No. 19-____

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

PETITION FOR A WRIT OF CERTIORARI

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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.

STATEMENT OF RELATED PROCEEDINGS

Perez v. People, Colorado Supreme Court No. 19SC587 (Feb. 24, 2020) (available at 2020 WL 897586) (denying Perez's petition for a writ of certiorari)

People v. Perez, Colorado Court of Appeals No. 16CA1180 (June 13, 2019) (affirming trial court judgment)

People v. Perez, Colorado District Court No. 14CR4593 (Apr. 7, 2016) (granting motion to quash subpoena seeking mental health records)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Perez respectfully petitions for a writ of certiorari to review the judgment of the Colorado Supreme Court.

OPINIONS BELOW

The Colorado Supreme Court's decision denying petitioner's petition for a writ of certiorari is published at 2020 WL 897586 and reprinted in the Appendix to the Petition ("Pet. App.") at 1a. The decision of the court of appeals is unpublished but reprinted at Pet. App. 2a–22a. The decision of the trial court is unpublished but reprinted at Pet. App. 23a–26a.

JURISDICTION

The Supreme Court of Colorado denied discretionary review of petitioner's appeal on February 24, 2020. Pet. App. 1a. On March 19, 2020, this Court issued an order automatically extending the time to file a petition for certiorari to 150 days from the date of the lower court judgment. This Court has jurisdiction under 28 U.S.C. § 1257.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI.

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

The relevant provision of Colorado law is reproduced in the appendix. Pet. App. 49a–68a.

INTRODUCTION

When a criminal defendant seeks potentially exculpatory information that is protected by the psychotherapist-patient privilege, a court must decide which prevails: the defendant's interest in accessing that material, or the government's policy interest embodied in the privilege. Both sides of the ledger are important: On the defendant's side, his constitutional rights to due process, compulsory process, and confrontation may all be compromised if he is denied access to the information. On the government's side, disclosing otherwise privileged information could compromise important public objectives, including "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).

Where the evidence is in the hands of the State and the privilege law at issue does not "absolute[ly] . . . shield [the] files from all eyes," this Court has held that a criminal defendant's constitutional right to due process trumps a privilege. *Pennsylvania v. Ritchie*, 480 U.S. 39, 57–58 (1987). That is not to say that a defendant automatically has access to any privileged information he claims may assist in his defense. Rather, a trial court must review the requested records

in camera to determine if they contain material, exculpatory evidence, and must provide the records to the defense if so. *Id.* at 59–60. This approach serves the defendant's "interest without destroying the [State's] need to protect the confidentiality" of the records. *Id.* at 61.

But this Court's decision in *Ritchie* left much unresolved. First, it did not address the question whether, or under what circumstances, a criminal defendant's constitutional rights related to presenting a defense trump a state law forbidding the discovery of records held by a private party. Second, it did not address how *Ritchie*'s rule applies where a state privilege law is absolute. Third, *Ritchie* did not resolve whether constitutional rights other than due process—specifically, the rights to compulsory process and confrontation—might also sometimes require *in camera* inspection. *Ritchie*, 480 U.S. at 51–58; *see id.* at 61–66 (Blackmun, J., concurring in part and concurring in the judgment); *id.* at 66–72 (Brennan, J., dissenting); *id.* at 72–78 (Stevens, J., dissenting).

This indeterminacy has led state high courts and federal courts of appeals to disagree over how *Ritchie* applies in the context of privately held psychotherapy records. Thirteen state courts and one federal court of appeals require a trial court to inspect privately held psychotherapy records *in camera* if the records probably or plausibly contain exculpatory evidence. Conversely, seven state courts and two federal courts of appeals flat-out prohibit a trial court from inspecting such records *in camera*. And two States allow *in camera* inspection only where the defendant can provide—*before* the requested inspection—evidence

demonstrating that the requested materials are essential to the defense.

This case presents an opportunity to resolve this entrenched disagreement among the state high courts and federal courts of appeals. Before being tried for murder following his wife's death, petitioner sought discovery of his wife's mental health records from her private healthcare provider. His defense was that his wife died by suicide, and he sought her therapy records to support that defense. But the trial court quashed petitioner's subpoena, declining to review the records *in camera* because the state privilege for psychotherapy records was absolute. That decision was affirmed on appeal, with the appellate court reasoning that *Ritchie* did not apply because petitioner's wife's mental health records were held by a private provider and were absolutely protected under state law.

Had petitioner sought the same records in most other jurisdictions, the trial court would have been required to review them *in camera* to determine if they contained material, exculpatory evidence. But because petitioner was prosecuted in Colorado, he was denied even the trial court's *in camera* inspection of the requested records. This varied treatment of criminal defendants' right to material, exculpatory evidence is intolerable, and only this Court can resolve it.

STATEMENT OF THE CASE

1. In 2014, petitioner's wife, Dennielle Perez, was found dead from a gunshot wound. The State of Colorado charged petitioner with first-degree murder.

Petitioner maintained that his wife had committed suicide. Pet. App. 4a.

Petitioner served a pretrial subpoena on Kaiser Permanente, seeking his wife's mental health records. Pet. App. 5a. Petitioner knew that Dennielle had sought therapy, but he did not know if she had been diagnosed with depression or had sought help for suicidal ideation. *Id.* at 12a.

The prosecution moved to quash the subpoena, arguing that Dennielle's mental health records were protected by Colorado's psychotherapist-patient privilege and that the representative of her estate had not waived the privilege. Pet. App. 5a–6a; *see* Colo. Rev. Stat. § 13-90-107(1)(g). Petitioner explained that he needed the records "to present an adequate defense and to be able to support his conclusion that this is a suicide." Pet. App. 33a. He also explained why he believed the records would include exculpatory information: He knew that Dennielle was sad, that she had sought therapy from the subpoenaed provider, and that depression may have led to her suicide. *Id.* at 12a, 31a–32a.

