STATE OF NEW HAMPSHIRE
SUPREME COURT

2017-0409

STATE OF NEW HAMPSHIRE

V.

DAVID BURRIS

ON INTERLOCUTORY APPEAL FROM THE ROCKINGHAM SUPERIOR COURT

BRIEF OF APPELLANT DAVID BURRIS

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QUESTION PRESENTED FOR REVIEW

Whether Part 1, Article 15 of the New Hampshire Constitution, as construed by the Supreme Court in State v. Nowell, 58 N.H. 314 (1878), requires that a public employee be afforded transactional immunity when he or she is compelled by a public employer to furnish statements under the threat of termination? (App. 5-23).[1]

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, OR REGULATIONS INVOLVED IN THE CASE

Part 1, Article 15 of the New Hampshire Constitution

> 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

[1] References to the Appendix filed herewith are denoted "App. at ____." References to the Addendum to this Brief are denoted "Addendum at ___."

> 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.

STATEMENT OF THE CASE

Procedural Posture

The Defendant is charged in the Rockingham Superior Court with three counts of Reckless Conduct in violation of RSA 631:3. (App. at 1-4). In response to the indictment, the Defendant filed a timely Motion to Dismiss arguing, inter alia, that because he had been compelled to answer questions by his public employer, he was entitled to transactional immunity pursuant to Pt. 1 Article 15 of the New Hampshire Constitution. (App. at 5-23, 33-50). Following hearing, the Trial Court (Delker, J.) denied the Defendant's Motion to Dismiss. (Addendum at 1). The Defendant subsequently moved the trial court to transfer the Question to this Court. (App. at 51). Following the trial court's execution of an interlocutory appeal statement, this appeal followed. (App. at 61).

Factual Background

For purposes of the Defendant's Motion to Dismiss at the trial court, the facts were materially undisputed. At the time of the events giving rise to the indictment, the Defendant was

employed as a Probation and Parole Officer by the New Hampshire Department of Corrections ("NH DOC"). (App. at 6). The indictments allege that on December 1, 2015, the Defendant and Appellant, David Burris, engaged in reckless conduct by discharging his weapon in the direction of a vehicle driven by a fleeing suspect. (App. at 2-4, 6).

The NH DOC undertook an investigation of the events of December 1, 2015, led by Director Colon Forbes. (App. at 6). The Defendant was ordered by the NH DOC on at least two occasions, under threat of termination, to provide a written report and to answer questions regarding the events giving rise to the indictment. (App. at 6-8). First, on or about December 4, 2015, Burris was ordered under threat of immediate termination to provide a written statement regarding the events giving rise to the indictment. (App. at 6-8). He complied with that order and provided a written report which included the following assertion and reservation of rights:

> I have been ordered by the NH Department of Corrections to participate in this interview/meeting and/or to provide this statement. I do so at this order as a condition of my employment. Failure for me to abide by this order would lead to immediate severe discipline in the form of automatic dismissal and/or job forfeiture. As such, I have no alternative but to abide by this order. It is my belief and understanding that the Chief and the

> Department requires my participation solely and exclusively for internal purposes and will not release it to any other agency. It is my further belief that any statements will not and cannot be used against me in any subsequent criminal proceedings. I authorize release of any statements to my attorney or designated union representative. I retain the right to amend or change this statement upon reflection to correct any unintended mistake without subjecting myself to a charge of untruthfulness. For any and all other purposes, I hereby reserve my constitutional right to remain silent under the Fifth and Fourteenth Amendments to the United States Constitution and Part 1, Article 15 of the New Hampshire Constitution and any other rights prescribed by law. I specifically rely on the [principles] and protections afforded to me by State v. Nowell, 58 N.H. 314 (1878). Further, I rely upon the protection afforded me under the doctrines set forth in Garrity v. New Jersey, 385 U.S. 493 (1967); Spevack v. Klein, 385 U.S. 551 (1956); State v. Litvin, 147 NH 606 (2002) and any other rights afforded under New Hampshire law and/or the New Hampshire Constitution, should this report/statement be used for any other purpose of whatsoever kind or description.

(App. at 6-8).

On or about January 14, 2016, Burris was again ordered by the NH DOC, under threat of termination, to submit to an interrogation by Director Forbes regarding the events giving rise to the indictment. (App. at 7). Burris again asserted the rights set forth above and the parties agreed that the interview would be conducted subject to Burris' assertion of the exact same

rights he asserted prior to providing his December 4, 2015 written statement. (App. at 6-8). Burris then provided a compelled statement regarding, inter alia, the events of December 1, 2015. (App. at 8).

On or about February 4, 2016, Director Forbes issued an investigative report (the "Forbes Investigation") to the Commissioner of Corrections that quoted and directly relied upon both the statement and interview provided by the Defendant. (App. at 8). A copy of Burris' written statement was included in the report to the Commissioner. (App. at 8).

The State's prosecuting entity in this case, the Strafford County Attorney's Office ("SCAO"), has averred that, in May 2016 when it was referred this case by the Rockingham County Attorney's Office, it was "made aware that an internal investigation [by the NH DOC] was completed" but was not initially provided with a copy. (App. at 24). Thereafter, the SCAO issued a Grand Jury subpoena to a representative from the NH DOC to appear before the Grand Jury and provide the NH DOC investigation. (App. at 24). Subsequently, the New Hampshire Attorney General's Office provided the the SCAO with a "redacted disk" containing the Forbes Investigation with Burris' statements redacted. (App. at 25). The SCAO has conceded that

its investigator "has had discussions with members of the Department of Corrections in an effort to conduct further investigation" but claimed that "[a]t no time did [the investigator] learn of any information provided by the defendant in violation of his Garrity rights." (App. at 25). The investigator has averred that "[n]one of the materials [obtained and reviewed from the NH DOC] contained any information obtained directly from PPO Burris under the Garrity interview during the administrative investigation." (App. at 30(F)). The State has further stated that "[a]t no time has this prosecutor or any member of the [SCAO] seen or been provided with any information offered by the defendant as a result of any interviewed [sic] he was compelled to provide." (App. at 25).

SUMMARY OF ARGUMENT

The New Hampshire Constitution, Pt. 1, Art. 15, requires that a public employee be afforded transactional immunity to displace the right to be free from providing compelled statements against one's self. This conclusion is mandated by this Court's holding in State v. Nowell, 58 N.H. 314 (1878), which remains binding authority and provides proper instruction regarding the scope, intent, and requirements of Article 15. Use immunity ultimately is inherently flawed and does not provide the

protection guaranteed by Article 15. Alleged problems with application of transactional immunity to public employees are overstated and must, in any case, give way to the plain and unmistakable command of the New Hampshire Constitution. For these reasons, the Defendant, having been compelled by his State employer, the NH DOC, to answers questions regarding the very incident that forms the basis for his indictment, is entitled to dismissal of the charges against him. Finally, even if this Court were to rule that the remedy of transactional immunity was ultimately not required to displace the Defendant's rights under Art. 15, he is entitled to dismissal as a result of his reasonable reliance on this Court's holding in Nowell.

ARGUMENT

PART I, ARTICLE 15 OF THE NEW HAMPSHIRE CONSTITUTION REQUIRES TRANSACTIONAL IMMUNITY TO DISPLACE THE CONSTITUTIONAL GUARANTEE TO BE FREE FROM FURNISHING COMPELLED STATEMENTS.

I. STANDARD OF REVIEW

This Court's review of the trial court's legal conclusions, is de novo. State v. Plch, 149 N.H. 608, 613 (2003). When the Court interprets a provision of the constitution, it looks to the provision's "purpose and intent." Warburton v. Thomas, 136 N.H. 383, 386-387 (1992). "The simplest and most obvious interpretation of a constitution, if in itself sensible, is most

likely to be that meant by the people in its adoption." State Employees' Ass'n of New Hampshire v. State, 161 N.H. 730, 740-741 (2011). Finally, this Court "will give the words in question the meaning they must be presumed to have had to the electorate when the vote was cast." Id. (quoting New Hampshire Munic. Trust Workers' Comp. Fund v. Flynn, 133 N.H. 17, 21 (1990)).

II. GENERAL PRINCIPLES REGARDING COMPELLED STATEMENTS BY PUBLIC EMPLOYEES

Garrity and its Progeny

In Garrity v. New Jersey, 385 U.S. 493, 494 (1967), police officers under investigation by their department were instructed that they had to answer an investigator's questions or face termination from employment. After the officers chose to answer questions, some of their answers were used against them in criminal proceedings. Id. The Supreme Court concluded that the officers' statements were obtained by compulsion because they were forced to either incriminate themselves or forfeit their employment with the State. Id. at 496-498; see also State v. Litvin, 147 N.H. 606, 608 (2002). Because the statements were obtained by compulsion, the Court ruled that the Fifth Amendment demanded the reversal of convictions obtained with the benefit of the statements. Id. at 500.

