IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2015

No. 99

ALICIA WHITE
v.
STATE OF MARYLAND, Appellee

and

CAESAR GOODSON
v.
STATE OF MARYLAND, Appellee

On Interlocutory Appeal from the Circuit Court for Baltimore City
(Honorable Barry G. Williams)

BRIEF OF APPELLANT WILLIAM PORTER

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I. INTRODUCTION

Appellant, Officer William Porter ("Porter") is being used by the State in an unprecedented (but convenient) manner as a means to an end in the State's cases against Sergeant Alicia White ("White") and Officer Caesar Goodson ("Goodson"). By ignoring the consitutional rights of Porter in order to overcome the lack of evidence in those cases, the State employs a "win at all costs" strategy. The law does not support such tactics. In a criminal prosecution, a prosecutor's interest

> is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.

Berger v. United States, 295 U.S. 78, 88 (1935). *See also Attorney Grievance Comm'n of Maryland v. Smith*, 442 Md. 14, 18 (2015) (finding that "an important responsibility of a prosecutor who, as a representative of the State, has a duty to ensure that 'justice shall be done'"); *Walker v. State*, 373 Md. 360, 394-95 (2003) ("Prosecutors are held to even higher standards of conduct than other attorneys due to their unique role as both advocate and minister of justice."). Calling Porter as a witness in two (or, depending on this Court's rulings, five) trials, about the same matters upon which he faces a pending manslaughter trial, is a foul blow.[2] This is because a prosecutors's duty "is to protect not only the public interest but the innocent as well and to safeguard the rights guaranteed to all persons, including those who may be guilty.'" *Walker*, 373 Md. at 395 (quoting

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[2] Porter, through counsel, expressly adopts the arguments made in this Court's September 2015 Term pleadings by Appellees Miller (Petition 661), Nero (Petition 660), and Rice (Petition 659).

Sinclair v. State, 27 Md. App. 207, 222-23 (1975). It does not matter that a case "garnered national media attention" or is "of great import." *See* State's Petition for Writ of Certiorari at 3, 8. Maryland law does not allow a prosecutor to abdicate this duty in order to secure evidence to prove its case, even when the absence of such testimony "effectively guts" its case.

The overarching principle is that the judicial system is built on the trust and respect of the public, and relies on that trust and respect for effectiveness. "[It] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." *Rex v. Sussex Justices*, 1 K.B. 256, 259 (1924). Similarly, the United States Supreme Court has said that trials themselves are "a reflection of the notion, deeply rooted in the common law, that 'justice must satisfy the appearances of justice,'" *Levine v. United States*, 362 U.S. 610, 616 (1960) (quoted source omitted), and that the perception of fairness of trials and judicial acts is essential to the effectiveness of the system itself. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 594 (1980) (Brennan, J., concurring).

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

Despite the lack of precedent, the State has suggested that Porter is making "much ado about nothing." The State is wrong. Porter's rights are not disposable. Porter should not be treated as the State's pawn in the cases of his co-defendants.[5]

II. STATEMENT OF THE CASE

Porter has been charged with Manslaughter, Second Degree Assault, Reckless Endangerment, and Misconduct in Office in the Circuit Court for Baltimore City, Case Number 115141037. The charges involve the April 12, 2015 arrest and subsequent in-custody death of Freddie Gray ("Gray") on April 19, 2015. There are six officers charged in the death of Gray: Porter, Goodson, White, Officer Garrett Miller ("Miller"), Officer Edward Nero ("Nero"), and Lieutenant Brian Rice ("Rice"). The Honorable Barry Williams was specially assigned to all six cases.

On September 15, 2015, the State of Maryland, through Chief Deputy State's Attorney Michael Schatzow ("Mr. Schatzow"), represented to the circuit court that the State would be calling Porter's case first, followed by Goodson, White, Miller, Nero and Rice. (E. 0093-94.) The State's rationale was that:

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

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

(E. 0093.) The court below granted the State its wish, and Porter proceeded to trial first.

Jury selection began in Porter's trial on November 30, 2015. During his trial, Porter testified in his defense. (E. 0213.) During the State's closing argument by Deputy State's Attorney Janice Bledsoe ("Ms. Bledsoe"), and the rebuttal by Mr. Schatzow, both commented on Porter's credibility, candor, and truthfulness. (E. 0392-0448.) On December 11, 2015, during his trial, Porter was handed a subpoena to testify in the trials of both Goodson (Case No. 115141032) and White (Case No. 115141036). (E. 0095-96.) Ultimately, Porter's case mistried on December 16, 2015, as the jury was unable to reach a verdict on any of the four charges placed against Porter. Following the mistrial, the circuit court set the retrial for June 13, 2016.

Porter moved to quash the State's subpoena asserting his Fifth Amendment privilege. (E. 0111-148.) The circuit court held a hearing on this matter on January 6, 2016. (E. 0450-0501.) The State filed a motion to compel in open court on that date, requesting that Porter be compelled to testify in Goodson's trial pursuant to a grant of use immunity pursuant to Md. Code Ann., Cts. & Jud. Proc. § 9-123 ("§ 9-123"). (E. 0458.)

Porter was called as a witness at the hearing and asserted his right to remain silent under the State and Federal Constitutions. (E. 0461-63.) The ircuit court acknowledged that it found itself in "uncharted territory." (E. 0483.) The trial court ruled that Porter could be compelled to testify, under grant of use and derivative use immunity, and issued an Order to that effect. (E. 0486-87.)

During the January 6, 2016 hearing, Porter orally moved to stay enforcement of the order pending the appeal. (E. 0487.) The trial court denied Porter's motion from the bench and entered an order to that effect. (E. 0488; E. 0209-10.) On January 7th before the Court of Special Appeals, Porter filed his Notice of Appeal and Motion to enjoin the trial court's January 6th order compelling his testimony pending an appeal. (App. 47-48.) On January 8th, the Court of Special Appeals granted a temporary stay of the trial court's January 6th order. (App. 49-50.) On January 11, 2016, the morning of Goodson's trial, the Court of Special Appeals, *sua sponte*, issued an order staying the trial.[6] (App. 51-52.)

Porter and the State each filed briefs before the Court of Special Appeals.[7] Prior to a decision by that court, the State filed a Petition for a Writ of Certiorari, which this Court granted on February 18, 2016.

III. QUESTION PRESENTED

DOES THE COURTS AND JUDICIAL PROCEEDINGS ARTICLE, SECTION 9-123 PROVIDE PORTER SUFFICIENT PROTECTION AGAINST SELF-INCRIMINATION TO ALLOW HIS TESTIMONY TO BE COMPELLED IN THE TRIALS OF CAESAR GOODSON AND ALICIA WHITE?

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6 White's trial was scheduled to start on February 8, 2016. Ultimately, Porter was ordered to testify in White's case. (E. 0211-12; E. 0502-03.)

7 Unlike in the State's appeals in the cases of Messrs. Rice, Nero, and Miller, there is no question that Porter's appeal of the trial court's order compelling him to testify was immediately appealable. *See St. Joseph Med. Ctr., Inc. v. Cardiac Surgery Assocs., P.A.*, 392 Md. 75, 88 (2006).

IV. RELEVANT FACTS

The State's position that Porter was lying under oath about critical facts was evidence throughout his trial. In the State's closing and rebuttal closing arguments, this theme was driven home for the jury.