The trial court concluded that mental health records were protected by the psychotherapist-patient privilege, that the privilege prohibited pretrial discovery of information within its scope, and that the only basis for authorizing disclosure of such records was express or implied waiver (which did not occur here). Pet. App. 25a–26a. The trial court refused to conduct even an *in camera* inspection of the records to determine whether they contained exculpatory evidence. It simply quashed the subpoena. *Id.* at 26a.

2. At trial, the prosecution's theory was that petitioner shot his wife because he had recently discovered that she had been having an affair with another man. Pet. App. 4a. The defense theory was that Dennielle committed suicide because she was depressed and afraid that petitioner would release details of the couple's sexual activities, bringing shame on her and her family. *Id.*

A defense expert—a crime scene and blood pattern analyst formerly with the Colorado Bureau of Investigation—concluded that Dennielle died from a self-inflicted gunshot wound. Pet. App. 14a. And while Colorado's coroner/medical examiner believed Dennielle's death was more likely a homicide, he testified that he could not rule out suicide. *Id.*

Both the prosecution and defense presented evidence that Dennielle appeared sad to her family and friends. Pet. App. 3a. Witnesses testified that Dennielle had discussed suicide but said she would never do it; her brother also testified that Dennielle had told him shortly before her death that she had wandered away from the house after taking a handful of sleeping pills. Pet. App. 13a–14a. But the jury never heard whether she had been diagnosed with depression or sought treatment for suicidal ideation—information that her mental health records could have revealed.

After a ten-day trial, the jury returned a verdict of guilty. Pet. App. 5a. Petitioner was sentenced to life imprisonment without the possibility of parole.

3. Petitioner appealed his conviction, arguing that the trial court erred by quashing the subpoena seek-

ing Dennielle's mental health records without reviewing them *in camera*. He contended that, in declining to review the records, the trial court violated his constitutional rights under the Due Process Clause, the Compulsory Process Clause, and the Confrontation Clause. Pet. App. 6a.

The Colorado Court of Appeals affirmed. It first confirmed that the state privilege law "preclude[s] the compelled production of mental health records"—even to a court "for in camera review"—"unless the privilege is waived." Pet. App. 8a.

Considering petitioner's constitutional claims *de novo*, the Colorado Court of Appeals rejected petitioner's argument that his "constitutional right to present a complete defense" required *in camera* review of Dennielle's mental health records. Pet. App. 9a–12a. The court of appeals acknowledged that the "constitutional right to present a complete defense" implicated petitioner's due process, compulsory process, and confrontation rights, and that *Ritchie* had "held that a victim's statutory right may yield to a defendant's right to present a complete defense under particular circumstances." *Id.* at 9a (citing *Crane v. Kentucky*, 476 U.S. 683 (1983)). But it believed *Ritchie* was distinguishable because it did not address an absolute privilege. *Id.* at 9a–10a.

The court of appeals further held that a defendant could not otherwise obtain *in camera* review of privileged psychotherapy records "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."

Pet. App. 11a–12a. The Colorado court of appeals believed petitioner did not satisfy this test because he failed to supply "factual support" for his claim that the records "likely contain evidence Dennielle was suicidal." *Id.* at 13a. The court did not explain how petitioner could have provided that factual support absent access to the records in the first place. Nor did it expressly address his Compulsory Process Clause claim.

The Colorado court of appeals did, however, expressly reject petitioner's argument that his confrontation rights required "some access to the victim's mental health records," even "in the absence of a waiver." Pet. App. 8a. In the court's view, a defendant's confrontation rights would compel *in camera* review only if he made a "particularized factual showing" that he "needed the records to effectively protect his confrontation rights." *Id.* The court of appeals further concluded that it was "doubtful" petitioner's "confrontation rights are implicated with respect to the subpoena in this case" because it believed confrontation rights to be "trial rights," not rights "to compel pretrial discovery." *Id.* at 10a n.3.

4. Petitioner sought a writ of certiorari from the Colorado Supreme Court, but that court denied his petition without comment. Pet. App. 1a.

REASONS FOR GRANTING THE WRIT

State high courts and federal courts of appeals are deeply and intractably divided over whether, and under what circumstances, a criminal defendant's constitutional rights require a court to review *in camera*

privately held psychotherapy records that the defendant contends are exculpatory. While these conflicting decisions focus on psychotherapy records, the same question arises in any context in which a defendant seeks purportedly exculpatory evidence that is held by third party and is otherwise protected by a privilege. This Court should use this case, which squarely presents this important issue, to resolve the conflict. And the Court should hold that a trial judge must conduct an *in camera* inspection of privately held psychotherapy records whenever they plausibly contain exculpatory evidence.

A. State high courts and federal courts of appeals are openly split on the question presented.

Several commentators have observed that "the *Ritchie* decision has been accorded a variety of interpretations" in the context of "an intrusion on private privilege." 1 McCormick on Evidence § 74.2 (8th ed. Jan. 2020 update); *see also, e.g.*, 4 Michael H. Graham, Handbook of Federal Evidence § 504:1 (8th ed. Nov. 2019 update) (citing cases). Courts, too, have acknowledged the disagreement. *See, e.g.*, *N.G. v. Superior Court*, 291 P.3d 328, 337 (Alaska Ct. App. 2012); *Commonwealth v. Barroso*, 122 S.W.3d 554, 561–62 (Ky. 2003). And the U.S. Department of Justice has recognized a split on whether the question presented implicates defendants' rights under the Confrontation Clause. *See* Pet. for Rehearing En Banc at 9–10, *United States v. Arias*, 936 F.3d 793, No. 18-2604 (8th Cir. Oct. 22, 2019).

The decision below deepens this entrenched split. Thirteen States and one federal court of appeals have

adopted rules that would have required *in camera* inspection of Denielle Perez's psychotherapy records because those records probably or plausibly contained exculpatory evidence. By contrast, the Colorado courts denied any *in camera* inspection of those records, consistent with the precedent of eight other States and two federal courts of appeals.

