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

REPLY BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

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(Fifteen-minute oral argument requested)

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I. PRESERVATION ISSUES.

The defendant raises issues that relate to preservation. The defendant observes that the State either assented to or did not object to his motions for *in camera* review in the trial court. DB at 17, 25, 29.[1] The defendant also argues that two of the arguments the Intervenor advances are not preserved for appellate review. DB at 17, 27-29, 35-36.

The Intervenor is the appellant in this matter, not the State — the State had no standing to object to the defendant's motion by asserting the Intervenor's statutory privileges or her rights under Part I, Article 2-b. Accordingly, the Intervenor must show that she preserved her claims and arguments for appeal in the trial court. *See State v. Batista-Salva*, 171 N.H. 818, 822 (2019). Since the State is not the appellant, the State has no burden demonstrate that it preserved arguments in the trial court.

The State is, however, a party to this appeal. The State therefore may argue the issues the Intervenor has raised on appeal and preserved below even if the State itself did not raise those issues or argue them. *Cf. Nat'l Assn. of Regulatory Util. Comm'rs v. Interstate Commerce Commn.*,

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[1] Citations to the record are as follows:
"SB" refers to the State's brief;
"DB" refers to the defendant's brief;
"AB" refers to the appellant's brief;
"Am. Br." refers to the amicus brief filed by the New Hampshire Association of Criminal Defense Attorneys;
"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.

41 F.3d 721, 729-30 (D.C. Cir. 1994) ("Intervenors may only argue issues that have been raised by the principal parties; they simply lack standing to expand the scope of the case to matters not addressed by the petitioners in their request for review.").

II. THE FEDERAL DUE PROCESS CLAUSE DOES NOT PROTECT A RIGHT OF CRIMINAL DEFENDANTS TO COMPEL THE PRODUCTION OF DOCUMENTS POSSESSED BY PRIVATE ACTORS.

The defendant and his amicus, the New Hampshire Association of Criminal Defense Attorneys (NHACDA), argue that the Federal Constitution protects a right of defendants to compel private actors to produce documents in their possession for *in camera* review. DB at 31-32, 43-45; Am. Br. at 14-16. NHACDA argues that the right is protected by the Due Process Clause of the Fourteenth Amendment. Am. Br. at 14-16. The Defendant asserts that *State v. Gagne,* 136 N.H. 101 (1992), and its progeny are "clear" that the right "flow[s] from the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution." DB at 44. This argument should be rejected for at least two reasons.

A. First, *Gagne* And *Cressey* Are State Constitutional Decision; They Do Not Establish Rights Under The Federal Constitution.

Since the defendant's argument in *Gagne* was advanced under the State and Federal Constitutions, and because this Court did not expressly state that its holding in *Gagne* was interpreting and applying the Federal Constitution, this Court must presume *Gagne* to have been decided under

the State Constitution, citing and relying on federal authorities for guidance only. *See State v. Ball*, 124 N.H. 226, 231 (1983).

This Court's seminal decision in *State v. Ball* compels this result. In *Ball*, this Court set forth the default rule that "[w]hen a defendant . . . has invoked the protections of the New Hampshire Constitution, we will first address these claims." 124 N.H. at 231. "Even if it appears that the Federal Constitution is more protective than the State Constitution, the right of our citizens to the full protection of the New Hampshire Constitution requires that [this Court] consider State constitutional guarantees." *Id.* at 232. "This is because any decision [this Court] reach[es] based upon *federal* law is subject to review by the United States Supreme Court, whereas [this Court] ha[s] unreviewable authority to reach a decision based on articulated adequate and independent *State* grounds." *Id.* "Since this court is the final authority on New Hampshire law, initial resolution of State constitutional claims insures that the party invoking the protections of the New Hampshire Constitution will receive an expeditious and final resolution of those claims." *Id.* "Therefore, [this Court] will first examine the New Hampshire Constitution and only then, if [this Court] find[s] no protected rights thereunder, will [this Court] examine the Federal Constitution to determine whether it provides greater protection." *Id.*

