THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0680

State of New Hampshire

v.

Seth Hinkley

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

BRIEF FOR THE DEFENDANT

Thomas Barnard
Senior Assistant Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301
NH Bar # 16414
603-224-1236
(3JX argument requested)

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QUESTION PRESENTED

Whether the court's factual findings — that the police promised Hinkley immunity by telling him, "[Y]ou're not gonna be in trouble from me if you told me that you had sex with [the alleged victim]," and that Hinkley's subsequent statements were the product of that promise — were contrary to the manifest weight of the evidence, as viewed in the light most favorable to Hinkley.

STATEMENT OF THE CASE

In June 2018, the State obtained from a Coos County grand jury five indictments charging Seth Hinkley with aggravated felonious sexual assault. SB[*] 36–40. In March 2019, the defendant filed a motion to suppress his statements. SB 41. In October 2019, the court (Bornstein, J.) granted that motion, SB 66, and in November 2019, it denied the State's motion for reconsideration, SB 82. The State appealed.

[*] Citations to the record are as follows:
"H1" refers to the transcript of the suppression hearing on August 6, 2019;
"H2" refers to the transcript of the suppression hearing on October 11, 2019;
"SB" refers to the State's brief.

STATEMENT OF THE FACTS

Undisputed facts

In the late summer and fall of 2017, Seth Hinkley, then an eighteen-year-old high-school student, lived with his girlfriend, F.T., then seventeen years old, and her family in Berlin. SB 9, 11–12, 15, 36–40, 68, 88–94, 100, H1 17. Hinkley and F.T. were both described as having cognitive limitations. SB 14, H2 13–14 (Hinkley had a composite IQ of 76, the fifth percentile); SB 9, 100 (detective and Hinkley agreed that F.T. was "pretty slow").

On December 28, 2017, F.T. alleged to the police that Hinkley sexually assaulted her. SB 9, 66–67, H1 15–16. On January 9, 2018, F.T. alleged during an interview at the Child Advocacy Center that Hinkley engaged in sexual intercourse and other sexual activity with her over her objections and by force. SB 9–10, 67, H1 16–18.

Berlin Police Detective Adam Marsh called Hinkley and asked him to come to the police department for an interview. SB 10, 67, H1 19. On February 6, 2018, Hinkley arrived alone, by bicycle, at the police station. SB 10, 67, H1 19, 67. Marsh took Hinkley to a conference room, where Marsh and a lieutenant conducted a recorded interrogation. SB 10, 66–67, 85–125, H1 19.

In response to Marsh's questions, Hinkley said that he was never sexually intimate with F.T. when he lived at her

house. SB 15, 68, 95. Marsh asked Hinkley, "[D]id you ever have intercourse with her?" SB 95. Hinkley answered, "No." SB 12, 68–69, 95.

Hinkley added, "[F.T.] was too young, and I didn't want to." SB 12, 15, 69, 95. After confirming that Hinkley and F.T. were eighteen and seventeen years old, respectively, Marsh asked Hinkley, "Is there anything illegal about that?" SB 15, 69, 96. Hinkley answered, "I didn't know, but I just wanted to be on the safe side." SB 15, 69, 96.

At that point, Marsh embarked on a monologue. SB 69, 96. He told Hinkley, "[W]e're being told something completely different." SB 16, 69, 96. He then told Hinkley, "[Y]ou're not in trouble if you had sex with her, okay. It's your girlfriend. She's over the age of 16. That's the age of consent." SB 12, 16, 69, 96. He then told Hinkley, "[F.T.'s] telling us that ['']yeah, we had sex on a few occasions,['] so I'm just trying to kind of delve into that and then some other stuff that we were told . . . because you're not gonna be in trouble from me if you told me that you had sex with her." SB 69, 96.

After telling Hinkley, "I want you to get ahead of this before this rests on your shoulders and . . . eventually hurts you . . . because we're the police here," and imploring him to be "up-front and straight up," Marsh again asked, "[T]here were occasions when you had intercourse with her[?]" SB 69, 96. Hinkley answered, "Yeah." SB 16, 69, 97.

In response to further questioning, Hinkley told Marsh that he had sexual intercourse with F.T. two to three times per week in F.T.'s house, that he always wore a condom, and that F.T.'s grandmother once walked in on them having sex. SB 12, 16, 69–70, 97–99.

