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

STATE OF IOWA,
Plaintiff-Appellant

vs.

MARK BERNARD RETTERATH,
Defendant-Appellee.

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

APPLICATION FOR FURTHER REVIEW FROM THE COURT OF APPEALS DECISION DATED DECEMBER 6, 2020

Alfredo Parrish
Gina Messamer
Jessica Donels
Parrish Kruidenier Dunn Gentry
Brown Bergmann & Messamer L.L.P.
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: aparrish@parrishlaw.com
gmessamer@parrishlaw.com
jdonels@parrishlaw.com
ATTORNEYS FOR DEFENDANT/APPELLEE

QUESTION PRESENTED FOR REVIEW

Whether, after the Court of Appeals ordered the district court to conduct an in-camera review of a witness' records to determine whether Mr. Retterath was entitled to a new trial, and after the records proved unavailable because the witness would not consent to their release and they were unobtainable through any other method, Mr. Retterath was entitled to have "any doubt . . . resolved in [his favor]" and receive a new trial to vindicate his rights under Iowa Code § 622.10(4).

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STATEMENT SUPPORTING FURTHER REVIEW

In this case, the "unobtainability" 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 and cannot conduct the in-camera review required by § 622.10(4)(a)(2)(b). The state argued that nothing should happen, and the Court of Appeals ultimately agreed. Choosing "nothing" – no remedy, no new trial and no excluding the witness's testimony – eviscerates Mr. Retterath's rights under Iowa Code § 622.10(4)(a)(2)(b). Mr. Retterath should be granted a new trial.

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. and/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 these witnesses' mental-health records. *Id.* at *11. The district court declined. *Id.* But on appeal, the Court of Appeals agreed that Mr. Retterath 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 Court remanded the case as to Count III[1] so that the district court could conduct an in-camera review of J.R. and Sellers' records, stating:

[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 (Count II) and remanded for dismissal due to an insufficiency of the evidence.

> 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 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 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. 8). The parties attempted to obtain the Sellers' records so the district court could review them in camera. (App. 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. 43).

After waiting for over 17 months for compliance with the remand order, Mr. Retterath moved to dismiss Count III. (App. 15). The district court originally denied the motion, but later reconsidered. (App. 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 concluded that "any doubt must be resolved in Mr. Retterath's favor and granting a new trial is the appropriate relief." (App. 43).

FACTS PERTINENT TO COUNT III

Before the facts supporting Count III materialized, Mr. Retterath was arrested and charged with sexual abuse in the third degree against C.L. *Retterath*, 912 N.W.2d 500 at *1–2. 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 claimed Mr. Retterath repeatedly asked them to help him murder C.L. by giving him drugs mixed with

ricin. (TT 443:16–458:5, 471:18–479:11). Sellers met Mr. Retterath through AA and the two were friends. (*Id.* at 439:19, 224:8). Sellers claimed that Mr. Retterath asked if he would kill C.L. (*Id.* at 443:4). He "didn't know whether to take him serious." (*Id.* at 445:7). He described Mr. Retterath getting "manic" about being angry with C.L.'s false allegations. (*Id.* at 448:17-20). Sellers stated that Mr. Retterath was "working himself up" over it, ranting about thinks like wanting to "kill that little mother f…" (*Id.* at 448:21-25). 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." (*Id.* at 460:9–461:3). 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. (*Id.* at 450:14-18, 461:4-6). 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. (*Id.* at 451:21–452:9, 461:7-9).

There was little to corroborate Seller's story. 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. (*Id.* at 593:22–594:6).

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." (*Id.* at 560:1–564:10). 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. (*Id.* at 569:19-25). 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." (*Id.* at 570:8-571:3).

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 seeds, Chickory Wildflower seeds, and many other seeds. (*Id.* at 591:1-376:13). 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. (*Id.* at 592:14–593:19).

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. (*Id.* at 615:9-12; 618:4-9). Castor beans and castor seeds are advertised, and used, as a repellant for pests like moles. (*Id.* at 618:15-24). Dr. Barnaby explained it was legal to buy castor beans, and that if one was swallowed whole, the body would not digest it. (*Id.* at 620:13-24). The first step to get ricin out of a castor seed was to break or crush the seed. (*Id.* at 629:5-13). 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. (*Id.* at 629:14-23).

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. (*Id.* at 717:24–718:15). Deb identified the gopher holes that Mr. Retterath put castor beans down to try to kill a gopher. (*Id.* at 723:18–724:6; App. 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 535:1–320:22).

