SAFEGUARDING THE OPPORTUNITY FOR EFFECTIVE CROSS-EXAMINATION: THE CONFRONTATION CLAUSE AND PRETRIAL DISCLOSURES

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ABSTRACT

The Sixth Amendment's Confrontation Clause provides criminal defendants "an opportunity for effective cross-examination" at trial. Defendants—usually through their attorneys—must be able to question adverse witnesses in person. But the mere opportunity to ask questions might not be sufficient for the defendant to ascertain favorable information from the witness or discredit the witness. And other criminal-procedure doctrines like the rule of Brady v. Maryland *may not provide the defendant with all the beneficial information he needs from a witness to make his case to the jury.*

In Pennsylvania v. Ritchie*, a 1987 Supreme Court case, a plurality of Justices interpreted the Confrontation Clause to apply during trial only. But Justice Brennan, joined by Justice Marshall, dissented and contended that the Confrontation Clause should apply to events before trial, not just to cross-examination during trial. In their view, the Confrontation Clause should have provided the* Ritchie *defendant access to some "material information" from a testifying witness pretrial in order to effectively cross-examine that witness. This Note argues that Justices Brennan and Marshall were correct—criminal defendants should be able to assert their Confrontation Clause right to seek access to some pretrial information from testifying witnesses. Trial judges could then review the requested information* in camera *to ensure that revealing it to the defendant would not violate the witness's privilege. In this way, interpreting the Confrontation Clause to apply before trial (as well as during trial) would provide criminal defendants with a fully effective opportunity to cross-examine witnesses while safeguarding witness privilege and the government's interest in maintaining witness privacy.*

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INTRODUCTION

Many Americans' knowledge of cross-examination in criminal trials comes from its depiction in television shows, books, and movies. The scenes range from somber to amusing: Atticus Finch, Elle Woods, Lieutenant Daniel Kaffee, and Vinny Gambini artfully (or not-so-artfully) persuade an adverse witness to make an emotional statement that exculpates the criminal defendant.[1] The right to cross-examination comes from the Sixth Amendment's Confrontation Clause, which states, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[2] The fictional courtroom scenes, although dramatic, do not show the arduous discovery process that precedes cross-

1. *See* HARPER LEE, TO KILL A MOCKINGBIRD 242–52 (1960); LEGALLY BLONDE (Metro-Goldwyn-Mayer Pictures 2001); A FEW GOOD MEN (Columbia Pictures 1992); MY COUSIN VINNY (Twentieth Century Fox 1992).
2. U.S. CONST. amend VI.

examination at trial. In reality, the pretrial discovery process can significantly hinder criminal defendants' ability to access information that would allow them to cross-examine adverse witnesses effectively.

The Confrontation Clause provides criminal defendants with "an opportunity for effective cross-examination," but it does not provide the right to pretrial disclosure of all information that might possibly aid a defendant's courtroom questioning.[3] The Supreme Court has held that a defendant must have "wide latitude" to question adverse witnesses at trial.[4] But defendants are not guaranteed access to records or materials from adverse witnesses that could open up relevant and potentially exculpatory lines of questioning, even if the only way a defendant could know to pursue those lines of questioning would be through discovery of a witness's records.[5]

This doctrine is not perfectly settled. It comes from the 1987 Supreme Court plurality opinion in *Pennsylvania v. Ritchie*.[6] Four Justices in *Ritchie* thought that the Confrontation Clause protected only a defendant's right to question adverse witnesses *during trial*—nothing more.[7] But three other Justices wrote separately in favor of a broader Confrontation Clause reading that would provide criminal defendants some pretrial discovery rights, including access to prior statements of the testifying witness, for use during cross-examination.[8]

This Note argues that the Supreme Court's current reading of the Confrontation Clause from the *Ritchie* plurality is too limited. The right to confront adverse witnesses should not only matter during a criminal trial. Instead, the Confrontation Clause should guarantee criminal defendants some ability to request materials from the government—specifically any materials that might be important when cross-examining adverse witnesses. Of course, some requested materials would be unavailable, such as attorney work product or psychotherapist communications. Before trial, the judge would review the requested materials *in camera* (in her chambers away from the jury, press, and public)[9] to determine if the materials were actually necessary to safeguard a defendant's opportunity for effective cross-examination and to ensure no privilege is violated. Reading the Confrontation Clause this way would both preserve government interests and witness privileges and protect the defendant's right to confrontation. The Eighth Circuit reached this

3. Pennsylvania v. Ritchie, 480 U.S. 39, 53 (1987) (plurality opinion) (quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam)).

4. *Id.* (citing *Fensterer*, 474 U.S. at 20).

5. *See id.* at 52–54.

6. *Id.*

7. *Id.* at 52–53.

8. Justice Marshall joined Justice Brennan's dissent and argued for a broad construction of the Confrontation Clause. *See id.* at 66 (Brennan, J., dissenting). Justice Blackmun concurred in the judgment but was "in substantial agreement" with Justice Brennan. *See id.* at 61 (Blackmun, J., concurring in part and concurring in the judgment).

9. *See In camera*, BLACK'S LAW DICTIONARY (11th ed. 2019).

conclusion in *United States v. Arias* in 2019,[10] and this Note advocates for a similar rule in all criminal trials.

Part I describes the Confrontation Clause's origin and development, the Clause's relation to *Brady v. Maryland*, under which the government must disclose exculpatory material to criminal defendants, and how the majority, plurality, concurring, and dissenting opinions in *Pennsylvania v. Ritchie* construed the Confrontation Clause and the *Brady* rule as they relate to pretrial discovery and *in camera* review of requested materials. Part II discusses how subsequent federal and state cases have construed the Confrontation Clause and the *Brady* rule, focusing on the different ways the federal courts of appeals and state courts of last resort have construed the Confrontation Clause and pretrial disclosures.

Part III argues that trial courts should adopt an *in camera* review procedure when a criminal defendant requests access to cross-examination materials that are confidential or privileged—like the procedure the Eighth Circuit ordered in *Arias*. Part III also explains why a Confrontation Clause *in camera* review standard is necessary, even though material disclosed under *Brady* is often useful to a defendant during cross-examination. In some cases, the prosecution will have access to material that does not rise to the level of *Brady* exculpatory or impeachment evidence, but will nonetheless help guarantee the defendant an opportunity for effective cross-examination. And ensuring that defendants have the opportunity for effective cross-examination—even just by accessing records that might open up new lines of inquiry—is crucial to safeguarding their constitutional rights.

I. THE CONFRONTATION CLAUSE, *BRADY V. MARYLAND*, AND PRETRIAL DISCOVERY IN CRIMINAL CASES

The Confrontation Clause and the rule of *Brady v. Maryland* both safeguard criminal defendants' constitutional rights. Although the two doctrines sometimes overlap—particularly during cross-examination—the Confrontation Clause and the *Brady* rule serve different purposes. The Confrontation Clause ensures that defendants can face adverse witnesses at trial and have an opportunity to effectively cross-examine them. *Brady* protects against prosecutorial suppression of evidence that is favorable to a defendant. In this Part, Section A describes the origins and development of the Confrontation Clause in English and American jurisprudence. Section B explains *Brady v. Maryland* and subsequent cases that have clarified the government's duty to disclose evidence favorable to a criminal defendant. Section C discusses *Pennsylvania v. Ritchie*, which held that *Brady*, but not the Confrontation Clause, entitled the defendant to an *in camera* review of materials that would have assisted his counsel during cross-examination.

10. 936 F.3d 793, 795 (8th Cir. 2019).

A. The Confrontation Clause's Origin and Development

A criminal defendant's right to physically confront an accuser dates back to the Roman Empire.[11] The English common-law right to confront adverse witnesses developed in the seventeenth century as a response to the practice of admitting depositions during trials without giving the deposed witness an opportunity to testify.[12] In sixteenth-century England, magistrates interrogated people accused of a crime, as well as their accomplices and any witnesses, to provide evidence for the court to use during trial.[13] The criminal defendant did not have the right to be present for the pretrial questioning.[14] Defendants, recognizing the unfairness, often demanded (unsuccessfully) to confront their accusers "face to face."[15] An extreme example of this is the trial of Sir Walter Raleigh in 1603.[16] The monarchy accused Raleigh of treason. He was convicted even though the monarchy's main evidence, which came from a non-testifying co-conspirator, "probably had been obtained by torture."[17]

The historical trial injustices and the common-law developments that corrected them likely inspired the Framers to include the Confrontation Clause in the U.S. Constitution's Sixth Amendment.[18] Although its American history is "murky,"[19] early judicial opinions suggest that the Framers intended the Clause to protect defendants against "*ex parte* examinations as evidence against the accused,"[20] and to "guarantee [defendants] the opportunity to cross-examine."[21] By its text, the Clause provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[22] The Due Process

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11. *See* Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 483–84 (1994).

12. Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 79 (1995).

13. White v. Illinois, 502 U.S. 346, 361 (1992) (Thomas, J., concurring in part and concurring in the judgment) (explaining the history of the Confrontation Clause and the rights of criminal defendants in 16th-century England).

14. *Id.*

15. *Id.* (quoting 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 221, 326 (1883)).

16. *See* Jonakait, *supra* note 12, at 79 & n.15.

17. *See id.* (quoting *White*, 502 U.S. at 361 (Thomas, J., concurring in part and concurring in the judgment)).

18. *See, e.g.*, Daniel N. Shaviro, *The Confrontation Clause Today in Light of Its Common Law Background*, 26 VAL. U. L. REV. 337, 337–38 (1991); *cf.* Jonakait, *supra* note 12, at 81 ("Traditional histories look to England for the meaning of the American right to confrontation."). Professor Jonakait, however, argues for "an alternative history" in which the Sixth Amendment "sought to constitutionalize criminal procedure as it then existed in the states." *Id.*

19. Jonakait, *supra* note 12, at 77 ("Early American documents almost never mention the right, and the traditional sources for divining the Framers' intent yield almost no information about the Clause." (footnotes omitted)).

20. Crawford v. Washington, 541 U.S. 36, 50 (2004).

21. Jonakait, *supra* note 12, at 122. For an in-depth historical analysis of early Confrontation Clause case law, see *id.* at 121–25.

22. U.S. CONST. amend. VI.

Clause of the Fourteenth Amendment incorporates the right to confront adverse witnesses in state-court criminal trials.[23]

The Supreme Court has explained that the Confrontation Clause's purpose is to guarantee that the evidence against a criminal defendant at trial is sufficiently reliable.[24] Pursuant to the Clause, a defendant has the right to be physically present at trial, to confront adverse witnesses directly, and to have the opportunity to effectively cross-examine adverse witnesses.[25] One of the ways in which the Clause guarantees the reliability of evidence, including witness testimony, is by allowing a defendant to subject the evidence to "rigorous testing" before the jury at trial.[26] During cross-examination, the defendant can ask questions about a witness's story to test her memory and perception.[27] The defendant can also impeach—i.e., discredit—the witness, such as by highlighting the witness's character for untruthfulness or by pointing out a prior inconsistent statement.[28] The right to cross-examine is infringed when a trial court allows a defendant to cross-examine a witness but does not allow the defendant to "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness."[29]

The Confrontation Clause, however, provides only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[30] For example, in *Delaware v. Fensterer*, the defendant's conviction was based partially on expert testimony about the murder weapon, even though the expert could not remember the scientific basis of his opinion at trial.[31] The lack of memory arguably impeded the defendant's ability to discredit the testimony during cross-examination, but the Supreme Court found no Confrontation Clause violation.[32] It explained that the defendant's cross-examination had not actually been limited in nature or scope.[33] Further, the Court emphasized that a factfinder at trial can observe a witness's demeanor under oath to determine the witness's trustworthiness.[34] In other cases, the Court has noted that the defendant can use cross-examination to "show a

23. *See* Pointer v. Texas, 380 U.S. 400, 403 (1965) ("We hold today that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment.").

24. Maryland v. Craig, 497 U.S. 836, 845 (1990).

25. *See id.* at 844–46; Kentucky v. Stincer, 482 U.S. 730, 736–39 (1987).

26. *Craig*, 497 U.S. at 845 (noting that although defendants are not guaranteed "the *absolute* right to a face-to-face meeting" at trial, the Court had not yet addressed whether any exceptions exist to the Confrontation Clause's text, which suggests an absolute right).

27. Davis v. Alaska, 415 U.S. 308, 316 (1974).

28. *See* FED. R. EVID. 608; FED. R. EVID. 613.

29. *Davis*, 415 U.S. at 318.

30. *Stincer*, 482 U.S. at 739 (quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam)).

31. *See* 474 U.S. at 16–17.

32. *Id.* at 19–20.

33. *Id.* at 19.

34. *Id.* at 20.

prototypical form of bias on the part of the witness."[35] At minimum, then, the American Confrontation Clause ensures that criminal defendants have the opportunity to question adverse witnesses before a jury.[36]

B. Brady v. Maryland*'s Requirement that the Government Disclose Exculpatory Evidence*

Although "there is no general constitutional right to [pretrial] discovery in criminal cases,"[37] the Fifth and Fourteenth Amendments require prosecutors to disclose certain types of evidence to criminal defendants before trial.[38] In *Brady v. Maryland*, the Supreme Court held that the Fourteenth Amendment's Due Process Clause requires the government to disclose evidence that is favorable to a criminal defendant when such "evidence is material either to guilt or to punishment."[39] *Brady*, however, is not a pure discovery rule. Rather, it sets the standard for when a prosecutor's failure to disclose material, exculpatory evidence "warrants a new trial" for the defendant.[40]

The government violates *Brady* when it suppresses evidence that is "material either to guilt or to punishment," even if the suppression was not in bad faith.[41] Evidence favorable to the defendant is "material only if there is a reasonable probability that . . . the result of the proceeding would have been different" if the prosecution had disclosed the evidence.[42] Any clearly exculpatory evidence thus meets the *Brady* standard. *Brady* originally applied only when a criminal defendant affirmatively requested the disclosure of evidence,[43] but now courts can find a constitutional violation even if the defendant does not make a *Brady* request.[44]

A criminal defendant seeking a new trial by alleging a *Brady* violation must "show that he 'more likely than not' would have been acquitted" if the government

35. Olden v. Kentucky, 488 U.S. 227, 231 (1988) (per curiam) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986)).

36. *E.g.*, Maryland v. Craig, 497 U.S. 836, 846 (1990).

37. Weatherford v. Bursey, 429 U.S. 545, 559–61 (1977).

38. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

39. *Id.*

40. Laurie L. Levinson, *Discovery from the Trenches: The Future of* Brady, 60 UCLA L. REV. 74, 77 (2013).

41. Wearry v. Cain, 136 S. Ct. 1002, 1006 (2016) (quoting *Brady*, 373 U.S. at 87).

42. United States v. Bagley, 473 U.S. 667, 682 (1985) (plurality opinion).

43. *Id.* at 669; *Brady*, 373 U.S. at 87 ("We now hold that the suppression by the prosecution of evidence favorable to an accused *upon request* violates due process where the evidence is material either to guilt or to punishment. . . ." (emphasis added)).

44. *See* Strickler v. Greene, 527 U.S. 263, 281–82 (1999) (explaining the elements of a *Brady* claim which do not include an affirmative-request requirement for defendants); *Bagley*, 473 U.S. at 682–83 (plurality opinion) (refusing to adopt a different *Brady* standard based on whether the defendant makes an affirmative request); United States v. Agurs, 427 U.S. 97, 110 (1976) ("[T]here are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request.").

had not suppressed evidence at trial.[45] If the suppressed evidence "'undermine[s] confidence' in the verdict," the appellate court will order a new trial.[46]

The government's *Brady* duty continues throughout a criminal proceeding, meaning that evidence once deemed immaterial might become material (and thus mandatory to disclose) "as the proceedings progress."[47] The duty to disclose extends beyond exculpatory evidence; it also applies to information the defendant could use to impeach a government witness, under the same "material either to guilt or punishment" standard.[48]

The Supreme Court has not articulated any specific procedure for trial courts to decide on the materiality of contested *Brady* evidence. In *Pennsylvania v. Ritchie*, a majority of the Court required the government to provide contested *Brady* impeachment material to the trial court for *in camera* review instead of sending it directly to the defendant's counsel.[49] The *Ritchie* Court explained that the defendant would not get the benefit of his lawyers looking at the material, but he could petition the trial court for its disclosure and "argue in favor of its materiality."[50] Since *Ritchie*, several federal circuit courts have instructed trial courts to perform an *in camera* review of the materiality of contested *Brady* evidence,[51] but often only after the defendant has made some showing that the contested evidence might be material.[52] Other federal circuit courts leave the decision of whether to review contested *Brady* material *in camera* up to the trial court's complete discretion.[53]

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45. *Wearry*, 136 S. Ct. at 1006 (quoting Smith v. Cain, 565 U.S. 73, 76 (2012)).

