NO. 19-1357

In the
Supreme Court of the United States

ROBERT ANGELO PEREZ,
Petitioner,
v.

STATE OF COLORADO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Colorado.

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, and to what extent, the Sixth and Fourteenth Amendments guarantee a criminal defendant the right to discover potentially exculpatory mental health records held by a private party, notwithstanding a state privilege law to the contrary.

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INTRODUCTION

Petitioner asks this Court to review an unpublished, nonprecedential Colorado Court of Appeals decision that affirmed the finding that he had not made a sufficient showing under the Sixth and Fourteenth Amendments to require an *in camera* review of his deceased wife's privileged mental health records, which he claims were necessary to his suicide defense.

This case is a poor vehicle to resolve that question because Petitioner confessed to his wife's murder during trial, making the suicide defense largely irrelevant to his conviction. Evidence discovered at the crime scene and presented at trial corroborated his detailed confession. Given Petitioner's confession and the extensive leeway he was otherwise given to present his suicide defense, any error in quashing his subpoena for his wife's privileged mental health records was harmless beyond a reasonable doubt.

The Colorado Court of Appeals decision also did not deepen any split in authority, as it applied longstanding Colorado law and comports with the national majority rule requiring defendants to make a particularized factual showing of need to trigger an *in camera* review. And the court of appeals correctly concluded that Petitioner's general assertion that his wife sought treatment for depression was not a sufficient particularized showing that those records were necessary to his defense.

Further review from this Court is unnecessary.

STATEMENT OF THE CASE

1. Factual background. Petitioner found out his wife, Dennielle, had an affair, and Petitioner became enraged. Pet. App. 3a-4a. When Dennielle's parents called her that day, they could hear Petitioner yelling in the background using profanity and racial epithets. R. Tr. 5-9 (May 3, 2016 PM). Concerned for her daughter's safety, Dennielle's mother asked Dennielle's aunt to go over to their house to check on her. R. Tr. 39-41 (May 3, 2016 AM). When Dennielle's aunt and uncle arrived, they saw Petitioner pacing angrily outside the house, and he told them that Dennielle had an affair. R. Tr. 41-52 (May 3, 2016 AM). Dennielle's mother called the police and they searched the house, but Dennielle was not there. R. Tr. 11-19, (May 3, 2016 PM). Her mother and sister eventually found her disoriented and wandering the neighborhood a few hours later. R. Tr. pp 19-25 (May 3, 2016 PM); R. Tr. 43-48 (May 9, 2016 PM). Dennielle went to stay with her parents. Pet. App. 3a-4a.

While Dennielle stayed with her parents, Petitioner called her repeatedly and sent her several messages that threatened to expose sexually explicit pictures of her and that were emotionally abusive. Pet. App. 4a. Eventually, Petitioner convinced Dennielle to come back and discuss their relationship, and Dennielle's brother dropped her off at Petitioner's work two days later. Pet. App. 4a.

The next day, Dennielle's mother and sister tried calling her multiple times, with no response. R. Tr. 33-35 (May 3, 2016 PM); R. Tr. 66 (May 9, 2016 AM). At around 2:00 p.m., Petitioner called Dennielle's mother and asked if she had seen Dennielle. R. Tr. 35 (May 3,

2016 PM). Dennielle's mother replied that she had not and that she was calling the police and coming over to their house. R. Tr. 35-39 (May 3, 2016 PM). After they hung up, Petitioner immediately called the police and told them he found his wife dead in the basement. Pet. App. 4a.

Responding officers found Dennielle's body lying on the basement floor next to a bed, with a shotgun partially beneath her body. Pet. App. 4a. The autopsy revealed a fresh scrape on one knee and bruising all over Dennielle's body consistent with blunt force trauma. Pet. App. 4a; R. Tr. 102-125 (May 4, 2016 PM). It also showed a gunshot entrance wound under her left armpit and a small exit wound in her middle back. Pet. App. 4a; R. Tr. 89, 125-131 (May 4, 2016 PM).

The coroner's reenactment showed that, while theoretically possible, it would have been difficult for a person Dennielle's size to shoot herself with the shotgun and receive the same injuries Dennielle received. R. Tr. 7-29 (May 5, 2016 AM). The coroner concluded that while "there's some compelling evidence at my autopsy, and with the reenactment, to rule this a homicide, at the end of the day . . . I could not absolutely exclude suicide." Pet. App. 14a; R. Tr. 31 (May 5, 2016 AM).

