LAW OFFICES
MURTHA PSORAS & LANASA, LLC

HEAVER PLAZA
1301 YORK ROAD, SUITE 200

JOSEPH MURTHA
GEORGE PSORAS, JR.
GREGORY J. PSORAS
FRANCIS C. LANASA
ERIC S. LICKSTEIN

LUTHERVILLE, MARYLAND 21093
(410) 583-6969
FAX (410) 583-4706
jmurtha@mpllawyers.com

Howard County Office
3697 PARK AVENUE, STE. 200
ELLICOTT CITY, MD 21043
(410) 750-6200

January 19, 2016

BY HAND DELIVERY
Clerk, Criminal Division
Circuit Court for Baltimore City
Clarence M. Mitchell, Jr. Courthouse
110 N. Calvert Street
Baltimore, Maryland 21202

Re: State of Maryland v. Officer Edward Nero
Case No.: 115141033

Dear Sir/Madam:

Enclosed for filing in the above-captioned matter please find Defendant William Porter's Opposition to the State's Motion to Compel A Witness to Testify Pursuant to Section 9-123 of the Courts and Judicial Proceedings Article.

Thank you for your assistance in the filing of this document.

Sincerely,
Joseph Murtha

Enclosure:
cc: The Honorable Barry G. Williams
Office of the State's Attorney

STATE OF MARYLAND	*	IN THE
V.	*	CIRCUIT COURT
OFFICER EDWARD NERO	*	FOR BALTIMORE CITY
	*	CASE NO. 115141033

* * * * * * * * *

DEFENDANT WILLIAM PORTER'S OPPOSITION TO THE STATE'S MOTION TO COMPEL A WITNESS TO TESTIFY PURSUANT TO SECTION 9-123 OF THE COURTS AND JUDICIAL PROCEEDINGS ARTICLE

Now comes the defendant, William Porter, by and through undersigned counsel and hereby files this Opposition to the State's Motion to Compel a Witness to Testify Pursuant to Section 9-123 of the Courts and Judicial Proceedings Article. In support thereof, William Porter states the following:

1. The State has previously suggested, if not requested, that the Court consider postponing the trials of Officer Caesar Goodson, Sergeant Alicia White, Officer Garrett Miller, Officer Edward Nero, and Lieutenant Brian Rice until after the retrial of Officer William Porter. Such a suggestion was not adopted by the Court, and the trials of the remaining defendants were scheduled to proceed in the order identified. The order of the trials was disrupted after the Court of Special Appeals stayed the trial of Caesar Goodson after staying this Court's order compelling Officer Porter to testify as a witness in the trial of Officer Goodson. An order compelling the testimony of Officer Porter in the trial of Sergeant Alicia White has been appealed, and it is anticipated that the trial of Sergeant White will

be stayed upon the Court of Special Appeals staying of this Court's order compelling Officer Porter to testify as a witness for the State.

2. On more than one occasion the State has communicated its interest in retrying the matter of Officer Porter before trying the remaining defendants. By virtue of the Court of Special Appeals' order staying Officer Goodson's trial, and the anticipated stay of Sergeant White's trial, it appears that the State's strategy of postponing the remaining cases now involves a not previously revealed desire to have Officer Porter testify in each and every co-defendant's trial. This theory, offered for the first time in communication with the Court on January 13, 2016, suggests that Officer Porter's "testimony about the failure to seatbelt at the second stop is also critical to the trials of Miller, Nero and Rice." The problem with this representation is that a review of the trial testimony of Officer Porter reveals absolutely no testimony "about the failure to seatbelt at the second stop." The State's attempt to use Section 9-123 of the Courts and Judicial Proceedings Article as a vehicle to obtain postponements of the trials of Officer Miller, Officer Nero and Lieutenant Rice cannot be ignored by the Court.

3. On January 14, 2016, for the first time in a publicly filed pleading since the inception of the prosecution of these matters, the State asserted that it "may" call Officer William Porter to testify as a witness during the trial of Defendant Nero because Officer Porter's testimony "may be necessary to the public interest."

4. Beyond this bare assertion, and its factually inaccurate

representation to the Court in a separate document, the State offers no proffer in its two page motion as to why Officer Porter's testimony is either material or necessary to the trial of Defendant Nero, or how it is necessary to serve the public interest.

5. As noted, the request comes days after the Court of Special Appeals' injunction staying the trial of Officer Goodson, and a likely injunction staying the trial of Sergeant White. Both injunctions are the result of the State's characterization of Officer Porter as a material and necessary witness for the trials of Officer Goodson and Sergeant White, as well as the need to clarify the issues concerning Officer Porter's compelled testimony.

6. The State now attempts to place Officer Nero's case in the same posture as those of Officer Goodson and Sergeant White in an attempt to require a stay of his trial.

7. The State's past actions contradict the alleged need on which the present request rests. When the State was afforded the opportunity to select the order in which to call the cases in this matter, the State contended that "Defendant Porter is a necessary and material witness in the cases against Defendants Goodson and White, so it is imperative that Mr. Porter's trial takes place before their trials." Exhibit A. State's Letter dated September 15, 2015. Consequently, the State suggested the following:"[w]ithout listing all the possible permutations, the State essentially seeks to have Mr. Porter tried before Mr.

Goodson and Ms. White, to have Mr. Miller tried before Mr. Nero, and to have Mr. Mr. Miller and Mr. Nero tried before Mr. Rice." *Id.*

8. In the State's previous four trial witness lists to Edward Nero, the State never once indicated that it intended to call Officer Porter as a witness. Moreover, the State has never suggested, until the filing of the present Motion, that Officer Porter's testimony was in any way necessary to the prosecutions of Defendants Miller, Nero or Rice.

9. In light of the State's past position, it is abundantly clear that the present Motion is nothing more than a pretext to regain control of the order of the Defendants' trials, and avoid trying the most factually and legally tenuous cases first.

10. However, in order to fulfill its procedural desires, the State is trampling upon the Fifth Amendment rights, as well as the Article 22 rights, of Officer Porter. The State essentially seeks to take Officer Porter hostage as an unwilling witness in five trials, three of which are solely for the sake of postponing the trials until after the retrial of Officer Porter. If the present Motion is granted, it would be in essence reward the State for its tactical inadequacies and utter disrespect for the constitutional protections afforded Officer Porter.

11. The State's actions in the cases before the Court are without precedent. Officer Porter is being used as the designated whipping boy in the State's case against Officer Goodson and Sergeant White, and now the State seeks to torture him even more by moving to compel him to testify in the trials of

Officer Miller, Nero and Lieutenant Rice. The State does not shy away from saying that Officer Porter committed perjury in his own trial, yet they continue to think that they can sponsor his testimony in the other officers' cases, and then prosecute him for the crimes that they allege in the charging document filed in his case. This cannot be tolerated, and particularly, should not be permitted as a means to obtain a postponement of the remaining three cases and dominate the order in which the trials proceed before the Court.

12. The Fifth Amendment to the U.S. Constitution declares in part that "No person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const., 5th Amend. The Fifth Amendment creates a privilege against compelled disclosures that could implicate a witness in criminal activity and thus subject him or her to criminal prosecution. *Hoffman v. United States,* 341 US 479, 486-488, 71 S.Ct. 814, 818-819 (1951). The privilege against self-incrimination is a *constitutionally-based* privilege—not an evidentiary privilege.

13. To be clear: Porter is not saying that § 9-123 is unconstitutional: he is saying that it is unconstitutional as applied to this defendant in this setting. To quote Chief Judge Murphy, in his capacity as chair of the General Assembly Criminal Law Article Review Committee:

> The granting of some form of immunity against prosecution arising from compelled incriminating testimony does not, of itself, cure the constitutional defect. The General Assembly may wish to explore the scope of immunity that may be required to allow compelled testimony in harmony with federal and State constitutional precedent.

See notes to Md. Code Ann., Crim. Law § 9-204. The General Assembly has failed to do so, so it falls to this Court to provide Officer Porter shelter from the storm.