Marsh then told Hinkley that F.T. alleged that "there [were] a couple of occasions when she got upset with you, that she didn't want to have sex with you." SB 16, 100. Marsh told Hinkley that F.T. told the police that she told Hinkley, "I really don't want to have sex with you," but that Hinkley "did it anyway." SB 101. Marsh told Hinkley that F.T. claimed that, on another occasion, Hinkley "got on top of her, and she was like[, 'No, I don't want to do this, Seth,[']] and you were like[, 'W]ell we're gonna do it[,']] because you were kind of like committed." SB 101. Marsh told Hinkley that "there's a big difference between being . . . a violent sexual predator and . . . letting yourself and your emotions . . . overrun you . . . sexually," adding, "everybody makes mistakes. . . I think as men we get aggressive . . . sexually, and it's hard for us to stop." SB 101–02.

At that point, Marsh asked Hinkley, "So there were occasions when she told you like[, 'N]o, I really don't want to do this[']]?" SB 102. Hinkley answered, "Um-hum." SB 13, 102. Marsh asked how many times that happened, and Hinkley answered, "Like once a month." SB 102. Hinkley

confirmed that, on these occasions, F.T. said, "[N]o I really don't want to have sex with you," but that Hinkley "ha[d] sex with her" anyway. SB 103.

Marsh asked Hinkley if F.T. ever "tr[ied] to push [him] off of her," and recounted F.T.'s allegation about a specific occasion in which she claimed she tried to push Hinkley off of her. SB 104. When Hinkley responded, "That never happened," Marsh reminded him that, earlier in the interview, Hinkley "lied to [him]," by saying, "['N]o, we never . . . had sex,[']" but later "admitted that [he] had sex with her a bunch of times . . . and that . . . there were occasions when she told [him, 'N]o,[']" but "[he] had sex with her anyway," adding, "I don't want you to lie to me again." SB 105.

After a brief conversation in which Hinkley confirmed that his father sexually assaulted him, and in which Marsh told Hinkley that predisposition to commit sexual assault was, like eye color, genetically inherited, Marsh said, "[S]o I think there were occasions when [F.T.] was having sex with you, and she didn't want to have sex with you. And she was trying to tell you beyond just telling you[, 'N]o.[']" SB 107. Hinkley responded, "Um-hum." SB 107. Marsh then asked Hinkley, "Why would [F.T.] lie about that?" SB 12, 16, 107. Hinkley answered, "She wouldn't." SB 12, 16, 107. Marsh then asked, "So how many times do you think she physically

pushed you to tell you no?" SB 107. Hinkley answered, "Maybe once or three . . . times a month." SB 107.

In response to further questioning, Hinkley confirmed that he engaged in penile-vaginal and digital-vaginal penetration with F.T., despite F.T. either telling him "No" or physically resisting, about six times. SB 108–13.

Marsh again reminded Hinkley that he initially lied about having sex with F.T. and told Hinkley, "[T]here's some things that you need to share with me that you haven't shared with me yet, and I'm just waiting . . . to hear 'em, okay." SB 116–17. Hinkley responded by telling Marsh that, when F.T. resisted sex, he sometimes slapped her or yelled at her. SB 13, 117–18.

Marsh then had Hinkley write and sign a letter of apology to F.T. SB 13, 122. The letter stated, "Dear [F.T.], I'm sorry for everything I've done to you and put you through. I'm sorry for making you do things you didn't want to do, and I'm sorry for the abuse." SB 13, 122.

In June 2018, the State obtained five indictments alleging that Hinkley committed aggravated felonious sexual assaults. SB 36–40. The indictments alleged that Hinkley engaged in penile-vaginal and digital-vaginal penetration, both "through the application of physical force . . . and superior strength," and "when F.T. indicated through speech or physical conduct that she did not consent." SB 36–40.

Factual findings challenged by the State

Marsh's statements that Hinkley would not be in trouble if he admitted to having sex with F.T. constituted a promise of immunity. SB 72–73. Hinkley relied on that promise when he admitted to having sex with F.T., and that admission was involuntary. SB 69, 73. "Throughout the remainder of the interview, . . . Marsh's questions and [Hinkley's] answers all related back to [Hinkley's] admission that he engaged in sexual intercourse with [F.T.]" SB 70. Hinkley's later statements were a product of Marsh's promise of immunity. SB 73.

