NO. _____

# In the Supreme Court of the United States

MARTY FRIEND,

*Petitioner*,

*v.*

STATE OF INDIANA,

*Respondent*.

*On Petition for a Writ of Certiorari to the Supreme Court of Indiana*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether, and under what circumstances, criminal defendants' Sixth Amendment and Due Process rights entitle them to obtain witnesses' privileged treatment records from private doctors, psychotherapists, or counselors.

## STATEMENT OF RELATED PROCEEDINGS

*Marty W. Friend v. State of Indiana*, No. CV-18-0080-PR (Ind. S. Ct.) (opinion issued and judgment entered January 23, 2020).

*Marty Friend v. State of Indiana*, No. 18-A-CV-02359 (Ind. Ct. App.) (opinion issued and judgment entered October 8, 2019).

*Marty Friend v. State of Indiana*, No. 20D03-1509-FA-000020 (Elkhart Sup. Ct.) (final judgment entered Sept. 20, 2018).

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# In the Supreme Court of the United States

No.

MARTY FRIEND,

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Marty Friend respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Indiana in this case.

## OPINIONS BELOW

The state supreme court's decision (Pet. App. 1a) is reported at 141 N.E.3d 25 (2020), and the opinion of the court of appeals (Pet. App. 3a) is reported at 134 N.E.3d 441. The trial court's decisions (Pet. App. 29a-49) are not reported.

## JURISDICTION

The Supreme Court of Indiana denied discretionary review of Petitioner's appeal on January 23, 2020. Pet. App. 2a. This Court has jurisdiction under 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor * * * *.

U.S. Const. amend. VI.

The Fourteenth Amendment provides in relevant part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law.

U.S. Const. amend. XIV.

The provisions of the Indiana Code at issue in this case are reproduced in the appendix. Pet. App. 50a-53a.

## INTRODUCTION

This petition concerns the critically important issue of criminal procedure: whether the Constitution entitles criminal defendants to obtain witnesses' treatment records from private doctors, psychotherapists, and counselors when those records are protected from disclosure under some sort of privilege.

This issue arises every day in criminal prosecutions. And it has special salience in rape and domestic abuse

cases, where victims usually seek treatment from a doctor, therapist, or counselor—and governments understandably hope to shield records of those treatments from public disclosure. Yet in such cases, "there often are no witnesses except the victim," *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 60 (1987), and sometimes victims misunderstand, misrepresent, or simply fabricate allegations of abuse, especially when they suffer conditions inhibiting their ability to perceive, understand, or relate those events. Privileged records can contain critical information about such conditions—and often, it is evidence that exists nowhere *outside* those records: a diagnosis. Privileges that block access to such treatment records may therefore put the *only* evidence proving the defendant's innocence entirely beyond reach.

Such privileges therefore threaten core constitutional rights of the accused. These include the Sixth Amendment's Confrontation right, which, as its "main and essential purpose" protects "the right to effective cross-examination," and to be armed with the evidence necessary to conduct it. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 678, 679 (1986) (internal quotations omitted). They also include Sixth Amendment Compelled Process, which requires governments to *assist* defendants by "compelling" the appearance of witnesses and the production of documents in private hands—not erect roadblocks in their paths. And of course, there is of Due Process, the backstop of all criminal defense rights, which protects the "fundamental fairness of trials," *Ritchie*, 480 U.S. at 56—a fairness that is lacking when the accused is denied critical defense evidence.

Yet determining whether these rights entitle the accused to obtain a witness's privileged treatment records

has led to an "incredible hodgepodge of conflicting approaches and procedural conundrums"—a conflict that encompasses all the federal circuits and 22 of the States. Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 86 Or. L. Rev. 1, 4 (2007). Indiana, where this case arises, is the extreme outlier in this conflict. The vast majority of jurisdictions recognize *some* mechanism for the accused to obtain privileged documents in virtually any circumstance—mitigated by the protective mediating filter of *in camera* review by the trial court. But Indiana is one of only a handful of jurisdictions that will recognize instances in which private treatment records can be categorically denied.

This is a compelling case to address Indiana's improper standard, and the full breadth of this widespread conflict, because the trial court's violations of Petitioner's constitutional rights caused him tangible harm. The trial court first denied Petitioner access to counseling records that would have revealed whether his putative victim suffered a condition making it likely that she fabricated events of alleged abuse. Then it used uncertainty about that undisclosed diagnosis as justification to bar Petitioner from presenting *his own* evidence and expert testimony about her condition. These actions not only precluded Petitioner from showing that the alleged victim's behavioral problems made her likely to fabricate abuse allegations, they also effectively barred him from countering the prosecution's narrative that those behavioral problems were caused by the alleged abuse. This case therefore provides the Court with an important opportunity, on sympathetic facts, to bring order to the "current, confused state of the law," Fishman at 5.

The petition for a writ of certiorari should be granted.

## STATEMENT

### A. Background

1. The common law recognized only two kinds of privileges: those for communications between husbands and wives, and between attorneys and their clients. 8 John Henry Wigmore, *Evidence* § 2290, at 542 (John T. McNaughton ed., 1961). In the Nineteenth Century, new types of privileges began to emerge. These began with protections for physician-patient communications, *id.* § 2380, at 819-820, and gradually expanded to cover communications to "psychiatrists, psychologists, or social workers." Fishman at 5. Now privileges for medical, psychological, and counseling records exist in every state. See Edward J. Imwinkelreid, *The New Wigmore: A Treatise on Evidence: Evidentiary Privileges* app. d. And the logic behind them is obvious. As this Court recognized in creating a federal psychiatrist-patient privilege, effective treatment "depends upon an atmosphere of confidence and trust." *Jaffee* v. *Redmond*, 518 U.S. 1, 10 (1996). Even "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Ibid.*

These new privileges came with greater capacity to hide critical evidence than their common-law forbearers. The attorney-client privilege and spousal privilege might shield particular *conversations* and *witnesses,* but they otherwise leave other avenues of investigation completely open. Yet the only avenue for investigating whether a witness suffers from a condition that affects her ability to perceive, understand, and accurately relate events is *a diagnosis*. And treatment privileges prevent that diagnosis from being uncovered.

