

IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

SEPTEMBER TERM, 2015

NO. 2308

RECEIVED

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BY THE COURT OF SPECIAL APPEALS

CAESAR GOODSON,

Appellant,

v.

STATE OF MARYLAND,

Appellee.

APPEAL FROM THE CIRCUIT COURT
FOR BALTIMORE CITY

(Hon. Barry G. Williams, Motions Judge)

BRIEF AND APPENDIX OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
QUESTION PRESENTED	1
STATEMENT OF FACTS.....	2
ARGUMENT	5
I. COURTS AND JUDICIAL PROCEEDINGS, SECTION 9-123 PROVIDES PORTER SUFFICIENT PROTECTION AGAINST SELF-INCRIMINATION TO ALLOW HIS TESTIMONY TO BE COMPELLED IN THE TRIAL OF CAESAR GOODSON.....	5
A. The History of Immunity Statutes.....	8
B. Maryland’s Immunity Statute.....	11
C. Ordering Porter to testify under Section 9-123 does not violate his Fifth Amendment privilege	15
1. Porter’s Fifth Amendment privilege is not enhanced because he is currently pending criminal charges	18
2. Porter has no Fifth Amendment right to commit perjury, and the State’s arguments at Porter’s first trial regarding his credibility are irrelevant.....	23
3. Immunity provided under § 9-123 protects Porter from federal prosecution	31
4. Porter’s complaints about the lack of a “taint team” can be resolved, if necessary, prior to his retrial.....	33

D. Ordering Porter to testify under § 9-123 does not violate his rights under Article 22 of the Maryland Declaration of Rights	35
CONCLUSION	39
CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH MD. RULE 8-112.	40
PERTINENT PROVISIONS	41

TABLE OF APPENDIX CONTENTS

Sept. 15, 2015 letter to Judge Williams	Apx. 1-2
Subpoena for William Porter	Apx. 3
State’s Motion to Compel	Apx. 4-8
Order Compelling Porter to Testify	Apx. 9-10
Position Paper for HB 1311	Apx. 11-19

TABLE OF AUTHORITIES

Cases

<i>Adkins v. State</i> , 316 Md. 1 (1989)	36
<i>Choi v. State</i> , 316 Md. 529 (1989)	36
<i>Counselman v. Hitchcock</i> , 142 U.S. 547 (1892).....	10
<i>Crosby v. State</i> , 366 Md. 518 (2001)	36
<i>Earp v. Cullen</i> , 623 F.3d 1065 (9th Cir. 2010).....	26
<i>Ellison v. State</i> , 310 Md. 244 (1987)	36, 37, 38
<i>Goldberg v. United States</i> , 472 F.2d 513 (2d Cir. 1973)	20
<i>Graves v. United States</i> , 472 A.2d 395 (D.C. 1984).....	20
<i>In re Ariel G.</i> , 383 Md. 240 (2004)	16, 17
<i>In re Bonk</i> , 527 F.2d 120 (2d Cir. 1975)	30
<i>In re Grand Jury Proceedings Appeal of Frank Derek Greentree</i> , 644 F.2d 348 (5th Cir. 1981).....	28, 29, 30
<i>In re Grand Jury Proceedings</i> , 889 F.2d 220 (9th Cir. 1989).....	22

<i>Johnson v. Fabian</i> , 735 N.W.2d 295 (Minn. 2007).....	30, 31
<i>Kastigar v. United States</i> , 406 U.S. 441 (1972).....	<i>passim</i>
<i>Kronick v. United States</i> , 343 F.2d 436 (9th Cir. 1965).....	27
<i>Marshall v. State</i> , 415 Md. 248 (2010)	36
<i>Murphy v. Waterfront Comm'n of New York Harbor</i> , 378 U.S. 52 (1964).....	32
<i>Napue v. People of State of Ill.</i> , 360 U.S. 264 (1959).....	25
<i>Saint Joseph Medical Center, Inc. v. Cardiac Surgery Associates, P.A.</i> , 392 Md. 75 (2006)	7
<i>Smith v. State</i> , 283 Md. 187 (1978)	37
<i>United States v. Apfelbaum</i> , 445 U.S. 115 (1980).....	26
<i>United States v. Cintolo</i> , 818 F.2d 980 (1st Cir. 1987).....	27
<i>United States v. Doe</i> , 819 F.2d 11 (1st Cir. 1987).....	27
<i>United States v. Hampton</i> , 775 F.2d 1479 (11th Cir. 1985).....	32
<i>United States v. Hubbell</i> , 530 U.S. 27 (2000).....	15, 16, 34

<i>United States v. Jones</i> , 542 F.2d 186 (4th Cir. 1976).....	32
<i>United States v. Mills</i> , 704 F.2d 1553 (11th Cir. 1983).....	25
<i>United States v. Patrick</i> , 542 F.2d 381 (7th Cir. 1976).....	27, 28
<i>United States v. Schwimmer</i> , 882 F.2d 22 (2d Cir. 1989).....	21, 22
<i>United States v. Turkish</i> , 623 F.2d 769 (2d Cir. 1980).....	16
<i>Zicarelli v. New Jersey</i> , 406 U.S. 472 (1972).....	11

Constitutional Provisions

Article 22 of the Declaration of Rights	8, 38
---	-------

Statutes

18 U.S.C. § 1623.....	27, 28
Md. Code Ann, Cts. & Jud. Proc., § 9-123 (2015)	<i>passim</i>

Other Authorities

1 WHARTON'S CRIMINAL LAW § 80.....	6
------------------------------------	---

Wayne LaFave, 3 Crim. Proc. § 8.11.....8, 11

*The Federal Witness Immunity Acts In Theory And Practice: Treading
The Constitutional Tightrope,*
72 Yale L.J. 1568 (1963)8, 9

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Caesar Goodson is pending second degree murder and related charges in the Circuit Court for Baltimore City (Case Number 115141032). On January 6, 2016, the State sought an order compelling William Porter to testify as a witness in Goodson's trial pursuant to Courts & Judicial Proceedings Section 9-123. The circuit court issued an order compelling Porter to testify. Porter noted a timely appeal, and sought to enjoin enforcement of the order compelling him to testify pending resolution of the appeal.

On January 8, 2016, this Court stayed the order compelling Porter's testimony. On January 11, 2016, this Court stayed the trial of Caesar Goodson pending a resolution of Porter's appeal.

QUESTION PRESENTED

Does Courts and Judicial Proceedings, Section 9-123 provide Porter sufficient protection against self-incrimination to allow his testimony to be compelled in the trial of Caesar Goodson?

STATEMENT OF FACTS

Freddie Gray was injured in police custody on April 12, 2015. He died from his injuries a week later. Six police officers were charged in connection with Gray's death: William Porter; Caesar Goodson; Alicia White; Garrett Miller; Edward Nero; and Brian Rice.

Pursuant to the prosecutor's request, Porter was tried first. (Apx. 1-2). Porter's trial began on November 30, 2015, and ended in a mistrial on December 16, 2015, after jurors were unable to reach a verdict. Porter's case is scheduled for retrial in June of this year.

Until it was stayed by this Court, Goodson's trial was scheduled to begin on January 11, 2016. One month prior to the start of Goodson's trial, the State served Porter with a subpoena to appear and testify as a witness for the prosecution. (Apx. 3). Porter moved to quash the subpoena, which motion was denied at a hearing on January 6, 2016. (H.1/6/16 40).

At that same hearing, Porter took the stand and testified that, if called as a witness in Goodson's trial, he intended to invoke his Fifth Amendment privilege against self-incrimination.

(H.1/6/16 44). The State sought an order compelling Porter's testimony pursuant to Courts and Judicial Proceedings Article, § 9-123. (Apx. 4-8; H.1/6/16 41-42). In its written motion, the State averred that Porter's testimony "may be necessary to the public interest," and that Porter was refusing to testify based upon his privilege against self-incrimination. (Apx. 4).

Porter objected to being compelled to testify on a number of grounds, including that: 1) Section 9-123 does not protect his right against self-incrimination under Article 22 of the Maryland Declaration of Rights, (Motion to Quash Trial Subpoena 33-35; H.1/6/16 48-50, 58); 2) Section 9-123 does not offer immunity coextensive with the Fifth Amendment because it did not protect against his testimony being used in a federal prosecution, (Motion to Quash Trial Subpoena 28-32; H.1/6/16 51-52); and 3) Section 9-123 does not provide immunity coextensive with the Fifth Amendment because he could still be prosecuted for perjury. (Motion to Quash Trial Subpoena at 13-16; H.1/6/16 53, 57-58).

