No. 18-1198

In the
# Supreme Court of the United States

WESTLEY A. ALBRIGHT,
*Petitioner*,

v.

TENNESSEE,
*Respondent*.

**On Petition for Writ of Certiorari to the Supreme Court of Tennessee, Middle Division**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether it violates due process to revoke a defendant's eligibility for deferred prosecution based on his refusal to be honest with his treatment provider about the facts of his offense when the defendant was not specifically informed at the time of his conditional *nolo contendere* plea that his therapy would require him to admit to the elements of his offense.

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## STATEMENT OF THE CASE

This case arises out of Tennessee's "judicial diversion" program. *See State v. Dycus*, 456 S.W.3d 918, 925-29 (Tenn. 2015) (explaining the "unique legislative construct" of judicial diversion). Under Tenn. Code Ann. § 40-35-313(a)(1)(A), a court may "defer further proceedings" against certain defendants "without entering a judgment of guilty." *See id.* at 925. Instead, defendants who are found guilty or plead guilty or *nolo contendere* to offenses eligible for the diversion program may, if they consent, be placed on probation upon such reasonable conditions as the court may require for a specified period of time. *See* Tenn. Code Ann. § 40-35-313(a)(1)(A). If a defendant does not violate the conditions of that probation, "then upon expiration of the period, the court shall discharge the person and dismiss the proceedings against the person." *Id.* § 40-35-313(a)(2). A discharge pursuant to the judicial diversion program "is without court adjudication of guilt" and the "discharge and dismissal shall not be deemed a conviction" for purposes of Tennessee law. *Id.* If a defendant violates a condition of the diversionary probation, however, the court may enter the previous adjudication of guilt. *Id.*

Petitioner was initially allowed to participate in this judicial diversion program. Pet. App. 3a. He was indicted on two counts of solicitation of a minor. Pet. App. 2a, 41a. An undercover officer, posing as a mother with a thirteen-year-old daughter, had been communicating with petitioner via email and text message for almost two months. Pet. App. 1a, 42a. According to the officer's affidavit, petitioner had

"expressed many times that he wanted to have sex with both" mother and daughter and had requested naked photographs of the mother and daughter, including topless photographs of the daughter specifically. Pet. App. 1a-2a, 18a n.8, 72a.

The affidavit stated that the undercover officer and petitioner set up a meeting that petitioner believed would result in sexual relations among him, the mother, and her daughter. Pet. App. 42a. When petitioner arrived at the meeting as arranged and was confronted by the officer, he admitted to sending the communications but claimed he had come to the meeting only to get the mother's license plate number. Pet. App. 2a, 5a.

Based on the officer's affidavit, petitioner was charged with two counts of solicitation of a minor in violation of Tenn. Code Ann. § 39-13-528(a)(7) and (a)(8), solicitation of a minor to engage in conduct that, if completed, would constitute a violation of Tenn. Code Ann. § 39-13-506(c) (aggravated statutory rape) and Tenn. Code Ann. § 39-17-1005 (especially aggravated sexual exploitation of a minor), respectively. Pet. App. 2a-3a, 41a. The latter charge, a Class C felony, was dismissed as part of petitioner's plea agreement with the State. Pet. App. 2a-3a, 41a.

Pursuant to his plea agreement, petitioner entered a *nolo contendere* plea to solicitation of a minor to engage in aggravated statutory rape, a Class E felony. Pet. App. 2a; *see* Tenn. Code Ann. § 39-13-528(a)(7), (c). As a result, petitioner was eligible for, and received, judicial diversion. Pet. App. 79a-80a. The court ordered the prosecution in the case deferred pursuant

to § 40-35-313 and placed petitioner on probation for one year. Pet. App. 3a, 80a.

As a condition of judicial diversion, the court ordered that the petitioner register as a sex offender and that he "abide by the Specialized Probation Conditions for Sex Offenders" adopted by the Tennessee Department of Correction. Pet. App. 3a-4a. One of the specialized conditions required petitioner to agree to the following:

> I will attend, participate in, and pay for treatment or counseling with an approved treatment provider as deemed necessary by the Board, the Court or my [Probation] Officer. I will continue in such treatment as instructed for the duration of supervision unless my treatment provider, in consultation with my Officer, instructs me in writing that I have satisfactorily completed treatment.

