THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2014-0592

**THE STATE OF NEW HAMPSHIRE**

**v.**

**SETH MAZZAGLIA**

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APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE STRAFFORD COUNTY SUPERIOR COURT

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# *AMICUS* BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE IN SUPPORT OF THE INTERVENOR'S REQUEST TO VACATE THE COURT'S JUNE 10, 2016 ORDER

Respectfully Submitted,

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

By Its Attorney,

Gilles R. Bissonnette, Esq. (N.H. Bar No. 265393)
American Civil Liberties Union of New Hampshire
18 Low Avenue
Concord, NH 03301
(603) 224-5591
gilles@aclu-nh.org

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### NEW HAMPSHIRE CASES

**UNITED STATES SUPREME COURT CASES**

**OTHER FEDERAL CASES**



**OTHER STATE CASES**



**CONSTITUTIONAL PROVISIONS AND STATUTES**

**RULES**



**OTHER AUTHORITIES**

## QUESTIONS PRESENTED AND STATEMENT OF THE CASE

On June 10, 2016, the New Hampshire Supreme Court unsealed portions of the trial court record containing information about the victim's prior consensual sexual activity. The trial court did not admit this information into evidence, and the admissibility of this information is the subject of the defendant's appeal before the Supreme Court. The Supreme Court's June 10, 2016 order unsealing this information, which was later stayed, was issued before the Court determined whether the trial court erred in concluding that this information was inadmissible.

Per this Court's June 15, 2016 order, *amicus curiae* American Civil Liberties Union of New Hampshire ("ACLU-NH") addresses the following questions in its brief:

I. Does N.H. R. Evid. 412 and RSA 632-A:6, II apply to New Hampshire appellate proceedings before the New Hampshire Supreme Court? *See infra* Part I.

II. How must the New Hampshire Supreme Court balance the constitutional rights of the victim, the defendant, and the public as they pertain to the sealed portion of the trial court record and the parties' unredacted briefs and appearances? *See infra* Part III.

III. What court procedures, both at the trial court level and on appeal, are required by the Victims' Rights Law, RSA 21-M:8-k? *See infra* Parts III and IV.

## TEXT OF RELEVANT AUTHORITY

**RSA 632-A:6; Testimony and Evidence**:

…. II. Prior consensual sexual activity between the victim and any person other than the actor shall not be admitted into evidence in any prosecution under this chapter.

**N.H. R. Evid. 412. Evidence of Prior Sexual Activity**:

(a) Except as constitutionally required, and then only in the manner provided in (b), below, evidence of prior consensual sexual activity between the victim and any person other than the defendant shall not be admitted into evidence in any prosecution or in any pretrial discovery proceeding undertaken in anticipation of a prosecution under the laws of this state.

(b) Upon motion by the defense filed in accordance with the then applicable Rules of Court, the defense shall be given an opportunity to demonstrate, ***during a hearing in chambers***, in the manner provided for in Rule 104:

(1) *Evidence Sought During Pretrial Discovery Stage:* that there is a reasonable possibility that the information sought in a pretrial discovery proceeding which would otherwise be excluded under subsection (a), above, will produce the type of evidence that due process will require to be admitted at trial;

(2) *Use of Evidence At Trial:* that due process requires the admission of the evidence proffered by the defense which would be otherwise excluded under subsection (a), above, and the probative value in the context of the case in issue outweighs its prejudicial effect on the victim.

**N.H. Const. pt. I, art. 8**:

[Accountability of Magistrates and Officers; Public's Right to Know.] All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.

**N.H. Const. pt. I, art. 15**:

[Right of Accused.] No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself. Every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and counsel. No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land; provided that, in any proceeding to commit a person acquitted of a criminal charge by reason of insanity, due process shall require that clear and convincing evidence that the person is potentially dangerous to himself or to others and that the person suffers from a mental disorder must be established. Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court.

**U.S. Const. amend VI**:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

**RSA 21-M:8-k; Rights of Crime Victims**:

II. To the extent that they can be reasonably guaranteed by the courts and by law enforcement and correctional authorities, and are not inconsistent with the constitutional or statutory rights of the accused, crime victims are entitled to the following rights: (a) The right to be treated with

fairness and respect for their dignity and privacy throughout the criminal justice process …. (m) The right of confidentiality of the victim's address, place of employment, and other personal information.

**N.H. Sup. Ct. R. 12. Requests for Confidentiality of Case Records; Access to Case Records:**

**(2) Procedure for Requesting Confidentiality of a Case Record or a Portion of a Case Record in a Supreme Court Case.**

(a) Case Record or Portion of Case Record That Has Already Been Determined to be Confidential. The appealing party shall indicate on the notice of appeal form or in the appeal document, e.g., appeal from administrative agency, that the case record or a portion of the case record was determined to be confidential by the trial court, administrative agency, or other tribunal, and shall cite the authority for confidentiality, e.g., the statute, administrative or court rule, or court order providing for confidentiality. Upon filing, the portion of the case record determined to be confidential by the trial court, administrative agency, or other tribunal shall remain confidential, unless and until the court determines on its own motion or the motion of a party that there is no statute, administrative or court rule, or other compelling interest that requires that the case record or portion of the case record be kept confidential. Whenever a party files a pleading or other document that is confidential in part or in its entirety, the party shall identify, by cover letter or otherwise, in a conspicuous manner, the portion of the materials filed that is confidential.

## INTEREST OF THE *AMICUS CURIAE*

The American Civil Liberties Union of New Hampshire ("ACLU-NH") is the New Hampshire affiliate of the American Civil Liberties Union—a nationwide, nonpartisan, public-interest organization with approximately 500,000 members (including over 3,500 New Hampshire members). The ACLU-NH engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of rights guaranteed under the United States and New Hampshire Constitutions.

This case presents the important question of how New Hampshire courts should balance three competing constitutional rights—the victim's constitutional right to privacy, the public's right to access government records under Part I, Article 8 to the New Hampshire Constitution, and a defendant's right to a public trial under the Sixth Amendment and Part I, Article 15 of the New

Hampshire Constitution—in determining whether rape-shield proceedings and related documents concerning a victim's prior consensual sexual activity should be made public.

The ACLU-NH is uniquely positioned to balance these competing rights, as this organization has routinely engaged in advocacy and litigation in support of each of these rights. In particular, the ACLU-NH (formerly the New Hampshire Civil Liberties Union) advocated for the enactment of RSA 632-A:6, New Hampshire's rape-shield statute, when it was being considered by the legislature in 1975. *See* H.B. 793 House Leg. History, Reg. Sess., Witnesses Appearing in Favor of Bill (N.H. 1975) (Intervenor's Appendix, at IBA000027). Then, and now, the ACLU-NH is greatly concerned that sexual assault remains a crime that is vastly underreported. The ACLU-NH has also defended the public's right to know under Part I, Article 8 of the New Hampshire Constitution. *See, e.g.*, *New Hampshire Civil Liberties Union v. City of Manchester*, 149 N.H. 437 (2003) (successful ACLU-NH action seeking access under Chapter 91-A to consensual photographs that the Manchester Police Department had taken of people who were stopped by officers, but not arrested); *Estate of Hagen Esty-Lennon v. State of New Hampshire*, No. 217-2015-cv-376 (Merrimack Cty. Super. Ct. Sept. 4, 2015) (ACLU-NH arguing as *amicus curiae* for press and public access to body camera footage of fatal police shooting). And the ACLU has repeatedly argued in support of defendants' right to a public trial under the Sixth Amendment. *See, e.g.*, *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (ACLU arguing as *amicus curiae* for reversal of state supreme court order excluding the press and the public from a murder trial); *Press-Enter. Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enter. II*") (ACLU arguing as *amicus curiae* for reversal of magistrate's decision closing the courtroom during a preliminary hearing on the grounds that the case had attracted national publicity and that the media might report only one side of the case).

Because this case presents important questions about victim privacy, public access, and defendants' rights, proper resolution of this matter is of significant concern to the ACLU-NH and its members. The ACLU-NH believes that its experience in the legal issues surrounding these competing rights will make this brief of service to the Court.