Porter also argued that the State should not be permitted to compel his testimony because doing so would be the equivalent of the State suborning perjury and would turn the prosecutors into

witnesses. (Motion to Quash Subpoena at 22-37). Finally, Porter said that it would be impossible to prevent future jurors and the State from using his immunized testimony against him in a later trial. (Motion to Quash at 16-18).

The State responded that Article 22 has been interpreted as *in pari materia* with the Fifth Amendment, that Supreme Court case law prevents compelled testimony from being used in a federal prosecution, and that Porter has no Fifth Amendment privilege to commit perjury. (State's Response to Motion to Quash Subpoena at 3-4, 6, 10-12; H.1/6/16 59, 60, 62-63). The State also noted that, prior to any retrial, it would be obligated to prove that it was not using Porter's immunized testimony (or anything derived from the testimony) in the case against him. (State's Response to Motion to Quash Subpoena at 9-10; H.1/6/16 59-60).

Moreover, the State said, Porter's complaints about potential improper use of the immunized testimony were not a reason to deny the motion to compel. (H.1/6/16 59-60). Any arguments about what effect Porter's immunized testimony would have on the ability for the State to retry him could be made by motion prior to that retrial. (H.1/6/16 59-60).

After hearing argument, the court issued an order pursuant to the State's request. (Apx. 9-10). The order stated that Porter must testify as a witness in Goodson's case, that he "may not refuse to testify on the basis of his privilege against self-incrimination," and that "no testimony of [Porter], compelled pursuant to this Order, and no information directly or indirectly derived from the testimony of Officer Porter compelled pursuant to this Order, may be used against Officer Porter in any criminal case, except in a prosecution for perjury, obstruction of justice, or otherwise failing to comply with this Order." (Apx. 9-10). This appeal followed.

ARGUMENT

COURTS AND JUDICIAL PROCEEDINGS, SECTION 9-123 PROVIDES PORTER SUFFICIENT PROTECTION AGAINST SELF-INCRIMINATION TO ALLOW HIS TESTIMONY TO BE COMPELLED IN THE TRIAL OF CAESAR GOODSON.

In a brief laced with attacks on the prosecution generally and the individual prosecutors specifically, Porter accuses the State of taking actions that are "without precedent," engaging in behavior that "wreaks [sic] of impropriety," and seeking to make law that "flies in the face of 12 score years of Anglo-Maryland [sic]

jurisprudence.” (Brief of Appellant at 1, 3, 37). Porter characterizes himself as “the designated whipping boy[;]” a victim of the State’s thirst for a conviction in the death of Freddie Gray. (Brief of Appellant at 1).

The reality is that the prosecution in this case did nothing improper, unethical, or unprecedented. It did no more than what prosecutors do every day all over the country. Every state and the federal government have a statute that allows for compelled testimony after the grant of immunity. *See* 1 WHARTON’S CRIMINAL LAW § 80 (15th ed.) (immunity statutes “are in force in the federal jurisdiction and in every state”). Here, pursuant to Maryland’s immunity statute, the prosecution exercised its discretion to grant Porter use and derivative use immunity, and requested and received an order compelling him to testify. There is nothing unusual or inappropriate about that.

Nevertheless, Porter now appeals the order compelling him to testify.¹ He alleges that the order violates his privilege against self-incrimination under the federal and state constitutions, and that allowing the State to call him as a witness would be akin to suborning perjury because the State challenged his credibility at his first trial. Porter's claims are without merit. Being compelled to testify pursuant to the order, which provides that neither Porter's testimony nor any information directly or indirectly derived from his testimony can be used against him in any criminal case, except in a prosecution for perjury, obstruction of justice, or violation of the order to compel, does not violate Porter's Fifth

¹ Porter claims that the issuance of the motion to compel is appealable under the collateral order doctrine. (Brief of Appellant at 13-17). It is not, but it is likely appealable as a final judgment. The Court of Appeals in *Saint Joseph Medical Center, Inc. v. Cardiac Surgery Associates, P.A.*, 392 Md. 75, 90 (2006), held that a discovery order issued to a third party in a civil case is not appealable under the collateral order doctrine, but "[i]n situations where the aggrieved appellant, challenging a trial court discovery or similar order, is not a party to the underlying litigation in the trial court," the aggrieved appellant may appeal the order because "it is a final judgment with respect to that appellant[.]"

Amendment privilege and it does not violate Porter's rights under Article 22 of the Declaration of Rights.

A. The History of Immunity Statutes

“Immunity statutes have historical roots deep in Anglo-American jurisprudence[.]” *Kastigar v. United States*, 406 U.S. 441, 445 (1972). Indeed, “[t]he use of immunity grants to preclude reliance upon the self-incrimination privilege predates the adoption of the constitution.” Wayne LaFave, 3 *Crim. Proc.* § 8.11(a) (4th ed.). In 1725, for example, after Lord Chancellor Macclesfield was accused of selling public appointments, the English Parliament passed a law immunizing Masters of Chancery and compelled those officeholders to testify regarding how they secured those positions. *See Kastigar*, 406 U.S. at 445 n.13 (discussing the origins of immunity statutes).

In the United States, New York and Pennsylvania passed immunity statutes in the late 1700's. *Id.* The first federal immunity statute was passed in 1857 — it offered immunity from criminal prosecution to “anyone required to testify before either House of Congress or any committee[.]” *The Federal Witness*

Immunity Acts In Theory And Practice: Treading The Constitutional Tightrope, 72 Yale L.J. 1568, 1610 n.15 (1963). A decade later, another statute was passed extending this immunity to testimony "in any judicial proceeding." *Id.* at 1572 (quoting 15 Stat. 37 (1868)).

Statutes authorizing compelled testimony in exchange for immunity from prosecution are not only time-tested, they are important to the proper functioning of our criminal justice system. Far from running afoul of the values underpinning the right against self-incrimination, immunity statutes "seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify." *Kastigar*, 406 U.S. at 446. In fact, the Supreme Court has acknowledged that immunity statutes are "essential to the effective enforcement of various criminal statutes[;]" they "reflect[] the importance of testimony" and the reality that "many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime." *Id.* at 446-47.

The last meaningful change in immunity statute jurisprudence occurred 43 years ago when the Supreme Court

confirmed in *Kastigar* that offering a witness use and derivative use immunity (as opposed to blanket transactional immunity) was sufficient to protect the witness's Fifth Amendment privilege. In 1892, the Court struck down a statute that offered only use immunity in exchange for compelled testimony. *Counselman v. Hitchcock*, 142 U.S. 547, 564 (1892). That statute did not offer protection coextensive with the Fifth Amendment, the Court said, because it left open the possibility that the witness's testimony would be used "to search out other testimony to be used in evidence against him or his property[.]" *Id.*

For eighty years, the Court's decision in *Counselman* was interpreted to mean that only transactional immunity was sufficient to protect a witness's Fifth Amendment privilege. In *Kastigar*, however, the Court explained that the deficiency in the *Counselman* statute was its failure to offer protection against evidence derived from immunized testimony. *Kastigar*, 406 U.S. at 453-54. So long as a statute offered use *and derivative use* immunity, the Court said, it offers sufficient protection to pass constitutional muster. *Id.* Thus, the Court held that the federal statute under consideration in *Kastigar*, which compelled a

witness to testify, but prevented his or her “testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)” from being used in any subsequent criminal proceedings, “is consonant with Fifth Amendment standards.” *Id.* at 453.

B. Maryland’s Immunity Statute

After *Kastigar* and its companion case *Zicarelli v. New Jersey*, 406 U.S. 472 (1972), were decided, roughly half the states amended their immunity statutes to offer use and derivative use immunity. 3 Wayne R. LaFare, *Criminal Procedure*, § 8.11(b) (4th ed.) Maryland’s immunity statute, codified as Courts and Judicial Proceedings, § 9-123, was enacted in 1989. Modeled after the federal immunity statute upheld in *Kastigar*, it was passed in order to provide prosecutors an additional tool with which to fight the war on drugs. See *Position Paper* on H.B.1311 at 1-2 (stating that the language of the bill is “based substantially on the federal immunity statutes”).²

² For the Court’s convenience, a copy of the position paper is appended at Apx. 11-19.