2. This paramount evidentiary need motivated the Court in *Pennsylvania* v. *Ritchie* to recognize that criminal defendants possess a constitutional right to access privileged treatment records. The Court held that even though such privileges serve the most "compelling" of interests, they still cannot "prevent[] disclosure in all circumstances." 480 U.S. at 57. Accordingly, borrowing a standard from *Brady* v. *Maryland*, 373 U.S. 83 (1963) and its progeny, the Court held that "Due Process" demands criminal defendants be entitled, in spite of any privilege, to obtain records containing "material" evidence—*i.e.*, evidence that "'there is [some] reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding might have been different.'" *Ritchie*, 480 U.S. at 57 (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985)). And the Court outlined a middle-way procedure that would "serve [Defendant's] interest" in obtaining material information "without destroying the * * * need to protect the [privileged information]"—*in camera* screening by the trial judge to determine what, if anything, should be disclosed to the defendant. *Ritchie*, 480 U.S. at 61.

Yet *Richie* left much undecided, including about the basic constitutional rights at stake. No majority coalesced around the ultimate source of this privilege-piercing right—with a 4-justice plurality looking only to Due Process, and rejecting the Sixth Amendment's Confrontation Clause as an alternate source, out of fear of transforming that "*trial* right" into "a constitutionally compelled rule of pretrial discovery." *Id.* at 52 (Powell, J., joined by Rehnquist, C. J., White, and O'Connor, J.J.). Yet three justices claimed it existed in *both* Due Process *and* the Confrontation Clause—Brennan joined by Marshall in

dissent, *id.* at 66-72, and Blackmun in his separate concurrence, *id.* at 61-66. And the justices only found themselves resorting to Due Process only after rejecting the Compulsory Process Clause as a potential source, determining its application in "*this* type of case" to be too "unsettled." *Id.* at 56 (emphasis added). Even so, the Court expressly declined to say "whether and how the guarantees of the Compulsory Process Clause" might "differ from those of the Fourteenth Amendment" in *other* types of cases. *Ibid.*

*Ritchie* also sowed uncertainty about the privileges it pierced. The privilege at issue in *Ritchie* was relatively narrow, "subject to 11 specific exemptions," including one allowing disclosure of privileged records "to a court of competent jurisdiction pursuant to a court order," *id.* at 43-44 (quoting Pa. Stat. Tit. 11, 2215(a)(5)). The Court expressly left open "whether the result in this case would have been different" if the state had asserted more "*absolute* authority to shield its files from all eyes"—through a privilege that "protected the * * * files from disclosure to *anyone*, including law-enforcement and judicial personnel." *Id.* at 57, 58 & n.14 (emphasis added). Further still, since the records at issue in *Ritchie* belonged to a government agency—the state's Children and Youth Services—and *Ritchie* borrowed *Brady*'s materiality standards and Due Process, questions remained whether its rule would apply if the records were in the possession of private actors who were not subject to *Brady* obligations.

*Ritchie* thus "barely scratched the surface" of a criminal defendant's right to obtain privileged records, Fishman at 4, and what it did decide has been "inconsistently interpreted," leading to nationwide divisions on its application. Kenneth M. Miller, Nixon *May Have Been Wrong,*

*But it is Definitely Misunderstood* 51 Willamette L. Rev. 319, 349 (2015).

3. Indiana is the outlier in this panoply. It adopted *Ritchie*'s "plurality view" that the Sixth Amendment is completely inapplicable to "pre-trial production of information," because Confrontation is only a "'trial right[].'" *In re Crisis Connection, Inc.*, 949 N.E.2d 789, 797 (Ind. 2011) (quoting *Ritchie*, 480 US. At 53 n.9). And it has refused to expand *Ritchie*'s Due-Process based rule to instances where records are covered by "absolute" privileges that "prohibit all disclosure," or are in the hands of private third parties—even as it acknowledged that other courts were going different ways. *Id.* at 799 (citing cases).

It held instead that in these instances, the accused enjoys only a very watered-down right to obtain privileged treatment records. *Id.* at 800. Whereas *Ritchie* provided an *absolute* right to material information in privileged records, Indiana instead adopted a privilege-specific "balancing approach," under which courts are required to "'weigh the interest advanced'" by a particular privilege "'against the inroads of such a privilege on the fair administration of criminal justice,'" in determining whether a criminal defendant would be able to access records protected by the privilege. *Ibid.* (quoting *United States* v. *Nixon*, 418 U.S. 683, 711-712 (1974)).

And whatever door this "balancing approach" leaves open in theory slams shut in application, as the test is slanted inexorably against disclosure. In analyzing a request for private records covered under the absolute "victim advocate privilege" in Ind. Code § 35-37-6-9, the court found the legislature had a "strong interest in maintaining the confidentiality of these records," 949 N.E.2d at 802, to avoid "'chill[ing]'" the "'atmosphere of confidence and

trust'" "necessary for effective treatment." *Id.* at 801 (quoting *Jaffee*, 518 U.S. at 10, 11-12). And it determined this interest was "not outweighed by the fair administration of criminal justice" when the defendant enjoys "access to other sources of evidence" and "the primary function of groups protected by the victim advocate privilege is * * * to provide counseling," not investigate crimes, making it "unlikely" that those records would contain evidence that is unobtainable elsewhere. *Ibid.* For that reason, the Court held that criminal defendants categorically "do[] not have a constitutional right to an *in camera* review" of the files of those protected by the "absolute" victim advocate privilege—ever. *Ibid.*

The results will be the same for virtually any privilege, because this test weighs an "interest" common to *all* treatment privileges against discovery rights that *all* criminal defendants enjoy in *every* case and a non-investigatory purpose shared by *all* physicians, psychiatrists, and counselors. That calculus goes against the defendant every time—a fact that the court of appeals confirmed in this case.

### B. Factual Background

1. Marty Friend stands accused of molesting his daughter A.F.—whom he and his then-wife Kathy adopted from a Russian orphanage in 2010 when A.F. was seven. Pet. App. 4a. The only evidence of the molestation came from A.F. herself. Pet. App. 6a-7a. And all admit A.F. has a history of disturbed behavior.

The jury heard that A.F. had trouble at home, experiencing difficulty bonding with her parents, especially Marty, whom she would taunt with cruel names like "idiot," "jerk," "stupid," "liar," "mean," "annoying," "dumb

loser," and "moron." Tr. Vol. V, p. 205. She also had great difficulty at school, where her insults continued against teachers, Tr. Vol. IV, p. 167, and she had problems bullying and being excessively aggressive with other students—so much so that she had 13 referrals to the principal's office. Tr. Vol. V, p. 57-58, 129, 139.