Mr. Retterath admitted being very angry when he heard C.L. was accusing of molesting him as a child. (*Id.* at 833:8-20). He admitted to saying things like "I want to kill that little mother F-er." (*Id.* at 833:21–834:3). But, he did not mean it literally, and did not ever plan on killing C.L. (*Id.* at 834, l. 1-9). He explained, as Deb had, that as a crop duster, chemicals interested him, and plants were his hobby. (*Id.* at 838:2–12). He read the ricin article law enforcement

seized, but never planned on extracting ricin. (*Id.* at 838:11-14). 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. (*Id.* at 838:9-16). He ordered multiple batches of castor beans, not just the ones brought to trial, 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. (*Id.* at 841:1-844:4).

ARGUMENT IN SUPPORT OF FURTHER REVIEW

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 district court ordered that the remedy was a new trial. The state argued, and the Court of Appeals agreed, that a new trial was not required by the statute. But that conclusion raises concerns that could have been avoided by a new trial. It was error to deny a new trial on this ground, and this Court should grant further review to provide instructions for how to proceed in this scenario that is sure to repeat itself.

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) is 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).

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. A new trial is the appropriate remedy because it allows Mr. Retterath to argue that Sellers' testimony be excluded, or for similar appropriate relief.

The state attempted to sidestep the mandatory duty imposed by the statute by treating Seller's records as if they did not exist, rendering their contents irrelevant. (Applt. Br. 17 ("And the biggest problem is that Seller's records are flatly unobtainable, so their contents are automatically immaterial."). But the records weren't *truly* unobtainable. They weren't destroyed in a fire, or shredded, or lost. Sellers could have consented to their release. His decision not to consent is meaningful.

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). Michigan, New Mexico, and Wisconsin follow the same line of reasoning. *People v. Stanaway*, 521 N.W.2d 557, 584 (Mi. 1994) ("Our ruling is that where the privilege is absolute if the complainant will not waive her statutory privilege and allow the in camera inspection after the defendant's motion has been granted, suppression of the complainant's testimony is the appropriate sanction."); *State v. Gonzales*, 912 P.2d 297, 303 (N. Mex. Ct. App. 1996) (finding "no abuse of discretion in the district court's decision to prohibit Rachel from testifying as long as she refused to produce the disputed records for in camera review"); *State v. Shiffra*, 499 N.W.2d 719, 724 (Wis. 1993) ("The only issue remaining is whether the trial court misused its discretion when it suppressed Pamela's testimony as a sanction for her refusal to release the records. In this situation, no other sanction would be

appropriate."), modified on other grounds in *State v. Green*, 646 N.W.2d 298 (Wis. 2002).

These jurisdictions are consistent with Iowa in their recognition that testifying as a witness is a *duty*, and one that is sometimes uncomfortable. *Compare Stanaway*, 521 N.W.2d at 562 (Mi. 1994) ("While the duty to provide evidence may involve a sacrifice of privacy, the public has a right to everyone's evidence.") *with State v. Richmond*, 590 N.W.2d 33, 34 (Iowa 1999) ("[T]here is a general duty to give what testimony one is capable of giving. The common law principles underlying the recognition of testimonial principles can be stated simply, for more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence." (citation omitted)); *Mason v. Robinson*, 340 N.W.2d 236, 242 (Iowa 1983) ("Although the duty to testify requires sacrifices from a citizen, the inconvenience to the witness may be overborne by the need of the court and litigant for the testimony."). For these reasons, despite the strong privacy interest individuals may have in their mental health records, this court has long recognized that the privilege must be overcome under appropriate circumstances. "Excluding evidence from a criminal trial for some

purpose other than enhancing the truth-seeking process increases the danger of convicting an innocent person." *State v. Cashen*, 789 N.W.2d 400, 407 (Iowa 2010), *superseded by statute as recognized in State v. Thompson*, 836 N.W.2d 470 (Iowa 2013).

The court cannot force Sellers to consent to releasing his records, nor can the court obtain Sellers' records. But this doesn't mean that the court should do nothing. If Sellers wishes to accuse Mr. Retterath, Mr. Retterath has the right to confront him. By refusing to consent to the release of his records, and as a result of the district court and appellate court's denial of a new trial, Mr. Retterath's right to cross examination is seriously undermined. 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 v. Hansen*, 286 N.W.2d 180, 186 (Iowa 1979).

