No. 19-1214

IN THE
Supreme Court of the United States

MARTY FRIEND,
Petitioner,
v.

STATE OF INDIANA,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Indiana

BRIEF IN OPPOSITION TO 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.

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INTRODUCTION

The State of Indiana, like this Court, has long recognized that "[t]he mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996). To this end, the State fosters strong therapeutic relationships between therapists and those seeking counseling and treatment by privileging from disclosure information "communicated to a counselor in the counselor's official capacity by a client." Ind. Code § 25-23.6-6-1. This counselor-client privilege ensures the "full and complete communication" necessary for a successful therapeutic relationship, *State v. Pelley*, 828 N.E.2d 915, 918–19 (Ind. 2005), and is premised on the well-established principle that effective psychotherapy "depends upon an atmosphere of confidence and trust," which is undermined by the "mere possibility" that a patient's disclosures will not remain confidential, *Jaffee*, 518 U.S. at 10.

Notwithstanding the strong interests underlying the counselor-client privilege, however, Indiana law recognizes that even this privilege sometimes "must yield" to a criminal defendant's constitutional rights. *In re Crisis Connection*, 949 N.E.2d 789, 795 (Ind. 2011). And following this Court's precedents, Indiana courts determine whether a defendant's constitutional right to present a defense requires disclosure of otherwise-privileged information by "weigh[ing] the interest advanced by" the privilege "'against the inroads of such a privilege on the fair administration of criminal justice.'" *Id.* at 801 (quoting *United States v. Nixon*, 418 U.S. 683, 711–12 (1974)).

The Indiana Supreme Court applied this framework in *Crisis Connection* to hold that in a situation where (1) a defendant has extensive access to other sources of evidence, (2) the privilege applies equally to both sides, and (3) the primary function of the protected relationship is to provide counseling and not investigate crime, the compelling interest advanced by the privilege outweighs its marginal effect on the defendant's ability to present a defense. *Id.* at 802. Accordingly, it held that in such circumstances the Constitution does not entitle a defendant to pretrial, *in camera* review of privileged records. *Id.*

This case involves a straightforward application of *Crisis Connection*. After suffering years of sexual molestation by her adoptive father Marty Friend, A.F. finally gained the courage to disclose the abuse to her adoptive mother. The State later criminally charged Friend with two counts of child molestation, and in pretrial discovery Friend sought access to a licensed clinical social worker's file concerning counseling she had provided to A.F. In the counseling records Friend hoped to find evidence to challenge A.F.'s credibility—particularly evidence suggesting that the counselor had diagnosed A.F. with Reactive Attachment Disorder (RAD). Friend speculated about a RAD diagnosis even though there was no evidence the counselor had ever made such a diagnosis and was no evidence from Friend's own expert that such a diagnosis was likely.

The trial court denied discovery of the privileged records in part because Friend had failed to show they contained exculpatory evidence. And the Indiana Court of Appeals affirmed, holding that applying the

privilege did not violate Friend's constitutional right to present a defense.

The petition for a writ of certiorari presents for this Court's review a multifaceted question pertaining to a criminal defendant's ability to access privileged information. This case is a poor vehicle for any such inquiry. First, Friend's litigation choices will prevent the Court from fully answering the broad question presented—including whether Indiana's privilege law precludes discovery of the only specific information Friend claims was important to his defense. Second, even under the due-process theory he urges the Court to adopt, Friend is not entitled to break the privilege, for he has failed to show any reasonable probability that the counseling records actually contain proof that A.F. suffers from RAD. For these reasons, the petition should be denied.

STATEMENT OF THE CASE

In 2010, Friend and his then-wife K.F. adopted A.F., then seven years old, from an orphanage in Russia. Tr. Vol. IV at 38–43, 49–50. The move was challenging for A.F.: She found it difficult to adjust to a new language, new cultural norms, and to life in a family rather than an orphanage, and she had trouble bonding with Friend. *Id.* at 44, 53–64, 128–29, 165. Making things worse, after beginning a trial separation in 2011, Friend and his wife K.F. formally separated in 2012 and divorced in 2014. Tr. Vol. II at 37; Tr. Vol. IV at 62–67.

After the separation, A.F. saw Friend on periodic weekend visits, and over the next few years he regularly used these visits as occasions to sexually molest his preteen daughter: He repeatedly fondled A.F.'s vagina and breasts, digitally penetrated her vagina, compelled her to masturbate him, and compelled her to fellate him. Tr. Vol. V at 140–41, 148–70. A.F. was confused by what Friend was doing to her, and Friend told A.F. not to tell K.F. about it. *Id.* at 154, 171. A.F. would become depressed prior to each weekend visit and would be angry and difficult for several days after returning to K.F. *Id.* at 67–70, 184–85.