1. Nine States (Arizona, Connecticut, Iowa, Kentucky, Michigan, New Hampshire, South Carolina, Wisconsin, and Wyoming) require *in camera* review when a defendant shows that the records probably contain exculpatory information. *See R.S. v. Thompson ex rel. Cty. of Maricopa*, 454 P.3d 1010, 1017 (Ariz. Ct. App. 2019); *State v. Fay*, 167 A.3d 897, 910 (Conn. 2017); *State v. Neiderbach*, 837 N.W.2d 180, 197 (Iowa 2013); *Barroso*, 122 S.W.3d at 564; *People v. Stanaway*, 521 N.W.2d 557, 574 (Mich. 1994); *State v. Cressey*, 628 A.2d 696, 704 (N.H. 1993); *State v. Blackwell*, 801 S.E.2d 713, 726 (S.C. 2017); *State v. Green*, 646 N.W.2d 298, 379 (Wis. 2002); *Hathaway v. State*, 399 P.3d 625, 640 (Wyo. 2017).[1]

Two States (Delaware and Minnesota) and the Seventh Circuit go even further, requiring *in camera* review when the defendant shows that the records "plausibly" contain such information. *See Dietrich v. Smith*, 701 F.3d 1192, 1196 (7th Cir. 2012); *Burns v. State*, 968 A.2d 1012, 1025 (Del. 2009); *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992). Nebraska and Vermont require effectively the same showing, but in

[1] Some of these courts require the defendant to provide extrinsic evidence to satisfy the probability showing, *see, e.g.*, *R.S.*, 454 P.3d at 1017, while others do not appear to have any such requirement, *see, e.g.*, *Neiderbach*, 837 N.W.2d at 196–98.

different words. *See State v. Trammell*, 435 N.W.2d 197, 201 (Neb. 1989) (requiring *in camera* inspection if defendant provides a "reasonable ground to believe that the failure to produce the information is likely to impair the defendant's right of confrontation"); *State v. Rehkop*, 908 A.2d 488, 498 (Vt. 2006) (requiring *in camera* review where "counseling records *might have* revealed" exculpatory evidence).

A final State, Rhode Island, suggested in an advisory opinion that *in camera* inspection might be required whenever there is "reason to believe" that the material sought contains exculpatory information. *Advisory Op. to the House of Representatives*, 469 A.2d 1161, 1163, 1166 (R.I. 1983).[2]

Petitioner would have prevailed in all of these jurisdictions on his request for *in camera* review: He knew his wife had sought therapy. Pet. App. 12a. He also knew that she had suffered an "emotional toll" because of several "pregnancies and miscarriages" and her resulting belief that she was unable to "be a mother." *Id.* at 31a–32a. Based on that evidence, he knew her therapy records probably (and certainly plausibly) contained exculpatory evidence—i.e., a diagnosis of his wife's depression or evidence of her suicidal ideation. He thus would have successfully

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[2] The Second Circuit has also held that a trial court must review a witness's psychotherapy records *in camera* in certain circumstances, but it has not adopted a definitive test for what a defendant must show to obtain *in camera* inspection. *See In re Doe,* 964 F.2d 1325, 1327, 1329 (2d Cir. 1992). In *Doe*, the court had already begun *in camera* proceedings pursuant to the record holder's consent, but the record holder withdrew that consent during *in camera* review. *Id.* at 1326–27.

moved the trial court to review his wife's psychotherapy records *in camera* in these jurisdictions.

2. But several jurisdictions, like Colorado, require criminal defendants to satisfy a heightened standard to obtain *in camera* inspection of privately held psychotherapy records—or they preclude any such inspection altogether. In those jurisdictions, as in the proceedings below, petitioner would have failed to obtain *in camera* inspection of his wife's mental health records.

Seven States (California, Florida, Illinois, Indiana, Maryland, New Jersey, and Pennsylvania) and the Fourth and D.C. Circuits flat-out deny *in camera* inspection of psychotherapy records held by private entities, at least where the relevant privilege is absolute. *See Kinder v. White*, 609 F. App'x 126, 130–32 (4th Cir. 2015); *United States v. Mejia*, 448 F.3d 436, 458 (D.C. Cir. 2006); *People v. Hammon*, 938 P.2d 986, 993 (Cal. 1997); *State v. Famiglietti*, 817 So.2d 901, 907–08 (Fla. Ct. App. 2002); *People v. Foggy*, 521 N.E.2d 86, 92 (Ill. 1988); *In re Crisis Connection, Inc.*, 949 N.E.2d 789, 802 (Ind. 2011); *Goldsmith v. State*, 651 A.2d 866, 874 (Md. 1995); *State v. J.G.,* 619 A.2d 232, 237 (N.J. Super. Ct. App. Div. 1993); *Commonwealth v. Wilson*, 602 A.2d 1290, 1297 (Pa. 1992). At least one district court has reached the same conclusion. *See United States v. Schrader*, 716 F. Supp. 2d 464, 472 (S.D. W.Va. 2010) (holding that records protected by the psychotherapist-patient privilege "are

unavailable to Defendant," notwithstanding his Sixth Amendment rights).[3]

Utah, like Colorado, requires a defendant to show that the records were "necessary to vindicate a defendant's right to present a complete defense." Pet. App. 12a; *see State v. Blake*, 63 P.3d 56, 62 (Utah 2002) ("reasonable certainty"). "This is a stringent test, necessarily requiring some type of extrinsic indication that the evidence within the records exists and will, in fact, be exculpatory." *Blake*, 63 P.3d at 61.[4]

3. The constitutional underpinnings of the decisions recognizing a right to *in camera* review of privately held psychotherapy records vary.

a. Some courts have deemed "the heart of this controversy" to be defendants' due process rights. *Stanaway*, 521 N.W.2d at 567. As the Supreme Court of Michigan put it: "[I]f relevant evidence is shielded by privilege for some purpose other than enhancing the truth-seeking function of a trial, then the danger of convicting an innocent defendant increases." *Id.* That court recognized that "[t]here is no general constitutional right to discovery in a criminal case," *id.* at 568 (quoting *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)), and that *Ritchie* was limited to the context in which the records requested are in the possession of

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[3] Although the Seventh Circuit seemed to adopt this approach in *United States v. Hach,* 162 F.3d 937, 947 (7th Cir. 1998), it has since reversed course, *see supra* Part A.1.

