THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0409

The State of New Hampshire

v.

David Burris

APPEAL PURSUANT TO RULE 8 FROM A JUDGMENT OF THE ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(15 minutes)

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ISSUE PRESENTED

Whether use and derivative use immunity, which prevent the State from using immunized statements and any evidence derived from those statements against the defendant in a criminal prosecution, satisfy the privilege against self-incrimination established by Part I, Article 15 of the New Hampshire Constitution.

STATEMENT OF THE CASE AND FACTS

A Rockingham County grand jury indicted the defendant, David Burris, on three counts of reckless conduct. DA[1] 2-4; RSA 631:3 (2016). The charges allege that on or about December 1, 2015, the defendant "placed or may have placed Andrew Holmes and/or local residents in danger of serious bodily injury" when he shot a gun at a car driven by Holmes three times. DA 2-4. The grand jury indicted the defendant once for each shot fired. DA 2-4.

At the time of the reckless conduct, the defendant worked as a probation and parole officer for the New Hampshire Department of Corrections ("Corrections"). DS 2.[2] Corrections investigated the defendant's conduct. DS 2. A few days after the incident, Corrections "ordered the defendant under the threat of termination to provide a written statement regarding [his conduct on December 1, 2015]." DS 2 (brackets omitted). The defendant complied and produced a written account of what occurred. DS 2. In the account, he "asserted his right against self-incrimination under both the Fifth Amendment . . . and Part I, Article 15." DS 2. He specifically stated, "'It is my further belief that any statements will

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[1] DB refers to the defendant's brief.
DS refers to the supplement at the end of the defendant's brief.
DA refers to the defendant's separately bound appendix.

[2] An evidentiary hearing has not occurred, and the trial court has not yet made factual findings in this matter. DS 2. Instead, it has accepted the facts provided by the defendant in his motion to dismiss for the purposes of ruling on his motion. DS 2.

not and cannot be used against me in any subsequent criminal proceedings.'" DS 2.

Several weeks later, Corrections ordered the defendant to submit to an interview with Corrections Director Colon Forbes to discuss the defendant's conduct on December 1, 2015. DS 3. The defendant reasserted his right against self-incrimination before participating in the interview. DS 3. During the interview, the defendant answered all of Director Forbes's questions about his conduct on December 1, 2015. DS 3.

On February 4, 2016, Director Forbes provided the report of his investigation to the Commissioner of Corrections. DS 3. The report quoted and relied upon the defendant's written statement and his oral statements made during the interview. DS 3. The report also included a copy of the defendant's written statement. DS 3.

In May 2016, the Rockingham County Attorney's Office referred the criminal investigation into the defendant's conduct on December 1, 2015, to the Strafford County Attorney's Office. DS 4. The Strafford County Attorney's Office received copies of Director Forbes's report that had any statements provided by the defendant redacted from it. DA 8, 25. The Strafford County Attorney's Office reviewed the case and brought the pending criminal charges. DS 4.

On January 30, 2017, the defendant filed a motion to dismiss or for a *Kastigar* hearing "based upon violation of his state and federal rights against self-incrimination." DA 5-21. In his motion, he argued that this Court's decision in *State v. Nowell*, 58 N.H. 314 (1878), held that transactional immunity alone was sufficient to protect a public employee's rights under Part I, Article 15. DA 11-12, 14-17. He alternatively argued that under the Fifth Amendment, he was entitled to a hearing to determine whether the prosecutor had "been affected 'in any way' by . . . exposure to the immunized statements." DA 17-20.

The State objected. In the objection, the State explained that it had received a redacted version of Corrections's investigation and that "[a]t no time did [it] learn of any information provided by the defendant in violation of his . . . rights." DA 25. The State's argument distinguished *Nowell* because *Nowell* involved the question of whether a statute that provided transactional immunity to government employees comported with the requirements of Part I, Article 15. DA 27. Instead, the State contended, that under the United States Supreme Court decision in *Garrity v. New Jersey*, 385 U.S. 493 (1967), use and derivate use immunity are sufficient to protect a public employee's right against self-incrimination under the Constitution. DA 25-26. The State also argued that a hearing was not necessary because sufficient evidence existed for the trial court to conclude that it had "never

received or made any use of any information provided by the defendant through any statements he was compelled to make." DA 29.

