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CAESAR GOODSON

* IN THE

Appellant,

* COURT OF SPECIAL APPEALS

v.

* OF MARYLAND

STATE OF MARYLAND

* SEPTEMBER TERM, 2015

Appellee.

* NO. 2308 (CC# 115141032)

* * * * *

**OFFICER GOODSON'S MOTION TO LIFT STAY OF TRIAL AND REQUEST
FOR AN ORDER DIRECTING THE TRIAL COURT
TO DISMISS THE INDICTMENT**

Defendant, Officer Caesar Goodson ("Defendant" or "Officer Goodson"),¹ through his counsel, and pursuant to Maryland Rule 8-431 and this Court's January 11, 2016 Order, moves to lift the stay of Officer Goodson's trial pending resolution of the interlocutory appeal filed by Officer Porter, and requests that an order be issued by this Court directing the trial court to dismiss the indictment.

I. INTRODUCTION

Officer Goodson objects to the Court of Special Appeals' January 11, 2016 Order staying, *sua sponte*, his criminal trial that was scheduled to begin on that same date ("Stay Order"). The interlocutory appeal filed by Officer William Porter (which is properly before this Court and should proceed as ordered) did not divest the circuit court of jurisdiction and this Court lacked the power and authority to stay Officer Goodson's trial.

¹ Although Officer Goodson is captioned as the "Appellant," this Court designated Officer William Porter ("Officer Porter") as the Appellant in its Order. See Maryland Rule 8-111. Officer Goodson has not noted an appeal on any issue, nor has the State noted any appeal in which Officer Goodson is the Appellee.

This Court's Stay Order, even if it were procedurally permissible, would violate Officer Goodson's right to a fair and speedy trial as guaranteed to him under the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Constitution. It is not and cannot be in Officer Goodson's interests to stay this matter as it is in violation of his constitutional rights, and the Court's presumption that this was in the best interest of the defendant is mistaken.

On May 1, 2015, the State decided whom to charge and with what charges. Since that day, it has engaged in a litigation strategy based on the faulty premise that it could call Officer Porter to testify in Officer Goodson's case. However, the State knew that Officer Porter was going to invoke his right against self-incrimination in Officer Goodson's case. Despite that knowledge, the State continued its prosecution of Officer Goodson and deliberately chose to try him after Officer Porter.

Due to the State's litigation tactics, Officer Porter was forced to take an emergency interlocutory appeal in order to protect his constitutional rights against self-incrimination. Officer Porter's appeal is appropriate based on the "extraordinary circumstances" created by the State, in its attempts to deprive a defendant with pending charges of his constitutional rights. Indeed, an injunction was necessary to protect Officer Porter's rights.

However, there is no need for Officer Goodson's rights to get trampled in the process, particularly when it only rewards the State for its trial tactics, lack of preparation, and lack of evidence. Although the issue of a stay was not before this Court, in the end, this Court circumvented the trial court's authority and effectively granted the

State's motion for a continuance pending the resolution of Officer Porter's appeal. Any way it is to be packaged, the reason Officer Goodson's trial is stayed is because of the State's decisions and tactics. Officer Goodson should not have to pay the price while the State reaps the benefit.

Every day that passes, Officer Goodson's right to a speedy trial is further violated. Officer Goodson asks, and the law requires, that the stay be lifted. Further, because the State's tactics have forced Officer Goodson into this position, and assuming this Court has jurisdiction over Officer Goodson's case, we ask that this Court find that Officer Goodson's state and federal constitutional rights have been violated, and that justice requires that the indictment against him be dismissed.

II. BACKGROUND

On May 1, 2015, State's Attorney Marilyn Mosby publicly declared the following relating to the April 12th arrest of Freddie Carlos Gray, Jr. ("Mr. Gray") and his untimely death:

It is my job to examine and investigate the evidence of each case and apply those facts to the elements of a crime, in order to make a determination as to whether individuals should be prosecuted. This is a tremendous responsibility, but one that I saw and accepted when the citizens of Baltimore City elected me as the State's Attorney, and it is precisely what I did in the case of Freddie Gray.