[4] Although the Supreme Court of North Dakota rejected a criminal defendant's request for privileged psychotherapy records held by a private party, it did so only under plain-error review because the defendant failed to raise the claim in trial court. *State v. Spath*, 581 N.W.2d 123, 127 (N.D. 1998).

the State. But it nevertheless held that "a defendant's due process rights" require *in camera* inspection of privately held psychotherapy records if the defendant shows "a reasonable probability that the records are likely to contain material information necessary to the defense." *Id.* at 574. After all, "at a minimum," due process principles establish that "criminal defendants have the right to . . . put before a jury evidence that might influence the determination of guilt." *Id.* at 568 (quoting *Ritchie*, 480 U.S. at 56); *see also, e.g.*, *State v. Gagne*, 612 A.2d 899, 901 (N.H. 1992) (holding that due process requires access to privileged medical and psychotherapy records by way of an *in camera* inspection if the defendant establishes a reasonable probability that the records contain exculpatory information).

Some courts have simply extended *Ritchie*—which was grounded in due process principles, 480 U.S. at 56—to the context of privately held psychotherapy records. For example, the Supreme Court of Delaware rejected any notion that *Ritchie* was inapplicable where "th[e] case involve[s] records held by" a private party rather than a state agency, holding that was "a distinction without a difference. . . . From the standpoint of the privilege holder it is immaterial whether the holder's therapy records are in the possession of a private party or the State." *Burns*, 968 A.2d at 1024. Similarly, the Supreme Court of Connecticut has held that "the rationale of" *Ritchie* applies even where "the documents subpoenaed by the defendant were not in the possession of the state's attorney." *State v. Kelly*, 545 A.2d 1048, 1056 (Conn. 1988). *See also, e.g.*, *Neiderbach*, 837 N.W.2d at 223

(Cady, J., concurring specially) ("Looking broadly at modern legal developments, the arc of the caselaw seeks to ensure a defendant has access to evidence sufficient to provide a fair trial.").

b. Some courts have grounded their decisions in the Confrontation Clause. For example, the Second Circuit has suggested that complete "preclusion of any inquiry into [a witness's] psychiatric history" during *in camera* review "would violate the Confrontation Clause and vitiate any resulting conviction of" the defendant. *In re Doe*, 964 F.2d 1325, 1329 (2d Cir. 1992). Similarly, the Supreme Court of South Carolina has held that denying a criminal defendant even *in camera* inspection of otherwise privileged psychotherapy records impairs his confrontation rights because a defendant cannot use these records in cross-examination if he cannot access them at all. *Blackwell*, 801 S.E.2d at 725–29.

c. Still other courts ground their rules in the Compulsory Process Clause. The Supreme Court of Kentucky, for example, has held that, "[i]f the psychotherapy records of a crucial prosecution witness contain evidence probative of the witness's ability to recall, comprehend, and accurately relate the subject matter of the testimony, the defendant's right to compulsory process must prevail over the witness's psychotherapist-patient privilege." *Barroso*, 122 S.W.3d at 563. In the Kentucky court's view, because "the Compulsory Process Clause operates in favor of criminal defendants," the Clause may require overriding a privilege "not held by a prosecution witness but by the third party who possessed the records." *Id.* at 560 (citing *United States v. Nixon*, 418 U.S. 683 (1974)).

* * *

The varied bases for these opinions confirm that this Court's intervention is badly needed. Courts not only cannot agree on an answer to the question presented; they also cannot agree on the right conceptual framework in which to consider it.

B. The question presented recurs frequently and is extremely important.

1. That numerous state courts and federal courts of appeals have considered the question presented in the past several years demonstrates that the question is recurring. So, too, does the fact that psychotherapy records enjoy some privilege in all fifty States and the District of Columbia, and under federal common law. *See Jaffee*, 518 U.S. at 7. Moreover, because mental health treatment is extremely common—19.8 million people in the United States received mental health services in 2017 alone[5]—victims and witnesses in criminal proceedings will often have psychotherapy records that defendants seek and that may be subject to *in camera* inspection.

The question's importance is also self-evident: Numerous individuals are, like petitioner, in prison following convictions on records that excluded potentially exculpatory, privileged information. *See supra* Part A. The question presented therefore governs whether a large number of prisoners' convictions may be constitutionally infirm. *See e.g.*, *Love v. Freeman*,

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[5] *See* Nat'l Institute on Mental Health, Mental Illness (updated Feb. 2019), https://www.nimh.nih.gov/health/statistics/mental-illness.shtml.

188 F.3d 502 (4th Cir. 1999) (ordering release of a defendant who was sentenced to life terms for rape because the district court erred in deeming immaterial the mental health records of the victim indicating she "had a known problem for lying and living in a 'fantasy world'"). And those convictions often carry steep criminal penalties, including life imprisonment. *See, e.g.*, *id.*; Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 86 Or. L. Rev. 1, 1 n.2 (2007) (citing homicide cases in which the question presented has arisen). Indeed, at the time of petitioner's prosecution, a conviction for his alleged crime carried a potential sentence of death. Colo. Rev. Stat. § 18-1.3-401(1)(a)(V)(A).

2. The importance of the question presented extends beyond psychotherapy records, too. States have accorded a variety of relatively novel evidentiary privileges, all of which are potentially subject to *in camera* inspection when they implicate a criminal defendant's constitutional rights.

The Colorado privilege law at issue in this case, for example, also protects confidential communications between certified public accountants and their clients. Colo. Rev. Stat. § 13-90-107(1)(f). It similarly protects "communications made to" public officers and "confidential intermediar[ies]" "in official confidence, when the public interests, . . . would suffer by disclosure." *Id.* § 13-90-107(1)(e), (i).