"When an employee is confronted with the threat of an

adverse employment action for refusal to answer questions, 'the very act of . . . telling the witness that he would be subject to removal if he refused to answer'" confers immunity. Sher v. U.S. Dept. of Veterans Affairs, 488 F.3d 489, 501-502 (1st Cir. 2007) (quoting Uniformed Sanitation Men Ass'n, Inc. v. Comm'r of Sanitation of New York, 426 F.2d 619, 626 (1st Cir. 1970)). Indeed, "no specific grant of immunity is necessary: 'It is the very fact that the testimony was compelled which [triggers immunity], not any affirmative tender of immunity.'" Id. (quoting Gulden v. McCorkle, 680 F.2d 1070, 1075 (5th Cir.1982)); see also United States v. Veal, 153 F.3d 1233, 1239 n. 4 (11th Cir. 1998) ("The Fifth Amendment protection afforded by Garrity to an accused who reasonably believes that he may lose his job if he does not answer investigation questions is Supreme Court-created and self-executing; it arises by operation of law; no authority or statute needs to grant it.").

Transactional Immunity Becomes the Law of the Land

Prior to 1972, the Supreme Court had, for approximately 80 years, held that transactional immunity was required to displace the protections of the Fifth Amendment. See Counselman v. Hitchcock, 142 U.S. 547, 585-586 (1892). Importantly, the Court in Counselman reached the conclusion that transactional immunity

was required to compel testimony by relying heavily on this Court's decision in State v. Nowell, 58 N.H. 314 (1878) and the Massachusetts Supreme Judicial Court decision in Emery's Case, 107 Mass. 172 (1871). The Counselman Court "held that the Massachusetts and New Hampshire [state constitutional] prohibition on being required to furnish incriminating evidence was also part of the Fifth Amendment right . . ." State v. Soriano, 68 Or. App. 642 (1984), aff'd 693 P.2d 26 (Or. 1984). In doing so, the Court wrote as follows:

> We are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the incriminating question put to him can have the effect of supplanting the privilege conferred by the constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.

Counselman, 142 U.S. at 585-586. Subsequent to Counselman, it is "irrefutable" that transactional immunity became part of our State and Federal "constitutional fabric." State v. Miyasaki, 614 P.2d 915, 921 (Haw. 1980).

Supreme Court Lowers Fifth Amendment Bar

In Kastigar v. United States, 406 U.S. 441 (1972), the Supreme Court abruptly reversed course. The Court held that, where a person is offered immunity to compel his testimony, it is constitutionally sufficient to merely preclude use of the testimony and any evidence derived from it in a later criminal proceeding. Casting off years of settled precedent, the Kastigar Court concluded that full transactional immunity for crimes discussed in a compelled statement is broader than that which is required by the Fifth Amendment of the United States Constitution. Id., 406 U.S. at 453. Instead, the U.S. Supreme Court concluded that "use" and derivative use immunity satisfied the requirements of the Fifth Amendment. Id. Nevertheless, the immunity provided must put the individual in "substantially the same position as if [he] had claimed his privilege." Id. at 458-459. This means that, at least pursuant to the Fifth Amendment, "the government cannot use . . . immunized testimony itself or any evidence that was tainted--substantively derived, 'shaped, altered or affected' . . . by exposure to immunized testimony." United States v. Slough, 641 F.3d 544, 549 (D.C. Cir. 2011) (quoting United States v. North, 910 F.2d 843, 855 (D.C. Cir. 1990)).

Of course, states are free to impose, and have imposed, greater restrictions on compelled statements than that required by the federal constitution. See Oregon v. Hass, 420 U.S. 714, 719 (1975) (noting that a state is free, as a matter of its own law, to impose greater restrictions than those under federal constitutional standards). In the end, if statements are obtained under the threat of the loss of government employment, the state "must offer to the witness whatever immunity is required to supplant the privilege . . . ." Lefkowitz v. Turley, 414 U.S. 70, 85 (1973). As discussed just below, this Court has already adopted a more restrictive state constitutional standard requiring transactional immunity to displace the privilege against the compelled furnishment of evidence.

III. ARTICLE 15 OF PART I OF THE NEW HAMPSHIRE CONSTITUTION REQUIRES TRANSACTIONAL IMMUNITY TO DISPLACE THE PRIVILEGE AGAINST SELF-INCRIMINATION.

In State v. Nowell, 58 N.H. 314 (1878), this Court expressly determined that transactional immunity is required to displace the right to remain silent under Article 15. In Nowell, the Court considered whether a statute that compelled and required clerks, servants, or agents to testify against their principals, offered sufficient safeguards so as to not deprive the witness of the full protection of Article 15. The statute in question

provided that "no testimony so given by him shall, in any prosecution, be used as evidence, either directly or indirectly, against him, nor shall he be thereafter prosecuted for any offence so disclosed by him." Id. at 315. Finding that the statute passed muster, the Court observed as follows:

> The legislature, having undertaken to obtain the testimony of the witness without depriving him of his constitutional privilege of protection, must relieve him from all liabilities on account of the matters which he is compelled to disclose; otherwise, the statute would be ineffectual. He is to be secured against all liability to future prosecution as effectually as if he were wholly innocent. This would not be accomplished if he were left liable to prosecution criminally for any matter in respect to which he may be required to testify.

Id. Accordingly, this Court held that what is now known as transactional immunity is required in order to assure that any witness forced to give compelled testimony is not deprived of the benefit of his Article 15 rights. Id.; see State v. Gonzalez, 853 P.2d 526, 528 (Alaska 1993) ("Transactional immunity . . . prohibits prosecution of a compelled witness for a crime concerning which the witness is compelled to testify.").

Here, the Defendant was compelled under threat of immediate job forfeiture to provide statements to the NH DOC investigator. He properly asserted and retained all his rights to remain silent under the Fifth and Fourteenth Amendments to the United States

Constitution and all his rights under the New Hampshire Constitution and State v. Nowell specifically. There can be no dispute that the compelled testimony relates directly to the offense for which he is charged. Because full transactional immunity--"as effectually as if he were wholly innocent"--is the price the State must pay for compelling his testimony, the indictment must be dismissed. State v. Nowell, 58 N.H. at 314; see also Wyman v. De Gregory, 101 N.H. 171, 174 (1957)(relying upon and citing to Nowell determined that where an individual is "no longer liable to prosecution," his Article 15 rights were sufficiently protected).[2]

IV. THE TRIAL COURT COURT ERRONEOUSLY CONCLUDED THAT THE HOLDING OF NOWELL IS DICTA.

The doctrine of stare decisis "demands respect in a society governed by the rule of law," for "when governing legal standards are open to revision in every case, deciding cases becomes a mere

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[2] State v. Litvin, 147 N.H. 606 (2002,) does not alter this result. In Litvin, a municipal clerk appealed the denial of a motion to suppress statements she made to city investigators. The "Garrity" warning provided to the clerk provided: "If you refuse to answer my questions, you will be in violation of City policy and shall be subject to disciplinary penalties." Id. at 607. In concluding that there was no compulsion requiring Garrity protections, the Court thought it relevant that the Clerk did not assert her right to remain silent "and was not threatened with automatic job loss" only "disciplinary penalties." Id. at 609. Here, of course, Burris asserted and retained his right to remain silent and was expressly threatened with automatic job loss if he did not provide a statement.

exercise of judicial will with arbitrary and unpredictable results." Jacobs v. Dir., N.H. Div. of Motor Vehicles, 149 N.H. 502, 504 (2003) (quoting Brannigan v. Usitalo, 134 N.H. 50, 53, 587 A.2d 1232 (1991)). Here, the trial court concluded that the holding of Nowell is "non-binding judicial dictum" that it was not obligated to follow. (Addendum at 11). The trial court reasoned as follows:

> [T]he [Nowell] court was only asked to pass upon the constitutionality of the statute at issue, which provided transactional immunity. Put differently, the court was not asked to decide whether something less than transactional immunity--such as use and derivative use immunity--would suffice for purposes of Part I, Article 15.

(Addendum at 12)(emphasis in original).

The trial court's conclusion that the holding of the Nowell case is "dicta" is erroneous. The rule that the Court adopted as the basis of its decision in Nowell, which was directly driven by the facts in Nowell, is binding precedent. See Trustees of Phillips Exeter Academy v. Exeter, 90 N.H. 472 (1940). As this Court has held:

> A rule adopted as the basis of decision of the issues involved is a judicial declaration of law constituting a precedent. The fact that another rule would lead to the same decision does not make it available if it is an erroneous one. A case is to be regarded as precedent when it furnishes a rule that may be applied in settling the rights of parties.

Id. (emphasis added).

In Nowell, the New Hampshire Supreme Court was squarely presented with the question of whether an individual could be compelled to testify against himself and, if so, under what circumstances. Nowell, a clerk, was held in contempt after refusing to answer under oath whether he or his principal engaged in the illegal sale of alcohol. He argued that Article 15 of the New Hampshire Bill of Rights guaranteed him the right to refuse to answer and that Gen. St., c. 99, § 20 was unconstitutional. He asserted, in other words, that even though he was granted statutory immunity, he had a constitutional right to remain silent and, to the extent the statute required otherwise, it was unconstitutional. Nowell, 58 N.H. at 315-316.

Contrary to the trial court's restrictive reading of the Nowell court's obligations, the Court was required to delineate the constitutional dimensions of Article 15's right of an individual not to be "compelled to accuse or furnish evidence against himself." Indeed, the court--in a case of first impression--appropriately did just that. The Court declared that in order for an individual to be constitutionally compelled to provide evidence against himself, he must, at a minimum, be "relieve[d] . . . from all liabilities on account of the matters

which he is compelled to disclose[,]" and "secured against all liability to future prosecution as effectually as if he were wholly innocent." Id. at 315. In modern parlance, an individual must be afforded "transactional" immunity to be compelled to provide evidence against himself. The Court then declared the statute at issue constitutional because it entitled a witness to transactional immunity as required by the constitution. Id.