Once alerted about this incident on April 13, investigators from my police integrity unit were deployed to investigate the circumstances surrounding Mr. Gray's apprehension. Over the course of our independent investigation, in the untimely death of Mr. Gray, *my team worked around the clock; 12 and 14 hour days to canvas and interview dozens of witnesses; view numerous hours of video footage; repeatedly reviewed and listened to hours of police video tape statements; surveyed the route, reviewed voluminous medical records; and we leveraged the information made*

available by the police department, the community and family of Mr. Gray.

The findings of our comprehensive, thorough and independent investigation, coupled with the medical examiner's determination that Mr. Gray's death was a homicide that we received today, has led us to believe that we have probable cause to file criminal charges.

See PBS News Hour (PBS television broadcast May 1, 2015), available at <http://time.com/3843870/marilyn-mosby-transcript-freddie-gray/> (emphasis added).

Ms. Mosby then read the State's version of the "facts," which it supposedly had evidence to support, in its Statement of Probable Cause and in the end, as it related to Officer Goodson, stated:

Officer Caesar Goodson is being charged with second-degree depraved heart murder, involuntary manslaughter, second-degree negligent assault, manslaughter by vehicle by means of gross negligence, manslaughter by vehicle by means of criminal negligence, misconduct in office by failure to secure prisoner, failure to render aid.

*Id.*² On that same day, Officer Goodson was suspended from the Baltimore City Police Department without pay.

Based on current filings by the State, Officer Goodson now knows that the "evidence" that was referenced by Ms. Mosby was in fact the testimony of Officer Porter. Thus, as early as May 1 of last year, the State's Attorney knew that the State's case depended upon Officer Porter's testimony. Even before the indictments were returned,

² On May 21, 2015, Officer Goodson was indicted. The seven-count indictment charged Officer Goodson specifically with 1) Second Degree Depraved Heart Murder; 2) Involuntary Manslaughter; 3) Second Degree Assault; 4) Manslaughter by Motor Vehicle; 5) Criminally Negligent Manslaughter by Motor Vehicle; 6) Misconduct in Office; and 7) Reckless Endangerment.

Officer Porter's counsel had been informed by the State of its position that he must be tried before Officer Goodson. *See* September 15, 2015 Letter from Chief Deputy State's Attorney Michael Schatzow, attached hereto as **Exhibit 1**.

On July 24, 2015, the State formally advised counsel for Officer Porter that his trial would go first. On September 2, 2015, after ruling that each defendant was to be tried separately, the trial court directed the State to identify the order in which it wished to try the defendants, as well as the anticipated length of each trial.

On September 15, 2015, the State advised the Court in writing that it intended to try the defendants in the following order: Porter, Goodson, White, Miller, Nero, and Rice. *See Ex. 1*. The State represented to the Court that, "Defendant Porter is a *necessary* and *material* witness in the cases against Defendants Goodson and White, so it is *imperative* that Mr. Porter's trial takes place before their trials." *Id.* (emphasis added).³ After consultation between the trial court and counsel, the trials of Officer Porter and Officer Goodson were scheduled for November 30, 2015 and January 6, 2016, respectively. It is reasonable to assume that before deciding upon the order in which it would call the six cases, the State reviewed Maryland law to determine whether Officer Porter could, in fact, be required to testify at the subsequent trials.

³ If the State *truly* believed that it could compel *any defendant* at *any time* to give trial testimony through the grant of use and derivative use immunity, it would logically follow that the order of the trials would be irrelevant.

A. The State knew of Officer Porter's intention to quash the subpoena and file an appeal.

As early as May 2015, Officer Porter's attorneys informed the State of his intention to assert his 5th Amendment privilege if called to testify in the trials of other defendants. *See* Affidavits of Joseph Murtha, Esq. and Gary E. Proctor, Esq., attached hereto as **Exhibits 2** and **3**, respectively. During the months leading up to Officer Porter's trial, his counsel repeatedly informed the State of his intention to invoke his right against self-incrimination, and advised the State of his intention to quash any subpoena issued to him. *See* **Ex. 2** and **Ex. 3**.

