IN THE
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2015

No.(s) 96, 97 & 98

STATE OF MARYLAND,
Appellant
v.
BRIAN RICE, EDWARD NERO, GARRETT MILLER,
Appellees

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

APPELLEES' BRIEF AND MOTION TO DISMISS

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INDEX

TABLE OF CONTENTS

Page

Statement of the Case 1

Questions Presented 3

Statement of Facts & Procedural History 3

Argument

I. THE CIRCUIT COURT'S ORDER DENYING THE STATE'S MOTION TO COMPEL OFFICER WILLIAM PORTER TO TESTIFY IS NOT AN APPEALABLE ORDER. THE LEGISLATURE DID NOT GIVE THE STATE THE ABILITY TO APPEAL THIS INTERLOCUTORY ORDER AND THERE EXISTS NO OTHER BASIS FOR THE STATE TO APPEAL THIS ORDER........ 5

II. COURTS AND JUDICIAL PROCEEDINGS ARTICLE, § 9-123 DOES NOT REQUIRE A COURT TO ORDER COMPELLED, IMMUNIZED WITNESS TESTIMONY AFTER VERIFYING THAT THE STATUTORY PLEADING REQUIREMENTS OF THE PROSECUTOR'S MOTION TO COMPEL HAVE BEEN MET. PARTICULARLY IN THE UNIQUE PROCEDURAL POSTURE OF THIS CASE, THE STATUTE DOES PERMIT A COURT TO EXERCISE ITS OWN DISCRETION AND JUDGMENT AS TO WHETHER COMPELLING THE WITNESS'S TESTIMONY MAY BE REQUIRED SUCH THAT THE COURT MAY DENY A PROSECUTOR'S MOTION TO COMPEL EVEN IF THE MOTION COMPLIES WITH THE STATUTE'S PLEADING REQUIREMENTS. EVEN IF THIS COURT WERE TO FIND TO THAT A TRIAL COURT DOES NOT HAVE THE DISCRETION TO SUPPLANT ITS VIEW OF THE PUBLIC INTEREST, THE COURT DOES HAVE THE DUTY TO BALANCE THE PUBLIC INTEREST OF THE STATE TO SEEK COMPELLED TESTIMONY AGAINST THE RIGHT OF A DEFENDANT TO DUE PROCESS, SPEEDY TRIAL AND OTHER CONSTITUTIONAL GUARANTEES. 16

A. Section 9-123 on its face provides discretion to the trial court and the word "shall" is directory, not mandatory, language. 17

B. The Circuit Court has a Constitutional duty to ensure the State's prosecutorial power is not exercised in such a way as to violate a Defendant's rights secured under the U.S. Constitution or the Maryland Declaration of Rights. ... 28

Conclusion ... 37

Pertinent Authority ... PA-1

Appendix ... Apx.1

TABLE OF CITATIONS
Cases

A.A. Abell Co. v. Sweeney, 274 Md. 715 (1975) 14

Beck v. Alabama, 447 U.S. 625 (1980) 34

Blumenthal v. Clerk of Circuit Court for A.A.Co., 278 Md. 398 (1976) 17

Caplin & Drysdale v. United States, 491 U.S. 617 (1989) 7

County Court of Ulster County, N.Y. v. Allen, 442 U.S. 140 (1979) 7

Dep't of Transp. v. Armacost, 311 Md. 64 (1987) 27

Deville v. State, 383 Md. 217 (2004) 19, 21

Douglas v. State, 423 Md. 156 (2011) 9, 13

Duffy v. Conaway, 295 Md. 242 (1983) 27

Eastgate Associates v. Apper, 276 Md. 698 (1976) 8

G&M Ross Enterprises. Inc. v. Bd. Of License Com'rs of How. Co, 111 Md. App. 540 (1996) 17, 23

Green v. McClintock, 218 Md. App. 336 (2014) 8

Harrison-Solomon v. State, 442 Md. 254 (2015) 17, 28, 30

Haynie v. Gold Bond Bldg. Products, 306 Md. 644 (1986) 14

Hiob v. Progressive Am. Ins. Co., 440 Md. 466 (2014) 9

Hook v. State, 315 Md. 25 (1989) 34, 35

In re Criminal Investigation No. 1-162, 307 Md. 674 (1986) 10

In re McDonald, 489 U.S. 180 (1989) 30

In re Najasha B., 409 Md. 20 (2009) 19

In re Perlin, 589 F.2d 260 (7th Cir. 1978) 32

In re Rebar Streel Antitrust Investigation, 343 So.2d 1377 (La. 1977)............24

In re Special Investigation No. 231, 295 Md. 366 (1983) 13

In re Special Investigation No. 236, 295 Md. 573 (1983) 13

Jones v. State, 298 Md. 634 (1984) 9

Kushell v. Dep't of Natural Resources, 385 Md. 563 (2005)...............17, 18, 19

Langworthy v. State, 284 Md. 588 (1979) 8

Marbury v. Madison, 5 U.S. 137 (1803)...29

Maryland Com'n for Fair Representation v. Tawes, 228 Md. 412 (1962).......30

Maryland State Bar Ass'n v. Agnew, 271 Md. 543 (1974) 21

McNeil v. State, 112 Md. App. 434 (1996)..37

Metheny v. State, 359 Md. 576 (2000)..17

Miles v. Illinois Cent. R. Co., 315 U.S. 698 (1942)..29

Miller v. Alabama, 567 U.S. --, 132 S.Ct. 2455 (2012)...................................34

Miller & Smith at Quercus, LLC v. Casey PMN, LLC, 412 Md. 230 (2010).....8

Montgomery v. Louisiana, -- U.S. --, 136 S.Ct. 718 (2016) 34

Patapsco Assoc. Ltd. Partnership v. Gurany, 80 Md. App. 200 (1989)...........22

Pope v. Secretary of Personnel, 46 Md. App. 716 (1980)...............................17

Presley v. Warden, Md. House of Correction, 242 Md. 405 (1966)................17

Resetar v. State Bd. of Education, 284 Md. 537 (1979) 17

Ross v. State, 117 Md. App. 357 (1997) ....*passim*

Seward v. State, -- Md. -- (Slip Op. No.12, Sept. Term, 2015)...............7, 9, 15

State v. Akopian, 155 Md. App. 123 (2004) 36

State v. Manck, 385 Md. 581 (2005).. 14

State v. Mosher, 461 S.E.2d 219 (Ga. 1995)... 18, 24

State v. Strickland, 42 Md. App. 357 (1979) 12, 13

State v. WBAL-TV, 187 Md. App. 135 (2009) 12

Stouffer v. Reid, 413 Md. 491 (2010)... 30

Sugarloaf Citizens Ass'n, Inc. v. Gudis, 319 Md. 558 (1990)........................... 28

Board of Supervisors v. Todd, 97 Md. 247 (1903) 27

United States v. Frans, 697 F.2d 188 (7th Cir. 1983)...................................... 32

United States v. Hooks, 848 F.2d 785, 799 (7th Cir. 1988)............................. 32

United States v. Taylor, 728 F.2d 930 (7th Cir. 1984) 32

Walter v. Gunter, 367 Md. 386 (2002) 16

Watkins v. United States, 354 U.S. 178 (1957).. 33

Webster v. Fall, 266 U.S. 507 (1925) 11

Wengert v. State, 364 Md. 76 (2001) 16

Will v. United States, 389 U.S. 90 (1967).. 9, 10

Woodfield v. West River Improv. Ass'n, Inc., 395 Md. 377 (2006) 21

Wynn v. State, 388 Md. 423 (2005) 23, 30

Constitutional Provisions

CONST. U.S. Amend. V 12

CONST. U.S. Amend. VI ....*passim*

CONST. U.S. Amend XIV .... *passim*

MD. Const. art.4 § 18 12

MD. Const. Decl. Rights art.21 .... *passim*

MD. Const. Decl. Rights art.22 12

Maryland Statutes & Rules

MD CODE ANN. CRTS & JUD. PROC. §9-123 .... *passim*

MD CODE ANN. CRTS & JUD. PROC. §12-101 11

MD CODE ANN. CRTS & JUD. PROC. §12-301 .... 8, 9, 10

MD CODE ANN. CRTS & JUD. PROC. §12-302 .... *passim*

MD CODE ANN. CRIM. LAW §2-304 33

MD CODE ANN. CRIM. LAW §14-101 10

Maryland Rule 1-311 22

Maryland Rule 4-271 .... 6, 23, 31

Maryland Rule 5-104 .... 21, 22

Maryland Rule 8-503 5

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STATEMENT OF THE CASE

On April 12, 2015, Freddie Gray was taken into custody by Baltimore City Police Officers at North and Mount Streets in Baltimore City, Maryland. He was arrested and placed in a transport van to be transported to the Baltimore City Western District Police Station. As a result of a serious medical condition, Mr. Gray was transported by a medic to the hospital where he remained in a coma from April 15 through April 19, 2015. Mr. Gray died on April 19, 2015.

On May 1, 2015, the State's Attorney for Baltimore City publicly announced charges against Officers Porter, Goodson, Miller, and Nero, as well as Lieutenant Rice and Sergeant White. The charges ranged from misdemeanor assault to murder in the second degree.[1] The State's theory of prosecution of Miller, Nero, and Rice differs from its theory of prosecution of the other three officers. The State's prosecution theory in Miller, Nero and Rice is based, in part, on the argument that the officers lacked probable cause to effectuate the arrest of Mr. Gray. These charges are the most factually and legally tenuous because they are based on the State's unprecedented argument that an officer's reasonable and good faith determination that probable cause exists can lead to criminal culpability on the part of the officer.

The State noted an appeal from the trial court's denial of its motion to compel Officer William Porter to testify during the trials of Lieutenant Rice, Officer Miller and Officer Nero. The State subsequently petitioned this Honorable Court to issue a Writ of Certiorari. Appellees filed an Answer and Motion to Dismiss the Petition for Writ of Certiorari since the State's appeal was improperly taken. This Honorable Court issued the

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[1] Officer Nero and Officer Miller, two of the bicycle officers who were present in the vicinity or participated in taking Mr. Gray into custody, were charged with assault in the second degree and related charges. Lieutenant Rice, who participated in taking Mr. Gray into custody, was charged with manslaughter, assault and related charges. Officer Goodson, the transport van driver, was charged with murder in the second degree and related charges. Sergeant White, who was present at one stop of the van, was charged with manslaughter, assault and related charges. Officer Porter, an officer that responded to multiple stops during the van's transport of Mr. Gray, was charged with manslaughter, assault and related charges.