Interpreted in light of this precedent, *Gagne*'s holding reflects solely a conclusive determination that the defendant's due process rights under Part I, Article 15 of the State Constitution were violated, relying on federal authorities and the decisions of other states for guidance, and with no reason to reach the federal constitutional issue. And *Gagne* reads this way. Specifically, when analyzing the due process issue in *Gagne*, this Court did

not hold that it was bound to follow *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987) and find a federal due process violation. It instead reviewed *Ritchie* and "agree[d]" with the Supreme Court's conclusion and approach in that case. *See State v. Gagne*, 136 N.H. at 105. This Court then fashioned a state-law-specific holding establishing what must be shown to trigger *in camera* review. *Id.* This holding was not tied to the federal constitution or a specific federal case. *Id.* This Court then cited other state court decisions taking similar approaches in the wake of *Ritchie*, *Id.* at 105-06, and applied the "*Ritchie* principles" it had just adopted to the arguments made below to reach its conclusion. Much of this analysis would be unneeded if *Gagne* was simply decided under the Federal Constitution.

The same conclusion must be drawn with regard to *State v. Cressey*, 137 N.H. 402 (1993). The *Cressey* Court did not state whether the defendant advanced his arguments under the State Constitution, the Federal Constitution, or both. However, the Court rejected the trial court's rationale in that case based on "a reading of *State v. Gagne*." *Id*. at 413. The only other case the *Cressey* Court cited was *Ritchie*, and that was only for the purpose of recognizing that the *Gagne* Court relied on *Ritchie*. *Id*. Accordingly, given the general rule in *Ball* and this Court's analysis in *Gagne* and *Cressey*, it must be concluded that *Cressey* was also decided under the State Constitution.

B. Second, No Federal Precedent or Well-Reasoned State Precedent Supports Extending *Ritchie* To Documents Held By Private Third Parties.

The State and Federal Constitutions establish the structure of the government and define the limits of its powers. *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) ("The Constitution created a Federal Government of limited powers."); *Wooster v. Plymouth*, 62 N.H. 193, 197 (1882) (explaining that part one of the New Hampshire Constitution "contains a list of rights not surrendered by the people when they formed themselves into a state" and part two "is, in general, a grant of powers, made by the people to 'magistrates and officers of government'").

They protect citizens from unlawful or overreaching acts of government, but do not afford private citizens affirmative rights against other private citizens. The Due Process Clauses of the Fifth and Fourteenth Amendments were "intended to prevent the government 'from abusing [its] power, or employing it as an instrument of oppression.'" *Deshaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 196 (1989) (citations omitted). The purpose of the Due Process Clauses in the Federal Constitution "was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes." *Id*.

Thus, it is the laws and rules that are legislatively and administratively adopted that protect private citizens against private action, not the State or Federal Constitution. New Hampshire has adopted laws and rules through the democratic political process that defendants in

criminal cases may be able to use to obtain pretrial discovery from private actors. *See e.g.*, RSA 517:13 (discovery depositions); N.H. R. Crim. Pro. 12 (discovery generally), 13 (discovery depositions), 17 (subpoenas). And a private actor may raise in defense any number of applicable privileges that New Hampshire adopted through the political process to protect certain documents or information.

But when a criminal defendant seeks such third-party discovery, there has been no State action, and the records sought are not in the hands of the government. The federal due process protections that apply under *Ritchie* therefore do not extend to that context. *See United States v. Hach*, 162 F.3d 937, 947 (7th Cir. 1998). The State cited several federal cases in its opening brief to establish that federal courts have not extended *Ritchie* to reach records in the hands of private actors. *See* SB at 25-26. The defendant and the NHACDA sidestep those cases and baldly assert that *Ritchie* does apply to privately held records. DB at 31; Am. Br. at 16. Their reading of *Ritchie* is strained, and no federal court that undersigned counsel is aware of has agreed with it.

