No. 19-1357

IN THE

Supreme Court of the United States

ROBERT ANGEL PEREZ,

Petitioner,

v.

COLORADO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

INTRODUCTION AND SUMMARY OF ARGUMENT

Evidentiary privileges that limit defendants' access to medical and counseling records strike at the heart of our adversarial system. "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v.*

[1] Counsel of record for the parties have received timely notice that this brief would be filed and have consented to its filing. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

South Carolina, 547 U.S. 319, 324 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). Exclusion of "exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Crane*, 476 U.S. at 690-91 (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984)). "The ends of criminal justice [are] defeated" when criminal "judgments [are] founded on a partial or speculative presentation of the facts." *Taylor v. Illinois*, 484 U.S. 400, 409 (1988) (quoting *United States v. Nixon*, 418 U.S. 683, 709 (1974)).

This Court has held that at least some evidentiary privileges "cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice." *Nixon*, 418 U.S. at 713 (executive privilege); *see Pennsylvania v. Ritchie*, 480 U.S. 39, 57-58 (1987) (privilege relating to child protective service records); *Roviaro v. United States*, 353 U.S. 53, 59, 65 (1957) (informer's privilege). The "interest in preserving confidentiality," though "weighty … and entitled to great respect," must "yield to the demonstrated, specific need for evidence." *Nixon*, 418 U.S. at 712-13.

In *Pennsylvania v. Ritchie*, this Court sought to explain when a privilege runs afoul of a defendant's constitutional due process, confrontation, and compulsory process rights. *Ritchie*, however, failed to establish the outer limits of a defendant's constitutional right to obtain privileged records. As the Supreme Court of Michigan put it, "[t]he numerous writings that contributed to the plurality *Ritchie* holding and the factors discussed, but not resolved therein, make

it difficult to divine a precise formula" for evaluating whether a defendant's rights trump a "state's pronounced interest in its evidentiary counseling privileges." *People v. Stanaway*, 521 N.W.2d 557, 574 (Mich. 1994). That uncertainty has resulted in a sharp divide across the federal and state courts about whether and in what circumstances defendants are entitled to in camera review of privileged mental health records to see whether they contain exculpatory evidence. *See* Pet. 9-16; Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 86 Or. L. Rev. 1, 4, 17-24 (2007).

Amicus agrees with Petitioner that this case presents an ideal opportunity for this Court to resolve what *Ritchie* left undecided. Amicus submits this brief to highlight why obtaining health records is of great practical importance to criminal defendants in a variety of contexts.

Material exculpatory information often comes only in the form of professional diagnoses or observations buried in health records. When that information undermines a witness's capacity for truthfulness, it is important for the defendant to be able to use it to impeach key prosecution witnesses. Such information carries even greater significance where, as here, the case against the defendant turns on the victim's mental state. That often will be necessary in homicide cases because the defendant may argue he acted in self-defense or that the victim took her own life. In this way, reviewing mental health records is most critical in the cases with the most serious penalties.

Evidentiary privileges thus can stand in the way of the defendant having access to evidence necessary to a potentially meritorious defense. If defendants cannot overcome that privilege, there can be little doubt that a substantial number of innocent defendants will end up convicted.

To be sure, evidentiary privileges serve important substantive values, and it is important to proceed with care when seeking to overcome such a privilege. But in camera review by a trial court is a well-established, reliable procedure by which a defendant's constitutional rights can be vindicated while largely preserving the interests the privilege is designed to protect.

Here, the Colorado Court of Appeals denied that vital in camera review after demanding that Mr. Perez meet an unduly onerous standard for showing that his wife's mental health "records are likely to contain exculpatory information necessary for [his] defense that the victim committed suicide." Pet. App. 13a. That meant that a judge could not even look at the records in camera to see whether they might help Mr. Perez establish that his wife committed suicide. Such an approach cannot be squared with due process or the guarantees of the Confrontation and Compulsory Process Clauses, and it warrants this Court's review.