Pet. App. 4a.

Petitioner selected an approved treatment provider, and that provider, James Welch, conducted an assessment of and established a treatment plan for petitioner. Pet. App. 43a. Petitioner signed off on the objectives listed in the treatment plan, including that he would "admit to 100 percent elements of the offense," "complete a written assessment of responsibility describing all elements of his crime, to include grooming and cover-up actions," and "complete a sexual autobiography which will include all deviant or illegal sexual fantasies or behaviors, the veracity of

which will be verified by polygraph examination or other means." Pet. App. 43a.

During his probationary period, petitioner attended all mandatory group therapy meetings. Pet. App. 45a. But he was hesitant to speak and would "dance around questions." Pet. App. 45a. He did not complete voluntary homework assignments, and Mr. Welch felt petitioner had a problem but was not willing to address it. Pet. App. 45a.

Despite the therapy objectives to which he had agreed, petitioner also refused to admit that he had intended to engage in sexual acts with a minor. Pet. App. 44a. Instead, he claimed that he had a stalker and was attending the meeting to get the alleged stalker's license plate. Pet. App. 5a, 44a. Confronted by Mr. Welch and the others in his group about the weaknesses in his story, petitioner refused to offer any further explanation for his sexual communications with the undercover officer. Pet. App. 44a. In light of petitioner's refusal to admit his sexual intent, Mr. Welch arranged for a specific-incident polygraph. Pet. App. 44a. Mr. Welch informed petitioner that if he passed the polygraph, Mr. Welch would send a favorable report to the probation officer indicating there was no further need for therapy. Pet. App. 44a.

Petitioner failed the polygraph. Pet. App. 44a. Mr. Welch then gave him a final chance to return to therapy, explain why he had failed the polygraph, and admit to lying. Pet. App. 44a. Had petitioner admitted to lying, he could have remained in therapy. Pet. App. 44a. Petitioner, however, continued to deny that he had intended to engage in sexual acts with a minor.

Pet. App. 45a. After other participants in the group therapy begged petitioner to tell the truth so that he could remain in therapy, he changed his story and said he intended to have sex with the mother but not her minor daughter. Pet. App. 45a. Petitioner was subsequently discharged from the program. Pet. App. 46a.

Mr. Welch determined that he could not treat petitioner if he would not admit he had a problem or at least show progress toward admitting he had a problem. Pet. App. 6a, 45a, 60a. He discharged petitioner due to his "failure to comply with his treatment program." Pet. App. 45a.

Mr. Welch and another therapist wrote a letter to petitioner's probation officer, informing her that petitioner had been discharged from the treatment program for noncompliance. Pet. App. 7a, 46a. The letter stated that "[a]lthough [petitioner] appeared to be in compliance with supervision and attended all required treatment groups, he was not able to give a credible statement of responsibility for his offense of conviction." Pet. App. 7a. After receiving the letter, petitioner's probation officer filed a diversion violation report indicating that petitioner had been "discharged from sex offender specific treatment for noncompliance with treatment goals," in violation of the condition of diversion that he participate in sex offender therapy "as instructed." Pet. App. 4a-5a. Petitioner's probation officer requested a warrant to revoke petitioner's deferred prosecution. Pet. App. 46.

After his discharge from the treatment program, petitioner filed a motion asking to be relieved of the

probation condition that he successfully complete a treatment program. Pet. App. 5a, 46a-47a. In his motion, petitioner asserted that "a confession should not be a condition" of probation and that he "d[id] not wish for his probation to be violated merely because he ha[d] refused to admit facts which he asserts are not true." Pet. App. 5a.

The trial court held an evidentiary hearing to consider both the revocation warrant and petitioner's motion. Pet. App. 5a, 47a. Mr. Welch testified that petitioner had been discharged because he had failed to comply with his treatment plan, specifically the necessity that he be "honest." Pet. App. 6a. In Mr. Welch's view, "[b]asically all of the evidence I had indicate[d] that [petitioner] had been lying to me." Pet. App. 6a. Mr. Welch also explained that, even though petitioner had admitted to exchanging the messages in question seeking naked photographs of the daughter and indicating he wanted to have sex with her, he "was not credible in his intentions or his reason or rationale for why." Pet. App. 6a.

