IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-0603

STATE OF IOWA,
Plaintiff-Appellant,

vs.

DEWAYNE MICHAEL VEVERKA,
Defendant-Appellee.

DISCRETIONARY REVIEW FROM THE IOWA DISTRICT COURT
FOR JASPER COUNTY
THE HONORABLE THOMAS P. MURPHY, JUDGE

APPELLANT'S BRIEF

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ROUTING STATEMENT

The order at issue in this case conflicts with controlling case law, including but not limited to *State v. Rojas*, 524 N.W.2d 659, 663 (Iowa 1994); *State v. Neitzel*, 801 N.W.2d 612, 623 (Iowa Ct. App. 2011); and *State v. Kone*, 562 N.W.2d 637, 638 (Iowa Ct. App. 1997). In brief, the district court refused to follow the residual-hearsay analysis set forth in *Rojas*, *Neitzel*, *Kone*, and other cases, erring at law and thwarting a credible prosecution of a father who sexually abused his minor daughter. Because this case can be decided based on existing legal principles, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

The State appeals, by application for discretionary review, a Jasper County District Court order that excluded a recorded interview of a child disclosing sexual abuse to a forensic interviewer. The ruling was entered by the Hon. Thomas P. Murphy.

Course of Proceedings

The defendant was charged by trial information with three counts of sexual abuse in the third degree for sex acts committed against S.V., a minor child. 3/3/2017 Trial Information; App. 23–25.

The defendant pled not guilty. 3/6/2017 Written Arraignment; App. 26.

The defendant filed a motion in limine seeking to exclude admission of the Child Protection Center (CPC) recorded interview in which the victim disclosed that the defendant had sexually abused her on multiple occasions. 9/18/2018 Motion in Limine; App. 30. The defendant later filed a second motion in limine, which indicated that the victim testified in an August-2017 deposition that she could not remember the abuse and in March of 2018 had written a letter that "[i]t didn't happen." 9/24/2018 Motion in Limine; App. 94–95. The second motion in limine also sought to exclude the victim's testimony in its entirety, ostensibly based on *State v. Turecek,* 456 N.W.2d 219 (Iowa 1990). 9/24/2018 Motion in Limine; App. 94–95.

Following a reported hearing in October of 2018, the district court ruled that the CPC recording "will neither be admitted into evidence nor played for the jury," absent testimony from the victim that would change the court's mind. 10/9/2018 Order, p. 2; App. 98. In particular, the court found that the CPC recording did not pass the "trustworthiness," "necessity," or "interests of justice" prongs of the

analysis required by *State v. Rojas*, 524 N.W.2d 659 (Iowa 1994). 10/9/2018 Order, p. 2; App. 98.

After the motion-in-limine ruling, the State filed a motion to adjudicate law points and requested a Rule-5.104(a) ruling to definitely address the evidentiary issues related to the CPC interview before trial. *See* 10/18/2018 State's Motion; App. 102–103. The defendant resisted, urging Confrontation Clause objections. *See* 10/23/2018 Defendant's Response; App. 104–110; 1/9/2019 Defendant's Additional Memorandum; App. 111–114.

Another reported hearing was held on February 7, 2019. The State called three witnesses: Tammera Bibbins, the forensic interviewer who spoke with the victim; Katie Strub, a supervising forensic interviewer from another Child Protection Center; and Douglas Shullaw, a DHS contractor who testified that the defendant confessed to sexually abusing the victim. *See* 2/7/2019 hrg. tr.

In a March 2019 order, the district court found the forensic interviewer "credible" and accepted "that she followed established protocol." 3/13/2019 Ruling, p. 2; App. 143. Despite this, the district court "reiterate[d]" its findings from the prior ruling and held the

CPC interview was not admissible at trial. 3/13/2019 Ruling, p.4 App. 145.

The State filed an application for discretionary review which the Supreme Court granted. *See* 4/12/2019 Application; App. 150–158; 5/2/2019 Supreme Court Order; App. 159.

During briefing, the parties discovered that two proposed exhibits that were expressly considered by the district court had been inadvertently omitted from the record. *See* 6/19/2019 Joint Stipulation & Motion to Correct the Record; App. 162–164. Based on the parties' joint motion, the district court entered an order correcting the record and directing transmission of the missing exhibits. *See* 6/20/2019 Order Correcting the Record; App. 165.

Facts

In December of 2016, S.V. was interviewed by Tammera Bibbins at the Child Protection Center in Des Moines. *See* Exhibit 101: CPC Interview, at approx. 13:31:45—14:09.[1] S.V. was 14 and a high school freshman at the time of the interview. *Id.* at approx. 13:33:30–13:33:45.

[1] Timestamps cited in this brief refer to the visible time counter superimposed on top of the video image, not the running time visible in a player application.

Bibbins has approximately eleven years' experience as a forensic interviewer and has conducted 1,751 forensic interviews. 2/7/2019 hrg. tr. p. 22, lines 11–15; p. 25, lines 23–24. Bibbins' interview of S.V. lasted approximately 45 minutes, including a six-minute break. *See* Exhibit 101: CPC Interview.

A forensic interviewer interviews children when there are allegations of abuse in order to "get information" from the child. 2/7/2019 hrg. tr. p. 22, lines 16–20. Forensic interviewers like Bibbins are specifically trained to "conduct an interview in the least suggestive, least leading manner possible." 2/7/2019 hrg. tr. p. 23, lines 9–13. They follow a national protocol. Exhibit 1: National Children's Advocacy Center Forensic Interview Structure Summary; App. 115; Exhibit 100: National Children's Advocacy Center Forensic Interview Structure Literature; App. 116–141; 2/7/2019 hrg. tr. p. 25, lines 13–16.

The protocol establishes two interview stages: rapport building and substantive information-gathering. *See* 2/7/2019 hrg. tr. p. 26, line 15 — p. 27, line 7. The first stage involves helping the child feel comfortable in the room and with the interviewer. 2/7/2019 hrg. tr. p. 26, lines 18–24. Scientific research shows that "if people are

anxious or emotional" their cognition will not function as well as if they are calm, and they will likely provide interviewers with better information if they are not anxious or emotional. *See* 2/7/2019 hrg tr. p. 26, line 18 — p. 27, line 7. The second stage of the interview focuses specifically on gathering information from the child pursuant to certain guidelines. 2/7/2019 hrg. tr. p. 27, lines 8–10.

The first stage: interviewer Bibbins builds rapport with S.V. by explaining the "rules" of the room and talking about non-sensitive subjects.

During the first stage when she interviewed S.V., Bibbins introduced herself, explained the physical structure of the room (including the cameras), discussed the rules of the room ("correct me if I make a mistake, "[d]on't guess," "[l]et me know if [you] don't understand a question," "only talk to me about things that [you] know and that [you] experienced"), and asked S.V. about her morning to "get her used to the way that [Bibbins] would be asking questions." 2/7/2019 hrg. tr. p. 28, line 22 — p. 29, line 20. Bibbins told S.V., "it's really important that we only talk about things that really did happen," and S.V. responded, "I know." Exhibit 101: CPC Interview, at approx. 13:32:45–13:33:10. S.V. told Bibbins: "I'm not going to lie at all." *Id.*

Bibbins explained to S.V. that it was important S.V. only "talk about things that you've seen or heard or you've felt that have happened to you" and "not guess." Exhibit 101: CPC Interview, at approx. 13:34:50–13:35:45. Bibbins also told S.V., "don't be shy about correcting me." *Id.* at approx. 13:35:00–13:35:20.