ARGUMENT

I. Mental Health Records Often Contain Evidence That Is Critically Important To Criminal Defendants.

Mental health issues are common. In 2017 and 2018, nearly 20% of the U.S. adult population experienced some mental illness. *See* Nat'l Institute Of Mental Health, *Mental Illness*, https://www.nimh.nih.gov/health/statistics/mental-illness.shtml (last updated Feb. 2019); Nat'l Alliance On Mental Illness, *Mental Health By The Numbers*, https://www.nami.org/mhstats (last updated Sept. 2019). Many juveniles, too, experience mental health challenges. *See* Nat'l Alliance On Mental Illness, *supra* (in 2016, 7.7 million youth aged 6-17 had mental health disorders).

Fortunately, many individuals receive treatment for their mental health issues. In both 2017 and 2018, approximately 43% of the adults experiencing mental illness (around 20 million people) received treatment. Nat'l Institute Of Mental Health, *supra*; Nat'l Alliance On Mental Illness, *supra*. The rate of treatment is even higher among youth aged 6-17, with nearly 51% receiving treatment. Nat'l Alliance On Mental Illness, *supra*.

As mental health treatment has become more prevalent, mental health records have come to play an important role in criminal proceedings. For many of the witnesses and victims involved in those proceedings, there will be detailed mental health records that

might contain information material to a criminal defense.

One way these records are useful to defendants is that they can reveal an underlying psychological reason that a prosecution witness may not be telling the truth. Courts regularly emphasize the importance of reviewing these records, precisely because they can "disclose information especially probative of a witness' ability to comprehend, know or correctly relate the truth." *State v. Peeler*, 857 A.2d 808, 841 (Conn. 2004).

For example, if a witness's health records reveal a diagnosis of a mental or behavioral condition that undermines the "witness's ability to recall, comprehend, and accurately relate the subject matter of the testimony," then that evidence will aid the jury in evaluating the credibility of the witness's accusation. *Commonwealth v. Barroso*, 122 S.W.3d 554, 563 (Ky. 2003); *see* Fishman, *supra,* at 44-45 & nn. 169-70. "Certain forms of mental disorder have high probative value on the issue of credibility." *Barroso*, 122 S.W.3d at 562 (quoting *United States v. Lindstrom*, 698 F.2d 1154, 1160 (11th Cir. 1983)). "On their face, [certain] diagnoses bear on [a witness's] 'ability to perceive or to recall events or to testify accurately.'" *United States v. Robinson*, 583 F.3d 1265, 1272 (10th Cir. 2009) (quoting *United States v. Butt*, 955 F.2d 77, 82 (1st Cir. 1992)); *Lindstrom*, 698 F.2d at 1166 ("The cumulative evidence of the psychiatric records suggests that the key witness was suffering from an ongoing mental illness … which might seriously affect her ability 'to know, comprehend and relate the truth.'"

(quoting *United States v. Partin*, 493 F.2d 750, 762 (5th Cir. 1974))).

Testing witness credibility is particularly important where the victim "and the accused are … the only ones present when the crime was committed," *Kennedy v. Louisiana*, 554 U.S. 407, 444 (2008), because that means there will be "no [other] witnesses except the victim." *Ritchie*, 480 U.S. at 60. Those cases will often turn "upon the jury's assessment of the relative credibility of opposing witnesses." *Ex parte Thompson*, 153 S.W.3d 416, 422 (Tex. Crim. App. 2005) (Cochran, J., concurring). In those cases, it is essential to review material to see if it bears on the credibility of a key witness. *See Robinson*, 583 F.3d at 1274 ("Where the witness the accused seeks to cross-examine is the 'star' government witness … the importance of full cross-examination to disclose possible bias is necessarily increased." (quoting *Greene v. Wainwright*, 634 F.2d 272, 275 (5th Cir. 1981))).

