IN THE SUPREME COURT OF IOWA
Supreme Court No. 16-1650

DAVID M. POWERS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
THE HONORABLE GEORGE L. STIGLER, JUDGE

APPELLEE'S BRIEF

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AMENDED FINAL

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7 Laurie Kratky Doré, *Iowa Practice Series: Evidence* § 5.104:2 (Westlaw 2016)

ROUTING STATEMENT

The applicant does not identify any grounds meriting retention. He argues that his appeal raises issues that are "germane" to his postconviction application and that "postconviction proceedings will be greatly impacted by a definitive ruling." Applicant's Proof Br. at 5. Retention is warranted in "[c]ases presenting fundamental and urgent issues *of broad public importance* requiring prompt or ultimate determination by the supreme court." Iowa R. App. P. 6.1101(2)(d) (emphasis added). Rather than presenting any issue of broad public importance, the applicant only seeks relief with the application of existing principles to the unique circumstances of his discovery dispute. Accordingly, the Court of Appeals can provide the "definitive ruling" he seeks. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Applicant David Powers was granted interlocutory appeal for a discovery issue in his postconviction relief action concerning his 2011 convictions for two counts of sexually abusing his granddaughter.

Course of Proceedings

A jury convicted Powers of one count of second-degree sexual abuse and one count of third-degree sexual abuse. PCR Appl.

(12/2/2013); App. 4. He appealed, and the Court of Appeals affirmed. *State v. Powers*, No. 11-0624, 2012 WL 4513843 (Iowa Ct. App. Oct. 3, 2012).

Powers filed an application for postconviction relief alleging ineffective assistance of counsel. PCR Appl.; App. 4. The State responded with a motion to dismiss because the Court of Appeals had already rejected the ineffective assistance claims on direct appeal. Motion to Dismiss (8/22/2014); App. 10. Powers then filed a motion to amend his PCR application to add a claim of newly discovered evidence. Motion to Amend (10/17/2014); App. 18. The district court granted both the applicant's motion to amend and the State's motion to dismiss. Order (10/31/2014), Order (12/12/2014); App. 22, 23.

Powers appealed the dismissal. Notice (1/7/2015); App. 33. Following a limited remand, the Supreme Court determined a final judgment had not been reached and denied Powers's request for "bifurcated proceedings." Sup. Ct. Order (10/27/2015); App. 34.

On June 10, 2016, Powers served a series of subpoenas. Victim K.P. moved to quash the subpoena compelling her appearance at the PCR hearing. Motion to Quash (6/13/2016); App. 39. K.P. then filed an amended motion to quash arguing Powers should not be permitted

to ask about unrelated allegations of a sexual assault that occurred after Powers's trial. Amended Motion (7/14/2016); App. 45. The Waterloo city attorney also filed a motion to quash Powers's subpoena compelling the police chief to produce investigative reports from K.P.'s unrelated, subsequent report of sexual assault. Motion to Quash (7/20/2016); App. 52. Meanwhile, Powers filed various motions and resistances revealing his intent to present a claim that K.P. had falsely reported sexual abuse. Motion for Admissibility (7/12/2016), Resistance (7/18/2016), Resistance (7/23/2016); App. 42, 47, 53.

The district court heard the motions on July 25, 2016. At the conclusion of the hearing, the court ordered the city attorney to provide the police reports from K.P.'s subsequent sexual abuse allegation. Tr. (7/25/2016) p. 26, lines 2–17.

Another hearing followed on August 31, 2016.[1] The court granted K.P.'s motion to quash in part, concluding she would not have to testify about the unrelated, subsequent report. Tr. (8/31/2016) p. 33, lines 19–23. The court also granted the city's

[1] The transcript cover erroneously states the hearing occurred September 1, 2016. *Compare* Tr. p. 1, *with* Court Reporter Memorandum (8/31/2016); App. --.

motion to quash, ruling the police did not have to turn over investigative reports of K.P.'s unrelated, subsequent report. Tr. p. 33, line 23 – p. 34, line 3.

Powers sought interlocutory appeal, which the Supreme Court granted. Sup. Ct. Order (10/26/2016); App. ---.

Facts

Powers seeks discovery of his victim's sexual assault committed by other men after his convictions.

Powers sexually abused his granddaughter.