During this initial rapport-building stage, Bibbins observed that S.V. was "rather forthcoming when it came to answering questions." 2/7/2019 hrg. tr. p. 30, lines 19–23. S.V. told Bibbins that her favorite subject in school was Spanish, her favorite color was purple, and her least favorite subjects were science and math. *See* Exhibit 101: CPC Interview, at approx. 13:33:30–13:34:30. S.V. also told Bibbins about her morning before the interview, her mom, and her brothers. *See id.* at approx. 13:36:10–13:37:20.

The second stage: interviewer Bibbins gathered information about the abuse by asking S.V. open-ended questions and seeking clarification where needed.

Bibbins transitioned to the second phase of the interview by asking open-ended questions that referenced S.V.'s statements during the first stage of the interview:

> **Bibbins:** You started talking about like … when you were thinking about coming here you thought about, "OK, I'm just gonna tell the

things that are the truth and stuff," can you tell me a little bit more about what you were talking – referring to?

[S.V.] Well, like, I told … for some reason … I don't like want my dad to go to jail to go for a little bit, we need his support, we need this … but I feel like we're protecting him like that. I was gonna like not do this, I wasn't gonna cooperate 'cause I was angry and I was this … but I was like, "Wait, they're trying to help me, why should I do this and treat them badly if they're trying to help me?" So I got my thoughts together and talked about my mood and my mood improved by talking about it.

[Bibbins] So what are the things that you are referring to about your dad?

[S.V.] What do you mean by that?

[Bibbins]: What happened?

[S.V.] Well, I still don't get it, my mind's just [inaudible] …

[Bibbins] Well, you mentioned you don't want your dad to go to jail?

[S.V] Well, my dad was verbally like … sexually and verballing touching me -- um -- for about a seven-month period. My brother was actually in the next room but I was so terrified to yell for him … Plus I didn't know what my dad would do if I did yell and I was terrified of someone else getting hurt with that too….

Exhibit 101: CPC Interview, at approx. 13:37:10–13:38:50.[2] When describing the abuse, S.V. was more reluctant, her voice quivered, and she fidgeted with a toy ball. *See id.*, at approx. 13:37:10–13:38:50. Prior to S.V.'s disclosure, Bibbins had not mentioned anything about sexual abuse to S.V.—S.V. brought that topic up. 2/7/2019 hrg. tr. p. 33, lines 6–22.

Throughout this stage of the interview, Bibbins asked clarifying questions without leading or suggesting an answer. For example, Bibbins asked S.V. if "it happened one time or more than one time," and S.V. said the defendant would come in "about once or twice a week" for a period of six or seven months, except when she was on her period. *See* Exhibit 101: CPC Interview, at approx. 13:39:10–13:40:00. Without prompting, S.V. explained that she had disclosed the abuse to her mother after seeing a video about sexual assault during health class at school. *See id.* at approx. 13:39:10–13:39:50.

Bibbins asked S.V. to do her best to remember one specific time when the abuse happened and told her: "tell me everything about one

[2] The CPC interview was not transcribed by a court reporter, but the State believes what is included in this brief to be generally accurate. There are some "um's," "like's," half-stuttered words, and extraneous statements that the State omits with ellipses.

specific time, from the beginning before touching happened, in the middle of the touching, and then what happened after." Exhibit 101: CPC Interview, at approx. 13:40:00–13:40:20. S.V. explained that, while she was reading, the defendant would come in with his phone, show her Facebook videos, then start moving her clothes and touching her. *See id.* at approx. 13:40:20–13:41:20. S.V. explained that sometimes she froze and felt like she was having an out-of-body experience. *Id.* at approx. 13:41:15–13:41:30.

Bibbins asked non-leading questions of S.V. to get more information about the touching:

> **[Bibbins]:** Did your body get touched?
>
> [**S.V.]:** [Nods affirmatively.]
>
> **[Bibbins]:** Where?
>
> **[S.V.]:** My genitals and my breast.
>
> **[Bibbins]:** Okay. Okay. It's okay. When your genitals or your breasts got touched, was it over your clothes –
>
> [S.V. shakes head to indicate "no"]
>
> **[Bibbins]:** Or to the skin?
>
> **[S.V.]:** It was to the skin.

Exhibit 101: CPC Interview, at approx. 13:41:50–13:42:10. During this time, S.V. was visibly upset. *Id.*, at approx. 13:41:50–13:42:10.

S.V. further explained that the defendant would untie the drawstring on her pajamas before he touched her, then slip his hands into her underwear. Exhibit 101: CPC Interview, at 13:42:10–13:42:50. S.V. said the defendant would touch her "everywhere" in the genital area, including directly on her vagina. *Id.* at approx. 13:42:10–13:43:51. S.V. said she tried to wear multiple layers of clothing to dissuade the defendant. *Id.* at approx. 13:44:30–13:45:15. S.V. told Bibbins: "It slowed him down, but it didn't really help stop him." *Id.* at approx. 13:45:10–13:45:20. S.V. told the defendant to stop sexually abusing her on at least one occasion, but it didn't stop him. *See id.* at approx. 13:45:20–13:45:40.

Bibbins asked S.V. whether the defendant put anything inside her body:

> **[Bibbins]:** Did something go inside your body?
>
> **[S.V.]:** He used to put his finger inside my body sometimes.
>
> **[Bibbins]:** Okay. Okay. Did that part happen one time or more than one time?
>
> **[S.V.]:** It happened more than once, but not often.

Exhibit 101: CPC Interview, at approx. 13:43:50–13:44:10. S.V. specified denied anything happening to what she referred to as her "butthole." *Id.* at approx. 13:44:10–13:44:25.

Bibbins also asked about whether anything was happening to the defendant's body while he sexually abused S.V.:

> **[Bibbins]:** Did something happen to your dad's body?
>
> **[S.V.]:** No. Not that I know of.
>
> **[Bibbins]:** Did he want something to happen to his body?
>
> **[S.V]:** I think he really actually wanted my body to touch him.
>
> **[Bibbins]:** Okay. What makes you think that?
>
> **[S.V.]:** Because he tried to get closer to me.
>
> **[Bibbins]:** Okay. Did he ever say he wanted you to do something to his body?
>
> **[S.V.]:** No.
>
> **[Bibbins]:** Did he ever have your body do something to his body?
>
> **[S.V.]:** I don't really remember that part. It's fuzzy a little bit.

Exhibit 101: CPC Interview, at approx. 13:49:40–13:50:15.

To the best of S.V.'s recollection, the abuse only happened in her parents' bedroom when she would be laying on the bed, and it

happened at night. Exhibit 101: CPC Interview, at approx. 13:49:00–13:49–15. During this time, S.V.'s mother was "working night-shift" and her brother would be sleeping because he dropped out of school. *See id*. at approx. 13:49:00–13:49:20.

