IN THE SUPREME COURT OF IOWA
Supreme Court No. 19–2075

STATE OF IOWA,
Plaintiff-Appellant,

vs.

MARK BERNARD RETTERATH,
Defendant-Appellee.

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

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

On Retterath's direct appeal from his convictions, the Iowa Court of Appeals found a reasonable probability that privileged mental health records of two witnesses contained exculpatory or impeaching information, and it remanded for *in camera* review of those records. Records for one witness (Sellers) are in the custody of federal agencies. Those agencies refused to produce the privileged records without the patient's consent, and Sellers declined to waive his privilege. Because it could not review his privileged mental health records, the district court ordered a retrial.

I. Did the district court err by ordering a retrial, without evaluating the strength of the State's evidence or the validity of the conviction without access to the records that all parties agree are unobtainable?

Authorities

Arizona v. Youngblood, 488 U.S. 51 (1988)
California v. Trombetta, 467 U.S. 479 (1984)
Pennsylvania v. Ritchie, 480 U.S. 39 (1987)
Strickler v. Greene, 527 U.S. 263 (1999)
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United States v. Valenzuela-Bernal, 458 U.S. 858 (1982)
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Channon v. United Parcel Serv., Inc., 629 N.W.2d 72 (Iowa 1999)
Commonwealth v. Barroso, 122 S.W.3d 554 (Ky. 2003)
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McMaster v. Iowa Bd. of Psychology Examiners, 509 N.W.2d 754(Iowa 1993)
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State v. Anderson, 410 N.W.2d (Iowa 1987)
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State v. Bedwell, 417 N.W.2d 66 (Iowa 1987)
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State v. Dulaney, 493 N.W.2d 787 (Iowa 1992)
State v. Hager, 630 N.W.2d 828 (Iowa 2001)
State v. Heard, 934 N.W.2d 433 (Iowa 2019)
State v. Maghee, 573 N.W.2d 1 (Iowa 1997)
State v. Johnson, 272 N.W.2d 480 (Iowa 1978)
State v. Lynch, 885 N.W.2d 89 (Wis. 2016)
State v. Millsap, 704 N.W.2d 426 (Iowa 2005)
State v. Neiderbach, 837 N.W.2d 180 (Iowa 2013)
State v. Redmond, 803 N.W.2d 112 (Iowa 2011)
State v. Retterath, No. 16–1710, 2017 WL 6516729
(Iowa Ct. App. Dec. 20, 2017)
State v. Romeo, 542 N.W.2d 543 (Iowa 1996)
State v. Smith, 876 N.W.2d 180 (Iowa 2016)
State v. Thompson, 836 N.W.2d 470 (Iowa 2013)
Struve v. Struve, 930 N.W.2d 368 (Iowa 2019)
Team Cent., Inc. v. Teamco, Inc., 271 N.W.2d 914 (Iowa 1978)
Whitsel v. State, 525 N.W.2d 860 (Iowa 1994)
Iowa Code § 622.10(4)(a)(1)
Iowa Code § 622.10(4)(a)(2)(a)–(b)
Iowa Code § 622.10(4)(a)(2)(c)

ROUTING STATEMENT

This appeal presents a narrow question because of its unique procedural posture, but it may have profound implications. Issues surrounding access to privileged mental health records of witnesses arise with increasing frequency, as the Iowa Court of Appeals broadens the definition of "exculpatory information" under section 622.10(4). *See, e.g.*, *State v. Barrett*, No. 17–1814, 2018 WL 6132275, at *3 (Iowa Ct. App. Nov. 21, 2018). Moreover, this is an issue of first impression. The Iowa Supreme Court should retain this appeal if it finds that this is a *substantial* issue, or one of public importance. *See* Iowa R. App. P. 6.1101(2)(c), (d), & (f). Otherwise, this appeal may be routed to the Iowa Court of Appeals. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This is the State's appeal from an order granting a new trial, following remand from direct appeal that directed the district court to conduct *in camera* review of privileged mental health records for two witnesses, determine whether they contained exculpatory evidence, and then determine if unavailability of any such evidence during trial required it to order a new trial on the charge involving those witnesses.

Records for one witness were discovered to be in the custody of the federal government, and neither the State nor the court can compel production of those records over the patient's refusal to consent. Faced with this roadblock, the court ordered a new trial. The State appeals, because unavailability of those privileged records does not establish any problem with the conviction. This Court should clarify that a materiality inquiry must be part of the retrospective analysis.

Course of Proceedings

Mark Bernard Retterath was charged with attempted murder, in violation of Iowa Code section 707.11 (2015); third-degree sexual abuse, in violation of section 709.4(1)(a); and solicitation to commit murder, in violation of section 705.1(1). The evidence showed that Retterath sexually abused C.L.—and then, after C.L. reported the abuse, Retterath formed a plan to poison C.L. and asked both J.R. and Aaron Sellers to help. Retterath was found guilty as charged.