A. Porter's Trial.

1. *Porter's Testimony and the State's Closing.*

At his trial, Porter testified that he heard Gray say during his initial arrest that he could not breathe. (E. 0218, 0237.) The State's theory at trial was that Gray had said this much later. In her closing, Ms. Bledsoe stated that not one of the other witness officers testified that they heard Gray say during his initial arrest that he could not breathe and went on to assert that "[n]ot one of them came in here and said I heard Freddie say I can't breathe at Presbury [Street]. And do you know why? Because it was never said at Presbury [at the initial arrest]." (E. 0399).[8] Ms. Bledsoe's assertion that it was never said leads to the inexorable conclusion that the State was accusing Porter of perjury.

The basis for the State's belief that Porter was lying about when Gray said he could not breathe was a report of Detective Syreeta Teel, who took notes of a

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[8] A review of the trial transcripts of the officers who were present during Gray's arrest and who testified as witnesses at trial reveals that they were never asked the question of whether, during his arrest, Gray indicated he had difficult breathing. The State's argument to the jury is misleading and suggests that the State has additional information not presented to the jury that supports its argument. What is more troubling (although not part of the record) is that the State has in its possession a sworn statement by another officer who stated that he heard Gray say "he was having trouble breathing." *See infra* at p. 46.

conversation she had with Porter during the investigation of Gray's death. (E. 0394-96.)[9] Ms. Bledsoe, in arguing that Porter was not to be believed, stated "[w]ho has the motive to be deceitful? It's not Detective Teel. It's Officer Porter." (E. 0399.)

Porter testified that when he saw Gray in the back of the police wagon at the corner of Druid Hill Avenue and Dolphin Street, Gray had power in his legs and bore the weight of his body when Porter assisted him from the floor onto the bench. (E. 0267-68.) In calling Porter a liar, Ms. Bledsoe stated that:

> Five times he [Porter] was asked about it. Not once did he say Freddie Gray assisted himself up on the bench. Five times he used words that indicate he put Freddie Gray on the bench.
>
> Not once in any of those five times did he say it would be physically impossible for me to do that. I did not just put him up on the bench. I couldn't do that. Not once. But he told you that from the stand.
>
> Ladies and gentlemen, there's only one reasonable conclusion about what happened between Officer Porter and Freddie Gray. He put him on the bench. Freddie Gray didn't help get up on the bench. He put him on the bench.

(E. 0401.)

Porter testified that he was aware that arrestees often feign injury in the hopes of avoiding a trip to jail. (E. 0269.) He testified that many officers refer to this behavior as "jailitis." (E. 0269.) In her closing, Ms. Bledsoe said that "this jailitis is a bunch of crap." (E. 0407.)

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[9] In Porter's trial, Detective Teel subsequently admitted that her notes reflecting her conversation with Porter and his indication as to where Gray said he could not breathe contained errors, including the location of Gray's statement. (App. 1-8.) Porter acknowledges that this is not part of the record below in the *Goodson* trial, due in part to the procedural posture and the timing of the filings.

Porter testified that, when he saw Gray at Druid Hill and Dolphin Streets, he believed that Gray was not injured. (E. 0274.) He further testified that if he knew Gray was injured, he would have sought immediate medical attention. (E. 0366.) Ms. Bledsoe, in labeling Porter a perjurer, stated that Porter "knew Gray was hurt badly [at Druid Hill and Dolphin], he knew he wasn't going to be accepted at Central Booking. But he did nothing." (E. 0408.)

Because of the statements of Porter referenced above, Ms. Bledsoe argued to the jury that "[t]here's only one reasonable conclusion, Officer Porter **was not telling the truth** about his involvement in this incident." (emphasis supplied) (E. 0412.)

After pointing out another statement that the State believed was inconsistent, regarding what Porter told a civilian named Brandon Ross, Ms. Bledsoe again stated that the "[o]nly reasonable conclusion you can [sic] from that **Officer Porter is not telling the truth**." (emphasis supplied) (E. 0414.) Additionally, Ms. Bledsoe argued to the jury that Porter lied under oath when he stated that on April 12, 2015 he was unaware of a General Order 1114. (E. 0418.)[10]

Porter testified at trial that he believed the wagon was headed to the hospital at one point, with Gray inside of it. (E. 0351-52, 0369.) Ms. Bledsoe stated that this was false testimony, because Porter was behind the wagon and knew it was headed in a different direction. (E. 0424.)

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[10] G.O. 1114 was issued immediately prior to April 12, 2015 and addressed, among other things, seat belting of, and medical care for, detainees.

2. *The State's Rebuttal Argument.*

In the State's rebuttal argument, Mr. Schatzow wasted no time in telling the jury that "now that the defendant is on trial, he comes into court, and **he has lied to you about what happened.**" (emphasis supplied) (E. 0433.) Shortly later, Mr. Schatzow repeated his assertion that "the state proved through the evidence that he [Porter] lied when he spoke to the [investigative] officers and **he lied on the witness stand.**" (emphasis supplied) (E. 0434.)[11]

Mr. Schatzow stated that one of Porter's lies was "[h]ow he tried to pretend in his April 17th statement that he was too far away at Stop 2 to know what was going on." (E. 0434.) He further argued that Porter misrepresented what he saw when at Baker and Mount Streets, asking the jury "[w]hat was he trying to cover up? Was he trying to cover up his own knowledge of what had happened there?" (E. 0435.) While opining on Porter's credibility generally, Mr. Schatzow stated that "you prove that people aren't telling the truth by showing inconsistencies in their statements. You prove that the statements are inconsistent with each other. You prove that they're telling something that just is - - makes no sense at all." *Id.*

The State's attribution of perjury to Porter was far from subtle:

> But what did we prove? The State proved when it said it lied [sic] -- at Stop 2 was a lie. And **this I can't breathe nonsense** that he came over. You'll see what he's trying to do in his testimony.

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[11] Of course, Mr. Schatzow's assertion that Porter lied to the initial police officers who interviewed him could lead to additional charges of misconduct in office and obstruction or hindering. *See Cover v. State*, 297 Md. 398, 400 (1983). This purported lie currently does not serve as a basis for Porter's charges.

> Every place that he is stuck, every place that he is stuck in his April 17th statement and in his April 15th statement, **he now comes up with some new explanation for it**.
>
> Asked repeatedly, this business about at Stop 4 used his own legs to get up, nonsense. Five, six times on April 17th you'll see. Asked what happened, I picked him up, and I put him on the bench. I put him on the bench. I put him on the bench. I put him on the bench. You won't find anything in there about Freddie Gray using his own muscles, using his own legs.
>
> But the real one is the I can't breathe. Ha, his credibility is not at issue here.

(emphasis supplied) (E. 0436.)

In response to the defense's assertion that Porter's testimony was credible, Mr. Schatzow stated that:

> When he sits here on the witness stand, and in trying to come up with explanations for why he said what he said, well, I didn't realize that I was a suspect. I thought I was just a witness.
>
> So is there one version of the truth when you're a suspect and a different version of the truth when you're a witness?
>
> Credibility is not at issue in this case. Credibility is not at issue in this case. Not at all.

(E. 0437.)

While discussing Mr. Porter's contention that Gray said "I can't breathe" during his initial arrest, Mr. Schatzow told the jury that the other witnesses "don't say that because **it didn't happen**, because **it didn't happen**." (E. 0438.)[12] If it did not happen, then Porter is being directly accused of perjury.

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[12] It appears that there is a transcription error, as the transcript indicates that Mr. Schatzow told the jury that "defense *attorneys*" did not make such statement.

Mr. Schatzow also told the jury that Porter has "a motive to lie." (E. 0440.)