Writ and stayed the trial proceedings of Miller, Nero and Rice in the Circuit Court pending resolution of the matters before this Honorable Court.

QUESTIONS PRESENTED

I. Whether the Circuit Court's order denying the State's motion to compel Officer William Porter to testify is appealable, *i.e.*, whether the order is a final judgment or an interlocutory order subject to appeal or an order appealable on any other basis?

II. Does Courts and Judicial Proceedings Article, § 9-123 require a court to order compelled, immunized witness testimony after verifying that the statutory pleading requirements of the prosecutor's motion to compel have been met, or does the statute instead permit a court to substitute its own discretion and judgment as to whether compelling the witness's testimony may be necessary to the public interest such that the court may deny a prosecutor's motion to compel even if the motion complies with the statute's pleading requirements?

STATEMENT OF FACTS & PROCEDURAL HISTORY

Appellees generally agree with the Statement of Facts set forth by Appellant with the following additions. The Honorable Barry G. Williams, Circuit Court for Baltimore City, was specially assigned to the trials of the six officers charged in the death of Freddie Gray. "On September 15, 2015, the State notified the Circuit Court that it intended to try the above-captioned case and the related cases in a certain order." (E.213). At that time the State identified Officer Porter as a material witness only in the trials of Officer Goodson and Sergeant White. (E.213). Officer Porter's trial ended in a mistrial and his retrial was scheduled for June of 2016. (E.213).

On or about January 7, 2016, the Circuit Court "granted the State's Motion to Compel Officer Porter to testify in the *Goodson* and *White* trials." (E.213). The Circuit Court notified all parties to the action that it intended to proceed with the trials of Officer Miller, Officer Nero and Lieutenant Rice, as already scheduled. (E.213).

Officer Edward Nero is pending second degree assault and related charges. Officer Nero's trial was scheduled to begin on February 22, 2016. (E.216-18). Officer Miller was supposed to begin trial on March 7, 2016. (E.130). On or about January 13, 2016, the State sent a letter to the Court expressing its intent to request a postponement of the trial date and, for the first time, notifying the Circuit Court that "Officer Porter ***may*** be a material witness in the *Nero, Miller,* and *Rice* cases." (E.1-3) (emphasis supplied). On January 14, 2016, the State filed a Motion to Compel Testimony of Officer Porter in the Miller, Nero and Rice trials. (E.213). This communication occurred *FOUR MONTHS* after the State originally identified Officer Porter as a material witness only in the Goodson and White trials. The State also requested the Circuit Court postpone all five cases until after Officer Porter's retrial scheduled for June of 2016, so the State could try the cases in the State's preferred order. (E.213). In the State's motion to compel, the State represented that it was unsure whether Porter would be called to testify during the trials of Miller, Nero and Rice, stating he "***may***" be called as a witness. (E.4-8). At the time that the State filed its motion to compel and at the time of the hearing on the motion to compel, the State had not issued a subpoena for Officer Porter to testify at the trials of Miller, Nero, and Rice. (E.111).

On January 20, 2016, the Circuit Court conducted a hearing on the State's dual requests. (E.75-163). The Court denied both requests. (E.140). The Circuit Court found that the State had filed the motion to compel "to get the postponement that they want, to get around [the] Court's ruling that these cases need to continue…" (E.139). The Circuit Court specifically found that "the State was using Md. Code, Cts. & Jud. Proc. § 9-123 in

an attempt to control the schedule and order of the trials, and to circumvent [the Circuit Court's] ruling that postponement in these cases was not appropriate." (E.214). The Circuit Court also found that "the State's motion was simply an attempt at subterfuge because [the State] did not agree with the Court's order to continue with the other trials." (E.214).

On February 4, 2016, the State improperly filed a notice of appeal in in the cases of Miller, Nero, and Rice. (E.164-66). On February 5, 2016, the State filed a motion to stay proceedings in the Circuit Court pending the improper appeal. (E.167-94). On February 10, 2016, Judge Williams denied the State's motion to stay the trials of Miller, Nero, and Rice, citing purposeful delay on the part of the State as the reason for the denial. (E.213-15). Additional facts are supplemented throughout Appellees' argument as needed.

Argument[2]

I. THE CIRCUIT COURT'S ORDER DENYING THE STATE'S MOTION TO COMPEL OFFICER WILLIAM PORTER TO TESTIFY IS NOT AN APPEALABLE ORDER. THE LEGISLATURE DID NOT GIVE THE STATE THE ABILITY TO APPEAL THIS INTERLOCUTORY ORDER AND THERE EXISTS NO OTHER BASIS FOR THE STATE TO APPEAL THIS ORDER.

The State asks this Honorable Court to change well-settled appellate procedure and jurisdiction in this case in order to reach its argument on the merits. The State asks this Court to (a) transform a criminal case into a civil case, (b) transform an interlocutory

[2] Appellees, pursuant to Maryland Rule 8-503(f), hereby incorporate by reference the arguments contained in the brief of Appellant Porter to the extent that those arguments are applicable and could be raised by Appellees themselves as if fully set forth herein.

order into a final order, (c) overrule this Court's precedent regarding the State's right to appeal, (d) expand the appellate rights of the State by judicial declaration, and (e) conclude that a named party in an action is actually not a party and has no standing to argue against such actions. The State is simply wrong. This Honorable Court should not contradict settled precedent and expand the appellate rights of the State in order to create appellate jurisdiction where none exists.

The notion that Miller, Nero and Rice do not have standing to argue on the appeal of this issue is a red herring. This issue, which the State raised at the beginning of its legal argument, is purely academic, as all Appellees (including Porter to the extent this Court considers him an Appellee) in the matter have been joined in this Brief and the arguments contained herein. In its Brief, the State claims that Miller, Nero and Rice "ha[ve] no direct interest which will be gained or lost by the ruling on this appeal." (Appellant's Brief at 11). This claim is untrue. Miller, Nero and Rice, like all other named defendants, have the right to a speedy trial under the 6th Amendment of the United States Constitution, applied through the Fourteenth Amendment and Article 21 of the Maryland Declaration of Rights.[3] The Circuit Court recognized that this right was being encroached upon when it denied the State's motion to compel Officer Porter's testimony and request for postponement, noting that "the State was using Md. Code, Cts. & Jud. Proc. § 9-123 in an attempt to control the schedule and order of the trials, and to circumvent [the Circuit Court's] ruling that postponement in these cases was not

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[3] They also have a statutory right to a speedy trial under Maryland Rule 4-271, which Miller, Nero and Rice have never waived.

appropriate," and further that "the State's motion was simply an attempt at subterfuge because [the State] did not agree with the Court's order to continue with the other trials." (E.214).

In *Caplin & Drysdale v. United States*, the Supreme Court found that the petitioner (an attorney) had standing to challenge a federal drug forfeiture statute which caused one of his clients to lose the assets with which he would have paid the petitioner. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n. 3 (1989). The Court came to the conclusion that the petitioner could advance the constitutional rights of the client, because the alleged abuse of those rights had caused injury to the petitioner, as well. *Id.* In the instant case, the injury is the loss of a constitutional right, which can certainly be described as "as adverse impact on [Nero's, Miller's, and Rice's] own rights." *County Court of Ulster County, N.Y. v. Allen*, 442 U.S. 140, 154-55 (1979). The State acknowledges that a party to an appeal is someone who has "an interest so closely and directly connected with the subject matter that the person will either gain or lose by the direct legal operation and effect of the decree." (Appellant's Brief at 11 (internal citations omitted)). Miller, Nero and Rice have a direct interest on the "effect of the decree" by this Court both in their speedy trial rights and the rights to request the exclusion of evidence that is not relevant. In any event, it is of no consequence to this Court in its ability to decide these issues, since whomever this Court finds to be the Appellees have properly joined in the arguments contained herein.

"The right of appeal is entirely statutory in Maryland." *Seward v. State*, -- Md. --, at *3 (Slip. Op. No. 12, Sept. Term, 2015) (Decided Jan. 27, 2016) (*citing Pack Shack,*

Inc. v. Howard County, 371 Md. 243, 247 (2002)). A party can question subject matter jurisdiction at any time, including on appeal. *Green v. McClintock*, 218 Md. App. 336, 358 (2014). "It is an often stated principle of Maryland law that appellate jurisdiction, except as constitutionally authorized, is determined entirely by statute, and that, therefore, a right of appeal must be legislatively granted." *Seward*, at *4 (*quoting Gisriel v. Ocean City Bd. of Supervisors of Elections*, 345 Md. 477, 485 (1997)). Courts article section 12-301 provides:

> ***Except as provided in § 12-302 of this subtitle***, a party may appeal from a ***final judgment*** entered in a civil or criminal case by a circuit court. The right of appeal exists from a final judgment entered by a court in the exercise of original, special, limited, statutory jurisdiction, unless in a particular case the right of appeal is expressly denied by law. In a criminal case, the defendant may appeal even though imposition or execution of sentence has been suspended. In a civil case, a plaintiff who has accepted a remittitur may cross-appeal from the final judgment.

Md. Code, Courts & Judicial Proceedings, §12-301 (emphasis supplied). According to §12-301, and as interpreted by this Court, an appeal is premature until after final judgment. *Id.*; *see also Langworthy v. State*, 284 Md. 588, 596 (1979). Accordingly, "[w]here appellate jurisdiction is lacking, the appellate court will dismiss the appeal *sua sponte*." *See, e.g.*, *Eastgate Associates v. Apper*, 276 Md. 698, 701 (1976). "Because the jurisdiction of this Court is circumscribed by constitutional provisions, statutory provisions, and rules, we have an obligation to ensure that appellate jurisdiction is authorized before addressing the merits of an appeal." *See Miller & Smith at Quercus, LLC v. Casey PMN, LLC*, 412 Md. 230, 240 (2010) (*citing Biro v. Schombert,* 285 Md. 290, 293 (1979)).

The purpose of CJP §12-301 is "to prevent piecemeal appeals and . . . the interruption of ongoing judicial proceedings." *Seward,* at *5 (*quoting Douglas v. State*, 423 Md. 156, 172 (2011)). This purpose "takes on added weight in criminal cases, where the defendant is entitled to a speedy resolution of the charges against him." *Will v. United States*, 389 U.S. 90, 96 (1967).

The prematurity of an appeal hinges on the existence, or absence, of a final judgment. "Final judgment" has been defined by this Honorable Court as:

> one that either determines and concludes the rights of the parties involved or denies a party the means to prosecute or defend his or her rights and interests in the subject matter of the proceeding. Important is whether any further order is to be issued or whether any further action is to be taken in the case.

