**IN THE SUPREME COURT FOR THE STATE OF IOWA**
**NO. 21-1211**

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***State of Iowa,***
***Plaintiff-Appellee,***

***v.***

***Benjamin Trane,***
***Defendant-Appellant,***

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***APPEAL FROM THE IOWA DISTRICT COURT***
***FOR LEE COUNTY (SOUTH),***
***HONORABLE MARK KRUSE***

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# *DEFENDANT/APPELLANT'S FINAL REPLY BRIEF*

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## ARGUMENT

### A. Defendant may, on remand, appeal the District Court's incorrect ruling

The State argues that Defendant cannot appeal the District Court's incorrect ruling based on two cases from the nineteen seventies. (See State's brief, at 14) (citing *State v. Anderson*, 246 N.W.2d 277 (Iowa 1976) and *State v. Coughlin*, 200 N.W.2d 525 (Iowa 1972)). This is incorrect and does not comport with modern legal practice in Iowa and Iowa Supreme Court precedent.

1. The State's argument is based on obsolete law.

Both cases cited by the State apply Iowa's prior appellate rule scheme from the same era. Iowa Code section 793.2 (1977) did state that "[a]ppeal can only be taken from the final judgment". This limitation does not exist in Iowa's modern appeal scheme. See Iowa Code § 814.6.

Further, neither case's facts apply here. *Anderson* dealt with an attempt to appeal from a deferred judgment, where the Court noted that a deferred judgment is by its very nature not final. *Anderson*,

246 N.W.2d at 279. Thus, because it was "interlocutory" in nature, it was not ripe to appeal. *Id.* Similarly, *Coughlin* did not allow an appeal from a motion for a new trial. *Coughlin*, 200 N.W.2d at 526. Defendant's present case is not interlocutory, nor is he appealing a motion for new trial. It is an appeal from the District Court's failure to correct the original error in Defendant's final judgment, as ordered on remand from the Supreme Court.

2. Review on conditional remand is the current state of law in Iowa.

Current Iowa law allows Defendant's appeal. Defendant is appealing the exact error made in his first appeal by right—the District Court's denial of his ability to present evidence regarding K.S.'s prior accusations. The fact that the District Court did not initially have the chance to commit fatal error in its Rule 5.412 hearing, *because it failed to hold one at all*, does not change the fact that this denial is still part of his final judgment. Had the error not been made, that same final judgment would have been nullified. There is no modern legal support for the State's position that when an Appellate Court conditionally affirms a conviction and remands it for further review, the appeal process vaporizes. Subsequent review

of remand for errors in the final judgment is standard practice. See *State v. Mosley*, No. 01-1118, 2002 WL 985697, at *1 (Iowa Ct. App. May 15, 2002); *State v. Plain II*, No. 20-1000, 2022 WL 188431, at *1 (Iowa Jan. 21, 2022).

Defendant can challenge these errors. Defendant directs the Court's attention to *State v. Plain I*, where the Iowa Supreme Court ordered the exact conditional review that it did in *Trane*:

> We conditionally affirm Plain's conviction and remand for development of the record on his Sixth Amendment challenge. On remand, the State shall provide the defendant reasonable access to the records necessary to evaluate whether African-Americans were systematically underrepresented in the jury pool from which the jurors were selected for Plain's trial. Following development of the record on this issue, the district court shall reconsider Plain's claim that his jury did not represent a fair cross-section of the community.

898 N.W.2d 801, 829 (Iowa 2017). As a result of *Plain I*, the District Court was ordered to conduct the same variety of preliminary reviews that the District Court was ordered to do in Trane. Plain's District Court performed this review on remand, and Plain appealed. See *Plain II*, 2022 WL 188431, at *1. This Court took Plain's appeal after remand when Plain complained that the District Court failed to

correctly perform the fair cross-section review it was instructed to do on remand. *Id.* This Court held that:

> In Plain I, we conditionally affirmed Plain's conviction and remanded for a determination on his fair-cross-section challenge. We now affirm the district court's holding on remand that Plain failed to prove a violation of his Sixth Amendment right to an impartial jury, and affirm his conviction.

