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THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0106

State of New Hampshire

v.

Charles Paul

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

BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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1. Whether the court erred by granting the State's motion in limine to admit evidence of Paul's prior convictions under New Hampshire Rule of Evidence 609.

Issue preserved by the State's motion in limine, A 89*, Paul's objection, A 91, the State's supplemental motion in limine, A 95, Paul's supplemental objection, A 100, the parties' arguments, T3 345–49, and the court's ruling, T3 349, 352; AD 3.

2. Whether the court erred by failing to disclose records submitted for in camera review.

Issue preserved by Paul's Gagne motions, A 11, 29, 33, 42, 51, the parties' joint motion to compel, A 84, the Court's orders granting in camera review, A 20, 27, 48, 76, 84, 88, and the court's orders declining to disclose some of the records, AD 4, 6, 7, 9.

* Citations to the record are as follows:
"A" refers to the appendix to this brief containing documents other than the appealed decisions;
"AD" refers to the appendix to this brief containing the appealed decisions;
"JS" refers to the transcript of jury selection on December 6, 2021;
"T1," "T2," etc., refer, by volume number, to the transcript of trial on December 9–14, 2021; and
"V" refers to the transcript of the verdict on December 15, 2021.

STATEMENT OF THE CASE

In June and September, 2019, the State obtained indictments from a Rockingham County grand jury charging Charles Paul with attempted murder, felon in possession, and three counts of first-degree assault. A 4–8. Paul filed notice of his intent to rely on the defense of self-defense. A 9–10. At the conclusion of a five-day jury trial on December 9–15, 2021, the jury found Paul guilty of all the charges. V 2–3. On February 17, 2022, the court (Honigberg, J.) sentenced Paul on the attempted-murder conviction to 45 years to life, to serve, and on the felon-in-possession conviction to seven-and-a-half to fifteen years, suspended. A 104, 107. The court did not enter convictions or sentences on the first-degree-assault charges because the parties agreed that they were lesser-included of the attempted-murder conviction.

STATEMENT OF THE FACTS

In February 2019, A.Y. was twenty-eight years old and living with her parents in Northwood. T2 178, 180–81, 219, 226. A.Y. suffered from serious mental-health disorders, including schizophrenia, psychosis, and bipolar disorder. T2 182, 208, 223–24, 252. She was twice hospitalized to treat these disorders. T2 183, 208.

A.Y. experienced paranoia and expressed fear that people were out to get her. T2 210–11. She told a treatment provider that, when she worked at a café, customers gave her dollar bills with the words "You are going to die" written on them. T2 255. She believed that a group of people tried to drown her during a "ceremony" in an Oregon hot spring. T2 261–62. She told a provider that her mother murdered her half-brother. T2 261–63, T4 534. She believed that when she wrote, "demonic activity" controlled her pen. T2 264–65.

A.Y. had limited insight into her mental illnesses. She clashed with her treatment providers, who, she testified, "convince everybody that they're crazy." T2 224, 253, 261, 266. She resisted taking medication because it made her feel weird, caused her to gain weight, and "suppressed [her] creative abilities." T2 224–25, 252–53. She stopped taking Latuda, a medication used to treat schizophrenia, prior to February 2019. T2 225, 252–53.

In 2018, A.Y. befriended Charles Paul, who was then fifty-two years old. T2 185, 227–28, 250–51, T4 481–82. A.Y.'s parents later hired Paul to construct a walkway and stairs at their house. T2 185, 227, T4 483. Paul was aware that A.Y. had been hospitalized for mental-health disorders, was on conditional release, and had been prescribed medication. T4 483–84.

In late January 2019, A.Y.'s parents left on a two-week vacation to Florida. T2 183–84, 226. A.Y. didn't like staying in the house alone, so her parents agreed that she could invite a friend over. T2 184–85, 227, T4 509. A.Y. chose to invite Paul. T2 228, 251, T4 484, 509. Being older and "more mature," A.Y. testified, she believed that Paul was not the type "to look up a girl's skirt" or "pressure them into anything that they didn't want to do." T2 228. Shortly after they left, A.Y. asked her parents if she could invite Paul over, and they agreed. T2 185. A.Y. slept in her parents' bedroom, while Paul slept elsewhere in the house. T2 230, T4 484, 493, 510.

