ELECTRONICALLY FILED JUN 12, 2020 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff–Appellee, v. PATRICK BARRETT, JR., Defendant–Appellant.	)))))))))	S.CT. NO. 19–1697

APPEAL FROM THE IOWA DISTRICT COURT
FOR CASS COUNTY
THE HONORABLE JEFFREY L. LARSON, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 12th day of June, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant–Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Patrick Barrett, Jr., #6407176, Clarinda Correctional Facility, 2000 North 16th Street, Clarinda, IA 51632.

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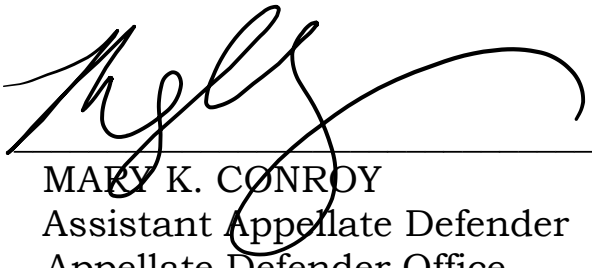

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ROUTING STATEMENT

The Iowa Supreme Court has "trust[ed] Iowa district court judges . . . [to] be able to recognize exculpatory information when they see it." State v. Thompson, 836 N.W.2d 470, 487 (Iowa 2013). In a previous appeal in this case, the Court of Appeals found the district court failed to recognize and disclose exculpatory evidence to the defense pursuant to Iowa Code section 622.10(4). See State v. Barrett, No. 17–1814, 2018 WL 6132275, at *3 (Iowa Ct. App. Nov. 21, 2018) (unpublished table decision). It remanded for a determination of whether the defendant was entitled to a new trial. Id.

This Court's guidance is needed on the standard the district court should apply when determining whether the defendant is entitled to a new trial after the district court conducts an in camera review and fails to disclose relevant and material information, pursuant to section 622.10(4). Since the enactment of the statute, Iowa courts have reversed several cases, concluding that the defendant was entitled an in camera review of mental health records under the statute.

See, e.g., State v. Neiderbach, 837 N.W.2d 180, 220 (Iowa 2013); State v. Edouard, 854 N.W.2d 421, 442–43 (Iowa 2014); State v. Leedom, 938 N.W.2d 177, 186–89 (Iowa 2020); State v. Retterath, No. 16–1710, 2017 WL 6516729, at *11 (Iowa Ct. App. Dec. 20, 2017) (unpublished table decision). However, the procedure and standard for the district court's determination of whether the defendant is entitled to a new trial after the trial court erroneously denied the defendant access to records that he is statutory entitled to has not been addressed and is a matter of first impression. As such, this Court should retain the case. See Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

Nature of the Case: Defendant–Appellant Patrick Barrett, Jr., appeals from the denial of his motion for new trial after a previous appeal from his conviction, sentence, and judgment following a jury trial and verdict finding him guilty of Sexual Abuse in the Second Degree, in Cass County District Court Case No. FECR015208.

Course of Proceedings: On October 11, 2016, the State charged Barrett with two counts of sexual abuse in the second degree, a class "B" felony, in violation of Iowa Code sections 709.1(3) and 709.3(1)(b)(2). (Trial Information) (App. pp. 5–7). In both counts, the State alleged Barrett performed sex acts with A.F., a child under twelve years old. (Trial Information) (App. pp. 5–7). Barrett filed a written arraignment and plea of not guilty to the charges on November 4, 2016. (Arraignment & Plea) (App. pp. 8–9). He also waived his right to a speedy trial within ninety days. (Arraignment & Plea) (App. pp. 8–9).

Prior to trial, on January 23, 2017, Barrett filed a request for discovery, including copies of all A.F.'s mental health care records from the Center for Healing and Hope, copies of all child protective services reports, copies of any counseling or mental health treatment records after January 1, 2016, and copies of any juvenile court files, records and reports related to A.F. (Request Discovery) (App. pp. 10–11). The State resisted these requests in the motion. (Resistance) (App. pp. 12–16). After hearing, the district court ordered the State produce the

mental health treatment records for the court to conduct an in camera review, pursuant to Iowa Code section 622.10(4). (02/22/2017 Order) (App. pp. 19–20). The district court reviewed the records and determined the release to the defense was not appropriate under section 622.10(4). (Ruling Request Medical Records) (App. pp. 21–24).

A jury trial commenced on September 12, 2017. (Tr. p.1 L.1–25). After the close of the State's evidence, Barrett successfully moved for judgment of acquittal on the second count of sexual abuse in the second degree, arguing the State failed to prove A.F. was twelve years old or younger. (Tr. p.345 L.3–p.347 L.7). As a result, the jury received the charges of sexual abuse in the second degree and sexual abuse in the third degree. (Verdict Form Count I, Verdict Form Count II) (App. pp. 27–28). On September 14, 2017, the jury returned a verdict finding Barrett guilty of count I: sexual abuse in the second degree and not guilty of count II: sexual abuse in the third degree. (Tr. p.506 L.8–p.508 L.16) (Verdict Form Count I, Verdict Form Count II) (App. pp. 27–28).

On October 20, 2017, Barrett was sentenced to an indeterminate term not to exceed twenty-five years. (Tr. p.523 L.3–8) (Sentencing Order) (App. pp. 34–37). Pursuant to Iowa Code section 902.12, the sentence carries a mandatory minimum of seven-tenths that must be served before Barrett is eligible for parole. (Tr. p.523 L.13–19) (Sentencing Order) (App. pp. 34–37). Barrett was also ordered to complete the sex offender treatment program and comply with the sex offender registry for life pursuant to Iowa Code section 692A. (Tr. p.523 L.20–p.524 L.14) (Sentencing Order) (App. pp. 34–37). The court also imposed a lifetime special sentence, pursuant to Iowa Code section 903B.1, and it ordered Barrett to submit a DNA sample. (Tr. p.523 L.25–p.524 L.22) (Sentencing Order) (App. pp. 34–37). Lastly, the court imposed a no contact order with A.F. for five years. (Tr. p.525 L.2–4) (Sentencing Order) (App. pp. 34–37).

Barrett appealed. See State v. Barrett, No. 17–1814, 2018 WL 6132275 (Iowa Ct. App. Nov. 21, 2018) (unpublished table decision). In part, he argued the district court erred in

denying his requests for A.F.'s medical records. Id. at *1. The case was transferred to the Court of Appeals, which concluded the district court abused its discretion in finding the challenged records did not contain exculpatory information. Id. at *3. The Court of Appeals also found that not only did the records contain exculpatory information, but that the district court should have mandated the material's disclosure under the balancing test of Iowa Code section 622.10(4). Id. at *3. Accordingly, the Court of Appeals remanded, ordering the district court to disclose the exculpatory portions of the medical records to the defense. Id. at *3. The Court of Appeals further ordered the district court to determine whether a new trial was needed in light of the undisclosed exculpatory material. Id. at *3 (citation omitted). The State filed an application for further review, which the Supreme Court denied. Procedendo issued on January 21, 2019. (Procedendo) (App. pp. 38–40).

On remand, the district court ordered the disclosure of the challenged evidence that the Court of Appeals found was

exculpatory. (Order 01/23/19) (App. pp. 41–42). Newly appointed counsel[1] filed a motion for a new trial, which the State resisted. (Mot. New Trial, Resist. Mot. New Trial) (App. pp. 47–54). At the hearing on the motion, Barrett entered the challenged evidence into the record and evidence that A.F.'s half-brother, Shawn Williams, had been convicted of sexual abuse in the third degree and had been charged with sex-offender-registry violation. On September 30, 2019, the district court denied the motion for a new trial. (Ruling Mot. New Trial) (App. pp. 58–62).

Barrett timely filed a notice of appeal on October 8, 2019. (Notice) (App. pp. 63–64).

Facts: A.F. was fourteen years old at the time of trial and thirteen at the time he alleged Barrett had been sexually abusing him; A.F. claimed the abuse started in 2010, when he was seven years old and continued until he turned thirteen in the summer of 2016. (Tr. p.173 L.12–15, p.183 L.19–24,

[1] Barrett retained private counsel for the trial in the underlying case. See (Order 09/05/2017).

p.248 L.12–13). Barrett and A.F are first cousins; Barrett is the son of A.F's father's sister. (Tr. p.181 L.23–p.182 L.1). A.F.'s parents separated in late 2008, and they eventually divorced in 2010. (Tr. p.178 L.13–p.179 L.2; p.396 L.1–4).

Initially after the separation, A.F.'s father had custody of A.F. for alternating one week increments at his home in Council Bluffs, which belonged to A.F.'s now-stepmother, whom A.F.'s father began dating during his separation from A.F.'s mother. (Tr. p.182 L.2–17; p.370 L.2–11, p.396 L.24–p.397 L.13). Sometimes when A.F. was visiting, Barrett would also be there to visit the family or help babysit. (Tr. p.182 L.2–p.183 L.3; p.365 L.19–p.366 L.1). When visiting, Barrett frequently played video games in A.F's older brother's room with Williams; it was not uncommon for A.F. and A.F.'s siblings and half siblings to also play. (Tr. p.183 L.9–p.184 L.1; p.370 L.23–p.372 L.17, p.389 L.8–14).