The trial court subsequently revoked petitioner's judicial diversion. Pet. App. 8a, 46a. The trial court found that "[petitioner] ha[d] in fact been dishonest with his Sexual Offender Treatment Provider regarding his intentions for committing the offense of solicitation of a minor" and "ha[d] not been truthful about his motivations for committing the crime." Pet. App. 7a. The court entered a judgment of guilt and sentenced the defendant to continued probation, rather than incarceration, but added six months to his term. Pet. App. 8a. As a condition of probation, the court

ordered petitioner to comply with and fulfill the specialized probation conditions for sex offenders established by the Department of Correction. Pet. App. 8a.

Petitioner appealed the trial court's ruling, and the Tennessee Court of Criminal Appeals affirmed. Pet. App. 8a, 41a-64a. The Court of Criminal Appeals refused to "reweigh evidence on appeal" and found "substantial evidence to support the trial court's finding the defendant violated his probation when he was discharged from the treatment program for failing to meet program goals." Pet. App. 64a.

The Tennessee Supreme Court granted discretionary review and affirmed. Pet. App. 1a-33a. It concluded that "a trial court placing a sex offender on judicial diversion or probation that includes sex offender treatment as a condition is not required to inform the offender that his or her failure to admit to certain facts or states of mind in therapy may result in the revocation of his or her judicial diversion or probation." Pet. App. 33a.

## REASONS FOR DENYING THE PETITION

### I. The Decision of the Tennessee Supreme Court Is Correct and Does Not Conflict With This Court's Decisions.

Petitioner's only argument in favor of certiorari is that the Tennessee Supreme Court erred in rejecting his due process claim. Pet. 10. He contends that his "due process rights were violated by a lack of fair notice," contrary to this Court's decision in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), which established that "the loss of liberty entailed by the revocation of probation is a serious deprivation for which an individual defendant must be accorded due process." Pet. 10.

Petitioner's arguments are without merit. Most importantly, *Gagnon* addressed the due process protections applicable to the "loss of liberty" that occurs when a *sentence* of probation is revoked and an individual is subject to imprisonment. *Gagnon*, 411 U.S. at 782 ("Probation revocation . . . is not a stage of criminal prosecution *but does result in a loss of liberty*.") (emphasis added). This case does not involve a loss of liberty. Revocation of judicial diversion results only in the continuation and completion of the defendant's prosecution and the formal entry of judgment. *See Dycus*, 456 S.W.3d at 926 ("[A] grant of judicial diversion precludes the entry of a judgment of guilt, and a sentence may be imposed only after the individual is found to have violated his or her probation."). The court then determines the appropriate sentence, which may be—as in this case—probation. Pet. App. 8a. No precedent of this Court addresses the

due process protections that are applicable in the context of judicial diversion or similar deferred prosecution programs, let alone establishes a rule of "actual notice" with which the Tennessee Supreme Court's decision "conflicts." Pet. 10, 12.

But even if due process required the same protections for revocation of judicial diversion as revocation of probation and resulting incarceration, the Tennessee Supreme Court's decision would be correct and in harmony with the applicable decisions of this Court, including *Gagnon*.[1] The Tennessee Supreme Court correctly held that due process does not require a court to notify a probationer about every specific aspect of a sex offender treatment program and that the notice given petitioner in this case was sufficient. Pet. App. 24a-32a.

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[1] The Tennessee Supreme Court applied to the revocation of judicial diversion the same, more exacting due process requirements that apply to the revocation of probation and resulting incarceration. Pet. App. 24a. It began with the premise that "with respect to the revocation of *judicial diversion or probation*, 'a defendant who is granted probation has a liberty interest that is protected by due process of law.'" Pet. App. 24a (emphasis added) (quoting *State v. Stubblefield*, 953 S.W.2d 223, 225 (Tenn. Crim. App. 1997)). And the court cited federal decisions applying this Court's principle from *Gagnon* that, "since revocation of probation may result in loss of liberty, the Fifth Amendment requires that a defendant be accorded due process." Pet. App. 24a (quoting *United States v. Twitty*, 44 F.3d 410, 412 (6th Cir. 1995)). Because the notice given the defendant satisfies due process even under that more exacting standard, it necessarily satisfies the lesser due process protections that would apply to the revocation of judicial diversion.