On the evening of February 6, 2019, A.Y. and Paul drank beer and smoked marijuana. T1 61, 82–83, T2 231–32, 239, 247–48, T4 486–88. A.Y. drank so much that, even at 5:00 the following morning, her blood alcohol level was still more than twice the legal limit for driving. T1 53–54, 82–84, 93–94. A.Y. went to sleep in her parents' bedroom. T1 240, T4 492.

In the early morning hours of February 7, 2019, A.Y. sustained three stab wounds to her neck. T1 55–57, 62. The parties disputed how these wounds were inflicted.

A.Y. testified that she remembered little of the incident: "I remember waking up from my mom's bed, realizing that I can't really breathe, getting up initially, looking down and seeing I didn't have any panties on, and I blacked out." T1 232, 240, 246–47. "The next thing I remember[]," she testified, "was being [o]n a[n ambulance] gurney." T1 232, 240–41, 246–47.

Paul testified that he couldn't find his cell phone, so he woke A.Y. to ask her to help him look for it. T4 494, 518, 527. When he shook her foot, she "lunged out of the bed . . . with a knife her hand." T4 494, 507, 519. In the struggle over the knife, they both fell to the floor, and A.Y. sustained the first stab wound. T4 495, 519. Paul picked up the knife from the floor and took a step back. T4 495–96, 508, 519. Although Paul then had the knife, A.Y. was looking in the direction of a nearby box cutter. T4 496, 508. A.Y. then ran into Paul. T4 496. Afraid for his life, Paul stabbed A.Y. to stop her from attacking him. T4 496, 507–08.

Paul testified that he immediately tended to A.Y.'s wounds, using towels to try to stop the bleeding. T4 496–96. Unable to find a phone, he brought her to the front door, intending to drive her to the hospital. T4 497–99. While

looking for his keys, he found his cell phone and immediately called 911. T4 499.

Paul stayed by A.Y.'s side, applying pressure to her neck to stop the bleeding. T4 499. Crying and wailing, Paul told the dispatcher that he stabbed A.Y. T4 500, 503. He feared that she would die if he didn't get her help immediately, and "it felt like it was taking forever" for help to arrive. T4 501, 523. Paul had inadvertently given the dispatcher the wrong house number, so when police arrived in the area, Paul ran into the street, flagged them down, and led them to A.Y. T2 311–13, T3 386–87, T4 501–02.

A.Y.'s three stab wounds were each one to three centimeters long. T1 55–57, 62. Her jugular vein was transected, which caused substantial blood loss, and there was a laceration to her esophagus. T1 40–41, 68, 72–74, T4 523. She underwent a four-to-six hour surgery and had a breathing tube for eleven days. T1 68, 71–81, 84–86, T2 243. When discharged from the hospital on March 1, 2019, she still had a feeding tube and needed an additional surgery to repair her esophagus. T1 89–90, T2 245. The feeding tube was removed in October 2021. T2 245–46.

When Paul spoke to the police, he was distraught and suicidal. T3 367–68, 383, 453, T4 503, 505, 507, 523. He told them that A.Y. forced him to take a large amount of her prescription medication by stuffing the pills down his throat,

and that he stabbed her while under the influence of that medication. T3 383, 455–56, 458, T4 489, 504–06, 513–14, 525–29. He told the police that, when he woke A.Y., she "rush[ed]" or "lunged" at him and punched him in the chest, causing him to "flip out" and stab her, but he did not tell the police that she had a knife. T3 385, 457, T4 506, 508, 521, 523, 526–27. Paul did not tell that the police that his actions were justified, instead telling them that he "tried to kill [his] best friend," and that he "d[id]n't know why." T4 521, 528.

At trial, Paul testified that he lied to the police; A.Y. did not try to give him her medication, and he did not take her medication. T4 488–89, 504–06, 513–14, 522–23, 526. Paul testified that he lied to protect A.Y.; he did not want A.Y. to be returned to the State Hospital or face criminal charges for attacking him with a knife. T4 489–90, 503–05, 508.