In accusing Porter of lying when he said that he had very little conversation with Goodson at Dolphin Street and Druid Hill Avenue, Mr. Schatzow sarcastically stated that:

> But that's like the [Baker and Mount] thing where he can't identify his own shift commander who's sitting right in front of his face. That's not a cover up. **That's not trying to hide the truth**. That's not trying to throw the investigators off. Nah, nah. That's not what that is.

(E. 0442.)

B. The Federal Investigation.[13]

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

In addition, at a meeting with one witness who was called at Porter's trial, and in response to a question posed, the witness's response was, "the FBI also asked me that question." As such, there is an ongoing, verifiable, Federal investigation into the conduct of Porter and others with regard to the death of Gray and, at this time, it is impossible to predict whether this will result in charges in United States District Court.

Undersigned counsel has listened to the audio recording, and Mr. Schatzow attributed said statement to the defense *witnesses*.

13 *See* Affidavit of Gary Proctor, attached hereto as (App. 45-46.)

Significantly, during Porter's trial testimony at least three current members of the United States Attorney's Office for the District of Maryland were in attendance, including the United States Attorney himself. It is therefore, surely, undeniable that Porter remains in the sights of the United States.

After receiving the subpoena in the middle of his trial, Porter raised the spectre of Federal involvement in his Motion to Quash on January 4, 2016. *See* (E. 0118-19, 0156-57.) There has been no denial by the State, nor has it proffered to any court that Federal immunity has been obtained.

V. STANDARD OF REVIEW

"When the question is whether a constitutional right . . . has been violated, the reviewing court makes its own independent constitutional appraisal, by reviewing the law and applying it to the peculiar facts of the particular case." *Jones v. State*, 343 Md. 448, 457 (1996) (right to be free from unreasonable searches and seizures) (citing *State v. Gee*, 298 Md. 565, 571 (1984) (right to a speedy trial)). Similarly, "[w]here an order involves an interpretation and application of Maryland constitutional, statutory or case law, [this Court] must determine whether the trial court's conclusions are 'legally correct' under a de novo standard of review." *Bd. of Educ. of Prince George's Cnty. v. Marks-Sloan*, 202 Md. App. 59, 63, *aff'd*, 428 Md. 1 (2012) (interpreting Worker's Compensation Act, Cts. & Jud. Proc. § 5-518). *Accord Gray v. State*, 388 Md. 366, 375 (2005) (analyzing trial court's denial of postconviction relief, pursuant to Md. Code Ann., Crim. Proc. § 7-103 and Md. Rule 4-407, for legal correctness under de novo standard of review).

VI. ARGUMENT

A. Summary Of The Argument.

The Fifth Amendment to the United States Constitution declares in part that "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Fifth Amendment creates a privilege against compelled disclosures that could implicate a witness in criminal activity and thus subject him or her to criminal prosecution. *Hoffman v. United States*, 341 U.S. 479, 486-88 (1951).[14] The privilege against self-incrimination is a *constitutionally-based* privilege—not an evidentiary privilege.

The Maryland Constitution reads that "That no man ought to be compelled to give evidence against himself in a criminal case." Md. Decl. of Rights, art. 22. While Porter believes that compelling him to testify will violate the Fifth Amendment, he also posits

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[14] Although Porter waived his Fifth Amendment right against self-incrimination by voluntarily testifying at his first trial, "[t]he waiver involved is *limited to the particular proceeding* in which the witness volunteers the testimony or the accused takes the stand. . . . Nor is his testimony at a first trial a waiver for a *later trial.*" *United States v. Gary*, 74 F.3d 304, 312 (1st Cir. 1996) (quoting 8 J. Wigmore, *Evidence* § 2276, at 470-72 (McNaughton rev. 1961) (emphasis in original)). Indeed, "[i]t is hornbook law" that a waiver in one proceeding does not affect a defendant's rights in a subsequent proceeding. *United States v. Cain*, 544 F.2d 1113, 1117 (1st Cir. 1976); *United States v. Miranti*, 253 F.2d 135, 139 (2d Cir. 1958); *United States v. Housand*, 550 F.2d 818, 821 n.3 (2d Cir. 1977) (same); *United States v. Lawrenson*, 315 F.2d 612, 613 (4th Cir. 1963) (same); *United States v. Licavoli*, 604 F.2d 613, 623 (9th Cir. 1979) (same). Notably, the limited circumstance in which a waiver in a previous proceeding has been held to carry through to another proceeding involves a *witness* who testifies before a grand jury. Such a *witness* may not invoke the Fifth Amendment privilege at the trial on the indictment returned by the grand jury, *unless* he is the *defendant* or himself under indictment. *Ellis v. United States*, 416 F.2d 791 (D.C. Cir. 1969). Thus, the exception recognized in *Ellis* proves the rule that Porter's waiver at his first trial has no effect on his privilege at his retrial.

that Article 22 provides an additional and separate basis that precludes the State from compeling his testimony. Article 22's use of the word "evidence" is more global than the protection envisaged by the Federal Constitution.

To be clear, Porter is not saying that § 9-123 is unconstitutional on its face; he is saying that it is unconstitutional as applied to this defendant in this setting. The application of immunity generally is not without limits. In discussing the application of immunity under Md. Code Ann., Crim. Law § 9-204, Chief Judge Joseph Murphy, in his capacity as chair of the General Assembly Criminal Law Article Review Committee, noted:

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

See notes to Md. Code Ann., Crim. Law § 9-204.

To date, the scope and application of § 9-123 under the circumstances here have not been considered by the General Assembly. Accordingly, it falls to this Court to analyze Porter's federal and state constitutional rights (as well as protection under Md. Code Ann., Cts. & Jud. Proc. § 9-107)[15] in conjunction with § 9-123.

B. SECTION 9-123

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

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[15] Section 9-107 states: "A person may not be compelled to testify in violation of his privilege against self incrimination. The failure of a defendant to testiy in a criminal proceeding on this basis does not create a prsumption against him."

(b)(1) If a witness refuses, on the basis of the privilege against self-incrimination, to testify or provide other information in a criminal prosecution or a proceeding before a grand jury of the State, and the court issues an order to testify or provide other information under subsection (c) of this section, the witness may not refuse to comply with the order on the basis of the privilege against self-incrimination.

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

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

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

(d) If a prosecutor seeks to compel an individual to testify or provide other information, the prosecutor shall request, by written motion, the court to issue an order under subsection (c) of this section when the prosecutor determines that:
(1) The testimony or other information from the individual may be necessary to the public interest; and

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

Md. Code Ann., Cts. & Jud. Proc. § 9-123. The circuit court ruled that, under the grant of immunity conferred by this section, Porter will have no Fifth Amendment Privilege, and will have to answer questions, under penalty of contempt.

C. PORTER CANNOT BE COMPELLED TO TESTIFY.

1. *The grant of immunity by the circuit court will not put Porter in the same position as if he had not testified.*

A grant of immunity must provide a protection coextensive with the Fifth Amendment, as required by *Kastigar v. United States*, 406 U.S. 441 (1972).[17] The Supreme Court ruled in *Kastigar* that a witness may be compelled to testify when given use and derivative use immunity, if after the immunity is granted, the immunity leaves the witness in the same position, as if the witness had simply claimed the privilege. *Kastigar v. United States*, 406 U.S. 441, 458-59 (1972); *see also Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 79 (1964), *abrogated by United States v. Balsys*, 524 U.S. 666 (1998).

Porter will not be in the same position as he was before testifying because the State thinks he lied in his trial. At Porter's trial, the State's theory was that he lied and attempted to cover up facts when giving a statement to police officers, and when taking the stand in his own defense. Effectively, the State now wishes to compel Porter, through the farce of a grant of immunity, to lay a foundation for evidence that the State has already deemed as constituting an obstruction of justice and perjury.[19] In a response to Porter's Motion to Quash, filed on January 6, 2016, the State informed the trial court that:

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[17] *Kastigar,* however, did not involve a defendant with pending charges being compelled to provide testimony.