At trial, A.F. testified that once, when he was seven or eight years old, he and Barrett were playing video games alone in Williams's room when Barrett had him go to a space near

the bed on the floor. (Tr. p.190 L.12–p.192 L.8). A.F. claimed Barrett then locked the door. (Tr. p.193 L.20–p.194 L.2). A.F. testified Barrett told A.F. to remove A.F's pants and boxers, which A.F. did, while Barrett took off his own clothes; A.F. claimed Barrett told him "to be quiet and not to say anything." (Tr. p.192 L.2–13). A.F. testified Barrett told him to hold his knees to his chest while Barrett held A.F.'s legs up with his hands. (Tr. p.192 L.17–21). A.F. testified then Barrett tried to insert his penis into A.F.'s anus, but was unsuccessful; however, A.F. stated Barrett's penis touched his butt. (Tr. p.192 L.23–p.193 L.12). A.F. testified it stopped because Barrett heard someone coming up the stairs towards the room. (Tr. p.193 L.13–19). A.F. testified that after it was over, Barrett told him: "Don't say anything about this." (Tr. p.194 L.194 L.14–15).

A.F. testified Barrett sexually abused him multiple times when the family was living in Council Bluffs. (Tr. p.194 L.19–20). A.F. did not know the amount of times it occurred, but he estimated it was somewhere between ten and thirty times,

which occurred over the span of a year. (Tr. p.194 L.21–p.195 L.1). A.F. also testified that he put his mouth on Barrett's penis once in Council Bluffs. (Tr. p.200 L.2–7).

A.F.'s father moved from Council Bluffs to outside of Spencer and then to Griswold, Iowa. (Tr. p.182 L.5–14; p.385 L.23–p.386 L.14). A.F. testified he would have been nine to eleven years old when his father lived in Griswold. (Tr. p.195 L.7–9). After the family moved, the custody agreement between A.F.'s parents changed so that A.F. would visit his father every other weekend. (Tr. p.196 L.11–12; p.370 L.8–11, p.397 L.1–p.398 L.19). At the Griswold house, Barrett would bring his video game console and play in the living room or in A.F.'s bedroom. (Tr. p.184 L.17–24, p.195 L.21–5). A.F. testified Barrett visited the house and stayed overnight approximately three times a month. (Tr. p.196 L.9–10).

A.F.'s father had a house rule of no electronics for the children after a certain time. (Tr. p.196 L.24–p.197 L.4; p.384 L.17–21, p.424 L.22–25). A.F. testified that in Griswold he and Barrett would be playing video games in A.F.'s bedroom;

Barrett would stop the game at the set time of the rule and ask A.F. he wanted to continue playing the game. (Tr. p.197 L.2–11). A.F. testified that if he wanted to continue to play Barrett would make A.F. touch Barrett's penis with his hands; A.F. stated Barrett would place his hands on top of A.F.'s hands and move them on Barrett's penis. (Tr. p.197 L.11–25). A.F. testified Barrett did not get an erection while doing this. (Tr. p.198 L.19). A.F. also testified that sometimes in order to continue playing he would let Barrett would touch his own penis. (Tr. p.198 L.20–21). A.F. stated Barrett would make him lay on the bed with his shirt up and pants halfway down, and Barrett would move his hand on A.F.'s penis. (Tr. p.198 L.20–p.199 L.1).

A.F. testified that once he lay down on the bed and Barrett put his mouth on A.F.'s penis. (Tr. p.199 L.2–22). A.F. also testified he put his mouth on Barrett's penis several times in the house the family moved to in Griswold. (Tr. p.200 L.2–7). A.F. testified once he was sitting on the edge of the bed when Barrett stood in front of him, with his pants off and

boxers down. (Tr. p.200 L.8–21). A.F. testified Barrett asked him to put Barrett's penis in A.F.'s mouth, which A.F. did; A.F. testified Barrett told him to move back and forth and forced A.F.'s head back and forth with his hands. (Tr. p.200 L.24–15). A.F. testified Barrett had an erection when this occurred. (Tr. p.201 L.16–17). A.F. testified he had trouble remembering all the individual times this abuse occurred, but it happened multiple times. (Tr. p.201 L.18–25). A.F. claimed Barrett ejaculated twice—once in a sock and once in A.F.'s mouth. (Tr. p.202 L.5–19).

A.F. also described an incident in the Griswold house where Barrett inserted his penis into A.F.'s anus. (Tr. p.203 L.3–5). A.F. testified they had again been playing video games when Barrett made A.F. lay down with his knees to his chest. (Tr. p.203 L.3–10). A.F. testified he thought Barrett spit on his hand, put the spit on A.F.'s anus, and then inserted his penis into A.F.'s anus. (Tr. p.203 L.7–15). A.F. testified Barrett started moving his body back and forth before A.F. told him to stop because it was painful. (Tr. p.204 L.7–23). A.F. told

Project Harmony that Barrett sexually abused him approximately ten times while the family lived in Griswold. (Tr. p.233 L.16–18). However, A.F's father testified Barrett only visited the family in Griswold approximately six times total, and for only two or three of those visits was A.F. also at the house. (Tr. p.399 L.16–p.400 L.4).

After Griswold, A.F.'s father moved to Lewis, Iowa. (Tr. p.182 L.5–14). At trial, A.F. testified Barrett touched him once in Lewis; A.F. was playing hide-and-seek with Barrett, his sisters, and his younger half-siblings. (Tr. p.204 L.1–10). A.F. testified he was the seeker and Barrett found him alone in his half-brother's room instead of hiding. (Tr. p.205 L.10–25). A.F. stated Barrett put his hand on A.F.'s penis over A.F.'s clothing and asked A.F. to remove his pants and underwear. (Tr. p.205 L.14–p.208 L.2). A.F. said he made some excuses and something happened that he did not remember at trial, but that he left the room. (Tr. p.206 L.20–p.208 L.2). A.F. testified that was the last time Barrett sexually abused him. (Tr. p.208 L.3–11). However, A.F. stated in his Project

Harmony interview that Barrett sexually abused him multiple times in Lewis. (Tr. p.233 L.19–22).

A.F. initially had an interview with Project Harmony, where both his mother and father were present; however neither parent was allowed to watch the interview or was told by the interviewer or by the police what was disclosed. (Tr. p.218 L.15–24; p.319 L.7–11, p.426 L.1–6). In the first interview, A.F. only disclosed Barrett had inappropriately touched him, and one incident of anal sex in the Griswold house. (Tr. p.223 L.20–18–24, p.232 L.18–24). After his first interview with Project Harmony, A.F. was told his physical exam was normal. (Tr. p.232 L.15–20; p.332 L.10–15). Moreover, in his physical exam, A.F. stated that all of the abuse was Barrett committing sex acts on him; he also denied ever putting Barrett's penis in his mouth. (Tr. p.329 L.6–15, p.330 L.2–7, p.342 L.18–23).

Approximately one week after the first interview, A.F.'s mother contacted Project Harmony and took A.F. back alone. (Tr. p.218 L.1–24). A.F. told the interviewer he was back

because his mother said there was a bunch of questions to which he answered: "I don't know." (Tr. p.218 L.1–17; p.270 L.18–2). A.F. denied talking to his mother about the contents of his first interview after it and before the second interview. (Tr. p.218 L.25–17). In the second interview, A.F. made more allegations, including oral sex. (Tr. p.232 L.18–24).

Prior to trial, A.F. never disclosed that Barrett had ever attempted anal sex in Council Bluffs. (Tr. p.216 L.25–p.217 L.4, p.336 L.5–14). A.F. only alleged Barrett had inappropriately touched him in Council Bluffs. (Tr. p.225 L.20–23). A.F. also denied Barrett ever ejaculated or had an erection in the Project Harmony interview. (Tr. p.231 L.231 L.18–24). In his Project Harmony interview, A.F. could not describe Barrett's penis, nor could he describe what it felt like to have oral sex. (Tr. p.231 L.25–p.232 L.4).

A.F. testified he did not consider his father supportive of him and he did not trust him enough to disclose the abuse. (Tr. p.222 L.21–22, p.239 L.13–21). A.F. believed his father unsupportive because his father liked his twin sister better.

(Tr. p.222 L.23–p.223 L.2). A.F. admitted to being angry that his father started dating while his parents were separated. (Tr. p.237 L.10–23). A.F.'s father testified sometimes A.F. confided in him about things that were worrying him, but never mentioned any sexual abuse. (Tr. p.401 L.23–p.402 L.6, p.405 L.8–11). A.F.'s father also testified they would talk about A.F.'s problems and he never disclosed any abuse. (Tr. p.407 L.19–21). A.F.'s father stated that A.F. was angry with him because he favored A.F.'s twin sister, which he admitted. (Tr. p.418 L.18–p.419 L.1).

A.F. stated he did not tell his mother about the abuse because he was uncomfortable. (Tr. p.239 L.4–9). A.F. testified he had a mostly good relationship with his stepmother. (Tr. p.237 L.24–p.238 L.2). Despite knowing that his stepmother used to be a police officer and having a good relationship with her, A.F. testified he did not ever report the abuse to her. (Tr. p.238 L.3–7). Nor did he report any abuse to school teachers or counselors. (Tr. p.220 L.7–p.221 L.15).