46. *Id.* (quoting *Smith*, 565 U.S. at 76).

47. Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987).

48. Giglio v. United States, 405 U.S. 150, 154–55 (1972).

49. *Ritchie*, 480 U.S. at 60. However, a defendant may not demand such *in camera* review by the trial court without reason. *Id.* at 58 n.15 ("Ritchie, of course, may not require the trial court to search through the [contested] file without first establishing a basis for his claim that it contains material evidence.").

50. *Id.* at 60.

51. *See, e.g.*, United States v. Rigal, 740 F. App'x 171, 176 (11th Cir. 2018) (per curiam) ("When the parties disagree as to whether the evidence is material under *Brady*, the government should submit the evidence to the court for in camera review."); Application of Storer Commc'ns, Inc. v. Presser, 828 F.2d 330, 335 (6th Cir. 1987) ("A district court has no obligation to conduct a general *in camera* search of the prosecutor's files for *Brady* material. . . . However, when a prosecutor presents material to the court for a *Brady* determination, the court has an obligation to examine the material *in camera* and determine whether disclosure to the defense is required." (citations omitted)); United States v. Jones, 612 F.2d 453, 456 (9th Cir. 1979) ("In camera inspection and excision is a sound approach to a Brady inquiry.").

52. *See, e.g.*, United States v. Garcia-Martinez, 730 F. App'x 665, 674 (10th Cir. 2018) ("To justify a court undertaking an in camera review for Brady material, at the very least, a defendant must make a 'plausible showing' that the government files at issue contain 'material' exculpatory or impeachment information." (quoting United States v. Williams, 576 F.3d 1149, 1163 (10th Cir. 2009))); United States v. Prochilo, 629 F.3d 264, 268 (1st Cir. 2011) ("To justify [*in camera*] review, the defendant must make some showing that the materials in question could contain favorable, material evidence."); United States v. King, 628 F.3d 693, 703 (4th Cir. 2011) ("King . . . made the required 'plausible showing' of possible exculpatory information . . . to trigger such an in camera inspection.").

53. *See, e.g.*, United States v. Bland, 517 F.3d 930, 935 (7th Cir. 2008) ("It is well-established that the decision whether to review purported *Brady* materials in camera is entrusted to the district court's sound discretion, and mere speculation that a government file might contain *Brady* material is not sufficient." (citations omitted)).

The U.S. Department of Justice encourages prosecutors to either reveal contested *Brady* material to the defense or to submit it for *in camera* review:

> Where it is unclear whether evidence or information should be disclosed, prosecutors are encouraged to reveal such information to defendants or to the court for inspection *in camera* and, where applicable, seek a protective order from the Court. By doing so, prosecutors will ensure confidence in fair trials and verdicts.[54]

With the variation in handling contested *Brady* evidence, defendants in different jurisdictions may go through different procedures when trying to obtain potential *Brady* material from the government.

Defendants often obtain information that will be helpful during cross-examination through *Brady*, especially because *Brady* requires disclosure of impeachment material. Consider material tending to show that someone else committed the criminal act with which the defendant is charged. This would probably be exculpatory under *Brady*.[55] During cross-examination, the defendant might use this material to impeach a witness who claims to have personal knowledge that the defendant committed the crime. Other material, though, could be useful during cross-examination but not necessarily qualify as *Brady* exculpatory or impeachment evidence. Consider prior statements of a testifying witness. If inconsistent with trial testimony or otherwise favorable to the defendant, prior witness statements probably fall under *Brady*—but not always.[56] In some cases, a witness's statement before trial might appear neutral on its face but lead the defendant to a line of questioning that otherwise would have been unknown. In this situation, neither *Brady* nor the Confrontation Clause as currently understood would allow the defendant to access the material for use during cross-examination.

C. Pennsylvania v. Ritchie *and Pretrial Discovery Related to Cross-Examination*

As noted above, neither the Confrontation Clause nor *Brady* provides criminal defendants with a broad, general right to pretrial discovery.[57] Both, however, help ensure that defendants are able to conduct effective cross-examination of adverse witnesses.[58] This Section explains *Pennsylvania v. Ritchie*, in which the Supreme

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54. U.S. DEP'T OF JUST., JUSTICE MANUAL, TITLE 9: CRIMINAL, 9-5.001(F) – POLICY REGARDING DISCLOSURE OF EXCULPATORY AND IMPEACHMENT INFORMATION (2008), https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings.

55. *See* Memorandum from Donald A. Davis, U.S. Att'y, to Att'ys and Support Staff 12 (Oct. 2010), https://www.justice.gov/sites/default/files/usao/pages/attachments/2015/04/01/miw_discovery_policy.pdf.

56. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 71–72 (1987) (Brennan, J., dissenting).

57. *Id.* at 52 (plurality opinion) ("[T]he Confrontation Clause [is not] a constitutionally compelled rule of pretrial discovery."); Weatherford v. Bursey, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case.").

58. *See, e.g.*, Davis v. Alaska, 415 U.S. 308, 315 (1974) ("Our cases construing the (confrontation) clause hold that a primary interest secured by it is the right of cross-examination." (quoting Douglas v. Alabama, 380 U.S. 415, 418 (1965))); *cf.* United States v. Bagley, 473 U.S. 667, 678 (1985) (explaining that suppressing *Brady*

Court analyzed both the Confrontation Clause and the *Brady* doctrine to determine that a defendant was entitled to *in camera* review of materials that would have assisted him during cross-examination.[59]

In *Ritchie*, the Commonwealth charged George Ritchie with sexually assaulting his thirteen-year-old daughter.[60] Before trial, Ritchie subpoenaed a confidential file about his daughter from Pennsylvania's Children and Youth Services agency ("CYS"), arguing that it might contain potentially exculpatory evidence, or at least the names of favorable witnesses.[61] He also sought disclosure of a medical report that he thought CYS had prepared during a previous investigation involving his daughter.[62] The Pennsylvania trial judge refused to require CYS to disclose the file and the record.[63] At trial, Ritchie's daughter testified and defense counsel cross-examined her without having seen the requested records.[64] Ritchie was convicted and sentenced to three to ten years in prison.[65]

On appeal in the Pennsylvania Superior Court, Ritchie argued that the trial court violated his Confrontation Clause right by allowing the Commonwealth to withhold the contents of the CYS file, without which he could not effectively cross-examine his daughter.[66] The appellate court agreed. The court "held on remand, the trial judge . . . was to examine the confidential material *in camera*, and release [to Ritchie] only the verbatim statements" his daughter made to her CYS counselor for use during cross-examination.[67] The appellate court also explained that Ritchie's attorney, on remand, should have access to the full CYS record to "argue the relevance" of the daughter's statements, and the "prosecution also should be allowed to argue that the failure to disclose . . . was harmless error."[68]

The Commonwealth appealed to the Pennsylvania Supreme Court, which held even more favorably for Ritchie. The court held that Ritchie should have access to the full CYS file to determine if it included relevant statements.[69] According to the court, it was a Confrontation Clause violation to deny Ritchie "the opportunity to have the records reviewed by 'the eyes and the perspective of an advocate,' who may see relevance in places that a neutral judge would not."[70]

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evidence "that might have been helpful in conducting [a] cross-examination" is a constitutional violation "if it deprives the defendant of a fair trial").

59. *See Ritchie*, 480 U.S. at 57, 60–61 (majority opinion).
60. *Id.* at 43.
61. *Id.* at 43–44.
62. *Id.*
63. *Id.* at 44.
64. *Id.* at 44–45.
65. *Id.* at 45.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 46.
70. *Id.* (quoting Commonwealth v. Ritchie, 502 A.2d 148, 153 (Pa. 1985)).

