STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2024-0066

STATE OF NEW HAMPSHIRE

v.

GENE L. ZARELLA

On Interlocutory Appeal from Decision of the

Belknap County Superior Court

BRIEF OF THE NEW HAMPSHIRE COMMUNITY BEHAVIORAL HEALTH ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF INTERVENOR K.R. a/k/a K.Z.

Robert L. Best, Esq., NH Bar #17437
rbest@sulloway.com
Sarah S. Murdough, Esq. NH Bar #10599
smurdough@sulloway.com
Sulloway & Hollis, P.L.L.C.
9 Capitol Street
Concord, NH 03301
(603) 223-2800

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STATEMENT OF INTEREST OF AMICUS CURIAE

The New Hampshire Community Behavioral Health Association ("NHCBHA") is an organization comprised of the ten community mental health centers throughout New Hampshire.[1] These centers provide emergency and ongoing mental health services to children, adolescents, adults, and older adults living in New Hampshire.

The NHCBHA and its ten community members have an interest in this case because they provide mental health care, and they generate and maintain custody of the type of mental health records the defendant seeks to access in the case at Bar. In addition, they maintain a commitment to safe, effective, and comprehensive treatment for mental health conditions, including trauma therapy for abuse victims that would be impacted by an adverse outcome from this appeal. The NHCBHA is dedicated to preserving the sanctity of the mental health provider-client relationship and patient privacy to ensure the accessibility and sustainability of high-quality mental healthcare and the elimination of the stigma and discrimination related to mental health.

As such, NHCBHA submits this *amicus curiae* brief in support of the Intervenor's appeal of the Superior Court's ruling that denied

[1] The ten community mental health centers that comprise the NHCBHA include: Center for Life Management (Derry); Community Partners (Rochester), Greater Nashua Mental Health; Lakes Region Mental Health Center, Inc. (Laconia); Mental Health Center of Greater Manchester; Monadnock Family Services (Keene); Northern Human Services (Conway); Riverbend Community Mental Health, Inc.(Concord); Seacoast Mental Health Center, Inc. (Portsmouth); West Central Behavioral Health (Lebanon).

Intervenor's Motion to Quash the court's order for production of her counseling and mental health records for *in camera* review and declining to adopt Intervenor's request to adopt a heightened standard for *in camera* review and production of such confidential and privileged records in light of New Hampshire's enactment of Part I, Article 2-b of the Constitution.

This brief is being submitted in accordance with N.H. Sup. Ct. R. 30(1) with written consent of all parties to the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This matter affords this Court the opportunity to affirm the constitutional importance of an individual's right to privacy in her mental health treatment records.

In spite of tremendous progress toward acceptance, mental health treatment still carries a stigma that adversely impacts an individual's willingness to seek and continue treatment and how she is perceived in society. For some individuals, their own subjective belief in the existence of this stigma (self-stigma) impacts their interactions with mental health providers. Confidentiality of treatment records is paramount to combat the adverse effects of stigma. Indeed, disclosure of an individual's records adds to the stigma attached to seeking mental health treatment and itself is traumatic. The nature of the injury suffered by a victim of abuse is, in part, associated with lost power and control over critical aspects of her life. By compelling disclosure of confidential treatment records, a court, in effect, once again takes control away from the victim against her will, and risks unravelling the effectiveness of the therapeutic relationship.

It is important to note this case does not concern compelling production of records from the State. Rather, this case involves the constitutional right of a private individual under Part I, Article 2-b of the New Hampshire Constitution to be free from governmental intrusion in her private or personal mental health records. The constitutional magnitude of this right, its intersection with the stringent statutory privilege attached to the relationship between mental health provider and patient, and the real world impact that disclosure of an individual's private mental health records has on the effectiveness of mental health treatment and the individual's well-being should compel this Court to find it to be a rare and extraordinary circumstance to justify the pretrial intrusion into the mental health treatment records of those seeking mental health treatment for abuse. To be clear, even an initial *in camera* disclosure carries a significant measure of the same harm associated with any further disclosure.