A.F. testified that when the abuse began that he did not think anything of it; he was too young to realize that it was inappropriate. (Tr. p.194 L.3–10). Later, in July 2016, A.F. disclosed to his therapist at the time, Chad Richter, that he had been sexually abused. (Tr. p.186 L.2–p.188 L.25). However, A.F. did not disclose the details of the abuse to Richter, nor did he disclose the identity of his abuser. (Tr. p.188 L.18–25, p.208 L.19–25). Richter contacted the police, and A.F. was sent to Project Harmony. (Tr. p.188 L.18–25; p.296 L.2–17). A.F. had started therapy with Richter when he was nine years old; he had seen Richter for three to four years before disclosing the abuse, and he previously saw a different therapist for a few years prior to seeing Richter. (Tr. p.209 L.15–p.211 L.1, p.215 L.4–11; p.404 L.25–p.405 L.7).

A.F. started therapy around age six after an incident with his twin sister, which occurred shortly after his parents' separation. (Tr. p.213 L.7–23, p.219 L.18–22; p.402 L.7–14). A.F. testified his twin and he were on the trampoline when she kicked or hit him; he pushed her back. (Tr. p.213 L.16–23).

A.F. stated his father saw him push his twin and came outside to yell at him, so A.F. jumped off the trampoline and started running. (Tr. p.213 L.16–23). A.F. testified his father kicked him in the side, leaving a big bruise for several months; A.F.'s mother reported his father for abuse a week later. (Tr. p.213 L.16–p.214 L.1; p.395 L.12–17).

At trial, A.F.'s father recalled the incident differently. (Tr. p.394 L.10–13). A.F.'s father testified he was inside the house when he looked out the window and witnessed A.F. and A.F.'s twin on the trampoline; A.F.'s twin was "curled up in a ball, and [A.F.] was kicking her in the stomach." (Tr. p.394 L.20–25). A.F.'s father testified he hobbled outside, because he had just had surgery on his ankle; he stated A.F. went to run away when he saw him so he grabbed him by the collar and A.F. fell to the ground. (Tr. p.395 L.1–11, p.419 L.8–22). A.F.'s father denied kicking A.F., but acknowledged A.F. had a scrape from the incident and there was a founded claim of child abuse from the incident. (Tr. p.395 L.8–19). A.F.'s father stated he

thought it has "been put in [A.F.'s] head" that he physically abused A.F. (Tr. p.420 L.1–5).

After the incident, A.F. started attending therapy for anger issues; A.F.'s father also testified A.F. acted out because of the separation and A.F. had "assault[ed] kids at school, stabbed a little girl with a pencil, kicked[children] in the privates," as well as kick[ed] his sisters in the privates and in the breast[s]." (Tr. p.402 L.7–p.404 L.4). As he was six to eight years old, A.F.'s father testified A.F. grabbed his genitals and thrusted them in his sisters' faces. (Tr. p.404 L.5–13, p.422 L.2–7). A.F.'s father stated they asked where he was taught that, and A.F. "shut down." (Tr. p.422 L.2–13).

A.F.'s mother and father did not get along after their separation and frequently argued about their shared children. (Tr. p.214 L.2–5; p.369 L.8–21, p.396 L.1–9). A.F.'s mother never remarried. (Tr. p.406 L.8–11). A.F.'s father testified his ex-wife lived with a man and after a while A.F's mother had called apologizing. (Tr. p.406 L.11–24). A.F.'s father testified A.F.'s mother told her that she found out the man was a

registered sex offender and pedophile. (Tr. p.406 L.19–24). A.F.'s mother admitted she lived with a man after the divorce, but denied he was a sex offender; she also denied ever telling her ex-husband he was one. (Tr. p.443 L.3–p.444 L.8).

A.F.'s father recounted an incident when he, along with A.F.'s mother, took A.F. to a doctor in 2011. (Tr. p.404 L.14–18). The doctor asked A.F. if he was being sexually abused. (Tr. p.405 L.15–17). A.F.'s father testified A.F. "looked at his mother and turned white as a ghost" but did not disclose any abuse. (Tr. p.405 L.18–22). A.F.'s father testified he specifically would ask A.F. if he had "ever been touched" and A.F. would tell him no. (Tr. p.405 L.23–25).

In March of 2016, a few months before A.F. made the allegations, A.F.'s mother and father were going through a custody battle. (Tr. p.412 L.18–p.413 L.25) (Ex. A) (Confidential App. pp. 6–17). A.F. was aware his mother was trying to limit his father's visits with him and keep his father from getting primary physical care of his twin before he disclosed the allegations. (Tr. p.228 L.17–22). As part of the

modification proceedings, A.F. met with his mother's attorney, whom he told that he did not want to be at his father's house because his twin was treated better than him, listing several childish grievances. (Tr. p.227 L.4–11, p.229 L.16–p.230 L.22). After A.F.'s allegations of abuse, the custody hearing was continuously delayed. (Tr. p.414 L.1–5). On January 18, 2017, several months after the visitation, a custody order was issued. (Tr. p.415 L.22–25). The order gave A.F.'s father visitation with A.F.'s two sisters and only allowed A.F.'s father to see him if A.F. wanted to. (Tr. p.415 L.14–25) (Ex. A) (App. pp. 6–17).

Sometime prior to August 2, 2016, Cass County Sheriff Darby McLaren contacted Barrett and asked to set up an interview; Barrett agreed to meet McLaren on August 2, 2016, at 8:30 a.m. (Tr. p.300 L.14–p.302 L.11). McLaren did not recall Barrett being nervous or scared. (Tr. p.302 L.18–25). Almost immediately, Barrett informed McLaren that he had to leave for his job in fifteen minutes. (Tr. p.303 L.1–4). Barrett

testified his work had changed his schedule last minute. (Tr. p.437 L.5–14).

McLaren told Barrett of A.F.'s allegations, which Barrett denied. (Tr. p.303 L.20–p.304 L.7). McLaren scheduled another interview two days later in the morning, but Barrett did not come to the station. (Tr. p.305 L.7–22). McLaren called him, but did not get a response from Barrett until several hours later; Barrett told the sheriff he had been suffering from migraines and had taken medicine in the early morning and slept through the meeting until late afternoon. (Tr. p.306 L.5–20). The two men rescheduled for August 14, 2016; however, Barrett again missed the meeting. (Tr. p.306 L.21–p.307 L.21). However, Barrett contacted McLaren and told him he was feeling sick and needed to reschedule for the following morning. (Tr. p.307 L.22–p.308 L.6).

On August 16, 2016, Pottawattamie County Sherriff's Deputy Jim Doty interviewed Barrett on behalf of McLaren. (Tr. p.271 L.18–p.272 L.7, p.273 L.11–13, p.285 L.23–p.286 L.1). Prior to the interview, Barrett called McLaren and told

him he was in the parking lot and was not feeling well; McLaren testified he coaxed Barrett into coming in and it did not appear to him that Barrett was ill. (Tr. p.308 L.11–p.21).

Doty testified before he started the interview Barrett requested a trash can because he had to vomit. (Tr. p.274 L.18–p.275 L.3). Barrett vomited several times during the interview. (Tr. p.275 L.1–3). Doty asked Barrett if he was sick or nervous, and Barrett responded that he had migraines and the pain was bothering him. (Tr. p.275 L.15–16). Doty testified initially Barrett spoke very quickly and was difficult to understand. (Tr. p.275 L.19–p.276 L.5).

Doty also described Barrett as "shaky" as the interview progressed, and he testified Barrett became quiet and did not respond to the questions he was asking; Doty testified Barrett gave him blank stares to several questions and did not respond when Doty asked if he needed the questions repeated. (Tr. p.277 L.3–15). Doty testified Barrett leaned back and started to "doze off a little bit." (Tr. p.278 L.6–25). These actions caused Doty to believe Barrett was either ill or under

the influence of a drug. (Tr. p.278 L.12–19). Towards the end of the interview Barrett stood up in an attempt to leave the room and vomit; he knocked over a file cabinet and stumbled over a chair before exiting the room and vomiting. (Tr. p.279 L.7–p.280 L.3). The interview lasted approximately an hour; Doty eventually called medics, who came and took Barrett to a local hospital, where he was admitted. (Tr. p.280 L.4–8, p.286 L.5–8).

During the interview, Doty asked if Barrett had sexually abused A.F., and Barrett denied the allegations. (Tr. p.276 L.21–25). Doty also questioned Barrett about why A.F. would allege the abuse, and Barrett told him that he did not know why A.F. had accused him. (Tr. p.277 L.1–4). Barrett told Doty that he saw A.F. approximately once every couple of months at A.F.'s father's house. (Tr. p.277 L.16–22). Barrett also told Doty he visited more frequently when the family lived in Council Bluffs. (Tr. p.277 L.16–22). Barrett testified he remembered going into the station that day, but not a lot else. (Tr. p.439 L.24–p.440 L.16).