In 2002, Powers was confronted for having inappropriate contact with his seven-year-old granddaughter. *Powers*, 2012 WL 4513843, at *1. K.P. had a "good touch, bad touch" lesson at school, and she reported to her mother that Powers "blew on her butt." *Id.* Believing Powers was only "blowing raspberries" on her stomach, K.P.'s parents told Powers to stop. *Id.* Powers continued providing frequent child care for K.P. *Id.*

As K.P. got older, Powers would rub her vagina after she showered and told her, "it's supposed to feel good and that it's supposed to help me when I get older." *Id.* at *7. Powers also put K.P.'s hand on his penis and made her move it up and down. *Id.*

Later, Powers started making K.P. put her mouth on his penis. *Id.* He never attempted intercourse. *Id.*

In 2009, K.P. revealed the abuse to a friend, who encouraged her to tell the school counselor. *Id.* at *1. In addition to investigating Powers for the sexual abuse, DHS investigated K.P.'s parents for failing to provide adequate supervision. *Id.* Following a CPC interview, K.P.'s parents expressed disagreement with her reports of sexual abuse. *Id.* at *2.

At Powers's trial, K.P.'s parents, brother, and friend all testified that K.P. had reputation for dishonesty. *Id.* Her brother also testified that K.P. asked him to tell the investigator that Powers had touched him too. *Id.* Powers denied sexually abusing K.P., and he presented testimony from his doctor regarding his treatment for erectile dysfunction. *Id.* at *3.

After trial, the victim reported getting raped by other men.

In March 2011—shortly after the verdict in Powers's case—K.P. ran away from home. Tr. (7/25/2016) p. 10, line 19 – p. 12, line 12. After returning to the youth shelter, K.P. reported to police that she got raped by some gang members while she was "on the run." Tr. p. 13, lines 1–17. K.P. and her father met with one or two detectives,

who said they would interview a couple people and get back to them. Tr. p. 13, line 18 – p. 14, line 4.

K.P.'s father, Phil, does not believe that Powers (his father) sexually abused K.P. Tr. p. 17, lines 12–14. According to Phil, at the second meeting with police about the gang rape, the detective said "that the stories weren't matching up." Tr. p. 14, lines 5–25. Phil also claimed that the detective said "they couldn't do anything" because "they felt there were too many loopholes." Tr. p. 15, lines 1–5. In particular, Phil said the detective told him "that they believed it was a false report." Tr. p. 15, lines 6–8. However, Phil was clear that K.P. has never recanted the abuse Powers perpetrated or the subsequent gang rape. Tr. p. 16, lines 5–14.

Contrary to Phil's testimony, Investigator Jason Chopard explained that he never told anyone that he disbelieved the victim or thought it was a false report. Tr. (8/31/2016) p. 9, lines 10–15. "I never would tell anybody I didn't believe them. I would tell them why there are factors in the case where I couldn't pursue charges." Tr. p. 12, line 13 – p. 13, line 6. Investigator Chopard said in his personal opinion, it was "hard for me to believe" K.P.'s story, based in part on the "lack of corroboration." Tr. p. 13, line 19 – p. 14, line 19.

Investigator Chopard agreed "there are a multitude of reasons" why a rape victim like K.P. would not want to pursue charges. Tr. p. 18, line 25 – p. 19, line 10. K.P. expressed during the meeting that "since nobody believed her she did not want to press charges." Tr. p. 8, lines 8–24. She had just been subjected to testifying in her grandfather's trial, so that experience could have factored into her decision. Tr. p. 19, lines 11–20. Also, the four suspects were all gang members, so there was some concern of retribution against K.P. if they found out that she had reported the rape. Tr. p. 16, line 12 – p. 18, line 14. Investigator Chopard did not charge K.P. with making a false report. Tr. p. 18, lines 19–24.

The district court reviewed the police reports before issuing its ruling. Tr. p. 9, lines 21–22, Order (8/3/2016) at 2; App. 62. The district court found Phil "intentionally testified falsely" because "he has identified with his father and has chosen to do whatever and say whatever is necessary to get his father out of the predicament that his father is in." Tr. p. 30, lines 5–10. The court concluded there was "absolutely no credible reason to believe that [K.P.] made a false accusation." Tr. p. 30, lines 21–23.

ARGUMENT

I. The District Court Properly Denied Powers's Discovery Request Because the Police Reports He Sought Were Not Relevant to His Convictions.

Preservation of Error

Powers preserved error by resisting the motions to quash and receiving an adverse ruling in the district court. Tr. (8/31/2016) p. 29, line 3 – p. 35, line 23.