ARGUMENT

I. Disclosure of Mental Health Records Reflects and Perpetuates the Stigma Associated with Mental Health Treatment.

As clinicians, mental health providers must address the stigma associated with mental health treatment in order to effectively treat the patient. And there can be no doubt that the stigmatization of the mentally ill remains in many forms. *See, e.g.*, Committee on the Science of Changing Behavioral Health Social Norms; Board on Behavioral, Cognitive, and Sensory Sciences; Division of Behavioral and Social Sciences and Education, Ending Discrimination Against People with Mental and Substance Use Disorders: The Evidence for Stigma Change 2-3 (2016),

https://www.ncbi.nlm.nih.gov/books/NBK384915/pdf/Bookshelf_NBK384915.pdf. Mental health treatment is influenced by public perceptions and acceptance of stereotypes which can result in discrimination against individuals seeking mental health treatment or avoiding treatment altogether. Patrick W. Corrigan (2016), *Lessons learned from unintended consequences about erasing the stigma of mental illness*, 15 World Psychiatry 1, 67-68, https://onlinelibrary.wiley.com/doi/epdf/10.1002/wps.20295. "Self-stigma" can also present a barrier to effective treatment when an individual turns those public perceptions inward. Doing so hurts self-esteem and an individual's confidence and ability to perform well in areas of life that are important to them. *Id.* Structural stigma even reaches our public and private institutions, including the court, and can intentionally or unintentionally discriminate against those who seek mental health treatment. *Cf.* Evidence for Stigma Change, at 5, 41-48, https://www.ncbi.nlm.nih.gov/books/NBK384915/pdf/Bookshelf_NBK384915.pdf.

The self-limiting effect stigma can have on an individual's ability to continue mental health treatment is particularly at issue where the individual is confronted with the risk of disclosure of her records. Here, the risk of disclosure presents not only a potential barrier to continued treatment, but a risk of re-traumatization by the Court process itself. *Cf.* Negar Katirai, *Retraumatized in Court*, 62 Ariz. Legal Stud. 81 (2020) (addressing retraumatization of intimate partner violence survivors). Court-compelled disclosure, even *in camera* to a single judge, chills an individual's ability and incentive to share sensitive personal information

with her mental health provider. When an individual avoids treatment or is less than candid with her mental health provider, the potential for effective treatment is severely diminished. *In re Berg,* 152 N.H. 658, 664 (2005).

II. THIS COURT SHOULD ADOPT A HEIGHTENED STANDARD FOR PRE-TRIAL INVASIONS TO THE PRIVACY OF A VICTIM'S MENTAL HEALTH RECORDS.

Over time this Court has implicitly recognized the impact that stigma and trauma have on mental health treatment and has endorsed the need to maintain the confidentiality of mental health records. There has always been a strong privilege for mental health records in New Hampshire, whereby the confidential relationship between provider and patient is afforded the same protection as the attorney-client privilege. *See* RSA 329-B:26 (psychologists); RSA 330-A:32(mental health providers). On multiple occasions, this Court has previously recognized the particular societal importance to the confidentiality of the psychotherapist-patient relationship. When discussing the public policy underlying the therapist-patient relationship in *In re Berg*, this Court acknowledged the compelling justification for the privilege anchored in the inherent nature of the communications between therapist and patient:

> The psychologist-patient privilege . . . serves to protect an individual's privacy interest in communications that will frequently be even more personal, potentially embarrassing, and more often readily misconstrued than those between attorney and client. Made public and taken out of context, the disclosure of notes from

> therapy sessions could have devastating personal consequences for the patient and his or her family….