The Court did not have the luxury of simply affirming the immunity statute as constitutional because it offered transactional immunity. It had to explain why the statute was constitutional. Indeed, to do otherwise would have ignored the very challenge before it: whether the statutory grant of transactional immunity (or legal innocence) was insufficient and unconstitutional. The question was not constrained, as it may be in modern day, to whether a grant of transactional immunity is sufficient merely because it offers more than the Fifth Amendment's constitutional floor of use and derivative use immunity.

The Court did not have the wisdom of more than 100 years of jurisprudence analyzing the issue under the federal constitution

or New Hampshire's sister state constitutions.[3] Instead, it was presented as a matter of first impression. To answer Nowell's challenge, the Court had to decide and dictate the contours of Article 15's promise that "[n]o subject shall . . . be compelled to accuse or furnish evidence against himself."

The Court had a panoply of options available to it on the constitutional compulsion spectrum: it could have determined, as Nowell urged, that an individual simply cannot be compelled to furnish evidence against himself; it could have determined, as it did, that an individual can only be compelled if granted transactional immunity; it could have determined that use and derivative use immunity (or just use immunity) was sufficiently protective to allow compelled testimony.[4] Contrary to the trial

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[3] Significantly, the Court did not have the Supreme Court's declaration of what the federal constitutional floor of immunity under the Fifth and Fourteenth Amendments was for witnesses compelled to provide incriminating testimony against themselves. Cf. Counselman v. Hitchcock, 142 U.S. 547 (1892); Kastigar v. United States, 406 U.S. 441 (1972); see also Garrity v. New Jersey, 385 U.S. 493 (1967).

[4] In answer to Nowell's objections, the Court explained the limitations of the rights and guarantees provided by Article 15. Nowell argued that he could not be compelled to testify even if entitled to transactional immunity because of the possibility he would be subjected to future unwarranted prosecutions and because the evidence would tend to degrade him. The Court instructed that Article 15 placed Nowell in no better position than innocent persons--the Bill of Rights entitled him to "legal innocence for the crime disclosed," and if a later related prosecution against him were made "[n]ot only would his testimony against his principal be excluded if offered, but the indictment

court's assertion, the Nowell Court answered the question before it by ruling as a matter of state constitutional law that, so long as effective legal innocence was imbued, an individual could be constitutionally "compelled to accuse or furnish evidence against himself." N.H. Const., pt. I, art. 15. This judicial precedent was essential to the judgment and based on the facts and issues before the court. Cf. Trustees of Phillips Exeter Academy, 27 A.2d at 577.

The precedential effect of Nowell was further reaffirmed by this Court in Wyman v. De Gregory, 101 N.H. 171, 174 (1957) (citing Nowell as authority for the proposition that the guarantees of Article 15 of the New Hampshire Constitution are protected by a statute granting transactional immunity). In Wyman this Court, relying on Nowell, observed that "[a]s to Fifteenth Article, pt. 1 of the New Hampshire Constitution, an immunity statute which protects a witness against criminal conviction in our State courts from disclosures which he may be compelled to

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would be dismissed, or a verdict entered in his favor." Id. It further explained that Article 15 did not protect against reputational harm and, to the extent Nowell wished it did, his answer would be found through the legislative and not judicial process. See id. ("It is also objected that the witness is not bound to answer, because his evidence may tend to degrade him; but this doctrine of the common law it must be competent for the legislature to change."). As a result, the court ruled Nowell could be held in contempt if he failed to testify. Presented with the issue, the court was required to adjudicate.

make satisfies its requirement."[5] Id.; see In Re Kinoy, 326 F. Supp. 407, 414 (S.D.N.Y. 1971)(rejecting an argument that a prior Supreme Court precedent on immunity was dicta the court noted if prior United States Supreme Court pronouncement on immunity was dicta it took on the new life as settled law when subsequently reaffirmed in another case). Nowell is binding authority that requires dismissal of the instant charges.

V. THIS COURT SHOULD NOT ABROGATE OR OVERTURN NOWELL, AS THE COURT PROPERLY CONCLUDED THAT ARTICLE 15 REQUIRES TRANSACTIONAL IMMUNITY TO DISPLACE ITS PROTECTIONS.

As this Court has observed:

> The relevant text of Part I, Article 15 is broader than the Fifth Amendment. The Fifth Amendment, in relevant part, states, "[N]or shall [any person] be compelled in any criminal case to be a witness against

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[5] It is instructive that the Supreme Court relied on what it obviously believed was the holding of the Nowell Court to conclude that transactional immunity was required to displace the Fifth Amendment. See Counselman v. Hitchcock, 142 U.S. 547, 577 (1892). Counselman remained good law for approximately seventy years until Kastigar. Other states have similarly concluded that Nowell represents a binding constitutional precedent. See, e.g., State v. Ely, 708 A.2d 1332, 1337 (Vt. 1997) (noting Nowell as a state court "precedent" relied upon in the Supreme Court's Counselman decision); State v. Murphy, 107 N.W. 470, 473 (Wis. 1906) ("Thus, in New Hampshire, it has been held sufficient to that end to declare immunity from any crime which a witness' testimony 'disclosed.'"). These affirmations of Nowell as binding precedent are entitled to weight and deference in determining the controlling force of stare decisis. Cf. Brannigan, 134 N.H. at 53 (weighing continued application of rule, as well as other state's approval of such rule, in determining whether stare decisis should be followed on a constitutional question).

> himself." . . . Part I, Article 15 states, "No subject shall . . . be compelled to accuse or furnish evidence against himself."

State v. Roache, 148 N.H. 45, 49 (2002) (internal citations omitted). Transactional immunity is thus required by the plain language of Article 15, and prohibits the compulsion applied by the NH DOC in this case. Bd. of Trustees, N.H. Judicial Ret. Plan v. Sec'y of State, 161 N.H. 49, 53 (2010). "The simplest and most obvious interpretation of a constitution, if in itself sensible, is most likely to be that meant by the people in its adoption." State Employees' Ass'n of New Hampshire, 161 N.H. at 740-741.

The marked difference between the language of Article 15 and the Fifth Amendment compels the additional protections that this Court has regularly applied when construing the reach of Article 15. See State v. Fleetwood, 149 N.H. 396, 402 (2003) (noting that the New Hampshire Constitution "provides greater protection to a criminal defendant with respect to confessions than does the Federal Constitution"); Roache, 148 N.H. at 49-50 (2002) ("Our prior interpretations of Part I, Article 15 also support the conclusion that it provides greater protection in this case than does the Federal Constitution."); State v. Laurie, 135 N.H. 438, 444-445 (1992)(stating New Hampshire requires State to prove

voluntariness of a waiver of Article 15 rights beyond a reasonable doubt, whereas the federal constitution requires only a preponderance of the evidence); State v. Monroe, 142 N.H. 857, 863-864 (1998) ("State Constitution provides greater protection to a criminal defendant with respect to confessions than does the Federal Constitution").

Importantly, the language of Part 1, Article 15 is identical to the language contained in Part I, Article 12 of the Massachusetts Constitution. In Carney v. Springfield, 403 Mass. 604, 610-611 (1988), the Supreme Judicial Court ("SJC") considered the level of immunity required to preserve the self-incrimination protections of a police officer terminated after being ordered to provide an internal affairs statement. The SJC held that unlike the "use" and "derivative use" immunity Kastigar found sufficient to satisfy the Fifth Amendment, "Article 12 of the Declaration of Rights requires transactional immunity to supplant the privilege against self-incrimination, even in the context of public employment." Carney, 403 Mass. at 610-611; Baglioni v. Chief of Salem Police, 421 Mass. 229 (1995); see also Attorney General v. Colleton, 387 Mass. 790 (1982).

"Given the shared history of [the] state constitutions" the New Hampshire Supreme Court has given "weight to the

Massachusetts Supreme Court's interpretation of Part I, Article 12" when interpreting the requirements of Article 15. Roache, 148 N.H. at 49; see also, In re Juvenile, 150 N.H. 644, 652 (2003) ("Because the language of the Confrontation Clause is identical, and given the shared history of our state constitutions, we again give weight to the Massachusetts Court's interpretation of an identical provision."). "Article 12 [of the Massachusetts Declaration of Rights] evolved from a sense of the inquisitorial methods of the Star Chamber and ecclesiastical courts in England." Roache, 148 N.H. at 49 (quoting Commonwealth v. Mavredakis, 430 Mass. 848, 859 (2000)). The language was incorporated verbatim into New Hampshire's Constitution four years after it was adopted by the Commonwealth. State v. Cormier, 127 N.H. 253, 262 (1985) (King, C.J. and Douglas, J., dissenting); see generally, Marshall, The New Hampshire State Constitution, A Reference Guide at 11 (2004). The SJC's treatment of this issue strongly substantiates this Court's longstanding and unchanged precedent in Nowell that transactional immunity is required under the Article 15.