SUMMARY OF THE ARGUMENT

1. Under New Hampshire Rule of Evidence 609(b), "if more than 10 years have passed since [a] witness's . . . release from confinement for [a conviction]," then the conviction cannot be used to impeach the witness unless its probative value substantially outweighs its prejudicial effect. The imposition of a suspended sentence is the remedy for a defendant's noncompliance with the terms of freedom, not punishment for the original conviction. Thus, it does not constitute "confinement for" the original conviction under the rule. Contrary to the trial court's interpretation, the rule does not envision multiple "releases" for a single conviction, nor does it envision that any event can "reset the clock" or that a particular conviction might "jump back and forth" between admissibility and inadmissibility. Even if the imposition of a suspended sentence can, in some circumstances, constitute "confinement for" the original conviction, that was not the case here because Paul's suspended sentences were not imposed for conduct that was substantively related or parallel to his original convictions.

2. Following in camera review of confidential records, a trial court must disclose records that are relevant and material. Here, the court disclosed only [redacted] By failing to disclose additional records, it may have erred.

I. THE COURT ERRED BY GRANTING THE STATE'S MOTION IN LIMINE TO ADMIT EVIDENCE OF PAUL'S PRIOR CONVICTIONS UNDER NEW HAMPSHIRE RULE OF EVIDENCE 609.

In 1987, Paul was convicted of two counts of aggravated felonious sexual assault ("AFSA"). A 89, 91. The court sentenced him, on one conviction, to seven-and-a-half to fifteen years, to serve, and on the other conviction to seven-and-a-half to fifteen years, all suspended for five years from his release. A 89, 91–92, 95.

In 1994, Paul was convicted of attempted escape. A 89, 96. The court sentenced him to three-and-a-half to seven years, all suspended for five years from his release. A 89, 96.

Paul was released in April 2008. A 95. In March 2010, the court, based on a finding that Paul, in late 2008, possessed a deadly weapon and failed to register as a sexual offender, imposed three-and-a-half to seven years of the suspended sentence from 1987, and the three-and-half-to-seven-year suspended sentence from 1994. A 95–96. Paul was released again in either 2014 or 2016. A 95–96, 101.

New Hampshire Rule of Evidence 609 governs the admissibility of a prior criminal conviction for impeachment. In general, a felony conviction not involving a dishonest act or false statement may be used to impeach a criminal defendant if its "probative value . . . outweighs its prejudicial effect to that defendant." N.H. R. Ev. 609(a)(1)(B). "If," however, "more

than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later," then a much more demanding test applies. N.H. R. Ev. 609(b). Such a conviction may be used to impeach a witness if, and only if, its "probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect." N.H. R. Ev. 609(b)(1) (emphasis added).

In November 2021, the State filed a motion in limine to permit it to impeach Paul with the three convictions described above, from 1987 and 1994, although the State mistakenly claimed that one of the 1987 convictions was from 2010. A 89. Based on the imposition of the two suspended sentences described above, the State claimed that all three convictions "f[e]ll[] within [Rule 609's] 10 year time limitation." A 89. The State argued that "even if the court disagrees that the convictions do not [sic] fall within the 10 year time limitation, the probative value of these convictions substantially outweigh its [sic] prejudicial effect due to specific facts and circumstances of this case." A 89.

Paul objected. A 91. He noted the State's mistake regarding the date of one of the 1987 convictions. A 91. He also noted that, on the other 1987 conviction, he was sentenced to serve seven-and-a-half to fifteen years. A 91–92. Because Paul would have completed that sentence no later

than 2002, it could not fall within Rule 609's 10-year limitation. A 92.

Paul argued that the other two convictions — from 1987 and 1994, and for which he received suspended sentences — were also "too remote" to fall within Rule 609's 10-year limitation, "regardless of the subsequent imposition of the suspended sentences." A 92. He argued that "[t]he imposition of a suspended sentence is not punishment for the original crime, but for the violation of the terms and conditions of the sentence." A 92. Thus, when a conviction results in a fully suspended sentence, the defendant is "release[d] from confinement" for that conviction, if at all, on the date of the original sentencing, not on the date he is released from a subsequently imposed sentence. A 92. Paul argued that the State's motion should be denied because it failed to show that the probative value of any conviction "substantially outweigh[ed] its prejudicial effect." A 92–93.

