**IN THE SUPREME COURT**
**FOR THE STATE OF ARIZONA**

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| R.S. and S.E.,<br><br>Petitioners,<br><br>v.<br><br>Hon. PETER THOMPSON, Judge of the Superior Court of Arizona in and for Maricopa County,<br><br>Respondent Judge,<br><br>and<br><br>TEDDY CARL VANDERS,<br><br>Real Party in Interest. | Arizona Supreme Court<br>No. CR-19-0395-PR<br><br>Arizona Court of Appeals, Division 1<br>No. 1 CA-SA 19-0080<br><br>Maricopa County Superior Court<br>No. CR 2017-132367-001 |

# BRIEF OF AMICUS CURIAE ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONER

**ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE**

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## IDENTITY AND INTERESTS OF AMICUS

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

Amicus AACJ offers this brief in support of Real Party in Interest because preservation and protection of due process in criminal trials touches the core of the mission of AACJ to protect individual rights guaranteed by the Federal and State Constitutions and to resist all efforts to curtail such rights.

## REASONS TO ACCEPT JURISDICTION

Amicus echoes Vanders' concern over the confusion created by the opinion below. *Compare State ex rel. Romley v. Superior Court In & For County of Maricopa (Roper)*, 172 Ariz. 232, 239 (App. 1992) (information "essential" to either justification or cross examination); *State v. Connor*, 215 Ariz. 553, ¶ 11 (App. 2007) (information "necessary" for the same); *State v. Sarullo*, 219 Ariz. 431, ¶ 20 (App. 2008) (requiring a "reasonable possibility"); *State v. Kellywood*, 246 Ariz. 45, ¶ 8 (App. 2018) (same), with Opinion Below (applying the significantly heightened standard outlined infra); *see also* Petition for Review, p. 6.

This Court should also grant review to reconcile the differing burdens for State and Defense in overcoming statutory privileges. *Compare Benton v. Superior Court In and for County of Navajo*, 182 Ariz. 466 (App. 1994) (bypassing in camera review and disclosing Victim's medical records on a showing that they are "needed"), *with* Opinion Below (applying much higher standard for mere in camera review outlined infra); *see also* Petition for Review, p. 7.

Amicus lastly urges review because the threshold test created by the Court of Appeals is unworkable as outlined below. For all these reasons, this Court should accept review, vacate the opinion below, and affirm the standard outlined in *Roper*.

## INTRODUCTION

### The Old Standard

*Roper* required that in order to obtain in camera inspection of privileged records, a defendant show that records were either "essential" to the presentation of the defense or "essential" to the determination of the witness' ability to perceive, recall, or relate events. 172 Ariz. at 23. *Roper's* progeny further honed that holding. As recently as 2018, Division 2 laid out the test in one sentence: "a victim may be compelled to produce treatment records for in camera inspection if the defendant shows a reasonable probability that the information sought … include[s] information to which [he or] she [is] entitled as a matter of due process." *Kellywood*, 246 Ariz. at ¶ 8 (alterations in original) (citing *Sarullo*, 219 Ariz. at ¶ 20; *Connor*, 215 Ariz. at ¶ 10). The approach outlined in *Roper* is similar to the approaches of many several other jurisdictions.[1]