On December 11th, before a verdict had been reached in his own trial, the State served Officer Porter with a subpoena to testify in Officer Goodson's trial, knowing that Officer Porter would move to quash it. During a bench conference with the trial court, Officer Porter's counsel stated on the record that Officer Porter would oppose any attempt by the State to compel him to testify. *Id.* On December 16, 2015, Officer Porter's trial ended in a mistrial.

The State had no reason to believe that Officer Porter's position had changed following the mistrial. On December 22, 2015, during a scheduling conference with the trial court and counsel for Officers Goodson and Porter, Mr. Proctor reminded the State of his client's intention to move to quash any subpoena and his intention to appeal the trial court's ruling if it entered an order compelling Officer Porter to testify. *Id.* Despite this knowledge, the State elected to proceed with the trial of Officer Goodson on January 6, 2016 and never requested that Officer Goodson's trial be moved to a later date. This

was a strategic trial decision made by the State, and it now must live with the consequences.

B. During the January 6, 2016, hearing on the Motion to Quash and Motion to Compel, the State acknowledged the absence of any Maryland appellate guidance.

At the hearing on Officer Porter's Motion to Quash the Subpoena and the State's Motion to Compel Testimony (pursuant to Md. Code Ann., Cts. & Jud. § 9-123),⁴ the State openly acknowledged that there are no Maryland appellate decisions that squarely address the issue confronted by the trial court, namely: can a defendant, without a plea agreement and with criminal charges pending against him, be compelled to testify in the trials of other defendants, involving the same facts and issues to be presented later at his own trial, under a grant of use and derivative use immunity?⁵ Indeed, the State

⁴ The Courts & Judicial Proceedings Article will be referred to as "CJP."

⁵ Officer Goodson agrees with the position taken by Officer Porter that the immunity statute was not written to be applied in this circumstance. The effect of this trial court's ruling leads to the conclusion that Officer Goodson, who never gave a statement regarding this matter (which was his right) and has the right not to testify in his own case, could have been compelled to testify in the trial of Officer Porter in December 2015 under the guise of use and derivative use immunity. Regardless of whether the State could ultimately meet its burden under a hearing based on the case of *Kastigar v. United States*, 406 U.S. 441 (1972), before his later trial, Officer Goodson's federally and state afforded rights would be breached. In fact, every single defendant involved in the April 12, 2015 arrest and transport of Mr. Gray could be compelled to testify in the case of Officer Porter (or any other defendant) under the State's theory. This is not only nonsensical but it completely eviscerates the purpose of their constitutional protections.

Moreover, only the State can grant immunity; a defendant cannot compel an individual to testify on his behalf if that person invokes the 5th Amendment. In multi-defendant cases like this one, the State alone would control the evidence and be able to deny a defendant equal access to witnesses. For example, assume that Defendants A and B were also officers who were indicted relating to the death of Mr. Gray. Both defendants refuse to testify in the trial of Officer Goodson and invoke their 5th Amendment privilege. Assume also that Defendant A has inculpatory testimony against Officer Goodson and Defendant B has exculpatory testimony. The State could subpoena Defendant A, provide immunity under § 9-123, and elicit inculpatory

commented to the effect that it would be nice to have appellate guidance in Maryland on the issue, but "someone has to go first."⁶ The trial court also recognized that it was wading into "uncharted territory." After acknowledging that there was a lack of precedent on this direct issue *and* that Officer Porter intended to appeal any order from the trial court compelling him to testify, the State elected to proceed with its motion to compel and asked the trial court to enter an order forcing Officer Porter to testify. Even after the trial court warned the State about the potential consequences of the entry of the order, the State requested that it be entered. *See* January 6, 2016 Order Compelling Testimony, attached hereto as **Exhibit 4**. This was yet another intentional, tactical decision made by the State.

