

STATE OF MARYLAND,

Petitioner,

v.

EDWARD NERO

Respondent.

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IN THE

COURT OF APPEALS

OF MARYLAND

September Term, 2015

Petition Docket No. 660

Filed

FEB 16 2016

Bessie M. Decker, Clerk
Court of Appeals
of Maryland

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**ANSWER AND MOTION TO DISMISS STATE'S
PETITION FOR WRIT OF CERTIORARI**

NOW COMES, Edward Nero, Respondent, by and through undersigned counsel, pursuant to Maryland Rule 8-303 and 8-431, and files this Answer and Motion to Dismiss State's Petition for Writ of Certiorari and in support thereof states as follows:

Introduction

The State has filed an appeal in this case to the Court of Special Appeals that is not permitted by law. The State seeks further review of this improper appeal by way of a Petition for Writ of Certiorari before this Honorable Court. The State attempts to "bootstrap" its own improperly noted appeals in Miller, Nero, and Rice with appeals that were properly noted by Porter in the Goodson and White trials. The State, unsure of its jurisdictional foundation for filing such an appeal with this Honorable Court, takes alternative and inconsistent approaches to its jurisdictional argument. The State concedes that it is not sure whether it is appealing a "final order" under Code Md. Ann. Courts & Judicial Proceedings ("CJP") 12-301, or instead, appealing under the "collateral order doctrine." (State's Petition for Writ of Certiorari at 7-8). The State is also unable to

decipher whether its improper appeal is taken from an order in a matter that is civil in nature or a matter that is criminal in nature. (See State's Petition for Writ of Certiorari at 7-8).

The State uses as its primary support for its right to appeal, an appellate brief that it filed 20 years ago in the Court of Special Appeals. The State argues that, because it briefed an argument 20 years ago that went unaddressed by the Court of Special Appeals or this Honorable Court, it must be, by implication, binding authority. To be clear, the Court of Special Appeals and this Honorable Court did not articulate *any* holding (or provide *any* mention) with respect to the State's right to appeal in that case. Further, the case from 20 years ago that the State cites to its previous brief as legal authority arose out of grand jury proceedings concerning a different predecessor statute, not a criminal trial involving the more recent CJP 9-123. *In re Criminal Investigation No.1-162*, 307 Md. 674 (1986).

The State's assertion that it has a right to appeal in this case is meritless and has failed to overcome the jurisdictional defect that exists to permit this appeal to move forward. This Honorable Court, on many occasions, has delineated the State's right to appeal and, additionally, defined what constitutes a final judgment. Based on this Honorable Court's *articulated* definition of what constitutes a final judgment, the ruling the State seeks to review does not qualify as such. Based on this Court's *articulated* interpretation of CJP 12-301, CJP 12-302, the collateral order doctrine, and the State's right to appeal, this Honorable Court should properly dismiss the State's Petition for Writ of Certiorari.

Relevant Procedural History

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

On May 1, 2015, the State's Attorney for Baltimore City publicly announced charges against Officers Porter, Goodson, Miller, and Nero, as well as Lieutenant Rice and Sergeant White. The charges ranged from misdemeanor assault to murder in the second degree.¹ The State's theory of prosecution of Miller, Nero, and Rice differs from its theory of prosecution of the other three officers. The State's prosecution theory in Miller, Nero and Rice is based, in part, on the argument that the officers lacked probable cause to effectuate the arrest of Mr. Gray. The State announced publicly that the knife for which Mr. Gray was arrested was legal under Maryland law, when it, in fact, was illegal under the Baltimore City Criminal Code. These charges are the most factually and legally tenuous because they are based on the State's unprecedented argument that an

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

officer's reasonable determination that probable cause exists to believe a crime has occurred can lead to criminal culpability on the part of the officer.

The Honorable Barry G. Williams, Circuit Court for Baltimore City, was specially assigned to the trials of the six officers. "On September 15, 2015, the State notified the Circuit Court that it intended to try the above-captioned case and the related cases in a certain order." (Order of J. Barry G. Williams denying State's Request to Stay Proceedings during Pendency of Appeal 2/10/2016 at 1) (hereinafter "J. Williams Order") (*see attached*). At that time the State only identified Officer Porter as a material witness in the trials of Officer Goodson and Sergeant White. (J. Williams Order at 1). Officer Porter's trial ended in a mistrial and his retrial was scheduled for June of 2016. (J. Williams Order at 1).