*Id.* at *5. Plain challenged his District Court's application a procedure it was ordered to perform on remand: Trane seeks to exercise this same right. *Id.* When a Defendant's complaint is that the District Court has still failed to correct its original error with Defendant's final judgment, appeal is warranted. Such is the holding of *Plain II*, and such is the current law of Iowa.[1]

3. Review was explicitly allowed in *State v. Trane.*

The State points out that when an Iowa appellate court intends to allow appeal, "it knows how to say so." (State's brief, at 16). The Iowa Supreme Court said so in *Trane*. The *Trane* Court noted that "[i]f Trane fails to make such a showing, 'then his conviction stands,'

[1] The same freedom to appeal from the district court decision on remand is implicated in *State v. Lilly*, No. 20-0617 (Iowa 2022), decided February 4, 2022.

*. . . unless reversal is warranted on some other ground*." *State v. Trane*, 934 N.W.2d 447, 463 (Iowa 2019) (emphasis added). There *are* other grounds warranting reversal, including the fact that Trane demonstrated K.S. made prior false claims of sexual assault at his Rule 5.412 hearing and that the District Court failed to conduct the Rule 5.412 hearing according to law, among the other grounds stated in his initial brief. If, as the Supreme Court stated in *Trane*, making the showing that "[K.S.] made these statements and . . . they are false" by a preponderance of the evidence was the trigger for granting a new trial, then erroneous rulings in the hearing conducted for that purpose are grounds warranting reversal. *Trane*, 934 N.W.2d at 463 (citing *State v. Alberts*, 722 N.W.2d 402, 412 (Iowa 2006)).

The State asks this Court to leap over logic to conclude that—against the Supreme Court's express invitation—Defendant cannot appeal. Interestingly, *Plain I* did not actually contain the 'on other grounds' savings language noted in *Trane*, affording Defendant an even greater, more explicit grounds for review. Compare *Plain I*, 898 N.W.2d at 829 with *Trane*, 934 N.W.2d at 463. If the law affords Plain an appeal on further District Court error impacting his final

sentence, then Trane, who has the same issue *and* a direct initiation to appeal, surely may appeal as well.

While Defendant maintains that this point of law has been settled since the introduction of the current appellate procedure rules, he would concur with the State that it is necessary for this Court to retain this case and rule on the matter as a "substantial question[] of enunciating or changing legal principles". Iowa R. App. P. 6.1101(2)(f); (State's Brief, at 7) ("The State urges no such review is appropriate. See Division I. The Court could retain this case to decide the question.").

### B. The State's arguments regarding credibility determinations are not founded on caselaw or fact

1. The State does not provide sufficient grounds to ignore or overrule *State v. Smith*.

The State makes efforts to invalidate *State v. Smith* based on its assessment that *Smith* is an "aberration and relic of a time [less] enlightened about the dynamics of sexual abuse." (state's brief, at 21) (noting the State's assessment that *Smith* "parades rape myths as legal analysis"). To support this assertion, the State cites to two of its own cases before the Iowa Appellate Court. (Id.) (citing *State v. Atkins*, 2021 WL 3895198 (Iowa Ct. App. Sept. 1, 2021) and *State v. Cardona*,

947 N.W.2d 684 (Iowa Ct. App. 2020)). The Appellate Court chose *not* to apply the State's argument in both cases. In each, the Appellate Court *summarized* the State's position in a footnote, and in each case concluded that "[b]ecause [the Appellate Court] do[es] not find the doctrine articulated in Smith applicable to the testimony in this case", it would decline to overrule *Smith*. *Atkins*, 2021 WL 3895198, at *3. It is from this summary and *rejection* of the State's prior argument that the State now draws its supporting quotations. (State's brief, at 21-22).

The State's claims regarding *Atkins* and *Cardona* are further distinguishable. *Atkins* involved the assessment of the testimony of a nine-year-old, rather than that of a 22-year-old woman. 2021 WL 3895198, at *2. Specifically, the *Atkins* court chose not to apply *Smith* because "inconsistencies raised in this appeal are of the kind commonly found in prosecutions for child sex abuse", demonstrating the Appeals Court's ability to separate the rape myths the State is concerned with and a situation where *Smith*'s holding is applicable. *Id*. The bogeyman of the State's own making—that a panel of jurists would not be able to tell the difference between the normal vagaries

of child testimony and a nonsensical narrative by an adult—is dispensed with by *Atkins*. *Smith* is at its most potent and salient where, like *Graham v. Chicago & Nw. Ry. Co*. before it, an otherwise competent adult provides a suspect and self-serving narrative, in direct contradiction to prior testimony. 119 N.W. 708 (Iowa 1909). Here an adult woman, rather than a child witness whose ability to testify is subject to legitimate developmental and cognitive limitations, produced a narrative that is questionable, improbable, and lacked credibility.

