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)

REPLY BRIEF OF APPELLANT WILLIAM PORTER

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I. INTRODUCTION

Appellant Officer William Porter ("Porter"), through counsel, submits this Reply Brief. The ruling of the Circuit Court for Baltimore City granting the State's motion to compel Porter to testify in the trials of Officer Caesar Goodson and Sergeant Alicia White should be reversed.

II. ARGUMENT

A. PORTER IS NOT A WITNESS

The State's Response devotes considerable bandwidth to saying that there is nothing extraordinary about the instant request, that Porter is amply protected, and that the aegis of the Circuit Court's § 9-123 Order will put Porter on the same footing as if he had never testified in the first place. The State is mistaken.

Porter is the appellant in this case, even though Goodson's and White's names are in the case caption. That, by itself, shows that he is not just a witness, but a defendant. Witnesses with immunity go home. But here, Porter faces for the charges already pending against him, and potential perjury charges lurk around every corner. Section 9-123 was not meant to be used in this way.

The State asserts that § 9-123 was passed to provide "an additional tool with which to fight the war on drugs." (Brief of Appellee at 14-15.) But even the example given in the position paper cited by the State was of two drug dealers who would otherwise invoke their privilege "before the grand jury." (App. 10.) There is nothing in the legislative history to support the State's argument that § 9-123 was passed to force criminal defendants with pending charges to testify.

The State's reliance on this Court's dicta in *In re Ariel G.*, 383 Md. 240 (2004), is also misguided. (Brief of Appellee at 20.) In *Ariel G.*, law enforcement sought a mother's assistance in locating a missing child. *Id.* at 242. An active investigation was ongoing.[1] *Id.* In this case, the results of the investigation were announced on May 1, 2015. Ms. Mosby identified who she thought responsible for Mr. Gray's death. Porter's name was on that list. To suggest now that there is currently an ongoing investigation relating to any of the criminal charges filed in connection with Gray's death is unsupportable.[2]

If there is one thing that both sides agree on it is that, for immunity to be valid it must "afford protection commensurate with that afforded by the privilege . . . the witness and the prosecutorial authorities [must be] in substantially the same position . . . [it has to be] coextensive." (Brief of Appellee at 18.) Where they part ways is whether § 9-123, as it applies to this particular defendant, achieves those ends. It does not.

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1 More to the point, because use immunity was never offered to the mother, there was no challenge by her as to whether the grant of immunity was appropriate under the facts of her case. 383 Md. at 254.

2 Likewise the State's citing of *Goldberg v. United States*, 472 F.2d 513, 514 (2d Cir. 1973) ignores that "Goldberg was called to testify before a grand jury in the same district, which was investigating possible violations of federal law on that subject, and was asked in substance the questions." (Brief of Appellee at 24-25.) The case against Porter and the other Officers went to the Grand Jury some nine months ago and, in the state's mind, there is nothing *possible* about the violations it alleges.

B. ALLOWING PORTER TO TESTIFY WOULD VIOLATE ARTICLE 22 OF MARYLAND'S DECLARATION OF RIGHTS

It is well established that "a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards." *Oregon v. Hass*, 420 U.S. 714, 719 (1975).

Against that backdrop, this Court has held, "we have previously interpreted Maryland's privilege against self-incrimination to be more comprehensive than that of the federal government." *Marshall v. State*, 415 Md. 248, 259 (2010) (citing *Crosby v. State*, 366 Md. 518, 527 (2001)). Less than a year ago, this Court re-affirmed that it is "highly protective of a defendant's ability to exercise his Fifth Amendment right to remain silent." *Simpson v. State*, 442 Md. 446, 461 (2015). Judge Harrell also has stated that there are "greater protections offered by Article 22 of the Maryland Declaration of Rights than the Fifth Amendment." *Crosby*, 366 Md. at 534. Thus:

> simply because a Maryland constitutional provision [or statute or common law principle] is *in pari materia* with a federal one or has a federal counterpart, does *not* mean that the provision will *always* be interpreted or applied in the same manner as its federal counterpart. Furthermore, cases interpreting and applying a federal constitutional provision are only persuasive authority with respect to the similar Maryland provision.

