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THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2023-0210

State of New Hampshire

v.

John Doyle

Appeal Pursuant to Rule 7 from Judgment
of the Merrimack County Superior Court

REPLY BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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STATEMENT OF THE CASE AND THE FACTS

The State sought the disclosure of Doyle's psychiatric records on the sole ground that the records fell within the exception, set forth in RSA 329:26 and RSA 330-A:32, for "hearings conducted pursuant to [the civil-commitment statutes]." DBA* 18; DBA 71–73. The Superior Court granted the State's request, ruling that RSA 329:26 and RSA 330-A:32 "'explicitly except' from the privilege 'involuntary proceedings and hearings conducted pursuant to' [the civil-commitment statutes]" and that "[p]roceedings in a civil commitment action include the pre-petition evaluation." AD 7–8. The court did not rely on any other ground to grant the State's request. AD 3, 5, 6–8.

In his opening brief, Doyle argued that this legal conclusion was error. DB 15–37. He argued that the exception for "hearings conducted pursuant to [the civil-commitment statutes]" does not apply to a prospective petitioner's pre-petition evaluation of a prospective admittee. DB 23–37.

* Citations to the record are as follows:
"DB" refers to Doyle's opening brief;
"AD" refers to the appendix to Doyle's opening brief containing the appealed decisions;
"DBA" refers to the appendix to Doyle's opening brief containing documents other than the appealed decisions;
"SB" refers to the State's brief;
"SBA" refers to the appendix to the State's brief; and
"H" refers to the transcript of the hearing on December 12, 2022.

The State, in its brief, does not defend the trial court's legal conclusion. SB 20–41. It does not argue that the exception for "hearings conducted pursuant to [the civil-commitment statutes]" applies to a prospective petitioner's pre-petition evaluation of a prospective admittee. SB 20–41.

Instead, the State makes three new arguments. First, it argues that Doyle waived the physician-patient and psychoanalyst-patient privileges. SB 22–28. Second, it argues that RSA 135:17-a, V authorized the disclosure of Doyle's psychiatric records. SB 29–33. Third, it argues that it has an essential need for Doyle's psychiatric records. SB 34–41.

The State did not advance any of these arguments below. DBA 18, 24, 31, 51, 71; H 2–9. Similarly, the trial court did not rely on any of these rationales in ordering the disclosure of Doyle's psychiatric records. AD 3, 5, 6. Doyle files this reply brief to address these arguments, made for the first time in the State's brief.

SUMMARY OF THE ARGUMENT

This Court should not address the State's waiver and "essential need" arguments because the State failed to raise those issues below, thereby depriving Doyle of the opportunity to develop the record. The State is estopped from arguing that RSA 135:17-a, V abrogates the physician-patient or psychotherapist-patient privileges because Doyle withdrew his appeal of the dangerousness finding in reasonable reliance on the State's disavowal of that argument.

To the extent that this Court addresses the State's waiver or "essential need" arguments, the question is whether a finding of waiver or "essential need" was required as a matter of law. A finding of waiver was not required as a matter of law because Doyle did not inject privileged material into non-existent civil-commitment proceedings. A finding of "essential need" was not required as a matter of law because the State never requested in camera review and because it already had alternative sources for the targeted information.

To the extent that this Court addresses the State's argument under RSA 135:17-a, V, the plain language of that provision does not abrogate the physician-patient or psychotherapist-patient privileges.

