THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2024-0066

State of New Hampshire

v.

Gene Zarella

INTERLOCUTORY APPEAL PURSUANT TO RULE 8 FROM A JUDGMENT OF THE BELKNAP COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(Fifteen-minute oral argument requested)

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ISSUES PRESENTED[1]

I. Does the constitutional right of an individual "to live free from governmental intrusion in private or personal information," N.H. Const. Part I, 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?

II. If the answer to question 1 is yes, and the constitutional amendment changes the applicable test, then what is the applicable test?

[1] The Issues Presented herein are taken verbatim from the interlocutory appeal statement certified by the trial court. *See* Interlocutory Appeal Statement at 4.

STATEMENT OF THE CASE

The defendant, Gene Zarella, was indicted on four counts of aggravated felonious sexual assault. *See* App. at 30.[2] On August 2, 2023, the court (*Leonard*, J.) ordered production of the victim's counseling records from New Beginnings for *in camera* review. *Id*. The court issued similar orders for records from Concord Hospital, Nina Demarco/Amoskeag Health, Genesis Behavioral Health, Simmons University Counseling Center, and Bedford Family Therapy. *Id*. Judge Leonard reviewed *in camera*, and subsequently disclosed, records from Concord Hospital and Bedford Family Therapy. *Id*. at 31. The remaining records have not yet been reviewed. *Id*. at 30-31.

On October 12, 2023, the court (*Ignatius*, J.) allowed the victim and New Beginnings to intervene to assert any privacy rights, privileges, and interests in the targeted counseling records. *Id*. at 30. The defendant and intervenors filed a motion to quash and submitted memoranda supporting their positions. *Id.* After a hearing, the court denied the motion to quash and stated that it would review the victim's counseling records *in camera*. *Id*. This interlocutory appeal followed.

[2] Citations to the record are as follows:
"T" refers to the transcript of the hearing on the motion to quash;
"IAS" refers to the interlocutory appeal statement;
"App." refers to the appendix to the interlocutory appeal statement filed under seal by the intervenor.

STATEMENT OF FACTS

A. Procedural History

1. Pleadings

Following his indictment, the defendant filed a motion seeking the victim's privileged medical and counseling records from six of the victim's providers: New Beginnings – Without Violence and Abuse, a women's crisis center ("New Beginnings"); Nina DiMarco/Amoskeag Health; Bedford Family Therapy; Simmons University Counseling Center; Genesis Behavioral Health; and Concord Hospital. The court granted the motion without an objection or response and ordered the above-listed entities to produce the victim's privileged records to it for *in camera* review. App. 37-38.

The victim and New Beginnings subsequently filed an emergency motion to intervene and quash the orders. App. at 37. The records related to counseling, medical care, and therapy, and therefore implicated the privileges contained in RSA chapter 173-C:2 [sexual assault/domestic violence counselor-patient privilege], RSA 329-B:26 [psychologist-patient privilege], RSA 330-A:32 [mental health counselor-patient privilege], and New Hampshire Rule of Evidence 503(b) [psychologist or pastoral counselor-patient privilege]. App. at 38.

The victim did not waive her privileges or her constitutional right to "live free from governmental intrusion in private or personal information," N.H. Const. Pt. I, Art. 2-b, and objected "strenuously to the *in camera* review" on these bases. App. at 38. The intervenors contended that the "*Gagne* landscape" had "changed dramatically with the adoption of Part 1, Art. 2-b to the State Constitution." *Id*. at 39. Rather than weighing a victim's statutory privilege against a defendant's constitutional due process rights, the intervenors argued that courts must now weigh competing constitutional rights — the defendant's right to due process and the victim's right to privacy. *Id*. To conduct that inquiry, the intervenors advocated that the court adopt the "essential need" standard that

Judge Delker applied in *State v. Javon Brown*, No. 216-2020-CR-00483, August 22, 2022. App. at 40.

The defendant objected to the victim's motion. *Id*. at 69. The defendant asserted that the victim did not move to intervene when the *in camera* review process began in June 2022 and should not be allowed to delay that process by intervening over a year later. *Id*. at 73-74. The defendant argued that the standard for triggering *in camera* review under *State v. Gagne*, 136 N.H. 101 (1992), remained the same after the passage of Part I, Article 2-b. App. at 78.

The intervenors and the defendant subsequently filed memoranda in support of their positions. App. at 81, 100.

The defendant argued that *Gagne* had been the applicable standard for triggering *in camera* review for thirty years and was reaffirmed in *State v. Girard*, 173 N.H. 619 (2020), which was decided after Part I, Article 2-b was adopted. App. at 86-87. In the defendant's view, Part I, Article 2-b was merely an "hortatory" and "precatory" provision that did not create any judicially enforceable rights. *Id*. at 87-89. The defendant argued that the amendment is "not a self-executing constitutional provision" and "is so vague as to make its judicial enforcement impossible." *Id*. at 89.

The defendant also contended that *in camera* review is "not a government intrusion," App. at 89, and that *Gagne* properly balanced a victim's right to privacy against a defendant's right to a fair trial. *Id*. at 90-91. The defendant asserted that the Supremacy Clause of the United States Constitution also prohibited the victim's interpretation of Part I, Article 2-b because "*Gagne* . . . [is] grounded, in relevant part, upon a defendant's federal constitutional rights." *Id*. at 95.

The intervenors argued that Part I, Article 2-b served to recalibrate *Gagne* and limit that case to its facts. *Id*. at 101. "That is to say, *Gagne* should have application only in cases in which the privileged potentially exculpatory information is in the *government's possession*, <u>not</u> in cases like this one, where the defendant seeks to compel disclosure of privileged confidential information from the private-party privilege holder."

Id. The intervenors contended that the due process clause protects private citizens from government overreach, but does not create rights in private citizens vis-à-vis other private citizens. *Id*. at 102.

The intervenors asserted that *Gagne* never should have been extended to allow citizens to invade the private, privileged records of other citizens, and that erroneous extension was based on a misunderstanding of *Pennsylvania v. Ritchie*, 480 U.S. 39 (1989). App. at 103-04. The intervenors asserted that, unlike this Court, the federal courts have never extended *Ritchie* to records in the hands of private actors, *id*. at 104-06, and that this Court "has never explained the basis for this radical extension of *Gagne*" and should reconsider the same. *Id*. at 105-06, 112. The intervenors averred that the passage of Part I, Article 2-b gave provided an opportunity to retether *Gagne* to its underpinnings — *Ritchie*, which was underpinned by *Brady v. Maryland*, 373 U.S. 83 (1963) — and to fairly balance the defendant's due process rights against the privacy rights of victims while respecting the intent of the legislature to place the counselor-patient privilege on par with attorney-client privilege. *Id*. at 112-13.