Standard of Review

"On review of a district court's ruling on a discovery matter, we afford the district court wide latitude. We will reverse a ruling on a discovery matter only for an abuse of discretion. . . ." *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d 38, 43 (Iowa 2004).

Discussion

Powers sought discovery of irrelevant information that would have resulted in re-victimizing the granddaughter he sexually abused. The police reports were not relevant—they did not indicate that K.P.'s report was false, and a report of an unrelated, subsequent sexual assault does not fit as newly discovered evidence in Powers's case. And even assuming the police reports held minimal relevance, the

court acted within its "wide latitude" to protect the victim from annoyance, embarrassment, and oppression.

A. Police reports of a subsequent sexual assault were not relevant to Powers's convictions.

The scope of discovery is limited. "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . ." Iowa R. Civ. P. 1.503(1). Powers fails to demonstrate relevance. First, K.P.'s report of getting gang raped was not false, so it holds no impeachment value in Powers's case. Second, K.P.'s report of sexual abuse occurred after Powers's trial, so it does not fit as newly discovered evidence. Third, the police reports are not reasonably calculated to lead to discovery of any evidence relevant to Powers's convictions.

1. K.P.'s report was not false, so the police reports were not relevant.

Powers theorizes that K.P. falsely reported the gang rape. Applicant's Proof Br. at 23. Generally, evidence of a sexual abuse victim's other sexual behavior is not admissible. *See* Iowa R. Evid. 5.412 (outlining Iowa's rape-shield protections). To enforce the rape-shield provision, "it is imperative that a claim of sexual conduct (or misconduct) by the complaining witness be shown to be false before it

is admissible at trial." *State v. Alberts*, 722 N.W.2d 402, 409 (Iowa 2006). A defendant must make a threshold showing—by a preponderance of the evidence—that the victim's prior report of sexual abuse was false. *Id.* Therefore, Powers was entitled to the police reports only if they tended to prove that K.P.'s gang rape report was false.

The parties offered conflicting evidence about the content of the police reports. K.P.'s father testified that the detective told him "that they believed it was a false report." Tr. (7/25/2016) p. 5, lines 6–8. Investigator Chopard, however, said he would never tell a victim that he disbelieved her. Tr. (8/31/2016) p. 12, line 13 – p. 13, line 6. After hearing the conflicting testimony, the district court concluded K.P.'s father had "intentionally testified falsely" due to his bias in favor of Powers. Tr. (8/31/2016) p. 30, lines 5–10. In this abuse-of-discretion review, the district court's assessment of credibility deserves deference.

Even more to the point, the district court reviewed the police reports in camera and found no evidence of a false report. The court had "absolutely no doubt" that "something happened to KP the night she was in that gang house." Tr. (8/31/2016) p. 31, lines 11–13. "This

child unfortunately has been victimized twice in her rather short life. Victimized first by Mr. Powers and victimized second by these three gang members." Tr. p. 32, lines 5–7. The district court preserved the police reports "in the event of an appeal," so this Court can conduct its own in camera review and "make its own determination as to whether there is a credible claim of falsity to KP's second report of having been abused." Tr. p. 32, lines 16–21.

Powers erroneously suggests that only his attorney was capable of determining whether the police reports were relevant. *See* Applicant's Proof Br. at 31 (complaining that the district court "did not allow counsel for the Applicant to see the reports"). However, if Powers is not on a fishing expedition, then he should be able to describe what evidence he seeks and trust that the district court can find it—if it exists. *Cf. State v. Thompson*, 836 N.W.2d 470, 487 (Iowa 2013) ("We believe that a defense counsel who is not merely 'fishing' should be able to articulate to the district court specifically what information is being sought and why. With that guidance, we trust Iowa district court judges will be able to recognize exculpatory information when they see it."). Powers explained his theory that the police reports contained evidence of a false report, but the district

court found none. There is no reason to continue indulging counsel's unsubstantiated hopes of what the police reports might contain.

Powers reads too much into an excerpt of the police report. He quotes a portion of the report in which the officer wrote, "K.P. told me that since nobody believed her, she did not want to press charges. . . ." Applicant's Proof Br. at 29. K.P.'s perception that nobody believed her does not prove her report was false. K.P. had just finished Powers's trial at which her own father, mother, and brother testified she was a liar (*Powers*, 2012 WL 4513843, at *2) and her father told police he disbelieved her gang-rape report (Tr. 8/31/2016 p. 8, lines 17–19), so it should surprise nobody that she would not desire to endure a series of new rape trials without familial support. *See* Tr. (8/31/2016) p. 19, lines 11–20 (acknowledging that K.P.'s experience in her grandfather's trial could have factored into her decision not to pursue charges against the gang members). Additionally, the suspects were all gang members, so the fear of violent retribution weighed into her decision. Tr. p. 16, line 12 – p. 18, line 14. Finally, police did not charge K.P. with making a false report (Tr. p. 18, lines 19–24), which indicates they did not have evidence to prove she lied.

