IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

September Term 2015

No. 2308

CAESAR GOODSON

v.

STATE OF MARYLAND, Appellee

On Interlocutory Appeal from the Circuit Court
for Baltimore City, Maryland
The Honorable Barry G. Williams, Presiding

BRIEF OF APPELLANT WILLIAM PORTER

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Table of Contents

Table of Authorities

Cases

Constitutional Provisions

Statutes and Rules

Other Authorities

I. INTRODUCTION

The actions of the State in this case are without precedent. Appellant is being used as the designated whipping boy in the State's case against Sergeant White, and Officer Goodson. The State does not shy away from saying that Porter committed perjury in his own trial, yet they continue to think that they can sponsor his testimony in the other officers' cases, and then prosecute him for manslaughter later. This cannot be.

II. SUMMARY OF THE ARGUMENT

The Fifth Amendment to the U.S. Constitution declares in part that "No person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const., Fifth Amend. The Fifth Amendment creates a privilege against compelled disclosures that could implicate a witness in criminal activity and thus subject him or her to criminal prosecution. *Hoffman v. United States,* 341 US 479, 486-488, 71 S.Ct. 814, 818-819 (1951). The privilege against self-incrimination is a *constitutionally-based* privilege—not an evidentiary privilege.

The Maryland Constitution reads that ""That no man ought to be compelled to give evidence against himself in a criminal case." While Appellant believes that compelling him to testify will violate the Fifth Amendment, he also posits that the Article 22 provides an additional and separate basis to keep him off the stand. Article 22 use of the word "evidence" is more global than that envisaged by the Federal Constitution.

To be clear: Porter is not saying that § 9-123 is unconstitutional: he is saying that it is unconstitutional as applied to this defendant in this setting. To quote Chief Judge Murphy, in his capacity as chair of the General Assembly Criminal Law Article Review Committee:

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

See notes to Md. Code Ann., Crim. Law § 9-204.[1] The General Assembly has failed to do so, so it falls to this Court to provide Appellant shelter from the storm.

While Porter has many valid reasons as to why he cannot be compelled to testify, the Fifth Amendment, the Sixth Amendment, Article 22, to name but three, the overarching principle is that the judicial system is built on trust and respect of the public and relies on that trust and respect for effectiveness. "It is of fundamental importance that justice should not only, but should manifestly and undoubtedly be seen to be done." *Rex v. Sussex Justices*, 1 K.B. 256, 259 (1924). Similarly, the United States Supreme Court has said that trials themselves are "a reflection of the notion, deeply rooted in the common law, that 'justice must satisfy the appearances of justice,'" *Levine v. United States*, 362 U.S. 610, 616 (1960) (quoted source omitted), and that the perception of fairness of trials and judicial acts is essential to the effectiveness of the system itself. See

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1 To be clear: this quote is not about § 9-123 specifically, but it remains no less true when applied to the statute at issue.

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (Brennan, J., concurring). Frankly, calling Porter as a witness in two (2) trials, about the same matters upon which he faces a pending manslaughter trial, wreaks of improriety.

On a related point: on September 15, 2015 the State told the that it was "imperative" that Porter be tried first. Implicitly, maybe even explicitly, the State acknowledged in this pleading that Porter had to go first in order that he not have a Fifth Amendment Privilege. If the State truly believes that Porter can be called as a witness, with a pending manslaughter charge, why was it "imperative" that Officer Porter proceed to trial first?

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

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

III. RELEVANT FACTS

(i) PROCEDURAL POSTURE

Baltimore City Police Officer William Porter (hereafter "Appellant") has been charged with Manslaughter, Second Degree Assault, Reckless Endangerment and Misconduct in Office in Baltimore City Circuit Court Case Number 115141037. The charges involve the in-custody death of Freddie Gray on April 12, 2015. There are six officers charged in the death of Mr. Gray: Officer Porter, Officer Caesar Goodson, Sergeant Alicia White, Officer Garrett Miller, Officer Edward Nero and Lieutenant Brian Rice. Judge Barry Williams was specially assigned to all six (6) cases.

On September 15, 2015 the State of Maryland, through Chief Deputy State's Attorney Michael Schatzow wrote to the Circuit Court, and told him that the State would be calling Officer Porter's case first, followed by Goodson, White, Miller, Nero and Rice. See Exhibit A of Motion for Injunction by Porter. The State's rationale for this was that:

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

Id. The court below granted the State its wish, and Officer Porter proceeded to trial first.

(ii) THE TRIAL

Jury selection began in Officer Porter's trial on November 30, 2015. Ultimately, the case mistried on December 16, 2015 as the jury were unable to reach a verdict as to any of the four (4) charges placed against Officer Porter. Following the mistrial, the circuit court set the retrial for June 13, 2016.

During his trial, Officer Porter testified in his defense. *See* Tr. 12/9/15. During the State's closing argument by Ms Janice Bledsoe, and the rebuttal by Mr. Schatzow, both commented on Officer Porter's credibility, candor and truthfulness.

The State's Opening Closing Argument

[A] during his testimony at trial Officer Porter stated under oath that he heard Freddie Gray say during his initial arrest that he could not breathe. Tr. 12/9/15 at 6; 25. The State's theory at trial, was that Mr. Gray had said this much later. In her closing Ms. Bledsoe stated that not one of the other witness officers testified that they heard Mr. Gray say during his initial arrest that he could not breathe and went on to assert that "Not one of them came in here and said I heard Freddie say I can't breathe at Presbury. And do you know why? Because it was never said at Presbury [at the initial arrest]." Tr. 12/14/15 at 8. Ms. Bledsoe's assertion that it was never said leads to the inexorable conclusion that the State was accusing Officer Porter of perjury.

[B] The reason the State believed that Mr. Gray said he could not breathe much later was because of a report of a Detective Teel, who wrote memorialized

a conversation she had with Officer Porter. In arguing that Officer Porter is not to be believed, Ms. Bledsoe stated that "Who has the motive to be deceitful? It's not Detective Teel. It's Officer Porter." Id.