After Marty and Kathy separated and A.F. had to shuttle between two houses, Kathy claimed A.F. became depressed when she had to go to Marty's house. Tr. Vol. IV, p. 67, 69-70. A.F.'s grandmother reported that A.F. would not want to visit Marty, would recoil from hugs with Marty, Tr., Vol. IV, p. 211, and when she would pick A.F. from Marty's, A.F. would be dirty, greasy, and stinky—behaviors that Kathy's new boyfriend, Crane, also observed. Tr. Vol. IV, p. 184-185, 204.

The prosecution attempted to paint these behavioral difficulties as the result of adjusting to life away from Russia, a lack of male role models in her home country, a lack of understanding of American norms, and the alleged abuse. Tr. Vol. IV, p. 63, 139, 167.

But there were inconsistencies in A.F.'s story that were harder to explain. A.F. claimed that Friend was not circumcised when he actually was. Tr. Vol. V, p. 210, 216-220. And during A.F.'s deposition, she claimed Marty's penis was erect during one alleged episode of abuse, only to recant at trial and say it was limp when confronted with testimony from Marty's new girlfriend that Friend was unable to get an erection and was severely allergic to erectile dysfunction medicine. Tr. Vol. VI, p. 21-22.

2. Marty was able to probe these inconsistencies at trial. He also explained that A.F.'s reticence to go to his house was a reaction to the coddled, spoiled environment

A.F. enjoyed with Kathy and her new boyfriend., and her poor hygiene the result of obstinacy. Vol. 4, p. 211, Vol. V, p. 211. And the trial court allowed Marty's expert, Dr. Wingard, to provide some limited, generalized testimony that behavioral difficulties like A.F.'s might stem from reasons other than abuse—such as counseling, changes in family structure, education, medicine, or certain psychological disorders affecting the "conscience." Tr. Vol. VI, 31-35.

Yet there was a vital part of the story that the jury was not permitted to hear—one that severely undermined the likelihood that her stories of abuse were true. The jury was denied evidence that A.F.'s behavioral problems were far worse than the trial testimony suggested. Marty obtained records from the Russian orphanage where A.F. grew up, showing more aggressive behavior, including outbursts that left caretakers questioning whether she was suffering from severe psychological problems. App., Vol. II, p. 38-39, 143; Vol. III, p. 211, 213-217.

Marty also collected text messages between A.F., Marty, and Kathy showing a repeated pattern of lying and bullying that Marty and Kathy were at a loss to address. App., Vol. V, p. 199–App., Vol. VI, p. 23. These texts also contained evidence that A.F. manipulated her parents. App. Vol. IV, p. 203-204, 221, 223, 240; App., Vol. V, p. 34-35, 43, 36, 104, 141. Most ominously, around the time A.F. accused Marty of abuse, she texted him complaining: "good job being a tattle tale to mom about me being rude * * * things will happen to u if u keep being rude dad." App., Vol. V, p. 171.

Marty prepared to have his expert, Dr. Wingard, testify that A.F.'s behavioral problems were signs of one of the pathologies Dr. Wingard mentioned: "Reactive

Attachment Disorder" (RAD), Tr., Vol. II, p. 58-60, a DSM-5-listed disorder that is caused by social neglect and maltreatment, affecting children's ability to develop a "conscience," and leaving them open to a variety of "impulsive" behaviors. Tr., Vol. II, p. 58, 59. It afflicts many orphans, especially those who grow up in the harsh conditions existing in many foreign orphanages. Tr., Vol. II, p. 58. Children with RAD have numerous behavioral problems that mapped exactly on to A.F.'s symptoms. They have difficulty developing emotional attachments, they are "unpredictable," they can "overreact," "steal[]," "exaggerate," be "physical[ly] violen[t]." Tr., Vol. II., p. 60-61, 69-70. Another symptom of RAD is habitual lying, Tr., Vol. II, p. 60, 64, lending credence to Marty's contention that A.F. fabricated the allegations of abuse.

A.F. had been evaluated for RAD by a private social worker Kate Creason—who treated A.F. with Marty's consent and participation before the abuse allegations surfaced. Tr., Vol. II, p. 41-42, 44-45, 80, 94-95, 153. After they did, Marty asked Creason to share the records, but she refused to turn them over, and refused to tell Marty whether she had diagnosed A.F. with RAD. Ex. Vol., p. 18 (Ex. G).

3. Marty then made repeated requests that the trial court order Creason to turn over the treatment records, including a request for *in camera* review, claiming he had a constitutional right to obtain them. App., Vol. II, p. 67, 84, 131-132. Yet the trial court refused, invoking the counselor-patient privilege in Ind. Code § 25-23-6-6-1, and insisting Marty had made "no showing that there is exculpatory information in the subject mental health files," and "did not establish that A.F. suffers from R.A.D"—neither of which Marty could know without access to the files

themselves. Pet. App. 46a, 49a. The trial court also refused to conduct an in *camera review* of the records on the basis that Marty could not "establish that there is exculpatory information in A.F.'s confidential mental health file" or identify "specific documents of an exculpatory nature that were being withheld," which, again, would require detailed knowledge of files he had never seen. Pet. App. 37a-38a. The court then held that while "Defendant is free * * * to elicit deposition and trial testimony from A.F." or "testify as to those behaviors of A.F. which Defendant has personal knowledge," it would not allow anything more. Pet. App. 47a.

The trial court enforced that order to the letter, refusing Marty's attempts to introduce his own evidence of A.F.'s RAD symptoms, including the text messages demonstrating A.F.'s behavior problems, the records from the Russian orphanage, and proffered testimony from Dr. Wingard, who had examined the texts and was prepared to testify that he believed A.F. needed to be tested for RAD Pet. App. 30a-31a. The court rebuffed these efforts, holding that the "topic" had been "heavily litigated already," and nothing more would be allowed, because it had concluded that A.F has not "absolutely been diagnosed with R.A.D."—a conclusion the court reached based on records it refused to review. Pet. App. 30a. The court decided "there is no evidence A.F. suffers from R.A.D. because it has not been established that she does"—because Dr. Wingard candidly admitted he could not diagnose her without having interviewed her. Pet. App. 30a.

