The State of New Hampshire
Superior Court

Rockingham S.S.

STATE OF NEW HAMPSHIRE

v.

MARK RICHARDSON

NO. 218-2014-CR-00461

ORDER ON THE DEFENDANT'S MOTION TO DISMISS

The defendant Mark Richardson is charged with one count of simple assault by an on-duty law enforcement officer. He has moved to dismiss the indictment, arguing that he is entitled to transactional immunity for the charge under the New Hampshire Constitution. Alternatively, he requests a hearing pursuant to Kastigar v. United States, 406 U.S. 441 (1972), in order to determine whether the State has made use or derivative use of certain compelled statements he made. On October 24, 2014, the Court held a hearing on the issues of whether the New Hampshire Constitution requires that the defendant be given transactional immunity in exchange for the compelled statements and, if not, whether he is entitled to a pretrial Kastigar hearing under these circumstances. For the reasons set forth herein, the Court answers both questions in the negative. The defendant's motion to dismiss is therefore DENIED.

Facts

The following facts are taken from the defendant's motion to dismiss. In November 2009, while the defendant was employed as an officer with the Seabrook Police Department, he allegedly assaulted Michael Bergeron, Jr., who was being held in custody. Mot. Dismiss ¶3. On April 4, 2014, the defendant was indicted on one count of simple assault by an on-duty law enforcement officer. Id. ¶1.

As part of its own internal investigation of the incident, the Seabrook Police Department hired Municipal Resources Inc. ("MRI") in 2014 to investigate the incident and publish its findings. Id. ¶4. MRI interviewed the defendant on May 22. Id. ¶6. On threat of termination, the defendant was required to answer MRI's questions relating to the incident. Id. Before answering any questions, the defendant was required to sign a form titled "GARRITY WARNING," which stated in part:

> This is to inform you that I have been engaged, on behalf of McKittrick Law Offices, which represents the Town, to question you regarding the **events and circumstances concerning the motor vehicle stop, arrest, and detention of Michael J. Bergeron on November 11, 2009 and any matters pertaining thereto**. This questioning will concern administrative matters relating to the official business of the Seabrook Police Department. I am not about to question you for the purpose of instituting a criminal prosecution against you. . . . [N]either your self-incriminating statements nor the fruits of any self-incriminating statements you make will be used against you in any criminal legal proceedings. . . . If you refuse to answer my questions or if you attempt to provide false, untrue, or deliberately erroneous information, or attempt to hamper the investigation in any way, this, in itself, is a violation of the rules and regulations of the Seabrook Police Department and will result in your dismissal.

Id. Ex. F (emphasis in original). After completing its investigation, MRI published its report, which was subsequently released to the public. Id. ¶13 & n.3; see generally id. Ex. C. The report contains statements made by the defendant to MRI. See id. Ex. C. On July 23, officials with the Town of Seabrook held a televised press conference to

announce the termination of the defendant based on the results of the MRI report. Id. ¶12. An Assistant Attorney General involved in prosecuting the defendant's case requested and received a copy of the report from the Town's attorney on that same day.[1] See State's Ex. 1.

Analysis

At the outset, the Court notes that the parties do not dispute that the defendant is entitled to some form of immunity for the statements he made to MRI after he was threatened with termination. See Mot. Dismiss 6; Obj. Mot. Dismiss ¶11. This conclusion is compelled by the United States Supreme Court's decision in Garrity v. New Jersey, 385 U.S. 493, 497–98 (1967), in which the court held that a public employer violates an employee's right against self-incrimination when it compels him to making incriminatory statements under threat of termination. See also State v. Litvin, 147 N.H. 606, 608–09 (2002) (discussing Garrity). Consequently, compelled statements "obtained under threat of removal from office" may not be used against the employee "in subsequent criminal proceedings . . . ." Garrity, 385 U.S. at 500. Courts now interpret Garrity to "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).

As Kastigar v. United States makes clear, the Fifth Amendment only prohibits the

[1] In his motion to dismiss, the defendant alleged that the State had received an earlier version of this report. Mot. Dismiss ¶¶ 9–11. At the hearing, however, the State proffered an email exchange that demonstrated that the State had received the report on the day it became public. Because the defendant did not challenge the accuracy of this evidence at the hearing, the Court accepts it for purposes of this motion.

prosecution's use or derivative use of testimony given under grant of immunity at a criminal proceeding; an employee is not entitled to transactional immunity, which is a total "grant [of] immunity from prosecution for offenses to which [the] compelled testimony relates." 406 U.S. at 443. Under the Fifth Amendment, the government is permitted to prosecute the employee for the alleged misconduct, so long as "the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." Id. at 460.[2]