On April 10, 2017, the trial court (*Delker*, J.) held a hearing on the defendant's motion.[3] DS 1; DA 32. The trial court had ordered the parties "to focus on the defendant's argument that this Court is bound by *Nowell* to hold that the defendant is entitled to transactional immunity." DA 32. It also wanted the parties to "be prepared to address the meaning of the term *dictum* with a special emphasis on how [this Court] has treated that concept." DA 32.

On May 18, 2017, the trial court issued an order in which it denied the defendant's motion. DS 1, 23-24. In the order, the trial court concluded that the United States Supreme Court has held that the Constitution accords a public employee use and derivative use immunity for statements compelled under threat of termination. DS 6-7. The trial court distinguished *Nowell* because it was interpreting the constitutionality of a statute that accorded transactional immunity to public employees. DS 8-9, 15-22. It also found that suggestions in *Nowell* that a lesser protection would not satisfy Part I, Article 15, were nothing more than non-binding dicta. DS 9, 11-14. It noted that granting transactional immunity is not a workable remedy. DS 20. Thus, it denied the defendant's motion but agreed to sign "a properly filed interlocutory appeal statement." DS 23.

This appeal followed.

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[3] The defendant did not order the hearing transcripts.

SUMMARY OF THE ARGUMENT

Use and derivative use immunity protect a public employee's privilege against self-incrimination because they are co-extensive with the privilege. Before the public employee gave a compelled statement to his employer, he was subject to prosecution if the State could discover sufficient alternative evidence of guilt. After the public employee gave a compelled statement to his employer, he was still subject to prosecution if the State could discover alternative evidence of guilt. In neither circumstance could the State compel the public employee to give evidence against himself or use evidence, and the fruits from that evidence, that the public employee gave upon threat of termination. This rule comports with the current New Hampshire immunity statutes. It also prevents public agencies from intentionally or inadvertently creating mischief in the criminal justice system by preventing the agencies from granting amnesty to their employees.

This Court has considered the interaction between Part I, Article 15 and immunity in the past. It did so in the context of statutes that granted transactional immunity to certain types of witnesses. It has never been asked to address what Part I, Article 15 requires to protect public employees or other members of the public from compelled self-incrimination. It has, however, recognized that use and derivative use immunity are sufficient in other contexts to protect individuals from compelled self-incrimination. To the extent that this Court's prior decisions

do control, this Court should overturn them as remnants of abandoned doctrine because mandating transactional immunity is unworkable, and the law has evolved in the past century and a half.

Accordingly, this Court should affirm the trial court's decision.

ARGUMENT

USE AND DERIVATIVE USE IMMUNITY SATISFY THE REQUIREMENTS OF PART I, ARTICLE 15 BECAUSE THEY PREVENT THE STATE FROM USING THE DEFENDANT'S COMPELLED STATEMENTS AGAINST HIM AND *STATE V. NOWELL*, 58 N.H. 317 (1878), DOES NOT CONTROL.

Use and derivative use immunity are more than sufficient to protect a public employee's privilege against self-incrimination under both the New Hampshire and United States Constitutions because they prevent the State from using compelled statements during its criminal investigation. So long as the State does not use the compelled statements, and remains unaware of the content of those statements, it may independently investigate and prosecute criminal offenses against a public employee. Most jurisdictions that have considered the application of use and derivative use immunity have reached that same conclusion.

Here, the State has asserted that it did not use the defendant's compelled statements because it had no knowledge of what the defendant said to Corrections during Corrections's investigation. The defendant has not presented any evidence beyond speculation that the State's has knowledge of or used the content of the defendant's compelled speech. And, the case law cited by the defendant is inapplicable. Thus, this Court must affirm the trial court's order and remand for trial.

This Court has never addressed the question of whether use and derivative use immunity satisfy the protection accorded under Part I, Article 15. *Cf. State v.*

Litvin, 147 N.H. 606, 608-09 (2002) (concluding that although statements given by public employees threatened with termination are compelled and cannot "be used in subsequent criminal proceedings," the statements at issue were not compelled). Because the question presents an issue of constitutional interpretation, this Court's review is *de novo*. *Petition of the State of New Hampshire (State v. Johanson)*, 156 N.H. 148, 151 (2007).

