No. 19-1214

IN THE

Supreme Court of the United States

MARTY FRIEND,

Petitioner,

v.

INDIANA,

Respondent.

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

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF AMICUS CURIAE[1]

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

INTRODUCTION AND SUMMARY OF ARGUMENT

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

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

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

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

But *Pennsylvania v. Ritchie*, the Court's most recent effort to set out when a privilege runs afoul of a defendant's constitutional due process, confrontation, and compulsory process rights, failed to establish the outer limits of a defendant's constitutional right to obtain privileged records. As the Supreme Court of Michigan put it, "[t]he numerous writings that con-

tributed to the plurality *Ritchie* holding and the factors discussed, but not resolved therein, make it difficult to divine a precise formula" for evaluating whether a defendant's rights trump a "state's pronounced interest in its evidentiary counseling privileges." *People v. Stanaway*, 521 N.W.2d 557, 574 (Mich. 1994). That uncertainty has resulted in a sharp divide across the federal and state courts. *See* Pet. 17-24; Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 86 Or. L. Rev. 1, 4, 17-24 (2007). Amicus agrees with Petitioner that this case presents an ideal opportunity for this Court to resolve what *Ritchie* left undecided.

Amicus submits this brief to highlight why obtaining medical and counseling records is of great practical importance to criminal defendants, especially in child abuse cases. This Court has long recognized that child abuse cases present special concerns. *See Kennedy v. Louisiana*, 554 U.S. 407, 443-44 (2008). They often involve a single prosecution witness—the child alleging abuse—and the focus of the trial is assessing the credibility of that witness. That itself provides a compelling basis for a defendant to have access to all material impeachment evidence.

The need for robust adversarial testing is even more important in such cases given the well-documented evidence that children can be unreliable witnesses. And the dangers are further multiplied if the child has a behavioral or mental disorder that is characterized by a greater propensity to lie. Evidence of such a diagnosis is necessary for the jury to evaluate the witness's credibility.

But that material exculpatory information often comes only in the form of a professional diagnosis buried in privileged health records. Evidentiary privileges thus stand in the way of the defendant having access to evidence necessary to offering a potentially meritorious defense. If the defendant cannot overcome that privilege, there can be little doubt that a substantial number of innocent defendants will end up convicted.

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

Here, the Indiana Court of Appeals denied that vital in camera review as a matter of a general rule. The court determined that a trial court was not authorized to take even a peek at the child's health records, concluding that "Indiana's [counselor-client] privilege is one that *generally* prohibits disclosure for even *in camera* review of confidential information." Pet. App. 12a. Thus, even in cases like this one, where it is likely that in camera review would confirm—one way or the other—whether the child was diagnosed with a disorder that is characterized by lying, a defendant will not be able to access evidence that would, at a minimum, be key impeachment evidence. Such an approach cannot be squared with due process or the guarantees of the Confrontation and Compulsory Process Clauses, and it warrants this Court's review.

ARGUMENT

I. Records Needed For Adversarial Testing Of Witness Testimony Are Particularly Important In Child Abuse Cases.

A. This Court has recognized that there are "serious systemic concerns" in prosecuting child abuse cases. *Kennedy*, 554 U.S. at 443. The nature of the alleged crime—in which the victim "and the accused are, in most instances, the only ones present when the crime was committed," *id.* at 444—means "there often are no witnesses except the victim." *Ritchie*, 480 U.S. at 60; *see Kennedy*, 554 U.S. at 444 (noting "heightened concerns" where the "central narrative and account of the crime … comes from the child herself"). Thus, the success of the prosecution will turn "primarily, if not solely, on the word of the victims involved." Dana D. Anderson, Note, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. Cal. L. Rev. 2117, 2118 (1996).

In this way, cases like Petitioner's will often turn "upon the jury's assessment of the relative credibility of opposing witnesses." *Ex parte Thompson*, 153 S.W.3d 416, 422 (Tex. Crim. App. 2005) (Cochran, J., concurring); *see Sheets v. Commonwealth*, 495 S.W.3d 654, 677 (Ky. 2016) (Noble, J., concurring in part and dissenting in part). It is thus essential that courts ensure defendants have access to material information that bears on the credibility of the prosecution's key witness. *See United States v. Robinson*, 583 F.3d 1265, 1274 (10th Cir. 2009) ("Where the witness the accused seeks to cross-examine is the 'star' govern-

ment witness … the importance of full cross-examination to disclose possible bias is necessarily increased." (quoting *Greene v. Wainwright*, 634 F.2d 272, 275 (5th Cir. 1981)).