[19] The State cannot call Porter, solely for the purpose of getting into evidence statements from the Porter trial that they believe aid in their pursuit of a conviction of others. That is because "even if the sole purpose in calling a witness is other than subterfuge, the questioning by a party of its own witness concerning an 'independent area

> The State has no intentions of calling Officer Porter to the stand in *Goodson* and then pretending that what the prosecutors called a lie in Porter's trial is now the truth in Goodson's trial. *If Officer Porter testifies in Goodson consistently with his testimony in* ***he may rest assured that prosecutors will be consistent with their evaluation of his testimony his own case.***

(emphasis added) (E. 0194.) Porter submits that he testified truthfully during his first trial. If his testimony is consistent, the State admits it will again call him a liar, and at the conclusion of his testimony, Porter will be facing an additional charge for perjury. What the State is attempting to do is force Porter to change his testimony and provide different, helpful testimony to the State. Whether or not his testimony is *actually* true does not matter to the State.[20]

Thus, based on the State's blatant impeachment of Porter during his trial, the State is effectively presented with a Hobson's choice. The State either has to retract their previous theory, and admit that Porter was truthful (the State has indicated this will not happen), or the State has to recognize that the grant of immunity would be a farce – that is, the State's grant of immunity would be coaxing Porter into committing what the State

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of inquiry' intended to open the door for impeachment and introduction of a prior inconsistent statement could be found improper." *Walker v. State*, 373 Md. 360, 386 (2003). As it relates to Porter's trial testimony regarding Gray's physical conditions and what Gray said, the State indicates that it "has no intention of solicity that testimony 'as true.'" Appellee's Ct. Spec. App. Brief at 24. Noticeably, the State did not state that it was not going to solicit the testimony at all.

[20] It is unclear how the State ethically could accept a change of testimony by Porter. Porter's taped recorded statement and his trial testimony are consistent. The State cannot adduce testimony from Porter on multiple occasions, call it perjury and then accept different compelled testimony of Porter that is only provided under a threat of contempt (and additional perjury charges). Porter's changed testimony effectively will be coerced and, as a result, lack reliability.

believes is perjury and an obstruction of justice, both of which are crimes that falls outside the scope of immunity granted in the immunity statute. Md. Code Ann., Cts. & Jud. Proc. § 9-123. Such a farcical grant of immunity would fly in the face of *Kastigar*'s holding that a witness may be compelled to testify when given use and derivative use immunity, if after the immunity is granted, the immunity leaves the witness in the same position as if the witness had simply claimed the privilege. 406 U.S. at 458-59. It is also important to note that Md. Code Ann., Crim. Law § 9-101(c)(1) states that if a defendant gives two contradictory statements, the State does not have to prove which is false; it is enough that both statements under oath cannot be true. As such, if Porter were to testify in Goodson's or White's trial (or both, or all five) to something that the State believes is inconsistent with his testimony in his own trial, the State would not have to prove which is false, and all the immunity the State could confer would be rendered meaningless.

An analogous scenario is found in *United States v. Kim*, 471 F. Supp. 467 (D.D.C. 1979). *Kim* held that when a defendant was found to have given a perjurious response to a congressional committee's question, and then that same defendant is granted use and derivative use immunity to answer the same question, such a grant was not coextensive with scope of privilege that must be provided under *Kastigar*, as it could have resulted in the infliction of criminal penalties. *Kim* is similar to Porter's scenario in that the prosecution cannot first allege that Porter has provided perjured testimony or committed obstructions of justice, and then thereafter grant immunity to suborn the very same testimony that was allegedly perjured. To summarize: "[i]t is well-established in federal courts that the privilege against self-incrimination can properly be invoked based on fear

of a perjury prosecution arising out of conflict between statements sought to be compelled and prior sworn testimony." *Johnson v. Fabian*, 735 N.W.2d 295, 310-11 (Minn. 2007) (citing other cases).

2. *The State has taken no action to ensure that Porter will be in the same position as he was prior to being forced to testify.*

When the United States or a state becomes aware of immunized testimony it typically develops a "taint" team. That has not happened here. The same prosecutors that presented the case to the grand jury, participated in pretrial hearings, and tried Porter's case, are now seeking to compel his testimony in the trials of two others, and, upon information and belief, will be counsel of record when his retrial commences. No walls will be erected around this testimony, the spill-over effect will be instantaneous and indelible. For that reason alone, this Court must disallow the calling of Porter as a witness.

Although originally cited by the State (E. 0108-09), Porter agrees that *United States v. Poindexter*, 698 F. Supp. 300 (D.D.C. 1988), is instructive. The primary thrust of the case concerns the steps taken to avoid learning of immunized testimony given at Congress, prior to their returning of an indictment. The reason *Poindexter* supports Porter's position is that:

> there must be noted several administrative steps which were taken by Independent Counsel from an early date to prevent exposure of himself and his associate counsel to any immunized testimony. Prosecuting personnel were sealed off from exposure to the immunized testimony itself and publicity concerning it. Daily newspaper clippings and transcripts of testimony before the Select Committees were redacted by nonprosecuting "tainted" personnel to avoid direct and explicit references to immunized testimony. Prosecutors, and those immediately associated with them, were

> confined to reading these redacted materials. In addition, they were instructed to shut off television or radio broadcasts that even approached discussion of the immunized testimony. A conscientious effort to comply with these instructions was made and they were apparently quite successful. In order to monitor the matter, all inadvertent exposures were to be reported for review of their possible significance by an attorney, Douglass, who played no other role in the prosecution after the immunized testimony started . . . . Overall, the file reflects a scrupulous awareness of the strictures against exposure and a conscientious attempt to avoid even the most remote possibility of any impermissible taint.

698 F. Supp. at 312-13. It is therefore readily apparent that the prosecution team in *Poindexter* had safeguards in place to avoid learning of any testimony. In the case at bar, however, there is but one prosecution team.[29]

The State in the circuit court, while attempting to minimize Porter's concerns, principally relied on *United States v. Balsys*, 524 U.S. 666, 680-82 (1998). (E. 0107-10.) This case is not persuasive authority. Firstly, even the portions that the State relies on cannot be said to be anything more than *dicta*. The holding of *Balsys* was that "[w]e hold that concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause." 524 U.S. at 669.

Balsys is dissimilar to the case at bar. *Balsys* was an immigration case in which Mr. Balsys was not given any immunity. Balsys's purported fear was that he might be prosecuted in foreign nations. *Id.* at 670. Of course, no prosecution at that time was pending, and there was nothing in the record that these countries had had any contact with the defendant for over thirty-seven years. The Supreme Court distilled the issue into

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[29] At a minimum "a prosecutor's failure to withdraw certainly makes it more difficult for the government to prove that the compelled testimony did not contribute to the prosecution." *United States v. Harris*, 973 F.2d 333, 337 (4th Cir. 1992).

one sentence: if Balsys could "demonstrate that any testimony he might give in the deportation investigation could be used in a criminal proceeding against him brought by the Government of either the United States or one of the States, [then] he would be entitled to invoke the privilege." *Id.* at 671-72. Here, Porter has demonstrated that there is an ongoing investigation by the United States.