On October 31, 2023, the court held a hearing on the intervenors' motion to quash. *See generally* T at 1-72. The hearing largely summarized the parties' respective positions as reflected in the pleadings.

2. Court's Order

Following the hearing, the court issued an order denying the intervenors' motion to quash. *See* App. at 30-36. The court found that counseling records are "indisputably 'private or personal information'" covered by Part I, Article 2-b, and that "a court's *in camera* review of those records . . . is 'governmental intrusion' because otherwise a defendant would have no means to access those records." *Id*. at 32. Accordingly, the court held that "Article 2-b applies to a court's *in camera* review of counseling records" and moved on to ask whether "Article 2-b alter[ed] the *Gagne* framework." *Id*.

The court observed that Judge Delker adopted the "essential need" standard in *State v. Javon Brown*, but did not adopt Judge Delker's approach. *Id*. at 33. The court instead "acknowledge[d] that Article 2-b requires reassessment of the procedures for review and disclosure of an alleged victim's counseling records[,]" but found no "basis to dispense wholesale the historic precedent to accommodate Article 2-b protections." *Id*. Accordingly, the court found that the *Gagne* standard remained "the appropriate standard of review." *Id*. The court observed that this Court had reaffirmed *Gagne* in *Girard* two years after the passage of Part I, Article 2-b, and was "not persuaded" that *Girard* would have come out differently if this Court had considered the applicability of Article 2-b in that case. *Id*.

The court stated that *Gagne* was "well balanced" to protect the privacy rights of victims and the due process rights of defendants, and that a more stringent standard "would in almost all cases prevent a defendant from obtaining *in camera* review of an alleged victim's counseling records." *Id*. at 34. The court observed that this Court acknowledged the importance of Part I, Article 2-b without altering *Gagne* in *State v. Gorman*, No. 2022-0178 (October 24, 2023) (non-precedential). *Id*.

Ultimately, the court ruled that the defendant had satisfied his burden under *Gagne* and stated that it would conduct an *in camera* review of the victim's private, privileged records. *Id*. at 34-36.

This interlocutory appeal followed.

SUMMARY OF THE ARGUMENT

Part I, Article 2-b declares that "[a]n individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent." N.H. CONST. Pt. I, Art. 2-b. It applies to the private, personal, and privileged counseling records being sought in this case and fortifies the statutory privileges applicable to those records. RSA 173-C; RSA 329-B:26; RSA 330-A:32.

This fundamental right of the victim to "live free from governmental intrusion" into her private and personal information applies to a court order seeking to review a victim's privileged medical and mental health records *in camera*. The judiciary is a governmental actor. Compulsory process issued by the judiciary requiring a healthcare provider or private citizen to provide to it a patient's private, personal, privileged medical or mental health records for its review is undoubtedly a governmental intrusion. The fundamental privacy protection Part I, Article 2-b affords therefore applies to victim's private, personal, privileged records in this case.

This fundamental privacy right must be balanced against the defendant's constitutional right to "produce all proofs that may be favorable to himself." N.H. Const. Pt. I, Art. 15. Under federal law, a criminal defendant's right to exculpatory evidence extends only to information in the hands of the government or "other actors assisting the government in its investigation" as "part of the 'prosecutorial team' broadly understood." *United States v. Mitrovich*, 95 F.4th 1064, 1071-72 (7th Cir. 2024); *United States v. Markovich*, 95 F.4th 1367, 1376 (11th Cir. 2024). It does not extend to records in the hands of private third parties like the victim's medical and mental health providers. *See United States v. Hach*, 162 F.3d 937, 947 (7th Cir. 1998).

This Court, however, has extended a criminal defendant's right under Part I, Article 15 to "produce all proofs that may be favorable to himself" to records in the hands of private third parties like the victim's medical and mental health providers without any substantive explanation or analysis as to why a provision of the Bill of Rights would operate in that manner. *State v. Cressey*, 137 N.H. 402, 413 (1993). This state

constitutional protection has allowed criminal defendants to use compulsory court process to obtain privileged medical and mental health records from victims for decades without having to meet the normal test required to pierce the privilege before *in camera* review is undertaken and without giving the victim notice and an opportunity to be heard so she can adequately protect her rights and interests. While the court has done this in the past in part "to protect . . . the victim's privacy interest," *Petition of State*, 162 N.H. 64, 70 (2011), the court's *in camera* review process itself is a substantial invasion of privacy that dilutes the relevant privileges, discourages victims of crime from pursuing needed counseling, and implicates the victim's constitutional right to "live free from governmental intrusion" in both private and personal information.

The passage of Part I, Article 2-b requires an end to that unfortunate practice. The fundamental right that Part I, Article 2-b secures puts a citizen's right to be free from governmental intrusion into her private and personal medical records on par with a criminal defendant's state constitutional right to produce all proofs that may be favorable to himself under Part I, Article 15.

Consequently, before a trial court can obtain a citizen's private, privileged medical records for *in camera* review, a criminal defendant should now be required to show that the statutory privileges applicable to that information may be overcome either under: the "essential need" test for records subject to RSA 329-B:26 [psychologist-patient privilege], RSA 330-A:32 [mental health counselor-patient privilege], and New Hampshire Rule of Evidence 503(b); or the procedures and standards contained in RSA 173-C:5 for rape crisis center counseling records.

Finally, this Court should make clear to lower courts that, when a private citizen's privileged records are put at issue in a criminal proceeding, that citizen should be given adequate notice of the order, should be given appointed counsel to defend her constitutional and statutory rights and privileges, and should be afforded a meaningful opportunity to be heard in the proceeding.

ARGUMENT

I. THE TRIAL COURT ERRED IN RULING THAT PART I, ARTICLE 2-B DID NOT CHANGE THE STANDARD A DEFENDANT MUST MEET TO OBTAIN *IN CAMERA* REVIEW OF PRIVILEGED MEDICAL RECORDS EXCLUSIVELY IN THE POSSESSION OF A PRIVATE PROVIDER.