As with the federal statute, Maryland's immunity statute vests the prosecutor with broad discretion to decide upon whom to grant immunity. *Id.* at 8. Under § 9-123, once the prosecutor determines that a witness's testimony "may be necessary to the public interest," and requests that the court order the witness to testify on the condition of use and derivative use immunity, the court "shall" issue such an order. Md. Code Ann, Cts. & Jud. Proc., § 9-123(c)-(d). Senator Leo Green, in his statement before the House Judiciary Committee in favor of the legislation, explained that the statute "specifies that the circuit court must order a witness to testify upon the request of the State's Attorney or the Attorney General[.]" *Statement of Senator Leo Green before the House Judiciary Committee on SB27, March 30, 1989 at 1.*³

Save for minor changes not relevant here, Section 9-123 has remained the same since its passage in 1989. In its current form, it reads:

³ Whether the circuit court retains any discretion to deny compliant § 9-123 requests is the subject of the appeal in *State v. Garrett Miller*, No. ___, Sept. Term, 2015; *State v. Edward Nero*, No. ___, Sept. Term, 2015; and *State v. Brian Rice*, No. ___, Sept. Term, 2015.

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

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

(3) “Prosecutor” means:

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

(ii) A Deputy State's Attorney;

(iii) The Attorney General of the State;

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

(v) The State Prosecutor or Deputy State Prosecutor.

(b) *Refusal to testify; requiring testimony; immunity*—

(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) *Order requiring testimony*—(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) *Prerequisites for order*—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.

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

Md. Code Ann., Courts & Jud. Proc., § 9-123.

C. Ordering Porter to testify under Section 9-123 does not violate his Fifth Amendment privilege

To comply with the Fifth Amendment's prohibition against self-incrimination, a grant of immunity "must afford protection commensurate with that afforded by the privilege." *Kastigar*, 406 U.S. at 453. In other words, the immunity must leave "the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege." *Id.* at 462.

The use and derivative use immunity granted to Porter is coextensive with the scope of a witness's Fifth Amendment privilege. The Supreme Court in *Kastigar* expressly held as much. *Id.* at 453; accord *United States v. Hubbell*, 530 U.S. 27, 40 (2000). This type of immunity is sufficient, the Court explained, because there is a "sweeping prohibition" of the use of any evidence derived from the immunized testimony, which safeguards against compelled testimony being used to provide investigatory leads or otherwise assist the State in its prosecution of the witness. *Kastigar*, 406 U.S. at 460.

Another aspect of this “very substantial protection,” the Court explained, is that the witness is “not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities.” *Id.* There is “an affirmative duty on the prosecution, not merely to show that its evidence is not tainted by the prior testimony, but ‘to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.’” *Hubbell*, 530 U.S. at 40 (quoting *Kastigar*, 406 U.S. at 40). Once the prosecution compels testimony pursuant to use and derivative use immunity, it shoulders the “heavy burden” of proving “that its evidence against the immunized witness has not been obtained as a result of his immunized testimony.” *United States v. Turkish*, 623 F.2d 769, 775 (2d Cir. 1980).

The Court of Appeals has acknowledged, albeit in dicta, the sufficiency of use and derivative use immunity to protect a witness’s Fifth Amendment privilege. In *In re Ariel G.*, 383 Md. 240, 243-44 (2004), the Court considered whether a mother could be held in contempt for refusing to answer questions regarding the whereabouts of her child when it was suspected that the mother

had kidnapped the child from the custody of child protective services. The Court held that the mother had a Fifth Amendment right to refuse to answer questions about the child's disappearance. *Id.* at 253. The Court went on to add, however, that the mother could have been given § 9-123 immunity and then she would have had to testify "or face contempt of court charges." *Id.* at 255. Citing *Kastigar*, the Court said that once a witness has use and derivative use immunity, the court can "punish a parent who refuses to testify without offending the constitutional guarantees of the Fifth Amendment." *Id.* "In doing so, the court balances its interest in prosecuting unlawful conduct and providing for the welfare of abused and missing children, all while respecting the accused's constitutional rights." *Id.*

Although Porter acknowledges *Kastigar*, and concedes that § 9-123 immunity may be sufficient to protect a witness's Fifth Amendment privilege in some cases, he argues that, in his case, it is insufficient. (Brief of Appellant at 2). Porter proffers four reasons for this: 1) he is currently pending criminal charges stemming from the same incident about which he is being compelled to testify; 2) the State will prosecute him for perjury

regardless of his testimony because it attacked his credibility in his first trial; 3) he is being investigated federally; and 4) the State has failed to establish safeguards to avoid making derivative use of his immunized testimony. None of Porter's complaints render the immunity conferred by § 9-123 insufficient.

1. *Porter's Fifth Amendment privilege is not enhanced because he is currently pending criminal charges*

Porter repeatedly contends that he is not a "witness," he is a "defendant." (Brief of Appellant at 2, 32, 42). Porter argues that "[t]here are witnesses, and there are defendants with pending homicide trials[,]" and urges this Court to hold that "the twain shall [never] meet." (Brief of Appellant at 42). Porter looks to the State's desire to try him before any of the other officers as recognition that "Porter had to go first in order that he not have a Fifth Amendment privilege." (Brief of Appellant at 3).

The State's request to try Porter first is a red herring. Although seized upon by Porter as evidence of wrong-doing, trying Porter first was a simple matter of judicial economy. Had Porter been convicted, the State would have provided him with § 9-123

immunity and compelled him to testify. The difference is that, unless Porter's convictions were reversed on appeal, the State would have avoided a *Kastigar* hearing because it concluded its case against Porter prior to hearing the immunized testimony. Had Porter been acquitted, he would no longer have had a Fifth Amendment privilege, and the State could have compelled him to testify. In that case, a *Kastigar* hearing would not be necessary because the State could not place Porter twice in jeopardy for any crime related to the death of Freddie Gray. Trying Porter first was a matter of common sense, not malice.

Moreover, Porter's insistence on labeling himself a defendant, and not a witness, misses the point. To be sure, in the case of the State of Maryland versus William Porter, Porter is the defendant. But in the other five cases related to the death of Freddie Gray, Porter is a witness. More importantly, Porter fails to explain the significance of the fact that he is actually facing criminal charges, as opposed to potentially facing criminal charges. With regard to his right not to provide the State with evidence to use against him, whether he is currently a defendant or a potential future defendant is of no moment.

The Second Circuit, in *Goldberg v. United States*, 472 F.2d 513, 515 (2d Cir. 1973), agreed with this assessment. Goldberg was charged with possessing money stolen from a bank. *Id.* at 514. While his charges were pending, he was given use and derivative use immunity and brought before a grand jury to answer questions about the theft of the bills. *Id.* at 514-15. Goldberg argued that the federal immunity statute was not intended to apply to “a person who was already the subject of a criminal complaint for the transaction into which the grand jury was inquiring[.]” or, if it did, such application was unconstitutional. *Id.* at 515.

The court found “no basis” for the distinction. *Id.* Referring to Goldberg’s reliance on the word “witness” in the statute, the court said: “[I]t seems clear that this includes a witness before the grand jury, which Goldberg surely is, even if he is also a potential defendant at a later trial.” *Id.* While the court acknowledged that the risks of prosecution might be “more immediate and less theoretical” for a person already facing criminal charges, there was no distinction in terms of the sufficiency of use and derivative use immunity. *Id.* at 516. *See also Graves v. United States*, 472 A.2d 395, 402 (D.C. 1984) (“Once granted a duly authorized assurance

of immunity, an indicted but untried defendant must testify, as ordered, and then challenge the government's compliance at a later *Kastigar* hearing before his or her own trial.”).

The court applied this reasoning to a convicted defendant pending appeal in *United States v. Schwimmer*, 882 F.2d 22, 23 (2d Cir. 1989). There, the court held that, consistent with the Fifth Amendment, “a defendant who has been tried, convicted, and whose appeal is pending may be granted use immunity and then be compelled to testify before a grand jury on matters that were the subject of his conviction[.]”