Accordingly, while the trial court permitted Dr. Wingard to opine about psychological disorders that impact children's credibility generally, it refused to allow him to explain that A.F. had been experiencing symptoms of

such a disorder. As a result, the prosecution's strategy of claiming A.F.'s *actual* behavioral difficulties stemmed from the alleged abuse went largely unrebutted.

### C. The decision below

1. On appeal, Petitioner challenged both the denial of access to A.F.'s counseling records and the rejection of his own evidence on A.F.'s RAD symptoms, invoking his "Due Process" "Compulsory Process," and "Confrontation" rights. Pet. C.A. Br. 30, 32, 39. The court of appeals rejected both points of error in a divided opinion.

In its review of the trial court's ruling on A.F.'s counseling records, the panel majority expanded upon the Indiana Supreme Court's ruling in *Crisis Connection*. Pet. App. 11a-18a. It interpreted that case as categorically excluding all access to records of "non-government actors"—even though *Crisis Connection* itself theoretically left a door open for accessing those private records, subject to its slanted "balancing approach." Pet. App. 12a.

The court then expanded on that "balancing approach," applying it to a statute that was far less "absolute" than the privilege at issue in *Crisis Connection* itself: the "counselor" privilege that the trial court invoked here. Ind. Code § 25-23.6-6-1. Pet. App. XXa. That statutory privilege contains *eight* different exceptions, several of which anticipate use by the government in criminal proceedings. See *Id.* Sec. 1. (1), (2).

Yet the court of appeals treated this highly qualified privilege the same as *Crisis Connection's* absolute one, because it served the same basic interests, and "[o]ur Supreme Court has held" defendants' constitutional rights are "well protected by 'extensive access to other sources

of evidence.'" Pet. App. 12a (quoting *Crisis Connection*, 949 N.E.2d at 802). The court deemed that general right of access to evidence sufficient even as it refused to recognize that A.F.'s diagnosis could not be obtained elsewhere, and as it went on to affirm the exclusion of the only alternative Marty could come up with.

In doing so, the court concluded that the trial court's exclusion of Marty's proffered evidence about A.F.'s RAD symptoms was proper when there had been no "official diagnosis or, at the very least, a more solid foundation that [A.F.] was actually suffering from RAD." Pet. App. 16a. And it did so despite the fact that the defendant in a criminal case "has no right to subject a prosecuting witness, in a trial on a sex offense, to a psychiatric examination," *Easterday* v. *State*, 256 N.E.2d 901, 903 (Ind. 1970). The court went on to decide that any error was "harmless" in light of the evidence the jury did hear of A.F.'s "ongoing behavioral issues," and the limited testimony from Dr. Wingard that the trial court allowed. Pet. App. 18a.

2. Judge Crone wrote separately, parting ways with the majority on whether the trial court should have granted *in camera* review of A.F.'s treatment records. Pet. App. 22a-28a. Judge Crone disagreed with the majority's decision to apply *Crisis Connection*'s "balancing" approach to a counselor-client privilege that was far less "absolute" than the "victim advocate privilege" at issue in *Crisis Connection* itself, since that qualification suggested "'the legislature anticipated that some interests will trump the need for counselor-client confidentiality.'" Pet. App. 24a. (quoting Pet. C.A. Br. at 29). Judge Crone also noted that *in camera* review would have raised no risk of "chilling" the patient-client relationship because "Creason's records in this case 'originated from

counseling with nothing to do with alleged abuse and everything to do with A.F.'s behavioral issues and failure to bond with Friend, which itself could be a motive for a false accusation.'" Pet. App. 26a (quoting Pet. C.A. Br. 34).

Judge Crone further took issue with the majority's approval of the trial court's demand for particularity in documents Marty had never seen, noting that this presented an impermissible "Catch-22" for the defense—when "Friend had tried every possible avenue to discover whether A.F. suffered from RAD," including "translat[ing] records from the [Russian] orphanage," only to have the trial court hold "that all of it was inadmissible without a diagnoses of RAD, which, of course, Friend could not discover because of the privilege." Pet. App. 24a-25a. Judge Crone also agreed with Marty that the exclusion was harmful, because "this is a rare case where the defendant knows there was a RAD assessment, but just does not know the results." Pet. App. 25a (quoting Pet. C.A. Br. 29). And he likewise agreed with Marty that the entire *Crisis Connection* "balancing approach" is misguided, because "the real world application of the privilege is unbalanced for the State"—saying "[u]nder the facts of this particular case, at least, I must agree." *Ibid.*

While Judge Crone agreed with the majority on the exclusion of Marty's RAD evidence, he did take care to note the intertwined nature of this ruling and the one on A.F.'s treatment records. He concluded that "the trial court's rationale for excluding Dr. Wingard's proffered testimony regarding RAD would stand on much shakier ground if Creason did in fact diagnose A.F. with RAD." After all, the trial court's demand for a "diagnosis" before permitting introduction of the RAD evidence falls apart if that diagnosis existed all along. Pet. App. 28a.

Marty filed a motion to transfer the case to the Indiana Supreme Court, which denied review, although two justices would have taken the case. Pet. App. 1a-2a.

## REASONS FOR GRANTING THE PETITION

The traditional criteria of certworthiness are all present here. There is an acknowledged, wide-spread, and fully developed split on the question presented. And that question is right now leading to different outcomes in similar cases across jurisdictional lines. This case is a compelling one for resolving the split, as it presents an opportunity to resolve several doctrinal divergences at once and lend clarity in an area of the law that badly needs a makeover. And the erroneous rule applied below, which places evidence under lock and key even when absolutely necessary to the defense and unobtainable outside of privileged records, cannot be squared with this Court's precedent or any proper understanding of a criminal defendant's constitutional rights.

### A. There is conflict among the circuits and state high courts on the Question Presented.

Review is warranted because there is an acknowledged, widespread, and entrenched conflict among the circuits and State high courts on the Question Presented. Courts diverge on virtually every avenue that *Ritchie* left open, including whether *Ritchie*'s privilege-busting right extends to treatment records held by private parties, whether the "absoluteness" of the privilege makes a difference in whether it can be busted, and even the doctrinal underpinnings of the constitutional rights at issue, which *Ritchie* left unsettled. And it is clear that Indiana is on the wrong end of a lopsided majority on each of these conflicts—at both the federal and state levels.

1. As for the federal circuits, they are 9 to 2, against, with the majority holding, in a series of rulings *all* involving requests for private medical records, that a criminal defendant has an unfettered right to access material information in privileged counseling records—filtered through the mediating influence of *in camera* review—regardless of the nature of the privilege.