In addition to Massachusetts, numerous other states have ruled that Kastigar use immunity is inadequate to displace the protections of state constitutional protections from compelled

self-incrimination. See State v. Gonzalez, 853 P.2d 526, 530-533 (Alaska 1993); State v. Miyasaki, 614 P.2d 915, 921-923 (Haw. 1980); Wright v. McAdory, 536 S.2d 897, 903-904 (Miss. 1988); State v. Soriano, 684 P.2d 1220, 1232-1234 (Or. Ct. App. 1984), aff'd, 693 P.2d 26 (Or. 1984); State v. Thrift, 440 S.E.2d 341, 349-351 (S.C. 1994).

The trial court suggested that "practical problems" mitigated against the requiring transactional immunity in the public employment context. (Addendum at 20). The trial court noted that the paucity of cases, in Massachusetts in particular, involving a criminal defendant seeking the remedy of dismissal was somehow an indicator of difficulty in the practical application of the constitutional guarantee. (Addendum at 21). To the contrary, the lack of cases demonstrates that the regular procedure of obtaining immunity prior to questioning in cases with criminal implications works seamlessly in the Commonwealth. See e.g. Furtado v. Town of Plymouth, 451 Mass. 529, 530 (2008)(noting that "[a]fter the district attorney and the Attorney General executed letters granting transactional immunity" the officer provided a report and took a polygraph examination).

Moreover, the procedural hurdles compare favorably with the

current use immunity procedures in New Hampshire as evidenced by the record in this case. First, contrary to the trial court's suggestion that there is some question regarding the mechanism by which immunity arises, the State has conceded that use and derivative use immunity arose as a matter of law in this case upon the assertion of rights by the Appellant. (App. 28 and 30B). The County Attorney's office was made aware of the NH DOC investigation and initially sought to subpoena a NH DOC representative to the Grand Jury to obtain a copy of the investigation. The County Attorney's investigator was in regular contact with the NH DOC as part of its investigation. The State has averred that the NH DOC investigation was produced to the New Hampshire Attorney General's Office, which, in turn, produced a redacted investigation to the County Attorney. The County Attorney has further stated that "[a]t no time has this prosecutor or any member of the [SCAO] seen or been provided with any information offered by the defendant as a result of any interviewed [sic] he was compelled to provide." Of course, now the State is represented by the same Attorney General's Office that is supposed to be the wall between Burris' statements and the prosecution.

While use immunity provides theoretical protections and the

promise of often complex procedural safeguards to remove the hazards of incrimination, in practice it is a promise that the State cannot confidently keep. As one Court has explained:

> [P]roblems of proof and ordinary human frailties combine to pose a potent threat to an individual compelled to testify. The accused faces proof problems because all evidence regarding use of compelled testimony necessarily rests in the hands of the state. Human frailty presents a further obstacle because the accused is reduced to probing the faded memories and incomplete recollections of the state's agents in tracing the path of the compelled testimony from the point where it is given to the point where it is used.

Gonzalez, 853 P.2d at 530. Similarly, Justice Brennan explained that:

> all the relevant evidence will obviously be in the hands of the government-the government whose investigation included compelling the individual involved to incriminate himself . . . [T]his argument does not depend upon assumptions of misconduct or collusion among government officers. It assumes only the normal margin of human fallibility. [People] working in the same office or department exchange information without recording carefully how they obtained certain information; it is often impossible to remember in retrospect how or when or from whom information was obtained.

Piccirillo v. New York, 400 U.S. 548, 552 (1971) (Brennan, J., dissenting); Kastigar, 406 U.S. at 469 (Marshall, J. dissenting) ("[E]ven a prosecutor acting in the best of faith cannot be

certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony.").[6]

Moreover, there can be no adequate procedural protection against a prosecutor's non-evidentiary use of compelled statements. Knowledge of the fact that a defendant provided a compelled statement may help focus the prosecutor's cross examination, allocate resources, probe certain subject areas more completely or impact the case in innumerable other ways. Gonzalez, 853 P.2d at 532; Miyasaki, 614 P.2d at 923. "Even the state's utmost good faith is not an adequate assurance against non-evidentiary uses because there may be 'non-evidentiary uses of which even the prosecutor might not be consciously aware.'" Gonzalez, 853 P.2d at 532 (quoting State v. Soriano, 684 P.2d at 1234). Ultimately, "[i]t is unrealistic to give a dog a bone and

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[6] The principle and the dangers are well illustrated by the investigation in this case. While the Defendant has not had the benefit of a Kastigar hearing type inquiry into the matter, it seems clear that the investigator from the SCAO had contact with the NH DOC and that subsequently the NH DOC was issued a subpoena to produce the investigation at the grand jury. The State has averred that, subsequently, the Attorney General's Office redacted the investigation before it was produced to the SCAO. The Attorney General now represents the State on appeal. Without in any way of questioning the good faith or honesty of the prosecutors and investigators involved in this matter, is not hard to imagine a scenario where because of some conversation, communication or happenstance, some use, inadvertent, indirect or otherwise, has been made of the Defendant's statements.

to expect him not to chew on it." Soriano, 684 P.2d at 1234. For these reasons, use immunity cannot protect the promise of Article 15 and is, thus, constitutionally infirm.[7]

VI. BURRIS WAS ENTITLED TO RELY ON THE NOWELL HOLDING.

Even if this Court determines that transactional immunity is not necessary to displace Burris' right to remain silent, dismissal of the current charges are appropriate as he was entitled to rely on this Court's longstanding precedent. To hold otherwise would be fundamentally unfair and contrary to the interests of justice. See State v. Hebert, 158 N.H. 306, 315-316 (2009) (applying new preservation standard prospectively to avoid "harsh result[s], contrary to the interests of justice"); Appeal of State Employees' Assoc. of N.H., 156 N.H. 507, 511 (2007) (applying new holding prospectively where retroactive application would lead to a harsh result due to parties' reasonable reliance upon prior holding); cf. State v. Tierney,

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[7] The trial court also erred by suggesting that compelled statements should be treated differently than compelled testimony obtained pursuant to an immunity statute. The forum in which the compulsion occurs does not impact the scope of an individual's right to be free from self-incrimination. Lefkowitz, 414 U.S. at 77 ("The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.").

150 N.H. 339, 343-344 (2003) (applying new constitutionally-based rule of criminal procedure retroactively because rule benefitted appealing criminal defendant).

CONCLUSION

The Defendant respectfully requests that the trial court's order denying the Defendant's Motion to Dismiss be **REVERSED** and that an Order granting the Motion to Dismiss be entered and that the indictments be dismissed with prejudice.

Pursuant to Rule 16(3)(i), undersigned counsel certifies that the the appealed decision is in writing and is appended to the brief at Addendum page 1.

Respectfully Submitted,
David Burris,
By his lawyer,

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DATED: September 29, 2017

CERTIFICATE OF COMPLIANCE

In accordance with New Hampshire Supreme Court Rule 16(7), the undersigned hereby certifies that an original and eight (8) copies of the Brief of the Appellant David Burris have been hand-delivered to the Clerk of the Supreme Court this 29th Day of September 2017.

In accordance with New Hampshire Supreme Court Rule 16(10), the undersigned hereby certifies that two copies of the Brief of the Appellant have been forwarded, via first class mail, postage prepaid to the Office of the New Hampshire Attorney General, .

In accordance with New Hampshire Supreme Court Rule 16(10), the undersigned hereby requests that this matter be heard on oral argument and , further, that Peter J. Perroni be designated as the attorney to argue its merits on behalf of the Appellant. Counsel requests fifteen (15) minutes for argument.

Dated: 9/29/17

Peter J. Perroni

ADDENDUM

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The State of New Hampshire
Superior Court

Rockingham S.S.

STATE OF NEW HAMPSHIRE

V.

DAVID BURRIS

NO. 218-2016-CR-1278

ORDER ON THE DEFENDANT'S MOTION TO DISMISS

The defendant, David Burris, is charged with three counts of felony Reckless Conduct. The State alleges that he committed Reckless Conduct when, during a home visit of an individual he was supervising as a probation officer, the defendant discharged his firearm three times at a motor vehicle operated by the probationer. The defendant moves to dismiss, arguing that he is entitled to transactional immunity for these charges under Part I, Article 15 of the New Hampshire Constitution. The defendant asserts he was compelled to make statements during an internal investigation of the incident by his employer, the Department of Correction ("the DOC"). Alternatively, the defendant requests a hearing pursuant to Kastigar v. United States, 406 U.S. 441 (1972), at which the State would be required to prove that its case is entirely independent of the compelled statement. The State objects on both grounds. The Court heard oral argument on April 10, 2017. For the reasons explained below, the defendant's motion to dismiss is DENIED. The Court will, however, permit the defendant to pursue an interlocutory appeal on this issue. Accordingly, the Court will sign a properly filed interlocutory appeal statement consist with the terms of this order. See Sup. Ct. R. 8.

Background

The following facts are taken from the defendant's motion to dismiss unless otherwise noted. At all relevant times, the defendant was employed by the DOC as a probation and parole officer. See Mot. Dismiss ¶ 3. The incident giving rise to the Reckless Conduct charges in this case occurred on December 1, 2015, while the defendant was conducting a home visit of a probationer in Raymond. See Obj. to Def.'s Mot. Dismiss Ex. 3, ¶¶ 4–5. Shortly after the incident, the DOC initiated an internal investigation. See Mot. Dismiss ¶¶ 4–6.