On or about January 7, 2016, the Circuit Court "granted the State's Motion to Compel Officer Porter to testify in the *Goodson* and *White* trials." (J. Williams Order at 1) (emphasis in original). The Circuit Court notified all parties to the action that it intended to proceed with the trials of Officer Miller, Nero and Lieutenant Rice. (J. Williams Order at 1).

Officer Edward Nero is pending second degree assault and related charges. Officer Nero's trial is currently scheduled to begin on February 22, 2016. On January 13, 2016, the State filed a Motion to Compel Testimony of Officer Porter in the Miller, Nero and Rice trials. On or about January 15, 2016, the State sent a letter to the Court expressing its intent to request a postponement of the trial date and, for the first time, notifying the Circuit Court that "Officer Porter may be a material witness in the *Nero*,

Miller, and Rice cases." (J. Williams Order at 1) (emphasis in original). This was *FOUR MONTHS* after the State originally identified Officer Porter as a material witness only in the Goodson and White trials. The State also requested the Circuit Court postpone all five cases until after Officer Porter's trial so the State could try the cases in the State's preferred order. (J. Williams Order at 1).

On January 20, 2016, the Circuit Court conducted a hearing on the State's dual requests. The Court denied both requests. The Circuit Court specifically found that "the State was using Md. Code, Cts. & Jud. Proc. § 9-123 in an attempt to control the schedule and order of the trials and to circumvent [the Circuit Court's] ruling that postponement in these cases was not appropriate." (J. Williams Order at 2). The Circuit Court also found that "the State's motion was simply an attempt at subterfuge because they did not agree with the Court's order to continue with the other trials." (J. Williams Order at 2).

The State continues its pattern of deception, pretext and subterfuge in an attempt to end-run the Circuit Court's Order and try the cases in the order in which it desires. On February 4, 2016, the State improperly filed a notice of appeal for an appeal not permitted by law. On February 5, 2016, the State filed a motion to stay proceedings in the Circuit Court pending the improper appeal. In an attempt to avoid another adverse ruling in the Circuit Court, on or about February 10, 2016, the State has filed two additional motions to stay the trials of Miller, Nero and Rice. The Court of Special Appeals motion for stay asks for the Court of Special Appeals proceedings to be stayed but the Court of Appeals motion for stay asks that the Circuit Court proceedings be stayed pending the resolution of the meritless appeal. These Motions to Stay are yet

another transparent subterfuge on the part of the State to obtain postponements, in order to avoid trying the most legally and factually tenuous cases first. Judge Williams has seen through the subterfuge and deception, the State's attempt to manipulate the dockets, and the State's burdening three levels of the judiciary in a frivolous appeal. On February 10, 2016, Judge Williams denied the State's motion to stay the trials of Miller, Nero and Rice citing purposeful delay on the part of the State as the reason for the denial.²

Further, the State is attempting to "bootstrap" its improperly taken appeals in Miller, Nero, and Rice with Officer Porter's proper appeals taken in White and Goodson by filing all five Petitions for Certiorari together. The State attempts to "mask" the jurisdictional divide between its displeasure with Circuit Court's ruling and the right to take an appeal in the first instance through its rhetoric, alleging a "separation of powers crisis" is occurring.

The Officers are asking this Honorable Court to DENY the State's Petition for Writ of Certiorari in the cases of Officers Miller, Nero, and Lieutenant Rice.

**REASONS FOR DENYING THE REQUESTED WRIT AND
DISMISSING THE STATE'S PETITION**

**I. PETITIONER'S ARGUMENT THAT IT HAS PROPERLY
APPEALED THE INTERLOCUTORY ORDER OF THE CIRCUIT
COURT IS MERITLESS.**

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

² The State has not appealed Judge Williams' Order denying the State's motion to stay but, instead, seeks appellate jurisdiction again where it does not exist and asks the appellate courts to issue the stay.

v. Howard County, 371 Md. 243, 247 (2002)). "It is an often stated principle of Maryland law that appellate jurisdiction, except as constitutionally authorized, is determined entirely by statute, and that, therefore, a right of appeal must be legislatively granted." *Seward*, at *4 (quoting *Gisriel v. Ocean City Bd. of Supervisors of Elections*, 345 Md. 477, 485 (1997)). Courts article section 12-301 provides:

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

Md. Code, Courts & Judicial Proceedings, §12-301 (emphasis supplied). According to §12-301, and as interpreted by this Court, an appeal is premature until after final judgment. *Id.*; see also *Langworthy v. State*, 284 Md. 588, 596 (1979). Accordingly, "[w]here appellate jurisdiction is lacking, the appellate court will dismiss the appeal *sua sponte*." See, e.g., *Eastgate Associates v. Apper*, 276 Md. 698, 701 (1976). The purpose of CJP § 12-301 is "to prevent piecemeal appeals and . . . the interruption of ongoing judicial proceedings." *Seward*, at *5 (quoting *Douglas*, 423 Md. at 172). This purpose "takes on added weight in criminal cases, where the defendant is entitled to a speedy resolution of the charges against him." *Will v. U.S.*, 389 U.S. 90, 96 (1967).

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

one that either determines and concludes the rights of the parties involved or denies a party the means to prosecute or defend his or her rights and

interests in the subject matter of the proceeding. Important is whether any further order is to be issued or whether any further action is to be taken in the case.

Seward, at *4 (quoting *Douglas v. State*, 423 Md. 156, 171 (2011)). In a criminal case, a final judgment has not been rendered until the court has entered a verdict and a sentence. *Jones v. State*, 298 Md. 634, 638 (1984).

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

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

Id. The State's appeal in the present case does not fall under one of the "narrow categories" presented in §12-302, and is therefore not valid.

In a veiled attempt to vest this Court with jurisdiction *allegedly* pursuant to Courts & Judicial Proceedings ("CJP") 12-301, the State alleges that the appeal is from a final

judgment with respect to Officer Porter alone.³ The State mistakenly relies upon *In re Criminal Investigation No. 1-162*, 307 Md. 674 (1986), for support of its argument. In making its argument, the State ignores a fundamental and glaring difference between *No. 1-162* and the appeal the State now seeks to prosecute: the appeal in *No. 1-162* was not an appeal from a criminal trial proceeding. *Id.* at 679-80. It was, instead, an appeal from a grand jury proceeding where witnesses had invoked immunity and the State unsuccessfully moved the court to compel their testimony before the grand jury. *Id.* Further, a grand jury proceeding is not included in the definition of a “criminal case” under CJP § 12-101(e). The State glosses over this very distinguishing fact in its analysis.

Further, the State does not rely on the reported opinion in that case, but instead it inappropriately relies on its brief filed 20 years ago as precedent. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) (“Questions which merely lurk in the record . . . are not to be considered as having been so decided as to constitute precedent”). Finally, the statute at issue in that case was a predecessor statute to CJP 9-123. CJP was not enacted until approximately five years after that case was decided and any reliance on that case would be misplaced.

In *State v. Strickland*, the Court of Special Appeals clarified, in reference to CJP §12-302, that “[i]t does not follow . . . that simply because a motion is filed in a court that exercises criminal jurisdiction, that the proceeding arising from the motion must, *ipso*

³ The State has not copied undersigned counsel on any pleadings in this Honorable Court as evidenced by the Certificates of Service. This is purely an attempt to portray the appeal as a final judgment where only Officer Porter is a party. The Sixth Amendment clearly gives Officers Nero, Miller and Lieutenant Rice standing to make the arguments contained herein.

facto, be criminal in nature.” 42 Md. App. 357, 359 (1979). The State relies upon this statement in an attempt to remove its appeal from the grips of §12-302, but the court in *Strickland* was considering an appeal from a motion for return of property that was granted by the trial court, which the court ultimately decided was “more akin to a replevin, a civil action, rather than a criminal proceeding.” *Id.* The judgment being appealed in the present case has nothing to do with property or title, and everything to do with the underlying criminal case; it *is* “criminal in nature.” It is from a criminal case where a criminal co-defendant invokes his rights under the Fifth Amendment and Article 22 of the Maryland Declaration of Rights to keep from criminally incriminating himself and who has his own criminal trial date approaching. There is nothing civil in nature about the proceeding that the State is attempting to appeal. Because of this, the exception in *Strickland* does not apply, and the State’s appeal is only valid if it comports with §12-302 – which it does not.