[1] *See, e.g.*, *D.P. v. Alabama*, 850 So.2d 370, 374 (Ala. Crim. App. 2002) (in camera review after sufficient allegation of relevancy and materiality); *State v. Fay*, 167 A.3d 897, 911 (Conn. 2017) (in camera review on a showing of compelling need for, among other things, a claim of self-defense); *Burns v. State*, 968 A.2d 1012, 1025 (Del. 2009) (in camera review after showing of precise articulation of records sought, a compelling basis, and specificity concerning relevant and materiality; *State v. Peseti*, 65 P.3d 119, 128, 134 (Haw. 2003) (allowing access to privileged information on a showing of (1) legitimate need, (2) relevancy and materiality, and (3) inability to obtain the information through less intrusive means); *People v. Graham*, 947 N.E.2d 294, 300 (Ill. App. Ct. 2011) (in camera review after defendant demonstrates materiality and relevancy as to witness' credibility and recognizing that a witness' mental condition can bear on witness credibility); *Commonwealth v. Barroso*, 122 S.W.3d 554, 558-561 (Ky. 2003) (requiring in camera inspection on a showing standard that records of "'crucial prosecution witness' contain evidence probative of ability to recall, comprehend, and accurately relate the subject matter of testimony" and recognizing that mental health issues may affect the accuracy of testimony); *State v. Olah*, 184 A.3d 360, 368 (Me. 2018) (requiring the trial court to make a preliminary determination that the requesting party has satisfied relevancy, admissibility, and specificity requirements prior to in camera review); *People v. Stanaway*, 521 N.W.2d 557, 574 (Mich. 1994) (defendant must show "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" before receiving in camera review of privileged records); *State v. Brown*, 937 N.W.2d 146, 160 (Minn. Ct. App. 2019) (plausible showing of materiality and favorability prior to in camera review); *State v. Duffy*, 6 P.3d 453, 458-59 (Mont. 2000) (in camera review sufficiently balances a defendant's need for exculpatory evidence against the privacy interest of the victim; implying required showing of information that is exculpatory or necessary for defense preparation); *State v. Trammell*, 435 N.W.2d 197, 201 (Neb. 1989) (striking testimony of witness if witness will not submit to in camera inspection after a showing by defendant that failure to produce privileged information is likely to impair defendant's ability to effectively cross-examine the witness); *State v. Gagne*, 612 A.2d 899, 901 (N.H. 1992) (requiring defendant to show by reasonable probability standard that material and relevant evidence is in privileged record); *State v. Luna*, 921 P.2d 950, 953 (N.M. Ct. App. 1996) (in camera review on a threshold showing of materiality); *People v. Arnold*, 177 A.D.2d 633, 634 (NY. App. Div. 1991) (in camera review after showing of reasonable likelihood that the requested records contain material concerning reliability and accuracy of the witness' testimony); *State v. Kholi*, 672 A.2d 429, 436-37 (R.I. 1996) (trial judge's use of in camera review to review victim's counseling records for relevancy and materiality "struck the requisite balance"); *State v. Blackwell*, 801 S.E.2d 713, 727-728 (S.C. 2017) (in

**The New Standard**

The opinion below guts *Roper*. It requires onerous showings from the defense before the trial court can review privileged information in camera. The Court recognized that such review can occur under its newly announced standard only in an "exceptional case." Opinion Below at ¶ 21-22. To demonstrate that a given case meets the "exceptional" criteria, the defense must make the following showing:

1. The defense must overcome the "strong presumption that the privilege prevents access . . . "

   *By*

2. Outlining a document-specific basis for invading the privilege

   *And*

3. Demonstrating either of the following:

   a. That there is a substantial probability that the protected records contain information that is trustworthy and critical to an element of the charge or defense;

      *Or*

   b. That unavailability of the protected records would result in a fundamentally unfair trial.

*Id*. at ¶ 24. The significantly heightened standard required by the opinion below was

deciding whether to conduct in camera hearing, trial court to determine whether disclosure is necessary for proceedings and failure of disclosure is in public interest; to make that determination, trial court to assess importance of the witness to the prosecution and whether records contain exculpatory evidence); *State v. Roya*, 708 A.2d 908, 909 (Vt. 1998) (recognizing the possibility of a case in which due process requires access to privileged information and implying a standard of a "showing of legitimate need for the information"); *State v. Kalakosky*, 852 P.2d 1064, 1074-76 (Wash. 1993) (requiring defendant to make particularized showing of specific reasons for the discovery request before in camera review appropriate); *State v. Robert Scott R., Jr.*, 754 S.E.2d 588, 599 (W. Va. 2014) (permitting in camera inspection on a showing of relevancy and legitimate need).

unnecessary, failed to adequately assess *Roper* and its progeny, and will prove insurmountable for all criminal defendants. As demonstrated below, this Court should vacate the opinion and affirm *Roper*.

## ARGUMENT I

### The Opinion Below Misread *Roper*. In Doing So, the Court of Appeals Overturned a Simple, Workable Standard That Adequately Balanced the Rights of Defendants and Victims.