Although 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. See N.H. CONST. pt. I, art. 15 ("No subject shall be . . . compelled to accuse or furnish evidence against himself."). In deciding this question, the guiding inquiry is whether the immunity granted to the witness is coextensive with the privilege displaced. See Kastigar, 406 U.S. at 449 ("The constitutional inquiry, rooted in logic and history, as well as in the decisions of this Court, is whether the immunity granted under this statute is coextensive with the scope of the privilege."); see also Wyman v. De Gregory, 101 N.H. 171, 175 (1957). The defendant asks the Court to interpret Part I, Article 15 to require transactional immunity in exchange for a statement compelled under threat of termination, arguing that only transactional immunity is sufficient to protect the privilege. See Mot. Dismiss 6–9. The State objects and responds that "the New Hampshire Constitution does not require that a witness be granted transactional immunity before

[2] The parties dispute the kinds of uses which are prohibited under Kastigar. The Court discusses the issue below. See Section IV, *infra*.

being compelled to testify." Obj. Mot. Dismiss ¶32.

Assuming that the Court were to hold that the State Constitution is no more protective than the Federal Constitution in this area, there would be a question as to whether the State has made or intends to make impermissible use of the defendant's compelled statements. The parties disagree on this issue as well. See Mot. Dismiss at 10–13; Obj. Mot. Dismiss at 6–11, ¶¶15–29. They further dispute whether the defendant is entitled to a pretrial Kastigar hearing, at which the State would bear the "heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." Kastigar, 406 U.S. at 461–62. The State asserts that a hearing is unnecessary because it has not made any impermissible use of the defendant's compelled statements. Obj. Mot. Dismiss ¶65.

The Court examines each of these matters in turn. For analytical purposes, the Court begins by examining and rejecting the defendant's contention that transactional immunity is required under the State Constitution. The Court then proceeds to set forth its reasoning as to why use and derivative use immunity, as articulated in Kastigar, is sufficient to protect the defendant's Article 15 right against self-incrimination. Applying Kastigar to the facts presented, the Court concludes that no hearing is necessary at this stage of the proceedings.

I. New Hampshire and Massachusetts Case Law Analyzing Immunity Statutes

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 first had occasion to consider whether an immunity statute violated Article 15. See State v. Nowell, 58 N.H. 314 (1878). The statute at issue stated:

> 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.

N.H. Laws 1858, ch. 99, §20. In Nowell, a clerk had been held in contempt for refusing to testify before a grand jury regarding whether his employer had sold intoxicating liquor. Nowell, 58 N.H. at 314. Nowell appealed the contempt decree to the Supreme Court. Id. The question presented to the court was "whether the provisions of Gen. St., *c.* 99, *s.* 20, are consistent" with Article 15. Id. In answering in the affirmative, the court reasoned that "[t]he 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[.]" Id. at 315. Because the statute granted total immunity from "future prosecution as effectually as if he were wholly innocent," the statute satisfied the demands of the State Constitution. Id.

The court did not undergo a thorough textual or historical analysis of Article 15; instead, it relied heavily on a Massachusetts Supreme Court case, Emery's Case, to support its holding. See id. Both states' constitutions use the same language to articulate the right against self-incrimination. See MASS. CONST. pt. I, art. 12 ("No subject shall be . . . compelled to accuse, or furnish evidence against himself."). In Emery's Case, the court struck down a statute compelling testimony from witnesses brought before a legislative committee on the ground that it failed to provide transactional immunity to witnesses. See Emery's Case, 107 Mass. 172, 172 (1871) ("The [statute] is ineffectual to deprive a witness before the legislative committee . . . of his constitutional privilege[,] . . . inasmuch as it leaves him liable to criminal prosecution and punishment for any matter to which his testimony may relate."). Parsing the terms of Article 12, the court interpreted the clause prohibiting a subject from being compelled to "accuse himself" to bar the legislature from compelling testimony from a witness in the absence of transactional immunity. Id. at 181. At common law, the logic of this rule was that, "[w]here . . . the reason for the privilege of the witness or party interrogated ceases, the privilege will cease also . . . ." Herbert Broom, A Selection of Legal Maxims, Classified and Illustrated 968–69 (7th Am. ed. 1874) (cited in Emery's Case, 107 Mass. at 181).

Nearly eighty years after Nowell, the New Hampshire Supreme Court upheld a statute granting transactional immunity to witnesses compelled to testify before the Attorney General. See Wyman, 101 N.H. at 174. The statute had been enacted to allow the Attorney General to compel testimony from witnesses summoned "in the course of the investigation of subversive activities . . . ." N.H. Laws 1955, ch. 312, § 1.

An inspection of the legislative history shows that there was at least some awareness of the constitutional dimensions of the immunity issue. For example, before passage of the statute, the Judicial Council filed a report with the Senate. See N.H. Judicial Council, Sixth Biennial Report 50–53 (1956). Citing to Nowell, the council opined that "[i]t has long been recognized that the State in the public interest has the power to compel a witness to testify notwithstanding the privilege against self-incrimination by granting full immunity against criminal prosecution." Id. at 50. In Wyman, the court concluded that "an immunity statute which protects a witness against criminal conviction in our State courts from disclosures which he may be compelled to make satisfies [Article 15's] requirements." Wyman, 101 N.H. at 174 (citing Nowell, 58 N.H. at 315). Wyman appears to be the most recent New Hampshire Supreme Court case to endorse Nowell's reasoning.