A plurality of the U.S. Supreme Court disagreed. The Justices rejected the state court's conclusion that Pennsylvania's failure to disclose the CYS record violated the Confrontation Clause.[71] The plurality also rejected such a broad reading of the Clause, and wrote that the Court could not "transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery."[72] It explained that, because "the Confrontation Clause only guarantees 'an opportunity for effective cross-examination,'" not a broader right to cross-examination in any manner a defendant wishes, it did not entitle Ritchie to disclosure of the CYS record.[73] The plurality noted that a defendant's opportunity to question a witness does not include the opportunity to obtain "pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony."[74]

Although the plurality explained that Ritchie could not obtain the CYS files under the Confrontation Clause, a majority of the Court held that, because the "CYS records may be relevant to Ritchie's claim of innocence," he was entitled to an *in camera* review of the records under *Brady v. Maryland*.[75] The majority acknowledged that a review of the CYS records by the trial court (as opposed to a review by Ritchie's counsel) would deny Ritchie the benefit of "the eye of an advocate," but that *Brady* does not guarantee defendants the right to "search through the Commonwealth's files."[76] This served Pennsylvania's purpose of ensuring that victims—particularly children—are able to speak with counselors without fear that their statements will be disclosed.[77] Plus, Ritchie could petition the court for disclosure of specific information from the CYS file, such as his daughter's medical report.[78] The trial court would then act as a gatekeeper to determine if the records were material, which would warrant disclosure under *Brady*.[79] The *Ritchie* Court concluded its *Brady* analysis by explaining that "*in camera* review by the trial court will serve Ritchie's interest without destroying the Commonwealth's need to protect the confidentiality of those involved in child-abuse investigations."[80]

Justice Blackmun agreed with the Court's holding that Ritchie could access the requested CYS materials under *Brady*, but he concurred to explain his view that the mere opportunity to question adverse witnesses is insufficient to satisfy a defendant's Confrontation Clause right.[81] He explained that in some cases, "simple

71. *Id.* at 54 (plurality opinion).
72. *Id.* at 52.
73. *Id.* at 53 (quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam)).
74. *Id.*
75. *Id.* at 57–58 (majority opinion); *see id.* at 65 (Blackmun, J., concurring in part and concurring in the judgment) (stating that, although he disagreed with the plurality's narrow reading of the Confrontation Clause, the lower court on remand could address "any confrontation problem").
76. *Id.* at 59 (majority opinion).
77. *Id.* at 60–61.
78. *Id.* at 60.
79. *Id.*
80. *Id.* at 61.
81. *Id.* at 62 (Blackmun, J., concurring in part and concurring in the judgment).

questioning" will not suffice to "undermine a witness' credibility."[82] He provided an example: where a witness is biased or prejudiced against the defendant, the defense may not be able to prove it without certain compelled pretrial disclosures pursuant to the Confrontation Clause.[83] Justice Blackmun cited *Davis v. Alaska*, in which the Court found a Confrontation Clause violation when a trial court prevented a defendant from accessing a testifying witness's juvenile record, which would have shown that the witness was biased against him.[84]

In dissent, Justice Brennan—joined by Justice Marshall—argued that Confrontation Clause protections go beyond the opportunity for cross-examination and may guarantee defendants access to some material that would assist them in confronting adverse witnesses.[85] Justice Brennan wrote that the plurality's interpretation of the Confrontation Clause "ignores the fact that the right of cross-examination also may be significantly infringed by events occurring outside the trial itself, such as the wholesale denial of access to material that would serve as the basis for a significant line of inquiry at trial."[86] He explained that, because the Clause guarantees defendants the right to cross-examination, denying disclosure of material that would serve as the basis for effective cross-examination may be unconstitutional.[87] Further, he argued that defendants are entitled to analyze material that is "shown to relate to the testimony of the witness."[88] In his view, the Confrontation Clause should have protected Ritchie against the trial court's "infringement on [his] right to cross-examination."[89]

Justice Brennan also disagreed with the majority's *Brady* holding, writing that the Court failed to account for the Confrontation Clause's "independent significance" in protecting criminal defendants' right to cross-examination.[90] He noted that the Confrontation Clause and *Brady* analysis may overlap in some cases, but that in other cases the Confrontation Clause would provide more constitutional protection to defendants.[91] Justice Brennan specifically argued that there is some evidence that does not rise to the level of *Brady* materiality that would nonetheless possess "more subtle potential for diminishing the credibility of a witness" against the defendant.[92] He thus contended that the plurality of the Court should have held that the Confrontation Clause independently protected Ritchie against an

82. *Id.* at 63 (citing Davis v. Alaska, 415 U.S. 308 (1974)).
83. *Id.*
84. *Id.* at 63–64 (citing *Davis*, 415 U.S. 308).
85. *See id.* at 66–72 (Brennan, J., dissenting).
86. *Id.* at 66.
87. *See id.*
88. *Id.* at 68 (quoting Jencks v. United States, 353 U.S. 657, 669 (1957)).
89. *Id.* at 72.
90. *Id.* at 71–72.
91. *Id.* at 72.
92. *Id.*

infringement on his ability to cross-examine the alleged victim.[93]

II. THE CONFRONTATION CLAUSE AND THE *BRADY* RULE AFTER *RITCHIE*

After *Ritchie*, multiple state courts of last resort and one federal appellate court have relied on the Confrontation Clause to hold that a criminal defendant is entitled to some pretrial disclosure of privileged or confidential records necessary for cross-examination.[94] In this Part, Section A details several Confrontation Clause cases from federal appellate courts after *Ritchie*, some of which did not require the prosecution to turn over any materials that the defendant requested for use during cross-examination. It also discusses *United States v. Arias*, a 2019 Eighth Circuit case, which held that the Confrontation Clause requires the government to submit some records for *in camera* review in order for the defendant to conduct effective cross-examination. Section B shows how state courts of last resort have adhered to *Ritchie*'s Confrontation Clause holding or discussed how *in camera* review of cross-examination materials can safeguard defendants' right to confrontation.

A. The Confrontation Clause in Federal Courts of Appeals After Ritchie

Multiple federal circuits since *Ritchie* have adhered to the plurality holding that the Confrontation Clause does not provide any right for criminal defendants to access cross-examination materials. As this Section describes, however, the Eighth Circuit recently came to a different conclusion, holding that a federal trial court was required to conduct an *in camera* review of the defendant's requested cross-examination materials to determine if disclosure of the materials was required to uphold his constitutional right to confrontation.[95]

1. Circuits with No Requirement of *In Camera* Review of Requested Cross-Examination Materials

Since the Supreme Court decided *Pennsylvania v. Ritchie* in 1987, the Third, Sixth, Tenth, Eleventh, and D.C. Circuits have followed the plurality to hold that the Confrontation Clause does not provide criminal defendants with a right to compelled discovery related to a witness's cross-examination.[96] These cases fall into

93. *Id.*

94. Just four months after *Ritchie*, the Supreme Court decided *Kentucky v. Stincer*, a Confrontation Clause case. *See* 482 U.S. 730 (1987). In *Stincer*, the Court held that a defendant's exclusion from a competency hearing was not a Confrontation Clause violation because his lawyer was not excluded, and his lawyer had an opportunity for effective cross-examination at the hearing. *Id.* at 744.

Justice Marshall dissented and explained that they would not read the Confrontation Clause to guarantee only the right of cross-examination, echoing Justice Brennan's *Ritchie* dissent that he joined. *See id.* at 748 (Marshall, J., dissenting). He wrote that the majority's narrow Confrontation Clause standard "enables the Court to conclude with relative ease" that no constitutional violation occurred. *Id.* at 749.

95. *See* United States v. Arias, 936 F.3d 793, 800 (8th Cir. 2019).

96. *See* United States v. Fatteh, 914 F.3d 112, 179 (3d Cir. 2019); United States v. Hargrove, 382 F. App'x 765, 774–75 (10th Cir. 2010); United States v. Sardinas, 386 F. App'x 927, 940–41 (11th Cir. 2010); Isaac v.

two groups. In one group of cases, the defendants relied solely on the Confrontation Clause to try to access records for cross-examination.[97] In the other group, the defendants argued that both the Confrontation Clause and *Brady v. Maryland* entitled them to access certain government records for cross-examination.[98] In some of these cases, the trial courts conducted an *in camera* review pursuant to *Brady* but not the Confrontation Clause, like the Supreme Court in *Ritchie*.[99] As discussed *infra* in Part III, though, an *in camera* review pursuant to *Brady* does not always result in the defendant having access to all the materials that would guarantee him an opportunity for effective cross-examination. In some cases, the defendant will request materials that do not rise to the *Brady* mandatory-disclosure level but would nonetheless alert the defendant to an otherwise-unknown line of witness questioning or a weakness in a witness's testimony.