On appeal, the Iowa Court of Appeals found insufficient evidence to prove attempted murder, because Retterath was arrested before his plan could advance beyond the point where he would have committed an assault. *See State v. Retterath*, No. 16–1710, 2017 WL 6516729, at *7–9 (Iowa Ct. App. Dec. 20, 2017). The Court of Appeals

also considered Retterath's challenges to pre-trial rulings involving privileged mental health records for C.L., J.R., and Sellers. The court had conducted *in camera* review of C.L.'s mental health records, and disclosed a single page of exculpatory material. The Court of Appeals reviewed C.L.'s records and agreed that no additional material should be disclosed. *See id.* at *12. But the Court of Appeals found Retterath had "established that Sellers and J.R. each had a history of psychiatric conditions that could impact his reliability as a witness," so it ordered the district court to order production of their mental health records for *in camera* review on remand. *See id.* at *11.

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

Id. Both parties sought further review on various grounds, but the Iowa Supreme Court denied further review and procedendo issued. The district court promptly ordered production of those records, for *in camera* review. *See* Order for Production (4/20/18); App. 8.

The State "was able to obtain the requested records of J.R." and it had "provided said records to the [c]ourt to review." *See* Statement (6/13/19) at 1; App. 10. But Sellers's records were unobtainable:

> The State has been unable to obtain the requested records of [Sellers]. Said record are in the possession and control of the Federal Government (i.e. Social Security Administration and Probation and Parole). The Federal Government has refused to comply with the state subpoena issued to them citing federal rules regarding privacy and confidentiality.
>
> On June 12, 2019, as suggested by the Court, the undersigned contacted [Sellers] to see if [Sellers] would be willing to provide consent to release his records. [Sellers] chose to decline consent.

Id.; App. 10. The State provided more details in another filing:

> . . . On December 13, 2018, the State caused subpoenas to be issued to the Social Security Administration and the United State[s] Probation and Parole Office for the substance abuse and mental health records of Sellers. On December 21, 2018, the State received a letter from the Office of General Counsel for the Social Security Administration indicating that none of the conditions were met that would require compliance with a State issued subpoena and the disclosure of Sellers's records. The Social Security Administration declined to provide Seller's records. On December 26, 2018, the District Court and defense counsel were provided a copy of the letter. . . . [T]he U.S. Probation and Parole Office stated they would not comply with the State subpoena and provide the records. The U.S. Probation and Parole Office also indicated that it would not provide the names of the vendors providing services to Sellers. . . . Sellers has declined to waive his statutory right to keep his substance abuse and mental health records confidential.

See Resistance to Motion to Dismiss (8/27/19) at 2–3; App. 21–22.

Retterath moved to dismiss this charge, based on "the State's lack of compliance" with the order to obtain them. *See* Motion to Dismiss (8/14/19); App. 15. But Retterath knew that the Social Security Administration needed "a release signed by the claimant" before releasing those records. *See* Notice (6/14/19) at 3; App. 14. The State, Retterath, and the district court agreed that none of them had any ability to compel production of those records. *See* Transcript (9/3/19) at 3:17–9:8. The district court speculated that its inability to review Sellers's records might "put [it] in a position of precluding the State from using him as a witness and then granting a new trial." *See* Transcript (9/3/19) at 9:9–23. The State argued it would be improper to "presume some sort of prejudice or that these would have been exculpatory or usable or would have somehow changed the outcome of the case." *See* Transcript (9/3/19) at 9:24–11:20. Retterath argued that the remedy was dismissal, because Sellers "didn't assert any kind of privilege or anything like that," and because "this evidence that ordinarily would have been available and could be exculpatory is not going to be available." *See* Transcript (9/3/19) at 11:21–14:16.

The court denied the motion to dismiss. *See* Order (9/24/19); App. 26. Retterath filed a motion to reconsider that ruling. *See*

Motion (10/17/19); App. 29. The State resisted. *See* Resistance (11/7/19); App. 35. The court denied that motion to reconsider. *See* Order (11/21/19); App. 40. But then, the court ordered a new trial on the solicitation-of-murder charge—not based on any review of J.R.'s records, but because of its inability to review Sellers's records:

> Over a significant period of time both the State and the defense attempted to obtain the pertinent records related to State's witness Aaron Sellers. Their efforts were unsuccessful. Although the records clearly exist, the federal entities possessing them are, apparently, beyond the state court's subpoena power. According to the State, Mr. Sellers is unwilling to sign a release for the records. . . .
>
> [. . .]
>
> As the Court reads the appellate ruling, Retterath is entitled to a review of Sellers' records by the Court. The Court respects Sellers' right to maintain his privacy. However, Retterath's rights must also be respected. The Court is unable to perform the required process on remand as directed by the Court of Appeals. Therefore, it is the Court's opinion that any doubt must be resolved in Retterath's favor and granting a new trial is the appropriate relief.