The parties dispute the precedential and persuasive value of Nowell. Clearly, if Nowell remains good law, the Court must hold that the defendant is entitled to transactional immunity under the circumstances presented. Only then would the defendant be accorded immunity coextensive with his right under the State Constitution. See id. at 175. But the Court concludes that it is not, for the basic reason that the Nowell court's discussion on the scope of immunity required by Article 15 is *dicta*. See Marshall v. Burke, 162 N.H. 560, 565 (2011) ("[W]e are not bound to follow our *dicta* in a prior case in which the point now at issue was not fully debated." (quoting Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006))).

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))). 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. From this Court's review of the cases, the Supreme Court has not squarely decided that a use and derivative use immunity statute is unconstitutional.

The Court has reviewed Massachusetts law in recognition of the fact that the New Hampshire Supreme Court has in some cases "give[n] 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." State v. Roache, 148 N.H. 45, 49 (2002); but see State v. Cormier, 127 N.H. 253, 255 (1985) (indicating that "Article 15, like similar guarantees in other states, is . . . comparable in scope to the fifth amendment [sic]"). Adhering to Emery's Case, the Massachusetts Supreme Court has construed Part 1, Article 12 to require "no less than transactional immunity to displace the privilege against self-incrimination . . . ." Attorney General v. Colleton, 444 N.E.2d

915, 917 (Mass. 1982). In Colleton, the court interpreted Article 12 to be broader than the Fifth Amendment and struck down a statute granting use and derivative use immunity to a witness compelled to testify, though it did so largely based on its acceptance of the continuing vitality of Emery's Case. Id. at 919–20. The persuasive value of Colleton is diminished by its failure to explain why Article 12 must be read, textually or historically, to necessitate transactional immunity. Rather, the court simply reaffirmed Emery's Case.

The Court does not find the above cases persuasive. The Nowell and Wyman courts did not provide a sound basis for their *dicta* that Article 15 requires a grant of transactional immunity. They did not clarify why use and derivative use immunity, which protects against the exact harms Article 15 was designed to prevent, was insufficient. And both the New Hampshire and Massachusetts courts failed to grapple with the thorny questions raised by the interaction between transactional immunity and other important interests, including the public's right to "every man's evidence." See In re Grand Jury Subpoena, 155 N.H. 557, 562 (2007). These omissions undercut the value of Nowell, Emery's Case, and their progeny. Ultimately, the mere inertia of precedent will not suffice to compel this Court to obey their decisions.

I. Text of Part I, Article 15

When a court interprets the State Constitution, "[t]he beginning point of [its] analysis is the text . . . ." State v. Santana, 133 N.H. 798, 803 (1991). The relevant text of Part I, Article 15 provides: "No subject shall . . . be compelled to accuse or furnish evidence against himself." In order to interpret this constitutional provision, it is necessary to understand that it derives from the doctrine of *nemo tenetur seipsum*

accusare.[3] See Emery's Case, 107 Mass. at 181 (interpreting identical language in the Massachusetts Constitution). This principle literally means "no one is bound to accuse himself," Lieberman v. Reliable Refuse Co., Inc., 563 A.2d 1013, 1016 (Conn. 1989), or "no man can be compelled to incriminate himself," Brown v. State, 753 A.2d 84, 90 (Md. 2000) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 431 (Spec. ed.1983)). The history leading to the adoption of the right against self-incrimination in the federal and various state constitutions has been analyzed exhaustively by courts and commentators. See generally United States v. Gecas, 120 F.3d 1419, 1435-57 (11th Cir. 1997) (engaging in detailed discussion of origins of doctrine through its adoption in the Revolutionary era by the state and federal constitutions as the right against self-incrimination); State v. McKenzie, 303 A.2d 406, 414 n.8A (Md. Ct. Spec. App. 1973) ("The history and evolution of the privilege was traced brilliantly by Dean Wigmore initially in 'Nemo Teneture Seipsum Prodere,' 5 Harv. L. Rev. 71 (1891); in expanded form in 'The Privilege Against Self-Incrimination: Its History,' 15 Harv. L. Rev. 610 (1902); and in final form in 8 Wigmore on Evidence (McNaughton Rev.1961), Chapter 80 'Privilege Against Self-Incrimination,' s 2250 'History of the Privilege,' pp. 267-295. See also Morgan, 'The Privilege Against Self-Incrimination,' 34 Minn. L. Rev. 1 (1949); Corwin, 'The Supreme Court's Construction of the Self-Incrimination Clause,' 29 Mich. L. Rev. 1 (1930); Pittman, 'The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America,' 21 Va. L.