By the mid-point of the interview, S.V. was fidgety and upset. Exhibit 101: CPC Interview, at approx. 13:50:10–13:56:10. They took a break, which Bibbins explained had two purposes: so that S.V. would have a few minutes to "collect [herself]," use the restroom, or get something to eat or drink; and so that Bibbins could see if there were any areas that she had not covered during the interview. *See* 2/7/2019 hrg. tr. p. 44, lines 5–14. According to Bibbins, easing "mental fatigue" with this kind of break is important for children, because when they are tired "they will maybe not remember [details]" or "don't want to engage [with the interviewer] as much anymore because they're just tired." 2/7/2019 hrg. tr. p. 44, lines 17–22.

When she returned to the room about six minutes later, Bibbins asked S.V. whether any additional thoughts had "bubbled up" while they took their break, and S.V. said no. Exhibit 101: CPC Interview, at approx. 13:56:10–13:56:30. S.V. told Bibbins that she had thought

about the abuse and what they had discussed, "to make sure I didn't miss anything." *Id.* at approx. 13:56:20–13:56:40.

Bibbins then asked a few clarifying questions to make sure she understood what S.V. had disclosed. For example, they re-visited whether the defendant wanted anything to happen to his body during the abuse:

> **[Bibbins]:** When it comes to the question did something happen to his body, remind me of your answer?
>
> **[S.V.]:** Not that I know of. So like I'm not really sure.
>
> **[Bibbins]:** What makes you not sure?
>
> **[S.V.]:** I wasn't really paying attention to him, really, so that's why I'm not really sure.
>
> **[Bibbins]:** Okay. So even though you're not sure, do you have any specific memory of you having to do something to his body?
>
> **[S.V.]:** I think I have one memory where he tried to take my hand and make me touch him.
>
> **[Bibbins]:** Where?
>
> **[S.V.]:** Uhhh … his thingy.
>
> **[Bibbins]:** Okay. Is there a word that the teacher would use or a doctor would use?
>
> **[S.V.]:** [Sighs audibly.] I feel uncomfortable using it.

> **[Bibbins]:** Could you write it down?
>
> [S.V. appears to write "penis" on a white piece of paper using magic marker.]

Exhibit 101: CPC Interview, at approx. 13:56:35–13:57:50. S.V. described the event in more detail, including that the defendant moved her hand, placed it on his penis ("thing"), and that he tried to make her "squeeze" his penis. *Id.* at approx. 13:57:50–13:59:35. When asked if this happened once or more than once, S.V. was sure that it happened at least once, but was explicit that she was not sure if it happened more than once. *Id.* at approx. 13:59:25:–13:59:40.

Bibbins also asked clarifying questions about whether anything went inside S.V.'s body:

> **[Bibbins]:** … Well, help me to remember, did something go inside your body?
>
> **[S.V.]:** His finger.
>
> **[Bibbins]:** Okay. And did that happen one time or more than one time?
>
> **[S.V.]:** I think it happened more than one. I remember it happening maybe twice.

Exhibit 101: CPC Interview, at approx. 13:59:35–14:00:00. S.V. said that she remembered the defendant touching her "skin-to-skin" a "handful of times," not just the one or two times he inserted his finger into her vagina. *See id.* at approx. 14:00:30–14:00:50.

S.V. also said that she thought the defendant "might have gotten more confident" because she did not resist him, so "he would try to do different or other things" to her. Exhibit 101: CPC Interview, at approx. 14:00:40–14:01:10. She described a gradual progression in which the touching became more abusive and more frequent over the course of several months. *See id.* at approx. 14:01:10–14:02:15 & 14:03:50–14:04:50.

Bibbins asked S.V. to describe the last time the defendant sexually abused her:

> **[Bibbins]:** Tell me all about the very last time that it happened. Tell me everything like you told me about your day [during stage one of the interview].
>
> **[S.V.]:** So I went to school after I got ready and stuff like that. And I came home and my mom was still working – and she just turned to going in at 10:30 and getting off about 6:00 or 7:00, so he went a little bit earlier than he normally did. And he started moving my clothes a lot, like really quickly. And he finally started touching me and my thoughts broke – like I don't know what I was thinking, I was pretty much shaking, having a[n] anxiety attack.
>
> **[Bibbins]:** Okay. And when you said he started moving our clothes, where?
>
> **[S.V.]:** He started moved them off of my breasts and trying to get my pants down and stuff like that.

> **[Bibbins]:** Did your pants come down?
>
> **[S.V.]:** [Shakes head.] No.
>
> **[Bibbins]:** How come?
>
> **[S.V.]:** 'Cause I was sitting on them and I weigh a lot, so...
>
> **[Bibbins]:** Okay. What about your shirt?
>
> **[S.V]:** My shirt – since I didn't change really quickly, since I forgot he'd get home later after my mom got home ... I only had my bra and my regular shirt I wore to school, so he was able to move it like a lot easier and stuff like that.

Exhibit 101: CP Interview, at approx. 14:02:10–14:03:35. S.V. said that, during the last incident of abuse, the defendant touched both her breast and her genitals, "like usual," but he did not insert his finger that day. *Id.* at approx. 14:03:35–14:03:50.

Bibbins also asked some questions about family dynamics during the final minutes of the interview. Before the abuse started, S.V. had a good relationship with her father:

> **[Bibbins]:** What was your relationship with your dad like before this happened?
>
> **[S.V.]:** He used to help me with everything, tease me like my brothers would, kind of like a playful tease. And he'd pretty much spoil me like a princess almost. And so it was different from what I was used to, kind of.

Exhibit 101: CPC Interview, at approx. 14:04:50–14:05:20. Immediately before the abuse and after the abuse started, the defendant "started buying more things" for S.V. (like "snack food"), more than he had before. *Id.* at approx. 14:05:20–14:06:00.

Near the end of the interview, S.V. told Bibbins: "I would not ever lie about this because this is a really serious thing and nobody should ever lie about this." Exhibit 101: CPC Interview, at approx. 14:06:05–14:06:25. She also explained that part of the reason she had not wanted to get the defendant in trouble was because her family depended on the defendant for financial support. *See id.* at approx. 14:06:25–14:06:50. S.V. also explained that she knew about some past infidelity committed by the defendant, but that had nothing to do with this: "I would never take that as anger to do this to him … or to anyone else." *Id.* at approx. 14:07:30–14:07:55.

S.V. also said that part of why she decided it was important to disclose the abuse was that she had been "having nightmares of this happening to someone else because of him." *Id.* at approx. 14:06:50–14:07:00. When Bibbins asked S.V. if she knew of the defendant "doing this" to anyone else, S.V. said that she knew the defendant had

prior sex offenses, but she only knew some of the details. *See id.* at approx. 14:07:00–14:07:30.

Expert testimony demonstrated that Bibbins' interview was not leading or suggestive and complied with the national protocol.