For all these reasons, K.P.'s decision not to pursue charges falls short of proving her report was false.

The police reports were not discoverable because they were not relevant. Demonstrating relevance required Powers to show that K.P. falsely reported the gang rape to police. But the credible evidence presented at the hearings showed no falsity, the district court's in camera review showed no falsity, and the circumstances of the K.P.'s report showed no falsity. The district court did not abuse its discretion when declining to grant discovery of irrelevant information.

2. K.P.'s subsequent report of sexual abuse does not qualify as newly discovered evidence.

The police reports also lacked relevance given the timing of K.P.'s gang-rape report. Powers seeks discovery to prove his claim of newly discovered evidence.[2] Amended PCR Appl. (10/17/2014) ¶ 15;

[2] Powers also claims trial counsel was ineffective for not presenting the gang-rape evidence in a motion for new trial. Amended PCR Appl. (10/17/2014) ¶¶12–13; App. 19. Such a motion for new trial would have alleged that "the defendant has discovered important and material evidence in the defendant's favor since the verdict . . ." Iowa R. App. P. 2.24(2)(b)(8). Thus, both claims rely on the same newly discovered evidence framework. *See Grissom v. State*, 572 N.W.2d 183, 184 (Iowa Ct. App. 1997) ("We follow the same analysis to resolve section 822.2(4) claims as we do to resolve claims of a new trial based on newly discovered evidence.").

App. 20. But K.P. was gang raped *after* Powers's trial concluded. Tr. (7/25/2016) p. 18, lines 2–9. This unrelated, subsequent report of sexual abuse is not newly discovered evidence in Powers's case.

"[B]y definition, newly discovered evidence refers to evidence which existed at the time of the trial proceeding." *Grissom v. State*, 572 N.W.2d 183, 184 (Iowa Ct. App. 1997) (citing *Benson v. Richardson*, 537 N.W.2d 748, 762–63 (Iowa 1995)). "Acts or events occurring subsequent to trial do not generally qualify as newly discovered evidence." *Id.* (citing 58 Am. Jur. 2d New Trial § 423, at 398 (1989)). The only exception is "in extraordinary cases when an 'utter failure of justice will unequivocally result' if the new evidence is not considered or where it is no longer just or equitable to enforce the prior judgment." *Id.* at 185.

Powers does not present an "extraordinary case" permitting him to explore evidence that arose after his convictions. Perhaps if K.P.'s credibility was not challenged at trial, then Powers could demonstrate an "utter failure of justice" would result without evidence of her subsequent dishonesty. But K.P. was "cross-examined extensively" about her credibility. *Powers*, 2012 WL 4513843, at *1. She admitted lying when her parents would not let he

do what she wanted. *Id.* K.P.'s father, mother, brother, and friend all testified she has a reputation for lying. *Id.* at *2. K.P.'s brother testified she tried to coax him into making a false report against Powers. *Id.* And Powers's doctor testified he was impotent. *Id.* at *3. The jury still convicted Powers despite all this evidence assailing K.P.'s credibility, so proof of an additional lie arising after the trial was not likely to sway the verdict.

Powers cites no authority to grant a new trial based on a subsequent false report of sexual abuse. He only cites two cases involving *prior* false reports. Applicant's Proof Br. at 30–31 (citing *Millam v. State*, 745 N.W.2d 719, 723 (Iowa 2008), *State v. Baker*, 679 N.W.2d 7, 9–11 (Iowa 2004)). And in the twenty years since *Grissom*, no appellate court has found a case to qualify for the "utter failure of justice" exception. *See, e.g.*, *Armstrong v. State*, No. 13-1985, 2015 WL 4642164, at *4 (Iowa Ct. App. Aug. 5, 2015) (finding the "utter failure of justice" exception did not apply); *Schawitsch v. State*, No. 11-0743, 2012 WL 1439223, at *4 (Iowa Ct. App. Apr. 25, 2012) (same); *Woolison v. State*, No. 07-0888, 2008 WL 4525773, at *2 (Iowa Ct. App. Oct. 1, 2008) (same); *Morales v. State*, No. 01-1328, 2002 WL 31529176, at *4 (Iowa Ct. App. Nov. 15, 2002) (same);