Petitioner's hands and shirt tested positive for gunshot residue. R. Tr. 53-54 (May 11, 2016 PM); R. Tr. 28-30 (May 12, 2016 PM). Police also discovered an ejected shotgun shell under the bed and that the pump action was worked after the shot was fired. R. Tr. 79-82, 88, 95-96 (May 4, 2016 AM); R. Tr. 53-63, 67-72 (May 12, 2016 AM).

Petitioner was charged with first degree murder – after deliberation for Dennielle's death. Pet. App. 4a.

Through counsel, Petitioner claimed he was not guilty because Dennielle committed suicide. Pet. App. 4a. He attempted to subpoena Dennielle's mental health records from Kaiser Permanente, but the trial court quashed this subpoena and found the records were covered by the psychologist-patient privilege, Dennielle had not waived her privilege, and the records were not subject to *in camera* review because the privilege is absolute. Pet. App. 23a-26a, 39a.

At trial, Petitioner presented evidence suggesting Dennielle was depressed and suicidal. Specifically, he presented evidence that she had erratic sleeping habits and had lost a significant amount of weight in the weeks preceding her death. R. Tr. 108-110 (May 3, 2016 AM); R. Tr. 60-61 (May 3, 2016 PM). He elicited testimony that Dennielle was disappointed with her career and unhappy in her marriage, and that she longed to have children but had trouble getting pregnant. Pet. App. 13a-14a. He presented evidence that Dennielle's cousin, to whom she had been close, committed suicide when they were teenagers. R. Tr. 61-62, 66 (May 3, 2016 AM). Friends and family members testified that Dennielle had discussed suicide with them but denied that she had ever considered committing suicide herself. Pet. App. 13a-14a Dennielle's brother testified that she took a handful of sleeping pills and wandered away from the house on the night Petitioner discovered her affair. Pet. App. 14a. A detective testified that Petitioner told him Dennielle struggled with depression and had sought mental health treatment. R. Tr. 8-9 (May 12,

2016 AM). And a defense expert in forensic pathology testified at length that Dennielle died of a gunshot wound that was self-inflicted. Pet. App. 14a.

But a week into the trial, police discovered Petitioner confessed to a fellow inmate after the first day of jury selection. Pet. App. 4a-5a. Petitioner told the inmate he killed Dennielle and offered the inmate $25,000 to say the inmate had slept with Dennielle and that she committed suicide because she was afraid of being prosecuted for stealing money from the restaurant her family owned. Pet. App. 4a-5a.

Although Petitioner tried to discredit the inmate with his numerous felony convictions involving dishonesty, the inmate knew several specific details about the events leading up to the murder and evidence found at the scene, which were corroborated by other evidence presented at trial. The jury also watched a jail surveillance video, which showed Petitioner and the inmate conversing for two hours on the day Petitioner confessed and showed Petitioner physically demonstrating how he positioned the shotgun by Dennielle's body to make it seem like she committed suicide. R. Tr. 10-15 (May 12, 2016 PM).

The jury convicted Petitioner of first degree murder. Pet. App. 5a.

2. Proceedings in the Colorado Court of Appeals. Petitioner directly appealed his conviction. Pet. App. 1a-22a. He claimed his Sixth and Fourteenth Amendment rights to confrontation, to compulsory process, and to present a defense required the trial court to review Dennielle's privileged mental health records *in camera* and balance his need for the

information in the records with her interest in confidentiality. Pet. App. 6a.

The Colorado Court of Appeals affirmed in an unpublished, nonprecedential decision. Pet. App. 2a-22a. The court of appeals observed that the plain language of Colorado's psychologist-patient privilege statute, section 13-90-107(1)(g), C.R.S. (2019), "appears to preclude the compelled production of mental health records unless the privilege is waived," even for *in camera* review. Pet. App. 8a. The court of appeals noted that the Colorado Supreme Court had distinguished this Court's decision in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), concluding that while the Pennsylvania statute in *Ritchie* contemplated some form of judicial review of confidential child abuse records, Colorado's psychologist-patient privilege statute contains no provision allowing for disclosure based on a court order. Pet. App. 9a-10a (citing *Dill v. People*, 927 P.2d 1315, 1325 (Colo. 1996)).