14. While Officer Porter has many valid reasons as to why he cannot be compelled to testify, the Fifth Amendment, the Sixth Amendment, Article 22, to name but three, the overarching principle is that the judicial system is built on trust and respect of the public and relies on that trust and respect for effectiveness. "It is of fundamental importance that justice should not only, but should manifestly and undoubtedly be seen to be done." *Rex v. Sussex Justices*, 1 K.B. 256, 259 (1924). Similarly, the United States Supreme Court has said that trials themselves are "a reflection of the notion, deeply rooted in the common law, that 'justice must satisfy the appearances of justice,'" *Levine v. United States*, 362 U.S. 610, 616 (1960) (quoted source omitted), and that the perception of fairness of trials and judicial acts is essential to the effectiveness of the system itself. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (Brennan, J., concurring). Frankly, calling Porter as a witness in two (2) trials **[OR FIVE]**, about the same matters upon which he faces a pending manslaughter trial, wreaks of impropriety.

15. On a related point, and as previously mentioned, on September 15, 2015 the State told the Court that it was "imperative" that Porter be tried first. Implicitly, maybe even explicitly, the state acknowledged in this pleading that Porter had to go first in order that he not have a Fifth Amendment Privilege. If the

State truly believes that Officer Porter can be called as a witness, with a pending manslaughter charge, why was it "imperative" that Officer Porter proceed to trial first?

16. Co-defendants trials are severed every day in Maryland. And yet there is not a single reported case of one co-defendant being compelled to testify against the other in the way the circuit court envisages happening here. There is a reason for that: it effectively renders constitutional protections all but meaningless.

17. Even if there were nothing wrong, in theory, with proceeding as the State suggests, in this case it would nevertheless be impermissible with the factual scenario that is before this Court. While it might be a closer call if the State chose to insert a clean team, give transactional immunity, or if the State called Officer Porter after his case resulted in acquittal, ultimately he would still be an impermissible witness. The bottom line is that the State, who has sole charging authority, believes he will lie about matters that are material. And all the immunity in the world cannot cure that.

18. For the purpose of continuity, and to ensure that previously asserted issues are again considered by the Court, and preserved for any record that may be considered by an appellate court, Officer Porter incorporates, and adopts by reference, and attaches hereto as Exhibit B, Motion to Quash Trial Subpoena of Officer William Porter, filed in the matter of *State of Maryland v. Officer Caesar Goodson*, Case Number 115141032. Undersigned counsel understands that no

subpoena has yet to be served upon Officer Porter to testify in the trial of Officer Miller, but the arguments set forth in the referenced Motion to Quash were incorporated by reference in Officer Porter's opposition to the State's Motion to Compel his testimony in Officer Goodson's case. As such, he once again requests that this Court consider those related issues in determining the impropriety of granting the State's request.

WHEREFORE, for the reasons set forth in the body of this response, and the accompanying documents, William Porter requests that this Honorable Court find that compelling his testimony at the trial of Officer Garrett Miller is not necessary to the public interest, and offends the constitutional protections afforded by the Fifth Amendment and Article 22, and deny the State's Motion to Compel his testimony in the trial of Officer Garrett Miller.

Respectfully submitted,

Joseph Murtha
Murtha Psoras & Lanasa, LLC
1301 York Road, Suite 200
Lutherville, Maryland 21093
(410) 583-6969
jmurtha@mpllawyers.com

Gary E. Proctor
Law Offices of Gary E. Proctor, LLC
8 E. Mulberry Street
Baltimore, Maryland 21202
(410) 444-1500
garyeproctor@gmail.com

Attorneys for Officer William Porter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of January, 2016, a copy of the foregoing Defendant William Porter's Opposition to the State's Motion to Compel a Witness to Testify Pursuant to Section 9-123 of the Courts and Judicial Proceedings Article, and referenced exhibits was sent via electronic mail to Janice Bledsoe, Deputy State's Attorney, Office of the State's Attorney for Baltimore City, 120 East Baltimore Street, Baltimore, Maryland 21202.

Joseph Murtha

Exhibit A

STATE'S ATTORNEY
Marilyn J. Mosby

OFFICE of the STATE'S ATTORNEY for BALTIMORE CITY
120 East Baltimore Street · Baltimore, Maryland 21202

DIRECT DIAL
443-984-6011

September 15, 2015

VIA HAND DELIVERY

The Honorable Barry G. Williams
Associate Judge
Circuit Court for Baltimore City
534 Courthouse East
Baltimore, MD 21202

Re: State v. Goodson, et al.,
Case Nos.: 115141032-37

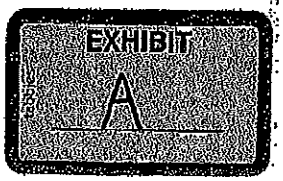
Dear Judge Williams,

I write as directed concerning the order and anticipated length of trials. The anticipated length of trial does not include the time for hearing and resolving pretrial motions, the time for jury selection, nor the length of the defense cases. Because the State has not yet received discovery from any of the Defendants, the anticipated length of trial also does not include possible additional time in the State's case from meeting anticipated defenses. The State would call the cases in the following order.

- First: William Porter, No. 115141037 Five days
- Second: Caesar Goodson, No. 115141032 Five days
- Third: Alicia White, No. 115141036 Four days
- Fourth: Garrett Miller, No. 115141034 Three days
- Fifth: Edward Nero, No. 115141033 Three days
- Sixth: Brian Rice, No. 115141035 Four days.

Defendant Porter is a necessary and material witness in the cases against Defendants Goodson and White, so it is imperative that Mr. Porter's trial takes place before their trials. Defendant Porter's counsel has known this since before the grand jury returned indictments in these cases. On July 24, 2015, counsel for Defendants Porter and Rice were advised by the State that Porter's case would be called first, either with Defendant Rice or without him, depending on the Court's ruling on the joinder sought by the State. Presumably, counsel for Defendants Porter and Rice so advised counsel for the other defendants. In any event, counsel for all Defendants were notified that the State intended to call the Porter case first during the chambers conference with the court on September 2, 2015.

The trial date of October 13, 2015 was ordered on June 19, 2015, based on the availability of the court and all counsel. As Judge Pierson requested, we had cleared that date with Dr. Carol Allan, the Assistant Medical Examiner who conducted the autopsy. We were advised by Dr. Allan this morning that she will be out of Maryland from November 16 through November 30. The State will be ready to begin the case against Mr. Porter on October 13. Counsel for Mr. Porter has expressed his intent to seek a continuance. The State informed counsel for Mr. Porter over the past weekend that it had no objection to a continuance of Mr. Porter's case of up to three weeks, *provided* that his remains the first case to be tried. However, given Dr. Allan's schedule,

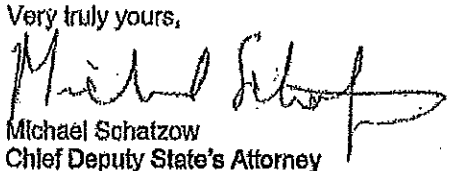


the State now believes that it cannot consent to a continuance beyond October 26. Given that no other Defendant is required to be ready for trial on October 13 (and the State has not received any discovery from any Defendant 30 days before October 13), a two week continuance would not unduly delay the time by which all six cases could be resolved. However, if the consequence of a continuance for Mr. Porter would be forcing the State to try a different Defendant first, then the State would vigorously oppose a continuance for Mr. Porter. Mr. Porter's counsel has been aware of the October 13 trial date for almost three months, and has known with certainty that Mr. Porter's case would be tried first for at least six weeks. In light of the long scheduled and agreed upon trial date, and the other background referenced above, Mr. Porter has no legitimate basis for a continuance, particularly one that would impact the State's traditional right to call cases in the order it chooses.

Finally, the Court directed the State to provide an alternative order in the event that Mr. Porter's case is not tried first. Without prejudice to the State's position that, in light of the facts of this case and the information in this letter, it should be able to call the cases in the order expressed above, the State's alternative order would be to try Mr. Miller first, and then, in order, Mr. Porter, Mr. Goodson, Ms. White, Mr. Nero and Mr. Rice. Without listing all the possible permutations, the State essentially seeks to have Mr. Porter tried before Mr. Goodson and Ms. White, to have Mr. Miller tried before Mr. Nero, and to have Mr. Miller and Mr. Nero tried before Mr. Rice.

Thank you for your consideration of these requests. Pursuant to your instructions, I have enclosed the transcript of each defendant's statement. I trust that this letter is clear and responsive to your direction. If you have any questions or think that a chambers conference would be useful, the State is available at the convenience of the Court.