[C] Officer Porter testified that when he saw Mr. Gray in the back of the police wagon, at Druid Hill and Dolphin, he helped Mr. Gray (who was on the floor) onto the bench, but that Mr. Gray had power in his legs and bore the weight of his body. Tr. 12/9/15 at 55-56. In calling Porter a liar, Ms. Bledsoe stated that:

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

Tr. 12/14/15 at 10.

[D] Officer Porter testified that he was aware that arrestees often feign injury in the hopes of avoiding a trip to jail. He testified that the term for it that many officers use is "jailitis." Tr. 12/9/15 at 57. Ms. Bledsoe in her closing said that "this jailitis is a bunch of crap." Tr. 12/14/15 at 16.

[E] Officer Porter testified that, when he saw Freddie Gray at Druid Hill and Dolphin he believed that Mr. Gray was not injured. Officer Porter further stated under oath that if he knew Mr. Gray was injured he would have sought immediate

medical attention. Tr. 12/9/15 at 59-60. Ms. Bledsoe, in labeling Officer Porter a perjurer stated that Porter "knew Gray was hurt badly [at Druid Hill and Dolphin], he knew he wasn't going to be accepted at Central Booking. But he did nothing." Tr. 12/14/15 at 17.

[F] Officer Porter testified that when Mr. Gray was loaded in the Wagon at Baker and Mount Streets, he did not know whether Mr. Gray was leg shackled or not. Tr. 12/9/15 at 108. Ms. Bledsoe told the jury "[h]e [Porter] knew Freddie Gray was placed into the wagon with handcuffs, leg shackles..." Tr. 12/14/15 at 20.

[G] Because of the statements of Officer Porter referenced above, Ms. Bledsoe argued to the jury that "[t]here's only one reasonable conclusion, Officer Porter **was not telling the truth** about his involvement in this incident." Tr. 12/14/15 at 21.

[H] After pointing out another statement that the State believed was inconsistent, regarding what Officer Porter told a civilian named Brandon Ross, Ms. Bledsoe again stated that the "[o]nly reasonable conclusion you can [sic] from that **Ofc. Porter is not telling the truth**." Tr. 12/14/15 at 23 (emphasis supplied).

[I] Additionally, Ms. Bledsoe argued to the jury that Officer Porter lied under oath when he stated that on April 12, 2015 he was unaware of a General Order numbered 11-14. Tr. 12/14/15 at 27.

[J] Officer Porter testified at trial that he believed the wagon was headed to the hospital at one point, with Mr. Gray inside of it. Ms. Bledsoe stated that this was false testimony, because Officer Porter was behind the wagon and new it was headed in a different direction. Tr. 12/14/15 at 33.

The State's Rebuttal

[K] 19 lines, less than one page of transcript, into his rebuttal Mr. Schatzow got to his point and told the jury that "now that the defendant is on trial, he comes into court, and **he has lied to you about what happened**." Tr. 12/14/15 at 42.

[L] Ten lines after that, Mr. Schatzow repeated his assertion that "the state proved through the evidence that he [Porter] lied when he spoke to the [investigative] officers and **he lied on the witness stand.**"[2] Tr. 12/14/15 at 43.[3]

[M] Mr. Schatzow stated that one of Porter's lies was "[h]ow he tried to pretend in his April 17th statement that he was too far away at Stop 2 to know what was going on." Tr. 12/14/15 at 43.

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2 This assertion also arguably violates Maryland Rule of Professional Conduct 3.4 which states that an attorney shall not "state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused."

3 Of course, Mr. Schatzow's assertion that Officer Porter lied to the initial police officers that interviewed him, could lead to additional charges of misconduct in office and obstruction and hindering. See, for example, *Cover v. State*, 297 Md. 398, 400 (1983) ("[b]oth this Court and the Court of Special Appeals have said that resisting, hindering, or obstructing an officer of the law in the performance of his duties is an offense at common law.")

[N] Mr. Schatzow stated that Officer Porter misrepresented what he saw when at Baker and Mount Street, asking the jury "[w]hat was he trying to cover up? Was he trying to cover up his own knowledge of what had happened there?" Tr. 12/14/15 at 44.

[O] While opining on Officer Porter's credibility generally, Chief Deputy Schatzow stated that "you prove that people aren't telling the truth by showing inconsistencies in their statements. You prove that the statements are inconsistent with each other. You prove that they're telling something that just is -- makes no sense at all." Id.

[P] The State's attribution of perjury to Officer Porter was far from subtle:

> But what did we prove? The State proved when it said it lied [sic] -- at Stop 2 was a lie. And **this I can't breathe nonsense** that he came over. You'll see what he's trying to do in his testimony. Every place that he is stuck, every place that he is stuck in his April 17th statement and in his April 15th statement, **he now comes up with some new explanation for it**. Asked repeatedly, this business about at Stop 4 used his own legs to get up, nonsense. Five, six times on April 17th you'll see. Asked what happened, I picked him up, and I put him on the bench. I put him on the bench. I put him on the bench. I put him on the bench. You won't find anything in there about Freddie Gray using his own muscles, using his own legs. But the real one is the I can't breathe. Ha, his credibility is not at issue here.

Tr. 12/14/15 at 45. (Emphasis supplied).

[Q] In response to the defense's assertion that Officer Porter's testimony was credible, Mr. Schatzow stated that

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

Tr. 12/14/15 at 46.

[R] While discussing Mr. Porter's contention that Mr. Gray said "I can't breathe" during his initial arrest, Mr. Schatzow tells the jury that the other witnesses "don't say that because **it didn't happen**, because **it didn't happen**." Tr. 12/14/15 at 47.[4] If it did not happen then Officer Porter is being directly accused of perjury.

[S] Mr. Schatzow told the jury "this is what you were told, you have no reason to not believe Defendant Porter. I've already given you a bunch of reasons. You heard reasons. But the biggest reason of all is he's got something at stake here, ladies and gentlemen. He's got a motive to lie." Tr. 12/14/15 at 49.