Similarly, the cases the defendant cites from Delaware, Kentucky, Connecticut, and Maryland, do not support his argument that *Ritchie* applies to records held by private actors. DB at 31-32. The Delaware Supreme Court held that the distinction between records in the State's possession and records in the possession of private actors is one without a difference because the privilege holder's interest in non-disclosure was the same regardless of whether the records were possessed by a public or private actor. *See Burns v. State*, 968 A.2d 1012, 1024-25 (Del. 2009). The *Burns* Court cited *Cressey* as support. *See id*. at 1024, n. 41.

However, like this Court in *Cressey*, the *Burns* Court failed to explain how a constitution could create rights in one private citizen against another.

In *Commonwealth v. Barroso*, 122 S.W.3d 554, 559 (Ky. 2003), the Kentucky Supreme Court recognized that "[t]he dispositive issue in *Ritchie* was the government's obligation under the Due Process Clause to provide discovery of records *in its possession* containing evidence both favorable to the accused and material to guilt or punishment." (citations omitted). The victim's records in *Barroso* "were not in the Commonwealth's possession and thus not within the holding in *Ritchie*." *Id*.

Instead, the Kentucky Supreme Court concluded that the Sixth Amendment's Compulsory Process Clause entitled the defendant to pre-trial discovery of the victim's privileged mental health records. *Id*. at 560-65. However, as the Kentucky Supreme Court noted, "*Ritchie* specifically avoided deciding" the issue before it under "the Sixth Amendment's Compulsory Process Clause." *Id*. at 559. No argument rooted in the Sixth Amendment's Compulsory Process Clause has been adequately developed in this case.

The defendant also cites to *Goldsmith v. State*, 651 A.2d 866 (Md. App. Ct. 1995). However, the majority in *Goldsmith* held that there was "no common law, court rule, statutory or constitutional requirement that a defendant be permitted pre-trial discovery of privileged records held by a third party." *Id*. at 873. It was the dissent, relying in part on this Court's holdings in *Gagne* and *Cressey*, that embraced the erroneous "distinction without a difference" reasoning. *Id*. at 881.

The defendant's reliance on *State v. Kelly*, 545 A.2d 1048, 1056 (Conn. 1988), is also misplaced. The Connecticut Supreme Court did not

hold that the distinction between public and private actors is immaterial under *Ritchie*, as the defendant asserts. *See* DB at 32. Rather, the Court seemingly acknowledged the inapplicability of *Ritchie* by recognizing that the "documents subpoenaed by the defendant were not in the possession of the state's attorney" and had never been "examined by the state's attorney or the defendant." *Id*. at 1056. "Nonetheless," the Court still found "the rationale of [*Ritchie*]" supportive of its conclusion that the trial court did not err "in denying the defendant access to the documents in question." *Id*. Accordingly, *Kelly* is not applicable here and, to the extent that it is, it does not support the defendant's position.

III. THIS COURT HAS NOT INCORPORATED PART I, ARTICLE 2-b INTO THE *GAGNE* ANALYSIS.

Relying on *State v. Chandler*, 176 N.H. 216 (2023), and three non-precedential orders, the defendant asserts that "this Court" has already "incorporated Article 2-b into the second prong of the *Gagne* test." DB at 20. That is inaccurate.

This Court has instructed trial courts to take "into account the victim's rights under Part I, Article 2-b of the New Hampshire Constitution and RSA 21-M:8-k" when crafting a protective order for the release of the victim's privileged records. *Chandler*, 176 N.H. at 233; *State v. Lapointe*, 2024 N.H. LEXIS 124 at *5-6 (May 13, 2024) (same); *State v. Claussells-Vega*, 2023 N.H. LEXIS 217 at *16-17 (November 15, 2023) (same); *State v. Gorman*, 2023 N.H. LEXIS 186 at *8 (October 24, 2023) (same). In those cases, the State specifically requested that, if this Court were to remand, it instruct the trial court to consider Part I, Article 2-b and the

victim's bill of rights. However, no substantive argument rooted in Part I, Article 2-b was before the Court in those cases.

