THE SUPREME COURT OF NEW HAMPSHIRE

Belknap
Case No. 2023-0664
Citation: State v. Stewart, 2026 N.H. 14

THE STATE OF NEW HAMPSHIRE

v.

CHRISTOPHER STEWART

Argued: September 30, 2025
Opinion Issued: April 7, 2026

John M. Formella, attorney general, and Anthony J. Galdieri, solicitor general (Sam M. Gonyea, assistant attorney general, on the brief and orally), for the State.

Carl Swenson, assistant appellate defender, of Concord, on the brief and orally, for the defendant.

DONOVAN, J.

[¶1] The defendant, Christopher Stewart, appeals his conviction, following a jury trial in the Superior Court (Leonard, J.), on one count of criminal threatening. See RSA 631:4, I(e) (2016). He argues that the trial court erred by denying his motion to preclude admission of his therapist-patient

communications into evidence and his motion to dismiss based upon the insufficiency of the evidence. We conclude that the State showed an essential need for the defendant's communications that justified the court's piercing of the therapist-patient privilege. We further conclude that the evidence sufficed to prove, beyond a reasonable doubt, that the defendant acted with the requisite recklessness for a criminal threatening conviction. Accordingly, we affirm.

I. Facts

[¶2] The jury could have found the following facts. The defendant was a patient at a community mental health center. The team assigned to his care included a nurse, a case manager, and a therapist, as well as a career counselor. Jessica McDonald, the defendant's career counselor, helped him enroll in classes at the University of New Hampshire at Manchester (UNH Manchester). Daniel Ventola, a licensed clinical social worker, supervised McDonald.

[¶3] In September 2022, UNH Manchester informed McDonald that the University had dismissed the defendant from all classes and that security would remove him if he returned to campus. McDonald relayed this information to the defendant when he came to the center for his noon therapy session. The defendant became distraught and said he would still attend that evening's class.

[¶4] Shortly thereafter, the defendant met with Ventola and told him that, notwithstanding his dismissal, he would still go to UNH Manchester that evening. In subsequent text messages with McDonald, the defendant restated his plan to attend that evening's class. McDonald repeatedly told him not to do so, citing his lack of funding for tuition. Later that afternoon, she called him and implored him not to go to class, saying she did not want him to get in trouble. The defendant said something to the effect of, "[W]hat is it going to take me doing a mass shooting for me to get what I want?"

[¶5] After McDonald said she would have to "report" this comment, the defendant replied something to the effect of, "[I]t was a figure of speech." After the call, the defendant texted McDonald: "It[']s the right thing to do. Even if it means going to jail, it[']s the right thing to do." He then continued to text with McDonald about his desire to attend class, stating that he would apply for loans to pay the tuition, if needed.

[¶6] While still messaging with the defendant, McDonald shared his comments with Ventola and the defendant's treatment team. Pursuant to the center's policy requiring staff to report a patient's dangerous statements to law enforcement or to the target of the threat, Ventola phoned the Laconia police. After speaking directly with McDonald, the Laconia police notified UNH

Manchester security and the Manchester police. UNH security coordinated an effort to lock and patrol the Manchester campus's front door that evening.

[¶7] A Laconia police officer also phoned the defendant, who then texted McDonald asking why the police were calling him. The defendant sent a text to McDonald stating, "[T]he cops are involved already, so my hand feels pretty forced."

[¶8] That evening, police apprehended the defendant at the Manchester rooming house where he was staying. A grand jury subsequently indicted the defendant on one count of criminal threatening, based on the allegation that he threatened to commit a mass shooting at UNH Manchester and "acted in reckless disregard of causing evacuation of a building or place of assembly, serious public inconvenience, fear, or terror." See RSA 631:4, I(e).

[¶9] Before trial, the defendant filed a motion in limine seeking to preclude testimony from McDonald and Ventola regarding the defendant's communications with McDonald. Following a hearing, the trial court issued an order denying the defendant's motion. Noting that the parties agreed that the defendant's statements to McDonald "were made in the course of treatment and therefore privileged," the trial court framed the issue as "whether the Court should pierce this privilege and permit McDonald to testify." The court ruled that the State could pierce the therapist-patient privilege, concluding, among other things, that the State had established an "essential need" for the communications.