Nor is Colorado an outlier. Some States accord privileges to communications between reporters and their confidential sources, *see* N.J. Stat. Ann. § 2A:84A-21(h), and between parents and their minor children, *see, e.g.*, *In re A and M*, 61 A.D.2d 426, 429

(N.Y. Sup. Ct., App. Div. 1978), among other idiosyncratic protections, *see generally* 1 McCormick on Evidence § 76.2 (8th ed. Jan. 2020 update).

The question presented potentially implicates all these privileges. Although these privileges serve important interests, the constitutional rights of criminal defendants should take precedence where a privilege would operate to deny even *in camera* inspection of potentially exculpatory evidence.

3. The question presented implicates not only the defendant's interest in presenting a complete defense, but also society's interest in ensuring that criminal trials continue to serve their "central function" of "discover[ing] the truth." *Portuondo v. Agard*, 529 U.S. 61, 73 (2000). Indeed, because criminal trials must first and foremost fulfill this truth-seeking function, this Court has already recognized that evidentiary rules "may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

* * *

In all events, the sooner this Court brings order to the rules governing when a trial court must review privately held psychotherapy records *in camera*, the better. At this point, there is no prospect that the conflict among the federal courts of appeals and state courts will resolve. This Court's review would help courts that have not yet weighed in on the question presented. And more important, it would provide much-needed clarity to the many defendants throughout the nation serving sentences imposed after trial

courts refused to review privileged psychotherapy records *in camera* based on the belief that privilege law somehow trumps defendants' constitutional rights. Those individuals should not be subjected to criminal penalties based solely on the happenstance of geography.

C. This case is an ideal vehicle to resolve the conflict.

For several reasons, this case is an ideal vehicle for the Court to resolve the questions left open in *Ritchie*.

1. To begin, petitioner squarely raised his Due Process Clause, Compulsory Process Clause, and Confrontation Clause arguments, and the Colorado court expressly rejected each of those arguments. Pet. App. 6a–19a. And petitioner specifically preserved the argument that the absolute nature of a state-law privilege should not preclude *in camera* review of privately held psychotherapy records. *Id*. at 9a.

2. Petitioner's case also would allow this Court to focus on the threshold question of when a court must conduct *in camera* inspection of records held by a private third party, not the question of when defense counsel or a defendant himself is entitled to those records.[6] Every court that authorizes *in camera* inspection of otherwise-privileged, privately held psychotherapy records agrees those records must be disclosed to the defendant if they are material and exculpatory under *Brady v. Maryland*, 373 U.S. 83 (1963),

[6] A recent petition filed with this Court asks the Court to address both questions. *See* Pet. for Certiorari, *Friend v. Indiana*, No. 19-1214 (U.S.)

and *United States v. Bagley*, 473 U.S. 667 (1985). *See, e.g.*, *Love v. Johnson*, 57 F.3d 1305, 1313–14 (4th Cir. 1995); *Dietrich*, 701 F. 3d at 1196; *Barroso*, 122 S.W.3d at 564; *Blake*, 63 P.3d at 61. There is universal agreement on that question for good reason: *Ritchie* already held that a trial court must disclose evidence to the defense when it satisfies the materiality standard in *Brady* and *Bagley*. *Ritchie*, 480 U.S. at 57. That is, if a court reviews psychotherapy records *in camera* and determines that those records "could . . . in any reasonable likelihood have affected the judgment of the jury," *Bagley*, 473 U.S. at 677, the district court must turn the records over to the defendant or his counsel.

The key split is thus about what a defendant has to show to get the court to examine the records *in camera* in the first place. And the Colorado court's decision clearly stakes out a position on that threshold legal issue. Pet. App. 11a–12a.

3. This case is also an excellent vehicle to resolve the question presented because that question is particularly important in homicide cases where the primary defense is that the victim committed suicide. In such cases, the victim "died for one of two reasons: [The defendant] killed her or [she] killed herself. No one suggests there are other possibilities. So the case really turns on whether [the victim] killed herself." *State v. Buelow*, 941 N.W.2d 594, 595 (Iowa Ct. App. 2019). In other words, in cases like this one, whether the victim committed suicide resolves the entire case. And the victim's psychotherapy records are the best evidence to resolve that question: They directly reflect her state of mind—i.e., whether she was suffering

from depression, and whether that depression was so severe that she was suicidal. *See United States v. Veltman*, 6 F.3d 1483, 1494 (11th Cir. 1993) ("A homicide victim's state of mind is unquestionably relevant to the defense theory that she committed suicide."); 41 C.J.S. Homicide § 332 (Mar. 2020 update) ("Where the theory of the defense is that the deceased committed suicide, any evidence otherwise competent tending to show that the deceased came to his or her death by his or her own act is admissible.").

By contrast, the connection between the records sought and the issues in other criminal cases is often more attenuated. The records might show that the accuser had a psychological tendency to lie, which might suggest that he made a false accusation in this instance. *See, e.g.*, *State v. Askins*, 2012 WL 2579532, at *19 (N.J. Super. Ct. July 5, 2012) (rejecting claim for mental health records of sexual assault victims because the "nexus between" those records "and their veracity as trial witnesses is too attenuated").

4. Finally, the question presented is likely to determine not only whether petitioner is entitled to access to the requested psychotherapy records, but also his ultimate guilt or innocence. Evidence is material "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Turner v. United States*, 137 S. Ct. 1885, 1893 (2017) (internal quotation marks omitted). The inquiry "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Rather, "the touchstone is

simply whether the ultimate verdict is one 'worthy of confidence.'" *United States v. Ford*, 550 F.3d 975, 993 (10th Cir. 2008) (Gorsuch, J., dissenting) (quoting *Strickler v. Greene*, 527 U.S. 263, 290 (1999)).

The information petitioner seeks meets that standard. While petitioner had some evidence that his wife seemed depressed, Pet. App. 31a–32a, only her psychotherapy records could have shown a diagnosis of depression. And those records may well have provided other exculpatory information, such as evidence of petitioner's wife's suicidal ideation or plans. Petitioner was forced to defend himself with one hand tied behind his back, denied even *in camera* review of records that plausibly contained exculpatory evidence.