The possibility that Schwimmer's conviction might be reversed on appeal and he would be subject to retrial did not sway the court's decision. Should this happen, the court said, the government would be required to prove that any evidence used at Schwimmer's retrial was derived from sources independent of the immunized testimony. *Id.* at 24.

Indeed, the court noted, Schwimmer's first trial helps ensure the government's compliance with the dictates of *Kastigar*. The first trial provides a record against which to compare the prosecution's proof at the second trial. *Id.* “Armed with that record,

the trial court could readily determine whether the government had deviated from the proof offered during the first trial[,]” and if they had, “could then require the government to carry its burden of proving that any evidence not presented at the first trial was derived from sources wholly independent of the immunized testimony.” *Id. Accord In re Grand Jury Proceedings*, 889 F.2d 220, 222 (9th Cir. 1989) (“a witness whose appeal is pending may be compelled to testify by a grant of use immunity”).

Porter enjoys the same insurance against derivative use of his compelled testimony that Schwimmer did. Porter’s first trial memorialized the State’s evidence against him. If the State seeks to introduce additional evidence against him at retrial, it will carry the “heavy burden” of showing that it was not derived from his immunized testimony. Contrary to Porter’s claim, the fact that he “faces a pending manslaughter trial” does not make the State’s application of § 9-123 “wreak[] [sic] of impropriety.” (Brief of Appellant at 3).

2. *Porter has no Fifth Amendment right to commit perjury, and the State's arguments at Porter's first trial regarding his credibility are irrelevant*

Porter next accuses the State of providing “a farcical grant of immunity” in order to “lay a foundation for evidence that the State has deemed . . . [to be] perjury.” (Brief of Appellant at 24). Porter seems to be arguing that because the State contended at his first trial that portions of his testimony were not credible, if he testifies consistently at Goodson’s trial, the State will have suborned perjury, and, moreover, could charge Porter with committing perjury. Porter’s claim is without merit.

First, the truthfulness *vel non* of a witness’s testimony is not an all-or-nothing proposition. The State argued at Porter’s trial that portions of Porter’s taped statement and trial testimony (specifically, his testimony regarding his inability to identify the other officers at one of the scenes, Gray’s physical condition at one point in the series of events, and at what point Gray first said that

he could not breathe) were not credible.⁴ The State has no intention of soliciting that testimony “as true” from Porter at Goodson’s trial.

The State is confident, however, that Porter will offer truthful testimony regarding other events that occurred the day of Gray’s arrest. The State has a good-faith belief that, if compelled to do so, Porter will testify to conversations he had with Goodson regarding Gray’s condition and whether to seek medical attention for Gray, and to conversations he had with White regarding the plan to seek medical attention for Gray. It is that testimony that the State seeks to compel.

⁴ One of several ethical violations Porter accuses the prosecutors of committing is opining as to his credibility. (Brief of Appellant at 8 n.2). The prosecutors did no such thing. Porter’s own excerpts establish that the prosecutors argued that “the state proved through the evidence” that portions of Porter’s version of events was not credible. (Brief of Appellant at 8). Indeed, one of the prosecutors explained to the jury how the State endeavored to establish that Porter was not telling the whole truth: by “showing inconsistencies in [his] statements[,]” by proving that his statements were “inconsistent with each other[,]” and by proving that Porter’s version of events “makes no sense at all[.]” (Brief of Appellant at 9). The prosecutors were not offering their personal opinions as to Porter’s credibility, they were urging the jury to conclude based on the evidence that part of what Porter said was not true. There was nothing inappropriate about the prosecutors’ closing arguments.

Porter's argument that Goodson's cross-examination of him will elicit testimony that the State believes is false, and that this is akin to suborning perjury, is likewise unpersuasive. (Brief of Appellant at 19-21). To be sure, "[f]or 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." *United States v. Mills*, 704 F.2d 1553, 1565 (11th Cir. 1983). And "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. People of State of Ill.*, 360 U.S. 264, 269 (1959). But the prosecution is not seeking to offer false evidence, nor to obtain a conviction through the use of false evidence. The State cannot control what Porter is asked during cross-examination or how he answers. The possibility that Porter might perjure himself is not a reason to preclude the State from compelling his testimony.⁵

⁵ Porter also seems to suggest that testimony he gives during cross-examination would be outside the scope of § 9-123 immunity. (Brief of Appellant at 22-23). Not so. The "testimony" that § 9-123(b)(2)

If it is Porter's intention to testify falsely at Goodson's (or anyone else's) trial, however, he will find no succor in the Fifth Amendment. "[T]he Fifth Amendment privilege against compulsory self-incrimination provides no protection for the commission of perjury[.]" *United States v. Apfelbaum*, 445 U.S. 115, 127 (1980). Moreover, "[t]here is 'no doctrine of anticipatory perjury,' and a 'future intention to commit perjury' does not create a sufficient hazard of self-incrimination to implicate the Fifth Amendment privilege." *Earp v. Cullen*, 623 F.3d 1065, 1070 (9th Cir. 2010) (quoting *Apfelbaum*, 445 U.S. at 131). If Porter offers immunized testimony at any future trial that is false, the State can charge him with perjury.

What the State cannot do is use Porter's immunized testimony to prove that he committed perjury in the past, or use his past testimony to show that his immunized testimony created

dictates is off-limits in any future prosecution, save for perjury, obstruction of justice, or contempt, obviously includes all of the witness's testimony at trial, including cross-examination.

an irreconcilable inconsistency with his previous statements.⁶ “The law is settled that a grant of immunity precludes the use of immunized testimony in a prosecution for past perjury (though affording no protection against future perjury).” *United States v. Cintolo*, 818 F.2d 980, 988 n.5 (1st Cir. 1987). Indeed, the State will be “precluded from relying upon any contradiction which may appear as between [Porter’s] new testimony and his past testimony.” *Kronick v. United States*, 343 F.2d 436, 441 (9th Cir. 1965). *Accord United States v. Doe*, 819 F.2d 11, 12 (1st Cir. 1987) (immunized grand jury testimony could not be used to prove witness perjured himself in his previous grand jury testimony).

The Seventh Circuit confronted this issue in *United States v. Patrick*, 542 F.2d 381 (7th Cir. 1976). There, Patrick refused to testify even after receiving statutory immunity because, he argued, if his trial testimony was inconsistent with his testimony before the grand jury, he could be prosecuted under 18 U.S.C.

⁶ To be clear, the State can charge Porter with perjuring himself at his first trial. It just cannot use his immunized testimony as evidence of that perjury.

§ 1623 for making “inconsistent declarations.”⁷ *Id.* at 385. The Seventh Circuit assured him that he could not. While Patrick’s “immunized testimony may be used to establish the fact that he committed perjury in the giving of such testimony,” the Court held that his testimony “could not also be used to establish the corpus delicti of an inconsistent declarations prosecution.” *Id.* The perjury exception was intended to cover only “future” perjury, and to allow immunized testimony to prove a crime that occurred prior to the granting of immunity would be giving the perjury exception too broad a reading. *Id.*

The Fifth Circuit came to a similar conclusion in *In re Grand Jury Proceedings Appeal of Frank Derek Greentree*, 644 F.2d 348, 350 (5th Cir. 1981). After testifying in his own defense at trial, Greentree was convicted of several drug offenses. *Id.* at 349. While Greentree’s convictions were pending appeal, he was compelled to testify before a grand jury about the same events for which he was

⁷ 18 U.S.C. §1623 punishes making “irreconcilably contradictory declarations material to the point in question” in a proceeding before a court or grand jury. There is no obligation for the prosecution to prove which statement was false. 18 U.S.C. § 1623 (2015).

convicted. *Id.* at 350. Greentree refused to testify, claiming that “if he testifie[d] truthfully to the grand jury under immunity, the answers to the questions asked will be inconsistent with the answers he earlier gave at his criminal trial[,]” and he would be subject to perjury charges.

