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CLIFFORD S. FISHMAN*

Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records

* Professor of Law, The Columbus School of Law, The Catholic University of America. B.A., University of Rochester, 1966; J.D., Columbia Law School, 1969. From 1969 to 1977, Professor Fishman served as an Assistant District Attorney in the New York County District Attorney's Office and as Chief Investigating Assistant District Attorney in New York City's Special Narcotics Prosecutor's Office, where, among other things, he tried dozens of jury trials; wrote and supervised the execution of dozens of court-authorized wiretap and eavesdrop orders; wrote search warrants leading to the seizure of untold quantities of heroin, cocaine, and marijuana, as well as a two-hundred-pound bag of peat moss; and oversaw the purchase of the most expensive pound of pancake mix in the history of American law enforcement. Since joining the law faculty at Catholic University, he has taken occasional court assignments to represent indigent defendants, in which capacity he complains loud and long about prosecutorial tactics that he himself employed with great delight against defense attorneys when the shoe was on the other foot.

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While preparing for trial, defense counsel learns that a key prosecution witness has undergone psychotherapy or other counseling. Under what circumstances, if any, should counsel be allowed to examine or use records of that therapy or counseling to impeach the witness's testimony?¹

The situation arises most often in sexual-assault or child abuse cases, because complainants in such cases often seek, or are taken to, counselors of various kinds to help them deal with what has happened (or what they claim has happened). But it also arises in a wide range of other criminal cases, for example where a key witness in a homicide case has had a lengthy record of treatment for various mental and emotional problems, or for drug or alcohol abuse.²

¹ Access to the records is of course not counsel's ultimate goal; it is an attempt to discover information that can be used to cross-examine the witness at trial, or to provide a basis to call the therapist or counselor as a witness and question him or her about the witness's condition and treatment.

² See, e.g., *Doe v. Diamond*, 964 F.2d 1325, 1329 (2d Cir. 1992) (extortion); *United States v. Mazzola*, 217 F.R.D. 84, 89–90 (D. Mass. 2003) (tax fraud); *United States v. Alperin*, 128 F. Supp. 2d 1251, 1255 (N.D. Cal. 2001) (assaulting a federal agent); *United States v. Hansen*, 955 F. Supp. 1225, 1226 (D. Mont. 1997) (murder); *People v. Gurule*, 51 P.3d 224, 249–51 (Cal. 2002) (robbery-murder); *State v. Peeler*, 857 A.2d 808, 841–44 (Conn. 2004) (murder); *State v. Bruno*, 673 A.2d 1117, 1124–

The issue raises profound questions about the conflict between various privileges recognized in the law, and a defendant's rights to confront and cross-examine his accusers, to use compulsory process to call witnesses, and to due process of law. The only Supreme Court decision on the subject, decided in 1987, barely scratched the surface.³

I THE ISSUES

In the ensuing two decades, the law on this subject has become an incredible hodgepodge of conflicting approaches and procedural conundrums, including the following:

a. Is the Confrontation Clause applicable to pretrial discovery?⁴

b. Does it matter whether the privilege on its face is conditional or absolute? If the privilege is absolute, but a court determines that the defendant has a constitutional right to the information, does the witness nevertheless retain the right to insist on the privilege, and if so, how should this affect the witness's testimony at trial?⁵

c. Does it matter whether the records in question are in the possession of the prosecutor, an unrelated state agency, or a private entity?⁶

d. Assuming the defendant can overcome the privilege, is counsel entitled to examine the records, or only to an *in camera* review of the records by the trial judge, and if so, when?⁷

e. What kind of allegation or showing must the defendant make to trigger a review of the records?⁸

f. Under what circumstances must a judge release relevant portions of the records to defense counsel?⁹

31 (Conn. 1996) (murder); *People v. Bean*, 560 N.E.2d 258, 269 (Ill. 1990) (murder); *People v. Dace*, 449 N.E.2d 1031, 1035 (Ill. App. Ct. 1983) (burglary); *State v. Taylor*, 134 S.W.3d 21, 26–27 (Mo. 2004) (en banc) (murder).

³ *Ritchie v. Pennsylvania*, 480 U.S. 39 (1987) (plurality opinion); *see infra* Part III.B.

⁴ *See infra* Part III.B.1.

⁵ *See infra* Part IV.A.

⁶ *See infra* Part IV.B.

⁷ *See infra* Part V.A.1.

⁸ *See infra* Part V.B.

This Article describes the current, confused state of the law and offers a series of suggestions to bring order out of chaos.

II THE PRIVILEGES

The issues discussed in this Article arise in connection with a variety of privileges, each of which involves communications (and records) of therapy or counseling of one kind or another.

A. The Psychotherapist-Patient Privilege

By the mid-1990s, every state had codified a privilege for communications between a patient or client and a psychologist or psychiatrist,¹⁰ and had also codified a privilege for communications between a patient or client and a psychiatric social worker.¹¹ In 1996, the Supreme Court, in *Jaffee v. Redmond*,¹² held that federal courts likewise must recognize a psychotherapist-patient privilege, and held further that the privilege covers a patient or client's confidential communications with duly licensed psychiatrists, psychologists, or social workers "in the course of psychotherapy."¹³ The privilege, the Court directed, is absolute, because "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."¹⁴

In *Jaffee*, the Court made no attempt to "delineate [the] full contours" of the privilege,¹⁵ other than to recognize that circumstances could exist where the privilege "must give way."¹⁶ That case involved a civil plaintiff's attempts to obtain a civil

⁹ See *infra* Part V.A.4.

¹⁰ For a listing of such provisions, see EDWARD J. IMWINKELREID, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* app. d (2002) ("A State-by-State Survey of the Principle Privilege Statutes and Court Rules").

¹¹ For a listing of such provisions, see *id.*

¹² 518 U.S. 1 (1996).

¹³ *Id.* at 15.

¹⁴ *Id.* at 17.

¹⁵ *Id.* at 18.

¹⁶ *Id.* at 18 n.19. As an example, the Court cited a situation in which the only way to avert a threat to the patient or others is to reveal the communication. *Id.*

defendant's records of psychotherapy.¹⁷ Thus, *Jaffee* provides no clear guidance to federal courts where a criminal defendant seeks a government witness's counseling or therapy records. Nor does it indicate whether any federal constitutional considerations might limit a State's authority to restrict or forbid discovery of otherwise-privileged information in criminal cases.

B. Other Privileges

Counseling specialties have emerged for which similar privileges have been created by statute. Enactment of a statutory privilege is important because in many states, the counselors are not licensed psychiatrists, psychologists, or social workers,¹⁸ and therefore do not fall within the traditional doctor-patient or patient-psychotherapist privileges.

Many jurisdictions have enacted privileges to protect communications made by victims of child abuse, including sexual abuse. These privileges cover communications to counselors who attempt to help the child deal with what has happened, and also cover communications by other adults to the counselors about the abuse.

Often the counselor is affiliated with a state agency or state-funded agency affiliated with the court system. In *Pennsylvania v. Ritchie*,¹⁹ the Supreme Court, in a plurality opinion, acknowledged that such a privilege serves important social goals:

Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim. A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent. It therefore is essential that the child have a state-designated person to whom he may turn, and to do so with the assurance of confidentiality. Relatives and neighbors who suspect abuse also will be more willing to

¹⁷ *Id.* at 4.

¹⁸ In Massachusetts, for example, a "sexual assault counselor" is defined as:

[A] person who is employed by or is a volunteer in a rape crisis center, has undergone thirty-five hours of training, who reports to and is under the direct control and supervision of a licensed social worker, nurse, psychiatrist, psychologist or psychotherapist and whose primary purpose is the rendering of advice, counseling or assistance to victims of sexual assault.

MASS. GEN. LAWS. ch. 233, § 20J (LexisNexis 2000).

¹⁹ 480 U.S. 39 (1987) (plurality opinion).

come forward if they know that their identities will be protected. Recognizing this, the Commonwealth—like all other States—has made a commendable effort to assure victims and witnesses that they may speak to the [state agency’s] counselors without fear of general disclosure.²⁰

If such “confidential material had to be disclosed upon demand to a defendant charged with criminal child abuse,” the Court added, the purpose of the provision would be undermined.²¹ According to the Court, “[n]either precedent nor common sense requires such a result.”²²

Similarly, many states have enacted a testimonial privilege for communications by sexual-assault victims (whether children or adults) to counselors who attempt to help the victims,²³ and for

²⁰ *Id.* at 60–61 (footnote omitted).

²¹ *Id.* at 61.

²² *Id.*

²³ For a listing of such provisions, see IMWINKELREID, *supra* note 10, at app. d. At least one federal court has also recognized such a privilege. See *United States v. Lowe*, 948 F. Supp. 97 (D. Mass. 1996). Because the complainant in that case waived the privilege, the court was not called upon to determine whether the privilege was qualified or absolute. *Id.* at 100. In *Commonwealth v. Wilson*, 602 A.2d 1290 (Pa. 1992), Pennsylvania’s highest court explained why such communications should be privileged:

Extensive research has been conducted documenting the severe psychological, emotional, and social difficulties suffered by rape victims, which cause a condition known as “rape trauma syndrome.” The devastating effects of this condition create a compelling need for a confidential counseling relationship to enable the victim to cope with the trauma. It is generally recognized that rape traumatizes its victim to a degree far beyond that experienced by victims of other crimes. Rape crisis centers have been developed nationwide to help victims of this most degrading offense recover from its debilitating effects.

Rape crisis centers are service facilities staffed with counselors extensively trained in crisis counseling. These counselors provide victims with much needed physical, psychological and social support during the recovery period that the victims otherwise might not be able to afford. At the onset of counseling the victim is informed that her communications will be confidential, and her willingness to disclose information quite obviously is based upon that expectation. The very nature of the relationship between a counselor and the victim of such a crime exposes the necessity for the same confidentiality that would exist if private psychotherapeutic treatment were obtained. If that confidentiality is removed, that trust is severely undermined, and the maximum therapeutic benefit is lost. The inability of the crisis center to achieve its goals is detrimental not only to the victim but also to society, whose interest in the report and prosecution of sexual assault crimes is furthered by the emotional and physical well-being of the victim.

communications between domestic violence victims and counselors (sometimes called “advocates”) who specialize in assisting such victims.²⁴ A number of jurisdictions also have enacted privileges protecting statements made by patients or clients in substance abuse counseling.²⁵

Id. at 1295 (quoted approvingly in *State v. Pinder*, 678 So. 2d 410, 415 (Fla. Dist. Ct. App. 1996)).

Thus, recognition of the privilege will encourage rape victims to seek professional help in dealing with what they have suffered, and will encourage victims to report the crime and cooperate in the prosecution of the perpetrators. *See generally* Jennifer L. Hebert, Note, *Mental Health Records in Sexual Assault Cases: Striking a Balance to Ensure a Fair Trial for Victims and Defendants*, 83 TEX. L. REV. 1453 (2005) (discussing the necessary balance between the defendant’s constitutional rights and the privacy rights of the victim); Maureen B. Hogan, Note, *The Constitutionality of an Absolute Privilege for Rape Crisis Counseling: A Criminal Defendant’s Sixth Amendment Rights Versus a Rape Victim’s Right to Confidential Therapeutic Counseling*, 30 B.C. L. REV. 411 (1989). Similarly, see *Commonwealth v. Fuller*, 667 N.E.2d 847, 852 (Mass. 1996), *abrogated by* *Commonwealth v. Dwyer*, 859 N.E.2d 400 (Mass. 2006), one of a series of cases in which Massachusetts established an elaborate procedure for protecting such records and communications. In *Commonwealth v. Dwyer*, 859 N.E.2d 400 (Mass. 2006), Massachusetts’s Supreme Court significantly reduced such protections in favor of defense counsel’s right to access such records. *See infra* Part V.A.1.

²⁴ *See, e.g.*, COLO. REV. STAT. ANN. § 13-90-107(k)(I) (West 2006); FLA. STAT. ANN. § 90.5036(1)(d) (West 1999); MO. ANN. STAT. § 455.220(1)(5) (West 2003); 23 PA. CONS. STAT. ANN. § 6116 (West 2001). In general, see U.S. DEP’T OF JUSTICE, REPORT TO CONGRESS: THE CONFIDENTIALITY OF COMMUNICATIONS BETWEEN SEXUAL ASSAULT OR DOMESTIC VIOLENCE VICTIMS AND THEIR COUNSELORS: FINDINGS AND MODEL LEGISLATION (1995), which in an appendix, lists and categorizes state provisions. *Id.* at app. 2. For a detailed discussion of the rationale underlying the creation of the privilege, see *People v. Turner*, 109 P.3d 639, 642–44 (Colo. 2005).

²⁵ *See, e.g.*, 42 U.S.C. § 290dd-2 (2006) (entitled “Confidentiality of records”). Section (a) establishes a general rule of confidentiality, subject to exceptions. § 290dd-2(a). Section (b)(2)(C) authorizes disclosure of the records:

If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services.

§ 290dd-2(b)(2)(C). The court must specify what may be disclosed and establish “appropriate safeguards against unauthorized disclosure.” *Id.*

Some states include communications to substance abuse counselors in general privilege or confidentiality statutes. *See, e.g.*, ARIZ. REV. STAT. ANN. § 28-3005(A) (2004); N.D. CENT. CODE § 31-01-06.4 (1996). Other states have enacted legislation creating a privilege for communications to such counselors. *See, e.g.*, LA. REV. STAT. ANN. § 37:3390.4 (2007); N.J. STAT. ANN. § 45:2D-11 (West 2004); S.C. CODE ANN. § 44-53-140 (2002). Information in this note is adapted from Phyllis Coleman,

III

IDENTIFYING THE CONSTITUTIONAL RIGHT AT ISSUE

In assessing whether a defendant should have access to otherwise-privileged communications, four provisions of the United States Constitution must be considered: the Due Process Clauses of the Fifth²⁶ and Fourteenth Amendments,²⁷ and the Confrontation Clause and Compulsory Process Clause of the Sixth Amendment.²⁸

A. Sixth Amendment Confrontation Clause

A defense attorney will seek access to a prosecution witness's therapy or counseling records in the hope of finding information with which to cross-examine and impeach the witness. The right to do this is guaranteed to the defendant by the Confrontation Clause.

*Davis v. Alaska*²⁹ is the Supreme Court's leading decision on the scope of cross-examination under the Confrontation Clause, and therefore merits discussion here, even though it does not involve a witness's psychiatric or counseling records. Davis was charged in connection with a safe that had been stolen from a bar.³⁰ Green, a sixteen-year-old, testified that (a few hours after the safe was stolen) he saw and spoke to Davis in the immediate vicinity of where the stolen safe was subsequently found.³¹ At

Privilege and Confidentiality in 12-Step Self-Help Programs: Believing the Promises Could Be Hazardous to an Addict's Freedom, 26 J. LEGAL MED. 435, 463 (2005).

²⁶ The Fifth Amendment provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V.

²⁷ Section 1 of the Fourteenth Amendment provides, in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

²⁸ The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

²⁹ 415 U.S. 308 (1974).

³⁰ *Id.* at 309.

³¹ *Id.* at 310. Green initially identified Davis in a photo lineup. *Id.* He also described Davis's car. *Id.* When police searched Davis's rental car, which matched Green's description, they found paint chips in the trunk matching the paint on the safe. *Id.*

the time, Green was on probation from a juvenile-court adjudication for delinquency for burglarizing two cabins and was still on probation during Davis's trial.³² Davis's attorney sought to cross-examine Green about whether Green might have hastily identified the defendant when the police first interviewed him for fear of jeopardizing his probation or of being accused himself.³³ The trial court, relying on an Alaska statute protecting the confidentiality of juvenile-court adjudications, refused to allow any reference to Green's adjudication or probation.³⁴

The Supreme Court, per Chief Justice Burger, reversed Davis's conviction.³⁵ The Sixth Amendment right to confront one's accuser, the Court emphasized, included the right to cross-examine the prosecution's witness in an attempt to prove his prejudice or bias.³⁶ Although defense counsel had been permitted at trial to ask Green *whether* he feared that the police might suspect him, counsel had not been permitted to bring out the underlying reason *why* Green might feel that way.³⁷ This, the Court held, prevented the defense from exposing the jury to information it needed to make a properly informed decision regarding the credibility of the witness's testimony.³⁸ While acknowledging the State's legitimate interest in protecting the anonymity of juvenile offenders, the Court held this interest "cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness."³⁹

The analogy between *Davis* and the subject of this Article is clear enough: in *Davis*, a statute, enacted to reflect a legitimate public policy to prevent disclosure of embarrassing information (which in a sense categorized the information as privileged), had

³² *Id.* at 310–11.

³³ *Id.* at 311.

³⁴ *Id.*

³⁵ *Id.* at 320–21.

³⁶ *Id.* at 315. Chief Justice Burger wrote that "[c]onfrontation means more than being allowed to confront the witness physically. 'Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.'" *Id.* (quoting *Douglas v. Alabama*, 380 U.S. 415, 418 (1965) (alteration in original)).

³⁷ *Id.* at 318.

³⁸ *Id.* at 317.

³⁹ *Id.* at 320. Justices White and Rehnquist, dissenting, argued that the trial court's decision was a typical and proper exercise of discretion over cross-examination. *Id.* at 321 (White, J., dissenting).

to give way to permit a defendant to accuse a state witness of bias and motive to lie, even though there was no direct evidence that the witness had lied⁴⁰ or that the information in fact motivated him to do so. If a defendant's Confrontation Clause rights are strong enough to trump Alaska's juvenile-adjudication "privilege" where the information supported at best a speculative argument of bias, does it not follow that a defendant's Confrontation Clause rights also are strong enough to trump state statutory or common law privileges protecting a witness's mental-health or rape counseling records, when information in those records might support a defense argument that the witness is delusional or lying?

This analogy may be clear, but is not necessarily apt, for at least two reasons. First, *Davis* involved a defendant's rights at trial to disclose information already in the defendant's possession. By contrast, most of the litigation discussed in this Article involves whether a defendant is entitled to obtain *pretrial* or *midtrial discovery* of information about which, often, defense counsel lacks specific knowledge. Second, society's interest in protecting the confidentiality of communications between a patient and a mental-health practitioner,⁴¹ or between a child abuse victim and a counselor,⁴² or between a rape victim and a counselor,⁴³ or between a domestic-abuse victim and a counselor,⁴⁴ is far more substantial than its interest in keeping a juvenile's adjudications secret.

But if the analogy did hold, then it would be difficult to justify constraints on a defendant's access to a complainant's counseling records.⁴⁵

⁴⁰ Indeed, circumstantial evidence strongly corroborated Green's testimony. See *supra* note 31.

⁴¹ See generally 5 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, JONES ON EVIDENCE § 47:1-2 (7th ed. 1992 & Supp. 2006).

⁴² See *id.* § 47:4B.