Marshall, 415 Md. at 259 n.4 (citing *Dua v. Comcast Cable*, 370 Md. 604, 621 (2002) (emphasis in the original)).

As a result of this basic distinction between the federal and state constitutions:

> this Court has maintained that the right to remain silent "has always been liberally construed in order to give fullest effect to this immunity . . . ." *Allen v. State*, 183 Md. 603, 607, 39 A.2d 820, 821 (1944) (citing *Blum v. State*, 94 Md. 375, 381, 51 A. 26, 28 (1902)).

Crosby, 366 Md. at 527 n.8. Thus, in *Marshall*, this Court announced that "we shall rest our decision, as we have often done in the past, solely upon the Maryland provisions," and that the citation of federal authority is "for guidance only." 415 Md. at 260. Accordingly, the State's argument that the Fifth Amendment and Article 22 provide the same protection is simply wrong. (Brief of Appellee at 43-46.)

Moreover, Maryland is not the only jurisdiction where a state constitution provides more protection than the federal counterpart. Alaska, California, Hawaii, Mississippi, Oregon, Massachusetts, and Pennsylvania all reach the same conclusion. (Brief of Appellant at 29.) In particular, the Mississippi Constitution reads that "In all criminal prosecutions the accused . . . shall not be compelled to give evidence against himself." Miss. Const. art. 3, § 26. This is, almost verbatim, the same as Maryland's. Mississippi's highest court stated that:

> [w]hat concerns us about the use/derivative use is that it permits a subsequent prosecution of the witness with evidence gained from independent sources. We regard it inevitable that under a use/derivative use immunity regime prosecutors will receive incentives to work backwards from what they learn from the witness. So-called independent sources in this sense will seldom be independent. Use/derivative use immunity will not prevent a prosecutor acting in good faith from relying inadvertently on information derived from immunized testimony in determining trial strategy in a subsequent prosecution.
>
> When a prosecutor decides to grant immunity to a witness such as John Wright-and thus [to] strip that witness of his right to remain silent, he must be prepared to make final peace with that witness, subject only to a possible perjury charge. To assure that this be so, we hold that Article 3, Section 26 of the Mississippi Constitution requires a transactional immunity grant.

Wright v. McAdory, 536 So. 2d 897, 903-04 (Miss. 1988).[3] That concern is no less critical here.[4]

Collectively, all of the previously cited state cases stand for the proposition that only witnesses with transactional immunity may be compelled to testify. Against this, the State cites one outlier: *Graves v. United States*, 472 A.2d 395 (D.C. 1984). Because this Court is not bound by *Graves*, Porter urges this Court to read the dissent in that case, and consider whether it is more in line with our state's precedent than the majority opinion. Secondly, the more reasoned opinion to come out of the District of Columbia is *United States v. Kim*, 471 F. Supp. 467 (D.D.C. 1979), which contains facts that are more analogous to Porter's case than *Graves*.

The State also argues that Maryland's immunity statute was "[m]odeled after the federal immunity statute upheld in *Kastigar*." (Brief of Appellee at 14.) While this is true, it omits that Maryland's Declaration of Rights was **not** modeled after the Fifth Amendment in that it includes the use of the word "evidence," which is surely a wider

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3 *See also State v. Soriano*, 684 P.2d 1220, 1232 (Or. Ct. App. 1984) (en banc), *aff'd*, 693 P.2d 26 (Or. 1984) (en banc) ("The drafters of Uniform Rule of Criminal Procedure § 732 (successor to the Model State Immunity Act) retained transactional immunity despite *Kastigar*, giving an extensive summary of the arguments in favor of it.").