[¶10] At trial, the State's case consisted of testimony by McDonald; Ventola; the Laconia police officer with whom Ventola, McDonald, and the defendant spoke; and a UNH Manchester security officer. The State also called two Manchester police officers who testified regarding the defendant's apprehension at the rooming house and a rifle and supplies seized from his car and bedroom. After the State rested, the defendant moved to dismiss the criminal threatening charge for insufficiency of evidence. He argued that "[t]he evidence was that he asked a rhetorical question," rather than "threaten[ing] to commit a crime of violence," and that the State had failed to prove that he "acted in reckless disregard of causing evacuation of a building or place of assembly or serious public inconvenience, fear or terror." The trial court denied the defendant's motion, concluding that a reasonable jury could find the defendant guilty. The jury subsequently convicted him of criminal threatening. This appeal followed.

II. Analysis

A. Defendant's Motion in Limine

[¶11] The defendant first contends that the trial court erred in denying his motion in limine based upon its conclusion that the State had demonstrated an "essential need" to pierce the therapist-patient privilege. We review a trial court's decisions on the management of discovery and admissibility of evidence for an unsustainable exercise of discretion. Desclos v. S. N.H. Med. Ctr., 153 N.H. 607, 610 (2006). The defendant bears the burden of demonstrating that the trial court's ruling was clearly untenable or unreasonable to the prejudice of his case. State v. Clark, 174 N.H. 586, 589 (2021). We consider whether the record establishes a sufficient objective basis for the discretionary decision made. Id.

[¶12] We review questions of law, including the interpretation of statutory privileges and rules of evidence, de novo. State v. Willis, 165 N.H. 206, 211 (2013). Because the trial court ruled on the admissibility of the challenged evidence before trial, we consider only the evidence presented at the pretrial hearing. State v. Nightingale, 160 N.H. 569, 573 (2010).

[¶13] RSA 330-A:32 (2025) provides that "confidential relations and communications between any person licensed under provisions of this chapter and such licensee's client are placed on the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communications to be disclosed," unless disclosure is "required by a court order" or authorized by provisions of federal law not applicable here. In addition, a patient's confidential communications with "any person working under the supervision of a person licensed under this chapter which are necessary and customary for diagnosis and treatment are privileged to the same extent as" communications with a licensed therapist. RSA 330-A:32.

[¶14] In ruling on the defendant's pretrial motion in limine, the trial court noted that the State did not challenge the defendant's assertion that the therapist-patient privilege applied to his communications with McDonald, leading the court to assume the privilege's applicability. The State argues for the first time on appeal, however, that the therapist-patient privilege in RSA 330-A:32 does not apply to the defendant's communications with McDonald. The State contends that McDonald's testimony at trial revealed that she was not the defendant's therapist and did not communicate with him to provide a diagnosis or treatment. The defendant counters that this argument is not preserved for appeal because the State did not present it to the trial court. We need not decide this issue because, even assuming, as the defendant contends, that this issue is not preserved for appeal and that the therapist-patient

privilege does apply, we uphold the trial court's ruling that "essential need" justified piercing the privilege.

[¶15] On appeal, the defendant argues that under the "essential need" test, no "compelling justification" warranted disclosure here, because the State's prosecution interest does not outweigh a defendant's right to privacy. See In re Grand Jury Subpoena (Medical Records of Payne), 150 N.H. 436, 442 (2004). The defendant also asserts that piercing a defendant's therapist-patient privilege undermines public safety because it deters people from pursuing mental health treatment.

[¶16] The State contends that after a therapist has fulfilled her duty to warn, particularly regarding a mass shooting threat, "the cost-benefit scales favor disclosure." (Quotation omitted.) According to the State, the public interest in investigating a threat of large-scale violence is weighty; meanwhile, the confidentiality has already been lifted, undermining the privilege.