The State filed a supplement to its motion. A 95. It withdrew its request to impeach Paul with the 1987 conviction that resulted in a sentence that was not suspended. A 95. It maintained, however, that the remaining two convictions were admissible, both because the subsequent imposition of suspended sentences rendered them "within the 10 year time limitation," and because, in any event, the probative value of the convictions was

"gigantic" and substantially outweighed any prejudicial effect. A 97–98.

Paul filed a supplement to his objection. A 100. He reiterated his argument that the convictions, from 1987 and 1994, did not fall within Rule 609's 10-year limitation, "regardless of whether the suspended sentences were ever imposed," and that the State had not shown that their "probative value substantially outweigh[ed] [their] prejudicial effect." A 101.

At trial, Paul reiterated his objection. T3 345–46. The State indicated that it intended to refer to the 1987 conviction as a "felony," with no reference to "sexual assault." T3 346–47. Paul maintained his objection. T3 347–49.

The court ruled that the State was correct "on the timeliness question." T3 349. Both convictions, it ruled, "are within the 10 years that is specified in [Rule 609]. So . . . we're talking about the [less demanding] analysis." T3 349. The court then granted the State's motion. T3 352; AD 3. While the 1987 conviction would be referenced as simply a "felony," it ruled that the State could describe the 1994 conviction for attempted escape. T3 352. The court reiterated its ruling that "both convictions fall within the 10 years, as that's been interpreted, to be either conviction or completion of the sentence." T3 352.

On direct examination, Paul testified that he was a convicted felon and that he had been convicted of escape. T4 481; see also Zola v. Kelley, 149 N.H. 648, 652 (2003) ("[W]hen a trial judge makes a definitive pretrial ruling that evidence of a prior conviction is admissible, a party's preemptive introduction of that evidence does not automatically waive the issue for appellate review."). On cross-examination, the State elicited Paul's testimony that he was convicted of attempted escape in 1994, when, despite being in official custody, he "ran across the parking lot of a courthouse." T4 530–31.

By ruling that the 1987 and 1994 convictions fell within Rule 609's time limitation and were admissible, the court impliedly found that their "probative value . . . outweigh[ed] [their] prejudicial effect." N.H. R. Ev. 609(a)(1)(B). The court did not, however, find that their "probative value, supported by specific facts and circumstances, substantially outweigh[ed] [their] prejudicial effect." N.H. R. Ev. 609(b)(1) (emphasis added). By finding that the 1987 and 1994 convictions fell within Rule 609's time limitation and by admitting those convictions without finding that they met the more demanding balancing test set forth in Rule 609(b), the court erred.

A. The imposition of a suspended sentence does not constitute "confinement for" the original conviction under Rule 609(b).

This Court reviews a trial court's interpretation of court rules, including rules of evidence, de novo. State v. Rivera, ___ N.H. ___ (N.H. Nov. 3, 2022); State v. Munroe, 173 N.H. 469, 472 (2020). Because this issue involves the interpretation of Rule 609(b), the trial court's ruling is reviewed de novo.

When interpreting a rule of evidence, this Court "will first look to the plain meaning of the words used and ascribe to them their plain and ordinary meaning where possible." Rivera, ___ N.H. at ___; accord Munroe, 173 N.H. at 472. It "will not consider words and phrases in isolation, but, rather, within the context of the rule as a whole." Rivera, ___ N.H. at ___. "[It] will not add words to the plain language of a rule." Munroe, 173 N.H. at 472.

The more demanding balancing test in Rule 609(b) applies "if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later." An initial period of confinement, imposed as a direct result of a conviction, undoubtedly constitutes "confinement for" that conviction. The issue here is whether the imposition of a suspended sentence constitutes "confinement for" the original conviction. For several reasons, it does not.

First, in New Hampshire, the imposition of a suspended sentence "is fundamentally different from that of an initial sentence," and "there is a significant distinction between the [two]." State v. Gibbs, 157 N.H. 538, 541–42 (2008). RSA 651:20 permits courts to suspend sentences. A suspended sentence creates a conditional liberty interest protected by due process. Stapleford v. Perrin, 122 N.H. 1083, 1088 (1982). Thus, a court may not impose a previously suspended sentence merely because it has second thoughts about suspending it. Id. at 1087. Rather, it may only impose a suspended sentence if it finds, after a hearing, that the defendant "has in some way violated the terms of his freedom." Id. at 1089.