There was nothing unworkable with *Roper* or its progeny. Compelling reasons are required for the Court of Appeals to overturn its own precedent. *State v. Hickman*, 205 Ariz. 192, ¶ 37 (2003) (citation omitted). Special justification—something more than "a prior case was wrongly decided"—is required. *Id.*

The opinion below does its work overturning *Roper* in Paragraph 20. After assessing other authority on various related issues, the opinion notes that the Court of Appeals was "unable to find a legal basis for *Roper's* broad proposition that a defendant's right to a fair trial creates a constitutional right to pretrial discovery."

There are two significant problems with that conclusion. First, nothing in *Roper* says that a defendant's right to a fair trial creates a constitutional right to pretrial discovery. In fact, *Roper* explicitly recognizes that there is no constitutional right to pretrial discovery. 172 Ariz. at 240 ("[w]e agree" with the plurality in *Pennsylvania v. Ritchie* (citation omitted) that confrontation "do[es] not afford defendants a right to pretrial discovery"). Judge Lankford drafted a concurrence

specifically to dispel any such notion. *Id*. at 241 (Lankford, J., concurring) ("This holding is not premised upon a recognition of a general constitutional right to pretrial discovery"). *Roper*, therefore, did not recognize a constitutional right to pretrial discovery.

Second, in effect, the Court of Appeals concludes that the *Roper* Court got it wrong. Even if that conclusion was correct, it's not a sufficient basis on which to overrule precedent. Without additional work, the Court of Appeals should not have overturned *Roper*. There's no indication that *Roper's* test was unworkable. In fact, by the Court of Appeals' own admission, "defendants have not been successful in challenging the privilege." Opinion Below at ¶ 23. The previous standard, in other words, worked. It adequately shielded privileged information. It's unclear why a more-protective standard was necessary. In practicality, the Courts were not even applying a reasonable probability standard. *Id*. (recognizing that in practice, Courts apply a stricter standard than that of reasonable probability). *Roper* didn't need fixing. The Court of Appeals should have affirmed it. This Court should affirm it now.

Paragraph 21 spends considerable time refuting arguments, presumably from Vanders. The problem is that Vanders didn't actually argue anything the Court of Appeals refuted. The Court of Appeals reasoned that if "mere relevance were enough to defeat [] privilege, it would provide no meaningful protection at all." *Id*. at ¶ 21

(citation omitted). True. It wouldn't. But Vanders didn't argue that "mere relevance" is the appropriate standard for overcoming privilege. Vanders correctly argued that he had "substantial need" for the information. The Court of Appeals noted the Sixth Amendment does not allow a defendant to cross-examine witnesses "in whatever way, and to whatever extent, the defense might wish." *Id*. (citation omitted). True. Confrontation has its limits. But Vanders was not requesting plenary cross-examination ability at trial. Lastly, the Court of Appeals reasoned that exercise of the Victim's privilege will create a conflict—a conflict with the defendant's ability to "perfect his trial presentation." *Id*. Vanders was not seeking perfect trial presentation. Vanders was not seeking unfettered cross-examination. And Vanders did not argue that relevance got the Victim's records in the door.

The Court of Appeals failed to truly grapple with the arguments in *Roper* and the arguments presented by Vanders' counsel. The Court of Appeals did not afford clear and workable precedent the weight it deserved. This Court should. It should vacate the opinion below and reaffirm *Roper*.

## ARGUMENT II

### In Place of the Simple, Balanced, and Workable *Roper*, the Court of Appeals Erected a Standard That Is, In Actuality, A Complete Bar to Discovery. Defendants Cannot and Will Not Meet the Heightened Standard.

The so-called "exceptional case" does not and will not exist. The procedural mechanism underlying this whole dispute, Rule 15.1(g), demonstrates that the Court

of Appeals standard is unworkable and impossible to meet. Vanders sought Victim records through a 15.1(g) motion with the trial court. A 15.1(g) motion, by its explicit terms, requires that the defendant does not have the requested information and cannot reasonably secure it. *See* Rule 15.1(g)(1)(B). Stated in plain terms—the defense doesn't know what it doesn't have. The defendant doesn't know:

- whether there are 7 or 700 pages of medical records;
- whether medical records come from 1 source or several;
- whether diagnoses were made;
- whether medication was prescribed;
- whether medication has proven effective in combating symptoms;
- whether records indicate that a medicine/treatment regimen was being followed; etc.