Order (12/2/19) at 2; App. 43. The State appeals from that order. *See* Notice of Appeal (12/13/19); App. 46; Iowa Code § 814.5(1)(c).

Statement of Facts

The Iowa Court of Appeals summarized the evidence that pertained to the solicitation charge, starting from the point when Retterath was arrested and charged with sexual abuse:

. . . Retterath admittedly was livid over C.L.'s accusations. Retterath testified: "I'm sure I've cussed him plenty. But killing him wasn't even a thought to me." The State's witnesses told a different story. Two acquaintances who met Retterath at their AA meetings testified Retterath incessantly "vented" about wanting C.L. dead. Sellers, who was thirty-five years old at the time of the trial and had spent nearly ten years in federal prison, testified Retterath repeatedly asked him to "kill that little mother fucker." Sellers did not know whether to take Retterath seriously. But Sellers initially entertained the idea out of "some loyalty" to Retterath whom Sellers believed to be falsely accused. When Sellers made it clear he would not kill C.L., Retterath asked if Sellers knew anybody who would. . . .

Retterath also implored J.R. to kill C.L. J.R., who was twenty years old at the time of the trial, told Retterath about a *Breaking Bad* episode where ricin was extracted from castor beans and used as a poison. After that discussion, Retterath suggested J.R. should leave a ricin-laced batch of drugs on C.L.'s property where he would "stumble across it" and "hopefully would shoot it up." J.R. testified he and Retterath went to Mason City to purchase methamphetamine but Retterath decided heroin would be better because its brownish color would help disguise the ricin. Retterath wanted J.R. to plant the drugs because Retterath was the subject of a no-contact order after the filing of the sexual abuse charges. Sellers likewise recalled the storyline: "I guess you can extract some poison from these beans and it will kill you. And it was untraceable. ... And [Retterath] was talking about where he could find them ... if you started looking around online."

In April 2015 Retterath signed onto eBay to purchase castor beans, along with other seeds and supplies. Retterath insisted he only wanted the poisonous beans to kill "varmints." Retterath recalled J.R. looking over his shoulder as he ordered the seeds, which prompted J.R. to recall the television episode involving ricin. Retterath also performed searches on Google related to ricin and castor beans on April 15, 2015. . . .

> In June 2015 Sellers and J.R. contacted Deputy Huftalin to report Retterath's plot to kill C.L. After they came forward, the deputy obtained another search warrant for Retterath's house. In that search, investigators found a forty-plus-page printout in Retterath's file cabinet that outlined how to extract ricin from castor beans. The printout was slipped into a folder labelled Roth IRA and was entitled: "Combined Castor Marker and Isotope Profile for Ricin Forsensics: Final Report." It included five examples of ricin-purification recipes. The searchers also found a jar of castor beans in Retterath's refrigerator, as well as a baggie holding about ten beans in the pocket of a pair of Retterath's blue jeans.
>
> In another pocket of the same jeans, the searchers found a handwritten list of the following items:
>
> - 6 Big Rolls Wide Duct Tape
>
> - 50 or 60 Large Heavy Duty Heft Bags (No draw strings if possible)
>
> - Saws All w/3 New blades, 6 inches long at least
>
> - power cord
>
> - 2 5-gallon containers gasoline
>
> - Large Sections of Vcqueen and/or Tarps 15 X 15 or larger[ ]
>
> - your vacumm sealer (foodsaver) with the bags that aren't pre-cut
>
> - $220 cash
>
> Sellers testified he jotted down the list as Retterath dictated it over the phone and then gave the note to him when Retterath arrived at the house. Sellers said he added the item "$220 cash" at the bottom because Retterath owed him that amount. Sellers recalled writing the note close in time to Retterath's arrest for attempted murder.

Retterath, 2017 WL 6516729, at *2–3. Additional facts about proof on the solicitation charge will be discussed when relevant.

ARGUMENT

I. Retrial was not a foregone conclusion. The court was required to review J.R.'s privileged records, determine whether they contained exculpatory information, and then determine if lack of access to that material (plus inability to access Sellers's records) was prejudicial enough to undermine the verdict and require retrial.