In this sense, "[t]he imposition of a suspended sentence is not part of a criminal prosecution." State v. Williams, 174 N.H. 635, 646 (2021) (internal quotation omitted). "Unlike the imposition of an initial sentence, the imposition of a suspended sentence is remedial rather than punitive." Id. It is "the remedy for a defendant's noncompliance" with the terms of his freedom, not an additional "punishment" for the original conviction. Id. Thus, the imposition of a previously suspended sentence does not constitute "confinement for" the original conviction.

Second, by its plain terms, Rule 609(b) envisions, at most, two relevant dates: the date of "the witness's

conviction" and the date of "the witness's . . . release from confinement for it." The use of the phrase "the witness's . . . release from confinement for it" establishes that the rule envisions that each conviction will correspond to, at most, one "release." Nothing in the rule suggests that a single conviction might correspond to multiple "releases." Under the trial court's interpretation, however, any release from initial incarceration and any subsequent releases following revocations of conditional liberty would each constitute "release from confinement for [a single conviction]." Thus, the court's interpretation requires "add[ing] words to the plain language of [the] rule." Munroe, 173 N.H. at 472.

Third, the trial court's interpretation is inconsistent with "the rule as a whole," and it would produce absurd results. Rule 609 envisions that, for each conviction, upon a specified event — either "the witness's conviction or release for confinement for it, whichever is later" — a proverbial "clock" starts ticking. Before that clock reaches "10 years," the more relaxed balancing test applies. After the clock reaches "10 years," the more demanding test applies. Nothing in the rule suggests that any event can reset the clock to zero.

Under the trial court's interpretation, the clock can be reset to zero multiple times, and it can even be reset to zero decades after it has struck "10 years." There is no time limit for how long a sentence can be suspended. See RSA 651:20

(failing to set forth any time limit for suspended sentences); State v. Ingerson, 130 N.H. 112, 116 (1987) (holding that a sentence cannot be suspended "indefinitely" but declining specify "a reasonable temporal limit."). If a court, upon conviction, imposed a ten-year sentence, but suspended it for thirty years, the conviction would be subject to the more relaxed balancing test for the first ten years and the more demanding balancing test thereafter. But under the trial court's interpretation, if the sentence were later imposed for some violation of its terms, the conviction would again be subject to the more relaxed balancing test, and it would remain so for twenty additional years. Thus, up to fifty years after the conviction was entered, it might still be subject to the more relaxed balancing test.

This court should reject any interpretation in which a conviction might, over time, "jump back and forth" between the relaxed balancing test and the demanding one. It should also reject any interpretation under which a conviction can be subject to the more relaxed balancing test long after the maximum possible sentence plus ten years has passed. Rather, it should adopt a construction that is fair, simple, and consistent: once the clock starts running for a particular conviction, it cannot be reset to zero. And after ten years have passed, it is forever subject to the more demanding balancing test.

Even if this court concludes that the plain language of Rule 609 is ambiguous, the rule's history contradicts the trial court's interpretation. New Hampshire Rule of Evidence 609 was modelled after the corresponding rule in the Federal Rules of Evidence, which were enacted by Congress, and in all relevant respects it is identical to the corresponding federal rule.

The United States House Judiciary Committee originally considered a different version of Rule 609. Under that version, a prior conviction was not admissible "if a period of more than ten years has elapsed since the date of the release of the witness from confinement imposed for his most recent conviction, or the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction, whichever is the later date." H.R. Rep. No. 93-650, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 7075, 7085 and in Fed. R. Ev. 609 advisory committee's note on 1974 enactment. "Under this formulation, a witness's entire past record of criminal convictions could be used for impeachment . . . if the witness had been most recently released from confinement, or the period of his parole or probation had expired, within ten years of the conviction." Id. Thus, under that version, a particular conviction could, over time, "jump back and forth" between admissibility and inadmissibility.

The Committee, however, rejected that proposal. Instead, it "provide[d] that upon the expiration of ten years from the date of a conviction of a witness, or of his release from confinement for that offense, that conviction may no longer be used for impeachment." Id. "The Committee was of the view that after ten years following a person's release from confinement (or from the date of his conviction) the probative value of the conviction with respect to that person's credibility diminished to a point where it should no longer be admissible." Id.

