IN THE CIRCUIT COURT
FOR BALTIMORE CITY

STATE OF MARYLAND	:	
	:	
v.	:	**CRIMINAL NO. 115141037**
	:	
OFFICER WILLIAM G. PORTER	:	
	:	
Defendant.	:	
	:	

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DEFENDANT MOTION IN LIMINE RE.
PEREMPTORY STRIKES

Comes now Defendant Officer William Porter, through his counsel, Joseph Murtha and Gary Proctor (hereinafter "Defendant") and respectfully submits this Motion in support of his contention that he is entitled to ten (10) peremptory challenges, with the state being given five (5).

1. Md. Rule 4-313(a) governs the number of strikes allotted to the parties in a criminal case, and says, in pertinent part:

> (1) *Generally.* Except as otherwise provided by this section, each party is permitted four peremptory challenges.
>
> (2) *Cases Involving Death or Life Imprisonment.* Each defendant who is subject on any single count to a sentence of death or life imprisonment, except when charged with a common law offense for which no specific penalty is provided by statute, is permitted 20 peremptory challenges and the State is permitted ten peremptory challenges for each defendant.
>
> (3) *Cases Involving Imprisonment for 20 Years or More, But Less Than Life.* Each defendant who is subject on any single count to a sentence of imprisonment for 20 years or more, but less than life, except when charged with a common law offense for which no specific penalty is provided by statute, is

> permitted ten peremptory challenges and the State is permitted five peremptory challenges for each defendant.

Id. In the case at bar, the State believes that each side is entitled to four challenges, whereas Defendant believes this is a ten and five case.

2. The offense for which Defendant is charged with, that he asserts entitles him to ten (10) strikes, is misconduct in office. "In Maryland, misconduct in office is a common law misdemeanor. It is corrupt behavior by a public officer in the exercise of the duties of his office or while acting under color of his office." Duncan v. State, 282 Md. 385, 387, 384 A.2d 456, 458 (1978).

3. As such:

> The common law misdemeanor...carries with it the common law penalty, which is anything in the discretion of the sentencing judge, provided only that it not be cruel and unusual. Because the constitutionality (the proportionality) of a sentence in terms of its length can never be judged in the abstract but must be determined on an *ad hoc,* case-by-case basis, the argument might be made that any crime punishable by common law sentencing carries the at-least theoretical possibility of life imprisonment, until the facts are fully developed. We do not believe, however, that the Legislature intended such a remote and theoretical possibility to vest initial jurisdiction in the criminal court for every crime with open-ended common law sentencing provisions. The crime now under review, however, does not need to rely upon such remote and theoretical possibilities so to qualify.

State v. Hardy, 53 Md. App. 313, 314-15, 452 A.2d 1299, 1301 (1982) aff'd, 301 Md. 124, 482 A.2d 474 (1984). Defendant does not contend that this is a case with the possibility of a life sentence, as that would be remote. That said: this is absolutely a case the gravamen of which means that he is entitled to ten (10)

strikes. There is a long history of persons received sentences of two decades in prison for common law misdemeanors:

> Both this Court [of Special Appeals] and the Court of Appeals have held that a sentence of 20 years' imprisonment for common law assault did not constitute cruel and unusual punishment. Roberts v. Warden, 242 Md. 459, 219 A.2d 254 (1966), cert. denied, 385 U.S. 876, 87 S.Ct. 156, 17 L.Ed.2d 104; Adair v. State, 231 Md. 255, 189 A.2d 618 (1963); Raley v. State, 32 Md.App. 515, 363 A.2d 261 (1976); Wilkins v. State, 5 Md.App. 8, 245 A.2d 80 (1968)

Brown v. State, 38 Md. App. 192, 195, 379 A.2d 1231, 1233 (1977).[1] As such, Defendant's argument is far from a "remote and theoretical possibilit[y]." Id.

4. Turning firstly to the statute itself. It reads, in relevant part that "[e]ach defendant who is subject on any single count to a sentence of imprisonment for 20 years or more, but less than life, except when charged with a common law offense for which no specific penalty is provided by statute, is permitted ten peremptory challenges and the State is permitted five peremptory challenges for each defendant." So the question that lies herein is: what happens when both are true?

5. This Court's starting point should be that:

> When a court construes a criminal statute, it may invoke a principle known as the "rule of lenity" when the statute is open to more than one interpretation and the court is otherwise unable to determine which interpretation was intended by the Legislature. Instead of

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1 See also Thomas v. State, 333 Md. 84, 102, 634 A.2d 1, 10 (1993) ("Although we believe the 30–year sentence imposed for this [common law] battery was harsh and severe, we do not find under the circumstances that it was so grossly disproportionate to the offense that it must be set aside.") Later partially abrogated by Legislature codifying assault.