Effective cross-examination could not take place without Sellers' medical records, because Sellers' admissions – if he even made any – would not have carried the same weight as the medical records. This same issue arose in *State v. Neiderbach*:

> [W]e disagree that [the defendant's] failure to depose Jherica was fatal to his motion to obtain her mental health records. Jherica may have made admissions to a mental health counselor that she would forget or deny in an adversarial interrogation. Statements memorialized by a neutral therapist would likely be more credible than Jherica's self-serving assertions as a hostile witness. Indeed, noted commentators have recognized that "[e]ven the taking of a deposition from a hostile witness may not provide the substantial equivalent of the information the witness has given to a party to whom he or she is not hostile." Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, 8 *Federal Practice and Procedure* § 2025, at 544 & n. 23 (3d ed. 2010) (citing Fed. R. Civ. P. 26(b)(3) advisory committee's note). Her records may very well have enabled defense counsel to more effectively cross-examine her at trial or assisted counsel's preparation for her deposition.

837 N.W.2d 180, 197-98 (Iowa 2013); *see also Cashen*, 789 N.W.2d at 410 ("[W]ithout examining Doe's records, Cashen cannot be sure the information provided in Doe's deposition testimony accurately reflects her true mental health condition.").

The materials submitted in the confidential appendix convincingly demonstrate the futility of cross-examining Sellers' without access to his mental health records. In one deposition, where he was a material witness for a murder that happened in a vehicle he was driving, Sellers' was cooperative, and truthfully disclosed his symptoms and diagnosis. (Conf. Appx. 20). When deposed by trial

counsel in Mr. Retterath's case, where he was a hostile witness, Sellers' lied about his diagnosis and refused to answer questions that would lead to the discovery of the truth about his conditions. (Conf. Appx. 39, 41). Without the medical records to impeach Sellers, as described in *Neiderbach*, trial counsel would have been in a difficult position. Sellers could have stated that he lied in either or both of his depositions, and in both depositions, he was vague as to his diagnosis and symptoms.

The (un)availability of appropriate records for cross-examination affects a defendant's entire trial strategy. As Justice McDermott recently noted in *State v. Barrett*:

> Both a *Brady* disclosure violation and an improper withholding of records under section 622.10(4) involve helpful evidence to which the accused had a right not only to use at trial but also to use in strategizing a defense to the State's charges more generally. Both types of violations thus take us beyond erroneous evidentiary ruligns, which deny the defendant an opportunity to present evidence at trial. With both types of violations, the defendant is deprived not simply of an opportunity to introduce the evidence at trial, but even to know if its existence, hamstringing the accused's trial preparation and strategy more broadly.

No. 19-1697, 2020 WL 7635837, at *5 (Iowa Dec. 23, 2020),

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.

CONCLUSION

The Court of Appeals should have affirmed the district court's decision to grant Mr. Retterath a new trial. Any other solution ignores the violation of a statute critical to the fair administration of justice. Mr. Retterath respectfully requests this Court grant further review and reverse the ruling of the Court of Appeals.

ORAL ARGUMENT NOTICE

Counsel requests oral argument.

PARRISH KRUIDENIER DUNN GENTRY BROWN BERGMANN & MESSAMER L.L.P.

By: /S/ *Jessica Donels*
Alfredo Parrish AT0006051
Gina Messamer AT0011823
Jessica Donels AT0013389
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: aparrish@parrishlaw.com
gmessamer@parrishlaw.com
jdonels@parrishlaw.com
ATTORNEYS FOR DEFENDANT-APPELLEE

CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.1103(4)(a) (no more than 5,600 words); excluding the parts of the brief exempted by Rule 6.110(3)94)(a), which are the table of contents, table of authorities, court of appeals decision, and district court order. This brief contains 4,097 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 January 5, 2021, I did serve Defendant-Appellee's Page Proof Brief on Appellee by mailing one copy to:

Mark Retterath

Defendant-Appellee

___/S/ *Jessica Donels*_____

Dated: January 5, 2021

Jessica Donels

IN THE COURT OF APPEALS OF IOWA

No. 19-2075
Filed December 16, 2020

STATE OF IOWA,
Plaintiff-Appellant,

vs.

MARK BERNARD RETTERATH,
Defendant-Appellee.

Appeal from the Iowa District Court for Mitchell County, James M. Drew, Judge.