[3] The doctrine is alternatively expressed as *nemo tenetur seipsum prodere*. See United States v. Archuleta, 981 F. Supp. 2d 1080, 1084 n.1 (D. Utah 2013); see also Walter v. State, 206 S.E.2d 662, 665 (Ga. Ct. App. 1974) ("The maxim of the Common Law, *nemo tenetur seipsum prodere*, that no man is bound to accuse himself of any crime, or to furnish any evidence to convict himself of any crime, is founded in great principles of constitutional right, and was not only settled in early times in England, but was brought by our ancestors to America, as a part of their birthright.") (citation omitted).

Rev. 763 (1935)."), abrogation on other grounds recognized by Hamilton v. State, 555 A.2d 1089, 1093–94 (Md. Ct. Spec. App. 1989).

Although the provisions of the New Hampshire and Massachusetts Constitutions are framed in somewhat different language from their federal counterpart, all three provisions are derived from this shared common law source. As the United States Supreme Court recognized,

> [A]s the manifest purpose of the constitutional provisions, both of the states and of the United States, is to prohibit the compelling of testimony of a self-criminating kind from a party or a witness, the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation; and that where the constitution, as in the cases of Massachusetts and New Hampshire, declares that the subject shall not be "compelled to accuse or furnish evidence against himself," such a provision should not have a different interpretation from that which belongs to constitutions like those of the United States and of New York, which declare that no person shall be "compelled in any criminal case to be a witness against himself."

See Counselman v. Hitchcock, 142 U.S. 547, 584-85 (1892), rev'd, Kastigar v. United States, 406 U.S. 441 (1972).[4] In fact, courts have recognized that, "[t]he 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." Walter, 206 S.E.2d at 667 (quoting State v. Davis, 18 S.W. 894, 894 (Mo. 1892)).

Thus, because of this shared history there is no reason to conclude that the language of Article 15 is more expansive than its federal counterpart with regard to the right against self-incrimination. And in view of the origins of the privilege, the holding of Nowell is at odds with the text of Part I, Article 15. By its plain language, the right

[4] For discussion of the evolution of the holding in Counselman, *see* Part II *infra*.

protects a witness from being forced to provide certain kinds of evidence that may incriminate him. See Cormier, 127 N.H. at 255. It therefore contemplates the impermissible acquisition and subsequent use of evidence against a person. See id. ("Historically [the privilege against compelled self-incrimination] originated as a reaction to the practice in the early English courts of compelling a witness to be sworn and give testimony concerning his guilt." (quoting State v. Arsenault, 115 N.H. 109, 112 (1975))). If that particular danger can be avoided by precluding any use of the immunized testimony, directly or indirectly, at a subsequent criminal trial, the privilege is preserved. Use and derivative use immunity achieves this: it prevents the prosecution from using any compelled testimony or evidence derived therefrom against the witness. See Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 101 (1964) (White, J., concurring) (concluding that use and derivative use immunity leaves "the Federal Government and the witness . . . in exactly the same position as if the witness had remained silent."). Given the language and origins of Part I, Article 15, a right to transactional immunity cannot be readily discerned from the provision itself. The fact that Part I, Article 15 of the New Hampshire Constitution is worded differently than the Fifth Amendment does not lead to the conclusion that the framers of the State Constitution intended to adopt broader protections than the framers of the Federal Constitution.

II. The Evolving Treatment of Federal Immunity Statutes

The Court is guided in its analysis primarily by two concerns: the coextensiveness principle and the practical consequences of transactional immunity. As discussed in detail below, use and derivative use immunity better accords with the

nature of the right embodied in Article 15, for "it is the impermissible use of compelled testimony that is the object of the privilege's protection." State v. Strong, 542 A.2d 866, 869 (N.J. 1988); see also Cormier, 127 N.H. at 255. In addition, the Court finds that transactional immunity fails to cohere with other important interests and constitutional rights. These same considerations convinced the United States Supreme Court to settle on use and derivative use immunity, as the evolving treatment of federal immunity statutes illustrates.

Near the turn of the twentieth century, the United States Supreme Court had an opportunity to assess the constitutionality of a federal use immunity statute. See Counselman, 142 U.S. at 564. Despite the textual differences between the State and Federal constitutions, the court cited favorably to both Emery's Case and Nowell in striking the statute down. Id. at 586 ("[W]e are of opinion that, however this [textual] difference may have been commented on in some of the decisions, there is really, in spirit and principle, no distinction arising out of such difference of language."); see also U.S. CONST. amend. V ("[N]or shall any person be . . . compelled in any criminal case to be a witness against himself . . . ."). The court concluded, "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 constitution of the United States." Id. at 585. For about fifty years, it appeared as if transactional immunity was required under the Federal Constitution.

