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IN THE SUPREME COURT OF IOWA
Supreme Court No. 24–0769
Polk County No. FECR371596

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LYNN MELVIN LINDAMAN,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HON. CHARLES C. SINNARD, JUDGE (SUPPRESSION)
& THE HON. DAVID NELMARK, JUDGE (TRIAL)

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. A nine-year-old testified over one-way CCTV, because the district court made a finding that testifying in Lindaman's physical presence would inflict trauma that would impair her ability to communicate during her testimony. Lindaman still cross-examined her at trial. Did this violate his right to confront a witness against him under Article I, Section 10 of the Iowa Constitution, as properly understood?

II. The victim's parents relied on Lindaman and his then-wife for childcare during the summer. The abuse happened on a summer day, as Lindaman was supervising the victim (and her brother) in his house. That evening, Lindaman told his wife that he had helped the victim explore her sexuality. Did the trial court err in ruling that Lindaman's admission was related to the subject matter of a report of child abuse, and overruling Lindaman's claim that marital privilege applied?

III. After her deposition but before her testimony at trial, the victim learned the word "vagina" from the prosecutor and her father. But she was not instructed to say that Lindaman touched her vagina, and her descriptions of how and where Lindaman touched her were consistent in substance even as her vocabulary grew. Lindaman argued that this was either a *Brady* violation or prosecutorial misconduct. Did the court err in overruling Lindaman's motion for new trial?

IV. Pretrial questionnaires showed that only 20% of jurors for other trials had heard about this prosecution. At voir dire, only three panelists had been exposed to news coverage of this prosecution. They were all excused for cause. Did the court abuse its discretion in overruling Lindaman's motion for change of venue?

V. The victim made an isolated comment that her mother had told her that Lindaman was a bad man when she was little. Lindaman moved for mistrial. The trial court offered to give a limiting instruction, but overruled the motion for mistrial because it found that vague comment would not render a fair trial impossible. Did it err?

VI. The victim testified that Lindaman touched her vagina. Was the evidence sufficient to support Lindaman's conviction for sexual abuse?

VII. CROSS-APPEAL ISSUE: Officers placed Lindaman in a room with a phone and a phone book, in plain view and within Lindaman's reach. Lindaman asked if he could use his own phone to call his wife to cancel a hair appointment. Officers told Lindaman that he could not have *his* phone, but he *could* make a phone call. Then, they *Mirandized* him. He said he understood his rights. He admitted to touching the victim's labia. He did not attempt to stop the interview at any point, nor did he try to make a call when left alone with the phone. Did the district court err in finding that the officers violated section 804.20? And if not, did it err in assuming that there was a causal connection between that purported violation and Lindaman's voluntary admissions, as required for suppression?

ROUTING STATEMENT

Retention is appropriate. This Court should overrule *State v. White*, 9 N.W.3d 1 (Iowa 2024). It has no firm basis in the text of Article I, Section 10. It makes Iowa an extreme outlier jurisdiction, unique in the level of trauma that it requires child victims of sexual abuse to experience in order for their abusers to be brought to justice. Lindaman might be right that, under *White*, he can demand a retrial. But that just shows why *White* is wrong. Lindaman had a fair trial, with a meaningful opportunity to confront HK's testimony. This Court should overrule *White* now, before it does any more damage.

Also, the State is cross-appealing from a ruling that suppressed Lindaman's confession to the acts described in HK's testimony. The court found that officers violated section 804.20. It was wrong—they could not give Lindaman *his* phone back (it had been seized pursuant to a warrant), but they told him that he could make a phone call, and there was a phone and a phone book on a table next to him. But even if that ruling was correct, suppressing the confession as a remedy makes no sense. Lindaman stated that he wanted to make a phone call to tell his wife to cancel an appointment for a haircut. There is no causal connection between a purported violation of section 804.20 and Lindaman's confession. "[T]he exclusionary rule should not be used to suppress evidence where there is no causal connection between

the government's illegal activity and the challenged evidence." *See State v. McMickle*, 3 N.W.3d 518, 522 (Iowa 2024). This Court should retain this appeal to clarify how this bedrock principle applies to a motion to suppress a voluntary confession for an alleged violation of section 804.20.

NATURE OF THE CASE

This is Lynn Melvin Lindaman's appeal from his conviction for second-degree sexual abuse as a second sexually predatory offense, an enhanced Class B felony, in violation of Iowa Code sections 709.3(1)(b) and 901A.2(3) (2023). The evidence showed that he touched his eight-year-old granddaughter's vagina. A jury found him guilty as charged. Lindaman was sentenced to a 50-year term of incarceration with an 85% minimum before parole eligibility, with a lifetime special sentence under section 903B.1. *See* D0328, Sentence (4/26/24). When Lindaman filed a notice of appeal, the State cross-appealed from a pretrial ruling that suppressed his confession.

On appeal, Lindaman argues: **(1)** the trial court violated his right to confront HK's testimony under Article I, Section 10 of the Iowa Constitution when it overruled his objection to her testimony by CCTV, as authorized by section 915.38(1); **(2)** the court erred in overruling his claim that evidence of his statements to his then-wife about how he abused HK were privileged; **(3)** the court erred in denying his motion for new trial and rejecting claims

that HK must have been coached because she had learned the word "vagina" from the prosecutor during the pendency of this case; **(4)** the court erred in denying his motion for change of venue based on pretrial publicity; **(5)** the court erred in denying his motion for mistrial when HK mentioned that her mother had said Lindaman "was a bad man when she was little,"; and **(6)** the evidence was insufficient to support conviction because HK's testimony was, in his opinion, neither credible nor sufficiently corroborated.

The State cross-appeals. The lower court erred in granting Lindaman's pretrial motion to suppress his voluntary confession. The court ruled that the officers violated section 804.20. They didn't. But even if they did, there was no reason to suppress the confession, under these circumstances. The court understood that, on an intuitive level—but it thought binding Iowa precedent required "the exclusion of all statements from Lindaman" upon finding any violation of section 804.20. *See* D0108, MTS Ruling (12/17/23), at 7–8. That cannot be correct. That confession was not causally connected to the alleged violation of section 804.20, so the district court erred in suppressing it and it should be admitted as evidence upon retrial (if necessary).

STATEMENT OF FACTS

HK and her immediate family lived within walking distance of the house where Lindaman lived with his wife (HK's maternal grandmother). *See* D0349, Trial Tr. vol. 3 (2/14/24), 46:3–48:14. During the summer of 2023, eight-year-old HK would ride her bike to her grandparents' house. Her grandparents had two cats, and HK really liked cats. *See* D0350, Trial Tr. vol. 4 (2/15/24), 94:23–98:25.

On June 27, 2023, HK and her younger brother rode their bikes to Lindaman's house. When they got there, HK played with Barbies, while HK's brother played on a computer. *See id.* at 99:1–100:4. After a while, HK went upstairs, laid down on a couch, and started watching a TV show. *See id.* at 101:15–23. Lindaman came upstairs, too. He sat on the couch. HK told Lindaman that she "wanted belly rubs like a kitty." *Id.* at 102:5–103:6. Lindaman rubbed her belly—but then, "he got a little low" and touched her in a way that felt "not right." *See id.* at 103:7–104:7. Then, Lindaman "got a little bit lower" and told HK "to take off [her] clothes." *See id.* at 104:10–21. HK said she "felt like he was forcing [her] for a second." *See id.* at 105:1–9. HK said that he touched her "vagina"—which she said was "[her] lower part, [her] private part." He was "rubbing it in a circle," and "[t]hen he started to run up and down, and then it felt like he was getting a little to [her] butt

and it started hurting a little bit." *See id.* at 105:10–106:6. HK clarified that Lindaman was using his finger to touch her bare skin. *See id.* at 106:7–13. When HK's brother came upstairs, HK put her skirt and underwear back on. *See id.* at 106:22–107:15. Lindaman told HK that she needed to keep this a secret from her mom. *See id.* at 108:5–109:13; *accord id.* at 111:17–112:5.

When HK and her brother came home, HK immediately took a shower "without even being told to do so," which had "never happened" before. *See* D0349, Trial Tr. vol. 3, 61:3–17. At dinnertime, HK's family met Lindaman and his wife at a food truck. Then, they all went to Lindaman's house to eat dinner on the patio. At some point during dinner, Lindaman left the table and went inside the house. HK's father (Aaron) testified that HK suddenly "stopped what she was doing, looked up" and "blurted out" a statement.

> She had a deeply concerned look on her face, almost fear or frightened of what she had said would maybe get her in trouble or that she had done something wrong, or maybe worse. When she looked at us and told us what had occurred, she was essentially staring straight through us at the time. I had never seen that look on her face before. It was a fear in her that I hadn't seen.

See id. at 61:25–64:12. Testimony on the contents of HK's initial disclosure was initially excluded as hearsay. *Id.* at 63:12–64:17. Later, the court revisited the issue and reversed its prior ruling. *See* D0350, Trial Tr. vol. 4, 4:7–12:10. So HK was able to testify about her initial disclosure, in her own words:

> My mind said, I can't hold this in. We should say it out loud. . . . I'm like, "Hey, everyone, stop what you're doing. Grandpa touched my private part." And then everyone was like, "Excuse me, what?" I'm like, "Grandpa touched my private part." My dad got up and threw the chair kind of across from him, and my dad was like, "What?"