The State appeals an order granting the defendant a new trial on his conviction for solicitation to commit murder. **REVERSED AND REMANDED WITH DIRECTIONS.**

Thomas J. Miller, Attorney General, and Louis S. Sloven, Assistant Attorney General, for appellant.

Alfredo Parrish, Gina Messamer, and Jessica Donels of Parrish Kruidenier Dunn Boles Gribble Gentry Brown & Bergmann L.L.P., Des Moines, for appellee.

Heard by Tabor, P.J., and Mullins and Schumacher, JJ.

TABOR, Presiding Judge.

This criminal case returns to our court after an unexpected development. First Mark Retterath appealed. We conditionally affirmed his conviction for solicitation to commit murder. *State v. Retterath*, No. 16-1710, 2017 WL 6516729, at *7 (Iowa Ct. App. Dec. 20, 2017).[1] But we remanded for the district court to perform an in camera review of counseling records for two State's witnesses, Aaron Sellers and J.R. *Id.* at *11. Their testimony was crucial in proving solicitation. On remand, the court ordered a new trial on the solicitation conviction after the federal government refused to turn over Sellers's counseling records. The court reasoned that under our remand order Retterath was entitled to a review of those records. And without that review, "any doubt must be resolved in Retterath's favor and granting a new trial is the appropriate relief."

Now the State appeals. The prosecution argues the district court misinterpreted our remand order and improperly awarded a new trial. That argument has sway. In retrospect, our remand order did not contemplate that Sellers's counseling records would be unavailable. What we did expect was compliance with Iowa Code section 622.10(4) (2016) and its focus on exculpatory evidence. That statute does not presume exculpatory evidence exists if the court cannot review the records. Without that presumption, the unavailability of Sellers's records does not compel retrial. So we reverse the order granting a new trial. We also remand for the district court to perform an in camera review of J.R.'s records, as directed in the first appeal.

[1] We also affirmed his conviction for third-degree sexual abuse and reversed his conviction for attempted murder. *Retterath*, 2017 WL 6516729, at *5, *9.

I. Facts and Prior Proceedings

Sellers has three felony convictions for drug and gun crimes. He served eleven years in federal prison and discharged his sentence in November 2013. A few months later, Sellers met Retterath at an Alcoholics Anonymous (AA) meeting, and they became "fast friends."

As his camaraderie with Sellers flourished, Retterath faced molestation accusations from family friend, C.L. So after his February 2015 arrest on sexual abuse charges, Retterath turned to Sellers for help. Or at least that was the testimony Sellers gave at Retterath's trial. Sellers told the jury that Retterath asked him to kill C.L. Believing his friend was falsely accused, Sellers entertained Retterath's entreaty. But Sellers eventually made it clear that he "wasn't interested" in committing murder. Not giving up, Retterath asked Sellers if he knew anyone who might be willing to kill C.L. Sellers testified: "I said I know people who might be but I don't truck with them people anymore."

Meanwhile, Retterath consulted another AA associate, J.R., about killing C.L. In conversations with J.R., Retterath "was always expressing his anger towards [C.L.]." They discussed mimicking an episode of the television show *Breaking Bad*[2] to bring about the accuser's demise:

> [Retterath] wished [C.L.] would just OD sometimes. There was a time he talked about the ricin and he wanted to have me help him put it on the [family's] property somewhere where [C.L.] would possibly stumble across it.

[2] *Breaking Bad* was a "critically acclaimed television show" produced and marketed by AMC Networks, Inc. from 2008 to 2013. *See United States v. Rodriguez*, 125 F. Supp. 3d 1216, 1239 n.9 (D.N.M. 2015). J.R. testified he watched the show on Netflix, a video streaming service, and shared the plot details with Retterath.

> And he wanted it put in a bag of drugs, either methamphetamine, preferably heroin. So [C.L.] would—being a drug addict, he would hopefully shoot it up.

But after Retterath ordered castor beans to concoct the poisonous ricin, J.R. and Sellers decided it was time to call police. Their information prompted officers to obtain a warrant to search Retterath's property, where they secured corroborating evidence. Based on the new proof, in April 2016, the State added charges of solicitation to commit murder and attempted murder to the pending sexual abuse charges.

Soon after the State amended the trial information, Retterath moved for an in camera review of Sellers's mental health records under Iowa Code section 622.10(4). As an offer of proof, Retterath provided information that, among other mental-health issues, Sellers reported having auditory hallucinations—"he hears things that are not actually there." Citing his own depositions, the motion alleged that Sellers had been diagnosed with post-traumatic stress disorder and schizophrenia. The motion also noted Sellers was "on full disability for a mental health disorder." Finally, the motion asserted "Sellers has had his federal supervised release revoked in the past for failure to participate in mental health treatment."