The practical difficulties with transactional immunity led the court to reconsider Counselman. The issue presented in Murphy v. Waterfront Commission of N.Y. Harbor was whether one jurisdiction's grant of immunity to a witness could limit the ability of

another jurisdiction to prosecute the witness. This problem had become more salient during the mid-twentieth century, as the scope of federal criminal law expanded beyond its traditional reach. See Cabot v. Corcoran, 123 N.E.2d 221, 225 (Mass. 1954) (noting that, historically, "[t]he privilege not to incriminate oneself had reference in the thought of that day only to such offences as the policy of the State might create"). To correct it, the court established a rule affording witnesses use and derivative use immunity in those circumstances:

> [W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity.

Murphy, 378 U.S. at 79. After this decision, the problem of cross-jurisdictional use of compelled testimony was, at least to some degree, ameliorated. In his concurrence, Justice White lauded the holding of the majority as an adequate balance between "the protections of the privilege against self-incrimination for all defendants" and the need for "local law enforcement" to investigate criminal activity. Id. at 101 (White, J., concurring).

The rule in Murphy would lay the foundation for the Supreme Court's holding in Kastigar eight years later. See Kastigar, 406 U.S. at 458. There, the court held that transactional immunity was inconsonant with the nature of the privilege: "Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than

does the Fifth Amendment privilege." Id. at 453. "The privilege [against self-incrimination] has never been construed to mean that one who invokes it cannot subsequently be prosecuted." Id.[5]

The court upheld the use and derivative use immunity statute at issue, concluding that such immunity was a "rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify." Id. at 446–47. Thus, the Supreme Court crafted a rule that effectuated the purpose of the Fifth Amendment without needlessly infringing upon other valid interests. These twin concerns – the coextensiveness principle and the evenhanded balancing of important interests – led the court to its decision.

III. Use and Derivative Use Immunity is Sufficient to Protect the Defendant's Article 15 Right against Self-Incrimination

The Court concludes that use and derivative use immunity is coextensive with the right against self-incrimination under Part I, Article 15 of the State Constitution. This immunity also balances the defendant's Article 15 privilege with other important interests, as well as the ever-expanding constellation of rights secured by the New Hampshire Constitution.

It is well-established in New Hampshire that the right against self-incrimination embodied in Article 15 prevents the use of the defendant's compelled testimony against him at a criminal trial. See Marchand, 164 N.H. at 32. But "[b]y definition, self-incrimination contemplates the use of [the defendant's statements] to aid in establishing

[5] Similarly, the state courts that have found use and derivative use immunity statutes to comport with their state constitutions have determined that such immunity is coextensive with the displaced privilege: "[T]he harm which the Fifth Amendment is designed to forestall is not accomplished when the witness is compelled to testify . . . but when compelled testimony is used against the testifier in a criminal prosecution." See, e.g., Strong, 542 A.2d at 871 (quoting In re Grand Jury Proceedings, 497 F. Supp. 979, 983–84 (E.D. Pa. 1980)).

the guilt of the defendant." Id. (quoting Lewis v. Thulemeyer, 538 P.2d 441, 443 (Colo. 1975)). Consequently, to the extent that the compelled testimony has not been used, directly or indirectly, for that purpose, Article 15 does not apply. See id. at 33 (holding that privilege is not violated by compelling a medical examination because it "would not be used by the State to prove an element of the charged crime or to prove the guilt of the defendant"). Use and derivative use immunity is therefore coextensive with the privilege, since the prosecution is barred from using the immunized testimony, directly or indirectly, to aid in establishing the defendant's guilt. See Commonwealth v. Swinehart, 664 A.2d 957, 968 (Pa. 1995) ("Transactional immunity offers complete amnesty to the witness, a measure of protection clearly greater than the privilege against self-incrimination."); accord Kastigar, 406 U.S. at 453; Strong, 542 A.2d at 872.

This conclusion is bolstered by the nature of the remedy imposed when the privilege is violated. A trial court must exclude any testimony unlawfully coerced from a defendant, but the defendant is not granted outright amnesty from prosecution. See State v. Phinney, 117 N.H. 145, 147 (1977) (noting that exclusion is remedy for involuntary confession); see also United States v. Blue, 384 U.S. 251, 255 (1966) ("Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether."). There ought to be no difference in remedy between testimony unlawfully coerced by threat of violence and that coerced by threat of contempt. See Kastigar, 406 U.S. at 461 ("The statutory proscription is analogous to the Fifth Amendment requirement in cases of coerced confessions."). Some courts and commentators have noted certain differences that may distinguish coerced confession cases from testimony compelled by

immunity. See id. at 470–71 (Marshall, J., dissenting); Kristine Strachan, Self-Incrimination, Immunity, and Watergate, 56 Tex. L. Rev. 791, 823–832 (1978). But there is a fundamental similarity in that, in both circumstances, the same privilege is implicated. A defendant's right against self-incrimination is no less implicated if a statement is coerced by a threat or promise made to the defendant by a police officer than it is if the municipality for which the defendant works threatens to fire him if he does not give a statement. Accordingly, "[t]he argument that broader protection should be afforded immunized statements because the government intentionally and voluntarily compelled this testimony ignores the fundamental principle of Fifth Amendment coextensiveness." Gary S. Humble, Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment, 66 Tex. L. Rev. 351, 377–78 (1987).