See id. at 112:15–113:5. HK's parents told their kids to take their bikes and ride home. Then, HK's parents went into the house to confront Lindaman about what HK had said. Aaron was not subtle.

> I verbally confronted [Lindaman]. I walked up to him and I was very heated, and I yelled. I said, "Did you fucking touch my daughter?" I said that multiple times, and he had no response initially.
>
> [. . .]
>
> He initially put his hands up in the air and he said, "Hold on," or "Let me explain," something to that effect, and "[HK] was exploring her sexuality."

See D0349, Trial Tr. vol. 3, 64:18–66:11; *accord id.* at 87:20–88:8. At that, Aaron shoved Lindaman to the ground. Lindaman told HK's parents to leave the house. They did; they went home. Aaron happened to be an officer with the Ankeny Police Department. He called an on-duty officer to report what he just learned. *See id.* at 66:12–67:25; *accord id.* at 25:12–28:7.

When HK's mother got home, she took HK outside on the patio and "allowed [HK] to tell [her] whatever she wanted to tell." *See* D0350, Trial Tr. vol. 4, 152:5–153:4. HK told her: "I was just pretending to be a cat. And Grandpa dug his fingers inside me and it hurt." *See id.* at 153:5–154:4.

Lindaman's wife (Anne) had heard HK say that "Grandpa had done something sexually to her." *See* D0350, Trial Tr. vol. 4, 80:19–83:16. Anne confronted Lindaman after everyone else left. He did not deny touching HK in an inappropriately sexual way.

> I asked him why he went after [HK], and he said that he was helping try to explore her sexuality in a safe place. He said that he was rubbing her belly like a kitten, then all he described the rest of it was he was trying to help her explore her sexuality in a safe place.

Id. at 84:23–86:5. Lindaman objected and claimed marital privilege. The court overruled that objection. *See id.*; *accord* D0221, Order (2/10/24).

HK had a physical exam on the following day. She had notable redness in the "hymenal area" of her vaginal canal. That was consistent with recent digital penetration or rubbing. *See* D0350, Trial Tr. vol. 4, 44:23–49:15.

Police approached Lindaman and asked to speak with him about the allegations against him. They had a warrant to search his cell phone and to collect DNA samples. *See* D0293, MTS Tr. (11/9/23), 15:11–17:22. Lindaman went with them. The officers placed Lindaman in handcuffs. At one point, Lindaman said he would "probably like to speak to an attorney." *See id.* at 21:1–14. But Lindaman reinitiated conversation and expressed a desire to speak to the officers about the case. *See* D0099, MTS Ex. 1, at 2:48–3:43.

When they arrived at the station, the officers took Lindaman to an interview room with couches. There was a phone and a phone book on the table, in plain view. Lindaman stood facing that table with the phone on it as an officer removed his handcuffs. Then, Lindaman sat down on the couch next to that table. *See* D0099, MTS Ex. 2, at 2:10–4:30. An officer testified:

> I was getting ready to walk out of the room to get a *Miranda* form, and . . . [DCI] Agent Myers asked, do you need anything? And Mr. Lindaman said, just my phone so I can call my wife to cancel my haircut. And I walked out at that point, and I could hear Agent Myers say, you probably can't have your phone, but you can definitely make a call.

D0293, MTS Tr., 22:25–24:27; *id.* at 38:10–39:15 ("[H]e said, I would like my phone to call my wife so she can cancel my hair appointment. . . . I said, you probably can't have your phone, but you can definitely use the phone."). As she said that, Agent Myers used a hand to gesture towards the phone on the table, right next to Lindaman. *See id.* at 39:16–23. Lindaman did not do anything in response to that—he did not reach towards the phone, nor ask to have a contact retrieved from his cell phone. *See id.* at 40:1–41:6.

Agent Myers read a *Miranda* advisory to Lindaman. He said that he understood his rights, and he signed the form. He was told that he had the right to stop the questioning at any time. D0099, MTS Ex. 2, at 4:30–5:10.

Lindaman told the officers that HK had asked him for a belly rub. He voluntarily admitted that he "massaged her genitals" with his hand. *See id.*

at 20:00–21:34. He said that HK directed him to touch her "down there," so he did. When asked if he touched her vagina, Lindaman said he did not—but he said he *did* touch HK's "labia majora." *See id.* at 24:25–25:04. When told that HK reported that she experienced pain, Lindaman said that might be because he had touched inside her labia minora or on her clitoris. *See id.* at 26:14–27:12. The officers were almost baffled by this set of admissions.

During the interview, someone got Lindaman a Gatorade. Whenever he put down the bottle, he set it on the table, right next to the phone. *See id.* at 1:03:20–1:04:15. Later, while alone in the room, Lindaman reached out from where he was sitting and touched the phone book to rotate it slightly, so that he could read what it said on the cover. *See id.* at 1:49:30–1:49:40. He sat in the room alone for the next 35 minutes. During that time, he read a magazine, cleaned his glasses, and reclined. He did not try to use the phone or the phone book. When officers returned, he told them: "I'm thinking what lawyer to call to bond out or bail out of here." *See id.* at 2:26:40–2:27:10.

The district court granted Lindaman's motion to suppress all evidence of his confession, because it found that the officers violated section 804.20. *See* D0108, MTS Ruling (12/17/23). So jurors did not hear any evidence of those damning admissions. They still found Lindaman guilty as charged.

As the trial date approached, HK "ha[d] nightmares on a regular basis" where "she sees [Lindaman] in the corner of the room where it's dark, and she thinks he's going to get her." *See* D0349, Trial Tr. vol. 3, 70:14–74:3; *accord* D0350, Trial Tr. vol. 4, 156:12–24 ("She doesn't sleep at night. . . . She has nightmares of her grandpa taking her away.").

* * *

ARGUMENT

I. HK's testimony over CCTV did not violate Lindaman's right to confront a witness against him under Article I, Section 10 of the Iowa Constitution. This Court should overrule *White*.

Preservation of Error

Lindaman recognized that binding Iowa precedent foreclosed a claim that presenting HK's testimony over CCTV (on the basis of the showing that section 915.38(1) required) would violate his constitutional rights. He asked the court to find otherwise, based on arguments made in the appeal in *White* (which was then pending on further review). *See* D0353, Transcript (1/19/24), 45:5–51:17; D0128, Resistance (1/9/24), at 3–4. The district court noted that Lindaman "acknowledged that the constitutionality of [that statute] has been settled by the Iowa Supreme Court," and then stated it was "without authority to overturn that precedent" based on a prediction about what might happen in another pending case. *See* D0165, Order (1/23/24), at 1.

Standard of Review

Rulings on constitutional claims are reviewed *de novo*.

Merits

On appeal, Lindaman celebrates how *White* "charted its own path with the Confrontation Clause." *See* Def's Br. at 15. That it did. The problem is that the path it charted has no basis in the text of the Confrontation Clause or in precedent that—by Lindaman's own admission—blocked that path off.

No other jurisdictions with similar constitutional text have chosen that path. Nobody knows where it leads—including Lindaman, whose brief on appeal spends almost this entire division on the suddenly-unresolved question of whether Article I, Section 10 now disallows testimony by *two*-way video. *See* Def's Br. at 16–21. The only thing anyone knows for sure about this new path is that trial courts that follow it will leave traumatized victims in their wake. This Court should overrule *White* now, before it does further damage.

A. The text of Article I, Section 10, properly understood, does not require the result in *White*.

White held that "[w]hen the accused and the witness are prevented from seeing each other, there is no face-to-face confrontation, and the Iowa Constitution is not satisfied." *See White*, 9 N.W.3d at 3. But it acknowledged that the authority that it cited in its analysis of the constitutional text "does not tell us exactly what the face-to-face confrontation must involve." *See id.* at 8. Even that obscures a deeper problem: the term "face-to-face" does not appear in Article I, Section 10—it gives the accused a right to "be confronted with the witnesses against him." *See* IOWA CONST. art I, § 10; *accord White*, 9 N.W.3d at 17 (Christensen, C.J., dissenting). A "face-to-face" confrontation is preferable, but not textually required. When meaningful cross-examination occurs without a face-to-face confrontation between witness and defendant, there is no violation of Article I, Section 10.

The crux of *White* is its holding that "article I, section 10 must afford at least 'the minimum degree of protection' that it 'afforded when adopted'" and that this logically means that it "includes a guarantee that the accused may confront trial witnesses face-to-face." *Id.* at 13 (quoting *State v. Wright*, 961 N.W.2d 396, 402 (Iowa 2021)). But Iowa courts always understood that constitutional right to be coextensive with common law, *and* "subject to the same exceptions as then existed, and those that may be legitimately found to exist, developed or created in the future in consonance with the progress of human affairs through necessity, expediency, or public policy." *See In re Orcutt*, 173 N.W.2d 66, 74 (Iowa 1969) (quoting Wigmore on Evidence). So while face-to-face confrontation was generally preferred, it certainly was *not* required when "the main and essential purpose of confrontation [was] secure" without it. *See id.* at 75; *accord In re Delaney*, 185 N.W.2d 726, 732 (Iowa 1971) ("[S]ecuring for the opponent the opportunity for cross-examination is the main and essential purpose of confrontation"). The two Iowa cases that *White* cited only found violations of Article I, Section 10 when evidence was offered *without* either an opportunity for meaningful cross-examination or a real showing of necessity. *See State v. Reidel*, 26 Iowa 430, 436–38 (1869); *State v. Collins*, 32 Iowa 36, 40 (1871); *accord State v. Fitzgerald*, 19 N.W. 202, 203–04 (Iowa 1884) (distinguishing *Collins* and holding that Article I,

Section 10 "is not violated by the admission of testimony in a criminal case to prove what a deceased witness testified to at the preliminary examination" when that already offered "an opportunity to cross-examine [that witness]"). *White*'s broad assertion that early Iowa cases recognized an absolute right to face-to-face confrontation at trial does not align with what those early Iowa cases actually say. *See State v. Brown*, 132 N.W. 862, 864–66 (Iowa 1911).