Likewise, in quoting *Cardona*—also a child witness case—the State fails to provide the full rationale for the Appellate Court's choice not to apply *Smith*: "*Given the substantial evidence of Cardona's brazen actions*, we leave for another day the question of *Smith*'s continued salience." 947 N.W.2d 684, at *2, n.1 (emphasis added). Unlike *Cardona*, the evidence in Defendant's case was far from overwhelming. *Trane*, 934 N.W.2d at 463 ("there were no third-party witnesses to any of the alleged incidents of sexual contact . . . the State's case rested on the relative credibility of K.S. and Trane"). Rather, Defendant's case exactly fits the conditions of *Smith*, where

the "complaining witnesses' self-contradictory statements, pervasive use of hedging language, and inability to recall significant details of the incidents" rendered evidence insufficient. *Cardona*, 947 N.W.2d at *2.

Ultimately, the State's position on *Smith* is that it would prefer Defendants not cite it. (State's brief, at 21) ("*Smith* is wrongly decided . . . and its continued citation by defense attorneys evidences why it needs to be formally overruled"). Citation to the State's own prior failed attempts to overrule *Smith* do not provide further support for this claim, particularly when those cases are distinguishable from the present matter. The State has provided insufficient reason to ignore or discard substantial Iowa caselaw.

2. The State substitutes opinion for factual analysis.

In support of its argument, the State advances several claims without citation, evidentiary record, or academic support. (See State's brief at 23). These include making assertions about the internal thought processes of the witnesses in this matter, claiming that "defendant and other abusers likely perceived K.S. as an ideal target for their sexual abuse, given her history and the likelihood

uneducated persons would consider her 'damaged goods' or otherwise unbelievable" (Id. at 23). This unadulterated speculation is unsupported by citation, the evidentiary record, or case law.

The State also denigrates the Iowa Department of Human Services, among other state agencies, claiming that "any experienced practitioner" would know that DHS and others "routinely fail to detect abuse, whether due to staffing shortages, poor training, bad screening criteria, etc." (Id. at 23-24). Again, this is a personal opinion, without any supporting data or citation to support such an important legal issue.

In support of these diverse arguments, the State also leans on the burden of proof in a Rule 5.412 hearing, asserting repeatedly that Defendant's appeal should fail because he has the burden to prove by a preponderance of the evidence that K.S. made prior false statements. (Id. at 23, 26). This is immaterial—the Defendant asserts that he proved that K.S. made false statements by a preponderance of the evidence. Two credible adults who adopted the child testified the allegations by the child were false and would have testified at the first trial that the child's allegations were false had they been called

as witnesses. Ultimately, *Smith* stands for the principle that regardless of which party bears the burden of proof, extraordinary narratives are suspect. *State v. Smith*, 508 N.W.2d 101, 104 (Iowa Ct. App. 1993). Likewise, the State's conjecture about fellow agencies, the internal mental life of witnesses and Defendants, and post hoc theories of evidence are not proof of any kind and should be irrelevant to the court's analysis regarding the issue of preponderance of evidence. The threshold for the Rule 5.412 was easily established by Trane.

**C. The State misconstrues the manner in which bias may be demonstrated in a motion to recuse.**

The State asserts that Defendant citing evidence of the District Court's years-long history of bias against Defendant is out of bounds. This is not how demonstrating bias works. Establishing bias of a District Court judge is never easy. However, an appellate court must consider the entirety of the District Court's conduct to assess whether its impartiality is compromised and thrown into question.

The burden is on the Defendant to show bias such that a "reasonable person[] with knowledge of *all facts* would conclude that the judge's impartiality might reasonably be questioned." *State v.*

*Mann*, 512 N.W.2d 528, 532 (Iowa 1994) (emphasis added). Pointedly, the "deep-seated favoritism or antagonism" of a presiding judge may be shown "on the basis of facts introduced or events occurring in the course of the current proceedings, *or of prior proceedings*". *Liteky v. United States*, 510 U.S. 540, 555 (1994). The State's argument that such should not be considered is incorrect.