⁴³ See *id.* § 47:5.

⁴⁴ See *id.* § 47:6.

⁴⁵ Another analogy also may be worth considering. Courts recognize that in sex-offense prosecutions, evidence of the complainant's prior sexual behavior that otherwise would be excluded by rape-shield legislation nevertheless should be admitted where such evidence is relevant to suggest that the complainant falsely accused the defendant to deny infidelity, see 3 FISHMAN & MCKENNA, *supra* note 41, § 19:35, deflect a prosecution for prostitution, see *id.* § 19:36, or protect a reputation for chastity or heterosexuality, see *id.* § 19:37. In addition, courts recognize that such evidence should be admitted where complainant falsely accused

B. *Pennsylvania v. Ritchie*

In *Pennsylvania v. Ritchie*,⁴⁶ a defendant accused of sexually abusing his teenage daughter sought to discover the records of the state Children and Youth Services (CYS) agency relating to the child, arguing that he was entitled to the information because the file might contain the names of favorable witnesses and other, unspecified exculpatory evidence.⁴⁷ The statute creating the agency directed that its records were generally privileged but provided that the agency must disclose the information when directed to do so by court order.⁴⁸ The trial judge refused to order disclosure of the records to the defendant and, further, refused to examine the records in camera to determine what, if anything, should be disclosed to defendant.⁴⁹ Defendant was convicted, and appealed. The state supreme court held that by denying access to the CYC file, the trial court order had violated both the Confrontation and the Compulsory Process Clauses of the Sixth Amendment, because, without the CYC material, defense counsel could not effectively question the defendant's daughter and best expose the weaknesses in her testimony.⁵⁰ It remanded for a hearing to determine if a new trial was necessary, and directed that, at the hearing, defense counsel was entitled to review the entire file for any useful evidence.⁵¹ The State appealed to the U.S. Supreme Court.

The Supreme Court agreed that further proceedings were necessary to determine if the defendant's rights had been violated, but did not produce a clear majority as to the right in question.⁵² One reason it could not do so is that two Justices, Stevens and Scalia, refused to consider the merits of the case, insisting that the Court should not have heard the case at all; they argued the ruling below was not a final judgment, and therefore the Supreme Court lacked jurisdiction over the

defendant out of vengeance or spite, *see id.* § 19:38–39, or in the aftermath of an episode involving sex and drugs, *see id.* § 19:40.

⁴⁶ 480 U.S. 39 (1987) (plurality opinion).

⁴⁷ *Id.* at 44.

⁴⁸ *Id.* at 43–44.

⁴⁹ *See id.* at 44.

⁵⁰ *See id.* at 46.

⁵¹ *See id.*

⁵² *Id.* at 61.

matter.⁵³ (It is perhaps worth noting that Justices Stevens and Scalia are the only Justices who are still on the Court.) The seven Justices who considered the merits divided widely on the theories and issues presented.

1. *Confrontation Clause*

Justice Powell's plurality opinion (in which Chief Justice Rehnquist and Justices White and O'Connor joined) rejected the theory that the Confrontation Clause was a constitutionally compelled rule of pretrial discovery.⁵⁴ The plurality insisted the right to confront one's accusers, guaranteed by the Sixth and Fourteenth Amendments is a *trial* right, guaranteeing an *opportunity* for effective cross-examination—not cross-examination that is effective in whatever way and to whatever extent the defense might wish.⁵⁵

Justice Blackmun disagreed with the plurality's assertion in *Ritchie* that the Confrontation Clause had no impact on pretrial discovery, but concurred in the result because he agreed that an in camera examination of the records would suffice to assure compliance with the Confrontation Clause.⁵⁶ Justice Brennan, writing also for Justice Marshall, dissented, insisting that the Pennsylvania Supreme Court had correctly concluded that the case implicated the Confrontation Clause, and that the only appropriate remedy was disclosure of the records to defense counsel. Justice Brennan reasoned that only counsel, not a judge, had sufficient knowledge of the facts and the theory of the defense to adequately evaluate the material in the records.⁵⁷

Thus, three Justices argued that the Confrontation Clause does apply to the situation; four concluded that it does not.

2. *Due Process*

The plurality concluded that the trial judge's refusal to conduct an in camera examination of the records constituted a

⁵³ *Id.* at 78 (Stevens, J., dissenting). Justices Brennan and Marshall joined in the dissent but also dissented on the merits from the plurality opinion. *Id.* at 66 (Brennan, J., dissenting).

⁵⁴ *Id.* at 52.

⁵⁵ *See id.* at 51–55.

⁵⁶ *Id.* at 61–66 (Blackmun, J., concurring in part and concurring in the judgment).

⁵⁷ *Id.* at 66–72 (Brennan, J., dissenting).

denial of defendant's due process right to exculpatory evidence in possession of the state.⁵⁸ Consistent with its decisions applying that due process right,⁵⁹ the plurality rejected the proposition that the defense should have access to the documents to make its own determination of relevance:

To allow full disclosure to defense counsel in this type of case would sacrifice unnecessarily the Commonwealth's compelling interest in protecting [privileged] information. . . . Neither precedent nor common sense requires such a result. . . . An *in camera* review by the trial court will serve Ritchie's interest without destroying the Commonwealth's need to protect the [privileged information].⁶⁰

The plurality expressed confidence that an *in camera* review could adequately protect the defendant's rights. It emphasized: "[T]he trial court's discretion is not unbounded. If a defendant is aware of specific information contained in the file (*e.g.*, the medical report), he is free to request it directly from the court, and argue in favor of its materiality."⁶¹

Moreover, the plurality stressed, the trial judge's *in camera* inspection was not a one-time-only proposition; rather, "the duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial."⁶²

The Court therefore remanded the case for an *in camera* examination of the records by the trial court to determine whether the files contained information that was "material" to the defense of the accused.⁶³ The Court explicitly "express[ed] no opinion on whether the result in this case would have been different if the statute had protected the CYS files from

⁵⁸ *Id.* at 58 (plurality opinion). See *infra* Part IV.B (discussing application of *Ritchie* to records and communications in the possession of private entities).

⁵⁹ See *infra* note 70 (brief summary of these cases).

⁶⁰ *Ritchie*, 480 U.S. at 60–61.

⁶¹ *Id.* at 60.

⁶² *Id.*

⁶³ *Id.* at 58; see *infra* Part III.B.4 (discussing the Court's definition of "materiality"). For reasons described later, this Article proposes a standard different from the materiality standard adopted in *Ritchie*. See *infra* Part V.C.1.

disclosure to *anyone*, including law-enforcement and judicial personnel [i.e., if the privilege had been absolute].”⁶⁴

3. *Compulsory Process Clause*

The Court declined to discuss whether the case implicated Ritchie’s rights under the Sixth Amendment’s Compulsory Process Clause.⁶⁵ The plurality acknowledged that the Compulsory Process Clause might, by implication, involve discovery, but concluded that there was no need to address the issue: “Because the applicability of the Sixth Amendment to this type of case is unsettled, and because our Fourteenth Amendment precedents addressing the fundamental fairness of trials establish a clear framework for review, we adopt a due process analysis for purposes of this case.”⁶⁶ Significantly, the plurality elaborated:

Although we conclude that compulsory process provides no *greater* protections in this area than those afforded by due process, we need not decide today whether and how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment. It is enough to conclude that on these facts, Ritchie’s claims more properly are considered by reference to due process.⁶⁷

This language suggests the possibility that the Compulsory Process Clause might provide *fewer* “protections in this area than those afforded by due process,” a possibility that may be quite significant in cases where the records are not generated or possessed by a state agency, in which case the due process precedents that the Court relied on would not apply.⁶⁸

4. “Materiality”

In remanding for an in camera examination by the trial court to determine whether the files contained information that was material to the defense, the Court defined “material” as follows: “Evidence is material only if there is a reasonable probability

⁶⁴ *Ritchie*, 480 U.S. at 57 n.14; *see infra* Part IV.A (discussing case law regarding the application of *Ritchie* to an absolute privilege).

⁶⁵ *See Ritchie*, 480 U.S. at 56.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *See infra* Part IV.B (discussing defense access to such records).

that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”⁶⁹ It derived this definition from its prior decisions regarding a prosecutor’s obligation to disclose exculpatory evidence that was already in the possession of the government.⁷⁰

This is obviously a more restrictive test than that articulated in *Davis v. Alaska*,⁷¹ which held that, despite a state statute akin to a privilege that bans the use of such evidence, the Sixth Amendment Confrontation Clause entitles a defendant to *introduce* evidence at trial, so long as that evidence *supports a defense argument* that a state witness has a motive to lie or shade his or her testimony.⁷² It may appear from this discussion that a defendant may have a greater right to *introduce* certain types of evidence than he or she has to *discover* such evidence. But this is not perhaps as strange as it may seem at first glance, because the privileges under discussion in this Article generally are regarded as far more important, and therefore as deserving much-greater protection, than the state policy at stake in *Davis*.

5. Summary

Thus, *Ritchie* resolved only two issues:

(1) The four-Justice plurality concluded that well-established due process principles, requiring the State to disclose any exculpatory material it possessed, applied to otherwise-privileged information in a witness’s mental-health records maintained by a state agency, at least when the privilege is qualified rather than absolute. Presumably the three Justices who argued that the Confrontation Clause should apply would have voted for the plurality’s due process in camera procedure if

⁶⁹ *Ritchie*, 480 U.S. at 57 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

⁷⁰ *See id.* (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)) (defining “materiality” in assessing whether a failure to disclose information provides a basis to set aside a conviction); *United States v. Agurs*, 427 U.S. 97 (1976) (holding that the prosecutor’s fulfillment of its obligations under *Brady* is measured in part by the degree of specificity with which the defendant seeks disclosure of exculpatory information); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (enunciating the prosecutor’s obligation to make timely disclosure to the defense of all exculpatory evidence).

⁷¹ 415 U.S. 308 (1974); *see also supra* Part III.A.

⁷² *See supra* text accompanying note 39.

the alternative had been no disclosure or review at all. Thus, where the records are possessed by a state agency and they are protected by a qualified and not an absolute privilege, a defendant's right to due process disclosure via in camera review appears to be firmly established.

(2) A majority held that at the postconviction stage, it suffices that the trial court conduct an in camera review of the state witness's mental health records; direct disclosure to defense counsel is not required.⁷³

Ritchie therefore did not resolve any of the issues listed above. Nearly two decades later, few if any of these issues have been resolved.

IV

"ABSOLUTE" PRIVILEGES; PRIVATE AGENCIES AND RECORDS

The privilege at issue in *Ritchie* was a qualified privilege, i.e., on its terms it recognized that a court had the authority to order disclosure of the records in question. The Court pointedly "express[ed] no opinion" as to the outcome "if the statute had protected the [government agency's] files from disclosure to anyone, including law-enforcement and judicial personnel."⁷⁴ Moreover, because the records in question were maintained by and in the possession of a state agency, the plurality based its decision on the State's due process obligation to provide the defense with exculpatory information in its possession.⁷⁵ Thus, *Ritchie* provides no guidance as to private records.

We now examine how lower courts have attempted to apply *Ritchie* in such situations.

A. "Absolute" Privilege

Lower federal and state courts have had to resolve the conflict between a defendant's right to obtain exculpatory information

⁷³ This majority consisted of the four-Justice plurality, and Justice Blackmun, who concurred in the result. The plurality concluded that only *Ritchie*'s right to due process was at stake; Justice Blackmun concluded that the situation implicated *Ritchie*'s Confrontation Clause right, but that an in camera review, rather than full disclosure of the records to the defendant, sufficed to protect his Confrontation Clause right. *Ritchie*, 480 U.S. at 39, 61.

⁷⁴ *Id.* at 57 n.14; see also *infra* Part IV.A.

⁷⁵ See *Ritchie*, 480 U.S. at 56–60; see also *infra* Part IV.B.

and a statutory privilege that on its face is absolute. Four different approaches have emerged.

1. If Witness Asserts "Absolute" Privilege, Her Testimony Is Stricken

Where a defendant has established a constitutional right to the disclosure of privileged information, but the statutory privilege is absolute on its face, some courts have held that the witness retains the privilege: a court cannot disclose unless the witness waives the privilege. Absent such a waiver, if the defendant adequately demonstrates the need for an in camera review or disclosure of the records,⁷⁶ the witness is precluded from testifying. If he or she has already testified, his or her testimony is stricken from the record.

States following this approach include Connecticut,⁷⁷ Michigan,⁷⁸ Nebraska,⁷⁹ New Mexico,⁸⁰ Wisconsin,⁸¹ and South Dakota.⁸²

⁷⁶ See *infra* Parts V.B–C (discussing current law and providing recommendations for a proposed standard for obtaining in camera review and, in appropriate circumstances, disclosure of records).

⁷⁷ *State v. Peeler*, 857 A.2d 808, 841 (Conn. 2004) (quoting *State v. Slimsky*, 779 A.2d 723, 730–31 (Conn. 2001)); *State v. Bruno*, 673 A.2d 1117, 1124 (Conn. 1996); *State v. Whitaker*, 520 A.2d 1018, 1025 (Conn. 1987); *State v. Esposito*, 471 A.2d 949, 956 (Conn. 1984). Connecticut's procedure is particularly elaborate. A defendant may subpoena witnesses to testify at a closed-courtroom hearing to attempt to make the required showing. See *Peeler*, 857 A.2d at 841. If defendant succeeds, and the witness refuses to waive the privilege, the witness's testimony is banned (or stricken). *Id.* The witness may waive the privilege for the limited purpose of permitting the court to make an in camera inspection of the records. See *id.* If the court concludes that information in the records must be disclosed to protect the defendant's confrontation rights under the state constitution, the witness again has the option of permitting disclosure by waiving the privilege as to those entries in the records that the trial judge believes must be disclosed, or of asserting the privilege, in which case he or she cannot testify (or the testimony must be stricken). See *id.* at 841–42.

⁷⁸ Michigan's statutes expressly provided that confidential communications made to a sexual- or domestic-assault counselor "shall not be admissible as evidence in any civil or criminal proceeding without the prior written consent of the victim." MICH. COMP. LAWS. ANN. § 600.2157a(2) (West 2000); see also *People v. Stanaway*, 521 N.W.2d 557 (Mich. 1994).

⁷⁹ *State v. Trammell*, 435 N.W.2d 197, 201 (Neb. 1989) (physical assault and rape of a forty-year-old woman; adopting the Connecticut procedure established in *Esposito*, 471 A.2d 949); see also *State v. Kinser*, 609 N.W.2d 322, 325–26 (Neb. 2000).

⁸⁰ See *State v. Gonzales*, 1996-NMCA-026, ¶¶ 16–17, 121 N.M. 421, 912 P.2d 297. The court upheld dismissal of rape charges because the complainant, acting at the

2. No In Camera Review, No Disclosure; Witness May Testify

At least a few state courts have held that, where a privilege is absolute, the defendant simply has no right to access the records, nor to trigger an in camera review, because even an in camera review would intrude upon the confidentiality of the records.⁸³

prosecutor's direction, refused to sign a waiver authorizing submission of the records to the court, even though earlier she had signed a waiver releasing those records to the police and prosecutor—although the prosecutor insisted that no one in that office ever received or looked at the records. *Id.*

⁸¹ See *State v. Shiffra*, 499 N.W.2d 719, 724–25 (Wis. Ct. App. 1993), *modified on other grounds*, *State v. Green*, 2002 WI App. 68, 253 Wis. 2d 356, 646 N.W.2d 298. In *Shiffra*, the court upheld a pretrial order suppressing the sexual-assault complainant's testimony after the trial court found that the defendant had made a satisfactory preliminary finding of materiality and complainant refused to waive the privilege to permit an in camera inspection. *Shiffra*, 499 N.W.2d at 724–25.

⁸² See *State v. Karlen*, 589 N.W.2d 594, 601 (S.D. 1999).

⁸³ Colorado's Supreme Court has addressed the issue twice. *People v. District Court of Denver*, 719 P.2d 722 (Colo. 1986) (decided prior to *Ritchie*), involved a defendant's attempt to obtain the records of a sexual-assault complainant's postassault psychological counseling. See *id.* In *People v. Turner*, 109 P.3d 639 (Colo. 2005), the defendant in a domestic-abuse case sought records of the complainant's counseling with a domestic-violence victim advocate center. *Id.* In both decisions the court held that the privilege was absolute and that the witness could testify. See *id.* at 647; *Dist. Ct. of Denver*, 719 P.2d at 727. *Turner* relied heavily on the fact that the privilege at issue was absolute, in contrast to the one at issue in *Ritchie*. In both *Turner* and *District Court of Denver*, the court stressed that the defendant did not make any specific factual showing that the records likely would contain significant impeachment material; rather, each defendant merely alleged that the records might reveal statements inconsistent with the witness's likely trial testimony. Thus, although the court in each case rejected a balancing test, it has not yet faced a case where a defendant makes a specific factual showing that denial of at least an in camera review would undermine his rights to confrontation, compulsory process, or a fair trial.

An intermediate appellate court in Illinois has adopted a similar approach. See *People v. Harlacher*, 634 N.E.2d 366, 372 (Ill. App. Ct. 1994) (discussing Family Advocate records).

The Pennsylvania Supreme Court read *Ritchie* as permitting a state to create an absolute privilege without negative repercussions. See *Commonwealth v. Wilson*, 602 A.2d 1290, 1297–98 (Pa. 1992). The court held that where the statutory privilege is absolute in its terms, the defendant is not entitled to any form of discovery or in camera review; nor, apparently, is the complainant's testimony subject to exclusion. See *id.* Neither defendant in the two unrelated cases joined for appeal in *Wilson* made any specific showing, each merely claiming a right to access to the records to see if they contained any impeaching material; but the opinion in its terms does not rely on the inadequacy of the defendants' showing to justify an absolute ban on access or in camera review. See *id.* at 1294–98. Although the case involves records of (and testimony by) rape counselors, dictum in the decision applies to statements protected by an equally broad and unequivocal psychotherapist-patient privilege. See *id.* at 1295. *But see Commonwealth v. Davis*,

Two federal court decisions also appear to lean in this direction.⁸⁴ One federal district court judge likened the situation to one where:

[A] co-defendant in a criminal case [makes] a deal with the Government and testif[ies] against the remaining defendants. The co-defendant is himself represented by counsel. Can anyone imagine the court granting a motion by the defendants to examine the cooperating defendant's attorney *in camera* regarding the privileged statements made to him to determine if any could be helpful to the defense?⁸⁵

Indeed, few lawyers could imagine a court granting such a motion.

But this does not compel giving equal weight to the privileges discussed in this Article. The law values the attorney-client privilege so highly because our entire adversarial system of criminal justice depends on the sanctity of that privilege; breach it, and there is a substantial risk that the entire system will crash,

674 A.2d 214 (Pa. 1996) (holding that where the complainant consents to allow the Commonwealth access to records of her sexual-assault counseling, the defendant must receive equal access); *Commonwealth v. Gibbs*, 642 A.2d 1132, 1135–36 (Pa. Super. Ct. 1994) (holding that where the State improperly called and elicited testimony from the complainant's counselor without the complainant's permission, it was reversible error to deny the defendant equal access).