Preservation of Error

Error was preserved when the district court rejected the State's request to consider other options, ruled that granting a new trial was the only option, and ordered a new trial. *See* Order (12/2/19) at 2–3; App. 43–44; Resistance to Motion to Dismiss (8/27/19) at 5; App. 24 (urging the district court to "perform the balancing test on the records of J.R. that have been produced as required by Iowa Code Section [622.10(4)(a)(2)(c)] and in accordance with the remand order of the Iowa Court of Appeals"); *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012) (holding error is preserved whenever a ruling "indicates that the court *considered* the issue and necessarily ruled on it").

Standard of Review

Generally, a ruling that grants a new trial is reviewed for abuse of discretion. *See Jack v. Booth*, 858 N.W.2d 711, 718 (Iowa 2015). But here, the trial court did not exercise discretion; it believed did not *have* the discretion to consider any other options. *See* Order (12/2/19)

at 2; App. 43. Failure to exercise discretion is an abuse of discretion. *See Lawson v. Kurtzhals*, 792 N.W.2d 251, 257 (Iowa 2010) (quoting *State v. Hager*, 630 N.W.2d 828, 836 (Iowa 2001)) ("A court abuses its discretion when it fails to exercise any discretion."). The issue of whether the court had such discretion is a legal question, and review is for errors at law. *See Pavone v. Kirk*, 901 N.W.2d 477, 496 (Iowa 2011) (quoting *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 72, 76 (Iowa 1999)); *accord State v. Millsap*, 704 N.W.2d 426, 434–35 (Iowa 2005); *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997).

Merits

There are multiple layers to this analysis. The first problem is that the district court interpreted the remand order to *require* it to order a new trial if it was unable to review Sellers's privileged records and determine whether they contained exculpatory material. But the remand order did not require that. The second problem is the court's conclusion that "any doubt must be resolved in Retterath's favor." *See* Order (12/2/19) at 2; App. 43. That cannot substitute for an exercise of discretion after weighing evidence and assessing the likelihood of a different result. And the biggest problem is that Sellers's records are flatly unobtainable, so their contents are automatically immaterial.

A. Upon remand for a post-trial review of privileged records under section 622.10(4)(a)(2), the court needed to identify any qualifying information and assess its materiality. Total inability to gain access to records would only entitle Retterath to relief if it was likely to have affected the verdict at trial.

The remand order, like other remand orders that direct courts to conduct *in camera* reviews of privileged mental health records, envisioned a two-step process. First, the district court needed to acquire and review the records, to identify any exculpatory material. Second, the court needed to "perform the balancing test outlined in paragraphs (2)(c) and (d) to assess whether Retterath is entitled to a new trial on the conviction for solicitation to commit murder." *See Retterath*, 2017 WL 6516729, at *11. Such a balancing test would require a qualitative assessment of the usefulness of that privileged material in light of the strength of the State's evidence, to "balance the need to disclose such information against the privacy interest of the privilege holder." *See* Iowa Code § 622.10(4)(a)(2)(c). Moreover, errors in discovery rulings *may* require retrial if they are material and somehow prejudicial—or they may be wholly harmless. So even upon finding some additional information that should have been disclosed, the court would need to gauge the materiality of that new information before vacating a conviction and ordering a new trial. *See Struve v.*

Struve, 930 N.W.2d 368, 378 (Iowa 2019) (quoting *Jones v. Univ. of Iowa*, 836 N.W.2d 127, 140 (Iowa 2013)) (observing that Iowa courts "do not presume the existence of prejudice based on an erroneous discovery ruling"); *Team Cent., Inc. v. Teamco, Inc.*, 271 N.W.2d 914, 922 (Iowa 1978) (holding that, even if discovery ruling was erroneous, error was "not of sufficient importance to justify a reversal"). If review of those records uncovered a just one single page of information that was exculpatory (like the review of C.L.'s records, before trial), then it would raise the question: would access to that scrap of evidence have created any reasonable probability of a different result at trial? If not, there would be no basis for a new trial, and the verdict would stand.

Retterath may urge this Court to read the remand order from the Iowa Court of Appeals to imply that it had already concluded that *any* exculpatory information would require the district court to order a new trial. But that would be incorrect. By its terms, the court was directed to "assess whether Retterath is entitled to a new trial on the conviction for solicitation to commit murder," even if it found that some of the information was exculpatory—which means that finding exculpatory material was a precondition to *assessing* the need to grant a new trial, in light of the quantity and character of new material. *See*

Retterath, 2017 WL 6516729, at *11. Logically, the Court of Appeals cannot have known whether that review would uncover one page or 1,000 pages. It would be nonsensical to construe that remand order to include a qualitative evaluation of the materiality of information that was still unknown and unknowable. That is why it directed the district court to assess the need for retrial, which it failed to do.