Before testifying at the pre-trial hearings, Bibbins reviewed the entirety of the recorded interview. She testified that she did not use leading or suggestive questions. 2/7/2019 hrg. tr. p. 48, lines 17–22. And she testified that she was confident that she stayed within the bounds of national standards for forensically interviewing children. 2/7/2019 hrg. tr. p. 49, lines 2–8.

Katie Strub, a supervising forensic interviewer from a different facility who is not affiliated with Bibbins, testified at the February 2019 hearing. Strub had been a forensic interviewer for nine years and a supervisor for approximately four years as of the hearing date. 2/7/2019 hrg. tr. p. 71, lines 15–20. Strub has conducted more than 1,600 forensic interviews. 2/7/2019 hrg. tr. p. 72, lines 19–20. Strub's testimony validated and expanded on Bibbins' testimony concerning forensic interviews and the national standards. Strub reaffirmed that the rapport-building and substantive phases executed

by Bibbins were part of national guidelines and best practices. *See* 2/7/2019 hrg. tr. p. 74, line 2 — p. 91, line 5.

Strub also differentiated between questions that suggested new pieces of information to children versus questions which did not suggest new pieces of information to children. *See* 2/7/2019 hrg tr. p. 80, line 21 — p. 81, line 11. The example she gave for a suggestive question was asking a visibly injured child "Did someone hit you?" when the child had not brought up anyone hitting him or her. 2/7/2019 hrg. tr. p. 81, lines 3–8. This example is problematic because the interview is "the one who brought up hitting." 2/7/2019 hrg. tr. p 81, lines 3–8.

Strub explained that the "best practice is not to completely exclude closed questions." 2/7/2019 hrg. tr p. 82, lines 3–17. In other words, those questions are appropriate to clarify information, particularly when paired with a "more open" question. 2/7/2019 hrg. tr. p. 82, lines 3–17. The example Strub gave for this was: "Was anyone else in the room when you were hit?" 2/7/2019 hrg. tr. p. 82, lines 14–17. And then if the child said no, Strub would ask a "more open" question like: "Where was everyone else?" 2/7/2019 hrg. tr. p. 82, lines 14–17. Strub reaffirmed that, when a child discloses sexual

abuse, it is appropriate to ask follow-up questions defining terms the child uses (like "privates") and about whether the touching was over-the-clothes or skin-to-skin. 2/7/2019 hrg. tr. p. 82, line 18 — p. 83, line 7. Strub also explained that multiple-choice questions are permissible in the national protocol. 2/7/2019 hrg. tr. p. 84, lines 8–16. The example she offered was that she may ask a child who disclosed abuse: "Did [the offender] touch your clothes or your skin or something else?" 2/7/2019 hrg. tr. p. 84, lines 2–4.

Like Bibbins, Strub explained that part of the accepted national protocol involves taking a break that may involve checking with law enforcement or DHS to see if there are additional areas of inquiry the interview has not covered. *See* 2/7/2019 hrg. tr. p. 87, line 14 — p. 88, line 9; p. 90, lines 5–20. Stub estimated that, of her approximately 1,600 interviews, 95% involved a break. 2/7/2019 hrg. tr. p. 88, lines 21–24.

Finally, Strub reaffirmed that the purpose of a forensic interview is to gather facts from the child's perspective. 2/7/2019 hrg. tr. p. 86, lines 5–16. Strub, like Bibbins, emphasized that it is not her job to decide if a child is telling the truth or if they were abused. 2/7/2019 hrg. tr. p. 86, lines 17–23. And, again like Bibbins, Strub

explained that while interviewees are often referred from law enforcement or DHS, forensic interviewers "do not work for" law enforcement or DHS. 2/7/2019 hrg. tr. p. 86, lines 5–16.

About nine months after her CPC interview, S.V. said in a deposition that she did not remember many of the details regarding the abuse.

S.V. was deposed by a defense attorney in August of 2017. *See* S.V. Depo. At the time, she was 15 years old. S.V. Depo, p. 3, lines 24–25. She told the defense attorney conducting the deposition that, in November of 2016 (when she was 14), she disclosed to her guidance counselor that her father had "sexually touched" her. S.V. Depo., p. 4, lines 16–17. She said it had been going on for about six months. S.V. Depo p. 9, lines 4–8.

S.V. had known from a young age that her father was a registered sex offender for crimes committed against other children. S.V. Depo., p. 7, lines 16–20. Even though her mother had previously asked her if anyone had touched her inappropriately in the home, S.V. told her mother "no" because S.V. "didn't know how to tell her [mother] that it ha[d] been happening" and she "was always scared of what could happen" if she disclosed the abuse. S.V. Depo., p. 8, line 5 — p. 9, line 18.

S.V. did not provide specific dates of when the abuse happened, but thought it started in May, at night, when her mother was at work. S.V. Depo, p. 17, line 19 — p. 18, line 11. When asked for details, like the time of the abuse or days of the week, S.V. said: "I don't really remember. I blocked a lot of things out." S.V. Depo., p. 20, lines 5–11. Whenever the defense attorney pressed for details, S.V. said she did not remember:

> **Q.** Okay. So explain to us then, if you recall, the first time this would have happened.
>
> **A.** I don't really remember anything much. Can you repeat that?
>
> **Q.** Okay. You indicated -- at least the person who wrote this report indicated that you said that this had been happening for about six months when you first --
>
> **A.** Yes.
>
> **Q.** -- reported it. Do you recall the first time?
>
> **A.** No, not really.
>
> **Q.** Okay. Can you give us any reason as to why you would not be able to remember that?
>
> **A.** My therapist says sometimes the trauma that it has caused. I also block a lot of things and put it in the back of my head and then just forget it.

S.V. Depo., p. 21, line 18 — p. 22, line 9.

> **Q.** So when would be the -- what would be the first thing that you recall that was inappropriate between you and your father?
>
> **A.** I'm sorry. I've blocked a lot of these memories out. I can't really remember.
>
> **Q.** Okay. Have you been given any explanation from your therapist or anyone else about why you – why you're blocking things out?
>
> **A.** No.
>
> **Q.** When you speak to your therapist or other people, do you indicate to them that you're blocking things out?
>
> **A.** With my therapist, she would ask me like a question asking -- like just to make sure that I kept my story straight, asking what would happen sometimes. And sooner or later I started not remembering. And so I'd always answer some -- like at the beginning I'd answer with what would happen and then after a while I'd say I can't remember.

S.V. Depo., p. 24, line 14 — p. 25, line 7.

When the defense attorney asked S.V. who she had talked to about the sex abuse, S.V. told him that "[a]bout mid January [of 2017] was probably the last time I was able to tell somebody what happened"—seven or eight months before the deposition. S.V. Depo., p. 26, lines 7–14. During later questioning, S.V. agreed with the defense attorney that she had a "memory problem," though it is

unclear if S.V.'s memory difficulties were exclusive to the abuse or touched on other traumas. *See* S.V. Depo., p. 28, lines 10–15.

The deposition concluded with this exchange:

> **Q.** Okay. What is it that you do remember that would be inappropriate touching by your father?
>
> **A.** What do you mean?
>
> **Q.** Well, we're here because you have made an allegation that he has inappropriately touched you.
>
> **A.** Yes.
>
> **Q.** And we need to know -- I need to know from you what it is that he -- in your own words what he did that was inappropriate, if you recall.
>
> **A.** I don't recall. I really don't. I'm sorry.