B. It is particularly important for a defendant to have access to relevant, material impeachment evidence when the witness is a child. A well-developed body of scientific research has recognized the "problem of unreliable, induced, and even imagined child testimony." *Kennedy*, 554 U.S. at 443. That's in part because "children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement." *Id.* at 443-44; *see Arizona v. Youngblood*, 488 U.S. 51, 72 n.8 (1988) (Blackmun, J., dissenting) ("Studies show that children are more likely to make mistaken identifications than are adults, especially when they have been encouraged by adults."); *Maryland v. Craig*, 497 U.S. 836, 868 (1990) (Scalia, J., dissenting) (highlighting "studies show[ing] that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality."). "No one familiar with the scientific research ought to doubt that some children could be brought to make false claims of sexual abuse if powerful adults pursue them repeatedly with … enjoinders." Stephen J. Ceci et al., *Children's Allegations of Sexual Abuse: Forensic and Scientific Issues*, 1 Psychol. Pub. Pol'y & L. 494, 506 (1995).[2] False claims are

[2] There is an "overwhelming consensus that children are suggestible to a degree that … must be regarded as significant." Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 Cornell

most likely in cases "where the dominant motives tilt children in that direction," such as "in acrimonious custody cases in which a custodial parent has relentlessly 'lobbied' a child." *Id.* at 505; *see* Anderson, *supra*, at 2146.

There are many real-world examples of false accusations made by children, including "the tragic Scott County investigations of 1983-1984, which disrupted the lives of many (as far as we know) innocent people in the small town of Jordan, Minnesota." *Craig*, 497 U.S. at 868 (Scalia, J., dissenting). That is hardly the only example. *See* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 539-40 & n.40 (2005) (abuse at the Little Rascals Day Care Center); Anderson, *supra*, at 2117-18 (discussing Manhattan Beach preschool case); Stephen J. Ceci & Maggie Bruck, *Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 Psychol. Bull. 403, 405 (1993) (false accusations during Salem witch trials). Indeed, an overwhelming percentage (over 80%) of exonerations in cases involving child sex abuse allegations are a result of false accusations. *See* National

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L. Rev. 33, 36 (2000); *see also, e.g.,* Richard D. Friedman & Stephen J. Ceci*, The Child Quasi Witness*, 82 U. Chi. L. Rev. 89, 98-102 (2015); Anderson, *supra*, at 2146 (noting "consensus in the social-science literature indicat[ing] that, depending on the procedures used, children can be suggestible"); Gail S. Goodman, *Children's Eyewitness Memory: A Modern History and Contemporary Commentary*, 62 J. Soc. Issues 811, 818-19 (2006) (in the 1990s, "[i]t became increasingly clear … that there were conditions under which children were susceptible to false suggestions").

Registry of Exonerations, *% Exonerations by Contributing Factor*, https://tinyurl.com/y5nc4a4v (last visited May 13, 2020).

In addition to the *general* potential unreliability of testimony by children, this case highlights the importance of access to potentially exculpatory materials where the accuser may have a relevant psychological or behavioral disorder that could enhance the possibility of a false accusation of abuse.

One example of such a condition is Reactive Attachment Disorder (RAD). RAD is a "serious condition in which an infant or young child doesn't establish healthy attachments with parents or caregivers." Mayo Clinic, *Reactive Attachment Disorder, Overview*, https://tinyurl.com/y7y8vl7g (last visited May 13, 2020).[3] Symptoms of RAD specifically include compulsive lying, along with lack of empathy, inability to bond with others, pyromania, and abuse of animals and other children. Gatti, *supra*, at 605 (citing Am. Psy. Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 265-66 (5th ed. 2013)); *see* Mayo Clinic,