Very truly yours,



Michael Schatzow
Chief Deputy State's Attorney
Baltimore City State's Attorney's Office

MS/tsr

Enclosures

Cc: Without Enclosures
Matthew B. Fraling, III, Esquire, Via Email
Marc L. Zayon, Esquire, Via Hand Delivery
Catherine Flynn, Esquire, Via Hand Delivery
Joseph Murtha, Esquire, Via Email
Ivan Bates, Esquire, Via Hand Delivery
Michael Belsky, Esquire, Via Hand Delivery
Andrew Jay Graham, Esquire, Via Hand Delivery
Gary Proctor, Esquire, Via Hand Delivery

Exhibit B

IN THE CIRCUIT COURT
FOR BALTIMORE CITY

STATE OF MARYLAND	:	
	:	
v.	:	CRIMINAL NO. 115141032
	:	
OFFICER CAESAR GOODSON	:	
	:	
Defendant.	:	
	:	

...oOOoo...

MOTION TO QUASH TRIAL SUBPOENA OF OFFICER WILLIAM PORTER

Comes NOW Witness Officer William G. Porter and hereby moves this Honorable Court to quash his trial subpoena in the case at bar, and in support thereof states as follows:

I. RELEVANT FACTS

PROCEDURAL POSTURE

Baltimore City Police Officer William Porter (hereafter "Officer Porter") has been charged with Manslaughter, Second Degree Assault, Reckless Endangerment and Misconduct in Office in Baltimore City Circuit Court Case Number 115141037. The undersigned are counsel for Porter in that case. The charges involve the in-custody death of Freddie Gray on April 12, 2015. There are six officers charged in the death of Mr. Gray: Officer Porter, Officer Caesar Goodson, Sergeant Alicia White, Officer Garrett Miller, Officer Edward Nero and Lieutenant Brian Rice. All were charged, and indicted, on the same day. As one

Judge was assigned to all six (6) cases, initially there was discussion about which case would go first.[1]

On September 15, 2015 the State of Maryland, through Chief Deputy State's Attorney Michael Schatzow wrote to the specially assigned Judge, Judge Barry Williams, and told him that the state would be calling Officer Porter's case first, followed by Goodson, White, Miller, Nero and Rice. Exhibit A. The state's rationale for this was that:

> Defendant Porter is a necessary and material witness in the cases against Defendants Goodson and White, so it is imperative that Porter's trial takes place before their trials. Defendant Porter's counsel has known this since before the grand jury returned indictments in these cases.

Id. The Court granted the state its wish, and Officer Porter proceeded to trial first.

THE TRIAL

Jury selection began in Officer Porter's trial on November 30, 2015. Ultimately, the case mistried on December 16, 2015 as the jury were unable to reach a verdict as to any of the four (4) charges placed against Officer Porter. Following the mistrial, this Court set the retrial for June 13, 2016.

During his trial, Officer Porter testified in his defense. During the state's closing argument by Ms Janice Bledsoe, and the rebuttal by Mr. Schatzow, both commented on Officer Porter's credibility, candor and truthfulness. The following

1 Initially the state moved to consolidate some trials, but eventually the Court found that six (6) separate trials was appropriate.

are not all of the instances when the state, in effect, called Officer Porter a perjurer, but it sets out specific examples that are germane to the decision this Court must make in relation to this Motion:

The State's Opening Closing Argument

[A] during his testimony at trial Officer Porter stated under oath that he heard Freddie Gray say during his initial arrest that he could not breathe. The state's theory at trial, was that Mr. Gray had said this much later. In her closing Ms. Bledsoe stated that not one of the other witness officers testified that they heard Mr. Gray say during his initial arrest that he could not breathe and went on to assert that "you know why? 'Cause it was never said [during the initial arrest]." TS 9:53:20.[2] Ms. Bledsoe's assertion that it was never said leads to the inexorable conclusion that the state was accusing Officer Porter of perjury.

[B] The reason the state believed that Mr. Gray said he could not breathe much later was because of a report of a Detective Teel, who wrote memorialized a conversation she had with Officer Porter. In arguing that Officer Porter is not to be believed, Ms. Bledsoe stated that "who has the motive to be deceitful? It's not Detective Teel. It's Officer Porter." TS 9:54:07.

[C] Officer Porter testified that when he saw Mr. Gray in the back of the police wagon, at Druid Hill and Dolphin, he helped Mr. Gray (who was on the floor) onto

2 The "TS" stands for Time Stamp. The State's closing and rebuttal have yet to be transcribed, but the undersigned have watched the video, and transcribed herein, the arguments of counsel as faithfully as possible.

the bench, but that Mr. Gray had power in his legs and bore the weight of his body. In calling Porter a liar, Ms. Bledsoe stated that:

> five times [Officer Porter] was asked about it, not once did he say Freddie Gray assisted himself up on the bench. Five times he used words that indicate he put Freddie Gray on the bench. Not once in any of those five times did he say, "it would be physically impossible for me to do that, I did not just put him up on then bench I couldn't do that," not once, but he told you that from the stand.

TS 9:57:40.

[D] Officer Porter testified that he was aware that arrestees often feign injury in the hopes of avoiding a trip to jail. He testified that the term for it that many officers use is "jailitis." Ms. Bledsoe in her closing said that "this jaillitis is a bunch of crap." TS 10:09:02.

[E] Officer Porter testified that, when he saw Freddie Gray at Druid Hill and Dolphin he believed that Mr. Gray was not injured. Officer Porter further stated under oath that if he knew Mr. Gray was injured he would have sought immediate medical attention. Ms. Bledsoe, in labeling Officer Porter a perjuror stated that Porter "knew Gray was hurt badly [at Druid Hill and Dolphin], he knew he wasn't going to be accepted at Central Booking and he did nothing." TS 10:10:10.

[F] Officer Porter testified that when Mr. Gray was loaded in the Wagon at Baker and Mount Streets, he did not know whether Mr. Gray was leg shackled or not. Ms. Bledsoe told the jury "he [Porter] knew Freddie Gray was placed into the wagon with handcuffs, leg shackles on..." TS 10:14:35.

[G] Because of the statements of Officer Porter referenced above, Ms. Bledsoe argued to the jury that "there's only one reasonable conclusion, Officer Porter **was not telling the truth** about his involvement in this incident." TS 10:15:15.

[H] After pointing out another statement that the state believed was inconsistent, regarding what Officer Porter told a civilian named Brandon Ross, Ms. Bledsoe again stated "the only reasonable conclusion you can come to is that **Ofc. Porter is not telling the truth.**" TS 10:18:27.

[I] Additionally, Ms. Bledsoe argued to the jury that Officer Porter lied under oath when he stated that on April 12, 2015 he was unaware of a General Order numbered 1114. TS 10:27:08.

[J] Officer Porter testified at trial that he believed the wagon was headed to the hospital at one point, with Mr. Gray inside of it. Ms. Bledsoe, at TS 10:39:45, stated that this was false testimony, because Officer Porter was behind the wagon and new it was headed in a different direction.

The State's Rebuttal

[K] Mr. Schatzow told the jury that "now that the defendant is on trial, he comes into court and **he has lied to you about what happened.**" TS 1:01:15.

[L] Less than a minute later, Mr. Schatzow repeated his assertion that "The state proved through the evidence that he [Porter] lied when he spoke to the [investigative] officers and **he lied on the witness stand.**" TS 1:02:09.[3]

[M] Mr. Schatzow stated that one of Porter's lies was "how he tried to pretend in his April 17th statement that he was too far away at stop 2, to know what was going on." TS 1:02:43.

[N] Mr. Schatzow stated that Officer Porter misrepresented what he saw when at Baker and Mount Street, asking the jury "what was he trying to cover up, was he trying to cover up his own knowledge of what had happened there?" TS 1:03:50.

[O] While opining on Officer Porter's credibility generally, Chief Deputy Schatzow stated that "you prove that people aren't telling you the truth by showing inconsistencies in their statements. You prove that the statements are inconsistent with each other. You prove that they're telling something that just is, makes no sense at all." TS 1:04:41.