S.V. Depo., p. 28, line 19 — p. 29, line 3

In March of 2018—about seven months after the deposition and about 14 months after the CPC interview—S.V. appears to have signed a letter that indicated she "wanted [her] dad to get help," and that she was "sorry for saying something happened because it **didn't** happen." 3/29/2018 S.V. Letter; App. 93 (emphasis original). The exact provenance of the letter is not disclosed in the record, and the defense attorney did not directly respond to the county attorney's assertion that it may have been the product of "enormous pressure specifically

by the woman who signed off as a witness on [the letter]"—apparently S.V.'s grandmother who had previously asked S.V. to "keep this in the family." 10/4/2018 hrg. tr. p. 25, line 23 — p. 26, line 8. The county attorney's assertion was supported by the police report included as an attachment to the minutes of testimony. Secure Attachment to Minutes, .PDF page 5; App. 16 (noting the grandmother "was trying to talk [S.V.] into dropping the allegations as [the grandmother] believes that this should be handled within the family").

The defendant's admissions corroborate S.V.'s statements to the CPC interviewer and contradict her alleged recantation.

During an investigation by a DHS contractor, the defendant admitted that the allegations regarding the sexual abuse of his daughter were true. 2/7/2019 hrg. tr. p. 12, line 22 — p. 13, line 13; *see also* Attachments to Minutes of Testimony, p. 9; App. 19.

ARGUMENT

I. The District Court Refused to Follow *Rojas* and Erred When It Excluded a Recorded Forensic Interview in Which a Child Disclosed that Her Father Had Sexually Abused Her on Multiple Occasions.

Preservation of Error

Error was preserved for this discretionary review concerning the admission of a recorded forensic interview. In its March 2019 order, the district court explained that it had "excluded the CPC interview." 3/13/2019 Ruling, p. 1; App. 142. To the extent one could read between the lines and argue that the court's ruling might suggest developments at trial could change the ruling, this is an untenable approach. Absent admission of the CPC interview, it will be difficult or impossible to obtain a guilty verdict. If the court refuses to definitively rule the tape inadmissible until trial, the State cannot obtain relief, as jeopardy will have attached and an acquittal will bar re-trial and appeal, even if the district court errs at law in refusing to admit the interview. This issue is appropriately heard at this juncture pursuant to the Supreme Court Order granting discretionary review. *See* 5/2/2019 Supreme Court Order; App. 159.

Standard of Review

While the district court believes it "ha[d] discretion" regarding the admission of this hearsay evidence, the Supreme Court disagrees. *See, e.g., State v. Jordan*, 663 N.W.2d 877, 879 (Iowa 2003) ("**Except in cases of hearsay rulings**, trial courts have discretion to admit evidence under a rule of evidence." (emphasis added)). "[A] district court has no discretion to deny the admission of hearsay if the statement falls within an enumerated exception, subject, of course, to the rule of relevance under rule 5.403...." *State v. Dullard*, 668 N.W.2d 585, 589 (Iowa 2003). This error alone may require reversal, as the district court erred at law with its belief that it had discretion to not admit hearsay that fell within an enumerated exception. *See id.*

In any event, under controlling case law, rulings on the admission of hearsay are reviewed for correction of errors at law. *See, e.g., State v. Paredes*, 775 N.W.2d 554, 560 (Iowa 2009); *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998).

Merits

A leading Iowa case, *Rojas*, unequivocally holds that statements made by children to forensic interviewers are admissible as

substantive evidence when the State can show five elements: trustworthiness, materiality, necessity, service of the interests of justice, and notice. *State v. Rojas*, 524 N.W.2d 659, 662–63 (Iowa 1994). Here, the district court excluded a CPC interview under facts indistinguishable from *Rojas*. The district court found that the CPC interview was material and that the defendant had adequate notice; waffled on the question of trustworthiness; found that the evidence was not necessary to the case; and found that admission of the evidence did not further the interests of justice. The district court's analysis of trustworthiness is refuted by the record and is—at best—inconsistent with *Rojas*, while the district court's analysis of necessity and the interests of justice cannot be reconciled with *Rojas* and thus constitutes an error at law. This Court should reverse.

On each of the contested elements,[3] the district court materially deviated from controlling case law:

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[3] The State views materiality and notice as uncontested. It seems beyond dispute that a CPC interview disclosing sexual abuse is material to a sexual abuse prosecution. *Rojas*, 524 N.W.2d at 663 ("Because the videotape contained [the victim's] statement that [the defendant] sexually abused [the victim], the materiality requirement is clearly met."). Similarly, the defendant did not dispute notice below, and the issue was litigated in two reported pre-trial hearings. *See* 10/4/2018 hrg. tr.; 2/7/2019 hrg. tr. The State does not address materiality or notice further in this opening brief.

Trustworthiness. In *Rojas*, the Iowa Supreme Court reviewed the tape of a similar forensic interview and concluded it had "sufficient circumstantial guarantees of trustworthiness." *Rojas*, 524 N.W.2d at 663. The Supreme Court's reasoning was based on five things: (1) how "[t]he interviewer asked [the victim] open-ended, non-leading questions"; (2) that the victim provided corroborating details, like where other family members were when the abuse happened; (3) that the victim described things beyond the normal understanding of "the average ten-year-old," like how "something white c[ame] from her father's penis"; (4) the victim's statements were consistent; and (5) the video was "more reliable than many other forms of hearsay because the trier of fact could observe for itself how the questions were asked, what the declarant said, and the declarant's demeanor." *Id.* at 663.

All or virtually all of the considerations that led the Supreme Court in *Rojas* to find a CPC tape trustworthy are also present in this case:

1. ***Open-ended/non-suggestive questions.*** Throughout the interview of S.V., interviewer Bibbins asked open-ended questions and sought clarification or confirmation when appropriate, consistent with the national protocol. *See* Exhibit 101: CPC Interview; Exhibit 1: National Children's Advocacy Center Forensic Interview Structure Summary;

App. 115; Exhibit 100: National Children's Advocacy Center Forensic Interview Structure Literature; App. 116–141. At the February 2019 hearing, the State questioned Bibbins extensively about her interview questions, including references to specific time-stamps in the video: that examination covers more than 30 pages of transcript and spells out in exacting detail why the questions were not suggestive. *See* 2/7/2019 hrg. tr. pp. 21–49; 61–66. Bibbins' views were also supported by the more generalized expert testimony of Strub, who is a supervising forensic interviewer at another center and validated Bibbins's use of the national protocol. *See* 2/7/2019 hrg. tr. pp. 71–92.