4 See also *State v. Thrift*, 440 S.E.2d 341, 351 (S.C. 1994) ("The immunity is not adequate if it does no more than assure him that the testimony coming from his lips will not be read in evidence against him upon a criminal prosecution. The clues thereby developed may still supply the links whereby a chain of guilt can be forged from the testimony of others. To force disclosure from unwilling lips, the immunity must be so broad that risk of prosecution is ended altogether.") (citing with approval *In Re: Hearing Before Joint Legislative Committee, Ex parte Johnson*, 196 S.E. 164, 169 (S.C. 1938)).

protection. In sum, Article 22 protects Porter to an even greater degree than the Fifth Amendment, and compelling him to testify violates his rights under both provisions.

C. A LATER *KASTIGAR* HEARING IS INSUFFICIENT TO PROTECT PORTER'S RIGHTS

Mr. Schatzow is the second in command at the State's Attorney's Office. Ms. Bledsoe is a Deputy State's Attorney, one of only six others listed as part of Ms. Mosby's "Executive Team" on the Baltimore City State's Attorney's Office website. The idea that both would cease and desist in Porter's prosecution, and that their successor would work free and untainted from their influence and knowledge seems far-fetched.[5] The State vigorously opposed the defense's request that they be recused. Moreover, the successor prosecutor, in addition to working unfettered from his or her bosses most also, somehow, avoid the media saturation and prepare his or her case without learning what Porter was compelled to testify to either twice, or five times, depending on this Court's rulings.[6]

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5 *See also State v. Gonzalez*, 853 P.2d 526, 530 (Alaska 1993):

> In a perfect world, one could theoretically trace every piece of evidence to its source and accurately police the derivative use of compelled testimony. In our imperfect world, however, the question arises whether the judicial process can develop safeguards to prevent derivative use of compelled testimony that satisfy [the analogous state constitution]. Because we doubt that workaday measures can, *in practice*, protect adequately against use and derivative use, we ultimately hold that [a statute that requires only that] impermissibly dilutes the protection of [the state constitution].

Id. (emphasis in the original).

6 Likewise, a federal prosecutor would face the same impossible task of compartmentalizing Porter's compelled testimony from non-tainted information. Thus, even if the Court accepts the State's position that the federal government would later be precluded from making use of Porter's compelled testimony, Officer Porter's defense

Even assuming that the State could prove a lack of taint under *Kastigar* before a retrial, the compelled testimony would still infect the proceedings—every potential juror and witness must also a) recall exactly what they read or heard about Porter's compelled testify and b) truthfully disclose it in oral questioning by the circuit court.[7] Under those circumstances, Porter can never get a fair trial.

While the prosecution's task sounds nigh-on impossible, it is a walk in the park compared to the role of the undersigned. Suppose at Porter's June 2016 trial the State introduces evidence that, say, Porter's police radio was not working properly that day. It could be that Porter has never spoken about the functionality or otherwise of his radio. It could be that he talked to Detective Teel about it fourteen months earlier, or he testified at his trial concerning it, half a year earlier. All three of these scenarios are fair game. But it could also be that he was compelled to answer questions about his radio by the State or counsel for Goodson, White, Nero, Miller, or Rice. Questioning derived from any one of these sources would run afoul of *Kastigar*. Yet when the testimony is adduced, counsel will be expected to keep track of when and where said testimony was adduced, and make the objection before even the next question is asked. Porter started testifying during his hung jury trial at 10:48 A.M. (E. 0215.) He finished testifying at 4:22 P.M. (E. 0390.) Imagine this multiplied several times more. There is simply no practical way for defense counsel to contemporaneously keep track of who asked what,

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counsel may, years later, find him or herself attempting to look inside an Assistant United States Attorney's mind.

[7] A request for a jury questionnaire was denied by the trial court.

when, and how; and to somehow look inside the minds of prosecutors as to whether they are making use of compelled testimony.