In a separate motion, Retterath also sought an in camera review of J.R.'s mental-health records. Retterath alleged that J.R. had received inpatient psychiatric treatment that could affect the veracity of his testimony.

The State resisted both motions to produce the witnesses' mental-health records. In an argument that it has since abandoned, the State urged that in camera review was not warranted because "the records would only contain

impeachment evidence as opposed to exculpatory evidence." The district court accepted the State's position and denied the defense request for records.

In the first appeal, we decided Retterath established that both Sellers and J.R. had a history of psychiatric conditions that could impact their reliability as witnesses. *Retterath*, 2017 WL 6516729, at *11. Citing *State v. Neiderbach*, 837 N.W.2d 180, 220 (Iowa 2013), we decided 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." *Id.* Thus we remanded the case "to allow the district court to conduct [an in camera] review under section 622.10(4)(a)(2) to determine whether their records contain exculpatory information." *Id.*

Then we addressed the possible remedies:

> 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.

Id.

On remand, the State subpoenaed the mental-health records of both witnesses. The State secured J.R.'s records for the court's in camera review. But the State could not obtain the requested records for Sellers. The prosecutor explained that Sellers's records were "in the possession and control of the Federal Government (i.e. Social Security Administration and Probation and Parole)." And that those federal agencies "refused to comply with the state subpoena issued to them citing federal rules regarding privacy and confidentiality." Given that

roadblock, the district court suggested the prosecutor seek Sellers's consent to release the records. He declined. Having reached a dead end, the State informed the court in June 2019 that it had exhausted its ability to obtain Sellers's confidential records. The State requested "the burden of obtaining said records now be placed on the defense."

In response, Retterath moved to dismiss the solicitation count, alleging the State violated the remand order. The State resisted, contending the only two options on remand were to affirm or to order a new trial. The court agreed with the State and denied Retterath's motion to dismiss. After ruling out dismissal, the court grappled with the remaining question: Did the unavailability of Sellers's mental-health records entitle Retterath to a redo? The court read our remand order as requiring a new trial under these circumstances:

> The court respects Sellers'[s] right to maintain his privacy. However, Retterath's rights must also be respected. The court is unable to perform the required process on remand as directed by the court of appeals. Therefore, it is the court's opinion that any doubt must be resolved in Retterath's favor and granting a new trial is the appropriate relief.

Disagreeing, the State appealed.

II. Scope and Standards of Review

The scope of the remand is "limited strictly" to the terms of our order. *See State v. Johnson*, 298 N.W.2d 293, 294 (Iowa 1980). The district court must "conduct whatever proceedings" we mandated and make its determination from there. *Id.* Because the court's new-trial grant required interpretation of the remand order and the relevant statutes, we review the ruling for correction of errors at law. *See Taylor v. State*, 632 N.W.2d 891, 894 (Iowa 2001).

III. Analysis

In remanding to the district court for an in camera inspection of Sellers's mental health records, we followed the lead of our supreme court. *See State v. Edouard*, 854 N.W.2d 421, 442 (Iowa 2014) (remanding for in camera review of the victim's records), *overruled on other grounds by Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 708 n.3 (Iowa 2016); *Neiderbach*, 837 N.W.2d at 198 (remanding for in camera review of a codefendant's records); *see also State v. Leedom*, 938 N.W.2d 177, 188 (Iowa 2020) (encouraging district court judges in close cases to examine records in camera). But in Retterath's case, the district court faced a predicament—how to follow our remand order when Sellers's records proved unavailable.[3]

The court resolved that predicament by deciding, first, that Retterath was entitled to an in camera review of Sellers's records. And, second, lacking those records, it had to resolve "any doubt" in Retterath's favor and grant a new trial.

Challenging that grant, the State argues retrial was "not a foregone conclusion." Because Sellers's records were "unobtainable," the State contends "their contents are automatically immaterial." The State poses the counterfactual: What if the court had granted Retterath's request to review these records before trial and found out then they were unavailable? The State asserts the trial would have been unaffected. As things stand, the State contends Retterath cannot show prejudice from any error in the original discovery order.

[3] Neither party questions the premise that the records were beyond the reach of the state court.