Accordingly, none of the cases relied upon by the defendant decided whether and how Part I, Article 2-b impacts the *Gagne* analysis.

IV. COLLATERAL CONSEQUENCES RAISED BY THE NHACDA.

The NHACDA asserts that the State's argument will have collateral consequences, such as raising the standard for the State to secure a search warrant. *See* Am. Br. at 40-42. The State does not share that concern. This case has nothing to do with search warrants. It asks this Court to apply Part I, Article 2-b in the context of a defendant seeking to use a mechanism of the State (the judicial branch) to intrude upon the victim's privacy in her privileged mental health records, which are in the possession of a private actor. If the State wished to obtain a warrant to achieve the same end, it already must meet the "essential need" standard it argues for in this case. *See In re Search Warrant*, 160 N.H. at 217, 225-27. Whether Part I, Article 2-b applies to raise the standard for the State to obtain a warrant to search for material that is not protected by a statutory privilege is an analytically distinct question that need not be addressed in this case.

The NHACDA also asserts that "in any case where the initial disclosure of a crime occurred in counseling or therapy, a defendant could only learn the circumstance of that disclosure" through therapy records. Am. Br. at 41. The NHACDA's semi-developed hypotheticals are not persuasive. In such a case, the party whose counseling records are implicated may agree to provide them to law enforcement. If so, the

defendant will receive the records in discovery. Alternatively, essential need might exist to obtain the records, and the State may have already obtained them under that standard as part of its investigation. If so, the defendant will receive the records in discovery; if not, the defendant may be able to establish essential need to get them. The facts and circumstances of every case will be different making imagined hypotheticals of little utility.

The NHACDA further contends that the standard proposed by the State would "incentivize prosecutors to only request and obtain private information . . . when they are sure it would assist in obtaining a conviction." *Id*. Or "prosecutors could refuse to request that information and, by declining to seek it out, render it completely undiscoverable to the defense." *Id*.

It is non-sensical to conclude that elevating the standard under which a criminal defendant may seek a private third-party's privileged records will somehow incentivize prosecutors, who must already operate under this elevated standard, to try to obtain such private information only when they are sure it will assist in obtaining a conviction.[2] A prosecutor's primary obligation is to seek justice, not merely a conviction. *See State v. Souksamrne*, 164 N.H. 425, 428 (2012); *N.H. R. Prof. Cond.* 3.8. This Court should not presume that prosecutors will knowingly ignore or deliberately decline to seek out information that is material and relevant to any criminal case.

[2] If anything, one might rationally conclude that the present state of affairs, where the defendant's standard to obtain *in camera* review of a third-party's privileged records is lower than the standard a prosecutor would have to meet to obtain them, would incentivize prosecutors not to seek the records and force the defendant to do the lifting to obtain them.

Prosecutors may not seek to obtain therapy records if they have no reason to believe that there is relevant and material evidence in those records that cannot be obtained from another source. That choice arises from a desire not to impede a person's progress in therapy, not to hide information from the defense and obtain illegitimate convictions. In cases where a defendant can demonstrate that a prosecutor had reason to believe that a victim's therapy records included relevant and material evidence and made no effort to confirm or deny that belief, the defendant may be able to demonstrate that the State violated his right to due process by failing to fulfill a duty to investigate further. *See United States v. Tanguay*, 787 F.3d 44, 52-53 (1st Cir. 2015).

In short, the collateral concerns the NHACDA raises are not persuasive and should not impact this Court's analysis of the question before it.

CONCLUSION

For the foregoing reasons, in addition to the reasons argued in the State's opening brief, 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.

Respectfully Submitted,

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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 2,951 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.

October 28, 2024

/s/ Sam M. Gonyea
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.

October 28, 2024

/s/ Sam M. Gonyea
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