Seward, at *4 (*quoting Douglas*, 423 Md. at 171). "A final judgment exists only if: the order is intended by the court as an unqualified, final disposition of the matter; the order adjudicates or completes the adjudication ***of all claims against all parties***; and the clerk makes a proper record in the docket." *See Hiob v. Progressive Am. Ins. Co.,* 440 Md. 466, 489 (2014) (emphasis added) (*citing Rohrbeck v. Rohrbeck,* 318 Md. 28, 41 (1989)). In a criminal case, a final judgment has not been rendered until the court has entered a verdict and a sentence. *Jones v. State,* 298 Md. 634, 638 (1984).

The State's right to appeal is further "limited . . . to narrow categories of orders terminating the prosecution." *Will*, 389 U.S at 96. Courts & Judicial Proceedings ("CJP") §12-302 provides specific guidance regarding the State's right to appeal in criminal cases. Md. Code, Courts & Judicial Proceedings, §12-302(c). The pertinent section provides:

> (c)(1) In a criminal case, the State may appeal as provided in this subsection.
> (2) The State may appeal from a final judgment granting a motion to dismiss or quashing or dismissing any indictment, information, presentment, or inquisition.
> (3) The State may appeal from a final judgment if the State alleges that the trial judge:
> (i) Failed to impose the sentence specifically mandated by the Code; or
> (ii) Imposed or modified a sentence in violation of the Maryland Rules.
> (4)(i) In a case involving a crime of violence . . . the State may appeal from a decision of a trial court that excludes evidence offered by the State or requires the return of property alleged to have been seized in violation of the Constitution of the United States, the Maryland Constitution, or the Maryland Declaration of Rights.

Id. The State's appeal in the present case does not fall under one of the "narrow categories" presented in §12-302, and is therefore not valid.[4] *Will*, 389 U.S at 96.

In an attempt to vest this Court with jurisdiction pursuant to CJP §12-301, the State alleges that the appeal is from a final judgment with respect to Officer Porter alone.[5] The State mistakenly relies upon *In re Criminal Investigation No. 1-162*, 307 Md. 674 (1986), for support of its position. In making its argument, the State ignores a fundamental difference between *No. 1-162* and the appeal the State now seeks to prosecute, specifically that the appeal in *No. 1-162* was not an appeal from a criminal trial proceeding. *Id*. at 679-80. It was, instead, an appeal from a grand jury proceeding where

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[4] The trial court did not "exclude" any evidence in this case. It was Porter who invoked his protections against compelled testimony. Further, involuntary manslaughter and second degree assault are not crimes of violence as defined by Md. Code Ann. Crim. Law § 14-101.

[5] This position conflicts with the State's second argument that the trial court's order constitutes a "collateral order" in the underlying cases (the criminal cases of State of Maryland v. Edward Nero, Brian Rice, and Garrett Miller). The position that an order can constitute a final judgment and an interlocutory order are in conflict as the two are mutually exclusive.

witnesses had invoked immunity and the State unsuccessfully moved the court to compel their testimony before the grand jury. *Id.* Furthermore, a grand jury proceeding is not included in the definition of a "criminal case" under CJP § 12-101(e).

The very statute that is the subject matter of the State's appeal on the merits further undercuts its argument that this appeal is not "criminal" in nature. Section 9-123 of the Courts article provides, in pertinent part, "[i]f 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…" Md. Code Ann. Crts & Jud. Proc § 9-123 (emphasis supplied). The Legislature specifically recognized, when enacting Section 9-123, that a criminal prosecution is different in kind than a grand jury proceeding. Otherwise, there would have been no reason to specifically identify both in the statute, and there would be superfluous language within the statute. This would violate the principles of statutory construction as discussed in further detail below. The State's reliance on cases addressing grand jury proceedings to support a right to appeal in a criminal case is misplaced.

Moreover, the State does not rely on the reported opinion in the grand jury case, but instead inappropriately relies on the brief the State filed therein 20 years ago as precedent. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record . . . are not to be considered as having been so decided as to constitute precedent."). Finally, the statute at issue in *No. 1-162* was a predecessor statute to Section 9-123. Section 9-123 was not enacted until approximately five years after that case was decided and any reliance on that case would be unavailing.

In *State v. Strickland*, the Court of Special Appeals clarified, in reference to CJP §12-302, that "[i]t does not follow . . . that simply because a motion is filed in a court that exercises criminal jurisdiction, that the proceeding arising from the motion must, *ipso facto*, be criminal in nature." *State v. Strickland*, 42 Md. App. 357, 359 (1979). The State relies upon this statement in an attempt to remove its appeal from the scope of Section 12-302, but reliance on this case is not persuasive because of overriding factual differences. The court in *Strickland* was considering an appeal from a motion for return of property that was granted by the trial court, which the court ultimately decided was "more akin to a replevin, a civil action, rather than a criminal proceeding." *Id.* The judgment being appealed in the present case has nothing to do with property or title, and everything to do with the underlying criminal case; it *is* "criminal in nature."

The State also relies on *State v. WBAL-TV*, 187 Md. App. 135, 149 (2009), for its argument. In *State v. WBAL-TV*, the Court of Special Appeals held that WBAL-TV's motion for access was appealable as a civil matter, noting that "although the Motion for Access was filed in the criminal proceeding, the relief sought was civil in nature and *could have been sought in 'a separate civil action.'*" *WBAL-TV*, 187 Md. App. at 149. The present case is distinguishable because, due to the criminal nature of the proceedings, there was no "separate civil action" available to the State here.

This improper appeal arises from a criminal case where a criminal co-defendant, who has his own criminal trial date approaching, invoked his rights under the Fifth Amendment and Article 22 of the Maryland Declaration of Rights to keep from incriminating himself. There is nothing civil in nature about the proceeding that the State

is attempting to appeal. Because of this, the exception in *Strickland* does not apply, and the State's appeal is only valid if it comports with §12-302 – which it does not. The fact that this is a criminal case vitiates the State's argument that the trial court's order constitutes a final judgment or, alternatively, is appealable under the collateral order doctrine.

The State also erroneously relies upon a string of cases where the State argues that this Court has extended the State's right to appeal beyond what the statute provides. The State cites two cases, *No. 231* and *No. 236*, in support of this argument. The holdings of these cases, however, turn on the fact that this Court found that the judgments appealed by the State were, in fact, final judgments.[6] The State's reliance upon these cases begs the question of whether or not the Circuit Court's denial of the State's motion to compel Officer Porter to testify is a final judgment. Looking back to the definition provided by this Court in *Douglas*, that it concludes the rights of the parties or denies a party the means to prosecute or defend his or her rights and interests in the subject matter of the proceeding, it is clear that the judgment at issue here is not a final judgment. *Douglas v. State*, 423 Md. 156, 171 (2011).

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[6] *See Special Investigation No. 231*, 295 Md. 366, 370 (1983) ("In this case the proceeding consisted only of a motion to disqualify the attorney in question. Once the motion was denied there was nothing more to be done in this particular case. There was nothing else before the court. There was nothing pending. Hence, we conclude that the order of the trial judge here settled the rights of the parties and terminated the cause. Thus, it was a final judgment."). In the subsequent case, this Court uses almost identical language to describe the judgment being appealed. *See Special Investigation No. 236*, 295 Md. 573, 575 (1983).

The State also argues for a prerogatory writ to be issued in the event that its first two arguments for appellate jurisdiction fail. In *State v. Manck*, the State conceded that it had no statutory right to appeal, but nevertheless asked this Court to issue a prerogatory writ. 385 Md. 581, 598-99 (2005). This Court denied the request, explaining that "'[m]andamus . . . may *never* be employed as a substitute for appeal in derogation of the policies behind limiting the state's access to appellate review." *Id*. at 598 (quoting *Will v. U.S.*, 389 U.S. 90, 97 (1967)).

Although the State has not used the term to describe its argument for the right to appeal, the State seems to be asking for this Court to treat its motion to compel Porter more akin to a declaratory judgment action, civil in nature, to enable appellate jurisdiction. This Court has already spoken on such a matter. This Court has previously held,

> Although there is an apparent division of authority on the question, in our opinion the better considered cases hold that once a criminal proceeding has been instituted in which the question of constitutionality of the statute, (court rule) or ordinance can be adequately decided, the courts properly exercise their discretion in declining to grant declaratory relief in a civil proceeding for such relief.

A. S. Abell Co. v. Sweeney, 274 Md. 715, 720-21 (1975); *Haynie v. Gold Bond Bldg. Products*, 306 Md. 644, 650-51 (1986).

The State's argument that this appeal is proper is simply incorrect. The State seems to acknowledge its inability to properly pursue this appeal in footnote 8 of its Brief, where the State argues that it would have no remedy if this Court finds no jurisdiction. This argument presumes that any remedy is necessary at all. In either event, it is not

incumbent upon this Court to enlarge the appellate jurisdiction on a case-by-case basis whenever the State feels it is entitled to a remedy; that is a matter that is committed to the discretion of the Legislature.

The State's argument in this regard is as ironic as it is flawed. When urging Certiorari upon this Court in the first instance to enable arguing the issue on the merits in its Brief, the State argues that this Court's intervention is necessary to prevent the judicial branch from encroaching into the executive branch functions. However, to be able to gain the right to argue this issue on the merits, the State urges this Court to encroach into the Legislature's function and enlarge the State's appellate rights. This is an action that would violate the separation of powers doctrine in the Maryland Constitution, which the State claims it endeavors to protect in this appeal.

Moreover, the result of enlarging the State's appellate rights in the manner that it suggests in this case would open the floodgates and cause the operation of the trial courts to come to a halt in criminal matters. It would permit the State to take an immediate appeal from (a) any discovery order relating to a third party, (b) any in limine order relating to a witness, (c) any order relating to a subpoena of a third party, and (d) any other order that the State felt aggrieved by in a criminal matter. The State's argument recognizes no limit to the appellate jurisdiction that it urges upon this Court, and calls for the "piecemeal appeals and . . . interruption of ongoing judicial proceedings," that the current statutory scheme is intended to prevent. *Seward,* at *5 (*quoting Douglas v. State*, 423 Md. 156, 172 (2011)). This would open Pandora's Box and would have a deleterious effect on Maryland's trial courts and appellate courts alike.

The State has provided no authority that would suggest the State has the ability to appeal the circuit court's order with respect to Porter's testimony in the Miller, Nero and Rice trials. Nor has the State provided any justification to enlarge the appellate rights of the State in this case. This Honorable Court should decline to address the merits of the State's claims and dismiss this appeal.