Indeed, even a *prior* opportunity to cross-examine the witness on the subject matter of their testimony will satisfy a confrontation right—even the right under Article I, Section 10. *See, e.g.*, *Fitzgerald*, 19 N.W. at 203–04; *State v. Kimes*, 132 N.W. 180, 182 (Iowa 1911). So Article I, Section 10 can't possibly guarantee an absolute right to have jurors watch how a witness reacts to the defendant's physical presence and facial expressions while testifying. *See Brown*, 132 N.W. at 864. Thus, it was ahistorical for *White* to insist that Article I, Section 10 guarantees a right to a *performative* confrontation, just so a defendant can make arguments about "what the witness's behavior says about the witness's credibility." *See White*, 9 N.W.3d at 9–10. *White* ignored Iowa precedent that considered that assertion at length and flatly rejected it. *Brown*, 132 N.W. at 864; *State v. Clay*, 271 N.W. 212, 215 (Iowa 1937).

White picked out instances where older Iowa cases used the phrase "face-to-face" to describe confrontation or cross-examination, and it said

that meant that face-to-face interaction was understood to be essential to confrontation. *See White*, 9 N.W.3d at 7. That view is foreclosed by *Brown*, *Fitzgerald*, and *Kimes*, as already discussed. Moreover, none of those cases cited by *White* actually decided that confrontation required any face-to-face interaction beyond the incidental physical proximity that would *always* occur when a defendant watched (or conducted) a cross-examination in the 1800s. *See Reidel*, 26 Iowa at 436–38; *Collins*, 32 Iowa at 40. So they do *not* say that confrontation requires anything more than meaningful cross-examination.

Other courts have used a similar analysis to explain why older cases and authorities that use the phrase "face to face" in discussing confrontation should not be interpreted as though they somehow pre-emptively considered and rejected the notion that virtual confrontation via digital-age technology can effectively vindicate that right:

> [T]he value which lies at the core of the Confrontation Clauses does not depend on an "eyeball to eyeball" stare-down. Rather, the underlying value is grounded upon the opportunity to observe and to cross-examine. The physical distance between the witness and the accused, and the particular seating arrangement of the courtroom, are not at the heart of the confrontation right.
>
> While closed-circuit television and videotape recording did not exist when the Ohio (or federal) Constitution was written and adopted, these new technologies, . . . provide a means for the defendant to exercise the right of cross-examination and to observe the proceedings against him with the same particularity as if he and the witness were in the same room. In no sense is the defendant barred from questioning the witness or the proceeding converted to a secret or "Star Chamber" affair.

State v. Self, 564 N.E.2d 446, 452–53 (Ohio 1990); *accord Commonwealth v. Willis*, 716 S.W.2d 224, 230 (Ky. 1986). Note that many state constitutions have text that *expressly* guarantees "face to face" confrontation. *See State v. Foster*, 957 P.2d 712, 722 n.7 (Wash. 1998) (collecting provisions). Article I, Section 10 does not. This Court presumes such omissions are deliberate, and it gives them effect. *See State v. Hauge*, 973 N.W.2d 453, 464 (Iowa 2022); *State v. Storm*, 898 N.W.2d 140, 153 (Iowa 2017). *White* erred when it held that Article I, Section 10 guaranteed something that it was drafted to omit.

White overruled *In re J.D.S.* without reckoning with its reasoning. *In re J.D.S.* rejected a Confrontation Clause challenge to a similar procedure. The accused's lawyer was able to cross-examine the minor witness. And the witness "was told by the court that [JDS] was on the other side of the mirror, that he could see and hear [the witness], but that he was going to stay in the other room." *See In re J.D.S.*, 436 N.W.2d 342, 346–47 (Iowa 1989). When JDS argued that this violated his right to confront a witness against him, the court found that this procedure was "reasonable" under the circumstances (where the witness "would be traumatized" by a face-to-face confrontation) and that it did not violate JDS's confrontation rights "under the federal or Iowa constitutions"—in part because JDS was able to consult with counsel and could ask counsel to confront the witness with a specific fact/question,

if he wanted to. *See id.* at 347. JDS also argued that the witness's refusal to answer a question on cross-examination violated his constitutional rights. *See id.* at 347–48. The court disagreed, because the constitution "guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *See id.* (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). JDS's confrontation rights arose from the same constitutional provisions—which is why an *effective and meaningful* confrontation was all that was required.

White said that *In re J.D.S.* was inapposite because JDS just made the same arguments under both the Sixth Amendment and Article I, Section 10. *White*, 9 N.W.3d at 12–13. But that was because the operative parts of those two provisions have identical text. *See In re J.D.S.*, 436 N.W.2d at 346. The question of whether Article I, Section 10 of the Iowa Constitution prohibits this procedure was squarely raised and resolved. *White* said that *In re J.D.S.* "did not discuss Iowa cases interpreting the Iowa Constitution" that found a reason to read it differently from identical text in the Sixth Amendment. *See White*, 9 N.W.3d at 12. But *White* couldn't find any of those, either. That's why *White* found it useful to discuss *Coy v. Iowa*—the *very same case* that was analyzed at length in *In re J.D.S.*—to help interpret Article I, Section 10. *See id.* at 8–9 (majority) (citing *Coy v. Iowa*, 487 U.S. 1012, 1016–17 (1988)).

So *White's* complaint that *In re J.D.S.* was missing something that deprived it of persuasive/precedential force on this question was mistaken, at best.

HK's testimony still gave Lindaman plenty of room to argue his view of her demeanor and how well she held up on cross-examination. *See* D0354, Trial Tr. vol. 5 (2/16/24), 37:17–21. There was a face-to-face confrontation between HK and Lindaman's attorney, who acted as Lindaman's agent. That confrontation included live cross-examination that jurors could watch (and which Lindaman could influence, by communicating with counsel through his other attorney and during the break that preceded cross-examination). *See* D0165, Order (1/23/24), at 2; D0350, Trial Tr. vol. 4, 123:22–125:7. And H.K. was told that Lindaman was watching her testify, from another room. D0350, Trial Tr. vol. 4, 89:16–25; *accord In re J.D.S.*, 436 N.W.2d at 346. This level of confrontation was meaningful, effective, and reasonable under the circumstances. *See White*, 9 N.W.3d at 16 (Christensen, C.J., dissenting). That is all that Article 1, Section 10 requires. A "face-to-face" confrontation at trial is preferable wherever feasible, but not absolutely required—as long as "the defendant was given a meaningful opportunity" to exercise "the right of cross-examination." *See State v. Castillo*, 315 N.W.2d 63, 65–67 (Iowa 1982) (collecting cases and authorities). *White* erred in holding otherwise.

B. Section 915.38(1) already requires in-person testimony <u>unless</u> it would traumatize a witness. That means that *White* traumatizes victims *every single time* it applies.

White's error is costly. The record in this case illustrates the impact it would have on HK—*just one* minor victim. HK's treating counselor explained how testifying in Lindaman's presence would likely traumatize HK:

> This goes into a trauma response. And a trauma response sets the stage for continued trauma responses, meaning she can go back and regress into nightmares, new nightmares, bed wetting, thumb sucking. Behaviors that are going to hinder her development.

See D0353, Transcript (1/19/24), 28:25–29:25; *cf*. D0349, Trial Tr. vol. 3, 70:14–74:3 (describing HK's nightmares about Lindaman and their effect on her ability to sleep). She also mentioned her concern about precipitating "intrusive thoughts and increase in negative thinking patterns" as a result of "the increased risk that she runs being sat right in front of him, having him look right at her as she's asked to speak of him." *See* D0353, Tr., 35:11–37:6; D0132, Att. (1/12/24). The district court found her credible, so it concluded:

> The Court finds that, based on [that counselor's testimony], that testifying in the physical presence of the Defendant would be traumatic for the minor victim . . . . The emotional distress the child would suffer from being in the same room as the Defendant is significant and certainly more than *de minimus*. The negative impacts of that distress would likely last long after the trial has concluded. The use of closed-circuit testimony is necessary to protect this child. The Court also finds the testimony is more likely to be reliable if the child is not placed in the mental state that would occur from seeing the Defendant.

> . . . [T]his established procedure ensures a fair trial for the Defendant while minimizing trauma to the alleged minor victim.

D0165, Order, at 2. Absent those findings, section 915.38(1) would not have authorized one-way CCTV testimony, and *White* would be irrelevant. *White*'s impact is limited to cases where *it will traumatize* a minor victim like HK.