During the January 6, 2016 hearing, Officer Porter orally moved to stay enforcement of the order pending the appeal. The trial court denied Officer Porter's motion from the bench and entered an order to that effect the next day. *See* January 7, 2016 Order Denying Stay, attached hereto as **Exhibit 5**. On January 7th, Officer Porter filed his Notice of Appeal and Motion for an Injunction of the trial court's January 6th

testimony and purposefully not call Defendant B because the testimony will hurt its case. Officer Goodson has no way of compelling Defendant B's testimony. As a result, this distorts the fact-finding process and essentially deprives a defendant of his right to a fair trial.

⁶ As of the filing of this Motion, Officer Goodson does not have a copy of the transcript. It is Officer Goodson's understanding that the Court has a DVD copy of the January 6, 2016 hearing.

order compelling his testimony pending an appeal.⁷ On January 8th, the State responded to Officer Porter's motion and this Court granted a temporary stay of the order.

Also on Friday, January 8, 2016, at approximately 2:30 p.m., Officer Goodson received the State's Motion for Continuance of his trial, pending the outcome of Officer Porter's appeal. *See* State's Motion for Continuance ("State's Motion"), attached hereto as **Exhibit 6**. The State claimed that refusing to grant a continuance would "result in irreparable harm to the People of Maryland by *effectively gutting* their government's prosecution against Caesar Goodson (and eventually Alicia White)" **Ex. 6 at 5** (emphasis added). It asserted that Officer Porter "is the only person[] capable of giving useful testimony" and that he was "the only witness able to testify to critical aspects of Defendant Goodson's alleged role in Mr. Gray's death." *Id.* at 5. Officer Goodson filed an Opposition to this motion on January 11, 2015.⁸

Before the trial court could rule on the State's Motion, this Court ordered a stay of Officer Goodson's trial.

⁷ Pleadings filed with this Court or generated by it will be identified in, but not attached to, Officer Goodson's Motion.

⁸ Because the arguments raised in Officer Goodson's Opposition to the State's Motion for Continuance are raised in his Motion to Lift Stay, a copy of the Opposition is not attached. Officer Goodson will provide a copy of his Opposition at the Court's request.

III. ARGUMENT

A. **Officer Goodson's trial should not have been stayed pending the resolution of Officer Porter's interlocutory appeal.**

The Court of Appeals has held that the fundamental jurisdiction of a trial court is not divested simply because an appeal is taken from an interlocutory order, and the underlying trial should continue at the discretion of the trial judge. *See Pulley v. State*, 287 Md. 406, 417-18 (1980).⁹ If all interlocutory appeals could halt underlying trials, there would be "havoc" with cases tried in this State. *Id.* at 418. However, the Court of Appeals recognized that there are some interlocutory appeals, particularly those involving the constitutional rights of the accused, where a stay may be warranted. *Id.* at 418-19 (identifying as an example an appeal related to the accused's guarantee against double jeopardy). In those circumstances, a stay of the underlying trial of the ***accused asserting the constitutional violation*** on appeal may be stayed either by the trial court or an appellate court, in order to aid in its appellate jurisdiction. *Id.* at 419.¹⁰

In the instant case, Officer Porter asserts that his constitutional rights were violated when the trial court ordered him to testify in Officer Goodson's case. Officer Porter noted an appeal and requested a stay in order to preserve and protect his rights. For this reason, a stay of an order relating to Officer Porter's constitutional rights was

⁹ The State agrees with this proposition. *See State's Response to William Porter's Motion for Injunction Pending Appeal*, at page 4.

¹⁰ The Court of Appeals also noted that if the trial court determines that the appeal is "utterly without merit and the defense was interposed merely to accomplish unwarranted delay," the trial may proceed. *Id.* at 419.

necessary and appropriate, and it was done in order to aid this Court's appellate jurisdiction relating to his appeal.