That dynamic arises frequently in cases involving allegations of sexual assault. Mental health records might contain evidence of recantation, mental illnesses or behavioral difficulties, or other indications that the complainant had an impaired ability to perceive or relate events. *See* Fishman, *supra*, at 41-46; *Ritchie*, 480 U.S. at 60; *State v. Johnson*, 102 A.3d 295, 309-10 (Md. 2014) (detailing circumstances where mental health records might "contain exculpatory evidence"); *Stanaway*, 521 N.W.2d at 576-77 (in camera review appropriate to determine whether "the complainant suffered sexual abuse by her biological

father before this allegation of abuse, the nonresolution of which produced a false accusation").[2] But the need to assess the veracity of a key witness also arises with other crimes. *See Robinson*, 583 F.3d at 1271-73 (review of CI's medical records was appropriate "[b]ecause the CI was the only witness who testified about Robinson's [gun] possession and because his testimony was essentially uncorroborated, the CI's credibility was of paramount concern"); *State v. Neiderbach*, 837 N.W.2d 180, 197 (Iowa 2013) (review of co-defendant's mental health records was appropriate in child endangerment case where defendant's defense theory was that "certain injuries may have been inflicted by [the co-defendant] instead of him").

This *indirect* use of medical health records—to undermine prosecution witnesses—is not the only way defendants seek to use these records. Defendants also directly use mental health records when their defense theory requires establishing the mental state of the victim. This more fundamental use of mental

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[2] As we recently explained in *Friend v. Indiana*, reviewing the victim's mental health records was important in that case—which involved allegations of sexual abuse of a child—because of the "well-developed body of scientific research" recognizing "the 'problem of unreliable, induced, and even imagined child testimony.'" NACDL Amicus Br. at 6, No. 19-1214 (U.S. May 14, 2020) (quoting *Kennedy*, 554 U.S. at 443). Even so, resolution of the question presented may prove more straightforward in this case, as the Court need not consider the interplay between the unreliability of child testimony, on the one hand, *see Kennedy*, 554 U.S. at 443-44, and the heightened "interest in 'the protection of minor victims of sex crimes from further trauma and embarrassment,'" on the other, *Maryland v. Craig*, 497 U.S. 836, 852 (1990) (quoting *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 607 (1982)).

health records arises in homicide cases where the defendant may try to show the victim committed suicide or that he acted in self-defense.

Mental health records can be used in multiple ways to establish a likelihood that the victim committed suicide. In some cases, the records may reflect that the victim had been "prescribed [a particular] anti-depressant …, which can worsen a depressed person's symptoms." *Jensen v. Clements*, 800 F.3d 892, 906-07 (7th Cir. 2015); *see Cox v. State*, 849 So. 2d 1257, 1272 (Miss. 2003) ("The relevance of the presence of an antidepressant in the victim's urine is irrefutable where [the] defense was that [the victim] committed suicide."); *Consalvo v. State*, 697 So. 2d 805, 814 n.12 (Fla. 1996) ("defense counsel obtained the victim's mental health records" to assess "the victim's psychological background" and "the effects of any medication she may have been taking").

In other cases, mental health records may show that the victim had previously attempted suicide (or experienced suicidal ideation). That information is material to the defense because "[i]t is reasonable to believe that a person who has attempted suicide in the past may attempt suicide again." *State v. Jaeger*, 973 P.2d 404, 406-07 (Utah 1999) (records "contained statements … admitting that [victim] had attempted suicide in the past"); *see State v. Stanley*, 37 P.3d 85, 89-90 (N.M. 2001) (records reflected that victim "had attempted suicide on at least six occasions" and had "expressed to his counselor suicidal ideations"); *Consalvo*, 697 So. 2d at 814 n.12 (defense counsel used information "that the victim had been hospitalized for

a mental illness and … had threatened to kill herself by stabbing herself to death").

Finally, the records can establish that the victim "was suffering from a major depressive disorder," such that the victim "posed a significant suicide risk." *See Jensen*, 800 F.3d at 907; *Moses v. Payne*, 555 F.3d 742, 749 (9th Cir. 2009) (medical providers explained that victim "had been treated for substance abuse and depression"); *Stanley*, 37 P.3d at 89 (psychological records showed victim "had been diagnosed as suffering from schizophrenia and bouts of severe depression"). Indeed, diagnostic information often will be present because nearly 50% of people who die by suicide have a *diagnosed* mental health condition and upwards of 90% show symptoms. Nat'l Alliance On Mental Illness, *supra*.