Abusers generally target "the most vulnerable children" within reach. *See* Thomas D. Lyon & Julia A. Dente, *Child Witnesses and the Confrontation Clause*, 102 J. CRIM. L. & CRIMINOLOGY 1181, 1193–94 (2012) (citing studies). *White* magnifies the harm to those already-vulnerable children, while also granting those predatory offenders an opportunity to derail prosecutions by exploiting that same vulnerability. *See* Gail S. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 229/57 MONOGRAPHS OF SOC. FOR RESEARCH IN CHILD DEV. 114–15 (1992) (reporting that control group of child victims of abuse had behavioral checklist scores that fell to "the normal range" at longitudinal follow-ups, while many children who testified against their abusers had *higher* CBCL scores at the follow-up, which indicated that experience testifying against defendant "played a role in exacerbating . . . these vulnerable children's disturbance"); *id.* at 73–74 (noting that child victims who were interviewed before testifying "expressed negative feelings . . . especially about having to see the defendant again"); *id.* at 100–01 (reporting that, in post-testimony interviews about their feelings,

"[f]ear of the defendant was a common response" and many children "stated that they were so frightened that they tried not to look at the defendant").[1]

Of course, the immediate effect of *White* is that minor victims who already testified under section 915.38(1) will probably have to testify *again*, in the presence of their alleged abuser. Longitudinal studies of child victims show "[t]estifying more than once [is] the factor most consistently associated with negative outcomes." *See* Jono Robinson, *The Experience of the Child Witness: Legal and Psychological Issues*, 42–43 INT'L J. L. & PSYCHIATRY 168, 169–70 (2015) (citing Jodi A. Quas et al., *Childhood Sexual Assault Victims: Long-Term Outcomes After Testifying in Criminal Court*, 70 MONOGRAPHS OF SOC. FOR RESEARCH IN CHILD DEV. 109–10 (2005)); *In re K.D.*, 975 N.W.2d 310, 314 (Iowa 2022) (quoting and relying on a treating therapist's testimony that "[a]dverse childhood experiences impact the development of a child and can increase the likelihood of lifelong mental or physical health problems").

Just five weeks before *White*, this Court reviewed a factual record that persuasively established that a victim-witness "suffer[ed] from post-traumatic stress disorder, anxiety, and depression because of the abuse she endured," and it found "substantial support" for a finding that "closed-circuit testimony

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[1] Almost all of the children in that study testified without using CCTV or any other "innovative procedure." *See id.* at 83–85. The study strongly recommended the adoption of testimony by CCTV. *See id.*

was necessary to protect her from further trauma." *State v. Gomez Medina*, 7 N.W.3d 350, 356–57 (Iowa 2024). *White* betrays her (and many others) by undermining the finality of *every* conviction where counsel could have raised a facial challenge to CCTV testimony under Article I, Section 10 (except for *In re J.D.S.* and *Rupe*, where similar challenges were raised—and rejected). *See State v. Rupe*, 534 N.W.2d 442, 444–45 (Iowa 1995); *In re J.D.S.*, 436 N.W.2d at 346–47. This is a "significant reliance interest" that should matter for stare decisis. *See Burnett v. Smith*, 990 N.W.2d 289, 303 (Iowa 2023).

White ignored that reliance interest. On the subject of minor victims, it only said that "[c]hild witnesses are not new." Nobody argued otherwise. Nor did anybody contend "that crimes against children are purely modern phenomena that the framers could not anticipate." *White*, 9 N.W.3d at 13. *White* did not consider or recognize the impact that its holding would have on all the victims who testified via CCTV in the 25 years since the enactment and implementation of section 915.38, in reliance on *In re J.D.S.* and *Rupe*. *See* 1998 Iowa Acts ch. 1090, § 31 (codified at Iowa Code § 915.38 (1999)). If nothing of consequence in *White* is "new," that weighs *against* overruling settled Iowa precedent—especially given that profound reliance interest.

White is correct that Iowa courts of bygone eras generally did not concern themselves with the impact that face-to-face testimony would have

on minor victim-witnesses. But that is because technology that can alleviate that harm while still supporting effective confrontation simply "didn't exist." *See White*, 9 N.W.3d at 16 (Christensen, C.J., dissenting). But now, it does. There is no danger of its overuse—section 915.38(1) requires a showing that "such measures are necessary to protect the minor from trauma." *See* Iowa Code § 915.38(1). So the consequences of *White* fall upon those victims who the Iowa legislature tried to use that new technology to protect, and who now *will be traumatized* (again) instead. Nothing requires that unjust result.

C. Appeals to a "truth-telling function" of confrontation weigh *against* the holding in *White*. It only applies in cases where a court has found that *White*-type trauma will impair the minor's ability to communicate.

White asserted that "any procedure that prevents trial witnesses from being able to see the accused" is "inconsistent with the truth-telling function of face-to-face confrontation." *See White*, 9 N.W.3d at 9. A textualist might object to this as superfluous at best, and policymaking at worst. If the text of Article I, Section 10 forbids testimony by CCTV, so be it. But if not, then the Iowa Supreme Court's view on the best way to promote "truth-telling" must yield to the legislature's policy judgment. Article I, Section 10 does not give the judicial branch any power to strike down legislation that *doesn't* abridge an enumerated constitutional right, to further a different policy preference.

On the other hand, it may make sense to consider the *purposes* of the confrontation right (as understood when drafted/ratified) as a tool to help discern the essential *meaning* of the constitutional text that guarantees it. As discussed, the leading cases and authorities generally conclude that the confrontation right is vindicated when the defendant has an opportunity for meaningful and effective cross-examination—which *can* occur without any face-to-face interaction in front of the trial jury. *See Brown*, 132 N.W. at 864–66; *Clay*, 271 N.W. at 215. They generally viewed confrontation as "the preliminary step to securing the opportunity of cross-examination; and, so far as it is essential, this is only because cross-examination is essential." *See Brown*, 132 N.W. at 864 (quoting Wigmore); *accord id.* at 864–65 (quoting *Mattox v. United States*, 156 U.S. 237, 242–44 (1895)). And that explains why Article I, Section 10 contains no separately enumerated right to cross-examine witnesses: they understood the confrontation right to be coextensive with a right to an opportunity for meaningful cross-examination. *See Kimes*, 132 N.W. at 182 ("The full opportunity which the defendant had for cross-examination, impeachment, and contradiction when the testimony was given obviates any objection which can be made on the constitutional ground that . . . defendant was not confronted with such witness.").

So, was the confrontation right in Article I, Section 10 understood to serve a truth-telling function? It was—but only insofar as cross-examination *itself* was understood to serve that function. *See Brown*, 132 N.W. at 864 (quoting Wigmore); *accord Castillo*, 315 N.W.2d at 65–66 (quoting Wigmore for the proposition that "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination" and also collecting Iowa authority to that effect). And Iowa courts *also* understood the confrontation right to incorporate common-law exceptions for cases where a public interest in the admissibility of probative and otherwise-unavailable evidence *outweighed* the defendant's interest in confrontation. That is why they said Article I, Section 10 would still "allow proof of dying declarations, which are everywhere admitted as evidence in cases of homicide"—without reference to any theory of waiver, and without requiring that the defendant must have had some opportunity to cross-examine the dying declarant. *See Fitzgerald*, 19 N.W. at 203; *accord Brown*, 132 N.W. at 864–65 (quoting *Mattox*, 156 U.S. at 243–44). In other words, there are some areas where a confrontation right *gives way* to a public interest in admission of evidence that is unconfrontable-yet-reliable, "to prevent a manifest failure of justice." *See Brown*, 132 N.W. at 864–65 (quoting *Mattox*, 156 U.S. at 243–44). *White* failed to reckon with that, so its originalist analysis is ahistorical.

Returning to present day: *White* said that allowing CCTV testimony is "inconsistent with the truth-telling function of face-to-face confrontation." *White*, 9 N.W.3d at 9–10. But section 915.38(1) only applies if a court finds "trauma caused by testifying in the physical presence of the defendant . . . would impair the minor's ability to communicate." Iowa Code § 915.38(1)(a).[2] *White* undercuts the public interest in receiving probative/reliable evidence in every case where it applies—which is *only* the universe of cases where a face-to-face interaction with the defendant would cause the witness to suffer a level of trauma that impairs their ability to communicate (and testify).

White prescribed a workaround for traumatized minors—it says they can just look away from the defendant. *See White*, 9 N.W.3d at 9–10. This doesn't solve the problem, for a lot of reasons. One of them is that children have poor impulse control. Another is that the fear/trauma response usually isn't solely dependent on a victim *seeing* their abuser; just knowing they are physically present often has the same effect. And, generally, a victim of abuse (especially a child) can't simply decide to *turn off* a severe trauma response or choose not to have one. It's neurophysiological—and it hinders speech:

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[2] Even if the legislature tried to expand the use of CCTV testimony in Iowa courts, the Sixth Amendment would limit its applicability to anything beyond a narrow class of cases where a court makes a case-specific finding of necessity. *See generally Maryland v. Craig*, 497 U.S. 836, 857 (1990).