McLaren went to the hospital to see Barrett on August 17, 2018. (Tr. p.311 L.2–12). McLaren testified Barrett told him he had taken a "handful of Tylenol PM in an attempt to hurt himself." (Tr. p.311 L.6–22). Barrett testified he did not recall much about the interview, including saying that to the sheriff; Barrett testified he was not trying to hurt himself, but only trying to get rid of his headache. (Tr. p.439 L.10–24, p.439 L.24–p.440 L.16). Barrett still agreed to talk with police again and set up an appointment for August 24th. (Tr. p.311 L.23–p.312 L.4).

Approximately a week later, on August 24, 2016, Doty interviewed Barrett again. (Tr. p.280 L.12–20). Doty described Barrett as not more alert, talking much slower and more coherently than before. (Tr. p.281 L.1–21). Barrett told Doty he had accidentally overdosed on Tylenol trying to medicate his migraines. (Tr. p.281 L.24–10). Barrett specifically denied he was trying to hurt himself when Doty asked. (Tr. p.282 L.2–15). Barrett told Doty he had not been sleeping well. (Tr. p.282 L.16–20). Barrett again denied A.F.'s

allegations and told Doty he did not know why A.F. claimed Barrett sexually abused him. (Tr. p.283 L.17–p.284 L.25). Barrett also told the deputy that he had seen A.F. at his father's house every couple of weeks in Council Bluffs and approximately every few months when they moved to Lewis. (Tr. p.284 L.5–17).

The police never questioned A.F. about the allegations or inquired about A.F.'s mental health background prior to charging Barrett. (Tr. p.317 L.2—p.318 L.14). Nor were the police aware until much later and after Barrett was charged that A.F.'s parents were in a custody battle. (Tr. p.318 L.15–25).

At trial, Barrett testified in his own defense. (Tr. p.428 L.18–p.441 L.19). Barrett denied ever sexually abusing A.F. or touching him inappropriately. (Tr. p.430 L.16–p.431 L.11). Barrett testified he did not know why A.F. made the allegations. (Tr. p.431 L.18–20). Barrett testified that the other children were always around when he visited. (Tr. p.431 L.21–p.432 L.2). Barrett testified he only visited the Griswold

house two or three times because he was living out of state in Kansas when the family lived there. (Tr. p.432 L.22–p.433 L. 21). Barrett testified he had always gotten along with A.F. and never had any problems with any of the other children as well. (Tr. p.432 L.3–8).

Barrett's cousin, Sarah Black, testified Barrett was only at the Lewis house two times. (Tr. p.351 L.16–p.352 L.10). Black was living outside of the home in a camper and then in the same town as A.F.'s father at the time. (Tr. p.349 L.2–p.351 L.15). One of the two times Barrett visited the family in Lewis, A.F. was not present. (Tr. p.352 L.5–7). The other time, Black testified Barrett spent almost the entire time by her and her husband and their kids; Black testified she had not seen Barrett in a long time so they spent the majority of the time talking and catching up; the only time Barrett was not with her was when he went to the bathroom. (Tr. p.352 L.8–p.353 L.21, p.358 L.11–23). Black testified she did not witness any physical contact between Barrett and A.F.; Black further stated that, other when the family all ate together,

Barrett and A.F. were never in the same room. (Tr. p.353 L.2–10). Black testified Barrett arrived to A.F.'s father's house after her, and Barrett left with her and spent the night at her house. (Tr. p.357 L.19–p.358 L.8). Black testified she had no qualms about letting Barrett care for her five year old and three year old in her absence. (Tr. p.355 L.24–p.356 L.4).

A.F.'s stepmother, a para educator with Griswold Community Schools and former police officer, also testified. (Tr. p.361 L.15–p.363 L.9). She testified she frequently checked in on the kids while they were playing, including playing video games, never witnessed anything improper, and never suspected anything; additionally, she testified that neither A.F. or any of the other children ever told her of anything improper occurring between Barrett or A.F. (Tr. p.373 L.15–p.374 L.1, p.375 L.5–12, p.377 L.20–p.378 L.20, p.380 L.23–p.381 L.1). Both A.F.'s father and stepmother testified that anytime A.F. was present in their home, A.F.'s other two siblings and his two half siblings were also present. (Tr. p.374 L.21–24, p.376 L.23–p.377 L.4, p.400 L.5–7, p.401

L.2–6). A.F.'s stepmother also testified she believed that Barrett and A.F. were never alone together. (Tr. p.382 L.25–p.383 L.20, p.387 L.14–17).

A.F.'s father, who was "constantly home" when the family lived in Council Bluffs, testified he did not see Barrett having the ability or access to have a sexual relationship with A.F. (Tr. p.407 L.22–p.408 L.17). He also stated all five younger children were around whenever Barrett visited, as well as his oldest son, who was closer to Barrett's age was usually there. (Tr. p.408 L.11–p.409 L.5, p. 410 L.3–13). A.F.'s father also testified that he checked on the children regularly and none of the children suspected or reported anything between Barrett and A.F. (Tr. p.408 L.18–p.409 L.11).

A.F.'s stepmother also testified Barrett only visited two times when the family lived in Lewis. (Tr. p.379 L.1–6). Lastly, she testified she would let Barrett care for her seven and five year old sons. (Tr. p.381 L.8–10, p.391 L.3–10). A.F.'s father also testified at trial that he had "complete faith

in [Barrett]" and would allow Barrett to watch his children, including his two youngest boys. (Tr. p.418 L.1–9).

A.F.'s father testified that the weekend after A.F. reported being sexually abused, A.F. wanted to attend a family function celebrating a birthday. (Tr. p.411 L.5–22). A.F. wanted to attend the party, despite knowing that Barrett, his alleged abuser, would be there. (Tr. p.411 L.21–25). A.F.'s father also testified he had had limited contact with A.F. after the allegations until January 2018, when the custody decree was issued, but they had seen each other a few times. (Tr. p.414 L.8–18). A.F.'s father stated that after the custody decree A.F. had texted him because he wanted something, but that was the only contact the two had. (Tr. p.416 L.25–p.417 L.10).

A.F.'s father testified he and his wife had not seen or talked with Barrett since after his arrest because the court had issued a restraining order against the entire family. (Tr. p.417 L.11–22). A.F.'s father also testified that initially when he heard the allegations he was extremely upset, threatened to "kick [Barrett's] ass" and told police that they "better get him

before I do." (Tr. p.426 L.13–22). However, after he contemplated the timelines and the details of the allegations, A.F.'s father changed his mind because he did not believe the allegations could have actually happened and they did not make sense to him. (Tr. p.427 L.3–13).

Any additional relevant facts will be discussed below.

ARGUMENT

THE DISTRICT COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A NEW TRIAL AFTER THE CONFIDENTIAL RECORDS WERE DISCLOSED TO THE DEFENSE ON REMAND.

A. Preservation of Error: Barrett properly preserved error by filing a motion for a new trial and the district court's denial of the motion. (Ruling Def.'s Mot. New Trial) (App. pp. 58–62). See Fry v. Blauvelt, 818 N.W.2d 123, 128 (Iowa 2012) (citations omitted).

B. Standard of Review: The Court reviews the district court's ruling on a motion for new trial for an abuse of discretion. State v. Romeo, 542 N.W.2d 543, 551 (Iowa 1996) (citation omitted). "An abuse of discretion occurs when the

trial court exercises its discretion 'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" State v. Rodriguez, 636 N.W.2d 234, 239 (Iowa 2001) (quoting State v. Maghee, 573 N.W.2d 1, 5 (Iowa 1997)). "'A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law.'" Id. (quoting Graber v. City of Ankeny, 616 N.W.2d 633, 638 (Iowa 2000)).

However, to the extent the challenge raises constitutional claims, review is de novo. State v. Cox, 781 N.W.2d 757, 760 (Iowa 2010) (citing State v. Bumpus, 459 N.W.2d 619, 622 (Iowa 1990)); State v. Cashen, 789 N.W.2d 400, 405 (Iowa 2010).

C. Discussion: Under Iowa Code section 622.10(4)(a)(2)(a), a defendant may seek mental health records of a victim or witness by "demonstrating in good faith a reasonable probability that the information sought is likely to contain exculpatory information that is not available from any other source and for which there is a compelling need for the

defendant to present a defense." Iowa Code § 622.10(4)(a)(2)(a) (2017). After the defendant has established these prerequisites, the district court conducts an in camera review of the privileged records. Id. § 622.10(4)(a)(2)(b); see also State v. Neiderbach, 837 N.W.2d 180, 197 (Iowa 2013) (discussing the application of section 622.10(4)). If the records do contain exculpatory information, the district court then balances the "need to disclose such information against the privacy interest of the privilege holder." Iowa Code § 622.10(4)(a)(2)(c). If the district court determines this standard is satisfied, it issues an order that allows the "disclosure of only those portions of the records that contain the exculpatory information." Id. § 622.10(4)(a)(2)(d).

Here, in the previous appeal, the Court of Appeals found the district court erred in finding there was no exculpatory information in the records, pursuant to section 622.10(4)(a)(2)(c). Barrett, 2018 WL 6132275, at *3. The Court of Appeals also found that the district court should have disclosed the material to Barrett because it satisfied section

622.10(4)(a)(2)'s balancing test. Id. The Court remanded the case, ordered the district court to disclose the evidence, and then "consider whether [a] new trial is necessary," citing State v. Neiderbach, 837 N.W.2d 180, 198 (Iowa 2013). Id.

