retterath. The Court rejected the State's narrow definition of "exculpatory" and remanded the case as to Count III so that the district court could conduct an in camera review of J.R. and Sellers' records.[1] The Court stated:

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

[1] The Court affirmed Mr. Retterath's conviction for sexual abuse in the third degree. The Court reversed his conviction for attempt to commit murder and remanded for dismissal due to an insufficiency of the evidence.

> case to allow the district court to conduct that review under section 622.10(4)(a)(2) to determine whether their records contain exculpatory information. If the district court finds no exculpatory evidence, Retterath's conviction for solicitation to commit murder is affirmed. If the district court finds exculpatory evidence in those records, then the district court should perform the balancing test outlined in paragraphs (2)(c) and (d) to assess whether Retterath is entitled to a new trial on the conviction for solicitation to commit murder.

*Retterath*, 912 N.W.2d 500 at *11 (internal citations omitted). Procedendo issued on Mr. Retterath's appeal on March 6, 2018.

On remand, the District Court accordingly entered an Order for Production of Documents on April 20, 2018 stating: "The State shall produce the requested records to [the court] without unreasonable delay and file a notice of compliance with the clerk identifying the facilities from which the documents were obtained and the number of pages from each." (App. p. 8). The parties attempted to obtain the Sellers' records so the district court could review them in camera. (App. p. 43). Those efforts were unsuccessful because the records were in the possession of the federal government and the federal government would not comply with the state subpoena. (App. p. 43).

After waiting for over 17 months for compliance with the remand order, Mr. Retterath moved to dismiss Count III. (App. p.

15). The district court originally denied the motion, but later reconsidered. (App. pp. 26, 40 & 42). In its December 2, 2019 Order, the district court concluded that Mr. Retterath was entitled to an in camera review of Sellers' records based on the Court of Appeals' decision. Given the inability to obtain those records and conduct an in camera review, the district court determined a new trial was the appropriate relief. (App. p. 43).

## FACT STATEMENT

The background facts regarding Count I, Sexual Abuse in the Third Degree, are summarized by the Court of Appeals:

> The accusations of sexual abuse surfaced in January 2015, but the events dated back more than ten years. As a young teenager, C.L. was friends with Casey Rolland, whose mother, Deb Rolland, lived with Retterath. When visiting Casey, C.L. was occasionally left alone with Retterath, who used those opportunities to introduce the topic of masturbation. Initially, C.L. told police he was thirteen years old when Retterath first touched his penis as they sat in Retterath's pickup after planting trees out in the country. C.L. recalled Retterath subtly displayed a handgun, which C.L. later believed to be a Luger, and warned C.L. not to tell his parents or Deb Rolland. During a videotaped interview, C.L. told police the touching occurred repeatedly when he was thirteen and fourteen years old.[2]
>
> But during his trial testimony, C.L. revised his allegations, recalling instead that during his encounters with Retterath as a young teenager, each masturbated himself,

> and Retterath did not touch C.L.'s penis until he was sixteen years old. . . .
>
> After high school, C.L. enlisted in the Army. He served for two years before he was discharged for alcohol-related violations. Following his discharge, he developed an addiction to opiates. In the fall of 2014, C.L. overdosed on heroin and was resuscitated by his mother. Prompted by the overdose, C.L. entered treatment, and for the first time, he disclosed that he had been sexually abused by Retterath. . . . C.L. was twenty-four years old when he detailed the abuse in an hour-long interview with Mitchell County Deputy Jeff Huftalin on January 28, 2015.

*Retterath*, 912 N.W.2d 500 at *1–2. The police consequently arrested Mr. Retterath and charged him with sexual abuse.