All of these examples show that mental health records must be consulted to determine whether suicide was a likely cause of the victim's death. And in fact, these records are so critical that "counsel pursuing a suicide theory as a defense" are urged to "attempt to locate any medical or psychiatric documents [of the deceased] tending to support that theory as part of a reasonable investigation." *State v. Howard*, 59 N.E.3d 685, 696-97 (Ohio Ct. App. 2016).

A defendant also frequently needs to establish the victim's mental state in self-defense cases. Again, the records are not needed to assess "the victim's ability to observe, remember, and recount an event," but to establish the victim's "psychological state during the fatal encounter." *State v. Fay*, 167 A.3d 897, 911

(Conn. 2017). That is because "[t]he mental and emotional condition of the deceased is a central element" of the self-defense claim. *United States v. Hansen*, 955 F. Supp. 1225, 1226 (D. Mont. 1997). And courts have recognized that it is "certainly possible that a psychiatric disorder involving aggressive behavior would be relevant to the defendant's claim of self-defense." *Fay*, 167 A.3d at 914; *State v. Heemstra*, 721 N.W.2d 549, 559 (Iowa 2006) (records could show "'unmanageable anger, aggression and violence and that [the victim] sought and received medical treatment for those problems within months of his death'"), *superseded in part by statute*, Iowa Code § 622.10(4)(a)(2), *as recognized in State v. Leedom*, 938 N.W.2d 177, 190 (Iowa 2020).

In short, defendants often need to rely on mental health records in a variety of contexts, both to impeach prosecution witnesses and establish defenses of their own. Given the importance of these records, there needs to be a mechanism for a judge to screen privileged materials to ensure that the defendant has access to information bearing on those crucial issues. A court cannot simply close the door on the defendant and allow material, exculpatory information to be hidden behind an assertion of privilege.

Contrary to the decision below, that is true even where a defendant might have access to other non-privileged evidence. Pet. App. 13a. As an initial matter, mental health records will often be "the only way" to obtain some evidence relating to an individual's mental state. *Fay*, 167 A.3d at 911. That is very likely to be the case where, as here, the victim cannot possibly be called to testify about her mental health history. Moreover, given the nature of an individual's

interaction with her mental health professional—where revelations are disclosed there and there alone—the therapist may be the only one aware of a mental health diagnosis or other deeply held secrets, such as experiences with suicidal ideation. In fact, "medical records frequently contain information unknown to the *patient*, including detailed diagnoses, comments regarding causation, and observations regarding a patient's appearance and demeanor, which may be relevant in a given case." *Neiderbach*, 837 N.W.2d at 228 (Appel, J., concurring) (emphasis added). And privacy protections on counseling records mean that this information likely will not have been shared with others, so there will be no alternative source of it.

Even if some comparable evidence could be found outside of the privileged material, "[c]umulative evidence can be probative." *Stanaway*, 521 N.W.2d at 577 n.44. Juries take more seriously the words of mental health professionals because they are "written," "contemporaneously generated," and created "by trained observers who are unbiased regarding the issues in litigation," *Neiderbach*, 837 N.W.2d at 228 (Appel, J., concurring). And more to the point, "[a]ny lawyer with practical experience with medical or mental health issues would recognize that a deposition of a patient or a witness is not the equivalent of a review of that person's medical or mental health records." *Id.* What's more, without supporting record material, a defendant's decision to pursue a theory that impugns a victim may backfire because the jury might think he "was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness." *Davis v. Alaska*, 415 U.S. 308,

318 (1974); *see Ritchie*, 480 U.S. at 64 (Blackmun, J., concurring in part and concurring in the judgment).

In this way, it is not enough that "a defendant has other evidence to make the same factual claim"; rather, before access to privileged sources is denied, a determination must be made that "the evidence available from less intrusive sources has persuasive power comparable to that in the privileged material." Fishman, *supra*, at 50. Given the nature of an inquiry that assesses the relative value of privileged and non-privileged material, "the decision of whether the other source is comparable to the medical or mental health record simply cannot be made with confidence until the record has been produced and a comparison made." *Neiderbach*, 837 N.W.2d at 229 (Appel, J., concurring). Thus, even if there is other evidence, a judge still must review the material in camera.