Concerned about A.F.'s ongoing behavioral problems, at the beginning of 2014 K.F. arranged for A.F. to begin counseling with licensed clinical social worker Kate Creason. App. Vol. III at 27–30, 225–26; Tr. Vol. II at 39–45, 80–81, 130, 153–54. As part of her initial evaluation, Creason assessed A.F. for several psychological disorders. *Id.* at 47–49, 90, 154–55, 227. One of the disorders for which Creason assessed A.F. was RAD, a rare but serious psychological disorder resulting from an absence of bonding with a parent or caregiver in infancy. *Id.* at 58–59, 181–82. Notably, Creason never suggested to A.F.'s parents that she had diagnosed A.F. as having RAD or any other psychological disorder. *Id.* at 53, 154, 175.

Following the initial visit, Creason provided counseling to A.F. roughly every other week, and Friend and K.F. were regularly present at these counseling sessions. *Id.* at 80–84, 96 (describing K.F.'s testimony that the sessions occurred in conjunction with Friend's every-other-weekend visitation, that Creason met with Friend and K.F. at the beginning of

every session, and that at times the parents would remain present for the entire session).

In 2015, when A.F. was in the sixth grade, she began cutting herself with a knife. Tr. Vol. V at 133–34. A.F's school therapist told K.F. about this, and, concerned by what she had heard, K.F. discussed the self-harm with A.F. Tr. Vol. IV at 72–73, 77. A.F. first said she was tired of pretending to be happy when she was not really happy, but she soon became too upset to be able to speak coherently. *Id.* at 76–78; Tr. Vol. V at 136–37. K.F. then gave A.F. a notebook and told her to write what she wanted to say—crying and shaking, A.F. then disclosed in writing Friend's sexual molestation of her. Tr. Vol. IV at 78; Tr. Vol. V at 137; State's Exs. 5, 5A. After learning of A.F.'s allegations, Friend fled to California and changed his appearance. Tr. Vol. IV at 102–03, 243–44; Tr. Vol. VI at 11–12; State's Exs. 7–9.

The State charged Friend with two counts of felony child molestation. App. Vol. II at 35. Prior to trial, Friend sought discovery of Creason's entire counseling file for A.F. on the basis that it "may contain exculpatory information." App. Vol. II at 66–68, 71–73; Tr. Vol. II at 18. Friend's request was premised on just one specific piece of potentially exculpatory information: He alleged that Creason's records included a conclusion that A.F. suffered from RAD, a diagnosis Friend argued would undermine A.F.'s credibility. App. Vol. II at 80–82, 105–09, 131–32.

The trial court denied the pretrial discovery request, in part because Friend had not demonstrated

reason to believe that there was exculpatory information generally, or a RAD diagnosis particularly, in the records. *Id.* at 93–94, 119–24, 137–40. The trial court also ruled that the discovery request for the entire file was not sufficiently particular, that the disclosure would substantially harm A.F., and that Friend had sufficient alternative means to challenge A.F.'s credibility. *Id.* at 119–24, 137–40.

An Indiana jury convicted Friend of both counts of felony molestation, and on appeal of these convictions the Indiana Court of Appeals affirmed the trial court's pretrial discovery rulings. Pet. App. 21a. Applying the Indiana Supreme Court's decision in *In re Crisis Connection*, 949 N.E.2d 789 (Ind. 2011), the Court of Appeals held that Friend was not entitled to discovery of the records under *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), because they were the records of a private third-party, not records compiled or held by a government actor. Pet. App. 9a–14a. Further, Indiana's counselor privilege "'is one that *generally* prohibits disclosure for even *in camera* review of confidential information'" because a defendant's right to present a defense is protected by extensive access to other sources of information. *Id.* at 12a (emphasis in original) (quoting *In re Crisis Connection*, 949 N.E.2d at 802). The Indiana Court of Appeals concluded that Friend had "ample opportunities" to access non-privileged information to try to show that A.F. exhibited symptoms of RAD. *Id.* It held that under these circumstances Friend had failed to establish that his constitutional rights were violated. *Id.* at 13a. The Indiana Supreme Court denied discretionary review. *Id.* at 2a.

REASONS TO DENY THE PETITION

I. The Exceedingly Broad Question Presented Leaves Unclear Exactly Which Issue Friend Wants the Court to Address and Is Precluded By His Own Litigation Choices

1. Friend's petition fails to articulate a focused question properly presented for the Court's consideration. It urges the Court to declare "under what circumstances" various constitutional provisions entitle criminal defendants "to obtain witnesses' privileged treatment records from private doctors, psychotherapists, or counselors." Pet. i. The breadth of this question, which encompasses many different factual scenarios and legal theories, makes it unclear precisely which issue the Court would be addressing if it were to grant the petition.