A. Use and derivative use immunity, which have been recognized in New Hampshire, sufficiently protect a public employee's right against self-incrimination, while preventing public employees from evading justice for criminal acts committed while working.

The Fourteenth and Fifth Amendments prevent the government from compelling public employees to incriminate themselves under the threat of termination from public employment. *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). The rationale behind this protection is that forcing public employees to choose between "their means of livelihood" or their constitutional rights "is the antithesis of free choice to speak out or to remain silent." *Id.* at 497. Thus, public employees who have been forced to make such a choice, and have chosen to forego their constitutional rights, have not freely waived those rights. *See id.* 497-98 ("Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other."). To protect public employees, the government cannot use statements compelled under threat of termination in subsequent criminal proceedings. *Id.* at 500.

This Court has recognized that Part I, Article 15 is "comparable in scope to the [F]ifth [A]mendment." *State v. Cormier*, 127 N.H. 253, 255 (1985); *see also Walter v. State*, 206 S.E.2d 662, 667 (Ga. Ct. App. 1974) ("The privilege against self-incrimination has been uniformly construed by the courts as giving the citizen protection as broad as that afforded by the common-law principle from which it is derived. The constitutional guaranty protects one from being compelled to furnish evidence against himself, either in the form of oral confessions or incriminating admissions of an involuntary character, or of doing an act against his will which is incriminating in its nature." (Quotation omitted.)). Part I, Article 15 provides that "No subject shall . . . be compelled to accuse or furnish evidence against himself." N.H. Const. part I, art. 15. Thus, this Court has interpreted Part I, Article 15 to accord public employees some degree of immunity where the government employer compels an employee to provide an incriminating statement under the threat of termination. *See Litvin*, 147 N.H. at 608 (citing *Garrity* to support the conclusion that Part I, Article 15 prohibits use of compelled statements by public employees in subsequent prosecutions). It has never addressed the scope of the immunity that the State must accord to public employees who have provided incriminating statements under the threat of termination.

Under the Fifth Amendment, use and derivate use immunity protect any person's privilege against self-incrimination because that privilege "has never

been construed to mean that one who invokes it cannot subsequently be prosecuted." *Kastigar v. United States*, 406 U.S. 441, 453 (1972). So long as the scope of the immunity accorded "is coextensive with the scope of the privilege against self-incrimination," the immunity is valid, and the government may compel the person to testify. *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 54 (1964); *see also Kastigar*, 406 U.S. at 449; *United States v. Gecas*, 120 F.3d 1419, 1435-53 (1997) (detailing the history and evolution of the privilege against self-incrimination from the medieval era to the present). The privilege's "sole concern is to afford protection against being forced to give testimony leading to the infliction of penalties affixed to criminal acts." *Kastigar*, 406 U.S. at 453 (quotations and ellipsis omitted). So, "[i]mmunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection." *Id.* "It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." *Id.*

Most jurisdictions that have considered the question of whether use and derivative use immunity are sufficient to protect a person's privilege against self-incrimination under their state constitutions have concluded that such immunities are sufficient. *See, e.g.*, *Patchell v. State*, 711 P.2d 647, 649 (Ariz. Ct. App. 1985); *Lybarger v. City of Los Angeles*, 40 Cal. 3d 822, 829 (1985) (recognizing

that use and derivative use immunities are sufficient to protect a public employee's privilege against self-incrimination); *In re Caito*, 459 N.E.2d 1179, 1183-84 (Ind. 1984); *State v. Strong*, 542 A.2d 866, 872 (N.J. 1988); *In re Criminal Investigation No. 1-162*, 516 A.2d 976, 981 n.3 (Md. 1986); *People v. Johnson*, 507 N.Y.S.2d 791, 793 (N.Y. Sup. Ct. 1986) (recognizing that New York courts have found use immunity sufficient under the New York constitution); *Commonwealth v. Swinehart*, 664 A.2d 957, 969 (Pa. 1995); *Ex Parte Shorthouse*, 640 S.W.2d 924, 928-29 (Tex. Crim. App. 1982); *State v. Ely*, 708 A.2d 1332, 1338-39 (Vt. 1997); *State v. Beard*, 507 S.E.2d 688, 690 (W. Va. 1998).

