THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2024-0066

STATE OF NEW HAMPSHIRE

v.

GENE ZARELLA

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

BRIEF OF AMICUS CURIAE THE NEW HAMPSHIRE ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS

By Its Attorneys,

Jeffrey D. Odland, Esq.
NH Bar No. 18967
Michael G. Eaton, Esq.
NH Bar No. 271586
WADLEIGH, STARR & PETERS PLLC
95 Market Street
Manchester, NH 03101
(603) 669-4140

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Constitutional Provisions

Other Authorities

INTEREST OF AMICUS CURIAE

The New Hampshire Association of Criminal Defense Lawyers ("NHACDL") is a voluntary, professional association of the New Hampshire criminal defense bar. NHACDL is an affiliate of the National Association of Criminal Defense Lawyers. Founded in 1988, NHACDL is the largest independent statewide organization devoted to criminal defense. It has approximately 250 attorney members, including state court public defenders, federal defenders and private practitioners. Collectively, NHACDL's members practice in every courthouse in the state and handle every type of criminal case.

NHACDL's mission is to ensure, safeguard and promote the effective assistance of counsel in criminal cases and to represent the interests of criminal defendants by seeking to preserve the fairness and integrity of the criminal legal system. NHACDL also takes public policy positions on issues of importance to the criminal legal system. When a judicial decision is likely to impact the fairness of future criminal adjudications, NHACDL will take a stand. The issues presented in this case are of direct concern to NHACDL, its members and their clients.

In this case, NHACDL seeks to provide perspective on the issues presented in the hope that criminal defendants' bedrock due process rights will be preserved and future wrongful convictions will be minimized.

QUESTIONS PRESENTED

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 the 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 that the constitutional amendment changes the applicable test, then what is the applicable test?

STATEMENT OF THE CASE AND FACTS

Amicus Curiae, the New Hampshire Association of Criminal Defense Lawyers, incorporates by reference the Statement of the Case and Facts contained in the brief of Defendant-Appellee Gene Zarella.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The passage of Article 2-b did not diminish criminal defendants' right to due process. Presumed to be innocent, a criminal defendant cannot receive a fair trial without the tools to investigate their case and present a complete defense. To ensure a fair trial, this Court has long recognized defendants' due process right to discover exculpatory evidence and the trial courts' inherent authority to compel the production of evidence.

In recent decades, hundreds of criminal defendants have been exonerated across the United States. According to the National Registry of Exonerations,[1] since 1989, 3,565 defendants have been exonerated. Collectively, these cases resulted in more than 31,900 years of unjust incarceration.[2] In more than sixty percent of these exonerations, perjury or false accusation was a contributing factor.[3] Of the 3,565 exonerations, 693

---

[1] The National Registry of Exonerations is a project of the Newkirk Center for Science & Society at University of California Irvine, the University of Michigan Law School and Michigan State University College of Law. It was founded in 2012 in conjunction with the Center on Wrongful Convictions at Northwestern University School of Law. The Registry provides detailed information about every known exoneration in the United States since 1989—cases in which a person was wrongly convicted of a crime and later cleared of all the charges based on new evidence of innocence. The Registry also maintains a more limited database of known exonerations prior to 1989.

[2] *Exonerations by Year and Type of Crime*, Nat'l Registry of Exonerations (Sept. 23, 2024), *available at* https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year-Crime-Type.aspx (last visited Sept. 23, 2024).

[3] *Percent Exonerations by Contributing Factor*, Nat'l Registry of Exonerations (Sept. 23, 2024), *available at* https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx (last visited Sept. 23, 2024).

occurred in sexual assault cases. In more than eighty percent of exonerations in child sexual abuse cases, perjury or false accusation was a contributing factor. In over forty percent of exonerations in adult sexual assault cases, perjury or false accusation was a contributing factor. Without the due process protections provided by *Gagne*, defendants cannot receive a fair trial and wrongful convictions will increase.

When constitutional rights conflict, courts must delicately balance the interests of the parties involved. When the privacy rights of a witness conflict with the defendant's due process right to present a complete defense, the due process right must prevail. In *Gagne*, this court properly balanced the defendant's due process rights against a witness's right to privacy. In the thirty-two years since *Gagne*, *in camera* review has proved a workable process for balancing these competing interests. The passage of Article 2-b did not change the relative interests at stake. Whether a witness's confidential records are constitutionally or statutorily protected, *in camera* review remains the only workable mechanism for respecting witness privacy while affording defendants due process of law. The Court must once again affirm *Gagne* and *Girard.*

ARGUMENT

I. *Gagne* and *Girard* are grounded in federal constitutional rights

The Constitution "guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment." *Strickland v. Washington,* 466 U.S. 668, 685 (1984). "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment [...] or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky,* 476 U.S. 683, 690 (1986). The right to present a complete defense includes the right to discover exculpatory evidence. *Cf., Brady v. Maryland,* 373 U.S. 83 (1963)*; see also Pennsylvania v. Ritchie,* 480 U.S. 39 (1986) (defendant entitled to *in camera* review of Child and Youth Services investigatory file).

> Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867

> (1982). Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system.

California v. Trombetta, 467 U.S. 479, 485 (1984). At a minimum, due process requires defendants have the ability to discover evidence relevant and material to their defense.

A. The *Gagne in camera* review process is rooted in the due process guarantees of the Fourteenth Amendment

For more than thirty years, this Court has recognized a defendant's due process right to *in camera* review of protected records. In *State v. Gagne*, the defendant moved for discovery of DCYF records based on "his due process rights under part I, article 15 of the State Constitution and the fourteenth amendment to the Federal Constitution." *State v. Gagne*, 136 N.H. 101 (1992). This Court ruled 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. In reaching that result, the Court cited approvingly to *Pennsylvania v. Richie*, 480 U.S. 39 (1987), for the proposition that the Fourteenth Amendment's due process clause entitles defendants to access

confidential child welfare investigatory records. *Id.* at 106. In *Girard*, this Court reaffirmed that "[a] criminal defendant's interest in obtaining disclosure of material helpful to his defense is rooted in the constitutional right to due process." *State v. Girard*, 173 N.H. 619, 627 (2020).

In *Ritchie*, the defendant was charged with child sexual assault. *Ritchie,* 480 U.S. at 39. Prior to the criminal prosecution, Pennsylvania's Child and Youth Services ("CYS") division investigated the allegations. The defendant in *Ritchie* sought an order compelling the division to provide his attorney with a copy of the investigatory file. *Id.* The trial court denied the motion and *Ritchie* was convicted. On appeal, the Pennsylvania Supreme Court reversed the conviction, finding the failure to disclose the CYS file violated the defendant's Sixth Amendment rights to Confrontation and Compulsory Process. The Commonwealth appealed.

The Supreme Court ruled that *in camera* review, rather than production directly to the defense, was appropriate under the circumstances. In so ruling, the *Ritchie* plurality stressed that "[w]e find that *Ritchie's interest* (as well as that of the Commonwealth) *in ensuring*

a fair trial can be protected fully by requiring that the CYS files be submitted only to the trial court for *in camera* review." *Ritchie,* 480 U.S. at 60 (emphasis added). *Ritchie's* plurality opinion, therefore, rested upon the defendant's federal due process right to ensure a fair trial.[4] Given *Gagne* cited directly to *Ritchie,* its holding is firmly grounded upon federal due process principles.

B. Federal due process rights apply equally to records held by private actors and to records held by the State

Appellant argues that federal due process protections are inapplicable here because the records in question are held by third parties rather than the State. But a close reading of *Ritchie* demonstrates this is wrong. The *Ritchie* court's decision dealt with the facts before it. In that case, the records sought were in the possession of a state agency. Yet *Ritchie's* holding, by its own terms, rested upon the general principle that the defendant is entitle to access relevant and material evidence, despite its confidential nature, in order to "ensure a fair trial." *Id.* When a defendant

[4] In *Ritchie,* a five-justice majority held that the defendant had a constitutional right to access confidential records. The justices differed, however, on whether that right was grounded in the due process clauses or the confrontation clause. A four-justice plurality held the right was grounded in due process. *Ritchie*, 480 U.S. at 57-58. A single justice, Justice Blackmun, believed the right was grounded in the confrontation clause. *Id* at 65 (Blackmun, J. concurring in part and concurring in the judgment). Under either analysis, all five justices agreed that the defendant's federal constitutional rights entitled him to access the documents and that *in camera* review was the proper discovery mechanism. *Id* at 58-61, 65.

seeks to discover information within confidential records, the right to a fair trial is implicated regardless of whether the records are held by the State or a third party.

For this reason, this Court has long recognized that when analyzing *Gagne* motions the distinction between records in the State's possession or the possession of a third party "is a distinction without a difference." *State v. Cressey*, 137 N.H. 402, 413 (2002). As the Court explained:

> *Gagne* did not distinguish between the privileged records of a State agency and the privileged records of a private organization. The rationale in *Gagne*, balancing the rights of a criminal defendant against the interests and benefits of confidentiality, applies equally in both cases. A record is no less privileged simply because it belongs to a State agency. Likewise, a defendant's rights are no less worthy of protection simply because he seeks information maintained by a non-public entity.

Id. Contrary to Appellant's claim, *Gagne*'s holding logically flows from *Ritchie* because it too vindicates the due process right to ensure a fair trial.