The Tenth Circuit, for example, reads the Confrontation Clause narrowly. In *United States v. Hargrove*, in which the defendant relied solely on the Clause to seek access to records for cross-examination, the Tenth Circuit held that the trial court did not violate the defendant's Confrontation Clause right when it refused to require a testifying witness to disclose her mental-health records for the defendant's use at cross-examination.[100] The court reasoned that denying the defendant access to the witness's records did not impede the defendant's ability to prove that the witness was untrustworthy, and did not violate the Confrontation Clause because the defendant could have questioned the witness "in great[] detail . . . thus giving the jury a better opportunity to assess whether [her odd behavior during testimony was] a sign of mental illness."[101] Because the defendant did not argue that *Brady* required disclosure of the mental-health records, the court held that he waived the issue.[102]

The D.C. Circuit in *United States v. Tarantino*, though, held that neither the Confrontation Clause nor *Brady* provides defendants the right to compelled pretrial

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Grider, No. 98-6376, 2000 WL 571959, at *6 (6th Cir. May 4, 2000); United States v. Tarantino, 846 F.2d 1384, 1415–16 (D.C. Cir. 1988) (per curiam).

97. *See, e.g.*, *Hargrove*, 382 F. App'x at 774–75 (making no mention of *Brady* and noting that the defendant waived any Fifth Amendment argument).

98. *E.g.*, *Tarantino*, 846 F.2d at 1415–17.

99. *E.g.*, *Fatteh*, 914 F.3d at 179.

100. *See* 382 F. App'x at 744–45. In addition to its decision in *Hargrove*, the Tenth Circuit has also held that there was no Confrontation Clause violation when a federal trial court refused to unseal records for a criminal defendant to use in cross-examination after it reviewed the records *in camera*. *See* Tapia v. Tansey, 926 F.2d 1554, 1558–60 (10th Cir. 1991).

101. *Hargrove*, 382 F. App'x at 774.

102. *Id.* at 775. The Sixth Circuit reached the same result in a similar case in 2000. *See* Isaac v. Grider, No. 98-6376, 2000 WL 571959, at *6–7 (6th Cir. May 4, 2000) ("The Confrontation Clause merely assures that the defendant's lawyer may fully question the witnesses at trial and does not require disclosure of agency records. The Commonwealth's rejection of Isaac's Confrontation Clause argument was entirely consistent with *Ritchie*." (citation omitted)).

discovery of records requested for use during cross-examination.[103] The defendant sought disclosure of witness statements that contradicted another witness's version of the events at issue.[104] The court held that the district court's refusal to compel disclosure of the witness statements did not violate the defendant's Confrontation Clause right to cross-examination or his *Brady* right to governmental disclosure of potentially exculpatory evidence.[105] The D.C. Circuit reasoned that, because neither the Confrontation Clause nor *Brady* creates a constitutional right to discovery in a criminal case, the defendant could not compel the government to disclose the witness statements.[106]

Finally, the Third Circuit has held that *Brady*, but not the Confrontation Clause, gives a defendant the right to *in camera* review of requested records.[107] In *United States v. Fattah*, the trial court conducted an *in camera* review of mental-health records of a testifying witness after the defendant requested them, but concluded that the government was not required to disclose them.[108] The defendant appealed to the Third Circuit and argued that his right to confrontation was infringed, despite the *in camera* review, because he could not use the mental-health records to impeach the witness.[109] The Third Circuit reiterated the *Ritchie* plurality's rule that the Confrontation Clause is not a mechanism for pretrial discovery, and that the defendant's right to confront the witness was not impeded by the trial court denying him access to the witness's mental-health records.[110] The court also noted that the *in camera* review was consistent with *Ritchie*'s application of *Brady*, so there was no due process violation.[111]

2. The Eighth Circuit's Requirement of *In Camera* Review to Determine If the Confrontation Clause Requires Disclosure of Records

In *United States v. Arias*, the Eighth Circuit broke with its sister circuits and held that, pursuant to the Confrontation Clause, the trial court should have reviewed a testifying witness's psychotherapy records to determine if the defendant was entitled to access them before cross-examining the witness at trial.[112] The court remanded the case for the trial judge to review the requested records *in camera*.[113] The case arose when K.P., a minor, accused her uncle, Ira Arias, of sexual

103. 846 F.2d at 1415, 1417. The Eleventh Circuit reached the same conclusion in *United States v. Sardinas*. 386 F. App'x 927, 940–41 (11th Cir. 2010) (affirming the trial court's holding that the government's refusal to disclose information about a witness was not a violation of the Confrontation Clause or *Brady*).

104. *Tarantino*, 846 F.2d at 1415.

105. *Id.* at 1415–17.

106. *See id.*

107. *See* United States v. Fattah, 914 F.3d 112, 179–80 (3d Cir. 2019).

108. *See id.* at 179.

109. *Id.*

110. *Id.*

111. *See id.* at 179–80.

112. 936 F.3d 793, 795, 800 (8th Cir. 2019).

113. *Id.*

assault.[114] Prior to trial, Arias learned that K.P. had received mental-health treatment; he moved to compel production of her psychotherapy records from both before and after the alleged assault.[115] The district court denied the motion as to both sets of records, citing the psychotherapist–patient privilege, but ruled that Arias could still question K.P. at trial about a bipolar disorder diagnosis she received before the alleged assault occurred.[116]

At trial, the prosecution asked K.P. about her mental health on direct examination.[117] When K.P. testified that she had been diagnosed with depression after her parents divorced, and the prosecution asked if she had "been diagnosed with anything else[,]" K.P. replied: "Yes. . . . After [the alleged sexual assault], not the divorce. . . . Anxiety and PTSD."[118] Arias objected and moved for a mistrial, explaining that it was both a Confrontation Clause and *Brady* violation to allow K.P. to testify about her mental health if Arias could not access her psychotherapy records to impeach her.[119] He contended that, without the records, he had no way of knowing whether K.P.'s reported diagnoses were accurate.[120] Further, he argued that the PTSD diagnosis "bolstered the credibility of K.P.'s allegations and that fundamental fairness required that the mental health records be produced to allow for effective cross-examination of K.P. on that point."[121] The court denied the motion and stated that allowing Arias to question K.P. on cross-examination about her pre-existing bipolar disorder was sufficient, so he was not entitled to review her psychotherapy records.[122]

Arias was convicted, and he appealed to the Eighth Circuit.[123] He challenged the district court's denial of his motion for a mistrial regarding K.P.'s statements about receiving a PTSD diagnosis after the alleged sexual assault.[124]

A divided Eighth Circuit panel held that the district court may have violated the Confrontation Clause by allowing K.P.'s testimony about her anxiety and PTSD diagnosis while Arias did not have access to her psychotherapy records.[125] It held that the district court should have reviewed the records *in camera* to determine if the Confrontation Clause gave Arias the right to access them.[126] It reasoned that, without the records, Arias could not have determined whether K.P.'s testimony about anxiety and PTSD was caused by other traumatic incidents.[127] This could

114. *Id.* at 795.
115. *Id.*
116. *Id.*
117. *Id.* at 796.
118. *Id.*
119. *See id.*
120. *See id.*
121. *Id.*
122. *Id.*
123. *Id.* at 797.
124. *Id.* at 799.
125. *Id.*
126. *Id.* at 800.
127. *Id.*

have prohibited him from proffering "alternative theories of defense."[128] Additionally, the records could have revealed that K.P. did not have an anxiety and PTSD diagnosis at all—Arias had no opportunity to learn the truth, and could not effectively cross-examine K.P.'s credibility even though the "case . . . rested entirely on conflicting testimony."[129] Further, according to the Eighth Circuit:

> K.P.'s testimony that she had received a post-assault diagnosis of PTSD tends to substantially bolster her accusation of a sexual assault. The clear implication of the testimony is that an objective medical professional found that she had suffered a traumatic event, and the timing of the diagnosis would tend to suggest to the jury that the assault was that event.[130]

