No. 19-1357

In the

Supreme Court of the United States

ROBERT A. PEREZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

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

REPLY BRIEF FOR PETITIONER

Ned R. Jaeckle
COLORADO STATE PUBLIC DEFENDER
1300 Broadway, Suite 300
Denver, CO 80203

Meaghan VerGow
Kendall Turner
Counsel of Record
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5204
kendallturner@omm.com

Jeffrey L. Fisher
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, CA 94025

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

RULES

REPLY BRIEF FOR PETITIONER

The brief in opposition concedes there is a split on the question presented. It also concedes that, in other jurisdictions, petitioner would have been entitled to the relief he seeks. It does not dispute that the issue presented by this petition recurs frequently and is critically important. And it includes virtually no argument defending the merits of the decision below.

Instead, the State principally argues that the Court should deny review because of two purported vehicle problems. Each is illusory. First, the State observes that the decision below is an unpublished decision from an intermediate court that applied pre-existing law from the state's highest court. But this Court routinely reviews this sort of unpublished decision. For good reason: That neither a published opinion nor state high court review was required here shows that Colorado's approach to the question presented is firmly entrenched and that the time for this Court's review is now.

Second, the State says any error is harmless. But no court addressed this issue below, meaning it is a question for remand, not one that precludes this Court's review. In any event, the error was not harmless; petitioner's entire defense was that his wife killed herself, and he was denied the only evidence that could have shown that she had been diagnosed with depression or struggled with suicidal ideation.

This case is accordingly an ideal vehicle for resolving the question presented and bringing much-needed clarity to the fundamental and frequently recurring issue of whether, or to what extent, the Constitution

guarantees a criminal defendant the right to discover potentially exculpatory, privileged mental health records held by a private party. This Court should grant certiorari and reverse.

1. *Split.* Colorado is one of many jurisdictions in which petitioner would not be entitled to *in camera* inspection of his wife's psychotherapy records. These jurisdictions include those in which defendants are never entitled to *in camera* review of privileged psychotherapy records. *See* Pet. 12–13. And these jurisdictions include Utah and Colorado, both of which preclude *in camera* inspection of privileged psychotherapy records unless the defendant shows the records "will, in fact, be exculpatory." *State v. Blake*, 63 P.3d 56, 61 (Utah 2002); *see* Pet. App. 11a–12a.

Furthermore, the State concedes there is a split among the state high courts and federal courts of appeals on the question presented. *See* BIO 18–22. In fact, the State acknowledges that at least three jurisdictions—the Seventh Circuit, Minnesota, and Nebraska—require judicial inspection of psychotherapy records whenever a defendant shows that the records "plausibly" contain exculpatory evidence. *See id.* at 20. Colorado does not dispute that petitioner has satisfied that standard and would have been entitled to *in camera* review of his wife's psychotherapy records had he been tried in those jurisdictions.

Even if that were the full extent of the conflict among the courts on the question presented, this split would warrant this Court's review. But the State, in two respects, understates the conflict's scope.

a. Both Delaware and Vermont count among the States that have adopted the "plausibility" standard. In *Burns v. State*, 968 A.2d 1012 (Del. 2009), the Delaware Supreme Court "conclude[d] that a defendant need only make a 'plausible showing' that the records sought are material and relevant. Otherwise, the defendant would find it impossible in most cases to establish materiality and relevance with specificity." *Id.* at 1025. To be sure, the court said that not "every defendant will automatically be entitled to an *in camera* review" because he must also "establish specifically what kinds or categories of records they are seeking, and must articulate a compelling basis for the request." *Id.* But those are the standard requirements that must be satisfied for *any* discovery request, *see id.* at 1026 (citing Del. Super. Ct. Crim. R. 17), not some special, heightened standard that applies in this context alone. Delaware courts have interpreted *Burns* accordingly, not as Colorado does: One recent decision cited *Burns* for the proposition that, if a defendant "make[s] a plausible showing that the records are material and relevant, then the State [must] produce the records to the trial Court for an in camera review." *State v. D.F.*, 2012 WL 4849143, at *2 n.7 (Del. Fam. Ct. Aug. 28, 2012). The court did not say the defendant has to satisfy any other requirements first.