A review of the Court's conduct in those prior proceedings, as well as its antagonism during remand, are clear grounds for recusal. From the initiation of the case, where the District Court wrongfully denied Trane's Motion for a Rule 5.412 hearing, to its conduct during sentencing, to erroneously and rudely questioning counsel on whether the motion for new trial was timely filed, to its stubborn refusal to apply reasonable health and safety standards in remote testimony simply because the Defendant was the one who moved for them, the District Court has demonstrated pervasive antagonism sufficient to "make a fair judgment impossible". In re *Marriage of Herum*, 924 N.W.2d 537 (Iowa Ct. App. 2018). It is clear from the record in this case that this District Court was not going to grant Mr.

Trane a proper hearing nor allow the evidence into the record if a new trial was ordered by the appellate court.

**D. The State conflates caselaw applying to the admission of evidence with the District Court's consideration of inadmissible factors in a Rule 5.412 hearing.**

The State misconstrues the nature of Defendant's primary argument regarding the District Court's misapplication of law. In its briefing, the State argues the Doctrine of Invited Error, which it applies to the admission of particular evidence, controls the entirely separate issue of whether the District Court relied on that evidence in a way that exceeds the scope of Iowa Rule of Evidence 5.412. (States brief, at 32-34). This is not the law, nor Defendant's argument.

1. The admission of evidence of physical abuse does not excuse the District Court from having to hold a Rule 5.412 hearing according to the law.

The fundamental confusion is that Defendant does not object to the mere fact that in the course of the hearing incidental testimony and additional, unproven, and false accusations of physical abuse were entered into evidence. Instead, Defendant argues that the District Court's basing of its ruling on that evidence was outside the scope of Rule 5.412. The Doctrine of Invited Error controls situations

where the very thing complained of was actively agreed to by the complaining party. See In re *Marriage of Campbell*, 851 N.W.2d 546 (Iowa Ct. App. 2014) (noting that dissolution litigant who specifically requested in a prior motion to reconsider that her 401(k) account be divided to reduce her equalization payment could not later appeal that division). However, where the actual misapplication of law is not directly related to or is otherwise separate from the 'error', a defendant may request an appellate court intervene. See *State v. Hall*, 740 N.W.2d 200, 202, 205 (Iowa Ct. App. 2007) (finding that a "no-contact order was not authorized by statute" because the error in accepting the terms was not fully negotiated).

Here, Rule 5.412 is a rule of evidence intended to determine the admissibly of very specific evidence, under very specific circumstances. See Iowa R. Evid. P. 5.412. The scope of the Rule is limited to evidence of prior sexual activity or false claims of such activity. *Alberts*, 722 N.W.2d at 412. As already noted by Defendant, "[a]ssessing the accuracy of claims of physical abuse is outside the purpose of a Rule 5.412 hearing." (Def. Brief, at 48). Any failure to object is not connected to the District Court's decision to go rogue on

Rule 5.412. Effectively, it would be akin to arguing that because hearsay evidence was entered in a trial for possession of a controlled substance, a District Court commits no error in entering a ruling against the defendant for possession of a controlled substance, and a count of attempted murder that was never charged up to that point.

Just as important, such error only accumulates after the time to object has occurred. Defendant had no idea during the hearing that the District Court would apply Rule 5.412 incorrectly and enter a ruling against him on grounds not contemplated by the Rule. A party is entitled to assume that the District Court will apply the law correctly and need not preemptively object to the future errors of the Court. The Court should consider plain error if it feels there was duty to object. However, there was no duty to object.

2. The District Court's consideration of evidence that wasn't heard at the Rule 5.412 hearing at all certainly was not invited error.

Likewise, the doctrine the State relies upon has no application to the District Court's reliance on facts that *never* came up during the Rule 5.412 hearing. As noted in Defendant's original briefing, the District Court's consideration of K.S.'s testimony at Defendant's original trial was improper. (Def. Brief at 50-51). The transcript of

Trane's original trial was not admitted into evidence for his Rule 5.412 hearing. (See Id. at 51). Such consideration for the purpose of bolstering K.S.'s credibility was improper.

## CONCLUSION

For the reasons stated herein and in Trane's prior filings with this Court, the relief requested in his initial appeal should be granted, along with any and all other relief in this favor this Court finds just.

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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 7,000 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 3,097 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 February 18, 2022, I did serve Defendant-Appellant's Final Reply Brief on Defendant-Appellant by emailing one copy to:

Benjamin Trane
**DEFENDANT-APPELLANT**

/S/ Lori Yardley .
Dated: February 18, 2022