The court of appeals recognized a defendant's constitutional rights might overcome the privilege in "extraordinarily narrow circumstances"; but, "in the absence of a particularized showing that mental health records contain statements or information necessary to vindicate a defendant's right to present a complete defense, Colorado's psychologist-patient privilege does not allow trial courts to conduct an *in camera* review of mental health records unless a patient has waived the privilege." Pet. App. 11a-12a. It then concluded Petitioner's claim that Dennielle may have been depressed and may have discussed her depression with her treatment provider at some unknown time was not a sufficient "particularized

showing" that the privileged records contained exculpatory evidence, and his "broad assertions are insufficient to overcome Colorado's strong public policy interest in securing the privacy of mental health records." Pet. App. 12a-13a.

The Colorado Supreme Court denied his petition for certiorari review. Pet. App. 1a.

REASONS FOR DENYING THE PETITION

This case is a poor vehicle to address the question presented. Petitioner confessed, in explicit detail, to his wife's murder. Physical evidence and testimony from other trial witnesses corroborated his confession. Combined with the extensive leeway Petitioner was given to present evidence supporting his suicide defense, his first degree murder conviction was surely unattributable to any error in quashing the subpoena for his deceased wife's privileged mental health records.

Under Colorado law, the unpublished opinion does not create binding precedent and did not deepen to any split in authority. Rather, it applied longstanding Colorado law, which contemplates allowing *in camera* review of privileged records if a defendant makes a particularized factual showing that the records contain material, exculpatory information necessary to vindicate the defendant's right to present a defense. This rule is consistent with the nationwide majority rule, which requires defendants to make a particularized factual showing that the requested privileged records would be material or exculpatory or otherwise demonstrate a "compelling need" for the records to trigger an *in camera* review.

And the Colorado Court of Appeals correctly concluded that Petitioner failed to make that required sufficient particularized showing. Petitioner claimed Dennielle sought treatment for depression and may have discussed her depression with her treatment provider, and that her depression "may" have led to her suicide. This proffer was general and vague, and Petitioner acknowledged the privileged records would merely corroborate the nonprivileged testimony of other witnesses. This proffer was not enough to show Dennielle's mental health records contained material, exculpatory evidence that would have influenced the outcome of his trial had it been discovered, and it did not justify piercing the psychologist-patient privilege.

This Court should deny the petition.

I. This case is a poor vehicle to resolve the question presented because any error was harmless beyond a reasonable doubt.

This case is a poor vehicle to resolve the question presented because even if the trial court erred in quashing Petitioner's subpoena for Dennielle's mental health records, the guilty verdict was surely unattributable to that error for two reasons.

First, the jury heard testimony that Petitioner confessed, during trial, to killing his wife, which conflicted with his suicide defense.

Second, before his confession surfaced in the middle of trial, Petitioner was given significant leeway to present other evidence supporting his suicide defense—in addition to testimony about Dennielle's depression from fact witnesses, he presented expert testimony suggesting she died from a self-inflicted gunshot wound.

Because any error was harmless beyond a reasonable doubt, this case is not a good vehicle to resolve the question presented.

A. Petitioner confessed in great detail to murdering his wife.

After the first day of jury selection, Petitioner confessed to a fellow inmate, in explicit detail, to murdering his wife. This confession undercut Petitioner's suicide defense and rendered any error in the trial court quashing his subpoena for Dennielle's privileged records harmless beyond a reasonable doubt.

A constitutional error is not reversible if the prosecution can demonstrate it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). An error is harmless beyond a reasonable doubt when the guilty verdict was "surely unattributable to the error," including when the properly admitted evidence of guilt was overwhelming. *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993); *Harrington v. California*, 395 U.S. 250, 254 (1969).

Petitioner's cousin introduced Petitioner to another inmate in the Denver County Jail because the inmate frequently gave legal advice to fellow inmates like Petitioner. R. Tr. 94-96 (May 12, 2016 AM). After the first day of jury selection for Petitioner's trial, Petitioner and the inmate talked about Petitioner's case for two hours in one of the jail's common areas. R. Tr. 96-97, 137-41 (May 12, 2016 AM).

Petitioner described how during one of their fights about her affair, Dennielle called her parents to come pick her up and he had yelled profanities and racial

epithets, hoping Dennielle's parents would hear those details and react negatively. R. Tr. 104-06 (May 12, 2016 AM).

Petitioner told this inmate that on the night of the murder, Dennielle said she wanted a divorce, and they fought "into the wee hours" of the night. R. Tr. 111 (May 12, 2016 AM). During the fight, Petitioner ripped up some of their wedding photos. R. Tr. 112-13 (May 12, 2016 AM). The fight turned physical, with both Petitioner and Dennielle throwing things. R. Tr. 113-14 (May 12, 2016 AM). Dennielle told him she was leaving the next day, then went to the basement bedroom to go to sleep. R. Tr. 114 (May 12, 2016 AM).