## SUMMARY OF ARGUMENT

This case presents the important question of how New Hampshire courts should balance three competing constitutional rights—the victim's constitutional right to privacy, the public's right to access government records under Part I, Article 8 to the New Hampshire Constitution, and a defendant's right to a public trial under the Sixth Amendment and Part I, Article 15 of the New Hampshire Constitution—in determining whether rape-shield proceedings and related documents concerning a victim's prior consensual sexual activity should be made public. *See infra* Part II (summarizing the competing rights). The ACLU-NH makes four arguments in this brief.

First, Rule 412 and RSA 632-A:6, II apply to appellate proceedings before this Court. Thus, Rule 412's important presumption that proceedings addressing the admissibility of a victim's prior consensual sexual activity be heard confidentially "*during a hearing in chambers*" applies equally before this Court, just as it applies before New Hampshire trial courts. It would make little sense for Rule 412's privacy protections to be nullified simply because a defendant files a notice of appeal challenging the trial court's finding that the victim's prior sexual history is inadmissible. *See infra* Part I.

Second, while Rule 412's "hearing in chambers" language cannot be viewed as a *per se* rule requiring that *all* rape-shield hearings be held in a closed courtroom, *see State v. Howard*, 121 N.H. 53, 59 (1981), nonetheless a rape-shield hearing, both at the trial court level and on appeal, should generally be conducted in a closed courtroom absent compelling reasons for public access. It should be the rare case in which a rape-shield hearing is opened to the public. This is because,

generally, the victim's constitutional right of privacy at a rape-shield hearing is compelling and outweighs the public's and defendant's more modest interests in public access. Public access to a Rule 412 hearing is unlikely to prejudice the defendant's rights. Regardless of whether the hearing is public, the defendant will, as a matter of due process, still be permitted to argue for the admissibility of the information in question. And if the information is ultimately deemed admissible, then the defendant can use the information at a public trial. Meanwhile, if a rape-shield hearing before the trial court or on appeal is opened to the public, it will cause the very damage that Rule 412 and the rape-shield statute seek to prevent—namely, public embarrassment, shame, and humiliation caused by the public disclosure of the victim's intimate relations that presumptively have no bearing on the criminal case. *See infra* Part III.A.

Third, and relatedly, since a Rule 412 motion is generally to be heard "during a hearing in chambers," New Hampshire trial courts and this Court should provisionally seal the record of the rape-shield hearing proceedings—including the written briefs, affidavits, transcripts, appendices and any other information disclosing the victim's prior sexual history—absent compelling reasons for public access. However, this sealing should be limited only to information that discloses the victim's prior sexual history to ensure that public access is not needlessly restricted in an overbroad, blanket fashion. This provisional sealing should remain in effect until a final determination has been made as to whether the information is admissible at trial, as the question of admissibility will be, in the overwhelming number of cases, dispositive as to whether the victim's prior consensual sexual activity presented in the rape-shield hearing should be publicly available. Only after the court makes an admissibility determination can the court fully balance the interests of the victim, the public, and the defendant in deciding how this information should be treated.

If documents concerning the victim's prior sexual history are inadmissible, then these documents, as well as the briefs and appendices, should generally remain sealed. The information

will have no bearing on the defendant's guilt or innocence, thus rendering minimal the public's interest in disclosure and the defendant's interest in public access. Conversely, the release of this inadmissible information could have a devastating impact on the victim's privacy rights. Perhaps even worse, disclosure would create an environment where victims of sexual assault will not report these crimes out of fear that their irrelevant prior sexual history will become public knowledge. Where the victim's prior sexual history is inadmissible, it should be the rare case in which this information is unsealed and released to the world.

If the defendant is able to overcome the rape-shield statute's presumption that a victim's prior sexual history is irrelevant, then the calculus changes considerably. After the court deems this information admissible, these documents, as well as the briefs and the appendices, should generally be unsealed but only (i) if the defendant or a third party requests that the Court unseal this information, and (ii) after giving the State and the victim notice and an opportunity to be heard as to why the documents should remain sealed—a requirement that is mandated as a matter of procedural due process. Here, a court's finding that the defendant has overcome the rape-shield statute's presumption of irrelevance (and is therefore entitled to present this information to a jury that will adjudicate guilt or innocence) significantly enhances the public's and defendant's respective interests in disclosure. Undoubtedly, the victim's privacy interest in this information is still strong. But when such information is deemed admissible despite the protections of the rape-shield statute, such privacy interests must generally give way to the defendant's rights under Article 15 and the compelling principle embedded in Article 8 that "the public's right of access to governmental proceedings and records shall not be unreasonably restricted." *See infra* Part III.B.

Finally, if a trial court or this Court pursuant to Supreme Court Rule 12 contemplates opening to the public a rape-shield hearing or unsealing documents concerning a victim's prior sexual history, the victim is entitled to process—particularly, notification and an opportunity to be

heard—before a final decision is made on disclosure. This is because a court's decision to disclose this information not only implicates the victim's constitutional right to privacy recognized in *Howard*, but also the victim's right to be free from reputational harm and social stigma. *See infra* Part IV.

## ARGUMENT

### I. N.H. R. Evid. 412 and RSA 632-A:6, II Apply to New Hampshire Appellate Proceedings

N.H. R. Evid. 412 states, in part, that "[e]xcept as constitutionally required, and then only in the manner provided in (b), below, evidence of prior consensual sexual activity between the victim and any person other than the defendant shall not be admitted into evidence in *any prosecution* or in any pretrial discovery proceeding undertaken in anticipation of a prosecution under the laws of this state." N.H. R. Evid. 412 (emphasis added). Similarly, RSA 632-A:6, II states that "[p]rior consensual sexual activity between the victim and any person other than the actor shall not be admitted into evidence in *any prosecution* under this chapter." RSA 632-A:6, II (emphasis added). Rule 412 and RSA 632-A:6, II predominantly address the *admissibility* of the victim's prior consensual sexual activity, not the *accessibility* of this information to the public. That said, Rule 412 does explicitly state that rape-shield evidentiary hearings should be done "*during a hearing in chambers*" outside from public view. This language is critical to protecting victims' privacy rights and creating an environment where victims will feel more comfortable reporting to law enforcement incidents of sexual assault.

As explained in more detail in *infra* Part III, the question of whether a victim's information is admissible under Rule 412 and RSA 632-A:6, II and the question of whether this information should be publicly accessible, though separate as a technical matter, are intertwined. While the ACLU-NH takes no position on the admissibility of the specific information at issue in this case,

to the extent this information is inadmissible under Rule 412 and RSA 632-A:6, II, the public's interest in accessibility and the defendant's interest in public disclosure are greatly reduced while both the public's interest in protecting victims and the victim's individual privacy interests are greatly enhanced. If the information is inadmissible under the rape-shield statute, public disclosure of the victim's sexual history should be a rare event occurring only in exceptional circumstances. Otherwise, public access carries the potential to circumvent the victim's "constitutional right to privacy" that goes to the heart of the rape-shield statute and that ultimately rendered the information inadmissible in the first place. *State v. Miskell*, 122 N.H. 842, 845 (1982). Indeed, this Court has held that RSA 632-A:6, II is a rule that goes beyond admissibility and, instead, creates a testimonial privilege designed to "protect the victim of a rape 'from being subjected to unnecessary embarrassment, prejudice and courtroom procedures that only serve to exacerbate the trauma of the rape itself.'" *Id.* (quoting *State v. Howard*, 121 N.H. 53, 57 (1981)).