Indeed, in cases where the district court *did* perform a pretrial *in camera* review of privileged records, and where the Iowa Court of Appeals found that additional records should have been disseminated to the parties, it *still* remanded to the district court to allow it to make findings about the materiality of those records, after the parties had an opportunity to present evidence and make arguments on that point. *See State v. Barrett*, No. 17–1814, 2018 WL 6132275, at *3 (Iowa Ct. App. Nov. 21, 2018) (reviewing district court's ruling that was made after *in camera* review of privileged records, identifying records that should have been disclosed, and instructing that "[o]nce the district court discloses the records to the attorneys, it shall consider whether new trial is necessary"). Clearly, the mere existence of undisclosed exculpatory records cannot be enough to invalidate a conviction without fact-specific analysis of its significance or materiality.

This bears some similarity to *Brady* materiality. Information in the State's possession that is exculpatory still falls outside of *Brady* if it is not material, which occurs if there is not "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *See United States v. Bagley*, 473 U.S. 667, 682 (1985) (plurality opinion). It can be dangerous to draw analogies to *Brady*, which only applies to things that the State has or knows. That is rarely true of privileged mental health records, so a trial where a defendant cannot make use of those records does not involve the inherent unfairness that arises from prosecutions where the State withholds exculpatory evidence within its possession. *See, e.g.*, *State v. Thompson*, 836 N.W.2d 470, 485 (Iowa 2013) (citing *Commonwealth v. Barroso*, 122 S.W.3d 554, 559–60 (Ky. 2003)) (noting that *Pennsylvania v. Ritchie* involved "records held by a state agency governed by a *Brady* analysis," which is "inapplicable" when a defendant seeks access to "records from a third party"). Still, *Neiderbach* compared its remand for retrospective *in camera* review of privileged material to similar remand orders in *Brady* cases. *See State v. Neiderbach*, 837 N.W.2d 180, 198 & n.3 (Iowa 2013) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 (1987) and *State v. Johnson*,

272 N.W.2d 480, 485 (Iowa 1978)). The remand order in this case was nearly identical to *Neiderbach*, and it referenced the same parts of section 622.10(4). *Compare Neiderbach*, 837 N.W.2d at 198, *with Retterath*, 2017 WL 6516729, at *11. Thus, notwithstanding problems with analogies to *Brady* cases, comparisons to the framework for retrospective analysis in *Brady* cases may help in determining what a remand order like this one intends to direct the district court to do.

A review of the analogous *Brady* cases illustrates two things. First, inability to access or retrieve evidence is only a violation of the defendant's due process rights when the State destroyed the evidence in bad faith, or when the evidence is already *known* to be exculpatory. *See generally State v. Dulaney*, 493 N.W.2d 787, 790–91 (Iowa 1992) (citing *Arizona v. Youngblood*, 488 U.S. 51 (1988) and *California v. Trombetta*, 467 U.S. 479 (1984)); *accord Whitsel v. State*, 525 N.W.2d 860, 864 (Iowa 1994) ("Failure of the State to preserve potentially useful evidence does not constitute a denial of due process unless the defendant can show bad faith."). Second, even in the *Brady* context and even when the suppressed evidence is known to be exculpatory, a new trial is required "only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial."

See Bagley, 473 U.S. at 678. That can only be established when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *See Harrington v. State*, 659 N.W.2d 509, 523 (Iowa 2003) (quoting *Strickler v. Greene*, 527 U.S. 263, 290 (1999)). Materiality may be shown by "the possible effects of nondisclosure on defense counsel's trial preparation"—but impeachment of an already-impeachable and already-impeached witness is rarely enough to make that showing. *See Cornell v. State*, 430 N.W.2d 384, 386 (Iowa 1988) (citing *Bagley*, 473 U.S. at 682); *cf. State v. Anderson*, 410 N.W.2d 234 (Iowa 1987).

Convictions may be affirmed after *Brady* violations that involve present unavailability of evidence that is not known to be exculpatory, or the suppression of evidence that is not material—those problems do not make the trial inherently unfair, and do not violate due process. *See Moon v. State*, 911 N.W.2d 137, 150–51 (Iowa 2018) (concluding "Moon's conviction does not violate his due process right to a fair trial" because "the suppressed evidence has no reasonable probability of changing the outcome of trial"); *see also State v. Bray*, 422 P.3d 250, 238–39 (Or. 2018) (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982)) ("[T]o prove a due process violation based on a

deprivation of evidence, a defendant must demonstrate that the loss of evidence was so material and favorable that it prevented a fair trial."). But it *would* be inherently unfair to assume that any unavailability of evidence undermines a conviction, without assessing the materiality of the missing evidence to the issues litigated and adjudicated at trial—even when the precise contents of that evidence cannot be known:

> We recognize that it is difficult for a defendant who has been denied access to the materials to establish with specificity what effect they might have had on his trial. . . . Nevertheless, it is incumbent upon the defendant to make a threshold showing of how the withheld evidence would have affected his case.