II. In Camera Review Preserves Defendants' Constitutional Rights And The Interests Of Privilege Holders.

Notwithstanding the critical role mental health records can play in presenting a defense, several jurisdictions—including Colorado—have erected high barriers that serve to prevent a criminal defendant from discovering them. Pet. 12-13. The decision below shielded records behind a heightened evidentiary requirement—requiring "a particularized showing that [the victim's] records are likely to contain exculpatory information necessary for Perez's defense." Pet. App. 13a. It justified granting access to mental health materials only in "extraordinarily narrow circumstances" because Colorado has "strong public policy

interest in securing the privacy of mental health records." Pet. App. 13a; *People v. Turner*, 109 P.3d 639, 646 (Colo. 2005) (a defendant's constitutional rights frequently "must bow to the strong public policy interest in encouraging victims … to obtain meaningful psychotherapy").

Other courts—including some with blanket prohibitions on accessing mental health records—also focus on privacy concerns. The California Supreme Court explained that, "[g]iven the strong policy of protecting a patient's treatment history, it seems likely that defendant has no constitutional right to examine the records even if they are 'material' to the case." *People v. Hammon*, 938 P.2d 986, 992 (Cal. 1997) (quoting *People v. Webb*, 862 P.2d 779, 794 (Cal. 1993)). Other courts have deployed similar reasoning. *See In re Crisis Connection, Inc.*, 949 N.E.2d 789, 802 (Ind. 2011) ("[T]he State's compelling interest in maintaining the confidentiality of information gathered in the course of serving emotional and psychological needs of victims of domestic violence and sexual abuse … is not outweighed by [a defendant's] right to present a complete defense."); *Commonwealth v. Wilson*, 602 A.2d 1290, 1297 (Pa. 1992) ("The broadly drawn privilege is … narrowly tailored to achieve the compelling interest in protecting the victim's privacy so that her treatment and recovery process will be expedited. Therefore, defendant's federal constitutional rights have not been violated." (citation omitted)).

To be sure, the "psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem." *Jaffee v.*

Redmond, 518 U.S. 1, 11 (1996). But these jurisdictions' singular focus on this interest in preserving confidential communications overlooks the state's similarly compelling "interest in the fair and accurate adjudication of criminal cases." *Ake v. Oklahoma*, 470 U.S. 68, 79 (1985); *see* Pet. 18. After all, *prosecutors* also can rely on the need for "fair administration of criminal justice" to overcome assertions of privilege. *Nixon*, 418 U.S. at 712-13; *see Trump v. Vance*, No. 19-635, slip op. at 19 (U.S. Jul. 9, 2020) ("[T]he public interest in fair and effective law enforcement cuts in favor of comprehensive access to evidence."). Should the mental health records sought by the defendant reveal exculpatory information, that "information" could also "cause the prosecutor to rethink whether to press the case at all." Fishman, *supra*, at 61.

More fundamentally, stringent restrictions on access to privileged material are unnecessary to preserve the interests in confidentiality these states have identified. No one is asking for direct, unfettered access by defense counsel to mental health records. Petitioner makes that much perfectly clear. Pet. 19-20. Rather, the key question in this case is whether and in what circumstances a defendant can require in camera review by the trial court to determine whether privileged materials contain exculpatory evidence that should be disclosed to the defendant.[3]

[3] By focusing only on how jurisdictions are divided on this threshold question of when in camera review is appropriate, the question presented here is narrower than the question presented in *Friend v. Indiana*, No. 19-1214 (U.S. Apr. 9, 2020), *cert. de-*

