THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2024-0066

STATE OF NEW HAMPSHIRE

v.

GENE L. ZARELLA

Interlocutory Appeal Pursuant to Rule 8 from a Decision of the Belknap Superior Court

BRIEF FOR APPELLEE GENE L. ZARELLA

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Pursuant to Supreme Court Rule 16(3)(c), the text of these provisions is set forth in Appendix – Volume I to this brief.

STATEMENT OF THE FACTS AND CASE

A. The Disclosure and Initial Investigation

On November 18, 2021, a Belknap County Grand Jury returned four indictments against Gene Zarella alleging different variations of aggravated felonious sexual assault. Two charges arise from 2007 and two from 2014. Apx.I. 9-12.[1] The complaining witness for these allegations is K.R., Mr. Zarella's daughter.[2] Mr. Zarella denies the allegations against him.

In December 2020, Detective Lance Rouse of the Gilford Police Department initiated a sexual assault investigation because in November 2020, at the age of 22, K.R. disclosed to her counselor, [redacted] App. 82. [redacted]

[1] Appellant's appendix is designated "App." Appellee's appendix is designated "Apx.I." and "Apx.II." Appellee's addendum is designated "Add."

[2] In the Indictments and most of the pleadings below, the complaining witness is identified as K.Z. Consistent with her brief, she will be referred to as K.R. herein.

[redacted] Id. [redacted] See RSA 169-C:29 (requiring therapists to report to the State suspected abuse of a child).

Detective Rouse interviewed [redacted] on December 15, 2020. During the interview [redacted] provided information concerning the alleged 2014 incident that she learned from her counseling session with K.R. Detective Rouse prepared a police report documenting the disclosure that was provided in discovery. App. 82.

On February 9, 2021, K.R. was interviewed by the State. In that interview, she claimed that [redacted] K.R. discussed communications with her counselor [redacted] A written report and video of the interview were provided in discovery. App. 82.

The investigation arising from the mandatory disclosure also caused the Gilford Police to reopen an investigation from 2009 that previously did not lead to any charges against Mr. Zarella. In 2009, K.R. [redacted] A criminal investigation, a family court case and a DCYF matter followed. During the investigations, K.R. was interviewed twice—[redacted]

[redacted][3] App. 82.

B. Mr. Zarella Seeks Limited Discovery and Exculpatory Evidence is Disclosed

After obtaining discovery post indictment, Mr. Zarella moved for limited additional discovery. On June 7, 2022, Mr. Zarella filed a Partially Assented To Motion for In Camera Review of Confidential Records seeking in camera review of [redacted] Apx.II. 6-11. The State assented to in camera review and the motion was granted. Apx.II. 6. [redacted] produced records for in camera review. The Court ordered the production of limited redacted records concerning K.R.'s disclosure and the mandatory report to Gilford Police and DCYF. Apx.II. 12. [redacted] The records were produced to counsel pursuant to an In Camera Protective Order with the limitation they were

[3] In her brief, K.R. misrepresents these prior proceedings. While it is accurate that the Family Court initially made a finding of abuse against Mr. Zarella, the following year, the court reunited Mr. Zarella with his family after [redacted] App. 137-140. [redacted] Mrs. Zarella was not convicted for tampering with K.R and it is false for K.R. to state otherwise. Apx.I. 13.

"not to be used at trial, or otherwise copied or disseminated, without prior approval of the Court." (emphasis in original). Apx.II. 14-15.

Mr. Zarella also filed an Assented to Motion for Court Order to Department of Health and Human Services to Release DCYF Investigation Records. Apx.II 3-5. The motion was granted. Apx.II. 3. DCYF produced its complete record from the 2009-2011case for in camera review. The records were produced to counsel pursuant to an In Camera Protective Order identical to the one discussed above. Apx.II. 13, 19. [redacted] App. 137-138.

C. K.R. Makes Additional Disclosures Before Trial

Trial was scheduled for the end of June 2023. On May 4, 2023, the State advised Mr. Zarella that [redacted] App. 83.

Based upon the State's disclosure, on May 5, 2023, Mr. Zarella filed an Assented To Motion for In Camera Review of Confidential Records [redacted] Apx.II. 20-24. The Court granted the motion, conducted in camera review and, on June 2, 2023, disclosed redacted records to counsel under a protective order identical to the two discussed above. Apx.II 25-26. [redacted]

[redacted] App. 83.

[redacted] App. 83.

Following the release of these records, the Belknap County Attorney's Office conducted an interview of K.R. on June 13, 2023. An audio of the interview was produced to the defendant. App. 83.

During the interview, K.R. [redacted] K.R. stated that [redacted] K.R. stated that [redacted] She said, [redacted] App. 83-84.

D. **The Court Orders Additional Discovery**

As of June 2023, it had been determined that K.R. made [redacted]

[redacted] In March 2023, K.R. disclosed [redacted] Both the state and the defense agreed that the June 2023 trial date needed to be continued to November 2023 so that the parties could assess the new state of the evidence. App. 84.

Counsel knew from discovery that K.R. [redacted] However, prior to the disclosure of the [redacted] and K.R.'s subsequent interview, Mr. Zarella had not moved for in camera review of any records [redacted] The reason was that K.R. had stated she [redacted] Additionally, prior to March 2023, K.R. had not [redacted] However, K.R.'s statements to [redacted] App. 84-85.

On June 26, 2023, Mr. Zarella filed a Motion for In Camera Review of Confidential Records from entities that were identified [redacted] Apx.II. 27-35. Without any objection from the State, the Court granted the motion for in camera review on July 31, 2023.[4] Apx.II. 27.

On August 1, 2023, Mr. Zarella submitted proposed orders pursuant to the Court's order and, on August 2, 2023, the Court issued orders to [redacted] to produce records to the Court for in camera review by August 23, 2023. Apx.II. 36-41.

E. K.R. Intervenes and Moves to Quash

On August 22, 2023, K.R. filed a Motion to Intervene and Quash the Court's Order for Production of these records. App. 37-68. The motion to intervene was allowed and a hearing on the motion to quash was scheduled for October 31, 2023. Apx.II 42. At the trial court, K.R. argued that the

[4] At the hearing on K.R.'s Motion to Quash, the prosecutor informed the Court [redacted] Apx.II 42 (lines 16-19). The prosecutor also informed the Court the [redacted] Apx.II. 44 (lines 3-5).

adoption of Part I, Article 2-b to the New Hampshire Constitution required the court to reject the test for in camera review of counselling records set forth in State v. Gagne, 136 N.H. 101 (1992) and replace it with a new heightened standard or "essential need" test adopted by Judge Delker in State v. Brown, No. 216-2020-CR-00483. Apx.I 14. The State took no position on K.R.'s motion.