II. THIS COURT SHOULD NOT AFFIRM ON THE GROUND THAT DOYLE WAIVED THE PRIVILEGES.

A. The State waived this argument by not presenting it below.

This Court "ha[s] long held that [it] will not consider issues raised on appeal that were not presented in the trial court." State v. Bailey, 166 N.H. 537, 541 (2014). While this Court may, in some circumstances, affirm on a ground upon which the trial court did not rely, Petition of N.H. Div. for Children, Youth & Families, 175 N.H. 596, 602 (2023), "[it] do[es] not mechanically follow the 'alternative grounds' rule." Doyle v. Comm'r, N.H. Dep't of Resources & Economic Dev., 163 N.H. 215, 222 (2012). If the appellee failed to raise the issue below and its failure deprived the appellant of "the opportunity to consider that legal issue or the development of facts that might or might not have supported that argument," State v. Santana, 133 N.H. 798, 809 (1991), this Court will not consider the issue. State v. Donovan, 175 N.H. 356, 362 (2022); State v. Gates, 173 N.H. 765, 772 (2020); State v. West, 167 N.H. 465, 468 (2015). Where the appellant "had no reason to believe that there was any dispute as to [the issue], . . . and thus no reason to develop the record to support such a ruling," consideration of the issue for the first time on appeal would give the appellee an unfair advantage, while imposing on the appellant an unfair detriment. Doyle, 163 N.H. at 222.

Here, the State failed to argue below that Doyle waived the physician-patient or psychotherapist-patient privileges. Thus, Doyle had no opportunity to consider the waiver issue and no reason to develop the record to support a ruling that he did not waive the privileges. For these reasons, consideration of the waiver issue for the first time on appeal would give the State an unfair advantage and impose on Doyle an unfair detriment, and this Court should decline to address the issue.

B. A finding of waiver was not required as a matter of law.

When this Court considers an alternative ground for affirmance, its consideration depends on the nature of the issue. If the trial court's decision on the issue would have been discretionary, then "[this Court] may sustain the trial court's ruling on [the alternative] ground . . . only if there is only one way the trial court could have ruled as a matter of law." State v. Cavanaugh, 174 N.H. 1, 11 (2020); accord Torromeo Indus. v. State, 173 N.H. 168, 179 (2020); In the Matter of Sheys & Blackburn, 168 N.H. 35, 40 (2015); State v. Hayward, 166 N.H. 575, 583 (2014).

Here, had the trial court addressed whether Doyle waived the physician-patient or psychotherapist-patient privileges, that decision would have been discretionary. See Livingston v. 18 Mile Point Drive, 158 N.H. 619, 627

(2009) (reviewing trial court's ruling on "at issue" waiver of attorney-client privilege under an unsustainable-exercise-of-discretion standard and affirming the finding that no waiver took place because "[t]he trial court reasonably could have concluded that th[e evidence] was insufficient to demonstrate a[] . . . waiver of the . . . privilege."); Bennett v. ITT Hartford Group, 150 N.H. 753, 760–61 (2004) (same). Because it would not have been "clearly untenable or unreasonable," In the Matter of Albrecht, ___ N.H. ___ (July 25, 2023), for the trial court to find that Doyle did not waive the privileges, the court's ruling cannot be affirmed on this alternative ground.

A party impliedly waives a privilege, such as the physician-patient or psychotherapist-patient privileges, only if the party "put[s] the confidential communications at issue by injecting the privileged material into the case," Petition of State of N.H. (State v. MacDonald), 162 N.H. 64, 69 (2011), "such that the information is actually required for resolution of the issue," Livingston, 158 N.H. at 627. Such a waiver occurs, for example, if "the holder of [the] privilege . . . bring[s] a cause of action that requires use of the privileged material to prove the elements of the case," Petition of State of N.H., 162 N.H. at 69, or if a criminal defendant brings a claim of ineffective assistance of counsel, Petition of Dean, 142 N.H. 889, 890 (1998).

If an implied waiver does occur, it is "a limited one," id. at 890–91, that is "only partial," Desclos v. S. N.H. Med. Ctr., 153 N.H. 607, 615 (2006). "[A]n implied waiver does not waive the privilege for all confidential communications between the attorney and client or doctor and patient." Id. "It extends not to all information given in the course of treatment, but only to what is relevant to the [privilege holder's] claim." Id.