The trial court's decision to allow testimony on K.P.'s pre-assault bipolar disorder diagnosis while Arias could not access her mental-health records "did not address the bolstering issue."[131] The court explained that, once K.P. testified about anxiety and PTSD and the jury considered it, "the Confrontation Clause became implicated" and Arias had a right to cross-examine K.P. effectively.[132] Without access to her mental-health records, that right might have been violated. The Eighth Circuit "remand[ed] the case to the district court . . . [to] conduct[] an *in camera* review of the records to determine the appropriate course of action."[133]

The *Arias* dissent relied on the plurality opinion in *Pennsylvania v. Ritchie* to argue that the Confrontation Clause provides only a trial right related to cross-examination, not a mechanism through which defendants can compel discovery.[134] The dissent explained that the majority's holding conflicted with the *Ritchie* plurality and created a split with the Third, Sixth, Tenth, Eleventh, and D.C. Circuits, all of which held that "the Confrontation Clause does not guarantee a right to compelled discovery."[135] It elaborated that the defendant was not prevented from questioning K.P. extensively about the PTSD diagnosis in order to "explore" her credibility at trial.[136] Plus, "if K.P. had successfully invoked a psychotherapist–patient privilege to prevent cross-examination, then Arias could have moved to strike her direct testimony about PTSD" from the record.[137] Because the Confrontation Clause does not provide defendants with the right to compel discovery from "a third party that might assist . . . in cross-examining a witness," the dissent argued that the majority's decision conflicted with *Ritchie* and improperly

128. *Id.* at 799.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 800.
134. *See id.* at 801–02 (Colloton, J., dissenting).
135. *See id.* at 802.
136. *Id.* at 801.
137. *Id.*

expanded the bounds of the Confrontation Clause.[138]

B. The Confrontation Clause in State Courts of Last Resort After Ritchie

The Sixth Amendment Confrontation Clause applies to the states through the Fourteenth Amendment.[139] Like the federal circuits, state courts vary in their approach to *in camera* review of cross-examination materials. Not every state's highest court, however, has examined *Ritchie*'s Confrontation Clause holding. Of those that have, many do not require any form of *in camera* review; rather, they follow the *Ritchie* plurality and do not allow defendants to request any pretrial discovery materials pursuant to the Confrontation Clause.[140] In these states, so long as the trial court does not hinder the defendant's ability to ask questions of the alleged victim during cross-examination, the defendant's Confrontation Clause right has been upheld.[141]

Other state courts have held that the Confrontation Clause requires trial courts to conduct an *in camera* review of requested materials if defendants can show that the records are necessary to safeguard their right to effective cross-examination. Connecticut, for example, developed this right prior to *Ritchie* in *State v. Esposito*. There, the state supreme court explained that "[i]f the in camera inspection does reveal relevant material then the witness should be given an opportunity to decide whether to consent to release of such material to the defendant or to face having her testimony stricken in the event of refusal."[142] South Dakota has similarly held that a defendant who showed "a reasonable probability that the [requested] records may contain material evidence" was entitled to have the testifying witness's file reviewed *in camera* in the trial court.[143] Rhode Island held, in a case with facts similar to *Ritchie*, that the defendant had a right to access records from the state child-

138. *Id.* at 801.

139. Pointer v. Texas, 380 U.S. 400, 403 (1965).

140. *See, e.g.*, *In re* Crisis Connection, Inc., 949 N.E.2d 789, 797 (Ind. 2011) (finding no Confrontation Clause violation where Indiana's "victim advocate privilege" prevented the disclosure of a victim's counseling records); People v. Turner, 109 P.3d 639, 647 (Colo. 2005) (holding that an organization's refusal to disclose records related to a victim of domestic violence pursuant to a "victim-advocate privilege" did not violate the Confrontation Clause); People v. Hammon, 938 P.2d 986, 992 (Cal. 1997) (declining to hold "that the Sixth Amendment confers a right to discover privileged psychiatric information before trial"); Cockerham v. State, 933 P.2d 537, 540–41 (Alaska 1997) (holding that the trial court's denial of *in camera* review of a witness's juvenile record did not violate the Confrontation Clause); Goldsmith v. State, 651 A.2d 866, 873 (Md. 1995) (holding that the Confrontation Clause does not establish "a pre-trial right of a defendant to discovery review of a potential witness's privileged psychotherapy records"); State v. Thiel, 768 P.2d 343, 345 (Mont. 1989) ("Montana's child abuse confidentiality statute as it applies to file review does not violate a defendant's right to confront his accusers.").

141. *See, e.g.*, Gale v. State, 792 P.2d 570, 583 (Wyo. 1990) (holding that the defendant's "right to confrontation was satisfied when he was allowed to conduct extensive cross-examination of the prosecution witnesses against him").

142. 471 A.2d 949, 956 (Conn. 1994).

143. State v. Karlen, 589 N.W.2d 594, 605 (S.D. 1999).

welfare agency to use during cross-examination.[144] Other state high courts have similar rules as well.[145]

Defendants in state court would benefit from a uniform Confrontation Clause rule, like the rule several states already have, that allows them to request and potentially access (after *in camera* review) materials that would help guarantee an opportunity for effective cross-examination.

III. THE CURRENT UNDERSTANDING OF CONFRONTATION CLAUSE PRETRIAL DISCLOSURES SHOULD BE BROADENED TO SAFEGUARD CRIMINAL DEFENDANTS' OPPORTUNITY FOR EFFECTIVE CROSS-EXAMINATION

As Justice Brennan explained in *Pennsylvania v. Ritchie*, the Confrontation Clause should provide criminal defendants with a broader right than just the opportunity for effective cross-examination at trial.[146] In some cases, allowing defendants to request access to government materials for use during cross-examination will help guarantee the opportunity for effective confrontation of adverse witnesses. Among the federal courts of appeals and the states, the Eighth Circuit's holding in *United States v. Arias* comes closest to the proper reading of the Confrontation Clause.

In this Part, Section A describes why a broader reading of the Confrontation Clause to include an *in camera* review of requested cross-examination materials is necessary to protect the constitutional rights of defendants despite the overlap with the government's requirement to disclose *Brady* materials. Section B explains why allowing a defendant to request cross-examination materials is necessary to guarantee an opportunity for effective cross-examination, particularly when a witness opens the door to a specific line of questioning. Section C explains how *in camera* review of requested cross-examination materials would appropriately balance the competing interests of defendants, witnesses, and the government during criminal trials. Finally, Section D demonstrates how requiring defendants to point to some way they expect requested materials to be necessary during cross-examination is a logical prerequisite to *in camera* review that will help ensure that trial courts are not overburdened.

144. State v. Kelly, 554 A.2d 632, 634–36 (R.I. 1989).

145. *See, e.g.*, Commonwealth v. Bishop, 617 N.E.2d 990, 996 (Mass. 1993) ("[T]he defendant must show, at the threshold, that records privileged by statute are likely to contain relevant evidence. If the judge finds, based on the defendant's proffer, that the records are likely to be relevant to an issue in the case, the judge shall review the records in camera to determine whether the communications, or any portion thereof, are indeed relevant.").

146. Pennsylvania v. Ritchie, 480 U.S. 39, 71 (1987) (Brennan, J., dissenting) ("The creation of a significant impediment to the conduct of cross-examination thus undercuts the protections of the Confrontation Clause, even if that impediment is not erected at the trial itself. In this case, the foreclosure of access to prior statements of the testifying victim deprived the defendant of material crucial to the conduct of cross-examination.").