Similarly, in *State v. Rekhop*, 908 A.2d 488 (Vt. 2006), the Vermont Supreme Court held that, as long as a defendant "show[s] that the counseling files in question *may* indeed contain material evidence," the defendant is "entitled to have the court conduct an in camera review of the requested documents." *Id.* at

496–97 (emphasis added). The court made clear that all the defendant needs to show to satisfy this requirement is some "basis for his claim that [the record] contains material evidence." *Id.* at 495 (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n.15 (1987)). That is a plausibility standard. *See Ritchie*, 480 U.S. at 58 n.15. Underscoring the point, the Vermont court's only example of a situation in which a defendant would fail to satisfy this standard was one in which he "made no offer of proof to show that the evidence is material to his defense and not otherwise available." *Rekhop*, 908 A.2d at 496 (internal citation omitted).[1]

b. Contrary to the State's assertions that all other jurisdictions agree with Colorado, many other jurisdictions follow a "probability" requirement under which petitioner would prevail. These jurisdictions do not require a defendant to establish that the privileged psychotherapy records are, in fact, "*necessary* to vindicate a defendant's right to present a complete defense"—which is Colorado's standard, Pet. App. 11a–12a (emphasis added). Instead, they require *in camera* inspection of such records so long as a defendant satisfies a less demanding "probability" standard. *See R.S. v. Thompson ex rel. Cty. of Maricopa*, 454 P.3d 1010, 1017 (Ariz. Ct. App. 2019) ("substantial probability"), *review granted* (Ariz. Aug. 25, 2020); *State v. Fay*, 167 A.3d 897, 911 (Conn. 2017) (multi-factor test focusing on "the potential significance of th[e] materials in establishing the defense"); *State v. Neiderbach*,

[1] Although Colorado faults petitioner for citing a Rhode Island advisory opinion, BIO 20–21 n.1, petitioner did not include Rhode Island in the split, but merely cited the opinion for its discussion of the question presented, *see* Pet. 10–11.

837 N.W.2d 180, 197 (Iowa 2013) ("reasonable probability"); *Commonwealth v. Barroso*, 122 S.W.3d 554, 564 (Ky. 2003) ("reasonable belief that the records contain exculpatory evidence"); *People v. Stanaway*, 521 N.W.2d 557, 574 (Mich. 1994) ("good-faith belief . . . that there is a reasonable probability"); *State v. Cressey*, 628 A.2d 696, 704 (N.H. 1993) ("reasonable probability"); *State v. Blackwell*, 801 S.E.2d 713, 726–29 (S.C. 2017) (citing *Barroso*'s requirement that defendant make "a proper preliminary showing"); *State v. Green*, 646 N.W.2d 298, 379 (Wis. 2002) ("reasonable likelihood"); *Hathaway v. State*, 399 P.3d 625, 641 (Wyo. 2017) (requiring "more than a hunch" or "a conclusory statement that the information is constitutionally material"). At least one of these courts has expressly recognized that this "reasonable likelihood" standard is "less stringent" than a requirement like Colorado's—i.e., a requirement that defendants show that psychotherapy records actually *do* contain exculpatory evidence. *Green*, 646 N.W.2d at 379.

Colorado nevertheless insists that these courts follow Colorado's rule of requiring "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." BIO 19. But, as the petition pointed out, *see* Pet. 10 n.1, many of these jurisdictions do *not* require defendants to provide any factual support for their request for *in camera* review of privileged psychotherapy records. *See, e.g.*, *Fay*, 167 A.3d at 911; *Neiderbach*, 837 N.W.2d at 197; *Cressey*, 628 A.2d at 704; *Blackwell*, 801 S.E.2d at 726–29; *Hathaway*, 399 P.3d at 641. And the State does not

dispute that, absent such a requirement, petitioner would prevail.