⁸⁴ See *United States v. Doyle*, 1 F. Supp. 2d 1187, 1189–91 (D. Ore. 1998) (holding that a defendant has no right to an *in camera* review of the mental-health records of a victim when the government sought an upward departure at a sentencing hearing for the victim's extreme psychological injury); see also *Newton v. Kemna*, 354 F.3d 776, 785 (8th Cir. 2004) (no abuse of discretion in a habeas proceeding when the trial court denied discovery and *in camera* review of psychiatric records).

Newton held that a petitioner was not entitled to habeas relief from a state conviction because *Ritchie* did not clearly establish a Confrontation Clause right to access to a witness's records: “[W]e may grant relief only if the state court has decided a matter contrary to clearly established Supreme Court precedent or has unreasonably applied that precedent.” *Id.* at 781 (citing 28 U.S.C. § 2254(d)(1) (2000)) (sets the standard for habeas relief from a state conviction). The court concluded that the Supreme Court, in *Ritchie*, had not “clearly established” the defendant's right to relief. See *id.* at 784–85. First, *Newton*'s habeas petition was founded on the Confrontation Clause, but of the seven Justices who considered the issue in *Ritchie*, four rejected a claim that the clause afforded discovery to a defendant. *Id.* Second, the privilege at issue in *Ritchie* was a qualified privilege for rape-counseling records, not, as in *Newton*, an absolute privilege for psychiatric records. See *id.*

⁸⁵ *Doyle*, 1 F. Supp. 2d at 1191.

or at least will produce verdicts of guilt far less reliable than we now take for granted.⁸⁶

3. *The Ritchie Approach Prevails Even if the Privilege Is “Absolute”*

By contrast, a number of courts have held that a trial judge can, and in appropriate cases must, conduct an in camera inspection of the records, despite the apparently absolute nature of a privilege.⁸⁷ These courts conclude that the defendant's

⁸⁶ I concede that a critic might plausibly argue that this is no more than a “profession-centric” way of saying: “The legal profession makes this distinction between the attorney-client and all other privileges because we have the power to do so.”

⁸⁷ *United States v. Mazzola*, 217 F.R.D. 84, 88 (D. Mass. 2003). The judge further concluded that the Fourteenth Amendment's concept of personal liberty provided, at best, only “qualified,” not absolute privacy protection, and that the defendants' legitimate need for the information outweighed the witness's privacy interest. *Id.*

In *United States v. Alperin*, 128 F. Supp. 2d 1251 (N.D. Cal. 2001), the court concluded, in a prosecution for assaulting a federal agent, that the defendant was entitled to in camera review of the complainant's mental health records. *Id.* at 1255. Curiously, the court commented that “[n]o circuit court has addressed this issue following [*Jaffee v. Redmond*, 518 U.S. 1 (1996), in which the Supreme Court recognized a federal patient-psychotherapist privilege].” *Id.* at 1253. The U.S. Magistrate Judge made no mention of *United States v. Hatch*, 162 F.3d 937, 947 (7th Cir. 1998).

In *United States v. Hansen*, 955 F. Supp. 1225 (D. Mont. 1997), a district court held that a murder defendant was entitled to disclosure of the deceased's psychiatric-treatment records, because “[t]he mental and emotional condition of the deceased is a central element” of defendant's self-defense claim. *Id.* at 1226. The court reasoned:

The holder of the privilege has little private interest in preventing disclosure, because he is dead. The public does have an interest in preventing disclosure, since persons in need of therapy may be less likely to seek help if they fear their most personal thoughts will be revealed, even after their death. However, I find that the defendant's need for the privileged material outweighs this interest.

Id. (citing *Jaffee*, 518 U.S. at 10–11). The year after *Hansen* was decided, however, the Supreme Court, in *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), held that the attorney-client privilege survives the death of the client. *Id.* at 410–11. The Court reasoned that clients frequently tell their attorneys highly personal information that attorneys need to help the clients structure their legal affairs, including information that the clients would not want divulged even after their death. *See id.* at 407–08. For a fuller discussion of *Swidler*, see 5 FISHMAN & MCKENNA, *supra* note 41, § 45:5. Presumably this is at least as likely with regard to statements made to a psychotherapist or other counselor.

Several states and a federal court in Massachusetts have leaned toward this approach as well. *See United States v. Lowe*, 948 F. Supp. 97 (D. Mass. 1996) (employing the in camera procedure where the complainant agreed to a limited

constitutional rights must prevail over the privilege.⁸⁸ Two pre-*Jaffe* federal circuit court opinions also support allowing in camera review when a defendant makes an adequate showing of need.⁸⁹

waiver of the privilege for that purpose); *People v. Hammon*, 938 P.2d 986, 993 (Cal. 1997); *Lucas v. State*, 555 S.E.2d 440, 446 (Ga. 2001) (no error to deny disclosure of codefendant's psychiatric- and psychological-counseling records); *Herendeen v. State*, 601 S.E.2d 372, 374 (Ga. Ct. App. 2004) (Herendeen was a psychologist whose records were subpoenaed, not a defendant); *State v. Peseti*, 65 P.3d 119, 133–34 (Haw. 2003); *Commonwealth v. Barroso*, 122 S.W.3d 554, 563 (Ky. 2003); *State v. Hummel*, 483 N.W.2d 68, 71 (Minn. 1992) (“[T]he medical privilege, like other privileges, sometimes must give way to the defendant’s right to confront his accusers.” (quoting *State v. Kutchara*, 350 N.W.2d 924, 926 (Minn. 1984))); *Missouri ex rel. White v. Gray*, 141 S.W.3d 460, 466–67 (Mo. Ct. App. 2004); *State v. Duffy*, 2000 MT 186 ¶¶ 23–24, 300 Mont. 381, 388, ¶¶ 23–24, 6 P.3d 453, 459; *State v. Donnelly*, 798 P.2d 89, 92 (Mont. 1990), *overruled on other grounds by State v. Imlay*, 813 P.2d 979 (Mont. 1991); *State v. J.G.*, 619 A.2d 232, 237 (N.J. Super. Ct. App. Div. 1993) (“We hold that in the absence of compelling circumstances, communications between a crime victim and a counselor consulted for treatment are absolutely immune from disclosure.”); *People v. Bridgeland*, 796 N.Y.S.2d 768, 771–72 (N.Y. App. Div. 2005); Advisory Opinion to the House of Representatives, 469 A.2d 1161, 1166 (R.I. 1983) (creation of an absolute evidentiary privilege would violate the defendant’s constitutional rights to confrontation and compulsory process); *State v. Gonzales*, 1996-NMCA-026, ¶¶ 20–21, 121 NM 421, 426–27, 912 P.2d 297 (upholding dismissal of rape charges because the complainant, acting at the prosecutor’s direction, refused to sign a waiver authorizing submission of the records to the court, even though earlier she had signed a waiver releasing those records to the police and prosecutor; the prosecutor insisted that no one in that office ever received or looked at the records.).

⁸⁸ See *infra* note 94 and accompanying text.

⁸⁹ In *Doe v. Diamond*, 964 F.2d 1325 (2d Cir. 1992), the Second Circuit upheld a trial court’s order holding a government witness (the complainant in an extortion case) in contempt for refusing to answer questions about his psychiatric history during a pretrial in camera hearing. *Id.* at 1326. The court reasoned that in view of the witness’s importance and the effect of his psychiatric history on his credibility, preclusion of the inquiry because of the privilege would violate the Confrontation Clause. *Id.* at 1328–29. “[T]he balance in this case weighs overwhelmingly in favor of allowing an inquiry into his history of mental illness.” *Id.* at 1329.

In *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983), a decision that preceded both *Jaffe* and *Ritchie*, the Eleventh Circuit held that the trial court erred in denying the defendants access to a key government witness’s records, which apparently revealed that the witness suffered from, and had been treated and confined for, paranoia. *Id.* at 1156–57. Because paranoia often skews a person’s perception of reality and may trigger an obsession to avenge imagined wrongs, the court reasoned, the trial court had denied the defendants the right to adequately confront and cross-examine this witness. *Id.* at 1160–63.

Neither *Doe* nor *Lindstrom* is in direct and flagrant contradiction of *Jaffe* or *Ritchie*, but their continued validity is open to some question.

4. Defense Counsel May Inspect Records Under Strict Conditions Regarding Disclosure

In *Commonwealth v. Dwyer*,⁹⁰ Massachusetts's highest court held that, upon an adequate showing of need, the trial court must permit defense counsel to examine the materials under carefully controlled conditions and circumstances, but that counsel may not disclose or use the information he or she learns unless explicitly authorized to do so by the trial judge.⁹¹

5. Courts Divided, or No Explicit Ruling

In some states, such as Florida, intermediate appellate courts are divided on the issue.⁹² In other states, such as Illinois, the law is too unclear to categorize.⁹³

⁹⁰ 859 N.E.2d 400 (Mass. 2006).

⁹¹ See *id.* at 418–19; see also *infra* Part V.A.1.

⁹² *State v. Pinder*, 678 So. 2d 410 (Fla. Dist. Ct. App. 1996). The court held that a defendant could obtain in camera review of a privilege that was absolute on its face. *Id.* at 417. Two other Florida state courts have held that because the privilege is absolute, the defendant has no right even to an in camera inspection of a state witness's mental-health records. *State v. Roberson*, 884 So. 2d 976, 980 (Fla. Dist. Ct. App. 2004); *State v. Famiglietti*, 817 So. 2d 901, 906–08 (Fla. Dist. Ct. App. 2002).

⁹³ Illinois's Supreme Court has sent mixed signals. In *People v. Dace*, 449 N.E.2d 1031 (Ill. Ct. App. 1983), *aff'd*, 470 N.E.2d 993 (Ill. 1984), an intermediate appellate court held that, even though a statutory psychotherapist-patient privilege was absolute on its face, the trial judge properly conducted an in camera inspection of the mental-health records of the state's key witness in a burglary trial, and further held that the trial judge had erred in refusing to disclose certain material to the defense. See *id.* at 1035. On appeal, the state supreme court commented: "The question is discussed in detail in the opinion of the appellate court and we need not repeat the discussion here. It suffices to say that we agree with the appellate court that, under the circumstances shown by the evidence, the refusal to permit the discovery was reversible error." *People v. Dace*, 470 N.E.2d 993, 996 (Ill. 1984) (citations omitted).

In *People v. Foggy*, 521 N.E.2d 86 (Ill. 1988), the court concluded that a defendant's request for an in camera inspection of the rape complainant's counseling records, which merely asked the judge to review records of her statements relating to the instant incident to determine whether they contained information useful for impeachment, with no specific allegations supporting a claim that such material was likely to be found, was insufficient to trigger an in camera review. *Id.* at 91–92. The court did not explicitly rule on the appropriate procedure if defendant had made an adequate showing and the complainant refused to waive the privilege, but at least one intermediate appellate court has apparently read *Foggy* as holding that the sex-abuse-counseling privilege is absolute. See *People v. Harlacher*, 634 N.E.2d 366, 372 (Ill. App. Ct. 1994). But since the defendant in *Foggy* did not make any specific showing as to why those records should be

6. *Evaluation*

Of the four approaches outlined above, the second, denying all review, is the least satisfying. As Kentucky's Supreme Court expressed:

The issue . . . is not whether [a defendant's] "need" for the evidence should be balanced against [a witness's] interest in maintaining the confidentiality of her psychotherapy, but whether the constitutional rights afforded to a criminal defendant by the Fifth, Sixth, and Fourteenth Amendments to [the] United States Constitution [and corresponding provisions in the state constitution] prevail over a state policy interest expressed in a statute or rule creating an evidentiary privilege. As a general proposition, constitutional rights prevail over conflicting statutes and rules.⁹⁴

There is a serious problem with the first approach: precluding the prosecutor from calling the witness at all, unless the witness waives the privilege, in essence gives the witness the legal authority to preclude the prosecution of a dangerous predator. A legislature has the authority to enact such a law, but to do so constitutes a profoundly unwise social policy.⁹⁵ Giving the witness the right to forbid disclosure, moreover, could often produce "unworkable or unwieldy" results, as when a witness-victim has already testified (an instruction to disregard the testimony is unlikely to "unring the bell"), or when the witness is a minor, in which case the judge would have to determine who has the authority to decide for the minor whether or not to waive the privilege.⁹⁶

The third and fourth approaches recognize that neither of the two conflicting interests, the patient or client's right to

inspected, there still appears to be no clear state law on how such a situation would be handled if in fact a defendant did make a compelling showing for such records.

⁹⁴ *Commonwealth v. Barroso*, 122 S.W.3d 554, 558 (Ky. 2003).

⁹⁵ "If . . . the witness is the victim of the crime without whose testimony the prosecution could not prove its case, must the case be dismissed if the victim refuses to waive the privilege? If so, what of 'the fair administration of justice' and the aim 'that guilt shall not escape?'" *Id.* at 565 (quoting *United States v. Nixon*, 418 U.S. 683, 708–09 (1974), in which the Supreme Court held that although the "presumptive privilege for Presidential communications . . . is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution," sometimes it must yield to a criminal defendant's rights to confront his accusers and to compulsory process to produce evidence in his own defense).

⁹⁶ *Id.*

nondisclosure and the defendant's right to a fair trial, should be given absolute preference over the other. Each requires counsel to make an adequate showing of need before the possibility of disclosure arises. Each requires the trial judge's approval before defense counsel may use or disclose privileged information. They differ in whether (once a showing of need has been made) the initial inspection of the records should be performed by the judge, or by defense counsel. The fourth (Massachusetts) approach creates too great a risk that the fear of disclosure will leave a patient or client unwilling or unable to confide fully in his or her counselor and thereby interfere with the therapeutic process.⁹⁷ The third approach, which authorizes the trial judge to make the preliminary examination of the records, strikes the best balance. It protects the public's interest by denying the witness the legal authority to veto the prosecution, and adequately protects the defendant's interest in due process. Lamentably, it may expose intensely personal and private matters, publicly humiliate the witness, and, in sexual-assault and child abuse cases, may renew or even magnify the original harm done by the defendant's conduct. However, allowing the State to rely on a witness's testimony to convict a defendant of a crime, yet denying the defendant even an in camera review of materials that may significantly undermine that witness's credibility, is a process that is anything but "due": it is fundamentally unfair and creates too a great a risk that an innocent defendant may be convicted.

*B. Records Held by Private Entities Unaffiliated with the State;
Compulsory Process Clause*

*Pennsylvania v. Ritchie*⁹⁸ dealt with a government agency's records. If the records were created by and are possessed by a private entity, the due process principle on which the *Ritchie* plurality relied presumably would not apply; rather, a defendant would have to rely on the Compulsory Process Clause of the Sixth Amendment.⁹⁹ The *Ritchie* plurality commented in dictum that "compulsory process provides no *greater* protections in this

⁹⁷ See *infra* Part V.B.1.

⁹⁸ 480 U.S. 39, 43 (1987).

⁹⁹ Each of the cases *Ritchie* cited in support of its due process analysis involved evidence or information possessed by state agencies. See *supra* Part III.B.2.

area than those afforded by due process,” but had no cause to “decide . . . whether and how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment.”¹⁰⁰

Courts that have considered the issue are divided. Some courts apparently have held that a defendant has no Fourteenth Amendment constitutional right to subpoena a witness’s mental-health or counseling records in such circumstances.¹⁰¹ Several state courts, applying state law, have held that a defendant does have the right to attempt to secure an in camera review of privately held records.¹⁰²

¹⁰⁰ *Ritchie*, 480 U.S. at 56.

¹⁰¹ See *United States v. Hatch*, 162 F.3d 937, 946–47 (7th Cir. 1998) (holding that the trial court had not erred in declining to conduct an in camera review of a government witness’s privately held mental-health records).

In *United States v. Skorniak*, 59 F.3d 750 (8th Cir. 1995) the court appears to have held that, because the records were not in the government’s hands, defendant could not subpoena them. *Id.* at 755–56. The court also notes, however, that the trial judge observed that the records did not contain anything of use to the defendant, which suggests that the trial court in fact may have conducted an in camera review. *See id.* at 756. Note that this case was decided prior to *Jaffee v. Redmond*, 518 U.S. 1 (1996), in which the Supreme Court recognized, and categorized as “absolute,” a federal patient-psychotherapist privilege. *See id.* at 17–18; *see also* *State v. Spath*, 1998 ND 133, ¶ 20, 581 N.W.2d 123, 126–27 (noting the distinction between accessing records held by the government and those not held by the government); *State v. Bassine*, 71 P.3d 72, 75–76 (Or. Ct. App. 2003) (Federal and Oregon Constitutions require discovery of materials that are in possession of the government.).

¹⁰² *Goldsmith v. State*, 651 A.2d 866, 874–75 (Md. 1995) (holding that although defendant had no constitutional right to *pretrial* discovery of such records, defendant had the right to subpoena the witness’s psychiatrist at trial).

Massachusetts’s highest court went even further, applying state rules of criminal procedure, and holding that upon an adequate showing of need, defense counsel must be permitted to inspect a state witness’s records prior to trial under carefully controlled conditions and circumstances. *Commonwealth v. Dwyer*, 859 N.E.2d 400, 414–423 (Mass. 2006).

Rhode Island’s Supreme Court, in an advisory opinion rendered prior to *Ritchie*, advised the state legislature that enacting an absolute privilege would violate a defendant’s right to confrontation guaranteed by the state and federal constitutions. Advisory Opinion to the House of Representatives, 469 A.2d 1161 (R.I. 1983).

In *State v. Shiffra*, 499 N.W.2d 719 (Wis. Ct. App. 1993), *abrogated by* *State v. Green*, 2002 WI App 68, 253 Wis. 2d 356, 646 N.W.2d 298, the Wisconsin Court of Appeals upheld a pretrial order suppressing the sexual-assault complainant’s testimony after the trial court found that the defendant had made a satisfactory preliminary finding of materiality and complainant refused to waive the privilege to permit an in camera inspection. *Id.* at 724–25. In *State v. Green*, 2002 WI App 68, 253 Wis. 2d 356, 646 N.W.2d 298, the state supreme court implicitly endorsed the conclusion that a defendant has a constitutional right to such records upon an

Although the United States Supreme Court has never squarely ruled on the issue, Kentucky's Supreme Court, in *Commonwealth v. Barroso*,¹⁰³ concluded that a careful review of United States Supreme Court precedent¹⁰⁴ strongly suggests that

adequate showing of need even where the records are not in state possession. See *id.* ¶ 21 n.4.