After Mr. Retterath was arrested, Aaron Sellers reported to law enforcement that Mr. Retterath had acquired castor beans and printed instructions for extracting ricin, a deadly poison; he said Mr. Retterath repeatedly asked them to help him murder C.L. by giving him drugs mixed with ricin. (TT p.443,ln.16–p.458,ln.5; TT p.471,ln.18–p.479,ln.11). Sellers met Mr. Retterath through AA and the two were friends. (TT p. 439, l. 19 – 224, l. 8). Sellers claimed that Mr. Retterath asked if he would kill C.L. (TT p. 443, l. 4). He "didn't know whether to take him serious." (TT p. 445, l. 7). He described Mr. Retterath getting "manic" about being angry with C.L.'s false allegations. (TT p. 448, l. 17-20). Sellers stated that Mr. Retterath

was “working himself up” over it, ranting about thinks like wanting to “kill that little mother f…” (TT p. 448, l. 21-25). Sellers said that Mr. Retterath was “in general venting” and that his talk about the supposed murder plans were “fantastical,” and after awhile he stopped bringing it up because “he just wasn’t going to do anything” and he was “just talking.” (TT p. 460, l. 9–p. 461, l. 3). Sellers also claimed that over “months” Mr. Retterath talked “several” times about castor beans, but that he never put drugs around C.L.’s house to try to kill him. (TT p. 450, l. 14-18; p. 461, l. 4-6). Sellers claimed that Mr. Retterath was buying silver on the internet to pay for a murder of C.L., but he never actually paid anyone to kill C.L. (TT p. 451, l. 21–p. 452, l. 9; p. 461, l. 7-9).

Mr. Retterath did order castor beans, and while whole (not crushed) castor beans were found at Mr. Retterath’s house, no ricin was ever extracted, no machine was built to extract ricin, no drugs were obtained, no ricin was ever mixed with drugs, no ricin-laced drugs were planted on C.L.’s property, and no attempt was made on C.L.’s life. Law enforcement searched Mr. Retterath’s house twice, his shed, car, and airplane hangar, and never found extracted ricin, methamphetamine, or heroin. (TT p. 593, l. 22–p. 594, l. 6).

Agent Crawley examined Mr. Retterath's computer for Google searches related to castor beans. In April of 2015, two months prior to the warrant, Mr. Retterath googled the phrases "castor bean plants," "how is ricin made" and "how fast does ricin degrade." (TT p. 560, l. 1–p. 564, l. 10). Crawley explained that at the same time Mr. Retterath google searched all sorts of plants, including Chickasaw plum tree, Chinese lantern plant, growing zones for coastal redwood, hackberry tree, and ginseng. (TT p. 569, l. 19-25). Crawley testified there were no searches for things like "how to kill someone with ricin," "how long is ricin in the human body," "how do I kill someone and get away with it," "how to dispose of a body," "how to mix ricin with drugs," or "does ricin look like heroin." (TT p. 570, l. 8–p. 571, l. 3).

Mr. Retterath's ebay history showed he bought 100 castor beans, marketed as "mole and gopher and deer repellent," at the same time as he ordered 200 royal empress tree seeds, 100 plus Aster Jewelaster Carmine Seeds, 100 plus China Aster single mix flower seeds, 150 Sweet William Indian Carpet seeds, Heirloom Herb, Chickory Wild Flower, and many other seeds. (TT p. 591, l. 1-376, l. 13). The ebay history also debunked Sellers's claim that Mr.

Retterath was buying silver to pay a hit man because the purchase logs showed silver purchases from before C.L. ever made any allegations about Mr. Retterath. (TT p. 592, l. 14–p. 593, l. 19).

Dr. Neel Barnaby, with the FBI laboratory in Quantico, Virginia explained there are legitimate uses for castor seeds, including growing ornamental plants and making castor oil. (TT p. 615, l. 9-12; 618, l. 4- 9). Castor beans and castor seeds are advertised, and used, as a repellant for pests like moles. (TT p. 618, l. 15-24). Dr. Barnaby explained it was legal to buy castor beans, and that if one was swallowed whole, the body would not digest it. (TT p. 620, l. 13-24). The first step to get ricin out of a castor seed was to break or crush the seed. (TT p. 629, l. 5-13). And, of course, there were no crushed or broken seeds found. Perhaps the most telling testimony of Dr. Barnaby was his unsolicited use of the phrase "degraded" as it pertained to ricin in castor beans, demonstrating that when Retterath was searching for "how long does it take for ricin to degrade," it was a reference to planting the seeds in the ground, rather than some other nefarious use. (TT p. 629, l. 14-23).