On November 3, 2023, the Court denied the motion to quash. Add. 49-55. The order is the subject matter of this appeal.

F. The Trial Court Allows Interlocutory Appeal

On November 7, 2024, K.R. moved for interlocutory appeal which was granted on December 4, 2023. Apx.I. 14-16. The Court framed the issue for appeal:

> [K.R.] asserts the standards set forth in State v. Gagne, 136 N.H. 101 (1992) and its progeny are no longer appropriate, after the ratification of Article 2-b. Rather, a heightened standard is required to protect the Constitutional rights of a person who has received counseling services, along the line set forth in State v. Javon Brown, docket number 216-2020-CR-0483, issued August 22, 2022 (Delker, J.). Further, a person with counselling records from a provider under RSA 173-C, is entitled to an interlocutory appeal before any in camera review or disclosure of records.

Apx.I 14-15.

The Court ordered K.R. and Mr. Zarella to confer regarding an agreed upon Interlocutory Appeal Statement. The Court explained after denying the motion to quash, it conducted in camera review of additional records pursuant to the Gagne test and "identified pages that should be disclosed from the records of Genesis Behavioral Health, New Beginnings

and Simmons College. However, these pages will not be disclosed to the parties until ruling from the Supreme Court on the interlocutory appeal." Apx.I. 16.

On January 3, 2024, K.R. filed the agreed upon Interlocutory Appeal Statement which was approved by the trial court on January 19, 2024. Apx.I. 17-24

H. Part I, Article 2-b

In 2018, New Hampshire voters approved a ballot measure to amend the New Hampshire Constitution adding Part I, Article 2-b which states in full: "An individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent." The amendment does not define "governmental intrusion" or "private or personal information." Nor does it reference Gagne, an "essential need" test, or rules of criminal procedure. The legislative history is scant. In response to a question whether the amendment adopts the right to privacy set forth in Roe v Wade, co-sponsor Representative Kurk opined that the amendment protects medical records. Apx.I. 26-27. Representative Kurk also stated the amendment addressed "development of the internet" and "cell phone[s]," co-sponsor Representative Cushing focused on "technology" and supporter Representative Itse expressed a concern that the constitution as originally written did not address governmental encroachment of "electronic" information. Id. at 25-26. No sponsor or supporter offered testimony that the amendment was intended to change the Gagne test or limit the due process or fair trial rights of criminal defendants.

SUMMARY OF THE ARGUMENT

In a careful well-reasoned order, the trial court correctly determined that with the adoption of Part I, Article 2-b, the test first adopted in State v. Gagne, 136 N.H. 101 (1992) remains the appropriate standard to determine in camera review and production of privileged records. Indeed, the Gagne test was reaffirmed by a unanimous Court in State v. Girard, 173 N.H. 619 (2020), two years after the adoption of Article 2-b, and, three years later, the amendment's privacy consideration was incorporated into the test in State v. Chandler, 176 N.H. 216 (2023). At the trial court and in the Interlocutory Appeal Statement, K.R. argued that Article 2-b required overruling Gagne and replacing it with an "essential need" test adopted by another judge. The trial court correctly rejected that argument finding that Gagne is "well balanced to ensure that the defendant had the opportunity to obtain information material to his defense while preventing the needless intrusion in an alleged victim's counseling records" and that the essential need test "would in almost all cases prevent a defendant from obtaining in camera review of an alleged victim's counselling records, in violation of the New Hampshire Supreme Court's interpretation of Part I, Article 15." Add. 53. Following this Court's guidance, the trial court correctly determined that the "governmental intrusion" of in camera review is minimal and, if the court finds that production is appropriate, the privacy interest enshrined in Article 2-b can be protected with a necessary protective order. Id. The court then made extensive factual findings that [redacted] Id. at 53-54., ApxI. 16.

In sum, the order below demonstrates both that Gagne remains a workable easily applied test and that the Appellee met his burden to obtain records consistent with his right to due process and a fair trial.

On appeal, K.R. ignores the record below, abandons her previous arguments and the questions accepted by this Court advancing novel arguments not presented to the trial court—State v. Cressey, 137 N.H. 402 (1993) should be overruled and this Court should adopt a prohibition on discovery of privileged records in the possession of non-governmental actors or a "substantial likelihood" test set forth in RSA 173-C:5 should be applied to requests for in camera review of confidential records. Despite assenting or not objecting to Appellee's motions below, the State now reverses itself adopting similar arguments on appeal. None of these arguments are preserved, are not a subject of the Interlocutory Appeal Statement or Questions Presented and must be rejected by this Court. See State v. McAdams, 134 N.H. 445, 446 (1991).

Furthermore, they are wrong. Contrary to the novel arguments on appeal, Gagne was never dependent on the location of the privileged records and Cressey did not expand Gagne, it affirmed it. Cressey, 137 NH at 413 (Gagne not based on "distinguish[ing] between the privileged records of a state agency and the privileged records of a private organization," but rather on "balancing the rights of a criminal defendant against the interests and benefits of confidentiality"). Similarly, K.R. and the State misapprehend Pennsylvania v. Ritchie, 480 U.S. 29, (1987) whose ruling, similarly, is not dependent upon the location of the records sought but the defendant's right to due process and a fair trial. Additionally, K.R. and the State rely on case law from other jurisdictions which apply to

absolute, not conditional privileges, or are wrongly decided. Finally, adoption of the RSA 173-C:5 "substantial likelihood" test was not argued below and would result in a more stringent standard than the "essential need" test correctly rejected by the trial court as contrary to Gagne and Girard.

Nothing in in the text of Article 2-b or its legislative history alters Gagne and neither K.R. nor the State offer textual analysis why this Court should reverse over thirty years of precedent that has recently incorporated Article 2-b into the analysis. Stare decisis requires this Court to affirm Gagne and the order below. In Re Blaisdell, 174 N.H. 187 (2021).

Finally, because Gagne is also rooted in the Fifth and Fourteenth Amendments to the United States Constitution, the claim that adoption of Article 2-b allows this Court to overrule Gagne is preempted by the Supremacy Clause. Norelli v. Secretary of State, 175 N.H. 186, 195 (2022).