The availability of in camera review offers a way for exculpatory evidence to be discovered while still safeguarding the privacy interests implicated by mental health and other privileges. As this Court has explained, "[i]n camera review of … documents is a relatively costless and eminently worthwhile method to insure that the balance between … claims of irrelevance and privilege and plaintiffs' asserted need for the documents is correctly struck." *Kerr v. U.S. Dist. Ct.*, 426 U.S. 394, 405 (1976). This Court thus has authorized trial courts to employ in camera review in a variety of contexts where sensitive information is at issue. *See, e.g.*, *United States v. Zolin*, 491 U.S. 554, 572 (1989) (attorney-client privilege); *N.Y. Times Co. v. Jascalevich*, 439 U.S. 1317, 1323 (1978) (journalist's witness interviews); *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 303 (1978) (IRS investigative file); *Nixon*, 418 U.S. at 706 (presidential communications); *Taglianetti v. United States*, 394 U.S. 316, 317 (1969) (electronic surveillance records). In camera review is not a new or difficult process; courts do it all the time.

In fact, this Court already has blessed the use of in camera review by the trial court as an appropriate method for reviewing records like the mental health records at issue here. *See Ritchie*, 480 U.S. at 60-61. There, as here, the state asserted a "strong" public interest in protecting privileged records. *Id.* at 57. But that interest did not warrant a blanket bar on disclosure. Instead, this Court concluded that a trial court's

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nied, 2020 WL 3492675, at *1 (Jun. 29, 2020), which also highlighted a broader disagreement about when a defendant (or his counsel) is entitled to the evidence. *See* Pet. 19-20 & n.6.

in camera review of privileged records can serve a defendant's interest in obtaining material information "without destroying the … need to protect the confidentiality" of that information. *Id.* at 61.

In the years since *Ritchie*, courts in numerous states regularly have used in camera review to determine whether mental health records contain exculpatory information. Echoing *Ritchie*, these courts reason that "the trial judge's in camera inspection of [the witness's records] protect[s] [defendants'] constitutional rights without destroying [the witness's] interest in protecting the confidentiality of … the records … irrelevant to [defendants'] interests." *Barroso*, 122 S.W.3d at 564; *see Stanaway*, 521 N.W.2d at 575.

Many state courts have embraced in camera review as the proper mechanism to balance the rights of defendants with those of privilege holders. *See, e.g.*, *Cox*, 849 So. 2d at 1271-72 (in homicide case where "defense" was that the deceased "committed suicide," "in camera review by the court of the [deceased's] medical records … would be appropriate"); *Commonwealth v. Feliciano*, 816 N.E.2d 1205, 1207 (Mass. 2004) (in camera review of accuser's counseling records for information regarding "her tendency to imagine or to fabricate"); *State v. Pandolfi*, 765 A.2d 1037, 1043 (N.H. 2000) (remanding for in camera review of counseling records to determine whether witness was taking medication that affected her "memory and perception"); *State v. Gonzales*, 912 P.2d 297, 303 (N.M. Ct. App. 1996) (in camera review appropriate to determine if accuser's medical and mental health records contained information that she "may have suffered cognitive difficulties which would affect her

credibility at trial"); *Stanaway*, 521 N.W.2d at 576-77 (in camera review where defendant asserted that "claimant is a troubled, maladjusted child whose past trauma has caused her to make a false accusation").

In camera review of mental health records also is common in the federal courts. *See, e.g.*, *United States v. Arias*, 936 F.3d 793, 795, 800 (8th Cir. 2019) (remanding to district court for in camera review of mental health records to determine whether defendant "was denied access to information that might dramatically undermine the testimony of his accuser, the sole eyewitness to the assault"); *Love v. Johnson*, 57 F.3d 1305, 1307, 1313 (4th Cir. 1995) (requiring in camera review of medical records to determine if they were "material" and "favorable" to defendant's claim that he was "falsely accused by a young girl who was emotionally disturbed for other reasons than his conduct" (quoting *Ritchie*, 480 U.S. at 60)); *cf. United States v. Parrish*, 83 F.3d 430 (9th Cir. 1996) (district court did not abuse its discretion by denying defendant access to medical and psychiatric records after in camera review).