Here, Doyle did not waive the physician-patient or psychotherapist-patient privileges with respect to a petition for involuntary commitment under RSA Chapter 135-C. Although Doyle's lawyer filed a motion to determine his competence in a criminal case, this did not amount to a "claim" of incompetence or anything else. "[W]henever [a lawyer] has a good faith doubt as to the defendant's competence," the lawyer is ethically obligated to "move for evaluation of the defendant's competence to stand trial," and to "make known to the court and to the prosecutor those facts known to counsel which raise the good faith doubt of competence." State v. Veale, 158 N.H. 632, 640 (2009) (citing ABA Criminal Justice Standards Committee, ABA Criminal Justice Mental Health Standards Standard 7-4.2(c), at 176 (1989)). The lawyer has these obligations even if the defendant maintains that he or she is competent, objects to raising competence, and objects to the disclosure of any information. Id. A patient does not "inject . . . privileged

material into [a] case," merely because his or her lawyer decides that there is "a good faith doubt" about the patient's competence and abides by the resulting ethical obligations. Cf. Petition of State of N.H., 162 N.H. at 69 ("We decline to hold that an alleged victim's medical records are put at issue simply because the State elects to proceed with a criminal prosecution.").

The State argues the Doyle waived the physician-patient and psychotherapist-patient privileges "by providing his medical records to the [Office of the Forensic Examiner (OFE)]." SB 22. The court, however, ordered Doyle's lawyer to provide his records to the OFE. It ordered:

> [C]ounsel for the defendant shall provide the [OFE] with all of the records required by that office to complete the evaluation . . . which are available and/or within good faith effort can be reasonably obtained, including: . . . Psychiatric records, if any, from the New Hampshire Hospital and New Hampshire Mental Health Centers generated within the past three years; Psychiatric records from other facilities or providers generated within the past three years or otherwise relevant; [and] Relevant general medical records generated in the past three years."

SBA 13–14. A patient does not "inject . . . privileged material into [a] case," merely because his or her lawyer complies with a court order.

Finally, the State argues that Doyle waived the physician-patient and psychotherapist-patient privileges "by providing the materials to Dr. [Laurie] Guidry for the purpose of obtaining a second opinion on his restorability." SB 20, n.6. To the extent that Doyle "put [his] confidential communications at issue" by providing his records to Dr. Guidry, "the issue" whose "resolution" "actually required" that "information" was restorability, not dangerousness. For these reasons, Doyle, at most, impliedly waived the physician-patient and psychotherapist-patient privileges with respect to restorability, and any implied waiver was limited to that claim, which was long settled by the time the State sought a court order requiring the disclosure of Doyle's records to its psychiatrist.

Even if Doyle had waived the physician-patient and psychotherapist-patient privileges with respect to all three determinations under RSA 135:17-a — competence, restorability and dangerousness — he did not waive them with respect to civil-commitment proceedings under RSA Chapter 135-C. A party impliedly waives a privilege only "by injecting the privileged material into the case." Petition of State of N.H., 162 N.H. at 69 (emphasis added). A non-

emergency civil-commitment proceeding under RSA Chapter 135-C is a different "case" than a criminal proceeding under RSA 135:17-a; the two proceedings don't even take place in the same court. See RSA 135-C:20, II (vesting jurisdiction over non-emergency civil-commitment proceedings in the Probate Court). A patient cannot "inject[] . . . privileged material into [a] case" that does not exist.

For these reasons, had the trial court found that Doyle did not waive the privileges with respect to civil-commitment proceedings, that finding would have been sustainable. Thus, the court's order, authorizing the disclosure of Doyle's privileged records to the State's hired psychiatrist, cannot be affirmed on the alternative ground that Doyle waived the privileges.

III. THIS COURT SHOULD NOT AFFIRM ON THE GROUND THAT RSA 135:17-a, V AUTHORIZED DISCLOSURE OF DOYLE'S PSYCHIATRIC RECORDS.