"The New Hampshire Constitution is the fundamental charter of our State." *State v. Ball*, 124 N.H. 226, 231 (1983). Its "division . . . into two parts was not made without a purpose, and the name of each part is not without significance." *Wooster v. Plymouth*, 62 N.H. 193, 197 (1882). "The first is a 'bill of rights:' the second is a 'form of government.'" *Id.* "The second is, in general, a grant of powers, made by the people to 'magistrates and officers of government,' who are declared (in Part I, art 8) to be the grantors' 'agents.'" *Id.* "The first contains a list of rights not surrendered by the people when they formed themselves into a state." *Id.* "By the reservation of these," the people "limited the powers they granted in the second part, and exempted themselves, to the stipulated extent, from the authority of the government they created." *Id.* Thus, "the office of the bills of rights is to protect individuals from the state." *Hodge v. Manchester*, 79 N.H. 437, 438 (1920).

In 2018, an overwhelming 81% of voters in New Hampshire approved a ballot measure to amend the State Constitution's Bill of Rights to include Part I, Article 2-b. App. at 15; T at 5. Part I, Article 2-b reads: "An individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent." The right is fundamental and is intended to protect the peoples' rights to privacy in their personal information, including medical records, from governmental intrusion. *See* Minutes of Hearing on CACR 16 before N.H. Sen. Comm. On Rules & Enrolled Bills at 2 (Mar. 29, 2018) (prime sponsor Rep. Neil Kurk explaining that Part I, Article 2-b was intended to protect "medical records").

The enactment of Part I, Article 2-b and the *Cressey* Court's extension of *Gagne* to reach medical records in the possession of a private provider has resulted in a clash of constitutional rights in criminal cases in which defendants move for *in camera* review of

a victim's mental health records. Resolution of that clash requires an interpretation of Part I, Article 2-b, a reexamination of *Cressey* in light of Part I, Article 2-b, and the adoption of more stringent standard that defendants must meet before they are entitled to have a court review victims' privately possessed mental health records *in camera*.

A. Interpretation And Application Of Part I, Article 2-b To This Case.

This case requires this Court to interpret Part I, Article 2-b of the State Constitution. "As the final arbiter of state constitutional disputes," this Court reviews the trial court's construction of constitutional provisions *de novo*. *State v. Mack*, 173 N.H. 793, 801 (2020). When this Court interprets a state constitutional provision, the Court "must look to its purpose and intent." *Id*. "The first resort is the natural significance of the words used by the framers." *Id*. "The simplest and most obvious interpretation of a constitution, if in itself sensible, is most likely to be that meant by the people in its adoption." *Id*. Additionally, this Court "view[s] the language used in light of the circumstances surrounding its formulation." *Id*. "The language used by the people in the great paramount law which controls the legislature as well as the people, is to be always understood and explained in that sense in which it was used at the time when the constitution and the laws were adopted." *Id*.

Part I, Article 2-b was decisively adopted by the citizens of New Hampshire, and this Court should presume that the voters intended the amendment to have meaning. Accordingly, any argument that the amendment is merely precatory or hortatory should be rejected. Indeed, it "cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it." *Marbury v. Madison*, 5 U.S. 137, 174 (1803).

Part I, Article 2-b is not an idealistic statement of advice or direction like some courts have held "inalienable rights clauses" to be, *see* App. at 88, nor is it vague or unclear in the protection it affords. Rather, Part I, Article 2-b identifies a specific right — a right to "live free from governmental intrusion" — into a specific thing — "private or personal information." It deems this right "natural, essential, and inherent" making the

right fundamental. The amendment is at least just as clear and precise as other constitutional provisions which this Court has acknowledged create enforceable constitutional rights. *See, e.g.*, N.H. Const. Pt. I, Art. 8 ("the public's right of access to governmental proceedings and records shall not be unreasonably restricted"); N.H. Const. Pt. I, Art. 22 ("Free speech and Liberty of the press are essential to the security of Freedom in a State: They ought, therefore, to be inviolably preserved."); N.H. Const. Pt. II, Art. 83 ("Free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it.").

Part I, Article 2-b therefore creates a fundamental constitutional right and fortifies the significant statutory privileges and rights that the legislature has put in place to protect a citizen's private mental health records and privacy interests. *See*, RSA 173-C:2; RSA 329-B:26; RSA 330-A:32; RSA 21-M:8-k. The amendment applies to this case because mental health records are "private or personal information" and *in camera* review of those records by a court is a "governmental intrusion" into that information.

It is not necessary in this case for the Court to fashion a generally applicable test for determining whether information is "private or personal" within the meaning of Part I, Article 2-b. In this case, the nature of the records at issue, the legal protections afforded to such records before and after the adoption of Part I, Article 2-b, and the history of Part I, Article 2-b itself, sufficiently establish that mental health records fall within the ambit of the amendment's protection.

A person's mental health records is a quintessential example of information that is private and personal, and privacy in those records is paramount to effective mental health treatment. "Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is 'rooted in the imperative need for confidence and trust.'" *Jaffee v. Redomnd*, 518 U.S. 1, 10 (1996) (citation omitted). "Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears." *Id*.

A counselor's ability to help her patients "is completely dependent upon [the patients'] willingness and ability to talk freely." *Id*. "This makes it difficult if not impossible for [a counselor] to function without being able to assure . . . patients of confidentiality and, indeed, privileged communication." *Id*. "Where there may be exceptions to this general rule . . ., there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment." *Id*. (citation omitted). Accordingly, "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Id*. "The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." *Id*. at 11.

Our legislature and courts recognized the personal and private nature of a person's mental health records long before the passage of Part I, Article 2-b. *See e.g.*, RSA 173-C:2; RSA 329-B:26; RSA 330-A:32; N.H. R. Ev. 503(b).

Under RSA 173-C:2, I, victims have "the privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made by a victim to a sexual assault counselor or a domestic violence counselor." Any such confidential communication or record "may be disclosed only with the prior written consent of the victim." *Id*. However, an exception to the privilege exists in criminal cases if the defendant can show that "there is a substantial likelihood that favorable and admissible information would be obtained through discovery or testimony." RSA 173-C:5, I. Even then, the only information subject to discovery are "statements of the victim which relate to the alleged crime being prosecuted." RSA 173-C:5, II.