There is also an important interest that is impaired unnecessarily by a grant of transactional immunity: the public's right to "every man's evidence." In re Grand Jury Subpoena, 155 N.H. at 562; see also Kastigar, 406 U.S. at 443. The New Hampshire Supreme Court has stated that the duty of every citizen to provide testimony in the public interest when called upon is abrogated only in "distinctly exceptional" circumstances. In re Grand Jury Subpoena, 155 N.H. at 562. The power to compel witnesses to testify at official proceedings is among the "necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government . . . ." Murphy, 378 U.S. at 93 (White, J., concurring). The New Hampshire legislature has seen fit on a number of occasions to enact immunity statutes. See, e.g., RSA 516:34 (2007) (use and derivative use immunity adopted in 1993 by N.H. Laws ch. 115:1). Without the power to grant immunity, prosecutors would

likely never be able to uncover and dismantle some types of criminal activity. See Swinehart, 664 A.2d at 968 ("The very nature of criminal conspiracies is what forces the [government] 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."). Immunity statutes are an attempt to accommodate this interest with the privilege against self-incrimination.

Use and derivative use immunity balances these two values. Transactional immunity safeguards one at the expense of the other, by imposing the dilemma on the government either to grant complete amnesty to a witness in exchange for testimony against a defendant or to let the defendant go free for lack of evidence. See id. In overprotecting a witness in such circumstances, transactional immunity fails to further the privilege's underlying purpose, which is to prevent the impermissible use of compelled testimony to establish the witness's guilt at a criminal trial. See Marchand, 164 N.H. at 32. That purpose is wholly served by use and derivative use immunity.

While acknowledging this, the state courts that have required, under their state constitutions, a grant of transactional immunity in exchange for compelled testimony have narrowly emphasized the practical "difficulty of determining whether a prosecution derives in some way from compelled evidence . . . ." State v. Miyasaki, 614 P.2d 915, 923 (Haw. 1980); see also State v. Gonzalez, 853 P.2d 526, 533 (Alaska 1993) (requiring transactional immunity "[b]ecause of the manifold practical problems in enforcing use and derivative use immunity"); State v. Soriano, 684 P.2d 1220, 1234 (Or. Ct. App. 1984) ("It is unrealistic to give a dog a bone and to expect him not to chew on it."). It is a pronounced skepticism that prosecutorial misconduct would be uncovered

that has led these courts to their decisions.

Whatever fears may be conjured in support of this speculation, it is clear that, in any given case, the prosecution's impermissible use or derivative use of immunized testimony is "a matter quite susceptible of proof." Murphy, 378 U.S. at 102 (White, J., concurring). Courts routinely hold hearings to establish the scope of the various privileges and rights of the parties; a Kastigar hearing is no different in this sense. The risk of impermissible use can be alleviated if the trial court holds the government to its "heavy burden" of proof. Kastigar, 406 U.S. at 461–62. Some states have chosen to impose an even higher burden of proof on the government. See, e.g., State v. Ely, 708 A.2d 1332, 1340 (Vt. 1997) ("beyond a reasonable doubt" standard); Swinehart, 664 A.2d at 969 ("clear and convincing" standard). In short, the unsubstantiated fear of government wrongdoing is not a principled basis for requiring transactional immunity.

In addition, there are constitutional privileges that would be impaired by a requirement of transactional immunity. They are of such recent vintage that neither the Nowell court nor the Wyman court had any occasion to consider them. First is the rule articulated in State v. Farrow, 118 N.H. 296, 305–06 (1978), which held that, in some circumstances, the prosecution's failure to immunize a defense witness constitutes a denial of the defendant's due process rights. The New Hampshire Supreme Court has acknowledged in this context that "use immunity may be less burdensome to the State because it does not completely foreclose prosecution of the immunized witness . . . ." State v. Roy, 140 N.H. 478, 481 (1995). Although the standard for finding that the defendant's due process rights were violated would be the same regardless of the kind of immunity required under the State Constitution, see id., it is probable that a court

would be even less inclined to reach that conclusion were transactional immunity the only means to compel an unwilling witness to testify on the defendant's behalf. In other words, a criminal defendant could hold over the State the Sword of Damocles by seeking to compel the testimony of a co-defendant with exculpatory evidence. See id. Instead of being given the choice to grant the defense witness use and derivative use immunity, the State would have to choose whether to grant the defense witness transactional immunity or to risk having the charges against the defendant dismissed on due process grounds because it refused to grant the witness absolute immunity.