The State also erroneously relies upon a string of cases where the State argues that this Court has extended the State’s right to appeal beyond what the statute provides. The State cites two cases, *No. 231* and *No. 236*, in support of this argument. The holdings of these cases, however, turn on the fact that this Court found that the judgments appealed by the State were, in fact, final judgments.⁴ The State’s reliance upon these cases begs

⁴ See *Special Investigation No. 231*, 295 Md. 366, 370 (1983) (“In this case the proceeding consisted only of a motion to disqualify the attorney in question. Once the motion was denied there was nothing more to be done in this particular case. There was nothing else before the court. There was nothing pending. Hence, we conclude that the order of the trial judge here settled the rights of the parties and terminated the cause. Thus, it was a final judgment.”). In the subsequent case, this Court uses almost identical

the question of whether or not the Circuit Court's denial of the State's motion to compel Officer Porter to testify is a final judgment. Looking back to the definition provided by this Court in *Douglas v. State*, it is clear that the judgment at issue here is not a final judgment. 423 Md. 156, 171 (2011).

In its petition, the State dedicates a majority of its argument to pleading with this Court to grant writ of certiorari in order to remedy the alleged "separation of powers crisis," created by the circuit court's order. While the State does not make an explicit request, it seems to be arguing for a prerogatory writ. In *State v. Manck*, the State conceded that it had no statutory right to appeal, but nevertheless asked this Court to issue a prerogatory writ. 385 Md. 581, 598-99 (2005). This Court denied this request, explaining that "[m]andamus . . . may *never* be employed as a substitute for appeal in derogation of the policies behind limiting the state's access to appellate review." *Id.* at 598 (quoting *Will v. U.S.*, 389 U.S. 90, 97 (1967)).

The State's argument that this appeal is proper is simply incorrect. The State has provided no authority which would suggest the State has the ability to appeal the circuit court's order with respect to Porter's testimony in the Miller, Nero and Rice trials.

II. THE ISSUES RAISED IN THE STATE'S IMPROPER APPEALS IN MILLER, NERO AND RICE ARE CUMULATIVE OF THE ISSUES RAISED IN PORTER'S PROPERLY TAKEN APPEALS IN GOODSON AND WHITE. GRANTING CERTIORARI IN MILLER, NERO AND RICE WILL NOT CLARIFY THE ISSUES ANY FURTHER THAN THIS COURT CAN CLARIFY IN THE APPEALS THAT ARE PROPERLY BEFORE IT IF THIS COURT FINDS IT DESIRABLE AND IN THE PUBLIC INTEREST.

language to describe the judgment being appealed. *See Special Investigation No. 236*, 295 Md. 573, 575 (1983).

Whether this Honorable Court (or Court of Special Appeals) decides the issues with two case numbers or five case numbers in the caption of an opinion, it can sufficiently address the concerns the State has expressed in its Petition for Writ of Certiorari if the Court finds it to be desirable and in the public interest. Nothing the State has argued in its reasons for granting the Writ in Miller, Nero and Rice is so compelling as to justify combining improperly taken appeals to be heard on the merits with ones that have been properly taken.

The State argues that this Honorable Court should grant the writ because CJP 9-123 *"has created a separation of powers crisis"* and this case presents an opportunity for this Court to *"Give 9-123 its first appellate construction and thereby resolve the serious constitutional and statewide problems that the Circuit Court's Order has created."* To be sure, the State has created the problems of which it complains by the failure to address this issue well before trial and for employing subterfuge to control the trial court docket. These problems are clearly self-inflicted and the State is simply distressed because the trial court is not bailing the State out of the boat that the State itself put a hole in.

The Goodson and White appeals are properly before this Court and the Miller, Nero and Rice appeals have been improperly taken. This Honorable Court, in the proper exercise of its discretion, is fully capable of addressing the issues in Goodson and White if it finds it to be desirable and in the public interest. The State's suggestion that by taking the Miller, Nero, Rice appeals on the merits would do something to resolve the

alleged "separation of powers crisis" that Goodson and White could not do is simply disingenuous and a continuation of the subterfuge initiated in the circuit court.

Conclusion

It is for the above-stated reasons that Respondent respectfully requests that this Honorable Court Dismiss the State's Petition for Writ of Certiorari in the cases of Miller, Nero and Rice and Order the trials of these three officers to move forward in the Circuit Court for Baltimore City. It is also for the above-stated reasons that Respondent respectfully requests this Honorable Court award attorneys' fees and costs of this frivolous appeal from the time of the noting of the improper appeal and to also remand this matter to the Circuit Court to determine what, if any, further sanction would be appropriate pursuant to *McNeil v. State*, 112 Md. App. 434, 461-62 (1996).