II. COURTS AND JUDICIAL PROCEEDINGS ARTICLE, § 9-123 DOES NOT REQUIRE A COURT TO ORDER COMPELLED, IMMUNIZED WITNESS TESTIMONY AFTER VERIFYING THAT THE STATUTORY PLEADING REQUIREMENTS OF THE PROSECUTOR'S MOTION TO COMPEL HAVE BEEN MET. PARTICULARLY IN THE UNIQUE PROCEDURAL POSTURE OF THIS CASE, THE STATUTE DOES PERMIT A COURT TO EXERCISE ITS OWN DISCRETION AND JUDGMENT AS TO WHETHER COMPELLING THE WITNESS'S TESTIMONY MAY BE REQUIRED SUCH THAT THE COURT MAY DENY A PROSECUTOR'S MOTION TO COMPEL EVEN IF THE MOTION COMPLIES WITH THE STATUTE'S PLEADING REQUIREMENTS. EVEN IF THIS COURT WERE TO FIND TO THAT A TRIAL COURT DOES NOT HAVE THE DISCRETION TO SUPPLANT ITS VIEW OF THE PUBLIC INTEREST, THE COURT DOES HAVE THE DUTY TO BALANCE THE PUBLIC INTEREST OF THE STATE TO SEEK COMPELLED TESTIMONY AGAINST THE RIGHT OF A DEFENDANT TO DUE PROCESS, SPEEDY TRIAL AND OTHER CONSTITUTIONAL GUARANTEES.

Appellees agree with the State that the proper standard of review for the trial court's "interpretation and application of Maryland statutory and case law," is that "[the] Court must determine whether the lower court's conclusions are 'legally correct' under a *de novo* standard of review." *Walter v. Gunter*, 367 Md. 386, 392 (2002) (Appellant's Brief at 30). However, any factual findings that the trial court made to apply the statute are measured under a clearly erroneous standard of review. *Wengert v. State*, 364 Md. 76, 84 (2001). If the trial court properly applied the statute in this case to the facts it found,

this Honorable Court should not disturb the trial court's ruling unless it finds that there was an abuse of discretion. *Metheny v. State*, 359 Md. 576, 604 (2000).

A. Section 9-123 on its face provides discretion to the trial court and the word "shall" is directory, not mandatory, language.

The word "shall," as found in Md. Code, Courts and Judicial Proceedings, §9-123, is directory, rather than mandatory. While it is true that "the word 'shall' ordinarily imports a mandatory result . . . this rule is not absolute." *Blumenthal v. Clerk of Circuit Court for Anne Arundel County*, 278 Md. 398, 408 (1976). This Court has held that the word "shall" does not "signify[] a mandatory intent if the context in which it is used indicates otherwise." *Id*. *See also Harrison-Solomon v. State*, 442 Md. 254 (2015); *G&M Ross Enterprises, Inc. v. Board of License Com'rs of Howard Co.*, 111 Md. App. 540 (1996); *Pope v. Secretary of Personnel*, 46 Md. App. 716 (1980); *Resetar v. State Bd. of Ed.*, 284 Md. 537 (1979); *Pressley v. Warden, Md. House of Correction*, 242 Md. 405 (1966) (all applying the exception to the general rule that "shall" signifies a mandatory intent). As in the cases cited above, the issue here is one of statutory interpretation.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature." *Kushell v. Dep't of Natural Resources*, 385 Md. 563, 193 (2005). This interpretation begins with a reading of the plain language of the statute. The pertinent portion of the statute reads:

> (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, Courts & Judicial Proceedings, §9-123(c)-(d) (emphasis added).

A reading of the individual subsection §9-123(c)(1) *in isolation* may make it seem unambiguous that the word "shall" in that section is mandatory – that a court *must* issue an order compelling an individual to testify any time the State makes a written motion in compliance with the requirements of §9-123(d). This illusion is shattered, however, when the statute is read in its entirety, as it should be. *Id.* ("The plain language of a provision is not interpreted in isolation."). The language in §9-123(d) indicates that the word "shall" in §9-123 is directory. This subsection states that, if a prosecutor seeks to compel a witness to testify, the prosecutor shall "*request*" the court to issue an order to that effect. The plain, English meaning of the word "*request*" and its use in §9-123(d) conflicts with the plain, English meaning of the word "shall" and it use in §9-123(c)(1).[7]

[7] According to Merriam-Webster Dictionary, "request" is defined as "the act or an instance of asking for something," while "shall" is "used in laws, regulations, or directives to express what is mandatory." Other jurisdictions have also interpreted the word "request" to "confer[] authority to perform upon the one to whom it is directed, but does not require his performance . . . ." *State v. Mosher*, 461 S.E.2d 219, 220 (Ga. 1995).

If §9-123 is read as a mandate to the court to issue an order, then the State should not have to "*request*" anything, rendering the language in §9-123(d) superfluous, and "statutory text 'should be read so that no word, clause, sentence or phrase is rendered superfluous or nugatory.'" *Kushell*, 385 Md. at 193 (*quoting Collins v. State*, 383 Md. 684, 691 (2004)). Even more than just a "word, clause, sentence or phrase" being superfluous here, a reading of "shall" in this statute as mandatory would render the entire statute superfluous. A mandate to the court to issue an order to compel testimony whenever the State files a request would essentially give the State the authority to compel testimony whenever it wishes, making §9-123(c)-(d) meaningless. Because of the discrepancy between the terms used in (c) and (d), the statute is ambiguous. [8]

When the plain language of a statute is ambiguous, this Court has sought "to discern legislative intent from surrounding circumstances, such as legislative history, prior case law, and the purposes upon which the statutory framework was based." *In re Najasha B.*, 409 Md. 20, 27 (2009) (*quoting Lewis v. State*, 348 Md. 648, 653 (1998)). In its brief, the State refers to a Position Paper found within the microfilm legislative bill history for HB1311. This Position Paper offers language supportive to the State's argument – that "[t]he judicial role under this statute is ministerial," and that a judge must issue a court order compelling testimony "[o]nce he concludes [the statutory] requirements are met" by the prosecutor. Position Paper on HB 1311, *Witness Immunity*, 8–9, 1989 Reg. Sess. (1989) (App. 49–50). What the State fails to bring to this Court's

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[8] "A statute is ambiguous when there are two or more reasonable alternative interpretations of the statute." *Deville v. State*, 383 Md. 217, 223 (2004).

attention, however, is that this Position Paper details the position of the Office of the Attorney General with respect to the legislation.[9] Consequently, this reference gives no insight as to what the *Legislature* intended when drafting §9-123.

The State also points to a "Summary of Legislation" provided in a Fiscal Note, which reads, in pertinent part:

> Specifically, if a witness refuses to testify on a criminal matter, on the grounds of privilege against self-incrimination, *the Court may compel the witness to testify or provide information by issuing a court order to that effect*. The court order would only be *granted* upon the written request of the prosecutor, who has found that the testimony or information of a witness may be necessary to the public interest, and that the testimony or information would not be forthcoming absent the order.

Md. Gen. Assembly Div. of Fiscal Research, *Fiscal Note Revised for H.B. 1311*, 1989 Reg. Sess. (Apr. 4, 1989) (emphasis added) (App. 51–52). The State placed emphasis on the last sentence in the above-quoted passage, seemingly ignoring the preceding sentence. When read in concert, it is clear that the summary indicates that the court *may grant*[10] the order *after* the prosecutor satisfies the conditions precedent.[11] It does not indicate that a satisfaction of those conditions *requires* a court to issue the order.

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[9] In the upper right-hand corner of the Position Paper, the words "From AG's Office" are clearly written.

[10] The use of the term "*granted*" within the Fiscal Note denotes a permissive action on the part of the court and implies a discretionary action.

[11] This reading is reinforced by the language in the Fiscal Note, which was omitted from the State's Appendix, provided by the Senate: "A court or grand jury *can* order the individual to testify or provide information if the prosecutor's motion is accepted . . . ." Md. Gen. Assembly Div. of Fiscal Research, *Fiscal Note Revised for S.B. 27*, 1989 Reg. Sess. (1989) (Apx.1).

Aside from direct evidence of legislative intent, it is also instructive to look to relevant Maryland case law. In cases concerning the directory or mandatory nature of the word "shall," one of the "surrounding circumstances" often examined is the presence or lack of a penalty for failure to act. *See, e.g.*, *Maryland State Bar Ass'n v. Agnew*, 271 Md. 543, 549 (1974) ("[W]e think it is of some significance . . . that the language of the statute provides no penalty for failure to act."); *see also Woodfield v. West River Improvement Ass'n, Inc.*, 395 Md. 377, 388 (2006) ("The suggestion implicit from such an analysis is that, if the command is 'mandatory,' some fairly drastic sanction must be imposed upon a finding of noncompliance, whereas if the command is 'directory,' noncompliance will result in some lesser penalty, or perhaps no penalty at all." (*quoting Tucker v. State*, 89 Md. App. 295, 297–98 (1991))). Under §9-123, there is no penalty for a court's failure to issue an order compelling a witness's testimony. This absence further demonstrates the legislature's intent that "shall" be directory in this case.

A statute must also be read in the context of other relevant rules or statutes. (*See, e.g.*, *Deville v. State*, 383 Md. 217, 223 (2004) ("[W]e do not view the plain language in isolation, but analyze the entire statutory scheme as a whole."). Article 4, Section 18, of the Maryland Constitution provides that this Honorable Court "shall adopt rules and regulations concerning the practice and procedure in and the administration of the appellate courts and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law." Art. 4, Section 18 MD Const. Maryland Rule 5-104(a) states that:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . . In making its determination, the court may, in the interest of justice, decline to require strict application of the rules of evidence, except those relating to privilege and competency of witnesses.

When read in congruence with this rule, it becomes more obvious that §9-123 *directs*, rather than mandates, the court to compel a witness to testify, because the court always has discretion "in the interest of justice."

Maryland Rule 1-311 also provides support for the conclusion that §9-123 is discretionary, particularly in the situation where a motion to compel has been found by the trial court to be taken for the purposes of delay. Rule 1-311 requires an attorney to sign every pleading or other paper filed with the Court. Md. Rule 1-311(a). The effect of the signature certifies that the pleading or paper has not been filed for "*improper purpose or delay*." Md. Rule 1-311(b) (emphasis supplied).[12] If the Court finds that the pleading or paper had been filed for an improper purpose or delay, the Rule gives discretion to the trial court on what action to take. The Rule provides, "[i]f a pleading or paper is not signed as required … or is signed with intent to defeat the purpose of this Rule, it may be stricken and the action may proceed as though the pleading or paper had not been filed." Md. Rule 1-311(c). "The decision to grant a motion to strike lies within the trial court's discretion." *Patapsco Associates Ltd. Partnership v. Gurany*, 80 Md. App. 200, 204 (1989) (*citing Lancaster v. Gardiner*, 225 Md. 260, 270 (1961)).