A. The State is estopped from advancing this argument.

"Quasi estoppel is an equitable doctrine preventing one from repudiating an act or assertion if it would harm another who reasonably relied on the act or assertion." Appeal of N.H. Elec. Coop., 170 N.H. 66, 84 (2017); see also Sunapee Difference v. State, 164 N.H. 778, 795 (2013) ("Governmental estoppel is appropriate . . . when government officials are acting within their prescribed sphere and functions, and are exerting no excess of authority."). "Quasi-estoppel prevents a party from successfully asserting a position inconsistent with a previously taken position, with knowledge of the facts and of its rights, to the detriment of the person seeking to invoke [the doctrine]." 31 C.J.S. Estoppel and Waiver § 146 (Aug. 2023 update).

The doctrine "is inherently flexible and cannot be reduced to any rigid formulation." Id. "[I]ts application depends upon a case-by-case analysis of the equities involved, rather than upon precise definitional standards." Id. "[F]or quasi-estoppel to apply, the party to be estopped must have either gained some advantage against the other party, produced disadvantage to the other party, or the other party

must have been induced to change positions." Id. In applying quasi-estoppel, courts consider many factors, including:

> (1) whether the party asserting the inconsistent position has gained an advantage or produced some disadvantage through the first position, (2) the magnitude of the inconsistency, (3) whether the changed circumstances tend to justify the inconsistency, (4) whether the party claiming estoppel relied on the inconsistency to his or her detriment, and (5) whether the first assertion was made with full knowledge of the facts.

Id.

RSA 135:17-a, V provides that, if a court determines that a criminal defendant is incompetent, unrestored and dangerous, it "may order the person to submit to examinations by a physician, psychiatrist, or psychologist designated by the state for the purpose of evaluating appropriateness and completing the certificate for involuntary admission into the state mental health services system." On appeal, the State argues, for the first time, that this provision authorized the disclosure of Doyle's psychiatric records. SB 29–32. Under this new argument, Doyle's records were subject to disclosure not just because the State was contemplating filing a civil-commitment petition, but because the Superior Court specifically found him dangerous. Thus, the State argues, its argument "applies to a small and

discrete group" and "will [not] have significant and far-reaching effects on all involuntary admission filings." SB 33–34.

In the Superior Court, however, the State not only failed to make this argument, it expressly disclaimed it. The court posited that "the finding of dangerousness . . . triggers anything that I do with respect to further evaluations." H 3. The State responded, "Not necessarily. It's the State's position that the finding of dangerousness would be separate from the court ordering the medical records to be released to Dr. L[ampignano] because there's no prerequisite finding of dangerousness in order to release those records[1]." H 3.

In reliance on this statement, Doyle withdrew his appeal of the dangerousness finding. SBA 96; DBA 53. Doyle knew that the State would continue to press its request to obtain his psychiatric records, but, based on the State's representations, he believed that his appeal of the dangerousness finding, even if successful, would have no

[1] The court posited, "[T]he only basis for me to order the forensic examiner to transfer the records to a third party is to further the proceedings that follow a finding of dangerousness. At least that's the way I see it." H 3. The State responded, "I don't disagree with that." In context, it is clear that the State understood the court to be referring to its jurisdiction over a motion authorizing the transfer of Doyle's records, not to the general applicability of the privileges to those records. The State subsequently reiterated its assertion that the applicability of the privileges was not dependent on the dangerousness finding, explaining that "a finding of dangerousness in superior court is [not] a prerequisite to [civil-commitment] proceedings," and noting, "We could certainly go forward with[] a probate court commitment without a court's finding of dangerousness." H 3–4.

effect on that request. Because Doyle reasonably and detrimentally relied on the State's assertion that the dangerousness finding had no effect on its motion to authorize the disclosure of his records, the State is estopped from arguing that RSA 135:17-a, V authorized the disclosure of his records.