Deb explained Mr. Retterath had been buying silver for years prior to the C.L. allegations, it had nothing to do with hiring a hitman,

and it was his way of saving money. (TT p. 717, l. 24 – p. 718, l. 15). Deb identified the gopher holes that Mr. Retterath put castor beans down to try to kill a gopher. (TT p. 723, l. 18 – p. 724, l. 6; App. pp. 4 & 6).

During the search of Mr. Retterath's home, law enforcement found a folder with data sheets about other chemicals, as well as a map of different types of plants and trees at Mr. Retterath's farm that matched what Deb, Casey and Mr. Retterath testified to about the dates of planting trees. (TT p. 535, l. 1 – 320, l. 22).

Mr. Retterath admitted being very angry when he heard C.L. was accusing of molesting him as a child. (TT p. 833, l. 8-20). He admitted to saying things like "I want to kill that little mother F-er." (TT p. 833, l. 21 – p. 834, l. 3). But, he did not mean it literally, and did not ever plan on killing C.L. (TT p. 834, l. 1-9). He explained, as Deb had, that as a crop duster, chemicals interested him, and plants were his hobby. (TT p. 838, l. 2 – 12). He read the ricin article law enforcement seized, but never planned on extracting ricin. (TT p. 838, l. 11-14). He googled the castor bean plant because he wanted to see one, and he googled how fast ricin degraded to know if it was dangerous to plant castor beans. (TT p. 838, l. 9-16). He ordered

multiple batches of castor beans, not just the ones brought to trial, and most of them were out at his farm when the warrants were executed, and the 10 left in his pocket were left over from the 12 he put in his pocket to drop down a gopher hole. (TT p. 841, l. 1-p. 844, l. 4).

## PRESERVATION AND STANDARD OF REVIEW

Mr. Retterath agrees error is preserved. As discussed below, Mr. Retterath disagrees that Iowa Code § 622.10(4)(a)(2)(b) grants district courts any discretion. (*See* State's Br. at 16–17). Accordingly, the principle that "failure to exercise discretion is an abuse of discretion" is inapposite. The district court's decision to grant Mr. Retterath a new trial was based upon its interpretation of Iowa Code § 622.10(4)(a) and the Court of Appeals' remand order pursuant to that statute. (App. p. 42). Where the decision to grant a new trial is based on an interpretation of statutory requirements, review is for correction of errors at law. *Taylor v. State*, 632 N.W.2d 891, 894 (Iowa 2001); *see also State v. Lopez*, 633 N.W.2d 774, 782 (Iowa 2001) (when motion raises legal question, review is for correction of errors at law).

## ARGUMENT

This case is governed by Iowa Code § 622.10(4)(a). That statute contains a threshold requirement that a defendant seeking access to privileged records must demonstrate "in good faith a reasonable probability that the information sought is likely to contain exculpatory information that is not available from any other source and for which there is a compelling need for the defendant to present a defense in the case." Iowa Code § 622.10(4)(a)(2)(a).

The Iowa Court of Appeals determined that Mr. Retterath met this threshold: "The defense made a plausible showing (1) exculpatory evidence could be unearthed in their mental health records and (2) the critical information was not available from another source." *Retterath*, 912 N.W.2d 500 at *11. The Court of Appeals thus remanded "to allow the district court to conduct that review under section 622.10(4)(a)(2) to determine whether their records contain exculpatory information." The review ordered by the Court of Appeals is called for by Iowa Code § 622.10(4)(a)(2)(b).

But the case hit a roadblock: because the district court was unable to obtain Sellers' records, the in camera review never occurred. This appeal thus presents two discrete questions. First,

what does Iowa Code § 622.10(4)(a)(2)(b) require? Second, what is the remedy when the requirements of Iowa Code § 622.10(4)(a)(2)(b) are not satisfied?

The plain language of Iowa Code § 622.10(4)(a)(2)(b) provides the answer to the first question: that statute *mandates* an in camera review. The inability to conduct that review constitutes a violation of that statute. This violation of the statute invalidates subsequent actions. In other words, Mr. Retterath's trial and conviction on Count III is invalid. The remedy thus is dismissal, answering the second question. In the alternative, Sellers' testimony must be excluded and a new trial is necessary.