Anderson, 410 N.W.2d at 234. Even then, materiality is essential.

Again, invoking 622.10(4) does not implicate *Brady* unless the State had possession of those privileged records. *See Thompson*, 836 N.W.2d at 485 (citing *Barroso*, 122 S.W.3d at 559–60). It is uniquely important to draw this distinction where evidence cannot be obtained after trial. If the evidence *was* ever possessed by the State, it would be correct to ask how the trial would have been different if *that evidence* had been turned over (and if the content of that evidence is no longer knowable, it becomes necessary to assess the likelihood and impact of various possible scenarios). But here, if this all happened before trial, the same barriers would have prevented any access to these records.

The court's inability to review and assess the privileged material in Sellers's records was not caused by prosecutorial misconduct, or by the ruling that was reversed on appeal. Thus, the real question is not whether the *contents* of unobtainable privileged records would have been reasonably likely to change the result of the trial. Instead, the question is whether the district court's pre-trial failure to seek these records and discover that they were totally unavailable (together with its failure to produce whatever portion of J.R.'s records that is found to be discoverable) had any material effect on the outcome of the trial.

Instead of answering that question, the district court found that Retterath was "entitled to a review of Sellers' records by the Court" and it ordered a new trial because it was "unable to perform the required process on remand as directed by the Court of Appeals." *See* Order (12/2/19) at 2; App. 43. But Retterath cannot be entitled to a review of records that cannot be obtained—he would not have received it if the court had tried to compel production before trial, and failure to review them cannot undermine the validity of these convictions if it was never possible in the first place. The Iowa Court of Appeals held that the district court, before trial, should have found that he made the predicate showing for *in camera* review under section 622.10(4). *See*

Retterath, 2017 WL 6516729, at *11. But that finding, whether made before trial or after trial, only entitles Retterath to *in camera* review of obtainable records that were still in existence. Retterath cannot be "entitled" to any remedy that would have been impossible to grant, at any point in the proceedings—no matter what the unavailable records were deemed to be reasonably likely to contain, the court would still be unable to conduct such a review. Instead of answering the question that the Iowa Court of Appeals directed it to answer on remand about the effect of the erroneous pre-trial ruling on the subsequent trial, the district court appears to have conflated it with a very different question about the legality or validity of *any* conviction that was obtained with testimony of a witness whose privileged mental health records would have been subject to *in camera* review under section 622.10(4)(a)(2), but were never within the reach of the district court at any point. *See* Order (12/2/19) at 2; App. 43. This brief will also address that issue, but it is critical to note that the question posed by the remand order can never be answered without performing a materiality analysis—not in *Brady* cases, not in other cases involving section 622.10(4), and not in this case. *See Neiderbach*, 837 N.W.2d at 198 & n.3; *Barrett*, 2018 WL 6132275, at *3; *accord Retterath*, 2017 WL 6516729, at *11.

B. Lack of access to Sellers's privileged records for post-trial review, standing alone, is not material and cannot establish any grounds for a new trial.

If the court had not made the error identified on direct appeal—if the district court, before trial, had found a reasonable probability that Sellers's records contained exculpatory or impeaching information and made unavailing attempts to obtain them for *in camera* review—what effect would that have had on Retterath's trial? Precisely none. Retterath already knew that Sellers had been taking medication that extinguished his schizophrenia-related auditory hallucinations since September 2014, at the latest. *See* Motion Ex. B (4/14/16) at 14–15; Motion Ex. B (4/14/16) at 27–29. That medication made Sellers more susceptible to alcohol-induced intoxication—but at his April 2016 deposition, Sellers testified that he had been completely sober for "[o]ver a year," which means that Sellers was sober when he reported Retterath's activities to Deputy Huftalin in June 2015. *See* Motion Ex. A (4/14/16) at 10–11; TrialTr. 440:19–441:4; TrialTr. 505:23–507:2. Retterath knew that Sellers admitted in his deposition that he used to experience schizophrenia-related auditory hallucinations, and that he took medicine to stop them from recurring—but he did not bring it up during trial, in cross-examining Sellers. *See* TrialTr. 458:18–465:17.