According to Petitioner, he then took a shower, and as he showered, "the more that he thought about the fights and the more he thought about the relationship and about letting her go he just got more and more agitated and angry." R. Tr. 114 (May 12, 2016 AM). The inmate described how Petitioner's demeanor changed and he became agitated and upset as he talked about his reaction. R. Tr. 115-16 (May 12, 2016 AM).

Petitioner explained that when he got out of the shower, he dried off, went to get his shotgun, and went downstairs where Dennielle was sleeping. R. Tr. 117-20 (May 12, 2016 AM). He woke her up, and as she started to get up he shot her in the chest. R. Tr. 121-22 (May 12, 2016 AM).

Petitioner said he then went upstairs to clean himself up and let one of their dogs inside, hoping that the dog would contaminate the crime scene. R. Tr. 122-23, 126 (May 12, 2016 AM). He laid the gun next to her body and tried to stage the scene to make it look like

she committed suicide. R. Tr. 123, 126-27 (May 12, 2016 AM). The jury watched a jail surveillance tape of Petitioner demonstrating for the inmate how he positioned the gun. R. Tr. 10-16 (May 12, 2016 PM); R. Tr. 141-42 (May 12, 2016 AM). Petitioner said Dennielle was still alive at that point, but unconscious and breathing heavily. R. Tr. 124 (May 12, 2016 AM). Petitioner kissed her forehead, then went to work to create an alibi for himself. R. Tr. 125-26, 128-29 (May 12, 2016 AM).

Petitioner then said that when he got home from work, he went to move Dennielle's body onto the bed and noticed blood trickling from a hole in her back, so he left her where she was on the floor. R. Tr. 124-25, 130 (May 12, 2016 AM). He then called the police and told them Dennielle killed herself. R. Tr. 130 (May 12, 2016 AM).

Petitioner asked the inmate if he would testify that he met Dennielle at a club for sadomasochists and that they had an affair. Pet. App. 5a. He told the inmate to say Dennielle committed suicide because she had been stealing from her family's restaurant to fund a sadomasochistic lifestyle and did not want to be exposed. Pet. App. 5a. He offered to pay the inmate $25,000 for this testimony. Pet. App. 5a.

The prosecution learned of this confession when the inmate was questioned about an unrelated assault in the jail a few days later, and it presented the inmate's testimony during the second week of trial. Pet. App. 4a-5a.

Petitioner's confession was corroborated by the evidence at trial and contained details the inmate could have only learned from Petitioner. For example,

the inmate knew the layout of their house, that Dennielle's nickname was "Nelly," that Petitioner and Dennielle had dogs, and that Petitioner yelled specific profanities and racial epithets while Dennielle was on the phone with her parents. *Compare* R. Tr. 99-101, 104-06, 119-20, 122-23, 126 (May 12, 2016 AM) *with* R. Tr. 33, 96-97 (May 3, 2016 AM); R. Tr. 5-9 (May 3, 2016 PM); R. Tr. 41-42 (May 4, 2016 AM); R. Tr. 4-5 (May 12, 2016 AM). The confession was also corroborated by physical evidence, including ripped up wedding photos police found in their house and a small hole on Dennielle's back from the shotgun blast. *Compare* R. Tr. 112-13, 124-25 (May 12, 2016 AM) *with* R. Tr. 46-47 (May 4, 2016 AM); R. Tr. 89, 125-131 (May 4, 2016 PM); R. Env 2, Exs, 19-21.

After the prosecution introduced Petitioner's detailed and damning confession at trial, his suicide defense was no longer credible. His confession ensured that any error in quashing the subpoena for Dennielle's mental health records did not contribute in any way to his conviction for first degree murder. *Sullivan*, 508 U.S. at 279; *see also Harrington*, 395 U.S. at 254.

B. Petitioner presented ample other evidence to support his suicide defense.

Petitioner was also given significant leeway to present nonprivileged evidence in support of his suicide defense, rendering any error in excluding redundant evidence from Dennielle's privileged mental health records harmless beyond a reasonable doubt.