The court held that Greentree’s fears were unfounded. The immunity statute, the court held, “forecloses the government from prosecuting an immunized witness for perjury based upon prior false statements.” *Id.* Moreover, the court said, “[n]ot only could he not be prosecuted for perjury on the ground the prior statements were false[,]” but “the prior statements could not be used as prior inconsistent statements to prove perjury in the testimony before the grand jury.” *Id.*

The court went on to explain that the immunity statute “is not a license to commit perjury before the grand jury but is a direction that he tell the truth. If telling the truth creates inconsistency with [Greentree’s] prior testimony at his criminal trial, the prior testimony is not admissible . . . to prove him guilty of perjury.” *Id.* at 350-51. The “sole purpose” of the contempt powers of the immunity statute “is to force [a witness] to tell the

truth[.]” *Id.* at 351. If he or she does so, there is “nothing further to fear” from any earlier inconsistent statements under oath. *Id.* The witness “cannot be prosecuted for perjury for those prior statements” nor can he be prosecuted for perjury for his immunized testimony “solely because of his inconsistent prior statements.” *Id.* See also *In re Bonk*, 527 F.2d 120, 125 (2d Cir. 1975) (an immunized witness “can presumably avoid a perjury indictment by answering . . . questions truthfully” whether or not the answers are inconsistent with previous testimony).

Porter’s claim that “it is well-established in federal courts that the privilege against self-incrimination can properly be invoked based on a fear of a perjury prosecution arising out of conflict between statements sought to be compelled and prior sworn testimony[.]” is technically correct, but misleading. (Brief of Appellant at 27 (quoting *Johnson v. Fabian*, 735 N.W.2d 295, 310-11 (Minn. 2007)). Porter cites this quotation as support for his argument that § 9-123 immunity is insufficient to protect his Fifth Amendment privilege because he could still face a perjury prosecution. But *Johnson*, the case Porter cites, was discussing the scope of the Fifth Amendment privilege generally. 735 N.W.2d

at 310-11. It was not discussing a witness's remaining privilege *after being granted immunity*. In fact, the *Johnson* case has nothing to do with immunity at all.

If the State called Porter as a witness without providing him immunity pursuant to § 9-123, there is no question that Porter could invoke his Fifth Amendment privilege and refuse to testify. That is not the issue in this case. Porter has been provided use and derivative use immunity in exchange for his compelled testimony. His testimony at Goodson's trial cannot be used to prove his prior testimony was false. His prior testimony cannot be used to prove that his testimony at Goodson's trial was false. Porter puts himself at risk of a perjury prosecution only if he lies at Goodson's trial. He will be convicted of that perjury only if the State can prove it without relying on Porter's previous testimony. If that situation occurs, Porter cannot look to the Fifth Amendment for help.

3. *Immunity provided under § 9-123 protects Porter from federal prosecution*

While Porter never expressly argues that he believes § 9-123 fails to protect him against a federal prosecution, he discusses the "federal investigation" into the death of Gray in his statement of

facts,⁸ and has a section in his argument entitled “Porter has not been immunized federally.” (Brief of Appellant at 11, 33). To the extent that Porter contends that his immunized testimony could be used against him in a federal prosecution, he is wrong.

“[A] state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits may not be used in any manner by federal officials in connection with a criminal prosecution against him.” *Murphy v. Waterfront Comm’n of New York Harbor*, 378 U.S. 52, 79 (1964) *abrogated on other grounds by United States v. Balsys*, 524 U.S. 666 (1998). “Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.” *Id.* at 79 n.18. *Accord United States v. Jones*, 542 F.2d 186, 198 (4th Cir. 1976); *United States v. Hampton*,

⁸ It is worth noting that none of the facts set forth in this section are in the record.

775 F.2d 1479, 1485 (11th Cir. 1985). The federal government will not be able to use Porter's immunized testimony against him.

4. *Porter's complaints about the lack of a "taint team" can be resolved, if necessary, prior to his retrial.*

Finally, Porter claims that if he is compelled to testify at Goodson's (or anyone's) trial, it will prevent him from getting a fair trial at his later criminal proceedings. (Brief of Appellant at 27-29, 34-37). Potential jurors, he argues, will be aware of his compelled testimony and could use it against him. (Brief of Appellant at 27-28). Moreover, he says, the prosecution has failed to create a "taint team," and, as such, "indelible taint" has been created that should preclude Porter from being compelled to testify at Goodson's (or anyone's) trial. (Brief of Appellant at 35).

Neither of these concerns, to the extent they are legitimate, should prevent Porter from being compelled to testify. Both of these issues can be litigated prior to Porter's retrial. The circuit court successfully voir dired a venire panel and selected a jury prior to Porter's first trial, there is no reason that the same procedures will not be effective at his second trial.

Furthermore, Porter's allegations regarding the prosecution's handling of the immunized testimony have no support in the record or anywhere else. Porter is not privy to the State's handling of his retrial, and has no idea whether "walls will be erected around [his immunized] testimony[.]" (Brief of Appellant at 34). When the State is called upon to fulfill its "affirmative duty" "to show that its evidence is not tainted by the [Porter's immunized] testimony," and to "prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony[.]" *Hubbell*, 530 U.S. at 40 (quotations omitted), then the State will have to show the steps it took to prevent taint and Porter is free to argue that whatever steps were taken were insufficient.

Porter's argument that "this Court must disallow" him to be called as a witness because "the State fail[ed] to Chinese wall the different prosecutions" is putting the cart before the horse. Even if his allegations were based on something other than speculation, the remedy for the State's failure, to the extent Porter is entitled to one, is not to prevent him from testifying against Goodson, but

to find that the State failed to prove that its evidence at retrial stems from a source independent of Porter's immunized testimony.

Porter's hand-wringing about the way in which the State is handling his subsequent prosecution is unfounded and premature. The State shoulders the heavy burden of proving that it is not making use or derivative use of Porter's immunized testimony at any subsequent trial. Porter will have ample opportunity, at that point, to argue that the State's handling of his immunized testimony and subsequent prosecution was improper and created an "indelible taint" that makes exclusion of the State's evidence necessary. Now, however, is not the time for such complaints.

D. Ordering Porter to testify under § 9-123 does not violate his rights under Article 22 of the Maryland Declaration of Rights

Finally, Porter contends that even if compelling him to testify after providing him with use and derivative use immunity does not violate the Fifth Amendment, it does violate Article 22 of the Maryland Declaration of Rights. (Brief of Appellant at 38-40). With regard to the scope of a witness's ability to refuse to testify, however, this Court has said that Article 22 provides protection

identical to that of its federal counterpart. Section 9-123 does not infringe Porter's Article 22 rights.

Generally speaking, this Court and the Court of Appeals have interpreted Article 22 *in pari materia* to the Fifth Amendment. *See, e.g., Marshall v. State*, 415 Md. 248, 259 (2010); *Choi v. State*, 316 Md. 529, 535 n.5 (1989) *Adkins v. State*, 316 Md. 1, 6 n.5 (1989); *Ellison v. State*, 310 Md. 244, 259 n.4 (1987). Article 22 is, however, an independent constitutional provision and has, on limited occasions, been construed as providing broader protections than the Fifth Amendment. *See Marshall*, 415 Md. at 259 (noting that on occasion Article 22 has been found to offer broader protections than the Fifth Amendment); *Crosby v. State*, 366 Md. 518, 528 (2001) (same); *Choi*, 316 Md. at 535 n.5 (identifying two discrete circumstances, not relevant here, where the appellate courts have found broader Article 22 protection).

Notwithstanding the rare occasions when Article 22 has been found to offer more protection than the Fifth Amendment, with regard to when a witness can invoke his or her right against self-incrimination when called to testify, the Court of Appeals has said that the Fifth Amendment and Article 22 are one and the

same. This was explained by the Court in *Ellison v. State*, 310 Md. 244 (1987). In *Ellison*, the Court considered whether a witness who had been convicted, but whose direct appeal rights had not yet been exhausted, could be compelled to testify about the facts that supported his conviction. 310 Md. at 249. This Court had held that once a witness is sentenced, the risk of incrimination becomes too “remote” to be protected by the Fifth Amendment. *Id.* at 248. The Court of Appeals reversed the decision, and held that a witness retains his or her Fifth Amendment privilege through the appellate process. *Id.* at 257-28.