The only conceivable impact of a pre-trial finding that Retterath met the statutory requirements for *in camera* review of his privileged mental health records (and a subsequent pre-trial finding that those records were beyond the reach of the district court) is that Retterath would know that Sellers refused to waive privilege—but he knew that already, because waiver would have made those records discoverable. *See* Iowa Code § 622.10(4)(a)(1). It is possible that the trial court may have allowed Retterath to cross-examine Sellers about his refusal to waive that privilege and permit *in camera* review of his records.[1] But Retterath already knew that Sellers would refuse to discuss his mental health diagnosis that required treatment (although he did confirm that he *was* receiving treatment). *See* Motion Ex. A (4/14/16) at 14;. More importantly, an exercise of privilege is not relevant to prove the contents of that privileged material, in any capacity. *See, e.g.*, *Heard*,

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[1] It is not clear that would even be permissible. *See, e.g.*, *State v. Heard*, 934 N.W.2d 433, 442 (Iowa 2019) (quoting *State v. Bedwell*, 417 N.W.2d 66, 69 (Iowa 1987)) (prohibiting defendant from calling accomplice who invoked Fifth Amendment privilege as to entire subject matter of the case because "the jury is not entitled to draw any inferences from the decision of a witness to exercise his constitutional privilege *whether those inferences be favorable to the prosecution or the defense*"); *McMaster v. Iowa Bd. of Psychology Examiners*, 509 N.W.2d 754, 758 (Iowa 1993) (recognizing constitutional basis for privilege that protects privacy of mental health records).

934 N.W.2d at 444 (quoting trial court's explanation that permitting inferences from fact of witness invoking privilege would amount to "evidence by innuendo, untested by the adversarial process"). The State cannot ascertain any way that Retterath's trial would have been different if the district court had granted Retterath's pre-trial motion for *in camera* review of Sellers's records, and encountered the same roadblocks that prevented anyone from acquiring them after trial.

If the State is incorrect about the materiality of that ruling, that should be proven by testimony and other evidence that can be tested through adversarial proceedings, and the district court should make factual findings to that effect (which could be appealed and corrected if they are erroneous). But none of that happened. There is still an opportunity for that to happen—the district court still needs to review J.R.'s privileged records and apply the balancing test for disclosure, then allow the parties to litigate the materiality of whatever records needed to be disclosed. *See Retterath*, 2017 WL 6516729, at *11. That would be the appropriate venue for evidence, argument, and findings about the materiality of the erroneous ruling on Sellers's records, too; Retterath should only receive a new trial if he can establish that error in that pre-trial ruling, one way or another, was somehow prejudicial.

C. A conviction that relied on testimony from Sellers may stand even without *in camera* review of his privileged mental health records, if such a review is not possible.

The district court ruled that Retterath was "entitled to a review of Sellers' records by the Court" and it ordered a new trial because it was "unable to perform the required process on remand as directed by the Court of Appeals." *See* Order (12/2/19) at 2; App. 43. By this point, all parties had agreed that the records were flatly unobtainable. *See* Transcript (9/3/19) at 3:17–9:8. The only apparent rationale for the court's ruling is that it would be unfair for the conviction to stand, if it could not perform the review that the Iowa Court of Appeals ordered. *See* Order (12/2/19) at 2; App. 43. But that order had assumed that an *in camera* review would be possible. If the records were lost in a flood or a fire, there would be no inherent unfairness in declining to vacate the convictions and order a new trial. The state court's inability to compel the federal government to produce records over the patient's refusal to consent to disclosure is a similarly insurmountable barrier. The remand order from the Iowa Court of Appeals does not envision dismissal or retrial as automatically necessary in the event that there is no way to review records that were thought to be available—which makes sense, because the conviction still retains its validity.

Part of the reason why inability to access this information does not create any inherent unfairness or invalidate the conviction is the fact that the Iowa Court of Appeals adopted a broad definition of the term "exculpatory information" that includes material that would not have stand-alone exculpatory value, and could only have been used for impeachment purposes. *See Retterath*, 2017 WL 6516729, at *11; *accord Barrett*, 2018 WL 6132275, at *3 (citing *Retterath*, 2017 WL 6516729, at *11) ("In *Retterath*, we rejected any distinction between impeachment evidence and exculpatory evidence."). While the State views this definition as overbroad and problematic, it already became "law of the case" for the purposes of these convictions. Going forward, the expansive breadth of this definition reduces the overall impact of the court's inability to access those records and determine whether additional "exculpatory" information may exist. *See State v. Belken*, 633 N.W.2d 786, 796 (Iowa 2001) ("[T]he risk of prejudice from a discovery violation is reduced when the only value of the evidence is for impeachment."); *accord Moon*, 911 N.W.2d at 149–50 (finding impeachment evidence was not material, and the suppression of that evidence could not establish a *Brady* violation); *State v. Romeo*, 542 N.W.2d 543, 551–52 (Iowa 1996) (same).