As this history demonstrates, the drafters of the rule intended that, for each conviction, once a triggering event (either "conviction" without incarceration or "release") starts the clock, subsequent events cannot reset the clock to zero. And once the clock strikes "10 years," the provisions of Rule 609(b) forever govern its admissibility. If the witness is subsequently convicted of a new offense, he can, of course, be impeached with the new conviction, assuming other requirements are satisfied. But a new conviction does not retroactively revive the admissibility of the old conviction.

A federal district court addressed this issue, under the federal rule, in United States v. DeLeon, 322 F. Supp. 3d 1189 (D.N.M. 2018). There, the government moved to preclude the defendants from impeaching its witness with prior convictions for involuntary manslaughter and second-

degree murder, which were entered over thirty years prior to trial. Id. at 1191. One defendant objected, asserting that the witness was released on parole, which was revoked, and that he was released again only seven years prior to trial. Id. at 1192, n.2.

The court concluded that, even if the defendant's assertions were correct, it was still more than ten years since the witness's release on those convictions. Id. "[W]hen determining whether '10 years have passed since the witness's conviction or release from confinement for it,'" the Court held, "the relevant date is when the witness was released from prison, even if the witness was released on probation or parole and even if that probation or parole is subsequently revoked." Id. "[A] release from confinement," the court noted, "occurs when a witness is released on probation or parole." Id. "Violating the terms of probation or parole can return a witness to prison, but," the court reasoned, "it does not mean that the witness was never released, nor does it alter whether 'ten years have passed since' that release." Id. "Additionally," the court observed, "rule 609(b) refers to release from confinement for a particular conviction, but, when a witness is released on probation or parole, that witness acquires a constitutionally protected liberty interest, and any additional imprisonment is imposed

for violating the terms of probation or parole, and not for the original crime." Id.

The court ruled that its interpretation "has a sound textual basis," but added that the rule's "legislative history bolsters those textual arguments," outlining the legislative history set forth above. Id. That history, the court observed, shows that "Congress amended th[e original] version of rule 609 so that renewed imprisonment following a witness' release from confinement does not alter whether rule 609(b) applies to a witness' conviction." Id.

B. Even if, in some circumstances, the imposition of a suspended sentence constitutes "confinement for" the original conviction, that was not the case here.

Even if this Court concludes that the imposition of a suspended sentence can constitute "confinement for" the original conviction, it should not adopt that as a blanket rule. Rather, it should adopt the more nuanced, case-by-case approach followed by the Ninth Circuit.

In United States v. McClintock, 748 F.2d 1278 (9th Cir. 1984), the defendant was convicted of mail fraud in 1967, stemming from his activities as a professional fundraiser for a charitable organization. Id. at 1287. He was placed on probation for five years, with a condition that he refrain from professional charitable fundraising. Id. His probation was revoked in 1972 for violating that condition. Id. He was

sentenced to a term of three years and released on parole in 1973. Id. at 1287–88. He was later charged with multiple counts of fraud arising from his sale of gemstones, and, at his 1982 trial, the court permitted the government to impeach him with his 1967 mail-fraud conviction, finding that the conviction "was not more than ten years old within the meaning of [the federal rule]." Id. at 1281, 1288.

On appeal, the Ninth Circuit held that "confinement imposed for substantive probation violations that implicate the original dishonest activity is 'confinement' for the original offense within the meaning of 609(b)." Id. at 1289. "[C]onfinement based on . . . violations not implicating the original dishonesty," it held, are subject to Rule 609's more demanding balancing test. Id. Because the defendant's probation was revoked for conduct "that directly paralleled his original crime" — engaging in professional charitable fund raising — the Court held that it was not subject to Rule 609's more demanding balancing test. Id. at 1288.

In United States v. Wallace, 848 F.2d 1464 (9th Cir. 1988), the defendant was convicted of heroin trafficking in 1970. Id. at 1472. She was sentenced to prison and released on parole. Id. In 1977, she was convicted for perjury, which resulted in the revocation of her parole. Id. She was released again by 1984. Id. at 1466. She was later charged with possessing heroin with intent to distribute. Id. At trial, which

took place more than 10 years after her initial release but less than 10 years after her most recent release, the court permitted the State to impeach her with both the heroin-trafficking and the perjury convictions, finding that the 1977 parole revocation for perjury constituted "confinement imposed for the original [heroin-trafficking] conviction," under McClintock. Id. at 1472. On appeal, the defendant challenged the admission of only the heroin-trafficking conviction, not the perjury conviction. Id. at 1472 & n.11.