B. RSA 135:17-a, V did not authorize disclosure of Doyle's psychiatric records.

Statutory interpretation presents a question of law. In the Matter of Kauble, ___ N.H. ___ (2023). This Court "first look[s] to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning." Id. It "construe[s] all parts of the statute together to effectuate its overall purpose and to avoid an absurd or unjust result." Id. It "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id.

If a court finds a defendant incompetent, unrestored and dangerous, RSA 135:17-a, V authorizes the court to "order the person to submit to examinations by a physician, psychiatrist, or psychologist designated by the state for the purpose of evaluating appropriateness and completing the certificate for involuntary admission into the state mental health services system." But nothing in the statute purports

to abrogate the physician-patient or psychotherapist-patient privileges.

Under the plain language of the statute, "submit[ting] to [an] examination[]," includes reporting to the scheduled examination, answering the examiner's questions, and, if requested, performing standardized tests. It does not include disclosing to the examiner the patient's past psychiatric records. See In re Kathleen M., 126 N.H. 379, 383 (1985) (RSA Chapter 135-B, the former civil-commitment chapter, did not "contain an exemption from the physician-patient privilege," even though RSA 135-B:32 (1977) required the court to "order the person sought to be admitted to make himself available for an examination by a psychiatrist designated by the court."). The State's proposed statutory interpretation[2] simply "add[s] language that the legislature did not see fit to include." Kauble, ___ N.H. at ___.

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[2] In the course of arguing that RSA 135:17-a, V authorized the disclosure of Doyle's psychiatric records, the State makes a seemingly independent argument. It asserts that the physician-patient and psychotherapist-patient privileges "do not apply to medical and mental health records in the custody and control of a third-party, independent evaluator who is not the defendant's physician or psychotherapist." DB 30, The State is mistaken. The physician-patient and psychotherapist-patient privileges place the "[c]onfidential relations and communications" between providers and patients "on the same basis as those provided by law between attorney and client." RSA 329:26; RSA 330-A:32. The attorney-client privilege permits the client "to prevent any . . . person from disclosing confidential communications." N.H. R. Evid. 502(b) (emphasis added); see also State v. Kibby, 170 N.H. 255, 259 (2017) (explaining that the evidentiary rule "essentially codifies the common law attorney-client privilege"). Thus, the physician-patient and psychotherapist-patient privileges permit the patient to prevent any person, including "third-party, independent evaluator(s)," from disclosing confidential communications. Common practice bears this out. As

If this Court holds that RSA 135:17-a, V authorized the disclosure of Doyle's psychiatric records, it should permit Doyle to reinstate his appeal of the dangerousness finding and stay further proceedings pending the resolution of that appeal.

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noted below, courts routinely review privileged material in camera. Although courts are "third-party, independent evaluator[s]," otherwise privileged material does not lose its privileged nature merely because it comes into "the custody and control" of a court.

IV. THIS COURT SHOULD NOT AFFIRM ON THE GROUND THAT THE STATE HAS AN ESSENTIAL NEED FOR DOYLE'S PSYCHIATRIC RECORDS.

A. The State waived this argument by not presenting it below.

As noted above, if the appellee failed to raise an issue below and its failure deprived the appellant of "the opportunity to consider that legal issue or the development of facts that might or might not have supported that argument," Santana, 133 N.H. at 809, this Court will not consider the issue. Donovan, 175 N.H. at 362.

As noted in Doyle's opening brief, DB 35–36, the process for piercing a privilege involves three steps. First, "the party seeking to pierce the privilege must . . . establish a reasonable probability that the records contain information that is material and relevant to the party's defense or claim." Petition of State of N.H., 162 N.H. at 70. Second, if that showing is made, the court reviews the records in camera. Id. Third, following in camera review, the court determines whether there is an "essential need" to disclose the information contained in the records. Id. "To establish essential need, the party seeking the privileged records must prove both that the targeted information is unavailable from another source and that there is a compelling justification for its disclosure." Id.; see also Desclos, 153 N.H. at 617–19

(explaining both the unavailability and compelling-justification requirements).