The rest of the petition only compounds the confusion. At times the petition criticizes Indiana for allegedly misreading and failing to follow *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), Pet. 27–28; while at other times the petition criticizes Indiana for following the plurality opinion in *Ritchie*, which it asserts was wrongly decided, *id.* at 25–26. Although Friend asserts that *Ritchie* left many questions unanswered, his hodge-podge attempt to bring all those questions into play in this case is unlikely to result in any significant clarification of the law. There are countless "circumstances," *id.* at i, in which a criminal defendant might seek access to privileged treatment records; any attempt to formulate a universal rule for all of them is bound to fail. The Court should decline Friend's invitation to do so.

2. Moreover, Friend's litigation strategy in the state courts renders this case a particularly poor vehicle for the sort of over-arching, multifaceted consideration he seeks. While it is true that the "'majority of state courts'" have held that a witness's counseling privilege "'may be subordinate to a criminal defendant's constitutional rights *at trial*,'" that is not the issue addressed by the courts below. Pet. 20 (emphasis added) (quoting *State v. Johnson*, 102 A.3d 295, 305 (Md. Ct. App. 2014)).

This case involved challenges to the denial of *pretrial* discovery of the records. Friend did not revisit the pretrial ruling denying access to the privileged records during the trial, even though the trial court had indicated it would evaluate any requests made during trial for *in camera* review of specifically offered evidence to determine admissibility. App. Vol. II at 146. Friend made no attempt to call Creason as a witness at the trial to question her regarding her diagnosis, the behaviors she observed in A.F., or any statements A.F. made in the course of the counseling. He also made no attempt to cross-examine A.F. or her adoptive mother K.F. regarding anything occurring during the counseling or any diagnosis A.F. received from Creason. Tr. Vol. IV at 118–67; Tr. Vol. V at 182–228. In neither this case nor in *In re Crisis Connection* did the Indiana courts address the scope of a defendant's constitutional right to present *at trial* privileged information in support of his defense. Decisions affirming a constitutional right to access privileged information during a trial are thus not in conflict with the Indiana courts' decisions. *See, e.g.*, *Commonwealth v. Barroso*, 122 S.W.3d 554, 559–65 (Ky. 2003); *Goldsmith v. State*, 651 A.2d 866, 872–77 (Md. 1995).

In addition, Friend identified just one specific piece of information as potentially in the privileged records and potentially important to his defense—the result of Creason's RAD assessment. But Friend never made a specific discovery request for that particular piece of information, even after the trial court denied his discovery motions as overbroad. App. Vol. II at 122, 139. At all times, Friend sought pretrial access to A.F.'s *entire* counseling file. App. Vol. II at 64–68, 71–73, 109, 131–32. Thus, the Indiana courts were never asked to rule on whether Friend had any constitutional right to pretrial discovery to the information on which his petition focuses—namely, the diagnosis resulting from a counselor's psychological evaluation. *See* Pet. 3, 5, 27, 32.

3. Finally, even with regard to arguments pertaining to pretrial discovery, Friend's litigation choices have rendered such review premature and inappropriate. He asks the Court to undertake a broad constitutional adjudication before he has given *any* court—including the state courts below—an opportunity to determine whether a narrower, statutory argument would have made his constitutional claim unnecessary. Friend's petition thus asks the Court to disregard decades of its precedents declining to reach unnecessary constitutional issues. *See, e.g., Rescue Army v. Municipal Court*, 331 U.S. 549, 568 (1947) (recognizing the Court's "policy of strict necessity in disposing of constitutional issues"); *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it

is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

In particular, Friend never asked the courts below to decide whether the results of the RAD assessment or the alleged diagnosis—the only specific information he identifies as important to his defense—fell within the counselor-client privilege. Under Indiana law, this privilege applies to "[m]atters communicated to a counselor in the counsel's official capacity by a client." Ind. Code § 25-23.6-6-1. Because they impede the search for truth, privileges in Indiana are strictly construed. *State v. Pelley*, 828 N.E.2d 915, 918 (Ind. 2005); *Matter of C.P.*, 563 N.E.2d 1275, 1277 (Ind. 1990). But Friend did not argue to any court below that the specific information he sought fell outside the privilege. Br. of Appellant at 25–36; Reply Br. at 7–13; App. Vol. II at 71–73, 105–09, 131–32.

If Friend were genuinely interested in only the RAD diagnosis, he could have argued that the diagnosis is not a matter "communicated to a counselor" and is therefore outside the counseling privilege entirely. *See Rogers v. State*, 60 N.E.3d 256, 262–63 (Ind. Ct. App. 2016) (suggesting, without deciding, that the requested discovery at issue might fall outside the scope of the counselor-client privilege because the information sought was not a communication from the client to the counselor). Yet Friend declined to do so, depriving Indiana courts of the opportunity to resolve this case on state statutory grounds. The Court should not reward Friend's litigation choice by accepting his invitation to decide a constitutional question that is both nebulous and unnecessary.