[¶17] A court may issue an order to pierce the therapist-patient privilege if the party requesting the privileged records establishes an "essential need" for them. Desclos, 153 N.H. at 615-16. For "essential need" to exist, the court must find that: (1) the targeted information is unavailable from another source; and (2) a "compelling justification" warrants its disclosure. Medical Records of Payne, 150 N.H. at 442. Here, the parties agree that the defendant made the threats in question only to McDonald, thus preventing the State from seeking this information from another source. Therefore, their dispute turns on the "essential need" test's second prong. See id.

[¶18] A compelling justification exists "when a sufficiently important public interest is at stake." Desclos, 153 N.H. at 618. The court must find that this interest countervails the societal benefit that the privilege advances. See In re Search Warrant (Med. Records of C.T.), 160 N.H. 214, 225 (2010); Desclos, 153 N.H. at 610.

[¶19] Within the context of the "essential need" test, we have held that investigating and prosecuting felonies may be a compelling justification that supports piercing the physician-patient privilege.[1] See Medical Records of Payne, 150 N.H. at 442. Similarly, in State v. Kupchun, 117 N.H. 412, 415-16 (1977), we found safety to be a relevant public interest and thereby allowed the piercing of the physician-patient and "psychologist-client" privileges at a criminal commitment hearing held to decide whether the defendant posed a danger to society. In In re Kathleen M., 126 N.H. 379, 385 (1985), we

[1] The pertinent statutes suggest that the physician-patient and therapist-patient privileges are applied similarly. See RSA 329:26 (2025) (equating physician-patient and attorney-client privileges); RSA 330-A:32 (2019) (equating therapist-patient and attorney-client privileges).

rejected a per se exception from the physician-patient privilege for involuntary commitment proceedings, but nonetheless reasoned that:

> the circumstances in individual cases may compel such an exemption. . . . [T]he testimony of a psychiatrist relating to his or her confidential relationship or communications with a patient may be "essential" where the psychiatrist feels that the patient is mentally ill and that this condition creates a potentially serious likelihood of danger to himself or others, and where the psychiatrist's testimony is the only available source by which to prove these elements.

(Emphasis added.)

[¶20] On similar public policy grounds, we have acknowledged an exception to the spousal privilege to allow testimony by one spouse about the other spouse's child abuse. State v. Pelletier, 149 N.H. 243, 248-49 (2003). We reasoned that "'[c]hild abuse is a horrendous crime'" and that barring "'a properly outraged spouse with knowledge'" from testifying against the perpetrator would not advance the privilege's purpose to promote marital trust. Id. (quoting United States v. Bahe, 128 F.3d 1440, 1446 (10th Cir. 1997)).

[¶21] As the defendant argues, we have indicated that the prosecution of felonies is not, standing alone, a per se compelling justification within the "essential need" framework. See Med. Records of C.T., 160 N.H. at 225-26. Here, however, two additional considerations weigh in favor of disclosure. First, a threatened mass shooting poses a particularly stark risk of "terror or inconvenience." See RSA 631:4(e). The State's interest in investigating a threat of mass violence and preventing it from being carried out implicates public safety on a broad scale. So too does the State's interest in deterring similar threats in the future. Our precedents counsel that these strong public safety interests support piercing the statutory privilege. See Medical Records of Payne, 150 N.H. at 442; Pelletier, 149 N.H. at 248-49; In re Kathleen M., 126 N.H. at 385; Kupchun, 117 N.H. at 415-16.

[¶22] Second, rather than merely proving an element of the charged crime, the defendant's threatening communications to McDonald formed the entire substance of the offense to be tried. This case is analogous to Kupchun, in which the State argued that it needed access to the defendant's medical records to prove whether he posed a danger if released at a commitment hearing. Kupchun, 117 N.H. at 414. The trial court granted the State's request, and we affirmed, explaining that without access to these records, "the [S]tate would be virtually deprived of the opportunity to present to the superior court the evidence it must have to properly decide the issue of the 'defendant's dangerousness or mental condition.'" Id. at 416. Similarly, here the defendant's communications were pivotal to his prosecution. Although "[i]n

some cases, the trial court may decide that disclosure of privileged information is not warranted even though the prosecution will be unable to prove its case," Medical Records of Payne, 150 N.H. at 442, here the court could fairly determine that the centrality of the communications to the State's case supported admitting them.