An individual potentially subject to sanctions—including the revocation of parole or probation—must be afforded "fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). "Fair notice" requires that a "person of ordinary intelligence" understand beforehand what conduct is prohibited. *United States v. Williams*, 553 U.S. 285, 304 (2008).

The Tennessee Supreme Court correctly concluded that Petitioner had fair notice here. The trial court ordered petitioner to "attend, participate in, and pay for" treatment as a sex offender and to "continue in such treatment as instructed for the duration of supervision" in order to remain eligible for judicial diversion. Pet. App. 4a. A person of "ordinary intelligence" would understand that condition to require that he comply with the conditions of the treatment program—including the requirement that he be honest—to remain eligible for judicial diversion. As the First Circuit has recognized, due process does not require trial courts to give "the fullest, or most pertinacious, warning imaginable" or "to describe every possible permutation, or to spell out every last, self-evident detail," about conditions of probation. *United States v. Gallo*, 20 F.3d 7, 12 (1st Cir. 1994). Nor does it require them to be "precise to the point of pedantry." *Id.* To hold otherwise would make a constitutional case out of every rule or policy applicable to particular treatment programs. *See Staples v. State*, 202 So.3d 28, 34 (Fla. 2016) (noting that sex offender treatment programs "will always have program-specific requirements not embodied by the generic language of the probation condition requiring 'successful

completion' of the program" and courts are not required "to specifically delineate, in each probation order, the program to which an offender is being sent and that program's internal requirements").

In the analogous context of whether a plea bargain has been entered into with full knowledge of its consequences, numerous courts have held that a defendant need not be advised about the particular requirements of mandated therapy, including a requirement that the defendant admit to certain conduct. *See, e.g.*, *Duke v. Cockrell*, 292 F.3d 414, 417 (5th Cir. 2002) (holding, in the context of a *nolo contendere* plea, that "the condition that a defendant admit his guilt as part of a required rehabilitation program is a collateral consequence" about which a defendant need not be expressly informed); *Warren v. Richland Cty. Circuit Court*, 223 F.3d 454, 458 (7th Cir. 2000) (holding, in the context of an *Alford* plea, that "the possibility of probation revocation for failure to admit guilt during mandatory counseling is a collateral consequence of which [the defendant] need not be informed").

Those decisions are not contrary to any decision of this Court, and the same principle applies here. Notice that an individual will be required to participate in a sex offender treatment program is sufficient notice that an individual will have to comply with the rules and regulations of that program.

Moreover, petitioner in this case was sufficiently on notice that he would be required to be honest about his charged offense and given multiple chances to comply before he was discharged. As the Tennessee Supreme

Court recognized, "common sense indicates that a person in the Defendant's position would realize that court-ordered sex offender treatment would involve some acknowledgement of the underlying criminal conduct." Pet. App. 28a; *see also State v. Coleman*, 632 A.2d 21, 23 (Vt. 1993) (Morse, J., concurring) ("[I]t is well known that any therapy treatment begins with recognition of the problem, in this case, an admission of guilt.").

And, even if not aware of that fact initially, petitioner was certainly aware of—but did not object to—the program's requirement of honesty at the outset of treatment when he signed his treatment plan. The plan required, as the first objective, that he "admit to 100 percent elements of the offense" and "complete a written statement of responsibility describing all elements of his crime." Pet. App. 29a n.13, 43a. That plan clearly put defendant on notice of what would be required to "participate" and "continue in" the sex offender treatment, and that additional information is relevant to the due process analysis. As the Ninth Circuit has explained, "in addition to the bare words of the probation condition, the probationer may be guided by the further definitions, explanations, or instructions of the district court and the probation officer." *United States v. Simmons*, 812 F.2d 561, 566-67 (9th Cir. 1987) (internal quotation marks and alterations omitted).