[T] In accusing Officer Porter of lying when he said that he had very little conversation with Officer Goodson at Dolphin and Druid Hill, Mr. Schatzow stated that:

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

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4 It appears in this instance that the court reporter made a typo in attributing to Mr. Schatzow the statement that the "defense attorneys" said this. The audio appears clear that he attributed said statement to the defense *witnesses*.

trying to throw the investigators off. Nah, nah. That's not what that is.

Tr. 12/14/15 at 51.

(iii) THE SUBPOENA

During Officer Porter's trial, he was handed a subpoena to testify in the trials of both Goodson (case number 115141032) and White (115141036). Exhibit B to Appellant's Motion for Injunction.

(iv) THE FEDERAL INVESTIGATION

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

Counsel have had a similar experience with the witnesses. In meeting with one witness, that was called at Officer Porter's trial, the undersigned asked him a question and the response received was "the FBI also asked me that question." As such, there is an ongoing, verifiable, Federal investigation into the conduct of Officer Porter and others with regard to the death of Freddie Gray and, at this

time, it is impossible to predict whether this will result in charges in United States District Court.

Significantly: when Officer Porter testified *at his trial* the undersigned observed at least three (3) current members of the United States Attorney's Office for the District of Maryland in attendance, including the United States Attorney himself. It is therefore, surely, undeniable that Officer Porter remains in the sights of the United States.

(v) THE HEARING IN THE COURT BELOW

The Circuit Court held a hearing on this matter on January 6, 2016. The State filed a motion in open court on that date, asking that, pursuant to § 9-123 of the Courts and Judicial Proceedings Article, that Porter be compelled to testify under a grant of immunity in the trial of Officer Caesar Goodson. *Exhibit C to Motion for Injunction.*

A transcript of the hearing is included in the record.

Porter was called at the hearing and asserted his right to remain silent under State and Federal Constitutions. Tr. 1/6/16 at 43-45. The circuit court acknowledged that it found itself in "unchartered territory." Tr. 1/6/16 at 65. The court ruled that Porter could be compelled to testify, under grant of use and derivative use immunity, and issued an Order to that effect. Tr. 1/6/16 at 68-69.

IV. PORTER MAY PROPERLY APPEAL THIS MATTER UNDER THE COLLATERAL ORDER DOCTRINE

"Appellate practice in this State has long been governed by a legislative scheme which, for the most part, permits appeals in civil and criminal proceedings only from final judgments." *Pulley v. State*, 287 Md. 406, 414 (1980). "In a criminal case, no final judgment exists until after conviction and sentence has been determined, or, in other words, when only the execution of the judgment remains." *Stephens v. State*, 420 Md. 495, 502 (2011) (internal quotations omitted) (internal citations omitted).

The Court of Appeals has previously recognized, however, that,

> we have made clear that the right to seek appellate review of a trial court's ruling ordinarily must await the entry of a final judgment that disposes of all claims against all parties, and that there are only three exceptions to that final judgment requirement: appeals from interlocutory orders specifically allowed by statute; immediate appeals permitted under Maryland Rule 2-602; and appeals form interlocutory rulings allowed under the common law collateral order doctrine.

Salvagno v. Frew, 388 Md. 605, 615 (2005).

"The collateral order doctrine ... permits the prosecution of an appeal from a narrow class of orders, referred to as collateral orders, which are offshoots of the principal litigation in which they are issued and which are immediately appealable as final judgments without regard to the posture of the case."

Addison v. State, 173 Md. App. 138, 153 (2005) (internal citations omitted) (internal quotations omitted).

To fall within the collateral order doctrine, four requirements must be satisfied. *Id.* at 154. The four requirements are "(1) it must conclusively determine the disputed question; (2) it must resolve an important issue; (3) it must be completely separate from the merits of the action; and (4) it must be effectively unreviewable on appeal from a final judgment." Id. "In Maryland, the four requirements of the collateral order doctrine are very strictly applied, and appeals under the doctrine may be entertained only in extraordinary circumstances." Id. (internal quotations omitted). "The four requirements are conjunctive in nature and each must be satisfied in order for a prejudgment order to constitute a collateral order." *Stephens*, 420 Md. at 502-03 (*quoting In re Franklin P.*, 366 Md. 306, 327 (2001)).

When a defendant has been denied an absolute constitutional right, a denial of that right may be immediately appealable. *Kable v. State*, 17 Md. App. 16, 28 (1973). For example, an interlocutory appeal from the denial of a motion to dismiss based on double jeopardy is permitted because of the "serious risk of irreparable loss of the claimed right if appellate review is deferred." *Stephens*, 420 Md. at 505-06. The "decision that an accused is incompetent to stand trial" also falls within the class of orders immediately appealable because after trial "will be too late effectively to review the present order, and the rights conferred by

the constitution(s) will have been lost, probably irreparably." *Adams v. State*, 204 Md. App. 418, 432 (2012).

An order to disclose documents that are subject to attorney-client privilege and the attorney work product doctrine is also immediately appealable under the collateral order doctrine because reversal after disclosure "cannot undo what will have already taken place: the disclosure of the documents" subject to the privilege. *Ashcraft & Gerel v. Shaw*, 126 Md. App. 325, 345 (1999). Likewise, returning documents from a grand jury was appealable as "there was nothing more to be done." *In re Special Investigation No. 236*, 295 Md. 573, 575 (1983).

Similarly, the Court of Appeals does "not believe in this day and age a person should be obliged to decide whether he should risk contempt in order to test the validity of a subpoena..." *In re Special Investigation No. 244*, 296 Md. 80, 86 (1983). The Court of Appeals reasoning in *St. Joseph Med. Ctr., Inc. v. Cardiac Surgery Associates, P.A.*, 392 Md. 75, 88 (2006) is equally applicable here:

> Although the discovery order was interlocutory with regard to the underlying unfair competition litigation and the parties to that case, the order was not interlocutory with regard to St. Joseph. St. Joseph is not a party to the unfair competition case and would have no standing to challenge the discovery order by appealing from a final judgment in that case.