Cressey's extension of the logic of *Ritchie* and *Gagne* to cover third party records is also consistent with rulings throughout the country. *See State v. Kelly*, 208 Conn. 365 (1988) (holding third party's possession of privileged records immaterial); *Burns v. State*, 968 A.2d 1012 (Del. 2009) ("From the standpoint of the privilege holder it is immaterial whether the holder's therapy records are in the possession of a private

party or the State...[t]herefore, *Ritchie* applies here."); *State v. Olah*, 184 A.3d 360 (Me. 2018) ("[T]he standard applied [to *in camera* review of counselling records] should be the same regardless of whether the confidential records are held by the government or a private entity."); *see also, People v. Bean*, 137 Ill.2d 65 (1990); *Cox v. State*, 849 So.2d 1257 (Miss. 2003)*; State v. Rehkop*, 180 Vt. 228 (2006); *Gale v. State*, 792 P.2d 570, 581 (Wyo. 1990); *State v. Johnson*, 440 Md. 228, 247 (2014); *State v. Chambers*, 252 N.J. 561, 587 (2023); *People v. Stanaway*, 446 Mich. 643 (1994).

Due process requires this result because "the purpose of pretrial discovery is to ensure a fair trial[…] [and] [a] criminal trial where the defendant does not have access to the raw materials integral to the building of an effective defense is fundamentally unfair." *In the Interest of A.B.,* 219 N.J. 542, 556 (2014). "When relevant evidence is excluded from the trial process for some purpose other than enhancing the truth-seeking function, the danger of convicting the innocent increases." *Rehkop*, 180 Vt. at 494. (2006). The arbitrary distinction between privately held and publicly held records urged by Appellant offends fundamental fairness and must be rejected.

C. A defendant's Sixth Amendment rights to confrontation and compulsory process also support *in camera* review of confidential records

Additionally, this Court has previously ruled that the Sixth Amendment right to confrontation affords criminal defendants a limited right to access and use a witness's privileged medical records. In *State v. Farrow*, the Court considered "the question [of] whether the defendant's sixth amendment right to confrontation entitles him to have access to and to use information which falls within the scope of [the doctor-psychologist] privileges for the purpose of cross-examination and impeachment." 116 N.H. 731, 733 (1976). Relying upon *Davis v. Alaska*, 415 U.S. 308 (1974), this Court ruled that defendants hold a limited right to discover and use privileged materials where "such materials are found to be essential and reasonably necessary to permit counsel [to] adequately cross-examine for the purpose of showing unreliability or bias." *Id.* This "limited right" appears to be coextensive with, but separate from, the due process right later announced in *Gagne*. The Sixth Amendment, therefore, supplies an additional, independent basis for *in camera* review and production of confidential records. *Cf. Girard*, 175 N.H. at 365 (discussing separately the Sixth Amendment confrontation standard for

triggering review and the due process standard announced in *Gagne*).

The Sixth Amendment's compulsory process clause also supports a defendant's right to compel the review and production of material evidence that is helpful to their defense. *Cf. Barroso*, 122 S.W.3d. at 563. ("If the psychotherapy records of a crucial prosecution witness contain evidence probative of the witness's ability to recall, comprehend, and accurately relate the subject matter of the testimony, the defendant's right to compulsory process must prevail over the witness's psychotherapist-patient privilege."). Appellant's position, on the other hand, would create a category of exculpatory evidence that can never be discovered.[5] Juries would be deprived of evidence material to guilt or innocence. The risk of wrongful convictions would increase. Explaining the import of compulsory process, the Supreme Court has noted:

> The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

United States v. Nixon, 418 U.S. 683, 709 (1974).

---

[5] Notably, Appellant's position would also forestall the ability of a defendant to seek discovery regarding whether an initial disclosure of sexual assault occurring in a therapeutic setting as the result of a repressed or recovered memory. *Contra State v. Hungerford*, 142 N.H. 110 (1997).

Indeed, this Court has repeatedly recognized that failure to disclose records can be so prejudicial as to warrant a new trial. *See State v. Graham*, 142 N.H. 357, 364 (1997) (finding that where trial court erroneously fails to conduct *in camera* review of confidential records, trial court "should order a new trial unless it finds that the error of not admitting the evidence in the first trial was harmless beyond a reasonable doubt."); *see also State v. King*, 162 N.H. 629, 633 (2016) (remanding case to trial court to conduct *in camera* review and determine whether new trial must be ordered); *State v. Eaton*, 162 N.H. 190, 195 (2011) (same); *State v. Pandolfi* 145 N.H. 508, 515 (2000); *State v. Hoag*, 145 N.H. 47, 50 (2000) (same); *State v. Claussells-Vega,* 2022-0070, 2023 WL 7704883 (N.H. Nov. 15, 2023) (non-precedential order) (same); *State v. Gorman*, 2022-0178, 2023 WL 7001665 (N.H. Oct. 24, 2023) (non-precedential order) (same); *State v. Knott*, 2019-0751, 2020 WL 7663477 (N.H. Nov. 18, 2020) (non-precedential order) (same); *State v. Rivera*, 2018-0674, 2019 WL 6971570 (N.H. Dec. 19, 2019) (non-precedential order) (same); *State v. Potter*, 2011-0691, 2013 WL 11984320 (N.H. May 13, 2013) (non-precedential order) (same).