> Our [brain imaging] study clearly showed that when traumatized people are presented with images, sounds, or thoughts related to their particular experience, the amygdala reacts with alarm—even, as in Marsha's case, thirteen years after the event. Activation of this fear center triggers the cascade of stress hormones and nerve impulses that drive up blood pressure, heart rate, and oxygen intake. . . . The monitors attached to Marsha's arms recorded this physiological state of frantic arousal, even though she never totally lost track of the fact that she was resting quietly in the scanner.
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> [. . .]
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> Our most surprising finding was a white spot in the left frontal lobe of the cortex, in a region called Broca's area. . . . Broca's area is one of the speech centers of the brain, which is often affected in stroke patients when the blood supply to that region is cut off. Without a functioning Broca's area, you cannot put your thoughts and feelings into words. Our scans showed that Broca's area went offline whenever a flashback was triggered. In other words, we had visual proof that the effects of trauma are not necessarily different from—and can overlap with—the effects of physical lesions like strokes.

Bessel Van Der Kolk, THE BODY KEEPS THE SCORE, at 44–45 (2014). There is no plausible argument that applying *White*—that requiring a minor witness to testify in the defendant's physical presence after a court finds that doing so will trigger or worsen that neurophysiological trauma response that disables the speech centers of the brain—will further any "truth-telling function."

White also probably makes it unconstitutional to use CCTV testimony for victim-witnesses with intellectual disabilities, under section 915.38(1)(c). In *People v. Franklin*, the Illinois Court of Appeals upheld a use of CCTV to take testimony from an intellectually disabled adult (SR) who was kidnapped,

beaten, and raped. SR was examined at length by a clinical psychologist, who reported that thinking about Franklin caused SR to "shut down" and "start crying uncontrollably"—she couldn't answer questions, and it took "half an hour to calm [her] back down" to continue the interview. So that clinical psychologist concluded that SR "would not be able to function" if required to testify in Franklin's presence. *See People v. Franklin*, 229 N.E.3d 364, 382–83 (Ill. Ct. App. 2023). Worse still, SR's victim-advocate testified that thinking about Mr. Franklin would cause SR to have "panic attacks"—and one of them was "so intense that [SR] had trouble catching her breath and [the advocate] thought she might have to call for medical assistance." *See id.* at 382. So would a face-to-face confrontation with Franklin improve SR's truth-telling? Clearly not. It would just make her *unable* to testify (and make her suffer, besides). And is watching the witness suffer a panic attack a more effective vindication of the confrontation right (properly understood) than *actual* cross-examination, viewed by a defendant and jury over CCTV? Again, clearly not. *See Brown*, 132 N.W. at 864 (quoting Wigmore); *cf. Foster*, 957 P.2d at 726–27 (quoting *Craig*, 497 U.S. at 851). So *White* undercuts the core interest at the heart of confrontation rights, too.

Moreover, *White*'s view that Article I, Section 10 requires that result cannot be correct—even if the provision *was* meant to guarantee face-to-face

confrontation at trial *in most cases*—because that constitutional right was always understood to give way when outweighed by strong public interest in certain kinds of probative/reliable evidence. *See Brown*, 132 N.W. at 864–65 (quoting *Mattox*, 156 U.S. at 243–44). This is exactly that kind of evidence. A child victim is often the only person who can testify on personal knowledge of abuse they experienced. Young victims who experience heinous abuse are more likely to suffer severe emotional trauma that impedes their testimony. Goodman et al., *Testifying in Criminal Court*, 229/57 MONOGRAPHS at 89–90 & 94 (reporting that "the two main determinants of the children's courtroom experiences were age and severity of the assault," and "[h]ow the children felt about testifying in front of the defendant was associated with the children's ability to answer the prosecutors' questions"). The public interest in taking testimony over CCTV where a court makes the requisite finding of necessity is overwhelmingly strong. *State v. Rankin*, 181 N.W.2d 169, 172 (Iowa 1970) ("A person should not be able to escape punishment . . . because he has chosen to take carnal knowledge of an infant too young to testify clearly as to the time and details of such shocking activity."). Just like a dying declaration, this is probative and generally reliable evidence that must be taken in this way "to prevent a manifest failure of justice." *Brown*, 132 N.W. at 864–65 (quoting *Mattox*, 156 U.S. at 243–44). *White* erred in failing to recognize that.

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When meaningful cross-examination occurs without a face-to-face interaction between witness and defendant, that does not violate Article I, Section 10. *White* held otherwise. To get there, it had to misunderstand the original meaning of the confrontation right, as understood when drafted. It was understood to enshrine a right to an opportunity for cross-examination, subject to exceptions at common law as the public interest required. It was *not* understood to create an inviolable constitutional right to a face-to-face encounter with witnesses/declarants at trial, come hell or high water. *See Brown*, 132 N.W. at 864–65 (quoting both Wigmore and *Mattox*, 156 U.S. at 243–44); *see also Fitzgerald*, 19 N.W. at 203; *Kimes*, 132 N.W. at 182. So *White* is wrong, from an originalist perspective. *White* is also wrong under a textualist approach—it constitutionalizes a face-to-face requirement that other states chose to include in parallel constitutional provisions, but which the drafters of the Iowa Constitution chose to omit. *See Hauge*, 973 N.W.2d at 464; *Storm*, 898 N.W.2d at 153. And the practical consequences of *White* will be dire: victims will be unnecessarily retraumatized, and finders of fact will be deprived of probative/reliable evidence whenever a trauma response renders a victim unable to testify in the defendant's presence—which will be most likely to happen in cases involving severe abuse and/or young children.

None of that needs to happen, because Article I, Section 10 does not grant an inviolable constitutional right to a face-to-face encounter with witnesses at trial—it doesn't *say* that, and it has never been understood to *mean* that. So this Court should correct its error and overrule *White*—and it should act *immediately*, before further damage is done.

D. If this Court doesn't overrule *White*, it should remand for development of a record on harmless error.

White said error could be harmless. But it said the test was whether the evidence was overwhelming without *any* testimony from the (allegedly) unconfronted witness. *See White*, 9 N.W.3d at 14–15 (quoting *State v. Coy*, 433 N.W.2d 714, 715 (Iowa 1988)). That skips a step—that's what a court should say *if* it finds that it is "pure speculation" to argue about what the evidence from that witness would have shown, if the witness testified in the defendant's presence (which is usually the case). *See Coy*, 433 N.W.2d at 715 (quoting *Coy*, 487 U.S. at 1021–22). But this case is different because video of HK's forensic interview was available and admissible to fill any gap in her testimony. If Lindaman's presence would make HK unable or unwilling to testify to a given material fact, the State would have been able to respond by proving that fact anyway (with a video showing that HK said it). *See* Iowa R. Evid. 5.807; *State v. Skahill*, 966 N.W.2d 1, 14–15 (Iowa 2021) (explaining that necessity requirement is met when trial testimony has "a significant gap

or weakness," or "was inconsistent and hesitant," or when the witness "was unable to provide important details" that were in the out-of-court statement); *accord State v. Maldonado*, 993 N.W.2d 379, 385–89 (Iowa Ct. App. 2023).

The State met the notice requirement—it told Lindaman that it was intending to offer "the forensic interviews of [HK]" in video form. D0129, Notice of Residual Hearsay (1/9/24). Just before trial, the State agreed not to offer that video as evidence, unless it became necessary. D0356, Transcript (2/6/24), 21:19–22:1. The State had the forensic interviewer lay the required foundation for a showing of reliability and for circumstantial guarantees of trustworthiness. *See* D0349, Trial Tr. vol. 3, 104:14–115:8, 129:21–131:2, & 137:21–138:19. So if HK's testimony had been derailed by a trauma response (or if it differed from her CCTV testimony for any other reason), that would make the recorded interview necessary and admissible under Rule 5.807. *See Skahill*, 966 N.W.2d at 12 (clearest showing of necessity is where "the most probative evidence, the victim's account of the alleged sexual abuse, would not have been presented to the jury simply by having the victim testify").

The video of the interview is not in the record.[3] This is nobody's fault. Neither the parties nor the Court could have known that it would be needed.

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[3] The record *does* show that HK's statements in that video would have generally matched her trial testimony. *See* D0350, Trial Tr. vol. 4, 117:4–118:16; *accord* D0218, CPA Report (2/8/24), at 7.

But without it, it is impossible to know if any *White* error was harmless. So if this Court does not overrule *White*, it should remand for development of a record that enables a harmless-error determination. *See State v. Barrett*, 952 N.W.2d 308, 310–11 (Iowa 2020) (describing similar remand); *State v. Moorehead*, 699 N.W.2d 667, 675 (Iowa 2005) (remanding with instructions to determine whether error in ruling on evidence was harmless).

II. The trial court did not err in overruling Lindaman's motion to exclude his wife's testimony under the marital privilege.

Preservation of Error

Error was preserved by objections and rulings when the evidence was offered during trial. *See* D0350, Trial Tr. vol. 4, 84:23–86:5; D0221, Order.

Standard of Review

A ruling on privilege is reviewed for correction of errors at law.

Merits

Section 622.9 prohibits a witness from "reveal[ing] in testimony" any "communication" to or from their ex-spouse "while the marriage subsisted." *See* Iowa Code § 622.9. Unsurprisingly, there are common-law exceptions. *E.g.*, *Sexton v. Sexton*, 105 N.W. 314 (Iowa 1905). And a statutory exception applies to "evidence regarding a child's injuries or the cause of the injuries in any judicial proceeding, civil or criminal, resulting from a report pursuant to [chapter 232] or relating to the subject matter of such a report." *See* Iowa

Code § 232.74. The district court found that child-abuse exception applied. *See* D0221, Order. Lindaman challenges that ruling. But the court was right.