## I. Iowa Code § 622.10(4)(a)(2)(b) mandates in camera review of Sellers' records.

The language of § 622.10(4)(a)(2)(b) must be the starting point for the analysis of this case. It states:

> Upon a showing of a reasonable probability that the privileged records sought may likely contain exculpatory information that is not available from any other source, the court **shall** conduct an in camera review of such records . . . .

(Emphasis added).

The legislature's directive that the district court "shall" conduct an in camera review meant that the district court was *required* to review Sellers' records in camera on remand. The Iowa legislature has made clear that "[t]he word 'shall' imposes a duty. Iowa Code § 4.1(30(a). Accordingly, in criminal cases, the Iowa Supreme Court has "interpreted the term 'shall' in a statute to create a mandatory duty, not discretion." *In re Det. of Fowler*, 784 N.W.2d 184, 187 (Iowa 2010) (internal quotation marks omitted); *see also State v. Moyer*, 382 N.W.2d 133, 134 (Iowa 1986) "[W]hen used in a statute directing that a public body do certain acts, it is manifest that the word is to be construed as mandatory and not permissive." *State v. Klawonn*, 609 N.W.2d 515, 522 (Iowa 2000) (internal quotation marks omitted); *Moyer*, 382 N.W.2d at 134 (holding statute's use of "shall" "clearly obligated the district court"). Stated otherwise, when the legislature tells public officials they "shall" do something, that directive "is mandatory and excludes the idea of discretion." *Klawonn*, 609 N.W.2d at 522 (internal quotation marks omitted).

When a statute imposes a duty and the duty is not discharged, the next step of the analysis is to determine whether the prescribed duty was "so essential to the main objective of the amended statute

as to be considered mandatory in nature." *Moyer*, 382 N.W.2d at 135. "[A] statutory duty, though ordinarily considered mandatory, may be deemed directory if its performance merely assures order or promptness and is not essential to accomplishing the principal purpose of the statute." *Id.*

The in camera review mandated by § 622.10(4)(a)(2)(b) is crucial to the statute's purpose. The main objective of § 622.10(4)(a) is to protect "the confidentiality of counseling records while also protecting the due process rights of defendants." *State v. Leedom*, 938 N.W.2d 177, 186 (Iowa 2020) (internal quotation marks omitted). In camera review protects the due process rights of defendants—one half of the statute's purpose. The in camera review is not merely to assure order or promptness. It is necessary in order to guarantee that defendants are provided with exculpatory evidence. At bottom, then, the legislature requires in camera review as a mechanism to prevent against wrongful conviction. Without the in camera review, a defendant may be deprived of exculpatory evidence, which in turn increases the risk of wrongful conviction.

Because in camera review is crucial to the statute's purpose, that review is mandatory. "If [the statute] is to have any meaning

compliance must be mandatory." *State v. Luckett*, 387 N.W.2d 298, 301 (Iowa 1986); *see also Fowler*, 784 N.W.2d at 190 (finding time limitation mandatory and recognizing "[a]ny remedy other than dismissal would render a time limitation for trial meaningless").

## II. The violation of Iowa Code § 622.10(4)(a)(2)(b) invalidated subsequent proceedings, which requires dismissal.

Though the district court does not bear the blame for failing to comply with Iowa Code § 622.10(4)(a)(2)(b), at the end of the day the statute was violated because the in camera review was not performed (and would not be performed in the future). Mr. Retterath was in limbo for months, waiting to see if the records would be produced. The parties and the district court ultimately agreed that the records could not be obtained. It is undisputed that the district court was unable to comply with Iowa Code § 622.10(4)(a)(2)(b) due to the inability to obtain the records. As the district court stated in its ruling, "The Court is unable to perform the required process[.]" (App. p. 42). Iowa Code § 622.10(4)(a)(2)(b) thus was violated.

When a statute sets forth a mandatory duty, violation of the statute invalidates subsequent actions. *Fowler*, 784 N.W.2d at 187; *Moyer*, 382 N.W.2d at 135. This rule applies regardless of whether it

results in a benefit to a defendant. Indeed, the Iowa Supreme Court has repeatedly adhered to this rule in cases where the defendant did in fact benefit: *Luckett* vacated a five-year mandatory minimum sentence because the State violated a rule of criminal procedure requiring indictments to specify if the offense carried a minimum sentence because of the use of a firearm. 387 N.W.2d at 301. *Moyer* invalidated subsequent sentencing proceedings when the defendant did not receive the mandated substance abuse evaluation. 382 N.W.2d at 136. *Fowler* dismissed a civil commitment proceeding and released the defendant from custody when trial was not held within the required time. 784 N.W.2d at 190.