Petitioner was not, as he suggests, discharged from the treatment program simply because he maintained his innocence with regard to his sexual interest in the daughter. Pet. 13. He was discharged "because, while admitting that he told the undercover officer that he

wanted 'topless' photographs of a minor female and that he wanted to have sex with her, he refused to acknowledge during treatment that he had harbored any pedophilic intent." Pet. App. 18a n.8.

He was given—and did not respond appropriately to—several opportunities to comply with the program requirements. Petitioner's treatment provider testified that the explanation petitioner gave for his actions was not credible and that, when the members of the group pressed him to explain its inconsistency, he refused to give further explanation. Pet. App. 44a. The treatment provider allowed petitioner to take a specific-incident polygraph, and, had petitioner passed, he would have been released from therapy. Pet. App. 44a. But petitioner failed and then continued to refuse to provide a credible explanation for the messages indicating he wanted to have sex with the thirteen-year-old girl. Pet. App. 44a. Petitioner was warned again that he would be given one final chance to provide a credible account of his actions, and he again refused to do so. Pet. App. 44a. The trial court found that petitioner "ha[d] in fact been dishonest with his Sexual Offender Treatment Provider regarding his intentions for committing the offense of solicitation of a minor" and "ha[d] not been truthful about his motivations for committing the crime." Pet. App. 7a.

Petitioner was thus given ample notice of—and numerous opportunities to avoid—the consequences of his failure to provide a credible account of his communications with the undercover detective about the thirteen-year-old daughter. That repeated notice is itself sufficient to satisfy due process. *See Staples*, 202

So.3d at 35 (noting that the defendant "was made aware, before being discharged, that continuing to deny sexual misconduct could result in his termination from the program and thereby violate his probation"); *Latson v. United States*, 68 Fed. Appx. 544, 549 (6th Cir. 2003) (holding that a defendant had received fair notice because, in part, his probation officer had at one point "warn[ed] [the defendant] that he was at risk of additional penalties," which constituted "specific notice . . . in addition to the listed terms of his probation").

The Tennessee Supreme Court's decision was thus correct and not contrary to this Court's decisions. The notice provided to petitioner about the requirements of sex offender treatment was sufficient to satisfy due process even if petitioner's physical liberty—rather than just his participation in the diversion program—had been at stake. This Court's review is not warranted.

## II. Petitioner Does Not Point To Any Split of Authority Warranting Certiorari and Admits This Case Involves a "Narrow Issue."

The question presented by this case is not one on which lower courts are divided. Indeed, petitioner has not cited another judicial decision addressing the due process requirements applicable to revocation of judicial diversion, let alone pointed to a developed conflict among the lower courts on that issue that would warrant this Court's review. Nor is the question petitioner asks this Court to review an important one of broad significance; it "is admittedly a very narrow issue." Pet. 12.

### A. There is no conflict among lower courts on the question presented.

Petitioner does not allege a split of authority on the question presented. Nor could he, given the narrowness of the issue. But he does, as the Tennessee Supreme Court did, rely on related decisions from other jurisdictions in his analysis of the merits of the issue. *See* Pet. 12 n.2, 14 n.3.

None of the decisions from other jurisdictions cited in the petition or in the Tennessee Supreme Court's opinion involve revocation of judicial diversion. In each of those cases, a defendant who had been *sentenced* to probation had that sentence of probation revoked, resulting in incarceration. *See, e.g.*, *State v. Katon*, 719 A.2d 430 (Vt. 1998); *People v. Walters*, 627 N.Y.S.2d 289 (Schoharie Cty. Ct. 1995); *State v. Birchler*, No. 00AP-311, 2000 WL 1473152 (Ohio Ct. App. Oct. 5, 2000).

The issue in this case is thus not one that has arisen in any other case cited in the petition or the Tennessee courts' opinions. Moreover, the Tennessee Supreme Court exhaustively catalogued other state and federal decisions to demonstrate that—even when revocation of a *sentence* of probation and a defendant's physical liberty is at issue—almost every court has held that due process does not require a trial court to specifically inform a defendant that he may have to make certain admissions as part of required sex offender therapy. Pet. App. 24a-32a.