Moreover, *Balsys* reiterates "the requirement to provide an immunity as broad as the privilege itself." *Id.* at 682. Given that the same prosecutors will participate in both the trials of Goodson and White, he will not, and cannot be, placed in the same position as if he had never testified. The State gets an advantage, and what Mr. Schatzow learns of Porter's knowledge during the compelled testimony during the trials of Goodson and White cannot be unknown to him at Porter's retrial on June 13, 2016. Therefore, it cannot be foreclosed at this point that the State will not use Porter's testimony.

Following *Balsys*, the State also cited to the unreported decision of *United States v. Cimino*, No. CM-14-0103, 2014 WL 5473234, 2014 U.S. Dist. LEXIS 155236 (S.D.N.Y. Oct. 29, 2014). (E. 0107-10.) In *Cimino*, the defendant was charged with drug distribution and conspiracy. *Id.* The government introduced recordings of a confidential, paid informant engaging in various drug transactions with the defendant, but did not call the informant to testify. *Id.* The defendant sought to compel the informant to testify, over the informant's invocation of the privilege against self-incrimination. *Id.* Firstly, an unreported United States District Court decision from another circuit is scarcely a reason for this Court to make law that flies in the face of 12 score years of jurisprudence on both sides of the pond. Secondly, the reluctant witness in *Cimino* was an "agent of the FBI . . .

carrying out the controlled buys orchestrated by the Bureau." 2014 WL 5473234, at *2, 2014 U.S. Dist. LEXIS 155236, at *5. This is a world away from the case at bar. The *Cimino* witness was an agent of the government and did not have pending charges pursuant to the Southern District of New York United States Attorney's Office policy of not prosecuting confidential informants, even without a formal immunity agreement, who perform controlled buys at the FBI's direction. *Id.* at *2, 2014 U.S. Dist. LEXIS 155236, at *5. Porter, however, has already been tried once for homicide, with another trial to follow anon. Lastly, in *Cimino*:

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

2014 WL 5473234, at *5, 2014 U.S. Dist. LEXIS 155236, at *11-12. Thus, the portion cited by the State cannot be said to be anything other than unreported, non-binding, *dicta*.

There can be no real assurance that a prosecutor, either deliberately or accidentally, will not use information obtained through immunized testimony. It is because of this that,

> at least two circuits have held that once a prosecuting attorney reads a defendant's immunized testimony, he cannot thereafter participate in the *trial* of the defendant, even where all the evidence to be introduced was derived from legitimate independent sources. *United States v. Semkiw*, 712 F.2d 891 (3d Cir. 1983); *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973).

United States v. Byrd, 765 F.2d 1524, 1530 (11th Cir. 1985) (emphasis in the original).[30]

It is Porter's understanding that Mr. Schatzow and Ms. Bledson are trying the cases of Goodson and White, as well as his re-trial. Porter has little to no confidence that the State will adhere to § 9-123's requirement that his compelled testimony not be used in any criminal proceeding, particularly when it has no qualms ignoring his constitutional rights.

3. Section 9-123 does not apply to a defendant with pending charges.

Before the Court of Special Appeals, the State relied on a Position Paper that was filed in support of the House Bill on witness immunity. (App. 09-17.) The position paper makes clear that the Legislature did not contemplate using the statute for a defendant in Porter's circumstance. Rather, the statute would be used to help "build a case" against a previously untouchable defendant. (App. 11-12.) Use immunity would allow for future prosection of a testifying witness (as opposed to transaction immunity which forecloses the opportunity), and provides an incentive for more complete disclosure (under the notion that it is in a witness's best interest to give as much information that subsequently cannot be used against him at a later trial). (App. 11.) Throughout the position paper, the focus is gathering information for investigatory

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30 *Byrd* also held that "certain of the feared results—*e.g.*, the government's use of its knowledge of Byrd's immunized testimony to elicit evidence on cross-examination—would probably constitute an impermissible use of *evidence* derived indirectly from the immunized testimony." *United States v. Byrd*, 765 F.2d 1524, 1531 (11th Cir. 1985) (emphasis in the original).

purposes and compelling the testimony of witnesses who are not currently defendants. (App. 14-16.)

Maryland law recognizes the distinction between defendants and witnesses. Section 9-107, addressing the privilege against self-incrimination, is specifically titled, "Defendant in criminal trial" and states that a person under this title "may not be compelled to testify in violation of his privilege against self-incrimination." This section does not say that it only applies to a defendant's own proceeding or that there is an exception to this statutory privilege by the grant of use immunity. Even if use immunity is granted, a person's status as a defendant will not change until and unless charges are no longer pending. Accordingly, while the State considers a person a defendant, he has a blanket protection against self-incrimination.

Contrast § 9-107 to § 9-123, entitled "Witness immunitity for compulsory testimony" which only applies to witnesses in certain circumstances, namely those who are compelled to testify in a criminal prosecution or before a grand jury. Md. Code Ann., Cts. & Jud. Proc. § 9-123 ("if a witness refuses . . . the witness may not refuse to comply . . . may be used against the witness . . . if a witness refuses to comply . . . ."). In being called as a "witness" if the trials of Goodson and White, Porter does not lose his status as a defendant. When these two statutes are read in conjunction, a witness who is also a defendant has that blanket protection against self-incrimination and cannot be compelled to testify. Thus, § 9-123 is designed for people who currently do not have "skin in the game:" witnesses, not defendants, and therefore, not Porter.

The right of defendant against self-incrimination is different than the right of a non-defendant witness. It was not settled that the Fifth Amendment even applied to witnesses other than the accused until the Supreme Court held that the "privilege protects a mere witness as fully as it does one who is also a party defendant." *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (emphasis added). Although both a defendant and a witness have a Fifth Amendment privilege, their respective rights are not identical, and should not be improperly conflated. *See, e.g., United States v. Echeles*, 352 F.2d 892, 897-98 (7th Cir. 1965) ("The error made arises from confusing the privilege of any witness not to give incriminating answers with the right of the accused not to take the stand in a criminal prosecution against him. Both come within the protection of the clause of the 5th Amendment which provides: 'No person . . . shall be compelled in any criminal case to be a witness against himself.' The plain difference between the privilege of witness and accused is that the latter may not be required to take the stand at all." (quoting *United States v. Housing Found. of Am., Inc.*, 176 F.2d 665, 666 (3d Cir. 1949)). The Court in *Echeles* recognized that this is the "'universally held' interpretation of this right prohibiting any person who is on trial for a crime from being called to the witness stand." 352 F.2d 892, 897 (citing 8 Wigmore on Evidence 406 (Claim of Privilege, § 2268); McCormick on Evidence 257-59 (Self-Incrimination, § 124) (1954)). Similarly, it has been held that "the protections provided a witness claiming the privilege of the Fifth Amendment and *a defendant* in his own criminal trial are very different. Specifically, . . . there is a danger that invocation of the Fifth Amendment may lead the court or jury to draw negative inferences. . . . However, a witness, unlike a defendant, need not fear the

negative inferences a court or jury may draw from his invocation of the privilege because the witness's liberty is not in peril in a proceeding in which he is merely called to testify." *State v. Maestas*, 272 P.3d 769, 786 (Utah Ct. App. 2012) (emphasis in original) (internal citations omitted) (holding that a potential witness cannot be shown to be unavailable under Utah Rule of Evid. 804 unless he is brought in the invoke the privilege, but a defendant cannot force his co-defendant to take the stand to invoke the privilege).