D. The Colorado court's ruling is incorrect.

Where a criminal defendant shows that psychotherapy records plausibly contain exculpatory evidence, the Sixth and Fourteenth Amendments require a trial court to review those records *in camera*.

1. *Ritchie* did not resolve the question whether criminal defendants have a pretrial, constitutional right to obtain *in camera* review of privately held, plausibly exculpatory evidence protected by a state evidentiary privilege. Rather, *Ritchie* grounded its ruling in the prosecutorial disclosure obligation established in *Brady v. Maryland*, 373 U.S. 83 (1963), and expanded on in *United States v. Agurs*, 427 U.S. 97 (1976). *See Ritchie*, 480 U.S. at 57 (citing *Brady* and *Agurs*). That approach made sense in *Ritchie* because everyone agreed that the State possessed the records Ritchie sought.

But where the State does not possess the requested records, *Brady* disclosure obligations do not clearly apply. A court must accordingly decide whether a defendant's due process, compulsory process, or confrontation rights require a court to review privileged psychotherapy records *in camera*. *Ritchie* did not address due process rights outside the *Brady* context, and it expressly declined to resolve whether the case implicated the Compulsory Process Clause, saying only that the Clause "provides no *greater* protections in this area than those afforded by due process." 480 U.S. at 56. *Ritchie* also did not resolve the applicability of the Confrontation Clause. The four-Justice plurality found no Confrontation Clause violation, saying "that the right to confrontation is a *trial* right" that "does not include the power to require [a] pretrial disclosure," but simply the power "to cross-examine all of the trial witnesses fully," *id.* at 52–54. Three Justices, however, believed that "there might well be a confrontation violation if, as here, a defendant is denied pretrial access to information that would make possible effective cross-examination of a crucial prosecution witness." *Id.* at 61–62 (Blackmun, J., concurring in part and concurring in the judgment); *see id.* at 66–72 (Brennan, J., dissenting). The remaining two Justices did not reach the issue because they believed the state court's pretrial discovery ruling was not a final judgment, and thus was not reviewable by this Court. *See id.* at 72–78 (Stevens, J., dissenting).

2. This Court's other precedent points the way for answering the question whether the trial court was obligated to review petitioner's wife's mental health

records *in camera*, and confirms that question must be answered affirmatively.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (internal quotation marks omitted). This right includes "[t]he right to offer the testimony of witnesses," "to compel their attendance," and "to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967). This right to present a defense expressly includes not only "the right to confront the *prosecution*'s witnesses," but also "the right to present [the defendant's] *own* witnesses to establish a defense." *Id.* (emphases added).

This right has deep roots. One of the seminal cases in England before the Revolution illustrated the harms of abridging the right to present a defense in the name of a sort of privilege. John Udall was tried for the felony of authorizing a book that disparaged the Queen; the key evidence against him was a written statement by a third party saying Udall had admitted to being the author. *Trial of John Udall*, 1 Complete Collection of State Trials 1281 (T. Howell ed. 1816). Udall produced witnesses to impeach the statement and prove his innocence, but the witnesses were barred from giving testimony against the Queen. *Id.* This proceeding—which was well known in the

colonies[7]—was considered "so unreasonable and oppressive" that England changed its laws. 4 William Blackstone, Commentaries on the Laws of England 353 (1st ed. 1765–1769) [hereinafter Blackstone]. Thereafter, any defendant was required to "be received and admitted to make any lawful proof that he could, by lawful witness or otherwise, for his discharge and defence." *Id.*

Colony after colony followed suit, adopting a constitutional right allowing defendants to offer exculpatory evidence. Although the particulars varied from State to State, three States specifically emphasized the defense's right to present evidence, guaranteeing the accused the right "to call for evidence in his favour." Va. Dec. of Rts. art. 8 (1776); Pa. Dec. of Rts. art. IX (1776); Vt. Dec. of Rts. art X (1777). Two emphasized the subpoena power, giving the defendant the right to produce "all proofs that may be favorable" to him. Mass. Dec. of Rts. art. XII (1780); N.H. Bill of Rts. art. XV (1783). North Carolina, Delaware, New Jersey, and Maryland used similar language. *See* N.C. Dec. of Rts. art. VII (1776); Del. Dec. of Rts. § 14 (1776); N.J. Const. art. XVI (1776); Md. Dec. of Rts. art. XIX (1776).

This guarantee was incorporated into the Bill of Rights, including the Sixth Amendment. When Representative Aedanus Burke of South Carolina moved to change that Amendment to expressly guarantee the accused the right to a continuance of his trial if subpoenas for "evidence of the witnesses" that "was

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[7] *See* Peter Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 94 & n.92 (1974).

material to his defence" were not served, the proposal was rejected as unnecessary because the "judicial system" could be trusted to construe the Constitution to provide that right. 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1114 (1971).

Consistent with this history, the Court has held that the right to present a defense trumps a variety of evidentiary privileges. In *United States v. Burr*, 25 F. Cas. 30 (C.C.Va. 1807), Chief Justice Marshall held that President Jefferson had to comply with a subpoena to produce documents for *in camera* review, notwithstanding the President's arguments that the documents were protected by executive privilege. The Chief Justice explained that the privilege could not be employed to deny a defendant access to "a paper which the accused believed to be essential to his defence" and "which may, for aught that now appears," in fact "be essential." *Id.* at 37. Any contrary result, he wrote, would "tarnish the reputation of the court." *Id.*

More recently, this Court has held that the defendant's right to present a defense overrides executive privilege, *see United States v. Nixon*, 418 U.S. 683, 711–14 (1974), the government's privilege to withhold the identity of an informant, *Rovario v. United States*, 353 U.S. 53, 64–65 (1957), and a state-law prohibition on introducing a witness's juvenile record, *Davis v. Alaska*, 415 U.S. 308, 319–21 (1974).