While the Sixth and Fourteenth Amendments do not provide criminal defendants with a generalized right to discovery, upon a

particularized showing, they do create a right to discover otherwise protected information that is material and relevant to the defendant's ability to present a complete defense. *Gagne* and *Girard* vindicate these same federal constitutional rights.

II. The supremacy clause protects defendants' federal rights from being diminished by the passage of a state constitutional amendment

The Appellant contends that adoption of Article 2-b requires this Court to overrule *Gagne* and articulate a more stringent discovery standard. But diminishing defendants' federal due process rights due to the passage of a state constitutional amendment would violate the Supremacy Clause. *See* U.S. Const. Art. VI, Paragraph 2.[6] Accordingly, Appellant's request to overrule or amend *Gagne, Girard* and *Cressey* must be denied.

"The Supremacy Clause makes [the Federal Constitution and laws passed pursuant to it] the supreme Law of the Land, and charges state courts with a coordinate responsibility to enforce that law." *Norelli v. Secretary of State*, 175 N.H. 186, 195 (2022) (cleaned up). The

[6] "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." U.S. Const. Art. VI, Paragraph 2.

Supremacy Clause controls even where a federal *statute* conflicts with a state *constitutional* right. *See e.g., United States v. Minnick*, 949 F.2d 8, 11 (1st Cir. 1991) ("Minnick's protestation that New Hampshire would allow him to possess a firearm [under its "qualified state constitutional right to bear arms, *see* N.H. Const. pt. I, art. 2-a"], despite his previous convictions, is fully answered by the Supremacy Clause.").

As discussed above, this Court's *Gagne* jurisprudence flows from criminal defendants' federal constitutional rights under the Sixth and Fourteenth Amendments. Appellant, however, asks this Court to reduce defendants' federal due process rights as a result of the adoption of Article 2-b in violation of the Supremacy Clause. *See Reynolds v. Sims,* 84 S.Ct. 1362 (1964) ("When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls."). Because the adoption of a state constitutional amendment cannot reduce a criminal defendants' federal constitutional rights, this Court must affirm *Gagne* and its progeny.

Courts which have grappled with this issue in other jurisdictions have determined the supremacy clause controls. Arizona, for example, has incorporated its Victims' Bill of Rights into its constitution. *See*

Ariz. Const. Art. 2, Sec. 2.1. Unlike the rights described in Article 2-b, Arizona's Victim's Bill of Rights is tailored specifically to protect alleged victims and provides an enumerated right to "refuse an interview, deposition, or other discovery request." *Id*.

Shortly after Arizona adopted its Victim's Bill of Rights constitutional amendment, the Arizona Supreme Court held that "if, in a given case, the victim's state constitutional rights conflict with a defendant's federal constitutional rights to due process and effective cross-examination, *the victim's rights must yield.*" *State v. Riggs*, 942 P.2d 1159, 1162 (Ariz. 1997) (emphasis added). In reaching that conclusion, the court added that: "The Supremacy Clause requires that the Due Process Clause of the U.S. Constitution prevail over state constitutional provisions." *Id*.

In a more recent opinion, the Arizona Supreme Court addressed the precise issue at bar, *i.e.* the interplay between *in camera* review of privileged records and an alleged victim's constitutional privacy rights. In *Crime Victims R.S. and S.E. v. Thompson (Vanders II)*, 485 P.3d 1068 (Ariz. 2021), the court addressed an objection to a trial court's order that a hospital produce the victim's records for *in camera* review. Recognizing

the victim's rights under both state statute and the Arizona Constitution act as "powerful counterbalances to defendants' rights," the court nevertheless recognized that "federal constitutional rights trump state constitutional and statutory rights." *Id*. at 1075. That court, citing both Arizona and United States Supreme Court precedent, stated: "the very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts . . . if a trial court excludes essential evidence, thereby precluding a defendant from presenting a theory of defense, the trial court's decision results in a denial of the defendant's right to due process that is not harmless." *Id*. at 1074 (quotations and citations omitted). Accordingly, the court found, "the due process right to present a complete defense is vitiated if a defendant is prevented access at the pretrial discovery stage to the 'raw materials' necessary to build his defense, rendering his trial fundamentally unfair." *Id*.

To avoid this fundamentally unfair result, Arizona's Supreme Court held that *in camera* review was the proper balance between a victim's state constitutional right to privacy and a criminal defendant's due process rights. As the Supreme Court of Arizona observed:

> [a] victim does not have an absolute privilege against disclosure of private records, nor does a defendant have an unqualified right to

> obtain those records for use at trial in every circumstance. Consequently, the rights of the defendant and victims are not necessarily mutually exclusive. In exercising its discretion, a court must strike a balance between the competing interests of a victim's privilege and a defendant's federal constitutional rights to procure and present evidence necessary to construct a complete defense. Thus, a victim's right to refuse discovery must yield when a defendant makes the requisite constitutional showing of need for the information.