On December 4, 2015, the DOC "ordered [the defendant] under threat of termination to provide a written statement regarding the events [of December 1, 2015]." Id. ¶ 6. The defendant "complied with that order and provided a written report." In doing so, he asserted his right against self-incrimination under both the Fifth Amendment to the United States Constitution and Part I, Article 15 of the New Hampshire Constitution. Id. Specifically, page 2 of his "Incident Report" states:

> I have been ordered by the NH Department of Corrections to participate in this interview/meeting and/or to provide this statement. I do so at this order as a condition of my employment. Failure for me to abide by this order would lead to immediate severe discipline in the form of automatic dismissal and/or job forfeiture. As such, I have no alternative but to abide by this order.
>
> It is my belief and understanding that the Chief and the Department requires my participation solely and exclusively for internal purposes and will not release it to any other agency. **It is my further belief that any statements will not and cannot be used against me in any subsequent criminal proceedings.** I authorize release of any statements to my attorney or designated union representative. I retain the right to amend or change this statement upon reflection to correct any unintended mistake without subjecting myself to a charge of untruthfulness.

> For any and all other purposes, **I hereby reserve my constitutional right to remain silent under** the Fifth and Fourteenth Amendments to the United States Constitution and **Part I, Article 15 of the New Hampshire Constitution** and any other rights prescribed by law. **I specifically rely on the principals and protections afforded to me by State v. Nowell, 58 N.H. 314 (1878).** Further I rely upon the protection afforded me under the doctrines set forth in Garrity v. New Jersey, 385 U.S. 493 (1967); Spevack v. Klien, 385 U.S. 551 (1956); State v. Litvin, 147 N.H. 606 (2002)[,] and any other rights afforded under New Hampshire law and/or the New Hampshire Constitution, should this report/statement be used for any other purpose of whatsoever kind or description.

Id. Ex. A (emphases added); accord id. ¶ 6.[1]

On January 14, 2016, the DOC ordered the defendant "to submit to an interrogation by [DOC] Director Forbes regarding the events [of December 1, 2015]." Id. ¶ 7. The defendant asserted his right against self-incrimination under the State and Federal Constitutions in the same manner as he did in his written report. See id. "[T]he parties agreed that the interview would be conducted subject to [the defendant's] assertion of the exact same rights he asserted prior to providing his December 4, 2015 written statement." Id.; accord id. Ex. B. The defendant then answered Director Forbes' questions about the December 1, 2015 incident. See id. ¶¶ 5, 7.

Director Forbes authored a report ("the Forbes Report") about the internal investigation and submitted this report to the Commissioner of Corrections on February 4, 2016. See id. ¶ 8. The Forbes Report "quoted and directly relied upon" statements the defendant made in his December 4th written statement and during his January 14th interview. Id. The Forbes Report also included a copy of the defendant's December 4th written statement. Id.

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[1] The defendant argues that the invocation of his right to remain silent under Part I, Article 15, in combination with his express reference to Nowell, sufficiently asserted and preserved his claim to transactional immunity. See Mot. Dismiss 9 (noting the defendant "specifically [invoked] his rights under Nowell"); id. at 10 n.2. The State does not contest this.

In May 2016, the Rockingham County Attorney's Office referred the December 1, 2015 incident involving the defendant to the Strafford County Attorney's Office (hereafter "the SCAO" or "the State") "for review of possible criminal charges." Obj. to Def.'s Mot. Dismiss ¶ 3; see also id. Ex. 3, ¶ 5. The defendant was indicted on three counts of felony Reckless Conduct in October 2016.

In his motion to dismiss, the defendant asserts that, prior to indicting the defendant, the SCAO obtained a copy of the Forbes Report, and its chief investigator, William Irving, also spoke with Director Forbes about the internal investigation. See Mot. Dismiss ¶¶ 9–10. The State counters that it obtained a redacted copy of the DOC's internal investigation, which the Court assumes is synonymous with the Forbes Report, in response to a grand jury subpoena in June 2016. See Obj. to Def.'s Mot. Dismiss ¶¶ 4–5. The cover letter accompanying the redacted report explains that because the defendant "assert[ed] his Garrity rights as to his incident report and interview," the Attorney General's Office "redacted all reference to information he was required to report to his employer, [the DOC]."[2] Id. Ex. 1. The State has also provided this Court with a statement from Irving explaining that he "reviewed the reports and the evidence gathered by the Raymond Police Department" in relation to the December 1, 2015 incident. Id. Ex. 3, ¶ 6. While the State concedes that Irving "had discussions with members of the [DOC] in an effort to conduct further investigation," the State avers that Irving did not "learn of any information provided by the defendant [during the internal investigation]." Obj. to Def.'s Mot. Dismiss ¶ 7. The State further avers that no one from the SCAO has "seen or been provided with any information offered by the

[2] The Attorney General's Office acts as legal counsel for the DOC. The grand jury subpoena was issued to a DOC employee. See Obj. to Def.'s Mot. Dismiss ¶¶ 4–5.

defendant as a result of any interview[] he was compelled to provide." Id. ¶ 8. As such, the State asserts that its case is entirely independent of the defendant's statements.

Analysis

The Court will first address the defendant's claim that he is entitled to transactional immunity under Part I, Article 15 of the New Hampshire Constitution. He asserts that the right against self-incrimination under the State Constitution is broader than the right provided by the Fifth Amendment to the United States Constitution. See Mot. Dismiss 6–7. This Court addressed the very same issue in State v. Richardson, Rock. Cty. Super. Ct., No. 218-2014-CR-00461, 2014 WL 7009287 (Dec. 2, 2014) (Delker, J.) [hereinafter "Richardson Order"]. In Richardson, the Court concluded:

> After considering the text, the evolving treatment of immunity statutes by state and federal courts, and other relevant policies and interests, the Court concludes that use and derivative use immunity, along with the procedural safeguards set forth in Kastigar, is sufficient to protect the defendant's right against self-incrimination under Part I, Article 15 of the State Constitution. See Kastigar, 406 U.S. at 461–62. The defendant will not receive complete amnesty from prosecution simply because he testified to an investigator as part of an administrative investigation of his conduct. Rather, pursuant to Garrity and Kastigar, he is afforded use and derivative use immunity for those statements.

Richardson Order at 24–25, 2014 WL 7009287, at *11 (footnote omitted).[3]

The defendant urges the Court to reconsider its conclusion in Richardson. More specifically, the defendant asserts that this Court incorrectly classified as dicta the New Hampshire Supreme Court's discussion of transactional immunity in Nowell. See Mot. Dismiss 11–13. The defendant argues that Nowell is controlling precedent on the issue of whether Part I, Article 15 requires transactional immunity, as opposed to other types of immunity, when a public employer compels a statement from its employee under

[3] The Richardson Order is available on the N.H. Superior Court website and on Westlaw. Because the Westlaw version uses different pagination than the original order, the Court employs parallel citations.

threat of termination. See id. According to the defendant, Nowell forecloses the analysis undertaken by the Court in Richardson and requires dismissal of the charges.

For the reasons explained below, the Court rejects the defendant's invitation to revise the conclusion it reached in Richardson. The Court does, however, clarify and expand upon its rationale for treating Nowell as dicta and for declining to adopt Massachusetts' approach to immunity in the public employment context. In doing so, the Court borrows heavily from the analysis contained on pages 3 through 10 of the Richardson Order, usually without attribution. But with the exception of the sentence identified on infra page 15, the Court reaffirms the entirety of its analysis in Richardson, regardless of whether that analysis is expressly repeated herein. Because the Richardson order is available online, see supra note 3, the Court hereby incorporates by reference the analysis contained in that order instead of reproducing it in full.

The United States Supreme Court held in Garrity and its progeny that if a public employer compels its employee, under threat of termination, to make incriminatory statements, the Fifth Amendment's privilege against self-incrimination prohibits use of those statements in subsequent criminal proceedings against the employee. See Garrity, 385 U.S. at 500–01; Gardner v. Broderick, 392 U.S. 273, 278–79 (1968); see also Litvin, 147 N.H. at 608–09 (discussing Garrity); see generally Clymer, Compelled Statements from Police Officers and Garrity Immunity, 76 N.Y.U. L. REV. 1309, 1315–20 (2001) (discussing Garrity line of cases). Around the same time, the United States Supreme Court decided Kastigar, in which the Court held that the Fifth Amendment prohibits the prosecution's use or derivative use of testimony compelled by a grant of immunity, see Kastigar, 406 U.S. at 452–53, but does not require transactional

immunity, which is a total "grant [of] immunity from prosecution for offenses to which [the] compelled testimony relates," id. at 443.

Taken together, these cases "stand for the proposition that a government employee who has been threatened with an adverse employment action by her employer for failure to answer questions put to her by her employer receives immunity from the use of her statements or their fruits in subsequent criminal proceedings . . . ." Sher v. U.S. Dep't of Veterans Affairs, 488 F.3d 489, 501 (1st Cir. 2007). This is sometimes referred to as "Garrity immunity." See, e.g., 3 W. LaFave et al., Criminal Procedure § 8.11(f) (4th ed. 2015) ("'Garrity immunity' commonly is viewed as providing use/derivative-use immunity equivalent in scope to the immunity described in Kastigar."). The government can prosecute the employee for the alleged misconduct, consistent with the Fifth Amendment, so long as "the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." Kastigar, 406 U.S. at 460. Importantly, the employee is not entitled to transactional immunity under the Fifth Amendment. Sher, 488 F.3d at 501. Furthermore, because the employee is entitled to Garrity immunity as a consequence of her employer compelling her to give a statement under threat of an adverse employment action, she "may be subject to such an adverse employment action for remaining silent." Id.