Moreover, unavailability of these records for *in camera* review would not automatically invalidate this conviction because there are, at best, only limited rights to discovery of evidence that the State does not possess. *See Ritchie*, 480 U.S. at 59–60 (quoting *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)) ("There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one."). The Iowa Supreme Court has noted that "other state supreme courts have upheld *absolute* privileges against constitutional challenges by criminal defendants." *See Thompson*, 836 N.W.2d at 489; *accord State v. Lynch*, 885 N.W.2d 89 (Wis. 2016); *In re Crisis Connection*, 949 N.E.2d 789 (Ind. 2011). This suggests that any right to review of privileged mental health records can tolerate an exception for when records are wholly unavailable. The State cannot locate any other case where privileged records turned out to be unavailable, after a court had already determined it should procure them for *in camera* review. However, this situation is foreseeable—especially when the records must already be "unavailable from other sources" as a prerequisite for compelling production in the first place. *See Thompson*, 836 N.W.2d at 488–89; Iowa Code § 622.10(4)(a)(2)(a)–(b). Loss of that last copy of privileged records should not be a windfall for criminal defendants.

Any conclusion that it is impossible for this conviction to stand would essentially require witnesses (and in some cases, victims) to waive privilege in order for the State to proceed with a prosecution. That seems to have been Retterath's advocacy, below. *See* Transcript (9/3/19) at 11:21–14:16. But that approach gives witnesses and victims a veto power over prosecutions, which justice will not permit.

> If, as here, the witness is the victim of the crime without whose testimony the prosecution could not prove its case, must the case be dismissed if the victim refuses to waive the privilege? If so, what of "the fair administration of justice" and the aim "that guilt shall not escape"? [*United States v. Nixon*, 418 U.S. 683, 708–09 (1974).] . . .

Barroso, 122 S.W.3d at 565. That would be particularly problematic in domestic violence contexts, where prosecutions must often advance without cooperation from victims, or even over their active resistance. *See State v. Smith*, 876 N.W.2d 180, 187–88 (Iowa 2016) (identifying "complex dynamics" that arise from domestic violence and "can create many obstacles in the criminal prosecution of perpetrators," which often include circumstances that "lead many victims to refrain from reporting abuse and then further lead to the recantation of statements of identity prior to trial"). The rule that Retterath advances would eviscerate prosecutorial discretion and allow defendants to escape justice by instilling fear of reprisals among witnesses and victims.

Even if the unavailability of Sellers's privileged records for this *in camera* review *could* require dismissal or retrial, it would never be automatic—there must be some fact-specific analysis as to whether the unavailable evidence was likely to be material. *See, e.g.*, *State v. Redmond*, 803 N.W.2d 112, 124 (Iowa 2011) (explaining that value of impeachment evidence cannot be gauged without reference to content of their trial testimony "as the testimony itself may be inconsequential, noncredible, or conclusively shown credible by other evidence"); *see also Moon*, 911 N.W.2d at 149–50; *Cornell*, 430 N.W.2d at 386 (citing *Bagley*, 473 U.S. at 682); *Anderson*, 410 N.W.2d at 234. Other than testimony from Sellers that Retterath had asked him to help kill C.L., Retterath's testimony matched up with events that Sellers described, including most of the interactions and conversations that Sellers had described having with Retterath (right down to Retterath's struggle to find a phone signal during his call with C.L., while at Sellers's house). *Compare* TrialTr. 850:6–852:25, *with* TrialTr. 440:19–444:23. And Sellers was already impeached with his prior criminal history, and his prior inconsistent statements from earlier points in the investigation (before he learned new facts that made him realize that Retterath was serious about his desire to kill C.L.). *See* TrialTr. 447:10–454:17;

TrialTr. 460:20–462:16. The remand order contains a finding that there was a reasonable probability that Sellers's records contained some information falling within a broad definition of "exculpatory," but there has never been fact-finding on the likelihood that Sellers's privileged records would have contained any information that would undermine the validity of any convictions that were obtained when Retterath did not have access to it. At a bare minimum, even if there were some cognizable theory that would enable Retterath to attack the legality or validity of this conviction, any ruling granting relief would need to assess probable materiality—and this ruling does not.

There is no defensible theory under which the district court's order granting an automatic retrial would be correct—its failure to exercise discretion was a clear abuse of discretion. Thus, this Court should reverse that ruling and remand for further proceedings. This should include *in camera* review of J.R.'s records, an analysis of any facts that might show (or foreclose) a need for retrial as a result of the exculpatory evidence (or lack thereof) in J.R.'s records, and findings on the impact of events relating to Sellers's records on the trial itself.

CONCLUSION

The State respectfully requests that this Court vacate the district court's ruling that granted a new trial on Count III, and remand for further proceedings consistent with that order.

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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CERTIFICATE OF COMPLIANCE

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) or (2) because:

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