A. The Need for In Camera *Review of Requested Cross-Examination Materials Under the Confrontation Clause Despite the Government's Compelled* Brady *Disclosures*

The overlap between a defendant's Confrontation Clause right to effective cross-examination and his *Brady* right to exculpatory evidence is not always sufficient to ameliorate the current narrow understanding of the Confrontation Clause. *Brady* materials may cover everything a defendant needs for cross-examination, so in some cases a broader Confrontation Clause standard would not be necessary at trial. This happened in *Ritchie*: the defendant requested access to certain government materials pursuant to both *Brady* and the Confrontation Clause, and the Supreme Court remanded for the trial court to determine, *in camera*, if he was entitled to them under *Brady* (but not the Confrontation Clause).[147] But Justice Brennan still contended that Ritchie suffered a constitutional violation by not being allowed to access the material under the Confrontation Clause.[148]

Justice Brennan's dissent in *Ritchie* points to why a broader Confrontation Clause right for criminal defendants is necessary, even though defendants receive exculpatory and impeachment material under *Brady*. He wrote that courts can violate the Confrontation Clause by denying criminal defendants "access to material that would serve as the basis for a significant line of inquiry at trial."[149] But under *Brady*, a defendant only receives material for which "there is a reasonable probability" that its disclosure will change the outcome of the case.[150] Not all material that would ensure that a defendant can effectively formulate lines of questioning during cross-examination meets this high standard. Justice Brennan explained that the value of some evidence lies in its "more subtle potential for diminishing the credibility of a witness," rather than in its ability to influence the outcome of the proceeding, or even its obvious impeachment value.[151]

Consider K.P.'s psychotherapy records in *United States v. Arias*.[152] Arias did not know what they contained, but it is possible that the records may have opened up new, relevant topics during cross-examination that would otherwise remain unknown. Just because the psychotherapy records did not obviously enable Arias to more effectively impeach K.P. under *Brady* does not mean that they were unnecessary for his opportunity to effectively cross-examine her under the Confrontation Clause. Even though in some cases a defendant's request for disclosure might be identical under the Confrontation Clause and *Brady*, Justice Brennan correctly advocated for a reading of the Confrontation Clause that affords it

147. *Id.* at 58 (majority opinion).

148. *See id.* at 66 (Brennan, J., dissenting).

149. *Id.*

150. *See* United States v. Bagley, 473 U.S. 667, 682 (1985) (plurality opinion); *id.* at 685 (White, J., concurring in part and concurring in the judgment).

151. *Ritchie*, 480 U.S. at 72 (Brennan, J., dissenting).

152. 936 F.3d 793, 796 (8th Cir. 2019); *see supra* Section II.A.2.

"independent significance in protecting against infringements on the right to cross-examination."[153]

Further, prohibiting a defendant from questioning a witness about a relevant topic—even when questions on the topic would invoke confidential material—violates the Confrontation Clause.[154] *Arias* illustrates this. The defendant believed, but was not sure, that reading the alleged victim's psychotherapy records might open up an otherwise-unknown line of questioning, such as whether other traumatic events besides the assault in question caused her to develop PTSD.[155] The trial court allowed Arias to question the witness, K.P., about her bipolar disorder diagnosis even though he could not access her mental health records.[156] But probing K.P. about the accuracy of her PTSD diagnosis without any factual basis for the question might have seemed malicious to the jury. And asking K.P. if she suffered other traumatic events that led to her PTSD diagnosis might have seemed random or desperate. Without accessing the records, the potential harm to Arias of asking K.P. about her mental health without full information might have outweighed the benefit of an attempt to impeach her. Further, K.P.'s psychotherapy records might have contained helpful information that Arias had not thought of. Thus, as Justice Brennan explained, denying a defendant access to material that would "serve as the basis" for cross-examination is tantamount to precluding the defendant from pursuing a line of questioning at trial.[157]

The high-stakes nature of criminal trials requires a stronger protection than the mere ability to ask questions during cross-examination. Ensuring that defendants have the opportunity for effective cross-examination by accessing records that might open up new lines of inquiry or otherwise help challenge a witness is crucial to safeguarding their constitutional rights.

B. The Need for Pretrial Disclosure of Confrontation Clause Materials to Guarantee an Opportunity for Effective Cross-Examination, Especially When the Witness Opens the Door to a Line of Questioning

The *Ritchie* majority effectively held that the Confrontation Clause is satisfied so long as a defendant is not expressly prohibited from any line of questioning at trial.[158] But this narrow understanding does not always give a criminal defendant an opportunity for *effective* cross-examination.[159] Justice Blackmun made this

153. *Ritchie*, 480 U.S. at 72.

154. *See id.* at 52 (plurality opinion) (discussing *Davis v. Alaska*, 415 U.S. 308, 316 (1974), in which the Court held that a defendant could not be prohibited from questioning a witness about his "presumptively confidential" juvenile record).

155. *See Arias*, 936 F.3d at 799.

156. *Id.* at 795.

157. *Ritchie*, 480 U.S. at 66 (Brennan, J., dissenting).

158. *Id.* at 61–62 (Blackmun, J., concurring in part and concurring in the judgment).

159. *Id.*

point in his *Ritchie* concurring opinion.[160] He believed it could violate the Confrontation Clause if a court denies a defendant access to material that "would make possible effective cross-examination of a crucial prosecution witness."[161] Additionally, Justice Brennan wrote that reading the Confrontation Clause as simply a trial right is "inconsistent with [its] underlying values" and changes criminal defendants' right to an opportunity for *effective* cross-examination to merely the right to an opportunity for *some* cross-examination.[162] In some cases, it may be impossible for a defendant to demonstrate that a witness is biased or has a faulty memory without certain pretrial disclosures from the government—particularly those that are not compelled under *Brady*.[163]

This is especially true when a witness opens the door to a particular line of questioning, but the court has denied the defendant access to materials pertaining to that line of questioning. For example, in *United States v. Arias*, the Eighth Circuit did not allow Arias to review K.P.'s psychotherapy records, but allowed K.P. to testify about their contents.[164] Even though Arias could ask K.P. questions about the records during cross-examination, he did not have an opportunity for *effective* cross-examination without reviewing the records himself. Once a witness herself opens the door to a line of questioning, even if the court has previously denied a defendant access to requested cross-examination records, the court should allow the defendant to access the records that would aid in cross-examining the witness about the topic that she put at issue.

Even assuming that the majority of witnesses in criminal trials are truthful, their responses are often practiced and their demeanor is highly coached[165]—which likely puts a defendant at a disadvantage when the trial court does not allow him to access materials about which the witness is testifying. Jurors use nonverbal cues to determine a witness's credibility, even though such cues are easy to misinterpret.[166] And perjury and false testimony can burden a defendant's ability to cross-examine effectively.[167] If a defendant is unable to access materials about which a witness will testify, the defendant is less likely to have an opportunity for effective cross-examination because he may not be able to anticipate flaws in the testimony.

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160. *Id.*

161. *Id.* at 62.

162. *See id.* at 72 (Brennan, J., dissenting).

163. *Id.* at 71–72.

164. 936 F.3d 793, 795 (8th Cir. 2019).

165. *See* Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1079–82 (1991) (summarizing pertinent social science materials and concluding that jurors are unlikely to "make effective use" of demeanor evidence).

166. Robert K. Bothwell & Mehri Jalil, *The Credibility of Nervous Witnesses*, 7 J. SOC. BEHAV. & PERSONALITY 581, 583–85 (1992) (examining mistaken jury reactions to nervousness in a trial setting and arguing that "[w]ho presents the evidence and how they act when they present it may be as important, or even more important, than the evidence itself").

167. *See* Wellborn III, *supra* note 165, at 1080–81 (discussing how cross-examination is considered a "legal engine . . . for the discovery of truth," but jurors are still unlikely to detect a witness's falsehoods during cross-examination (citation omitted)).

An *in camera* review of requested materials could ensure that defendants have access to materials that will safeguard their opportunity for effective cross-examination while also ensuring that a defendant's access is not overbroad.

C. An In Camera *Review of Requested Cross-Examination Materials Can Balance the Interests of Criminal Defendants, Witnesses, and the Government*

An *in camera* review of requested cross-examination materials would facilitate a defendant's access to materials necessary for the opportunity for effective cross-examination while protecting witnesses from disclosures that unnecessarily violate their privilege. While reviewing a defendant's requested cross-examination materials, the trial court can confirm that the defense will not access records that are not necessary to safeguard the defendant's constitutional rights, and can protect the alleged victim's privileged material. This protects the government's interest in protecting victims' privacy, while ensuring the criminal defendant has access to materials that will guarantee his opportunity for effective cross-examination.

In *Ritchie*, Justice Brennan suggested that, instead of an *in camera* review, defense counsel should have direct access to requested materials to evaluate whether they will be useful for cross-examination.[168] His view was that defense counsel was "adequately equipped to determine" whether the requested material would be useful during cross-examination.[169] Although true, this point must be balanced against a state's interest in protecting victims[170]—especially when Confrontation Clause cases arise in the context of juvenile sexual abuse.[171] In *Ritchie*, the majority noted that an *in camera* review would safeguard the defendant's *Brady* right while preserving Pennsylvania's interest in its child victims' ability to speak with counselors without fear that their personal information will be made public.[172] State courts of last resort have reached the same conclusion.[173] And the same concept of balancing interests through *in camera* review can be applied to Confrontation Clause disclosures. Even under *Brady*'s mandatory disclosure requirement (and the Confrontation Clause disclosures proposed here),

168. *Ritchie*, 480 U.S. at 68–69 (Brennan, J., dissenting) ("[U]nless counsel has access to prior statements of a witness, he or she cannot identify what subjects of inquiry have been foreclosed from exploration at trial. Under the Court's holding today, the result is that partial denials of access may give rise to Confrontation Clause violations, but absolute denials cannot.").