THE ARGUMENT

A. Standard of Review

A trial court's decision on the management of discovery is reviewed under an unsustainable exercise of discretion standard. State v. Girard, 173 N.H. 619, 627 (2020) (citing State v. Guay, 162 N.H. 375, 385 (2011)). Thus, the appellant must establish that the ruling was clearly untenable or unreasonably prejudicial. Id.

B. Part I, Article 2-b Does Not Change the Standard for In Camera Review and the Test Announced in Gagne and Upheld Over the Course of Thirty Years is Applicable Law

"A criminal defendant's interest in obtaining disclosure of material helpful to his defense is rooted in the constitutional right to due process."

Girard, 173 N.H. at 627. "[T]o determine whether the psychotherapist-patient privilege must cede to due process considerations such that the privileged records must be disclosed to a criminal defendant, the trial court must balance the confidentiality of such records against the defendant's right to obtain evidence helpful to his defense." Id. A defendant's request to obtain such privileged records involves two distinct issues: 1) the standard to obtain in camera review of the privileged material; and 2) the standard for the defendant to obtain access to the records. Id.

The standard to trigger in camera review of counselling records is well established: "[I]n order to trigger in camera review of confidential and privileged records, the defendant must establish a reasonable probability that the records contain information that is material and relevant to his defense." State v. Gagne, 136 N.H. 101, 106 (1992). To meet this burden, the defendant must present "some specific concern, based on more than bare conjecture, that, in reasonable probability, will be explained by the information sought." State v. Sargent, 148 N.H. 571, 573 (2002) (quotation omitted). This "threshold showing is not unusually high." Id. (quotation and ellipses omitted). "In contrast, the harm done by disclosing the information to the trial court in the first instance is minimal." Graham, 142 N.H. 357, 363 (1997).

If the defendant satisfies the first step of the inquiry, the court must then review the requested information in camera and must disclose to the defendant confidential material that contains evidence "essential and reasonably necessary" to the defense. Gagne, 136 N.H. at 106. "[T]he court may release that evidence to the parties with any necessary protective order, taking into account the victim's rights under Part I, Article 2-b of the

New Hampshire Constitution and RSA 21-M:8-k." State v. Chandler, 176 N.H. 216, 233 (2023). When "reviewing the records, the trial court must determine if material and relevant 'evidence is in fact contained in the records.'" Girard, 173 N.H. at 628 (quoting State v. Graham, 142 N.H. at 363 (emphasis in original); (citing State v. Peseti, 65 P.3d 119, 129 (Hawaii 2003) (requiring disclosure of privileged documents when they are, among other things, "relevant and material to the issue before the court" (quotation omitted)). "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." N.H. R. Evid. 401. "[E]vidence is material only if there is a reasonable probability that disclosure of the evidence will produce a different result in the proceeding." Girard, 173 N.H. at 628-629 (citing United States v. Bagley, 473 U.S. 667, 682 (1985) (quotations omitted)). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Id. (quoting Bagley, 473 U.S. at 692). "[R]ecords containing general credibility evidence may be material and relevant thereby requiring disclosure." Id.

This easily understood, workable test has been utilized by New Hampshire courts for over thirty years and was reaffirmed by a unanimous court in Girard in 2020, two years after the adoption of Article 2-b. Add. 52. Three years later this Court incorporated Article 2-b into the second prong of the Gagne test. See Chandler, 176 N.H. at 233; see also State v. Gorman, 2023 WL 7001665, at *3 (N.H. Oct. 24, 2023) (non-precedential), State v. Claussells-Vega, 2023 WL 7704883, at *5 (Nov. 5, 2023); State v.

LaPointe, 2024 WL 2957146, at *2 (May 13, 2024 NH).[5] The record below (ignored by K.R. and the State) and the trial court's order illustrates that the Gagne test properly balances the privacy rights a person has in her counseling records with a criminal defendant's constitutional rights to due process and a fair trial.

The trial court found that counselling records are "indisputably" "private and personal information" within the ambit of Article 2-b. Add. 51. Moreover, it found that in camera review of the records is "governmental intrusion." Id. The court concluded that Article 2-b applies to the Gagne/Girard test and demonstrated that the amendment easily fits within the test. Id.

At the trial court and in the Interlocutory Appeal Statement, K.R. argued that Article 2-b required overruling Gagne and replacing it with an "essential need" test adopted by Judge Delker in State v. Brown.[6] Apx.I.

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[5] K.R. expends significant ink arguing that Gorman is a non-precedential order ignoring that Chandler is a published opinion of the full court. The number of times the Court has explained in nonpublished opinions that the right to privacy in Article 2-b is protected through "any necessary protective order" demonstrates that this consideration is now firmly entrenched within the Gagne test.

[6] In Girard, this Court reversed Judge Delker's trial court rulings concerning in camera review of counselling records and remanded for additional review consistent with the Gagne/Girard standard. Two years later, Judge Delker ignored that directive and declared Gagne a dead letter when adopting the "essential needs" test in Brown.

14-15. K.R. offered no textual explanation why Article 2-b requires a more stringent test and, now that she has abandoned that argument on appeal for a wholesale overruling of Gagne and Cressey (which was not argued below), K.R. does not explain why the text of Article 2-b mandates a prohibition on obtaining records not in the possession of the State. Nothing in the text of Article 2-b commands this result or suggests that it replaces rather than complements prior law and this Court's recent opinions establishes it does not. In any event, the "essential need" test adopted in Brown and proffered by K.R. below requires the defendant to "present a credible basis to believe that the discovery of the privileged records is directly exculpatory or would present a highly material variance from the tenor of the State's evidence" and prove that "he conducted an adequate investigation and there is no alternative source of admissible evidence to support this theory of defense." Add. 51-52 (quoting Brown at 21-22).

The trial court rejected Brown's holding and found that Gagne remains the appropriate standard of review after the adoption of Article 2-b. Add. 52. And with good reason. The "essential need" test is derived from two cases involving governmental intrusion into private confidential information. In re Search Warrant for Medical Records of C.T., 160 N.H. 214 (2010) and In re Grand Jury Subpoena for Med. Rec. of Payne, 150 N.H. 436 (2004). Unlike in the typical request for in camera review by a defendant during the pendency of a criminal case, it was the government in each of these cases using its resources in a non-adversarial preindictment setting to pierce a confidential privilege and gain unfettered access to an uncharged person's confidential information. Given the government's vast investigatory resources, the adoption of a heightened standard as a brake

against governmental overreach in a non-adversarial setting is understandable.