Likewise, the manner in which a defendant's privilege may be waived is also markedly different from what is required for waiver by a mere witness. In particular, a witness may testify without waiving his self-incrimination rights by steering clear of incriminating facts on direct examination, whereas the accused's rights are waived by simply testifying at all. *See Brown v. United States*, 356 U.S. 148, 155-56 (1943) (holding that an accused who testifies "cannot reasonably claim . . . an immunity from cross-examination on the matters he himself put in dispute"). *See also* Fed. R. Evid. 611 advisory committee's note to subdivision (b) ("When [an accused] testifies on the merits, however, can he foreclose inquiry into an aspect or element of the crime by avoiding it on direct? The affirmative answer given in *Tucker v. United States*, 5 F.2d 818 (8th Cir. 1925), is inconsistent with the description of the waiver as extending to 'all other relevant facts' in *Johnson v. United States*, 318 U.S. 189, 195, 63 S. Ct. 549, 87 L. Ed. 704 (1943)." (citing *Brown*, 356 U.S. 148)). Accordingly, this Court should interpret § 9-123 with the distinction between the accused and a mere witness foremost in the analysis.

To be sure, Porter is not saying that § 9-123 is always unconstitutional. Instead, as applied to him, a defendant with pending charges, § 9-123 is insufficient. The State's

treatment of other officers involved in Gray's arrest illustrates that § 9-123 is being used improperly on Porter.

At Porter's trial, the defense called three witnesses who were police officers in the Western District of Baltimore City on the day Gray was arrested. All three had previously testified before the Grand Jury. And all three were provided immunity. To be clear, Porter does not believe there is anything inappropriate about the grant of immunity to those three officers. All three were witnesses. All three were part of an investigation. The State was gathering evidence.[33] As to all three, the State ascertained that their testimony was in the public interest.[34] None of the trifecta have since been charged with a crime. All three remain salaried officers.

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[33] Charles Kastigar was "subpoenaed to appear before a United States grand jury in the Central District of California." *Kastigar v. United States*, 406 U.S. 441, 442 (1972). Porter submits that this makes the world of difference. The government in that case was investigating *if* a crime had occurred and, *if so*, who were the culprits. In the case at bar, the government has decided *that* a crime occurred and Porter, Goodson, and White *are* the culprits.

[34] Other State's have found ways of compelling someone that the State believes to be less culpable in a criminal act to testify at the other's trial. *People v. Brunner*, 108 Cal. Rptr. 501, 503-06 (Cal. Ct. App. 1973). Under California law:

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

People v. Campbell, 187 Cal. Rptr. 340, 341 (Cal. Ct. App. 1982). Pursuant to the California immunity statute "The measure of what incriminates *defines* the offenses immunized. Thus, the inference ('link') from compelled testimony to implicated offense serves to identify and hence *define* the offense immunized from prosecution." *Id.*

The State, in previous pleadings, has relied on *Goldberg v. United States*, 472 F.2d 513 (2d Cir. 1973). This case inapposite to Porter's circumstance because it involved a grand jury investigation; the Second Circuit considered it of no great import that Goldberg was "a **potential** defendant at a later trial." *Id.* at 515. On the other hand, there is nothing potential about Porter's scheduled retrial. Appellee has also drawn the lower courts' attention to *United States v. Schwimmer*, 882 F.2d 22 (2d Cir. 1989). There are several reasons that this case is readily distinguishable. Mr. Schwimmer was subpoenaed at a grand jury: "[t]he purpose of calling appellant before the grand jury is to obtain information regarding the identity of unapprehended individuals allegedly involved with him in the conspiracy as recipients of the payoffs." *Id.* at 26. Again, the government was in the business of discovering facts. Six officers have already been apprehended, indeed one has already gone to trial, with other trials due to begin within days of oral argument in this matter. Secondly, Schwimmer had already been *convicted*. Thirdly, Schwimmer "elected not to testify at his jury trial." *Id.* at 23.

Porter, on the other hand, has already been labeled a perjurer based in part on his trial testimony. The State has also made clear that he will will be subject to potential prosecution based on any testimony in the *Goodson* or *White* trials, whether that testimony is consistent with his testimony in his own trial or not. State's Resp. to Mot. to

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(emphasis in the original). Under California's statute, if Porter were called to testify, the State would have not dismiss all charges that stem from his immunized testimony.

Quash at 12 (E. 0194.)[35] The majority of the jurisdictions that have considered the issue have stated that, even for a witness not yet facing charges, only transactional immunity will adeqautely protect the privilege in the face of future prosecution. *State v. Thrift*, 440 S.E.2d 341, 351 (S.C. 1994); *State v. Gonzalez*, 853 P.2d 526, 533 (Alaska 1993); *Wright v. McAdory*, 536 So.2d 897, 905 (Miss. 1988); *State v. Soriano*, 684 P.2d 1220, 1232 (Or. Ct. App. 1984); *Att'y Gen. v. Colleton*, 444 N.E.2d 915, 921 (Mass. 1982); *D'Elia v. Pa. Crime Comm'n*, 555 A.2d 864, 870 (Pa. 1989), *State v. Miyasaki*, 614 P.2d 915, 922-23 (Haw. 1980); *Campbell*, 187 Cal. Rptr. at 341. However, Porter (already an accused) has not been granted transactional immunity by any sovereign that might wish to prosecute him.

4. *Porter has not been immunized federally.*

Federal prosecutors and Judges have the ability pursuant to 18 U.S.C. §§ 6001-03 to grant formal immunity. There have also been many instances when the United States Attorney in the local jurisdiction has provided a letter, stating that any statement will not be used against the witness. Notwithstanding that the United States Department of Justice is very much aware and monitoring Porter's trial and conduct, no such action has been taken in this case.

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[35] Courts have stated that "[t]he exception in the immunity statute allows the use of immunized testimony only in prosecutions for *future* perjury, *future* false statements, and *future* failure to comply with the immunity order, not for past acts." *Matter of Grand Jury Proceedings of Aug., 1984*, 757 F.2d 108, 113 (7th Cir. 1984) (emphasis in original). Truthful testimony under a grant of immunity may not be used to prosecute the witness for false statements made earlier. *In re Grand Jury Proceedings*, 819 F.2d 981, 983 (11th Cir. 1987).

5. *Based on the State's position, it would be suborning perjury by calling Porter to testify.*

The relevant law governing a prosecutor's use of perjured testimony is set forth in the Supreme Court's decision in *Napue v. Illinois*:

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

360 U.S. 264, 269 (1959) (citations omitted). Accordingly, *State v. Yates*, decided by the Supreme Court of New Hampshire, presents a legal scenario that is analogous to that of the instant matter. 629 A.2d 807, 809 (N.H. 1993). In *Yates*, the prosecutor reasonably believed that a witness presented false testimony when the witness denied any involvement in illicit drugs, and that witness' false testimony was integral to the conviction of the defendant. *Id.* The defendant's "entire defense depended on the premise that [the witness] owed [the defendant] money from a cocaine sale." *Id.* The prosecutor knew before trial that the witness had recently been indicted for drug possession, yet, the prosecutor failed to correct the witness's statement when the witness denied any involvement in illicit drugs.