In so doing, the Court took the opportunity to correct what it perceived as a misunderstanding by this Court. In footnote four of the opinion, the Court noted that in an earlier case, *Smith v. State*, 283 Md. 187 (1978), it distinguished another opinion as inapposite “because it was concerned with the self-incrimination privilege under the Maryland Declaration of Rights,” while *Smith* “relied solely on the self-incrimination privilege under the Fifth Amendment to the federal constitution.” *Ellison*, 310 Md. at 259 n.4. This “unfortunate” statement, the Court said, led this Court to conclude that the Maryland Declaration of Rights should be

viewed “one way and the Fifth Amendment a different way.” *Id.* This is wrong, the Court said. With respect to the scope of the privilege against self-incrimination the Court of Appeals said it “perceive[d] no difference between Article 22 of the Declaration of Rights and the Fifth Amendment’s Self-Incrimination Clause.” *Id.*

The order compelling Porter to testify does not violate his federal or state constitutional right of self-incrimination. Like its federal counterpart, Courts & Judicial Proceedings, § 9-123 adequately safeguards Porter’s rights by granting him use and derivative use immunity before compelling him to testify. Pursuant to this immunity, the State will be obligated to prove that any evidence it intends to use against Porter is independent from Porter’s immunized testimony. Moreover, while § 9-123 is not a license to commit perjury, the State will not be able to use Porter’s immunized testimony to prove past perjury, and will not be able to use past testimony to prove that Porter committed perjury while immunized.

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. He is not a “whipping

boy[.]” and the State is not seeking to alter the history of Anglo-Saxon jurisprudence. The 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. It has granted a witness immunity and sought to compel his testimony. The State has done nothing unusual and nothing wrong. This Court should affirm the order compelling Porter to testify.

CONCLUSION

The State respectfully asks the Court to affirm the judgment of the Circuit Court for Baltimore City.

Dated: February 10, 2016

Respectfully submitted,

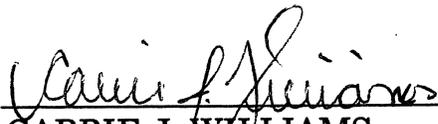
BRIAN E. FROSH
Attorney General of Maryland

CARRIE J. WILLIAMS
Assistant Attorney General

Counsel for Appellee

**CERTIFICATION OF WORD COUNT AND
COMPLIANCE WITH MD. RULE 8-112.**

This brief complies with the font, line spacing, and margin requirements of Md. Rule 8-112 and contains 7512 words, excluding the parts exempted from the word count by Md. Rule 8-503.


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Counsel for Appellee

APPENDIX

STATE'S ATTORNEY
Marilyn J. Mosby



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

DIRECT DIAL
443-984-6011

September 15, 2015

VIA HAND DELIVERY

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

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

Dear Judge Williams,

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

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

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

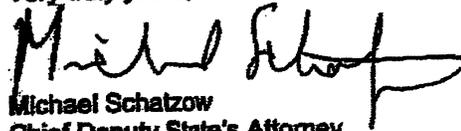
The trial date of October 13, 2015 was ordered on June 19, 2015, based on the availability of the court and all counsel. As Judge Pierson requested, we had cleared that date with Dr. Carol Allan, the Assistant Medical Examiner who conducted the autopsy. We were advised by Dr. Allan this morning that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

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

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

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

Very truly yours,


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

MS/tsr

Enclosures

Cc: Without Enclosures

Matthew B. Fraling, III, Esquire, Via Email
Marc L. Zayon, Esquire, Via Hand Delivery
Catherine Flynn, Esquire, Via Hand Delivery
Joseph Murtha, Esquire, Via Email
Ivan Bates, Esquire, Via Hand Delivery
Michael Belsky, Esquire, Via Hand Delivery
Andrew Jay Graham, Esquire, Via Hand Delivery
Gary Proctor, Esquire, Via Hand Delivery



CIRCUIT COURT FOR BALTIMORE CITY
 100 N. Calvert Street, Baltimore, Maryland 21202
 Phone: (410) 333-3722 Maryland Relay call: 711

Case No. 115141032

STATE OF MARYLAND
 or

vs. Caesar Goodson
 Defendant

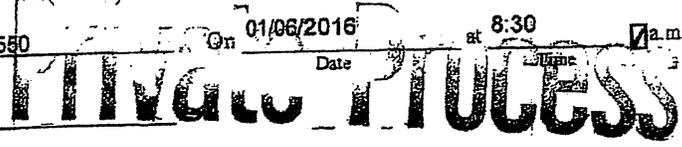
Plaintiff
 TO: William Porter
 Name
242 West 29th Street
 Address
Baltimore, MD 21211
 City, County, State, Zip

Issue Date: November 20, 2015
 Service Deadline: 60 days after Issue Date.

SUBPOENA

You are hereby compelled to appear at a court proceeding deposition at the following location:

100 North Calvert Street, Part 31, Room 550 On 01/06/2016 at 8:30 a.m. or p.m.
 Address of court or other location Date Time
Baltimore, Maryland 21202
 City, State, Zip



- To testify in the above case, and/or
- To produce the following documents, items, and information, not privileged: _____
- To produce, permit inspection and copying of the following documents or other tangible items: _____

Deputy State's Attorney Janice Bledsoe requested issuance of this subpoena. Questions should be referred to:
 Requested by Name
Janice Bledsoe
 Name
(443) 985-6000
 Phone
120 East Baltimore Street, 10th Floor
 Address
Baltimore, Maryland 21202
 City, State, Zip

Special Message: _____

- If this subpoena compels the production of financial information, or information derived from financial records, the requestor of this subpoena hereby certifies having taken all necessary steps to comply with the requirements of Md. Code Ann., Fin. Inst. §1-304 and any other applicable law.
- If this subpoena compels the production of medical records, the requestor of this subpoena hereby certifies having taken all necessary steps to comply with the requirements of Md. Code Ann., Health - Gen. §4-206 and any other applicable law.

Lavinia G. Alexander, Clerk
 Circuit Court for Baltimore City

NOTICE:

1. YOU ARE LIABLE TO BODY ATTACHMENT AND/OR FINE FOR FAILURE TO OBEY THIS SUBPOENA.
2. This subpoena is effective for the date and time stated and any subsequent dates as directed by the court.
3. If this subpoena is for attendance at a deposition and the party served is an organization, notice is hereby given that the organization must designate one or more persons who will testify on its behalf, pursuant to Rule 2-412(d).
4. Serving or attempting to serve a subpoena more than 60 days after the date of issuance is prohibited.

RETURN OF SERVICE

I certify that I delivered the original of this Subpoena to the following person(s): WILLIAM PORTER
 on the following date: 12/11/2015 by the following method (specified as required by Rule 2-126):
In Hand

Wayne Williams
 Signature
WAYNE WILLIAMS
 Printed Name

STATE OF MARYLAND

v.

CAESAR GOODSON

* * * * *

IN THE
CIRCUIT COURT FOR
BALTIMORE CITY
CASE No. 115141032

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

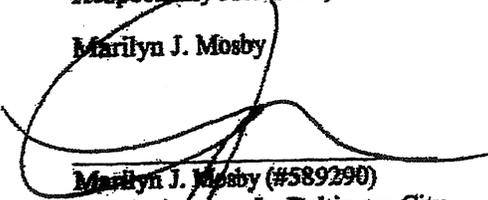
Now comes the State of Maryland, by and through Marilyn J. Mosby, the State's Attorney for Baltimore City, and pursuant to Section 9-123 of the Courts and Judicial Proceedings Article moves this Court to issue an order requiring Officer William Porter, D.O.B. 6/26/1989, in the above-captioned case to give testimony which he has refused to give on the basis of his privilege against self-incrimination. In support of this Motion, the State avers the following:

1. The State has subpoenaed and called Officer William Porter to testify as a witness in the above-captioned criminal proceeding being held before this Court.
2. The State's Attorney for Baltimore City has determined that the testimony of Officer William Porter in the above-captioned case may be necessary to the public interest.
3. Officer William Porter has refused to testify in the above-captioned case on the basis of his privilege against self-incrimination.
4. The State's Attorney for Baltimore City seeks to compel Officer William Porter to testify in the above-captioned case.

Wherefore, the State requests that this Court issue an order requiring Officer William Porter in the above-captioned case to give testimony which he has refused to give on the basis of his privilege against self-incrimination.