Liggins v. State, No. 99-1188, 2000 WL 1827164, at *9 (Iowa Ct. App. Dec. 13, 2000) (same). *But see Jordan v. State*, No. 11-0166, 2012 WL 2819356, at *4 (Iowa Ct. App. July 11, 2012) (suggesting that, if true, a victim's recantation would qualify for the *Grissom* exception). Although *Millam* and *Baker* recognize a prior false report could have some impeachment value, nothing requires the extraordinary relief of reopening the trial record to receive evidence of a subsequent report occurring after trial.

Even if K.P.'s subsequent report was false, it was not relevant to Powers's convictions. There is no question the gang rape happened after Powers's trial, so it is not evidence that he could have presented to change the jury's verdict. And because he already took the opportunity to attack K.P.'s credibility at trial, no failure of justice will occur if he is not allowed to pile on with another example of her supposed dishonesty. Consequently, the district court did not abuse its discretion by denying discovery of an irrelevant matter.

3. Disclosure of the police reports was not "reasonably calculated" to lead to the discovery of admissible evidence.

The discovery rules did not permit Powers to engage in a fishing expedition. The police reports themselves were inadmissible hearsay,

so discovery was not allowed unless "the information sought appears *reasonably calculated* to lead to the discovery of admissible evidence." Iowa R. Civ. P. 1.503(1) (emphasis added). The "reasonably calculated" standard required Powers to articulate a good faith basis to believe the police reports would lead to admissible evidence. *See Fagen v. Grand View Univ.*, 861 N.W.2d 825, 835 (Iowa 2015) (stating a party is not entitled to "go on an unlimited fighting expedition" under Rule 1.503 and section 622.10, and requiring the seeking party to show a "reasonable basis to believe" or a "good-faith factual basis" that medical records will contain relevant, admissible evidence). Powers failed to meet that standard.

Powers has not demonstrated that the police reports will lead to admissible evidence that K.P. falsely reported the gang rape. First, K.P. will not be testifying that she made a false report—she has never recanted the gang rape report. Tr. (7/25/2016) p. 16, lines 5–14. Second, Investigator Chopard's opinion about K.P.'s credibility is not admissible. *See Bowman v. State*, 710 N.W.2d 200, 204 (Iowa 2006) ("It is well-settled law in Iowa that a bright-line rule prohibits the questioning of a witness on whether another witness is telling the truth. There are no exceptions to this rule." (citations omitted)). The

investigator's opinion also lacks reliability because it appears he was misguided by common rape myths. *See* Tr. (9/1/2017) p. 13, line 19 – p. 14, line 19 (Investigator Chopard explaining that factors such as a "lack of corroboration" made it "hard for [him] to believe" K.P.'s report); *see also State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995) ("The law has abandoned any notion that a rape victim's accusation must be corroborated."). Therefore, the most obvious sources will not provide admissible evidence that K.P. made a false report.

Powers's argument relies on a great deal of speculation. He proposes that "[t]here may well be references in the reports to statements K.P. made in reference to [Powers]" and that other witnesses who might be named in the report "may have heard K.P. make statements about her accusations against [Powers]." Applicant's Proof Br. at 31. Although Powers may hope to find that sort of information, there is no reasonable, good-faith basis to believe it exists. The district court reviewed the records in camera and found no credible reason to believe K.P. made a false report. Tr. (8/31/2016) p. 30, line 20 – p. 32, line 21.

Powers is fishing. The police reports themselves do not contain proof that K.P. made a false report, and speculation about what the

reports might contain does not satisfy the "reasonably calculated" standard. Therefore, the district court did not abuse its discretion by denying discovery of K.P.'s unrelated, subsequent report of sexual abuse.

B. The district court appropriately protected the victim from annoyance, embarrassment, and oppression.

Even assuming the police reports held some marginal relevance, the district court had discretion to limit discovery to protect the victim. The district court "[m]ay make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . ." Iowa R. Civ. P. 1.504(1)(a). It can limit the method of discovery or order "[t]hat the discovery not be had" altogether. *Id.* "The district court may prevent or restrict [abusive] discovery even though the requirements of rule 1.503(1) are met." *Mediacom Iowa, L.L.C. v. Inc. City of Spencer*, 682 N.W.2d 62, 67 (Iowa 2004) (citation omitted).