After the remand, Barrett formally filed a motion for a new trial. (Mot. New Trial) (App. pp. 47–52). In it and in the subsequent hearing, Barrett highlighted several pieces of information that was in the previously undisclosed materials that affected the defense: 1) several instances where A.F. denied he had been sexually abused, including during his therapy sessions and after a sex abuse education program at his school in 2011; 2) Williams entered A.F.'s room at night, and the two did not get along; 3) Williams was prosecuted for sexual abuse against a minor; 4) A.F.'s father and stepmother believed A.F. was being sexually abused at his mother's house; and 5) information that impeached A.F.'s truthfulness, recollection, and ability to recall events. (Mot. Tr. p.3 L.21–p.4 L.4, p.7 L8–15, p.10 L.18–p.11 L.14, p.1) (Mot. New Trial) (App. pp. 47–52). The defense also noted that there were no

eyewitnesses to any crimes, there was no physical evidence, Barrett testified he was innocent, A.F. delayed reporting and gave inconsistent accounts, and the jury in part discredited A.F.'s testimony, acquitting Barrett of one count of sex abuse that A.F. testified occurred. (Mot. Tr. p.14 L.2–9, 17–20) (Mot. New Trial) (App. pp. 47–52). The State responded that the "records may have some minimally-exculpatory information in them" but it argued the information contained in the records was cumulative to what was presented at trial. (Mot. Tr. p.15 L.17–23).

The district court subsequently issued a written ruling denying the motion for a new trial. (Ruling Mot. New Trial) (App. pp. 58–62). In doing so, it stated:

> The present consideration of whether new trial should be granted hinges on whether the exculpatory evidence carries sufficient weight so as to make the jury's guilty verdict contrary to the collective evidence. If it does not, then the motion for new trial should be denied. Defendant, in his motion for new trial, revealed five points of exculpatory evidence for consideration. Defendant's motion does not, however, make any arguments as to how this evidence is contrary to the verdict, or how the evidence exculpates defendant, or how this new

> evidence would probably change the outcome of the trial. This court in its review of the record, nevertheless, finds no evidence that would probably have changed the outcome of the trial. The nondisclosure was indeed harmless, and even if the jury had the exculpatory evidence, it would not alter the weight of the evidence insofar as to grant a new trial.
>
> Nothing in the revealed exculpatory evidence creates an exceptional circumstance, because each of the points were either already addressed during trial or do not carry enough weight sufficient to grant a new trial. For instance, evidence of the victim denying having been sexually abused was introduced at trial through testimony. Evidence of other potential perpetrators or the location of perpetration was also included in the exculpatory evidence, but this evidence was certainly available to be presented during trial through questioning the already available witnesses and it does not discredit the evidence that was already presented. Despite some minor inconsistencies in the victim's reports of abuse, the victim's testimony was constant in that defendant sexually abused the victim multiple times over a long period of time. The exculpatory evidence is credible, but does not find that it would support an alternative verdict. This court finds that the verdict is not contrary to the law or evidence.

(Ruling Mot. New Trial) (App. pp. 58–62).

The district court erred in concluding that Barrett was not entitled to a new trial and in misapplying the standard when it considered whether Barrett was entitled to a new trial.

The mental health records contained material exculpatory evidence that Barrett was unable to use at trial. They provided important information that could have been used to impeach key parts of A.F.'s testimony, his truthfulness, and his recollection. The materials also showed that there was another possible suspect of the sexual abuse: A.F.'s half-brother Shawn Williams.

With no physical evidence, A.F.'s credibility was essential to the State's case. See DeSimone v. State, 803 N.W.2d 97, 105 (Iowa 2011). Information in the mental health records contained impeachment evidence, which is particularly important in a he-said/he-said case such as this one. See, e.g. State v. Edouard, 854 N.W.2d 421, 442 (Iowa 2014), overruled on other grounds by Alcala v. Marriott Intern., Inc., 880 N.W.2d 699, 708 n.3 (Iowa 2016) ("Information in the counseling records could have significantly undermined [the victim's] testimony."); State v. Swartz, 506 N.W.2d 792, 795 (Iowa Ct. App. 1993) ("[T]he failure to disclose the upcoming psychiatric examination of [the witness] before he testified, or

at any time during trial, was the denial of material information on the issue of [the witness's] credibility.").

A.F.'s credibility was "a central issue in the case." See Neiderbach, 837 N.W.2d at 197. His testimony was *the only* inculpatory evidence. A.F.'s testimony was also "not without some question of credibility." See DeSimone, 803 N.W.2d at 106 (noting the "inconsistent versions of how the sexual assault occurred"). A.F. made numerous conflicting statements since first alleging Barrett sexually abused him. A.F.'s descriptions of the sex acts allegedly performed on him, the time, and the location of the sex abuse varied and changed over time. At his first Project Harmony interview, A.F. only alleged he was touched inappropriately and one instance of anal sex in the Griswold house. (Tr. p.225 L.20–23, p.232 L.18–24). He specifically denied any oral sex occurred and said all the abuse was Barrett committing sex acts on him. (Tr. p.329 L.6–15, p.330 L.2–7, p.342 L.18–23). After his first interview his mother contacted Project Harmony for a second interview for A.F. to fill in his "I don't know" answers, despite

A.F. claiming he had not talked to her about the interview—the only way she would have found out the contents at that time. (Tr. p.218 L.1–17, p.232 L.15–24, p.270 L.18–21, p.319 L.7–11, p.332 L.10–15, p.426 L.1–6).

It was at the second interview, and after A.F. found out his physical exam was normal, that A.F. added several accounts of oral sex, which would be consistent with the physical exam findings. (Tr. p.232 L.18–24). Despite the multiple allegations of oral sex, A.F. could not describe Barrett's penis or what oral sex felt like. (Tr. p.231 L.25–p.232 L.4). Despite denying Barrett ever had an erection during the abuse or ever ejaculated during his interviews at Project Harmony, A.F. claimed for the first time at trial that Barrett had erections and had ejaculated twice. (Tr. p.201 L.16–17, p.202 L.5–19, p.231 L.231 L.18–24).

Furthermore, A.F. testified Barrett visited the house in Griswold approximately ten times and recounted several instances of abuse. However, Barrett testified he lived out of state during this time period and only visited two or three

times. (Tr. p.432 L.22–p.433 L.21). A.F.'s father's testimony corroborated Barrett's testimony that he only visited two or three times when A.F. was there. (Tr. p.399 L.8–p.400 L.1). A.F. also testified Barrett came to the house in Lewis five to six times, and he claimed to Project Harmony that Barrett abused him multiple times in Lewis. (Tr. p.226 L.9–16, p.233 L.19–22). However, A.F.'s stepmother and Black both testified Barrett only came to the house twice, and only once when A.F. was there. (Tr. p.351 L.16–p.352 L.10, p.379 L.1–6).

Other evidence also sheds doubt on A.F.'s credibility. A.F. had stated that during one incident, Barrett locked the door; however, A.F.'s stepmother testified none of the doors had locks. (Tr. p.193 L.20–24, p.387 L.18–24). Both A.F.'s father and stepmother testified that there were always several people home, including the other five children. (Tr. p.373 L.15–p.374 L.24, p.375 L.5–12, p.376 L.23–p.378 L.20, p.380 L.23–p.381 L.1, p.400 L.5–7, p.401 L.2–6, p.407 L.22–p.409 L.5, p. 410 L.3–13). At any one time, there were upwards of eight to nine individuals in each house, including several

adults, yet no one saw the abuse nor did anyone else witness anything inappropriate or concerning between Barrett and A.F. (Tr. p.374 L.21–24, p.376 L.23–p.377 L.4, p.400 L.5–7, p.401 L.2–6, p.408 L.11–p.409 L.5, p. 410 L.3–13).

Moreover, both parents checked on the children several times when they were playing and Barrett was visiting, and neither witnessed anything inappropriate. (Tr. p.408 L.18–p.409 L.11). Neither parent believed that Barrett would have had access to A.F. alone for the abuse to occur. (Tr. p.382 L.25–p.383 L.20, p.387 L.14–17, p.407 L.22–p.408 L.17, p.427 L.3–13). Both parents clearly did not believe A.F.'s allegations, as each testified they would allow Barrett to watch their children without reservation at the time of trial. (Tr. p.381 L.8–10, p.391 L.3–10, p.418 L.1–9, p.427 L.3–13).

Moreover, Barrett was consistent in his constant denial that anything inappropriate had ever happened between him and A.F. (Tr. p.276 L.21–25, p.283 L.17–p.284 L.25, p.303 L.20–p.304 L.7, p.430 L.16–p.431 L.11). There was no physical evidence of any abuse to A.F., and A.F.'s physical

exam was completely normal. (Tr. p.232 L.15–20, p.332 L.10–15). Notably, it was clear the jury did not credit all of A.F.'s testimony because it acquitted Barrett of the second count of sexual abuse. (Verdict Form Count II) (App. p. 28).