Under RSA 329-B:26, confidential communications between any psychologist and a patient "are placed on the same basis as those provided by law between attorney and client" and such "privileged communications" are not required to be disclosed "unless such disclosure is required by a court order." The same privilege applies to communications between other mental health counselors — for example, social workers, clinical mental health counselors, and family therapists — and their patients. *See* RSA

330-A:32. These privileges are also protected by the rules of evidence. *See* N.H. R. Ev. 503(a), (b).

Additionally, to "the extent that they can be reasonably guaranteed . . . and are not inconsistent with the constitutional or statutory rights of the accused . . . crime victims are entitled to" be treated fairly and have their "safety, dignity, and privacy" respected "throughout the criminal justice process." RSA 21-M:8-k. Like Part I, Article 2-b, these statutes protect a crime victim's private and privileged mental health records from discovery except in compelling circumstances.

Thus, the intimate nature of mental health records and the legal protections afforded to such records before the enactment of Part I, Article 2-b yields the conclusion that the law in New Hampshire has long considered mental health records to be "private or personal information." The amendment's history further supports that conclusion. During a hearing before the Senate Committee on Rules & Enrolled Bills, the prime sponsor of Part I, Article 2-b, Rep. Neil Kurk, specifically noted that the amendment would protect "medical records." *See* Minutes of Hearing on CACR 16 before N.H. Sen. Comm. On Rules & Enrolled Bills at 2 (Mar. 29, 2018).

Moreover, in an opinion piece published in the Union Leader, Rep. Kurk stated that, "[u]nfortunately, courts and ordinary people don't think the same things are reasonable" when it comes to privacy. *See* Erin Fitzgerald, *No Place for Strict Katz in New Hampshire's Right of Privacy*, 56 New Eng. L. Rev. F. 6 at 8 (2022) (citing, Neal Kurk, *Vote for Your Privacy on Question 2*, UNION LEADER (Nov. 2, 2018)).[3] "Most people would think that they haven't surrendered their DNA by dining out and they haven't made their personal thoughts public by sending texts and emails." *Id*. "Courts think those things are not private." *Id*. "Texts and emails are not encrypted, so anyone

[3] The sentiment of Rep. Kurk's opinion piece is that Part I, Article 2-b is necessary because the "expectation of privacy" analysis conducted under the Fourth Amendment and *United States v. Katz*, 389 U.S. 347 (1967), as well as Part I, Article 19 and *State v. Goss*, 150 N.H. 46 (2003), is not protective enough of peoples' right to privacy. Accordingly, any argument that Part I, Article 2-b offers the same protection as Part I, Article 19, or that the amendment merely codifies *Goss*, should be rejected.

with the right equipment can read them," and "you didn't take that fork to the bathroom and wash it." *Id*.

Rep. Kurk stated that Part I, Article 2-b was needed so that, "at least in New Hampshire, ordinary peoples' expectation of information privacy is the norm, not the exception, and government 'snooping' into our personal and private information is prohibited.'" *Id*. One would be hard pressed to find an ordinary person who thinks that mental health records do not qualify as private or personal information.

Accordingly, the law predating the amendment, common sense, and the history of the amendment's passage, demonstrates that Part I, Article 2-b was intended to protect a person's privacy in his or her mental health records. Submission of these protected records to a court for *in camera* review constitutes a "governmental intrusion" into those records.

As the trial court observed in this case, as well as Judge Delker in *State v. Javon Brown*, a defendant would have no access to a victim's privileged mental health records without some sort of court-issued compulsory legal process. App. at 16, 32. Therefore, a "court order or subpoena *duces tecum* to produce privileged records for *in camera* review by the judge or for dissemination to the prosecutor and defendant is [ ] 'government intrusion' into 'private or personal information.'" *Id*. This interpretation of Part I, Article 2-b is supported by case law from Florida, which has a state constitutional provision similar to Part I, Article 2-b. *See Mack*, 173 N.H. at 802 ("Interpretations by other courts are most persuasive when the language of the constitutional provision at issue is similar to the wording in our constitution.").

The Florida Constitution contains a provision that has been in place since the 1980s, which provides: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein." Art. I, § 23 Fla. CONST. This right to privacy has been construed to provide greater protection than the Federal Constitution and to protect such information as

personal financial information, medical records, and cell phone data. *Wharran v. Morgan*, 351 So. 3d 632, 636 (Fla. 2d DCA 2022).

Additionally, Florida courts have construed "court orders compelling discovery" to constitute state action (i.e., governmental intrusion) that may impinge on the constitutional right to privacy. *See, e.g.*, *Barker v. Barker*, 909 So. 2d 333, 337 (Fla. 2d DCA 2005) ("Court orders compelling discovery of personal medical records constitute state action that may impinge on the constitutional right to privacy."); *Berkeley v. Eisen*, 699 So. 2d 789, 790 (Fla. 4th DCA 1997) ("Court orders compelling discovery constitute state action that may impinge on constitutional rights, including the constitutional right of privacy."). The United States Supreme Court has similarly explained that discovery may "seriously implicate privacy interests of litigants and third parties." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984).

So too here, a trial court's order to produce a person's privileged and privately possessed mental health records for inspection by a court is a "governmental intrusion in private or personal information." N.H. CONST. Pt. I, Art. 2-b. Further, an *in camera* review of privileged mental health records is not a "minimal intrusion" on privacy that can be easily justified. *See State v. Johnson*, 407 Wis. 2d 195, 216[4] (Wis. 2023). "In camera review, even if it does not ultimately lead to the disclosure to the defense of any privileged health records, still undermines [the] statutory privilege" and the constitutional protection afforded to victims' mental health records. *Id*. at 216; *see State v. Pinder*, 678 So. 2d 410, 415 (Fla. 4th Dist. Ct. App. 1996) ("Even in camera disclosure to the trial judge (and to court reporters, appellate courts and their staff) 'intrudes on the rights of the victim and dilutes the statutory privilege.'"); *State v. Kellywood*, 433 P.3d 1205, 1209 (Ariz. Ct. App. 2018). Any "impl[ication] that in camera review" of a person's mental health records "is a minimal intrusion on a victim's privacy" is simply "wrong" and

[4] *State v. Johnson* does not include any citation to a regional reporter. Accordingly, the state reporter citation is used throughout this brief.

demonstrates a misunderstanding of mental health treatment. *Johnson*, 407 Wis. 2d at 217.