The Ninth Circuit reversed. Id. at 1472–73. It noted that, in McClintock, it "conspicuously declined to endorse a broad rule that probation or parole revocations always constitute confinement for the original conviction for Rule 609(b) purposes." Id. at 1472. Rather, it "relied on the fact that" McClintock's "probation was revoked for [a] violation . . . that directly paralleled his original crime." Id. "Because Wallace's perjury was not substantively related or parallel to the original heroin conviction," the court held, "the revocation of [her] parole based on the perjury charge does not constitute confinement for the original heroin conviction" under Rule 609(b). Id. at 1472–73.

Here, Paul's suspended sentences were not imposed for conduct that was "substantively related or parallel to" his original AFSA and attempted-escape convictions. Rather, they were imposed for possession of a deadly weapon and failure to

register as a sexual offender. Even if Paul's failure to register as a sexual offender can be said to have been related to his AFSA conviction, which was not named at trial, that conduct was still not related to the attempted-escape conviction, which was named. Thus, the court erred by treating both convictions as falling within Rule 609(a) and by failing to apply Rule 609(b)'s more demanding balancing test.

C. The court's error prejudiced Paul.

Admission of the prior convictions prejudiced Paul. Particularly given that A.Y. claimed little recollection of the events in question, Paul's credibility was crucial.

Had the court recognized that the convictions were subject to Rule 609(b)'s more demanding balancing test, it almost certainly would have excluded them. Had the convictions been excluded, the jury would not have been informed that Paul had any criminal record.[1]

Particularly regarding the attempted-escape conviction, the State maximized the prejudicial effect in its cross-

[1] Paul was charged with being a felon in possession of a deadly weapon. A 8. Prior to jury selection, however, he stipulated that he was a felon. JS 12–15. By agreement of the parties, the court informed the jury panel, and later the jury, only that he was charged with "being in possession of a dangerous weapon when he was not legally permitted to be in possession of such a weapon." JS 15–16; see also T1 14 (informing the jury that the indictment alleged that Paul possessed a deadly weapon "when he was not lawfully permitted to do so."); T4 585 ("[Paul] is charged with the crime of being in possession of a deadly weapon, without the legal right to possess a deadly weapon"). In its final jury instructions, the court told the jury that the only two elements of the crime were that Paul "had a deadly weapon under his custody or control" and that he "did so knowingly." T4 586.

examination of Paul. It began by impeaching Paul with his prior inconsistent statements to the police, T4 513–15, 520–23, 525–29. It then elicited his testimony that he subsequently "retained a couple of attorneys," "g[o]t a copy of [his] discovery," and "reviewed that discovery and made sure [he] w[as] familiar with everything about this case." T4 529–30. After eliciting Paul's testimony that he "d[id]n't want to go prison," the State elicited his testimony that he had previously been convicted of attempted escape, eliciting affirmative answers to the questions: "You were in official custody?" and "With a purpose to escape from custody, you ran across the parking lot of a courthouse?". T4 530–31.

The crime of attempted escape does not inherently involve deception. See N.H. R. Ev. 609(a)(2) (recognizing that crimes involving "a dishonest act or false statement" are more probative of a witness's credibility). Here, however, the prosecutor presented Paul's attempted escape conviction as showing that he would do anything to avoid going to prison, which, in turn, demonstrated that he was particularly predisposed to lie about the circumstances of the stabbing.

In this sense, admission of the convictions made it far more likely that the jury would discredit Paul's version of the events. That, in turn, made conviction more likely in two respects. First, and most obviously, Paul's testimony was the only testimony that he acted in self-defense. Rejection of that

testimony made it more likely that the jury would reject the defense of self-defense, which would have applied to all the charges.

Second, even if one assumes that the jury would have rejected self-defense in any event, to find Paul guilty of attempted murder, it still would have had to find that he intended to kill A.Y., not merely to injure her. See T4 582–84 (defining attempted murder). Had Paul's prior convictions been correctly excluded, the jury may have found that, even if the technical requirements of self-defense were not all satisfied, the evidence still did not prove, beyond a reasonable doubt, that Paul intended to kill A.Y.