[P] The state's attribution of perjury to Officer Porter was far from subtle:

> [the state] proved that what he said at stop two **was a lie** and that this "I can't breath" nonsense that he came up with. You see what he's tried to do in his testimony, every place that he is stuck, every place that he is stuck in his April 17, and every place in his April 15

3 Of course, Mr. Schatzow's assertion that Officer Porter lied to the initial police officers that interviewed him, could lead to additional charges of misconduct in office and obstruction and hindering. See, for example, Cover v. State, 297 Md. 398, 400, 466 A.2d 1276, 1277 (1983) ("[b]oth this Court and the Court of Special Appeals have said that resisting, hindering, or obstructing an officer of the law in the performance of his duties is an offense at common law.")

> statement **he now comes up with some new explanation for**. This business about that at stop 4 Mr. Gray used his own legs to get up. Nonsense. Five, six times on April 17, you'll see "I picked him up and I put him on the bench, I put him on the bench, I put him on the bench". You wont see anything about Freddie Gray using his own muscles, using his own legs.

TS 1:05:54.

[Q] In response to the defense's assertion that Officer Porter's testimony was credible, Mr. Schatzow stated that "[Porter] sits here in the witness stand and he tries to come up with explanations for why he said what he said. But credibility is not an issue in this case, credibility is not an issue, not at all." TS 1:07:21.

[R] While discussing Mr. Porter's contention that Mr. Gray said "I can't breathe" during his initial arrest, Mr. Schatzow tells the jury that the other witnesses "don't say that because **it didn't happen**, because **it didn't happen**." TS 1:08:10. If it did not happen then Officer Porter is being directly accused of perjury.

[S] Mr. Schatzow told the jury "this is what you were told, 'you have no reason to not believe defendant Porter.' I have already given you a bunch of reasons, you've heard reason. But the biggest reason of all is he's got something at stake here ladies and gentlemen, he's got motive to lie." TS 1:12:12.

[T] In accusing Officer Porter of lying when he said that he had very little conversation with Officer Goodson at Dolphin and Druid Hill, Mr. Schatzow stated that:

> But that's like the [Baker and Mount] thing where, he can't identify his own shift commander that's sitting right in front of his face, that's

not a cover up, **that's not trying to hide the truth**, that's not trying to throw the investigators off. Naw, Naw that's not what that is.

TS 1:15:33.

While there are other examples of both prosecutors impugning William Porter's veracity, the above sets out a sufficient basis for this Motion.

The Subpoena

During Officer Porter's trial, he was handed a subpoena to testify in the trials of both Goodson and White. Exhibit B.

The Federal Investigation

Counsel have spoken with the members of the Civil Rights Division of the United States Attorney's Office that are investigating the in-custody death of Mr. Gray. As recently as October 22, 2015, the undersigned corresponded with the United States Attorneys involved in the investigation. It is standard practice for the Department of Justice not to be involved prior to the conclusion of the state prosecutions.

Counsel have had a similar experience with the witnesses. In meeting with one witness, that was called at Officer Porter's trial, the undersigned asked him a question and the response received was "the FBI also asked me that question." As such, there is an ongoing, verifiable, Federal investigation into the conduct of Officer Porter and others with regard to the death of Freddie Gray and, at this

time, it is impossible to predict whether this will result in charges in United States District Court.

Significantly: when Officer Porter testified *at his trial* the undersigned observed at least three (3) current members of the United States Attorney's Office for the District of Maryland in attendance, including the United States Attorney himself. It is therefore, surely, undeniable that Officer Porter remains in the sights of the United States.

II. RELIEF SOUGHT

Officer Porter seeks that this Court find that, notwithstanding any grant of immunity by the state, that he cannot be compelled to testify in either the Goodson or White matters, because such testimony would result in the abridgment of his rights under both the state and federal constitutions.

III. THE STATE'S PROPOSAL

On January 6, 2016 this Court proposes to hold a hearing. At said hearing, Officer Porter will assert his rights under state and federal constitutions to decline to testify at the trials of Goodson and White. Following that, the state proposes to give Porter immunity.

The immunity statute in question reads, in relevant part, as follows:

> (b)(1) If a witness refuses, on the basis of the privilege against self-incrimination, to testify or provide other information in a criminal prosecution or a proceeding before a grand jury of the State, and the court issues an order to testify or provide other information under

subsection (c) of this section, the witness may not refuse to comply with the order on the basis of the privilege against self-incrimination.

(2) No testimony or other information compelled under the order, and no information directly or indirectly derived from the testimony or other information, may be used against the witness in any criminal case, except in a prosecution for perjury, obstruction of justice, or otherwise failing to comply with the order.

(c)(1) If an individual has been, or may be, called to testify or provide other information in a criminal prosecution or a proceeding before a grand jury of the State, the court in which the proceeding is or may be held shall issue, on the request of the prosecutor made in accordance with subsection (d) of this section, an order requiring the individual to give testimony or provide other information which the individual has refused to give or provide on the basis of the individual's privilege against self-incrimination.

(2) The order shall have the effect provided under subsection (b) of this section.

(d) If a prosecutor seeks to compel an individual to testify or provide other information, the prosecutor shall request, by written motion, the court to issue an order under subsection (c) of this section when the prosecutor determines that:

(1). The testimony or other information from the individual may be necessary to the public interest; and

(2) The individual has refused or is likely to refuse to testify or provide other information on the basis of the individual's privilege against self-incrimination.

Md. Code § 9-123. The state believes that, under the grant of immunity conferred on by this section, Officer Porter will have no Fifth Amendment Privilege, and will have to answer the questions, under penalty of contempt.

While it is known to the Court and the parties - - but may not be by the reader of this Motion - - the state fully intends to go forward with Officer Porter's

retrial on June 13, 2016 - - but in the interim seeks to compel him as a witness in their cases against Officer Goodson and Sergeant White.

IV. PORTER CANNOT BE COMPELLED TO TESTIFY

(a) Summary of the argument

The Fifth Amendment to the U.S. Constitution declares in part that "No person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const., 5th Amend. The Fifth Amendment creates a privilege against compelled disclosures that could implicate a witness in criminal activity and thus subject him or her to criminal prosecution. *Hoffman v. United States*, 341 US 479, 486-488, 71 S.Ct. 814, 818-819 (1951). The privilege against self-incrimination is a *constitutionally-based* privilege—not an evidentiary privilege.

While Porter has many valid reasons as to why he cannot be compelled to testify, the overarching principle is that the judicial system is built on trust and respect of the public and relies on that trust and respect for effectiveness. "It is of fundamental importance that justice should not only, but should manifestly and undoubtedly be seen to be done." *Rex v. Sussex Justices*, 1 K.B. 256, 259 (1924). Similarly, the United States Supreme Court has said that trials themselves are "a reflection of the notion, deeply rooted in the common law, that 'justice must satisfy the appearances of justice,'" *Levine v. United States*, 362 U.S. 610, 616 (1960) (quoted source omitted), and that the perception of fairness of trials and judicial acts is essential to the effectiveness of the system itself. See

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (Brennan, J., concurring). Frankly, calling Porter as a witness in two (2) trials, about the same matters upon which he faces a pending manslaughter trial, wreaks of improriety.

On a related point: on September 15, 2015 the state told this Court that it was "imperative" that Porter be tried first. Implicitly, maybe even explicitly, the state acknowledged in this pleading that Porter had to go first in order that he not have a Fifth Amendment Privilege. If the state truly believes that Porter can be called as a witness, with a pending manslaughter charge, why was it "imperative" that Officer Porter go first?

Concomitantly, America has racked up masses of jurisprudence in its independence. Indeed, as argued herein, Maryland had a running start with English jurisprudence pre-1776 as precedent. So, for example, plug "bear wrestling" into Westlaw and you'll find statutes from Louisiana (La. Stat. Ann. § 14:102.10), Oklahoma (Okla. Stat. Ann. Tit. 21, § 1700), Missouri (Mo. Ann. Stat. § 578.176) and Arkansas (Ark. Code Ann. § 5-62-124). You'll find cases from around the country discussing whether bear wrestling (or the undersigned's favorite: boxing with a kangaroo) constitutes animal cruelty, or is unconstitutionally vague. In short: the courts of this land have tackled almost every conceivable issue. And yet, the silence is deafening when it comes to one defendant with a pending homicide trial being compelled to testify against another defendant about the same event, over his objection. There is a reason for that: it effectively renders the Fifth Amendment all but meaningless.

