

IN THE
INDIANA SUPREME COURT

NO. _____

IN RE SUBPOENA)	
TO CRISIS CONNECTION, INC.)	Court of Appeals Number
)	19A05-0910-CR-602
STATE OF INDIANA,)	
)	Appeal from an Interlocutory Order
Appellee (Plaintiff below),)	of the Dubois Circuit Court
)	
v.)	No. 19C01-0708-FA-192
)	
RONALD KEITH FROMME,)	Hon. William E. Weickert
)	Judge
Appellee (Defendant below).)	

***AMICI CURIAE* BRIEF OF THE
NATIONAL ASSOCIATION OF SOCIAL WORKERS AND
THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, INDIANA
CHAPTER**

Paul L. Jefferson [#23939-49]
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, Indiana 46204
Telephone: (317) 236-1313
Facsimile: (317) 231-7433
pjefferson@btlaw.com

*Attorney for Amici Curiae National
Association of Social Workers and National
Association of Social Workers, Indiana
Chapter*

REC'D AT COUNTER ON:

NOV - 4 2010

AT 1:10 AM PM

William E. Weickert
CLERK OF COURTS
STATE OF INDIANA

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	3
I. THE DECISION BELOW THREATENS THE ABILITY TO PROVIDE NECESSARY CONFIDENTIAL SERVICES.....	4
II. THE <i>WILLIAMS</i> BALANCING TEST DOES NOT PROVIDE A WORKABLE FRAMEWORK FOR APPLICATION OF THE PRIVILEGE.....	6
CONCLUSION.....	8
WORD COUNT CERTIFICATE.....	9
CERTIFICATE OF SERVICE.....	10

TABLE OF AUTHORITIES

	<u>Page</u>
FEDERAL CASES	
<i>Jaffee v. Redmond</i> , 518 U.S. 1 (1996)	7
<i>Kennedy v. Louisiana</i> , 554 U.S. 407 (2008)	ii, 7
<i>Taylor v. United States</i> , 222 F.2d 398 (D.C. Cir. 1955)	7
<i>Williams v. State</i> , 819 N.E.2d 381 (Ind. Ct. App. 2004)	i, ii, 6
FEDERAL STATUTES	
42 U.S.C. § 290dd-2	3
29 C.F.R. § 825.118(b) (2)	4
Federal Employees Benefits Improvement Act of 1986, Pub. L. No. 99-251, § 105(b), as amended by Pub. L. No. 100-202, § 101(m), codified at 5 U.S.C. § 8902(k) (1) (1986)	3
La. Rev. Stat. Ann. § 37:2714	3
Pub. L. No. 100-203, § 4074(a)(1), as amended by Pub. L. No. 100-360, § 411(h) (5) (A), codified at 42 U.S.C. § 1395x (s) (2) (H) (ii)	4
Pub. L. No. 101-239, § 6113(b), codified at 42 U.S.C. §§ 13951(a) (1) (F), 1395x(s) (2)(N)	4
S.C. Code Ann. 19-11-95	3