Here, although the State argues that it demonstrated "essential need" to pierce the privileges, SB 34–41, it made none of these arguments below. It did not argue that there was a reasonable probability that Doyle's records contained information that was material and relevant to the State's claim. It did not request that the court review Doyle's records in camera. It did not argue that there was an "essential need" for the disclosure of Doyle's records. It did not argue that the targeted information was unavailable from another source. And it did not argue that there was a "compelling justification" for its disclosure.

Because Doyle had no opportunity to consider these issues and no reason to develop the record, consideration of the State's argument for the first time on appeal would give the State an unfair advantage and impose on Doyle an unfair detriment, and this Court should decline to address the issue.

B. The State's failure to request in camera review is fatal to its claim of essential need.

"Before establishing essential need for the information contained in the privileged records, . . . the party seeking to pierce the privilege must first establish a reasonable probability that the records contain information that is material and relevant to the party's defense or claim." Petition

of State of N.H., 162 N.H. at 70. "The 'reasonable probability' showing also establishes an initial, minimum standard that the [party] has to meet before the trial court undertakes an in camera review and a determination of whether the privilege should be abrogated." Id.

The State asks this Court to find that it has an essential need for Doyle's psychiatric records without first determining whether there is a reasonable probability that the records contain information that is material and relevant to the State's claim or conducting in camera review. This would be error.

In Petition of State of New Hampshire, the court disclosed a patient's medical and mental health records to the parties' counsel without conducting an in camera review. Id. at 65–66. The State filed a petition for certiorari in this Court, arguing that "the court was required to conduct an in camera review to determine whether there was an 'essential need' for disclosure of the records, and to release only those portions of the records that were relevant and responsive to the purpose for which the disclosure was ordered." Id. at 65, 67. This Court reversed. Id. at 70. "[T]he court," it held, "was required to conduct an in camera review to determine whether the privileges at issue should be abrogated," and "[i]ts failure to do so was error." Id.; see also In re Search Warrant (Med. Records of C.T.), 160 N.H. 214, 226 (2010) (police may not

obtain direct disclosure of privileged records by search warrant; records must first be reviewed in camera); In re Grand Jury Subpoena (Med. Records of Payne), 150 N.H. 436, 448 (2004) ("the trial court is required to conduct an in camera review" to "make certain that irrelevant and non-responsive information is not released.").

Just as it was error for the Superior Court, in Petition of State of New Hampshire, to order the disclosure of privileged records without first conducting in camera review, it would be error for this Court to do so here.

C. A finding of essential need was not required as a matter of law.

As noted above, if the trial court's decision on an alternative ground for affirmance would have been discretionary, then "[this Court] may sustain the trial court's ruling on [the alternative] ground . . . only if there is only one way the trial court could have ruled as a matter of law." Cavanaugh, 174 N.H. at 11. Here, had the trial court addressed the issue of "essential need," including the subsidiary requirements of unavailability from another source and compelling justification, its ruling would have been discretionary. Petition of State of N.H., 162 N.H. at 67. Because it would not have been "clearly untenable or unreasonable," Albrecht, ___ N.H. at ___, for the trial court to

find that the State had not demonstrated "essential need," this Court cannot affirm on this alternative ground.

The State argues that the "records" it seeks "are not available from a non-privileged source." SB 36; see also SB 39 ("[T]he State established essential need because no . . . non-privileged source . . . exists from which to obtain the medical records."). The question, however, is not whether the records themselves are unavailable from a non-privileged source; by definition, privileged records are never "available from a non-privileged source." The question, rather, is whether "the targeted information is unavailable from another source." Petition of State of N.H., 162 N.H. at 70; see also Payne, 150 N.H. at 443 ("Invasion of the privilege can never be justified just because a defendant's medical records might be the best evidence of" the targeted information). The record here demonstrates that any relevant information in Doyle's psychiatric records has already been provided to the State.