The ACLU-NH agrees with the State and the Intervenor that these rules apply to appellate court proceedings before this Court. Thus, Rule 412's important presumption that issues concerning the admissibility of a victim's prior consensual sexual activity be heard confidentially "*during a hearing in chambers*" applies equally before this Court, just as it applies before New Hampshire trial courts. It is true that Rule 412 says nothing explicit about its applicability on appeal. However, it does apply to "*any prosecution* or in any pretrial discovery proceeding." N.H. R. Evid. 412. The term "prosecution" is broad and is not limited to evidentiary hearings, pre-trial matters, or issues that are within the exclusive province of the trial courts. Of course, issues related to a prosecution are addressed on appeal, just as they are addressed before a trial court. And a victim's right to privacy should not vitiated simply because the defendant opts to file a notice of appeal challenging the trial court's inadmissibility decision. This Court has taken an expansive view of the term "prosecution," explaining that it captures judicial actions prior to a

case's final determination. *See Appeal of Naswa Motor Inn*, 144 N.H. 89, 91 (1999) ("'prosecution'…means to follow up or carry forward a judicial action, be it civil or criminal, *from its beginning to its final determination*." (emphasis added; internal quotation omitted)); *see also Prosecution*, Black's Law Dictionary (10th ed. 2014) (defining "prosecution" as "the commencement *and carrying out* of any action or scheme") (emphasis added). RSA 632-A:6, II—upon which Rule 412 was based—applies on appeal for the same reason. It applies to "any prosecution" for sexual assault, which covers any judicial action up to and until final adjudication. And if there is any further doubt that these principles apply on appeal, it is eliminated by N.H. R. Evid. 1101, which states that the New Hampshire Rules of Evidence—including Rule 412—apply to the New Hampshire Supreme Court. N.H. R. Evid. 1101(a) ("These rules apply to the proceedings in the district and probate divisions of the circuit court, the superior court, *and the supreme court*.") (emphasis added). This is a departure from the Federal version of Rule 1101, which does not specifically mention the United States Supreme Court. *See* Fed. R. Evid. 1101(a).

But even if this Court concludes that Rule 412 and RSA 632-A:6, II do not apply to appellate court proceedings—which they do—this does not end this Court's inquiry. Independent of Rule 412 and RSA 632-A:6, II, all New Hampshire courts retain the sound discretion to seal otherwise inadmissible information concerning a victim's prior sexual history when the victim's compelling privacy rights, as well as the significant public interest in creating an environment where victims of sexual assault feel comfortable reporting such abuse, outweigh the public interest in disclosure. *See Bowman Search Warrants*, 146 N.H. 621, 626 (2001) ("The decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.") (*quoting Nixon v. Warner Commc'ns*, 435 U.S. 589, 599 (1978)). This is especially true here where the rape-shield statute's protections are grounded in the victim's constitutional right to privacy. *See Howard*, 121 N.H. at

59 (recognizing victim's constitutional right to privacy); *Miskell*, 122 N.H. at 845 (same). As this Court has explained, court documents can be sealed when "there is some overriding consideration or special circumstance, that is, a sufficiently compelling interest, which outweighs the public's right of access to those records." *See Petition of Keene Sentinel*, 136 N.H. 121, 128 (1992). This principle is also memorialized in New Hampshire Supreme Court Rule 12(2), which states that, for information to be sealed, the court must determine that there is a "statute, administrative or court rule, *or other compelling interest* that requires that the case record or portion of the case record be kept confidential." *See* N.H. Sup. Ct. R. 12(2) (emphasis added).

Even in the absence of a specific statute or rule requiring confidentiality, New Hampshire courts, as well as other courts throughout the United States, have applied these principles in concluding, in certain circumstances, that the names of litigants and/or their personal information should not be of public record given the compelling privacy interests at stake. *See, e.g., Doe v. State Farm Fire & Cas. Co.*, No. 2015-0136, 2015 N.H. LEXIS 181 (N.H. Sep. 21, 2015) (petitioner proceeding as "Jane Doe" in insurance declaratory judgment action); *Doe v. State*, 167 N.H. 382 (2015) (trial court order allowing petitioner to proceed anonymously undisturbed where petitioner argued before the trial court that the harm of public disclosure of his name would cause the same injury the petitioner sought to remedy through the litigation itself); *Doe v. N.H. Dep't of Safety*, 160 N.H. 474 (2010) (Doe appealing a Department of Safety ruling that required him to register for life as a sex offender under Chapter 651-B); *Doe v. Doe*, 119 N.H. 773 (1979) (anonymity of litigants in child custody case); *Roe v. Wade*, 410 U.S. 113 (1973) (anonymity of litigant permitted in case addressing the substantive due process right to privacy and whether it includes the private decision to have an abortion); *Doe v. Harris*, 640 F.3d 972, 973 n.1 (9th Cir. 2011) ("We have allowed Doe to continue to proceed under a pseudonym because drawing public attention to his status as a sex offender is precisely the consequence that he seeks to avoid by

bringing this suit."); *United States v. Doe*, 655 F.2d 920, 922 n.1 (9th Cir. 1980) (anonymity appropriate "to protect a person from harassment, injury, ridicule or personal embarrassment"); *Dept. of Fair Employment and Housing v. Law School Admission Council, Inc.*, No. C-12-1830 EMC, 2012 U.S. Dist. LEXIS 117363, at *9 (N.D. Cal. Aug. 20, 2012) (approving anonymity request designed to "preserve … privacy in a matter of a sensitive and highly personal nature"); *John Doe 140 v. Archdiocese of Portland in Oregon*, 249 F.R.D. 358, 361 (D. Or. 2008) ("Here, the court finds that, if required to make his name known publicly, John would face a very real risk of harassment, ridicule, and personal embarrassment."); *Doe v. Town of Madison*, No. 3:09-CV-2005 (JCH), 2010 U.S. Dist. LEXIS 31487, at *5-6 (D. Conn. Mar. 30, 2010) (allowing anonymity where because "[t]he crux of plaintiff's claim is that his identity was unlawfully released to the public in violation of the Youthful Offender Statute's requirements").

These cases collectively embody a concern among courts that, in certain circumstances, sensitive information relevant to a lawsuit should be kept confidential because, if it were publicly disclosed, litigants would be deterred from bringing legitimate legal claims addressing important statutory and constitutional rights—a result that would harm the public interest by allowing violations of legal rights to go unanswered. This concern is similar here. The public disclosure of inadmissible information concerning a victim's past sexual history carries the real risk of deterring victims from reporting sexual assault—a result that harms the public interest by allowing the crimes of sexual assault perpetrators to go unaddressed, thereby potentially exposing victims to future abuse. Put another way, public disclosure of a victim's sexual history perpetrates the very harm that Rule 412 and the rape-shield statute aim to prevent. As a result, regardless of whether RSA 632-A:6, II and N.H. R. Evid. 412 apply to New Hampshire appellate proceedings, this Court must engage in the important inquiry of balancing the victim's privacy rights against the public's right to access government records under Part I, Article 8 to the New Hampshire Constitution and

a defendant's right to a public trial under the Sixth Amendment and Part I, Article 15 of the New Hampshire Constitution.

## II. The Constitutional Rights of the Victim, the Public, and the Defendant as they Pertain to a Victim's Prior Consensual Sexual Activity

Below is a brief description of these competing rights.

### A. The Rape-Shield Statute and the Victim's Constitutional Right to Privacy

The provision of the rape-shield statute at issue here states that "[p]rior consensual sexual activity between the victim and any person other than the actor shall not be admitted into evidence in any prosecution under this chapter." RSA 632-A:6, II. This statute—which was enacted in 1975 and supported by the ACLU-NH (formerly the New Hampshire Civil Liberties Union)[1]—is designed to "protect the victims of rape from being subjected to unnecessary embarrassment, prejudice and courtroom procedure that only serve to exacerbate the trauma itself." *State v. Walsh*, 126 N.H. 610, 611 (1985) (quoting *Howard*, 121 N.H. at 57). These provisions have been memorialized in N.H. R. Evid. 412.

"The underpinnings of the [rape-shield] privilege are grounded in the constitutional right to privacy" held by the victim. *Miskell*, 122 N.H. at 845; *see also Howard*, 121 N.H. at 59 ("It has also been recognized that a person's consensual sexual activity is a right of personal privacy which is afforded a measure of protection under the United States Constitution…*[w]e recognize such a right in this State*, at least to the extent that hearings held on the admissibility of the victim's prior sexual activity may, upon request of the victim and in the exercise of sound discretion by the trial justice, be closed to those not party to the proceeding.") (emphasis added). Put another way, the victim's constitutional right to privacy is a right independent from statute. Thus, this Court has held that, under the law's rape-shield statute, the victim "is the real party in interest, and her

[1] *See* H.B. 793 House Leg. History, Reg. Sess., Witnesses Appearing in Favor of Bill (N.H. 1975) (Intervenor's Appendix, at IBA000027).

interests may differ from those of the State." *Miskell*, 122 N.H. at 845. And in RSA 21-M:8-k, II(a), the legislature has recognized that victims, including victims of sexual assault, have "the *right* to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process." (emphasis added).