Even before *Ritchie* was decided, the Eleventh Circuit reached this position in *United States* v. *Lindstrom*, 698 F.2d 1154 (11th Cir. 1983), categorically holding that "the privacy interest of a patient in the confidentiality of her medical records and the societal interest in encouraging the free flow of information between patient and psychotherapist * * * must yield to the paramount right of the defense to cross-examine effectively the witness in a criminal case." *Id.* at 1167. (internal quotation omitted). That ruling left no doubt that *any sort* of privilege must fall, no matter how absolute.

Since *Ritchie* was decided, the Sixth Circuit has stated its rule in similarly categorical terms. *Renusch* v. *Berghuis*, 75 Fed. App'x 415, 424-425 (6th Cir. 2003) (applying *Ritchie*'s "require[ments]" to habeas review of Michigan courts' refusal to turn over private medical records).

Other circuits have been even more explicit in holding that criminal defendants' rights trump even "absolute" privileges, deciding that defendants could obtain records covered by the federal psychotherapist-patient privilege that this Court in *Jaffee*, 518 U.S. at 10, determined to be absolute. See *United States* v. *Butt*, 955 F.2d 77, 82, 87 & n.16 (1st Cir. 1992) (holding that defendants "received their due under the Sixth Amendment" when the trial court conducted an *in camera* review of witness's

"privileged" privately held psychiatric records); *In re Doe*, 964 F.2d 1325, 1327, 1329 (2d Cir. 1992) (holding that refusal to allow access to these records "would violate the Confrontation Clause"); *United States* v. *Fattah*, 914 F.3d 112, 179 (3d Cir. 2019) (holding that such refusal is incompatible with a defendant's right to obtain "evidence that is favorable to his case"); *Love* v. *Johnson*, 57 F.3d 1305, 1312, 1314 (4th Cir. 1995) (holding that these records present a situation "indistinguishable in any material respect from *Ritchie*"); *United States* v. *Arias*, 936 F.3d 793, 798-800 (8th Cir. 2019) (holding over the dissent of Judge Coloton, that the Confrontation Clause required such access); *United States* v. *Parrish*, 83 F.3d 430 (9th Cir. 1996) (following the First Circuit's decision in *Butt* and holding that the Confrontation Clause requires access); *United States* v. *Robinson*, 583 F.3d 1265, 1269-1274 (10th Cir. 2009) (so holding, over Judge Tymkovich's dissent).

And while the Fifth Circuit has not directly faced a request for privileged medical records, it has, in a case involving phone records, interpreted *Ritchie* to apply to records in the hands of third parties. *United States* v. *Soape*, 169 F.3d 257, 268-269 & n.6 (5th Cir. 1999). Each of the results above is flatly incompatible with Indiana's approach.

Only the Seventh and D.C. Circuits actually provide any support for Indiana's side at the federal level. Neither has employed Indiana's particular "balancing" approach, but both have held that *Ritchie* does not allow defendants to reach privileged records in the hands of third parties. *United States* v. *Hach*, 162 F.3d 937, 947 (7th Cir. 1998) (holding that "if the documents are not in the government's possession," there can be no "state action" and consequently no violation of *Ritchie*'s Due Process right); *United States* v. *Mejita*, 448 F.3d 436, 458 (D.C. Cir. 2006)

(holding that *Ritchie*'s "right" "is limited to" "certain categories of evidence in the possession of the government"). That is slim federal support for Indiana's side.

2. The state of the States is similarly lopsided. On the state level, as numerous courts have recognized—and in another series of rulings all involving privately-held treatment records—"a majority," comprised of the highest courts of 16 states, "have held that a criminal defendant, upon a preliminary showing that the records likely contain exculpatory evidence, is entitled to some form of pretrial discovery of a prosecution witness's mental health treatment records that would otherwise be subject to an 'absolute' privilege." *Commonwealth* v. *Barroso*, 122 S.W.3d 554, 561 (Ky. 2003); see also *State* v. *Johnson*, 102 A.3d 295, 305 (Md. 2014) (noting that "the majority of state courts * * * agree that a victim's privilege may be subordinate to a criminal defendant's constitutional rights at trial").[1] See also *Advisory Opinion to the House of Representatives*, 469 A.2d 1161, 1166 (R.I. 1983) (holding creation of an absolute evidentiary privilege would violate the defendant's

[1] *State* v. *Slimskey*, 779 A.2d 723 (Conn. 2001); *Burns* v. *State*, 968 A.2d 1012 (Del. 2009); *Lucas* v. *State*, 555 S.E.2d 440 (Ga. 2001); *People* v. *Foggy*, 521 N.E.2d 86 (Ill. 1988); *State* v. *Neiderbach*, 837 N.W.2d 180 (Iowa 2013); *Commonwealth* v. *Barroso*, 122 S.W.3d 554 (Ky. 2003); *Commonwealth* v. *Stockhammer*, 570 N.E.2d 992 (Mass. 1991); *People* v. *Stannaway*, 521 N.W.2d 557 (Mich. 1994); *State* v. *Hummel*, 483 N.W.2d 68 (Minn. 1992); *State* v. *Duffy*, 6 P.3d 453 (Mont. 2000); *State* v. *King*, 34 A.3d 655 (N.H. 2011); *State* v. *Trammell*, 435 N.W.2d 197 (Neb. 1989); *State* v. *Blake*, 63 P.3d 56 (Utah 2002); *State* v. *Green*, 646 N.W.3d 298 (Wis. 2002); *Gale* v. *State*, 792 P.2d 570 (Wyo. 1990).

constitutional rights to confrontation and compulsory process).

Only six states agree with Indiana that there are instances in which records might remain completely off-limits for the accused. California and Maryland say this occurs *only* when the records are in the hands of third parties. *People* v. *Hammon*, 938 P.2d 986, 991 n.3 (Cal. 1997) (calling it a step too far "in a direction the United States Supreme Court has not gone" to hold that a defendant's constitutional rights require turnover of private records that were never in "the government's possession"); *Goldsmith* v. *State*, 651 A.2d 866, 873 (Md. 1995) (finding "no common law, court rule, statutory or constitutional requirement [providing] that a defendant be permitted pretrial discovery of privileged records held by a third party").