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[12] The Circuit Court found that "the State's motion was simply an attempt at subterfuge because they did not agree with the Court's order to continue with the other trials." (E.213-15).

This rule dovetails with the trial court's ability to control its own dockets under Maryland Rule 4-271 and the judiciary's *inherent* ability to control its dockets enabled by the Maryland Constitution. "The inherent authority of a court to control its docket is widely recognized." *Wynn v. State*, 388 Md. 423, 437 (2005). "The reason for this widespread recognition is clear: courts could not function without the ability to control their dockets." *Id.* "When [a trial court] postpones a case, he is generally aware of the state of the docket in the future, the number of cases set for trial, and the normal time it will likely take before the case can be tried." *Ross v. State*, 117 Md. App. 357, 365 (1997). Consideration of these other Maryland Rules and statutes demonstrates the directory nature of the language used in §9-123.

It is also of importance to note *who* is being governed by the statutory language in question. Here, the court is being governed, and the State is arguing that the court *must* order a witness to testify when the State proffers that the testimony might be necessary to the public interest. The State's argument contradicts what was said in *G&M Ross Enterprises*: "[a] careful reading of these cases leads us to the conclusion that those [cases] not interpreting use of the word "shall" as mandatory are those governing an arbiter, whether a court or an administrative agency. Thus, *if a statute governs the actions of an arbiter, its use of the word "shall" will generally be interpreted as directory*, rather than mandatory." *G&M Ross Enterprises, Inc. v. Board of License Com'rs of Howard Co.*, 111 Md. App. 540, 544–45 (1996) (emphasis added).

This interpretation of §9-123 is perfectly consistent with how other states have interpreted similar compelled immunity statutes. For example, Georgia and Louisiana

have compelled immunity statutes containing language similar to that of §9-123,[13] and those statutes have been interpreted as directory toward the court. *See In re Rebar Streel Antitrust Investigation*, 343 So.2d 1377, 1384 (La. 1977) (holding that, aside from the *procedures* afforded in Article 439.1, "there is no authority in attorney general or district attorney, statutory or inherent, to grant immunity from prosecution"); *see also State v. Mosher*, 461 S.E.2d 219, 220 (Ga. 1995) (interpreting compelled immunity statute as directory due to the presence of the phrase "the district attorney may *request* the superior court . . . to order that person to testify ," as "[a] 'request' confers authority to perform upon the one to whom it is directed, but does not require his performance").

This case also presents to this Honorable Court in a very unique posture. Judge Barry Williams was specially assigned to oversee the trials of the six officers charged in the death of Freddie Gray. Over the last nine months, Judge Williams has heard and decided an extraordinary number of motions from both sides concerning evidence, expert

[13] L.S.A.-C.Cr.P. Art. 439.1(a) ("In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a grand jury of the state, at any proceeding before a court of this state, or in response to any subpoena by the attorney general or district attorney, the judicial district court of the district in which the proceeding is or may be held shall issue, in accordance with Subsection B of this article, upon the request of the attorney general together with the district attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in Subsection C of this article."); *State v. Mosher*, 461 S.E.2d 219, 220 (1995) ("Whenever in the judgment of the Attorney General or any district attorney the testimony of any person or the production of evidence of any kind by any person in any criminal proceeding before a court or grand jury is necessary to the public interest, the Attorney General or the district attorney may *request* the superior court in writing to order that person to testify or produce the evidence.").

witnesses, procedure, theories of both the State and defense cases, discovery disputes, motions to dismiss, motions for sanctions, has held numerous meetings with all of the counsel involved, and has presided over the trial of Officer William Porter.

Judge Williams had the pulse of the entire proceedings and was well aware of the parties' respective positions. It is against this backdrop that the State, at the eleventh hour, decided to seek compelled testimony of Officer Porter against Miller, Nero and Rice. The State's theory was first articulated in a letter to the court. In that letter the State explained, first and foremost, that it wanted to try the cases in their original order – Porter, Goodson, White, Miller, Nero, and Rice. (E.1-3). On the second page, the State finally gets to its argument about the necessity of Porter's testimony in the trials of Miller, Nero and Rice.[14] The State followed this letter up with a motion to compel Officer Porter's testimony in the Miller, Nero and Rice cases.[15] Under these circumstances, the trial court was properly able to gauge and make findings of fact that the State's motion was for the purpose of delay. It would be no different if a prosecutor in a criminal case filed a motion with the trial court to compel testimony that was facially valid and affirmatively told the trial court that, although it is filing the motion for nefarious purposes which could infringe on the rights of the defendant on trial, the court, is

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[14] In this letter the State, *on its own accord without a request from the court*, offered to explain why Officer Porter's testimony might be necessary to the public interest. Once Judge Williams read the State's reasoning, he did not have to ignore the State's transparent attempt to delay the proceedings.

[15] The State's Motion to Compel seems to further indicate its attempt to delay the proceedings. In the Motion, the State asserts that it "*may* call Officer William Porter to testify," not that it 'will' or 'must' or even "plans on." (E.4). This equivocation conflicts with the claim that Officer Porter's testimony is "necessary to the public interest." (E.4).

nonetheless, obligated to sign the order. The State is simply not entitled to abuse the power and discretion entrusted to a prosecutor by filing a motion under these circumstances.

Finally, if the State's argument that the discretion to grant immunity is solely an executive function is correct, meaning that the judicial branch is *required* to sign an order upon verifying a proper petition by a prosecutor, then the statute is unconstitutional on its face. This Honorable Court has rejected any statute that attempts to make the judiciary's role simply one of a "rubber stamp" for the legislative or executive branches of the government as encroaching upon the separation of powers doctrine. This Honorable Court has previously observed,

> Under the separation of powers doctrine, we have not permitted the imposition of one governmental branch's duties or privileges upon another branch. *See, e.g., Attorney General v. Waldron,* 289 Md. 683, 426 A.2d 929 (1981) (Legislature may not enact a statute that effectively denies attorneys the right to practice law since only the Judiciary may determine eligibility to practice law); *Reyes v. Prince George's County,* 281 Md. 279, 380 A.2d 12 (1977) (Article 8 of the Declaration of Rights and Article IV of the Maryland Constitution prohibit courts from rendering advisory opinions requested by the legislative or executive branch prior to actual litigation); *Shell Oil v. Supervisor,* 276 Md. 36, 343 A.2d 521 (1975) (statute conferring adjudicatory functions on the Maryland Tax Court, an administrative agency, does not confer on it judicial functions as well; any attempt to authorize an administrative agency to perform a purely judicial function or power would violate the separation of powers principle); *Ahlgren v. Cromwell,* 179 Md. 243, 17 A.2d 134 (1941) (statute authorizing the Governor to extend the merit system to employees excepted from, or not included in, the merit system violates Article 8 because it effectively authorizes an amendment of a legislative act by an order of the Governor); *Board of Supervisors v. Todd,* 97 Md. 247, 54 A. 963 (1903) (statute requiring circuit court judges to order an election if voters wanted to vote on whether to grant liquor licenses imposed a nonjudicial duty on the judges and thus violated Article 8).

Dep't of Transp. v. Armacost, 311 Md. 64, 74 (1987).

In *Board of Supervisors v. Todd*, this Honorable Court invalidated a statute on constitutional grounds that required a circuit court judge to order an election after certifying a petition had been properly filed with the court. 97 Md. 247 (1903). This Court observed that, "[n]ew judicial duties may often be unnecessarily imposed, and services not of a judicial nature may sometimes be required. In the latter case a judge is under no legal obligation to perform the[m] – which was to say that the opinion of the court was that duties not of a judicial nature could not legally and constitutionally be imposed upon the courts or the judges." *Id.* This Court further observed,

> [t]hat counting the names upon a petition, ascertaining whether the names appended thereto are those of voters at the last election for Governor, and ordering an election, is not a judicial function, is a proposition that would seem to be too plain to need argument to enforce it. The order, which by the statute here under consideration, the court is required to pass, *is not the result of any judicial inquiry.*

Id. (emphasis added).

More recently, this Court reiterated this separation of powers principle, stating "[i]n light of the separation of powers provision of the Maryland Constitution, set forth in Article 8 of the Declaration of Rights, a court has no jurisdiction to perform a nonjudicial function, and any enactment which attempts to confer such a function on a court is unconstitutional." *Duffy v. Conaway,* 295 Md. 242, 254 (1983).

Although the term "nonjudicial function" does not have a bright-line definition, this Court has provided guidance as to characteristics of functions which are nonjudicial in nature. *Armacost*, 311 Md. at 74 (1987): *Sugarloaf Citizens Ass'n, Inc. v. Gudis*, 319

Md. 558 (1990).[16] These examples indicate that if a statute provides no "judicial inquiry" other than to "rubber stamp" the actions of another branch of the government, there is nothing "judicial" in such an act. Therefore, if the State's argument regarding the trial court's role under CJP § 9-123 is correct, and the function of immunity is one strictly delegated to the executive branch, there is nothing "judicial" that the court is being asked to do under CJP § 9-123. This court has observed that "[w]e do not presume that the Legislature intended to enact unconstitutional legislation and, if it did so intend, we would limit a statute to only those situations in which it would pass constitutional muster." *Harrison-Solomon v. State*, 442 Md. 254, 287 (2015). The State seemed to acknowledge this at the hearing on the State's motion to compel in this case, stating "when the State wishes to have a witness immunized, ***obviously the Court -- only the Court*** has the authority to do it." (E.89) (emphasis supplied). The State's reading would invalidate CJP § 9-123 as unconstitutional on its face for violating the separation of powers doctrine contained within Article 8 of the Maryland Declaration of Rights.

B. The Court has a Constitutional duty to ensure the State's prosecutorial power is not exercised in such a way as to violate a Defendant's rights secured under the U.S. Constitution or the Maryland Declaration of Rights.

"Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution and laws of the United States

[16] In *Gudis*, this Court cautioned that "[a] good example of the element of discretion is the determination of a legislative body on the basis of ***public interest****…[o]ne must be careful...not to confuse this legislative discretion with judicial discretion*." *Id.* at 572 (emphasis supplied).

whenever those rights are involved in any suit or proceedings before them." *Miles v. Illinois Cent. R. Co.*, 315 U.S. 698, 713 (1942) (internal citations omitted). This absolute duty of the judiciary, to enforce constitutional protections, was first recognized in 1803 by the United States Supreme Court. The Supreme Court observed,

> *So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.*
>
> *Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory.*

Marbury v. Madison, 5 U.S. 137, 178 (1803).