In reaching this conclusion, those jurisdictions have found that according amnesty to witnesses through transactional immunity provides "a measure of protection clearly greater than the privilege against self-incrimination." *Swinehart*, 664 A.2d at 968. Those jurisdictions that have concluded that transactional immunity alone is sufficient have based their decisions on "the concern for the practical effect of separating out the information garnered from the compelled testimony when later prosecuting the individual," rather than upon whether the grant of immunity satisfies the demands of the privilege against self-incrimination. *Id.* at 967; *see also State v. Gonzalez*, 853 P.2d 526, 530-31 (Alaska 1993) (expressing doubt that the State can conduct an independent investigation after reviewing the compelled testimony) *State v. Miyasaki*, 614 P.2d

915, 923-24 (Haw. 1980) (same); *Wright v. McAdory*, 536 So. 2d 897, 903 (Miss. 1988) ("We regard it inevitable that under a use/derivative use immunity regime prosecutors will receive incentives to work backwards from what they learn from the witness. So-called independent sources in this sense will seldom be independent.").

In New Hampshire, the legislature, trial courts, and this Court have recognized, as the United States Supreme Court did in *Murphy* and *Kastigar*, that use and derivative use immunity protect a person's privilege against self-incrimination while allowing the State to pursue criminal investigations and prosecutions against wrong-doers. The legislature recognized that use and derivative use immunity were sufficient methods through which a prosecutor can compel a recalcitrant witness's testimony while protecting the witness's privilege against self-incrimination when it amended RSA 516:34 (2010) to allow the State to seek use and derivative use immunity as opposed to transactional immunity. *See* RSA 516:34; *State v. Roy*, 140 N.H. 478, 480 (1995) (acknowledging the legislatures amendment to RSA 516:34 and concluding that the State cannot be compelled to grant a witness immunity absent a due process violation). In the nearly quarter-century since the legislature amended RSA 516:34 to require courts to grant use and derivative use immunity, this Court has never held or questioned whether such immunity is insufficient to protect a person's rights under Part I,

Article 15. *See, e.g.*, *State v. Rogers*, 159 N.H. 50, 57-59 (2009) (discussing RSA 516:34 and concluding that nothing compels the trial court to grant immunity under the statute absent a request from the State); *State v. Kivlin*, 145 N.H. 718, 721-23 (2001) (same); *State v. Winn*, 141 N.H. 812, 814-16 (1997) (same); *Roy*, 140 N.H. at 480-81 (same).

For public employees, the Fifth Amendment requires 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 receive[] immunity from the use of her statements or their fruits in subsequent criminal proceedings." *Sher v. U.S. Dep't of Veterans Affairs*, 448 F.3d 489, 501 (1st Cir. 2007). The use and derivative use immunity is automatically conferred when the employee makes statements under the threat of adverse employment action. *Id.*

Because use and derivative use immunity allow the State to pursue its compelling interest in promoting public safety while preventing the State from relying upon compelled statements and the fruits derived from those statements, the scope of the immunity granted is co-extensive with the scope of the privilege against self-incrimination. The defendant also remains in the same legal position both before and after he provides the immunized statements. Because before he provides the statements, he is subject to prosecution if the State can find independent evidence that supports guilt. And after he provides the statements, he

is still subject to prosecution if the State can find independent evidence that supports guilt. This is particularly true when, as occurred in this case, a separate prosecuting entity with no knowledge of the content of the compelled statements undertakes the investigation and prosecution. *See* 3 Wayne R. LeFave et al., *Criminal Procedure* § 8.11(c) (2d ed. 1999) (describing that the "Chinese Wall" technique allows prosecutors and investigators to show that the investigation occurred without reliance upon the immunized testimony and that the prosecutors "did not make strategic use of information obtained from the testimony"). Transactional immunity, however, places the defendant in a better position than he had been in before giving the immunized testimony because he now has amnesty from prosecution entirely.