Arkansas, Colorado, Pennsylvania, and Utah say this occurs *only* when the privilege is "absolute." *Johnson* v. *State*, 27 S.W.3d 405, 411, 412, 413 (Ark. 2000) (holding, over a dissent by Justice Brown, joined by Justices Imber and Thornton, that the "absolute privilege" in Ark. R. Evid. 503 "preempts" a criminal defendant's "constitutional right to present his defense"); *People* v. *Turner*, 109 P.3d 639, 644, 647 (Colo. 2005) (holding that records covered by the "absolute" privilege in Colo. Stat. 13–90–107(1)(k)(I), were not subject to *in camera* review); *Commonwealth* v. *Wilson*, 602 A.2d 1290, 1267-1297 (Pa. 1992) (holding, with Judge Larson concurring, joined by Judge Papadakos and Judge Zapala dissenting, the same for records covered under the "absolute" privilege in 42 Pa. Cons. Stat. § 5945.1(b)); *State* v. *Gomez*, 63 P.3d 72 (Utah 2002) (holding the same for an absolute privilege for "rape crisis counselor" records in Utah Code Ann. § 78-3c-4).

Only North Dakota joins Indiana in holding *Ritchie* distinguishable, and records unavailable, when *either* of these conditions are met. *State* v. *Spath*, 581 N.W.2d 123, 126 (N.D. 1998) (distinguishing *Ritchie* because the privilege for medical records in North Dakota Rule of Evidence 503 had stronger protections than the statute at issue in *Ritchie*, and neither the prosecutor nor any other state agency "held [the] records").

Further, much of the support for Indiana's position within this minority is qualified. Maryland, for example, disallows only *pretrial* access, *Goldsmith*, 651 A.2d at 873, still allowing for a right of access "*at trial*." *State* v. *Johnson*, 102 A.3d 295, 306 (Md. 2014) (emphasis added).

3. Even within the lopsided majority of jurisdictions that allow unconditional access, there are substantial doctrinal divisions. Courts differ first on the source of the right at issue. Some depart from the *Ritchie* plurality and hold that this right comes from the Sixth Amendment right of Confrontation. E.g., *In re Doe*, 964 F.2d at 1329; *Vitale*, 459 F.3d at 195. Some say it is a legitimate extension of *Ritchie* to apply it to third parties or to pierce "absolute" privileges. E.g., *State* v. *Cressy*, 628 A.2d 696, 704 (N.H. 1993) ("[A] defendant's rights are no less worthy of protection simply because he seeks information maintained by a non-public entity."). And some read *Ritchie*'s conflation of Compelled and Due Process as limited to its facts, giving the former independent operation when records are in third-party hands. E.g., *Barrosso*, 122 S.W.3d at 560.

This disagreement on fundamentals is a problem, because it influences how courts apply the right in practice. To provide one example, the Court has not extended Confrontation rights to sentencing, *Williams* v. *New York*, 337

U.S. 241 (1949), so some formulations limit the right to access privileged material to the guilt phase of the proceeding, saying the defendant must demonstrate that "the records will be necessary to a determination of guilt or innocence." See, e.g., *State* v. *Green*, 646 N.W.2d 298, 310 (Wis. 2002). Others finding different origins for the right say the records requested can be "material to guilt *or* punishment." E.g., *Barroso*, 122 S.W.3d at 564 (Compelled Process).

There is also disagreement in the substantial majority that allows for universal access on the threshold showing a defendant must make to obtain *in camera* review in order to obtain it. On *some* things, "there appears to be a unanimous consensus," such as the *nature* of the showing that the defendant must make, at least "in sexual-assault and child abuse cases." Fishman at 34. The request for records must be more than a "fishing expedition," *Stanaway*, 521 N.W.2d at 576 (quoting *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, 221 (1951)), and "a defendant must do more than speculate" that the privileged records "might contain statements about the incident or incidents that are inconsistent with the complainant's testimony at trial." Fishman at 37 & n. 143 (citing cases). After all, that would make *in camera* review required "in virtually every such case." *Id.* at 38. Rather, the courts are united that the defendant must demonstrate a belief that the records likely will reveal some "evidence probative of the witness's ability to recall, comprehend, and accurately relate the subject matter of the testimony." E.g., *Barroso*, 122 S.W.3d at 563.

Yet the courts differ once again about how strong that belief must be. Some require a "reasonable ground to believe" the evidence exists. *Peeler*, 857 A.2d at 841. Some

are more relaxed than that, requiring only a "good faith belief, grounded on some demonstrable fact," *Stanaway*, 521 N.W.2d at 574. And some are stricter, requiring closer to "reasonable certainty." *State* v. *Blake*, 63 P.3d 56, 61 (Utah 2002) (internal quotations omitted). Plenary review is needed to correct all of these conflicts.

**B. The decision below is incorrect.**

1. Review is also necessary because the court of appeals is incorrect. If the lower court had done no more than follow Indiana precedent, it would still be wrong, because Indiana's "balancing" approach adopted by the Indiana Supreme Court and followed in this case is completely broken. There can be no "balancing" of interests to be done here. The Constitution is "the supreme law of the land." U.S. Const. art. VI. In any balancing contest between the constitution and a privilege statute—state or federal—the constitution must prevail.

To consign a criminal defendant's core constitutional rights to second-class status, so that they might stand on equal footing with statutes that infringe upon them, is fundamentally misguided. And the particular balancing employed here is doubly problematic, because Indiana's idea of "balancing" is not balancing at all: the accused's constitutional rights always lose—even when the information the defendant needs is unavailable from any other source. Every time, "relevant evidence is shielded by privilege for some purpose other than enhancing the truth-seeking function of a trial, [and] the danger of convicting an innocent defendant increases." *Stanaway*, 521 N.W.2d at 567.

Unsurprisingly, the sources Indiana draws upon to support adoption of this balancing approach, all of which predate *Ritchie*, provide no support for the idea that the

constitutional rights of a criminal defendant should ever be *balanced* against the interests served by privilege statutes. Indiana relied upon *United States* v. *Nixon*, 418 U.S. 683 (1974). *Crisis Connection*, 949 N.E.2d at 801. But *Nixon* involved no criminal defendant—at least none seeking constitutional protection. It involved the Watergate Special Prosecutor—and the one claiming constitutional rights was the one claiming privilege—the President of the United States. *Crane* v. *Kentucky*, 476 U.S. 683 (1986) involved no assertion of privilege. It involved only a defendant's claimed right to challenge exclusions of evidence on Due Process grounds. And *Rovario* v. *United States*, 353 U.S. 53 (1957) involved no constitutional rights—only the particular contours of a particular privilege. While, as the Indiana high court mentioned, *Rovario* referenced the "individual's right to prepare his defense," 949 N.E. at 801 (quoting 353 U.S. at 62), it did so in the most generic sense. So Indiana's precedent lacks both logical and doctrinal foundation.