[3] "RAD is very common in children adopted from orphanages in foreign countries and children who have been in multiple foster care placements." Christina Rainville, *Working with Children Who Have Reactive Attachment Disorder*, 32 Child. L. Prac. 17, 21 (2013). RAD is particularly prevalent in children who, like A.F., Pet. App. 4a, were adopted from Russia. This prevalence in Russian adoptees "could be the result of abuse or neglect in a birth home or in a poorly administered orphanage, or a combination of the two." Sarah Gatti, Note, *After Artyom: How Efforts to Reform U.S.-Russia Adoption Failed, and What Russia Must Do Now to Ensure the Welfare of Her Orphans*, 46 Case W. Res. J. Int'l L. 589, 605 (2014).

Reactive Attachment Disorder, *Complications*, https://tinyurl.com/y7y8vl7g (last visited May 13, 2020) (RAD "may have lifelong consequences," including "callous, unemotional traits that can include behavior problems and cruelty toward people or animals"). In other words, RAD is just the sort of condition that could cause a false accusation.

C. It is vital that a defendant have access to material information that may bear on the credibility of a child witness, especially where there is reason to believe there may be a relevant mental or behavioral condition. There needs to be a mechanism for a judge to screen otherwise privileged materials to ensure that the defendant has access to information bearing on those crucial issues. A court cannot simply close the door on the defendant and allow material, exculpatory information to be hidden behind an assertion of privilege.

A central feature of "the fact-finding process" in child abuse cases is rooting out "the false accuser, or reveal[ing] the child coached by a malevolent adult." *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988). A child witness's medical or counseling records can play a critical role in achieving those ends. In cases where abuse is reported to the counselor directly, such records can potentially reveal whether the child has been impermissibly coached by the counselor to make an accusation. *See* Ceci & Friedman, *Suggestibility of Children*, *supra*, at 54, 66 n.168.

Health records also can establish that an accuser later "recanted the allegation against the defendant." Fishman, *supra*, at 41-42 (collecting cases); *see, e.g.*,

Kamala London et al., *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways that Children Tell?*, 11 Psychol. Pub. Pol'y & L. 194, 216-19 (2005) (collecting studies showing recantation rates ranging from 4% to 27%). And they can contain evidence that "implicitly contradicts the charges [the accuser] has subsequently brought against the defendant." Fishman, *supra*, at 41-42 (collecting cases); *see State v. Johnson*, 102 A.3d 295, 309 (Md. 2014) (noting case of "strange behavior by the victim surrounding the counseling sessions").

And, as particularly relevant here, if a witness's health records reveal a diagnosis of a mental or behavioral condition that undermines the "witness's ability to recall, comprehend, and accurately relate the subject matter of the testimony," then that evidence will aid the jury in evaluating the credibility of the witness's accusation. *Commonwealth v. Barroso*, 122 S.W.3d 554, 563 (Ky. 2003); *see* Fishman, *supra,* at 44-45 & nn. 169-70. "Certain forms of mental disorder have high probative value on the issue of credibility." *Barroso*, 122 S.W.3d at 562 (quoting *United States v. Lindstrom*, 698 F.2d 1154, 1160 (11th Cir. 1983)). "On their face, [certain] diagnoses bear on [a witness's] 'ability to perceive or to recall events or to testify accurately.'" *Robinson*, 583 F.3d at 1272 (quoting *United States v. Butt*, 955 F.2d 77, 82 (1st Cir. 1992)); *see Stanaway*, 521 N.W.2d at 576-77 (review of records for evidence "that the complainant suffered sexual abuse by her biological father before this allegation of abuse, the nonresolution of which produced a false accusation"); *Lindstrom*, 698 F.2d at 1166 ("The cumulative evidence of the psychiatric records suggests that the key witness was suffering from an

ongoing mental illness which caused her to misperceive and misinterpret the words and actions of others, and which might seriously affect her ability 'to know, comprehend and relate the truth.'" (quoting *United States v. Partin*, 493 F.2d 750, 762 (5th Cir. 1974))).

In short, evidence found in health and counselor records can be uniquely probative of the credibility of a key prosecution witness. If there is to be "constitutionally guaranteed access to evidence," *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982), health records that reveal critical impeachment evidence fit the bill.