Id at 1075.

Similarly, South Carolina, which has adopted a constitutional right to privacy, *see* S.C. Const. Art. I, Sec. 10, has addressed "the novel question of whether a criminal defendant's constitutional right to confront a witness trumps a witness's state constitutional right to privacy and statutory privilege to maintain confidential mental health records." *State v. Blackwell*, 801 S.E.2d 713 (S.C. 2017). The court noted that "the majority of jurisdictions in the United States have determined that a criminal defendant's right, provided certain requirements are met, may supersede a witness's rights or statutory privilege." *Id*. at 726. The *Blackwell* court then resolved the issue by creating an *in camera* review process prior to the dissemination of any confidential materials. *Id.* at 727.

In several other states with constitutional rights to privacy, courts have employed *in camera* review to balance a defendant's due process

rights against an alleged victim's privacy rights. *See State v. Duffy*, 6 P.3d 453, 459 (Mo. 2000) ("The best way to balance the accused's need for exculpatory evidence against the privacy interest of the victim is to have the district court review the confidential records in camera.")[7]; *Susan S. v. Israels*, 55 Cal. App. 4th 1290, 1295-96 (Cal. Ct. App. 1997) (stating that, after a showing of "good cause," the trial court "should (1) obtain the records and review them in camera; (2) weigh the constitutional right of confrontation against the witness's right to privacy; (3) determine which if any records are essential to the defendant's right of confrontation; and (4) create an adequate record for review.")[8], *see also Muller v. Wal-Mart Stores, Inc.*, 164 So.3d 748, 750 (Fla. Ct. App. 2015) (noting, in a civil case where a criminal defendant's fundamental and paramount rights are not at stake, that "[t]he right of privacy set forth in article 1, section 23, of the Florida Constitution undoubtedly expresses a policy that compelled disclosure through discovery be limited to that which is necessary for a court to determine contested issues" and ruling that "[w]hen a party

[7] Montana's Constitution reads, in relevant part, "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Mo. Const. Art. II, Sec. 10.

[8] California's Constitution "recognizes the people of California have certain 'inalienable rights' including the right of 'pursuing and obtaining safety, happiness and privacy.'" *See id*. at 1295, n.3 (quoting Cal. Const. Art. I, Sec. 1).

challenges a discovery order by asserting a constitutional right to privacy, the trial court must conduct an in camera review to determine whether the requested materials are relevant to the issues in the underlying action." (quotations omitted)).

As the court found in *Vanders II,* the adoption of a state constitutional amendment cannot reduce a criminal defendant's due process rights. As discussed above, *Gagne* vindicates defendants' federal constitutional rights. As a result, its holding cannot be disturbed due to the adoption of Article 2-b.

III. *Gagne* is also grounded in the defendant's part I, Article 15 rights to due process and all proofs favorable

The New Hampshire Constitution guarantees the rights to due process and all proofs favorable under part I, Article 15. Even if *Gagne* was not supported by the Sixth and Fourteenth Amendments, *Gagne* would remain good law under part I, Article 15.[9]

"When State constitutional issues have been raised, this court has a responsibility to make an independent determination of the protections afforded under the New Hampshire Constitution." *State v. Ball,* 124 N.H.

[9] Amici curiae incorporates by reference the arguments in Section I, *supra,* as they apply with equal force to the Court's analysis of the due process rights at stake under part I, Article 15.

226 (1983). This Court has previously observed that though "the privileges protected by the Fifth Amendment and part I, Article 15 are 'comparable in scope,' we have also declined to follow federal standards when those standards did not sufficiently protect the rights of New Hampshire citizens." *State v. Roache*, 148 N.H. 45 (2002) (cleaned up). In assessing a defendant's due process claims under the State Constitution, "we look to the principles of fundamental fairness." *State v. Graf*, 143 N.H. 294, 302 (1999).

Appellant suggests that federal constitutional law compels this Court to rule that evidence held by third parties in confidential records–even exculpatory evidence–cannot be discovered by criminal defendants. Even if that is correct, it cannot be correct that part I, Article 15 compels the same result.

Under New Hampshire law, it is well settled that the trial courts have "the inherent power [] to compel discovery in a criminal case if the interests of justice so require." *State v. Healey*, 106 N.H. 308, 309 (1965); *see also* N.H. R. Crim. Pro. 17(b) (allowing for information to be obtained via subpoena *duces tecum* in criminal cases). Further, in *State v. Girard*, this Court held that "[a] criminal defendant's interest in obtaining disclosure of

material helpful to his defense is rooted in the constitutional right to due process." In *State v. Alcorn*, this Court noted that "generally [] there is no denial of due process under part I, article 15 in leaving discovery in criminal cases within the discretion of trial courts, *unless existing exculpatory evidence* or a statutory disclosure requirement *is involved*." 125 N.H. 672 (1984) (citations omitted) (emphasis added). The *Gagne* process exists to ensure defendants' access to existing exculpatory evidence. The interests of justice and fundamental fairness require defendants have that ability. Accordingly, *Gagne* is required by part I, Article 15.