[¶23] Together, these considerations present a "compelling justification" that countervails the defendant's privacy interest. By the time of the defendant's prosecution, McDonald's disclosures to police had already undermined his privacy interest. On these facts, the keen public interest in deterring threats of mass violence countervails the public good — the promotion of mental health treatment — that the privilege advances. See Med. Records of C.T., 160 N.H. at 225; Desclos, 153 N.H. at 610; see also Jaffee v. Redmond, 518 U.S. 1, 11 (1996) (discussing public interest in effective psychotherapy). Given the terror and public inconvenience a threatened mass shooting risks, the "mental health benefits" of privileging such communications "pale in comparison to the normally predominant principle of utilizing all rational means for ascertaining truth." Cf. In re Grand Jury Proceedings (Gregory P. Violette), 183 F.3d 71, 77 (1st Cir. 1999) (quotation omitted) (discussing crime-fraud exception to federal psychotherapist-patient privilege). Accordingly, we conclude that the State established an "essential need" to pierce the defendant's therapist-patient privilege, and we need not address the trial court's conclusion that the privilege in RSA 330-A:32 includes a "dangerous patient" exception.

B. Sufficiency of the Evidence

[¶24] The defendant also argues that the evidence was insufficient to prove that he was aware of and disregarded the risk that his communications with McDonald would cause the kind of fear or terror that would lead to an evacuation of a building or serious public inconvenience. We review a challenge to the sufficiency of the evidence, which presents a question of law, de novo. State v. Chalpin, 176 N.H. 680, 693 (2024), 2024 N.H. 36, ¶35. The defendant bears the burden of persuasion in a sufficiency of evidence challenge. Id. Our inquiry is "whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, considering all the evidence and all reasonable inferences therefrom in the light most favorable to the State." State v. Saintil-Brown, 172 N.H. 110, 117 (2019). We assess "each evidentiary item in the context of all the evidence, and not in isolation." Id. The jury "determine[s] the weight and credence to be given the evidence at trial" and may "reject any inferences urged by the defendant." State v. Evans, 134 N.H. 378, 384 (1991).

[¶25] The State's evidence regarding the defendant's recklessness when he made the statements in question is solely circumstantial. When the evidence as to one or more elements of the charged offense is solely

circumstantial, a defendant challenging sufficiency must establish that the evidence does not exclude all reasonable conclusions except guilt. State v. Higgins, 176 N.H. 579, 584 (2024), 2024 N.H. 24, ¶13. The proper analysis is not whether every possible conclusion consistent with innocence has been excluded, but, rather, whether all reasonable conclusions based upon the evidence have been excluded. Id.

[¶26] "A person is guilty of criminal threatening when . . . [t]he person threatens to commit any crime of violence . . . with a purpose to cause evacuation of a building . . . or otherwise to cause serious public inconvenience, or in reckless disregard of causing such fear, terror or inconvenience . . . ." RSA 631:4, I(e) (emphasis added). "A person acts recklessly with respect to a material element of an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct." RSA 626:2, II(c) (2016). A defendant's recklessness does not depend on the actual harm that occurred, nor on whether the defendant anticipated the precise risk that resulted. State v. Hull, 149 N.H. 706, 713 (2003). To convict the defendant of the charged offense, the jury had to find, beyond a reasonable doubt, that: (1) the defendant's comments to McDonald amounted to a threat to commit a violent crime; and (2) he made these comments "in reckless disregard of causing" a building evacuation or similar fear, terror, or "serious public inconvenience." See RSA 631:4, I(e).

[¶27] The defendant contends that the evidence did not exclude the conclusion that he was unaware that his comments to McDonald would be shared with the police or, if they were, that they could incite "serious public inconvenience or such fear or terror." According to the defendant, the State failed to prove that he knew of the mental health center's policy to disclose patients' dangerous statements to authorities. The defendant also argues that he made his comments privately to McDonald, who knew about his mental health history, and not in a public manner.