Another benefit of use and derivative use immunity is that they place public employees in the same position as any other person compelled to give testimony under grants of immunity. As detailed above, RSA 516:34 allows courts, upon the request of the State, to grant use and derivative use immunity to witnesses to secure their testimony. Under the defendant's reasoning, Part I, Article 15 accords public employees special protection that is not accorded to anyone else because it grants them amnesty from prosecution, if the government compels them to testify. Yet, Part I, Article 15 does not entitle distinct groups of people to unique protections. It applies equally to all. Thus, if use and derivative use immunity are

sufficient to protect the rights of the public, then they are sufficient to protect public employees.

Transactional immunity for public employees poses a unique problem because it strips the power to grant immunity from the prosecutor. Under RSA 516:34, only a county attorney or the attorney general may authorize a prosecutor to seek immunity for a witness.[4] *See also* RSA 7:6 (Supp. 2016) ("The attorney general shall have and exercise general supervision of the criminal cases pending before the supreme and superior courts of the state, and with the aid of the county attorneys, the attorney general shall enforce the criminal laws of the state."). Requiring transactional immunity would give non-law enforcement investigators for a municipal, county, or state agency the ability to grant amnesty to individuals who may have committed serious crimes without any input from a county attorney or the attorney general. Or even worse, the investigator could grant amnesty against the advice or demands of a county attorney or the attorney general. This power would be ripe for abuse in the wrong hands. Use and derivative use immunity do not allow for this abuse and allow the prosecutor to retain control over criminal investigations and prosecutions.

Use and derivative use immunity are more consistent with the New Hampshire Constitution and statutes. They are more practical. And, they assure

[4] This was also true before 1993 when RSA 516:34 accorded transactional immunity. *See State v. McManus*, 130 N.H. 256, 259 (1987) (indicating that the State has the authority to grant immunity to witnesses).

the fair and impartial administration of justice in the state. Thus, this Court should conclude that use and derivative use immunity are sufficient to protect public employees privilege against self-incrimination and affirm the trial court's decision.

B. This Court's decision in *Nowell* addressed only the question of whether Gen. St., c. 99, s. 20, which granted transactional immunity to "clerk[s], servant[s], or agent[s]" of accused persons, satisfied the requirements of Part I, Article 15.

Nowell does not apply because it concerned the constitutionality and application of a statute that no longer exists and granted transactional immunity to class of witnesses who testified against their overseers or employers. The defendant relies heavily upon the continued applicability of this Court's decision in *Nowell*. In *Nowell*, this Court simply concluded that a statute conferring transactional immunity, the highest level of immunity available, satisfied Part I, Article 15. It never determined whether use and derivative use immunity would satisfy Part I, Article 15. Thus, that issue remains an open question that this Court can decide.

This Court identified the question before it in *Nowell* as "whether the provisions of Gen. St., c. 99, s. 20, *are consistent with* the constitutional prohibition above set forth." 58 N.H. at 314 (emphasis added). The constitutional provision at issue was Part I, Article 15. *Id.* The statute at issue provided that

> 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 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 offense so disclosed by him.

Id. at 315. The defendant had been asked if, as a store clerk, he had sold "spiritous or intoxicating liquors" and whether his employer kept them for sale. *Id.* He refused to answer, and the court held him in contempt. *Id.* He appealed the contempt finding. *Id.*

The sole issue before the court was determining whether the statute at issue was "consistent with" Part I, Article 15. *Id.* at 314-15. This Court then went on the interpret the statute and concluded that the language of the statute provided the defendant with immunity from further prosecution, which was "consistent with" Part I, Article 15. *Id.* at 315-16. Having concluded that the statute protected defendant from various forms of prosecution, the held that his refusal to testify was unfounded and upheld the contempt order. *Id.* at 316.

In other words, all this Court did in *Nowell* was determine whether transactional immunity satisfied the privilege against self-incrimination established by Part I, Article 15. *Id.* at 314. It concluded that transactional immunity did satisfy Part I, Article 15. *Id.* at 315. It never addressed or considered whether use and derivative use immunity would satisfy Part I, Article 15 because the statute at issue did not provide for that type of immunity.