To obtain in camera review under the standard laid out by the Court of Appeals, a defendant must demonstrate a document-specific basis for the requested documents. The opinion below, for a moment, recognizes the difficulty of this standard. That recognition consists of one dependent clause in one-half of one sentence in a 12-page opinion: "we cannot expect a defendant to know the exact content of the privileged records he has not yet seen . . ." Opinion Below at ¶ 25. Unfortunately, the independent clause that follows still requires a defendant to "demonstrate a document-specific basis for invading the privilege." *Id*. The opinion fails to recognize that it's also unreasonable to outline a "document-specific" basis for documents a defendant has never seen. If a defendant was capable of outlining a document-specific basis for a Rule 15.1(g) request, his counsel wouldn't be making

the request. If the defense already had the documents, defense wouldn't be filing the 15.1(g); defense would be disclosing those documents to the State under Rule 15.2(c)(3).

The case below illustrates how such an unreachable standard will affect defendants in actual trial cases. Vanders' entire trial strategy rests on the jury accepting his self-defense justification. There's no dispute concerning the Victim's manner or cause of death. The dispute revolves, entirely, around whether the killing was justified. In a self-defense case, Revised Arizona Jury Instruction (RAJI) 4.04 requires, among several other elements, that the jury consider whether "a reasonable person *in the situation* would have believed that physical force was immediately necessary" (emphasis added). In this case, however, the Court of Appeals order, renders the modifier "in the situation" dead letter.

*What the Situation Actually Was:*

- Vanders described being abused by the Victim to the 911 operator;
- Vanders described the act being self-defense to officers;
- Defendant described being fearful of Victim based on prior documented assaults;
- Defendant's fear of the Victim was caused/exacerbated by unknowns concerning Victim's mental health issues/lack of treatment.

*The Situation the Jury Will Be Presented With:*

- Defendant describes the act being self-defense to officers.

The Victim's mental health and treatment issues aren't just relevant to the

defense; they are the defense. And preclusion of these records distorts that situation to the point that it bears no resemblance to reality. At his eventual trial, Vanders won't be able to testify concerning *The Situation*. He won't be able to testify concerning the Victim's mental health issues. He's not qualified. He lacks sufficient foundation to substantiate his claims. At best, Vanders will be allowed to testify that he was scared of the Victim. But that's not really the full picture. It's not really *The Situation*. And it doesn't really put the jury in the place of assessing what a reasonable person would have done under the circumstances.

If Vanders were to testify concerning the Victim's actions at the time of the offense (in his words, she was "acting insane" (Response to Petition for Special Action, p. 6)), that testimony must be considered in light of his ability to know whether she was or not. *See* RAJI Preliminary Instruction 10 (instructing the jury to consider a witness' ability to know the things the witness testifies to); Standard Instruction 15 (instructing the jury to consider the reasonableness of the witness' testimony when considered in light of other evidence). And existence, or not, of documents in support of such a claim is of paramount importance to the defense. Testimony concerning the Victim's diagnoses and whether and how she responded to being on or off medication, therefore, is not just relevant. It will likely be the difference between guilt and acquittal. The upshot of the Court of Appeals opinion is this: the defense bar must advise its clients that, given the opinion below, the

possibility of receiving privileged records under Rule 15.1(g) is effectively zero. If the facts in this case don't justify in camera review, it's hard to say that the facts of any case ever will.

## CONCLUSION

*Roper* didn't create a right to pretrial discovery. The defense bar is not requesting perfect trial presentation, unfettered cross-examination, or disclosure of privileged records on a mere showing of relevance. The new standard for in camera review discovery is so high that counsel for defendants must advise clients that the chances of receiving essential, material, and potentially case-dispositive inculpatory information is nil once a claim of privilege is raised. Balancing can be adequately entrusted to the trial court. In camera review adequately balanced victim privacy interests and defendant due process concerns in numerous other jurisdictions and Arizona until the Court of Appeals published the opinion below. There was no reason to overturn *Roper*. This Court should accept review, vacate the opinion below, and re-affirm the standard outlined in *Roper*

RESPECTFULLY SUBMITTED this 10th day of April 2020.

By: */s/ Brian Thredgold*
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