(b) A grant of immunity by this Court in this case will not put Officer Porter in the same position

A grant of immunity must provide a protection coextensive with the Fifth Amendment, as required by *Kastigar.* The State attempted to impeach Officer Porter during his mistrial, and to do so, the State presented a theory during Officer Porter's trial which alleged that Officer Porter lied and attempted to cover up facts when giving a statement to police officers, and when taking the stand in his own defense. Effectively, the State wishes to compel Porter, through the farce of a grant of immunity, to lay a foundation for evidence that the State has deemed as constituting an obstruction of justice and perjury.

Perjury, of course, has no statute of limitations. Md. Crim. Code § 9-101(d). So Officer Porter can be charged with it as and when the state chooses to. It is also important to note that Md. Crim. Code § 9-101(c)(1) states that if a defendant gives two contradictory statements, the state does not have to prove which is false, it is enough that both statements under oath cannot be true. As such, if Officer Porter were to testify in Officer Goodson or Sergeant White's trial (or both) something that the state believes is inconsistent with his trial testimony, the state would not have to prove which is false, and all the immunity the state could confer would be rendered meaningless.

Further: a defendant, of course, always has a right to testify in his defense. At the bench during Officer Porter's trial the Court went to great lengths to inform

Officer Porter of his absolute right to testify and the corresponding right to remain silent. That said "a person convicted of perjury may not testify." Md. Code 9-104. As such, calling Officer Porter as a witness in the Goodson/White trials may result in him being stripped of his ability to testify at his own trial. Again, all the immunity in the world can do nothing to alleviate this concern.

MD. CODE, CTS. & JUD. PROC. § 9-123, "Privilege against self-incrimination provides:

> (b)(1) If a witness refuses, on the basis of the privilege against self-incrimination, to testify or provide other information in a criminal prosecution or a proceeding before a grand jury of the State, and the court issues an order to testify or provide other information under subsection (c) of this section, the witness may not refuse to comply with the order on the basis of the privilege against self-incrimination.
>
> (2) No testimony or other information compelled under the order, and no information directly or indirectly derived from the testimony or other information, may be used against the witness in any criminal case, except in a prosecution for **perjury**, **obstruction of justice**, or otherwise failing to comply with the order.

(Emphasis supplied). In addition, the Supreme Court ruled in *Kastigar* that a witness may be compelled to testify when given use and derivative use immunity, if after the immunity is granted, the immunity leaves the witness in the same position, as if the witness had simply claimed the privilege. *Kastigar v. United States*, 406 U.S. 441 (1972); *see also Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 79 (1964) *abrogated by United States v. Balsys*, 524 U.S. 666 (1998). Thus, the Maryland statute and *Kastigar* are directly inapposite to the State's theory that Officer Porter committed an obstruction of justice during his

taped statement and Officer Porter committed perjury when he took the stand in his defense at trial.

Courts have agreed, that "[t]he exception in the immunity statute allows the use of immunized testimony only in prosecutions for future perjury, future false statements, and future failure to comply with the immunity order, not for past acts." *Matter of Grand Jury Proceedings of Aug., 1984*, 757 F.2d 108 (7th Cir. 1984). Truthful testimony under a grant of immunity may not be used to prosecute the witness for false statements made earlier. *In re Grand Jury Proceedings*, 819 F.2d 981 (11th Cir. 1987). Thus, based on the State's blatant impeachment of Officer Porter during his trial, the State is effectively presented with a Hobson's choice. The State either has to retract their previous theory, and admit that Officer Porter was truthful, or the State has to recognize that the grant of immunity would be a farce – that is, the State's grant of immunity would be coaxing Officer Porter into committing what the State believes is perjury and an obstruction of justice, both of which are crimes that falls outside the scope of immunity granted in the immunity statute. MD. CODE, CTS. & JUD. PROC. § 9-123. Such a farcical grant of immunity would fly in the face of *Kastigar*'s holding that a witness may be compelled to testify when given use and derivative use immunity, if after the immunity is granted, the immunity leaves the witness in the same position, as if the witness had simply claimed the privilege. 406 U.S. 441.

An analogous scenario is found in *United States v. Kim*, 471 F. Supp. 467 (D.D.C. 1979). *Kim* held that when a defendant was found to have given a

perjurious response to a congressional committee's question, and then that same defendant is granted use and derivative use immunity to answer the same question, such a grant was not coextensive with scope of privilege that must be provided under *Kastigar*, as it could have resulted in the infliction of criminal penalties. *U.S. v. Kim* is similar to Officer Porter's scenario in that the prosecution cannot first allege that Porter has provided perjured testimony/committed obstructions of justice, and then thereafter grant immunity to suborn the very same testimony that was allegedly perjured. To summarize: "[i]t is well-established in federal courts that the privilege against self-incrimination can properly be invoked based on fear of a perjury prosecution arising out of conflict between statements sought to be compelled and prior sworn testimony." *Johnson v. Fabian*, 735 N.W.2d 295, 310-11 (Minn. 2007) (citing other cases).

Further: each additional statement by Officer Porter would be live tweeted and reported upon, resulting in an inability to receive a fair trial. Notably, this is a matter in which 100% of the jury panel was aware of the case. Likely the same percentage of a new panel would have at least some knowledge of preceding case(s). If Officer Goodson or Sergeant White were to be acquitted it is all but inevitable that jurors would conclude that Porter -- the star witness -- was not credible. If convicted, the jurors will assume that Officer Porter has knowledge of inculpatory acts that he has now revealed when granted immunity. Commentators will likely opine as to this regardless of the outcome of each trial.

Officer Porter's statement at his trial was unquestionably voluntary, and his statements to F.I.T. and Detective Teel were found by the Court to be voluntary. Contrarily, Officer Porter's potential statements in Officer Goodson's trial and Sgt. White's trial would not be. Officer Porter would thereby be subjected to jurors with some knowledge of the substance of his compelled statements. Parsing out whether a juror's knowledge of Officer Porter's previous testimony was from the initial voluntary statements, or the later compelled statements would not be possible in voir dire. A mini-*Kastigar* hearing would be required for each juror.[4]

Moreover, in Officer Porter's trial, and any retrial, the witness were and can be sequestered. The reason for this is obvious, that each witness should testify about his or her recollection, untainted by what every other witness said. And while the Court can compel witnesses at Officer Porter's trial from learning what the other witnesses have testified to, it can scarcely prohibit people from following accounts of Officer Porter's testimony in the Goodson and White trials.

If this Court buys what the state is selling, why wouldn't a prosecutor do it in every case? It is all too common that more than one person is charged with any given homicide. Because of a host of reasons, the cases are often severed or not joined. Why would an enterprising prosecutor not say "you know what, Defendant B may testify in his trial. So I'll give him immunity and call him as a witness in Defendant A's trial. I'll see how he responds to questions, get an advance preview of what he's going to say, get a feel for how to cross him,

4 See the related *Poindexter* argument below.

whether to offer him a plea, sure I can't use what he says, but they can't make me forget it, there's no prohibition against me getting a transcript, no brainer, right?" This is exactly the kind of harm the Eighth Circuit saw, when holding that "[s]uch use 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." *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973).

A later *Kastigar* will be insufficient to remedy Officer Porter's testimony at two trials. As Officer Porter has "not yet delivered the...material, and he consistently and vigorously asserted his privilege. Here the 'cat' was not yet 'out of the bag' and reliance upon a later objection or motion to suppress would 'let the cat out' with no assurance whatever of putting it back." *Maness v. Meyers*, 419 U.S. 449, 463, 95 S. Ct. 584, 593, 42 L. Ed. 2D 574 (1975).

Should this Court give the state its imprimatur to make an end run around self-incrimination, the preceding sentence is a preview of coming attractions. "[E]ven if the sole purpose in calling a witness is other than subterfuge, the questioning by a party of its own witness concerning an "independent area of inquiry" intended to open the door for impeachment and introduction of a prior inconsistent statement could be found improper.". *Walker v. State*, 373 Md. 360, 386, 818 A.2d 1078, 1093 (2003)

Mr. Schatzow will surely not ask Officer Porter the same questions six months later as he did the first go around. Even if he did, it is inconceivable that

Officer Porter will answer them the same way. All good cross examination is palimpsest, it builds on what you already know. To allow the state to have two (2) more runs at Officer Porter, prior to his retrial, is anathema to our notions of the right to remain silent.