[¶28] With respect to the defendant's first argument, the State counters that, because the mental health center had informed him of its disclosure policy, the defendant was aware that his initial "mass shooting" threat would be reported to the police. Ventola testified at trial that the center followed a practice of reviewing its disclosure policy with new patients; the policy required staff to notify police of patients' dangerous statements. Our mandate to draw "all reasonable inferences . . . in the light most favorable to the State," Saintil-Brown, 172 N.H. at 117, compels us to assume that staff had informed the defendant of the policy, pursuant to the center's standard practice. Thus, the jury could fairly infer that the defendant was "aware of and consciously disregard[ed]" the risk that his comments would be conveyed to the police. RSA 626:2, II(c).

[¶29] The defendant's alternative argument — that even if he knew McDonald would likely report his statements to the police, "it is reasonable to conclude that he was unaware that his statement would cause serious public inconvenience or such fear or terror" — is unpersuasive. The defendant submits that he quickly dismissed his "mass shooting" comment as "a figure of speech" and "moved on." The jury was free to determine the weight of each piece of evidence, however, and "to reject any inferences urged by the defendant." Evans, 134 N.H. at 384. Thus, the jury could — as the State points out — reasonably conclude that the defendant's "mass shooting" comment was a threat. It could also conclude that he was reckless as to a building evacuation or other "serious public inconvenience," due to the common understanding that threatened mass shootings are taken seriously. See RSA 631:4, I(e). Having found that the jury could reasonably construe the defendant's "mass shooting" comment as a threat and conclude that he acted recklessly when making it, we need not analyze the defendant's subsequent communications with McDonald.

III. Conclusion

[¶30] In summary, we conclude that the State demonstrated an essential need for the defendant's communications with McDonald that justified piercing his therapist-patient privilege. We further conclude that the evidence was sufficient to find, beyond a reasonable doubt, that the defendant acted "in reckless disregard of causing . . . fear, terror or [public] inconvenience" when he communicated with McDonald. See RSA 631:4, I(e). Accordingly, we affirm.

Affirmed.

COUNTWAY, J., and NADEAU, J., retired superior court chief justice, specially assigned under RSA 490:3, II, concurred; GOULD, J., with whom MACDONALD, C.J., joined, concurred specially.

GOULD, J., with whom MACDONALD, C.J., joins, concurring specially.

[¶31] I concur in the judgment of the majority because it applies the court's existing case law, and neither party has asked us to reconsider our previous decisions. I write separately, however, because I am troubled by the very idea of piercing privileges on "essential need" grounds. My misgivings are particularly acute in cases like this one that allow the piercing of a statutory privilege where the legislature did not include an exception for essential need in the statute. I am also concerned that the court's decisional law has grown to undermine the legislatively-determined purpose of privileges. Embedded in privileges are policy decisions made by the legislature. Our decisions effectively undermine these policy decisions. For example, because the patient cannot know in advance whether a New Hampshire court will find an essential or compelling need for a privileged record, he or she can have no assurance that

what is communicated to a therapist or physician will remain confidential. This has a vitiating effect on the very purpose of the privileges which is to encourage candor by the patient. See State v. Doyle, 176 N.H. 594, 597 (2024), 2024 N.H. 25, ¶11. As discussed below, we have likewise introduced an element of uncertainty into the client's reliance upon the attorney-client privilege by suggesting that that privilege is also subject to piercing.

[¶32] The defendant in this case made a statement to an employee of a community mental health center where he was a patient. Although the State argues on appeal that the privilege does not apply to the defendant's communications with the employee, the majority assumes that it does and that the statement is privileged. It then holds that a "compelling justification" outweighs the defendant's statutory privacy interests and upholds the trial court's decision piercing the privilege. The practical result of our decision is that the state of the law is such that a patient may be convicted of a crime based solely upon his privileged statement to his psychotherapist. What has brought us to this point is the court's adoption of the rule half a century ago that privileges may be "pierced" on compelling or essential need grounds. The legislature did not include an essential or compelling need exception in the statute creating the psychotherapist-patient privilege. See RSA 330-A:32 (2025). Today's decision extends the already-lengthy line of cases using this extra-statutory exception to deprive patients of the protection the legislature gave them.