Since 1803, the judiciary has clearly been defined as the branch of government that acts as the "ultimate arbiter" of the federal or state constitutions. *Id.* at 178. In Maryland, the power of the judiciary derives from Article IV of the Maryland Constitution. This Honorable Court has previously observed,

> Section 1 of Article IV of the Maryland Constitution vests the judicial power of the State in the Judiciary, and this encompasses *all* the judicial power of the State. That the Judiciary is the ultimate authority to determine whether constitutional limitations have been transcended is a proposition that has been so long established and frequently applied it can no longer be seriously challenged.

Maryland Comm. for Fair Representation v. Tawes, 228 Md. 412, 425-26 (1962) (internal citations omitted).

Both the U.S. Supreme Court and this Honorable Court have held that when the executive branch of government exercises its power or applies regulations in a way that "offends a fundamental constitutional guarantee, . . . courts must discharge their duty to protect constitutional rights." *Stouffer v. Reid*, 413 Md. 491, 511 (2010) (*quoting Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974)). More importantly, the Supreme Court has held that courts have the "inherent power and constitutional obligation to protect their jurisdiction" from conduct which impairs their ability to carry out their constitutional functions. *In re McDonald*, 489 U.S. 180, 185 (1989). This Court has previously recognized:

> In exercising its power to do what is reasonably necessary for the proper administration of justice – in remedying the affront – a court must proceed with a cautious and cooperative spirit into those areas where its constitutional powers overlap with those of other branches. Accordingly, in cases of overlap between an asserted application of an inherent authority and a legislative or executive branch power, we must weigh carefully the interest of the court and the necessity of exercising the inherent power against the interest of the other branch in the unmitigated exercise of power.

Wynn, 388 Md. at 436-37.

This Honorable Court has previously observed that "whatever the intent of the Legislature" when it enacts a statute, "it must comply with the Due Process Clause of the Fourteenth Amendment and its counterpart provision in Maryland, Article 24 of the Maryland Declaration of Rights." *Harrison-Solomon v. State*, 442 Md. 254, 287 (2015). This goes equally for the application of that statute by the executive branch.

In Appellee's case, the Court specifically found that if it compelled Officer Porter to testify as requested by the State, Miller's, Nero's and Rice's constitutional right to a speedy trial, secured by the 6th Amendment and applied to Maryland through the 14th Amendment as well as Article 21, would be violated. This is because Goodson's and White's trials had already been stayed due to Officer Porter's proper appeal in those cases. It would follow that Officer Porter would note appeals in the final three cases like he had done in the first two. When the ruling from the trial court was in Officer Porter's favor, the State improperly noted the appeal. Further, the trial court found that the State's rationale for filing the motion to compel Officer Porter was subterfuge to gain advantage of an appellate procedural stay.

The trial court, fulfilling the duties described above, properly stepped in to prevent a constitutional transgression of appellees' rights to speedy trials.[17] Judge Williams did not decide the way he did because he was exercising discretion; quite to the contrary, Judge Williams ruled in the manner he did because he had an affirmative constitutional duty to protect the defendants from a delay that would offend their right to a speedy trial. This was based on his factual finding that the State was attempting to circumvent his ruling on the denial of the requested postponements, calling it "subterfuge."

The trial court was well aware that, if it granted the State's requested action, Miller, Nero and Rice would not likely be tried until after Porter, Goodson, and White. At earliest, this would mean trial dates in July of 2016, a delay of seven months or more,

[17] The trial court also had authority to control the trial dates under Maryland Rule 4-271.

which is of constitutional dimension. *See Ross v. State*, 117 Md. App. 357, 365 (1997) ("When [a trial court] postpones a case, he is generally aware of the state of the docket in the future, the number of cases set for trial, and the normal time it will likely take before the case can be tried."). The speedy rights of Miller, Nero, and Rice engaged in May of 2015. This delay would place their trials (almost all of which are misdemeanor charges) *a minimum* of fourteen months, if there are no further unanticipated delays, from the time the speedy trial clock began running.

The trial court's ruling is not without precedent. The Court of Appeals for the Seventh Circuit has opined that a prosecutor's actions with respect to seeking immunity under the federal counterpart to Maryland's immunity statute could be reviewed for a violation of a defendant's constitutional rights. *United States v. Taylor,* 728 F.2d 930, 935 (7th Cir. 1984), *quoting United States v. Wilson,* 715 F.2d 1164, 1173 (7th Cir.), *cert. denied,* 464 U.S. 986, 104 S.Ct. 434, 78 L.Ed.2d 366 (1983) ("the prosecutor's power to seek or to refuse to seek immunity is limited by the constitutional right to due process of the law"); *In re Perlin*, 589 F.2d 260 (7th Cir. 1978) (a prosecutor's immunity decision may be subject to the court's discretion to review as a violation of due process, even if not reviewed directly under the "public interest"). The judiciary also has the ability to step in if a prosecutor uses his authority to "distort the judicial fact-finding process." *United States v. Frans,* 697 F.2d 188, 191 (7th Cir. 1983). Moreover, if a prosecutor's selective grants of immunity "have produced egregiously lopsided access to evidence," a trial court would have the ability to step in to correct this. *United States v. Hooks*, 848 F.2d 785, 799 (7th Cir. 1988).

The Seventh Circuit is in lockstep with prior pronouncements of the Supreme Court that the judiciary has a duty to act when another branch of government runs afoul of the Constitution and implicates personal liberties. When discussing the separation of powers, the Supreme Court has observed that, "[t]here is a wide gulf between the responsibility for the use of investigative power and the actual exercise of that power … [t]his is an especially vital consideration in assuring respect for constitutional liberties." *Watkins v. United States*, 354 U.S. 178, 205 (1957). The Court in *Watkins* observed that the actions and decisions of the other branches of government will be accepted by the courts "up to the point where their own duty to enforce the constitutionally protected rights of individuals is affected." *Id.*

The trial court's actions were entirely consistent with principles that this Honorable Court has applied to other similar situations and, without question, would have to apply in future situations in protecting individual rights under the United States and Maryland Constitutions. A perfect example of this can be seen with recent Supreme Court decisions relating to sentencing and the Maryland statute *requiring* a trial court to impose a life without parole sentence. Section 2-304 of the Criminal Law Article of Maryland's Annotated Code provides that, *if the State filed the requisite notice* and *"[i]f the jury finds that a sentence of imprisonment for life without the possibility of parole shall be imposed*, *the court* <u>*shall*</u> *impose* a sentence of imprisonment for life without the possibility of parole." Md. Code Ann. Crim. Law. § 2-304(b)(2) (emphasis supplied). However, it is now beyond controversy -- as determined by the Supreme Court -- that if the defendant is under the age of 18 when

an offense was committed, the trial court has a constitutional obligation to prevent the statute from being implemented, regardless of the word "shall." *Miller v. Alabama*, 567 U.S. --, 132 S.Ct. 2455 (2012); *Montgomery v. Louisiana*, -- U.S. --, 136 S.Ct. 718 (2016). Applying the State's rationale used in the Miller, Nero and Rice cases to the sentencing of a juvenile, a trial court would still be *required* to impose a sentence of life without parole, even if that application runs afoul of the Constitution. This simply cannot be the case, just as it cannot be the case for a trial court to sit on its hands and watch executive power be used in a way that violates individual liberties secured by the Constitution.

Further, similar situations this Honorable Court has already addressed demonstrate this principle more vividly. The entry of a nolle prosequi is typically within a prosecutor's prerogative. However, this Court has held that when a prosecutor exercises that power to the detriment of an individual's constitutional rights, the judiciary is duty-bound to step in and curtail any abuse that is constitutionally offensive.

The first example of when this Court has found it appropriate to step in is when the State attempts to circumvent the *Beck*[18] rule. This Court observed that "[t]he entry of a nolle prosequi is generally within the sole discretion of the prosecuting attorney, free from judicial control and not dependent upon the defendant's consent." *Hook v. State*, 315 Md. 25, 35 (1989). This court also observed that "[t]his settled rule allowing

[18] *Beck v. Alabama*, 447 U.S. 625 (1980) (entitling a defendant to a jury's consideration of lesser-included charges to avoid the substantial risk of a jury convicting on a higher count than the evidence supports to avoid finding a defendant not guilty).

prosecutorial choice, however, is not completely without restraint. The prosecutor's power is not absolute." *Id.* This Court held,

> [t]he trial judge's refusal to give the requested instruction on second degree murder and to permit defense counsel to argue that crime stemmed from the State's nolle prosequi which removed second degree murder from the consideration of the jury. The action of the State left no charge of second degree murder on which to convict, and thus placed the case outside the scope of the *Beck* rule. We do not believe that, under the circumstances, the State can circumvent the *Beck* rule in this manner. The nolle prosequi resurrected the very evils which *Beck* and its siblings buried. We think that the exceptional circumstances of this case present a rare occasion calling for a tempering of the broad authority vested in a State's Attorney to terminate a prosecution by a nolle prsequi. We believe that the State, in entering the nolle prosequi here, failed to observe that fundamental fairness essential to the very concept of justice. Its action was inconsistent with the rudimentary demands of fair procedure. Excluding second degree murder from the jury did not meet the civilized standards for the fair and impartial trial we called for in *Madison v. State*, 205 Md. 425, 434 (1954). We conclude, therefore, that the trial judge erred in overruling the objection to the entry of the nol pros. It follows that his refusal to instruct on second degree murder and to allow argument as to that crime was erroneous.

Id. at 42. In *Hook*, this Honorable Court checked the State's authority which ran afoul of a defendant's constitutional right to a fair trial. *Id.*

Just as the State tried to circumvent the *Beck* rule in *Hook*, it also tried to circumvent an administrative judge's decision denying the State's postponement request in *Ross*. In *Ross*, the administrative judge denied the State's requested postponement because he did not find good cause." *Ross v. State*, 117 Md. App. 357, 369-70 (1997). The State entered a nolle prosequi "immediately following the judge's ruling." *Id.* at 370-71. The Court of Special Appeals found that "[w]e can discern no clearer attempt to circumvent the time period dictated by Art. 27, § 591 and Rule 4-271." *Id.* at 370. The Court of Special Appeals reversed Ross's conviction and remanded the case to the

Circuit Court with directions to that court that the charges be dismissed for violation of the statutory right to a speedy trial. *Id.*

Similarly, in *State v. Akopian*, the State asked for and was denied a postponement request by the administrative judge in the Circuit Court for Montgomery County. 155 Md. App. 123 (2004). The Court of Special Appeals found that if the State's entry of a nolle prosequi had "the purpose of circumventing the 180-day rule" when a postponement was denied, the 180 days will continue to run from the time of the first Indictment. *Id.* at 139-40.