The only circumstances where this Court has found a violation of a defendant's right to present a

defense is when an evidentiary rule excluded "critical" defense evidence or deprived the defendant of a fundamental right, such as testifying in his or her own defense. *See Holmes v. South Carolina*, 547 U.S. 319, 327-30 (2006) (rule prohibiting defendant from presenting evidence that another person committed the crime violated right to present a defense because it was arbitrary and excluded significant defense evidence); *Rock v. Arkansas*, 483 U.S. 44, 52-57 (1987) (rule excluding hypnotically refreshed testimony violated right to present a defense because it excluded the defendant's testimony about the crime); *Chambers v. Mississippi*, 410 U.S. 284, 301-02 (1973) (rule excluding evidence that a witness confessed to three different people that he committed the crime the defendant was charged with violated the right to present a defense because the evidence was "critical" to the defense); *Washington v. Texas*, 388 U.S. 14, 16-23 (1967) (rule prohibiting codefendants, accomplices, and accessories from testifying violated right to compulsory process because it precluded defendant from presenting the testimony of the only other person who witnessed the crime).

Excluding Dennielle's privileged mental health records did not deprive Petitioner of evidence "critical" to his defense because Petitioner had ample other opportunities to introduce nonprivileged evidence to support his suicide defense.

Petitioner presented expert testimony from a forensic pathologist who opined that Dennielle died from a self-inflicted gunshot wound. Pet. App. 14a. The coroner testified that while there was "compelling" evidence that the cause of Dennielle's

death was homicide, he "could not absolutely exclude suicide." Pet. App. 14a; R. Tr. 31 (May 5, 2016 AM).

Petitioner also elicited testimony from Dennielle's family and friends that she had discussed suicide with them but denied that she would ever commit suicide herself. Pet. App. 13a-14a. He presented evidence that Dennielle longed to have children but had not been able to get pregnant, that she was disappointed in her career, and that her marriage to Petitioner was unhappy. *E.g.*, Pet. App. 13a-14a. He pointed out that Dennielle had recently lost a significant amount of weight and had erratic sleeping habits. R. Tr. 108-110 (May 3, 2016 AM); R. Tr. 60-61 (May 3, 2016 PM).

Dennielle's brother testified that Dennielle told him she took a handful of sleeping pills and wandered away from the house on the night Petitioner discovered her affair. Pet. App. 14a. And a detective testified that Petitioner told him Dennielle had sought mental health treatment at Kaiser Permanente for depression. R. Tr. 8-9 (May 12, 2016 AM).

Under these circumstances, Petitioner presented ample evidence supporting his suicide defense, and the jury's guilty verdict was surely unattributable to any error in excluding what would have been cumulative evidence from Dennielle's privileged mental health records, if it existed.

Because any error was harmless beyond a reasonable doubt, this case is a poor vehicle to resolve the question presented. This Court should deny the petition for certiorari review.

II. The opinion did not deepen any split, and on these facts most States would deny *in camera* review of the privileged records.

This Court should deny the petition for three additional reasons.

First, the unpublished, nonprecedential opinion did not deepen any split in authority, as it applied longstanding Colorado law holding that a defendant is not entitled to an *in camera* review of privileged records absent a particularized factual showing that the records are necessary to vindicate the right to present a complete defense.

Second, Petitioner misstates the degree and nature of any split in authority, as most jurisdictions that allow *in camera* review of privileged records require defendants to make a particularized factual showing that the requested records are material, exculpatory, or necessary to his defense. Because the psychologist-patient privilege serves significant public interests, most jurisdictions recognize that requiring a particularized factual showing of need is necessary to prevent fishing expeditions into confidential and privileged materials.

Third and finally, Petitioner asks this Court to correct the court's alleged error in declining to review Dennielle's privileged mental health records *in camera*. However, the court of appeals correctly concluded that Petitioner's general and vague proffer that Dennielle was depressed and might have discussed her depression with her treatment provider was not enough to show the records he sought were necessary to support his suicide defense.

Given these circumstances, this Court should not review this correct, nonprecedential decision.

A. The unpublished opinion applied longstanding Colorado law.

The unpublished, nonprecedential Colorado Court of Appeals did not "deepen" any split in authority. Rather, it applied longstanding Colorado law.