Id. Replace the word "St. Joseph" with Porter and "unfair competition" with Goodson trial, and you have the issue herein. Extrapolating from the caselaw above, and others, immunity is a right that fits within the requirements of the

collateral order doctrine permitting an interlocutory appeal when that right is infringed by a trial court. See *Milburn v. Milburn*, 142 Md. App. 518 (2002).

Considering each of the four (4) factors in turn:

(1) it must conclusively determine the disputed question. For the reasons outlined below, Officer Porter submits that the State cannot call him as a witness in the Goodson trial, or any of the other officers for that matter, without infringeing his rights under State and Federal Constitutions.

(2) it must resolve an important issue. A violation of Porter's Fifth Amendment Rights and Article 22 ones is crucially important, as is the right to a fair trial. This issue potentially affects every case in Maryland from this point forward where two people are charged with the same crime, and their cases are severed. That has to occur literally thousands of time a year. It is important. At the hearing in the circuit court on this matter, all the parties agreed that there is no appellate guidance in Maryland on this issue. The circuit court lamented the lack of appellate law on this issue and opined "[w]hy does it got to be me [going first]?". Tr. 1/6/16 at 63. It goes without saying that this case is garnering international attention.

(3) it must be completely separate from the merits of the action. The Motion to Compel was filed in Officer Caesar Goodson, and Sgt. Alicia White's cases. Those cases involve homicide charges against the officers. Porter's right not to incriminate himself is separate and distinct from the other Officers' trials.

(4) it must be effectively unreviewable on appeal from a final judgment. At the hearing in the Circuit Court the parties and the court agreed that Goodson did not have standing to challenge the State's subpoena and motion to compel, filed to procure the testimony of Porter. Thus, it cannot and will not be in any way reviewed on appeal. Even if Porter could somehow appeal it later, unless this Court considers the matter now, the horse will have bolted. The harm complained of here is William Porter testifying in the case of the other officers. The time to review it is before he hits the stand. Afterwards this Court cannot posthumously pardon such conduct.

For these reasons, Porter may properly challenge his subpoena and order to be a compelled witness now.

V. THE CIRCUIT COURT'S RULING THAT PORTER CAN BE COMPELLED TO TESTIFY WAS ERRONEOUS

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

> (b)(1) If a witness refuses, on the basis of the privilege against self-incrimination, to testify or provide other information in a criminal prosecution or a proceeding before a grand jury of the State, and the court issues an order to testify or provide other information under subsection (c) of this section, the witness may not refuse to comply with the order on the basis of the privilege against self-incrimination.
>
> (2) No testimony or other information compelled under the order, and no information directly or indirectly derived from the testimony or other information, may be used against the witness in any criminal case, except in a prosecution for perjury, obstruction of justice, or otherwise failing to comply with the order.

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

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

(d) If a prosecutor seeks to compel an individual to testify or provide other information, the prosecutor shall request, by written motion, the court to issue an order under subsection (c) of this section when the prosecutor determines that:

(1) The testimony or other information from the individual may be necessary to the public interest; and

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

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

Porter has not been given transactional immunity. The State fully intends to go forward with Officer Porter's retrial on June 13, 2016 - - but in the interim seeks to compel him as a witness in their cases against Officer Goodson and Sergeant White.

VI. PORTER CANNOT BE COMPELLED TO TESTIFY

(a) The State would be suborning perjury

Firstly, Maryland does not allow for a prosecutor or a court to immunize perjury. Which makes sense from a societal standpoint: 'here's your immunity, now go say whatever you want' is scarcely in the public interest. So, the circuit court's grant of immunity will have no effect on the ability of the State of Maryland to charge Officer Porter with perjury later.

If Officer Porter is compelled to testify at Goodson and White trials, and were to testify differently from his own trial: it is surely axiomatic that he would have committed perjury during at least one of the trials. However, even if he testifies consistently with his previous trial: as narrated above the prosecution already believes he has committed multiple instances of perjury. And, as detailed below, what is of crucial importance is what they, the State, believe.

The State's commenting on Officer Porter's testimony would be admissible in Goodson and White's trial as an admission of a party oponent. See, for example, *Wisconsin v. Cardenas-Hernandez*, 219 Wis. 2d 516, 529, 579 N.W.2d 678, 684 (1998) (collecting cases).

The relevant law governing a prosecutor's use of perjured testimony is set forth in *Napue v. Illinois* (1959):

> [I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the

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

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

Importantly, the *Yates* court stated that one does not need to prove that the prosecutor had *actual knowledge* of the uncorrected false testimony; one "need only show that the prosecutor *believed* [the witness'] testimony was probably false." *See May v. Collins,* 955 F.2d 299, 315 (5th Cir. 1992), *cert. denied,* 504 U.S. 901 (1992); *United States v. Mills,* 704 F.2d 1553, 1565 (11th Cir. 1983), *cert.*

denied, 467 U.S. 1243 (1984); *cf. Giglio v. United States*, 405 U.S. 150, 154 (1972) (knowledge of one attorney in prosecutor's office attributed to other attorneys in office). The Supreme Court of New Hampshire ultimately held that a lawyer's duty of candor to the tribunal "is neglected when the prosecutor's office relies on a witness's denial of certain conduct in one case after obtaining an indictment charging the witness with the same conduct in another case." *Yates*, 629 A.2d at 809.[5] For the prosecution to offer testimony into evidence, knowing it or believing it to be false, is a violation of the defendant's due process rights. *Mills*, 704 F.2d at 1565 *citing United States v. Sutherland,* 656 F.2d 1181, 1203 (5th Cir. 1981), *cert. denied,* 455 U.S. 949 (1982); *United States v. Brown,* 634 F.2d 819, 827 (5th Cir. 1981). As noted by the District of Columbia Court of Appeals, "the nondisclosure of false testimony need not be willful on the part of the prosecutor to result in sanctions." *Hawthorne v. United States*, 504 A.2d 580, 591 n. 26 (D.C. 1986) *citing Giglio v. United States,* 405 U.S. at 154.