In contrast, Officer Goodson, the accused in this case, did not file any appeal to this Court, nor did he request a stay. While the stay of the circuit court's order compelling Officer Porter's testimony *protects Officer Porter's constitutional rights*, a stay of the *Goodson* trial *violates Officer Goodson's constitutional rights*.

B. Officer Goodson's right to a speedy trial is violated with each passing day.

In its papers below, the State has argued that the immunity statutes serve "the legitimate demands of government to compel citizens to testify' particularly where 'the only persons capable of giving useful testimony are those implicated in the crime.'" **Ex. 6 at 5** (citation omitted). The State did not identify any case that held that litigation to determine whether a statute applied to a non-party was a "legitimate demand[] of government," much less a case that holds that such litigation trumps an accused's constitutional right to a speedy trial.

Under Maryland law, Officer Goodson's trial was required to start within 180 days after his or his counsel's initial appearance, *i.e.*, November 23, 2015. *See* Md. Code Ann., Crim. Proc. § 6-103 (formerly Article 27 § 591); Md. Rule 4-271(a)(1); *State v. Hicks*, 285 Md. 310 (1979) (holding that the 180-day requirement is mandatory)

("Hicks"). Officer Goodson's trial was already postponed once to January 6th, well past the *Hicks* date.¹¹

Over and above the statutory requirement that he be tried within 180 days, Officer Goodson's right to a speedy trial is guaranteed by Article 21 of the Maryland Declaration of Rights and the Sixth Amendment to the United States Constitution. In this case, the State moved the trial court for a continuance and, by action of this Court, it was effectively granted. It is appropriate for this Court to consider the impact of a further delay on Officer Goodson's right to a speedy trial.

For speedy trial purposes, the length of delay is measured from the date of arrest or filing of indictment, information, or other formal charges to the date of trial. *Divver v. State*, 356 Md. 379, 388-89 (1999) (citations omitted). When the period of delay "is of constitutional dimensions, the court is required to consider a four-factor balancing test to determine whether the defendant has been deprived of his right to a speedy trial." *Schmitt v. State*, 46 Md. App. 389, 390 (1980) (citations omitted). *See also Divver*, 356 Md. at 388 (holding that the trigger for a speedy trial analysis is when the pretrial delay becomes "presumptively prejudicial"). The factors are: 1) the length of delay; 2) the reason for the delay; 3) the defendant's assertion of his right, and 4) prejudice to the defendant. *See Divver*, 356 Md. at 388. An evaluation of all four factors demonstrates

¹¹ Officer Goodson does not waive his right to argue in the future that his original trial date in January 2016 was in violation of *Hicks* and his right to a speedy trial and expressly reserves the right to do so. Officer Goodson also does not waive his right to argue that there will be an inordinate delay between January 6, 2016 and his rescheduled trial date, and that dismissal will be warranted. *State v. Brown*, 355 Md. 89, 108-09 (1999).

that a stay for an indefinite period of time will violate Officer Goodson's right to a speedy trial.

1. Length of delay.

Officer Goodson was indicted on May 21, 2015. The day jury selection was scheduled to begin—January 11, 2016—was the 236th day after he was indicted (or seven months and 22 days). There is no set date for Officer Goodson's trial to resume. A stay of his trial has been put in place "pending resolution of [Officer Porter's] interlocutory appeal or further order from this Court." The time frame for the resolution of Officer Porter's appeal is unknown, given his right to exhaust all appellate avenues, including petitioning the United States Supreme Court for review of this important constitutional issue. Maryland has held that delays of six and one half months to nine and one half months cross the threshold of being of "constitutional dimension." *See Schmitt*, 46 Md. App. at 391-92 (citations omitted). The evaluation of the length of delay focuses on the "amount of time reasonably necessary for trial preparation" (*Coleman v. State*, 49 Md. App. 210, 221 (1981)), which is often dependent on the peculiar circumstances of the case, *i.e.*, the level of complexity of a case. *Schmitt*, 46 Md. App. at 391 (citing *Barker*, 407 U.S. at 530-31). In this case, the State cannot and has not argued that the reason it requested a continuance was for additional time to prepare for trial.