II. The Court's Review Would Not Affect the Case's Outcome Because Friend Did Not Show That the Privileged Materials He Seeks Likely Contain Exculpatory Information

The petition should also be denied because Friend has not made the bare minimum showing required even under his preferred due process test—namely (as required by every court to address the issue), specific evidence showing that the privileged materials likely contain exculpatory information.

Under any understanding of the due-process theory Friend advances, before a court is required to conduct *in camera* review, a defendant must make a preliminary showing that the privileged materials he seeks contain exculpatory information. *See* Pet. 23. *See also, e.g.*, *Commonwealth v. Barroso*, 122 S.W.3d 554, 563–64 (Ky. 2003) ("*[I]n camera* review of a witness's psychotherapy records is authorized only upon receipt of evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence."); *State v. Thompson*, 836 N.W.2d 470, 484–85 (Iowa 2013) (requiring further showing that the exculpatory information is not available from any other source); *Goldsmith v. State*, 651 A.2d 866, 877 (Md. 1995) (holding that the defendant must establish that the records sought likely contain exculpatory information); *People v. Stanaway*, 521 N.W.2d 557, 562 (Mich. 1994) (requiring that the records sought must likely contain material information necessary to defense); *State v. King*, 34 A.3d 655, 658 (N.H. 2011) (requiring defendant to articulate how requested information is relevant and material to defense).

Friend did not make any showing that the counseling records at issue here are reasonably likely to contain exculpatory evidence. His initial request for the records asserted only that the records "may contain exculpatory information" and that he wanted to examine any "potential impeaching information" in them. App. Vol. II at 64, 66, 68; Tr. Vol. II at 18. Even the decisions Friend suggests are in his favor agree that such a generic desire to fish for information relevant to witness credibility is insufficient to meet threshold relevance requirement. *See, e.g., Barroso*, 122 S.W.3d at 563 (concluding that a "reasonable belief that the records contain exculpatory information" test "is required to preclude 'fishing expedition[s] to see what may turn up'" (quoting *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221 (1951) (alteration in original)).

Friend's subsequent requests made clear that he was hoping to find evidence in the records showing that A.F. has RAD, which he could use to attack her credibility and suggest that she would apt to make a false accusation against him. App. Vol. II at 105–09, 131–32. Yet Friend did not present any basis for inferring that A.F. had in fact received a RAD diagnosis. For example, despite regular interactions among Friend, K.F., A.F., and Creason, Friend did not offer evidence that Creason (1) had expressed concerns that A.F. *might* have RAD, (2) had referred A.F. to a psychiatrist or psychologist (let alone one specializing in RAD), (3) had suggested that A.F. was in need of greater treatment than a licensed clinical social worker was suited to provide, or (4) had provided treatment and therapy consistent with a RAD diagnosis. Nor even did Friend's own expert, Dr. Wingard,

testify that he believed there was a reasonable probability that A.F. had RAD (indeed, he disclaimed any attempt to make such a diagnosis), or that he was aware of any specific information suggesting that Creason was treating A.F. as a child with RAD. Tr. Vol. II at 193–94, 197, 207, 217.

Friend also provided no evidence that A.F. suffered from poor, insufficient, or inattentive orphanage caregivers, that her primary caregiver changed frequently, or even that the orphanage was otherwise substandard. Dr. Wingard examined A.F.'s orphanage records, but did not testify that they contained information that caused him to believe A.F. had RAD. Although Dr. Wingard testified that as many as 20% of international adoptees who are classified as "high risk" "could have" RAD, *id.* at 59, Friend provided no evidence that *anyone* (including the adoption agency or Dr. Wingard) ever classified A.F.'s adoption as "high risk."

A RAD diagnosis is "uncommon" and "rarely" justified, even among children suffering extreme neglect. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 266–67 (5th ed. 2013). It is a diagnosis that should be "made with caution in children older than 5 years" and one that clinicians are very "reluctant" to make. *Id.*; Tr. Vol. II at 63.

For these reasons, the fact that Creason merely included a RAD assessment as part of a general, routine assessment battery does not establish the *likely* existence of a RAD diagnosis in Creason's records. Friend has thus failed to show the privileged materials he

seeks likely contain exculpatory information. In the absence of such a showing, Friend is not entitled to an *in camera* review of the records, even under the due process analysis he asks the Court to adopt.

Accordingly, even if the Court were to grant the petition and adopt the due-process theory Friend urges, it would not change the outcome of this case. The question Friend asks the Court to decide is thus not only exceedingly broad and ineffectively presented; it is also unnecessary to resolve his case. The Court should decline Friend's request to answer it.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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Dated: June 3, 2020