At the time the mental health records were created, A.F. was already allegedly being abused by Barrett. (Tr. p.209 L.15–p.211 L.1, p.215 L.4–11, p.404 L.25–p.405 L.7). As such, the information contained in those records was particularly important because the various assessments, therapist observations, and progress notes provided vital information to the defense that was not otherwise to the defense. See Neiderbach, 837 N.W.2d at 197. The additional information provided in these materials would have changed the outcome of the trial given the question of the credibility of A.F.—the State's crucial witness—even without the additional information that the defense could have used at trial stemming from the mental health records.

For example, while it is true that at trial A.F. did admit that he had been in therapy during the entire time the sexual

abuse was occurring and that he did not inform his therapist of the abuse, it was not clear from his testimony that his therapist had specifically questioned whether he had been sexually abused as early as 2011. (Ex 102A pp. 25–26, Ex 102B pp. 1–2) (Confidential App. pp. 62–65). Nor was it clear that he had specifically denied being sexually abuse to a different mental health professional who had also directly questioned whether A.F. was being sexually abused. (Ex 102B p. 13, 16) (Confidential App. pp. 76, 79). Rather, A.F.'s testimony just suggested that he simply did not disclose it; not that he was specifically asked and denied abuse.

Furthermore, at trial, A.F. explained his delay in reporting the abuse by testifying that he did not understand what was happening was wrong until about two or three years before the trial, when he was in sixth grade. (Tr. p.187 L.13–p.188 L.12, p.207 L.2–9). A.F.'s mental health records cast doubt on this assertion. The records establish A.F.'s school provided an educational program on recognizing sexual abuse sometime prior to January of 2011. (Ex. 102A pp. 18–19)

(Confidential App. pp. 56–57). In addition, the records indicate that A.F.'s school counselor did not "get any feedback that hints at sexual abuse" from A.F. after the education program. (Ex. 102A pp. 18–19) (Confidential App. pp. 56–57).

The trial occurred in 2017. (Tr. p.1 L.1–25). Therefore, the records establish A.F. received information about sexual abuse, not only several years before he was in sixth grade, but also around or shortly after the time the sexual abuse was alleged to have started. (Tr. p.190 L.12–p.192 L.8) (Instruction 17, 18) (App. pp. 25, 26). If the defense had the information contained in the records, it could have investigated the program the school presented to the children and directly contradicted A.F.'s assertion that he did not know the sexual abuse was wrong until 2014 or 2015, thus damaging his credibility. Accordingly, this information also supports the defense's theory that A.F. fabricated the allegations only after his parents were in a custody battle to ensure his mother got custody of him and his twin.

The records also suggest that A.F. was not a reliable witness: DHS Case Manager indicated in May of 2012 that she believed A.F. "is a good manipulator and . . . an attention seeker." (Ex 102B p. 5) (Confidential App. p. 68). The records also contain dissociative checklists: one filled out by a parent and one by A.F. in December of 2015. (Ex. 102C pp. 6–12 Event Ex.2 Pt.2) (Confidential App. pp. 94–100). On the parental checklist, the parent[2] stated that it was "somewhat or sometimes true" that A.F. did "not remember or denies traumatic or painful experiences that are known to have occurred." (Ex. 102C p. 6) (Confidential App. p 94). It also indicated that it was "somewhat or sometimes true" that A.F. continued "to lie or deny misbehavior even when the evidence is obvious." (Ex. 102C p. 6) (Confidential App. p 94). The checklist indicates it is "not true" that A.F. "is unusually sexually precocious and . . . attempt[s] age-inappropriate sexual behavior with other children or adults." (Ex. 102C p. 6)

[2] The document does not indicate which parent completed the checklist.

(Confidential App. p 94). A.F. himself reported that he was a six on a scale of one to ten that when people told him that he did or say things that he did not remember doing or saying. (Ex. 102C p. 9) (Confidential App. p 97). He circled a five for the proposition that he couldn't "figure out if things really happened or if [he] only dreamed or thought about them." (Ex. 102C p. 11) (Confidential App. p 99). This information is directly relevant and material to the question of whether A.F.'s recollection, pretrial statements, and trial testimony were accurate and truthful.

The medical records also revealed that A.F. had significant animosity towards his father for a long period of time. There is evidence in the disclosed records that established A.F. stated he did not want to live with his father as early as September of 2011 and did not even want to even visit his father's home as of March of 2015. (Ex 102B pp. 14, 18, 24) (Confidential App. pp. 77, 81, 87). The therapist's notes establish A.F.'s anger towards his father that stemmed multiple years. For example, on November 10, 2015, A.F.'s

therapist notes that A.F. "was able to identify anger he has towards his father and how he has been treated. Explored possible consequences [A.F.] will face *if he does try to "get even" with this father*. (Ex 102C p. 1) (Confidential App. p. 89) (emphasis added). An observation from a session on November 17, 2015, states that A.F. was "upset with his dad" and "explored many different areas where he is angry with . . . his family." (Ex 102C p. 3) (Confidential App. p. 91). It further states the A.F. and his therapist "[d]iscussed standards and requirements he expects from other[s] and *how he wants revenge* when they are unable to meet these requirements." (Ex 102C p. 3) (Confidential App. p. 91) (emphasis added). Notes from a therapy session on April 19, 2016, stated that A.F. "explored anger he has towards his father for requesting full custody of his twin sister. [A.F.] discussed what emotions were connected to his anger and how to focus on those." (Ex. 102C p.16) (Confidential App. p. 104). An observation from a session on February 7, 2017, stated that A.F. "*discussed his desire to have his father completely removed from all aspects of*

his life and how that can influence his response to future situations." (Ex. 102C p.23) (Confidential App. p. 111) (emphasis added).

The fact that A.F. harbored significant anger and resentment towards his father over several years puts the defense's claims that A.F. fabricated the allegations in a new and stronger light. For example, at trial, A.F. testified he did not remember telling a mental health professional that he did not want to live with his father. (Tr. p.212 L.20–22). However, the disclosed records stated he made this exact declaration. (Ex 102B pp. 14, 18) (Confidential App. pp. 77, 81). See Neiderbach, 837 N.W.2d at 197 (noting the codefendant "may have made admissions to a mental health counselor that she would forget or deny in an adversarial interrogation").

During his trial testimony, A.F. stated that he did wanted his father to have visits and he wanted his dad "to hold on" and continue asking for custody. (Tr. p.229 L.7–15). The State argued this heavily in its rebuttal argument to refute the defense's proposition that A.F. fabricated the allegations for

the custody battle. See (Tr. p.500 L.11–19) ("[A.F.] -- you heard him from the witness stand. He was disappointed when his father basically gave his full custody to his mom."). However, the mental health records disclosed that A.F. was angry towards his father, seeking "revenge" and to "get even" with his father. (Ex 102C p. 1, 3) (Confidential App. p. 89, 91). Moreover they contained several statements A.F. did not even want to visit his father, as well as a statement made just months before the trial that A.F. wanted his father completely out of his life. (Ex. 102C p.23) (Confidential App. p. 111). This particular statement was in direct contrast to the A.F.'s testimony at trial and the State's rebuttal. (Tr. p.229 L.7–15, p.500 L.11–19). Therefore, the mental health records provided significant corroboration from a neutral source—A.F.'s mental health providers—as to the defense's theory on why A.F. accused Barrett of sexual abuse. See Neiderbach, 837 N.W.2d at 197 ("Statements memorialized by a neutral therapist would likely be more credible than . . . self-serving assertions . . . .").

Additionally, the mental health records show that there was another possible defense to the allegations: that A.F. was in fact sexually abused, but that the perpetrator was actually his half-brother, Shawn Williams. During the trial, Williams was hardly mentioned. He was identified as living in the house with the family at the timeframe at the beginning of the allegations and mentioned as a visitor to the home later. (Tr. p.372 L.9–12, p.372 L.21–p.373 L.14, p.374 L.8–20, p.401 L.7–14, p.410 L.3–7). However, the mental health records suggest that Williams had been staying in the house in 2015. (Ex. 102C p.5) (Confidential App. p. 93).

The mental health records indicated that A.F.'s parents reported that A.F. had a "conflict" relationship with Williams. (Ex. 102A p.1) (Confidential App. p. 39). A DHS report noted that Williams and A.F. do "not get along." (Ex. 102B p. 6) (Confidential App. p. 69). A note from February 7, 2011 showed A.F.'s mother told his therapist she was concerned with A.F. fighting with Williams. (Ex. 102A p. 23) (Confidential App. p. 61). Notes from A.F.'s therapist show that, in a call on

February 15, 2011, A.F.'s mother had alerted her that A.F. had angry at Williams and kicked him. (Ex. 102A p.21) (Confidential App. p. 59). Notes from a session occurring a day later indicate that the therapist was troubled about Williams enough to discuss her concerns with A.F.'s mother. (Ex 102A p. 20) (Confidential App. p. 58).

The records show that A.F. engaged in a "[s]afety/security" play theme by telling a story about a "spooky house and flashlights." (Ex 102A p. 20) (Confidential App. p. 58). The therapist documented the play theme as follows:

> Client mentioned he had things he didn't want to say about Shawn because they were "embarrassing"[.] Would whisper when talking about. Would say he didn't want to talk about and would distract by going to story about spooky house and several flashlights. At end of story it was as if he couldn't get away from the spooky house who grew wings and could fly. Did say that Shawn and Patrick would "bully" him. And make him mad. At one point he referred to Shawn being in his room [illegible].