Respectfully submitted,

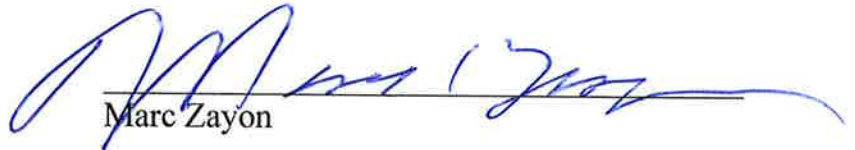


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CERTIFICATE OF COMPLIANCE

This Answer to Petition for Writ of Certiorari contains 3819 words, excluding the parts of the brief exempted from the word count by Rule 8-503. This Petition complies with the font, spacing, and type size requirements stated in Rule 8-112.


Marc Zayon

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of this Answer and Motion to Strike were this **16th** day of **February 2016**, hand-delivered to Assistant Attorney General Carrie Williams, Office of the Attorney General, Criminal Appeals Division, 200 St. Paul Place, Baltimore, Maryland 21202; and Michael Shatzow, Deputy State's Attorney for Baltimore City, 120 E. Baltimore Street, 9th Floor, Baltimore, Maryland 21202.


Marc Zayon

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CRIMINAL DIVISION

STATE OF MARYLAND

* IN THE

* CIRCUIT COURT FOR

v.

* BALTIMORE CITY

EDWARD NERO

* Case No. 115141033

* * * * *

ORDER

On September 15, 2015, the State notified this Court that it intended to try the above-captioned case and related cases in a certain order. The State indicated that the order was preferable because Officer William Porter was a material witness in the cases against Sergeant Alicia White and Officer Caesar Goodson. On December 16, 2015, Officer Porter's trial ended in a mistrial. His retrial is currently scheduled for June 13, 2016.

On January 7, 2016, this Court granted the State's Motion to Compel Officer Porter to testify in the *Goodson* and *White* trials. Officer Porter appealed this Court's decision and the *Goodson* and *White* trials are stayed pending a decision by the Court of Special Appeals.

Shortly after the *Goodson* and *White* trials were stayed, this Court notified all parties that it planned to proceed with the *Nero*, *Miller*, and *Rice* trials, with Nero's scheduled to begin on February 22, 2016. It was only then, four months after the State identified Officer Porter as a material witness in two other trials, and one month after Officer Porter's mistrial, that the State notified this Court, in a January 16, 2016 letter, that Officer Porter may be a material witness in the *Nero*, *Miller*, and *Rice* cases and that it wished to postpone all five cases until after Officer Porter's retrial. One of the reasons

the State requested the Court grant the postponement was so that the State could avoid a *Kastigar* hearing and the need to put together a “clean team.”

On January 20, 2016, this Court heard arguments on the State’s Motion to Compel the testimony of Officer Porter in the *Nero*, *Miller*, and *Rice* trials and denied the State’s motion. This Court found that the State was using Md. Code, Cts. & Jud. Proc. § 9-123 in an attempt to control the schedule and order of the trials and to circumvent this Court’s ruling that postponement in these cases was not appropriate.

This Court agrees that its role is not to impose its opinion upon the State’s determination that a witness’ testimony is in the public interest. This Court believes, however, that rather than become a rubber-stamp for the State’s Attorney, there should be a two-step process in granting immunity under § 9-123 when, and only when, the motives of the requesting party are called into question. The denial of the State’s motion to compel was not based upon an imposition of the Court’s opinion on the State’s determination that a witness’ testimony was in the public interest under § 9-123, but rather based upon the Court finding that the State’s motion was simply an attempt at subterfuge because they did not agree with the Court’s order to continue with the other trials. It is this action of the State that this Court found was not in the public interest.

For these reasons, this Court finds that its denial of the State's motion to compel was appropriate. Therefore, it is this 10th day of February, hereby

ORDERED that the State's Motion to Stay Proceedings Pending trial in the above-captioned case is **DENIED**.

Judge Barry G. Williams

Judge's Signature appears on the
original document

BARRY G. WILLIAMS
JUDGE, CIRCUIT COURT FOR
BALTIMORE CITY

Clerk, please mail copies to the following:

Marc Zayon, Attorney for Edward Nero

Janice Bledsoe, Deputy State's Attorney, Office of the State's Attorney for Baltimore
City