The State has already told this Court that Porter was "inaccura[te] . . . that his taped recorded statement and his trial testimony are consistent." (Brief of Appellee at 10.) Imagine then the un-navigable minefield that Porter and his counsel will have to tread when Porter has testified five more times about events that occurred more than a year earlier. It is virtually inconceivable that such considerations will not color Porter's decision as to whether or not to testify in his re-trial. In a nutshell, should this Court allow him to be paraded unwillingly onto the stand on multiple occasions, it may make Porter's election for him.

The State's attempt to parse out what Porter can testify to that is truthful is beyond problematical.[8] It is hair splitting at the atomic level: combining what the prosecutors said about Porter in their closings, and what they seek to now adduce at the trials of others, the State accuses Porter of lying as to:

- What Porter said to Goodson when he drove up to Druid Hill and Dolphin.
- The condition Mr. Gray was in.
- How Mr. Gray was helped onto the seat of the wagon.
- The direction and alignment of the vehicles immediately afterward.

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[8] The State argues that if Porter intends to testify untruthfully he will "find no succor in the Fifth Amendment." (Brief of Appellee at 33.) In Maryland, though, the prosecution has sole charging authority. So, regardless of Porter's intentions, the State who have already called Porter a liar on these very same issues, gets to make the call.

The State says that they have a "good-faith belief" that some of Porter's testimony will be truthful, without citing to the record to evince what that belief is. (Brief of Appellee at 31-32.) In reality, the State does not know what testimony Porter will give. What Appellee really means is that there are two questions that they would have Porter answer in their quest to convict White and Goodson, and they remain indifferent to all the attendant circumstances of testimony that they have, and continue to label as, perjury. Specifically, the State fails to account for the fact that Porter will also be exposed to cross-examination by counsel for Goodson and White. Of course, each time Porter reiterates his earlier testimony—on direct or on cross—he remains susceptible to ten more years in the Department of Corrections.

The practical problems staring Porter down demonstrate *Kastigar*'s lack of utility. *Kastigar* was decided by the United States Supreme Court in 1972. Forty-four years ago. When it was issued the Watergate hearings had yet to commence. You would think then, given its relative antiquity, that there would have been plenty of occasions for this Court to opine on situations such as this one. Yet a search of Westlaw turns up only one *Kastigar* hearing, in *State v. Linda Tripp*, No. K-99-038397, 2000 WL 675492 (Md. Cir. Ct. May 5, 2000). This opinion is from the Circuit Court for Howard County, and is unreported.

Yet, despite this lack of application of *Kastigar*, the State's argument is that what is happening to Porter is:

> no different than any of the countless witnesses over the centuries to whom the government granted immunity in exchange for their compelled testimony . . . [t]he reality is far more mundane - - the State has chosen to

> use one of the many tools in its toolbox to prosecute the officers charged in the death of Freddie Gray.

(Brief of Appellee at 46.) Given that the only two people who show up in situations such as this one are a person with knowledge of Presidential infidelity, and Officer Porter, the situation could not be less mundane.

Likewise, the State's argument that Porter's "hand-wringing about the way in which the State is handling his subsequent prosecution is unfounded and premature," is itself unavailing. This is because:

> "one mischief to be prevented by the privilege is not only the risk of conviction but the risk of prosecution. The risk of prosecution is not a risk which the wise take lightly. As experienced a judge as Learned Hand once said, 'I must say that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and of death.' See Frank, Courts on Trial (1949), 40." . . . By invoking the privilege one retains the security that comes with knowing that the government is left to its own devices to ascertain illegality and produce evidence. If one is compelled to testify, though, that security vanishes entirely and the individual cannot help but wonder if he is now caught in an untraceable web of effects that might lead to the ordeal of a trial, regardless of how innocuous the questioning might appear. Only an immunity that prevents the risk of such ordeal can duplicate the effect of invoking the privilege.