Here, the Indiana Court of Appeals held that, as a general rule, no in camera review of the claimed privileged information was allowed. That means the records at issue could have relevant, material, exculpatory information relating to the credibility of the key prosecution witness, but those materials would never be provided to the defendant, or ever even reviewed in camera by a judge. In other words, the court "allow[ed] the State to rely on a witness's testimony to convict a defendant of a crime, yet den[ied] the defendant even an in camera review of materials that may significantly undermine that witness's credibility." *Commonwealth v. Shaw*, No. 2019-SC-000218, 2020 WL 2092599, at *3 n.1 (Ky. Apr. 30, 2020) (quoting Fishman, *supra*, at 25).

Such a restriction on access to exculpatory materials cannot satisfy the dictates of due process. It is "fundamentally unfair and creates too great a risk

that an innocent defendant may be convicted." *Id.*; *see also Stanaway*, 521 N.W.2d at 567-75.

And it runs afoul of the Confrontation and Compulsory Process Clauses too. The Confrontation Clause embraces cross-examination "designed to show a prototypical form of bias on the part of the witness." *Olden v. Kentucky*, 488 U.S. 227, 231-32 (1988) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)). Evidence showing that an accusation may have been a result of suggestion or a mental condition, or was later recanted, would give a "reasonable jury … a significantly different impression of [the witness's] credibility." *Id.* (quoting *Van Arsdall*, 475 U.S. at 680); *see also Davis v. Alaska*, 415 U.S. 308, 318 (1974) ("[D]efense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.").

The right to "compulsory process … stands on no lesser footing than the other Sixth Amendment rights." *Washington v. Texas*, 388 U.S. 14, 18 (1967). It guarantees the "government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Ritchie*, 480 U.S. at 56. Evidence supporting a defendant's theory that the prosecution's key witness has made a false accusation no doubt would have such an influence. And while that right has no role to play where the government has the sought-after "evidence in its possession," *id.* at 56-57, third-party "evidence probative of

the witness's ability to recall, comprehend, and accurately relate the subject matter of the testimony" is subject to compulsory process, *Barroso*, 122 S.W.3d at 563.[4]

D. The Court of Appeals tried to downplay the value of this potentially exculpatory evidence in this case. The court rationalized its absolute adherence to the privilege on the ground that "a criminal defendant's rights to a fair trial and to present a complete defense are well protected by 'extensive access to other sources of evidence.'" Pet. App. 12a (quoting *In re Crisis Connection, Inc.*, 949 N.E.2d 789, 802 (Ind. 2011)). But no matter how much "access" to "non-privileged information" a defendant has, Pet. App. 12a, it remains possible that mental health records could contain vital, potentially exculpatory information not available elsewhere. As this case shows, evidence of a diagnosis of a psychological or behavioral condition often will exist *only* in that privileged material. These privileges make it likely that a counselor will not share the diagnosis with anyone else, so no one will be able to testify about the existence (or not) of a di-

[4] *See also* Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. Pa. J. Const. L. 487, 527-28 (2009) (providing a text-based analysis of the Compulsory Process Clause and explaining that the Clause affords defendants an unqualified "right to the issuance of subpoenas for compelling a witness's attendance in court"); Stacey Kime, Note, *Can a Right Be Less Than the Sum of Its Parts? How the Conflation of Compulsory Process and Due Process Guarantees Diminishes Criminal Defendants' Rights*, 48 Am. Crim. L. Rev. 1501, 1517-18, 1524 (2011) (the Clause is properly read to provide an unqualified right "to subpoena physical evidence and documents").

agnosis. A defendant cannot otherwise obtain a psychological evaluation of his accuser: In Indiana, for example, "a defendant on trial for a sex offense has no right to subject the victim to a psychiatric examination." *Solomon v. State*, 439 N.E.2d 570, 573 (Ind. 1982). Without a diagnosis in hand, a defendant's ability to challenge the credibility of that key witness will be limited.