2. ***Corroborating details.*** In *Rojas*, the Supreme Court found the child's CPC interview trustworthy because she provided information about her clothing during the abuse, provided "a fairly detailed account of the abuse itself," and "remembered details such as where other family members were when the abuse occurred." *Rojas*, 524 N.W.2d at 663. All three corroborating details are present here, as well. First, S.V. testified that she tried to wear multiple layers of clothing to dissuade the abuse, but that the defendant nonetheless untied the drawstring on her pajamas and then slipped his hands into her underwear. *See* Exhibit 101: CPC Interview, at approx. 13:42:10–13:42:50; 13:44:30–13:45:20. Second, she provided extensive details about the abuse, including where the defendant touched her (the vaginal area and skin surrounding the vaginal area), that it was skin-to-skin, that it happened more than once, that it happened in the bedroom at night during a six- or seven-month period, and that the defendant made her squeeze his penis at least once. *See id.* at approx. 13:39:10–13:50:15; 13:59:25–14:04:50. And finally, S.V. specifically remembered details like where other family members were during the abuse: her mother was at work and her brother was asleep in his room. *See id.* at approx. 13:49:00–13:49:20. These corroborating details, just like those offered by the child in *Rojas*, demonstrate the trustworthiness of the interview. *See* 524 N.W.2d at 663.

3. ***Description outside the normal understanding of a child.*** The fourteen-year-old victim here likely had a better understanding of sexual anatomy than the ten-year-old who testified in *Rojas*. A close parallel, however, is that S.V. used age-appropriate vocabulary to describe the abuse: she was visibly reluctant to use the word "penis," instead referring to the defendant's "thing"; and she said the defendant made her hand "squeeze" his "thing," instead of referring to masturbation or more-adult slang terms for manual stimulation of a male sex organ. *See* Exhibit 101: CPC Interview, at approx. 13:56:35–13:59:35. The description (including the vocabulary) offered by S.V. lends itself toward trustworthiness; "thing" is one of the specific instances of child-specific vocabulary found persuasive by the Court in *Rojas*, 524 N.W.2d at 663. And, as in *Rojas*, the interviewer here did not introduce the adult term for "thing," but rather made the child supply the term: here by writing it down. Exhibit 101: CPC Interview, at approx. 13:56:35–13:57:50.

4. ***Consistent statements.*** S.V.'s statements throughout the interview were consistent, both in terms of the details she offered and her description of the abuse. *See generally* Exhibit 101: CPC Interview. Notably, S.V.'s statements were consistent both before and after the six-minute break in the middle of the interview, after which Bibbins asked clarifying questions about some of the topics they had previously discussed. This supports admission of the recorded interview. *Rojas*, 524 N.W.2d at 663.

5. ***Reliability.*** As in *Rojas*, admitting the video recording would permit the jury to "observe for itself how the questions were asked, what the declarant said, and the declarant's demeanor." *Rojas,* 524 N.W.2d at 663. The statements also have a "ring of veracity," in part because they were corroborated by the defendant's confession to a DHS contractor. *See id.* at 663; 2/7/2019 hrg. tr. p. 12, line 22 — p. 13, line 13. In the district court, the defendant argued rather vociferously that *Idaho v. Wright*, 497 U.S. 805 (1990), barred consideration of the corroborating confession. *See* 2/7/2019 hrg. tr. p. 9, lines 11–22; p. 102, lines 15–19.

> But the Iowa Supreme Court correctly recognized in *Rojas* that *Wright* is a Confrontation Clause case, not a hearsay case. 524 N.W.2d at 664 (noting the values underlying the Confrontation Clause and hearsay rules may be similar, "but are not to be equated with each other"). To the extent the district court accepted the *Wright* argument from the defense, this too is an error that would independently warrant reversal. *See* 3/13/2019 Ruling, p. 6; App. 147 ("The fact that an independent witness will testify that the Defendant made admissions does not make this CPC interview admissible."). Most courts expressly recognize that corroboration can and should be considered when evaluating the reliability of residual hearsay. *See Sanders v. State*, 364 P.3d 412, 426 & n.63 (Alaska 2015) ("Permitting trial courts to consider extrinsic corroboration appears to be the majority rule in jurisdictions which have specifically addressed the issue.") (also collecting cases).[4]

Compare Rojas, 524 N.W.2d at 633.

It is difficult to understand why the district court did not follow *Rojas* in its analysis of the trustworthiness factor. Contrary to the factors set forth by the Supreme Court in *Rojas*, the district court appears to have elevated its view of appropriate interviewing practices above not only those of trained forensic interviewers, but the district court also appears to have privileged its personal views

[4] The State, like the Alaska Supreme Court in *Sanders*, acknowledges that there is some contrary authority. *See* 364 P.3d 426 n.63. Because there is ample reason to reverse the district court's ruling here without deciding the corroboration issue, this Court could leave the question for another day.

above the Iowa Supreme Court's holding in *Rojas*. This is not permissible:

> [I]t is the prerogative of this court to determine the law, and we think that generally the trial courts are under a duty to follow it as expressed by the courts of last resort, as they understand it, even though they may disagree. If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves.

State v. Eichler, 83 N.W.2d 576, 578 (Iowa 1957).

The district court's specific criticisms of the interview are somewhat difficult to understand. At the very least, however, they do not overpower the holding of *Rojas*:

First, the district court complained that "at around 17:40 on the interview, the interviewer asks specifically what the Defendant did in touching the alleged victim." 3/4/2019 Ruling, p. 4; App. 145. The exchange at issue asked S.V. whether she was touched over the clothes or under the skin, then asked her to describe a specific time it happened. Exhibit 101: CPC Interview, at approx. 13:42:00–13:42:30. These questions came after S.V. had already volunteered that the defendant was "sexually and verbally touching me," and that it happened "once or twice a week" for months. *See id.* at approx. 13:37:10–13:38:50; 13:39:10–13:40:00. There was nothing leading or

suggestive about this exchange. S.V. is the one that introduced sexual touching into the conversation; not the interviewer. *See id*. at approx. 13:39:10–13:39:50; 2/7/2019 hrg. tr. p. 33, lines 6–22.

Second, the district court complained that the interviewer "asked specific questions at about 25:00 regarding what happened to the Defendant's body." 3/4/2019 Ruling, p. 4; App. 145. This is the exchange at issue:

> **[Bibbins]:** Did something happen to your dad's body?
>
> **[S.V.]:** No. Not that I know of.
>
> **[Bibbins]:** Did he want something to happen to his body?
>
> **[S.V]:** I think he really actually wanted my body to touch him.
>
> **[Bibbins]:** Okay. What makes you think that?
>
> **[S.V.]:** Because he tried to get closer to me.
>
> **[Bibbins]:** Okay. Did he ever say he wanted you to do something to his body?
>
> **[S.V.]:** No.
>
> **[Bibbins]:** Did he ever have your body do something to his body?
>
> **[S.V.]:** I don't really remember that part. It's fuzzy a little bit.

Exhibit 101: CPC Interview, at approx. 13:49:40–13:50:15. This dialogue was not suggestive or leading. In addition, Bibbins circled back to the issue later, in a non-suggestive way, to ensure she understood S.V.'s answers. *See id.* at approx. 13:56:35–13:57:50 ("**[Bibbins]:** When it comes to the question did something happen to his body, remind me of your answer?"). And more importantly, even if—out of a 45-minute interview—there is a single arguably suggestive question, the remedy is exclusion of that portion of the interview, not exclusion of the whole thing.