D'Elia v. Pennsylvania Crime Comm'n, 555 A.2d 864, 871 (Pa. 1989) (some internal citations omitted).

D. THIS COURT CANNOT BIND THE UNITED STATES

The United States Attorney's Office reminded the undersigned on March 1, 2016 that they have already announced their position. It is that:

> The Department of Justice has been monitoring developments in Baltimore, Md., regarding the death of Freddie Gray . . . . Based on preliminary information, the Department of Justice has officially opened this matter and is gathering information to determine whether any prosecutable civil rights

> violation occurred . . . the investigation . . . would include the FBI, the U.S. attorney's office and civil rights lawyers within the department.[9]

Thus, it is hardly surprising that the United States have provided no assurances whatsoever to Porter as to what will happen as a result of his testimony, compelled or otherwise.

No defense attorney in this situation would ever advise his client that he was protected against his statement being used federally. The authority cited by the State for that proposition does not apply to Porter. *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964), is more than half a century old. The portion of *United States v. Balsys*, 524 U.S. 666 (1998), that Appellee would have this Court rely on is mere dicta. The only course that adequately protects Officer Porter is to ensure that he never gets on the stand in the first place.

III. CONCLUSION

At his trial Porter would have loved to have called several of the other charged officers in this case, to corroborate and buttress his testimony as to what occurred on April 12, 2015. He could not, as there is no basis under which a defendant can confer immunity on anyone. From a fundamental fairness perspective, however, the State would have this Court believe that they can bestow immunity as they see fit, and neither a

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[9] In an email to the undersigned (Mr. Proctor), the United States Attorney for the District of Maryland, Mr. Rosenstein, referred him to http://www.baltimoresun.com/news/maryland/crime/bs-md-gray-federal-probe-20150421-story.html. This story was published on April 21, 2015.

Defendant nor a Court can say otherwise.[10] Indeed, the Position Paper has handwritten at the top "from AG's office." (App. 9.) Thus, it appears that the executive branch told the legislative branch why § 9-123 should be enacted, and now it is telling the judicial branch how it should be interpreted. That said, the position paper in question makes clear that the bill of goods that was sold to the Legislature was not designed to cover situations analogous to Porter's.

As stated throughout both sides' pleadings, the immunity must *at least* be coextensive with what would have happened had Porter never been compelled to testify.[11] It cannot seriously be maintained that Porter testifying on direct, and subject to cross-examination by parties whose interests are adverse to his, two or five more times, with so many members of the press in attendance that an overflow media room has been created, reporting on it in close to real time, would leave him in the same position as if it had never happened.

This Court should give the State's attempt to make Porter their piñata the boot.

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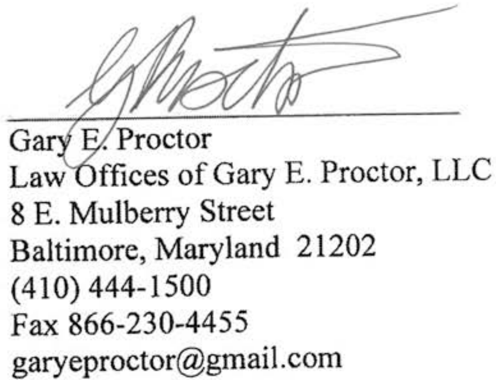
[10] The immunity order in question states that Porter "shall testify as a witness for the State." (E. 0209.) Thus, there is no basis under which Goodson or White may recall Porter to the stand. In the event that whatever they want to ask Porter is beyond the scope of his direct examination, they will be stuck with his answers.

[11] Porter says "at least" because, as argued *supra*, he believes that Article 22 offers him rights over and above the federal constitutional minimum.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March 2016, a copy of Porter's Reply Brief was sent via electronic mail and first class, postage pre-paid mail to:

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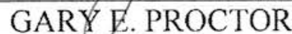

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CERTIFICATION OF WORD COUNT

This brief contains 4,221 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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