In re Berg, 152 N.H. 658, 664 (2005) (quoting *Kinsella v. Kinsella*, 696 A.2d 558, 584 (N.J. 1997)). This Court further recognized the importance of protecting that privilege because effective psychotherapy "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of acts, emotions, memories and fears." *Id.* (quoting *Jaffe v. Redmond*, 518 U.S. 1, 10 (1996)). The lack of such confidence and trust is a barrier to effective therapy. *Id.* ("a psychiatrist must have his patients confidence, or he cannot help him"). *See also State v. Doyle*, No. 2023-0120, 2024 N.H. 25 (May 14, 2024) (noting unique nature of the mental health provider-patient relationship underlying need for strict construction of statutory privileges); *Petition of State of N.H.*, 162 N.H. 64, 68 (2011) (acknowledging the strong public policy behind the psychotherapist-patient privilege).

However, this Court has not addressed the impact that New Hampshire's constitutional right to privacy (Part I, Article 2-b) has on the ability to intrude on the privilege afforded mental health records developed by the Court under an earlier line of cases. As explained below, the current standard for pre-trial disclosure of a victim's mental health records for *in camera* review is insufficient to protect an individual's right to privacy, especially in light of Part I, Article 2-b, and the modern appreciation for the substantial privacy interest in mental health records.

A. Part I, Article 2-b Affords an Individual a Constitutional Right to Privacy in her Mental Health Records Which Demands a Heightened Standard be Applied to Pre-Trial

***In Camera* Disclosures of Such Records.**

In 2018, New Hampshire voters approved an amendment to the State constitution to explicitly protect the right to privacy from government intrusion. Part I, Article 2-b states, "An individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent." This Court has not had occasion to address the scope of rights protected by Article 2-b. However, as noted above, this Court has previously recognized the undisputably "private and personal" information necessarily conveyed by patients for effective mental health treatment. The legislative history to Article 2-b further demonstrates that medical information fell squarely within the scope of information this constitutional amendment was intended to protect. *See Comm. Minutes of Hearing on CACR 16 Before N.H. Senate Rules & Enrolled Bills Comm.*, Reg. Sess. (Mar. 29, 2018) at 2 ("enshrining that [privacy] right of your personal medical information into the constitution"). By approving this amendment, New Hampshire citizens validated the strides made to counter the stigma on mental health treatment by making an individual's right to privacy in mental health counseling and treatment records "natural, essential, and inherent." While this Court has previously tried to balance this statutory zone of privacy established in 329-B:26 and RSA 330-A:32 against asserted due process rights of a criminal defendant, the constitutional recognition of this privacy right of individuals changes the landscape for how such a balancing test should be conducted. In brief, the current standard applied by this Court to compel the pre-trial *in camera* review of mental health treatment records fails to account for an individual's fundamental constitutional right to privacy under the New

Hampshire Constitution.

Indeed, the current two-step process and standards developed by this Court for 1) determining whether the trial court should conduct an *in camera* review of a victim's mental health records; and 2) whether any such records should be disclosed to a criminal defendant was derived by comparing a defendant's asserted constitutional due-process interest with the victim's statutory privacy privilege. As noted by this Court in *State v. Girard*, explaining the standards first set forth in *State v. Gagne*:

> A criminal defendant's interest in obtaining disclosure of material helpful to his defense is rooted in the constitutional right to due process. In contrast, the psychotherapist-patient privilege, which is intended "to encourage full disclosure by the patient" to receive complete treatment has been established by statute.

State v. Girard, 173 N.H. 619, 627 (2020) (internal citations omitted). *See also State v. Gagne*, 136 N.H. 101 (1992). This Court has further acknowledged that the standard for *in camera* pretrial review – "a reasonable probability that the records contain information that is material and relevant to his defense" – is "not unduly high." *State v. King*, 162 N.H. 629, 632 (2011) (quoting *State v. Graham*, 142 N.H. 357, 363 (1997)).