In any event, even if some comparable evidence could be found outside of the privileged material, "[a]ny lawyer with practical experience with medical or mental health issues would recognize that a deposition of a patient or a witness is not the equivalent of a review of that person's medical or mental health records." *State v. Neiderbach*, 837 N.W.2d 180, 228 (Iowa 2013) (Appel, J., concurring). Records "offer evidence of a different content or persuasive quality." *Id.* at 229. Without supporting record material, cross-examination can even harm the defendant, because the jury might think he "was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness." *Davis*, 415 U.S. at 318; *see Ritchie*, 480 U.S. at 64 (Blackmun, J., concurring in part and concurring in the judgment).

In this way, it is not enough that "a defendant has other evidence to make the same factual claim"; rather, before access to privileged sources is denied, a determination must be made that "the evidence available from less intrusive sources has persuasive power comparable to that in the privileged material." Fishman, *supra*, at 50. Given the nature of an inquiry that assesses the relative value of privileged and non-privileged material, "the decision of whether the other

source is comparable to the medical or mental health record simply cannot be made with confidence until the record has been produced and a comparison made." *Neiderbach*, 837 N.W.2d at 229 (Appel, J., concurring). Thus, at a minimum, a judge must review such material in camera to ensure that it does not contain such valuable evidence for the defense. The Court of Appeals' refusal to do so in all such cases where a privilege is raised is simply untenable as a matter of constitutional law.

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

Notwithstanding the critical value mental health records can have for criminal defendants in presenting a defense, the decision below hewed to the Supreme Court of Indiana's view that "the State's compelling interest in maintaining the confidentiality of information gathered in the course of serving emotional and psychological needs of victims of domestic violence and sexual abuse … is not outweighed by [a defendant's] right to present a complete defense." *Crisis Connection*, 949 N.E.2d at 802. Indiana is not alone. Other courts likewise conclude that a defendant's right to present a complete defense always "must bow to the strong public policy interest in encouraging victims of sexual assaults to obtain meaningful psychotherapy." *People v. Turner*, 109 P.3d 639, 646 (Colo. 2005); *see Commonwealth v. Wilson*, 602 A.2d 1290, 1297 (Pa. 1992) ("The broadly drawn privilege is … narrowly tailored to achieve the compelling interest in protecting the victim's privacy so that her treatment and recovery process will be expedited.

Therefore, defendant's federal constitutional rights have not been violated." (citation omitted)); *People v. Hammon*, 938 P.2d 986, 992 (Cal. 1997) ("Given the strong policy of protecting a patient's treatment history, it seems likely that defendant has no constitutional right to examine the records even if they are 'material' to the case." (quoting *People v. Webb*, 862 P.2d 779, 794 (Cal. 1993))).

At a minimum, this singular focus on the state's interest in preserving confidential communications overlooks the state's similarly compelling "interest in the fair an accurate adjudication of criminal cases." *Ake v. Oklahoma*, 470 U.S. 68, 79 (1985). After all, *prosecutors* also can rely on the need for "fair administration of criminal justice" to overcome assertions of privilege. *Nixon*, 418 U.S. at 712-13. Indeed, should the mental health records sought by the defendant reveal exculpatory information, that "information" could also "cause the prosecutor to rethink whether to press the case at all." Fishman, *supra*, at 61.

More fundamentally, a *blanket* ban on access to privileged material is unnecessary to preserve the interests in confidentiality these states have identified. As this Court has explained, "[i]n camera review of … documents is a relatively costless and eminently worthwhile method to insure that the balance between … claims of irrelevance and privilege and plaintiffs' asserted need for the documents is correctly struck." *Kerr v. U.S. Dist. Ct.*, 426 U.S. 394, 405 (1976). This Court has thus authorized trial courts to employ in camera review in a variety of contexts where confidential and sensitive information is at issue. *See, e.g.*, *United States v. Zolin*, 491 U.S. 554, 572

(1989) (attorney-client privilege); *N.Y. Times Co. v. Jascalevich*, 439 U.S. 1317, 1323 (1978) (journalist's witness interviews); *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 303 (1978) (IRS investigative file); *Nixon*, 418 U.S. at 706 (presidential communications); *Taglianetti v. United States*, 394 U.S. 316, 317 (1969) (electronic surveillance records). In camera review is not a new or difficult process; courts do it all the time.