The violation of § 622.10(4)(a)(2)(b) invalidates any further proceedings in the case. The procedural posture of this case is atypical in that the in camera review was to occur on remand, after Mr. Retterath had been convicted. The in camera review ordinarily is conducted pretrial. When a district court wrongfully denies an in camera review and the error is corrected on appeal, the case is conditionally remanded for a review. Procedurally, this review is treated as if it occurred before trial. Thus, if the in camera review reveals exculpatory material, the district court then conducts the

balancing required by § 622.10(4)(a)(2)(c) and (d) and determines if the defendant is entitled to a new trial. *See, e.g.*, *Leedom*, 938 N.W.2d at 189.

The violation of § 622.10(4)(a)(2)(b) that occurred in this case therefore must be treated as if it occurred pre-trial. If this violation had occurred pretrial, the violation would invalidate all further proceedings. In other words, any trial would be invalid. This makes sense, when the purpose is to protect a defendant's due process rights and against wrongful conviction.

It follows that Mr. Retterath's trial and conviction are invalid. Consequently, dismissal was the correct remedy. This is akin to how the time limitation violation in *Fowler*, which occurred pretrial, resulted in the dismissal of the civil commitment proceeding. *Fowler*, 784 N.W.2d at 192.

## III. Alternatively, a new trial is the appropriate remedy because Sellers' testimony must be excluded.

Mr. Retterath maintains that outright dismissal is the remedy for a violation of Iowa Code § 622.10(4)(a)(2)(b). If the Court disagrees, suppression of Sellers' testimony would be the appropriate alternative remedy. (*See* 9/3/19 Trans. at 13:4–14 (defense argument

for exclusion of Sellers' testimony)). Under this alternative, a new trial was the correct result in this case because Sellers' testimony must be excluded and, without his testimony, there is a reasonable probability Mr. Retterath would not have been convicted of Count III.

Other jurisdictions have held that exclusion of a witness's testimony is the appropriate remedy when a defendant is denied the right to review privileged records. As explained by the Supreme Court of Connecticut: "'The right of cross-examination is not a privilege but is an absolute right and if one is deprived of a complete cross-examination he has a right to have the direct testimony stricken.'" *State v. Esposito*, 471 A.2d 949, 956 (Conn. 1984). Accordingly, Connecticut courts will strike a witness's testimony if a defendant has made the threshold showing necessary to trigger in camera review and the records have not been produced for that in camera review. *Id.* The Supreme Court of Nebraska likewise has concluded that a witness may not testify if the defendant was wrongfully denied the right to review the witness's mental-health records. *State v. Trammell*, 435 N.W.2d 197, 201 (Neb. 1989).

Iowa courts have consistently excluded evidence due to statutory violations. Most recently, *State v. Werner*, 919 N.W.2d 375,

380 (Iowa 2018), the Iowa Supreme Court suppressed evidence discovered during a traffic stop when the officer did not possess the statutory authority to stop the drive. In *State v. Hellstern*, the Iowa Supreme Court found suppression necessary when the defendant invoked his right to a confidential consultation with his attorney and the law enforcement officer failed to explain the scope of that right, instead denying it. 856 N.W.2d 355, 364 (Iowa 2014). Similarly, in *State v. Lukins*, the Iowa Supreme Court suppressed the results of a Breathalyzer test when law enforcement denied the defendant his statutory right to an independent chemical test. 846 N.W.2d 902, 911 (Iowa 2014). The suppression of evidence due to a statutory violation is not a new rule. *See, e.g., State v. Kjos*, 524 N.W.2d 195, 196 (Iowa 1995) (holding a police officer's false statement about a defendant's choice to take a breathalyzer resulted in exclusion of evidence); *State v. McAteer*, 290 N.W.2d 924, 925 (Iowa 1980) (affirming a district court's suppression of evidence when a detainee was denied her right to call a family member); *State v. Vietor*, 261 N.W.2d 828, 832 (Iowa 1978) (holding when a detainee's request to call a lawyer is denied "evidence of his refusal to take a chemical test shall be inadmissible at a later criminal trial"). Support for exclusion can also be found in

the district court's authority to exclude evidence when there is a discovery violation. *See* Iowa R. Crim. P. 2.14(6)(c).