The criminal justice system often overlooks the interests of crime victims. Sexual abusers and their attorneys can perpetuate rape myths in an effort to embarrass their victims into submission.

Studies illustrate how the process can inflict additional wounds on rape survivors. One study has found "that rape victims scored higher in distress measures *after* pursuing criminal prosecution of their cases than victims whose cases were not prosecuted." Mary Fan, *Adversarial Justice's Casualties: Defending Victim-Witness Protection*, 55 B.C. L. Rev. 775, 786 (2014) (citing Patricia A. Cluss et al., *The Rape Victim: Psychological Correlates of Participation in the Legal Process*, 10 Crim. J. & Behav. 342, 354–55 (1983)). Victims report high rates of negative interactions with the criminal justice system, which results in disappointment and reluctance to seek further help. *Id.* at 786–87 (citing Rebecca Campbell, *What Really Happened? A Validation Study of Rape Survivors' Help-Seeking Experiences with the Legal and Medical Systems*, 20 Violence & Victims 61–62, (2005)). To sexual assault victims, it seems that "rapists [have] more rights than victims, that victims' rights [are] not protected, and that the system [is] unfair." *Id.* at 787 (citing Patricia A. Frazier & Beth Haney, *Sexual Assault Cases in the Legal System: Police, Prosecutor, and Victim Perspectives*, 20 Law & Hum. Behav. 607, 620 (1996)). To prevent any additional secondary victimization

of K.P., the district court was justified to rein in Powers's irrelevant discovery request.

The district court recognized the emotional damage Powers's discovery could inflict on his victim. It ruled, "We're not going to victimize this child yet again by having her questioned as to the events that occurred to her in that gang house." Tr. (8/31/2016) p. 32, lines 14–16. Beyond questioning K.P. directly about the gang rape, Powers also wants to question other witnesses—presumably her acquaintances and maybe the perpetrators—about the gang rape. Applicant's Proof Br. at 31. Such discovery efforts would expose K.P. to annoyance, embarrassment, and oppression by reopening the wounds of her grandfather's abuse and by exposing her to the potential for violent retribution by the gang members who raped her.

"[I]n the administration of criminal justice, courts may not ignore the concerns of victims." *Morris v. Slappy*, 461 U.S. 1, 14 (1983). The district court reasonably weighed Powers's need for the information against the harm discovery would cause. At best, he demonstrated minimal relevance because the police reports did not contain proof of a false report and were not reasonably calculated to lead to the discovery of admissible evidence. Meanwhile, Powers's

continual efforts to pry into the embarrassing and painful events of K.P.'s life risk inflicting even more damage than he has already caused. Encouraging or permitting sexual abusers to pursue abusive defense strategies only serves to discourage victims from reporting sexual abuse and seeking relief in the criminal justice system. The district court acted reasonably to prevent secondary victimization, so Powers fails to demonstrate an abuse of discretion.

II. Powers Failed to Preserve Error by Not Raising His Complaints in the District Court, and the District Court's Reasonable Rulings Fail to Substantiate His Constitutional Challenge.

Preservation of Error

Powers did not preserve all the error he raises on appeal. First, he never made some of his specific complaints in the district court. For example, he did not complain when the district court asked questions of the witnesses or when the district court "[i]nitiated [its] own investigation" by requesting additional information from the city attorney or by scheduling a second hearing. *Compare* Applicant's Proof Br. at 44, *with* Tr. (7/25/2016) p. 19, line 4 – p. 23, line 15, p. 26, lines 2–25. This Court should decline to consider the complaints that Powers did not present to the district court. *See State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999) ("Nothing is more basic

in the law of appeal and error than the axiom that a party cannot sing a song to us that was not first sung in trial court.").

Similarly, Powers failed to add a constitutional dimension to all but one of his complaints. He raises six points he alleges violated his due process rights, but in the district court his only mention of due process concerned whether he should get access to police reports. *See* Suppl. Motion (8/14/2016); App. 67. "Issues not raised before the district court, including constitutional issues, cannot be raised for the first time on appeal." *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997). Therefore, this Court should confine its constitutional analysis to only the issue of whether Powers was entitled to access the discovery materials before litigating whether he should get discovery of those same materials.

Standard of Review

"On review of a district court's ruling on a discovery matter, we afford the district court wide latitude. We will reverse a ruling on a discovery matter only for an abuse of discretion. . . ." *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d 38, 43 (Iowa 2004). Constitutional challenges are reviewed de novo. *State v. Seering*, 701 N.W.2d 655, 661 (Iowa 2005).