In defense of the retrial ruling,[4] Retterath argues the district court was correct to resolve any doubt in his favor. He asserts that without Sellers's records, he has "no way" to "affirmatively establish prejudice." He argues the legislature did not create the rights under section 622.10(4) without the intent for someone in his position to have a remedy.

To assess the parties' positions, we find it helpful to recall section 622.10(4)'s origin story. That story opens with *State v. Cashen*, 789 N.W.2d 400, 408–10 (Iowa 2010), in which the majority of our supreme court drafted a protocol for criminal defendants to obtain access to the mental-health records of their accusers.[5] The *Cashen* protocol featured a balancing test between the accusers' right to privacy and the defendants' right to produce evidence relevant to their innocence. 789 N.W.2d at 407. The *Cashen* majority held: "Because of the importance of the public interest in not convicting an innocent person of a crime, any standard should resolve doubts in favor of disclosure." *Id.* at 407–08. That standard did not sit well with the *Cashen* dissent. *Id.* at 411–17 (Cady, J., dissenting). Justice Cady bemoaned the blow to the confidentiality of private

[4] Retterath also resurrects his trial position that the district court should have dismissed the solicitation prosecution rather than granting a new trial. The State contends we cannot consider this argument because Retterath did not cross-appeal. We agree. "[A] party who has not appealed is not entitled to a ruling more favorable than it obtained in the trial court." *See Fed. Land Bank of Omaha v. Dunkelberger*, 499 N.W.2d 305, 308 (Iowa Ct. App. 1993).

[5] Reaching further back, *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006), foreshadowed the *Cashen* protocol. In that case, the court allowed Heemstra to obtain the medical records of the homicide victim to help prepare his defense. *Heemstra*, 721 N.W.2d at 563 (announcing a compelling-need test to resolve clash between competing interests of victim's confidentiality and a fair trial).

counseling records, attacking the majority's relevancy test for failing to require a compelling need for disclosure. *Id.* at 415.

Fast forward to the next legislative session. The general assembly addressed Justice Cady's concerns by enacting section 622.10(4). *See* 2011 Iowa Acts ch. 8, § 3; *see also State v. Thompson*, 836 N.W.2d 470, 481 (Iowa 2013) ("We must interpret the resulting statutory enactment mindful of the legislature's purpose to supersede the *Cashen* test with a protocol that restores protection for the confidentiality of counseling records while also protecting the due process rights of defendants."). The new subsection returned the expectation of confidentiality, unless a criminal defendant seeking access to privilege records could make certain showings. Iowa Code § 622.10(4)(a).[6]

[6] Iowa Code section 622.10(4)(a) provides:

> Except as otherwise provided in this subsection, the confidentiality privilege under this section shall be absolute with regard to a criminal action and this section shall not be construed to authorize or require the disclosure of any privileged records to a defendant in a criminal action unless either of the following occur:
>
> (1) The privilege holder voluntarily waives the confidentiality privilege.
>
> (2)(a) The defendant seeking access to privileged records under this section files a motion demonstrating in good faith a reasonable probability that the information sought is likely to contain exculpatory information that is not available from any other source and for which there is a compelling need for the defendant to present a defense in the case. Such a motion shall be filed not later than forty days after arraignment under seal of the court. Failure of the defendant to timely file such a motion constitutes a waiver of the right to seek access to privileged records under this section, but the court, for good cause shown, may grant relief from such waiver.
>
> (b) 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 to determine whether exculpatory information is contained in such records.

Against that backdrop, we turn to the district court's reasoning. Without citing section 622.10(4), the court recognized Sellers's right to privacy but decided "any doubt" must tip toward Retterath's right to present a defense. At first glance, the court's default resembles the *Cashen* test, where the majority advised judges to "resolve doubts in favor of disclosure." 789 N.W.2d at 407–08. But that default diverges from the statutory language. At its foundation, the statute enshrines the confidentiality privilege for mental-health records as "absolute with regard to a criminal action." Iowa Code § 622.10(4)(a). The statute does not authorize disclosure to a defendant unless (1) the privilege holder waives confidentiality or (2) the defendant's request for access to the privileged information meets a threshold test. *See id.* § 622.10(4)(a)(1), (2).