II. THE COURT MAY HAVE ERRED BY FAILING TO DISCLOSE RECORDS SUBMITTED FOR IN CAMERA REVIEW.

In November 2019, Paul filed a motion requesting that the court review, in camera, [redacted] A 11. In December 2019, the court (Delker, J.) granted that motion. A 20. In February 2020, the court (Honigberg, J.) ordered the disclosure of [redacted], apparently withholding other portions. AD 4.

In April 2020, Paul filed a motion requesting that the court review, in camera, [redacted] A 33. In May 2020, Paul filed a supplement to his motion, noting that [redacted] A 42. Later in May 2020, the court issued an order granting Paul's motion, and disclosing [redacted] AD 6; A 48. In June 2020, Paul submitted [redacted] A 51. In March 2021, the court issued an order [redacted] ordering the

disclosure of [redacted] apparently withholding[2] other portions. AD 7.

In May 2021, the parties filed a joint motion requesting that the court review, in camera, [redacted] A 84. The court granted the motion. A 84. In June 2021, the court issued an order [redacted] ordering the disclosure of [redacted], apparently withholding other portions. AD 9.

By failing disclose some of the records, the court may have erred. Thus, Paul respectfully requests that this Court review the material provided to the court for in camera review, to determine whether the court erred in failing to disclose any material.

Part I, Article 15 of the New Hampshire Constitution protects a criminal defendant's rights to due process, compulsory process, all proofs favorable and confrontation. The Fourteenth Amendment to the United States Constitution protects the right to due process, and the Sixth and Fourteenth Amendments protect the right to compulsory process and confrontation. These provisions require that, following in camera review of confidential records, a trial

[2] Undersigned counsel has reviewed the disclosed records. [redacted]

court must disclose records that are relevant and material. State v. Girard, 173 N.H. 619, 628 (2020).

Evidence is relevant if it has any tendency to alter the probability of a fact of consequence. Id. (quoting New Hampshire Rule of Evidence 401). Evidence is material if "there is a reasonable probability that disclosure of the evidence will produce," or would have produced, "a different result in the proceeding." Id. at 628–29. A defendant "need not show that he more likely than not would have been acquitted had the new evidence been admitted." Wearry v. Cain, 577 U.S. 385, 392 (2016) (quotation omitted). "He must only show that the new evidence is sufficient to undermine confidence in the verdict." Id. (quotation omitted); accord Girard, 173 N.H. at 629.

Issues of constitutional law are reviewed de novo. State v. Lopez, 174 N.H. 201, 206 (2021); see also State v. Shepherd, 159 N.H. 163, 171–73 (2009) (determining de novo that undisclosed evidence was material); State v. Laurie, 139 N.H. 325, 332–33 (1995) (same); cf. State v. Newton, ___ N.H. ___ (July 8, 2022) (in the context of ineffective-assistance-of-counsel claims, this Court reviews de novo "the ultimate determination" of whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different.").

If this Court concludes that the trial court erred by failing to disclose any records, it should order a new trial. As the United State Supreme Court has observed, once a court determines that relevant, material evidence was withheld from the defense, "there is no need for further harmless-error review." Kyles v. Whitley, 514 U.S. 419, 435 (1995). The failure to disclose material evidence, by definition, "c[an] not be treated as harmless, since 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,' necessarily entails the conclusion that the suppression must have had 'substantial and injurious effect or influence in determining the jury's verdict.'" Id. The fact that New Hampshire courts, unlike their federal counterparts, require the State to prove harmlessness beyond a reasonable doubt only further renders a harmlessness inquiry, following a finding of materiality, redundant and unnecessary.

CONCLUSION

WHEREFORE, Charles Paul respectfully requests that this Court reverse.

Undersigned counsel requests 15 minutes oral argument.

The appealed decisions were in writing and are included in a separate appendix containing no other documents.

This brief complies with the applicable word limitation and contains 6,483 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to Audriana Mekula-Hanson, counsel for the State, through the electronic filing system's electronic service.

/s/ Thomas Barnard
Thomas Barnard

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