Another privilege relevant here is the multi-jurisdictional exclusionary principle announced in Murphy, 378 U.S. at 79. "Murphy . . . held that 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." United States v. Balsys, 524 U.S. 666, 682 (1998) (internal quotation marks omitted). The rule corrected the inequity wrought by allowing a prosecutor from one jurisdiction to use a witness's compelled and immunized testimony against him, so long as the witness was immunized under a separate jurisdiction's law. Prior to the holding in Murphy, the state or federal government could compel a person to testify under a grant of transactional immunity. Because the government which compelled the witness to testify could not extend the transactional immunity to bar another co-equal sovereign from prosecuting the witness, that witness's testimony could then be used to prosecute him in a different jurisdiction. See Wyman, 101 N.H. at 174–75 (upholding constitutionality of state immunity statute despite this possibility).

As noted, Murphy rectified this by concluding that the Fifth Amendment bars the use and derivative use of the compelled testimony by the other jurisdiction. Thus, a witness who is compelled to give testimony by one state may still be prosecuted by another state, but the Fifth Amendment prohibits the use of that compelled testimony in the prosecution. This doctrine ensures that the witness is no worse off after he is compelled to testify under a grant of immunity. It does not result, however, in one sovereign infringing on the rights of another sovereign to make prosecutorial decisions.

If the Court were to recognize Part I, Article 15 as requiring transactional immunity, it would reinstitute this inequity, albeit for the benefit of defendants prosecuted under state law. Two similarly situated defendants who had given immunized testimony—one prosecuted solely under state law and one prosecuted under both state and federal law—would be subject to vastly different consequences. In the former case, transactional immunity would bar the prosecution. In the latter case, the defendant could be prosecuted by federal authorities despite the immunity. By permitting this discrepancy, our courts would be enabling the very conduct that we find repugnant under the State Constitution. In finding Article 15 comparable to the Fifth Amendment in this area, the Court places all defendants on an equal footing while protecting their Article 15 privilege.

Moreover, when considered in conjunction with Garrity, a grant of transactional immunity would have far-reaching effects on the distribution of power between state and local authorities. Generally, "[t]he power to appoint officers or employees of a municipal corporation carries with it the power of removal of such employees at the municipality's pleasure unless the power of removal is restricted by statutory law." Am. Fed. of State,

Cnty. and Mun. Emps., AFL-CIO v. City of Keene, 108 N.H. 68, 71 (1967). In discharging this power, it is both necessary and proper for state and local agencies to investigate employee misconduct, particularly if the misconduct may be criminal. The employee's own testimony may assist the agency in its investigation, subject to the immunity granted by Garrity.

Whatever administrative discipline may be imposed, up to and including termination, county- and state-level prosecutors undoubtedly have an independent interest in enforcing this State's criminal laws. With a grant of use and derivative use immunity, the employee and the prosecution are left in the same position as if the employee had remained silent. The prosecution may still prosecute the employee with whatever evidence it has from sources independent of the employee's testimony. And the employee's right to self-incrimination has not been infringed, as his testimony has in no way contributed to the evidence used against him at trial. See Marchand, 164 N.H. at 32.

If transactional immunity were to be required in exchange for an employee's compelled statement, the outcome would be much different. The locality would be able to investigate the misconduct, but in doing so it would thereafter bar prosecutors from pursuing criminal charges against the employee. The employee receives a windfall, as his testimony will not be used against him at a trial and he has been granted complete amnesty from prosecution. To avoid this result, prosecutors would need to be intimately involved in administrative investigations at all levels of government throughout the state to ensure that no locality grants transactional immunity inadvertently. This conflicts with New Hampshire's long "tradition of local self-government." Opinion of the Justices, 143

N.H. 429, 442 (1999). It also conflicts with the principle that the State cannot be compelled to grant a witness immunity in the absence of a due process violation. See Roy, 140 N.H. at 480-83.

Moreover, the combination of transactional immunity with Garrity would incentivize great mischief, since a locality could unilaterally shield an employee from prosecution. One could imagine a *quid pro quo* between supervisor and employee: the employee testifies and receives administrative discipline, thus relieving the supervisor of his or her responsibility to investigate the misconduct, in exchange for complete amnesty for the criminal conduct. Criminal misconduct could never be criminally punished in such circumstances so long as the employee testified ostensibly under threat of termination. This would be the case even if the prosecution had discovered incontrovertible evidence of the crime before the employee had ever made the statement. Without promoting the privilege's purpose, transactional immunity would wreak havoc upon the fair and impartial administration of justice.

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.[6] See Kastigar, 406 U.S. at 461–62. The

[6] The defendant contends that Article 15 should be interpreted more broadly than the Fifth Amendment. It is true that the New Hampshire Supreme Court has determined that Part I, Article 15 provides greater protection than the Fifth Amendment in some circumstances. See, e.g., Roache, 148 N.H. at 48–53. But the court has also noted that Article 15 is "comparable in scope" to the Fifth Amendment. Cormier, 127 N.H. at 255. The Supreme Court has never set forth a clear test to determine in what circumstances Article 15 should be interpreted more broadly than the Fifth Amendment. Accordingly, the blanket assertion that Article 15 is sometimes interpreted more broadly than the Fifth Amendment does not assist the Court in its analysis. For the reasons articulated above, this Court finds that in the context of the right to immunity for compelled statements the state and federal constitutional rights are identical.