To be sure, the right to present a defense is not limitless. "[S]tate and federal rulemakers" may "establish rules excluding evidence from criminal trials." *United States v. Scheffer*, 523 U.S. 303, 308 (1998). For example, state or federal law may disqualify those

incapable of observing events due to mental infirmity or infancy from being witnesses, *Washington*, 388 U.S. at 23 n.21, or may deem polygraphs inadmissible, *Scheffer*, 523 U.S. at 305, or may exclude expert testimony that is not relevant or that lacks adequate foundation, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). These evidentiary rules are "designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers*, 410 U.S. at 301. But this Court has not blessed evidentiary rules that "infring[e] upon a weighty interest of the accused" or are "disproportionate to the purposes they are designed to serve," because that would "abridge an accused's right to present a defense." *Scheffer*, 523 U.S. at 308 (internal quotation marks omitted).

b. The Court should not bless such a rule here, regardless of whether the right to present a defense is seen as a creature of due process principles alone, as this Court has sometimes suggested, *see Washington*, 388 U.S. at 19, or as a hybrid of due process, confrontation, and compulsory process rights, as this Court has suggested at other times, *see, e.g.*, *Nixon*, 418 U.S. at 709, 711.

i. The Due Process Clause requires criminal prosecutions to "comport with prevailing notions of fundamental fairness," which in turn "require that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). "That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence . . . when such evidence

is central to the defendant's claim of innocence." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

Accordingly, this Court has "long interpreted" due process principles to provide "what might loosely be called . . . constitutionally guaranteed access to evidence." *Trombetta*, 467 U.S. at 485 (internal quotation marks omitted). That guarantee clearly encompasses access to evidence in the government's possession. *See id.* This Court has also suggested that the guarantee may encompass access to evidence held by third parties if "a criminal defendant's preparation for trial" would be "hamper[ed]" without it. *Id.* at 486. And this Court has specifically held—when the government was seeking privileged evidence in the possession of third parties—that allowing "privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." *Nixon*, 418 U.S. at 712.

The same rule should pertain when a defendant seeks privately held, potentially exculpatory evidence that is otherwise protected by a psychotherapist-patient privilege. Disclosure for *in camera* review in those circumstances furthers the key purposes of due process: It allows for "develop[ment of] all relevant facts," which is "fundamental" to a properly functioning "adversary system." *Nixon*, 418 U.S. at 709. It allows defendants to obtain evidence "central to" a "claim of innocence." *Crane*, 476 U.S. at 690. And it thereby ensures that criminal trials "comport with prevailing notions of fundamental fairness," *Trombetta*, 467 U.S. at 485—including the notion that it is better to let ten guilty men go free than to wrongly

imprison one innocent, 2 Blackstone 358. Further, this "full disclosure of the facts" supports "public confidence" in "[t]he very integrity of the judicial system." *Nixon*, 418 U.S. at 709. In sum, a defendant's due process "rights are no less worthy of protection simply because he seeks information maintained by a non-public entity." *Cressey*, 628 A.2d at 704.

This case shows how denying defendants *in camera* inspection of privately held psychotherapy records that plausibly contain exculpatory evidence undermines the fairness of trials and confidence in ensuing convictions: Although petitioner had good reason to believe his wife was depressed and suicidal, Pet. App. 31a–32a, the trial court refused to review her psychotherapy records *in camera* for evidence confirming petitioner's theory, *id.* at 23a–26a. That evidence could have been central to petitioner's defense, which rested on the theory that his wife died by suicide. *Id.* at 31a. Failure to review Dennielle Perez's records *in camera* under these circumstances not only "hamper[ed]" petitioner's "preparation for trial," *Trombetta*, 467 U.S. at 486, but also denied him any possibility of fully developing the facts "central to" his "claim of innocence," *Crane*, 476 U.S. at 690. That result is inconsistent with fundamental due process principles.

ii. Petitioner's confrontation and compulsory process rights support *in camera* inspection of his wife's psychotherapy records, too. Indeed, because the Constitution effectuates its due process "guarantee[of] a fair trial . . . largely through the several provisions of the Sixth Amendment," *Strickland v. Washington*, 466 U.S. 668, 684–85 (1984), defendants' due process

rights can only be fully effectuated through satisfaction of his confrontation and compulsory process rights.

Although the *Ritchie* plurality rejected the Confrontation Clause's applicability, that "opinion of four Members of this Court" is not binding, only persuasive, *Texas v. Brown*, 460 U.S. 730, 737 (1983). And it should not persuade this Court: In many cases, a defendant will not be able to effectively confront witnesses against him unless he is able to access information about those witnesses before trial. *Ritchie*, 480 U.S. at 61–62 (Blackmun, J., concurring in part and concurring in the judgment); *see id.* at 66–72 (Brennan, J., dissenting). In this context, that means that the Confrontation Clause sometimes requires pretrial review of otherwise privileged psychotherapy records, without which a defendant will be unable to cross-examine witnesses effectively.

This conclusion is compelled—as the *Ritchie* concurrence noted, 480 U.S. at 63–64 (Blackmun, J., concurring in part and concurring in the judgment)—by not only common sense but also this Court's decision in *Davis v. Alaska*, 415 U.S. 308 (1974). There, defense counsel had the juvenile record of a key prosecution witness, but was prohibited under state law from introducing it at trial. *Id.* at 310–11. The juvenile record showed that the witness was on probation for the same crime with which the defendant was charged, and defense counsel wanted to introduce it to show the witness might be lying because he was trying to deflect blame onto the defendant. *Id.* at 313–14. Although defense counsel was able to question the witness about his apparent bias, the questioning was

not effective. In fact, it may have backfired: "[T]he jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or . . . a 'rehash' of prior cross-examination." *Id.* at 318.