Third, in its trustworthiness analysis, the district court notes that S.V. was "was told there was a two-way mirror and that Sean (ph) and Jeremy were behind it to help." 3/9/2019 Ruling, p. 4; App. 145. To be clear, what Bibbins told S.V. was that "Sean and Jeremy are back there [behind the mirror] and while they're back there, they're going to help make sure that today we talk through as many topics as we can, so they might kind of help me out here." Exhibit 101: CPC Interview, at approx. 13:32:15–13:32:40. It is unclear what about this statement, in the district court's view, renders S.V.'s statement untrustworthy. To the extent the district court suggests it would be better to lie to children and not tell them about the two-way mirror or

people watching the interview, this Court should not require trained professionals to lie to traumatized and abused children.

This case is on all fours with the trustworthiness analysis in *Rojas*. The complaints identified by the district court fundamentally misread the record and are at best immaterial. The recorded interview was trustworthy under controlling case law, and the district court's ruling should be reversed. *See Rojas*, 524 at 663.

Necessity. Evidence is "necessary" under the residual-hearsay analysis when a child-victim does not remember the abuse or cannot describe the abuse, and there are not alternative means of offering the evidence. *See State v. Neitzel*, 801 N.W.2d 612, 623 (Iowa Ct. App. 2011) ("The admission of the evidence was necessary because [the victim] was of a young age when the abuse occurred and unable to testify to the abuse at trial years later, making the close-in-time video recitation from [the victim] the most probative evidence of the abuse that occurred."); *accord Rojas,* 524 N.W.2d at 663 (finding evidence necessary when victim recanted); *State v. Kone*, 562 N.W.2d 637, 638 (Iowa Ct. App. 1997) (same). Materially identical circumstances prompted the State to offer the recorded interviews in this case: the victim is expected to testify either that she cannot remember the

abuse or to recant, and controlling cases recognize either is sufficient to meet the "necessity" requirement. 10/4/2018 hrg. tr. p. 11, lines 15–23; *see Neitzel*, 801 N.W.2d at 623 (lack of victim memory rendered interview necessary); *Kone*, 562 N.W.2d at 683 (recantation rendered interview necessary); *Rojas*, 524 N.W.2d at 663 (same); *see also State v. Cagle*, No. 17-1663, 2019 WL 1936271, at *1 (Iowa Ct. App. May 1, 2019) (child victim "did not remember much" about the abuse, CPC interview admissible under *Rojas*).

As in most sex-abuse cases, the only available witnesses to the sexual abuse here were the defendant and the victim. *See State v. Tracy*, 482 N.W.2d 675, 682 (Iowa 1992) ("Because of the nature of child sexual abuse, the only direct witnesses to the crime will often be the perpetrator and the victim. Consequently, much of the State's proof will necessarily have to be *admissible* hearsay statements made by the victim to relatives and medical personnel." (emphasis original)). The evidence was necessary.

Below, the district court asserted that the recorded CPC interview was not "necessary" because, "[i]n her deposition, [the victim] was not asked specific questions about what happened." 3/13/2019, p. 4; App. 145. This assertion is indefensible, given the

record below. The context for the victim's repeated assertions that she did not remember the abuse or had "blocked lot of th[o]se memories out" are clearly in reference to the charged sexual abuse. *See* S.V. Depo., p. 21, line 18 — p. 29, line. The final exchange in the deposition was the defense attorney asking the victim to tell him in "[her] own words what [the defendant] did that was inappropriate," and the victim's response was: "I don't recall. I really don't. I'm sorry." S.V. Depo, p. 28, line 19 — p. 29, line 3. The district court's assertion that the victim was never asked "specific questions" about the abuse does not withstand scrutiny and this error alone would independently require reversal.

But, even if the victim here (contrary to her sworn deposition testimony or the unsworn letter) was able or willing to give limited answers regarding the sexual abuse at trial, the Iowa Court of Appeals would still find the interview necessary under Rule 5.807.[5] By way of example, this was the holding of *Green*, a 2005 case:

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[5] The State acknowledged this possibility during its reply argument at the February 2019 hearing, noting that it would only seek to admit the interview if the victim's trial testimony was at odds with or less complete than the CPC interview. *See* 2/7/2019 hrg. tr. p. 103, line 22 — p. 105, line 20. The State maintains in this brief that the existing record was sufficient for a ruling permitting admission under those circumstances.

> While [the victim] was able to answer most of the State's questions on direct examination, her answers were brief and provided only the basic details of the alleged abuse. [The victim] was unable to answer or clearly answer more specific and detailed questions, particularly those advanced during cross-examination. ... Having viewed the videotape, we agree with the district court's assessment that the videotaped interview provided some responses that could not be successfully elicited from [the victim] during trial, and served to clarify and place in context other answers.

State v. Green, No. 04-0339, 2005 WL 1629993, at *2 (Iowa Ct. App. July 13, 2005). Given S.V.'s very limited recollection in her August 2017 deposition, as well as her alleged partial recantation in March of 2018 there is no doubt that the information elicited during the December 2016 CPC interview was closer to the events in question and more detailed than her subsequent statements. There is no question that more, better-detailed information was elicited during the CPC interview than the deposition. *Compare* Exhibit 101: CPC Interview, *with* S.V. Depo. The reasoning of *Green* and related cases applies with full force to this victim on these facts. *See also Neitzel*, 801 N.W.2d at 623 ("The admission of the evidence was necessary because [the victim] was of a young age when the abuse occurred and unable to testify to the abuse at trial years later, making the close-in-

time video recitation from [the victim] the most probative evidence of the abuse that occurred."); *Hopwood*, 2015 WL 6509746, at *4 (finding necessity in part because victim "was unwilling or unable to testify about certain incidents, [and therefore] the videotape was the most probative evidence about these incidents"). The evidence was necessary.

The interests of justice. *Rojas* remains the touchstone for the interests-of-justice analysis and the record here is virtually indistinguishable from the record in *Rojas*. In both cases, the forensic interview was conducted appropriately, the child-sex-abuse victim used age-appropriate language, the child offered some corroborating details, and the core of the statements was consistent throughout the interview. *Compare* Exhibit 101: CPC Interview, *with Rojas*, 524 N.W.2d at 663. In *Rojas*, as here, "admitting the evidence serves the interests of justice" and "advances the goal of truth-seeking." 524 N.W.2d at 663.

Numerous Court of Appeals opinions support with this conclusion. *See, e.g., State v. Cagle*, No. 17-1663, 2019 WL 1936271, at *7 (Iowa Ct. App. May 1, 2019); *State v. State v. Hopwood*, No. 13-1479, 2015 WL 6509746, at *5 (Iowa Ct. App. Oct. 28, 2015); *State v.*

Olds, No. 14-0825, 2015 WL 6510298, at *7–8 (Iowa Ct. App. Oct. 28, 2015); *State v. Green*, No. 04-0339, 2005 WL 1629993, at *2 (Iowa Ct. App. July 13, 2005); *In re A.J.S.*, No. 03-1675, 2004 WL 796185, at *2 (Iowa Ct. App. Apr. 14, 2004). In short, providing jurors with the recording of a minor victim's forensic interview furthers the interests of justice in a child-sex-abuse prosecution.