Just like when the State attempted to circumvent the *Beck* rule in *Hook*, and when the State attempted to circumvent the *Hicks* rule in *Ross*, the State in Miller, Nero and Rice attempt to circumvent the trial court's denial of the State's postponement request in this case. The State did this by filing its motion to compel Officer Porter to testify, knowing that whichever way the trial court ruled, either Porter himself or the State would appeal the ruling, thereby staying the trials of Miller, Nero and Rice. It is this unfettered lack of restraint on the part of the State that invoked the constitutional duty of the trial court to become involved and deny the motion to Compel Porter's testimony. Since a prosecutor's power is not absolute and the judiciary is charged with the protection of an individual's constitutional rights, the trial court had a duty to deny the State's request in order to protect the constitutional rights to a speedy trial of Miller, Nero and Rice. The State, by its actions, implicated the constitution, and in so doing, triggered the trial court's constitutional authority to regulate any abuse of power by the State which may encroach upon the constitutional rights of the Appellees.

CONCLUSION

This Honorable Court should dismiss this appeal and decline to address the merits of the State's argument as the State has no right to this appeal in the first instance. In the alternative, Appellees respectfully request that this Honorable Court affirm the trial court's ruling denying the State's motion to compel Porter to testify in the cases of Miller, Nero and Rice. It is also for the above-stated reasons that Appellees respectfully request this Honorable Court award attorneys' fees and costs of this appeal and to remand this matter to the Circuit Court to determine what, if any, further sanction would be appropriate pursuant to *McNeil v. State*, 112 Md. App. 434, 461-62 (1996), and for such further relief this Court believes to be in the interests of justice.

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CERTIFICATE OF COMPLIANCE

This Appellees' Brief contains 11,493 words, excluding the parts of the brief exempted from the word count by Rule 8-503. This Brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

Thomas M. Donnelly

PERTINENT AUTHORITY

Constitutional Provisions

CONST. U.S. Amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONST. U.S. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

CONST. U.S. Amend XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MD. Const. Art.4 § 18

(a) The Court of Appeals from time to time shall adopt rules and regulations concerning the practice and procedure in and the administration of the appellate courts and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law. The power of courts other than the Court of Appeals to make rules of practice and procedure, or administrative rules, shall be subject to the rules and regulations adopted by the Court of Appeals or otherwise by law.

MD. Const. Decl. Rights Art.21

That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

MD. Const. Decl. Rights Art.22

That no man ought to be compelled to give evidence against himself in a criminal case.

Maryland Statutes & Rules

MD CODE ANN. CRTS & JUD. PROC. §9-123
(Privilege against self-incrimination)

Definitions

(a)(1) In this section the following words have the meanings indicated.

(2) “Other information” includes any book, paper, document, record, recording, or other material.

(3) “Prosecutor” means:

(i) The State's Attorney for a county;

(ii) A Deputy State's Attorney;

(iii) The Attorney General of the State;

(iv) A Deputy Attorney General or designated Assistant Attorney General; or

(v) The State Prosecutor or Deputy State Prosecutor.

Order requiring testimony or information in a criminal prosecution or proceeding

(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.

Order requiring testimony or information in grand jury proceedings

(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.

Motion to compel individual to testify or provide information

(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.

Refusal to testify or provide information as contempt

(e) If a witness refuses to comply with an order issued under subsection (c) of this section, on written motion of the prosecutor and on admission into evidence of the transcript of the refusal, if the refusal was before a grand jury, the court shall treat the refusal as a direct contempt, notwithstanding any law to the contrary, and proceed in accordance with Title 15, Chapter 200 of the Maryland Rules.

MD CODE ANN. CRTS & JUD. PROC. §12-101
Definitions

In general

(a) In this title the following terms have the meanings indicated.

Appellate court

(b) "Appellate court" means any court which reviews a final judgment of another court, and includes any court authorized to enter judgment following a de novo trial on appeal of a case or proceeding previously tried in another court.

Appellate jurisdiction

(c) "Appellate jurisdiction" means the jurisdiction exercised by an appellate court.

Circuit court

(d) "Circuit court" means the circuit court for a county.

Criminal action, criminal case, criminal cause, or criminal proceeding

(e) "Criminal action", "criminal case", "criminal cause", or "criminal proceeding" includes a case charging violation of motor vehicle or traffic laws and a case charging violation of a rule or regulation if a criminal penalty may be incurred.

Final judgment

(f) "Final judgment" means a judgment, decree, sentence, order, determination, decision, or other action by a court, including an orphans' court, from which an appeal, application for leave to appeal, or petition for certiorari may be taken.

MD CODE ANN. CRTS & JUD. PROC. §12-301
Appeal of final judgments

Except as provided in §12-302 of this subtitle, a party may appeal from a final judgment entered in a civil or criminal case by a circuit court. The right of appeal exists from a final judgment entered by a court in the exercise of original, special, limited, statutory jurisdiction, unless in a particular case the right of appeal is expressly denied by law. In a criminal case, the defendant may appeal even though imposition or execution of sentence has been suspended. In a civil case, a plaintiff who has accepted a remittitur may cross-appeal from the final judgment.

MD CODE ANN. CRTS & JUD. PROC. §12-302
Appeals not permitted

Final judgment of court reviewing decision of District Court, administrative agency, or local legislative body

(a) Unless a right to appeal is expressly granted by law, §12-301 of this subtitle does not permit an appeal from a final judgment of a court entered or made in the exercise of appellate jurisdiction in reviewing the decision of the District Court, an administrative agency, or a local legislative body.

Contempt cases

(b) Section 12-301of this subtitle does not apply to appeals in contempt cases, which are governed by §12-304 of this subtitle and §12-402 of this title.

Appeals by State in criminal cases

(c)(1) In a criminal case, the State may appeal as provided in this subsection.

(2) The State may appeal from a final judgment granting a motion to dismiss or quashing or dismissing any indictment, information, presentment, or inquisition.

(3) The State may appeal from a final judgment if the State alleges that the trial judge:

(i) Failed to impose the sentence specifically mandated by the Code; or

(ii) Imposed or modified a sentence in violation of the Maryland Rules.

(4)(i) In a case involving a crime of violence as defined in § 14-101 of the Criminal Law Article, and in cases under §§ 5-602 through 5-609 and §§ 5-

612 through 5-614 of the Criminal Law Article, the State may appeal from a decision of a trial court that excludes evidence offered by the State or requires the return of property alleged to have been seized in violation of the Constitution of the United States, the Maryland Constitution, or the Maryland Declaration of Rights.

(ii) The appeal shall be made before jeopardy attaches to the defendant. However, in all cases the appeal shall be taken no more than 15 days after the decision has been rendered and shall be diligently prosecuted.

(iii) Before taking the appeal, the State shall certify to the court that the appeal is not taken for purposes of delay and that the evidence excluded or the property required to be returned is substantial proof of a material fact in the proceeding. The appeal shall be heard and the decision rendered within 120 days of the time that the record on appeal is filed in the appellate court. Otherwise, the decision of the trial court shall be final.

(iv) Except in a homicide case, if the State appeals on the basis of this paragraph, and if on final appeal the decision of the trial court is affirmed, the charges against the defendant shall be dismissed in the case from which the appeal was taken. In that case, the State may not prosecute the defendant on those specific charges or on any other related charges arising out of the same incident.

(v) 1. Except as provided in subsubparagraph 2 of this subparagraph, pending the prosecution and determination of an appeal taken under this paragraph or paragraph (2) of this subsection, the defendant shall be released on personal recognizance bail. If the defendant fails to appear as required by the terms of the recognizance bail, the trial court shall subject the defendant to the penalties provided in § 5-211 of the Criminal Procedure Article.

2. A. Pending the prosecution and determination of an appeal taken under this paragraph or paragraph (2) of this subsection, in a case in which the defendant is charged with a crime of violence, as defined in § 14-101 of the Criminal Law Article, the court may release the defendant on any terms and conditions that the court considers appropriate or may order the defendant remanded to custody pending the outcome of the appeal.

B. The determination and enforcement of any terms and conditions of release shall be in accordance with the provisions of Title 5 of the Criminal Procedure Article.

(vi) If the State loses the appeal, the jurisdiction shall pay all the costs related to the appeal, including reasonable attorney's fees incurred by the defendant as a result of the appeal.

Decisions of circuit court judges sitting in banc

(d) Section 12-301 of this subtitle does not permit an appeal from the decision of the judges of a circuit court sitting in banc pursuant to Article IV, § 22 of the Maryland Constitution, if the party seeking to appeal is the party who moved to have the point or question reserved for consideration of the court in banc.

Final judgments following guilty pleas in circuit court

(e)(1) In this subsection, "conditional plea of guilty" means a guilty plea with which the defendant preserves in writing any pretrial issues that the defendant intends to appeal.

(2) Except as provided in paragraph (3) of this subsection, § 12-301 of this subtitle does not permit an appeal from a final judgment entered following a plea of guilty in a circuit court. Review of such a judgment shall be sought by application for leave to appeal.

(3) An appeal from a final judgment entered following a conditional plea of guilty may be taken in accordance with the Maryland Rules.

Orders of sentence review panels of a circuit court

(f) Section 12-301 of this subtitle does not permit an appeal from the order of a sentence review panel of a circuit court under Title 8 of the Criminal Procedure Article, unless the panel increases the sentence.

Orders of circuit court revoking probation

(g) Section 12-301 of this subtitle does not permit an appeal from an order of a circuit court revoking probation. Review of an order of a circuit court revoking probation shall be sought by application for leave to appeal.

MD CODE ANN. CRIM. LAW §2-304
First degree murder --Sentencing procedure
imprisonment for life without the possibility of parole

In general

(a) If the State gave notice under § 2-203(1) of this title, the court shall conduct a separate sentencing proceeding as soon as practicable after the defendant is found guilty of murder in the first degree to determine whether the defendant shall be

sentenced to imprisonment for life without the possibility of parole or to imprisonment for life.

Findings

(b)(1) A determination by a jury to impose a sentence of imprisonment for life without the possibility of parole must be unanimous.

(2) If the jury finds that a sentence of imprisonment for life without the possibility of parole shall be imposed, the court shall impose a sentence of imprisonment for life without the possibility of parole.