Before it sought an order authorizing the disclosure of Doyle's psychiatric records, the State, without objection, obtained authorization to disclose to its evaluator the OFE's reports regarding Doyle's competence, restoration and dangerousness. These reports are included in the appendix to the State's brief. SBA 15 (competency evaluation); SBA 136 (report addressing restoration and dangerousness). The

report addressing restoration and dangerousness, in particular, contains [redacted]

SBA 138–39.

The State's appendix also includes the report written by Dr. Guidry, who was retained by Doyle to assess his restorability. SBA 121. This report contains [redacted]

SBA 126–30.

The State does not even attempt to explain why, in light of this available information, Doyle's treatment records from August 2016 to August 2019, over four years ago, are necessary for its evaluator to determine whether Doyle is currently dangerous.

Rather than advancing a case-specific argument about why there is a compelling justification for disclosure in this case, the State instead advocates for a broad, per se rule. SB 39–41. It argues that, "when[ever] a defendant has been adjudicated to be incompetent," SB 39, "it is always essential . . . for the State's involuntary admission evaluator to receive the same medical records that the forensic examiner reviewed," SB 41.

When evaluating whether there is an "essential need" or "compelling justification" to abrogate a privilege, this Court has required the evaluation of "the circumstances in individual cases" and rejected calls[3] for per se rules. Kathleen M., 126 N.H. at 385–89 (pending civil-commitment hearing did not per se constitute "essential need" to pierce the privilege physician-patient and psychotherapist-patient privileges); see also C.T., 160 N.H. at 226 (probable cause that privileged records contain evidence of a crime does not per se constitute "essential need" to pierce the privilege physician-patient privilege); Payne, 150 N.H. at 442 (pending investigation or charge for aggravated driving while intoxicated, which requires proof of "serious bodily injury," does not per se constitute "essential need" to pierce the

[3] In advocating for its per se rule, the State relies heavily on State v. Kupchun, 117 N.H. 412 (1977). SB 37, 39. In Kathleen M., however, this Court limited Kupchun on two grounds. Kathleen M., 126 N.H. at 384–85. First, when a criminal defendant is found insane, as in Kupchun, "[t]he defendant's mental illness, by his own admission, ha[s] already resulted in criminal activity dangerous to others." Id. at 384. Second, when Kupchun was decided, confinements of the criminally insane were reviewed every two years, which "ma[de] it likely that privileged information w[ould] be the only evidence [of future dangerousness] available." Id. Here, Doyle has never admitted that his mental illness has resulted in criminal activity dangerous to others. Additionally, Doyle has been living in the community for years. This fact renders "[un]warrant[ed]" any "finding, without more, that [disclosure of his privileged records] [i]s essential" to evaluate future dangerousness. Id. at 385. In any event, this Court, in Kupchun, affirmed an order authorizing the disclosure of the defendant's medical records so that, at the pending recommittal hearing, "the . . . court be presented with the best information available." Kupchun, 117 N.H. at 415. Here, unlike in Kupchun, no commitment hearing is pending. As Doyle conceded in his opening brief, DB 33–34, if a hearing does take place, then, at that hearing, the physician-patient and psychotherapist-patient privileges will not apply.

physician-patient privilege). It should reject the State's request for a per se rule in this context as well.

CONCLUSION

WHEREFORE, John Doyle respectfully requests that this Court reverse. In the alternative, Doyle requests that this Court permit him to reinstate his appeal of the dangerousness finding and stay further proceedings pending the resolution of that appeal.

Undersigned counsel requests 15 minutes oral argument.

This brief complies with the applicable word limitation, as enlarged by this Court, and contains 4,970 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to Mike R. Grandy and Audriana Mekula, Assistant Attorneys General, through the electronic filing system's electronic service.

/s/ Thomas Barnard
Thomas Barnard

DATED: October 2, 2023