In Richardson, this Court noted that "[a]lthough the nature of the protection afforded pursuant to the Federal Constitution is well-settled, the New Hampshire Supreme Court has yet to determine whether use and derivative use immunity is sufficiently protective of a public employee's privilege against self-incrimination under Part I, Article 15 of the State Constitution." Richardson Order at 4, 2014 WL 7009287,

at *2. The defendant contends that the New Hampshire Supreme Court did answer this question in Nowell, and, furthermore, that it reaffirmed Nowell in Wyman v. De Gregory, 101 N.H. 171, 173–74 (1957). According to the defendant, the New Hampshire Supreme Court has already decided that only transactional immunity is sufficient to protect the privilege against self-incrimination provided by the State Constitution. As explained below, the Court disagrees.

Enacted in 1784, Part I, Article 15 provides in relevant part that "[n]o subject shall be . . . compelled to accuse or furnish evidence against himself." N.H. CONST. pt. I, art. 15. This right against self-incrimination permits an individual "to refuse to testify against himself at a criminal trial in which he is a defendant, [and] also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." Knowles v. Warden, N.H. State Prison, 140 N.H. 387, 391 (1995) (quoting Minnesota v. Murphy, 465 U.S. 420, 426 (1984)). The purpose of the right is to prevent the unlawful acquisition and subsequent use of a defendant's testimony to establish his guilt in a criminal case. See State v. Marchand, 164 N.H. 26, 32 (2012).

In 1878, the New Hampshire Supreme Court decided Nowell. The issue in Nowell was whether the immunity statute then in effect was "consistent with" Part I, Article 15. Nowell, 58 N.H. at 314. The statute at issue provided:

> No clerk, servant, or agent of any person accused of a violation of this chapter shall be excused from testifying against his principal for the reason that he may thereby criminate himself; but no testimony shall, in any prosecution, be used as evidence, either directly or indirectly, against him, nor shall he be thereafter prosecuted for any offence so disclosed by him.

Id. (emphasis added) (quoting Laws 1858, 99:20). Nowell, a clerk, was called to testify

before a grand jury regarding whether his employer had sold intoxicating liquor. Id. Nowell refused to testify, citing his right against self-incrimination, and was held in contempt. See id. He appealed the contempt decree to the New Hampshire Supreme Court, arguing that the immunity statute was unconstitutional. Id.

The New Hampshire Supreme Court concluded that the immunity statute was "consistent with" Part I, Article 15 and upheld the contempt finding. See id. at 314–15. The court noted that the statute provided transactional immunity by "secur[ing the witness] against all liability to future prosecution as effectually as if he were wholly innocent." Id. at 315. "[B]eing no longer liable to prosecution, [the witness] is not compelled, by testifying, to accuse or furnish evidence against himself." Id. Therefore, the witness could be held in contempt for refusing to testify. See id.

In its reasoning, the Nowell court suggested that a statute that conferred less than transactional immunity would be insufficient and unconstitutional under Part I, Article 15. See id. In Richardson, this Court concluded that "the Nowell court's discussion on the scope of immunity required by [Part I,] Article 15 is dicta." Richardson Order at 8, 2014 WL 7009287, at *4. This Court explained:

> The question presented to the court in Nowell was solely whether the statute at issue was "consistent with" Article 15. Nowell, 58 N.H. at 314. In other words, the court was tasked with deciding whether transactional immunity was sufficient to protect Nowell's right against self-incrimination. By concluding that the statute was constitutional, the court had no need to then delineate what it considered to be the scope of the right. Its additional determination that transactional immunity was necessary to protect the right against self-incrimination was inessential to the judgment. Cf. Tyler v. Hannaford Bros., 161 N.H. 242, 247 (2010) ("If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded. Such determinations have the characteristics of dicta . . . ." (quoting Restatement (Second) of Judgments § 27 cmt. h (1982))).

Id. at 8–9, 2014 WL 7009287, at *4.

The defendant argues that the Nowell court's reasoning is not dicta and that it is instead binding precedent. See Mot. Dismiss 11. The defendant also suggests that only the New Hampshire Supreme Court can classify portions of its prior opinions as dicta, and thus this Court cannot treat the portion of Nowell at issue as dicta unless or until the New Hampshire Supreme Court classifies it as such. See Suppl. Brief Supp. Def.'s Mot. Dismiss 16–17.

"An appellate decision is not an authority for everything said in the court's opinion but only for the points actually involved and actually decided." 20 Am. Jur. 2d Courts § 130 (2015). Portions of an opinion that are not authoritative (i.e., not precedential) are considered dicta. See United States v. Crawley, 837 F.2d 291, 292–93 (7th Cir. 1988). "[A] later court, even if it is an inferior court, is free to reject [dicta]." Id. at 292. Because New Hampshire trial courts are tasked with interpreting and applying New Hampshire Supreme Court precedent, it follows that, in the course of interpreting this precedent, trial courts have the ability to discern what constitutes dicta.[4] Cf. Am. Fed'n of Teachers—N.H. v. State of N.H., 167 N.H. 294, 304 (2015) (agreeing with trial court that case relied upon by plaintiffs was not controlling on issue presented because, inter alia, quoted language from that case was dicta) (citing Am. Fed'n of Teachers—N.H. v. State of N.H., Merrimack Cty. Super. Ct., No. 217-2009-EQ-290, 2013 WL 10371696, at *8–10 (July 10, 2013) (McNamara, J.)).

Generally speaking, "there is no real consensus on the correct definition" of the

[4] Classifying portions of an opinion as dicta does not contravene the doctrine of stare decisis, which requires adherence to binding precedent unless or until that precedent is overruled by the New Hampshire Supreme Court. See Appeal of Corporators of Portsmouth Sav. Bank, 129 N.H. 183, 198 (1987); see also Lord v. Lovett, 146 N.H. 232, 238 (2001) ("We are not required, however, to give to dicta the deference accorded by stare decisis to actual holdings." (quotation omitted)).

term "dicta." Killian, Dicta and the Rule of Law, 2013 PEPP. L. REV. 1, 8 (2013). The defendant's survey of New Hampshire law on the subject demonstrates that the New Hampshire Supreme Court has not applied a uniform definition of this concept. See Suppl. Brief Supp. Def.'s Mot. Dismiss 7–10. Furthermore,

> [t]here is authority for the proposition that a distinction should be drawn between "obiter dictum," which constitutes an aside or an unnecessary extension of comments, and considered or "judicial dictum" where the Court . . . is providing a construction of a statute to guide the future conduct of inferior courts.

United States v. Bell, 524 F.2d 202, 206 (2d Cir. 1975) (footnotes omitted). While neither type of dicta is binding, judicial dictum "must be given considerable weight." Id. The New Hampshire Supreme Court appears to recognize the distinction between these types of dicta. Compare Bendetson v. Killarney, Inc., 154 N.H. 637, 646–47 (2006) ("considered dicta"), State v. Dionne, 131 N.H. 630, 631–32 (1989) ("considered dictum"), State v. Deflorio, 128 N.H. 309, 313–14 (1986) ("considered dictum"), and Hopps v. Utica Mut. Ins. Co., 127 N.H. 508, 510 (1985) ("considered dicta"), with Sheedy v. Merrimack County Superior Court, 128 N.H. 51, 56 (1986) ("obiter dictum"), Charbonneau v. MacRury, 84 N.H. 501, 502 (1931) ("obiter dictum"), and Dodge v. Clark, 39 N.H. 243, 246 (1859) ("obiter dicta").

A. *Nowell* Is Non-Binding Judicial Dictum

As the defendant notes, Black's Law Dictionary defines "judicial dictum" as "[a]n opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision and therefore not binding even if it may later be accorded some weight." Black's Law Dictionary 549 (10th ed. 2014); accord Suppl. Brief Supp. Def.'s Mot. Dismiss 16.

Applying this definition to the Nowell opinion, it is clear that the portion of Nowell upon which the defendant relies is indeed dictum, and that it is considered dictum or judicial dictum, as opposed to obiter dictum.

The Nowell court held that the statute at issue was constitutional because it provided transactional immunity. See Nowell, 58 N.H. at 314–15. The court, relying on Emery's Case, 107 Mass. 172 (1871), suggested that if "the statute did not afford full indemnity to the witness," it would not pass constitutional muster. Nowell, 58 N.H. at 315. But the court was only asked to pass upon the constitutionality of the statute at issue, which provided transactional immunity. Put differently, the court was not asked to decide whether something less than transactional immunity—such as use and derivative use immunity—would suffice for purposes of Part I, Article 15. Although the New Hampshire Supreme Court answered this question anyway, that answer is not controlling authority because it is judicial dictum—it is effectively an advisory opinion on the constitutionality of a differently worded statute. See Killian, supra at 9 ("Dicta is, at bottom, a form of advisory opinion for future cases.").