[¶33] It is familiar law that the courts will not add words to a statute that the legislature did not choose to include. See In re Search Warrant (Med. Records of C.T.), 160 N.H. 214, 220 (2010). Nor is it within our authority to supplement or temper a statutory scheme to fill a perceived gap in policy, no matter how compelling we may find that outcome. See Appeal of New England Police Benevolent Ass'n, 171 N.H. 490, 497 (2018) (noting that the role of this court is "not to make laws, but to interpret them," and that "any public policy arguments relevant to the wisdom of the statutory scheme and its consequences should be addressed to the General Court" (quotation omitted)). A survey of our privilege-piercing decisions establishes that we have strayed substantially from these principles.

[¶34] This court's compelling or essential need rule has its origin in State v. Farrow, 116 N.H. 731 (1976). Farrow was a short per curiam opinion in which the court was addressing an interlocutory question transferred by the trial court in the midst of a murder trial. Id. at 732. We were asked to decide the extent to which certain doctor-patient and psychologist-patient privileges of certain witnesses for the State "must give way to" a criminal defendant's Sixth Amendment right to confront witnesses. Id.; see also RSA 329:26 (2025) (current physician-patient privilege); RSA 330-A:32 (current psychotherapist-patient privilege). After observing that the law "does not give the defendant a right to the blanket use of privileged information," we held that "the

defendant's right is limited to the use of such materials as are found to be essential and reasonably necessary to permit counsel adequately to cross-examine for the purpose of showing unreliability or bias." Id. at 733. Thus, Farrow did not use the terms "essential" and "necessary" as justifications for piercing the privileges but rather as limitations on the extent to which the privileges must yield to a criminal defendant's Sixth Amendment rights. But cf. Opinion of the Justices, 117 N.H. 386, 388 (1977) (citing Farrow for the proposition that "[e]ven a statutory privilege is not fixed and unbending and must yield to countervailing considerations such as the rights to counsel and confrontation in a criminal case").

[¶35] We next cited Farrow in State v. Kupchun, 117 N.H. 412 (1977). The defendant in that case had pleaded not guilty by reason of insanity to criminal charges and was committed to the state hospital. Kupchun, 117 N.H. at 414. In preparation for a hearing to determine whether it would still be dangerous for the defendant to be released, at which the State bore the burden of proof, the State sought access to the defendant's state hospital medical records. Id. The trial court granted the State's request for access and ordered that the physicians and psychologists at the state hospital "'may disclose all information which may have any bearing on this defendant's dangerousness or mental condition.'" Id.

[¶36] On appeal, we were asked to determine whether the trial court's order was barred by the then-applicable statutory physician-patient and psychologist-client privileges. See id. at 415. We began our analysis by attributing to Farrow the proposition that "the privileges in question are not absolute and must yield when disclosure of the information concerned is considered essential." Id. at 415. Kupchun overstated Farrow which, as noted above, does not stand for the broad proposition that the privileges may be set aside if the information sought is "considered essential."

[¶37] While its misreading of Farrow was to have insupportable consequences years later, Kupchun was actually grounded in principles of statutory interpretation. See id. at 415-16. Specifically, we reasoned that interpreting the statutory privileges at issue to bar access to the defendant's records for the purposes sought by the State would interfere with the superior court's ability to perform its statutorily mandated duties "to commit to the state hospital a defendant who has pleaded guilty by reason of insanity if it will be dangerous for him to go at large," to monitor "[h]is stay therein," and to decide "when to release a criminally insane person so confined." Id. at 415 (citing RSA 651:9 (repealed 1985), :9-a; RSA 135:28-a (repealed 1986), :30-a (repealed 1986)). We concluded that if the statutory physician-patient and psychologist-client privileges "were interpreted to prevent the ordered disclosures, the practical result could be that commitments under RSA 651:9 (Supp. 1975) or RSA 651:9-a (Supp. 1975) would be for a duration of two years only" and held that "such a result was not intended by the legislature." Id. at 416. Thus, in

Kupchun, we sought to reconcile two statutory schemes in tension with one another.