Importantly, the *Yates* court stated that one does not need to prove that the prosecutor had *actual knowledge* of the uncorrected false testimony; one "need only show that the prosecutor *believed* [the witness's] testimony was probably false. *See May v. Collins*, 955 F.2d 299, 315 (5th Cir. 1992), *cert. denied*, 504 U.S. 901 (1992); *United States v. Mills*, 704 F.2d 1553, 1565 (11th Cir. 1983), *cert. denied*, 467 U.S. 1243 (1984); *cf. Giglio v. United States*, 405 U.S. 150, 154 (1972) (knowledge of one attorney in prosecutor's office attributed to other attorneys in office)." *Yates*, 629 A.2d at 809. The Supreme Court of New Hampshire ultimately held that a lawyer's duty of candor to the tribunal "is neglected when the prosecutor's office relies on a witness's denial of certain conduct in one case after obtaining an indictment charging the witness with the same conduct in another case." *Id.*[38] For the prosecution to offer testimony into evidence, knowing it or believing it to be false, is a violation of the defendant's due process rights. *Mills*, 704 F.2d at 1565 (citing *United States v. Sutherland*, 656 F.2d 1181, 1203 (5th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982)); *United States v. Brown*, 634 F.2d 819, 827 (5th

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

> (a) A lawyer shall not knowingly:
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> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
>
> . . .
>
> (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

Cir. 1981). As noted by the District of Columbia Court of Appeals, "the nondisclosure of false testimony need not be willful on the part of the prosecutor to result in sanctions." *Hawthorne v. United States*, 504 A.2d 580, 591 n.26 (D.C. 1986) (citing *Giglio v. United States*, 405 U.S. at 154).

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

There is no way around the constitutional ill complained of above. It is of no moment if the State makes claims that Porter is very unlikely to be prosecuted for any statement he might make at the *White* or *Goodson* trials. That is because:

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

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

The State's pleading in the Court of Special Appeals narrated that it wanted to elicit testimony on direct examination (presumably during Goodson's trial) as to Porter's "conversations he had with Goodson regarding Gray's condition and whether to seek medical attention for Gray." Firstly, counsel for Goodson will, one would assume, dispute that there was any such conversation. And, as discussed below, their scope of

cross-examination will be wider than the State's direct. But, more fundamentally, this conversation that the State seeks to elicit occurred at Druid Hill and Dolphin. And what exactly did the State say about that in its closing? Here's what:

> The defendant arrives and pulls up. Defendant's credibility. Do you believe this story? His story, you'll hear it when you listen to his statement, no conversation with Officer Goodson. Now, do you believe -- does that sound to you reasonable? Does that sound to be truthful? Does that sound credible? Does that sound -- here, he's responding to a call to check this prisoner out, and he doesn't say, well, what happened, man? Why do you -- why do you need me to check the prisoner out? What are you doing? What -- what -- what's going on? No conversation.
>
> But that -- you know, that's like the Stop 2 thing where he can't identify his own shift commander who's sitting right in front of his face. That's not a cover up. That's not trying to hide the truth. That's not trying to throw the investigators off. Nah, nah. That's not what that is.

(E. 0442.)

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

This is because "a judge must allow a defendant wide latitude to cross-examine a witness as to bias or prejudices." *Smallwood v. State*, 320 Md. 300, 307-08 (1990). Accordingly, whatever narrow focus the State may decide to employ in an attempt to cure the unconstitutional ill set out herein, nothing would bind counsel for Goodson and White from a much wider foray on cross-examination. Lest this Court make any mistake: the State believes that Porter's testimony is *pivotal* to a conviction against either White or Goodson. They told the circuit court that not calling Porter would "gut" those prosecutions. As such, it is far from a stretch that counsel for the defendants will

additionally jump on the Officer-Porter-lack-of-veracity bandwagon. With one crucial difference: counsel for Goodson and White owe Porter nothing by way of discovery obligations. Porter does not have the faintest inkling what is coming from these hostile questioners, yet he will be compelled to answer their accusations, within a few seconds of hearing them, under oath. In the event that Porter withstands their cross with his reputation intact, the prosecutors could then become character witnesses to impugn his veracity (see further below).

6. Porter has a separate right not to testify under the Maryland Declaration of Rights.

As stated *supra*, Article 22 of the Maryland Declaration of Rights is the more protective state analog to the self-incrimination clause of the Fifth Amendment. Counsel has located no case which holds that the *Murphy* or *Balsys* rulings are applicable in Maryland on Article 22 grounds.

Article 22 of the Maryland Declaration of Rights reads that "That no man ought to be compelled to give evidence against himself in a criminal case." Under Article 22, "[t]he privilege must be accorded a liberal construction in favor of the right that it was intended to secure." *Adkins v. State*, 316 Md. 1, 8 (1989). Article 22 uses the word "evidence," which the Federal Constitution does not. Evidence against oneself can be provided in a number of ways. Accordingly, Porter submits that the protection under the Maryland Declaration of Rights is wider than that afforded Porter by the United States Constitution.

The State, in the trial court below, relied on a footnote for the proposition that "Article 22 of the Maryland Declaration of Rights grants the same privilege against compulsory self-incrimination [as the Fifth Amendment]." State's Resp. to Mot. to Quash at 5-6 (citing *In re Criminal Investigation No. 1-162*, 307 Md. 674, 683 n.3 (1986)) (E. 0191-92.) This appears to contradict the actual holding found in the Court of Appeals' later case of *Choi v. State*, 316 Md. 529, 545 (1989). Because while a witness may have:

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

Id. This is authority for Porter's contention herein that, while immunity cannot cure his Fifth Amendment concerns, it most certainly cannot protect his Maryland rights.[39]

Maryland retains the dual sovereignty doctrine in its entirety. *Evans v. State*, 301 Md. 45, 54-55 (1984) (adopting the dual sovereignty principle as a matter of Maryland common law); *see also Gillis v. State*, 333 Md. 69, 73 (1993) (holding that "[u]nder the 'dual sovereignty' doctrine, separate sovereigns deriving their power from different sources are each entitled to punish an individual for the same conduct if that conduct

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[39] It has been suggested for many years that under dual sovereignty, what is required is transactional immunity in the court in question, and use immunity as to all others. *See, e.g.*, Richard D. Bennett, *Self-incrimination: Choosing a Constitutional Immunity Standard*, 31 Md. L. Rev. 289, 295 (1972).

violates each sovereignty's laws). *Bailey v. State*, 303 Md. 650, 660 (1985) ("This Court has adopted, as a matter of common law, the dual sovereignty doctrine.").

Similarly, the Massachusetts Declaration of Rights, Article XII states that no one can be "compelled to accuse, or furnish evidence against himself." And in Massachusetts, "[o]nly a grant of transactional immunity" will suffice. *Att'y Gen. v. Colleton*, 444 N.E.2d 915, 921 (1982). Thus, Porter could not be called, were we in Massachusetts, "so long as the witness remains liable to prosecution criminally for any matters or causes in respect of which he shall be examined, or to which his testimony shall relate." *Id.* at 919 (citation omitted).

The State will surely not ask Porter the same questions six months later as he did the first go-around. Even if he did, it is inconceivable that Porter will answer them exactly the same way. All good cross-examination is palimpsest; it builds on what you already know. To allow the State to have the windfall of two more runs at Porter (or more), prior to his retrial, is anathema to our notions of the right to remain silent.

D. The application of this order to defendants with pending charges will have ramifications for all defendants in Maryland, not just the trials of the officers charged in connection with the death of Freddie Gray.

In the age of social media, it will be close to impossible for Porter (or any defendant) to get a fair trial Each additional statement by Porter would be live tweeted and reported upon, resulting in an inability to receive a fair trial. In connection with Porter's trial, 100% of the jury panel was aware of the case. Likely the same percentage

of a new panel would have at least some knowledge of preceding case(s).[40] If Goodson or White were to be acquitted it is all but inevitable that jurors would conclude that Porter—the State's star witness—was not credible. If Goodson or White were to be convicted, the jurors will assume that Porter has knowledge of inculpatory acts that he has now revealed when granted immunity. Commentators will likely opine as to this regardless of the outcome of each trial.