The California Supreme Court in *People v. Hammon*, 938 P.2d 986 (Cal. 1997), first observed that the facts of the case provided no occasion "to revisit the question of whether a defendant may generally obtain pretrial discovery of unprivileged information in the hands of private parties." *Id.* at 993 (emphasis added). The court then added: "That the defense may issue subpoenas duces tecum to private persons is implicit in statutory law and has been clearly recognized by the courts for at least two decades. However, this more general right provides no basis for overriding a statutory and constitutional privilege." *Id.* (citations omitted).

¹⁰³ 122 S.W.3d 554 (Ky. 2003).

¹⁰⁴ The court in *Barroso* summarized its review thus:

[T]o date, the United States Supreme Court has held that the denial of the right to impeach a prosecution witness violates the Confrontation Clause [citing *Davis v. Alaska*, 415 U.S. 308 (1974)] but has yet to muster a majority on whether the denial of pretrial access to impeachment evidence is also a denial of confrontation rights [citing *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)]. It has declared that evidentiary rules [citing *Chambers v. Mississippi*, 410 U.S. 284 (1973)] and at least one recognized evidentiary privilege [citing *Roviaro v. United States*, 353 U.S. 53 (1957)] must yield to a criminal defendant's due process right to present a defense. It has also stated that a defendant's due process right to discover exculpatory evidence in the possession of the government cannot be defeated by a qualified privilege [citing *Ritchie*], and that the "fair administration of justice" requires that privileged inculpatory evidence in the hands of a third party be turned over to the prosecution [citing *United States v. Nixon*, 418 U.S. 683 (1974)]. It has further held that the right to compulsory process includes the right to elicit favorable testimony from defense witnesses [citing *Washington v. Texas*, 388 U.S. 14 (1967)], but has yet to specifically decide whether that same right prevails over an absolute privilege (though *Washington* provides a close analogy).

Id. at 561; see *supra* Part III (discussion of *Ritchie* and *Davis*). In *Chambers*, the Court held that a state's rule precluding a party from impeaching its own witness could not preclude a defendant from offering highly probative evidence of his innocence. See 2 FISHMAN & MCKENNA, *supra* note 41, § 13:38; 5 *id.* § 37:20. *Roviaro* held that a defendant has the right to learn the identity of an informer where a fair trial requires it. See *id.* § 13:18; see also *Roviaro*, 353 U.S. at 60–61. In *Nixon*, the Supreme Court held that although the "presumptive privilege for Presidential communications . . . is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution," sometimes it must yield to a criminal defendant's rights to confront his accusers and to compulsory process to produce evidence in his own defense. See *Nixon*, 418 U.S. at 708. In *Washington*, the Supreme Court declared unconstitutional a state statute prohibiting accomplices or co-conspirators from testifying on behalf of one another, reasoning that a criminal defendant's right to compulsory process included not only

the Compulsory Process Clause of the Sixth Amendment may, in an appropriate case, require the third party to provide information to the court for in camera inspection.¹⁰⁵ According to the court: “If 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.”¹⁰⁶

The issue is not an easy one to resolve, but on balance, the latter view—allowing access—is correct. First, the availability or extent of legal protection from disclosure should not depend on the fortuity of whether the witness obtained counseling from a state agency or a private practitioner or organization, particularly given that people of modest means may have no recourse but to rely on a public agency. Second, most jurisdictions have created significant substantive requirements and procedural protections to prevent unjustified or excessive disclosure.¹⁰⁷ Thus, this exception to the privilege applies only where legitimate doubts exist as to a government witness’s testimonial capacity or the truthfulness of a government witness’s testimony. In such a case, to withhold such information from the jury creates too great a risk that an innocent defendant may be convicted.

the right to compel attendance of defense witnesses, but also the right to introduce their testimony into evidence. *Washington*, 388 U.S. at 23.

To this list of decisions it is appropriate to add *Holmes v. South Carolina*, 547 U.S. 319 (2006). At his trial for murder, sexual assault, robbery, and burglary, Holmes sought to offer evidence tending to show that someone else committed the crime, but the evidence was excluded. *Id.* at 322–24. The Supreme Court acknowledged the general validity of the principle that a court may exclude such evidence if the legitimate probative value of the evidence is outweighed by the risk of unfair prejudice, confusion of the issues, or the potential to mislead the jury, or the evidence is repetitive or only marginally relevant. *Id.* at 326. The Court unanimously held, however, that a South Carolina variation on the doctrine, which excluded evidence of another’s guilt if the State’s case was perceived to be particularly strong, was unconstitutional. *Id.* at 329–31. Exclusion, the Court insisted, could only be based on an evaluation of the evidence the defendant offered, not on the supposed strength of the evidence it was offered to counter. *Id.* at 331.

¹⁰⁵ See *Barroso*, 122 S.W.3d at 563.

¹⁰⁶ *Id.* The court also cited decisions by courts from several other states reaching the same conclusion. See *id.* at 561–62.

¹⁰⁷ See *infra* Part V.B.

V PROCEDURAL ISSUES

A. Overview

In *Pennsylvania v. Ritchie*, the Supreme Court was called upon to establish the appropriate level of *postconviction* review of the records.¹⁰⁸ A four-to-three plurality of the Court rejected the concept that the Sixth Amendment Confrontation Clause entitled a defendant to pretrial discovery; rather, it reasoned, the Confrontation Clause applies only at trial.¹⁰⁹ A five-Justice majority concluded that, at least in the circumstances in that case, the defendant was not entitled to examine the records; instead, an *in camera* review of the records by the trial judge sufficed to protect the defendant's right to due process.¹¹⁰

Subsequent to *Ritchie*, defense attorneys naturally have sought to obtain the records (or at least an *in camera* review of them) in time for the defendant to use the records at trial. Numerous issues arise.

1. Disclosure to Counsel, or *In Camera* Review

Justice Brennan, dissenting in *Ritchie*, argued that that only defense counsel, who is far more familiar with the facts and the defense strategy, can effectively evaluate the information.¹¹¹ Nevertheless, until December 2006, each of the states that permit any review of privileged records¹¹² denied defense counsel the right to review such records. Instead, the law in each such state was that if a defendant made an adequate preliminary showing, the *trial court* would have to conduct an *in camera* inspection of the kind approved in *Ritchie*.¹¹³

¹⁰⁸ See 480 U.S. 39 (1987).

¹⁰⁹ See *id.* at 998–1000; see generally *supra* Part III.A.

¹¹⁰ *Ritchie*, 480 U.S. at 58, 61. Justice Blackmun, concurring in the result, provided the fifth vote for the *in camera* procedure. See also *supra* Part III.B.2–3.

¹¹¹ See *supra* Part III.B.1.

¹¹² Recall that some states permit no review whatsoever of records protected by an absolute privilege, unless the witness waives the privilege. See *supra* Parts IV.A.1–2.

¹¹³ Each state court opinion I have read that discusses the issue so holds. See, e.g., *People v. Gurule*, 51 P.3d 224, 249 (Cal. 2002); *People v. Hammon*, 938 P.2d 986, 993 (Cal. 1997); *State v. Peeler*, 857 A.2d 808, 841 (Conn. 2004); *State v. Slimskey*, 779 A.2d 723, 732 (Conn. 2001); *State v. Bruno*, 673 A.2d 1117, 1124 n.11

In December of 2006, however, in *Commonwealth v. Dwyer*,¹¹⁴ Massachusetts's highest court abrogated its prior decisions on the subject,¹¹⁵ and held that once a defendant makes a sufficient showing of need,¹¹⁶ defense counsel, not the judge, should make the preliminary examination of the witness's records.¹¹⁷ The court explained:

Experience has . . . confirmed that trial judges cannot effectively assume the role of advocate when examining records. Requiring judges to take on the perspective of an advocate is contrary to the judge's proper role as a neutral arbiter. Despite their best intentions and dedication, trial judges examining records before a trial lack complete information about the facts of a case or a defense to an

(Conn. 1996); *State v. Pinder*, 678 So. 2d 410, 417 (Fla. Dist. Ct. App. 1996); *State v. Peseti*, 65 P.3d 119, 131–33 (Haw. 2003); *Goldsmith v. State*, 651 A.2d 866 (Md. 1995); *People v. Stanaway*, 521 N.W.2d 557, 574 (Mich. 1994); *Cox v. State*, 2001-KA-01427-SCT (¶¶ 52–54) (Miss. 2003); *State v. Taylor*, 134 S.W.3d 21, 26 (Mo. 2004) (en banc); *State v. Hoag*, 749 A.2d 331, 333 (N.H. 2000); *State v. Gagne*, 612 A.2d 899, 901 (N.H. 1992); *State v. L.J.P.*, 637 A.2d 532, 537–38 (N.J. Super. Ct. App. Div. 1994); *People v. Buchholz*, 805 N.Y.S.2d 763, 765 (N.Y. App. Div. 2005); *State v. Black*, 621 N.E.2d 484, 488 (Ohio Ct. App. 1993); *State v. Bassine*, 71 P.3d 72, 75–76 (Or. Ct. App. 2003); *Dixon v. State*, 923 S.W.2d 161, 166–67 (Tex. App. 1996), *vacated on other grounds*, 928 S.W.2d 564 (Tex. Crim. App. 1996), *on remand*, 955 S.W.2d 898 (Tex. App. 1997), *aff'd*, 2 S.W.3d 263 (Tex. Crim. App. 1999); *State v. Cramer*, 2002 UT 9, ¶¶ 18–24, 44 P.3d 690, 695–96; *State v. Kalakosky*, 852 P.2d 1064, 1076–77 (Wash. 1993); *State v. Diemel*, 914 P.2d 779, 781 (Wash. Ct. App. 1996); *State v. Green*, 2002 WI App. 68, ¶¶ 34–35, 253 Wis. 2d 356, ¶¶ 34–35, 646 N.W.2d 298, ¶¶ 34–35.

¹¹⁴ 859 N.E.2d 400 (Mass. 2006).

¹¹⁵ *Commonwealth v. Fuller*, 667 N.E.2d 847 (Mass. 1996), *abrogated by Commonwealth v. Dwyer*, 859 N.E.2d 400 (Mass. 2006); *Commonwealth v. Bishop*, 617 N.E.2d 990 (Mass. 1993).

¹¹⁶ *See infra* Part V.B.1.

¹¹⁷ *See Dwyer*, 859 N.E.2d at 418–19. The court primarily relied upon MASS. R. CRIM. P. 17(a)(2). *See Dwyer*, 859 N.E.2d at 414. Rule 17, entitled “Summonses for Witnesses,” provides:

(2) *For Production of Documentary Evidence and of Objects.* A summons may . . . command the person to whom it is directed to produce the books, papers, documents, or other objects designated therein. The court on motion may quash or modify the summons if compliance would be unreasonable or oppressive or if the summons is being used to subvert the provisions of Rule 14. The court may direct that books, papers, documents, or objects designated in the summons be produced before the court within a reasonable time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, objects, or portions thereof to be inspected and copied by the parties and their attorneys if authorized by law.

MASS. R. CRIM. P. 17(a)(2).

indictment, and are all too often unable to recognize the significance,¹¹⁸ or insignificance, of a particular document to a defense.

The court cited no studies or other authority to document that experience has shown that trial judges cannot adequately conduct the preliminary review.¹¹⁹ Nor did it discuss, or even cite, any of the numerous court decisions in other jurisdictions that have held to the contrary.

In an appendix to its opinion, the court in *Dwyer* established specific, detailed, and elaborate procedures designed to protect against improper disclosure of presumptively privileged records.¹²⁰ Initially, only defense counsel may inspect the records.¹²¹ “Before conducting any such inspection, counsel shall sign, as an officer of the court, and file a protective order containing stringent nondisclosure provisions.”¹²² In the protective order, the court must “prohibit counsel from copying any record or disclosing or disseminating the contents of any record to any person, including the defendant.”¹²³ Information contained in the records may be copied or disclosed to the defendant or another person (such as an investigator) “if, and only if, a judge subsequently allows a motion for a specific, need-

¹¹⁸ *Dwyer*, 859 N.E.2d at 418 (citations omitted). The court cited, after the second sentence, *Commonwealth v. Stockhammer*, 570 N.E.2d 992, 1001 (1991), and quoted in a parenthetical: “In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate.” *Dwyer*, 859 N.E.2d at 418 (quoting *Stockhammer*, 570 N.E.2d at 1001) (language originally from *Dennis v. United States*, 384 U.S. 855, 875 (1966)).

¹¹⁹ The court added: “The absence of an advocate’s eye may have resulted in overproduction, as well as underproduction, of privileged records, and has repeatedly contributed to trial delays and appeals, jeopardizing the rights of defendants, complainants, and the public.” *Dwyer*, 859 N.E.2d at 418. The court cited no authority to substantiate these statements.

¹²⁰ *Id.* app. The court first set out procedures to follow in determining whether the records were privileged and defense counsel’s access to them if the trial court concluded that they were not privileged. *Id.* app. at 420–21; see *infra* Part V.A.3. Once the trial judge determines that the records are presumptively privileged, the *Dwyer* Appendix specifies where the records are to be kept and how they are to be marked. See *Dwyer*, 859 N.E.2d 400 app. at 421.

¹²¹ *Dwyer*, 859 N.E.2d at 419.

¹²² *Id.*

¹²³ *Id.* Judges and counsel are required to report any violation of a protective order to the Board of Bar Overseers for disciplinary action. *Id.*

based written modification of the protective order.”¹²⁴ Similarly, counsel may introduce information from the records at trial only if counsel first files a motion in limine “at or before any final pretrial conference,”¹²⁵ and the judge, after a hearing,¹²⁶ concludes that introduction of specific documents or information contained in the records “is necessary for the moving defendant to obtain a fair trial.”¹²⁷

Massachusetts’s highest court has done a superb job in drafting these procedures. If defense counsel is to be given access to the witness’s privileged counseling records, it is difficult to imagine how to design a regime better calculated to protect those records from unnecessary or excessive disclosure. Nevertheless, Massachusetts’s decision to allow defense counsel to review the records without prior judicial screening is poor public policy for at least three reasons. First, it may not adequately protect the records from unauthorized disclosure because enforcement of the protective orders may not be as absolute as the court supposes. It is not unheard of for an unscrupulous attorney to leak protected information where he believes that doing so will help the client and the leak will not be traceable back to him.¹²⁸

Second, it may not adequately protect the records from unauthorized disclosure because human mistakes are inevitable. A clerk may mislabel the documents. An attorney’s handwritten notes may be seen by outsiders. An e-mail containing discussion

¹²⁴ *Id.* “The motion shall be accompanied by an affidavit explaining with specificity the reason why copying or disclosure is necessary; the motion and the affidavit shall not disclose the content of any presumptively privileged record. Counsel shall provide notice of the motion to all parties.” *Id.* app. at 422.

¹²⁵ *Id.*

¹²⁶ Prior to ruling on defendant’s motion in limine, the prosecutor “shall be permitted to review enough of the presumptively privileged records to be able adequately to respond to the motion in limine, subject to signing and filing a protective order” similar to the one that defense counsel must sign. *Id.* app. at 422–23.

¹²⁷ *Id.* app. at 423. “Before permitting the introduction in evidence of such records, the judge shall consider alternatives to introduction, including an agreed to stipulation or introduction of redacted portions of the records.” *Id.*

¹²⁸ In a typical case, at least some of the information contained in the records is also likely to be known to the witness’s close friends or relatives, to those who provided the counseling, and to members of the counselor’s staff. The existence of other potential sources for the leak will often make it difficult to positively identify the culprit.

of such matters, intended for a limited distribution, may be sent accidentally to a much-wider readership.

Third, and most important, even if the *Dwyer* procedures do prevent unauthorized and unnecessary disclosure, the court failed to consider—indeed, expressed not a syllable of concern about—the impact they are likely to have on the witness. Consider the circumstance of a woman who has been raped. The crime itself likely has had a traumatic, shattering, and destructive impact on her ability to live the life she had before it was committed. In an effort to deal with and recover from her ordeal, she has undergone counseling, during which she may have disclosed information, thoughts, fears, and self-doubts of the most intensely personal and private kind. It is bad enough that, come the trial, she must relive her ordeal before an audience of strangers, and that the judge will examine her records to determine whether they contain information that must be disclosed to the defense. In Massachusetts, however, she must take the witness stand knowing that her rapist's lawyer, whose primary responsibility is to attack her testimony, credibility and character, has read the entire file of her counseling. The lawyers in the case may have every confidence that defense counsel has adhered and will adhere to the rules. To the witness, by contrast, this may provide little comfort compared to the sense of betrayal, humiliation, and exposure she is likely to experience.

2. *Timing of In Camera Review*

Most courts that have discussed the issue have held that a defendant has no right to seek in camera review of a witness's therapy or counseling records prior to trial; rather, the procedure may be invoked only after the witness has testified on direct.¹²⁹

¹²⁹ See *infra* Part V.D. (discussing when, if ever, defense counsel can seek in camera review of the privileged records by the court).

3. *Determining Whether a Privilege Protects the Records*¹³⁰

To assess whether a privilege protects the witness's records, a trial court should apply the following procedure:

(1) A defendant seeking a complainant's or other witness's counseling records pursuant to Federal Rule of Criminal Procedure 17 or a state equivalent must file a motion with the court specifying the entity that holds the records and the name of the witness, "and describing, as precisely as possible, the records sought."¹³¹ The motion must be accompanied by an affidavit setting forth the defendant's factual basis to believe that the records contain information to which the defendant must have access in order to receive a fair trial.

(2) The defendant must serve the motion and affidavit on the prosecutor and any codefendants. The prosecutor in turn must forward copies to the record holder and, if possible, the witness,¹³² and notify them of the time and date that a hearing will be held on the motion for the subpoena.¹³³

¹³⁰ As will be apparent in the following footnotes, the rest of this subsection relies heavily on a detailed set of procedures developed over the course of many opinions by the Supreme Judicial Court of Massachusetts, the most recent of which, *Commonwealth v. Dwyer*, 859 N.E.2d 400 (Mass. 2006), abrogated many aspects of what state courts referred to as the "Bishop-Fuller" protocol. See *Commonwealth v. Fuller*, 667 N.E.2d 847, 855 (Mass. 1996); *Commonwealth v. Bishop*, 617 N.E.2d 990, 997-98 (Mass. 1993); see also *Commonwealth v. Oliveira*, 780 N.E.2d 453, 459-65 (Mass. 2002); see generally Ellen M. Crowley, Note, In Camera *Inspections of Privileged Records in Sexual Assault Trials: Balancing Defendants' Rights and State Interests Under Massachusetts's Bishop Test*, 21 AM. J.L. & MED. 131 (1995).

¹³¹ *Dwyer*, 859 N.E.2d 400 app. at 420.

¹³² Cases may arise in which the individual whose records are sought is not a witness, for example where that person is dead or incompetent to testify. The procedures outlined herein should be adaptable to cover that situation as well.