[¶38] After Kupchun, however, the essential need test became untethered from our duty to discern and implement the legislature's intent and instead became a de facto judicial exception to the statutory privilege. Subsequent cases rotely cited Kupchun for the proposition that the physician-patient privilege "will yield" to "sufficiently compelling countervailing considerations," In re Kathleen M., 126 N.H. 379, 382 (1985), or an "essential" need for disclosure, State v. Elwell, 132 N.H. 599, 605 (1989), superseded by statute as stated in Desclos v. S. N. H. Med. Ctr., 153 N.H. 607, 613 (2006). We then applied that extra-statutory exception in In re Grand Jury Subpoena (Medical Records of Payne), 150 N.H. 436, 438-39 (2004), to consolidated cases on interlocutory appeal to determine, under the circumstances in each case, whether the physician-patient privilege must "yield in favor of the State's professed need to access the defendant['s] records in order to pursue or continue criminal prosecution." Specifically, in each case the trial court had allowed the State access to the criminal defendant's "privileged medical records for the purpose of establishing the 'serious bodily injury' element of felony aggravated driving while intoxicated." Medical Records of Payne, 150 N.H. at 438.

[¶39] Citing prior cases including Elwell and In re Kathleen M., we stated:

> The physician-patient privilege may be abrogated in certain narrow circumstances when disclosure of privileged information is essential. To establish essential need, the party seeking the privileged records must prove both that the targeted information is unavailable from another source and that there is a compelling justification for its disclosure.

Id. at 442 (citations omitted). We then reached the surprising conclusion that "[t]he investigation of felonies and the search for relevant evidence constitute a compelling justification to support invasion of the privilege." Id.

[¶40] Although that holding substantially undermined a privilege established by the legislature, we engaged in no meaningful statutory interpretation. Rather, we sought to excuse the dilution of the physician-patient privilege, which the legislature created "to protect patient health by encouraging patients to fully disclose all information about their injuries or ailments to medical providers, however personal or embarrassing, for the purpose of receiving complete treatment," with the vague acknowledgement that "[t]he legislature also identifies certain conduct as criminal to protect the public welfare." Id. at 439. The codification of crimes, however, in no way approximates the statutorily "mandated duties" of the courts that Kupchun

recognized as posing a conflict with the physician-patient and therapist-client privileges. Kupchun, 117 N.H. at 415-16. We went on in Medical Records of Payne to state that "much of the information . . . shield[ed]" by the physician-patient privilege "may well be of little real consequence to society," but that if such information is "pertinent to criminal investigation and prosecution, . . . [it] may be of significant consequence to society in some circumstances." Thus, we were "reluctant to conclude that the legislature intended the privilege to operate as a cloak for criminal wrongdoing." Medical Records of Payne, 150 N.H. at 440.

[¶41] This passage illustrates the extent of the court's departure from its traditional role of construing statutory language. It is not within the court's purview to weigh how consequential the interests protected by the privilege are in comparison to the interests of society in criminal investigation and prosecution. That is a policy judgment commended exclusively to the legislature by the New Hampshire Constitution. See N.H. CONST. pt. II, art. 5; State v. Kidder, 150 N.H. 600, 604 (2004); State v. Jackson, 71 N.H. 552, 554 (1902).