Decades of experience with in camera review of health records belies any concern that "even an in camera review" would "eviscerate the effectiveness of the privilege" by "chill[ing]" "confidential conversations between [victim advocates and victims]." *Crisis Connection*, 949 N.E.2d at 801-02. This Court confronted that same concern in *Ritchie*, and while it thought that "full disclosure to defense counsel" may eliminate the utility of the privilege, it accepted in camera review as sufficient to preserve it. 480 U.S. at 60-61. A majority of jurisdictions have followed the

blueprint laid out by this Court in *Ritchie*, and there is no indication that doing so has eliminated the efficacy of these privileges across the country.

To the contrary, courts have explained that it is unlikely that "authorizing disclosure of [mental health] records in … limited circumstances will significantly reduce the number of individuals choosing to confide in counselors and psychotherapists." *Fay*, 167 A.3d at 909-10 & n.18; *cf. Nixon*, 418 U.S. at 712 ("[W]e cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution."); Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 Colum. L. Rev. 1369, 1451 (1991).

In short, there is no compelling reason for a jurisdiction to flatly prohibit in camera review in order to protect its citizen's mental health records, and this Court's intervention is needed to require in camera review where appropriate to protect a defendant's constitutional right to present a defense.[4]

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[4] Several of those jurisdictions whose mental-health-record privileges always trump a defendant's right to obtain in camera review would benefit from this Court's review, too. That's because those prohibitions on in camera review of mental health records are being thwarted by the persistent conflict that exists today. To take just one example, Indiana has categorically prohibited "disclosure for even in camera review of confidential information." *Crisis Connection*, 949 N.E.2d at 802. But those same health records might be disclosed in federal proceedings because the Seventh Circuit will permit in camera review of rec-

Granting review also would allow this Court to establish a clear and uniform standard for obtaining in camera review. This Court has noted that a defendant "may not require the trial court to search through the [confidential] file without first establishing a basis for his claim that it contains material evidence." *Ritchie*, 480 U.S. at 58 n.15. *Ritchie* did not establish definitively the showing a defendant must make to obtain in camera review, but it suggested that they "must at least make some plausible showing." *Id.* (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)); *see also United States v. Zolin*, 491 U.S. 554, 572 (1989) (requiring a "good faith belief … that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies" (citation omitted)).

Even so, "no clear consensus has emerged" about what a defendant must establish to obtain in camera review of mental health records in those jurisdictions where such review is authorized. Fishman, *supra*, at 39; Pet. 10-13. Depending on the jurisdiction, the required showing ranges from a "reasonable ground to believe" that material evidence exists, *e.g.*, *Peeler*, 857 A.2d at 841; *Barroso*, 122 S.W.3d at 564, to a "reasonable probability" that such evidence exists, *e.g.*, *Stanaway*¸ 521 N.W.2d at 574, to a "reasonable certainty" that such evidence exists, *State v. Blake*, 63

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ords the defendant establishes might plausibly contain exculpatory information. *See Dietrich v. Smith*, 701 F.3d 1192, 1196-97 (7th Cir. 2012).

P.3d 56, 61 (Utah 2002). *See* Pet. 10-13; Fishman, *supra*, at 41.

Here, the Colorado Court of Appeals embraced the most demanding standard when it required Mr. Perez to make a "particularized showing that [the] mental health records contain statements or information necessary to vindicate a defendant's right to present a complete defense." Pet. App 11a-12a. That the Colorado court deployed a standard out of sync with almost every other court to consider the issue makes this an ideal vehicle to resolve the question presented because it shows precisely why the standard for in camera review makes a difference. *See* Pet. 10-13.