Officer Goodson submits that any further delay, much less a delay for an indefinite period of time, will be of a constitutional dimension and presumptively prejudicial.

2. *Reasons for delay.*

The delay of an indefinite period of time was due solely to the State's unsuccessful litigation tactics and its reliance on a single witness to substantiate the charges against Officer Goodson, and this weighs heavily against the State. In *Schmitt*, this Court held that the State's need for a delay in order to have a particular witness available to testify was an insufficient reason for the delay. *See Schmitt*, 46 Md. App. at 393-94 (finding that a witness's unavailability due to back surgery was an insufficient reason, particularly where there had been no efforts by the State to reach a stipulation as to testimony). The case of *State v. Hiken*, 43 Md. App. 259 (1979), is also instructive. In *Hiken*, this Court affirmed the dismissal of an indictment, where the reason for the delay was the State's need to obtain evidence from another jurisdiction. The Court found that the evidence was not available for trial due to the State's lack of diligence. *Hiken*, 43 Md. App. at 272-74 (finding that the State did not make any earlier efforts to secure the evidence for use at trial).

In this case, the State has known since May 2015 that Officer Porter would be invoking his 5th Amendment privileges. The State knew that Officer Porter would aggressively challenge the issuance of any subpoena, and that he had the right to appeal any adverse ruling. Yet it made no efforts to secure Officer Porter's testimony until one month before Officer Goodson's trial. The failure to have this supposedly "necessary" and "material" evidence is the State's fault, and Officer Goodson's constitutional rights should not have to suffer for it.

3. *Assertion of the right.*

On May 27, 2015, shortly after he was indicted, Officer Goodson filed a motion demanding a speedy trial. *See* Online Docket (May 27, 2015) ("Motion for Speedy Trial"), **Ex. 7**. On September 2, 2015, the trial court severed the cases of the six defendants and Officer Goodson's trial date was set for October 13, 2015. *See* Hearing Notice, **Ex. 8**. Then, on September 29, 2015, without a waiver of Officer Goodson's *Hicks* rights, the trial court postponed his original trial date past the 180-day limit to January 6, 2016. *See* Hearing Notice, **Ex. 9**; *see also* **Ex. 7** (Sept. 29, 2015, "Postponement Form Filed; *Hicks*, Md. Rule 4-271 Not Waived"). The State filed a Motion for Continuance of that trial, which Officer Goodson opposed on January 11, 2016, arguing, among other things, that it would violate his right to a speedy trial. Most recently, on January 15th, Officer Goodson filed an objection to this Court's Order staying his case based on those same reasons. *See* **Exhibit 10**. Officer Goodson has asserted his rights at each turn.

4. *Prejudice to the accused.*

A delay of his trial prejudices Officer Goodson. The Court of Appeals recognizes that there are personal factors that should be considered when determining prejudice to a defendant, such as "the disruption of his employment, the drain of his financial resources, the curtailment of his associations, his subjection to public obloquy and the creation of anxiety in him, his family and friends." *Divver*, 356 Md. at *Id.* at 274-75 (citations omitted). The media scrutiny Officer Goodson has been subjected to, by itself, shows actual prejudice. With each day, Officer Goodson suffers fear, anxiety, and exposure to

public scrutiny and criticism. Additionally, because the State chose to charge him with a felony, Officer Goodson was suspended without pay on May 1, 2015. Further delay will not only violate Officer Goodson's constitutional and statutory rights, but it will impact his livelihood and the welfare of his family. Finally, Officer Goodson's defense will also be impaired, as evidence turns stale, by witnesses relocating or forgetting critical information with the passage of time. *Id.*

Due to this Court's de facto grant of the State's Motion for Continuance, Officer Goodson is now forced to wait for an unknown period of time for his trial to begin. The constitutional issues raised by Officer Porter, the lack of authority on the application of CJP § 9-123 to defendants with pending charges, and the State's pronouncement that the absence of Officer Porter's testimony effectively guts its case against Officer Goodson, makes it reasonable to assume that there will be future appeals, even to the United States Supreme Court. Should the stay continue until the resolution of Officer Porter's interlocutory appeal, it could be years before Officer Goodson's trial occurs, through no fault of Officer Goodson. This would be a violation of Officer Goodson's right to a speedy trial and should not be permitted.