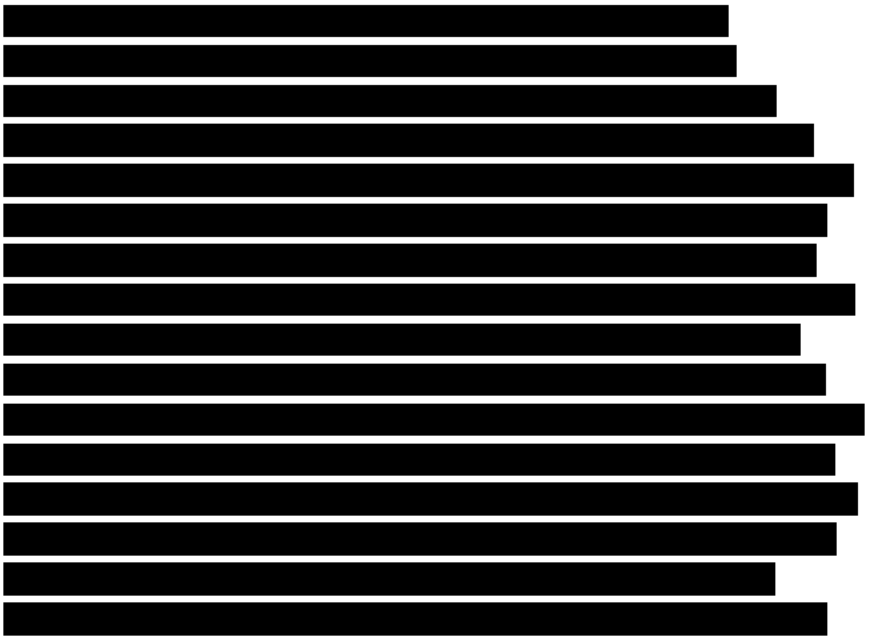
In contrast, when a defendant moves for in camera review in a post indictment adversarial setting involving the State, the defendant, and the court, the Gagne test "is well balanced to ensure that the defendant has the opportunity to obtain information material and relevant to his defense while preventing needless intrusion in an alleged victim's counselling records." Add. 53. The reliance on the "essential need" test below perhaps explains the abandonment of the test on appeal. Both In re CT and Payne were decided prior to the adoption of Article 2-b. Neither the Brown court, K.R. or the State explain on appeal why Article 2-b allows the government to continue to obtain confidential records in a non-adversarial preindictment setting notwithstanding Article 2-b's limitations on "governmental intrusion" while Article 2-b prevents a criminal defendant—a non-governmental actor facing the government's ultimate exercise of power, the deprivation of liberty—from obtaining exculpatory evidence consistent with their right to due process and a fair trial.

The more stringent, essential need test "would in almost all cases prevent a defendant from obtaining in camera review of an alleged victim's counselling records, in violation of the New Hampshire Supreme Court's interpretation of Part I, Article 15 …" Add. 53. "[T]rial courts cannot realistically expect defendants to articulate the precise nature of the confidential records without having prior access to them." Gagne, 136 N.H. at 105. If the bar to in camera review is set too high, "[the Court] risk[s] depriving the defendant of his constitutional right to due process." Graham, 142 N.H. at 363. And, "the trial court cannot, consistent with the

due process clauses of the State and Federal Constitutions, simply bar access to a victim's confidential counseling records under all circumstances." Gorman, 2023 WL 7001665, at 2. Despite not preserving the issue at the trial court, the Interlocutory Appeal Statement or the Questions Presented, this result is exactly what K.R., the State, and the amici now argue for on appeal.

Following this Court's directives in Chandler and Gorman, the trial court found that the "governmental intrusion" of in camera review is minimal and, if the court finds production of records is appropriate, the privacy interest enshrined in Article 2-b can be protected with a necessary protective order. Add. 53. (citing Graham, 142 N.H. at 363 and Gagne, 136 N.H at 105).

The trial court also relied on the actual record before it to demonstrate that Mr. Zarella had met his burden and Gagne remains the appropriate test:



[redacted]

Add. 54 (citations and footnote omitted).

Further, the trial court conducted in camera review of the additional records subject to the motion to quash pursuant to the Gagne test and "identified pages that should be disclosed from the records of Genesis Behavioral Health, New Beginnings and Simmons College." Apx.I. 16.

These factual findings are not challenged on appeal. They are ignored. Nevertheless, they demonstrate a record overbrimming with [redacted] See State v. Hoag, 145 N.H. 47, 49-50 (2000) (ordering production of records based upon contradictory statements by victim regarding penetration); State v. Eaton, 162 N.H. 190, 194-195 (2011) (ordering production of records when victim's statements to counsellor differed from statements to others). The principal reason Mr. Zarella is aware of these inconsistent statements is because the trial court carefully applied the Gagne test to each measured incremental request for records—[redacted] At all times the state either agreed or did not object to Mr. Zarella's requests. After denying K.R.'s motion to quash, the trial court made additional factual findings determining there is additional exculpatory information contained in the records from [redacted] When records have been produced, they have been under strict protective order with the

additional limitation they were "not to be used at trial, or otherwise copied or disseminated, without prior approval of the Court." (emphasis in original).

This overwhelming record demonstrates that the Gagne test protects the confidentiality of privileged records while acknowledging that a right to privacy must yield to a criminal defendant's constitutional rights upon a specific showing that the records contain information relevant and material to the defense. Girard, 173 N.H. at 627-628.

K.R. and the State also ignore the genesis of the investigation—

[redacted] That disclosure is not privileged—it would be a crime for the therapist to fail to make it.[7] See RSA 169-C:29. In December 2020, the counselor was interviewed by Gilford police and discussed information derived from her sessions with K.R. In February 2021 and June 2023, K.R. was interviewed and discussed [redacted] No privilege was asserted in any of these interviews. See Desclos v. Southern New Hampshire Medical Center, 153 N.H. 607, 612

[7] Neither K.R. nor the State take a position on whether RSA 169-C:29 is now unconstitutional after the adoption of Article 2-b. The compelled disclosure of information from a privileged counselling session is undoubtably "governmental intrusion in private or personal information." It would be terrible public policy if therapists were prohibited from reporting the abuse of their clients or put in a position of coercing a waiver to allow them to do so.