Protecting victims from unnecessary embarrassment and prejudice—including through the needless public dissemination of victims' inadmissible sexual history—is a critical component of New Hampshire's rape-shield statute. The rape-shield statute was enacted, in part, due to the reality that disclosure causes unnecessary embarrassment and prejudice that deters victims from reporting sexual assault to law enforcement. As the 1975 legislative history of the statute explains, the statute was designed to "make[] it less onerous for [a] victim to report the crime" so that the reporting of such horrific acts are brought to the attention of law enforcement, thereby preventing future abuse from happening. *See* H.B. 793 House Leg. History, Reg. Sess., Witnesses Appearing in Favor of Bill (N.H. 1975) (Intervenor's Appendix, at IBA000027); *see also* Marah deMeule, *Privacy Protections for the Rape Complainant: Half a Fig Leaf*, 80 N.D. L. Rev. 145, 149 (2004) ("Research conducted during the 1970s estimated the ratio of unreported rapes ranged … as high as twenty-to-one."); *see also* Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn. L. Rev. 763, 767 (1986). During her testimony before the House Committee on the Judiciary, Representative Jean Wallin noted that the difficulty inherent in reporting rape causes a low rate of reporting, and that the rape-shield law was designed to encourage victims to come forward. She explained: "What prevents women from reporting rape is that [the] defense attorney lays out [her] entire sex history [] in court." *See* H.B. 793 House Leg. History, Reg. Sess., Witnesses Appearing in Favor of Bill (N.H. 1975) (Intervenor's Appendix, at IBA000026).

These concerns are no less salient today. The Centers for Disease Control and Prevention ("CDC") estimate that "nearly 1 in 5 women has been raped in her lifetime … [which] translates almost 22 million women in the United States."[2] In 2010, the CDC estimated that 1.27 million adult women were raped in this country. *Id.* at 18. In 2011, that figure rose to approximately 1.9 million.[3] These figures, however, actually understate the total incidence, because they exclude rapes of minors under 18, who account for about 44% of rape victims.[4] Nationally, nearly 50% of rapes go unreported.[5] Recent studies suggest that underreporting is actually much higher.[6] Non-reporting often occurs because women regard rape as a personal matter or fear retaliation.[7] Not only do victims often not report rape to legal authorities, but they also often do not disclose the rape even to their own families.[8] Many rape victims remain silent because they are ashamed, because they are concerned that their credibility will be questioned, or because they fear that they

[2] M. Black, et al., Centers for Disease Control, The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report 1 (2011), http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf ("CDC 2010 National Sexual Violence Report").

[3] Centers for Disease Control and Prevention, National Data on Intimate Partner Violence, Sexual Violence, and Stalking 1 (2014), http://www.cdc.gov/violenceprevention/pdf/nisvs-fact-sheet-2014.pdf; M. Breiding et al., Centers for Disease Control and Prevention, Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization - National Intimate Partner and Sexual Violence Survey, United States, 2011 (2014), http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6308a1.htm.

[4] L. Greenfeld, U.S. Dep't of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault, 3 (1997), http://www.mincava.umn.edu/documents/sexoff/sexoff.pdf.

[5] R. Bachman, U.S. Dep't of Justice, Bureau of Justice Statistics, Violence Against Women: A National Crime Victimization Survey Report 9 (1994), https://www.ncjrs.gov/pdffiles1/digitization/145325ncjrs.pdf, ("BJS Crime Victimization Report").

[6] P. Tjaden et al., U.S. Dep't of Justice, Bureau of Justice Statistics, Extent, Nature, and Consequences of Rape Victimization: Findings from the National Violence Against Women Survey 33 (2006), https://www.ncjrs.gov/pdffiles1/nij/210346.pdf (only 19.1 percent of the adult women said their rape was reported to the police); *see also* J. Truman et al., U.S. Dep't of Justice, Bureau of Justice Statistics, Criminal Victimization, 2011 8 (2012), http://www.bjs.gov/content/pub/pdf/cv11.pdf (percent of victimizations reported to the police for rape/sexual assault in 2002, 2010, and 2011 were 55%, 49%, and 27%, respectively); M. Planty et al., U.S. Dep't of Justice, Bureau of Justice Statistics, Female Victims of Sexual Violence, 1994-2010, 7 (2013), http://www.bjs.gov/content/pub/pdf/fvsv9410.pdf ("Female Victims of Sexual Violence, 1994-2010") ("36% of rape or sexual assault victimizations reported to police in 2005-10"); J. Truman et al., U.S. Dep't of Justice, Bureau of Justice Statistics, Criminal Victimization, 2014 7 (2015), http://www.bjs.gov/content/pub/pdf/cv14.pdf (percent of victimizations reported to the police for rape in 2005, 2013, and 2014 were 35.1%, 34.8%, and 33.6%, respectively).

[7] BJS Crime Victimization Report, *supra* note 5, at 9.

[8] National Victim Ctr. & Med. U. of S.C., Rape in America: A Report to the Nation 9 (1992), http://tinyurl.com/hh53lkz (rape victims reported concerns about their family knowing that they have been sexually assaulted).

will be blamed for what happened to them.[9] As the *amicus* brief of the New Hampshire Coalition Against Domestic and Sexual Violence et al. demonstrates, New Hampshire is not immune from these troubling trends. *See* Coalition Amicus Br. at 9.

That said, the protections in the rape-shield statute are not without some limitations necessary to provide due process to defendants. This Court has explained that, to comport with due process, evidence of a victim's "prior sexual activity could be relevant and admissible in certain limited circumstances." *State v. Shute*, 122 N.H. 498, 503 (1982); *see State v. La Clair*, 121 N.H. 743, 745 (1981); *Howard*, 121 N.H. at 58-59; *State v. Goulet*, 129 N.H. 348, 351 (1987). In *LaClair* and *Howard*, this Court held that, in the specific circumstances of those cases, due process required that the evidence be admitted because its probative value outweighed its possible prejudicial effect. *LaClair*, 121 N.H. at 745; *Howard*, 121 N.H. at 58-59. As Rule 412's reporter's notes explain: "[RSA 632-A:6] has been 'interpreted' by case law to … provide for a hearing in camera, wherein the defendant can attempt to show the relevancy of his otherwise excludable evidence …." N.H. R. Evid. 412 (reporter's notes); *see also* C. Douglas, New Hampshire Evidence Manual, § 412.02, at IV-129 (2015 ed.) ("Rule 412 is basically a rephrasing of the requirements set forth in *State v. Howard*, 121 N.H. 53, 426 A.2d 457 (1981), which modified RSA 632-A:6, the rape shield law."). This is because "[t]he blanket exclusion of reputation and opinion evidence [in RSA 632-A:6, II] would probably not withstand constitutional attack." N.H. R. Evid. 412 (reporter's notes).

[9] CDC 2010 National Sexual Violence Report, *supra* note 2, at 4; *see also* M. Koss et al., Depression and PTSD in Survivors of Male Violence: Research and Training Initiatives to Facilitate Recovery, 27 Psychol. of Women Q. 130, 137 (2003) ("Depression in Survivors") ("[S]urvivors of male violence fear their credibility will be questioned or they will be partly blamed for what happened to them. For example, most rape survivors who had contacted legal or medical services had two or more experiences that left them feeling revictimized.").

### B. The Public's Right to Know under Part I, Article 8 of the New Hampshire Constitution

Under Part 1, Article 8 of the New Hampshire Constitution, the government "should be open, accessible, accountable and responsive." N.H. Const. pt. I, art. 8. As a result, "the public's right of access to governmental proceedings and records shall not be unreasonably infringed." *Id.* New Hampshire is one of the few states that explicitly enshrines the right of public access in its Constitution. *Associated Press v. State*, 153 N.H. 120, 128 (2005). Article 8's language was included upon the recommendation of the bill of rights committee to the 1974 constitutional convention and adopted in 1976. While New Hampshire then (and now) already had a statute addressing the public's right to access information—Chapter 91-A—the committee argued that the right was "extremely important and ought to be guaranteed by a constitutional provision." Lawrence Friedman, *The New Hampshire State Constitution* 53 (2d Cir. 2015).