Lindaman admits that most requirements for the exception were met. He only challenges whether his statements related to the subject of a report under chapter 232, because the Iowa Supreme Court held "the exception to the marital privilege under section 232.74 is limited to cases of child abuse that result from acts or omissions of a care provider" under section 232.68. *See State v. Anderson*, 636 N.W.2d 26, 37 (Iowa 2001); Def's Br. at 25–29. *Anderson* is clearly atextual and should be overruled, but that is a problem for another day. This ruling was correct under *Anderson* because the court was right that Lindaman was a "person responsible for the care of [HK]" at the time of the abuse. *See* Iowa Code § 232.68(2)(a); D0221, Order, at 3–5.

A care provider includes "[a]ny person providing care for a child, but with whom the child does not reside, without reference to the duration of the care." *See* Iowa Code § 232.68(8)(d). DHS found that Lindaman "was providing for [HK's] care and supervision while she was visiting in his home and is therefore considered a caretaker." *See* D0218, Report (2/8/24) at 11. The existence of this report also proves that the conversation about whether Lindaman touched HK related to the subject matter of a report of child abuse under chapter 232. Iowa Code § 232.74; *State v. Davis*, No. 05–1306, 2006

WL 3331019, at *6–7 (Iowa Ct. App. Nov. 16, 2006). Lindaman argues that providing supervision, without more, does not qualify as providing care. *See* Def's Br. at 27–29. But it does. *See Doe v. Iowa Dep't of Hum. Servs.*, No. 16–0664, 2017 WL 1735647, at *2 (Iowa Ct. App. May 3, 2017) (finding Doe "had assumed care of the child" within meaning of that provision when no other adult was around and when Doe had supervisory/disciplinary role). The definition of care provider in 232.68(8)(d) is deliberately broad—and it includes "care" for any "duration." *See* Iowa Code § 232.68(8)(d). So "care" under that subsection cannot require provision of any physical item—that would create a *de facto* minimum duration, which the statute forecloses.

The evidence supported the finding that Lindaman was providing care for HK and her brother when they came to his house at his open invitation to play there, under his supervision. Aaron testified that, during the summer, they frequently relied on Lindaman and his wife for daytime child-care. *See* D0349, Trial Tr. vol. 3, 48:6–17; D0206, Depo. Tr. (2/8/24), 24:16–27:14. Lindaman assumed the role of care provider by allowing the children into his home and by supervising them, as the only adult in the home. *See* D0350, Trial Tr. vol. 4, 107:25–108:4 (HK stating that she and her brother "would go back home at the same time when [Lindaman] watches us"); *accord id.* at 136:16–137:3; *Doe*, 2017 WL 1735647, at *2. So the ruling was correct.

If the ruling was in error, that error was harmless. HK's testimony was compelling and consistent across multiple statements over time. Her descriptions of Lindaman's contact with her genitals were corroborated by physical evidence of redness inside her vagina. *See* D0316, State's Ex. 19; D0350, Trial Tr. vol. 4, 44:23–49:15. The only evidence that he challenges as privileged is his wife's testimony that he told her he was trying to help HK explore her sexuality. *See id.* at 85:4–23. That was wholly cumulative with Aaron's testimony that Lindaman told him essentially the same thing. *See* D0349, Trial Tr. vol. 3, 64:18–66:11 & 87:20–88:8. So any error in the ruling on marital privilege would be harmless. *See, e.g.*, *State v. Swift*, 955 N.W.2d 876, 883 (Iowa 2021); *State v. Chapalonis*, No. 20–0085, 2021 WL 3075721, at *3–4 (Iowa Ct. App. July 21, 2021).

III. The court did not err in overruling Lindaman's motion for new trial. There was no prosecutorial misconduct.

Preservation of Error

Error was preserved by the ruling on this challenge below. *See* D0351, Sent. Tr. (4/26/24), 8:24–14:18; D0324, Brief (4/18/24).

Standard of Review

Review of a ruling on a motion for new trial is for abuse of discretion. Review of a ruling on *Brady* claim would be de novo. *See State v. Cahill*, 972 N.W.2d 19, 27 (Iowa 2022).

Merits

When HK disclosed the abuse, she did not know the word "vagina"—she reported Lindaman touched her "private part." D0350, Trial Tr. vol. 4, 112:15–113:5. She said that he "dug his fingers inside [her] and it hurt." *See id.* at 153:5–154:4. In her deposition, she said that he touched her "heinie" and "was rubbing it up and down." *See* D0304, Depo Tr. (2/18/24), 29:11–31:16. She said that her heinie was "just [her] private." *See id.* at 32:8–16. Later, she made it clear that Lindaman was "rubbing up and down, like, the front part." She also mentioned that he touched "inside." *Id.* at 69:13–72:4. When the prosecutor asked if she had heard the word "vagina," HK replied: "[n]ot really" and "[n]ot most of the time, no." *See id.* She said her parents called that part a "[h]einie," which was not the same as a "butt." *See id.*

At trial, HK used the word "vagina" to describe where Lindaman had touched her—meaning "[her] lower part, [her] private part." *See* D0350, Trial Tr. vol. 4, 105:10–106:11. Fortunately, Lindaman had an opportunity for a meaningful and effective cross-examination. He asked HK if someone told her what "vagina" means. HK said she learned it from a prosecutor and from her father. *See id.* at 130:23–133:10. ("And my dad said to me that it's not hiney, it's actually vagina."). That became a focus of Lindaman's closing. *See* D0354, Trial Tr. vol. 5, 29:10–30:10 & 37:22–39:8.

Lindaman argues that this raises an inference of coaching because it means that the prosecutor taught HK what to say. *See* Def's Br. at 27–41. No, it doesn't. Nobody told HK what to say. *See* D0304, Depo Tr., 8:10–16 & 76:19–78:6. The record shows she learned she could use the word "vagina" from her father, in a conversation that occurred after the prosecutor asked her (on the record) if she knew that word. *See* D0350, Trial Tr. vol. 4, 130:23–133:10; D0354, Trial Tr. vol. 5, 7:10–8:24. Even if it *had* been the prosecutor who told her what the word "vagina" meant, that would not be coaching or prosecutorial misconduct, by any stretch. *See Owens v. State*, No. 22–1359, 2024 WL 960455, at *3 (Iowa Ct. App. Mar. 6, 2024) (holding a prosecutor "educat[ing] the complaining witness on what the term 'private part' meant" was "not impermissible coaching" and thus "the prosecutor did not commit misconduct when preparing the child to testify"); *cf. DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002) ("If by 'coaching,' DeVoss means the prosecutor went over Maggio's testimony with her, the claim simply has no merit."). The court was right that "helping an eight-year-old learn a particular word is not the same as insisting that she use that word or alter her testimony in any way." *See* D0350, Sent. Tr., 14:11–18. There was no misconduct here.

Lindaman's concerns that someone influenced HK's testimony are a proper subject of cross-examination and argument. If he wanted the jury to

see how HK described what happened *before* she talked with a prosecutor, he could have shown the forensic interview video. Ironically, his argument to the jury was that HK's testimony was insufficiently credible because it was *too* consistent with her initial account in that non-leading forensic interview. *See* D0354, Trial Tr. vol. 5, 38:19–39:12. The reason why HK's accounts of what happened stayed the same over time (even as her vocabulary grew) is because they all described something that really happened. And the fact that HK's initial disclosures matched her deposition/trial testimony undermines any claim that she was coached in any way that changed what she described.

Lindaman alleges a *Brady* violation and complains that he was not allowed to discover what the prosecutor told HK. *See* Def's Br. at 41–43. The prosecutor told everyone what she knew about the facts surrounding HK's growing vocabulary. *See* D0354, Trial Tr. vol. 5, 7:10–8:24. There is no basis for any accusation that favorable evidence is being suppressed. And if such evidence *did* exist, it could not be material. The "private" or "heinie" that Lindaman had rubbed was always the same part that the sexual assault examiner later "cleaned out" with "a little Q-tip." *See* D0304, Depo Tr., 55:1–57:13; *accord* D0350, Trial Tr. vol. 4, 55:15–24 (stating that photo showing visible redness in HK's vagina would have been taken *before* swabbing it to collect samples). So Lindaman cannot prove any element of a *Brady* claim.

IV. The district court did not err in denying Lindaman's motion for change of venue. The pretrial publicity had only reached a small percentage of potential jurors.

Preservation of Error

Error was preserved by rulings on the motions for change of venue. *See* D0352, Trial Tr. vol. 2 (2/13/24), 4:1–6:1; D0161, Order (1/22/24).

Standard of Review

On review of a ruling on a motion to change venue, a court examines the record *de novo* and reverses only if it finds an abuse of discretion. *See State v. Dorsey*, No. 23–1063, __ N.W.3d __, slip op. *10–11 (Iowa 2025).