2. *Vehicle*. Contrary to Colorado's contentions, this case is an excellent vehicle to resolve the conflict over the question presented.

a. There is no merit to the State's assertion that the decision is a poor vehicle because it arises from an unpublished Colorado Court of Appeals decision that did not "deepen" any split. BIO 16–18. This Court has routinely and recently granted petitions in similar circumstances. *See, e.g.*, *Herrera v. Wyoming*, 139 S. Ct. 1686, 1694 (2019); *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017); *Foster v. Chatman*, 136 S. Ct. 1737, 1745 (2016); *Grady v. North Carolina*, 575 U.S. 306, 308 (2015); *Navarette v. California*, 572 U.S. 393, 396 (2014). There is good reason for reviewing cases in this posture: That a State's position on a question is so well established that an intermediate appellate court's decision merited neither publication nor review by the State's court of last resort confirms that the State's approach to a question is entrenched. And that is exactly the context in which this Court should intervene.

b. While Colorado argues that any constitutional violation was harmless, no lower court has addressed harmlessness. And this Court has repeatedly held that "the determination whether [a constitutional] error" is "harmless beyond a reasonable doubt is best left to the" court below "in the first instance." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *see also, e.g.*, *Maslenjak v. United States*, 137 S. Ct. 1918, 1931 (2017); *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016); *McFadden v. United States*, 576 U.S. 186, 189

(2015); *Bullcoming v. New Mexico*, 564 U.S. 647, 668 n.11 (2011); *Skilling v. United States*, 561 U.S. 358, 414 (2010); *Chapman v. California*, 386 U.S. 18, 24 (1967). Where, as here "the court below has not yet passed on the harmlessness of any error," this Court's "normal practice" is to resolve the question presented and then "remand th[e] case to the" court below "to consider in the first instance whether the [particular] error was harmless." *Neder v. United States*, 527 U.S. 1, 25 (1999). Harmlessness is therefore, at most, an issue for remand—not an issue that precludes this Court's review of the question presented.

In any event, the error here was not harmless. The State's primary argument why the error was harmless is that one of petitioner's fellow inmates testified that petitioner had confessed. BIO 9–12. But as defense counsel explained during his closing argument, this witness was a repeat jailhouse informant who was "making it up" to curry favor with the prosecution. R. Tr. 116–18 (May 13, 2016); *see also, e.g.*, Br. for Nat'l Ass'n of Crim. Defense Lawyers as *Amicus Curiae*, 2008 WL 5409458, at *4, *Kansas v. Ventris*, No. 07-1356 (Dec. 23, 2008) ("snitch testimony is often fabricated and unreliable"); Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 Wake Forest L. Rev. 1375, 1376–79 (2014) (similar). Defense counsel also impeached the inmate's testimony "by questioning him regarding his extensive felony history and pending charges." Pet. App. 5a. This unreliable, impeached testimony hardly proves that precluding petitioner from developing exculpatory evidence was harmless. After all, the question of harm-

lessness is not whether the evidence could have supported a conviction, but whether the government has shown "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. Colorado has not carried that burden here.

The State also says any error in denying petitioner *in camera* inspection of his wife's psychotherapy records was harmless because he was able to introduce some other evidence that she seemed depressed. BIO 12–14. But none of that evidence—testimony about the gunshot wound from a forensic pathologist, testimony from his wife's family and friends that she seemed depressed but said she would never commit suicide, and testimony that she was disappointed in her marriage and her inability to have children, *see id.* at 13–14—resolved whether petitioner's wife had been diagnosed with depression or whether she was suicidal. Her psychotherapy records, by contrast, could have confirmed or refuted a diagnosis of depression and suicidal ideation. *See* Pet. 20–21. That evidence was essential to petitioner's claim of innocence, which hinged on his argument that his wife died by suicide. *See id.* at 21–22.

In these circumstances, petitioner's wife's psychotherapy records were just as "critical" to the defense as the evidence in Colorado's chosen cases. *See* BIO 13. The facts in *Rock v. Arkansas*, 483 U.S. 44 (1987), are especially similar. There, the petitioner sought to introduce her own post-hypnosis testimony that she had not killed her husband, but rather he had shot himself. *Id.* at 46–47. Arkansas, however, had a *per*

se rule prohibiting introduction of a defendant's hypnotically refreshed testimony. *Id.* at 56. This Court deemed that rule unconstitutional because "[i]t virtually prevented" the petitioner from presenting evidence of her innocence, "despite corroboration of" much of the defendant's testimony "by other witnesses." *Id.* at 57.