(2006) ("a party waives the psychotherapist-patient privilege by putting the confidential communications at issue by injecting privileged material into the case"). Police reports of the interviews and recordings of K.R.'s statements were produced in discovery setting the factual predicate for limited discovery of the [redacted] records as well as the additional records subject to this appeal. Mr. Zarella did not conduct, and the trial court did not allow a fishing expedition into K.R.'s counselling records. Rather, a party must take the evidence where it exists subject to applicable limitations and privileges. Here, relevant and material evidence exists in [redacted] The United States and New Hampshire Constitutions do not permit a system of justice in which a witness and their counselor can cooperate with law enforcement without assertion of any privilege and then that same privilege is invoked as a constitutional right barring a defendant access to [redacted] Girard, 173 N.H. at 627-628. However, this is exactly the unconstitutional result K.R., the State, and amici argue for on appeal.

The trial court's analysis of the facts and Article 2-b was correct and it should be affirmed.

C. K.R. Presents Arguments not Raised Below and not Preserved on Appeal

On appeal K.R. proffers new legal arguments untethered to the record, not presented below, not preserved and, not a subject matter of the

questions accepted by this Court. Despite assenting to Mr. Zarella's motion at the trial court—"At no time did I have any disagreement with the Defense counsel on any of their motions." Apx.II. 43—the State now asserts a position that is clearly waived—a defendant has no right to counselling records in the possession of a third party or, alternately, that a heightened standard now applies.

It is well settled that there is a "general procedural requirement that all issues be presented to the trial court to adequately preserve them for appellate review." State v. McAdams, 134 N.H. 445, 446 (1991). This rule is "grounded in common sense and judicial economy," and "gives the trial court an opportunity to consider alleged errors and to take remedial measure when necessary." Id. Therefore, the Court "will not consider issues raised on appeal that were not presented in the lower court." Id.

In the instant case, the Interlocutory Appeal Statement includes, as required, the Statement of the Questions certified for appeal to the Supreme Court. Both parties agreed upon the Statement of the Questions, which states:

1. Does the constitutional right of an individual "to live free from governmental intrusion in private or personal information," N.H. Const. Part 1, Art. 2-B change the test applicable to disclosure of an individual's therapeutic, privileged mental health or sexual assault counseling records for in camera review and, ultimately, to a criminal defendant or does *Gagne* remain the applicable test?
2. If the answer to question 1 is yes, and the constitutional amendment changes the applicable test, then what is the applicable test?

Apx.I 20.

The Statement of the Questions was carefully crafted based on the litigation in trial court. Abandoning the questions presented in her Interlocutory Appeal Statement, K.R. first argues that Part I, Article 2-b of the New Hampshire Constitution abrogates State v. Cressey, 137 N.H. 40 (1993). In the pleadings below, K.R. did not argue that Cressey is wrongly decided or that records in the hands of third parties are never discoverable.[8] Rather, as explained above, K.R. argued that Article 2-b requires overruling Gagne and replacing it with the "essential need" test articulated in Brown. K.R. did not ask the trial court to adopt the "substantial likelihood" test articulated in 173-C:5. For its part, the State did not object to Mr. Zarella's motions and, in fact, jointly agreed to a continuance of trial so the records could be obtained.

As a result, the trial court never considered Article 2-b's impact on the holding in Cressey nor did it consider whether Gagne should be limited to records in the government's possession. Finally, the Superior Court conducted no analysis regarding the test articulated in RSA 173-C:5. Because these issues were not briefed or argued below, they cannot be used on appeal to circumvent consideration of the trial court's analysis and holding and this Court must decline to consider these arguments on appeal.

D. K.R. and the State Misapprehend Cressey and the Law Relied Upon from Other Jurisdictions

[8] Cressey is referenced once in K.R.'s pleadings and not cited in the trial court's orders.

Even if the Court considers the arguments outlined in the briefs, though not properly preserved, Cressey does not expand or extend Gagne and rather only restates and affirms it. While the factual circumstance of Gagne included in camera review of privileged records in the hands of a governmental agency, the holding was not specific to that set of facts. Although Gagne cited approvingly to Pennsylvania v. Ritchie, 480 U.S. 39 (1987), the factual circumstances in Ritchie were also not the basis for the holding in Gagne. Rather, this Court agreed with Ritchie's reasoning, stating that "due process considerations require trial courts to balance the State's interest in protecting the confidentiality of child abuse records against the defendant's right to obtain evidence helpful to his defense." Gagne, 136 NH at 105. This Court acknowledged that "trial courts cannot realistically expect defendants to articulate the precise nature of the confidential records without having prior access to them" and, thus, to ensure due process protections, and "to trigger an *in camera* review of **confidential or privileged records**, the defendant must establish a reasonable probability that the records contain information that is material and relevant to his defense." Id. (emphasis added).

One year later, Cressey simply affirmed Gagne. The Cressey Court noted that the rationale for the holding in Gagne was not based on "distinguish[ing] between the privileged records of a state agency and the privileged records of a private organization," but rather on "balancing the rights of a criminal defendant against the interests and benefits of confidentiality." Cressey, 137 NH at 413. That reasoning can be applied "equally" to both government and privately held privileged records. Id. ("A defendant's rights are no less worthy of protection simply because he seeks

information maintained by a non-public entity"). In sum, Cressey never expanded Gagne, but affirmed it and made clear that the Court's reasoning was based on balancing the defendant's constitutional rights with interests in confidentiality and not the location of the privileged information.

Contrary to the new arguments on appeal, the holding in Gagne was never predicated on factual circumstances where there is a request for access to records in the possession of a state agency. The Court in Ritchie specifically held that "[b]oth [the defendant's] and the State's interests in ensuring a fair trial can be protected fully by requiring that the CYS files be submitted only to the trial court for *in camera* review." 480 U.S. at 60. While the Ritchie Court grounded its holding in the due process requirement that the government is required to turn over information in its possession, it never limited its holding to only circumstances where privileged information is in the hands of the government. The Ritchie Court reasoned that "*in camera* review by the trial court [of confidential records] will serve Ritchie's interest without destroying the Commonwealth's need to protect the confidentiality of those involved in child-abuse investigations." 480 U.S. 39, 61 (1987).