Discussion

The district court did not deny Powers a fair hearing. First, the district court's ruling on Power's pretrial motion for admissibility was reasonable because evidence of K.P.'s subsequent gang rape held no relevance. Second, even if Powers had preserved error, none of the district court's actions denied him due process. Accordingly, this Court should affirm.

A. The district court reasonably excluded irrelevant evidence.

In criticizing the district court for "reach[ing] the ultimate conclusion in this preliminary evidentiary motion" (Applicant's Proof Br. at 37), Powers complains of a self-inflicted wound. It was his own "motion for ruling on admissibility of evidence" that requested a pretrial ruling concerning whether K.P.'s gang rape report would be admissible at his PCR hearing. Motion for Ruling (7/12/2016); App. 45–47. The Iowa Rules of Evidence require the district court to decide preliminary questions such as whether evidence is admissible. Iowa R. Evid. 5.104(a). "The proponent of the evidence bears the burden of demonstrating its admissibility." 7 Laurie Kratky Doré, *Iowa Practice Series: Evidence* § 5.104:2 (Westlaw 2016). Powers

requested the preliminary ruling, but he failed to demonstrate the relevance of K.P.'s gang rape report.

Evidence of the gang rape was not relevant to Powers's convictions. "Evidence is relevant if: a. It has any tendency to make a fact more or less probable than it would be without the evidence; and b. The fact is of consequence in determining the action." Iowa R. Evid. 5.401. As proponent of the evidence, Powers held the burden to establish a link between his convictions and K.P.'s subsequent rape. That link existed only if he could demonstrate that K.P.'s report was false. But as detailed above in Section I(A), the district court found no credible proof that K.P. falsely reported the gang rape. It found that "none of this relating to the events that related to the gang situation has anything at all to do with the situation involving the criminal case against Mr. Powers . . ." Tr. (8/31/2016) p. 34, lines 4–10. Because Powers could not establish a connection to K.P.'s gang rape, evidence of the subsequent events held no relevance to any fact of consequence in his case.

Even if the gang-rape report held some minimal relevance in Powers's case, the district court still had discretion to exclude it. "The court may exclude relevant evidence if its probative value is

substantially outweighed by a danger of . . . confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Iowa R. Evid. 5.403. There is no clear proof that K.P.'s report was false. Unlike previous false-report cases, K.P. has never recanted. If Powers's were allowed to present the subsequent gang-rape report at his trial, then the jury's attention would be diverted to a trial-within-a-trial to determine whether the gang members raped K.P. Powers could certainly benefit from distracting the jury's attention from all of the proof of his guilt. But the district court retained discretion to exclude the evidence and avoid creating a sideshow at trial.

Powers falsely accuses the district court of stating "[it] was in a better position than the detective to determine whether K.P. was telling the truth." Applicant's Proof Br. at 37. The court never compared positions. Rather, the court recognized it was improper for the detective to give his opinion whether K.P. was telling truth: "[I]t is not an assessment of the officer to make a judgment as to whether she is credible or not. That is not his function in the criminal justice system." Tr. (8/31/2016) p. 31, lines 1–4. The court's statement parrots controlling case law. *See, e.g.*, *Bowman*, 710 N.W.2d at 204

("It is well-settled law in Iowa that a bright-line rule prohibits the questioning of a witness on whether another witness is telling the truth."). That rule works both ways—if one witness cannot testify that another is telling the truth, then Investigator Chopard could not testify that K.P. was lying. The district court did not abuse its discretion by retaining its fact-finder duty to determine questions of credibility.

Next, Powers makes too much of the district court's "fixation on Phillip's description of Detective Chopard." Applicant's Proof Br. at 38. First, Phil's description of the officer did reflect on the credibility of his testimony. His inability to remember the officer's appearance gave reason to doubt his recollection of other details, such as the officer's exact statements. Or perhaps more devious, Phil may have given an overly vague description[3] to prevent anyone from identifying the officer who could give conflicting testimony. Second, the district court's credibility determination rested on more than Phil's description of Investigator Chopard. Most notably, the court

[3] Phil said the officer at the second meeting was a "completely brand-new officer" than the first meeting, and he described him in very general terms as "30's or 40's," "shorter than 6-1," "slender; probably 200 or less," and having "brown, black" hair and "[j]ust a regular male voice." Tr. (7/25/2016) p.20, line 22 – p. 22, line 14.

commented on Phil's bias for his father: "He is biased in favor of his father and biased against his daughter and he is willing to testify to anything that is necessary to get his father out of prison." Tr. (8/31/2016) p. 30, lines 15–18. Therefore, the district court drew a "logical line" to disbelieve Phil's testimony.