The purpose of reviewing Sellers' records was to uncover any impeachment evidence for cross-examination. *See Retterath*, 912 N.W.2d 500 at *11. "Cross-examination is a right essential to a fair trial." *Gibb*, 286 N.W.2d at 186. Given that Iowa Code § 622.10(4)(a)(2)(b) is intended to protect Mr. Retterath's right to cross-examination and his right to a fair trial, exclusion of Sellers' testimony is necessary.

Without Sellers' testimony, it is highly likely Mr. Retterath would not have been convicted of Count III. Sellers' was a key prosecution witness on Count III since it was him that Mr. Retterath was alleged to have solicited. If Sellers' testimony is stricken, there is no evidence in the record to establish that Mr. Retterath "command[ed], entreat[ed], or otherwise attempt[ed] to persuade" Sellers to commit murder—a necessary element of the crime of solicitation. Iowa Code § 705.1(1). A new trial is necessary because the exclusion of Sellers' testimony undermines confidence in the verdict. *Cf. State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006) (*Strickland* standard asks whether reasonable probability exists that

result of proceeding would have been different); *Harrington v. State*, 659 N.W.2d 509, 523 (Iowa 2003) (*Brady* standard asks whether undisclosed evidence undermines confidence in verdict). The district court recognized this when it asked the State, "at a minimum doesn't that put me in a position of precluding the State from using him as a witness and then granting a new trial?" (9/3/19 Trans. at 9). The district court's analysis was correct.

## IV. Mr. Retterath is not required to show the unavailability of the records prejudiced him.

The State fails to confront the fact that this case presents a statutory violation. The State's brief never addresses the plain language of § 622.10(4)(a)(2)(b) and the law invalidating proceedings when a mandatory statute is violated. Instead, the State hangs its hat on prejudice. The State's prejudice argument fails because it has already been rejected by the Iowa Supreme Court.

*Moyer* is the first example of this. 382 N.W.2d at 135. In *Moyer*, the district court did not order a substance abuse evaluation prior to sentencing, thus violating Iowa Code § 321.281(2)(c) (1983). The *Moyer* Court found that the purpose of the statute was to increase evaluation and treatment of persons with substance abuse problems

and that a mandatory presentence substance abuse evaluation was key to that purpose. *Id.* at 135.

Nevertheless, the State objected to vacating the defendant's sentencing, arguing the defendants was not prejudiced. *Id.* at 136. The State pointed out that evaluation and treatment are provided for prison inmates. *Id.* The *Moyer* Court disagreed that this was enough to excuse the district court's duty to fulfill the duty imposed by § 321.281(2)(c):

> [T]his record does not show what evaluation or treatment, if any, must be provided prison inmates, in comparison with the presentence evaluation and treatment contemplated by the amendment to section 321.281(2)(c). Treatment in the penitentiary after incarceration is not what the legislature had in mind when it mandated a presentence substance abuse evaluation and authorized the sentencing court to order treatment recommended in the report.

*Moyer*, 382 N.W.2d at 136. Because the statute set forth a mandatory duty and the district court did not discharge that duty, the *Moyer* Court vacated the defendant's sentence and remanded for resentencing. *Id.*

The Iowa Supreme Court again rejected a prejudice requirement in *Luckett*. 387 N.W.2d at 301. In *Luckett*, the State violated a rule of criminal procedure requiring indictments to specify if the offense

carried a minimum sentence because of the use of a firearm. The State argued that the defendant "was obviously aware that use of a firearm was a contention of the prosecution." In other words, the defendant was not prejudiced. The *Luckett* Court quickly dispatched this argument: "this knowledge does not excuse the State's wholesale and continued failure to comply with [the rule.]" *Id.*

The State's attempt to require Mr. Retterath to show prejudice consequently fails here. It is presumed that the Iowa legislature is aware of the caselaw interpreting mandatory statutes and invalidating subsequent proceedings when mandatory statutes are violated. *See Roberts Dairy v. Billick*, 861 N.W.2d 814, 821 (Iowa 2015) ("We have often indicated we presume the legislature was aware of our decisions when it crafted new statutes."). According to that caselaw, prejudice is not a requirement when a mandatory statute is violated.