C. If the State's motion for continuance had been granted by the trial court on January 11th, this Court would be compelled to find that it was an abuse of discretion.

In ordering the stay, this Court essentially stepped into the shoes of the trial court and granted the State's Motion for a Continuance because of the need to secure an absent witness.

Under well-established Maryland law, a trial court's decision to grant or deny a request for continuance based on the absence of a witness will be reviewed by the appellate courts for an abuse of discretion. *Jackson v. State*, 214 Md. 454, 459 (1957). In determining whether a continuance should be granted, the party making the request must show the following: "1) he had a reasonable expectation of securing the evidence of the absent witness . . . within some reasonable time; 2) that the evidence is competent and material, and he believed that the case could not be fairly tried without it; and 3) that he had made diligent and proper efforts to secure the evidence." *Id.* (citations omitted) (generally referred to as the "*Jackson* factors"). The State has failed to provide proof that it satisfies these requirements as it has to in order to warrant a continuance, much less continued enforcement of this Court's Order.

1. The State has not demonstrated, nor can it, that it had a reasonable expectation that Officer Porter would testify.

Almost since making the determination that it wanted to have Officer Porter's trial proceed first, the State has known that he would be invoking his right not to testify. In light of the State's (and the trial court's) recognition that the State's request to compel Officer Porter to testify because of a grant of use and derivative use immunity ventured into "uncharted territory," the State cannot argue that it truly believed it had well established Maryland precedent on its side.¹² Indeed, the Maryland cases and the

¹² In light of the statements made by the State and the trial court on January 6th regarding the lack of precedent on point, it is unclear why the State argues that Officer's Porter's appeal is "doomed to fail." *See Ex. 6 at 3*. The cases cited by the State as support for the appeal's forecasted failure do not involve a criminal defendant, with current charges pending and a trial date scheduled, being given use and derivative use immunity. *See Ex. 6 at 4*.

statutory language plainly do not support this argument. As the Court is aware, "A person may not be compelled to testify in violation of his privilege against self-incrimination. The failure of a defendant to testify in a criminal proceeding on this basis does not create any presumption against him." *See* CJP § 9-107. That statute is clear and unequivocal on its face.

The State attempts to circumvent Officer Porter's unassailable right against self-incrimination by granting him use and derivative use immunity under CJP § 9-123. But CJP § 9-123 applies to "witnesses," not current defendants. The State has presented no case law in which use and derivative use immunity was ever given to a defendant in Officer Porter's current situation—a fact the State does not dispute.

Maryland law does not support the State's use of § 9-123, or the State's request for a continuance (and this Court's stay). The recent case of *Davis v. State*, 207 Md. App. 298, *cert. denied*, 429 Md. 529 (2012), is instructive. In *Davis*, the defendant requested a continuance on the first day of his trial in order to present the testimony of a co-defendant (a juvenile, "Jerquan"), whose adjudication was not scheduled to take place until two months later.¹³ The defendant argued that he needed a continuance because Jerquan was refusing to testify based on his 5th Amendment privilege until after his adjudication. *Davis*, 207 Md. App. at 304-05. The defendant characterized Jerquan's statements as exculpatory. *Id.* at 305. The trial court denied the defendant's request. *Id.*

¹³ Although *Davis* involved a defendant's request for a continuance, there is no reason why the same factors would not apply to the State's request for a continuance due to an absent witness.