In our view, Retterath's motion met the threshold requirement—"demonstrating in good faith a reasonable probability that the information sought is likely to contain exculpatory information that is not available from any other source and for which there is a compelling need for the defendant to present a defense in the case." *See id.* § 622.10(4)(a)(2)(a). As we explained in our first decision: "Retterath asserted Sellers experienced 'auditory hallucinations which

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> (c) If exculpatory information is contained in such records, the court shall balance the need to disclose such information against the privacy interest of the privilege holder.
>
> (d) Upon the court's determination, in writing, that the privileged information sought is exculpatory and that there is a compelling need for such information that outweighs the privacy interest of the privilege holder, the court shall issue an order allowing the disclosure of only those portions of the records that contain the exculpatory information. The court's order shall also prohibit any further dissemination of the information to any person, other than the defendant, the defendant's attorney, and the prosecutor, unless otherwise authorized by the court.

are severe enough to warrant him receiving disability payments from Social Security.'" *Retterath*, 2017 WL 6516729, at *11. That history of mental illness showed a reasonable probability that Sellers's counseling records would yield exculpatory information not available from another source and for which Retterath had a compelling need in countering the allegation that he solicited Sellers to kill C.L. True, the legislature did not define "exculpatory" in section 622.10(4). So our supreme court stepped into the breach. The court gave the term its "ordinary" meaning: "Exculpatory evidence tends to 'establish a criminal defendant's innocence.'" *Leedom*, 938 N.W.2d at 188 (citing *Exculpatory Evidence*, *Black's Law Dictionary* (11th ed. 2019)) (entertaining notion that "exculpatory" includes impeachment evidence).[7]

But showing a reasonable probability of exculpatory evidence is only step one. From there, the district court had a duty to inspect the counseling records to confirm that they indeed contained exculpatory evidence. *See* Iowa Code § 622.10(4)(a)(2)(b). Through no fault of its own, the court could not fulfill that duty. It turns out Sellers's counseling records, presumably from his time in federal prison, were unavailable from the federal agencies that controlled them. Without the records, the court could not identify any exculpatory evidence. And the court could not balance any compelling need to disclose exculpatory evidence against Sellers's privacy interests. *See id.* § 622.10(4)(a)(2)(c). With no information to disclose to Retterath, his counsel, or the prosecutor, no reason exists to order a new trial. *See id.* § 622.10(4)(a)(2)(d). No language in section 622.10(4)(a)(2)

[7] Indeed, the State recognized in its reply brief that *Leedom* equated impeachment and exculpatory evidence.

provides that, without access to mental health records for a State's witness, we presume the existence of exculpatory evidence material to the defense.[8]

Retterath suggests a new trial without Sellers's testimony is the only way to "vindicate" the "right" provided in section 622.10(4).[9] Retterath's suggestion overstates the purpose of these evidentiary provisions for three reasons. First, the statute "generally prohibits disclosure of confidential communications between mental health professionals and their patients." *Leedom*, 938 N.W.2d at 186. Second, the two exceptions to confidentiality under section 622.10(4)(a) scale back the breadth of disclosure allowed under *Cashen* while maintaining defendants' due process protections. *See Thompson*, 836 N.W.2d at 490 (holding limits to obtaining records under section 622.10(4) were constitutional). Third, and most important, the drafters did not envision a recalcitrant records holder like we have today. Or at least they did not include a step in the protocol to remedy this unusual stalemate.

Without guidance in our statute, Retterath looks to case law from other jurisdictions for a remedy. Those courts recognized the ability to exclude a witness's testimony if the defendant makes the threshold showing necessary to trigger an in camera review of a witness's mental-health records and that witness declines to waive the privilege. *See State v. Esposito*, 471 A.2d 949, 956 (Conn.

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[8] Conceptually, it helps to contrast this situation with spoliation of evidence. Under that doctrine, when the State intentionally destroys evidence, a fact finder may infer that the missing evidence was unfavorable to the prosecution. *See State v. Hartsfield*, 681 N.W.2d 626, 630 (Iowa 2004). By contrast, section 622.10(4) features no favorable inference for a defendant who cannot obtain the counseling records for a State's witness.

[9] The district court's new-trial order did not specify that it would exclude Sellers as a witness.