SUMMARY OF THE ARGUMENT

Under the State Constitution, a defendant's statements cannot be admitted unless the State proves, beyond a reasonable doubt, that they were voluntary, and statements made in reliance on a promise of immunity are per se involuntary. A trial court's factual findings, including its determination of voluntariness or involuntariness, will be upheld on appeal unless contrary to the manifest weight of the evidence, as viewed in the light most favorable to the appellee. Here, the police told Hinkley, "[Y]ou're not gonna be in trouble from me if you told me that you had sex with [F.T.]." The trial court's findings — that this constituted a promise of immunity and that Hinkley's subsequent statements were the product of that promise — were not contrary to the manifest weight of the evidence, as viewed in the light most favorable to Hinkley.

I. THE TRIAL COURT'S FACTUAL FINDINGS — THAT THE POLICE PROMISED HINKLEY IMMUNITY AND THAT HINKLEY'S STATEMENTS WERE THE PRODUCT OF THAT PROMISE — ARE NOT CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE, AS VIEWED IN THE LIGHT MOST FAVORABLE TO HINKLEY.

Prior to trial, Hinkley moved to suppress the statements he made in the interrogation after Marsh told him, "[Y]ou're not gonna be in trouble from me if you told me that you had sex with [F.T.]" SB 41. Hinkley noted that, under Part I, Article 15 of the New Hampshire Constitution, a defendant's statements are inadmissible unless the State proves, beyond a reasonable doubt, that they were voluntary. SB 48. He further noted a statement made in reliance on a promise of immunity is involuntary per se. SB 49. Hinkley argued that Marsh's statements — including "[Y]ou're not gonna be in trouble from me if you told me that you had sex with [F.T.]" — "were a clear promise of immunity from prosecution and all statements made by . . . Hinkley subsequent are per se involuntary and must be suppressed." SB 49.

The State objected. SB 57. It argued that Marsh's statement "was accurate" because "F.T. and [Hinkley] were both over the age of consent" and Hinkley "has only been charged with assaulting F.T., not for consensually having intercourse with her which is the only conduct that . . . Marsh told [Hinkley] that he would not get in trouble for." SB 62. Thus, the State argued, "Marsh's statement does not

qualify as a 'promise of immunity.'" SB 62. "Even if" it did, the State argued, Hinkley "did not rely on said statement in later confessing to his criminal conduct." SB 62.

In its order granting Hinkley's motion, the court noted that "Marsh asserted to [Hinkley] twice that he would not be in trouble if he admitted to having sex with [F.T.]." SB 71. The court noted that, "[w]hile [Hinkley] could not be prosecuted for engaging in consensual intercourse with [F.T.], sexual penetration" was an element of each of the indictments. SB 72. "Marsh's assertions," the court found, "were not simply statements of fact," but "promises of immunity from at least one element of the charged offenses." SB 72. "Because the State [wa]s required to prove all the elements," the court found, Marsh's statements were "tantamount to a promise of immunity from the offenses themselves." SB 72–73.

The court emphasized the fact that "Marsh did not tell [Hinkley] that he would not be in trouble if he admitted to having 'consensual' sex with [F.T.], as the State contend[ed]." SB 73. "Rather, . . . Marsh unequivocally asserted, without qualification or limitation, that [Hinkley] would not be in trouble if he confessed to having sex with [her]." SB 73. "Immediately thereafter, and plainly relying upon . . . Marsh's assertions, [Hinkley] confessed to having intercourse with [her]." SB 73. For these reasons, the court found, "[Hinkley's]

confession that he had intercourse with [F.T.] was involuntary, and it must therefore be suppressed . . . under the State Constitution." SB 73.

The court also found that "the statements [Hinkley] made after he first confessed to having intercourse with [F.T.] were derivatively obtained through a prior violation of [his] constitutional rights." SB 73. "Accordingly," the court ruled, "those statements are fruits of the poisonous tree and must likewise be suppressed." SB 73.