In summary, mental health records are a classic example of personal or private information. The only way for a defendant to obtain access to such records is to ask a court to exercise its discretion — which the court only possesses by virtue of being a government officer — to order production of the records. Accordingly, when a court orders the production of a person's privately possessed mental health records for inspection, the government has intruded upon that person's right to privacy under Part I, Article 2-b.

B. Clarifying *Gagne* And *Cressey*, And Reconciling Those Cases With Part I, Article 2-b.

In the trial court, the defendant argued that the Supremacy Clause of the United States Constitution prohibited Part I, Article 2-b of the State Constitution from altering the *Gagne* standard because "*Gagne* . . . [is] grounded, in relevant part, upon a defendant's federal constitutional rights." App. at 95; *see* T at 21-22, 37. The defendant asserted that this Court's "*Gagne* jurisprudence" flowed from the "Fifth, Sixth, and Fourteenth Amendment[s] to the United States Constitution" and could not be diluted by an amendment to the State Constitution. App. at 95-96.

In *Gagne*, the defendant argued that his due process rights under Part I, Article 15 and the Fourteenth Amendment were violated when the trial court declined to conduct an *in camera* review of confidential records in the possession of the New Hampshire Division for Children and Youth Services (DCYS). 136 N.H. at 102. This Court agreed with the Supreme Court of the United States' holding in *Ritchie* and held 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." *Id*. at 105-106.

The *Gagne* Court did not specify whether its holding was grounded in the State or Federal Constitution. However, since the Federal Constitution "provides a floor below

which state court decisions may not fall," *see State v. Brown*, 792 N.E.2d 175, 178 (Ohio 2003), the State Constitution provides at least as much protection as the Fourteenth Amendment. Additionally, the *Gagne* Court was bound by *Ritchie* as a matter of federal law, whether the Court agreed with *Ritchie* or not. Nevertheless, the *Gagne* Court announced its agreement with *Ritchie* before reaching its holding. *Gagne*, 136 N.H. at 105. Accordingly, one can reasonably infer that the *Gagne* Court was interpreting solely the State Constitution in a manner consistent with the Federal Constitution.

One year after *Gagne* was decided, with no analysis or explanation, this Court expanded *Gagne*'s holding when it required a "private mental health facility" to submit a victim's records to the court for *in camera* review. *Cressey*, 137 N.H. at 413. The trial court in that case declined to conduct an *in camera* review because the records were in the possession of a private entity, not the state. *Id*. at 413. However, this Court summarily concluded that "a reading of [*Gagne*], makes clear, this is a distinction without a difference." *Id*.

The *Cressey* Court asserted that "*Gagne* did not distinguish between privileged records of a state agency and the privileged records of a private organization." *Id*. The Court said that the "rationale in *Gagne* . . . applies equally in both cases" because a "record is no less privileged simply because it belongs to a State agency" and "a defendant's rights are no less worthy of protection simply because he seeks information maintained by a non-public entity." *Id*. Following *Cressey*, the *Gagne* standard was applied to records in the hands of private actors. *See e.g.*, *State v. Ellsworth*, 142 N.H. 710, 713-14 (1998) (private counseling records); *State v. Hoag*, 145 N.H. 47, 49-50 (2000) ("any counseling records"); *Desclos v. Southern N.H. Med. Ctr.*, 153 N.H. 607, 615-17 (2006) (private psychiatric records); *State v. Aldrich*, 169 N.H. 345, 354 (2016) (DCYF records and "psychiatric and psychological evaluations, and medical records"); *Girard*, 173 N.H. at 626-27 (family counseling records).

It is unclear whether the *Cressey* Court's decision was a matter of State or Federal constitutional law. The *Cressey* Court did not cite the State or Federal Constitutions, or

note which constitution the defendant relied on in advancing his arguments. Neither *Gagne* nor *Cressey* mentioned the State Constitution being more protective than the Federal Constitution on this issue, and neither case relied on the language of Part I, Article 15 to reach its conclusion.

In the State's view, however, the *Cressey* Court's holding establishes solely a rule of state constitutional law. *Gagne* itself appears to have simply agreed with federal law and adopted the *Ritchie* Court's approach as a matter of state constitutional law. The *Cressey* Court's holding is best understood as solely an extension of the state constitutional rule adopted in *Gagne*. Accordingly, in the State's view, no established federal rule applies or controls in this case, and *Cressey*'s expansion of *Gagne* is properly impacted and altered by Part I, Article 2-b.

If, however, *Cressey* is a rule of federal constitutional law, then it was wrongly decided because, "as many other courts have said, *Ritchie*" — and, consequently, *Gagne* — "simply do[] not apply to privately held records." *State v. Johnson*, 407 Wis. 2d at 212 (citing *Hach*, 162 F.3d at 947; *Vaughn v. State*, 608 S.W.3d 569, 575 (Ark. 2020); *Goldsmith*, 651 A.2d 866, 872 (Md. 1995)).

In *Ritchie*, the Supreme Court drew "heavily on *Brady v. Maryland*, 373 U.S. 83 (1963)," in holding that the defendant's "due process rights were violated" by the trial court's refusal to review confidential[5] records possessed by the state *in camera*. *State v. Johnson*, 407 Wis. 2d at 204 (citing *Ritchie*, 480 U.S. at 56-58; *Brady*, 373 U.S. at 87). "The *Ritchie* Court seemingly assumed that the evidence satisfied *Brady*'s possession requirement, perhaps because the agency that held the records was responsible for investigating child abuse cases." *Id*. (citing *Ritchie*, 480 U.S. at 57; *see State v. Pinder*, 678 So. 2d at 414.

[5] The records in *Gagne* were also privileged. *See Gagne*, 136 N.H. at 102, 104-05. The records at issue in *Ritchie* were confidential, but not privileged. *See Johnson*, 407 Wis. 2d at 203 (citing *Ritchie*, 480 U.S. at 43).

The Supreme Court explained that *Brady*'s materiality requirement was difficult to evaluate in that case because neither the parties nor the trial court had reviewed the records. *Ritchie*, 480 U.S. at 57. To overcome that difficulty, the Court held that an *in camera* review was the appropriate way to assess the materiality of the records, in part because the Pennsylvania statute did not guarantee confidentiality in all circumstances — it made exceptions, such as when a court ordered that the documents be produced. *Id*. at 58. Accordingly, the Supreme Court held that the defendant's interest in a fair trial and the State's interest in confidentiality of certain records "can be protected fully by requiring that the [records] be submitted only to the trial court for *in camera* review." *Id*. at 60.