And the court of appeals did not merely follow this precedent, it improperly expounded upon it, by applying Indiana's balancing approach to a context it was never meant to handle—to bar a criminal defendant from obtaining records even when covered under a statutory privilege that is *not* absolute. That is flatly incompatible with *Ritchie*.

2. The legal maneuvering Indiana employs to develop its weakened, located-nowhere, slanted balancing test for access to privileged records is also fundamentally wrongheaded. Indiana's (and others') acceptance of the *Ritchie* plurality's conclusion that the Confrontation Clause has no application to a defendant's request for privileged records makes no sense. The "main and essential purpose" of

the Confrontation Clause is to protect "the right to *effective* cross-examination," and to be armed with the evidence necessary to conduct it. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 677, 678 (1986) (internal quotations omitted and emphasis added). No minimally "effective" cross-examination can be conducted while the accused is denied material evidence in privileged records necessary to cross-examine the key witness in any trial—when such evidence could literally be the difference between innocence and guilt, life or death. Recognizing that fact does not "transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery," as the *Ritchie* plurality feared. 480 U.S. at 52 (Powell, J., joined by Rehnquist, C. J., White, and O'Connor, J.J.). A criminal defendant like Marty is not asking the court to create new, constitutionally imposed avenues for obtaining evidence. He is simply asking that the *currently available* avenues for obtaining evidence not be blocked by statutory privilege.

Nor does such recognition risk expanding upon Confrontation's roots as a "trial right." *Ibid.* This information is not being pursued as an academic exercise, nor is it sought in service of some procedure collateral to the trial itself, like a probable cause hearing, which is properly regarded as separate from trial. See *California* v. *Green*, 399 U.S. 149, 157-158 (1970). Rather, it is being pursued for *trial*, so that the information may be used during cross-examination, making it a proper part of the trial itself. If there is any doubt of that fact, this case is the perfect example of why: The refusal to grant *in camera* review of A.F.'s records here affected the entire course of the trial, fatally hindering Marty's ability to introduce *any* evidence about A.F.'s RAD symptoms. This is because, as Judge

Crone noted, Pet. App. 22a-23a, 27a-28a, the trial court cited the lack of a "definitive" RAD diagnosis as grounds to exclude Dr. Wingard's opinion that A.F.'s behaviors were consistent with RAD. If A.F.'s counseling records had been turned over, it might have turned out there had been a diagnosis all along. It requires blinders to suggest that this error was fundamentally divorced from the trial.

3. The artificial restraints that Indiana (and others in the minority) put on *Ritchie* are also improper. It makes no difference how "absolute" a privilege is. This Court's cases demonstrate that virtually *every* privilege must fall before a criminal defendant's constitutional rights. Even vaunted common law privileges like the marital privilege do not stand up against those rights. *Crawford* v. *Washington*, 541 U.S. 36 (2004). Indeed, the Court has left open whether the granddaddy of *all* common law privileges—the attorney-client privilege—must yield against a criminal defendant's rights. *Swidler & Berlin* v. *United States*, 524 U.S. 399, 409 n.3 (1998). And as the Sixth Amendment "Confrontation right concede only to evidentiary restrictions that existed at common law," that puts the newer crop of treatment-related evidentiary privileges on even lower footing than their common law forbearers. *Giles* v. *California*, 554 U.S. 353, 358 (2008) (internal quotation omitted). Indeed, even as this Court created one of these treatment privileges in *Jaffe* and made it absolute, it recognized that "there are situations in which the privilege must give way." 518 U.S. at 18 n.19. And that is the only constitutionally permissible result.

In any event, the idea inherent in giving greater protection to "absolute" privileges—the fewer loopholes the better—again gets constitutional rights backward. Normally with tailoring, the Court looks to see if the statute

intrudes on constitutional liberties as *little* as possible. Here, *maximal* intrusion on constitutional liberties is regarded as preferable. That cannot be right.

It was likewise improper for Indiana to misread *Ritchie* as limited to the *Brady* and government-possessed records. It may have been natural enough for the court to reference *Brady* standards when it was adopting *Brady* standards of materiality and *in camera* review—and, after all, the records at issue in the case *were* governmental records. But the references in *Ritchie* to *Brady* obligations mean nothing at all in determining whether *Ritchie*'s Due Process right applies when the records being pursued are not in government hands. This is because *Ritchie* draws upon concepts of Due Process that are broader than *Brady*, protecting the "fundamental fairness of trials," *Ritchie*, 480 U.S. at 56, which implicate the legal system as a whole, not simply the behavior of the prosecution. Indeed, if the right described in *Ritchie* were nothing more than a right to obtain material that the prosecution already had to turn over under *Brady*, then the right would mean nothing at all. Limiting *Ritchie*'s Due-Process right only to information in government hands would therefore be completely arbitrary.

4. This is especially true because Compulsory Process should pick up wherever Due Process leaves off when a criminal defendant "seek[s] in camera review of records that are possessed by a private entity." Fishman 62. Accordingly, Compulsory Process may have lain dormant in *Ritchie* itself, providing no more than Due Process already allowed, but that was only because it was not needed in *Ritchie*. The government was already a party in the case. It already had an obligation to turn over records of its own volition. The trial court did not need to access any

other powers to order they be turned over. But when records are in the hands of a private party who is *not* a part of the criminal prosecution, the right of Compelled Process comes roaring to life, because that right conveys "an imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or the defense." *Nixon*, 418 U.S. at 709. And it does so regardless of privilege claims, as in *Nixon* itself. Accordingly, the right to Compelled Process requires all members of the criminal process—be that the legislature or the courts—to do their part in facilitating such access, not hindering it by putting material documents behind privilege walls. For all these reasons, the lower court's ruling was wrong, as was the precedent it applied. And this Court's intervention is needed to correct these serious errors.