The court's ostensible reaffirmation of Nowell in Wyman suffers from the same infirmity. In that case, the court again considered and upheld a transactional immunity statute. See Wyman, 101 N.H. at 173 ("[A]n immunity statute which protects a witness against criminal conviction in our [s]tate courts from disclosures which he may be compelled to make satisfies [Part I, Article 15's] requirements." (citing Nowell, 58 N.H. at 315)). The New Hampshire Supreme Court has not squarely decided that a use and

derivative use immunity statute is unconstitutional.[5] As such, both Nowell and Wyman are dicta on the issue of whether Part I, Article 15 mandates transactional immunity.

The Kastigar Court applied the concept of dictum in a manner similar to this Court's interpretation of Nowell. As the Richardson Order noted, in the late nineteenth century, the United States Supreme Court struck down a statute which provided only use immunity. See Counselman v. Hitchcock, 142 U.S. 547, 586 (1892). In doing so, the Supreme Court cited favorably to both Emery's Case and Nowell. See id. at 577–79, 585–86. The Counselman Court stated:

> We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the [C]onstitution of the United States. [The immunity statute at issue] does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.

Id. at 585–86. "For eighty years, Counselman stood as the definitive statement on the ability to obtain incriminating testimony consistent with the Fifth Amendment through a grant of immunity . . . ." State v. Ely, 708 A.2d 1332, 1335 (Vt. 1997). Then, in Kastigar, the Supreme Court held that use and derivative use immunity "is coextensive with the scope of the [Fifth Amendment] privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." Kastigar, 406 U.S. at 453. The Kastigar Court acknowledged the above-quoted passage from Counselman but classified it as "dictum." Id. at 455 n.39. The constitutional infirmity

[5] New Hampshire's current immunity statute, RSA 516:34, was amended in 1993 to provide only use and derivative use immunity. See State v. Roy, 140 N.H. 478, 480-81 (1995) (comparing New Hampshire's current and former immunity statutes). The constitutionality of the current version of the statute has never been addressed by the New Hampshire Supreme Court.

with the statute at issue in Counselman was that it only provided "use" immunity and not "derivative use" immunity. Id. at 454 (citing Ullmann v. United States, 350 U.S. 422, 437 (1956)). As a result, the discussion in Counselman regarding the need for transactional immunity "was unnecessary to the Court's decision, and cannot be considered binding authority." Id. at 455.

The defendant next asserts that even if Nowell is judicial dictum, this Court is bound by such dictum. See Suppl. Brief Supp. Def.'s Mot. Dismiss 16–17. The Court disagrees. Judicial dictum is certainly entitled to weight in the Court's analysis. See Bell, 524 F.2d at 206. Nonetheless, it is ultimately only persuasive authority, as opposed to binding precedent. The experience of nearly 140 years since Nowell and 60 years since Wyman has laid bare the problems with the broad pronouncements in those cases. This Court detailed at length in Richardson the analytical shortcomings of Nowell, Wyman, and the Massachusetts cases that have interpreted Emery's Case since Kastigar. See Richardson Order at 7–10, 2014 WL 7009287, at *3–5. These cases illustrate the rationale underlying the concept of dicta and its non-binding status, which Chief Justice Marshall explained as follows:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. 264, 399–400 (1821).

B. *Nowell* Is Not Controlling on the Issue Presented Here

Even assuming, arguendo, that Nowell is binding authority with respect to transactional immunity, its holding does not control the outcome of the instant case. This is because Nowell is only controlling as to the constitutionality of an immunity statute under the New Hampshire Constitution. In both Nowell and Wyman, the individual refused to testify, despite being granted immunity under the relevant immunity statute, and the New Hampshire Supreme Court upheld the finding of contempt. See Nowell, 58 N.H. at 314–15; Wyman, 101 N.H. at 173, 178. Neither case identifies the appropriate remedy when an individual makes compelled statements after being provided with use and derivative use immunity, as opposed to transactional immunity. Nor do these cases address how Part I, Article 15 applies in the context of statements compelled by a public employer under threat of an adverse employment action. Accordingly, the Court withdraws and revises the following statement contained in the Richardson order: "Clearly, if Nowell remains good law, the Court must hold that the defendant is entitled to transactional immunity under the circumstances presented." Richardson Order at 8, 2014 WL 7009287, at *4. In actuality, the answer is not nearly as clear as the Richardson Order suggested.[6]

For guidance, the Court looks at how other states with more protective state constitutional provisions have applied those provisions beyond the immunity-statute context. Six states have interpreted their constitutions to require transactional immunity

[6] This Court's own sweeping statement in the Richardson Order illustrates the problem with dictum. The scope and meaning of Nowell were not as fully developed in Richardson as they have been in the case at bar. Because the Court was not forced to focus on the nuances of dictum in Richardson, this Court jumped to an improper conclusion, which it articulated as established law. In the instant case, by contrast, the dictum issue has been "investigated with care." Cohens, 19 U.S. at 399; see Order (Mar. 3, 2017) (Doc. 14) (scheduling oral argument on the dictum issue); Suppl. Brief Supp. Def.'s Mot. Dismiss (briefing dictum issue).

post-Kastigar. See State v. Gonzalez, 853 P.2d 526, 530–33 (Alaska 1993); State v. Miyasaki, 614 P.2d 915, 921–23 (Haw. 1980); Attorney General v. Colleton, 444 N.E.2d 915, 917–21 (Mass. 1982); Wright v. McAdory, 536 S.2d 897, 903–04 (Miss. 1988); State v. Soriano, 684 P.2d 1220, 1232–34 (Or. Ct. App. 1984), aff'd, 693 P.2d 26 (Or. 1984); State v. Thrift, 440 S.E.2d 341, 349–51 (S.C. 1994); see also Com. v. Swinehart, 664 A.2d 957, 965 (Pa. 1995) (collecting cases); Ely, 708 A.2d at 1337–38 (same); see generally Annotation, Propriety, Under State Constitutional Provisions, of Granting Use or Transactional Immunity for Compelled Incriminating Testimony—Post-*Kastigar* Cases, 29 A.L.R.5th 1 (1995 & Supp. 2017). Of these six states, only Massachusetts and Oregon have considered the application of the state constitutional provision beyond the immunity-statute context.

1. **Oregon Cases**

In Soriano, the Oregon Supreme Court was asked to determine the constitutionality of a statute which provided use and derivative use immunity. It held that, "under the Oregon Constitution, only transactional immunity is permissible and that the lesser, statutory immunity of use and derivative use fails to meet the requirements of the Oregon Constitution." Soriano, 693 P.2d at 26. The Oregon Court of Appeals has subsequently limited the application of this holding to cases in which the witness was cited for contempt after refusing to testify pursuant to a statute that provided only use and derivative use immunity. As the court of appeals explained, Soriano mandates that the contempt citation be reversed. See State v. White, 773 P.2d 824, 825 (Or. Ct. App. 1989); see also Oatney v. Premo, 369 P.3d 387, 396–97 (Or. Ct. App. 2015). But Soriano "did not hold that immunity granted by statute [(i.e., use and derivative use

immunity)] was transformed into transactional immunity." White, 773 P.2d at 825 (emphasis added); see also Oatney, 369 P.3d at 397 ("We have subsequently explained, however, that Article I, section 12, protects only the right not to be compelled to testify against oneself; it does not, in itself, confer transactional immunity whenever that testimony is given."). Indeed, where the witness accepted the statutory use-and-derivative-use immunity and testified pursuant to that grant of immunity, the court "may not now transform the immunity that he accepted into something that he would have preferred." White, 773 P.2d at 825.

The Oregon Court of Appeals decisions are premised on the distinction between immunity provided by statute and immunity provided by operation of law. An immunity statute must grant transactional immunity in order for a contempt citation to be constitutional under the Oregon Constitution. In contrast, immunity conferred by operation of law can be less than transactional immunity. As the Oregon Court of Appeals has observed, the issue comes down to the question of remedy:

> The right to transactional immunity arises only when the legislature has granted it as a substitute for the right against self-incrimination guaranteed by Article I, section 12, of the Oregon Constitution. In the absence of a legislative decision to grant immunity, the remedy for unconstitutionally compelled testimony is suppression of that testimony and any evidence derived from it.

State v. Beugli, 868 P.2d 766, 768 (Or. Ct. App. 1994) (citations omitted). Accordingly, while Oregon appellate courts have not yet addressed how the Soriano holding applies to a Garrity situation, this Court predicts that, consistent with Beugli, a public employee would only be entitled to use and derivative use immunity for statements compelled by the public employer under threat of an adverse employment action.

The cases from Oregon are instructive on whether and how Nowell controls the

legal issue presented by the instant case. Nowell, like Soriano, examined the constitutionality of an immunity statute after an individual was cited for contempt for refusing to testify under a grant of immunity. See Nowell, 58 N.H. at 314–15. Just as Soriano is not controlling on the issue of "the remedy for unconstitutionally compelled testimony" outside the context of an immunity statute, see Beugli, 868 P.2d at 768, Nowell is not controlling on the issue of the remedy for incriminatory statements compelled from a public employee under threat of termination.