Respectfully submitted,

Marilyn J. Mosby



Marilyn J. Mosby (#589290)
State's Attorney for Baltimore City
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(443) 984-6256 (facsimile)
mail@stateattorney.org

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 2016, a copy of the State's Motion to Compel a Witness to Testify Pursuant to Section 9-123 of the Courts and Judicial Proceedings article was mailed and e-mailed to:

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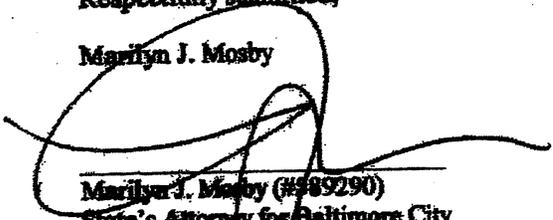
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Respectfully submitted,

Marilyn J. Mosby



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STATE OF MARYLAND

v.

CAESAR GOODSON

* * * * *

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*
*

IN THE
CIRCUIT COURT FOR
BALTIMORE CITY
CASE No. 115141032

ORDER

Having reviewed the State's Motion to Compel a Witness to Testify Pursuant to Section 9-123 of the Courts and Judicial Proceedings Article, in which the State's Attorney for Baltimore City seeks to compel Officer William Porter, D.O.B. 6/26/1989, to testify in the above-captioned criminal proceeding; finding that Officer William Porter has been called by the State as a witness to testify in the above-captioned criminal proceeding but that Officer William Porter has refused to testify on the basis of his privilege against self-incrimination; and further finding that the State's Motion to Compel Officer William Porter's testimony complies with the requirements of Section 9-123 of the Courts and Judicial Proceedings Article, it is this ____ day of January, 2016, by the Circuit Court for Baltimore City

ORDERED that the State's Motion to Compel a Witness to Testify Pursuant to Section 9-123 of the Courts and Judicial Proceedings Article be and hereby is **GRANTED**; and it is further

ORDERED that Officer William Porter, D.O.B. 6/26/1989, shall testify as a witness for the State in the above-captioned criminal proceeding and may not refuse to comply with this Order on the basis of his privilege against self-incrimination; and it is further

ORDERED that no testimony of Officer William Porter, D.O.B. 6/26/1989, compelled pursuant to this Order and no information directly or indirectly derived from the testimony of Officer William Porter compelled pursuant to this Order may be used against Officer William Porter in any criminal case, except in a prosecution for perjury, obstruction of justice, or otherwise failing to comply with this Order.

Judge
Circuit Court for Baltimore City

RECEIVED FOR RECORD
CIRCUIT COURT FOR
BALTIMORE CITY

STATE OF MARYLAND

* IN THE 2016 JAN -6 P 4 22

* CIRCUIT COURT FOR BALTIMORE CITY

* BALTIMORE CITY

* Case No. 115141032

v.

CAESAR GOODSON

* * * * *

ORDER

On January 6, 2016, during a pre-trial motions hearing for the above-captioned case, the State presented this Court with its written Motion to Compel a Witness to Testify Pursuant to Section 9-123 of the Courts and Judicial Proceedings Article. During this hearing, counsel for the Defendant incorporated their arguments from their Motion to Quash Trial Subpoena of Officer William Porter.

Based on the motions, arguments, and testimony presented during the hearing, this Court finds that Officer William Porter, D.O.B. 6/29/1989, has been called by the State as a witness to testify in the above-captioned case but that Officer Porter has refused to testify on the basis of his privilege against self-incrimination. This Court further finds that the State's Motion to Compel Officer Porter's testimony complies with the requirements of Section 9-123 of the Courts and Judicial Proceedings Article. For these reasons, it is this 6th day of January, 2016, by the Circuit Court for Baltimore City, hereby

ORDERED that the State's Motion to Compel a Witness to Testify Pursuant to Section 9-123 of the Courts and Judicial Proceedings Article is **GRANTED**, and further

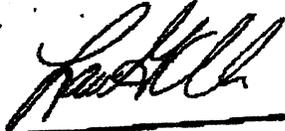
ORDERED that Officer William Porter, D.O.B. 6/26/1989, shall testify as a witness for the State in the above-captioned case and may not refuse to comply with this Order on the basis of his privilege against self-incrimination, and further

ORDERED that no testimony of Officer William Porter, D.O.B. 6/26/1989, compelled pursuant to this Order, and no information directly or indirectly derived from the testimony of Officer Porter compelled pursuant to this Order, may be used against Officer Porter in any criminal case, except in a prosecution for perjury, obstruction of justice, or otherwise failing to comply with this Order.

Judge Barry G. Williams
Circuit Court for Baltimore City
Signature appears on the original document

BARRY G. WILLIAMS
JUDGE, CIRCUIT COURT FOR
BALTIMORE CITY

TRUE COPY
TEST



LAVINIA G. ALEXANDER, CLERK



Clerk, please mail copies to the following:
Joseph Murtha, Attorney for William Porter
Janice Bledsoe, Deputy State's Attorney, Office of the State's Attorney for Baltimore City

POSITION PAPER
WITNESS IMMUNITY

I. INTRODUCTION

A. The Problem

From
76's
office

There are basically two types of immunity: transactional and use and derivative use immunity (hereinafter "use immunity"). Transactional immunity means that once a witness has been compelled to testify about an incident, he may never be prosecuted for offenses arising out of that transaction even if independent evidence of the offense(s) -- from a source other than the witness -- comes to light. Use immunity, a shorthand term for use and derivative use immunity, means that once a witness has been compelled to testify about an offense, neither that testimony nor any evidence derived from that testimony may be used against the witness. If independent evidence is discovered, or has been preserved, the witness theoretically may still be prosecuted for the offense.

Obviously, in situations in which insider information about criminal activity is necessary in order to prosecute criminal activity, the prosecutor is faced with untenable alternatives when only transactional immunity is available.

For example, assume a scenario in which a narcotics network is functioning effectively with a hierarchy in which the first echelon leader is a prosperous, "white collar" professional who has never been convicted of a crime. That individual, who we can refer to as "Kingpin", provides the capital necessary to purchase the narcotics which is distributed to users. He never has his hand on the narcotics and enters only into cash transactions. Kingpin, however, relies upon a certified public accountant ("A") and an individual who monitors the actual narcotics trafficking network ("B").

Kingpin may never be successfully prosecuted without information from "A" or "B". There may not be enough evidence against "A" or "B" to prosecute them for their role in the

conspiracy.

A resourceful prosecutor, who could be investigating Kingpin for narcotics violations or criminal violations of the income tax code would subpoena "A" or "B" before the grand jury at which time "A" and "B" would invoke their privilege against self-incrimination. Under the present law, the prosecutor would then face the dilemma of having to give "A" or "B" transactional immunity or a total exemption from liability for their misdeeds. "A" or "B", then, could conceivably not be prosecuted for their role in the conspiracy on either the state or federal level. If granted transactional immunity, they also conceivably may not incur civil liability for their involvement. "A" or "B" conceivably may not incur civil tax liability in the form of penalties and "A" conceivably may not face professional discipline in the form of license suspension or revocation by his professional licensing authority. To permit "A" or "B" to walk away from their misdeeds would truly be a miscarriage of justice.

B. The Resolution

The resolution of the dilemma is to provide the prosecutor with use immunity to permit the prosecutor to build a tax prosecution case against Kingpin by immunizing "A" from the use of "A's" testimony against him, or a narcotics case by immunizing "B" from the use of his testimony against him. "A" and "B" could still be prosecuted for their involvement in the conspiracy, could still be forced to pay civil tax penalties and "A" could still be subject to discipline on a professional basis. Certainly, consideration of appropriate sanctions against "A" and "B" should and must include all possibilities given the magnitude of their involvement in the crime.

II. PROPOSED GENERAL IMMUNITY STATUTE

The proposed statute is based substantially on the federal immunity statutes: 18 U.S.C. §§6001-04 (1985). Changes made in the language are primarily those required by the differences

between the organizational structure of law enforcement agencies in the federal and state systems.

The proposed general immunity statute differs substantively from existing Maryland statutes in three ways:

1. It provides for use and derivative use instead of transactional immunity;
2. It is generally available rather than limited to specific crimes;
3. It has built-in procedural safeguards which must be complied with prior to its utilization. Generally, the present statutes operate automatically.