Similarly, *Holmes v. South Carolina*, 547 U.S. 319 (2006), *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Washington v. Texas*, 388 U.S. 14 (1967), all invalidated state rules limiting a defendant's ability to introduce evidence that someone else committed the crime with which the defendant was charged. The Court held the State cannot constitutionally bar evidence of third-party guilt simply because "the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict." *Holmes*, 547 U.S. at 330. So too here: Petitioner's defense is that he did not murder his wife; she shot herself. Colorado cannot prohibit the development and introduction of that evidence of third-party guilt any more than other States could in *Holmes*, *Chambers*, and *Washington*.

c. Finally, the State says petitioner simply did not make a sufficiently particularized showing that he needed his wife's psychotherapy records to present a complete defense. BIO 22–25. But this argument assumes that Colorado's rule requiring petitioner to make that showing is correct. The entire point of the petition is that Colorado's rule is wrong, both as a matter of first principles and under this Court's decision in *Ritchie*. *See* Pet. 22–35. In *Ritchie*, Pennsylvania argued—as Colorado does here—that disclo-

sure of privileged records should require "a particularized showing of what information [the defendant] was seeking or how it would be material." 480 U.S. at 58 n.15. This Court rejected that proposal; it required *in camera* inspection even though it was "impossible to say" whether the records contained information "relevant to [the defendant's] claim of innocence." *Id.* at 57. Colorado cannot fault petitioner for failing to satisfy a test that lacks any constitutional foundation and has been squarely rejected by this Court.

The facts of this case underscore just how flawed the "particularized showing" requirement is. Colorado says petitioner did not make a sufficiently particularized showing of his need for *in camera* inspection of his wife's psychotherapy records because he failed to identify the precise dates on which she sought psychotherapy and because he was unable to establish that "she was struggling with suicidal ideation." BIO 23. But petitioner had no way to know either piece of information without access to the psychotherapy records themselves. The State's own logic shows that petitioner was stuck in a Catch-22: If he had somehow been able to provide more detailed information about his wife's psychotherapy records, a court may well have concluded that the records were not material because petitioner "could elicit essentially the same information from nonprivileged sources." *Id.* at 24. Conversely, because petitioner did not have more detailed information about his wife's psychotherapy records, the decision below held that he had not made a "sufficiently particularized showing" to warrant *in camera* inspection. *Id.* at 25.

This circle cannot be squared, which is precisely why Colorado's answer to the question presented is wrong.

3. *Merits*. Read generously, the brief in opposition contains one paragraph defending the merits of the decision below. *See* BIO 21. That argument amounts to an observation that "the psychologist-patient privilege" is important to "the public interest," *id.*, because the "mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996).

No one disputes that the privilege accorded psychotherapy records serves important public ends. *See* Pet. 2. But this Court has repeatedly held that a defendant's right to present a complete defense overrides evidentiary privileges, even when those privileges serve worthy societal interests. *See id.* at 26 (citing cases). And *Jaffee* itself recognized that "there are situations in which the privilege" accorded psychotherapy records "must give way." 518 U.S. at 18 n.19.

This is just such a situation. The decision below allowed Colorado's privilege law to override petitioner's constitutional right to present a complete defense. For all the reasons provided in the petition, that was error. Where—as here—a criminal defendant shows that psychotherapy records plausibly contain exculpatory evidence, the Sixth and Fourteenth Amendments require that the trial court review those records *in camera*. *See* Pet. 22–35. Colorado never even addresses those arguments, confirming that its chosen approach to the question presented has no basis in the Constitution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Ned R. Jaeckle
COLORADO STATE PUBLIC DEFENDER
1300 Broadway, Suite 300
Denver, CO 80203

Meaghan VerGow
Kendall Turner
Counsel of Record
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5204
kendallturner@omm.com

Jeffrey L. Fisher
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, CA 94025

September 25, 2020