Porter's statement at his trial was unquestionably voluntary, and his statements to law enforcement were found by the circuit court to be voluntary. Contrarily, Porter's potential statements in Goodson's and White's trials would not be. Porter would thereby be subjected to jurors with some knowledge of the substance of his compelled statements. Parsing out whether a juror's knowledge of Porter's previous testimony was from the initial voluntary statements, or the later compelled statements, would not be possible in voir dire. A mini-*Kastigar* hearing would be required for each juror.[41]

Moreover, in Porter's trial, and any retrial, the witnesses were and can be sequestered. The reason for this is obvious, that each witness should testify about his or her recollection, untainted by what every other witness said. And while a trial court can prevent witnesses at Porter's trial from learning what the other witnesses have testified to,

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[40] The recent newspaper reports by the Baltimore Sun of the jury split in Porter's mistrial, as well as the extensive coverage of these appellate proceedings, have yet further muddied the waters.

[41] For the problems abundant at *Kastigar* hearings generally, see *United States v. Hampton*, 775 F.2d 1479, 1487 (11th Cir. 1985).

it can scarcely prohibit people from following accounts of Porter's testimony in the Goodson and White trials.

If the application of this statute to criminals with pending charges was "nothing unusual" as the State suggests, why did the Court and the State agree that they were in "uncharted territory?" More to the point, from a public policy standpoint, why would a prosecutor *not* do it in every case? It is all too common that more than one person is charged with any given homicide. Because of a host of reasons, the cases are often severed or not joined. Application of the statute as asserted by the State would allow for the following scenario:

Defendants A, B and C are involved in a crime and are charged separately. For various reasons, the State is unsure of the strength of its cases against B and/or C and does not know how to proceed (plea or no plea, reduction of charges, etc.). In order to aid in its determination, the State knows it can get a preview of B's defenses if B is given immunity under § 9-123 and is compelled to testify in A's trial. Although the testimony cannot be used in B's trial, the intangible information collected cannot be erased (i.e., how B responds to tough questions, whether B volunteers information, B's temperment generally, a jury's acceptance or disbelief of his testimony, etc.). The unfair advantage gained by the State is is exactly the kind of harm the Eighth Circuit saw, when holding that "[s]uch use could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning

cross-examination, and otherwise generally planning trial strategy." *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973).[42]

To highlight the constitutionally repugnant nature[43] of the State's application of § 9-123 to a criminal defendant with pending charges, what is to stop the State from calling Goodson, who has never given a statement, in Porter's retrial? If the State has its way, nothing.

There is also an inherent unfairness in the State's application of §9-123. Only the State can grant immunity; a defendant cannot compel an individual to testify on his behalf if that person invokes the Fifth Amendment. *See, e.g.*, *United States v. Cain*, 544 F.2d 1113, 1117 (1st Cir. 1976) (holding that defendant was not permitted to call his co-defendant to the stand despite the co-defendant having previously testified in a deposition). In multi-defendant cases like Porter's, the State alone would control the evidence and be able to deny a defendant equal access to witnesses. This, a defendant's

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42 In *McDaniel* the prosecutor was unaware that the testimony in question was protected by a statutory grant of immunity. In this instance, however, it is deliberate and knowing.

43 As now-United States District Court Judge Bennett has noted:

> [t]here is without question a great possibility of secret misuse of compelled testimony, since there is no great difficulty in finding sources "wholly independent" for a conclusion already reached from the leads of compelled testimony . . . . The task of proving that evidence offered is the result of illicit use of compelled testimony is an impossible burden for a defendant . . . . No defendant is in a position to pierce the law enforcement process and prove to a court that illicit use was made of his testimony.

Richard D. Bennett, *Self-incrimination: Choosing a Constitutional Immunity Standard*, 31 Md. L. Rev. 289, 300 (1972).

right to call an exculpatory witness who happens to be a co-defendant, may depend on the luck of the draw in trial scheduling. *Davis v. State*, 207 Md. App. 298, *cert. denied*, 429 Md. 529 (2012) (holding that defendant had no right to a continuance of his trial until his co-defendant's juvenile adjudication). Or worse, a defendant's ability to call an exculpatory witness may be foreclosed, as has already happened to Porter, by the State's deliberate engineering of the trial schedules of multiple defendants.

An example cited by Goodson in his Motion to Lift Stay filed in the Court of Special Appeals illustrates the inherent unfairness the State can create:

> Assume that Defendants A and B were also officers who were indicted relating to the death of Gray. Both defendants refuse to testify in the trial of Officer Goodson and invoke their 5th Amendment privilege. Assume also that Defendant A has inculpatory testimony against Officer Goodson and Defendant B has exculpatory testimony. The State could subpoena Defendant A, provide immunity under § 9-123, and elicit inculpatory testimony and purposefully not call Defendant B because the testimony will hurt its case. Officer Goodson has no way of compelling Defendant B's testimony. As a result, this distorts the fact-finding process and essentially deprives a defendant of his right to a fair trial.

(App. 24 n.5.)

What is more, this hypothetical situation that may arise in Officer Goodson's trial already actually happened in Porter's mistrial. Although not part of the record below, one of Porter's co-defendants provided a sworn statement to the police indicating that during the initial arrest Gray indicated he was having trouble breathing.[44] Because it was in the State's interest, it did not call Porter's co-defendant who had exculpatory information and supported Porter's testimony that Gray said he could not breathe at the

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[44] Porter will provide a copy of the statement at the Court's request.

initial arrest. Because of the co-defendant's Fifth Amendment privilege, Porter could not call him as a witness. The end result is that the State created an unequal playing field. This unfairness is compounded by the State's suggestion to the jury during closing that such information did not exist.

There is also a Sixth Amendment issue with regard to the State's purported course of action. Porter is, of course, entitled to counsel of his choice. *State v. Goldsberry*, 419 Md. 100, 132 (2011). And it is surely obvious that Porter's counsel and he have discussed this matter at length over the preceding months. So what, then, should happen if, as a result of the State's threats of perjury and contempt, Porter testifies inconsistently under grant of immunity with what he has informed his counsel? To be clear: a lawyer may not suborn perjury. *See, e.g.*, *Green v. State*, 25 Md. App. 679, 697-98 (1975). Rule 3.3 of the Rules of Professional Conduct, which governs the undersigned, contains a number of prohibitions. But, in a nutshell, counsel shall not offer anything to a court that they know to be incorrect, shall correct anything that they later learn to be false, and may refuse to offer evidence they reasonable believe to be false. If this Court allows Porter to testify once, twice, thrice or more, it may very well violate Porter's right to counsel of his choice, because counsel will be in an untenable position. This is not a coextensive position.

VII. CONCLUSION

For almost a quarter millennium the legislatures of Maryland have enunciated laws. The courts of Maryland have interpreted them. And, in all that time, there is not an analogous situation which this Court can call upon to guide it. That in and of itself

speaks volumes to the length the State seeks to go to bend Porter's rights, so that their cases against Goodson and White do not break.

The statute the State seeks to rely on was not remotely meant to cover a situation like the one at bar. It was designed for *witnesses*. Porter has a pending homicide trial, and yet the State seeks to have him testify to those very same events in their thirst to convict others. It is indubitably correct that this will give the State a leg up in their later quest to convict Porter. They will see firsthand not once, but twice or more, how Porter reacts to repeated direct and cross by parties with interests adverse to his. And, if their quest to convict Porter of homicide fails, the State will now have further instances under oath that they have already asserted loudly and repeatedly constitute perjured testimony. There are witnesses, and there are defendants with pending homicide trials. It is time to tell the State that never the twain shall meet.

Respectfully Submitted,

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CERTIFICATION OF WORD COUNT

This brief contains 12,959 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 that are set out in Rule 8-112.

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