(3) If, within a reasonable time, the jury is unable to agree to imposition of a sentence of imprisonment for life without the possibility of parole, the court shall impose a sentence of imprisonment for life.

MD CODE ANN. CRIM. LAW §14-101
Mandatory sentences for crimes of violence

"Crime of violence" defined

(a) In this section, "crime of violence" means:

(1) abduction;

(2) arson in the first degree;

(3) kidnapping;

(4) manslaughter, except involuntary manslaughter;

(5) mayhem;

(6) maiming, as previously proscribed under former Article 27, §§ 385 and 386 of the Code;

(7) murder;

(8) rape;

(9) robbery under § 3-402 or § 3-403 of this article;

(10) carjacking;

(11) armed carjacking;

(12) sexual offense in the first degree;

(13) sexual offense in the second degree;

(14) use of a handgun in the commission of a felony or other crime of violence;

(15) child abuse in the first degree under § 3-601 of this article;

(16) sexual abuse of a minor under § 3-602 of this article if:

(i) the victim is under the age of 13 years and the offender is an adult at the time of the offense; and
(ii) the offense involved:
1. vaginal intercourse, as defined in § 3-301 of this article;
2. a sexual act, as defined in § 3-301 of this article;
3. an act in which a part of the offender's body penetrates, however slightly, into the victim's genital opening or anus; or
4. the intentional touching, not through the clothing, of the victim's or the offender's genital, anal, or other intimate area for sexual arousal, gratification, or abuse;
(17) an attempt to commit any of the crimes described in items (1) through (16) of this subsection;
(18) continuing course of conduct with a child under § 3-315 of this article;
(19) assault in the first degree;
(20) assault with intent to murder;
(21) assault with intent to rape;
(22) assault with intent to rob;
(23) assault with intent to commit a sexual offense in the first degree; and
(24) assault with intent to commit a sexual offense in the second degree.

Fourth conviction of crime of violence

(b)(1) Except as provided in subsection (f) of this section, on conviction for a fourth time of a crime of violence, a person who has served three separate terms of confinement in a correctional facility as a result of three separate convictions of any crime of violence shall be sentenced to life imprisonment without the possibility of parole.
(2) Notwithstanding any other law, the provisions of this subsection are mandatory.

Third conviction of crime of violence

(c)(1) Except as provided in subsection (f) of this section, on conviction for a third time of a crime of violence, a person shall be sentenced to imprisonment for the term allowed by law but not less than 25 years, if the person:
(i) has been convicted of a crime of violence on two prior separate occasions:
1. in which the second or succeeding crime is committed after there has been a charging document filed for the preceding occasion; and

2. for which the convictions do not arise from a single incident; and

(ii) has served at least one term of confinement in a correctional facility as a result of a conviction of a crime of violence.

(2) The court may not suspend all or part of the mandatory 25-year sentence required under this subsection.

(3) A person sentenced under this subsection is not eligible for parole except in accordance with the provisions of § 4-305 of the Correctional Services Article.

Second conviction of crime of violence

(d)(1) On conviction for a second time of a crime of violence committed on or after October 1, 1994, a person shall be sentenced to imprisonment for the term allowed by law, but not less than 10 years, if the person:

(i) has been convicted on a prior occasion of a crime of violence, including a conviction for a crime committed before October 1, 1994; and

(ii) served a term of confinement in a correctional facility for that conviction.

(2) The court may not suspend all or part of the mandatory 10-year sentence required under this subsection.

Compliance with Maryland Rules

(e) If the State intends to proceed against a person as a subsequent offender under this section, it shall comply with the procedures set forth in the Maryland Rules for the indictment and trial of a subsequent offender.

Eligibility for parole after age 65

(f)(1) A person sentenced under this section may petition for and be granted parole if the person:

(i) is at least 65 years old; and

(ii) has served at least 15 years of the sentence imposed under this section.

(2) The Maryland Parole Commission shall adopt regulations to implement this subsection.

Maryland Rule 1-311
Signing of Pleadings and Other Papers

(a) Requirement. Every pleading and paper of a party represented by an attorney shall be signed by at least one attorney who has been admitted to practice law in this State and who complies with Rule 1-312. Every pleading and paper of a party who is not represented by an attorney shall be signed by the party. Every pleading or paper filed shall contain the signer's address, telephone number, facsimile number, if any, and e-mail address, if any.

Committee note: The requirement that a pleading contain a facsimile number, if any, and e-mail address, if any, does not alter the filing or service rules or time periods triggered by the entry of a judgment. See Blundon v. Taylor*, 364 Md. 1 (2001)*.

(b) Effect of Signature. The signature of an attorney on a pleading or paper constitutes a certification that the attorney has read the pleading or paper; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for improper purpose or delay.

(c) Sanctions. If a pleading or paper is not signed as required (except inadvertent omission to sign, if promptly corrected) or is signed with intent to defeat the purpose of this Rule, it may be stricken and the action may proceed as though the pleading or paper had not been filed. For a wilful violation of this Rule, an attorney is subject to appropriate disciplinary action.

Maryland Rule 4-271
Trial Date

(a) Trial Date in Circuit Court.

(1) The date for trial in the circuit court shall be set within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213, and shall be not later than 180 days after the earlier of those events. When a case has been transferred from the District Court because of a demand for jury trial, and an appearance of counsel entered in the District Court was automatically entered in the circuit court pursuant to Rule 4-214 (a), the date of the appearance of counsel for purposes of this Rule is the date

the case was docketed in the circuit court. On motion of a party, or on the court's initiative, and for good cause shown, the county administrative judge or that judge's designee may grant a change of a circuit court trial date. If a circuit court trial date is changed, any subsequent changes of the trial date may be made only by the county administrative judge or that judge's designee for good cause shown.
(2) Upon a finding by the Chief Judge of the Court of Appeals that the number of demands for jury trial filed in the District Court for a county is having a critical impact on the efficient operation of the circuit court for that county, the Chief Judge, by Administrative Order, may exempt from this section cases transferred to that circuit court from the District Court because of a demand for jury trial.
(b) Change of Trial Date in District Court. The date for trial in the District Court may be changed on motion of a party, or on the court's initiative, and for good cause shown.
Committee note: Subsection (a)(1) of this Rule is intended to incorporate and continue the provisions of Rule 746 from which it is derived. Stylistic changes have been made.

Maryland Rule 5-104
Preliminary Questions

(a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of section (b). In making its determination, the court may, in the interest of justice, decline to require strict application of the rules of evidence, except those relating to privilege and competency of witnesses.
Committee note: See *United States v. Zolin,* 491 U.S. 554 (1989) and *Zaal v. State,* 326 Md. 54 (1992), noting the ability of a court, upon a proper foundation, to inspect privileged material in camera.
(b) Relevance Conditioned on Fact. When the relevance of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding by the trier of fact that the condition has been fulfilled.
(c) Hearing of Jury. Hearings on preliminary matters shall be conducted out of the hearing of the jury when required by rule or the interests of justice.

Cross reference: Rule 4-252.

(d) Testimony by Accused. The accused does not, by testifying upon a preliminary matter of admissibility, become subject to cross-examination as to other issues in the case.

Committee note: An accused who testifies only on a preliminary matter of admissibility can be cross-examined only on that matter and as to credibility. See also Rule 5-611(b)(2).

(e) Weight and Credibility. This rule does not limit the right of a party to introduce before the trier of fact evidence relevant to weight or credibility.

Maryland Rule 8-503
Style and Form of Briefs

(f) Incorporation by Reference. In a case involving more than one appellant or appellee, any appellant or appellee may adopt by reference any part of the brief of another.

FISCAL NOTE
REVISED

SB 27

Senate Bill 27 (Senator Green)

Judicial Proceedings

SUMMARY OF LEGISLATION: This enrolled bill authorizes a prosecutor to file a written motion for a court order to compel a witness to testify or provide information when the testimony may be necessary in the public's interest, or the witness has refused to provide information on the grounds of self-incrimination. A court or grand jury can order the individual to testify or provide information if the prosecutor's motion is accepted; such information or testimony may not be used against the witness. Individuals refusing to comply with court's order to testify can be charged with contempt.

STATE FISCAL IMPACT STATEMENT: No effect.

LOCAL FISCAL IMPACT STATEMENT: No effect.

STATE REVENUES: No effect.

STATE EXPENDITURES: The Administrative Office of the Courts and the State's Attorney Coordinator advises that the procedures specified in this bill would not require additional State expenditures.

LOCAL REVENUES: No effect.

LOCAL EXPENDITURES: No effect.

INFORMATION SOURCE: Administrative Office of the Courts, State's Attorney Coordinator

ESTIMATE BY: Administrative Office of the Courts, State's Attorney Coordinator, Department of Fiscal Services

Fiscal Note History: First Reader - January 13, 1989
Revised-- Enrolled - May 16, 1989

[illegible]: L. Logan

William R. Miles, Supervising Analyst
Division of Fiscal Research

STATE OF MARYLAND,	*	IN THE
Appellant,	*	COURT OF APPEALS
v.	*	OF MARYLAND
BRIAN RICE,	*	CASE NO. 96, Sept. Term, 2015
Appellee,	*	

* * * * * * * * * * * * *

STATE OF MARYLAND,	*	IN THE
Appellant,	*	COURT OF APPEALS
v.	*	OF MARYLAND
EDWARD NERO,	*	CASE NO. 97, Sept. Term, 2015
Appellee,	*	

* * * * * * * * * * * * *

STATE OF MARYLAND,	*	IN THE
Appellant,	*	COURT OF APPEALS
v.	*	OF MARYLAND
GARRETT MILLER,	*	CASE NO. 98, Sept. Term, 2015
Appellee,	*	

* * * * * * * * * * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **29th** day **February 2016** of a copy of Appellee's Brief and Motion to Dismiss was emailed to **Special Assistant Attorney General Michael Schatzow** (mschatzow@stattorney.org) and **Assistant Attorney General Carrie Williams** (cwilliams@oat.state.md.us), and that two copies were hand-

delivered to **Assistant Attorney General Carrie Williams**, Office of the Attorney General, Criminal Appeals Division, 200 St. Paul Place, Baltimore, Maryland 21202: **Marc Zayon**, 201 N. Charles Street, Suite 1700, Baltimore, Maryland 21201; **Catherine Flynn**, One North Charles Street, Suite 2470, Baltimore, Maryland 21201; **Michael Belsky**, 300 East Lombard Street, Suite 1100, Baltimore, Maryland 21202, and **Gary Proctor**, 8 Mulberry Street, Baltimore, Maryland 21201.

Thomas M. Donnelly