IV. *In Camera* review properly balances the defendant's right to due process against a witness's right to privacy

As discussed above, *Gagne* and *Girard* remain good law, firmly grounded in a criminal defendant's federal and state constitutional rights to due process, confrontation and compulsory process. Nevertheless, Appellant asserts that the adoption of Article 2-b requires this Court to heighten the standards for triggering *in camera* review and production of confidential documents. *Gagne,* however, already strikes the appropriate balance between the competing interests at stake. Further, any revision to the *Gagne* standard would prove unworkable and would effectively

foreclose a defendant's ability to trigger *in camera* review, rendering the rights protected by *Gagne* illusory.

While Article 2-b creates a right to privacy, it is axiomatic that "no constitutional right is absolute." *In Re Caulk*, 125 N.H. 226 (1984). Thus, when individuals' rights come into conflict, either may give way. In such circumstances, courts "must engage in a delicate balancing, weighing the conflicting interests of the parties involved." *State v. Donnelly*, 145 N.H. 562, 566 (2000).

In *Gagne*, the Court considered the balance between witness privacy and a defendant's rights to due process. The Court balanced those rights through a two-step *in camera* review process, which the Court noted "provides an intermediate step between full disclosure and total nondisclosure." *Gagne*, 136 N.H. at 105. *In camera* review is a remedial measure aimed at protecting witness privacy and ensuring that only relevant and material evidence is ultimately disclosed to the parties.

In step one, in order to trigger *in camera* review, the Court held that "the defendant must establish a reasonable probability that the records contain information that is material and relevant to his defense." *Id.; see also Girard,* 173 N.H. at 628. The *Gagne* Court explained that "trial

courts cannot realistically expect defendants to articulate the precise nature of the confidential records without having prior access to them." *Gagne*, 136 N.H. at 105. In *Graham*, the Court reiterated that, in order to trigger *in camera* review, a defendant "need not articulate the precise nature of the purported contents," nor *guarantee* that the records will contain exculpatory evidence because if the "bar to *in camera* review is set too high," defendants' due process rights would be jeopardized. *Graham*, 142 N.H. at 363; *see also State v. Amirault*, 149 N.H. 541, 544 (2003) (reiterating courts do not require defendants to "articulate with precision the materiality and relevancy of the requested information to their defense," before triggering *in camera* review).

In step two, after conducting *in camera* review, the court must determine whether material and relevant evidence is, in fact, contained in the records. *Girard,* 173 N.H. at 628. Evidence may be material and relevant to the defense if it contradicts the State's evidence, shows bias, motive or prejudice, or materially impacts the credibility of the witness. *Id.* at 629.

Appellant urges this Court to replace the *Gagne* standard. Under Appellant's test, in step one, a defendant could only trigger *in camera*

review of materials protected under RSA 173-C upon showing "a substantial likelihood" —rather than a reasonable probability—that the records sought will contain "favorable and admissible" evidence.[10]

This Court must reject this heightened standard for same reasons it has refused to adopt similar standards in the past. As Arizona's Supreme Court recently observed, the "substantial probability standard […] is unworkable because it effectively requires a defendant to know the contents of the requested documents as a prerequisite for *in camera* review." *Vanders II*, 251 Ariz. at 119. As a result, "the substantial probability standard goes too far as it *effectively forecloses in camera review in all circumstances*. The reasonable probability standard, by comparison, reasonably protects a victim's privacy interests but does so without infringing on a defendant's right to obtain information necessary to a complete defense." *Id.* (emphasis added). Arizona, therefore, utilizes a "reasonable probability" standard despite the fact that its state constitution includes a Victim's Bill of Rights.

Of the jurisdictions that require the defendant to meet a burden as a prerequisite to *in camera* review of protected records, the majority require a

[10] *See Appellant's Opening Brief* at 31-34.

burden similar to that articulated in *Gagne*. Last year, the Alaska Supreme Court—noting that Alaska Constitution's provision of privacy rights to crime victims requires "a standard that takes full account of the competing constitutional rights at stake"—collected a "representative sample of the various tests that defendants in different jurisdictions must meet in order to obtain in camera review of otherwise privileged mental health records." *Douglas v. State*, 527 P.3d 291, 304-06 (Ala. 2023). The Alaska Supreme Court rejected the State's argument for a "more stringent" standard, and adopted "a standard similar to the ones used by the majority of other jurisdictions." *Id*. at 307-08; *citing State v. Peeler,* 271 Conn. 338 (2004) (requiring preliminary showing of reasonable grounds to believe that failure to produce records would likely impair his right to impeach the witness)*;* *Commonwealth v. Barroso* 122 S.W.3d 554 (Ky. 2003) (requiring defendant establish a reasonable belief that the records contain exculpatory evidence); *Goldsmith v. State*, 337 Md. 112 (1995) (requiring defendant establish a reasonable likelihood that the privileged records contain exculpatory evidence necessary for a proper defense)*; People v. Stanaway*, 446 Mich. 643 (1994) (requiring a showing of a good faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records