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

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

. . .

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

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

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

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

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

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

This is because "a judge must allow a defendant wide latitude to cross-examine a witness as to bias or prejudices." *Smallwood v. State*, 320 Md. 300, 307-08 (1990). Accordingly, whatever narrow focus the State may decide to

employ in an attempt to cure the unconstitutional ill set out herein, nothing would bind counsel for Goodson and White from a much wider foray on cross-examination. Lest this Court make any mistake: the State believes that Officer Porter's testimony is *pivotal* to a conviction against White and Goodson. They told the circuit court that not calling Porter would "gut" said prosecutions. As such, it is far from a stretch that counsel for the defendants will additionally jump on the Officer Porter lack of veracity bandwagon. With one crucial difference: counsel for Goodson and White owe Appellant nothing by way of discovery obligations. Appellant does not have the faintest inkling what is coming from these hostile quesitoners, yet he will be compelled to answer their accusations within a few seconds of hearing them: under oath. In the event that Officer Porter withstands their cross with his reputation intact, the prosecutors could then become character witnesses to impugn his veracity (see further below).

To allow Porter to testify, is likely to result in him being unavailable for cross-examination. While the state may give him immunity, the defense cannot. And any new areas that they enquire into are likely to result in Porter declining to answer. No part of any statement Porter has ever given can be used if he is unavailable for cross-examination. *Crawford v. Washington,* 541 U.S. 36 (2004); *State v. Snowden*, 385 Md. 64 (2005).

(b) The grant of immunity by the Circuit Court will not put Officer Porter in the same position

In a reply to Porter's Motion to Quash, filed on January 6, 2016, the state informed the court below that:

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

Id. at 12. Thus, the state continues to believe that Porter committed perjury as they used the word "lie," and there is certainly no question that where the state parted ways with Porter was material.

A grant of immunity must provide a protection coextensive with the Fifth Amendment, as required by *Kastigar*. The State attempted to impeach Officer Porter during his mistrial, and to do so, the State presented a theory during Officer Porter's trial which alleged that Officer Porter lied and attempted to cover up facts when giving a statement to police officers, and when taking the stand in his own defense. Effectively, the State wishes to compel Porter, through the farce of a grant of immunity, to lay a foundation for evidence that the State has deemed as constituting an obstruction of justice and perjury.

Perjury, of course, has no statute of limitations. Md. Crim. Code § 9-101(d). It carries ten (10) years in jail. So Officer Porter can be charged with it as and when the state chooses to, and be confined to a penitentiary for up to a

decade. It is also important to note that Md. Crim. Code § 9-101(c)(1) states that if a defendant gives two contradictory statements, the state does not have to prove which is false, it is enough that both statements under oath cannot be true. As such, if Officer Porter were to testify in Officer Goodson or Sergeant White's trial (or both or others) something that the state believes is inconsistent with his trial testimony, the state would not have to prove which is false, and all the immunity the state could confer would be rendered meaningless.

Further: a defendant, of course, always has a right to testify in his defense. At the bench during Officer Porter's trial the circuit court went to great lengths to inform Officer Porter of his absolute right to testify and the corresponding right to remain silent. That said "a person convicted of perjury may not testify." Md. Code § 9-104. As such, calling Officer Porter as a witness in the Goodson/White trials may result in him being stripped of his ability to testify at his own trial. Again, all the immunity in the world can do nothing to alleviate this concern.

In addition, the Supreme Court ruled in *Kastigar* that a witness may be compelled to testify when given use and derivative use immunity, if after the immunity is granted, the immunity leaves the witness in the same position, as if the witness had simply claimed the privilege. *Kastigar v. United States*, 406 U.S. 441 (1972); *see also Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 79 (1964) *abrogated by United States v. Balsys*, 524 U.S. 666 (1998). Thus, the Maryland statute and *Kastigar* are directly inapposite to the State's theory that Officer Porter committed an obstruction of justice during his taped

statement, and Officer Porter committed perjury when he took the stand in his defense at trial. The state cannot adduce testimony from Appellant on multiple occasions, that it has deemed perjurious, and then say it's a wash.

Courts have agreed, that "[t]he exception in the immunity statute allows the use of immunized testimony only in prosecutions for future perjury, future false statements, and future failure to comply with the immunity order, not for past acts." *Matter of Grand Jury Proceedings of Aug., 1984*, 757 F.2d 108 (7th Cir. 1984). Truthful testimony under a grant of immunity may not be used to prosecute the witness for false statements made earlier. *In re Grand Jury Proceedings*, 819 F.2d 981 (11th Cir. 1987). Thus, based on the State's blatant impeachment of Officer Porter during his trial, the State is effectively presented with a Hobson's choice. The State either has to retract their previous theory, and admit that Officer Porter was truthful (the state has indicated this will not happen), or the State has to recognize that the grant of immunity would be a farce – that is, the State's grant of immunity would be coaxing Officer Porter into committing what the State believes is perjury and an obstruction of justice, both of which are crimes that falls outside the scope of immunity granted in the immunity statute. MD. CODE, CTS. & JUD. PROC. § 9-123. Such a farcical grant of immunity would fly in the face of *Kastigar*'s holding that a witness may be compelled to testify when given use and derivative use immunity, if after the immunity is granted, the immunity leaves the witness in the same position, as if the witness had simply claimed the privilege. 406 U.S. 441.