[¶42] Attempts in Medical Records of Payne and subsequent cases to confine the breadth of the compelling or essential need grounds for piercing the physician-patient and psychotherapist-patient privileges in criminal prosecutions have done little to remedy the uncertainty caused by the court's interlineation by fiat of an exception to the statutes. See Medical Records of Payne, 150 N.H. at 443 ("Invasion of the privilege can never be justified just because a defendant's medical records might be the best evidence of 'serious bodily injury' or provide the least burdensome means to pursue a felony prosecution."); Med. Records of C.T., 160 N.H. at 225 (countering the State's argument that this court has "found the prosecution of felonies to present a sufficiently compelling countervailing consideration to warrant piercing the [physician-patient] privilege" with the observation that "a close examination of our precedent establishes that the privilege has yielded only when disclosure of the privileged information is essential in light of the countervailing consideration" (quotation and citation omitted)). Nor does our observation in Medical Records of Payne that "[i]n some cases, the trial court may decide that disclosure of privileged information is not warranted even though the prosecution will be unable to prove its case" provide patients with any predictability with respect to whether their communications will remain confidential or trial courts with any guidance for making such a determination. Medical Records of Payne, 150 N.H. at 444.

[¶43] In the roughly five decades since Farrow and Kupchun were decided, the compelling or essential need doctrine has been repeatedly deployed uncritically in cases presenting none of the countervailing constitutional considerations or statutory conflicts that underlay the Farrow and Kupchun decisions. Subsequent cases involving the physician-patient and

psychotherapist-patient privileges have further muddled the analysis by citing McGranahan v. Dahar, 119 N.H. 758 (1979), an attorney-client privilege case[2] that is itself troubling.

[¶44] In McGranahan, we stated in dicta that "[t]he attorney-client privilege may not be absolute when there is a compelling need for the information and no alternative source is available." Id. at 764. We relied upon Stevens v. Thurston, 112 N.H. 118 (1972), and a note in the Harvard Law Review[3] for that proposition. Id. Stevens, however, said no such thing about the privilege. That case concluded only that, as "[t]he authorities uniformly hold," where "the [attorney-client] privilege is being asserted not for the protection of the testator or his estate but for the protection of a claimant to his estate . . . all reason for assertion of the privilege disappears." Stevens, 112 N.H. at 119. Because Stevens ruled that the privilege was inapplicable in that case, it says nothing about whether the privilege is absolute where it concededly applies, much less whether it can be overcome by a compelling need.

[¶45] As the foregoing demonstrates, our jurisprudence regarding the piercing of the physician-patient and psychotherapist-patient privileges are far afield from what the legislature has actually enacted. Because the physician-patient and psychotherapist-patient privileges were statutorily created, our construction of those privileges must be grounded in established principles of statutory interpretation, which instruct us to "first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." Doyle, 176 N.H. at 597, 2024 N.H. 25, ¶9; see id. at 598, 2024 N.H. 25, ¶13 (holding that the trial court erred in concluding that RSA 135:17-a, V exempted the defendant's records from the physician-patient and psychotherapist-patient privileges when "neither the plain language of RSA 329:26 nor of RSA 330-A:32 exempts an evaluation conducted pursuant to

[2] Although we have often cited McGranahan v. Dahar, 119 N.H. 758 (1979), without elaboration in cases involving the physician-patient and psychotherapist-patient privileges, see, e.g., In re Kathleen M., 126 N.H. at 385, in Elwell, we explained our reasoning for looking to attorney-client privilege precedent in construing the physician-patient privilege by noting that because "the statute places the privilege on the same basis as that which exists by law between attorney and client . . . , a review of the legal protections afforded attorney-client relations provides guidance in determining the limits of the physician-patient privilege," Elwell, 132 N.H. at 604.

[3] The law review piece cited in McGranahan, which appears to be a student-written note, purported to "examine the inconsistencies inherent in current judicial applications of attorney-client privilege and . . . [to] construct a model for the privilege that more accurately reflects the privilege's grounding in utilitarian calculations of social costs and benefits." Note, The Attorney-Client Privilege: Fixed Rules, Balancing and Constitutional Entitlement, 91 Harv. L. Rev. 464, 464 (1977). This academic exploration of circumstances in which it may be desirable to curtail the protection of privileges is hardly authority that "the attorney-client privilege may not be absolute." McGranahan, 119 N.H. at 764.

RSA 135:17-a, V from the protections afforded to th[ose] privileged communications").

[¶46] Hence, while I acknowledge that today's decision is consistent with our prevailing decisional law, I would — in an appropriate case — revisit the soundness of our privilege-piercing doctrine.