Although under the first step of the existing process records are being provided *in camera* to the Court and not the defendant, it is no less a "governmental intrusion" into an individual's natural, essential, and inherent right to privacy in her mental health records. Such an intrusion requires more than a "not unduly high" standard; rather, this Court should hold that it requires a demonstration of a compelling State interest. *E.g.*, *In*

re Caulk, 125 N.H. 226, 230 (1984).

B. The Fact that the Records at Issue are Held by a Private Provider and Not the State is a Meaningful Distinction that Calls into Question the *Gagne-Girard* standards.

It is important to note that this case does not involve a criminal defendant seeking records held by the State. The fundamental nature of constitutional "due process" is that a criminal defendant is afforded due process in relation to some action by the State. In the context of this case, the State did not create the victim's mental health records, the State does not possess the records, nor did the State seek to use them against the defendant. Those records are in the hands of a private actor and belong to the victim, neither of whom owe due process to the defendant. State action simply is not present here.

The current 2-step process which allows a criminal defendant to access his victim's mental health records is derived from *Gagne*, a case involving records held by the State. *Gagne* relied upon the due process analysis of the United States Supreme Court in *Pennsylvania v. Ritche,* 480 U.S. 39 (1987). *Gagne*, 136 N.H. at 105-106. *Ritchie*, like *Gagne*, involved records held by the State. *Ritchie* addressed whether a criminal defendant had a right to access records from a state child protective services agency. *Ritchie*, 480 U.S. at 43. Therefore, importantly, the very underpinnings of *Ritchie* do not support this Court's expansion of *Gagne*'s principles to extend to privileged records held by a *private* mental health provider.

This distinction was recently comprehensively addressed by the Supreme Court of Wisconsin in *State v. Johnson*, 407 Wis. 2d 195, 210-15 (2023). There the Wisconsin Supreme Court overturned the Wisconsin

Court of Appeals decision in *State v. Shiffra*, 499 N.W.2d 719 (Wis. Ct. App. 1993). That decision had stood for 30 years as setting the process for review of a victims private mental health records *in camera* which was remarkably similar to the current process in New Hampshire, and the Wisconsin Supreme Court had signaled its approval of that process on multiple prior occasions. *Johnson*, 407 Wis. 2d at 208-09. In deciding that *Ritchie* did not support Wisconsin's process, the Supreme Court of Wisconsin, relied, in part, on the "meaningful" distinction between publicly held records and records held by a private entity, noting that *Ritchie* rested on the State's obligation to disclosed exculpatory and material evidence set forth in *Maryland v. Brady*, 373 U.S. 83 (1963), which obligation was not implicated when considering privately held records. *Id.* at 211 (citing *Ritchie*, 480 U.S. at 57).

This distinction should similarly compel this Court to revisit the appropriate standard to be applied to any forced disclosure of these private mental health records in the hands of mental health providers. However, in the alternative, the adoption of Part I, Article 2-b also compels the adoption of a new heightened standard before permitting *in camera* review that recognizes an individual's constitutional right to privacy in her mental health records.

C. Intrusion from *in camera* review is no less an intrusion to private or personal information which requires a heightened standard.

In finding the rationale of the deeply rooted *Shiffra* decision "unsound" and overturning the long-standing process for *in camera* review of a victim's private mental health records in Wisconsin, the Supreme

Court of Wisconsin recognized the evolution of law over the years away from an historical distrust of sexual assault victims. *Johnson*, 407 Wis. 2d at 220-21. That court noted, however, that even with some changes to procedures meant to combat misconceptions about sexual assault victims, the process for permitting *in camera* review of privileged mental health records of those victims continued "to reflect outdated skepticism toward victims of sexual assault." *Id.* at 221-23. We too in New Hampshire should be beyond the outdated view of that assault victims who seek mental health treatment are somehow less credible and therefore less worthy of protection from intrusion to their privileged mental health treatment.