Article 8 must be read in conjunction with the preceding Article 7, which states, in part, that "'The people of this state have the sole and exclusive right of governing themselves as a free, sovereign, and independent state.' These sections express the American theory of government that 'the state being sovereign, the people being the state, and all magistrates and public officers being their substitutes and agents' they are accountable to the people." *Opinion of the Justices*, 111 N.H. 175, 177 (1971) (quoting *Attorney General v. Taggart*, 66 N.H. 362, 369 (1890)). Thus the right to access official proceedings grows out of the need for government accountability. *Associated Press*, 153 N.H. at 124-25; *State v. DeCato*, 156 N.H. 570, 574-75 (2007). It is therefore unsurprising that the right of public access predates both the New Hampshire and United States Constitutions. *See Associated Press*, 153 N.H. at 125. Under Article 8, the public should have the greatest possible access to the actions of all public bodies. Put another way, there is a presumption in favor of disclosure to the public. But this presumption can give way to privacy

interests, including the interests of litigants and/or victims. As referenced in *supra* Part I, the courts have set out standards to be used in determining whether information should be sealed and kept from public view. *See Keene Sentinel*, 136 N.H. at 128.

### C. The Defendant's Right to a Public Trial under Part I, Article 15 of the New Hampshire Constitution and the Sixth Amendment

Although there is no specific reference to a defendant's right to a public trial in the New Hampshire Constitution, this Court has held that this "right is protected by the requirement of due process" embedded within Part I, Article 15. *See Martineau v. Helgemoe*, 117 N.H. 841, 842 (1977). The Sixth Amendment right to a public trial is also applicable to the states. *State v. Blake*, 113 N.H. 115, 118 (1973) (citing *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968)). While the right to a "public trial" is explicitly guaranteed by the Sixth Amendment only for "criminal prosecutions," this provision "is a reflection of the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.'" *Levine v. United States*, 362 U.S. 610, 616 (1960) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). As the United States Supreme Court has explained: "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979)). Put another way, the Sixth Amendment right to a public trial "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 270 (1948).

This right to a public trial under Article 15 and the Sixth Amendment, however, is not without limitations. This right is not violated so long as (1) the party seeking to close the court hearing advances an overriding interest that is likely to be prejudiced; (2) the closure is not broader than necessary to protect that interest; (3) the trial court considers reasonable alternatives to closing the proceeding; and (4) the court makes findings adequate to support the closure. *State v. Guajardo*, 135 N.H. 401, 404 (1992) (citing *Waller*, 467 U.S. at 48).

## III. A Procedure for Balancing These Competing Principles

### A. Whether Rape-Shield Hearings Should Be Public Before the Trial Court and Before this Court on Appeal

In determining whether rape-shield hearings should be publicly accessible, this Court should first start with the language of N.H. R. Evid. 412. Rule 412(b) states that, "[u]pon motion by the defense filed in accordance with the then applicable Rules of Court, the defense shall be given an opportunity to demonstrate, *during a hearing in chambers*, in the manner provided for in Rule 104" that the evidence should be admitted. N.H. R. Evid. 412. Thus, all hearings addressing the admissibility of a victim's prior consensual sexual activity should be done in a closed courtroom, out of public view, absent compelling reasons for public access. And, as explained above in *supra* Part I, these protections must apply on appeal, which means that the New Hampshire Supreme Court should hold oral argument on the admissibility of the evidence in question in a closed courtroom to protect the victim's privacy.

It should be noted that Rule 412's "hearing in chambers" language is not a *per se* rule requiring that all rape-shield hearings be done in a closed courtroom at the trial court level and on appeal. Rule 412 was drafted to memorialize, in part, the *Howard* decision. *See* C. Douglas, New Hampshire Evidence Manual, § 412.02, at IV-129 (2015 ed.). As this Court explained in *Howard*, "hearings held on the admissibility of the victim's prior sexual activity *may*, upon request of the

victim and in the exercise of sound discretion by the trial justice, *be closed to those not party to the proceeding*." *Howard*, 121 N.H. at 59 (emphasis added). Such pretrial procedures "enable the court to balance and safeguard the rights of all the parties as applied to the facts of a particular case and avoid unnecessary prejudice to either the victim or the accused." *Id.* Though there has been a recent debate among several state courts as to whether a rape-shield hearing is tantamount to a "public trial" under the Sixth Amendment that would preclude a *per se* rule barring public access, this Court need not resolve this question. *Compare Oregon v. Macbale*, 305 P.3d 107, 353 Ore. 789, 810-12 (Or. 2013) (en banc) (*per se* rule making rape-shield hearings private does not violate the defendant's constitutional right to a public trial) and *North Carolina v. McNeil*, 393 S.E.2d 123, 99 N.C. App. 235, 242 (N.C. App. Ct. 1990) ("We do not see that the defendant or the public has a constitutionally protected interest in the disclosure of personal information of the victim's past sexual behavior unless it is determined to be relevant to the case being tried.") *with Massachusetts v. Jones*, 37 N.E.3d 589, 472 Mass. 707, 725-28 (Mass. 2015) (*per se* rule making rape-shield hearings private does violate the defendant's Sixth Amendment right to a public trial) and *State v. Kelly*, 545 A.2d 1048, 208 Conn. 365, 374 (Conn. 1988) (trial judge erred in justifying the closure of the court room for a rape-shield hearing on the basis of a "general reference to the rape shield statute"). Here, *Howard* resolves this question by prohibiting a *per se* rule barring public access to a rape-shield hearing. *Howard*'s discussion of public access to a rape-shield hearing is also consistent with *State v. Weber*, 137 N.H. 193 (1993), where this Court concluded that, given a defendant's right to a public trial under Article 15, a victimized minor's interest "does not … justify a rule requiring closure of the courtroom in *all* such cases. Rather, the trial court must balance these interests on a case-by-case basis in ruling on a request to close the courtroom." *Id.* at 196 (emphasis added). Thus, upon motion by the defendant under Rule 412 seeking to deem

admissible a victim's prior sexual history, New Hampshire courts must still balance the interests of victim, the public, and the defendant before closing the courtroom during a rape-shield hearing.

That said, it should be the rare case in which a rape-shield hearing is opened to the public when balancing the competing interests of the victim, defendant, and the public. *See Jones*, 37 N.E.3d at 607 ("[T]he State's overriding interest in protecting the privacy rights of rape victims and the absence of any other more narrowly tailored means of accommodating that interest may well mean that *the majority of rape shield proceedings properly are closed*.") (emphasis added). As one treatise explains in examining the analogous Federal Rule of Evidence 412:

> The purpose of Rule 412 would be frustrated or impaired if the hearing must be held in public view, and this fact distinguishes such hearings from other pretrial hearings, and in related settings in the *Globe Newspaper* [*Globe Newspaper Co. v. Superior*, 457 U.S. 596 (1982)] and Press Enterprise [*Press-Enter. Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enter. I*"); *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8-9 (1986) ("*Press-Enter. II*")] cases the [United States Supreme] Court has recognized that concerns for victims of crime justify limited measures closing off the proceedings from public scrutiny. The Court has condemned blanket closure rules, but is clearly ready to sustain case-by-case restrictions imposed on the basis of careful case-by-case assessment of the facts. *These suggest that Rule 412 is proper if it is read as permitting (rather than always requiring) the judge to restrict access in particular cases when meritorious privacy interests appear* ***(as seems usually true****, but not necessarily always)*.

Christopher B. Mueller and Laird C. Kirkpatrick, Federal Evidence § 4:82 Notice and Hearing (4th ed.) (emphasis added).

These commentators correctly explain that it is "usually true" that the victim's interest in privacy will require a confidential proceeding. This is because, generally, the victim's constitutional right of privacy at a rape-shield hearing is compelling and outweighs the public's and defendant's more modest interests in public access. Indeed, if a rape-shield hearing before the trial court or on appeal was open to the public, it would cause the very harm that the rape-shield statute seeks to prevent—namely, public embarrassment, shame, and humiliation caused by the public disclosure of the victim's intimate relations that presumptively have no bearing on the

criminal case. As the congressional discussion embedded within the annotations of the analogous Federal Rule of Evidence 412 explain: "The purpose of the in camera hearing is twofold. It gives the defendant an opportunity to demonstrate to the court why certain evidence is admissible and ought to be presented to the jury. At the same time, *it protects the privacy of the rape victim in those instances when the court finds that evidence is inadmissible*. Of course, if the court finds the evidence to be admissible, the evidence will be presented to the jury in open court." Fed. R. Evid. 412, congressional history (emphasis added).