### C. The issue is of obvious national importance, and this is an appropriate vehicle to address it.

1. Certiorari is also warranted because the Question Presented in this case is a recurring one of national significance. The conflict implicated here incorporates 33 jurisdictions and the procedural rules of all 50 states and the federal government. That widespread conflict has been recognized in numerous appellate decisions—including by the applicable Indiana precedent at issue in this case. *Crisis Connection*, 949 N.E. 2d at 797, 799-800; see also *Johnson*, 102 A.3d at 305; *Goldsmith*, 651 A.2d at 881-882 (Bell, J., dissenting); *Green*, 646 N.W.2d at 308-310; *Hach*, 162 F.3d at 947. It is acknowledged by commentators. See generally Fishman; Miller at 343-355; Jennifer L. Hebert, Note, *Mental Health Records in Sexual Assault Cases: Striking a Balance to Ensure a Fair Trial for Victims and Defendants*, 83 Tex. L. Rev. 1453 (2005). It is even

acknowledged by the Justice Department. See *United States of America* v. *Arias*, Pet. for Rehearing En Banc at 2, 9-10 No. (8th Cir. Oct. 22, 2019) (asserting that the Eighth Circuit "conflicts" with other circuits over a criminal defendant's "right to compelled discovery from a sex abuse victim's psychotherapist"). This conflict has existed almost as long as *Ritchie* has been on the books, and time has only sent it spiraling out of control. The issue frequently fractures courts internally, as the many split opinions noted above all attest. And indeed, the Wisconsin Supreme Court recently took a case to revisit its position within the conflict on the Question Presented, see *State* v. *Lynch*, 885 N.W.2d 89 (Wis. 2016), only to fail at the task when an equally divided court could not unify behind a single resolution. Only this court can bring order to this proliferating chaos.

2. Moreover, these conflicts in the law are intolerable. The basic split between states like Indiana and the majority elsewhere means that defendants in some jurisdictions are denied access to records that would be granted to them in others based on arbitrary jurisdictional boundaries—which is no way to treat constitutional rights that should be uniform. The basic confused state of the law also makes these rules hard to understand and apply. And the risk of misunderstanding can be fatal. Even in a jurisdiction that allows access, one defendant's pretrial request for the records might be unripe and too early, because the right of access applies only "during trial," *Johnson*, 102 A.3d at 303, whereas another defendant who waits *until* trial to request those materials might be found to have come too late because of his "eve-of-trial demands." *United States* v. *Henry*, 482 F.3d 27, 30 (1st Cir. 2007).

Even the most diligent attorney who tries to pick through this mess is likely to be led astray.

3. This case is also a compelling one to resolve all these conflicts. Marty has raised all three of the constitutional rights that might be implicated by his request for privileged records, giving the Court an opportunity to set the entire doctrinal thicket to right.

And there is also no question that the standard was outcome determinative. That is because if Marty were only tried in one of the 25 jurisdictions that allow access to privileged records, he would have been able to meet even the most restrictive threshold showing necessary to obtain review: "reasonable certainty." *Blake*, 63 P.3d at 61. Marty *knows* that A.F. was evaluated for RAD—he took part in the counseling sessions during which the evaluation was done. He simply does not know whether she was ultimately diagnosed with the condition. And it is likely that she was. A.F.'s counselor must have believed A.F. had symptoms of RAD or some similar disorder. After all, as Justice Crone noted, "[h]ealth care providers do not test for disorders they have no reason to think exist." Pet. App. 25a. There is also no question that this condition would impact A.F.'s "ability to perceive, remember, and relate events." Fishman at 45. The trial court's refusal to grant at least *in-camera* access to these treatment records was therefore serious constitutional error.

4. The consequence of that refusal infected the entire trial. If Marty had been armed with A.F.'s counseling records, he would have been able to challenge the veracity of A.F.'s story by questioning whether she had the capacity to accurately tell it, and he would have been able to effectively counter the Government's theory, by showing that A.F.'s behavioral problems were not caused by the abuse,

but caused her to make up her story. And Marty's attempts to come up with substitute evidence he was denied from the records only showed the futility of the task: he needed a diagnosis that could only be found in the records. And his failure to obtain evidence of that diagnosis was cited as sole reason why Marty's second-best evidence was refused.

The net effect of these rulings was to deny Marty *any* opportunity to cross-examine A.F. on the most important issue of the case—the veracity of her allegations. And it slanted the playing field heavily in the Government's favor. This case therefore puts the rub to the question of whether information can be hidden behind privilege when it is vital to the defense and is unobtainable anywhere else. Plenary review is required to correct this obvious violation of Marty's constitutional rights.

5. This is also the appropriate vehicle for the Court to entertain such review. The Government has indicated it is currently considering whether to seek writ of certiorari in this Court from the Eighth Circuit's decision in the *Arias* case. See Application for An Extension of Time, *United States* v. *Arias*, 19A-927 (Feb. 20, 2020) (requesting an extension of time because "The Solicitor General has not yet determined whether to file a petition for a writ of certiorari in this case."). If it does so, it is likely to raise the precise issue in this case or one closely related to it. See Pet. for En Banc Rehr'g 2 (claiming that the result in *Arias* "conflicts" with other circuits on "the right to compelled discovery from a sex abuse victim's psychotherapist").

But this case is a superior vehicle to *Arias*. Unlike Marty, who raised all of his potentially applicable constitutional rights—under both the Sixth and Fourteenth Amendments—Arias raised only his Sixth Amendment

Confrontation rights. He did not raise Due Process on appeal. Pet. for En Banc Rehr'g 4 n.1. That is why the Eighth Circuit's ruling applied only the "Confrontation Clause" even as it relied upon *Ritchie*, and determined it was properly invoked under *Ritchie* solely because Arias raised his records request "at trial." 936 F.3d at 795, 799. Accordingly, the holding in *Arias* strips *Ritchie* of its Due Process roots. This Court's review of that ruling would therefore mean deciding the issue on a basis that the *Ritchie* plurality rejected and ruling on *Ritchie*'s application without being able to consider the Due Process application upon which it actually was decided. That cramped procedural posture is a recipe for a fractured opinion, undoubtedly hampering any effort to undo the doctrinal thicket that currently exists, which is doing substantial harm to criminal defendants nationwide. Accordingly, the Court should grant this case instead of *Arias*.

In any event, if the Government does file a petition in *Arias*, the Court should consolidate this case and that one, to allow for a fuller presentation of the Question Presented. At the very least, a hold for *Arias* would certainly be appropriate.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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