

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

CASE NO. 2024-0066

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STATE OF NEW HAMPSHIRE

v.

GENE L. ZARELLA

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

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**REPLY BRIEF FOR APPELLANT K.R.**

Respectfully submitted,

**APPELLANT**

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## ARGUMENT

### **I. The *Gagne/Cressey* Process Harms Both the Victim and the Search for Truth**

The brief filed by Appellee/Defendant, Gene Zarella, (“Zarella”) highlights an important additional flaw in the way the Gagne/Cressey procedure ignores and devalues the privacy rights of crime victims (or of any private third-party who falls within its purview).

Zarella sought Appellant/Intervenor K.R.’s privileged mental health records, *without ever telling her*. Based on Zarella’s partisan, sealed, *ex parte* submission, the trial court ordered the production of K.R.’s privileged mental health records, *without ever telling her*. The prosecutors, ostensibly to avoid a confrontation of minimal relevance to the case that could create another issue for appeal, either assented or took no position. They, too, did so *without ever telling* K.R. that her privileged mental health records were at risk of being disclosed behind her back.<sup>1</sup>

This case demonstrates the egregious consequences of the constitutionally deficient Gagne/Cressey process. Everyone involved in the case—except the holder of the privilege whose most intimate, private records were to be disclosed to her abuser—knew about the court-sanctioned invasion of K.R.’s privacy rights. In other words, the only person who had standing and incentive to actually protect her private and privileged materials from disclosure (and from the distortions and inaccurate interpretations of a

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<sup>1</sup> The prosecution stated, retrospectively, that they were unable to alert K.R. because the Cressey motions were filed under seal, and she, not being a party, was barred from knowing about them.

criminal defendant incentivized to secure access to those materials) was completely unaware of her abuser's efforts to circumvent her privileges. New Hampshire law cannot possibly sanction this result. Yet, this is exactly what routinely happens in New Hampshire as a result of the Gagne/Cressey line of cases.

As noted in the record below:

Few things are more intimidating or create a greater disincentive for traumatized victims to report crime and seek justice than to have their mental health "privilege" demoted to an unimportant third tier "privilege" and their most private, painful feelings and thoughts displayed to a stranger (the judge) and, as here, to the actual perpetrator and his advocates, who are motivated to construe the records as "evidence" of "lies" and "delusion" and "character flaws." The mischaracterizations of [K.R.'s] already disclosed records in this case are a good example.

App. at 108-109.

Perhaps the thing most painful to the victim is that this skewering of her rights occurred completely without her knowledge, and that the Defendant/Appellant – her abuser – used her private records *ex parte* to cut-and-paste a "record" that he then – again, unbeknownst to her – used to seek and receive further *ex parte* incursions on her rights.

In his brief, and based solely on the *ex parte* interpretations he advanced to the trial court, Zarella asserts that excerpts from K.R.'s privileged records are "inconsistent" with each other. (See Appellee Br. at 10-11, repetitively citing as authority App. 83-84: his own brief submitted to the superior court). Those arguments are a partisan mischaracterization, enabled by an *ex parte* process excluding the privilege holder and preventing

her from countering the self-serving narrative Zarella constructed in order to impeach his victim. In this case, like so many others, the secret, one-sided process sanctioned by Gagne/Cressey obscures rather than illuminates the truth.

Here, the trial court has not held an evidentiary hearing to determine the true value or significance of K.R.'s *ex parte* treatment records. No judge has heard K.R.'s explication of her own records. No judge has heard from the prosecution on this topic. K.R. credibly contends that the defense's "spin" is a misinterpretation, motivated by this criminal defendant's desperate attempt to avoid accountability. The so-called "inconsistencies" Zarella supposes are instead *cumulative* evidence of Zarella's guilt which corroborates K.R.'s testimony.<sup>2</sup> What Zarella derides as "additional" information consists of K.R.'s answers to questions not previously asked, or referring to new subject matter covered only tangentially or not at all in a prior interview. There is no inconsistency within the *ex parte* treatment records themselves. The only inconsistencies are products of Zarella's jaundiced and one-sided presentation to the trial court and, by extension, this Court. In reality, the records strongly corroborate the prosecution's case.

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<sup>2</sup> For example, in the Concord Hospital records, K.R. reports that she was physically abused as well as sexually abused by the defendant. (Appellee Br. at 10-11.) Defendant/Appellant claims the physical assault claims are "new" and hence inconsistent. But that assertion is plainly false. In an order from August 2009, Judge Sadler describes the physical abuse suffered by K.R., her sisters and mother, as well as K.R.'s sexual assault. (App. 130-133.) Zarella's suggestion that K.R. did not disclose the physical violence she suffered until she underwent mental health treatment in 2023 is false.

Ultimately, none of this should matter to the issue central to this appeal—the continuing viability of Cressey and the scope of protection provided to victims by Part 1, Article 2-b of the New Hampshire Constitution. But Zarella has made his self-serving characterization of the *ex parte* records a feature of his argument on appeal. This Court should be wary of crediting Zarella’s argument in this regard because neither the prosecution nor K.R. have been heard on that issue and Zarella’s narrative has not been tested through an adversarial process.

### **CONCLUSION**

For all the foregoing reasons, this Court should reverse the trial court’s November 3, 2023, order denying Appellant’s motion to quash production of her counseling and mental health records for *in camera* review, and remand the case for a new decision in accordance with this Court’s answers to the questions certified for interlocutory appeal.

Dated: October 28, 2024

Respectfully submitted,

**APPELLANT K.R.**

By her Attorneys,

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### **CERTIFICATION**

I hereby certify that this reply brief contains no more than 3,000 words, exclusive of those portions which are exempted, which is fewer than the maximum number of words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

### **CERTIFICATE OF SERVICE**

I hereby certify that on October 28, 2024, a copy of the foregoing brief was sent via the Court's e-filing system to all parties and counsel of record.

/s/ Allison K. Regan  
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