An analogous scenario is found in *United States v. Kim*, 471 F. Supp. 467 (D.D.C. 1979). *Kim* held that when a defendant was found to have given a perjurious response to a congressional committee's question, and then that same defendant is granted use and derivative use immunity to answer the same question, such a grant was not coextensive with scope of privilege that must be provided under *Kastigar*, as it could have resulted in the infliction of criminal penalties. *U.S. v. Kim* is similar to Officer Porter's scenario in that the prosecution cannot first allege that Porter has provided perjured testimony/committed obstructions of justice, and then thereafter grant immunity to suborn the very same testimony that was allegedly perjured. To summarize: "[i]t is well-established in federal courts that the privilege against self-incrimination can properly be invoked based on fear of a perjury prosecution arising out of conflict between statements sought to be compelled and prior sworn testimony." *Johnson v. Fabian*, 735 N.W.2d 295, 310-11 (Minn. 2007) (citing other cases).

Further: each additional statement by Officer Porter would be live tweeted and reported upon, resulting in an inability to receive a fair trial. Notably, this is a matter in which 100% of the jury panel was aware of the case. Likely the same percentage of a new panel would have at least some knowledge of preceding case(s).[6] If Officer Goodson or Sergeant White were to be acquitted it is all but

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6 The recent newspaper reports by the Baltimore Sun of the jury split in Porter's mistrial have yet further muddied the waters.

inevitable that jurors would conclude that Porter - - the star witness - - was not credible. If convicted, the jurors will assume that Officer Porter has knowledge of inculpatory acts that he has now revealed when granted immunity. Commentators will likely opine as to this regardless of the outcome of each trial.

Officer Porter's statement at his trial was unquestionably voluntary, and his statements to law enforcement were found by the circuit court to be voluntary. Contrarily, Officer Porter's potential statements in Officer Goodson's trial and Sgt. White's trial would not be. Officer Porter would thereby be subjected to jurors with some knowledge of the substance of his compelled statements. Parsing out whether a juror's knowledge of Officer Porter's previous testimony was from the initial voluntary statements, or the later compelled statements, would not be possible in voir dire. A mini-*Kastigar* hearing would be required for each juror.[7]

Moreover, in Officer Porter's trial, and any retrial, the witness were and can be sequestered. The reason for this is obvious, that each witness should testify about his or her recollection, untainted by what every other witness said. And while a trial court can compel witnesses at Officer Porter's trial from learning what the other witnesses have testified to, it can scarcely prohibit people from following accounts of Officer Porter's testimony in the Goodson and White trials.

From a public policy standpoint: why wouldn't a prosecutor do it in every case? It is all too common that more than one person is charged with any given

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

homicide. Because of a host of reasons, the cases are often severed or not joined. Why would an enterprising prosecutor not say "you know what, Defendant B may testify in his trial. So I'll give him immunity and call him as a witness in Defendant A's trial. I'll see how he responds to questions, get an advance preview of what he's going to say, get a feel for how to cross him, whether to offer him a plea, sure I can't use what he says, but they can't make me forget it, there's no prohibition against me getting a transcript, no brainer, right?" This is exactly the kind of harm the Eighth Circuit saw, when holding that "[s]uch use could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973).[8]

A later *Kastigar* will be insufficient to remedy Officer Porter's testimony at two trials.[9] As Officer Porter has "not yet delivered the...material, and he

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

9 As now United States District Court Judge Bennett has noted:

> [t]here is without question a great possibility of secret misuse of compelled testimony, since there is no great difficulty in finding sources 'wholly independent' for a conclusion already reached from the leads of compelled testimony...The task of proving that evidence offered is the result of illicit use of compelled testimony is an impossible burden for a defendant...No defendant is in a position to pierce the law enforcement process and prove to a court that illicit use was made of his testimony.

consistently and vigorously asserted his privilege. Here the 'cat' was not yet 'out of the bag' and reliance upon a later objection or motion to suppress would 'let the cat out' with no assurance whatever of putting it back." *Maness v. Meyers*, 419 U.S. 449 (1975).

By the same token, the state cannot call Officer Porter, solely for the purpose of getting into evidence statements from the Porter trial that they believe aid in their pursuit of a conviction of others. That is because "even if the sole purpose in calling a witness is other than subterfuge, the questioning by a party of its own witness concerning an 'independent area of inquiry' intended to open the door for impeachment and introduction of a prior inconsistent statement could be found improper." *Walker v. State*, 373 Md. 360, 386 (2003).

There is also a Sixth Amendment issue with regard to the State's purported course of action. Appellant is, of course, entitled to counsel of his choice. *State v. Goldsberry*, 419 Md. 100 (2011). And it is surely obvious that Appellant's counsel and he have discussed this matter at length over the preceding months. So what, then, should happen if Appellant testifies inconsistently under grant of immunity with what he has informed his counsel? To be clear: a lawyer may not suborn perjury. See, for example, *Green v. State*, 25 Md. App. 679 (1975). Rule 3.3 of the Rules of Professional Conduct, which govern the undersigned, contain a number of prohibitions. But, in a nutshell, counsel shall not offer anything to a

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

court that they know to be incorrect, shall correct anything that they later learn to be false, and may refuse to offer evidence they reasonable believe to be false. If this Court allows Officer Porter to testify once, twice, thrice or more, it may very well violate Officer Porter's right to counsel of his choice, because counsel will be in an untenable position. This is not a coextensive position.

Mr. Schatzow will surely not ask Officer Porter the same questions six months later as he did the first go around. Even if he did, it is inconceivable that Officer Porter will answer them the same way. All good cross examination is palimpsest, it builds on what you already know. To allow the state to have the windfall of two (2) more runs at Officer Porter (or more), prior to his retrial, is anathema to our notions of the right to remain silent. It is the same trial team for all six (6) cases. Indeed,

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

United States v. Byrd, 765 F.2d 1524, 1530 (11th Cir. 1985). (Emphasis in the original).[10]

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

In Porter's trial, it is axiomatic that his lawyer could object if the State asked him something objectional, or were to elicit hearsay, all manner of issues. The rights of a witness, however, are markedly less concrete in the trial of the other officers.

The Maryland statute on immunity states that "if a witness refuses...the witness may not refuse to comply...may be used against the witness...if a witness refuses to comply..." Id. (emphasis supplied).[11] The statute is designed for people without skin in the game: witnesses. Not Officer Porter.