The State filed a motion for reconsideration. SB 75. It reiterated its argument that Marsh's statement — "[Y]ou're not gonna be in trouble from me if you told me that you had sex with [F.T.]" — was a "simple statement[] of [the] fact" that "[i]t would have not have been illegal for the defendant to have consensual intercourse with [F.T.]." SB 78. It also argued that Hinkley's later admissions — to sexual activity over F.T.'s objections and by force — "were entirely independent of . . . Marsh's previous statements." SB 81. The court denied the State's motion for reconsideration, ruling that it "ha[d] not overlooked or misapprehended any point of law or fact." SB 82.

On appeal, the State challenges only the court's factual findings. Because those factual findings are not contrary to the manifest weight of the evidence, as viewed in the light most favorable to the Hinkley, this Court should affirm.

Part I, Article 15 of the New Hampshire Constitution provides, in relevant part, "No subject shall . . . be compelled to accuse or furnish evidence against himself." The provision also protects the right to due process. State v. Parker, 160 N.H. 203, 207 (2010).

Under Part I, Article 15, a defendant's statements cannot be admitted unless the State proves, beyond a reasonable doubt, that they were voluntary. State v. Carrier, 173 N.H. 189, 205 (2020). Courts generally determine voluntariness "in light of the totality of all the surrounding circumstances." State v. Hernandez, 162 N.H. 698, 703 (2011). "The totality of the circumstances test, however, does not apply to promises of confidentiality or promises of immunity from prosecution." Parker, 160 N.H. at 209. Such promises are "categorically different" from others. State v. McDermott, 131 N.H. 495, 501 (1989). Thus, statements made in reliance on a promise of confidentiality or immunity are per se involuntary. Parker, 160 N.H. at 209.

Voluntariness "is a question of fact for the trial court to decide." Carrier, 173 N.H. at 205, n.4. This Court "will not overturn a trial court's determination that a confession was not voluntary unless it is contrary to the manifest weight of the evidence, as viewed in the light most favorable to the defendant." Id. at 205.

A. The finding that the police promised Hinkley immunity is not contrary to the manifest weight of the evidence.

In his monologue delivered immediately before Hinkley's admission to having sex with F.T., Marsh made three relevant statements. SB 96. First, Marsh said, "[Y]ou're not in trouble if you had sex with [F.T.]." SB 96. Second, Marsh said, "She's over the age of 16. That's the age of consent." SB 96. Third, Marsh said, "[Y]ou're not gonna be in trouble from me if you told me that you had sex with her." SB 96.

The State focuses on Marsh's second statement. See, e.g., SB 6 (referencing only the second statement in its framing of the "issue presented"); SB 19 (referencing only the second statement in the caption of its main argument); SB 27 (referencing only the second statement in the caption of its third subsidiary argument); SB 30–31 (referring to the entire monologue as "the discussion about the age of consent."). By telling Hinkley that sixteen was the "age of consent," the State argues, Marsh "simply told him the state of the law," SB 22, "explaining . . . that consensual activity with [F.T.], by itself, did not violate the law," SB 23.

The trial court, however, did not find that Marsh's second statement constituted a promise of immunity; it found that Marsh's first and third statements did. SB 71 ("Marsh asserted to [Hinkley] twice that he would not be in trouble if he admitted to having sex with [F.T.]. The Court must

therefore determine whether those assertions constituted a promise of immunity from prosecution."). To the extent that the State argues that the court was compelled, as a matter of law, to find that Marsh's first and third statements were equivalent to his second, that argument should be rejected. The court's finding that Marsh's first and third statements "went far beyond" his second, SB 72, is not contrary the manifest weight of the evidence, viewed in the light most favorable to Hinkley.

Three factors support the courts finding. First, as the court noted, Marsh "did not tell [Hinkley] that he would not be in trouble if he admitted to having 'consensual' sex with the complainant, as the State contend[ed]." SB 73. Rather, Marsh told Hinkley that he would "not . . . be in trouble . . . if [he] told [Marsh] that he had sex with her." SB 96. Marsh never used the word "consensual." SB 96.

Second, Marsh began his first and third statements, "You're not in trouble . . . " and "You're not gonna be in trouble with me. . ." SB 96. Had Marsh intended only to describe the law, he would have said, "It's not illegal to . . ." or "You can't get in trouble for . . ." By instead using the phrases, "You're not in trouble . . ." and "You're not gonna be in trouble from me . . .," Marsh implied that that whether Hinkley was "in trouble" was not a matter of law, but discretion. The addition of the phrase "from me" in Marsh's

third statement further implied that Marsh was referring to his own discretionary decision, not an outcome required by law.