In the vast majority of cases—even if this Court opts to apply the factors in *State v. Guajardo*, 135 N.H. 401 (1992) and *Waller v. Georgia*, 467 U.S. 39 (1984) in evaluating the defendant's Article 15 right to a public trial in the context of a rape-shield hearing—the defendant's Article 15 right will be overshadowed by the victim's compelling privacy interests that will prejudiced if the proceeding is open to the public. This is for two reasons. First, public access to a Rule 412 hearing is unlikely to prevent a defendant from receiving a fair trial. Regardless of whether the hearing is public, the defendant will, as a matter of due process, nonetheless be permitted to argue for the admissibility of the information in question. And if the information is ultimately deemed admissible, then the defendant can use the information at a public trial. As the Oregon Supreme Court correctly explained:

> The defendant, with counsel, attends the hearing and is entitled to examine witnesses and present evidence. The hearing is narrowly focused on the relevance of information related to a victim's or witness's sexual history. The standards governing that question are circumscribed by statute, and, to the extent that that evidence is offered for a purpose authorized under the statute, it will be presented at trial, before the public …. [E]xcluding the public from such a narrowly focused hearing will not affect the probability of additional witnesses coming forward or encourage perjury. On the contrary, a rape victim who is examined about the details of her personal sexual background may be less likely to be forthcoming if forced to discuss the matter in open court. Moreover, unlike at a suppression hearing, public attendance at [a Rule 412] hearing is not necessary to expose public corruption or police misconduct.

*Macbale*, 305 P.3d at 122.[10] Given that opening a rape-shield hearing to the public will cause the very harm that the rape-shield statute and Rule 412 aim to prevent, closing the courtroom will not be broader than necessary to protect the victim's interest, nor are there reasonable alternatives to closing the proceeding.

Second, a rape-shield hearing is neither a trial nor a traditional evidentiary hearing where there generally is a compelling interest in public access. A hearing under Rule 412 does not deal with guilt or innocence, but rather addresses only the admissibility of information that the New Hampshire legislature has (wisely and uniquely) deemed presumptively irrelevant to the outcome of a sexual assault prosecution. The only question at these hearings is whether the defendant can rebut this strong legislative presumption against admissibility. As the Oregon Supreme Court has explained, "the purpose of a [Rule 412 hearing] is not to consider whether a witness's relevant testimony should be excluded based on the witness's assertion of immunity from testifying, but, instead, to determine whether particular evidence falls within a class of evidence that the legislature has determined is presumptively *irrelevant* and should be protected from public disclosure." *Id.* at 118 (emphasis in original). The Court added: "[T]he purpose of the hearing is not to determine guilt or innocence, or even to determine whether relevant evidence is admissible at trial, but to screen from disclosure sensitive, but presumptively irrelevant facts related to the victim's or witness's sexual history." *Id.* at 121; *see also McNeil*, 393 S.E.2d at 127. Put another way, unless a court concludes after a closed hearing that the defendant has rebutted the legislature's presumption of irrelevance—in which case the information likely will become part of the public record of the case—the discussion at a rape-shield hearing concerning a victim's prior

[10] The wording of Oregon's open courts provision is broader than that of New Hampshire's. The New Hampshire provision contains a qualification: "the public's right of access…shall not be unreasonably restricted." N.H. Const. pt. I, art. 8. The Oregon provision contains no such qualification.

sexual history will have no bearing on the outcome of the defendant's case. Thus, these proceedings should, in almost every instance, be closed to the public.

Evaluating the public's Article 8 interest to have access to a rape-shield hearing also strongly leans in favor of confidentiality to protect the victim's privacy interests. Of course, under Article 8, the public has a strong interest in bearing witness to criminal proceedings. But that interest does not attach to every facet of a criminal proceeding, nor is the open access promise of Article 8 unlimited. *See Associated Press*, 153 N.H. at 134 ("[T]he state constitutional right of access attaches only to those documents that are important and relevant to a determination made by the court in its adjudicatory function in connection with a proceeding to which the state constitutional right of access has attached."). Article 8, itself, permits "reasonable" restrictions on public access. Even if a rape-shield hearing could be viewed as adjudicatory, not all "adjudicatory" proceedings are traditionally open to the public. As this Court has explained, certain court proceedings can be deemed *per se* private consistent with Article 8 if the "experience and logic" test is satisfied. *See id.* at 132 (adopting "experience and logic" test); *DeCato*, 156 N.H. at 571. Under this test, a court must determine: (1) whether the place and process have historically been open to the press and general public, and (2) whether public access plays a significant positive role in the functioning of the particular process in question. If the proceeding at issue meets both prongs of the test, then the right of public access attaches." *DeCato*, 156 N.H. at 571. For example, grand jury proceedings have been traditionally closed to the public. *See* RSA 91-A:5, I; *State v. Purrington*, 122 N.H. 458, 462 (1982) ("[i]t has long been the policy of the law, in furtherance of justice, that the investigations and deliberations of a grand jury should be conducted in secret, and that for most intents and purposes, all its proceedings should be legally sealed against divulgence") (quoting *Opinion of the Justices*, 96 N.H. 530, 531 (1950)); *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8-9 (1986) ("*Press-Enter. II*") (noting that the operation

of the grand jury system would be frustrated if conducted openly); *see also Associated Press*, 153 N.H. at 131 (citing approvingly *Press-Enter. II* for proposition that, if grand juries were not secret, their purposes would be frustrated); N.H. Sup. Ct. R. 52 (addressing grand jury transcripts and presumption of confidentiality). Juvenile delinquency proceedings have similarly been provided blanket confidentiality protections. *See* RSA 169-B:34-:38 (relating to confidentiality of juvenile delinquency proceedings and records). Involuntary commitment proceedings under Chapter 135-C are also presumptively closed. *See* RSA 135-C:43.

Applying the "experience and logic test" here, rape-shield hearings both before the trial court and on appeal must be, consistent with Rule 412, done *in camera* outside public view absent compelling reasons for public access. Consistent with Rule 412 and the victim's compelling privacy interests, rape-shield hearings have historically been done out of public view since these hearings were first established over thirty years ago. *See State v. Dean*, 129 N.H. 744, 747, 749 (1987) (trial court and New Hampshire Supreme Court both conducting *in camera* review). This is for good reason. As the Oregon Supreme Court explained:

> Openness in that circumstance would not advance any particular public interest …. Indeed, rape shield laws, such as [Rule] 412, were enacted to "protect victims of sexual crimes from degrading and embarrassing disclosure of intimate details of their private lives" and thus eliminate one barrier to a victim's decision "to report and assist in the prosecution of the crime."

*Macbale*, 305 P.3d at 119; (quoting *State v. Lajoie*, 849 P.2d 479, 483 (Or. 1993)) (emphasis in original).

Moreover, public access would play a minimal role in the proper functioning of the rape-shield hearing. To the contrary, public access would frustrate the purpose of rape-shield statute to protect victims from needless embarrassment and humiliation. The proper functioning of rape-shield proceedings depends upon the secrecy of these proceedings. Meanwhile, as explained above, a rape-shield hearing is not the equivalent of a public jury trial where guilt is determined

and where public scrutiny would "enhance[] the quality and safeguards the integrity of the fact finding process." *DeCato*, 156 N.H. at 577 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982)).

### B. Whether the Trial Court Record Concerning a Victim's Prior Consensual Sexual Activity, Including Briefs and Appendices, Should Be Sealed Before the Trial Court and Before this Court on Appeal

The balancing test a court must employ in determining whether information submitted at a rape-shield hearing should be sealed and/or redacted is functionally the equivalent to the test explained above that the courts must employ in determining whether a rape-shield hearing should be held outside public view. *See Associated Press*, 153 N.H. at 138 (the New Hampshire Constitution "requires an individualized determination of a sufficiently compelling interest on the facts of each case"). As this Court explained in *Keene Sentinel*, for a court document to be sealed, there must be "a sufficiently compelling interest, which outweighs the public's right of access to those records." *Keene Sentinel*, 136 N.H. at 128; *see also Associated Press*, 153 N.H. at 130. This principle is also memorialized in New Hampshire Supreme Court Rule 12(2), which states that, for information to be sealed, the court must determine that there is a "statute, administrative or court rule, *or other compelling interest* that requires that the case record or portion of the case record be kept confidential." *See* N.H. Sup. Ct. R. 12(2) (emphasis added). Thus, the courts, both at the trial court level and on appeal, must assess whether the interests underpinning New Hampshire's rape-shield protections—including its goal of protecting victim privacy and the strong public interest in encouraging victims to report sexual assault—are sufficiently compelling to override the public's right to access this information. *Keene Sentinel*, 136 N.H. at 128.