These same cases require the rejection of the State's assertion that dismissal or a new trial is inappropriate unless Mr. Retterath can prove his due process rights were violated (a variation of the State's prejudice argument). (*See* State's Br. at 22–24). It is

immaterial if Mr. Retterath's due process rights were violated.[2] *Fowler*, *Moyer*, and *Luckett* did not ask if the defendant's due process rights were violated, they asked if the defendant's statutory rights were violated. The determinative issue is whether Mr. Retterath's statutory rights were violated—and they were.

The State's prejudice requirement would deprive Mr. Retterath of his rights under the statute. Mr. Retterath made the threshold showing to trigger in camera review. The whole point of the in camera review is to ascertain if there is information in Sellers' records that could undermine the outcome of trial. The State's argument that Mr. Retterath should prove materiality by presenting "testimony and evidence that can be tested through adversarial proceedings" is nonsensical. In camera review is only granted when privileged records may "contain exculpatory information *that is not available*

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[2] In the same vein, it is immaterial whether a defendant in fact has a constitutional right to in camera review. It is more than sufficient that the protection of a defendant's due process rights was the legislature's intent. This point is illustrated by *Fowler*, in which the Iowa Supreme Court considered a statute imposing a 90-day deadline for civil commitment trials. 784 N.W.2d at 190. The Court recognized the legislature adopted that "bright-line rule to avoid any due process problems," although the legislature was "not required to do so." *Id.* at 189–90.

*from any other source.*" Iowa Code § 622.10(4)(a)(2)(b). There is no way for Mr. Retterath to affirmatively establish prejudice without Sellers' records. If he could so, he wouldn't need the records to begin with. (State's Br. at 29). The district court was correct to resolve any doubt in Mr. Retterath's favor. Any other outcome leaves Mr. Retterath without a remedy, an outcome the legislature surely did not intend. *See also Glanville v. Chicago, R.I. & P. Ry. Co.*, 196 Iowa 456 (1923) ("We will not presume that the Legislature intended to create a right without a remedy.").

Finally, it is worth reiterating that Mr. Retterath's case was remanded because he made the threshold showing that exculpatory evidence could be found in Sellers' records. As recounted by the Court of Appeals: Sellers "was thirty-five years old at the time of the trial and had spent nearly ten years in federal prison." *Retterath*, 912 N.W.2d 500 at *2. He "had mental-health and substance-abuse disorders that would bear upon the truthfulness of [his] testimony. Sellers experienced "auditory hallucinations which are severe enough to warrant him receiving disability payments from Social Security." *Id.* at *11. Mr. Retterath established that he "had a history of psychiatric conditions that could impact his reliability as a witness."

*Id.* Additional specifics regarding Sellers' condition and the need for his records is discussed in Mr. Retterath's motion filed April 14, 2016. (Conf. App. pp. 4, 34, 13, 10). Having made this threshold showing, if a burden is to be placed on anyone, it should be on the State to show that Sellers' records did *not* contain exculpatory material that would have undermined the result of trial.[3] How the State could carry this burden without knowing what is in the records is anyone's guess, which further illustrates why it is unreasonable for Mr. Retterath to prove the opposite. The district court was correct to resolve any doubt in Mr. Retterath's favor and grant him a new trial.

[3] The State complains the Court of Appeals' holding in *Retterath* that impeachment evidence is exculpatory evidence is "overbroad and problematic." (State's Br. at 31); *see also Retterath*, 912 N.W.2d 500 at *11 (rejecting "any distinction between 'impeachment' evidence and 'exculpatory' evidence"). Since the filing of the State's brief, the Iowa Supreme Court has confirmed that the Court of Appeals was correct in its interpretation of "exculpatory" in § 622.10. *Leedom*, 938 N.W.2d at 188 ("We too have recognized that impeachment evidence if disclosed and used effectively, may make the difference between conviction and acquittal." (Cleaned up)).