Third, in Marsh's third statement, Marsh told Hinkley, "[Y]ou're not gonna be in trouble from me if you told me that you had sex with [F.T.]." SB 96. The word "if" indicated that Hinkley not being "in trouble" was not absolute, but contingent on a prerequisite. That prerequisite, moreover, was not the existence or non-existence of a past event, as would be the case if Marsh were merely describing the law. Rather, Hinkley not being "in trouble" was expressly contingent on whether Hinkley "told [Marsh] that [he] had sex with [F.T.]." Thus, Marsh's statement was inconsistent with a mere description of the law, and consistent with a promise of immunity contingent upon Hinkley making a specific statement to Marsh. The court's finding is not contrary to the manifest weight of the evidence, as viewed in the light most favorable to Hinkley.

B. A promise of immunity is a promise of immunity, regardless of whether the promise is made contingent on the suspect's admission to each and every element of an offense.

The court found that "Marsh's assertions constituted promises of immunity from at least one element of the charged offenses. Because the State is required to prove all

the elements of the charged offenses beyond a reasonable doubt, . . . Marsh's promise of immunity from at least one of the elements was tantamount to a promise of immunity from the offenses themselves." SB 72–73. In subsection B(2) of its brief, the State criticizes this reasoning, noting that one cannot limit immunity to an element of an offense.

As an initial matter, the nature of the State's criticism is not entirely clear. In fact, it appears that State agrees with the court. Compare SB 26 (State: "[I]t is hard to image how someone could be granted immunity for an element of an offense without being granted immunity for the offense itself") with SB 72–73 (court: "Marsh's promise of immunity from at least one of the elements was tantamount to a promise of immunity from the offenses themselves.").

Near the end of subsection B(2), the State argues that "a promise of immunity for a legal act is simply illusory." SB 27. To the extent that the State argues that a promise of immunity is not really a promise of immunity unless contingent on the suspect's admission of each and every element of an offense, that argument should be rejected, for three reasons.

First, the argument conflates two distinct questions: (a) "What is the scope of the immunity promised?", and (b) "What, if anything, must the suspect admit to in order to secure the immunity?" Here, the scope of the immunity

Marsh promised to Hinkley — that he would not "be in trouble" — was broad. As the trial court found, the promised immunity was "unequivocal[]," and "without qualification or limitation." SB 73. The fact that Marsh made that promised immunity contingent on Hinkley's admission to one element of an offense did not affect the scope of the immunity promised or its status as a promise of immunity.

Second, the State cites no legal authority for its argument, and undersigned counsel is aware of none. The law in this area is clear: any statement made in reliance on a promise of immunity is per se involuntary. Parker, 160 N.H. at 209. It does not matter whether the police condition immunity on the suspect's admission to all of the elements of any offense, and it does not matter whether the suspect's statement constitutes an admission to all of the elements of any offense. If the police promise a suspect that he "won't be in trouble" if he admits that he was present at the scene of the suspected crime, for instance, then they have made a promise of immunity, even though the police did not condition immunity on the suspect's admission to any element of any offense.

Third, the State's proposed approach would produce unjust results. Under the State's argument, the police could permissibly promise a bombing suspect that he "won't be in trouble" if he admits to causing an explosion in his neighbor's

house, as long as they don't make their promise contingent on his admission that the explosion caused damage. See RSA 634:1, I. Similarly, the police could permissibly tell a murder suspect that he "won't be in trouble" if he admits to shooting the victim in the head, as long as they don't make their promise contingent on his admission that he acted purposely, knowingly, recklessly or negligently. See RSA Chapter 630. Finally, the police could permissibly tell a middle-aged sexual-assault suspect that he "won't be in trouble" if he admits to having sexual contact with a 13-year-old girl, as long as they don't make their promise contingent on his admission that he was more than five years older than her. See RSA 632-A:4, I(b).

This Court should reject any argument that a promise of immunity is not really a promise of immunity unless it is made contingent on the suspect's admission of each and every element of an offense.