In 1986, the Colorado Supreme Court held that absent a waiver from the privilege holder, "the defendant is not entitled to examine the victim's post-assault psychotherapy records or to have the trial court review such records *in camera* on the basis that the records might possibly reveal statements of fact that differ from the anticipated testimony of the victim at trial." *People v. Dist. Court*, 719 P.2d 722, 727 (Colo. 1986). Responding to the defendant's argument that the Confrontation Clause may require *in camera* review in some circumstances, the supreme court held the defendant "failed to make any particularized factual showing in support of his assertion that access to the privileged communications of the victim is necessary for the effective exercise of his right of confrontation." *Id.*

Subsequent Colorado case law consistently applied this standard. In *Dill v. People*, the Colorado Supreme Court reaffirmed the rule from *District Court* and concluded that the defendant's request to search the victim's psychotherapy records for inconsistent statements "was nothing more than a desire to conduct a fishing expedition in the hope of discovering material exculpatory information that he has no

reason to believe will be found." *Dill v. People*, 927 P.2d 1315, 1324 (Colo. 1996).

Later in *People v. Wittrein*, the Colorado Supreme Court resolved the case on non-constitutional grounds but noted that the psychologist-patient privilege "may not yield to Wittrein's bare request for the records, hoping that they may contain exculpatory information." 221 P.3d 1076, 1084 n.7 (Colo. 2009). The concurrence addressed the Defendant's constitutional claims and similarly concluded, "in the absence of a particularized showing that the records contain exculpatory information not otherwise available to the defendant, *in camera* review is not required." *Id.* at 1088 (Martinez, J., concurring).

And most recently in *Zapata v. People*, the Colorado Supreme Court again applied the rule from *District Court* and held: "For a court to review statutorily privileged material, the initial showing must be more than a 'vague assertion that the victim may have made statements to her therapist that might possibly differ from the victim's anticipated trial testimony.'" *Zapata v. People*, 428 P.3d 517, 529 (Colo. 2019) (quoting *Dist. Court*, 719 P.2d at 726).

Contrary to Petitioner's claims, the court of appeals did not break new ground or deepen any split in authority; it applied consistent Colorado Supreme Court precedent when it concluded, "Perez's simple assertion that Dennielle may have been depressed and may have discussed her depression with her mental health provider does not constitute a particularized showing that her records are likely to contain exculpatory material necessary for Perez's defense

that the victim committed suicide." *See* Pet. App. 10a-13a.

And under Colorado law, unpublished opinions such as this one do not create precedent for other cases. Colo. App. Rule 25(e); *Yeutter v. Industrial Claim Appeals Office*, ___ P.3d___, 2019 COA 53 ¶22 (Colo. App. 2019) ("Nor do we give precedential weight to unpublished decisions of other divisions of this court.")

B. The nonprecedential opinion did not deepen any split.

Petitioner also misapprehends the nature of the split. He groups the case law from jurisdictions around the country into two broad categories: (1) those requiring *in camera* review when a defendant shows that records "plausibly" or "probably" contain exculpatory material or there is a "reason to believe" they may contain such material—standards under which he insists he would prevail; and (2) those that either categorically prohibit *in camera* review, or impose a "stringent test" of showing, to a "reasonable certainty," that evidence necessary to a defense exists within the records and "will, in fact, be exculpatory"—standards under which he admittedly would lose. Pet. 9-13. Petitioner places Colorado in the second category and argues that Colorado's requirement of a particularized, factual showing that the records would be material or exculpatory is an improper, "heightened" standard that makes Colorado an outlier. Pet. 32-34. He argues that a defendant should only need to make "some plausible showing" that privileged records would be material and relevant to obtain an *in camera* review. *Id.*

Actually, Colorado's rule is the majority view. Most jurisdictions that allow *in camera* review of privileged medical records require defendants to make a particularized factual showing that the requested records would be material, exculpatory, or necessary to the defense or otherwise demonstrate a "compelling need" for the privileged records. *See R.S. v. Thompson in & for Cty. of Maricopa*, 454 P.3d 1010, 1017 (Ariz. Ct. App. 2019), (requiring "a substantial probability" that the records contain information that is "critical to an element of the charge or defense," or that their unavailability "would result in a fundamentally unfair trial"), *cert. granted* Aug. 25, 2020; *State v. Fay*, 167 A.3d 897, 911 (Conn. 2017) (requiring a "compelling need" for the records, including the unavailability of less intrusive sources of the same information); *State v. Neiderbach*, 837 N.W.2d 180, 197 (Iowa 2013) (upholding statute requiring a reasonable probability that the information sought is likely to contain exculpatory information that is "not available from any other source" and "for which there is a compelling need" for the defendant to present a defense); *State v. Rehkop,* 908 A.2d 488, 496-97 (Vt. 2006) (requiring a "sufficiently particularized showing" that the records contain material evidence, and a "need for the privileged information"); *Commonwealth v. Barroso*, 122 S.W.3d 554, 563-64 (Ky. 2003) (requiring "receipt of evidence" sufficient to establish that the records contain exculpatory evidence that is "both favorable to the accused and material," and a "reasonable likelihood that the records will be necessary to a determination of guilt or innocence"); *State v. Green*, 646 N.W.2d 298, 309 (Wis. 2002) (requiring a "fact-specific evidentiary showing," describing "as precisely