To be sure: there are ways of compelling someone that the state believes to be less culpable in a criminal act to testify at the other's trial. *People v. Brunner*, 32 Cal. App. 3d 908, 911, 108 Cal. Rptr. 501 (CA Ct. App. 1973). California sensibly holds that:

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

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11 In fact the caption above § 9-123(c) states "**Order requiring testimony or information in grand jury proceedings**." (Emphasis in the original). By the same token: subsection (e) deals with contempt when the refusal is before the grand jury. As such, it is arguable that the only form of compelled testimony contemplated by the statute is that before a grand jury: which is in the process of gathering facts. Certainly, there is not even a scintilla of support in the language for the notion that this section was intended for the case at bar. A word search for "trial" in § 9-123 turns up not a single hit, nor can you find the word "jury" unless you include "grand jury" or "per*jury*."

People v. Campbell, 137 Cal. App. 3d 867, 187 Cal. Rptr. 340 (CA Ct. App. 1982).[12] Accord *People v. Matz*, 68 Cal. App. 4th 1216, 80 Cal. Rptr. 2D 872, 875 (1998).

Officer Porter is not saying that Md. Rule 9-123 is unconstitutional. Instead Appellant posits that, as applied to him, § 9-123 is insufficient in this particular instance to protect a man with a pending manslaughter charge. The majority of the jurisdictions that have considered the issue, have stated that only transaction immunity will do. *State v. Thrift*, 312 S.C. 282 (S.C. 1994), *State v. Gonzalez*, 853 P.2d 526 (Alaska 1993), *Wright v. McAdory*, 536 So.2d 897 (Miss. 1988), *State v. Soriano*, 68 Ore. App. 642 (Or. Ct. App. 1984), *Attorney General v. Colleton*, 387 Mass. 790 (Mass. 1982), *D'Elia v. Penn. Crime Commn.*, 521 Pa. 225 (PA. 1989), *State v. Miyasaki*, 62 Haw. 269 (Hawaii 1980), *Campbell* id.

(c) Porter has not been immunized federally

Federal prosecutors and Judges have the abiltiy pursuant to 18 U.S.C. §§ 6001–03 to grant formal immunity. There have also been many instances when the United States Attorney in the local jurisdiction have provided a letter, stating that any statement will not be used against the witness.

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12 Again, California holds that, under its statute "The measure of what incriminates *defines* the offenses immunized. Thus, the inference ("link") from compelled testimony to implicated offense serves to identify and hence *define* the offense immunized from prosecution." People v. Campbell, 137 Cal. App. 3d 867, 874, 187 Cal. Rptr. 340 (CA Ct. App. 1982) (emphasis in the original).

No such action has been taken in this case. And that notwithstanding, as stated earlier, that the United States Department of Justice is very much aware and monitoring all that is going on in the case at bar.

When the United States Government becomes aware of immunized testimony it typically develops a "taint" team.[13] That has not happened here. The same prosecutors that presented the case to the grand jury, participated in pretrial hearings, and tried Officer Porter's case, are now seeking to compel his testimony in the trials of two others, and will be counsel of record when Porter Round 2 commences. No walls will be erected around this testimony, the spill over effect will be instantaneous and indellible. For that reason alone this Court must disallow the calling of Officer Porter as a witness.

While *United States v. Poindexter*, 698 F. Supp. 300 (D.D.C. 1988) was initially cited by the state in the court below, it nicely summarizes Appellant's argument in this Court. The primary thrust of the case concerns the steps taken by grand jury members to avoid learning of immunized testimony given at Congress, prior to their returning of an indictment. That is night-and-day from what we have here. The reason *Poindexter* supports Officer Porter's position is that:

> there must be noted several administrative steps which were taken by Independent Counsel from an early date to prevent exposure of himself and his associate counsel to any immunized testimony. Prosecuting personnel were sealed off from exposure to the immunized testimony itself and publicity concerning it. Daily

13 Sometimes the respective teams are called "clean" and "dirty."

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

Id. at 312-313. It is therefore, readily apparent that the prosecution team in *Poindexter* went out of their way to avoid learning anything - - let alone anything of consequence - - from the immunized testimony. In the case at bar, however, there is but one prosecution team. The same people that crossed Officer Porter last time will be in the room when he is called as a witness next time, and the time after that and, potentially, a fourth time at his retrial.[14] The state's failing to Chinese wall the different prosecutions means that they cannot now remove the indellible taint.

The state in the circuit court, while attempting to minimize Porter's concerns, principally relies on *United States v. Balsys*, 524 U.S. 666, 680-682 (1998). There are several points to make about this case. Firstly, even the

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

portions that the state relies on cannot be said to be anything more than *dicta*. The holding of *Balsys* was that "[w]e hold that concern with foreign prosecution is beyond the scope of the Self–Incrimination Clause." Id. at 669.

Balsys was an immigration case. *Balsys* was not given any immunity, and so is dissimilar to the case at bar. And *Balsys*' purported fear was that he might be prosecuted in "Lithuania, Israel and Germany." Id. at 670. Of course, no prosecution at that time was pending, indeed there was nothing in the record that Lithuania had had any contact with the defendant since his immigration from that country 37 years earlier. The Supreme Court distilled the issue into one sentence: could *Balysis* "demonstrate that any testimony he might give in the deportation investigation could be used in a criminal proceeding against him brought by the Government of either the United States or one of the States, [then] he would be entitled to invoke the privilege." Here: Officer Porter has demonstrated, **conclusively**, that there is an ongoing investigation by the United States.

Moreover, *Balsys* reiterates that "the requirement to provide an immunity as broad as the privilege itself." As stated herein, given that the same prosecutors will take Mr. Porter's testimony not once: but twice - - in the trials of Goodson and White, will then cross-examine Officer Porter again at his retrial, he will not, and cannot be, placed in the same position as if he had never testified. The state gets an advantage, and what Mr. Schatzow learns of Officer Porter's

knowledge during the compelled testimony during the trials of Goodson and White cannot be unknown to him on June 13, 2016.