¹³³ See *Dwyer*, 859 N.E.2d 400 app. at 420. In Massachusetts, the prosecutor must also inform the record holder and witness that:

- (i) [T]he . . . hearing shall proceed even if either is absent; (ii) the hearing shall be the [witness's] only opportunity to address the court; (iii) any statutory privilege applicable to the records sought shall remain in effect unless and until the [witness] affirmatively waives any such privilege, and that failure to attend the hearing shall not constitute a waiver of any such privilege; and (iv) if the [witness] is the [alleged] victim in the case, he or she has the opportunity to confer with the prosecutor prior to the hearing.

Id.

(3) The subpoena must direct that the records be submitted to the court, not to the defendant who obtained the subpoena.¹³⁴

(4) Prior to the hearing, neither the parties nor the court may inspect the records.¹³⁵

(5) At the hearing on the defendant's motion, all parties, the record holder, and the witness may be heard as to whether the record is privileged¹³⁶ and, if so, whether the defendant has made a showing sufficient to require an in camera inspection of the records by the trial court.

(6) The judge issues findings of fact and law, setting forth whether the records are or are not privileged.¹³⁷

¹³⁴ Federal case law suggests that when a defendant subpoenas evidence using FED. R. CRIM. P. 17(c), the evidence must be delivered to the court directly, and not defense counsel. See *United States v. Santiago-Lugo*, 904 F. Supp. 43, 46 (D.P.R. 1995) (stating “[n]owhere in Fed.R.Crim.P. 17 do we find language allowing the utilization of the court’s subpoena power privately, with a secret return directly to an attorney”); *United States v. Najarian*, 164 F.R.D. 484, 487 (D. Minn. 1995) (“As we read the plain language of Rule 17(c), the documents being subpoenaed are ‘to be produced before the court.’”); see also FED. R. CRIM. P. 17(c)(1) (stating that “[w]hen the items arrive, the court may permit the parties and their attorneys to inspect all or part of them”).

This discussion from *Najarian* was approved more recently by the Federal District Court for the District of Minnesota. See *United States v. Agboola*, No. 00-100-JRT/FLN, 2001 WL 1640094, at *6 (D. Minn. Oct. 31, 2001) (“[T]he Court would find no reason to grant Agboola’s request to deliver the documents directly to his counsel. The plain language of Rule 17(c) requires subpoenaed documents ‘to be produced before the court.’” (citing *Najarian*, 164 F.R.D. at 487)).

Moreover, the court in *Santiago-Luga* also suggests that when a subpoena is used under Rule 17(c), notice must be made to all parties, parallel to the mandate of FED. R. CIV. P. 45(b)(1). See *Santiago-Luga*, 904 F. Supp. at 47 (finding that civil subpoenas issued for the criminal action were improper for, among other things, failure to provide notice to all parties).

State courts also have addressed the issue. See *State v. Gonzales*, 2005 UT 72, 125 P.3d 878, discussed *infra* note 139.

¹³⁵ Because most states require the defendant to make a sufficient showing of need even to trigger an in camera review of the records by the trial judge, it follows that no one should examine the records unless and until that showing is made. Massachusetts requires that defense counsel be allowed to examine the records in camera, but only after an adequate showing of need. There, too, it follows that the records are off-limits to all participants unless that showing is made.

¹³⁶ *Dwyer*, 859 N.E.2d 400 app. at 420.

¹³⁷ In Massachusetts the judge must state whether any given record is not privileged, or “presumptively privileged.” *Id.* app. at 420. In that state, defense counsel, upon signing a protective order, is entitled to inspect presumptively privileged records. See *supra* Part V.A.1.

(7) If the records are not privileged, the defendant is entitled to review them without any judicial review or screening for relevance or a special showing of need.¹³⁸

(8) If defense counsel improperly obtains and examines records that are thereafter held to be privileged, the trial court should take measures to ensure that counsel does not use the improper information in any way in preparing or presenting the defense.¹³⁹

4. *Basis for Disclosure if the Record Is Privileged*

If the trial court concludes that the communications and records are privileged, a defendant is entitled to in camera review of the records¹⁴⁰ and, thereafter, to disclosure of pertinent

¹³⁸ See *Dwyer*, 859 N.E.2d 400 app. at 420; *State v. Davis*, 186 S.W.3d 367, 372 (Mo. Ct. App. 2005). The trial court may nevertheless restrict public access or disclosure if the records contain confidential or personal information. *Dwyer*, 859 N.E.2d 400 app. at 421 n.5. Such information should not be accessible to the public nor disclosed by defense counsel if it would be inadmissible on evidentiary grounds at trial. See, e.g., FED. R. EVID. 402 (admitting only relevant evidence); FED. R. EVID. 403 (authorizing a judge to exclude evidence whose relevance is substantially outweighed by various negative considerations, including the risk of unfair prejudice, confusion, waste of time, and the like); FED. R. EVID. 611(a) (directing the trial court to “exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . protect witnesses from harassment or undue embarrassment”).

¹³⁹ In *State v. Gonzales*, 2005 UT 72, 125 P.3d 878, counsel filled out a subpoena directing the child sexual-abuse complainant’s records be delivered to him, not, as state rules required, to the court, and also violated state rules by failing to inform the prosecutor of the subpoena (thereby precluding the state from moving to quash). *Id.* ¶ 12. Counsel inspected the records before reporting the matter to the court. *Id.* ¶ 15. The trial judge pointed out that counsel had created “a possibly insurmountable conflict of interest,” because it was impossible to separate counsel’s knowledge of the privileged information from his knowledge of the rest of the case. *Id.* ¶ 18. Counsel took the hint and moved to withdraw; the court granted the motion and appointed new counsel. *Id.* ¶¶ 10–18. On appeal, the state supreme court reached four significant conclusions. First, the court held that such records must be deliverable to the court, not to counsel. *Id.* ¶¶ 44–45. Second, the fact that counsel sought to impeach the complainant’s credibility did not render her mental condition “an element of any claim or defense,” and therefore the case did not fall within an exception to the privilege for such records. *Id.* ¶¶ 42–43. Third, the court agreed that the trial judge properly granted a motion to quash the subpoena based on counsel’s improper conduct. *Id.* ¶¶ 41, 45. Fourth, because counsel voluntarily withdrew, this rendered moot the defendant’s assertion that the court denied him the right to counsel of his choice. *Id.* ¶ 46.

¹⁴⁰ In most jurisdictions, this in camera review is performed by the trial judge, but Massachusetts permits it to be conducted by defense counsel under specified circumstances and conditions. See *supra* Part V.A.1.

portions of them, only if the defendant makes an adequate showing of necessity.¹⁴¹

5. *Appellate Review*

A defendant may seek appellate review of a trial judge's decision to disclose or withhold a witness's records only if the defendant's showing satisfied the standard referred to in the previous paragraph. If that showing was sufficient and the defendant seeks review of the trial judge's nondisclosure, the appellate court should "review the judge's in camera decision making as to relevance within the scope of the proffer, using a deferential abuse of discretion standard."¹⁴²

B. Showing Required for In Camera Review and Disclosure

1. Overview

What kind of preliminary showing must a defendant make to trigger an in camera review of a state witness's mental-health or counseling records?

On one point there appears to be a unanimous consensus. In sexual-assault and child abuse cases, there is general agreement that a defendant must do more than speculate that, because the complainant has participated in counseling or therapy after the alleged assault, the records in question might contain statements about the incident or incidents that are inconsistent with the complainant's testimony at trial.¹⁴³

¹⁴¹ See *infra* Part V.B (discussion of various standards employed by state and federal courts). This Article, in turn, recommends that disclosure of privileged information by the trial judge is appropriate only when the information raises significant doubts about the truthfulness or accuracy of the witness's testimony. See *infra* Part V.C.1.

¹⁴² *Commonwealth v. Feliciano*, 816 N.E.2d 1205, 1209 (Mass. 2004).

¹⁴³ *People v. Foggy*, 521 N.E.2d 86, 91–92 (Ill. 1988) (defendant charged with abducting and raping a twenty-six-year-old woman); *Commonwealth v. Barroso*, 122 S.W.3d 554, 564 (Ky. 2003) (rape of an adult woman); *Goldsmith v. State*, 651 A.2d 866, 876–77 (Md. 1995) (defendant charged with raping and otherwise sexually abusing his stepdaughter from ages seven to fourteen; she was twenty-five years old at trial.); *People v. Stanaway*, 521 N.W.2d 557, 576 (Mich. 1994) (intercourse with a fourteen-year-old girl); *State v. Hoag*, 749 A.2d 331, 332–33 (N.H. 2000) (sexual assault of a nine-year-old girl); *State v. Gonzales*, 1998-NMCA-026, ¶ 21, 912 P.2d 297 (rape of an adult woman); *People v. Bush*, 788 N.Y.S.2d 258, 259 (N.Y. App. Div. 2005) (rape of fourteen-year-old girl); *State v. Blake*, 2002 UT 113, ¶¶ 19–24, 63 P.3d 56 (sexual misconduct with a twelve-year-old girl); *Farish v.*

Because this assertion can be plausibly made in every sexual-assault or child molestation case, if this was enough to trigger an in camera review, a court would be required to conduct the review in virtually every such case.¹⁴⁴ Moreover, at least two courts have supported such decisions based on their belief that:

[T]he role of rape crisis counselors is not to investigate the occurrence. Rather, the primary purpose of the counseling is to help the victim understand and resolve her feelings about the event. Thus . . . an *in camera* inspection of counseling records would not likely result in the disclosure of any material useful to an accused.¹⁴⁵

Similarly, in prosecutions of other types of crimes, it does not suffice to allege that at some point in a witness's life, he received treatment or counseling for an emotional or mental difficulty or drug or substance abuse. To obtain an in camera review of the witness's records, the defendant must make a more factually specific showing that the records will reveal some significant condition relevant to the witness's credibility or the accuracy of his testimony.¹⁴⁶

Commonwealth, 346 S.E.2d 736, 737–38 (Va. Ct. App. 1986) (rape of an adult woman); *State v. Kalakosky*, 852 P.2d 1064, 1076–77 (Wash. 1993) (rape; it is unclear which of the five victims' records were sought—the victims ranged in age from thirteen to twenty-six); *State v. Green*, 2002 WI App. 68, ¶¶ 33, 37, 253 Wis. 2d 356, ¶¶ 33, 37, 646 N.W.2d 298, ¶¶ 33, 37 (rape of a twelve-year-old girl; defendant's argument that girl's counseling records might contain statements inconsistent with what she told the police was “not even a close call”).

¹⁴⁴ See, e.g., *Stanaway*, 521 N.W.2d at 576; *Kalakosky*, 852 P.2d at 1076–77.

¹⁴⁵ *Foggy*, 521 N.E.2d at 91 (basing this conclusion on amicus briefs filed in the case); see also *State v. Pinder*, 678 So. 2d 410, 416–17 (Fla. Dist. Ct. App. 1996) (basing this conclusion on the testimony of counselors at a hearing in the trial court). On the other hand, query whether it is possible for the victim to “understand and resolve her feelings about the event” without some discussion of the event itself.

¹⁴⁶ See, e.g., *State v. Joyner*, 625 A.2d 791, 806 (Conn. 1993); see also *State v. D'Ambrosio*, 561 A.2d 422, 427 (Conn. 1989), *abrogated by State v. Bruno*, 673 A.2d 1117 (Conn. 1996). “We have never held that a history of alcohol or drug abuse or treatment automatically makes a witness fair game for disclosure of psychiatric records to a criminal defendant.” *Joyner*, 625 A.2d at 806 (citations omitted).

Similarly, a Missouri court held, “[An allegation that] the records in dispute *might* have had a bearing on [a state witness's] competency to testify,” absent some evidence that the “witness exhibits some mental infirmity *and* fails to meet the traditional criteria for witness competence,” is not enough to overcome the “presumption that a witness is competent to testify.” *State v. Taylor*, 134 S.W.3d 21, 26–27 (Mo. 2004) (en banc) (witness in a murder trial).

There is, as one court has recognized, a kind of “Catch-22” to this: a defendant is required to demonstrate that the information sought is material and favorable enough to require disclosure, even though he does not have access to the information.¹⁴⁷ Yet there is general agreement that before a defendant can trigger an in camera review of the records, let alone win discovery of their contents, the defendant must do more than merely suggest they contain relevant information.

As to *how much* more than probable relevance a defendant must show, no clear consensus has emerged. Rather, courts have used a variety of terms to articulate the appropriate standard. These formulations vary in what the defendant must seek to show, and how persuasively the defendant must show it, in order to trigger the in camera review by the court.¹⁴⁸

¹⁴⁷ State v. Bassine, 71 P.3d 72, 76 n.9 (Or. Ct. App. 2003). The court stated:

We recognize the Catch 22 quality to that test, which results from the conflict between a defendant’s constitutional right to produce witnesses in his favor and venerated evidentiary privileges. The test acknowledges that the information sought is confidential, but nonetheless requires the party seeking the information to demonstrate that the information, which the party does not have access to, is material and favorable.

Id.

Catch-22 is the title of Joseph Heller’s darkly comic novel about American servicemen in World War II. JOSEPH HELLER, *CATCH-22* (Simon & Schuster Paperbacks 2004) (1955). One pilot persistently sought to be grounded on the grounds that he was insane:

There was only one catch and that was Catch-22, which specified that a concern for one’s own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn’t, but if he was sane he had to fly them. If he flew them he was crazy and didn’t have to; but if he didn’t want to he was sane and had to.

Id. at 46.

¹⁴⁸ The following is a representative sample:

A defendant must “make a preliminary showing that there is a reasonable ground to believe that the failure to produce the records would likely impair his right to impeach the witness.” State v. Peeler, 857 A.2d 808, 841 (Conn. 2004) (quoting State v. Slimsky, 779 A.2d 723, 732 (Conn. 2001)).

“To obtain in camera review of confidential communications or records under [an ‘absolute’ privilege], a defendant must first establish a reasonable probability that the privileged matters contain material information necessary to his defense.” *Pinder*, 678 So. 2d at 417 (citation omitted).

A defendant must demonstrate that: “1) [T]here is a legitimate need to disclose the protected information; 2) the information is relevant and material to the issue

How is one to rank, in difficulty of proof, “a reasonable ground to believe,”¹⁴⁹ “a reasonable probability,”¹⁵⁰ “a reasonable belief,”¹⁵¹ “a reasonable likelihood,”¹⁵² “a good-faith belief, grounded on some demonstrable fact,”¹⁵³ and “reasonable certainty”?¹⁵⁴ How is one to compare “would likely impair his right to impeach the witness,”¹⁵⁵ “material information necessary to [the] defense,”¹⁵⁶ “information . . . relevant and

before the court; and, 3) the party seeking to pierce the privilege shows by a ‘preponderance of the evidence’ that ‘no less intrusive source’ for that information exists.” *State v. L.J.P.*, 637 A.2d 532, 537 (N.J. Super. Ct. App. Div. 1994) (quoting *United Jersey Bank v. Wolosoff*, 483 A.2d 821, 826 (N.J. Super Ct. App. Div. 1984)) (quoted approvingly in *State v. Peseti*, 65 P.3d 119, 129 (Haw. 2003)).

“[I]n camera review of a witness’s psychotherapy records is authorized only upon receipt of evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence.” *Commonwealth v. Barroso*, 122 S.W.3d 554, 564 (Ky. 2003). “If the *in camera* inspection reveals exculpatory evidence, *i.e.*, evidence favorable to the accused and material to guilt or punishment, including impeachment evidence, that evidence must be disclosed to the defendant if unavailable from less intrusive sources.” *Id.* (citing *Eldred v. Commonwealth*, 906 S.W.2d 694, 701 (Ky. 1994)).

“[A] defendant must establish a reasonable likelihood that the privileged records contain exculpatory information necessary for a proper defense.” *Goldsmith v. State*, 651 A.2d 866, 877 (Md. 1995).

Defendant must make a “showing [of] a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense.” *People v. Stanaway*, 521 N.W.2d 557, 574 (Mich. 1994). Disclosure to defense counsel is permissible only if the trial judge has inspected the records and “is satisfied that the records reveal evidence necessary to the defense.” *Id.* at 575.

A defendant must show “with reasonable certainty that exculpatory evidence exists which would be favorable to [the] defense.” *State v. Blake*, 2002 UT 113, ¶ 19, 63 P.3d 56 (quoting *State v. Cardall*, 1999 UT 51, ¶ 30, 982 P.2d 79) (alteration in original).

To obtain in camera review of the records, “a defendant must show a reasonable likelihood that the records will be necessary to a determination of guilt or innocence.” *State v. Green*, 2002 WI App. 68, ¶ 32, 253 Wis. 2d 356, ¶ 32, 646 N.W.2d 298, ¶ 32 (internal quotation marks omitted).

¹⁴⁹ *Peeler*, 857 A.2d at 841 (Connecticut).

¹⁵⁰ *Pinder*, 678 So. 2d at 417 (Florida).

¹⁵¹ *Barroso*, 122 S.W.3d at 563 (Kentucky).

¹⁵² *Goldsmith*, 651 A.2d at 877 (Maryland); *Green*, 2002 WI App. 68, ¶ 19 (Wisconsin).

¹⁵³ *Stanaway*, 521 N.W.2d at 574 (Michigan).

¹⁵⁴ *State v. Blake*, 2002 UT 113, ¶ 19, 63 P.3d 56 (quoting *State v. Cardall*, 1999 UT 51, ¶ 30, 983 P.2d 79).

¹⁵⁵ *State v. Peeler*, 857 A.2d 808, 841 (Conn. 2004) (quoting *State v. Slimskey*, 779 A.2d 723, 732 (Conn. 2001)).

¹⁵⁶ *State v. Pinder*, 678 So. 2d 410, 417 (Fla. Dist. Ct. App. 1996).

material to the issue before the court,”¹⁵⁷ “evidence favorable to the accused and material to guilt or punishment, including impeachment evidence,”¹⁵⁸ “exculpatory information necessary for a proper defense,”¹⁵⁹ “exculpatory evidence which is relevant and material to the issue of the defendant’s guilt,” i.e., “material information necessary to the defense,”¹⁶⁰ “exculpatory evidence . . . which would be favorable to [the] defense”¹⁶¹ (is there any other kind of “exculpatory evidence”?), and “necessary to a determination of guilt or innocence”?¹⁶² And how is one to assess the sum, or quotient, of one from column A and one from column B?

The extent to which these differences in language denote significant differences of substance can only be answered (if it can be answered at all!) by examining in detail how various courts have applied their standards to specific cases. That is the subject of the next several sections.