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.

IV. Propriety of a *Kastigar* Hearing Before Trial

The remaining question is whether the defendant is entitled to a Kastigar hearing, at which the State would bear a "heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." Id. The Court finds that no hearing is necessary under these circumstances, either under the State or Federal Constitution.[7]

It is undisputed that the defendant was indicted almost two months before he made the compelled statements. See Obj. Mot. Dismiss ¶¶4, 6. Thus, the State could not have made any sort of use or derivative use of the compelled statements in procuring the indictment. The defendant instead focuses, as he must, on the possibility of impermissible use at trial. First, he argues that the prosecution's possession of the statement before trial will allow the prosecution to put it to impermissible use in crafting its trial strategy. Mot. Dismiss 10 (citing to United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973)). Second, the defendant asserts that the pervasive publication of his compelled statements "make[s] it a virtual certainty that witnesses have been exposed to and digested compelled testimony." Id. at 12. In the defendant's view, this is an impermissible use of his testimony. Id. The Court disagrees that the State is presently making impermissible use of the defendant's statements.

[7] At the October 24 hearing, the parties did not present live testimony relating to these issues. The parties proceeded on, and the Court accepted, offers of proof. See Smith v. Shepard, 144 N.H. 262, 264–65 (1999) (discussing that trial court may conduct a hearing by offers of proof).

Both of the uses the defendant describes are nonevidentiary uses of his compelled testimony. It is clear from Kastigar that the prosecution may not make "use of compelled testimony . . . [or] evidence derived directly and indirectly therefrom" at trial. 406 U.S. at 453. What remains an open question after Kastigar is whether the prosecution may make any nonevidentiary use of the compelled testimony. Nonevidentiary uses "could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." McDaniel, 482 F.2d at 311. Courts have differed on whether and to what extent nonevidentiary uses are impermissible under Kastigar. Some have held that Kastigar forbids "all prosecutorial use of the testimony, not merely that which results in the presentation of evidence before the jury." Id. Under this stricter formulation, the mere exposure of compelled testimony to a prosecutor may have an "immeasurable subjective effect" that taints the prosecution's presentation of the evidence at trial. Id. at 312. The difficulty in disproving such taint may make the government's burden of proof at a Kastigar hearing "virtually undischargeable." Id.

Other courts reject this interpretation of Kastigar and permit a prosecution to move forward if the only risk is that the prosecutor's exposure to immunized testimony will "tangentially influence[] [his] thought processes in . . . .preparing for trial . . . ." United States v. Mariani, 851 F.2d 595, 600 (2d Cir. 1988). In other words, a prosecutor's knowledge of immunized testimony alone is not an "impermissible use of that testimony." Id. at 601. As support for this more permissive position, these courts have drawn an analogy to the remedy for a coerced confession, which has never

"prohibited the nonevidentiary use of an involuntary statement." United States v. Serrano, 870 F.2d 1, 18 (1st Cir. 1989).

Fortunately, the Court need not delve into the debate at this juncture. The defendant argues that the prosecution's and the witnesses' mere possession of the statements are impermissible nonevidentiary uses. Mot. Dismiss 10–13. But possession is not use. In reality, the allegedly impermissible uses of which the defendant complains are hypothetical at the current stage of the proceedings. They relate to certain psychic or strategic uses that could taint the prosecution's case at trial.

A hearing on whether the prosecution's trial strategy or witness testimony was derived from independent sources would be challenging, if not impossible, to conduct *ex ante*. Unlike a hearing to determine the source of concrete evidence, which can be readily identified before trial, any meaningful examination of these nonevidentiary uses would require that the prosecution furnish its entire trial strategy, including its planned examination of each witness, to the Court and to the defendant. Not only would this give the defendant a wholly improper advantage at trial, it would hamstring the prosecution's ability to respond spontaneously to issues as they arise in the course of trial. This is because the defendant could then rightly object that the State is engaging in strategic choices that have not been examined pursuant to Kastigar. These difficulties sway the Court to conclude that, to the extent that it becomes necessary, any Kastigar hearing on the nonevidentiary use of the defendant's statements by prosecutors or by witnesses must be conducted after the trial if the defendant is convicted, when the allegedly impermissible uses are definite and assessable. In issuing this ruling, the Court has not concluded that the State is, in fact, barred from all

non-evidentiary use of the immunized statements. Rather, the Court merely holds that the challenge to the non-evidentiary use of the defendant's statement is premature. The defendant may move to revisit this issue if he is convicted after trial. At that time the Court will determine whether the non-evidentiary use of an immunized statement is prohibited, and, if so, what the scope of that prohibition is.

Conclusion

For the reasons discussed above, the defendant's motion to dismiss is DENIED.

SO ORDERED.

12/2/2014
DATE

N. William Delker
Presiding Justice