The district court's preliminary determination of admissibility reveals no abuse of discretion. Powers was unable to link his case to K.P.'s gang rape because no reliable proof suggested her report was false. Because it was not relevant, the district court reasonably stopped Powers from prying any deeper into the unrelated sexual assault.

B. Powers had a fundamentally fair opportunity to present his PCR challenge.

Powers's right to due process did not trump established rules of procedure and evidence. *Cf. Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("In the exercise of this right [to present a defense], the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."). And because Powers was already convicted at trial and had his convictions upheld on direct appeal, the State has even more flexibility to

administer the limited right to postconviction relief. *See Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009) ("The State accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief. . . . [The applicant's] right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief."). On this backdrop, Powers fails to prove any due process violation in the district court's application of established rules and procedures.

Powers identifies six actions he alleges "violated fundamental due process" (Applicant's Proof Br. at 43–44), but none amounts to a constitutional violation.

- Powers complains that the district court denied access to the police reports "without stating any reasons for the denial." Applicant's Proof Br. at 43 ¶1. But the court provided nearly five pages of reasons why it denied Powers's discovery request. Tr. (8/31/2016) p. 29, line 3 – p. 34, line 12. And if Powers is resurrecting his requests to review the police reports before cross examining the

witnesses (Tr. 8/31/2016 p. 9, lines 18–24) or "to preserve any error in the ruling" (Motion 7/25/2016; App. 56), then he was not entitled to any sort of de facto discovery of the police reports in order to litigate whether he should get discovery of those same police reports.

- Powers complains that the district court allowed the city attorney and the victim's guardian ad litem to "participate in challenging the relevance of the evidence." Applicant's Proof Br. at 43 ¶ 2; *see also* Tr. (7/25/2016) p. 24, lines 16–23 (". . . I don't think either one of these attorneys has standing to cite a relevance objection"). Even if their participation strayed beyond the bounds of resisting the subpoenas, it did not alter the outcome. The State was a party in the action with standing, and it resisted Powers's discovery of irrelevant information. Tr. (8/31/2016) p. 23, line 15 – p. 25, line 11.
- Powers complains, twice, that the district court "cross-examined" the witnesses. Applicant's Proof Br. at 44 ¶¶ 3, 5. But the court has discretion to examine witnesses to clarify their testimony. *See* Iowa R. Evid. 5.614(b); S*tate*

v. Cuevas, 288 N.W.2d 525, 532–33 (Iowa 1980) (finding no abuse of discretion when the court asked clarifying questions of the medical examiner in a criminal case). And because this was a PCR case, the court had more latitude to ask questions without the risk of influencing a jury with its "advocacy."

- Powers complains that the court "[i]nitiated its own investigation." Applicant's Proof Br. at 44 ¶ 4. Again, however, the court had discretion to call witnesses. Iowa R. Evid. 5.614(a). And the circumstances—a witness's testimony that was "diametrically at odds" with the discovery sought (Order 8/3/2016 at 3; App. 63)—justified the court's desire for clarification from the reports' author.
- Powers complains the district court's rulings "were not supported by substantial evidence . . ." and suggests the judge was not "neutral and unbiased" Applicant's Proof Br. at 44 & ¶ 6. But district court's discovery and evidentiary rulings were reasonable, and a judge's adverse ruling does not prove judicial bias. *See, e.g.*, *Harris v.*

Missouri, 960 F.2d 738, 740 (8th Cir. 1992) ("An unfavorable judicial ruling . . . does not raise an inference of bias or require the trial judge's recusal.").

Powers's complaints—even if they had all been preserved with timely objections—do not rise to the level of a constitutional due process violation. He was given the opportunity for collateral review within the confines of established procedural rules, but he could not substantiate his belief that the police reports contained relevant evidence or that victim made a subsequent false report. He received all the process that was due, so this Court should reject his unpreserved due process challenge.

CONCLUSION

The Court should deny David Powers's interlocutory appeal.

REQUEST FOR NONORAL SUBMISSION

Consideration of this appeal will depend on the Court's in camera review of the discovery materials. Because neither the applicant nor the State's appellate attorney have reviewed the materials, it is unlikely that oral argument would assist the Court. Therefore, nonoral submission is appropriate.

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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