as possible" the information sought from the records and how it supports a particular defense); *People v. Stanaway*, 521 N.W.2d 557, 574 (Mich. 1994) (requiring a good-faith belief, "grounded on some demonstrable fact," that there is "a reasonable probability that the records are likely to contain material information necessary to the defense."); *Dist. Court*, 719 P.2d at 727 (requiring a "particularized factual showing" that "access to the privileged communications of the victim is necessary"); *Hathaway v. State*, 399 P.3d 625, 637-40 (Wyo. 2017) (requiring "more than a hunch that some vague type of record may exist or a conclusory statement that the information is constitutionally material").

Only three jurisdictions appear to have adopted something truly akin to the low "plausibility" standard that Petitioner favors. *Dietrich v. Smith*, 701 F.3d 1192, 1197 (7th Cir. 2012) ("plausible showing"); *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992) ('plausible showing"); *State v. Trammell*, 435 N.W.2d 197, 201 (Neb. 1989) ("reasonable ground to believe").[1]

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[1] Petitioner categorizes Delaware and Vermont as applying a low "plausibility" standard, but their full standards are bolstered by other requirements. *See Burns v. State*, 968 A.2d 1012, 1025-26 (Del. 2009) (adopting "plausible showing" standard but requiring a "compelling justification that that information was needed"); *Rehkop*, 908 A.2d at 498 (*in camera* review proper upon a "sufficiently particularized showing" that the records "may indeed contain material evidence" and defendant had established that the evidence was "necessary to his defense"). Petitioner also cites a Rhode Island advisory opinion, but it only recognized that a defendant-friendly "reason to believe" standard would pass constitutional muster; it did not hold that such a standard was

And most jurisdictions emphasize that an *in camera* review is not constitutionally required upon a mere allegation that privileged records might contain information that could be relevant or helpful. *See, e.g.*, *Green*, 646 N.W.2d at 310 ("A defendant must show more than a mere possibility that the records will contain evidence that may be helpful or useful to the defense."); *Zapata* 428 P.3d at 529 ("For a court to review statutorily privileged material, the initial showing must be more than a 'vague assertion that the victim may have made statements to her therapist that might possibly differ from the victim's anticipated trial testimony.'" (quoting *Dist. Court*, 719 P.2d at 726)).

Recognizing the psychologist-patient privilege "serves the public interest, since the mental health of the Nation's citizenry, no less than its physical health, is a public good of transcendent importance," *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996), most jurisdictions require a particularized factual showing that the records contain material or exculpatory information to prevent fishing expeditions into privileged records. *See, e.g.*, *Stanaway*, 521 N.W.2d at 576 ("The defendant overstates his case when he asserts that his right to discovery, confrontation, and effective cross-examination compels that he be granted an opportunity to discover any potentially exculpatory evidence. Without a more specific request, defendant is fishing.").

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constitutionally required. *See Advisory Op. to the House of Representatives*, 469 A.2d 1161, 1163-66 (R.I. 1983).

The Colorado Court of Appeals applied the majority standard when it required Petitioner make a particularized factual showing that the requested records were "necessary to vindicate a defendant's right to present a complete defense." Pet. App. 11a-12a. And it concluded that Petitioner's general and vague proffer did not meet that standard. Pet. App. 12a-13a. This reasoning mirrors the reasoning in cases from the majority of jurisdictions that permit *in camera* review of privileged records upon a particularized factual showing that the requested records are material, exculpatory, or necessary to the defense.

Because the Colorado Court of Appeals opinion applied longstanding Colorado law and the majority rule nationwide, it does not "deepen" any split in authority. And under Colorado's approach—which is largely the same as most other jurisdictions that allow *in camera* review—the Colorado Court of Appeals decision was correct, as will be discussed next.