Merits

Lindaman raised concerns that certain news coverage of the case had mentioned his prior conviction on a similar offense, in the 1970s. *See* D0353, Transcript, 5:18–25. But, as the State noted, the reporting on this case that Lindaman submitted in his pretrial motion to change venue was "older," and that press coverage had since dropped off. *See id.* at 11:1–3; *accord Dorsey*, slip op. at *18–19 (explaining that "relying on stale information" to grant a motion to change venue without voir dire is an abuse of discretion); *State v. Siemer*, 454 N.W.2d 857, 859–61 (Iowa 1990); *State v. Spargo*, 364 N.W.2d 203, 208 (Iowa 1985). And questionnaires given to other jury pools showed "less than 20%" of jurors had heard *anything at all* about the case. D0161, Order, at 1; D0166, Exhibit (1/23/24); D0353, Transcript, 9:1–10:8. Even

Lindaman conceded the questionnaires "don't show a high number of individuals that would know about this case." D0353, Transcript, 4:14–24.

Dorsey establishes that the trial court would have abused its discretion if it *granted* Lindaman's pretrial motion to change venue on an assumption that voir dire wouldn't be enough to root out the influence of news coverage and seat a fair/impartial jury in the county where the crime was committed. *See Dorsey*, slip op. at *16–21; *accord State v. Evans*, 671 N.W.2d 720, 727 (Iowa 2003). It also would have erred if it had relied on Lindaman's assertion that coverage "will pick up again" when trial begins, or his claim that existing coverage reached a level that was "pervasive and inflammatory." *See* D0353, Transcript, 6:1–19; *Dorsey*, slip op. at *19–21.

Proceeding to voir dire was the right move, and voir dire proved it. Most prospective jurors hadn't heard anything about this case. Moreover, the trial court "exercised abundant caution" in granting for-cause excusals of the only three panelists who had seen or heard news coverage—even when one of them said that he could remain fair and impartial. *See, e.g.*, D0358, Trial Tr. vol. 1 (2/12/24), 3:10–9:12; *id.* at 36:17–40:6; *id.* at 69:24–73:11. No other panelist had been exposed to *any* news coverage of this case. And the trial court instructed the panelists to avoid news coverage, going forward. *See id.* at 143:8–15. There was no indication that any juror did otherwise.

Dorsey also establishes that it would have been an abuse of discretion to grant Lindaman's renewed motion to change venue, after the first day of voir dire. The trial court accurately noted that "a very small percentage of [panelists] have actually viewed the coverage"—3 out of 80, to be precise. *See* D0352, Trial Tr. vol. 2, 5:5–14. Those few panelists were just excused, leaving the court able to seat only jurors who had *no* exposure to any such coverage. That goes far beyond what is required. *See Dorsey*, slip op. at *14 (quoting *State v. Harris*, 436 N.W.2d 364, 367 (Iowa 1989)); *accord id.* at 20–21 (discussing *Siemer*, 454 N.W.2d at 861). The single bit of coverage that Lindaman offered from the morning of trial did not show that there was pervasive coverage—and the panelists who remained had already said they had not seen that piece, or any other coverage about Lindaman. *See* D0352, Trial Tr. vol. 2, 5:15–21. So Lindaman's arguments about the tone and content of that coverage are irrelevant. The trial court did not err when it found this small effect on the panel (already fully contained) did not meet the "demanding standard" for a change of venue. *See Dorsey*, slip op. at *19.

V. The court did not err in overruling the motion for mistrial. HK's unprompted comment was vague and isolated.

Preservation of Error

Error was preserved by the ruling on the timely motion for mistrial. *See* D0350, Trial Tr. vol. 4, 121:19–128:20.

Standard of Review

Review of a ruling on a motion for mistrial is for abuse of discretion. *See State v. Newell*, 710 N.W.2d 6, 32 (Iowa 2006).

Merits

"[T]o show an abuse of discretion by the district court in denying a motion for mistrial, the defendant must show prejudice that prevented the defendant from having a fair trial." *State v. Tewes*, No. 20–0253, 2021 WL 1904693, at *5 (Iowa Ct. App. May 12, 2021) (citing *State v. Callender*, 444 N.W.2d 768, 770 (Iowa Ct. App. 1989)). Lindaman can't, so his claim fails.

HK was testifying about what happened before her disclosure. Her testimony included an unforeseen and unprompted comment.

> **HK**: . . . Then we went outside. My mind said, like, I can't hold it anymore. We have to say it out loud because he's a bad man.
>
> **STATE**: Why do you say that?
>
> **HK**: Because my mom said that he was a bad man when she was little and it was not for my ears.
>
> **STATE**: We're not going to talk about any of that stuff, okay?

D0350, Trial Tr. vol. 4, 111:17–113:3. The prosecutor explained that she had "no knowledge" of any such conversation between HK and her mother, so it was an entirely unexpected answer. *See id.* at 122:6–25. Lindaman conceded that the State "did a good job of trying to move along from that statement." *See id.* at 123:17–21. But he still moved for a mistrial based on the prejudice

that would result if jurors "conclude that [HK's comment] is referring to abuse that [her mother] suffered when she was a child." *See id.* at 126:23–128:20. The trial court ruled that was "a leap in logic," so it overruled the motion for mistrial and offered to give a limiting instruction instead. *Id.*

Lindaman argues that HK's comment was so prejudicial that the court was required to grant a mistrial. *See* Def's Br. at 52–55. He relies almost exclusively on *State v. Belieu*. But *Belieu* is nothing like this case—in *Belieu*, a witness gave detailed accounts of three separate unrelated crimes (a robbery, a theft, and a burglary) which Belieu had committed, to prove a co-defendant's defense that Belieu forced her to participate in *this* offense. *See State v. Belieu*, 288 N.W.2d 895, 898 (Iowa 1980). This prejudice was beyond the power of a limiting instruction to contain because "it involved numerous references to other alleged crimes," and they were "pervasive and central to the defenses" that his co-defendants were arguing to the jury. *See id.* at 901. And *Belieu* noted the result would have been different if—as here—there was only "a brief, inadvertent reference to prior criminal activity." *Id.*

Generally, when a stray comment "was isolated and abrupt, caused by a nonresponsive answer from a witness" and "was not belabored, either in questioning or closing argument," it is not an abuse of discretion to deny a motion for mistrial. *See State v. Howland*, No. 22–0519, 2023 WL 3613259,

at *8 (Iowa Ct. App. May 24, 2023); *accord State v. English*, No. 21–0315, 2022 WL 3052322, at *3 (Iowa Ct. App. Aug. 3, 2022). A limiting instruction (which the court offered, and Lindaman declined) is "typically sufficient to ameliorate prejudice in all but the most extreme situations." *English*, 2022 WL 3052322, at *3 (citing *State v. Plain*, 898 N.W.2d 801, 815 (Iowa 2017)). It would have been sufficient here, too. This was a stray, isolated remark that was too vague to create a level of prejudice that required a mistrial—especially "in the context of the entire trial and all the properly admitted evidence." *See Newell*, 710 N.W.2d at 32–33; *accord Plain*, 898 N.W.2d at 815–16. So it was not an abuse of discretion to deny this motion for mistrial.

Finally, Lindaman was not prejudiced because the evidence of his guilt was very strong. *See English*, 2022 WL 3052322, at *4; *Plain*, 898 N.W.2d at 815; *Newell*, 710 N.W.2d at 33. The State will elaborate further below.

VI. The evidence was beyond sufficient to support conviction.

Preservation of Error

There is no longer an error-preservation requirement for challenges to sufficiency of the evidence on direct appeal. *See State v. Crawford*, 972 N.W.2d 189, 194–202 (Iowa 2022).

Standard of Review

"Sufficiency of evidence claims are reviewed for a correction of errors at law." *See State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012).

Merits

A verdict withstands a sufficiency challenge if it is supported by substantial evidence. That means evidence which, *if believed*, is enough to "convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." *See State v. Hennings*, 791 N.W.2d 828, 823 (Iowa 2010) (quoting *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008)).

Lindaman argues "there was no physical evidence of abuse." *See* Def's Br. at 59. That is false. Visible redness inside HK's vagina was consistent with the contact that she described and the fact that it was "hurting." *See* D0316, State's Ex. 19; D0350, Trial Tr. vol. 4, 44:23–49:15 & 105:10–106:8.

There was other corroborative evidence, too. Lindaman's non-denial and admission that he touched HK in the context of "exploring her sexuality" was powerfully incriminating. *See* D0349, Trial Tr. vol. 3, 64:18–66:11 & 87:20–88:8. This corroborated HK's statements that Lindaman touched her in the way she described (which an adult would recognize as sexual).

The circumstances of HK's disclosure and its consistency over time are further evidence of its truth. And there was no evidence of any motive to fabricate allegations against Lindaman. *See State v. Werner*, No. 16–1315, 2017 WL 2684348, at *3 (Iowa Ct. App. June 21, 2017) (finding evidence was "very strong" due to consistency over time and lack of motive to fabricate);

State v. Hildreth, 582 N.W.2d 167, 170 (Iowa 1998) (noting child's testimony was corroborated by "her contemporaneous emotional upset" and was not undercut by inconsistencies that were "minor and due to her young age").

Of course, even without any of that, Lindaman's sufficiency challenge would fail. HK's testimony is direct evidence of the touching that establishes the requisite sex act, so it "itself is sufficient" to support the conviction. *See State v. Mathis*, 971 N.W.2d 514, 518–19 (Iowa 2022); *State v. Donahue*, 957 N.W.2d 1, 10–11 (Iowa 2021); *Hildreth*, 582 N.W.2d at 110. Arguments about why HK was not credible were properly made to jurors. They do not offer a basis for a cognizable sufficiency challenge. So Lindaman's challenge fails.