Even the Ritchie Court noted that the information sought was not *actually* in possession of the state: the prosecution did not see the records and could not have turned over the records without court intervention. Ritchie, 480 US at 57. Indeed, the prosecution's possession of the records would have been a violation of the privilege that the state sought to protect. For these reasons, Cressey is correct that the location of the information is a "distinction without a difference." 137 N.H. at 413; See also Burns v. State, 968 A.2d 1012, 1024 (Del. 2009) (Declining to adopt the State's argument

that Ritchie did not apply to records held by a third-party, stating "[t]hat is a distinction without a difference," reasoning that "[a]lthough Ritchie involved the disclosure of records in the possession of the State, nothing in the Ritchie Court's holding or analysis limits its application to records held by the State" and "[f]rom the standpoint of the privilege holder, it is immaterial whether the holder's therapy records are in possession of a private party or the State."); and see Id. at 1024, fn 41, citing: Commonwealth v. Barroso, 122 S.W.3d 554, 558-61 (Ky. 2003) (analyzing Ritchie and concluding defendants have a Confrontation right to review of privileged therapy records); Goldsmith v. State, 651 A.2d 866, 874-75 (1995) (holding that privileged documents held by a third party subject to in camera review); and State v. Kelly, 545 A.2d 1048, 1056 (Conn. 1988) (holding that third party's possession of privileged records immaterial to Ritchie analysis.).

The Supreme Court in Ritchie reached its holding despite the Government's argument that requiring disclosure to the trial court for in camera review would "override the Commonwealth's compelling interest in confidentiality on the mere speculation that the file 'might' have been useful to the defense." 480 U.S. at 57. The Court rejected this argument because "[a]lthough the public interest in protecting this type of sensitive information is strong, we do not agree that this interest necessarily prevents disclosure in all circumstances." Id. The Court noted that the Pennsylvania statute codifying the privilege at issue "provides that the information shall be disclosed in certain circumstances, including when CYS is directed to do so by court order." Id. at 57-58 (citing Pa.Stat.Ann., Title 11, § 2215(a)(5)). In other words, the statutory privilege at issue was a

limited privilege, subject to an exception for disclosure when a court order directed it.[9] "Given that the Pennsylvania Legislature contemplated *some* use of CYS records in judicial proceedings, we cannot conclude that the statute prevents all disclosure in criminal prosecutions." Id. at 58.[10]

Distinguishable from Ritchie and inapposite to the instant case, K.R. and the State rely on State v. Pinder, 678 So.2d 410 (Fla. 1996), in which Florida declined to extend the reasoning in Ritchie to circumstances where

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[9] The Supreme Court in Ritchie compared the statute codifying the limited privilege in child abuse investigations to the statute codifying the absolute privilege for communications between sexual assault counselors and patients. 42 Pa.Cons.Stat. § 5945.1(b) (1982). The Court was clear it issued "no opinion on whether the result in this case would have been different if the statute had protected the CYS files from disclosure to anyone, including law enforcement and judicial personnel." Ritchie, 480 U.S. at 58, n. 14.

[10] Since the decision in Ritchie, the Supreme Court has declined several opportunities to rule on the constitutionality of an absolute privilege for communications between a victim and crisis counselor, nor has the Court elaborated on the constitutional analysis contained in Ritchie despite split decisions below. See People v. Foggy, 521 N.E.2d 86 (Ill. 1988), cert. denied 486 U.S. 1047 (1988) (upholding absolute statutory privilege as constitutional); Commonwealth v. Wilson, 602 A.2d 1290 (Penn. 1992), cert. denied, 504 U.S. 977 (1992) (upholding absolute statutory privilege as constitutional).

the defendant sought in camera review of counseling records that were subject to an absolute statutory privilege pursuant to section 90.5035, Florida Statutes (1995). Id. at 414-15. In reaching this holding, the Court acknowledged that general principles of due process include the accused's right to defend himself against the state's accusations. Id. "Application of the constitutional right involves weighing the importance of preserving the statutory privilege against the 'inroads of such a privilege on the fair administration of criminal justice.'" Id. at 415 (citing United States v. Nixon, 418 U.S. 683, 711–12 (1974)). Importantly, the Court recognized that "[l]egislatively created rules of privilege shield potential sources of evidence to foster relationships deemed socially valuable and [d]ue process requires that these competing interests be examined and weighed." Id. (citations omitted).

Because the statute at issue contained no exceptions to the privilege, though, the Pinder Court concluded in camera review was not appropriate. Id. However, the court noted that Florida's discovery rules allow for depositions of any persons with relevant information to the offense charged, including the victim, giving the defendant access to unprivileged statements made by the victim to the police, her family, or other witnesses. Id. at 416. Thus, the Court concluded that the absolute statutory privilege would not "shield a significant and irreplaceable means of impeaching the chief prosecution witness." Id.

K.R. also asks this Court to rely on State v. Johnson, 990 N.W.2d 174 (Wis. 2023), a split decision with two concurring opinions and a dissent, overturning a previous Wisconsin Supreme Court case for misapplying Ritchie. Importantly, the statute in question codifies an

absolute privilege W.S.A. 905.04(2) (subject to limited exceptions in "proceedings for commitment, guardianship, protective services, or protective placement or for control, care, or treatment of a sexually violent person" W.S.A. 905.04(4)) and just like Pinder, is not persuasive and inapplicable to New Hampshire.

For these reasons, K.R.'s reliance on Pinder and Johnson is misplaced. Gagne and its progeny espouse the exact balancing and weighing of competing interests that even Pinder recognizes is paramount to the constitutional right to due process. The statutory privileges at play in Gagne were all subject to exceptions, including the Child Protection Act, RSA 169–C:25, III, RSA 330–A:19 (psychologist-patient privilege) and RSA 329:26 (physician-patient privilege). These same privileges, in addition to the privileges cited by K.R. and the State are still all limited privileges. See RSA 329-B:26; RSA 330-A:32; RSA 173-C:2, 5. Nothing in Article 2-b converts these privileges into absolute privileges and no party cites to any notice to voters that they were adopting such a result when approving the amendment. For these reasons, Pinder and Johnson are not applicable and are not persuasive authority establishing that Gagne, Cressey, and their progeny are wrong. Further, to the extent Pinder and Johnson would deny a defendant access to uncontroverted exculpatory evidence ranging from [redacted] as illustrated by the record in this case, they are wrongly decided.

E. Adoption of the "Substantial Likelihood" Test Was Not Briefed Below and is Contrary to Gagne

As an afterthought, K.R. argued below that production of her records was implicated by RSA Chapter 173-C. The argument was so poorly

developed that RSA 173-C is not mentioned in the trial court's merits order and the December order authorizing this appeal limits the issue to whether K.R. has a statutory right to interlocutory appeal. Nevertheless, as a fallback to the unpreserved argument that Cressey should be overruled, K.R. advances another unpreserved argument that 173-C's "substantial likelihood" standard should be expanded to apply to any request for counseling records.