The Maryland statute on immunity states that "if a witness refuses...the witness may not refuse to comply...may be used against the witness...if a witness refuses to comply..." Id. (emphasis supplied). The statute is designed for people without skin in the game: witnesses. Not Officer Porter.

To be sure: there are ways of compelling someone that the state believes to be less culpable in a criminal act to testify at the other's trial. *People v. Brunner*, 32 Cal. App. 3d 908, 911, 108 Cal. Rptr. 501 (CA Ct. App. 1973). California sensibly holds that:

> where, as here, the defendant properly invokes the privilege against self-incrimination in a felony proceeding and is compelled by invocation of [the California Immunity Statute] to testify to matters which tend to incriminate him as to presently charged offenses, he may not be prosecuted for them, notwithstanding that his testimony is not used against him.

People v. Campbell, 137 Cal. App. 3d 867, 187 Cal. Rptr. 340 (CA Ct. App. 1982).[6] Accord *People v. Matz*, 68 Cal. App. 4th 1216, 80 Cal. Rptr. 2D 872, 875 (1998).

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5 Again, California holds that, under its statute "The measure of what incriminates *defines* the offenses immunized. Thus, the inference ("link") from compelled testimony to implicated offense serves to identify and hence *define* the offense immunized from prosecution." People v. Campbell, 137 Cal. App. 3d 867, 874, 187 Cal. Rptr. 340 (CA Ct. App. 1982) (emphasis in the original).

(c) Porter has not been immunized federally

As this Court is aware:

> The assistant United States attorney testified that she too was authorized to grant [a witness] immunity from any federal prosecution within the...District [that that Federal prosecutor practices in] based upon his testimony or the fruits thereof. She also indicated that the immunity she was offering was not immunity under the federal immunity statute, 18 U.S.C. §§ 6001–03 (1982), which requires federal judicial approval, but rather immunity granted solely under the authority of her office and without the approval of a federal judge.

State ex rel. Munn v. McKelvey, 733 S.W.2d 765, 767 (Mo. 1987). Of course, Federal prosecutors and Judges also have the abiltiy pursuant to 18 U.S.C. §§ 6001–03 to grant a more formal immunity.

Neither such Orders have been provided in this case. And that notwithstanding, as stated earlier, that the United States Department of Justice is very much aware and monitoring all that is going on in the case at bar.

As the Court is aware, and as will be discussed further later, when the United States Government becomes aware of immunized testimony it typically develops a "taint" team.[6] The undersigned provides two (2) examples for the purposes of making a record in this case.

1) the undersigned both represented correctional officers that were accused of beating an inmate. The officers, and others that worked on their shift, were compelled to testify in administrative hearings. As a result of this compelled

6 Sometimes the respective teams are called "clean" and "dirty."

testimony the Federal Government put a "taint" team in place. The FBI Agents and the United States Department of Justice had two prosecution teams. The first got to read everything. The compelled testimony, the information developed through other sources, all of it. The second got to read only what the first team decided was untainted. So the prosecutors did not know what was said by people compelled to answer questions. Nor were the agents actually proactively investigating the case aware what was said during the compelled statements.

2) Under Federal law a defendant in a capital case has a right to raise mental diseases and defects, not amounting to insanity, to argue that he should not receive a sentence in death. Fed. R. Crim. P. § 12.2. The wrinkle is that the Government has a right to advance notice of it, and the opportunity to get their own assessment. What if a capital defendant, not raising insanity, decides to testify at his guilt phase? Well, any prosecutor worth his salt would surely work that information into his cross. Even if a defendant doesn't testify, it could, almost inadvertently, be brought out through other witnesses. IQ scores, personality disorders, defects that go to an ability to accurately recall events, all would be fair game. So the United States Attorney's Office provides two (2) sets of attorneys. Team 1 tries the case. Team 2 receives the mental health disclosure from the defense, hires their own experts, files whatever challenges they believe may lie. And, here's the important part, Team 2 does not share anything that they are doing with Team 1 unless and until said mental health evidence becomes a factor at the penalty phase of the trial.

These two examples are provided solely to point out that there are no such dichotomous participants in this case. The same prosecutors that presented the case to the grand jury, participated in pretrial hearings, and tried Officer Porter's case are now seeking to compel his testimony in the trials of two others, and will be counsel of record when Porter round 2 commences. No walls will be erected around this testimony, the spill over effect will be instantaneous and indellible. For that reason alone this Court must disallow the calling of Officer Porter as a witness.

(d) The state would be suborning perjury

Firstly, it will surely have escaped no-one's notice that Maryland does not allow for a prosecutor or a Court to immunize perjury. Which makes sense from a societal standpoint: 'here's your immunity, now go say whatever you want' is scarcely in the public interest. So, whatever grant this Court makes will have no effect on the ability of the State of Maryland to charge Officer Porter with perjury later.

If Officer Porter is compelled to testify at Goodson trial, and were to testify differently from his own trial: it is surely axiomatic that he would have committed perjury during at least one of the trials. However, even if he testifies consistently with his previous trial: as narrated above the prosecution already believes he has committed multiple instances of perjury. And, as detailed below, what is of crucial importance is what they, the state, believe.

The state's commenting on Officer Porter's testimony would be admissible in Goodson and White's trial as an admission of a party oponent. See, for example, *Wisconsin v. Cardenas-Hernandez*, 219 Wis. 2d 516, 529, 579 N.W.2d 678, 684 (1998) (collecting cases).

Similar situations

The Tennessee Bureau of Investigation investigated a Tri-Cities attorney for perjury, after he was accused of advising one of his clients to "lie under oath" in a DUI case. The lawyer sent the following email to the client, "they won't have anyone there to testify how much you had to drink. You won't be charged with perjury. I've never seen them charge anyone with perjury, and everybody lies in criminal cases, including the cops. If you want to tell the truth, then we'll just plead guilty and you can get your jail time over with."[7]

In *State Bar of Cal. v. Jones*, 208 Cal. 240, 280 P. 964 (1929), the Supreme Court of California held that a one-year suspension from practice for attorney's attempt to cause miscarriage of justice through inducing clients to give perjured testimony was not an excessive penalty.

In *Premium Pet Health, LLC v. All American Proteins, LLC, et al.* the Court reprimanded counsel for suborning perjury by submitting an affidavit stating that counsel did not have relevant materials, after counsel deleted all of the relevant

7 *Available at* http://crimlaw.blogspot.com/2005/12/from-dont-leave-written-evidence-of.html

materials the day before. The judge took particular issue with this turn of events, since Bryan Cave partner Randall Miller was aware of this before he filed an affidavit that denied this, "[Miller] reviewed the Landers Affidavit and filed it ... thereby suborning perjured testimony ... Miller also failed to alert the Court or opposing counsel to the spoliation that Bryan Cave had ordered the day before, another clear violation of professional and ethical obligations."[8]

In *Tedesco v. Mishkin*, an attorney, against whom sanctions were sought both as an attorney and as a litigant in a securities action, suborned perjury of witness in violation of 18 U.S.C.A. § 1622 and aided and abetted witness to commit perjury in violation of 18 U.S.C.A. §§ 2, 1621 by not advising witness, after hearing his proposed testimony and knowing it to be false, against testifying in that manner. *Tedesco v. Mishkin*, 629 F. Supp. 1474 (S.D.N.Y. 1986). The attorney's later telling witness to do what he had to do was insufficient to stop witness from carrying out agreement given attorney's knowledge that witness would go to drastic lengths to protect attorney. *Id.*

The harm to due process

The relevant law governing a prosecutor's use of perjured testimony is set forth in *Napue v. Illinois* (1959):

> [I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall

8 *Available at* http://abovethelaw.com/2015/06/biglaw-partner-and-associate-destroyed-evidence-suborned-perjury/2/.

> under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.
>
> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

360 U.S. 264, 269 (citations omitted.) Accordingly, *State v. Yates*, decided by the Supreme Court of New Hampshire, presents a legal scenario that is analogous to that of the instant matter. 629 A.2d 807, 809 (1993). In *Yates*, the prosecutor reasonably believed that a witness presented false testimony when the witness denied any involvement in illicit drugs, and that witness' false testimony was integral to the conviction of the defendant. Id. The defendant's "entire defense depended on the premise that [the witness] owed [the defendant] money from a cocaine sale." Id. The prosecutor knew before trial that the witness had recently been indicted for drug possession, yet, the prosecutor failed to correct the witness' statement when the witness denied any involvement in illicit drugs.