STATE STATUTES

225 ILCS 20/163

Ark. Code Ann. § 17-103-1073

Cal. Bus. & Prof. Code § 4992.33

Colo. Rev. Stat. Ann. § 13-90-107.....3

D.C. Code Ann. § 14-307, *et seq*3

Del. Code Ann. tit. 24, § 39133

Idaho Code § 54-3213.....3

Ind. Code § 35-37-6-9..... ii

Ind. Code Ann. § 25-23.6-6-13

Kan. Stat. Ann. § 65-63153

Mass. Gen. L. ch. 112, § 135B.....3

Me. Rev. Stat. Ann. tit. 32, § 70053

Mich. Comp. Laws Ann. § 333.18513.....3

Miss. Code Ann. § 73-53-29.....3

Mo. Rev. Stat. § 337.6363

Mont. Code Ann. § 37-22-4013

N.J. Stat. Ann. § 45 :15BB-133

N.M. Stat. Ann. § 61-31-243

N.Y. Civ. Prac. L. & R. 4508.....3

Okla. Stat. Ann. tit. 59, § 1261.63

S.D. Codified Laws Ann. § 36-26-303

Tenn. Code Ann. § 63-23-1093

W. Va. Code § 30-30-12.....3

Wis. Stat. Ann. § 905.04.....3

INTEREST OF *AMICI CURIAE*

The National Association of Social Workers (NASW) is a professional membership organization comprised of 145,000 social workers with 56 chapters. The Indiana Chapter has 2,650 members. Created in 1955 by the merger of seven predecessor social work organizations, the NASW has as its purpose to develop and disseminate high standards of practice while strengthening and unifying the social work profession as a whole. In furtherance of its purposes, the NASW promulgates professional standards and criteria including *Standards for Clinical Social Work in Social Work Practice*, conducts research, publishes studies of interest to the profession, provides continuing education and enforces the *NASW Code of Ethics*. The NASW also sponsors a voluntary credentialing program to enhance the professional standing of social workers including the NASW Diplomate in Clinical Social Work and the Qualified Clinical Social Worker credentials.

As the principal professional organization involved with clinical social workers in the United States and in the State of Indiana, these *amici* have a strong interest in the issues presented in this case. Presently, the Codes of Ethics and Standards of Practice adopted and enforced by *amici* and the laws of nearly every state, including the State of Indiana, require clinical social workers to maintain the confidentiality of their communications with their patients, recognizing that such confidentiality is essential for the diagnosis and treatment of mental and emotional conditions. The need for this confidentiality is especially acute when treating victims of sexual assault and violence. If the Court of Appeals' recognition of a privilege for such communications were not to stand or were to stand with a relatively low threshold necessary to defeat it, clinical social workers would face the dilemma of being ordered

to violate state law and well-established professional standards which are crucial to their provision of effective mental health services.

SUMMARY OF ARGUMENT

Indiana, like nearly every other state, recognizes the need for confidentiality when communicating with mental health professionals. While confidential communications with social workers generally have several exceptions, when a social worker or other advocate is dealing with a victim, as defined by Indiana law, those confidentiality concerns are heightened. People whose trust is shaken and whose clinical needs are triggered by the illegal acts of others are dependent on a relationship of trust and confidence with those who treat and advocate for them. Without an assurance of confidentiality, this trust would be more difficult to achieve, and the treatment for these individuals will be hampered. A weak Victim-Advocate privilege is also likely to create a barrier to the reporting of domestic and sexual crimes.

Indiana law recognizes this, and has a broader Victim-Advocate privilege. However, the decisions below require very little by way of a threshold showing by a requesting party who will often, as here, be the alleged perpetrator. Even an *in camera* review will have adverse clinical implications for the victims that Indiana's statute seeks to protect. Accordingly, NASW respectfully requests that this Court grant transfer and determine that the privilege is absolute or, at a minimum, that the burden to seek such information is high and must be met by the requesting party.

ARGUMENT

Clinical social workers are the predominant providers of psychotherapy, as reflected in the broad acceptance of clinical social workers as compensable providers by federal and state health programs and private insurers. For the less economically advantaged and those living in many inner-city or rural areas, clinical social workers constitute an even higher percentage of mental health care providers. In the past twenty-five years, clinical social work has received widespread recognition as a distinct profession, including through state licensing and certification regimes and the growth and development of specific standards of clinical practice and ethical rules.

Nearly all states have recognized, with limited exceptions for particular circumstances, a psychotherapist-patient privilege protecting confidences imparted to clinical social workers by their therapy patients.¹ Congress has also adopted certain confidentiality rules which encompass services by clinical social workers.²

The expanded role of clinical social workers in the provision of mental health care in the United States is in large part the result of federal and state government policies that recognize the valuable role of clinical social workers. Since their emergence in the 1960s, the major federal