This Court's decision in *Wyman v. DeGregory*, 101 N.H. 171 (1957) supports this conclusion because it narrowly interprets *Nowell*. In *Wyman*, this

Court finds that "[a]s to the Fifteenth Article 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 make satisfies its requirements." *Id.* at 174. It then quotes *Nowell* to support that finding. *Id.* This Court has never considered *Nowell* to be a statement that Part I, Article 15 requires transactional immunity. Instead, it viewed *Nowell* as supporting the conclusion that transactional immunity can satisfy Part I, Article 15. That does not mean, however, that only transactional immunity can satisfy Part I, Article 15. Thus, *Nowell* does not bind this Court, and it should affirm.

C. The suggestion in *Nowell* that transactional immunity alone satisfies the requirements of Part I, Article 15 is nothing more than mere dicta that does not bind this Court.

Any discussion beyond that which resolved the issue before the court in *Nowell*, whether the statute at issue was "consistent with" Part I, Article 15, is nothing more than mere dicta that this Court is free to disregard. Thus, this Court should reject the *Nowell*'s outdated dicta for the reasons articulated in section A above and affirm.

Dicta, even that which was derived from determinations of facts and arguments presented by counsel, does not bind future courts and can be disregarded. *Black's Law Dictionary* defines "judicial dictum" as "[a]n opinion by a court on a question that is directly involved, brief, 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). This is consistent with how this Court had defined dicta. *See Tyler v. Hannaford Bros.*, 161 N.H. 242, 247 (2010) ("If issues are determined but the judgment is not dependent upon the determinations, re-litigation of those issues in a subsequent action between the parties is not precluded. Such determinations have the characteristics of dicta." (Quotation omitted.)). This Court has never hesitated to disregard dicta and other statements that were not necessary to support the holding of a prior decision. *See*, *e.g.*, *Lord v. Lovett*, 146 N.H. 232, 238 (2001) ("[This Court is] not required, however, to give dicta the deference accorded by *stare decisis* to actual holdings." (Quotation omitted.)); *In re Estate of Norton*, 135 N.H. 62, 64 (1991) ("Since [the statements in a prior decision] were not necessary to the decisions, they may be said to be truly dicta and not deserving of the deference accorded by *stare decisis* to actual holdings." (Quotation, citations, brackets, and ellipsis omitted.)). Thus, this Court is only bound by the holdings of prior decisions like *Nowell* and *Wyman*.

The holdings of *Nowell* and *Wyman* are limited to the discrete issue of whether transactional immunity satisfies Part I, Article 15 and any other discussion of Part I, Article 15 is non-binding dicta. *See Wyman*, 101 N.H. at 714; *Nowell*, 58 N.H. at 314-15. The additional discussion or suggestions in those cases were not the holdings of those cases, were not necessary to decide the issue

before the Court, and did not serve as the foundation for the holdings. Thus, this Court should disregard any such statements as mere dicta and affirm.

D. To the extent that *Nowell* does control, it should be overturned as unworkable because it immunizes public employees from the criminal consequences of their actions and because legal principles have so evolved to make it nothing more than a remnant of abandoned doctrine.

This Court's holding in *Nowell* is an archaic remnant of abandoned constitutional doctrine. At the time this Court decided *Nowell*, the two immunity options were transactional or use immunity. Use immunity did not prevent the State from getting investigatory leads from the compelled testimony. Thus, a person with use immunity whose compelled statements could not be used against him, still could incriminate himself by furnishing leads to the State. More recently, the doctrine of use and derivative use immunity, which some refer to as testimonial immunity, has accorded greater protection by preventing the statements and any fruits derived from those statements from being used against the person. With the advent of use and derivative use immunity courts have begun to abandon the extreme requirement of transactional immunity.

The holding in *Nowell* has also defied practical workability because it has become difficult to enforce without inviting a host of unintended consequences. Applying *Nowell* in the present context would empower public agencies to, inadvertently or intentionally, hinder criminal investigations by granting amnesty to their employees. It would make it nearly impossible for the State to adequately

investigate complex crimes, such as conspiracies, without granting amnesty to individuals whose may have committed serious offenses. It would also upend New Hampshire law, which has come to recognize use and derivative use immunity as a way to protect a defendant's due process rights in certain circumstances. Thus, this Court should overrule *Nowell* to the extent that it retains any vitality.