Importantly, the *Yates* court stated that one does not need to prove that the prosecutor had *actual knowledge* of the uncorrected false testimony; one "need only show that the prosecutor *believed* [the witness'] testimony was probably false." *See May v. Collins*, 955 F.2d 299, 315 (5th Cir.), *cert. denied*, 504 U.S.

901 (1992); *United States v. Mills*, 704 F.2d 1553, 1565 (11th Cir. 1983), *cert. Denied*, 467 U.S. 1243 (1984); *cf. Giglio v. United States*, 405 U.S. 150, 154 (1972) (knowledge of one attorney in prosecutor's office attributed to other attorneys in office). The Supreme Court of New Hampshire ultimately held that a lawyer's duty of candor to the tribunal "is neglected when the prosecutor's office relies on a witness's denial of certain conduct in one case after obtaining an indictment charging the witness with the same conduct in another case." *Yates*, 629 A.2d at 809.[9] For the prosecution to offer testimony into evidence, knowing it or believing it to be false is a violation of the defendant's due process rights. *Mills*, 704 F.2d at 1565 *citing United States v. Sutherland*, 656 F.2d 1181, 1203 (5th Cir.), *cert. denied*, 455 U.S. 949 (1981); *United States v. Brown*, 634 F.2d 819, 827 (5th Cir. 1981). As noted by the District of Columbia Court of Appeals, "the nondisclosure of false testimony need not be willful on the part of the prosecutor to result in sanctions." *Hawthorne v. United States*, 504 A.2d 580, 591 n. 26 (D.C. 1986) *citing Giglio v. United States*, 405 U.S. at 154.

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9 The parallel rule in Maryland is Maryland Rule 16-812, Maryland Rule of Professional Conduct 3.3 "Candor Toward the Tribunal," which provides:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

. . .

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

So while Officer Porter one "need only show that the prosecutor *believed* [the witness'] testimony was probably false," he need go no further than the factual summary above to evince that both Ms. Bledsoe and Mr. Schatzow stated unambiguously that what Officer Porter said was demonstrably false.

There is no way around this

It is of no moment if the state makes claims that Officer Porter is very unlikely to be prosecuted for any statement he might make at the White / Goodson trials. That is because:

> We find no justification for limiting the historic protections of the Fifth Amendment by creating an exception to the general rule which would nullify the privilege whenever it appears that the government would not undertake to prosecute. Such a rule would require the trial court, in each case, to assess the practical possibility that prosecution would result from incriminatory answers. Such assessment is impossible to make because it depends on the discretion

United States v. Miranti, 253 F.2d 135, 139 (2nd Cir.1958) (cited with approval in *Choi v. State*, 316 Md. 529, 539 (1989).

Even if (which they cannot) the state could somehow confine their direct questioning to areas in which they have never levied a perjury accusation against Officer Porter, this would still not solve the issue.

This is because "a judge must allow a defendant wide latitude to cross-examine a witness as to bias or prejudices." Smallwood v. State, 320 Md. 300,

307-08, 577 A.2d 356, 359 (1990). Accordingly, whatever narrow focus the state may decide to employ in an attempt to cure the unconstitutional ill set out herein, nothing would bind counsel for Goodson and White from a much wider foray on cross-examination. And, in the event that Officer Porter withstands their cross with his reputation intact, the prosecutors could then become character witnesses to impugn his veracity (see further below).

To allow Porter to testify, is likely to result in him being unavailable for cross-examination. While the state may give him immunity, the defense cannot. And any new areas that they enquire into are likely to result in Porter declining to answer. No part of any statement Porter has ever given can be used if he is unavailable for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *State v. Snowden*, 385 Md. 64, 867 A.2d 314 (2005).

(e) The cases cited by the State

They do not stand for the proposition that Officer Porter can be compelled to testify

The state principally relies on *United States v. Balsys*, 524 U.S. 666, 680-682 (1998). There are several points to make about this case. Firstly, even the portions that the state relies on cannot be said to be anything more than *dicta*. The holding of *Balsys* was that "[w]e hold that concern with foreign prosecution is beyond the scope of the Self–Incrimination Clause." Id. at 669.

Balsys was an immigration case. *Balsys* was not given any immunity, and so is dissimilar to the case at bar. And *Balsys*' purported fear was that he might be prosecuted in "Lithuania, Israel and Germany." Id. at 670. Of course, no prosecution at that time was pending, indeed there was nothing in the record that Lithuania had had any contact with the defendant since his immigration from that country 37 years earlier. The Supreme Court distilled the issue into one sentence: could *Balysis* "demonstrate that any testimony he might give in the deportation investigation could be used in a criminal proceeding against him brought by the Government of either the United States or one of the States, [then] he would be entitled to invoke the privilege." Here: Officer Porter has demonstrated, **conclusively**, that there is an ongoing investigation by the United States.

Moreover, *Balsys* reiterates that "the requirement to provide an immunity as broad as the privilege itself." As stated herein, given that the same prosecutors will take Mr. Porter's testimony not once: but twice - - in the trials of Goodson and White, will then cross-examine Officer Porter again at his retrial, he will not, and cannot be, placed in the same position as if he had never testified. The state gets an advantage, and what Mr. Schatzow learns of Officer Porter's knowledge during the compelled testimony during the trials of Goodson and White cannot be unknown to him on June 13, 2016.

Further, what the state is in effect asking this Court to find is that as a matter of Federal law, Officer Porter's testimony at the Goodson and White trials cannot be used against him later. Respectfully, this matter is proceeding in the Circuit Court for Baltimore City, and this Court cannot make such an inferential leap as to what a separate sovereign may decide in the future.

Following *Balsys*, the state next cites *United States v. Cimino*, 2014 U.S. Dist. LEXIS 155236 (10/29/14). Firstly, an unreported United States District Court decision from another circuit is scarcely a reason for this Court to make law that flies in the face of 12 score years of Anglo-Maryland jurisprudence. Secondly, the reluctant witness in *Cimino* was an "agent of the FBI...carrying out the controlled buys orchestrated by the Bureau." Id. at 5. This is a world away from the case at bar. While the *Cimino* witness may have had a snowball's chance in hell of being prosecuted, no matter what she said, Officer Porter has already been tried once for homicide, with another to follow anon. Lastly, in *Cimino*:

> However, the immunity arguments pressed on this Court by defendant are of no relevance to the case at bar. The informant has not been immunized by anyone, for anything. She has no agreement that requires any sovereign to forbear from prosecuting her for any crimes she may commit, including crimes committed during the course of her work as an informant

Id. at 11-12. Thus, the portion cited by the state cannot be said to be anything other than unreported, non-binding, *dicta*.

The third case in the state's trifecta of cases it cited is *United States v. Poindexter*, 698 F. Supp. 300 (D.D.C. 1988). The primary thrust of the case concerns the steps taken by grand jury members to avoid learning of immunized testimony given at Congress, prior to their returning of an indictment. That is night-and-day from what we have here. The reason Poindexter supports Officer Porter's position, however, is that:

> there must be noted several administrative steps which were taken by Independent Counsel from an early date to prevent exposure of himself and his associate counsel to any immunized testimony. Prosecuting personnel were sealed off from exposure to the immunized testimony itself and publicity concerning it. Daily newspaper clippings and transcripts of testimony before the Select Committees were redacted by nonprosecuting "tainted" personnel to avoid direct and explicit references to immunized testimony. Prosecutors, and those immediately associated with them, were confined to reading these redacted materials. In addition, they were instructed to shut off television or radio broadcasts that even approached discussion of the immunized testimony. A conscientious effort to comply with these instructions was made and they were apparently quite successful. In order to monitor the matter, all inadvertent exposures were to be reported for review of their possible significance by an attorney, Douglass, who played no other role in the prosecution after the immunized testimony started...Overall, the file reflects a scrupulous awareness of the strictures against exposure and a conscientious attempt to avoid even the most remote possibility of any impermissible taint.