2. *Rape and Child Abuse Cases*

Where a defendant is charged with rape or with sexual abuse of a child, courts have given serious consideration to discovery requests in three relatively specific situations, as well as a variety of other circumstances.

a. *Recantation or Other Contradictory Conduct*

Several courts have held that, where the defense makes a specific showing that the complainant may have recanted the allegation against the defendant, an in camera review of relevant records to ascertain whether the complainant likewise recanted her allegation during therapy or counseling is justified.¹⁶³ The

¹⁵⁷ *State v. L.J.P.*, 637 A.2d 532, 537 (N.J. Super. Ct. App. Div. 1994) (New Jersey) (quoted approvingly in *State v. Peseti*, 65 P.3d 119, 129 (Haw. 2003)).

¹⁵⁸ *Commonwealth v. Barroso*, 122 S.W.3d 554, 564 (Ky. 2003).

¹⁵⁹ *Goldsmith v. State*, 651 A.2d 866, 877 (Md. 1995).

¹⁶⁰ *People v. Stanaway*, 521 N.W.2d 557, 574 (Mich. 1994).

¹⁶¹ *State v. Blake*, 2002 UT 113, ¶ 19, 63 P.3d 56 (quoting *State v. Cardall*, 1999 UT 51, ¶ 30, 982 P.2d 79).

¹⁶² *State v. Green*, 2002 WI App. 68, ¶ 19, 253 Wis. 2d 356, ¶ 19, 646 N.W.2d 298, ¶ 19.

¹⁶³ See, e.g., *State v. Peseti*, 65 P.3d 119, 132–33 (Haw. 2003). *Peseti* was charged with third-degree sexual assault for fondling his foster daughter. *Id.* at 122. The court held that, despite statutory privileges, the trial court violated defendant’s

same is true where the defendant proffers evidence that the complainant had *not* made such allegations during counseling or therapy, where her failure to do so implicitly contradicts the charges she has subsequently brought against the defendant.¹⁶⁴

rights under the state constitution's confrontation clause in precluding defendant from asking the complainant on cross-examination whether she told her counselor that in fact the defendant had not touched her inappropriately. *See id.* at 129–30. Counsel had learned of the alleged recantation from a social worker. *Id.* at 123. Although a foster sister testified to similar recantations by the complainant, the sister's animosity toward the complainant may have undermined the sister's credibility with the jury; hence, excluding references to the exculpatory statement to the counselor was not harmless error. *Id.* at 129–30.

In another case, the nine-year-old complainant told the police that the defendant penetrated her (which defendant denied), and caused her pain, but told a physician who examined her that there had been no penetration and no pain. *State v. Hoag*, 749 A.2d 331, 332 (N.H. 2000). The court held that this sufficed to require an in camera inspection of her counseling records. *Id.* at 333.

¹⁶⁴ *See Missouri ex rel. White v. Gray*, 141 S.W.3d 460, 466–67 (Mo. Ct. App. 2004). In 1991, White married McKenna, the mother of two young children. *Id.* at 462. In 1995, White petitioned to adopt the children; McKenna supported the petition. *Id.* A state agency performed a home study and psychological testing, and filed a report with recommendations. *Id.* In January, 1996, the petition was approved. *Id.* In March of 1998, J.L., one of the children, told McKenna that since the summer of 1995 (a time that preceded the adoption), White had been touching her inappropriately. *Id.* The court held that White was entitled to disclosure of information in the state agency's adoption file. *Id.* at 467. The opinion does not specify the file's contents, but it is reasonable to conclude that it contained neither allegations by J.L. against White, nor anything else to suggest he had behaved improperly toward either of the children. It is inconceivable that the state agency would have approved the adoption otherwise. Incidentally, White had previously been convicted in the case, but the conviction was reversed because the prosecutor withheld information that the lead detective on the case was having an affair with McKenna during the investigation and trial—a fact that, the court noted laconically, “would have served to impeach the police work and [McKenna's] testimony.” *Id.* at 462. By the time the litigation concerning the file reached the appellate court, McKenna had married the detective. *See id.* at 462 n.2. (McKenna now shares the name of the lead detective, McKinley.) All those who consider McKenna a good role model for her daughter are invited to meet in my upper-left-hand desk drawer. There should be plenty of room.

In another case, *State v. L.J.P.*, 637 A.2d 532 (N.J. Super. Ct. App. Div. 1994), prior to trial, the judge disclosed the complainant's Division for Youth and Family Services file to both the prosecutor and defense counsel; the file indicated that the complainant told a psychologist that her accusations of sexual abuse by her stepfather were untrue. *Id.* at 537–38. At trial, however, the judge refused to permit counsel to elicit this information from the psychologist. *Id.* at 535. Held: the judge's denial was reversible error. *Id.* at 538. Although the complainant had also recanted to other witnesses (family members), those recantations could be discounted as having been coerced; the same could not be said with regard to the recantation to the psychologist. *Id.*

In *State v. Speese*, 528 N.W.2d 63 (Wis. Ct. App. 1995), *rev'd*, 545 N.W.2d 510 (Wis. 1996), defendant allegedly assaulted the teenage complainant in January and

And more generally, evidence that a complainant acted in a way that is highly inconsistent with her allegations of sexual assault or extortion should suffice to require in camera inspection of records, at least where the complainant was in counseling or therapy at the same time as the alleged crimes and inconsistent conduct.¹⁶⁵

February of 1991; complainant was hospitalized in February of 1991. *Id.* at 67. Had she told hospital personnel about the alleged assault, they would have been obliged by law to report it to the police; yet no criminal investigation was initiated until the complainant's mother reported the alleged assault in September of that year. *Id.* at 70. From this, defendant argued, it was reasonable to infer that the complainant did not tell hospital personnel about the alleged assault, which in turn might persuade a jury to disbelieve her testimony that the assault occurred. *Id.* Instead, the trial court conducted an in camera inspection and concluded that the records contained nothing material. *Id.* at 71. An intermediate appellate court held that defendant had made an adequate preliminary showing, and that the trial court should have ruled that unless the complainant consented to an in camera inspection, she would not be permitted to testify. *Id.* The appellate court also inspected the records, concluded that they did contain information material to the defense, reversed the conviction, and remanded for a new trial with instructions that unless the complainant voluntarily consented to disclosure, she would not be permitted to testify at the retrial. *Id.* On appeal, the state supreme court reversed and reinstated the conviction, concluding that the error in not disclosing the information was harmless because the jury was well aware of the complainant's inconsistent behavior and failure to inform hospital officials about the assault. *State v. Speese*, 545 N.W.2d 510, 513 (Wis. 1996).

In *People v. Higgins*, 784 N.Y.S.2d 232 (N.Y. App. Div. 2004), at defendant's trial for sexually abusing his daughter from the time she was nine until she was fifteen (when she reported him to the police), defendant was permitted to elicit from her social workers that she was treated by them. *Id.* at 234. The court instructed the jury that the counselors would have been legally obligated to report any allegations of sexual abuse, and they made no such reports, from which, naturally, the defendant argued that she made no such allegations to them. *Id.* Held: this testimony gave defendant all he was entitled to; the trial judge's decision to deny discovery of her counseling records was therefore no abuse of discretion. *Id.*

¹⁶⁵ See *State v. Luna*, 1996-NMCA-071, 122 N.M. 143, 921 P.2d 950. Complainant, a married woman, began an affair with a coworker, which lasted four years, then alleged that during most of that period the defendant extorted sexual favors from her by threatening to reveal nude pictures of her to her husband if she broke off the relationship. *Id.* at 951. During the period of supposed extortion, she entered counseling, and also wrote what she herself described as a "very emotional melodramatic letter telling [Defendant] of my love for him." *Id.* at 952 (internal quotation marks omitted) (alteration in original). The court held that this sufficed to justify an in camera inspection of her counseling records to determine whether they contained information material to the defense. See *id.* at 953 (lower court did not abuse its discretion in granting access to counseling records when privilege was not asserted until after disclosure of records).

b. Evidence of Behavioral, Mental, or Emotional Difficulties

Courts have also mandated in camera review of a complainant's counseling or therapy records where the defense offers evidence that the complainant has engaged in other behavior, particularly relating to sexual conduct, which, although not directly related to her allegations against the defendant, nonetheless casts doubts on the credibility of those allegations. One such situation arises where the defendant can show that the complainant has previously made a false rape accusation and underwent counseling at that time or at the time she filed charges against the defendant.¹⁶⁶

The same is true where the defendant makes a plausible showing of other sexually related behavior¹⁶⁷ that has special and unusual relevance to the case at hand.¹⁶⁸ In such circumstances, it is reasonable to believe that records of the complainant's counseling during the period in question may contain information relevant to the credibility of the charges against the defendant.¹⁶⁹

¹⁶⁶ See *Commonwealth v. Feliciano*, 816 N.E.2d 1205, 1209–10 (Mass. 2004). Two men were accused of raping a seventeen-year-old girl; they claimed she consented. *Id.* at 1207. The victim was being treated in the aftermath of surgery to remove a brain tumor. *Id.* The victim's father had testified in the grand jury that the girl sometimes made up stories to get something she wanted, and a previous rape case involving the girl had been *nolle prosequi*. *Id.* The court held that the trial judge properly concluded that this was an adequate showing to trigger an in camera review, *id.* at 1210, for "disclosure of information in the victim's counseling records concerning her tendency to imagine or to fabricate, and any reference to the prior rape case," *id.* at 1207. See also 3 FISHMAN & MCKENNA *supra* note 41, §§ 19:42–47 (concerning the general question of whether evidence that a rape complainant has made prior rape accusations).

¹⁶⁷ As a rule, evidence of a sexual-offense complainant's prior sexual behavior is inadmissible. See generally FED. R. EVID. 412. The subject is exhaustively covered in 3 FISHMAN & MCKENNA, *supra* note 41, § 19.

¹⁶⁸ See generally 3 FISHMAN & MCKENNA, *supra* note 41, §§ 19:51–55.

¹⁶⁹ See, e.g., *People v. Stanaway*, 521 N.W.2d 557 (Mich. 1994). In *Stanaway*, the court considered the issue in two unrelated cases involving defendants Stanaway and Caruso. *Id.* Caruso was charged with fondling his eight-year-old niece. *Id.* at 564. Caruso alleged that the complainant was a "troubled, maladjusted child"; he asserted a "good-faith belief" that she had been sexually abused by her biological father, that the lack of any resolution to this incident may have prompted her to falsely accuse defendant and that she had written a letter to her mother's boyfriend offering to have sex with him in his car. *Id.* at 576–77. The court held that these allegations "may have demonstrated a realistic and substantial possibility that the material he requested might contain information necessary to his defense," and remanded for further action by the trial court. *Id.* (Noting that the statutory

c. Complainant's Ability to Perceive, Remember, and Relate Events

Courts have likewise considered whether such review is required where specific evidence suggested that the complainant's ability to perceive, remember, or relate events was uncertain. At least one case has arisen involving each of the following: mental retardation,¹⁷⁰ the effects of prescribed medication,¹⁷¹ drug and alcohol abuse,¹⁷² documented problems with memory,¹⁷³ and other characteristics.¹⁷⁴

privileges in question were absolute in their terms, the court held that if the judge determined that the defendant was entitled to the records but the complainant refused to waive the privilege, the complainant's testimony would be suppressed); *see also supra* Part IV.A.

¹⁷⁰ Commonwealth v. Figueroa, 661 N.E.2d 65, 67–69 (Mass. 1996) (holding, in essence, that where the defense has offered evidence suggesting that complainant was mildly retarded and sometimes had difficulty distinguishing reality from fantasy, an in camera inspection of the complainant's mental-health records is justified).

¹⁷¹ State v. Pandolfi, 765 A.2d 1037, 1043 (N.H. 2000). When, on cross-examination, the complainant in a sexual-assault case testified that she may have been confused about the dates because of the medication she was taking in connection with her counseling, this sufficed to require an in camera review of the counseling records to determine what medication, if any, the witness was taking, and to disclose that information to defense counsel. *Id.* at 1042–43. The court determined that the trial judge erred in refusing to disclose this portion of the records, but the trial judge was correct in refusing to disclose other aspects of the records to the defense. *Id.* at 1043.

¹⁷² *See, e.g.,* State v. Gonzales, 1996-NMCA-026, 121 N.M. 421, 912 P.2d 297. Complainant admitted drinking four beers and two schnapps in the five hours immediately preceding her encounter with defendant, and defendant claimed (though the complainant denied) that they had consumed cocaine together before intercourse (which he claimed was consensual). *Id.* ¶¶ 2–3. Other evidence showed that the complainant had a history of blackouts from alcohol. *Id.* ¶ 21. Held: it was no abuse of discretion to conclude that this justified requiring an in camera inspection of the complainant's counseling records. *Id.* ¶¶ 15–16.

¹⁷³ State v. Pinder, 678 So. 2d 410, 417 (Fla. Dist. Ct. App. 1996). Defendant was charged with abducting the complainant, raping her, and shooting her in the head. *Id.* at 411. The complainant testified that although she had problems with her memory generally as a result of her injuries, she remembered the incident in detail. *Id.* The trial judge ordered an in camera review of the relevant records and subpoenaed the counselor to assist in that review; the State appealed. *Id.* at 412. The appellate court held that defendant had failed to meet the “reasonable probability” test. *Id.* at 413. The court stressed that the sexual-assault counselor had testified that her primary function was to explain how a victim and her family get through the medical examinations, legal systems, and other repercussions of the assault, rather than to discuss the assault itself with her in any detail. *Id.* at 411–12. “Given the function of counseling,” the court reasoned, “it is improbable that an in camera inspection of counseling records would uncover information critical to the

d. Other Situations Involving Rape and Child Abuse Complaints

Numerous other examples of judicial assessment of specific factual allegations in other circumstances exist.¹⁷⁵

3. Criminal Cases Generally

The question of defense access to mental therapy or counseling records arises less often, but still with some

defense, irreplaceable by other means.” *Id.* at 415–16. The court noted that Florida procedure “provides for extensive discovery, and allows a defendant to take depositions of persons with information relevant to the offense charged, including the victim. A defendant has access to unprivileged statements made by the victim to the police, her family or other witnesses.” *Id.* at 416. Thus, the defendant had ample other opportunities to obtain such information from unprivileged sources. *Id.*

In *Wagner v. Commonwealth*, 581 S.W.2d 352 (Ky. 1979), *overruled on other grounds by* *Estep v. Commonwealth*, 663 S.W.2d 213 (Ky. 1983), which preceded *Ritchie* by several years, the court held that the defendant was properly denied discovery of the psychiatric records of a charitable, private hospital, because the state did not have custody or control over the records. *Id.* at 355. The court held, however, that it was reversible error to preclude defendant from cross-examining the complainant about her psychiatric history where the proffered evidence would have established that she had been committed to a psychiatric hospital prior to the events at issue for attempted suicide, severe depression, and drug abuse, and that at the time of the alleged events, she was under psychiatric care and was receiving shock treatments that were affecting her memory. *Id.* at 355.

¹⁷⁴ *Commonwealth v. Feliciano*, 816 N.E.2d 1205, 1207–09 (Mass. 2004); *see also supra* note 164.

For further information, see *United States v. Diamond*, 964 F.2d 1325, 1329 (2d Cir. 1992), and *State v. Jackson*, 862 A.2d 880, 889 (Conn. App. Ct. 2005) (“[T]he trial court must determine whether the records are especially probative of the witnesses’s capacity to relate the truth or to observe, recollect and narrate relevant occurrences” (quoting *State v. Peeler*, 857 A.2d 808, 841 (Conn. 2004))).

¹⁷⁵ For example, in *State v. Behnke*, 553 N.W.2d 265 (Wis. Ct. App. 1996), defendant was accused of raping complainant, hitting her on the face, eye, and chest, and biting her genital area; a physician testified that the day after the alleged attack, she had bruises and bite marks on those parts of her body. *Id.* at 268. Defendant alleged that the complainant had previously told the defendant that she had a history of self-abuse that included inflicting cuts and bruises on her arms, and sought access to the complainant’s medical records, alleging that the records might show that the bruises in question were self-inflicted. *Id.* at 269. The court held that it was not error to refuse an in camera review of the records of complainant’s medical treatment following the rape. *Id.* First, the wounds confirmed by the doctor were radically different in kind than the self-inflicted kind about which she had told the defendant. *Id.* Second, they were of a kind that were unlikely to have been self-inflicted. *Id.* Third, despite defendant’s allegation that the complainant had a psychological disorder (based on the statements that she had made to him regarding her self-abuse), he had offered no evidence she sought and received mental-health counseling. *Id.*

frequency, in cases where the recipient of the therapy or counseling was only a witness, not a victim or complainant. An in camera review of appropriate records is required where a defendant makes an adequate showing to suggest that the witness suffered from a significant impairment in testimonial capacity—that is, in the ability to perceive, remember, or accurately narrate what he has seen, done, and heard.¹⁷⁶

Less clear is whether a more generalized showing of emotional and mental difficulties or substance abuse suffices to require an in camera inspection. A Connecticut murder case, *State v. Bruno*,¹⁷⁷ illustrates the issue. One of the State's key witnesses (who was sixteen at the time of the crime) testified that he participated in beating the victim unconscious and then

¹⁷⁶ See, for instance, *State v. Peeler*, 857 A.2d 808, 841 (Conn. 2004), which held that the trial judge erred in precluding the defense's use of records containing information that "both prior to and after the murders, [the witness] was diagnosed with significant mental disorders, including 'cocaine induced psychiatric disorder with hallucinations,' 'chronic paranoid schizophrenia,' 'drug induced psychosis' while using cocaine, and antisocial personality disorder." *Id.* at 842. The court further held that, in light of other overwhelming evidence of defendant's guilt, the error was harmless. *Id.* at 844–46; see also *Commonwealth v. Feliciano*, 667 N.E.2d 847, 855 (Mass. 1996); *State v. Pandolfi*, 765 A.2d 1037 (N.H. 2000); *infra* Part V.B.2.b. (discussion of *Pandolfi* and *Feliciano*).

In another case, *Bobo v. State*, 349 S.E.2d 690, 692 (Ga. 1986) (pre-*Ritchie* plurality opinion), Bobo was charged with burglary, and with murdering a police officer and wounding his partner when they went to investigate. *Id.* at 691. Officer Sullivan, the surviving officer, was the State's main witness. *Id.* Defendant established that Officer Sullivan suffered from posttraumatic stress syndrome as a result of the event. *Id.* At a hearing to determine discovery and admissibility of Officer Sullivan's mental therapy, psychiatrists testified that she had difficulty concentrating and remembering, but that no evidence showed directly that she was unable to identify the defendant as the perpetrator or was unsure about her identification of him. *Id.* at 693. Moreover, other information was available at trial to impeach the officer's ability to identify the assailant. *Id.* at 693–94. A plurality of the court concluded that "the defendant has failed to show the necessity for the admission of this privileged information and the trial court properly refused to grant his request." *Id.* at 694. In *Lucas v. State*, 555 S.E.2d 440 (Ga. 2001), the Georgia Supreme Court noted the *Bobo* plurality opinion and applied it to the case at hand, concluding that the trial judge had correctly concluded that records of a codefendant's psychiatric and psychological counseling contained nothing exculpatory. *Id.* at 446.