likely contain material information necessary to the defense); *State v. Blake*, 63 P.3d 56 (Utah. 2002) (requiring the defendant show with reasonable certainty that exculpatory evidence exists which would be favorable to the defense). After consideration of this authority, Alaska adopted "a standard that is similar to the ones used by the majority of the jurisdictions" that requires the defendant to show "a reasonable likelihood that the records will contain exculpatory evidence that is necessary to the defense and unavailable from a less intrusive source." *Id.* at 308.

Appellant also argues that after the passage of Article 2-b medical and mental health records should be protected by something approaching an absolute privilege.[11] *See generally*, RSA 329-B:36; RSA 330-A:32. Appellant argues that, after Article 2-b, the only applicable exceptions to the mental health counselor privilege are the exceptions recognized as exceptions to attorney-client privilege.[12] But these privileges cannot have identical contours and exceptions because they do not serve identical purposes. More generally, Appellant fails to articulate how a statutory privilege would expand due to the passage of a state constitutional

---

[11] *See Appellant's Opening Brief* at 34-38.

[12] *See Appellant's Opening Brief at 38.* ("[C]ourts should not even entertain a request to pierce the [mental health counsellor] privilege unless that request otherwise fits within the narrow exceptions to the attorney-client privilege.").

amendment. Assuming for argument's sake that any additional rights were created, those rights would flow from the new amendment itself and not an expansion of a previously extant statute.

In fact, Appellant's privilege-based arguments have already been rejected by this Court. First, this Court has previously noted that, in defining the mental health counselor privilege, the legislature explicitly recognized that disclosure of protected communications may be required by court order. *See Girard*, 173 N.H. at 626 n. 2 citing RSA 330-A:32. Second, this Court has previously held that the physician privilege may be pierced upon a showing of an "essential need," which equates to showing "a reasonable probability that the records contain evidence that is material and relevant to the party's defense or claim." *See Petition of the State of New Hampshire (Richard McDaniel)*, 162 N.H. 64, 70 (2011). In short, this Court has previously ruled that these privileges must yield when the *Gagne* standard is met. Appellant's claim that the privilege piercing analysis should be augmented after the passage of Article 2-b must be rejected for the same reasons this Court must reject the heightened "substantial need" test.

Gagne's reasonable probability test is workable and consistent with the weight of authority. "If the bar to *in camera* review is set too high, we risk depriving the defendant of his constitutional right to due process." *Graham*, N.H. 142 at 363. By creating an unattainable threshold to trigger *in camera* review, the substantial likelihood standard would vitiate *Gagne* and violate the due process rights *Gagne* aimed to protect. Further, "such a requirement would effectively render [*in camera*] review superfluous, as the defendant essentially would have to obtain the information itself in order to meet his burden." *Id.* at 364. Whether a witness's confidential records are protected by statutory privilege or state constitutional right, *Gagne* strikes the proper balance between the competing interests at bar. New Hampshire must affirm the *Gagne* test.

V. Stare decisis and the collateral consequences of overruling *Gagne*

The principle of *stare decisis* also supports affirming *Gagne* and its progeny. Overturning *Gagne* and *Cressey,* on the other hand, would usher in significant unintended consequences and erode due process protections.

The doctrine of *stare decisis* recognizes that in a society governed by the rule of law, "today's court should stand by yesterday's decisions." *In Re*

Blaisdell, 174 N.H. 187, 190 (2021). The Court, therefore, will only overrule a decision after considering:

> (1) whether the rule has proven to be intolerable simply by defying practical workability;
> (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling;
> (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and
> (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Id.

Gagne has been the law for more than thirty years. In that time, the *Gagne* rule has proved workable. There is no evidence in the record to suggest otherwise. Indeed, here, the trial court expressly rejected an invitation to deviate from *Gagne* and found that standard to be appropriate. Further, Appellant and the State say little about why an augmented test would be more workable. The State, for example, faults the *Gagne* test for being "inherently speculative."[13] But the State fails to explain how requiring a showing of "substantial likelihood," or "essential need," is any less speculative. Because all three tests necessarily concern the contents of

[13] *State's Opening Brief at 29.*

records the parties and court have not reviewed, any test will include some element of the unknown. Further, for reasons explained in detail above, the proposed heightened standards are unworkable themselves as they would require the defendant to have prior knowledge of the contents of records in order to obtain them. Given *Gagne* remains a workable solution to delicately balancing the vital interests at issue, it must be affirmed.