Id. at 312-313. It is therefore, readily apparent that the prosecution team in *Poindexter* went out of their way to avoid learning anything -- let alone anything of consequence -- from the immunized testimony. In the case at bar, however, there is but one prosecution team. The same people that crossed Officer Porter last time will be in the room when he is called as a witness next time, and the

time after that and, potentially, a fourth time at his retrial. The state's failing to Chinese wall the different prosecutions means that they cannot now remove the indellible taint.

Even if the cases said what the state believes they say, Officer Porter has a separate right not to testify under the Maryland Declaration of Rights

Assuming, *arguendo*, that *Murphy* signaled a sea change in *federal* constitutional jurisprudence in its ruling that the *federal* constitutional privilege against self-incrimination protects a state witness against incrimination under federal *and* state law, and a federal witness against incrimination under state *and* federal law. *Murphy*, 378 U.S. 52, 78. Very importantly, in making its decision, the *Murphy* Court discussed, in detail, two English common law cases decided before 1776:

> In 1749 the Court of Exchequer decided *East India Co. v. Campbell*, 1 Ves.Sen. 246, 27 Eng.Rep. 1010. The defendant in that case refused to 'discover' certain information in a proceeding in an English court on the ground that it might subject him to punishment in the courts of India. The court unanimously held that the privilege against self-incrimination protected a witness in an English court from being compelled to give testimony which could be used to convict him in the courts of another jurisdiction.

Id. at 58. The Supreme Court also cited *Brownsword v. Edwards*, 2 Ves.sen. 243, 28 Eng.Rep. 157, decided in 1750, one year after *East India Co. v. Campbell*, in which the defendant refused to divulge whether she was lawfully married to a certain individual, on the ground that if she admitted to the marriage she would be confessing to an act which, although legal under the common law, would

render her 'liable to prosecution in ecclesiastical court.' *Murphy*, 378 U.S. 52, 58–59. Thus, as the Supreme Court stated, *Brownsword* applied the ruling from *East India Co.* in a case involving separate systems of courts and law located within the same geographic area.

Why this matters is that the Maryland Declaration of Rights Article 5(a)(1) provides, "That the Inhabitants of Maryland are entitled ***to the Common Law of England, . . . as existed on the Fourth day of July, seventeen hundred and seventy-six.***" (Emphasis supplied). Thus, pursuant to Article 5 of the Maryland Declaration of Rights, Maryland common law retains the dual sovereignty doctrine in its entirety, as Maryland retains the rulings set forth in England pre-1776, providing a different protection for its citizens than its federal counterpart.

As stated *supra*, Article 22 of the Maryland Declaration of Rights[10] is the state parallel to the self-incrimination clause of the Fifth Amendment. Counsel has located no case which holds that *Murphy* or *Balsys'* rulings are applicable in Maryland under Article 22 grounds.

Further support is found in *Choi v. State*, 316 Md. 529, 545, 560 A.2d 1108, 1115-16 (1989). Because while a witness may have:

> waived her Fifth Amendment privilege, she certainly did not waive her privilege against compelled self-incrimination under Art. 22 of the Maryland Declaration of Rights. Long ago, in the leading case of *Chesapeake Club v. State*, 63 Md. 446, 457 (1885), this Court expressly rejected the waiver rule now prevailing under the Fifth Amendment and adopted the English rule that a witness's testifying

10 Article 22 states, "[t]hat no man ought to be compelled to give evidence against himself in a criminal case."

about a matter does not preclude invocation of the privilege for other questions relating to the same matter.

Id. This is authority for Officer Porter's contention herein that, while immunity cannot cure his Fifth Amendment concerns, it most certainly cannot assauge his Maryland rights.

Maryland retains the dual sovereignty doctrine in its entirety. *Evans v. State*, 301 Md. 45 (1984) (adopting the dual sovereignty principle as a matter of Maryland common law); *see also Gillis v. State*, 333 Md. 69, 73, 633 A.2d 888, 890 (1993) (holding that "[u]nder the "dual sovereignty" doctrine, separate sovereigns deriving their power from different sources are each entitled to punish an individual for the same conduct if that conduct violates each sovereignty's laws). *Bailey v. State,* 303 Md. 650, 660, 496 A.2d 665, 670 (1985) (stating that "[t]his Court has adopted, as a matter of common law, the dual sovereignty doctrine.").

Article 22 of the Maryland Declaration of Rights reads that "That no man ought to be compelled to give evidence against himself in a criminal case." Id. Under Article 22, "[t]he privilege must be accorded a liberal construction in favor of the right that it was intended to secure." Adkins v. State, 316 Md. 1, 8, 557 A.2d 203, 206 (1989).

Massachusetts Declaration of Rights, Article XII states, similarly, that no one can be "compelled to accuse, or furnish evidence against himself." And in Massachusetts "[o]nly a grant of transactional immunity" will suffice. Attorney

Gen. v. Colleton, 387 Mass. 790, 801, 444 N.E.2d 915, 921 (1982). Thus, Officer Porter could not be called, were we in Massachusetts, "so long as the witness remains liable to prosecution criminally for any matters or causes in respect of which he shall be examined, or to which his testimony shall relate." Id. at 797.

(e) The state would be making themselves witnesses

There have been only two people that called Officer Porter untruthful. It was not Officer Porter. It was not the Detective Teel, the lead investigator, to the contrary she said he was trying to be candid in her discussions with him. It was not the coroner, nor was it Dr. Lyman, who did not opine as to the reasonableness of Porter's actions. It was not any members of the jury, who presumably at least partly credited his testimony in failing to return a guilty verdict.

The only two (2) persons that have called Officer Porter a liar - - to date - - are Janice Bledsoe and Michael Schatzow. As stated, *supra*, Mr. Schatzow's greatest hits include that Porter "lied to you [the jury] about what happened... lied when he spoke to the [investigative] officers and he lied when he spoke on the witness stand;" while Ms. Bledsoe penned the one hit wonder "Officer Porter was not telling the truth about his involvement in this incident...the only reasonable conclusion you can come to is that Ofc. Porter is not telling the truth." Id. Coming from two deputies in the States Attorney's Office these comments are that much more significant because:

> Attorneys' representations are trustworthy, the [The Supreme] Court [has] reasoned, because attorneys are officers of the court, and when they address the judge solemnly upon a matter before the court, their declarations are virtually under oath.

Lettley v. State, 358 Md. 26, 47, 746 A.2d 392, 404 (2000) (internal citations omitted).

If Officer Porter is called to testify in the Goodson and White trial there are two (2) people, and only two (2) people, that can be called to impugn his credibility, Ms. Bledsoe and Mr. Schatzow. Thus, "[i]n order to attack the credibility of a witness, a character witness may testify...that, in the character witness's opinion, the witness is an untruthful person." Md. Rule 5-608.

> This presents all sorts of problems because:
>
> MLRPC Rule 3.7(a). The policy behind this rule is succinctly stated in the Comment: "Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client." MLRPC Rule 3.7 cmt. With regard to the mixing of roles, the Comment continues:
>
> The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.
>
> *Id.*

Klupt v. Krongard, 126 Md. App. 179, 205-06, 728 A.2d 727, 740 (1999). The advocate-witness rule "assumes heightened importance in a criminal case." *Walker v. State*, 373 Md. 360, 397 (2003). In short: calling Officer Porter at the

Goodson and White trials will not only result in his rights being violated, but will necessitate a quagmire in which rights are trampled on all sides in the ensuing free-for-all.

WHEREFORE, for the foregoing reasons and any others that appear to this Court, Officer Porter prays that the Court grant his Motion to Quash the Subpoena he received for the case at bar.

Respectfully Submitted,

Joseph Murtha
Murtha, Psoras & Lanasa, LLC
1301 York Road, Suite 200
Lutherville, MD 21093
410-583-6969
jmurtha@mpllawyers.com

Gary E. Proctor
Law Offices of Gary E. Proctor, LLC
8 E. Mulberry Street
Baltimore, MD 21202
410-444-1500
garyeproctor@gmail.com

Attorneys for Officer William Porter

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2016, a copy of witness William Porter's Motion to Quash the subpoena was hand delivered to Ms. Bledsoe at 120 E. Baltimore Street, 9th Floor, Baltimore MD 21202.

Gary E. Proctor GM

GARY E. PROCTOR