(Ex 102A p. 20) (Confidential App. p. 58). The therapist further noted that A.F. was hesitant to talk about Williams. (Ex 102A p. 20) (Confidential App. p. 58).

The records also show that on October 7, 2011, A.F.'s therapist had specific conversations about Williams and whether he touched A.F. in a way "he didn't like." (Ex. 102A p. 25) (Confidential App. p. 63). A.F. denied it, but he told his therapist that Williams came "into his room at night, sometimes while [A.F.] is asleep." (Ex. 102A p. 25) (Confidential App. p. 63). A.F. also denied that Williams, as well as other boys, had seen him naked or vice versa. (Ex. 102A p. 25) (Confidential App. p. 63). The assessment from this session indicates that the parents have voiced concerns and the therapist has concerns that A.F. had "inappropriate sexual exposure." (Ex. 102A p. 25) (Confidential App. p. 63). However, it notes A.F. continued to deny this. (Ex. 102A p. 25) (Confidential App. p. 63). A progress note indicated this information prompted A.F.'s therapist to inform his father and stepmother that A.F. "had eluded to issues with his half

brother Shawn [Williams] such as Shawn coming in his room at night. Also [A.F.] had drawn Shawn on the bop bag, drawing X over his private areas and then hitting and kicking them." (Ex. 102B p. 1) (Confidential App. p. 64). Later, in 2015, a note from a different therapist after a session with A.F. suggests A.F. had concerns about his siblings and, therefore, did not want to visit his father's home.[3] (Ex. 102B p. 24) (Confidential App. p. 87).

In mid-December of 2015, Williams was charged with two counts of sexual abuse in the third degree. (Ex. 100) (Confidential App. pp. 18–38). The basis of the charges was that Williams, then twenty-one years old have sexual intercourse with a female that was fourteen or fifteen years old. (Ex. 100) (App. pp. 18–38). Williams eventually pled guilty and was sentenced in April of 2016. (Ex. 100) (Confidential App. pp. 18–38). Court records also show Williams was unsuccessfully terminated from Sex Offender

[3] The records indicate Williams was in A.F.'s father's house again in 2015. See (Ex. 102C p. 5) (Confidential App. p. 93).

Treatment Program, in part because he viewed pornography, did not participate in treatment group, and failed polygraph testing. (Ex. 100) (Confidential App. pp. 18–38).

The mental health records show in late 2015 Williams was "not allowed to stay at [A.F.'s father's] house due to possible sexual assault charges." (Ex. 102C p. 5) (Confidential App. p. 93). At that time, A.F.'s mother did not believe A.F. knew the specific reason Williams was not allowed to stay. (Ex. 102C p. 5) (Confidential App. p. 93). The note stays that A.F. engaged in play therapy "to explore how he believes time at his father's home will change with his brother gone" but does not give further details other than the discussion was limited due to time constraints. (Ex. 102C p. 5) (Confidential App. p. 93). A note from a session on April 5, 2016 (just days prior to Williams's sentencing) indicates that by coincidence A.F. ran into Williams at a gas station and spoke to him. (Ex. 100) (App. pp. 18–38) (Ex 102C p. 14) (Confidential App. p. 102). The therapist note states that A.F. "asked to begin having contact with [Williams] again" and A.F. "explored areas

of concern that he has had in the past and how he could express those to Shawn(Ex 102C p. 14) (Confidential App. p. 102). The note also suggests that A.F. knew of Williams was in trouble with the law because the therapist informed him that "how and when he is allowed to have contact with Shawn will need to be figured out." (Ex 102C p. 14) (Confidential App. p. 102).

When A.F. first disclosed the abuse to his therapist, he reported having "fears he has with sharing situations that have happened to him over multiple years at his father's house." A.F. "did not say someone touched him in an inappropriate way" but did refer to "a young male in his 20s". (Ex. 102C pp. 19–20) (Confidential App. pp. 107–08). This description matched Williams, although A.F. denied Williams was the perpetrator at that time. (Ex. 102C p. 20) (Confidential App. p. 108). A note from a session written by A.F.'s therapist on February 23, 2017 indicated that A.F. "explored recent information he has discovered about [Williams] and sexual abuse charges against him. [A.F]

discussed emotions connected to his past that were activated by this recent information." (Ex. 102C p. 25) (Confidential App. p. 113).

The information the mental health records provided about Williams is important for several reasons. First, it provided a possible suspect for the alleged sexual abuse. "Had the defense known about the information . . . , the defense would have zeroed in on the alternative suspect and would have used the suspect 'as the centerpiece of a consistent theme that the State was prosecuting the wrong person.'" Moon v. State, 911 N.W.2d 137 (Iowa 2018) (citing State v. Harrington, 659 N.W.2d 509, 515 (Iowa 2003)). Moreover, the unreliability of A.F. as revealed in the mental health records is important because it makes it probable the jury would disregard or doubt parts of A.F.'s account of the sexual abuse—in particular if there was a suspect that made more sense with regards to the allegations and had more access to A.F. See Harrington, 659 N.W.2d at 524. Second, the information suggested that, after witnessing some aspects of

what happened to Williams, A.F. realized the seriousness of sexual assault accusations and their damaging nature. A.F. may not have been willing to accuse his own brother, but realized that such allegations would drive a further wedge into his relationship with his father and prevent his father from getting visitation rights to A.F. and full custody of A.F.'s twin sister.

At the hearing on the motion for a new trial, the State argued that the defense

> is putting a lot of relevance on the conviction of A.F.'s brother of sex abuse. However, again the fact that A.F.'s brother was convicted of sex abuse was available at the time of trial. He had already been convicted at the time of trial. A.F.'s father testified at trial. A.F.'s father certainly knew that his son had been convicted of sex abuse. . . . [T]he circumstances regarding A.F.'s brother's sex abuse case are in no way related to the present case. There is no similar abuse pattern. We're talking about a sex abuse charge involving an under age [sic] female who – there's just simply no correlation between the abuse allegations made at the trial of Mr. Barrett and the sexual abuse that was perpetrated by A.F.'s brother. And even if the defense finds that they can make such an argument, they could have made that argument just as easily at trial.

(Mot. Tr. p.16 L.10–p.17 L.2).

The prosecutor's statements actually highlight the problems created by the nondisclosure of the exculpatory information contained in the mental health records. First, there is nothing in the record that indicates that the defense should have or did know about Williams's criminal conviction for sexual abuse. Second, even if the defense was aware of the conviction at the time of trial, it could have determined that the allegation against Williams—statutory rape of a female—was vastly different from the sexual abuse of a young male child.

The problem is the defense did not have the benefit of the information in the mental health records, which showed that A.F.'s therapists questioned the nature of Williams's relationship with A.F., A.F. and Williams did not get along, A.F. was scared of Williams, and A.F. reported that Williams came into his room at night. Moreover, A.F. told his therapist that there were things he didn't want to say about Shawn because they were "embarrassing"—an emotion the forensic interviewer identified as sometimes hampering the reporting of

sexual abuse. (Tr. p.252 L.1–6, p.255 L.2–10) (Ex 102A p. 20) (Confidential App. p. 58). Without knowledge of the information incriminating Williams that was provided in the records, the defense would have "no reason to expend the time or resources" investigating him. See Harrington, 659 N.W.2d at 523 (citation omitted). Moreover, it was not clear that A.F.'s father or stepmother would have volunteered this otherwise unknown information to the defense; the mental health records establish that they "did not seem concerned that there was possible abuse by Shawn to [A.F]." (Ex. 102B p. 1Event Ex.1 p. 110) (Confidential App. p. 64). Rather, the records show that in May of 2012, despite numerous reports from other sources that Williams and A.F. did not get along, A.F.'s father described the relationship as a "typical brotherly relationship." (Ex. 102B p. 6) (Confidential App. p. 69). He stated the two "sometimes get a long [sic] great and sometimes they fight as they are just the same kind of person." (Ex. 102B p. 6) (Confidential App. p. 69).

In Barrett's first appeal, the Court of Appeals found that "[o]nce the district court discloses the records to the attorneys, it shall consider whether [a] new trial is necessary," citing State v. Neiderbach. In Neiderbach, the Supreme Court remanded for an in camera review of mental health records pursuant to section 622.10(4)(a)(2). The Court stated if there was exculpatory evidence "the district court shall proceed as directed in section 622.10(4)(a)(2)(c) and (d) and determine whether [the defendant] is entitled to a new trial." Neiderbach, 837 N.W.2d at 198.

This Court should find the mandate on remand from the Court of Appeals was for the district court to simply determine whether the nondisclosure was harmless error. First, in this case, the Court of Appeals has already determined that the mental health records contained exculpatory information and that there was a compelling need for the information that outweighed A.F.'s privacy interests, in accordance with section 622.10(4)(a)(2). See Barrett, 2018 WL 6132275, at *3; see also Iowa Code section 622.10(4). Namely, by ordering their

disclosure, the Court of Appeals already determined that the records contained material evidence for which the defense had a compelling need. See Barrett, 2018 WL 6132275, at *3; see also Neiderbach, 837 N.W.2d at 224 (Appel, J., concurring specially) ("The test for disclosure is applied only after the records have been examined and found to contain material and relevant evidence."). Thus, the district court should have determined whether the nondisclosure was harmless error. For the reasons discussed, it was not.