The proposed immunity statute would replace the immunity provisions for specific crimes. Presently, Maryland has separate immunity provisions for the following crimes: Article 27, §23, Bribery of Public Officials; ^{1/} Article 27, §24, Bribery of Athletic Participants; Article 27, §39, Conspiracy to Commit Bribery; ^{2/} Gambling or Lottery Violations; Article 27, §298, Controlled Dangerous Substances; Article 27, §262, Gambling; Article 27, §371, Lottery Violations; Article 27, §400, Selling Liquor to Minors; Article 27, §540, Sabotage Prevention; Article 33, §26-16, Election Irregularities; Financial Institutions §9-

^{1/}Article III, §50 of the Constitution of Maryland requires the General Assembly to adopt a bribery statute conferring transactional immunity. Article 27, §§23 and 39 are the response to the mandate. Consequently, absent a constitutional amendment, immunity for bribery must continue to be "transactional" as opposed to the more limited "use and derivative use" immunity.

^{2/}Transactional immunity for conspiracy to commit bribery also would not be affected since it has constitutional overtones.

III. BASES FOR USE IMMUNITY

A. Legal Basis for Use Immunity

In 1892, the Supreme Court held unconstitutional a federal immunity statute which barred the introduction of compelled testimony but permitted it to be used to locate other evidence.^{4/} The Court reasoned -- correctly -- that such derivative use of the tainted evidence rendered the immunity meaningless. But rather than simply stating that the Constitution required derivative use immunity; i.e., immunity from both the introduction of compelled testimony and exploitation of the testimony to find leads, the opinion spoke in broad language which seemed to require transactional immunity. Consequently, Congress enacted a transactional immunity statute which was upheld by the Supreme Court,^{5/} and which became the model for state legislation. In 1970, Congress repealed the transactional immunity statutes and enacted a new use immunity statute, 18 U.S.C. §§6001-04 (1970). When the Supreme Court reviewed the new statute, it held that the transactional immunity language in Counselman which had been relied on for almost one hundred years was dicta. Thus, the Court held that the new statute which bars the use and derivative use of information obtained under a grant of immunity provides the protection required by the Fifth Amendment.^{6/}

Maryland's transactional immunity statutes, like the federal

^{3/} Immunity in the savings and loan situation would remain the same since the duration of the immunity accorded to the investigation of the pending matters would be limited to one more extension of the sunset provisions.

^{4/} Counselman v. Hitchcock, 142 U.S. 547 (1892).

^{5/} Brown v. Walker, 161 U.S. 591 (1896).

^{6/} Kastigar v. United States, 406 U.S. 441 (1972).

immunity statutes repealed in 1970, are based upon an incorrect interpretation of the 1892 decision. It is now clear that use immunity will meet constitutional requirements. Maryland's laws are, therefore, outdated.

B. Practical Bases for Use Immunity

In addition to providing the possibility that a witness given use immunity may be subject to subsequent prosecution for his criminal activity, i.e., the Oliver North prosecution, and would be subject to collateral consequences, use immunity provides for more complete disclosure of evidence than transactional immunity. As Professor G. Robert Blakely stated at the 1974 Seminar of the National Associations of Attorneys General:

With transactional immunity all the witness has to do is mention the transaction; he does not have to fill in the details. So his attorney can tell him to just mention it, and then say, "I don't remember." But with a "use" statute, a smart attorney advises his client to tell all he knows, because the more he tells, the less can be later used against him. So "use" statutes encourage fuller disclosure by witnesses, and that is what they are really all about.

As a result, individuals testifying under a grant of use immunity have greater reason to disclose their involvement.^{7/}

Further, a general immunity statute, instead of the present patchwork quilt of immunity statutes for particular crimes, would likewise be more conducive to full disclosure of evidence by an immunized witness. Often testimony about a drug transaction will encompass other crimes, such as violations of criminal tax statutes. Under the present system, a witness subpoenaed to testify pursuant to the immunity provisions of Article 27, §298

^{7/}Whether transactional or use witness immunity does not preclude prosecution for perjury or making false statements under oath.

(Controlled Dangerous Substances) may not refuse to testify because testimony regarding the controlled dangerous substances transaction would simultaneously implicate him in the commission of other crimes, e.g., tax perjury.^{8/} Yet this circumstance presents the possibility of a trap for the unwary prosecutor inquiring into drug violations and inadvertently granting transactional immunity for some previously unknown criminal activity.

Further, there are no procedural safeguards in the present immunity statutes and consequently their operation is triggered haphazardly, without identification of when a witness begins to receive immunity. The statutes also provide an "automatic immunity bath". Across the nation,^{9/} witnesses subpoenaed before the grand jury must either assert the privilege against self-incrimination or else notify the prosecutor that it is their intention to do so. The prosecutor then asks the court to order testimony and certifies that the immunity conferred thereby is in the public interest. This is the procedure set out in this proposed statute and is the procedure incorporated in the recently adopted savings and loan immunity legislation. In sharp contrast, most present Maryland statutes immunize everyone who answers questions in the grand jury.^{10/} No assertion of the privilege is required, nor is there any requirement of a certification that the immunity is in the public interest. The uncertainty of when the statute is applicable, coupled with the blanket automatic transactional immunity bath, makes Maryland immunity statutes both haphazard and dangerous. Unless a

^{8/} In re: Criminal Investigation No. 1-162, 307 Md. 622 (1987).

^{9/} Witness Immunity, National Association of Attorneys General, August, 1978.

^{10/} State v. Panagoulis, 253 Md. 699 (1969) (Witness who appeared voluntarily before grand jury to make statement and was then asked questions was "compelled" to testify within meaning of bribery immunity statutes).

prosecutor is very conversant in the vagaries of investigative grand jury law, he or she accidentally may immunize potential targets. As a consequence of the risks arising from the broad automatic immunity received by anyone subpoenaed before a grand jury investigating drugs, gambling and election laws, the grand jury frequently becomes unusable as an investigative tool in these areas. The result is that the financial aspects of large drug operations cannot be investigated by Maryland grand juries.

Finally, despite the broad brush immunization the present statutes provide, they may ironically deprive potential defendants of the opportunity to provide exculpatory evidence to a grand jury. A prosecutor who might otherwise consent to the appearance of a defendant who want to testify before an investigative grand jury or -- the more common occurrence -- a prosecutor who is willing to call a witness supportive of the defense, may decline to do so because he fears automatic immunization. There are no immunity waiver statutes and the question of whether the automatic immunity can be waived has yet to be resolved by the appellate courts.

IV. PROPOSED STATUTE

The proposed statute substitutes use for transactional immunity^{11/} because of the additional fact-finding utility that use immunity provides. It would automatically bring the Maryland law into accord with the Supreme Court's current view of the breadth of the Fifth Amendment.

The proposed statute is made generally applicable primarily for two reasons. It assures the compellability of the testimony regarding a transaction which may involve a variety of interrelated crimes and thus circumvents any constitutional

^{11/}Transactional immunity for the crime of bribery is retained because of its constitutional underpinning and for the savings and loan investigation because of its limited duration.

problem which may presently exist.^{12/} Secondly, it is now apparent that a grand jury may be an inappropriate forum for the investigation of a variety of crimes, particularly large scale drug operations, money laundering, and tax perjury. The existence of a generally available but limited immunity statute would remedy the dual problems of no immunity for most crimes and too much immunity for drugs, gambling and elections offenses.

By far the most significant changes provided by the proposed statute are procedural. Immunity would no longer be conferred automatically or accidentally, but rather only through court order. To ensure coordinated, responsible requests for immunity, the decision to seek a court order requires approval by the State's Attorney, Attorney General or State Prosecutor. The State's Attorney, the Attorney General or State Prosecutor will thereby have central control and ultimate responsibility for the issuance of grants of immunity.

The judicial role under this statute is ministerial. The judge verifies that:

1. The State's Attorney, the Attorney General, or State Prosecutor has approved the request for an immunity order;
2. The witness has refused or is likely to refuse to testify;
3. The prosecutor has determined that the witness's testimony may be necessary to be the public interest.

Once the judge concludes these three requirements are met, he issues a court order compelling testimony and immunizing the witness.

The Judge will not himself determine whether the witness'

^{12/}Cf. In re Criminal Investigation No. 1-162, supra. n.6, (witness must reasonably fear prosecution for one of enumerated offenses).

testimony may be necessary to the public interest. To do so would transform the Judge into a prosecutor and require him to make delicate prosecutorial judgments which are inappropriate. Furthermore, a particular immunity grant may be a very small aspect to a large scale investigation, making it impossible for the judge to make any meaningful evaluation of the public interest.