C. The finding that all of Hinkley's statements were the product of the promise of immunity is not contrary to the manifest weight of the evidence.

The State's argument in subsection B(3) is also not entirely clear. The State begins by asserting that Hinkley "knew what the accusations were . . . at the outset of the interview," but it doesn't explain what relevance that has to the question of whether Marsh promised him immunity.

SB 27–28. The State then appears to argue that Hinkley's statement was voluntary under the totality-of-the-circumstances test, SB 28–30, but the trial court here had no occasion to apply the totality-of-the-circumstances test, having found that Hinkley's statements were induced by a promise of immunity, rendering them involuntary per se. The State argues that Marsh's second statement was "not a promise of leniency," SB 28, but the trial court's ruling was based on Marsh's first and third statements, not his second, and it found that those statements constituted a promise of immunity, not merely a "promise of leniency."

The State then argues that Agee v. White, 809 F.2d 1487 (11th Cir. 1987), supports reversal. SB 29–30, 32. Agee does not support reversal, for three reasons.

First, Agee involved a federal habeas petition arising from a state court conviction. Id. at 1489. The state trial court found that the defendant's statements were voluntary, the state appellate court affirmed, the federal district court found that his statements were voluntary, and the federal appellate court affirmed. Id. Here, in contrast, the trial court found that Hinkley's statements were involuntary, a factual finding that, on appeal, is entitled to considerable deference. Although the federal appellate court in Agee conducted an "independent legal analysis" of "the ultimate 'voluntariness' inquiry," id. at 1494, that court was not required to defer to

any prior finding that the defendant's statements were involuntary because there was no prior finding that his statements were involuntary.

Second, the court in Agee construed the Federal Constitution, not Part I, Article 15 of the New Hampshire Constitution. Id. at 1489. While the State has the burden of proving voluntariness beyond a reasonable doubt under the State Constitution, Carrier, 173 N.H. at 205, the burden under the Federal Constitution is preponderance of the evidence, Lego v. Twomey, 404 U.S. 477, 487–89 (1972). Also, unlike under the State Constitution, Parker, 160 N.H. at 209, a statement induced by a promise of immunity is not considered per se involuntary under the Federal Constitution, see Arizona v. Fulminante, 499 U.S. 279, 285–88 (1991) (totality of the circumstances test applies under Federal Constitution to all promises); United States v. Flemmi, 225 F.3d 78, 91–92 (1st Cir. 2000) (even if the suspect makes a statement in reliance on a promise of immunity, voluntariness under the Federal Constitution is reviewed under the totality of the circumstances).

Third, the facts in Agee are distinguishable. In Agee, the police questioned the defendant about a rape and double-homicide. Agee, 809 F.2d at 1489. The defendant admitted that, on the evening in question, he was with two men suspected of the crimes, but denied any involvement in the

crimes. Id. The police told the defendant that he might be needed as a witness, adding, according to the defendant, that he had "nothing to worry about." Id. at 1489, 1493. The police then learned more information implicating the defendant in the crimes. Id. at 1489. Six days after the initial questioning, the police questioned the defendant again, and he admitted to raping one of the victims. Id.

In Agee, the police told the defendant that he had "nothing to worry about" because they assumed, at the time, that his denials were true, and they did not make their "nothing to worry about" statement contingent on the defendant providing a contrary incriminating statement. As the federal appellate court found, "the more likely implication was that [the defendant] would not face prosecution so long as his account of the event proved true." Id. at 1494. Here, in contrast, Marsh clearly did not tell Hinkley, "[Y]ou're not gonna be in trouble with me if you told me that you had sex with [F.T.]" because he believed Hinkley's denials, but because he disbelieved those denials. Marsh expressly made his statement contingent upon Hinkley providing a contrary incriminating statement — that he "had sex with [F.T.]." When viewed in context, the statement at issue in Agee is not comparable to Marsh's statement here.

Finally, the State argues that Hinkley's "confession was not made in reliance on the alleged promise of immunity."

SB 30. Thus, the State appears to argue that, even if Marsh promised Hinkley immunity, one of Hinkley's statements — what the State refers to, without specification, as his "confession" — was not made in reliance on that promise. SB 30. To the extent that the State challenges the court's factual finding that "the statements [Hinkley] made after he first confessed to having intercourse with the complainant were derivatively obtained through a prior violation of [his] constitutional rights," SB 73, that challenge should be rejected.