Rather than inquire whether admission of the interview would advance the goal of truth-seeking, per *Rojas*, the district court's sole rationale for finding admission would not further the interests of justice was that "[t]he interview [wa]s not … conducted for the purpose of creating testimony." 10/9/2018 Ruling, p. 3; App. 99. This appears to erroneously conflate elements of a Confrontation Clause analysis with the residual-hearsay analysis under Rule 5.807 and *Rojas*. The likeliest explanation for the district court going off track here is because the defendant argued about the Confrontation Clause extensively at the hearings below, in a supplement between the October and February hearings, and in a response to the State's 5.104 motion. *See* 10/4/2018 hrg. tr. p. 8, line 21 — p. 11, line 23 (citing *Bentley* and *Crawford*, complaining that *Neitzel* did not cite *Crawford*); 10/23/2018 Defendant's Response; App. 104–109

(arguing the court's prior ruling definitively resolved the evidentiary question, reiterating Confrontation arguments); 1/9/2019 Defendant's Additional Memorandum; App. 111–114 (same); 2/7/2019 hrg. tr. p. 101, line 13 — p. 103, line 19.

But there is no Confrontation Clause issue in this case: the victim "is going to testify at trial," and—for purposes of Confrontation—it does not matter if she recants or cannot remember the abuse. 10/4/2018 hrg. tr. p. 17, lines 15–21.[6]

"[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his [or her] prior testimonial statements." *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004). In other words, "The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Id.* at 59 n.9; *accord State v. Froning*, 328 N.W.2d 333, 336 (Iowa 1982) ("Where the declarant whose testimony the state wishes to introduce is present at trial, gives his sworn

[6] Even if the State did not plan to call the victim at trial, and her lack of memory or refusal to testify rendered her "unavailable," the Confrontation Clause would be satisfied by the defendant's opportunity to cross-examine her in deposition. *See State v. Holland*, 389 N.W.2d 375, 379 (Iowa 1986); *see also* Iowa R. Evid. 5.804(b)(1).

testimony at trial, and is subject to cross-examination by the defense …, the Confrontation Clause is satisfied."). Under similar circumstances, where a victim testified at trial and a CPC interview was admitted, the Court of Appeals has held "[t]he Confrontation Clause issue is easily resolved," for the foregoing reason. *State v. Cagle*, No. 17-1663, 2019 WL 1936271, at *6 (Iowa Ct. App. May 1, 2019) (victim "did not remember much" about the abuse); *see also State v. Hopwood*, No. 13-1479, 2015 WL 6509746, at *2, 5 (Iowa Ct. App. Oct. 28, 2015) (rejecting identical argument on virtually identical facts, where victims "did not remember many of the facts of the case").

Despite the case law's clear resolution of the Confrontation issue, the defense below urged that any time "an out-of-court statement is testimonial, then [Rule] 5.807 of residual hearsay clause is not applicable." 2/7/2019 hrg. tr. p. 101, lines 20–25. This is false. *See, e.g.*, *Crawford*, 541 U.S. at 59 n.9; *Froning*, 328 N.W.2d at 336; *Cagle*, 2019 WL 1936271, at *6; *Hopwood*, 2015 WL 6509746, at *2, 5. And while it is not possible to affirmatively prove that this error by defense counsel independently caused the district court to err in its interests-of-justice analysis, the ruling's repeated use of

Confrontation-Clause terminology suggests the issue did infect and corrupt the analysis. *See* 3/13/2019 Ruling, pp. 4–6; App. 145–147 (discussing whether the interview is "conducted for the purpose of creating testimony," whether law enforcement is involved, finding interviews "not … testimonial," noting the lack of cross-examination). This error at law requires correction.

As a final coda to the Confrontation Clause diversion in the district court, it seems the court unknowingly made the one finding that would permit admission of the CPC interview even if the victim did not testify at trial or deposition, by finding that "[t]he interview is not … conducted for the purpose of creating testimony." 10/9/2018 Order, p. 3; App. 99. The United States Supreme Court surveyed its Confrontation Clause case law in 2015, including *Crawford* and its progeny, and explained that the Clause can only be used to bar evidence if the "primary purpose" of questioning was to "create[e] an

out-of-court substitute for trial testimony."[7] *See Ohio v. Clark*, 135 S. Ct. 2173, 2179–80 (2015) (citing and quoting *Michigan v. Bryant*, 562 U.S. 322, 6374 (2011)). In its March 2019 ruling, the district court used almost the precise language of *Crawford* et al., finding that CPC interviews "are not (and should not be considered) testimonial." 3/13/2019 Ruling, p. 5; App. 146 (parentheses original). Though perhaps counterintuitive, given the outcome of the district court's ruling, this fact-finding necessarily absolves any lingering Confrontation concern, even if the victim had refused examination at a deposition and refused to appear for trial (neither of which are the case here).

Finally, one additional consideration drives home that admitting the victim's CPC interview furthers the interests of justice and truth-seeking, even though that consideration may fall outside the somewhat rigid and driven-by-case-law analysis above. During

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[7] *Clark* also recognized that, even if the primary purpose behind questioning is testimonial, the admission of hearsay is not barred if it would have been admissible when the Constitution was adopted. 135 S. Ct. at 2182 (hearsay statements by young children were admissible at common law and do not violate the Confrontation Clause, even if otherwise testimonial); *see also Giles v. California*, 554 U.S. 353 (2008) (forfeiture by wrongdoing). The State does not urge that exception to Confrontation here, as the victim was in her teens.

the course of this prosecution, family members have put "enormous pressure" on S.V. to say the abuse didn't happen. *See* 10/4/2018 hrg. tr. p. 25, line 23 — p. 26, line 8. In the November 2016 complaint and affidavit, police noted that the defendant's grandmother, Jo Holmes, "was trying to talk [S.V.] into dropping the allegations as [Holmes] believes this should be handled within the family." Attachment to Minutes, p. 6; App. 16. In an unsurprising twist, Holmes was also the "witness" to the typewritten March 2018 letter that was allegedly signed by S.V. and allegedly recants the allegations. 3/29/2018 S.V. Letter; App. 93. It would thwart the fundamental purposes of the criminal justice system to permit a defendant to successfully exclude prior reliable statements disclosing sexual abuse merely because the defendant's mother (the victim's grandmother) was able to coerce an abused child to remain silent. To hold otherwise would give abusers a free pass if they are able to further manipulate the power-disparity between the abusing adult and the abused child by enlisting beloved family members as co-conspirators to the obstruction of justice. This Court should not bless a perversion of the criminal justice system that rewards efforts to coerce sexually abused children into keeping sexual abuse "within the family."

CONCLUSION

This Court should reverse the district court's order excluding the recorded CPC interview and remand (a) with directions to admit the recording at trial or (b) direct that, once the victim testifies that she cannot remember the abuse or that it did not happen, the recording shall be admitted at trial.

CONDITIONAL REQUEST FOR ORAL ARGUMENT

If this Court believes oral argument will assist its resolution of the issue presented, the State requests to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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