1984); *People v. Stanaway*, 521 N.W.2d 557, 562 (Mi. 1994); *State v. Trammell*, 435 N.W.2d 197, 201 (Neb. 1989); *State v. Gonzales*, 912 P.2d 297, 303 (N. Mex. Ct. App. 1996); *State v. Shiffra*, 499 N.W.2d 719 (Wis. 1993), *modified on other grounds in State v. Green*, 646 N.W.2d 298 (Wis. 2002). Because the witnesses in those cases had an absolute privilege not to reveal their counseling records, the courts decided exclusion was a possible remedy when the privilege interfered with the defendant's constitutional rights.[10]

By contrast, our legislature has qualified the privilege for witnesses in some criminal cases. Section 622.10(4)(a) forces in camera disclosure of privileged records in two scenarios. Review comes either (1) by the privilege holder's voluntary waiver or (2) by a defense motion alleging in good faith a reasonable probability the records contain exculpatory evidence not available from another source and for which there is a compelling need in defending the case. Sellers refused to waive his privilege. So we are on the second track. But without access to Sellers's records, the court cannot determine whether they contain exculpatory evidence that would outweigh Sellers's privacy interests. The statute does not require exclusion of the witness's testimony if the records are not available.

The unavailability of Sellers's mental-health records did not entitle Retterath to retrial under section 622.10(4)(a)(2). We reverse the district court's order granting a new trial. But we also recognize a bit of unfinished business. Both parties asserted at oral argument that the district court had yet to perform an in

[10] Retterath does not assert a constitutional violation. In fact, he contends: "It is immaterial if [his] due process rights were violated." Thus any constitutional basis for excluding Sellers's testimony has not been litigated.

camera review of J.R.'s mental-health records. We therefore remand for that to happen.

REVERSED AND REMANDED WITH DIRECTIONS.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
19-2075	State v. Retterath

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IN THE IOWA DISTRICT COURT FOR MITCHELL COUNTY

STATE OF IOWA,	)	
	)	
Plaintiff,	)	Criminal No. FECR024846
	)	
vs.	)	ORDER GRANTING NEW
	)	TRIAL ON COUNT III
MARK BERNARD RETTERATH,	)	
	)	
Defendant.	)	

This matter comes before the Court following a remand by the Iowa Court of Appeals. The Court has conducted several hearings on matters related to the remand. Counsel have informed the Court that there will be no further submissions. They have indicated it is appropriate for the Court to make a final determination on the remand without further hearing.

CASE HISTORY

On August 19, 2016, a jury found Retterath guilty of Count I, Sexual Abuse in the Third Degree; Count II, Attempt to Commit Murder; and Count III, Solicitation to Commit Murder. He was sentenced to an indeterminate terms of ten years for Count I, 25 years for Count II, and ten years for Count III. The sentence for Count III was ordered to run concurrently with the sentences imposed for Counts I and II.

Retterath appealed his convictions. The Court of Appeals vacated the conviction for the most serious charge, Count II, Attempt to Commit Murder. The Court of Appeals conditionally affirmed the conviction for Count III, Solicitation to Commit Murder. However, the Court of Appeals ordered a remand and directed the trial court to conduct

an "in-camera" (i.e. court only) review of the mental health records of two of the State's witnesses under Iowa Code § 622.10(4)(a)(2) to determine whether their records contain exculpatory information.

Over a significant period of time both the State and the defense attempted to obtain the pertinent records related to State's witness Aaron Sellers. Their efforts were unsuccessful. Although the records clearly exist, the federal entities possessing them are, apparently, beyond the state court's subpoena power. According to the State, Mr. Sellers is unwilling to sign a release for the records. Therefore, the question is whether the unavailability of the records requires the Court to order a new trial for Count III.

The Court of Appeals determined that Retterath made a sufficient showing to justify a review of Sellers' mental health records. The Court stated:

> *We remand the case to allow the district court to conduct that review under § 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.*

As the Court reads the appellate ruling, Retterath is entitled to a review of Sellers' records by the Court. The Court respects Sellers' right to maintain his privacy. However, Retterath's rights must also be respected. The Court is unable to perform the required process on remand as directed by the Court of Appeals. Therefore, it is the Court's opinion that any doubt must be resolved in Retterath's favor and granting a new trial is the appropriate relief.

ORDER

IT IS THEREFORE ORDERED that Retterath is granted a new trial on Count III. A trial scheduling conference shall be held on the 13th day of December, 2019, at 9:30 o'clock a.m. Mr. Brown or his office will be responsible for initiating the conference call. The case coordinator may be reached at (641) 494-3612.

Clerk shall provide a copy to:
Court Administrator

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
FECR024846	(GRR)STATE V. RETTERATH, MARK BERNARD (MONO)(NCO)

So Ordered

James M. Drew, District Court Judge,
Second Judicial District of Iowa

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