Applying a harmless error standard after the district court conducts an in camera review but fails to disclose evidence it should have pursuant to Iowa Code section 622.10(4) ensures the preservation of the defendant's constitutional rights. Indeed, some jurisdictions have found that in order for a defendant's due process rights to be vindicated, the State must show that the nondisclosure of the information was "harmless beyond a reasonable doubt." See, e.g., Cockerham v. State, 933 P.2d 537, 541–42 (Alaska 1997); People v. Boyette, 201 Cal.App.3d 1527, 1534 (Cal Ct. App.

1988) ("[Pennsylvania v.]Ritchie . . . indicates that reversal of a conviction was appropriate absent a finding that nondisclosure was harmless beyond a reasonable doubt."). Both the Iowa Constitution and the United States Constitution ensure criminal defendants are accorded due process of law, a right to a fair trial, the right to present a defense, and the right to confront witnesses against him. U.S. Const. amend. VI, XIV; Iowa Const. art. I, §§ 9, 10. All of these constitutional rights are implicated when the district courts errors by denying the disclosure of mental health records that the defendant should be entitled to pursuant to the statute and the defendant is forced to trial without the information.

"[W]hen relevant evidence is excluded from the trial process for some purpose other than enhancing the truth-seeking function, the danger of convicting an innocent defendant increases." Neiderbach, 837 N.W.2d at 225 (Appel, J., concurring specially) (quoting Commonwealth v. Bishop, 617 N.E.2d 990, 994 (Mass. 1993)); see also California v. Trombetta, 467 U.S. 479, 485 (1984) (noting prevailing notions

of fundamental fairness "require that criminal defendants be afforded a meaningful opportunity to present a complete defense, including the disclosure of exculpatory material). Furthermore, the "[t]imely disclosure [of the records] may be critical to the development of trial strategy" and the ability to present a defense. See Neiderbach, 837 N.W.2d at 235 (Appel, J., concurring specially). As noted above, had the defense obtained the information in the records about Williams, it could have argued that Williams was actually the perpetrator of the abuse and it had credible evidence, including therapist's observations that something was amiss in Williams's behavior, to support that theory.

Additionally, the nondisclosure of the impeachment evidence contained in the records significantly hampered the defense's ability to effectively cross examine A.F. and accordingly, implicated Barrett's right to due process and a fair trial. The "development of effective cross-examination is not an isolated event but must be integrated with the fabric of the trial through 'careful preparation and painstaking effort.'"

Neiderbach, 837 N.W.2d at 235 (Appel, J., concurring specially) (quoting John A. Burgess, Persuasive Cross-Examination, 59 Am.Jur. Trials 1, § 19 (2013)). Moreover, the "denial of an effective cross-examination is a constitutional error of the first magnitude." Id. (quoting Davis v. Alaska, 415 U.S. 308, 318 (1974)) (internal quotation marks omitted).

"Medical records are the gold standard of evidence." State v. Thompson, 836 N.W.2d 470, 495 (Iowa 2013) (Appel, J., concurring); see also Neiderbach, 837 N.W.2d at 225 (Appel, J., concurring specially) ("In considering content and persuasive power, medical or mental health records occupy a special place in the evidentiary pantheon and are generally superior to the recalled memory of an interested witness . . . ."). As discussed above, the medical records would have provided the defense with crucial impeachment material, including A.F.'s specific denials of sexual abuse to his mental health providers, A.F.'s statements regarding his desire for revenge and anger towards his father, information that questioned his reasons for delayed reporting, and information

suggested his ability to accurately recall events was compromised.

Assuming arguendo that the proper standard for the new trial was whether the nondisclosed evidence "probably would have changed the outcome" of Barrett's trial, the district court still erred by failing to order a new trial. The Iowa Supreme Court has likened the "multistep procedure . . . to that prescribed in cases remanded for in camera reviews to determine whether exculpatory evidence was withheld in violation of the disclosure requirements in Brady v. Maryland, 373 U.S. 83 (1963))."[4] Neiderbach, 837 N.W.2d 198, n.3 (citing Pennsylvania v. Ritchie, 480 U.S. 39, 58 (1987)). To establish a Brady violation, the defendant

> must prove by a preponderance of the evidence that "(1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issue of guilt.

[4] Again, there is a distinction between cases in which a district court improperly denied a defendant an in camera review, and cases such as Barrett's, where the district court conducted an in camera review and improperly failed to disclose material and relevant information contained in the records.

DeSimone, 803 N.W.2d at 103 (citing Harrington, 659 N.W.2d at 516).

First, the evidence was suppressed. The defendant attempted to get the information through the proper channels and the court denied the request. See Neiderbach, 837 N.W.2d at 225 (Appel, J., concurring specially) ("[W]ith the records in hand, the district court now . . . becomes an arm of the state. The obligation of the state to disclose exculpatory material, of course, does not depend on the presence of a specific request by the defendant."). The evidence was also clearly favorable to Barrett, as the Court of Appeals found it was exculpatory. See DeSimone, 803 N.W.2d at 105 ("In a case that hinges on a victim's credibility, evidence that impeaches . . . is, without question, favorable to the accused."). Moreover, as discussed above, information in the records also suggested an alternative suspect. See Harrington, 659 N.W.2d at 524.

Evidence is material when 'there is a reasonable probability that, had the evidence been disclosed to the

defense, the result of the proceeding would have been different. DeSimone, 803 N.W.2d at 105 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). The Court has defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." Id. The U.S. Supreme Court further explained materiality:

> [T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether "the favorable evidence could reasonable be taken to put the whole case in such a different light as to undermine confidence in the verdict."

Harrington, 659 N.W.2d at 523 (quoting Strickler v. Greene, 527 U.S. 263, 290 (1999)). Thus, when determining whether confidence in the verdict is undermined, the court must consider "the possible effects nondisclosure had on trial preparation and strategy, not merely the weight of the evidence." DeSimone, 803 N.W.2d at 105 (citing Strickler, 527 U.S. at 291). When the nondisclosed evidence "leads to a new trial 'dynamic,' [Iowa courts] have found the evidence to be

material. Aguilera v. State, 807 N.W.2d 249, 255 (Iowa 2011) (citation omitted). "An additional aspect of materiality that needs to be stressed . . . is that the suppressed evidence is to be considered collectively, not item by item." Id. (citation omitted).

As discussed, the State's case turned on the credibility of A.F.; his testimony was central and essential to the State's case. In the Brady context, "impeachment evidence has been found to be material where the witness at issue supplied the only evidence linking the defendant(s) to the crime." United States v. Robinson, 583 F.3d 1265, 1271 (10th Cir. 2009) (citing United States v. Payne, 63 F.3d 1200, 1210 (2d Cir. 1995)); see also Ritchie, 480 U.S. at 65 (Blackmun, J., concurring in part and in the judgment) ("[I]mpeachment evidence of a key prosecution witness could well constitute the sort whose unavailability to the defendant would undermine confidence in the outcome of a trial."). Thus, the evidence was material because it impeached the sole witness that a crime had occurred. See id.

Additionally, because of the nondisclosure, the defense simply did not have "the essential facts" in the mental health records as to allow them to take advantage of this evidence. See Harrington, 659 N.W.2d at 522–23. "Only access to the documents themselves would have provided the range and detail of information necessary . . . ." Aguilera, 807 N.W.2d at 254 (citing id. at 523). Moreover, as discussed above, had Barrett possessed the information regarding the records combined with the information related to Williams, the trial would have taken on a different dynamic. See DeSimone, 803 N.W.2d at 106 (reversing for a new trial, finding that "had DeSimone been provided the evidence to which he was entitled, [a corroborating witness's] testimony would have shown to be false and the trial would have taken on a different dynamic."). For these reasons, the nondisclosed evidence probably would have changed the outcome of the trial, the confidence in the verdict is undermined, and the district court erred in denying Barrett a new trial.

In the alternative, the Court should remand for the application of the correct standard. The district court did not apply the correct standard for determining whether Barrett was entitled to a new trial. While the ruling does state that it "finds no evidence that would probably change the outcome of the trial" and that the "nondisclosure was indeed harmless," these statements are conclusory; the court's analysis is all based on the weight of the evidence. (Ruling Mot. New Trial) (App. pp. 58–62). Indeed, the first sentence in the court's findings and conclusions states that whether it should grant a new trial "hinges on whether the exculpatory evidence carries sufficient weight." (Ruling Mot. New Trial) (App. pp. 58–62). Because this is an incorrect standard for a motion for a new trial after mental health records are disclosed pursuant to section 622.10(4), the Court should remand for the application of the correct standard. See, e.g., State v. Ary, 877 N.W.2d 686, 691–92 (Iowa 2016) (remanding for the district court to apply the proper standard for the defendant's motion for a new trial).

CONCLUSION

For the reasons above, Defendant–Appellant Patrick Barrett, Jr. respectfully requests this Court reverse his conviction and remand for a new trial. Alternatively, he requests a remand for the application of the proper standard to the motion for a new trial.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $5.66, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

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

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