This Court already has blessed the use of in camera review by the trial court as an appropriate method for reviewing the records of a child witness. *See Ritchie*, 480 U.S. at 60-61. There, as here, the state asserted a "strong" public interest in protecting privileged records. *Id.* at 57. But that interest did not warrant a blanket bar on disclosure. Instead, this Court concluded that a trial court's in camera review of privileged records can serve a defendant's interest in obtaining material information "without destroying the … need to protect the confidentiality" of that information. *Id.* at 61.

In the years since *Ritchie*, courts regularly have used in camera review to determine whether mental health records contain information relevant to the credibility of a witness's testimony. While protecting the confidentiality of medical records is no doubt important, most courts have concluded that "the witness' privacy must yield to the paramount right of the defense to cross-examine effectively the witness in a criminal case." *Lindstrom*, 698 F.2d at 1167 (quoting *United States v. Soc'y of Indep. Gasoline Marketers of Am.*, 624 F.2d 461, 469 (4th Cir. 1979)). These courts

have specifically recognized the importance of reviewing "privileged records [that] would disclose information especially probative of a witness' ability to comprehend, know or correctly relate the truth." *State v. Peeler*, 857 A.2d 808, 841 (Conn. 2004). Echoing *Ritchie* itself, these courts reason that "the trial judge's in camera inspection of [the witness's records] protect[s] [defendants'] constitutional rights without destroying [the witness's] interest in protecting the confidentiality of the records … irrelevant to [defendants'] interests." *Barroso*, 122 S.W.3d at 564; *see Stanaway*, 521 N.W.2d at 575.

Many state courts have thus embraced in camera review as the proper mechanism to balance the rights of defendants with those of privilege holders. *See, e.g.*, *Commonwealth v. Feliciano*, 816 N.E.2d 1205, 1207 (Mass. 2004) (in camera review of accuser's counseling records for information regarding "her tendency to imagine or to fabricate"); *State v. Pandolfi*, 765 A.2d 1037, 1043 (N.H. 2000) (remanding for in camera review of counseling records to determine whether witness was taking medication that affected her "memory and perception"); *State v. Gonzales*, 912 P.2d 297, 303 (N.M. Ct. App. 1996) (in camera review appropriate to determine if accuser's medical and mental health records contained information that she "may have suffered cognitive difficulties which would affect her credibility at trial"); *Stanaway*, 521 N.W.2d at 576-77 (in camera review where defendant asserted that "claimant is a troubled, maladjusted child whose past trauma has caused her to make a false accusation").

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

Decades of experience with in camera review of health records belies the Supreme Court of Indiana's concern that "even an in camera review" would "eviscerate the effectiveness of the privilege" by "chill[ing]" "confidential conversations between [victim advocates and victims]." *Crisis Connection*, 949 N.E.2d at 801-02. This Court confronted that same concern in *Ritchie*, and while it thought that "full disclosure to defense counsel" may eliminate the utility of the privilege, it accepted in camera review as sufficient to preserve it. 480 U.S. at 60-61. The majority of courts have followed the blueprint laid out by this Court in *Ritchie*, and there is no indication that doing so has eliminated the efficacy of these privileges across the country.

Courts have explained that it is unlikely that "authorizing disclosure of [mental health] records in … limited circumstances will significantly reduce the number of individuals choosing to confide in counselors and psychotherapists." *State v. Fay*, 167 A.3d 897, 909-10 & n.18 (Conn. 2017); *cf. Nixon*, 418 U.S. at 712 ("[W]e cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution."); Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 Colum. L. Rev. 1369, 1451 (1991). That is particularly true where, as here, the privilege statute already contains exceptions; any "deterrent" effect of possible disclosure would be "already attributable to existing statutory exceptions." *See Fay*, 167 A.3d at 909-10.