These harms are only magnified where (as here) defense counsel is not even allowed the chance to discover exculpatory evidence. Because the trial court refused to review petitioner's wife's psychotherapy records *in camera*, petitioner had no idea whether his wife had been diagnosed with depression or had made plans to commit suicide. He thus could not argue or pose questions with the conviction of the counsel in *Davis*. And, like the defendant in *Davis*, he could not press too hard on the privileged evidence without appearing unsympathetic to the finder of fact. In other words, without at least *in camera* inspection of his wife's psychotherapy records, petitioner was denied the ability to effectively cross-examine the witnesses against him.

iii. The Compulsory Process Clause also informs the constitutional analysis. It grants a defendant the right to call "witnesses in his favor." U.S. Const. amend. VI. This Clause, at a minimum, guarantees the government's help in compelling the attendance of witnesses favorable to the defense and the right to present evidence that might influence the finder of fact's guilt or innocence determination. *See Ritchie*, 480 U.S. at 56 n.13 (citing cases). And this Clause overrides at least some evidentiary privileges accorded records held by third parties. *See Nixon*, 418 U.S. at 708.

That defendants' compulsory process rights sometimes override evidentiary privileges makes sense: The Compulsory Process Clause is designed to vindicate the principle that the "ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *Nixon*, 418 U.S. at 709. Both pretrial discovery and compulsory process during trial "minimize[] the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony." *Taylor v. Illinois*, 484 U.S. 400, 411–12 (1988).

That is precisely the case here: Pretrial *in camera* review of Dennielle Perez's mental health records would have minimized the risk of inaccurate evidence at trial. It could have, for example, allowed petitioner to rebut witnesses' denial of the victim's suicidality, Pet. App. 13a–14a, with a definitive diagnosis or evidence of suicidal plans. And while "[t]he interest in preserving confidentiality is weighty indeed," *Nixon*, 418 U.S. at 712, that privilege cannot trump a defendant's right to present a complete defense. Allowing a "privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into" fundamental constitutional guarantees "and gravely impair the basic function of the court." *Id.*

3. Once the constitutional right to exculpatory information held by private parties is established, it is clear that a defendant need not satisfy any heightened standard to obtain *in camera* review of records that might contain such information. The decision below, however, required petitioner to satisfy just such a heightened standard. It demanded that petitioner

supply "factual support" for his claim that the records "likely contain evidence [his wife] was suicidal." Pet. App. 13a. It acknowledged that he cited some evidence of his wife's depression, but it deemed that evidence insufficient. *Id.* at 12a–14a.

Ritchie itself confirms that the Colorado court erred. There, the defendant argued that he was entitled to a state agency's investigation files because they "might" have contained the names of favorable witnesses and exculpatory information. *Ritchie*, 480 U.S. at 55. This Court agreed that he was entitled to *in camera* inspection of the state records on that basis. Pennsylvania argued—as the Colorado court of appeals concluded here, Pet. App. 8a–12a—that any disclosure of the records should be impermissible without "a particularized showing of what information he was seeking or how it would be material." *Ritchie*, 480 U.S. at 58 n.15. This Court rejected that approach and required *in camera* inspection even though it was "impossible to say whether any information in the [state] records may be relevant to [the defendant's] claim of innocence." *Id.*

To support that conclusion, this Court cited *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1992). *See Ritchie*, 480 U.S. at 58 n.15. *Valenzuela-Bernal* held that, to show a compulsory process violation where certain witnesses were deported before they could testify, a defendant need only "make *some plausible showing* of how their testimony would have been both material and favorable to his defense" to obtain *in camera* inspection. 458 U.S. at 867 (emphasis added). That required showing may be "relax[ed]" where a defendant has no "opportunity . . . to determine what

favorable information" a witness may offer; but it requires more than simply pleading lack of access to the evidence. *Id.* at 870.

Thus, while courts may demand that a defendant seeking *in camera* review of otherwise privileged psychotherapy records held by a third party "first establish[] a basis for his claim that it contains material evidence," this Court's precedent demands nothing more than a "plausible showing" of how that evidence is exculpatory. *Ritchie*, 480 U.S. at 58 n.15.

4. Nor does the fact that the state privilege law at issue in *Ritchie* contained an exception change this analysis. In *Ritchie*, the relevant law protected state files on investigations of child abuse from disclosure, but created several exceptions, including one allowing disclosure to "[a] court of competent jurisdiction pursuant to a court order." 480 U.S. at 43 n.2. In holding that the trial court was obligated to review the otherwise privileged records *in camera* to decide whether they had to be produced to the defense, this Court noted that its decision did not necessarily apply to "case[s] where a state statute grants . . . absolute authority to shield [certain] files from all eyes." *Id.* at 57.

The absolute nature of the privilege should not make any difference to the constitutional analysis. "As a general proposition, constitutional rights prevail over conflicting statutes and rules." *Barroso*, 122 S.W.3d at 558; *see People v. Adamski*, 497 N.W.2d 546, 548 (Mich. Ct. App. 1993) ("It appears well settled as a matter of constitutional law that common-law or statutory privileges, even if purportedly abso-

lute, may give way when in conflict with the constitutional right of cross-examination."). Although this Court may "ascribe some weight to [] legislative finding[s]" about the importance of absolutely protecting certain records, it "should not be bound by the legislature's assessment" regarding whether the privilege should be absolute or qualified. Edward J. Imwinkelried, The New Wigmore: A Treatise on Evidence: Evidentiary Privileges § 11.4.2 (3d ed. 2020 supp.).

Indeed, even when stressing the importance of the privilege accorded psychotherapy records and recognizing a federal common law privilege for those records for the first time, this Court said there was "no doubt that there are situations in which the privilege must give way." *Jaffee*, 518 U.S. at 18 n.19. And *Jaffee* was a civil case; its acknowledgement of the importance of allowing exceptions to the psychotherapist-patient privilege should have even more force in the criminal context.

Moreover, if the absolute nature of a privilege made a difference, then a case identical to *Ritchie* would come out the other way in a neighboring State that made the privilege absolute. That makes no sense as a matter of fundamental fairness nor as a matter of the Supremacy Clause: A State could eliminate the constitutional right to present a defense just by making its evidentiary privileges absolute.

CONCLUSION

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

Respectfully submitted,

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