The federal courts have not extended the Supreme Court's holding in *Ritchie* to privileged or confidential records in the possession of private persons or entities. *See, e.g.*, *Johnson v. Norris*, 537 F.3d 840, 847 (8th Cir. 2008) ("The Arkansas court did not unreasonably apply *Brady* when it said that the State has no obligation to disclose medical records that are not in its possession."); *Lavallee v. Coplan*, 374 F.3d 41, 45 (1st Cir. 2004) (explaining that the *Ritchie* Court relied on *Brady*, but "did not ask the question that usually begins the *Brady* analysis -- namely, whether the agency file at issue was within the custody, possession, or control of the prosecutor"); *Hach*, 162 F.3d at 947 (7th Cir. 1998) (defendant's "attempt to bootstrap onto *Ritchie* suffer[s] from a grave[] problem -- the evidence is not and never was in the government's possession," which was "fatal to the defendant's claim" because "if the documents are not in the government's possession, there can be no 'state action' and consequently, no violation of [the] Fourteenth Amendment."); *United States v. Skorniak*, 59 F.3d 750, 755-56 (8th Cir. 1995) (the district court did not err in denying application to subpoena medical records because defendant "made no showing that the records he sought were in the possession of the government" and there is "no obligation on the Government to *seek out* such evidence" (emphasis in original)); *Love v. Johnson*, 57 F.3d 1305, 1313 (4th Cir. 1995) ("The basic constitutional right recognized in *Ritchie* is the well[-]established right of an

accused to disclosure of evidence *in the prosecuting government's possession* that 'is both favorable to the accused and material to guilt or punishment.'") (emphasis added (citation omitted)); *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992) (cases that have expanded *Brady* to include "a duty to search have involved files maintained by branches of government 'closely aligned with the prosecution'"); *United States v. Shrader*, 716 F. Supp. 2d 464, 473 (S.D. W. Va. 2010) ("*in camera* review under *Ritchie* is also inappropriate in this case because, unlike in *Ritchie*, the [counseling] records are not in possession of the government or a government agent; *Ritchie's Brady* analysis is inapplicable here.").

Stare decisis poses no obstacle to overturning *Cressey* as a matter of Federal Constitutional law. *Stare decisis* plays an important role in our legal system, but it is "not an inexorable command," and it "is at its weakest when [ ] interpret[ing] the Constitution." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 263-64 (citations omitted); *see Brannigan v. Usitalo*, 134 N.H. 50, 53 (1991) (recognizing that "the doctrine of *stare decisis*" is "not binding on a constitutional question").

In some circumstances, it is more important that an issue "be settled than that it be settled right." *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455 (2015). "But when it comes to interpretation of the Constitution—the 'great charter of our liberties,' which was meant 'to endure through a long lapse of ages,'—we place a high value on having the matter 'settled right.'" *Dobbs*, 597 U.S. at 264 (citing *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816)).

Further, *stare decisis* considerations weigh in favor of overturning *Cressey* if *Cressey* is a rule of federal constitutional law that this Court has created. *See id*. at 268 (considering the following factors: (1) the nature of the error; (2) the quality of the reasoning; (3) the workability of the rule; (4) the rules disruptive effect on other areas of the law; and (5) the absence of concrete reliance); *see also In the Matter of Blaisdell*, 174 N.H. 187, 190 (2021) (considering the following factors: (1) whether the rule is unworkable in practice; (2) whether the rule is subject to a special kind of reliance; (3)

whether related principles of law have developed to leave the rule as a remnant of abandoned doctrine; and (4) whether facts have changed or come to be seen differently so as to rob the old rule of significant application or justification).

Cressey's expansion of *Gagne* incorrectly concluded that *Ritchie* and *Gagne* apply to records in the hands of private actors, thereby undermining the counselor-patient relationship. *See Johnson*, 407 Wis. 2d at 210. That expansion, which was essentially devoid of reasoning, resulted in a standard that is unworkable as applied to privately possessed records because it does not consider the rights of the person to whom the records belong — *Gagne* and *Ritchie* purport to balance the interests of the State and the defendant, but not the victim or any other witness. *See id*.

Further, the *Cressey* Court's expansion of *Gagne* does not reflect concerns for due process so much as it does the outdated "stance of overt suspicion toward rape accusers" that "the law" had "[h]istorically" "adopted." *Johnson*, 407 Wis. 2d at 220. "Over the last several decades," however, "our law [and society] has evolved away from this distrust of sexual assault victims, and removed many of the procedural and evidentiary barriers to prosecuting those cases." *Id*. (citations omitted); *see e.g.*, N.H. CONST. Pt. I, Art. 2-b; RSA 632-A:6; RSA 21-M:8-k; 1990 NH HB 1245 (repealing RSA 632-A:7, "Limitations of Prosecutions"); N.H. R. Ev. 412. "Collectively, these changes reflect increased concern for the rights of crime victims, as well as a broader conception of what it means to be a crime victim." *Johnson*, 407 Wis. 2d at 224.

We now "know that false reports of crimes are rare, and no more common in sexual assault cases than any other type of case." *Johnson*, 407 Wis. 2d at 222. "And yet," *Gagne* "motions are commonplace in sexual assault and domestic violence cases," but "are highly unusual in other types of cases, even though nothing about [*Gagne*'s] rule is limited to sexual assault cases." *Id*. at 222-23. "This difference is particularly striking considering that witness credibility is an issue in nearly every case, regardless of the type of crime being prosecuted." *Id*. at 223. In short, *Cressey*'s disregard for the need to protect the privacy of peoples' mental health records "has been undermined by

developments in the law" and in society "regarding sexual assault and domestic violence, and is therefore detrimental to coherence in the law." *Id*.

Therefore, if *Cressey* was decided as a matter of federal constitutional law, then it should be overturned because it has no federal support in that arena and *stare decisis* favors it.