RSA 173-C:2 identifies a statutory privilege in certain "confidential communications" by a "victim to a sexual assault counselor or a domestic violence counselor." A "victim" is "any person alleging sexual assault under RSA 632-A … who consults a sexual assault counselor … for the purpose of securing support, counselling, or assistance concerning a mental, physical, emotional, legal, housing, medical, or financial problem caused by an alleged act of sexual assault …" RSA 173-C:1, VI. A sexual assault counsellor is "any person who is employed or appointed or who volunteers in a rape crisis center" who meets certain qualifications and renders counseling to victims of sexual assault. See RSA 173-C:1, V. A rape crisis center is any agency that "primarily offers assistance to victims of sexual assault and their families" and provides nine statutorily delineated services. See RSA 173-C:1, IV. The scheme creates a procedure for a criminal defendant to seek information designated as privileged under Chapter 173-C under a "substantial likelihood" standard, see RSA 173-C:5, and provides the victim a right to interlocutory appeal from a court order requiring disclosure of records covered by Chapter 173-C. See RSA 173-C:9.

There are no factual findings below that [redacted]

[redacted] at any of these entities. Discovery produced to date establishes that K.R. [redacted] Considering the available record and the lack of any mandatory disclosure from [redacted] there is no evidence suggesting K.R. received [redacted] Additionally, K.R. never asked the court to follow the procedural steps outlined in RSA 173-C:5 to determine if in camera review was appropriate and only mentioned the "substantial likelihood" standard in passing as a last gasp attempt to stop the disclosure of records the trial court determined contains additional exculpatory information. RSA 173-C:5 is not even referenced in the trial court's orders.

The legislature enacted both RSA 173-C:5 and RSA 173-C:9[11] in 1985 and neither provision has ever been amended or discussed in a

[11] At the trial court, K.R. invoked RSA 173-C:9 when requesting interlocutory appeal. As demonstrated by the case, that statutory provision does not comport with due process. Here, the parties have been ready for trial for over a year, however, the litigation ground to a halt because of K.R.'s intervention and the interlocutory appeal. Mr. Zarella is released on personal recognizance, but many defendants charged with AFSA are detained pending trial. Adoption of an automatic right to interlocutory appeal whenever the court allows in camera review as proffered by K.R. and the State would require defendants to languish in jail at best for months and more likely for over a year every time they seek in camera review of

reported case.[12] The obvious reason for the lack of judicial attention to these statutory provisions is because the process to demonstrate the need for in camera review is rooted in the defendant's constitutional right to due process. Girard, 173 N.H. at 627. Because Gagne/Girard and its progeny find the basis for their decisions in Part I, Article 15 of the New Hampshire Constitution and the 5th and 14th Amendments to the United States Constitution, the statutory procedure cannot be applied because it does not pass constitutional muster.

As with the "essential need" test, K.R. and the State offer no textual analysis why Article 2-b requires adoption of the "substantial likelihood" test. Further, there is no explanation why a statute adopted in 1985 and never amended would become an appropriate balancing test for constitutional rights based on an amendment adopted in 2018. Finally, by its plain language RSA 173-C applies the "substantial likelihood test" to very narrow categories of records in the possession of rape crisis or domestic violence centers. K.R. and the State seek to extend this test to apply to all counselling records notwithstanding the context of the counselling or the custodian. There is no textual basis for this result in

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confidential records. This is yet another example why there is no basis in law to overrule the workable Gagne test.

[12] RSA 173-C:5 is discussed in one unreported case in which this Court assumed, without deciding, that RSA 173-C:5 is inconsistent with Gagne and applied the Gagne test on appeal. State v. Harris, 2016 WL 7451408, at *5 (N.H. Nov. 15, 2016).

Article 2-b or its legislative history and it should be rejected out of hand by this Court.

F. Stare Decisis Requires Upholding Gagne

Despite arguing that this Court should overturn thirty years of precedent, K.R. never discusses the factors set forth in In Re Blaisdell, 174 N.H. 187 (2021) and the State only mentions them in passing. "Stare decisis, the idea that today's court should stand by yesterday's decisions, commands great respect in a society governed by the rule of law" and heavily weighs against overruling a prior opinion. Id. at 190. "Thus, when asked to reconsider a holding, the question is not whether we would decide the issue differently de novo, but whether the ruling has come to be seen so clearly as error that its enforcement was for that very reason doomed." Id. (quoting Seacoast Newspapers v. City of Portsmouth, 173 N.H. 325, 333 (2020)). This Court will only overrule a decision after considering:

(1) whether the rule has proven to be intolerable simply by defying practical workability;

(2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling;

(3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and

(4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Id.

Gagne has been a workable easily understood test for over thirty years. It has been cited numerous times by this Court without a single dissenting opinion suggesting it should be modified or overruled. See e.g., State v. Hodges, No. 2023-0121, 2024 N.H. 44, 2024 WL 4009710 at *3-4 (N.H. Aug. 27, 2024) (holding that the Gagne inquiry remains the standard and that Girard clarified part of, but did not eliminate or displace, Gagne); Claussells-Vega, 2023 WL 7704883, at *4-5 (applying the Gagne standard in determining that the defendant met his burden to trigger an in camera review of victim's counseling records); Gorman, 2023 WL 7001665 at *2-3 (determining that the Gagne standard was met by the defendant when requesting in camera review of victim's counseling records and remanding to the trial court for such review); State v. Knott, No. 2019-0751, 2020 WL 7663477 at *2 (N.H. Nov. 18, 2020) (applying the Gagne standard to analyze defendant's request for in camera review of school counseling records of victim and remanding to the trial court for additional review under the Girard clarification of Gagne); Girard, 173 N.H. at 628-29 (2020) (applying the Gagne standard to defendant's request for in camera review of family counseling records while clarifying the second prong of Gagne); State v. Fiske, 170 N.H. 279, 285-6 (2017) (finding that the Gagne standard governed analysis of in camera review of victim's counseling records); State v. Aldrich, 169 N.H. 345, 354 (2016) (affirming the lower court's use of the Gagne standard when conducting in camera review of confidential psychiatric, psychological, and medical records of victim); State v. King, 162 N.H. 629, 631-33 (2011) (holding that Gagne standard governed defendant's request for in camera review of certain medical and counseling records of victim); State v. Eaton, 162 N.H. at 193 (applying the governing