Justice Brennan also pointed to *Jencks v. United States*, a case in which the Court, pursuant to its supervisory authority, held that a criminal defendant was entitled to access prior statements of witnesses who testified against him at trial. *Id.* at 68 (citing Jencks v. United States, 353 U.S. 657 (1957)). Because defense counsel was better equipped to analyze the material for its usefulness during cross-examination, Justice Brennan himself wrote for the *Jencks* majority that the required disclosure was not subject to *in camera* review before the defendant gained access to it. *See Jencks*, 353 U.S. at 668–69.

169. *Ritchie*, 480 U.S. at 72 (quoting *Jencks*, 353 U.S. at 668–69).

170. *See id.* at 60 (majority opinion).

171. *See, e.g.*, *id.*; United States v. Arias, 936 F.3d 793, 795 (8th Cir. 2019).

172. *See Ritchie*, 480 U.S. at 60–61.

173. *See, e.g.*, People v. Stanaway, 521 N.W.2d 557, 562 (Mich. 1994).

defendants do not have the right to "unsupervised authority to search through the Commonwealth's files."[174]

D. A Materiality Requirement for Requested Confrontation Clause Materials Can Avoid Overburdening Trial Courts

According to the Supreme Court, *in camera* review is "a relatively costless and eminently worthwhile method to insure" a fair "balance between petitioners' claims of irrelevance and privilege" and a party's need to access materials before and during trial.[175] Trial courts in criminal cases already conduct *in camera* review of contested *Brady* material,[176] as well as in numerous other contexts.[177] Imposing an *in camera* review requirement of requested Confrontation Clause materials for cross-examination would not overburden trial courts, but it would safeguard criminal defendants' constitutional right to confront adverse witnesses.

Further, an *in camera* review requirement would not have to apply to every request a defendant makes for Confrontation Clause materials. Unlike *Brady* exculpatory materials that the government must disclose regardless of whether the defense requests them,[178] courts could follow *Arias* and require defendants to affirmatively request Confrontation Clause materials. This would protect courts from having to review information that the defendant does not think will be useful. Courts could also require defendants to show why they think the requested materials might be material to the opportunity for effective cross-examination. This distinction from *Brady* makes sense given that cross-examination materials may not rise to the level of changing the outcome of a trial, but are still necessary to uphold defendants' right to confront adverse witnesses.[179]

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174. *Ritchie*, 480 U.S. at 59; *see also* United States v. Bagley, 473 U.S. 667, 675 (1985) (majority opinion) (noting that, in the *Brady* context, a "prosecutor is not required to deliver his entire file to defense counsel"); United States v. Agurs, 427 U.S. 97, 110–11 (1976) (same).

175. Kerr v. U.S. Dist. Ct., 426 U.S. 394, 405 (1976).

176. *See supra* notes 50–54 and accompanying text.

177. *See* Brief of Amicus Curiae National Association of Criminal Defense Lawyers in Support of Petitioner at 16, Friend v. Indiana, 141 S. Ct. 162 (2020) (No. 19-1213). The amicus brief explained:

> This Court thus has authorized trial courts to employ in camera review in a variety of contexts where sensitive information is at issue. *See, e.g.*, *United States v. Zolin*, 491 U.S. 554, 572 (1989) (attorney-client privilege); *N.Y. Times Co. v. Jascalevich*, 439 U.S. 1317, 1323 (1978) (journalist's witness interviews); *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 303 (1978) (IRS investigative file); [*United States v.*] Nixon, 418 U.S. [683,] 706 [1974] (presidential communications); *Taglianetti v. United States*, 394 U.S. 316, 317 (1969) (electronic surveillance records). In camera review is not a new or difficult process; courts do it all the time.

Id. at 16–17.

178. *See Bagley*, 473 U.S. at 682 (plurality opinion) (stating that prosecutorial failures to disclose may arise regardless of whether the defendant makes "no request," a "general request," or a "specific request" for *Brady* material).

179. In *Brady* cases, the argument that the prosecution should decide whether evidence is favorable to the defendant has been compared with "appoint[ing] the fox as henhouse guard." DiSimone v. Phillips, 461 F.3d 181, 195 (2d Cir. 2006). The same idea applies here—the prosecution should not decide what the defense will need at cross-examination, but the trial court may serve as the gatekeeper of such evidence.

Requiring defendants to show that requested records might be material to the opportunity for effective cross-examination would make defendants less likely to bombard judges with numerous requests for *in camera* review. The materiality requirement does not have to specifically define what the evidence will reveal—after all, defendants might not be able to predict what the requested records contain. In this context, "material" might be as Justice Brennan imagined—records that would "serve as the basis" for cross-examination would qualify, such as records that would open up a new line of questioning.[180] Take *Arias* as an example. Arias's arguments "made clear" that K.P. testifying about her PTSD diagnosis "presented difficulties different from [her] pre-existing mental-health issues."[181] He did not just blindly request K.P.'s psychotherapy records—he did so with a specific intention to check if he could challenge K.P. by showing that her PTSD diagnosis was not a clear-cut indication that he committed the alleged crime. This type of request could satisfy a defendant's burden of showing why he needs the requested materials.

Additionally, courts developing a materiality standard could look to states that have *in camera* Confrontation Clause review and require defendants to show that the requested records will make their cross-examination more effective. For example, in Michigan, the state supreme court has held that only "where a defendant can establish a reasonable probability that the privileged records are likely to contain material information necessary to his defense, an in camera review of those records must be conducted to ascertain whether they contain evidence that is reasonably necessary, and therefore essential, to the defense."[182]

Massachusetts has handled Confrontation Clause *in camera* review differently. Its approach is closer to Justice Brennan's idea of Confrontation Clause disclosures that still protects trial courts' time. In one case, the Commonwealth's Supreme Court allowed defense counsel to access requested records *before* the judge analyzed them.[183] The court reasoned that judges should not have to act as defense counsel, determining which records may be useful to the defendant's case.[184] Once defense counsel reported which records would be useful at trial, the judge would conduct an *in camera* review of the records' admissibility.[185] The Massachusetts court explained that the judge would have discretion to "enter any orders that are deemed appropriate to ensure that the information contained in the records will not be disclosed beyond the defendant's need to prepare and present his defense."[186]

180. Pennsylvania v. Ritchie, 480 U.S. 39, 66 (1987) (Brennan, J., dissenting).
181. United States v. Arias, 936 F.3d 793, 799 (8th Cir. 2019).
182. People v. Stanaway, 521 N.W.2d 557, 562 (Mich. 1994).
183. Commonwealth v. Stockhammer, 570 N.E.2d 992, 1002–03 (Mass. 1991).
184. *Id.* at 1001.
185. *Id.* at 1003.
186. *Id.*

Imposing a materiality standard for Confrontation Clause disclosure requests will help protect a defendant's right to confront adverse witnesses while respecting the time and effort that trial courts have to put into *in camera* review.

CONCLUSION

Beyond the general public's understanding of cross-examination as an entertaining aspect of legal scenes in television, movies, and books, the Confrontation Clause helps guarantee the right to a fair trial that is critical to the American criminal justice system. To ensure that criminal defendants' constitutional rights are protected at trial, the Supreme Court, as well as lower federal and state courts, should walk back from the *Ritchie* plurality and hold that the Confrontation Clause requires trial courts to conduct *in camera* review of materials that a criminal defendant requests for use during cross-examination—so long as the defendant can point to some way the records might be material. *In camera* review of requested cross-examination materials will protect defendants' constitutional rights while ensuring that the government is not required to make unnecessary disclosures or violate a witness's privilege. The Eighth Circuit in *United States v. Arias* correctly held that a criminal defendant who requested government materials to use during cross-examination of a critical government witness was entitled to *in camera* review of the records to determine if their disclosure was necessary to uphold his Confrontation Clause right. Other courts should follow suit.