Moreover, the division among the state and federal courts today means that some states will bar disclosure of mental health records without in camera review, while the federal courts in the same states would allow such in camera review. To take just two examples,[5] Arkansas and Colorado both have rigid rules curtailing the use of in camera review, *Johnson v. State*, 27 S.W.3d 405, 413 (Ark. 2000); *Turner*, 109 P.3d at 646. But the federal courts of appeals that encompass those states—the Eighth and Tenth Circuits—regularly permit in camera review, *see Arias*, 936 F.3d at 798-800; *Robinson*, 583 F.3d at 1269-74,

[5] But there are more. *See* Pet. 20-22 (referencing other states where "records might remain completely off-limits," including California, Maryland, Pennsylvania, and Utah).

which means that health records of individuals in Arkansas and Colorado might be disclosed in federal proceedings. To the extent a state claims that it has a strong interest in its mental-health-record privilege trumping a defendant's right to potentially exculpatory materials, that interest is being thwarted by the persistent conflict that exists today.

This Court's intervention is needed to both require in camera review where appropriate and help establish a clear and uniform standard for obtaining in camera review. This Court has noted that a defendant "may not require the trial court to search through the [confidential] file without first establishing a basis for his claim that it contains material evidence." *Ritchie*, 480 U.S. at 58 n.15. *Ritchie* did not describe the showing required to obtain in camera review, but it suggested that defendants "must at least make some plausible showing." *Id.* (quoting *Valenzuela-Bernal*, 458 U.S. at 867); *see also United States v. Zolin*, 491 U.S. 554, 572 (1989) (requiring a "good faith belief … that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies" (citation omitted)). Even so, "no clear consensus has emerged" about what a defendant must establish to obtain in camera review of mental health records in those jurisdictions where such review is authorized. Fishman, *supra*, at 39.

Today, there is a broad range of inconsistent approaches. Depending on the jurisdiction, defendants must make a showing that ranges from having a "reasonable ground to believe" that material evidence exists, *Peeler*, 857 A.2d at 841, to establishing "a reasonable likelihood" that such evidence exists,

Goldsmith v. State, 651 A.2d 866, 877 (Md. 1995), to showing with "reasonable certainty" that such evidence exists, *State v. Blake*, 63 P.3d 56, 61 (Utah 2002). *See* Fishman, *supra*, at 41. This confusion regarding the appropriate standard makes it difficult for defendants to know what they must show.

To protect the constitutional rights of the defendant, the standard cannot be so onerous as to make it practically impossible for the defendant to secure material, exculpatory information. Because the material sought is privileged, it often will be "impossible to say whether any information … may be relevant to [defendant's] claim of innocence, because neither the prosecution nor defense counsel has seen [it]." *Ritchie*, 480 U.S. at 57. This concern dates back two hundred years, to the prosecution of Aaron Burr. *United States v. Burr*, 25 F. Cas. 187, 191 (No. 14,694) (C.C.D. Va. 1807) ("It is objected that the particular passages of the letter which are required are not pointed out. But how can this be done while the letter itself is withheld?"). As this Court later explained, Chief Justice Marshall "found it unreasonable to require Aaron Burr to explain the relevancy of General Wilkinson's letter to President Jefferson … precisely because Burr had never read the letter and was unaware of its contents." *Valenzuela-Bernal*, 458 U.S. at 871 n.8.

This Court should agree with those courts that have recognized that where the accused "cannot possibly know, but may only suspect, that particular information exists which meets these requirements," the defendant should not be required "to make a particular showing of the *exact information* sought and how it is material and favorable." *Love*, 57 F.3d at

1313 (emphasis added). Indeed, a standard that requires defendants to have seen the evidence before in camera review is even authorized makes little sense. Understandably, courts seek to limit "fishing expeditions" by defendants, especially regarding witnesses' confidential medical records, but they can remedy this concern without requiring defendants to prove the unprovable when it comes to the threshold showing of materiality. It is enough if the defendant "make[s] some plausible showing" that the information exists and is "both material and favorable to his defense." *Id.* (quoting *Ritchie*, 480 U.S. at 58 n.15).

In this case, for example, there was no risk of a fishing expedition. Petitioner requested a modest search for a piece of diagnostic evidence. And he *knew* that A.F. was evaluated for RAD, and Petitioner explained how a diagnosis would be material to his defense. Pet. 12. In circumstances like these, any infringement on the broader purposes of the privilege is slight.

CONCLUSION

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

Respectfully submitted,

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May 14, 2020