¹ See, e.g., Ariz. Rev. Stat. § 32-3283 ; Ark. Code Ann. § 17-103-107 ; Cal. Bus. & Prof. Code § 4992.3 ; Colo. Rev. Stat. Ann. § 13-90-107; Del. Code Ann. tit. 24, § 3913; D.C. Code Ann. § 14-307 *et seq.*; Idaho Code § 54-3213; 225 ILCS 20/16 ; Ind. Code Ann. § 25-23.6-6-1; Kan. Stat. Ann. § 65-6315; La. Rev. Stat. Ann. § 37:2714; Me. Rev. Stat. Ann. tit. 32, § 7005; Mass. Gen. L. ch. 112, § 135B; Mich. Comp. Laws Ann. § 333.18513; Miss. Code Ann. § 73-53-29; Mo. Rev. Stat. § 337.636; Mont. Code Ann. § 37-22-401; N.J. Stat. Ann. § 45 :15BB-13 ; N.M. Stat. Ann. § 61-31-24; N.Y. Civ. Prac. L. & R. 4508; Okla. Stat. Ann. tit. 59, § 1261.6; S.C. Code Ann. 19-11-95; S.D. Codified Laws Ann. § 36-26-30; Tenn. Code Ann. § 63-23-109; W. Va. Code § 30-30-12; Wis. Stat. Ann. § 905.04.

² See 42 U.S.C. § 290dd-2.

health care programs have all been expanded to include coverage of mental health services by independent clinical social workers. *See, e.g.*, Federal Employees Benefits Improvement Act of 1986, Pub. L. No. 99-251, § 105(b), as amended by Pub. L. No. 100-202, § 101(m), codified at 5 U.S.C. § 8902(k) (1) (1986); Pub. L. No. 100-203, § 4074(a)(1), as amended by Pub. L. No. 100-360, § 411(h) (5) (A), codified at 42 U.S.C. § 1395x (s) (2) (H) (ii); Pub. L. No. 101-239, § 6113(b), codified at 42 U.S.C. §§ 13951(a) (1) (F), 1395x(s) (2)(N); 29 C.F.R. § 825.118(b) (2) (allowing for different forms of reimbursement for social workers).

Because of this expertise and widespread recognition, clinical social workers are uniquely well-equipped, both through their training and their universal acceptance as qualified providers of mental health services, to treat victims as defined by I.C. § 35-37-6-5. Accordingly, the NASW has a significant interest in ensuring that the Victim-Advocate Privilege exists in a manner that will facilitate the ability of social workers to serve this population.

I. THE DECISION BELOW THREATENS THE ABILITY TO PROVIDE NECESSARY CONFIDENTIAL SERVICES.

Whether the Victim-Advocate Privilege is absolute or subject to limited exceptions, the Court of Appeals' decision has announced a Rule that, at least when Constitutional concerns are raised, will render the privilege a dead letter. The decision ignores the fact that the legislature has determined those limited instances in which the privilege must yield. In all other instances, it should be absolute.

If the privilege is not absolute and may be rebutted, the burden should be on the requesting party—and not the producing party—to show that the information is necessary, even for *in camera* review. *See* Petitioners Brief at Part II. Here, the Court of Appeals applies a standard that holds that once the requesting party meets the requirement necessary to engage in a

balancing, the burden is on the producing party to show why the documents should remain privileged. This does not go far enough to ensure that the privilege serves its purpose. NASW supports the grant of transfer so that the privilege will continue to be narrowly construed to ensure that the needs of those the statute was designed to serve are met.

Indiana Code § 35-37-6-9, the Victim-Advocate Privilege, provides in relevant part:

- (a) The following persons or entities may not be compelled to give testimony, to produce records, or to disclose any information concerning confidential communications and confidential information to anyone or in any judicial, legislative, or administrative proceeding:
 - (1) A victim.
 - (2) A victim advocate or victim service provider unless the victim specifically consents to the disclosure in a written authorization that contains the date the consent expires.
- (b) A victim advocate, victim service provider, or victim may not be compelled to provide testimony in any judicial, legislative, or administrative proceeding that would identify the name, address, location, or telephone number of any facility that provided temporary emergency shelter to the victim of the offense or transaction that is the subject of the proceeding unless the facility is a party to the proceeding.

This is broader than the clinical social worker privilege, codified at I.C. § 25-23.6-6-1, and for good reason. The Victim-Advocate privilege protects communications with individuals who have been defined as "victims" under I.C. § 35-37-6-5. Thus, it relates to that subset of individuals who seek professional help because of acute and well-defined situations that raise the need for confidential communications. Thus, unlike privileges such as the attorney-client or spousal privileges, which are not dependant on the reason for the privileged communication, the Victim-Advocate privilege reflects a policy determination by the legislature that certain individuals should have heightened confidentiality protections because of the nature of the information that is being protected.