"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 exercise of judicial will with arbitrary and unpredictable results." *State v. Balch*, 167 N.H. 329, 334 (2015). "Nevertheless, [this Court] will on rare occasion overrule past decision." *Id.* "The key question in determining whether to overrule a prior decision is not whether [this Court] disagree[s] with it, but whether it has come to be seen so clearly as error that its enforcement was for that very reason doomed." *Id.* (quotation omitted). This Court considers four factors when it determines whether to overturn a prior decision: (1) "whether the rule has proven to be intolerable simply by defying practical workability"; (2) "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling"; (3) "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine"; and (4) "whether facts have so changed, or

come to be seen so differently, as to have robbed the old rule of significant application or justification." *Id.* "Evaluation of the four factors requires balancing the various interests involved because no single factor is dispositive and the factors are not meant to be rigidly applied or blindly followed." *Id.* (quotation omitted).

Factor one militates in favor of overruling *Nowell* because it has become impractical as it hamstrings the State's ability to seek justice. *See id.* (describing the considerations of the first factor). First, as detailed in section A above, *Nowell* has become unworkable because granting transactional immunity to public employees under these circumstances gives public entities unfettered power to grant employees amnesty from criminal prosecution. This power would be ripe for abuse and allow public entities to interfere in criminal investigations and prosecutions of their employees. This power would also immunize public employees from prosecution in federal courts under the multi-jurisdictional exclusionary principle. *See United States v. Baisys*, 524 U.S. 666, 682 (1998) ("[A] federal court could not receive testimony compelled by a State in the absence of a statute effectively providing for federal immunity, and it did this by imposing an exclusionary rule prohibiting the National Government from making any such use of compelled testimony and its fruits." (Quotation omitted.)).

Second, the requirement that the State can grant only transactional immunity would make it nearly impossible to uncover and prosecute certain criminal activities. As the Pennsylvania Supreme Court observed, "The very nature of criminal conspiracies is what forces the [State] into the Hobson's choice of having to grant one of the parties implicated in the criminal scheme immunity in order to uncover the entire criminal enterprise." *Swinehart*, 664 A.2d at 968. "A grant of immunity should protect the witness from prosecution through his own words, yet it should not be so broad that the witness is forever free from suffering the just consequences of his actions, if his actions can be proven by means other than his own words." *Id.*

Third, the evolution of due process considerations in New Hampshire has evolved to the point where denying the State the ability to grant use and derivative use immunity would force it to have to choose between granting amnesty to a witness who also has some degree of culpability or risking having the charges dismissed. In *State v. Farrow*, 118 N.H. 296 (1978), and its progeny, this Court recognized that in some circumstances the State's failure to immunize a defense witness may violate a criminal defendant's due process rights. *Id.* at 305-06. It later recognized that use and derivative use immunity would be sufficient in those circumstances. *Roy*, 140 N.H. at 481. But, if this Court were to conclude that *Nowell* retains its vitality, then it would abrogate *Roy* and regularly put the State in

untenable situations in which it must grant amnesty to those who have committed serious crimes to prosecute others who it hopes have greater culpability. Thus, the dramatic redistribution of power that transactional immunity would create and the interference with the State's ability to carry out one of its essential functions militate in favor of overruling *Nowell*.

Factor three militates in favor of overruling *Nowell* because the law has developed "in such a manner as to undercut the prior rule." *Balch*, 167 N.H. at 335. First, federal law has evolved to the point that transactional immunity is no longer considered the only option for federal prosecutors to immunize witnesses. In *Counselman v. Hitchcock*, 142 U.S. 547 (1892), the Court concluded that a "[use immunity] 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 [against self-incrimination] conferred by the Constitution of the United States."[5] *Id.* at 585. Years later, in *Murphy*, the Court recognized that the immunity conferred by the government must be "coextensive with the