The one court to hold to the contrary—the North Dakota Supreme Court—did so in a case in which the

defendant had been convicted in a bench trial and had testified to his innocence at trial. *See Morstad v. State*, 518 N.W.2d 191, 192 (N.D. 1994). That decision did not address whether the same rule would apply to a guilty or *nolo contedere* plea and relied principally on the specific factual circumstances of the sentencing colloquy, i.e. that the trial court had made comments during that colloquy that "[c]ould be fairly read as advising [the defendant that] his probation was *not* contingent on admitting to guilt as part of treatment." *Id.* at 194 (emphasis added). Moreover, as the Tennessee Supreme Court noted, the twenty-five-year-old *Morstad* decision "has not been adopted in any other state jurisdictions." Pet. App. 28a.

In petitioner's words, the issue in this case is "the requisite due process notice to be given a criminal defendant who enters a *nolo contendere* plea *pursuant to judicial diversion*." Pet. 10 (emphasis added). Petitioner has not cited any other decision addressing that issue.

### B. The question presented is narrow and of limited applicability.

The case addresses only the due process requirements applicable to revocation of judicial diversion, specifically judicial diversion under Tennessee's statutory scheme. And its resolution depends on the specific facts of this case, including the precise information given to petitioner prior to and during his treatment. For that reason, the issue is "admittedly a very narrow" one that does not warrant this Court's review. Pet. 12.

As the trial court explained to the petitioner below, it decided, pursuant to Tennessee's judicial diversion program, to "put [petitioner's conditional *nolo contendere* plea] in a drawer or in the court file for one year." Pet. App. 86a. To have the proceedings against him dismissed, petitioner was required to comply with the court's conditions, including that he successfully complete sex offender treatment as instructed. Pet. App. 4a. Under Tennessee's judicial diversion program, that dismissal would have been "without court adjudication of guilt" and would "not be deemed a conviction." *Id.*; *see also Dycus*, 456 S.W.3d at 926 ("It is well-settled that the decision to grant judicial diversion and the judicial diversion probationary period that results do not constitute a sentence.").

Accordingly, as Petitioner indicates, the issue in this case involves the due process requirements applicable in the context of a conditional *nolo contendere* plea entered "pursuant to judicial diversion" under Tennessee's statutory scheme. Pet. 10. This case does not raise the question of whether a defendant who has been *sentenced* to probation after a *nolo contendere* plea can have his probation revoked and be incarcerated based on his refusal to make certain admissions in court-ordered therapy. Because of the "unique legislative construct" of judicial diversion, *Dycus*, 456 S.W.3d at 925, "the trial court initially entered neither a guilty plea nor a sentence" in this case. Pet. 11.

Cases in which a judgment of guilt has been entered and a sentence imposed present significantly different due process issues. Due process "is flexible and calls

for such procedural protections as the particular situation demands." *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972). And the due process inquiry "must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Id.* (quoting *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)).

The precise government function here is revocation of judicial diversion. And petitioner's private interest is to remain in that diversionary program. Petitioner's interest is *not* the "loss of liberty entailed by the revocation of probation" discussed by this Court in *Gagnon*. Pet. 10. Indeed, after the trial court revoked petitioner's judicial diversion, petitioner did not suffer a "loss of liberty"; he remained on probation, though the court extended that probation for six additional months. Pet. App. 65a-68a. Aside from the additional six months, the only action taken by the trial court as a result of petitioner's refusal be honest in his treatment sessions was its entry of the judgment of guilt. Pet. App. 67a, 86a.

The issue in this case thus depends wholly on what type of notice due process requires given the State's interests in an effective judicial diversion program and petitioner's private interest in remaining in that program. And resolution of that "narrow issue," Pet. 12, is dependent both on the specifics of Tennessee's judicial diversion program and the facts of this case. This Court's review of the question presented would thus have little applicability beyond the facts of this case and no applicability outside of the context of

judicial diversion or similar deferred prosecution programs. Certiorari is thus not warranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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