And see *Commonwealth v. Figueroa*, 661 N.E.2d 65 (Mass. 1996), in essence holding that where the defense has offered evidence suggesting that the complainant, who was mildly retarded, sometimes had difficulty distinguishing reality from fantasy, an in camera inspection of the complainant's mental-health records is justified. *Id.* at 70–71.

¹⁷⁷ 673 A.2d 1117 (Conn. 1996).

helped the defendant dispose of the body and other evidence.¹⁷⁸ The defendant (a man in his thirties)¹⁷⁹ offered evidence that the witness had persistent attitude and behavioral problems in school, had used intravenous drugs and was drinking heavily around the time of the murder, had received psychiatric treatment, and was placed in the special-education program.¹⁸⁰ The other witness, defendant's eighteen- or nineteen-year-old girlfriend, testified that she knew in advance of defendant's intent to kill the victim, and witnessed the crime.¹⁸¹ Defendant established that she, too, had a series of mental and emotional difficulties.¹⁸² The court, emphasizing that "what is at issue is the existence of a mental problem that may bear on the witness' [*sic*] testimonial capacity, not the witness' [*sic*] general character or intelligence,"¹⁸³ concluded that the defendant failed to establish a "reasonable ground" to believe that the witnesses' therapy and counseling records would reveal any significant shortcomings in their capacity to perceive, remember, and relate what happened, and therefore upheld the trial judge's refusal to conduct an in camera examination of the witnesses' records.¹⁸⁴ A dissenting judge protested that the court had applied too rigid a standard,¹⁸⁵

¹⁷⁸ *See id.* at 1122.

¹⁷⁹ *Id.* Defendant claimed no memory of the events in question, and hypothesized that the two witnesses had committed the crime themselves. *Id.* at 1123.

¹⁸⁰ *Id.* at 1126–27.

¹⁸¹ *Id.* at 1133.

¹⁸² *Id.* at 1125–26. In her initial statements to the police, the witness lied about several aspects of the murder. *Id.* at 1125 n.13. She had been enrolled in a special-education program in high school because she was unable to learn academic subjects as rapidly as other students. *Id.* at 1125. She admitted having trouble "recalling things," but denied that this difficulty interfered generally with her ability to recall or relate the events of her life. *Id.* Approximately four years prior to the murder, she received three weeks of inpatient psychiatric treatment at a hospital for depression, followed by a few months of outpatient treatment, and thereafter consulted from time to time with a psychologist or social worker (the record was unclear as to which) to deal with problems she had getting along with people. *Id.* at 1125–26.

¹⁸³ *Id.* at 1126.

¹⁸⁴ *Id.* at 1127 (regarding the girlfriend); *see also id.* at 1126–27 (regarding the sixteen-year-old accomplice). As to each witness, the court stressed that the school counselor testified at the hearing that neither witness had demonstrated problems in perceiving, remembering, or relating information. *Id.* at 1125–27.

¹⁸⁵ *Id.* at 1140 (Berdon, J., dissenting). Specifically, the dissent noted:

which improperly required the defendant to establish as fact the very information for which he was requesting an in camera review of the records.¹⁸⁶

Other courts have been less demanding in similar circumstances.¹⁸⁷ Indeed, in a later case, Connecticut's Supreme Court held it was error to deny the defendant the right to introduce information gleaned from such records that indicated a witness's substantial problems with substance abuse at the time of the events in question and at the time of the trial.¹⁸⁸

The majority seems to lose sight that this threshold showing is preliminary. It is not determinative of whether the records are available for use by the defendant's counsel in his or her cross-examination of a witness. Rather, the showing merely allows an in camera inspection to determine whether any admissible impeaching evidence is contained in the records.

Id.

¹⁸⁶ *Id.* The dissent also objected that the trial judge had placed unfair restrictions on the defendant's ability to elicit the very information he needed to make the required showing. *Id.*

¹⁸⁷ See, e.g., *People v. Dace*, 449 N.E.2d 1031 (Ill. App. Ct. 1983), *aff'd*, 470 N.E.2d 993 (Ill. 1984). In *Dace*, the testimony of an accomplice was the sole evidence that the defendant had committed a burglary. *Id.* at 1032–33. A year and a half before the burglary, the accomplice had been adjudged dangerous to others and was involuntarily committed to a mental-health hospital. *Id.* at 1035. The trial judge precluded the defense from discovering any information about the witness's mental health or from questioning the witness about it on cross-examination, ruling that the information was too old to be relevant. *Id.* at 1033. The appellate court held that, given the arguable relevance of the information, it was error to preclude discovery and to prohibit defendant from raising the issue at trial. *Id.* at 1035. The state supreme court agreed that, "under the circumstances shown by the evidence, the refusal to permit the discovery was reversible error." *Id.* at 996. (Note that the *Dace* decisions preceded the Supreme Court's decision in *Ritchie v. Pennsylvania*, 480 U.S. 39 (1987)).

¹⁸⁸ *State v. Francis*, 836 A.2d 1191 (Conn. 2003). The court observed:

Where, as in the present case, . . . the trial court does examine the records and those records indicate a long, persistent and serious history of alcohol and drug abuse and blackouts, and evidence was presented that the witness was drinking at the relevant times in question, common sense dictates that a jury should have that information before it in order properly to gauge the witness' [*sic*] general credibility.

Id. at 1201. This was particularly so, the court held, because based on the trial judge's ruling, the jury could get the impression that the witness had only begun to drink heavily after his mother's death. *Id.* *Francis* was on trial for killing the witness's mother; the witness provided important testimony suggestive of Francis's guilt. *Id.* at 1195. The court held, however, that in light of overwhelming evidence of Francis's guilt, the error was harmless. *Id.*

Other courts have decided the issue of what evidence to submit to the jury similarly. See, e.g., *People v. Di Maso*, 426 N.E.2d 972, 975 (Ill. App. Ct. 1981).

4. “Unavailable from Less Intrusive Sources”

A number of courts have held that, even if the requisite standard for in camera review has been established, the defendant is entitled to disclosure only if comparable evidence is “unavailable from less intrusive sources.”¹⁸⁹ This is an entirely appropriate requirement. Courts should recognize, however—and many do—that it is necessary to assess not only whether a defendant has other evidence to make the same factual claim, but also whether the evidence available from less intrusive sources has persuasive power comparable to that in the privileged material.¹⁹⁰

C. Proposed Standards for In Camera Review and Disclosure

The preceding review of the various standards imposed by state and federal courts demonstrates that there is no clear consensus of what showing the defendant should be required to make in order to trigger in camera review. The variation in the terms used for the standards, alone, demonstrates the confusion in this area.¹⁹¹ Similarly, courts have used a variety of terms to describe when, after such a review, the judge must disclose information to the defense.¹⁹² Rather than choose among these various standards, I propose the following:¹⁹³

¹⁸⁹ Commonwealth v. Barroso, 122 S.W.3d 554, 564 (Ky. 2003); accord State v. Peseti, 65 P.3d 119, 129 (Haw. 2003); State v. L.J.P., 637 A.2d 532, 537 (N.J. Super. Ct. App. Div. 1994).

¹⁹⁰ Thus, in *Peseti*, even though the defendant had already elicited from the defendant’s foster sister that complainant had recanted her sexual-abuse allegation, that witness’s animosity toward the complainant may have undermined the sister’s credibility with the jury. Therefore, excluding references to the exculpatory statement made to the counselor was not harmless error. See *Peseti*, 65 P.3d at 129–30.

Similarly, in *L.J.P.*, although the complainant had also recanted to other witnesses (family members), those recantations could be discounted as having been coerced. The same could not be said with regard to a recantation to a state agency’s psychologist; hence, exclusion of the latter was reversible error. See *L.J.P.*, 637 A.2d at 537–38.

¹⁹¹ See, e.g., *supra* notes 148–162 and accompanying text.

¹⁹² See *supra* notes 153–160.

¹⁹³ A critic might well ask: “Given the hodgepodge of standards and verbal formulas already cluttering up the law, why not choose the best among the existing ones, instead of proposing yet two more? Why add to the confusion?” My flippant answer is: “Because I am a law professor, and adding to the confusion is what law professors do best.” Seriously, though, I believe (and hope) these proposals will

(1) A judge must disclose information to the defense that is otherwise protected by a patient-psychotherapist or similar privilege¹⁹⁴ if the information casts significant doubts upon the truthfulness or accuracy of the witness's testimony.

(2) The judge must conduct an in camera review of the records if defense counsel makes a factually specific showing of probable cause that such information will be found in those records.

Defense counsel's ultimate goal is not merely in camera review, but disclosure. Because it is necessary to define the standard for disclosure in order to assess what counsel must show to trigger a review, I will first discuss the disclosure standard and then discuss what defense counsel must show to require the judge to examine the records.

1. Recommended Standard for Disclosure: Information Raising Significant Doubts upon the Truthfulness or Accuracy of the Witness's Testimony

As noted earlier, courts have used a variety of terms to describe the kind of information a judge must disclose to the defense.¹⁹⁵ At first glance, proposing the above standard may seem strange. The Supreme Court, in *Ritchie*, applied a materiality test.¹⁹⁶ This standard has been applied by other courts¹⁹⁷ and supported by scholars and commentators.¹⁹⁸ A reader might reasonably ask: why propose a different definition?

The difficulty is that, at least in this context, "materiality" is a retrospective standard.¹⁹⁹ In *Ritchie*, the Court held that

add greater clarity to the issues than any of the standards and verbal formulas currently in use.

¹⁹⁴ By "similar privilege" I mean the various privileges discussed above, whether "absolute" or "qualified" in nature. See *supra* Part II.B.

¹⁹⁵ See *supra* notes 153–160.

¹⁹⁶ *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 (1987) (plurality opinion).

¹⁹⁷ See, e.g., *Commonwealth v. Fuller*, 667 N.E.2d 847, 855 (Mass. 1996) (inquiring before a judge conducts in camera review whether the evidence will contain something material to defense).

¹⁹⁸ See, e.g., Hebert, *supra* note 23, at 1478 (advocating for disclosure of privileged material only where the privileged material contains "relevant and material evidence that would be admissible at trial").

¹⁹⁹ Note, however that the materiality standard will first be applied prospectively, where the trial court determines for the first time whether the information sought

“Ritchie is entitled to have the CYS file reviewed by the trial court to determine whether it contains information *that probably would have changed the outcome* of his trial.”²⁰⁰ This standard is not readily applicable to the midtrial (and occasionally pretrial) decisions that a trial judge must make to disclose or withhold information. Moreover, applied prospectively, the *Ritchie* definition of materiality—“information that probably [will] change the outcome of [the] trial”²⁰¹—sets the bar too high and requires too much speculation on the part of the judge.²⁰²

As discussed earlier, information contained in a prosecution witness’s counseling or therapy records is likely to be relevant only to the extent that it undermines or impeaches that witness’s testimony.²⁰³ Thus, the appropriate standard should be expressed in that context: information in such records should be disclosed to the defense only if, and to the extent, it raises significant doubts upon the truthfulness or accuracy of an important government witness’s testimony.²⁰⁴ The

will be material to the defense. *See* DiBlasio v. Keane, 932 F.2d 1038, 1041–42 (2d Cir. 1991) (stating that the trial judge will make the initial determination regarding whether the evidence will be material to the defense). The retroactive application arises where the trial judge’s decision is reviewed on appeal. *See Ritchie*, 480 U.S. at 58.

²⁰⁰ *Ritchie*, 480 U.S. at 58 (emphasis added).

²⁰¹ *Id.*

²⁰² For example, a judge might conclude that information highly damaging to a witness’s credibility might not change the outcome because, in the judge’s opinion, the State’s case is very strong. But the Court rejected such thinking in 2006 in *Holmes v. South Carolina*, 547 U.S. 319 (2006). *See supra* note 104. Conversely, a judge who expects the defendant to be acquitted even without the information might opt not to disclose it on the assumption that defense counsel does not need it. This, too, would be an improper basis on which to withhold the information.

²⁰³ *See* Commonwealth v. Barroso, 122 S.W.3d 554, 562 (Ky. 2003) (“The relevancy of evidence to a witness’s credibility is universally recognized . . .”).

²⁰⁴ Courts frequently address the issue in terms of “a witness’s credibility.” *See, e.g., Barroso*, 122 S.W.3d at 563–64 (allowing the judge to review in camera the records to examine whether they contained “exculpatory evidence,” such as evidence affecting witness’s credibility). I avoid using the word “credibility” because, in this context, it is both too broad and too vague. Suppose, for example, the records reveal that a rape complainant tells people her father died when she was a teenager because she is ashamed to acknowledge that in fact he is serving a life sentence after several convictions for armed robbery. Or suppose a homicide witness persists in saying that he was a star athlete in high school, even though he actually occupied the bench often enough that by graduation, he had a legitimate adverse-possession claim. Such information is arguably relevant to the witness’s “credibility” because it suggests that he or she will lie in order to improve how he or she is perceived by others. But although a judge would have discretion to permit

determination will be based on such indicia as certain medical conditions, prior contradictory information, or other indications of a witness's inability to testify accurately,²⁰⁵ and is consistent with general principles of evidence law.²⁰⁶

2. *Recommended Standard for In Camera Review: Probable Cause*

It is clear that courts should not conduct a review of a witness's records every time that the defendant requests it. To do so would accord insufficient significance to the privacy of the complainants and witnesses whose records are at issue,²⁰⁷ and in addition could impose an undue burden on the judiciary.²⁰⁸ Rather, a defendant should be required to offer evidence that adequately suggests the records contain information that satisfies the "significant doubts" standard described above.²⁰⁹ This must involve more than merely showing that the witness received mental-health care or counseling of some kind.²¹⁰ However, a defendant should not be required to prove that the

defense counsel to cross-examine the witness about these lies if the counsel learned about them from an unprivileged source, see for example, FED. R. EVID. 608(b), surely this information has so little relevance in assessing whether the witness testified truthfully and accurately about the defendant's alleged crime that it would be absurd to pierce the privilege of a witness's therapy or counseling records to disclose such information to the defense. (After all, don't we all stretch the truth from time to time?) (By the way, although the "author's dagger" does not say so, George Lucas wanted me to play Han Solo in *Star Wars* (20th Century Fox 1977), and hired Harrison Ford only after I turned him down.) Expressing the standard in terms of the "truthfulness or accuracy of the witness's testimony," rather than the witness's "credibility," makes it clear that the focus is on the testimony, rather than the witness's character for truthfulness per se. Thus, if the records also reveal that the rape complainant frequently and compulsively claims she was forced by others to do things she did voluntarily but now regrets, or that the homicide witness has significant difficulty in perceiving and recalling events accurately, or that a witness has a particular reason for lying about the events in this particular case, the judge would be obliged to disclose such information.

²⁰⁵ See *supra* Part V.B.2.c.; see also *Barroso*, 122 S.W.2d at 562 (citing case law for situations where a witness's capacity is relevant).

²⁰⁶ See *supra* Part V.B.2.c.

²⁰⁷ See *State v. Spath*, 1998 ND 133, ¶ 18, 581 N.W.2d 123, 126. ("[H]aving the trial court review confidential material is not a right. It is a discovery option, but only after certain prerequisites are satisfied." (quoting *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992))).

²⁰⁸ Cf. *infra* Part V.D.

²⁰⁹ See *supra* Part V.C.1.

²¹⁰ See *supra* notes 145–147 and accompanying text.

information does exist, nor, necessarily, establish the precise nature of the information that is sought. Courts and legislatures should keep in mind that this is a *preliminary* showing that affords a defendant no more than a judicial in camera examination of the records. In camera examination does intrude into the witness's privacy, but the intrusion is comparatively minor and controlled and will go no further (other than review on appeal) unless the records contain information that in fact satisfies the "significant doubts" standard. Accordingly, the required showing must protect against "fishing expeditions" but also accommodate the defendant's lack of concrete knowledge.²¹¹

Each of the verbal formulas that courts have developed to describe the appropriate standard suffers from the same weakness: a lack of precision. Take the formula proposed by Kentucky's Supreme Court in *Commonwealth v. Barroso*: "[E]vidence sufficient to establish a reasonable belief that the records contain exculpatory evidence."²¹² The difficulty, of course, is that the key phrase in this formula, "reasonable belief," is not self-defining, and therefore, as a practical matter, the standard defines very little. Every other definition coined by the nation's courts to deal with this situation suffers from a similar shortcoming.²¹³

In that regard, this area of the law reminds me of the Fourth Amendment phrase, "probable cause," which is the factual justification generally required to arrest or search.²¹⁴ The most recent, and perhaps the most precise, definition of that phrase offered by the Supreme Court, with regard to probable cause to search, is: "Probable cause exists when 'there is a *fair probability* that contraband or evidence of a crime will be found

²¹¹ See also Hebert, *supra* note 23, at 1472.

²¹² *Commonwealth v. Barroso*, 122 S.W.3d 554, 564 (Ky. 2003).

²¹³ See *supra* notes 148–62 and accompanying text.

²¹⁴ According to the Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. As a prosecutor and law professor, I have used, litigated, taught, and written about the Fourth Amendment for nearly four decades.

in a particular place.”²¹⁵ Presumably, “a fair probability” means less than “more probable than not,”²¹⁶ the preponderance-of-the-evidence standard sufficient to win a verdict in most civil litigation, and the standard federal courts apply in determining whether the factual requirements of an evidence rule have been satisfied.²¹⁷ “Probable cause,” after all, determines only whether the authorities may *look for* evidence, not whether it can be introduced.²¹⁸ In essence, therefore, “probable cause” means “substantially more than a mere suspicion, hunch, speculation, or inference, but substantially less than ‘more probable than not.’”²¹⁹

Thus defined, probable cause strikes me as an appropriate standard to apply to a defense counsel’s motion for an *in camera*

²¹⁵ *United States v. Grubbs*, 547 U.S. 90, 95 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (emphasis added)). The Court has steadfastly refused to put a mathematical value on probable cause.

²¹⁶ For a general discussion of the requisite degree of probability the Fourth Amendment requires, see 2 WAYNE R. LAFAVE, *SEARCH AND SEIZURE* § 3.2(e), at 66–90 (4th ed. 2004).

²¹⁷ *See, e.g., Bourjaily v. United States*, 483 U.S. 171, 176–77 (1987) (holding that before the government may introduce evidence pursuant to FED. R. EVID. 801(d)(2)(E), the co-conspirator exception to the hearsay rule, it must persuade the judge by a preponderance of the evidence that the factual requirements of that exception—that a conspiracy existed, the declarant and the nondeclarant defendant against whom it was offered were both members of the conspiracy, and the statement was made during and in furtherance of the conspiracy—have been satisfied).