C. Petitioner did not make a sufficient showing to justify *in camera* review.

Petitioner disagrees with the Colorado Court of Appeals' conclusion that Petitioner did not make a sufficient particularized showing that Dennielle's records contained material, exculpatory information that was necessary to vindicate his right to present a complete defense and asks this Court to correct the alleged error. *See* Pet. 11-12, 29. Because the court of appeals correctly applied the appropriate standard, this Court should not grant certiorari review.

As set out above, a defendant must make a particularized factual showing that the privileged

records he seeks contained material, exculpatory evidence necessary to his defense. *Dist. Court*, 719 P.2d at 727; *Dill*, 927 P.2d at 1324. Evidence is "material" and exculpatory "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

Petitioner proffered that Dennielle sought psychotherapy treatment from Kaiser Permanente "due to depression surrounding miscarriages and other issues" and argued that "because she was depressed, she may have taken her own life." Pet. App. 31a-32a. Petitioner acknowledged that "there will be other witnesses presented who will talk about her wanting to be a mother and her inability to do that and how that took an emotional toll on her" and that the psychotherapy records would "be corroborating in that sense." Pet. App. 32a. He did not indicate *when* Dennielle sought psychotherapy treatment (including whether it was close in time to her death), that she sought treatment because she was struggling with suicidal ideation, or that she had attempted suicide before. Pet. App. 13a. Nor did he suggest that Dennielle sought treatment for depression because of her unhappy marriage or Petitioner's discovery of her affair, let alone that she sought treatment because these circumstances made her suicidal. *See* Pet. App. 31a-32a, 35a.

Petitioner's proffer was not a sufficiently particularized showing that Dennielle's privileged mental health records contained material, exculpatory

information necessary to his suicide defense. Contrary to Petitioner's speculation that Dennielle's depression "may" have led her to take her own life, recent studies suggest that only 2% of individuals treated for depression in an outpatient setting die by suicide, and only 1% of women with a lifetime history of depression die by suicide. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., *"Does depression increase the risk for suicide?" FAQ – Mental Health and Substance Abuse*, https://www.hhs.gov/answers/mental-health-and-substance-abuse/does-depression-increase-risk-of-suicide/index.html (last accessed Sept. 11, 2020).

Coupled with Petitioner's failure to specify *when* Dennielle received treatment, whether he had reason to believe she sought treatment based on expressions of suicidal ideation, or whether she sought treatment because she felt suicidal due to her unhappy marriage or Petitioner's discovery of her affair, his general, vague proffer that Dennielle was treated for depression at some point was not a sufficiently particularized showing that the privileged records might have contained exculpatory material.

Petitioner also acknowledged that he could elicit essentially the same information from nonprivileged sources, such as Dennielle's family or friends, so the privileged records would merely corroborate that testimony. *E.g.*, *Dietrich*, 701 F.3d at 1197-98 (noting "no *in camera* review of B.T.'s counseling records was necessary because even if the files contained the exact information Dietrich speculated existed, that information was first and foremost immaterial and cumulative at best"); *Fay*, 167 A.3d at 911 (defendant must show information sought was unavailable from

other nonprivileged sources); *Green*, 646 N.W.2d at 310 ("[T]he evidence sought from the records must not be merely cumulative to evidence already available to the defendant.").

Petitioner's subpoena was ultimately nothing more than a broad discovery request, hoping that Dennielle's privileged records might contain evidence supporting his suicide defense. *See Dill*, 927 P.2d at 1324 ("The defendant asserts nothing more than a desire to conduct a fishing expedition in the hope of discovering material exculpatory information that he has no reason to believe will be found."). Given society's paramount interest in protecting privileged documents from disclosure—here, the substantial interest in encouraging citizens to seek and obtain effective mental health treatment—the Sixth and Fourteenth Amendments did not require the court to conduct an *in camera* review of Dennielle's privileged records based on Petitioner's general and vague proffer.

The trial court did not err in quashing Petitioner's subpoena for Dennielle's mental health records without reviewing them *in camera* because Petitioner failed to make a sufficiently particularized showing that the records might contain material, exculpatory evidence necessary to his defense. Under these circumstances, the Colorado Court of Appeals correctly concluded that the Sixth and Fourteenth Amendments did not require an *in camera* review of Dennielle's records covered by the psychologist-patient privilege.

CONCLUSION

Because Petitioner's confession and presentation of other evidence supporting his suicide defense rendered any error harmless beyond a reasonable doubt, and because Petitioner was not entitled to an *in camera* review of Dennielle's privileged records under any standard, the petition for writ of certiorari should be denied.

Respectfully submitted,

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