Even as a ruling of state constitutional law, *Cressey*'s holding is still disconcerting. "[I]t has long been established that the provisions of part 1 of our Constitution, which constitutes our Bill of Rights, are restrictions on government action which protect our private citizens . . ." *Nottingham v. Harvey*, 120 N.H. 889, 898 (1980); *see Hodge*, 79 N.H. at 438 (stating that "the office of the bills of rights is to protect individuals from the state."). In other words, the Bill of Rights protects citizens from the government; it does not give private citizens rights against one another.

Like the *Cressey* Court, in *State v. Shiffra*, 499 N.W.2d 719 (Wis. Ct. App. 1993), the Wisconsin Court of Appeals "brushed [the] difference" between records possessed by the state and those possessed by a private actor "aside." *Johnson*, 407 Wis. 2d at 211. But that "distinction" is "meaningful," and *Shiffra* "broadened the holding in *Ritchie*" by "overlook[ing] [that] point," just as *Cressey* did *Gagne*. *Id*. Like *Cressey*, *Shiffra* and the cases that it relied on "gave no explanation for how the rule in *Ritchie* could apply to privately held records." *Id*. at 211-12. "Simply put, nothing in *Ritchie* supports *Shiffra*'s [or *Cressey*'s] conclusion that criminal defendants have a due process right to in camera review of a victim's privately held, privileged health records upon a showing of materiality." *Id*. at 214.

Proceeding from a mistaken first premise, *Shiffra* and *Cressey*'s puzzling application of constitutional rights has proven "unworkable in practice" because the standard in *Ritchie* and *Gagne* "cannot be applied consistently and is inherently speculative." *Id*. at 217. Like *Gagne*, *Shiffra* and its progeny required defendants to set forth "a specific factual basis demonstrating a reasonable likelihood that the records contain[ed] relevant information necessary to a determination of guilt or innocence." *Id*.

at 217; *see Gagne*, 136 N.H. at 105; *see also, Hoag*, 145 N.H. at 49 (requiring defendant to "present a plausible theory of relevance and materiality," including "some specific concern, based on more than bare conjecture, that, in reasonable probability, will be explained by the information.").

"Reading [that] language in isolation, one would think the standard for obtaining in camera review is high." *Johnson*, 407 Wis. 2d at 217. "Yet at the same time," *Shiffra*'s progeny, like *Gagne*'s, "also" maintains "that the standard" for obtaining *in camera* review is not "unduly high for the defendant" because the defendant "will most often be unable to determine the specific information in the records." *Id*. at 218; *see Gagne* 136 N.H. at 105; *Hoag*, 145 N.H. at 49 (stating that "[t]he threshold showing necessary to trigger *in camera* review is not unduly high.").

"As these quotes demonstrate," *Cressey*'s inexplicable expansion of *Gagne* placed *Gange* "in tension with" its progeny. *Johnson*, 407 Wis. 2d at 218. *Gagne*'s low standard for obtaining *in camera* review was sensible in that case because, despite any statutory privileges or confidentiality requirements, the due process clause imposes a constitutional obligation on the state to disclose records that are in the state's possession and are material to a determination of guilt or innocence. *See Brady*, 373 U.S. at 87; *State v. Laurie*, 139 N.H. 325, 327 (1995). However, the constitution imposes no such obligation on private actors and, accordingly, the privileges protecting sensitive information from disclosure serve to raise the standard that must be met to obtain an *in camera* review. *See Pinder*, 678 So.2d at 414-16; *see also Hach*, 162 F.3d at 947; *State v. Fromme (In re Crisis Connection, Inc.)*, 949 N.E.2d 789, 799-802 (Ind. 2011).

The *Cressey* Court's indifference to the constitutionally relevant distinction between records possessed by the state and records possessed by private actors extended the due process clause to places it has no ability to reach, which unnecessarily created an irreconcilable tension between *Gagne* and its progeny. That tension is aggravated by the reality that the *Gagne* standard "is inherently speculative." *Johnson*, 407 Wis. 2d at 219.

"When a [*Gagne*] motion is filed, neither the defendant, the State, nor the [ ] court have seen the victim's treatment records." *Id*. "Yet the [ ] court must decide, often based on vague allegations and an affidavit from the defendant, whether it is reasonably likely that records the judge has never seen contain information 'necessary to a determination of guilt or innocence.'" *Id*. (citation omitted). Thus, courts are left with "no choice but to guess at whether a victim's records contain material information and," because a defendant's due process rights are at stake, "resolve close questions in favor of in camera review." *Id*.

Erring on the side of *in camera* review may be prudent when the records are in the hands of the state, which has a constitutional obligation to turn exculpatory information in its possession over to the defendant. However, erring on the side of *in camera* review when the records are in the hands of a private actor arbitrarily disregards the constitutional privacy right and significant legal privileges afforded to victims' mental health records to satisfy a non-existent due process right of the defendant.

In sum, *Gagne* is sound and sensible when read in the context of the facts upon which it was decided, but it is imperative that *Gagne* be retethered to the constitutional principles underlying that decision. After the passage of Part I, Article 2-b, the already significant statutory protections afforded to peoples' private mental health records were reinforced with constitutional protection.

Accordingly, the significant constitutional protection Part I, Article 2-b affords has elevated the standard a criminal defendant must meet before a court may obtain and review *in camera* a person's private, personal, and privileged mental health records from a private provider.

II. THE STANDARD TO OBTAIN IN CAMERA REVIEW OF THE MENTAL HEALTH RECORDS IN THIS CASE IS THE "SUBSTANTIAL LIKELIHOOD" TEST FOR RSA 173-C RECORDS AND THE "ESSENTIAL NEED" TEST FOR RECORDS SUBJECT TO RSA 329-B:26, RSA 330-A:32.

The adoption of Part I, Article 2-b has placed a private citizen's fundamental right to live from governmental intrusion in private or personal information on par with a criminal defendant's due process right to obtain third-party discovery in his criminal case. The legislature may properly balance these rights and has done so through RSA 173-C:5, RSA 329-B:26, and RSA 330-A:32. To obtain rape crisis center records, a defendant must follow the procedure contained in RSA 173-C:5, must explain why the discovery is requested, and must show that "there is a substantial likelihood that favorable and admissible information would be obtained through discovery." RSA 173-C:5, I. To obtain records privileged under RSA 329-B:26 and RSA 330-A:32, a defendant must show "essential need."