However, only after the court makes an admissibility determination can the court fully balance the interests of the victim, the public, and the defendant in evaluating how this information should be treated. The answer to this admissibility question will be, in the

overwhelming number of cases, dispositive as to whether the information presented at a rape-shield hearing should be made available to the public. Accordingly, since the defendant's Rule 412 motion is generally to be heard "during a hearing in chambers" absent compelling reasons for public access, the trial courts and the New Hampshire Supreme Court should provisionally seal the record of the proceedings—including the written motion, affidavits, briefs, transcript, appendices, and any other information disclosing the victim's prior sexual history—absent compelling reasons for public access until the final admissibility decision is made. *See* Christopher B. Mueller and Laird C. Kirkpatrick, Federal Evidence § 4:82 Notice and Hearing (4th ed.); *see also Dean*, 129 N.H. at 749 (deeming victim's prior sexual history inadmissible "[a]fter a review of the in camera voir dire"). This provisional sealing should be limited only to information that discloses the victim's prior sexual history to ensure that public access is not needlessly restricted in an overbroad, blanket fashion. *See In re N.B.*, No. 2014-0765, slip opinion, at 5-7 (N.H. Aug. 19, 2016) (explaining that sealing and redactions must be narrowly tailored, and not overbroad).

If documents concerning the victim's prior sexual history are inadmissible, then these documents, as well as the briefs and the transcript of the proceedings, should generally remain sealed under the same balancing analysis employed above. The information will have no bearing on the defendant's guilt or innocence, thus rendering minimal the public's interest in disclosure and the defendant's interest in public access. *See Macbale*, 305 P.3d at 118-119, 121. Conversely, the release of these inadmissible documents could have a devastating impact on the victim's privacy rights while, perhaps even worse, creating an environment where victims of sexual assault will not report these crimes out of fear that their prior sexual history will become public knowledge. *See id.* at 119. Where documents evidencing the victim's prior sexual history are inadmissible, it should be the rare case in which these documents are unsealed and made accessible to the public. This approach is also consistent with the Victim's Rights Law, RSA 21-

M:8-k(m), which provides victims with "[t]he right of confidentiality of the victim's address, place of employment, *and other personal information*." (emphasis added).

If the defendant is able to overcome the rape-shield statute's significant presumption that a victim's prior sexual history is irrelevant, then the calculus changes considerably. After the court deems this information admissible, these documents, as well as the briefs and the transcript of the proceedings, should generally be unsealed but only (i) if the defendant or a third party requests the unsealing of this information, and (ii) after giving the State and the victim notice and an opportunity to be heard as to why the documents should remain sealed—a requirement that is mandated as a matter of procedural due process, *see infra* Part IV. Here, a court's finding that the defendant has overcome the rape-shield statute's presumption of irrelevance and is therefore entitled to present this information to a jury at a trial that will adjudicate guilt or innocence significantly enhances the public interest in disclosure. Under the Sixth Amendment and Part I, Article 15 of the New Hampshire Constitution, it is critical for trials to be open and free to the public. Public access protects the defendant, who is able to rely on the fact that the actors within his or her proceeding will be subjected to public scrutiny. Undoubtedly, the victim's privacy interests in this admissible information is still strong—interests which are factored into the threshold determination of whether the information is admissible in the first instance under the rape-shield statute. But when such information is deemed admissible despite the protections of the rape-shield statute, such privacy interests must generally give way to the defendant's rights under Article 15 and the compelling principle embedded in Article 8 that "the public's right of access to governmental proceedings and records shall not be unreasonably restricted." N.H. Const. pt. I, art. 8. Public disclosure may also be important because, by enabling other lawyers and judges to have an understanding as to what transpired in these proceedings where the victim's prior sexual history was deemed admissible, a public body of precedential case law will develop that will guide

practitioners and the judiciary in future cases.

It is worth reiterating that, because the admissibility of documents evidencing a victim's past sexual acts is the threshold question the courts must answer before determining whether this information can be publicly disclosed, it is critical that the courts, absent exceptional circumstances, keep this information sealed before a final determination on admissibility is made. Once disclosed, these intimate, personal facts—even if irrelevant to the defendant's trial—will no longer be private. In the Internet age, once the information is released, this public disclosure cannot be undone and can cause permanent damage to the victim's privacy rights—an outcome that is especially troubling if the trial court erred in deeming admissible the information in question. Put simply, "[t]he bell cannot be unrung." *Macbale*, 305 P.3d at 118; *see also People v. Bryant*, 94 P.3d 624, 635-36 (Colo. 2004) ("Under the circumstances and context of this case, any details of the victim's sexual conduct reported from the in camera transcripts will be instantaneously available world-wide and will irretrievably affect the victim and her reputation."). Thus, if the trial court deems a victim's prior sexual history admissible—thereby creating the strong presumption that the information concerning the victim will be unsealed—the State and the victim should be given the opportunity to obtain an immediate stay and seek an interlocutory appeal under Supreme Court Rule 8 to avoid irreparable harm. Otherwise, disclosure will moot the victim's privacy rights before the issue can be heard by the New Hampshire Supreme Court. *See Miskell*, 122 N.H. at 845 (application of the rape-shield statute at deposition was appropriate question for interlocutory review); *see also Keene Sentinel*, 136 N.H. at 130, 131 ("There will be instances where the claimed countervailing rights of a party … must not be rendered moot pending final resolution of the access issue."; "[N]o access to the documents in question shall be granted until the matter has been finally resolved."); N.H. Sup. Ct. R. 12(2)(b)(1) ("…the portion of the case record which is subject to the motion [to seal] shall be kept confidential pending a ruling on

the motion").

To be clear, the ACLU-NH does not argue for *per se* rules concerning the sealing of information addressing the victim's prior consensual sexual activity. To comply with Article 8, we recognize that a defendant or member of the public must still be provided some process by which he or she can request public access and that, upon such a request, the court must engage in an individualized determination. *Associated Press*, 153 N.H. at 139 (a court must be able to make an "individualized determination" as to whether information should be sealed). But these rules above should provide useful guidance to this Court and trial courts as to how to balance these competing interests when there is an attempt to unseal a victim's sexual history. In weighing these interests, it should be the rare case where this information is disclosed (i) before a final determination on admissibility is made and (ii) after a court concludes that the information is inadmissible. Indeed, the harm that the courts (through Rule 412) intended to prevent by requiring a confidential hearing process is not just the appearance of the victim as a witness, but the degrading and embarrassing disclosure of intimate details about the victim's private life.

One challenging aspect of these procedures is how this Court, as well as trial courts, should formulate written opinions addressing the admissibility of a victim's prior sexual history. If the New Hampshire Supreme Court ultimately concludes that the evidence is admissible, the Court should have much greater latitude to discuss the relevancy of the evidence in question in a published opinion. This is important because such opinions will develop a body of case law that will provide guidance to other judges and practitioners who are handling similar issues. However, trial courts—even if they conclude that the evidence is admissible—have less latitude because public disclosure of this information in their opinions could vitiate the right of the State or victim to seek an appeal asking this Court to keep this information confidential. Conversely, if a trial court or this Court ultimately concludes that the evidence in question is inadmissible, the courts

should not issue a public opinion describing the victim's sexual history unless it is absolutely necessary to its legal analysis. And, even then, the description should be general and not convey more than necessary. As Supreme Court Rule 12(1)(d) explains, "[i]nformation which would compromise the court's determination of confidentiality … shall be omitted or replaced by a descriptive term." *See also Keene Sentinel*, 136 N.H. at 130 ("When appropriate, the document's subject matter, however, can be described in general terms such that persons objecting to closure can present an adequate argument to the court."). Otherwise, the Court's opinion would cause the very harm that *in camera* review and the inadmissibility decision itself are designed to prevent. Accordingly, consistent with RSA 21-M:8-k(m), if this Court concludes that the information concerning the victim's testimony is inadmissible in this case, the Court should craft the opinion with tremendous care in an effort to protect the privacy rights of the victim.