Gagne standard in addressing defendant's request for in camera review of sets of victim's counseling records and finding that the trial court below correctly applied the Gagne standard to one set of records but erred, in part, by denying in camera review of another set of records), as modified on reconsideration (Aug. 19, 2011); In re State, 162 N.H. 64, 70 (2011) (remanding to the trial court for in camera review of certain psychiatric and psychological records of the victim under the Gagne standard, noting that the State did not dispute the application of Gagne having agreed that the defendant met his initial burden under the Gagne standard); State v. McLellan, 146 N.H. 108, 112-13 (2001), (holding that the trial court misapplied the Gagne standard when denying defendant's request for in camera review of confidential records of victim and remanding to the trial court for in camera review); Hoag, 145 N.H. at 50-51 (applying the Gagne standard to analyze defendant's request for in camera review of counseling records of child witness); Graham, 142 N.H. at 362-64 (remanding to the trial court for application of the Gagne standard to defendant's request for in camera review of certain privileged records of victim, having been unconvinced that the Gagne standard was applied at all in the trial court level); State v. Taylor, 139 N.H. 96, 98 (1994) (holding that the Gagne standard controls when evaluating discovery by a criminal defendant of private and confidential New Hampshire Division of Children and Youth Services records of a youth victim); Cressey, 137 N.H. at 413 (affirming the Gagne standard controls when analyzing defendant's request for in camera review of confidential records of minor victim irrespective of the records' origination at either a State agency or a private mental health facility).

In 2020, two years after the adoption of Article 2-b, Gagne was reaffirmed by Girard and in 2023, this Court began incorporating the privacy considerations of Article 2-b into the second prong of the Gagne test. The record below demonstrates that, in practice, Gagne both protects the privacy rights of the person whose records are sought and the due process rights of a defendant. Mr. Zarella filed three motions of limited scope based upon specific facts developed in discovery and each time discovered exculpatory evidence ranging from [redacted] And the fourth motion, which is the subject of this appeal, has resulted in a finding that additional exculpatory evidence exists in records from Genesis Behavioral Health, New Beginnings and Simmons College.

In response, neither K.R. nor the State cite to any language in Article 2-b or its legislative history necessitating overturning Gagne and its progeny and never explain why the untested "essential need" or "substantial likelihood" tests are more workable than the Gagne construct which has operated well for over thirty years. Rather, K.R., the State, and amici throw darts at the Court claiming its jurisprudence—affirmed last month—is based not upon due process concerns, but upon "the outdated stance of overt suspicion toward rape accusers." Again, the record below demonstrates this is false. This investigation began with a [redacted] See supra, pp. 6-10. The

records produced by the trial court were limited in scope to [redacted] Similarly, the [redacted] Id. The court ordered all documents produced under a protective order with strict limitation on their use requiring additional motion practice to allow their use at trial. This record establishes that [redacted] Any system of justice that would require Mr. Zarella to proceed to trial without knowledge of those statements is fundamentally unfair and a denial of due process. Nevertheless, this is exactly the system of justice K.R. and the State argue should be adopted by overruling Gagne for a prohibition upon obtaining records in the possession of a nongovernmental actor or under one of the heightened standards that are now argued on appeal.

G. The Supremacy Clause Precludes the Relief Sought by K.R. and the State

The claim that adoption of Article 2-b requires this Court to overrule Gagne/Girard/Cressey and reduce a criminal defendant's due process rights must also be rejected as contrary to the Supremacy Clause. See U.S. Const. Article VI, Paragraph 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."); Norelli v. Secretary of State, 175 N.H. 186, 195 (2022) (state courts required to enforce Supremacy Clause). Gagne and Girard are rooted, in relevant part, upon a defendant's federal constitutional

rights. In Gagne, for example, this Court grounded its analysis in the Sixth Amendment's requirement that defendants must be permitted to use privileged material "if such material is essential and reasonably necessary to permit counsel to adequately cross-examine for the purposes of showing reliability and bias." Gagne, 136 N.H. at 104. Gagne relied on Ritchie for the proposition that the Fourteenth Amendment's due process clause entitles a defendant access to confidential records. Id. at 105; see also Gorman, 2023 WL 7001665, at *2 (due process clauses of State and Federal Constitutions mandates access to confidential records under certain circumstances). And in Girard, this Court referred to a defendant's right to confront witnesses being a right held under the Sixth Amendment. Girard, 173 N.H. at 628.

Nothing in the Gagne/Girard line of cases suggests that the defendant's right to obtain access to confidential records arises only under the State Constitution. To the contrary, the jurisprudence is clear that the defendant's constitutional rights flow from the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Passage of a state constitutional amendment cannot operate to reduce a criminal defendant's rights under the United States Constitution. Nevertheless, this is exactly what K.R. and the State ask this Court to do in violation of the Supremacy Clause. See Reynolds v. Sims, 377 U.S. 533 (1964) ("When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls."); Crime Victims R.S. and S.E. v. Thompson (Vanders II), 485 P.3d 1068, 1075 (Ariz. 2021) (in balancing defendant's requests for in camera review of victim's counseling records against victim's statutory and state constitutional rights, defendant's federal

constitutional rights to due process control); State v. Riggs, 942 P.2d 1159, 1162 (Ariz. 1997) ("[I]f, in a given case, the victim's state constitutional rights conflict with a defendant's federal constitutional rights to due process and effective cross examination, the victim's rights must yield."); State v. Blackwell, 801 S.E.2d 713, 736 (S.C. 2017) (constitutional right to privacy yields to defendants' federal right to confrontation).

CONCLUSION

For the reasons stated above, the answer to question 1 is no and the order of the trial court should be affirmed.

REQUEST FOR ORAL ARGUMENT

Given the issues involved, Mr. Zarella requests oral argument before the full court.

Respectfully submitted,

Dated: September 24, 2024

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RULE 26(7) CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2024, a copy of the foregoing brief and appendix have been served through the Court's e-filing system upon all parties and counsel of record.

/s/ William E. Christie
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CERTIFICATE AS TO COMPLIANCE WITH WORD LIMIT

I hereby certify that the Appellee's Brief complies with the word limit and is in accordance with Appellee's Assented-To Motion for Leave to Exceed Word Count Limit By No More Than 10,500. Appellee's Brief contains 10,498 words.

/s/ William E. Christie
William E. Christie, #11255

ADDENDUM