The court acknowledged that Mr. Perez backed his request for in camera review with an explanation that his wife "was depressed, that she had sought therapy from the subpoenaed provider, and that depression may have led to suicide." Pet. App. 12a-13a. That "assertion"—further supported with a detailed account of why Mr. Perez believed his wife sought treatment for depression—was enough to establish that the records probably (or plausibly) contained exculpatory evidence of a depression diagnosis or suicidal ideation. *See*, *e.g.*, *State v. Graham*, 702 A.2d 322, 326 (N.H. 1997) (requiring only that "'a defendant … present some specific concern, based on more than bare conjecture, that, in reasonable probability will be explained by' the information sought" (quoting *State v. Taylor*, 649 A.2d 375, 376 (N.H. 1994))). Indeed, the decision below is not to the contrary—it does not suggest that it was improbable that his wife's records would contain exculpatory evidence. Pet. App. 12a-14a. (That would have been a curious conclusion

given the decision's recitation of all the other "substantial evidence" supporting Mr. Perez's theory that his wife was suicidal. Pet. App. 13a-14a.)

And so, had Mr. Perez been in any of the jurisdictions with less demanding standards, he would have been entitled to court review of his wife's mental health records. That process was rejected here only because Mr. Perez failed to meet the Colorado court's "extraordinarily narrow" test, which required him to offer sufficient additional "particularized … factual support" proving what the identified records contain. Pet. App. 13a.[5]

The decision below also illustrates the illogic of using a standard that has the practical effect of requiring a defendant to assert what material might contain before he has seen it. The privileged nature of the material means that it often will be "impossible to say whether any information … may be relevant to [defendant's] claim of innocence, because neither the

[5] In this way, this case lacks the purported vehicle flaw the respondent identified in *Friend v. Indiana*, No. 19-1214 (U.S.). Indiana raised a concern that the question presented was not implicated in Friend's case because he "has not made the bare minimum showing"—whether a plausibility or a probability—that "the privileged materials he seeks contain exculpatory information." Br. in Opp. 11-12, *Friend v. Indiana*, No. 19-1214 (U.S. Jun. 3, 2020). In fact, it is understandable that Friend might not have tried to meet even the most lenient standard given the Indiana Supreme Court's blanket ban on in camera review of privileged material. *Friend v. State*, 134 N.E.3d 441, 447 (Ind. Ct. App. 2019) ("Indiana's [counselor-client] privilege is one that *generally* prohibits disclosure for even in camera review of confidential information." (quoting *Crisis Connection*, 949 N.E.2d at 802)).

prosecution nor defense counsel has seen [it]." *Ritchie*, 480 U.S. at 57. That concern dates back two hundred years to the prosecution of Aaron Burr. *United States v. Burr*, 25 F. Cas. 187, 191 (No. 14,694) (C.C.D. Va. 1807) ("It is objected that the particular passages of the letter which are required are not pointed out. But how can this be done while the letter itself is withheld?"). As this Court later explained, Chief Justice Marshall "found it unreasonable to require Aaron Burr to explain the relevancy of General Wilkinson's letter to President Jefferson … precisely because Burr had never read the letter and was unaware of its contents." *Valenzuela-Bernal*, 458 U.S. at 871 n.8.

Courts rejecting a heightened standard for obtaining in camera review have understood this practical difficulty. Heightened standards "effectively render [in camera] review superfluous, as the defendant essentially would have to obtain the information itself in order to meet his burden." *Graham*, 702 A.2d at 326. In this way, "to require a defendant to describe with *particularity* the relevance of information in documents he has never seen is something of a catch-22." *Neiderbach*, 837 N.W.2d at 225 (Appel, J., concurring) (emphasis added). It is common sense that the accused "cannot possibly know, but may only suspect, that particular information exists which meets these requirements." *Love*, 57 F.3d at 1313.

And so, these courts have made clear that a defendant need not "make a particular showing of the *exact information* sought and how it is material and favorable." *Id.* (emphasis added). Nor can he be "required to prove that his theory" about what the records probably contain "is true." *Graham*, 702 A.2d at

326. This does not render courts helpless to prevent "fishing expeditions"; courts still can achieve that end by requiring a showing of "a reasonable belief that the records contain exculpatory evidence." *Barroso*, 122 S.W.3d at 563-64.

By demanding more here, the Colorado court required Mr. Perez to prove the unprovable, using information about the contents of documents he had not yet seen. This shows that, although the decision below has left open the theoretical possibility of in camera review, as a practical matter, its rule is not meaningfully different from those jurisdictions categorically forbidding in camera review.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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