Simply because disclosure of records under *Gagne*, initially, is "only" to a single judge does not somehow minimize the intrusion. *Id.* at 217. Putting aside the State constitutional privacy interest afforded by Part I, Article 2-b, these records are privileged under New Hampshire law to the same extent as are records that fall under the attorney-client privilege. With respect to attorney-client privileged information, disclosure to one person breaches the privilege. Similarly, *in camera* disclosure of records to a judge who then determines which records can subsequently be disclosed to others necessarily presupposes disclosure of a greater category of records to the judge, not related to any issues in the prosecution, so that the judge may sift through and determine a smaller set of records to provide to the defendant. As a result, while an *in camera* review of records involves a disclosure only

to the Court, it encompasses disclosure of a potentially much wider swath of the victim's records, including records not relevant to *any* State interest.[2]

The constitutional protection afforded by Part I, Article 2-b now needs to be applied to the front end of any standard or balancing test that may be crafted by this Court to allow *in camera* review of mental health records against the wishes of the patient or victim. The *Johnson* Court also held that the balancing test in long use in Wisconsin had been undermined by new statutory and constitutional provisions affording crime victims with the State constitutional right to privacy. *Id.* at 224-25. Similarly, here, this Court must consider the expanded constitutional rights of individuals in New Hampshire to be free from intrusion to their private and personal mental health records.

The intrusion into an individual's mental health records resulting from *in camera* review perpetuates the stigma associated with seeking mental health treatment and disincentivizes individuals from seeking treatment. It cannot be disputed that mental health providers must have their patient's trust to support effective therapy and patient privacy is an ethical and professional obligation to achieve therapeutic goals. How can mental health providers earn patient trust where they cannot be confident that they can hold private their patient's frank and complete disclosures? With disclosures, the therapist must then not only treat the patient's

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[2] As a practical matter, the victim herself likely has never seen or reviewed her medical records or mental health records that are given over to the Court to review. Moreover there are times when a clinician may determine that it would be harmful for the patient to see her own records, and therefor withheld the same records from the patient that are disclosed to the Court and potentially the criminal defendant.

underlying trauma, but the trauma associated with the disclosure itself. Of course, a patient's therapeutic communications are also made in context which cannot be explained by a record. So, disclosure of those communications out of context further risks pulling the therapist into the criminal case for purposes of explaining the context and what should or should not be construed from those communications.

The New Hampshire legislature has recognized the importance of mental health care by placing mental health privileges on the same strict level of confidentiality as the attorney-client privilege. The People of New Hampshire have created a fundamental right of privacy in those records. It is now this Court's turn to enforce this fundamental right by crafting a heightened standard which, at a minimum, requires an essential need for the records, as well as compelling and extraordinary circumstance to justify the pretrial *in camera* intrusion into an individual's mental health treatment records.

CONCLUSION

The NHCBHA urges this Court to adopt a heightened standard to review a criminal defendant's request for *in camera* review of a victim's mental health records in recognition of the natural, essential, and inherent right" of an individual "to live free from governmental intrusion in private or personal information" under Part I, Article 2-b of the New Hampshire Constitution.

Respectfully submitted,

New Hampshire Community Behavioral Health Association

By and through its attorneys,

SULLOWAY & HOLLIS, P.L.L.C.

Dated: August 5, 2024

By: /s/ Robert L. Best

Robert L. Best, Esq.,
N.H. Bar # 17437
rbest@sulloway.com
Sarah S. Murdough, Esq.,
N.H. Bar # 10599
smurdough@sulloway.com
Sulloway & Hollis PLLC
9 Capitol St.
Concord, NH 03301
Telephone: (603) 223-2800

CERTIFICATION

I hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief is written in 13-point Times New Roman font, with line spacing set to 1.5. This brief contains fewer than 9,500 words.

Dated: August 5, 2024

By: /s/ Robert L. Best

Robert L. Best, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of August, 2024, copies of the foregoing Amicus Brief was served through the Court's electronic filing system on all counsel of record.

Dated: August 5, 2024 By: /s/ Robert L. Best
Robert L. Best, Esq.