VII. The district court erred in granting Lindaman's motion to suppress the evidence of his voluntary confession.

Preservation of Error

Error was preserved by the ruling that granted the motion to suppress, over the State's resistance (on both of the grounds argued here). *See* D0108, MTS Ruling; D0097, Resistance (11/16/23), at 6–9.

Standard of Review

Review of a ruling that suppresses evidence due to a statutory violation is for the correction of legal error. *See State v. Starr*, 4 N.W.3d 686, 691–92 (Iowa 2024) (quoting *State v. Casper*, 951 N.W.2d 435, 437 (Iowa 2020)).

Merits

The district court erred in finding that officers violated section 804.20. It also erred in finding that the correct remedy was to suppress all evidence of Lindaman's voluntary confession. Lindaman's statements showed that handing him a phone would have had no effect on what happened next—he would have cancelled a haircut, then made the same voluntary admissions. Because there is "no causal connection between the [allegedly] illegal activity and the challenged evidence," it was error to grant the motion to suppress. *See McMickle*, 3 N.W.3d at 522.

A. Lindaman was seated next to a phone and phone book, within arm's reach. He was told he could make a call. He was also told he could stop the interview whenever he wanted (unlike an implied-consent arrestee). Under the circumstances, section 804.20 was not violated.

The district court ruled *Hicks* was controlling and indistinguishable, even if Agent Myers *did* point towards the phone when she told Lindaman that he could place a call. *See* D0108, MTS Ruling, at 6–7. It was incorrect.

Hicks held that officers did not provide an OWI arrestee with the requisite "reasonable opportunity" to place a phone call, where the officers deflected and delayed in response to his requests to make a phone call. *See State v. Hicks*, 791 N.W.2d 89, 92 (Iowa 2010) ("I got to go through all this stuff first."). *Hicks* held that section 804.20 "requires peace officers to take

some affirmative action to permit the communication." *See id.* at 96–97. It held the presence of a phone in "the corner farthest diagonally from where Hicks was seated" in the interview room was insufficient. And it stated that "once section 804.20 is invoked, the detaining officer must direct the detainee to the phone and invite [him] to place his call or obtain the phone number from the detainee and place the phone call himself." *See id.*

Iowa courts apply section 804.20 "pragmatically," not mechanically. *See State v. Davis*, 922 N.W.2d 326, 331 (Iowa 2019). *Hicks* requires that officers take certain actions when section 804.20 is invoked in the context of "the chemical-testing statutes." *See Hicks*, 791 N.W.2d at 95 (quoting *State v. Tubbs*, 690 N.W.2d 911, 914 (Iowa 2005)). Outside of that context, acts recommended by *Hicks* are not essential, and a "reasonable opportunity" to place a phone call may be provided in other ways—as it was here.

Hicks was inebriated and would likely *need help* to be able to use the phone to place a phone call. *See id.* at 92 (noting that Hicks admitted "that he had too much to drink" and that he wanted to "have somebody called"). This is often the case with intoxicated arrestees. Also, the telephone in the room "clearly was not within the reach or control of Hicks." *Id.* at 96. True, *Hicks* said that if the phone *had been* within reach, "that alone" still would not establish that officers gave him a reasonable opportunity to make a call.

See id. But placing an arrestee in close proximity to a phone and phone book can still qualify as "affirmative action to permit that communication," under other circumstances. *See id.* at 97. It just wasn't sufficient in *Hicks*, because the officer "insisted on completing the implied consent form" while ignoring repeated attempts to *stop* that process to place a phone call. *See id.* at 92, 97.

Both that pressure and the arrestee's intoxication are critical parts of *Hicks*'s holding that granting access to a phone and phone book within reach is not enough to give the arrestee a "reasonable opportunity" to make a call. Whether something is "reasonable" is fact-dependent and fact-specific. *See State v. Baraki*, 981 N.W.2d 693, 697–700 (Iowa 2022); *accord Reasonable, Black's Law Dictionary* (11th ed. 2019) ("fair, proper, or moderate under the circumstances"). Simply telling an OWI arrestee that they can make a call is not enough when the officer proceeds to plow through implied consent and demand a yes-or-no answer on testing (treating any attempt to suspend the inquiry as a binding "no"). But when a sober arrestee is told that they can make a phone call, *Mirandized*, and told that they can *stop all questioning* whenever they want, then having both a phone and phone book within reach *is* enough to give them a reasonable opportunity to place a call. That arrestee has what they need to make a phone call whenever they choose to, *throughout* any interview that follows—their "opportunity" is a window that never closes.

The arrestee's level of sophistication and comprehension matters in determining whether officers have discharged their obligation to ensure that the arrestee understands a right. *See State v. Park*, 985 N.W.2d 154, 176–77 (Iowa 2023). So do other contextual factors. The district court was incorrect to read *Hicks* to prescribe a one-size-fits-all routine that officers *must* follow every time, no matter the circumstances.

Under the circumstances, there was no obligation to place the phone in Lindaman's hand or dial the number for him—he was sober, and he was told that he could *stop* the interview whenever he wanted to. *See* D0239, MTS Tr., 49:25–50:10. The district court faulted the officers for proceeding onward to a discussion of *Miranda* rights. *See* D0108, MTS Ruling, at 6–7. But the *Miranda* advisory told Lindaman that he had the power to suspend or stop questioning. So if Lindaman wanted to call his wife before answering a question, he could just *invoke* the rights that the officers just read him. *See* D0099, MTS Ex. 2, at 4:30–5:10. And Lindaman knew that the phone was within his reach—he faced the phone and phone book for at least 20 seconds, while an officer unlocked his handcuffs. Then, he sat next to that table. *See id.* at 3:00–4:30. His opportunity to make a phone call was ongoing, for the entire duration of the interview, as he sat next to that phone and phone book and chose *not* to stop the interview to use them. So there was no violation.

B. When officers violate section 804.20, but it is clear that certain evidence is not causally connected to the violation, that evidence should not be suppressed.

In OWI investigations, "[p]rejudice is presumed upon a violation of section 804.20." *See State v. Walker*, 804 N.W.2d 284, 296 (Iowa 2011). But that is because the implied-consent decision and the quantitative result of a test are time-sensitive, and because counterfactual test decisions/results are generally impossible to know with any certainty (both because the time that would pass during a phone call would affect a test result, and because an intoxicated arrestee might have changed their implied-consent decision as the result of an unrelated phone call for reasons that elude sober minds). Conversely, when it *is* apparent that there is no causal connection between a violation of section 804.20 and discovery/collection of challenged evidence, then suppression is improper—for the same reasons that animate this rule in other contexts. *See McMickle*, 3 N.W.3d at 521–22.

McMickle confirmed that this applies to violations of section 804.20. *See id.* The fact that officers violated section 804.20 is not cause to suppress evidence that was "untainted" by the violation. *See id.* (citing *State v. Seager*, 571 N.W.2d 204, 214 (Iowa 1997)). In *McMickle*, that untainted evidence was a chemical test result for a blood sample that was obtained through a search warrant, which still would have been obtained even if officers had

not violated section 804.20. *See id.* Similarly, in *State v. Garrity*, officers violated section 804.20, but that did not taint the admissibility of a video showing "Garrity's body motions, judgment, slurred speech and inability to communicate" at the police station. *See State v. Garrity*, 765 N.W.2d 592, 597 (Iowa 2009). Even in those OWI investigations, there was room for a showing that challenged evidence stood independent from the violation.

Here, Lindaman stated that he only wanted to call his wife to cancel a haircut appointment. *See* D0293, MTS Tr., 22:25–24:27; *id.* at 38:10–39:15. There is no reason to believe or infer that placing such a call would have any effect on Lindaman's voluntary and *Mirandized* confession. Indeed, it was clear from Lindaman's response (and his complete disinterest in using the phone to call his wife, when he was left alone in the interview room later on) that putting the phone in his hand would not even have caused him to make *that* call—he just wanted access to his own device (which was being searched). *See* D0099, MTS Ex. 2, at 1:49:30–2:27:10; *cf. State v. Krutsinger*, No. 16–0963, 2017 WL 1733181, at *2–3 (Iowa Ct. App. May 3, 2017) (rejecting an argument that officers did not fully discharge duty under *Hicks* because the arrestee's response to being told that he could call an attorney "showed he did not want to call an attorney at that time"). So his voluntary confession has no causal connection to any purported violation of section 804.20.

The district court erred by finding that the officers did not take the steps that were necessary to give Lindaman a reasonable opportunity to make a phone call, thereby violating section 804.20. And it erred again in granting suppression, because this record establishes there was "no causal connection between the illegal activity and the challenged evidence." *See McMickle*, 3 N.W.3d at 522. This Court should reverse that ruling and permit the State to offer evidence of Lindaman's voluntary statements at any retrial.

CONCLUSION

The State respectfully requests that this Court reject each of Lindaman's challenges and affirm his conviction. If it doesn't, the State requests that this Court reverse the ruling that suppressed his interview.

REQUEST FOR NONORAL SUBMISSION

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

Respectfully submitted,

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Dated: January 17, 2025

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