2. Massachusetts Cases

As noted above and in the Richardson Order, the Nowell court relied heavily upon Emery's Case, a Massachusetts case decided in 1871. See Richardson Order at 7, 2014 WL 7009287, at *3. In Richardson, this Court "reviewed Massachusetts law in recognition of the fact that the New Hampshire Supreme Court has in some cases given weight to the Massachusetts Supreme Judicial Court's interpretation of Part I, Article 12 when assessing Part I, Article 15 of the New Hampshire Constitution." Id. at 9, 2014 WL 7009287, at *4 (brackets and quotation omitted). This Court explained why the Massachusetts cases re-affirming Emery's Case are not persuasive. See id. at 10, 2014 WL 7009287, at *5. The Court also engaged in a thorough analysis of the text and history of Part I, Article 15, the co-extensiveness principle, and the practical consequences of transactional immunity. See id. at 10–24, 2014 WL 7009287, at *5–11. The Court ultimately concluded that the privilege against self-incrimination under Part I, Article 15 is "'comparable in scope'" to its Fifth Amendment counterpart, and that "the right to immunity for compelled statements" under both provisions is "identical." Id. at 24 n.6, 2014 WL 7009287, at *11 n.6 (quoting State v. Cormier, 127 N.H. 253, 255

(1985)).

Because the Court reaffirms the reasoning and analysis contained in the Richardson Order, it rejects the defendant's invitation to follow Massachusetts' approach to transactional immunity. See Mot. Dismiss 8–9. Nonetheless, the Court briefly discusses Massachusetts case law on this subject because these cases (1) support the Court's conclusion that Nowell is dictum and (2) illustrate the practical difficulties of applying transactional immunity in the public employment context.

A decade after Kastigar was decided, the Massachusetts Supreme Judicial Court was presented with the opportunity to address the continuing vitality of Emery's Case in Colleton.[7] See Colleton, 444 N.E.2d at 917–21. The Colleton court ultimately reaffirmed Emery's Case. Id. In the wake of Kastigar, the Supreme Judicial Court also began to grapple with how to apply the rule from Emery's Case/Colleton in the Garrity context. See Carney v. City of Springfield, 532 N.E.2d 631, 635–36 (Mass. 1988); Baglioni v. Chief of Police of Salem, 656 N.E.2d 1223, 1224 (Mass. 1995); Com. v. Dormady, 667 N.E.2d 832, 835 (Mass. 1996). In Carney, the court extended Colleton and held that, "[i]n Massachusetts, art. 12 of the Declaration of Rights requires transactional immunity to supplant the privilege against self-incrimination, even in the context of public employment." Carney, 532 N.E.2d at 635.

Importantly, the Carney court noted that the Supreme Judicial Court had not previously addressed the intersection between the state constitutional privilege against self-incrimination and Garrity immunity. See id. at 636 ("As our opinion in Colleton makes clear, this court has never before faced the question whether transactional immunity is needed to overcome a claim of testimonial privilege by a public employee.").

[7] The New Hampshire Supreme Court has not had a similar opportunity to review Nowell or Wyman.

In other words, Emery's Case was not binding authority on the issue of "whether transactional immunity is needed to overcome a claim of testimonial privilege by a public employee." Id. Rather, the Supreme Judicial Court addressed that issue for the first time more than a century after it decided Emery's Case. See id. at 635–36.

Just as Emery's Case cannot be classified as binding Massachusetts precedent on this issue, Nowell is not controlling on the issue of whether the New Hampshire Constitution requires transactional immunity to supplant the privilege against self-incrimination provided in Part I, Article 15. Put differently, the Massachusetts Supreme Judicial Court's treatment of Emery's Case in Carney provides strong support for this Court's conclusion that Nowell is not binding authority on the issue presented in the instant case. Unlike Emery's Case and Nowell, the issue here is whether a public employee is entitled to transactional immunity under Part I, Article 15 as a consequence of being compelled by his employer to provide incriminatory statements during an internal investigation.

This Court outlined some of the practical problems posed by the application of transactional immunity in the public employment context in the Richardson Order. See Richardson Order at 22–24, 2014 WL 7009287, at *10–11. At the April 10, 2017 hearing, the State raised similar concerns about the ramifications of granting the defendant's motion to dismiss. In response to what he termed "the parade of horribles argument," the defendant pointed to Massachusetts as having a "procedure [that] works very cleanly." Having reviewed Massachusetts case law addressing the intersection of transactional immunity and Garrity, the Court is not persuaded that Massachusetts has implemented a workable approach.

First, the Court notes that it can only find one Massachusetts case in which the court granted the same remedy the defendant requests here, i.e., dismissal of criminal charges. See Dormady, 667 N.E.2d at 833. The other Massachusetts cases addressing transactional immunity in the public employment context have reached the courts through employees' requests for declaratory or injunctive relief during an ongoing internal investigation, see Baglioni, 656 N.E.2d at 1223–24; Frawley v. Watson, No. CIV. A. 01-4486, 2001 WL 1631719, at *1 (Mass. Super. Ct. Dec. 12, 2001), or an employee challenging his termination for refusing to answer questions during an internal investigation, see Carney, 532 N.E.2d at 636. In each of those cases, the employees did not answer the incriminating questions posed to them during the internal investigation. Consequently, those Massachusetts courts had no opportunity to consider the appropriate constitutional remedy for compelled statements in the public employment context—that is, whether transactional immunity was automatically conferred upon the employee by operation of law as a consequence of the public employer's conduct.

Although the Supreme Judicial Court affirmed the dismissal of criminal charges in Dormady, the court's holding was effectively narrowed to the facts of that case. See Dormady, 667 N.E.2d at 836–37. Before the defendant made any incriminating statements under threat of termination during the internal investigation, id. at 833, he "object[ed] to testifying absent a grant of transactional immunity," id. at 836. Both the police chief and town counsel assured him that he was entitled to transactional immunity. See id. at 835, 837. The Supreme Judicial Court recognized that there was language in Carney—later classified as "dictum"—suggesting "that the police chief

might have authority to grant immunity absent the assent of the district attorney." Id. at 837. The court then framed the question presented as "whether, where reasonable reliance is placed on a promise of transactional immunity by [lesser officials], there is immunity as a matter of constitutional right." Id. The court answered that question in the affirmative because Carney "was the most recent statement of the law at th[e] time [the assurances were made to the defendant]." Id.

By framing its inquiry in terms of reasonable reliance, the Dormady court purposely avoided addressing the critical issue presented by the request for relief in the instant case. See id. at 836–37. That issue is whether a public employer effectively confers transactional immunity upon an employee by compelling that employee to answer incriminating questions under threat of an adverse employment action, even though that employer has no authority under the law to provide such immunity.[8] The failure of Massachusetts case law to adequately address such an important issue is another reason to reject its approach as unworkable.

Conclusion

For all of the foregoing reasons, the Court reaffirms its conclusion that "use and derivative use immunity is coextensive with the right against self-incrimination under Part I, Article 15 of the State Constitution." Richardson Order at 16, 2014 WL 7009287, at *8. Accordingly, the defendant is only entitled to use and derivative use immunity as a result of his compelled statements. Based on the representations made by the State,

[8] In many states, including New Hampshire, the power to grant immunity is only vested in certain officials by the jurisdiction's immunity statute. Under RSA 516:34, the current version of the immunity statute, the prosecutor must obtain "prior written approval of the attorney general or county attorney for the jurisdiction where offenses are alleged to have occurred" before requesting an order from the court compelling testimony from the witness. RSA 516:34, II. Judges have not power to confer immunity on a witness. See State v. Nightingale, 160 N.H. 569, 578 (2010).

which are outlined above, see supra pp. 4–5, the Court has no reason to doubt the State's assertion that its case is entirely independent of the defendant's compelled statements. Accordingly, the Court concludes that a Kastigar hearing is not necessary in this case, at least not at this juncture. See generally Richardson Order at 27–28, 2014 WL 7009287, at *12 (explaining Court's conclusion that a Kastigar hearing will only be conducted, if necessary, after trial if the defendant is convicted).

At the April 10, 2017 hearing, the defendant expressed his intent to seek an interlocutory appeal if the Court denied his motion to dismiss. The State had no objection to this course of action. The Court agrees that its denial of the defendant's motion to dismiss—and, indeed, its entire constitutional analysis—turns on its conclusion that Nowell is dictum. If the New Hampshire Supreme Court decides that Nowell is controlling authority on the issues raised by the defendant's motion to dismiss, he is entitled to transactional immunity for the Reckless Conduct charges he currently faces, and he should not endure a trial. Additionally, public employers throughout New Hampshire will have to revise their processes for conducting internal investigations if Nowell requires transactional immunity for incriminating statements compelled by a public employer. In light of these important considerations, the Court agrees that this case is an appropriate candidate for interlocutory appeal.

Accordingly, the Court will sign a properly filed interlocutory appeal statement, see Sup. Ct. R. 8, presenting for the New Hampshire Supreme Court's review a question concerning whether State v. Nowell, 58 N.H. 314 (1878), is controlling authority on the issue of whether Part I, Article 15 of the New Hampshire Constitution requires transactional immunity where a public employee has been compelled by his

employer, under threat of an adverse employment action, to make incriminatory statements during an internal investigation. This Court will hold the final pretrial conference as scheduled on May 24, 2017. At that time, the defendant must notify the Court whether he intends to pursue an interlocutory appeal of this ruling or proceed with jury selection (currently scheduled for June 5, 2017). If the defendant intends to seek an interlocutory appeal, the Court will establish a schedule for filing that motion at the May 24th hearing.

SO ORDERED.

5/18/2017
DATE

N. William Delker
Presiding Justice