## IV. Consistent with Procedural Due Process and RSA 21-M:8-k(a), if New Hampshire Courts Contemplate Unsealing Information Protected Under the Rape-shield Statute, the Victim Must Be Notified and Given an Opportunity to be Heard

Part I, Article 15 of the New Hampshire Constitution establishes the right to procedural due process by providing that "[n]o subject shall be … deprived of his property, immunities, or privileges … or deprived of his life, liberty, or estate … but by the law of the land." N.H. Const. pt. I, art. 15. New Hampshire courts engage in a two-part analysis in addressing procedural due process claims: "first, we determine whether the individual has an interest that entitles him or her to due process protection; and second, if such an interest exists, we determine what process is due." *State v. Veale*, 158 N.H. 632, 637-39 (2009). "The ultimate standard for judging a due process claim is the notion of fundamental fairness." *Saviano v. Director, N.H. Div. of Motor Vehicle*s, 151 N.H. 315, 320 (2004).

This Court has made clear that disclosure of a victim's prior sexual history implicates not only statutory rights under New Hampshire's rape-shield statute, but also the victim's

constitutional right to privacy. *Miskell*, 122 N.H. at 845 (1982); *Howard*, 121 N.H. at 59. Another constitutional right is also at stake—the right to be free from reputational harm and social stigma. As this Court has held, "we find ample support in our jurisprudence for the proposition that reputational stigma can, by itself, constitute a deprivation of liberty deserving due process." *Veale*, 158 N.H. at 639. Put another way, "[t]he general rule is that a person's liberty may be impaired when governmental action seriously damages his standing and associations in the community. We have recognized that the stigmatization that attends certain governmental determinations may amount to a deprivation of constitutionally protected liberty." *Petition of Bagley*, 128 N.H. 275, 284 (1986); *see also Duchesne v. Hillsborough Cty. Atty.*, 167 N.H. 774, 783 (2015) (noting protected liberty interest in one's "reputation[] and professional standing with those with whom [one] work[s] and interact[s] on a regular basis").

Disclosing the sexual history of a victim of sexual assault obviously impacts the victim's right to be free from reputational harm and social stigma. Even making the victim's name a matter of public knowledge can damage the victim's reputation. *See* Paul Marcus and Tara L. McMahon, *Limiting Disclosure of Rape Victims' Identities*, 64 S. Cal. L. Rev. 1019, 1033 (1991). That is so because most rapes are not committed by strangers but rather by someone known to the accused. *See* Deborah Denno, *Perspectives on Disclosing Rape Victims' Names*, 61 Fordham L. Rev. 1113, 1125 (1993). When the perpetrator is a friend or acquaintance of the victim, other members of the public often assume that the complained-of encounter was not a rape at all but was actually a consensual act. *See* Dana Berliner, *Rethinking the Reasonable Belief Defense to Rape*, 100 Yale L.J. 2687, 2687 (1991). Public knowledge of the intimate details of the victim's sexual history often serve to only reinforce this assumption, and can even lead to the loss of personal relationships and employment opportunities. *See* Marcus and McMahon, *supra*, at 1033. Furthermore, sexual assaults are the rare crime in which the victim may face stricter scrutiny than

the defendant. "At the same time a victim is suffering from the severe emotional and physical traumas brought on by the rape, *she is also being scrutinized and judged by her community*. There is no other crime in which the victim risks being blamed and in so insidious a way—she asked for it, she wanted it." *Id.* at 1030 (emphasis added)

The permanence of any erroneous deprivation of a victim's right to be free from reputational harm and social stigma is of serious concern. Once a victim is stigmatized by the public release of their sexual history, they are not easily made whole. As the Oregon Supreme Court correctly noted, "[o]nce disclosed … those intimate personal facts, even if irrelevant to the trial, will no longer be private." *Macbale*, 305 P.3d at 118. The Colorado Supreme Court similarly explained:

> Revealing the *in camera* rape shield evidence will not only destroy the utility of this very important legal mechanism in this case, but will demonstrate to other sexual assault victims that they cannot rely on the rape shield statute to prevent public airing of sexual conduct testimony the law deems inadmissible. This would directly undercut the reporting and prosecution of sexual assault cases, in contravention of the General Assembly's legislative purposes.

*Bryant*, 94 P.3d at 636. In short, the damage cannot be undone.

Thus, if a trial court or this Court pursuant to Supreme Court Rule 12 ever contemplates opening to the public a rape-shield hearing or unsealing documents concerning a victim's prior sexual history, the victim is entitled to process. The question then becomes what process is due, which turns upon three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *State v. Lavoie*, 155 N.H. 477, 482 (2007).

Here, at the very least, the victim is entitled to notice and an opportunity to be heard before a final decision is made on disclosure. As this Court has held:

> Where governmental action would affect a legally protected interest, the due process clause of the New Hampshire Constitution guarantees to the holder of the interest the right to be heard at a meaningful time and in a meaningful manner. A fundamental requirement of the constitutional right to be heard is notice of the impending action that affords the party an opportunity to protect the interest through the presentation of objections and evidence.

*Appeal of N.H. Fireworks, Inc. (N.H. Dep't of Safety)*, 151 N.H. 335, 338 (2004) (quotations omitted); *see also Board of Regents v. Roth*, 408 U.S. 564, 569-579 (1972) ("When protected interests are implicated, the right to some kind of prior hearing is paramount."). Notice must be "reasonably calculated, under all the circumstances, to apprise" the victim of the potential deprivation, *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950), and must inform the victim about the means for contesting the deprivation. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14-15 (1978). Not only are these protections required as a matter of due process, but they comport with RSA 21-M:8-k(a), which gives victim's the "right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process." As part of this process, the victim should be permitted to intervene in the matter with his or her own counsel to assert his or her own separate interests, just as this Court permitted in this case. *See Miskell*, 122 N.H. at 845 ("In this appeal, the prosecutrix is the real party in interest, and her interests may differ from those of the State.").

Supreme Court Rule 12(2)(a), in error, does not provide these protections for the victim, instead allowing the Court to unseal records protected under Rule 412 and RSA 632-A:6, II "on [the Court's] own motion," without necessarily informing the victim and giving the victim the opportunity to be heard. Rule 12(2)(a) also fails to provide these due process protections in other cases where individuals may have a privacy interest with respect to court documents. This could

include, for example, documents protected by the doctor-patient privilege, *see* RSA 329:26, and the therapist-patient privilege, *see* RSA 330-A:32, as well medical documents produced in proceedings addressing defendants' competency. N.H. R. Crim. P. 51(e) ("All information provided pursuant to this rule is for the purpose of evaluating the sanity or competency of the defendant and may not be used for any other purpose without permission of the court. Documents which contain such information and which are in the court record shall be kept under seal from public view ....").

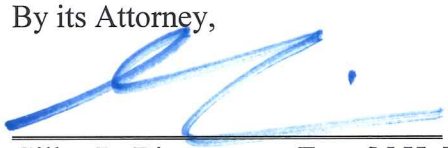
## CONCLUSION

For the above reasons, the New Hampshire Supreme Court should (i) vacate its June 10, 2016 order to unseal portions of the trial court record concerning the victim's prior consensual sexual activity that the trial court found inadmissible, (ii) provisionally seal information concerning the victim's prior consensual sexual activity while this Court's decision on admissibility is pending (which would include conducting oral argument on admissibility in a closed courtroom), and (iii) issue an opinion consistent with the rules propounded in this brief.

Respectfully Submitted,

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

By its Attorney,



Date: August 22, 2016

Gilles R. Bissonnette, Esq. (N.H. Bar No. 265393)
American Civil Liberties Union of New Hampshire
18 Low Avenue
Concord, NH 03301
(603) 224-5591
gilles@aclu-nh.org

## CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing *Amicus Brief of the American Civil Liberties Union of New Hampshire in Support of the Victim's Request to Vacate the Court's June 10, 2016 Order* was served this 22nd day of August, 2016 by first class mail, postage prepaid, and by electronic mail on Peter Hinckley, Esq., counsel for the State, Christopher M. Johnson, Esq., counsel for the Defendant, and Cyrus F. Rilee, Esq., counsel for the victim's estate and father.

Gilles R. Bissonnette, Esq.