"There is no general constitutional right to discovery in a criminal case," *Heath*, 129 N.H. 102, 109 (1986) (citing *Weatherford v. Bursey*, 429 U,S, 545, 559 (1977)), and "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . ." *Id*. (citing *Wardius*, 412 U.S. at 474; *United States v. Augenblick*, 393 U.S. 348 (1969). Beyond recognizing the state's "obligation to disclose evidence under *Brady* and subsequent cases, the Supreme Court has construed due process to demand only that when compulsory discovery is made available in criminal cases, it must be provided to the defendant on the same terms as it is to the government." *Id*. (citation omitted).

When the State seeks to obtain privileged medical records of the defendant or another witness, the State must meet the "essential need" standard by proving "both that the targeted information is unavailable from another source and that there is a compelling justification for its disclosure." *In re Grand Jury Subpoena for Med. Records of Payne v. Barka*, 150 N.H. 436, 442 (2004); *see In re Search Warrant (Med. Records of C.T.)*, 160

N.H. 214, 217, 225-27 (2010). Therefore, if the State wished to obtain the counseling records of a sexual assault victim over the victim's objection under RSA 329-B:26, and RSA 330-A:32, the State would have to show "essential need." Accordingly, requiring the same of the defendant makes "discovery . . . available in criminal cases . . . to the defendant on the same terms as it is to the government," as due process demands. *Heath*, 129 N.H. at 109. RSA 173-C does not make express provision for the prosecution to obtain the records it protects, nor does it equate the privilege in RSA 173-C:2 to the attorney-client privilege. Consequently, if the prosecution is able to obtain these records, the standard may be higher than the standard the defendant must meet.

Application of these appropriately rigorous standards shows due respect to the intent of the legislature and citizenry, as expressed in Part I, Article 2-b and the applicable statutes, to protect peoples' mental health records from disclosure except when the information is needed by a criminal defendant in his criminal case. Further, the "substantial likelihood" standard in RSA 173-C:5, I and the "essential need" standard directly serve the purposes of the relevant privileges, which serves the broader goal of successful mental health treatment.

"A patient's willingness to discuss sensitive issues will be chilled if she knows that her most private thoughts and fears might be revealed to a … judge in the context of a criminal case." *Johnson*, 407 Wis. 2d at 216. "Making the promise of confidentiality contingent upon a court'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." *Jaffee*, 518 U.S. at 17.

If "the purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected.'" *Jaffee*, 518 U.S. at 17. "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." *Id*.

The *Gagne* standard sets too low a bar and is inherently speculative, which severely undermines the utility of the privileges at issue in this case. *Cf. Allen v. Milligan*, 599 U.S. 1, 10 (2023) (observing that, in the years after the Civil War, Jim Crow laws rendered the right to vote protected by the Fifteenth Amendment "little more than a parchment promise."). The lesson it teaches victims of crime is not to seek mental health treatment until the criminal prosecution has run its course. Accordingly, "the rule that best serves the policies supporting" persons' statutorily and constitutionally protected privacy rights in their counseling records today "is one that generally prohibits disclosure for even in camera review of confidential information," *Fromme*, 949 N.E. 2d at 802, unless an appropriately elevated standard is met. For RSA 173-C records, the procedure and standards in RSA 173-C:5 must be met. For records subject to the privileges under RSA 329-B:26 and RSA 330-A:32, the "essential need" test must be met.

III. WHEN A DEFENDANT SEEKS THE PRIVILEGED MENTAL HEALTH RECORDS OF A VICTIM OR OTHER PERSON FROM A PRIVATE PROVIDER, THAT PERSON SHOULD RECEIVE ADEQUATE ADVANCED NOTICE AND APPOINTED COUNSEL.

When a criminal defendant seeks the privileged mental health records of a victim or other person from a private healthcare provider, the statutory privileges and constitutional rights of the person whose information is sought is implicated. *See* N.H. CONST. Pt. I, Art. 2-b; RSA 173-C:5; RSA 329-B:26; RSA 330-A:32; RSA 21-M:8-k, II(a). When a court orders disclosure of records from a rape or domestic violence crisis center, the victim is statutorily entitled to an interlocutory appeal to this Court. RSA 173-C:9.

To ensure that victims and other witnesses have an opportunity to assert and protect their constitutional rights and statutory privileges, courts must provide adequate notice to them when defendants attempt to obtain their private mental health records from a private healthcare provider. Additionally, victims of and witnesses to criminal activity should not be required to retain a lawyer at their own expense because a defendant has

chosen to pursue their mental health records in discovery. Therefore, when a defendant moves for a victim's or other witness's private mental health records to be reviewed by a court *in camera*, courts should appoint the victim or witness counsel to defend his or her interests. *Cf. State v. Richards*, 129 N.H. 669 (1987).

An appointed advocate in this context comes with many benefits. Legal counseling may result in a victim or witness voluntarily releasing records for *in camera* review. It may result in the withholding of the records as privileged or on some other basis with an accompanying privilege log that enables further judicial review without the need to conduct an *in camera* review of hundreds or thousands of mental health records. It permits a Fifth Amendment privilege to be knowingly and intelligently raised before documents are turned over. *See Richards*, 129 N.H. at 669. And if a court determines that the requisite standard for *in camera* review is met, the participation of appointed counsel will undoubtedly sharpen the parties' and the court's understanding of the content of the records involved such that the court may be able to conduct an *in camera* review of a much smaller universe of documents than it otherwise would have to conduct if appointed counsel had not been involved. Accordingly, in the exercise of this Court's inherent supervisory authority, it should take this opportunity to instruct lower courts to provide victims and witnesses with notice and appointed counsel when a defendant moves for *in camera* review of private and privileged mental health records.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court reverse the judgment below, hold that a criminal defendant must establish "essential need" to obtain an *in camera* review of the private, privileged mental health records of a private person, and remand for further proceedings.

The State requests a fifteen-minute oral argument. Solicitor General Anthony J. Galdieri will present oral argument on behalf of the State.

Respectfully Submitted,

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August 5, 2024

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CERTIFICATE OF COMPLIANCE

I, Sam M. Gonyea, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,211 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

August 5, 2024 *<u>/s/ Sam M. Gonyea</u>*
Sam M. Gonyea

CERTIFICATE OF SERVICE

I, Sam M. Gonyea, hereby certify that a copy of the State's brief shall be served on all parties of record through the New Hampshire Supreme Court's electronic filing system.

August 5, 2024 *<u>/s/ Sam M. Gonyea</u>*
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