²¹⁸ Several years ago, I proposed a question to criminal procedure professors on a listserv: based on your reading of Supreme Court and lower court opinions on the subject, if you had to define “probable cause” numerically (10 percent probable? 60 percent probable?), where would you put it? (I did so at the end of a semester, while grading exams, and received two dozen or so answers. Law professors are desperate for distractions at that time of year.) As I recall, the consensus was at about 30 percent. I did not archive the results, which, I acknowledge, reflect no more than the opinions of those who bothered to answer. Still, perhaps there is some small significance that this self-selected group of Fourth Amendment scholars understand the law to permit the government to search someone’s home, office, car, etc.—i.e., to intrude substantially into that person’s privacy—if it marshals facts that show a 30 percent probability that particularly described evidence of a particular crime or type of crime would be found.

²¹⁹ This definition is of my own devising. I am aware of no court decision or scholarly article that has offered it or anything like it. However, case law applies a flexible standard for probable cause. *See, e.g., Brinegar v. United States*, 338 U.S. 160 (1949) (“The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests.”). For an excellent overview of how courts have viewed probable cause, see 2 LAFAVE, *supra* note 216, § 3.2, at 24–35.

review of a government witness's counseling records, which, like the search of someone's home or office, is a significant intrusion into privacy.

I acknowledge that, for several reasons, the analogy is far from exact. First, the purpose of a physical search and seizure is to seek out evidence of a crime or evidence connecting a suspect with a crime. The purpose of the examination of records is to look for evidence that tends to impeach testimony that a crime was committed²²⁰ or that the defendant committed it.²²¹ Second, in the case of a search, the person whose privacy is invaded is usually suspected of wrongdoing.²²² With regard to the records, the person suffering the intrusion is often a crime victim²²³ or someone who coincidentally happened to be at the scene of the crime. Third, a physical search usually intrudes upon no special, privileged, therapeutic relationship. An examination of records does precisely that. Each of these differences arguably militates against applying the analogy.

There is, however, a consideration that perhaps offsets these factors. A typical search is conducted by several police officers, who inevitably see and learn much about the targeted individual beyond that for which they are looking. So long as they acted within the scope of the warrant, what they see or learn is fair game to be used at trial or in subsequent investigations.²²⁴ Thus,

²²⁰ This typically is the situation in a rape case where a defendant denies that intercourse occurred or claims the complainant consented, and child abuse cases where the defendant denies that he did what the child alleges. *See supra* Part V.B.2.a.

²²¹ This situation exists where a crime unquestionably was committed (for example, an assault, or a homicide where the victim was shot or stabbed to death), but defendant challenges the accuracy of a witness's testimony identifying him as the perpetrator.

²²² Although police may obtain a warrant to search the premises of a third party not suspected of wrongdoing, *see Zurcher v. Stanford Daily*, 436 U.S. 547, 559–60 (1978), in the overwhelming majority of cases (ninety-nine percent or more in my experience as a prosecutor, and an equal proportion of the reported opinions I have read in my nearly thirty years as a professor and author of Fourth Amendment-related issues), the warrant is directed at a location occupied or used by a suspect.

²²³ Such is the case in rape and child abuse cases. *See generally* *Pennsylvania v. Ritchie*, 480 U.S. 39, 43–44 (1987) (plurality opinion) (child sexual abuse); *United States v. Doyle*, 1 F. Supp. 2d 1187, 1188 (D. Or. 1998) (rape and abduction victim); *People v. Stanaway*, 521 N.W.2d 557, 562–63 (Mich. 1994) (sexual assault of child); *supra* Part IV.B.

²²⁴ This is known as the "plain view doctrine." *See, e.g., Horton v. California*, 496 U.S. 128 (1990); *see generally* 2 LAFAYE, *supra* note 216, § 4.11(b), at 779–806

that invasion of privacy is far more substantial than when an individual judge conducts an in camera examination of a witness's counseling records.

In any event, it is clear that a search or seizure by police differs substantially from a judicial in camera inspection of a prosecution witness's therapy or counseling records. Nevertheless, I believe courts should apply the Fourth Amendment probable cause standard. This standard requires that, to secure in camera review, defense counsel must offer facts sufficient to establish probable cause, substantially more than a mere hunch, speculation, or inference, but substantially less than "more probable than not,"²²⁵ to believe that the records contain information, of a kind counsel can describe at least in general terms, that casts significant doubts on the truthfulness or accuracy of the witness's testimony. This strikes the appropriate balance among the conflicting interests involved: the State's interest in prosecuting the defendant,²²⁶ the defendant's right to seek evidence of his innocence, and the witness's right to privacy.

Employing such a standard would have at least one significant fringe benefit: "probable cause," although far from precisely defined, is a standard with which judges are reasonably familiar. Moreover, the types of cases in which courts typically have permitted in camera examination of a witness's counseling or therapy records are consistent with a probable cause standard. In a rape or child abuse case where the defendant can show that the complainant has recanted her²²⁷ allegations to friends or relatives or has engaged in other conduct dramatically inconsistent with her allegations, the strong assumption²²⁸ should

(discussing application of the doctrine to execution of a search warrant); 3 *id.* § 6.7, at 479–500; *id.* § 7.5, at 671 *et seq.*

²²⁵ See *supra* note 219 and accompanying text.

²²⁶ See *supra* note 104.

²²⁷ In rare instances the complainant may be an adult male, and somewhat more often, a male child. In the vast majority of such cases, however, the complainant is a woman or girl. Hence, the use of the female pronoun here.

²²⁸ I use the term "assumption" instead of "presumption" because in evidence law, a "presumption" has a specific, technical meaning. A "presumption" is a procedural rule that says if Fact A is established, then Fact B is also taken as true, unless the adverse party produces sufficient evidence contradicting Fact B. See, e.g., FED. R. EVID. 301. Here, I propose that if Fact A (recantation or contradiction) is established, then in camera examination of appropriate records ensues.

be that probable cause has been established that counseling records will contain similar evidence.²²⁹ The same assumption should apply if a defendant can demonstrate that a witness suffered from substantial behavioral, mental, or emotional difficulties at the time of the alleged crime or suffers from such difficulties at the time he or she is to testify.²³⁰ Evidence of time-relevant difficulties in perceiving, remembering, or relating events also assumptively establishes probable cause.²³¹

A showing of probable cause by defense counsel thus should be a prerequisite but should not automatically trigger the in camera inspection. The availability to the defense of equivalent evidence from less intrusive sources is an important factor in deciding whether to conduct the examination, as well as whether to disclose information. In applying this factor, however, a court should keep in mind that statements made to or assessments made by a witness's therapist or counselor may have much-greater persuasive impact on a jury than statements made to others.²³²

D. Timing of In Camera Review and Disclosure

In the typical case, the information in a government witness's mental health records is relevant, if at all, only to impeach that witness's testimony.²³³ This is so whether the witness is the complainant in a sexual-assault or child abuse case, or a noncomplainant witness in a different type of criminal trial, such as a homicide or a drug conspiracy. Thus, it is difficult to see how a defendant can reasonably claim a *constitutional* right to *pretrial* disclosure of privileged information in such records.²³⁴ Rather, the timing of the in camera review and resultant disclosure is to be resolved by weighing the conflicting interests of the witness's privacy on the one hand, and convenience to the defense and efficient use of court time, on the other.

²²⁹ See *supra* Part V.B.2.a.

²³⁰ See *supra* Parts V.B.2.b, V.B.3.

²³¹ See *supra* Parts V.B.2.c, V.B.3.

²³² See *supra* Part V.B.4.

²³³ See *supra* Part V.C.1.

²³⁴ If the records themselves, or the information therein, are not privileged, then they generally are discoverable as a matter of course. See *supra* Part V.A.3.

Some courts have directed that no in camera review of a witness's records is to be made until after the witness has testified on direct examination.²³⁵ The advantage to delaying the in camera review until this point is that it avoids even a limited judicial intrusion into privileged matters until it is unequivocally necessary. As California's Supreme Court expressed it:

When a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court may be called upon, as in [*Davis v. Alaska*, 415 U.S. 308 (1974)], to balance the defendant's need for cross-examination and the state policies the privilege is intended to serve. Before trial, the court typically will not have sufficient information to conduct this inquiry; hence, if pretrial disclosure is permitted, a serious risk arises that privileged material will be disclosed unnecessarily.²³⁶

At least a few other state courts have hinted at least some reluctance to permit the in camera review, let alone allow disclosure of any information to the defense, until the trial itself has begun.²³⁷ Many of the decisions cited in this Article, however, do not squarely address the issue.

²³⁵ See *People v. Hammon*, 938 P.2d 986, 992–93 (Cal. 1997); *Goldsmith v. State*, 651 A.2d 866, 876 (Md. 1995). Such delay is not without precedent: the Jencks Act, 18 U.S.C. § 3500 (2006), entitles a defendant to receive copies of written statements of government witnesses, but only after the witness has testified for the government on direct. *Id.*

²³⁶ *Hammon*, 938 P.2d at 992 (citing *Davis v. Alaska*, 415 U.S. 308, 319 (1974)); see also *supra* Part III.A. *Hammon* was just such a case. Prior to trial, Hammon sought access to his foster child's records in the hopes of challenging her allegations that he had sexual intercourse with her at all; at trial Hammon conceded that he had sex with her, insisting only that he had waited until she was fourteen (i.e., he claimed to be guilty of a less serious crime than the top count with which he was charged). *Hammon*, 938 P.2d at 987. Thus, his trial strategy "largely invalidat[ed] the theory on which he had attempted to justify pretrial disclosure of privileged information. Pretrial disclosure under these circumstances, therefore, would have represented not only a serious, but an *unnecessary*, invasion of the patient's statutory privilege and [state] constitutional right of privacy." *Id.* at 993 (citations omitted). In a subsequent decision the court reaffirmed its rule, precluding pretrial discovery or in camera review. *People v. Gurule*, 51 P.3d 224, 249 (Cal. 2002).

²³⁷ Connecticut's Supreme Court speaks of a defendant's right, "out of the jury's presence," to seek in camera examination of the records. *State v. Peeler*, 857 A.2d 808, 841 (Conn. 2004) (quoting *State v. Slimsky*, 779 A.2d 723, 732 (Conn. 2001)). This implies a midtrial procedure.

At least three state courts have held that a defendant is entitled to disclosure only if, among other things, "no less intrusive source" for that information exists." *State v. L.J.P.*, 637 A.2d 532, 537–38 (N.J. Super. Ct. App. Div. 1994) (quoting *United Jersey Bank v. Wolosoff*, 483 A.2d 821, 826 (N.J. Super. Ct. App. Div. 1994); *accord State v. Peseti*, 65 P.3d 119, 129 (Haw. 2003); *Commonwealth v. Barroso*, 122

The concern expressed by the *Hammon* majority is legitimate: even an in camera inspection of a witness's therapy or counseling records constitutes a breach of the privilege and an intrusion into the witness's privacy, and sometimes developments during the trial may show that a pretrial review was unnecessary.

But where a defendant makes an adequate showing of necessity,²³⁸ certainly the trial judge should have the authority, if not the routine obligation, to conduct such an inspection prior to trial. Where the records are extensive or the question whether to order disclosure is a close one, which might require factual hearings outside the jury's presence, mandating that the judge wait until after the witness has testified on direct before reviewing the records in camera could require extensive midtrial delays.

Where in camera review reveals information that must be disclosed,²³⁹ as a rule such disclosure should be delayed until the witness has testified on direct.²⁴⁰ But where the records reveal information that requires investigative follow-up by the defense, waiting until midtrial to disclose it may significantly disrupt the trial. Moreover, postponing disclosure until after the trial has begun may seriously undercut defense counsel's ability to use the information effectively. In this regard, consider Justice Mosk's impassioned concurrence-in-result-only in *Hammon*:

Although [a defendant has the opportunity] to cross-examine an adverse witness only in the course of trial, to do so effectively he may have to undertake preparations long before. More generally, to defend himself meaningfully, he must

S.W.3d 554, 564 (Ky. 2003) (speaking of "evidence [that] must be disclosed to the defendant if unavailable from less intrusive sources"). This language also may imply that the in camera review should wait until the trial, as only at that point is the court likely to be able to assess with certainty whether a less intrusive source of the information has been found.

Utah's Supreme Court has recognized that "[i]n the context of a case yet to go to trial, the test becomes more difficult to apply because the trial court must anticipate the efficacy of the material contained in the records in persuading the fact-finder to discredit the victim." *State v. Blake*, 2002 UT 113, ¶ 23, 63 P.3d 56.

²³⁸ See *supra* Part V.B.

²³⁹ See *supra* Parts V.B.1, V.C.

²⁴⁰ The analogy to the Jencks Act, 18 U.S.C. § 3500 (2006), seems apt. See *supra* note 235.

usually seek out the truth immediately: He cannot wait until the cause is called to trial.²⁴¹

Indeed, on occasion, review of such records might reveal information that would cause the prosecutor to rethink whether to press the case at all. Where the case relies almost exclusively on the complainant's testimony and the records reveal a history of false accusations of sexual assault under circumstances that bear a striking similarity to the instant case, for example,²⁴² it may be that all participants in the case (defendant, prosecutor, court, and even complainant) might ultimately be better off if the information is disclosed to the defense and the prosecutor prior to a trial that, it may turn out in the light of that information, should not be held at all. The same may occasionally be true in prosecutions of other crimes, where the case relies on the uncorroborated testimony of a witness whose therapy records reveal a chronic inability to distinguish fantasy from reality.

To reiterate: even where a defendant makes a satisfactory showing to trigger an in camera review of the records, *pretrial* review and disclosure should be the exception, not the rule. But a judge should have the option to conduct a pretrial review where the situation appears to call for it, and, where compelling

²⁴¹ *Hammon*, 938 P.2d at 994 (Mosk, J., concurring in the result). Justice Mosk bitterly decried the *Hammon* majority's reversal of prior precedent permitting pretrial discovery in appropriate cases, noting that while this reversal was *permitted* by U.S. Supreme Court decisions interpreting the U.S. Constitution, it was not *mandated*, as the Supreme Court has not yet addressed the issue. *See id.* at 1130–31. “We ‘should disabuse [ourselves] of the notion that in matters of constitutional law and criminal procedure we must always play Ginger Rogers to the high court’s Fred Astaire—always following, never leading.’” *Id.* at 995 (quoting *People v. Harris*, 886 P.2d 1193, 1219 n.1 (Cal. 1994) (Mosk, J., concurring and dissenting)).

For those who do not recognize the reference, Fred and Ginger were the 1930s–1940s equivalent of Brad Pitt and Angelina Jolie, only Fred was not handsome or muscular and Ginger was willowy, not . . . er . . . Angelina-esque. Unlike Brad and Angelina, who have co-starred to date in only one movie (*MR. & MRS. SMITH* (Twentieth Century-Fox Film Corporation 2005)), in which Brad and Angelina play professional assassins for rival criminal organizations who discover to their chagrin that each has been assigned to kill the other; happily, several dozen deaths later, love triumphs after all), Fred and Ginger made ten movies together between 1933 and 1949. Their genre was musical comedy, not movies about shooting people, and when Fred and Ginger danced together the audience was transported into a world of rhythmic, ethereal beauty. In other words, come to think of it, Fred and Ginger were nothing whatsoever like Brad and Angelina.

²⁴² Concerning admissibility of a sexual-assault complainant's prior allegations of sexual assault, see 3 FISHMAN & MCKENNA, *supra* note 41, §§ 19:42–47.

reasons exist, should also be authorized to disclose appropriate information prior to trial.

CONCLUSION

Whether a defense attorney should have access to a prosecution witness's psychotherapy or counseling records presents a conflict between three highly held values: a prosecutor's right and duty to bring a suspect to trial, the witness's right to privacy and to avoid exposure that might interfere with his or her recovery, and a defendant's right to obtain exculpatory evidence. A procedure has developed that requires the trial judge to conduct an in camera inspection of such records to determine whether they contain exculpatory information, but only if the defendant first makes an adequate preliminary showing that such information will be found. The law governing this procedure, however, is riddled with vagueness and uncertainties. As this Article has attempted to show, these uncertainties are best resolved as follows:

(1) Just as a defendant has a right pursuant to the Due Process Clause of the Sixth Amendment to seek such in camera review when records are in possession of the State,²⁴³ so too a defendant must be allowed to seek in camera review of records that are possessed by a private entity, pursuant to the Compulsory Process Clause of the Sixth Amendment.²⁴⁴

(2) In camera review of such records must be available whether the privilege on its face is conditional or absolute.²⁴⁵

(3) A judge must conduct an in camera inspection of such records if, but only if defense counsel can offer specific evidence that establishes probable cause to believe that the records in question contain information that casts serious doubts on the truthfulness or accuracy of the witness's testimony, and such information is not available from less intrusive sources.²⁴⁶ As a rule, the judge should not conduct such an inspection until the witness has testified at trial but may conduct the inspection prior

²⁴³ See *supra* Part IV.A.

²⁴⁴ See *supra* Part IV.B.

²⁴⁵ See *supra* Part IV.A.

²⁴⁶ See *supra* Part V.C.

to trial where it appears that postponing the review until after the witness testifies may require a lengthy adjournment.²⁴⁷

(4) The judge must release portions of the records to defense counsel only if they contain information that raises a significant question about the credibility of a witness or the accuracy of testimony that is important to resolving important issues in the case.²⁴⁸

The solution I propose has its costs.²⁴⁹ The possibility that a judge might review a witness's therapy or counseling records may undermine the witness's ability to cope with whatever experiences or difficulties led the witness to therapy or counseling in the first place. The far-more-upsetting possibility is that the fear that such information will be provided to the defense may diminish the witness's willingness to engage in therapy or counseling at all. Each of these results is lamentable. The alternative, however, is to increase the risk that an innocent person will be convicted of a serious crime and deprived of his or her liberty or, in an extreme case, his or her life. I believe the latter is the greater evil, and a more liberal approach toward judicial in camera review of such records, coupled with the flexible disclosure standard for evidence that may raise a serious question about the truthfulness or accuracy of the witness's testimony regarding important issues of the case, strikes the best balance.

²⁴⁷ See *supra* Part V.D.

²⁴⁸ See *supra* Part V.C.1.

²⁴⁹ The current state of the law also has its costs. In October 2006, I made a presentation on this topic to the annual conference of the International Center for the Study of Psychiatry and Psychology, Inc. in Bethesda, Maryland. The therapists I spoke to knew in general of the possibility that their patients' records might be subpoenaed; several told me that, accordingly, they put as little information as possible in the records, generally noting in them only that a patient came to a scheduled therapy session and that some progress was made. They acknowledged that this could cause problems during a course of prolonged therapy, and that the lack of information in the records meant that if for some reason another therapist had to take over the case, he or she might have to start from scratch. They expressed the belief, however, that protecting patient privacy made these potential drawbacks necessary.