Respectfully, this matter is proceeding in the Circuit Court for Baltimore City, and this Court cannot make such an inferential leap as to what a separate sovereign may decide in the future.

Following *Balsys*, the state also cited *United States v. Cimino*, 2014 U.S. Dist. LEXIS 155236 (10/29/14). Firstly, an unreported United States District Court decision from another circuit is scarcely a reason for this Court to make law that flies in the face of 12 score years of Anglo-Maryland jurisprudence. Secondly, the reluctant witness in *Cimino* was an "agent of the FBI...carrying out the controlled buys orchestrated by the Bureau." Id. at 5. This is a world away from the case at bar. While the *Cimino* witness may have had a snowball's chance in hell of being prosecuted, no matter what she said, Officer Porter has already been tried once for homicide, with another to follow anon. Lastly, in *Cimino*:

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

Id. at 11-12. Thus, the portion cited by the state cannot be said to be anything other than unreported, non-binding, *dicta*.

(d) Appellant has a separate right not to testify under the Maryland Declaration of Rights

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

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

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

Id. This is authority for Officer Porter's contention herein that, while immunity cannot cure his Fifth Amendment concerns, it most certainly cannot protect his Maryland rights.[15]

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

Maryland retains the dual sovereignty doctrine in its entirety. *Evans v. State*, 301 Md. 45 (1984) (adopting the dual sovereignty principle as a matter of Maryland common law); *see also Gillis v. State*, 333 Md. 69, 73 (1993) (holding that "[u]nder the "dual sovereignty" doctrine, separate sovereigns deriving their power from different sources are each entitled to punish an individual for the same conduct if that conduct violates each sovereignty's laws). *Bailey v. State,* 303 Md. 650, 660 (1985) (stating that "[t]his Court has adopted, as a matter of common law, the dual sovereignty doctrine.").

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

The Massachusetts Declaration of Rights, Article XII states, similarly, that no one can be "compelled to accuse, or furnish evidence against himself." And in Massachusetts "[o]nly a grant of transactional immunity" will suffice. Attorney Gen. v. Colleton, 387 Mass. 790, 801, 444 N.E.2d 915, 921 (1982). Thus, Officer Porter could not be called, were we in Massachusetts, "so long as the witness

remains liable to prosecution criminally for any matters or causes in respect of which he shall be examined, or to which his testimony shall relate." Id. at 797.

(e) The state will be making themselves witnesses

The only two (2) persons that have called Officer Porter a liar - - to date - - are Deputy State's Attorney Janice Bledsoe and Chief Deputy Michael Schatzow. As stated, *supra*, Mr. Schatzow's has told one jury that Porter "lied to you [the jury] about what happened... lied when he spoke to the [investigative] officers and he lied when he spoke on the witness stand;" while Ms. Bledsoe argued "Officer Porter was not telling the truth about his involvement in this incident...the only reasonable conclusion you can come to is that Ofc. Porter is not telling the truth." Id. Coming from two deputies in the States Attorney's Office these comments are that much more significant because:

> Attorneys' representations are trustworthy, the [The Supreme] Court [has] reasoned, because attorneys are officers of the court, and when they address the judge solemnly upon a matter before the court, their declarations are virtually under oath.

Lettley v. State, 358 Md. 26, 47 (2000) (internal citations omitted).

If Officer Porter is allowed to testify in the Goodson and White trial there are two (2) people, and only two (2) people, that can be called to impugn his credibility, Ms. Bledsoe and Mr. Schatzow. Thus, "[i]n order to attack the credibility of a witness, a character witness may testify...that, in the character witness's opinion, the witness is an untruthful person." Md. Rule 5-608.

This presents all sorts of problems because:

> MLRPC Rule 3.7(a). The policy behind this rule is succinctly stated in the Comment: "Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client." MLRPC Rule 3.7 cmt. With regard to the mixing of roles, the Comment continues:
>
> The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.
>
> *Id.*

Klupt v. Krongard, 126 Md. App. 179, 205-06 (1999). The advocate-witness rule "assumes heightened importance in a criminal case." *Walker v. State*, 373 Md. 360, 397 (2003).

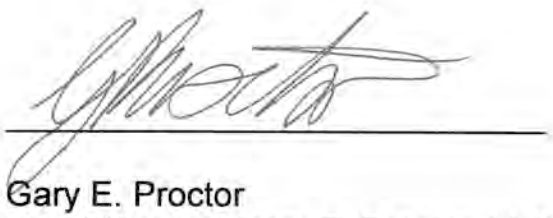
VII. CONCLUSION

For almost a quarter millenium the legislatures of Maryland have enunciated laws. The courts of Maryland have interpreted them. And, in all that time, there is not an analogous situation which this Court can call upon to guide it. That in and of itself speaks volumes to the length the state seeks to go to bend Officer Porter's rights, so that their case against Goodson and White does not break.

The statute the state seeks to rely on was not remotely meant to cover a situation like the one at bar. It was designed for *witnesses*. Officer Porter has a pending homicide trial, and yet the state seeks to have him testify to those very

same events in their thirst to convict others. It is indubitably correct that this will give the state a leg up in their later quest to convict Appellant. They will see first hand not once, but twice, how Porter reacts to repeated direct and cross by parties with interests adverse to his. And, if their quest to convict Porter of homicide fails, the state will now have further instances under oath that they have already asserted loudly and repeatedly constitute perjured testimony. There are witnesses, and there are defendants with pending homicide trials. It is time to tell the State that never the twain shall meet.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January 2016, a copy of Appellant's Opening Brief was hand delivered to Carrie Williams, Assistant Attorney General.

GARY E. PROCTOR

CERTIFICATION OF WORD COUNT

This brief contains 11,251 words, excluding the parts of the brief exempted from the word count by Rule 8-503. This brief complies with the font, spacing, and type size requirements that are set out in Rule 8-112.

GARY E. PROCTOR