The State supports its argument with a series of factual assertions. SB 30–31. It claims that, after Hinkley admitted to having sex with F.T., he "denied that the sexual relations were nonconsensual until [Marsh] asked why [F.T.] would lie." SB 30. It then claims that "[i]t was this exchange, and not" Marsh's promise that Hinkley would "not be in trouble" if he admitted to having sex with F.T., "that prompted" what the State calls Hinkley's "confession." SB 30.

The State's factual assertions are mistaken. Immediately following the monologue in which Marsh told Hinkley, "[Y]ou're not gonna be in trouble from me if you told me that you had sex with [F.T.]," Hinkley first admitted to having sexual intercourse with F.T. SB 97. Shortly thereafter, Hinkley first admitted that he had sex with F.T. despite her verbal objections. SB 102–03, 105. Contrary to

the State's assertion, SB 30, after admitting that he had sex with F.T., Hinkley never denied that he had "non-consensual" sex with her. SB 97–102.

Hinkley did, at that point, deny that F.T. physically resisted sexual activity. SB 104. Marsh, however, responded by reminding Hinkley that he initially claimed that he did not have sex with F.T. at all before later admitting that he did. SB 104–05. Hinkley then admitted that, in addition to verbally objecting to sex, F.T. also physically resisted. SB 107 (Marsh: "[F.T.] was trying to tell you [that she didn't want to have sex] beyond just telling you [, 'N]o['?]"; Hinkley: "Uh-hum."). It was only after Hinkley admitted that F.T. physically resisted that Marsh asked Hinkley, "Why would [F.T.] lie about that?" SB 107.

Thus, by the time Marsh asked Hinkley, "Why would [F.T.] lie about that?", SB 107, Hinkley had already admitted that he had sex with her despite her verbal objections, SB 102–03, 105, and that he had sex with her despite her physical resistance, SB 107.

The State also cites "[t]he elapse of time between" Marsh's promise that Hinkley would not "be in trouble," and Hinkley's admission that he had sex with F.T. despite her physical resistance. SB 31. The State, however, has failed to provide this Court with a copy of the audio recording of the interrogation, so this Court has no way to determine how

much time elapsed between those two events. See N.H. Sup. Ct. R. 13(2) ("The moving party shall be responsible for ensuring that all or such portions of the record relevant and necessary for the court to decide the questions of law presented by the case are in fact provided to the supreme court."); Carrier, 173 N.H. at 209, n.5 ("On appeal, the State has not provided us with this video recording. Therefore, we must assume that the evidence was sufficient to support the trial court's factual findings as they relate to the second interrogation."); State v. Dow, 168 N.H. 492, 499 (2016) (without relevant portions of lower court record, this Court "cannot conclude that the court unsustainably exercised its discretion.").

Later in the interview, Marsh reminded Hinkley that he had lied twice — first about having sex with F.T. and then about having sex with her despite her physical resistance — and told Hinkley that "[t]here's some things that . . . you haven't shared with me yet." SB 116–17. Hinkley responded by telling Marsh that, when F.T. resisted sex, he sometimes slapped or yelled at her. SB 117–18.

The court found that all of Hinkley's admissions — engaging in sexual activity with F.T., doing so despite her verbal objections, doing so despite her physical resistance, and doing so while slapping or yelling at her — were the product of Marsh's promise that Hinkley was "not gonna be in

trouble from [Marsh]," as long as Hinkley "told [Marsh] that [he] had sex with [F.T.]." SB 73. Because that finding is not contrary to the weight of the evidence, viewed in the light most favorable to Hinkley, this Court should affirm.

CONCLUSION

WHEREFORE, Seth Hinkley respectfully requests that this Court affirm.

Undersigned counsel requests a 10 minute, 3JX argument.

This brief complies with the applicable word limitation and contains 5,211 words.

Respectfully submitted,

By /s/ Thomas Barnard
Thomas Barnard, #16414
Senior Assistant Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to the Criminal Bureau of the New Hampshire Attorney General's Office through the electronic filing system's electronic service.

/s/ Thomas Barnard
Thomas Barnard

DATED: January 19, 2021