## V. The State's remaining arguments contravene Iowa Code § 622.10(4)(a)(2)(b).

The remainder of the State's arguments fail because they also ignore the plain language of this mandatory statute and attempt to graft additional requirements onto § 622.10(4)(a)(2)(b).

The State asserts that the district court abused its discretion by failing to exercise its discretion. (State's Br. at 35). This argument is founded on the State's complaint that the district court did not weigh the evidence in Sellers' records and assess whether the evidence undermined the result of trial. (State's Br. at 17). This argument skips over the statutory requirement for in camera review and ignores the fact that the district court could not weigh the evidence when it did not possess the evidence. The district court never came to the point in the process where it could exercise its discretion because the violation of the statute prevented the review of the records.

The State argues that the violation of § 622.10(4)(a)(2)(b) does not invalidate Mr. Retterath's conviction because he has "only limited rights to discovery of evidence that the State does not possess." (State's Br. at 32). This argument misses the point because it again turns a blind eye to the plain language of the statute. Iowa Code §

622.10(4)(a)(2)(b) requires in camera review of these records, regardless of who possesses the records. The question is, simply, was that statute violated? The answer is yes.

The boogeyman the State cites—dismissal/new trial would "eviscerate prosecutorial discretion and allow defendants to escape justice by instilling fear of reprisals among witnesses and victims"—is wildly overblown. (State's Br. at 33). So the record is clear, the suggestion that Sellers refused to waive privilege because of any fear of reprisal is entirely unsupported. As to the merits of the State's assertion, this situation will rarely arise. To violate § 622.10(4)(a)(2)(b), a defendant must have made the threshold showing (which is no mean feat), and then a witness must refuse to waive privilege **and** the witness's records must be beyond the reach of a state subpoena. The fact that this is case presents an issue of first impression demonstrates that this chain of events is exceedingly rare. *See also Gibb v. Hansen*, 286 N.W.2d 180, 188 (Iowa 1979) ("The fact that a witness may have to make personal sacrifices in testifying is an element of one's social duty to aid in the execution of justice. '(T)he discomfort Any witness has in testifying against his wishes about matters within his knowledge, cannot outweigh the court's

interest in getting the facts necessary to make a reasoned and informed decision.'" (internal citation omitted)).[4]

Much of the State's argument boils down to its opinion that it is "inherently unfair" to grant Mr. Retterath a new trial under these circumstances. In the State's view, vacating Mr. Retterath's conviction is bad policy. But as the Iowa Supreme Court has held:

> It is not our function to rewrite the statute. If changes in the law are desirable from a policy, administrative, or practical standpoint, it is for the legislature to enact them, not for the court to incorporate them by interpretation.

*See State v. Wedelstedt*, 213 N.W.2d 652, 656–57 (Iowa 1973) (Cleaned up)); *accord State v. Walden*, 870 N.W.2d 842, 843 (Iowa 2015) ("We decline the State's invitation to apply the absurd-results doctrine to effectively rewrite the statute."). The Iowa legislature granted defendants like Mr. Retterath the right to have an in camera review of records under certain narrow circumstances. Dismissal or

[4] And, as the district court recognized, this situation is no different than when the State encounters "an uncooperative witness who just refuses to testify"—something that does, on occasion, occur. (9/3/19 Trans. at 10–11). Though the State asserts "justice will not permit" giving "witnesses and victims a veto power over prosecutions," the reality is that they sometimes do have that power. (State's Br. at 33).

a grant of a new trial is the only way to vindicate that right under the unique circumstances this case presents.

## CONCLUSION

Count III should be dismissed due to the violation of Iowa Code § 622.10(4)(a)(2)(b). In the alternative, the district court was correct to grant Mr. Retterath a new trial. Sellers' testimony should be excluded at that retrial.

## ORAL ARGUMENT NOTICE

Counsel requests oral argument.

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## CERTIFICATE OF COMPLIANCE AND SERVICE

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

of contents, table of authorities, statement of the issues, and certificates. This brief contains 6,265 words.

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

I hereby certify that on April 23, 2020, I did serve Defendant-Appellee's Page Proof Brief on Appellee by mailing one copy to:

Mark Retterath

Defendant-Appellee

___/S/ *Gina Messamer*_____

Dated: April 23, 2020

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