II. THE *WILLIAMS* BALANCING TEST DOES NOT PROVIDE A WORKABLE FRAMEWORK FOR APPLICATION OF THE PRIVILEGE.

The Decision below fails to defer to the heightened need for a privilege for victims, and applies the *Williams* test in the same manner as for other privileges. *See, e.g.*, Decision at 1187, (noting *Williams* was applied to the pharmacist privilege, the attorney client and media contexts.) However, the need for confidentiality for those individuals whom the legislature has classified as “victims” raises a heightened need for confidentiality. These individuals are part of population where clinical needs are being met because they have been violated through such acts as violence or assault, all of whom raise criminal implications. If *Williams* remains the standard for this privilege (which always involves a criminal activity, otherwise the treated individuals would not be victims), and if the third prong of *Williams* shifts the burden (as the Decision does here) to the producing party to prevent disclosure under a balancing standard after low threshold particularity and relevance standards are met, the privilege will be a dead letter and the purposes for its broader application in these limited circumstances will become a nullity. At bottom, victims require the assurance of confidentiality to be successfully treated; if the privilege is so easily overcome then that need will not be met.

Without access to effective treatment many victims are unable or unwilling to submit themselves to the emotionally-wrenching process of serving as a complaining witness and testifying in court. Allowing alleged perpetrators almost automatic access to the private psychotherapeutic process of the victim perpetuates their control over and access to the victim, furthering the victims’ trauma and inhibiting full disclosure of the underlying criminal conduct. This concern is magnified when, as here, the victim is a child. A child, who may disclose the fact that he or she is a victim for the first time to a victim-advocate, will likely not understand the nuances of the confidentiality that the Decision below allows. However, and particularly for

child victims, the detrimental impact of being forced to divulge information thought to be confidential, with a likely result being additional discovery or trial testimony, is detrimental to recovery. See *Kennedy v. Louisiana*, 554 U.S. 407, 554 (2008) (reversing death penalty conviction for child rapist based in part on concern for the victim).

Confidentiality of communications between therapists and their patients has long been recognized as an essential ingredient in the relationship of trust which is the cornerstone of all successful psychotherapy:

The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. . . . It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand.

Guttmacher & Weihofen, *Psychiatry and the Law* 272 (1952); accord, *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955). The same logic applies to victim advocates, a role often served by social workers. Courts have also, as the other *amici* point out, recognized the unfeasibility of “balancing tests” in the application of privileges generally:

[m]aking the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. . . . An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

Jaffee v. Redmond, 518 U.S. at 17-18. Accordingly, and at a minimum, the default should be that the information remains confidentiality. A different standard than the one employed by the Decision which would require the requesting party to rebut the presumption of confidentiality with a particular showing of need would better serve the needs of those citizens the legislature has classified as victims. Accordingly, if the privilege is not absolute, it should be subject to a strict and heightened showing for even an *in camera* review.

CONCLUSION

For the reasons set forth above and in the briefs of petitioner and other *amici*, NASW supports the grant of transfer to make the Victim-Advocate Privilege absolute or, at a minimum, heightened.

Paul L. Jefferson /s/ _____
Paul L. Jefferson [#23939-49]

BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, Indiana 46204
Telephone: (317) 236-1313
Facsimile: (317) 231-7433

*Attorney for National Association
of Social Workers and National Association
of Social Workers, Indiana Chapter*

WORD COUNT CERTIFICATE

I verify that this *Amici Curiae* Brief contains not more than 7,000 words as required by Rule 44(E) of the Indiana Rules of Appellate Procedure.

Paul L. Jefferson /s/
Paul L. Jefferson [# 2339-49]

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a copy of the foregoing Brief was served by First-Class U.S. Mail, postage prepaid, on this 4th day of November, 2010.

S. Anthony Long
LONG & MATHIES LAW FIRM, P.C.
415 East Main Street
P.O. Box 250
Boonville, Indiana 47601

Michael Fritch
PROSECUTING ATTORNEY
602 Main Street, 2nd Floor
Jasper, Indiana 47546

Kerry Hyatt Blomquist
INDIANA COALITION AGAINST DOMESTIC VIOLENCE
1915 West 18th Street
Indianapolis, Indiana 46202