Nevertheless, referencing the third and fourth factors from *Blaisdell,* the State also asserts that *Cressey* must be overruled because "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."[14] The State's claim ignores the fact that nothing in *Gagne* and *Girard* confines their application to sexual assault cases or even to crime victims. The *Gagne* process applies equally in non-sexual assault cases and applies to third-party witnesses and complaining witnesses alike. Given that framework, it is clear *Cressey's* purpose is to uphold due process and the presumption of innocence. In sum, *Cressey* is grounded not in an archaic, "abandoned doctrine," but in our most fundamental due process

[14] *State's Opening Brief* at 27. (internal citations omitted).

rights: the right to bring facts to bear so that the courts can uphold their truth-finding function.

In addition, overruling *Cressey* due to the passage of Article 2-b would have far-reaching consequences beyond the facts of this case. First, in any case where the initial disclosure of a crime occurred in counselling or therapy, a defendant could only learn the circumstances of that disclosure if the alleged victim or a guardian voluntarily signed a release. Second, contrary to *Hungerford*, a defendant could never learn whether a disclosure occurring in a therapeutic was the result of a repressed or recovered memory. *State v. Hungerford*, 142 N.H. 110 (1997). Third, overruling *Cressey* would incentivize prosecutors to only request and obtain private information (e.g. medical records, counselling records or even cellphone data) when they are sure it would assist in obtaining a conviction. Alternatively, prosecutors could refuse to request that information and, by declining to seek it out, render it completely undiscoverable to the defense, thwarting the truth-seeking mission of the criminal legal system. To avoid these troubling implications, the court must affirm *Gagne*.

Finally, if Article 2-b requires this Court to deny criminal defendants any *in camera* review of records held by third parties,[15] it is unclear whether the State might access those records either. If the State maintains that its authority to search or subpoena medical or mental health records was not altered by Article 2-b, the State must explain how it can be exempt from Article 2-b's protections while criminal defendants are not. Such a position would seem particularly difficult to maintain given that Article 2-b, by its very terms, is aimed at protecting private information from *governmental* intrusion.

In fact, in its brief, the State specifically asserts that this Court should rule in K.R.'s favor because Article 2-b created substantive privacy rights, which are separate from, and more expansive than, the rights protected by Part I, Article 19.[16] Granting K.R.'s requested relief would require that the Court endorse that position. Given the import of that determination, if the Court agrees that Article 2-b created substantive rights beyond those contained in Article 19, it should clarify the law by explicitly

---

[15] *See State's Opening Brief* at 24. ("[I]n 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.").

[16] *See State's Opening Brief* at 19 n. 3 ("[A]ny 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.").

affirming that proposition. Such a ruling would radically alter New Hampshire's search and seizure law. In the future, mere probable cause would no longer be the standard applicable to the State seeking "private information." Instead, the heightened standards discussed above would apply. At a minimum, searches not only for medical records, but also for any type of electronic data would appear to fall within the category of "private information" worthy of increased protection under Article 2-b.

For all the reasons above, the Court should affirm *Gagne* and its progeny. If the court amends or overrules the *Gagne* test in light of the passage of Article 2-b, however, it can only do so by holding that Article 2-b created new, substantive constitutional rights.

CONCLUSION

Criminal defendants enter court presumed innocent. Consistent with the presumption of innocence and the truth-seeking mission of the courts, defendants must be afforded the tools to discover exculpatory evidence and present a complete defense. Without these tools, wrongful convictions will increase. Though witnesses enjoy a right to privacy, that right must be balanced against the defendant's fundamental rights to due process, confrontation and compulsory process. *Gagne*, *Cressey* and *Girard*

appropriately balance these competing interests. In the more than thirty years since *Gagne*, *in camera* review has proved a workable solution to these concerns. The passage of Article 2-b does not, and in fact cannot, require this court to overrule that precedent. To ensure fair trials within our criminal legal system, *Gagne* must be affirmed.

NEW HAMPSHIRE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
By Its Attorneys,

/s/ Jeffrey D. Odland

Jeffrey D. Odland, Esq.
NH Bar No. 18967
Michael G. Eaton, Esq.
NH Bar No. 271586
WADLEIGH, STARR & PETERS PLLC
95 Market Street
Manchester, NH 03101
(603) 669-4140
jodland@wadleighlaw.com

CERTIFICATE OF SERVICE

The undersigned certifies that, on this date, copies of this Brief, as required by the Rules of this Court, are being electronically delivered through the Court's electronic filing system to all counsel of record.

Dated: September 24, 2024 */s/ Jeffrey D. Odland*
Jeffrey D. Odland, Esq.

STATEMENT OF COMPLIANCE

The undersigned hereby certifies that, pursuant to New Hampshire Supreme Court Rule 26(7), this Brief complies with New Hampshire Supreme Court Rule 26(2)-(4). Further, this Brief complies with New Hampshire Supreme Court Rule 16(11), in that this Brief contains 6,994 words (including footnotes) from the "Questions Presented" to the "Conclusion" sections of the Brief.

/s/ Jeffrey D. Odland
Jeffery D. Odland, Esq.