[5] Commentators have suggested that at the time the Court decided *Counselmen* and the states addressed immunity before *Counselmen*, like New Hampshire did in *Nowell*, they were considering the distinction between transactional and use immunity—use immunity, alone, does not prevent the government from using the compelled testimony to further its investigation. *See* Peter Lushing, *Testimonial Immunity and the Privilege against Self-Incrimination: A Study in Isomorphism*, 72 J. Crim. L. & Criminology 1690, 1708 (1982) ("The statute examined in *Counselman* afforded immunity from admission of the compelled testimony into evidence—'use immunity'—but not immunity from a prosecutor following up investigatory leads suggested by the testimony—'derivative use immunity.'"); *see also State v. Thrift*, No. 23957, 1993 S.C. LEXIS 218, at *21 (1993) (describing use and derivative use immunity as "a fairly modern development in Fifth Amendment law"). *Kastigar* rightly rejected the reasoning in *Counselman* as dicta because the Court had never considered a statute that had afforded use and derivative use immunity together. Lushing, *Testimonial Immunity*, *supra* at 1709.

privilege which it displaces." 378 U.S. at 54. The Court concluded that granting immunity in a state proceeding, provides the witness with use and derivative use immunity in federal courts. *Id.* at 79; *see also Baisys*, 524 U.S. at 682. Eighty years after *Counselman*, the Court held in *Kastigar* that use and derivative use immunity were "coextensive" with the Fifth Amendment. *Kastigar*, 406 U.S. at 462. Thus, in federal courts any suggestion that the Fifth Amendment required transactional immunity has been completely abandoned.

Second, as detailed in section A, most of the state courts that have considered whether use and derivative use immunity are sufficient under their privileges against self-incrimination have concluded that it is sufficient. For example, Pennsylvania found that its privilege was like the federal privilege and "that use/derivative use immunity can best achieve the necessary balance between the right to protect a witness from giving evidence against himself and the right of the public to compel every person's testimony." *Swinehart*, 664 A.2d at 969. In another example, New Jersey found that the protection of a *Kastigar* hearing was a sufficient method for preventing the violation of use and derivative use immunity by the State. *Strong*, 542 A.2d at 871-72.

Some jurisdictions continue to have statutes that provide for transactional immunity or use immunity, so those courts have never considered whether use and derivative use immunity satisfies their constitutional privilege against self-

incrimination. *See*, *e.g.*, *State ex rel Nothum v. Walsh*, 380 S.W.3d 557, 565 (Mo. 2012) (concluding that use immunity, which is what Missouri's statute provides for, is insufficient to satisfy the privilege against self-incrimination); *State v. Tricas*, 290 P.3d 255, 258-59 (Nev. 2012) (concluding that it does not need to reach the constitutional question about use and derivative use immunity because Nevada's statutes confer transactional immunity).

Only six jurisdictions continue to interpret their state constitutions to require transactional immunity. *See*, *e.g.*, *Gonzalez*, 853 P.2d at 530-31; *Miyasaki*, 614 P.2d at 923-24; *Attorney General v. Colleton*, 444 N.E.2d 915, 919-20 (Mass. 1982); *McAdory*, 536 So. 2d at 903-04; *State v. Soriano*, 684 P.2d 1220, 1231 (Ore. 1984); *Thrift*, 1993 S.C. LEXIS 218, at *23. Three of these jurisdictions do so out of paranoia and doubt about the State's ability to conduct an independent investigation. *See Gonzalez*, 853 P.2d at 530-31; *Miyasaki*, 614 P.2d at 923-24; *McAdory*, 536 So. 2d at 903. These six jurisdictions are the minority that have retained transactional immunity despite the evolution of the law over the past century and a half.

Given the evolution of New Hampshire's jurisprudence and the fact that most jurisdictions that have considered the immunity question have concluded that use and derivative use immunity satisfy the privilege against self-incrimination, the reliance upon transactional immunity has become a remnant of discarded law.

Thus, this Court should not longer require transactional immunity and should affirm the trial court's decision.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a fifteen-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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CERTIFICATE OF SERVICE

I, Sean R. Locke, hereby certify that I have sent two copies of the State's brief to counsel for the defendant, Peter J. Perroni, Esquire, by first-class mail postage prepaid, at the following address:

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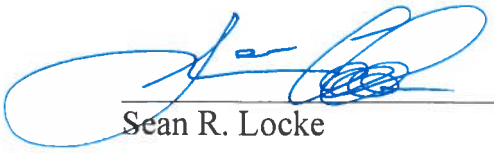
December 1, 2017



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