On appeal, this Court found that the trial court did not abuse its discretion in denying the continuance under the first two *Jackson* factors. As it relates to the reasonableness of the defendant's expectation to secure Jerquan's live testimony (factor 1), the Court said the following:

Under *Jackson*, the first factor that appellant must show in order to be entitled to a continuance is that "he had a reasonable expectation of securing the evidence of the absent witness or witnesses within some reasonable time." 214 Md. at 459, 135 A.2d 638. Here, it is undisputed that Jerquan was not going to waive his Fifth Amendment privilege and testify at appellant's trial. In *Tann v. State*, 43 Md. App. 544, 548, 406 A.2d 448 (1979), this Court held "that where the absent witness is also a co-defendant and there is no showing that he will waive his privilege against self-incrimination and exonerate the appellant, the trial judge may deny the postponement of a trial."

Appellant, nevertheless, asserts that, because Jerquan's trial was scheduled only two months after appellant's trial, "there was a reasonable likelihood that [Jerquan] would cease to have a Fifth Amendment basis for refusing to testify after that point." Appellant's contention overlooks the fact that Jerquan's Fifth Amendment privilege would not end with his trial, unless he was found not involved. If Jerquan was found involved, his Fifth Amendment privilege would continue through disposition and *all subsequent appeals*. Any appeal to this Court could take anywhere from nine months to over a year. At the hearing on appellant's motion for a continuance, there was no indication that Jerquan was going to enter a plea of involved. Therefore, because Jerquan was not going to waive his Fifth Amendment privilege to testify at appellant's trial and there was no indication that he would enter a plea of [*sic*] involved, we conclude that appellant failed to show that Jerquan would be available to testify "within some reasonable time." See *Jackson*, 214 Md. at 459, 135 A.2d 638.

Davis, 207 Md. App. at 308-09 (emphasis in original). Like the State in this case, the defendant in *Davis* knew that the co-defendant was *not* going to waive his 5th Amendment Privilege and, like the State in this case, the defendant was unable to say when the co-defendant would become a compellable witness.

Any claim by the State that it had a reasonable expectation of securing Officer Porter's testimony is belied by opinions from the Court of Appeals of Maryland. In *Archer v. State*, 383 Md. 329 (2005), the Court of Appeals noted that a defendant becomes a compellable witness when "no appeal or sentence review was pending and the time for appeal and sentence review had expired." *Archer*, 383 Md. at 344 (citing *Ellison v. State*, 310 Md. 244 (1987)). The Court also observed that a government can compel a defendant who entered into a plea agreement with the State *and* could not be further incriminated by answering questions. *Id.* (citing *United States v. Gernie*, 252 F.2d 664 (2d Cir. 1958)).

In the case at bar, the State failed to cite to the trial court any law whatsoever relating to the factors to be considered when requesting a continuance. It was well known to the State that Officer Porter would invoke his rights against self-incrimination under state and federal law. Further, it was and is well known to the State that it is within a court's discretion to deny a request for a postponement where a party "desires to secure the Fifth Amendment protected testimony of a co-defendant." See Brief of the State of Maryland in *Davis v. State*, No. 953, Sept. Term 2011, 2012 WL 2153708 (Mar. 15, 2012), a copy of which is attached hereto as **Exhibit 11**. Indeed, in *Davis*, the State argued, in pertinent part,

Moreover, the basis for Davis's postponement request cannot, *as a matter of simple logic*, be an adequate basis for a postponement. Davis was demanding, essentially, that he not be tried until after his co-defendant had been tried, so that his co-defendant could be available to testify in his case. If both co-defendants took that same position, no trial could ever be held. (...) Had Jerquan H. demanded that his proceeding be halted until Davis was available to testify (on the grounds that he wished to take advantage of

Davis's exculpatory statement), *the courts would have been paralyzed* if, as a matter of law, a desire to wait for a co-defendant's case to conclude constitutes grounds for an automatic continuance.

In terms of the three *Jackson* requirements noted above, Davis has *categorically failed* to show that he had a "reasonable expectation of securing the evidence or witness in a reasonable time." His "expectation of securing" Jerquan's testimony was itself was [*sic*] unreasonable; one co-defendant has no right to be tried before or after another. And the time required to "secure" the witness was not reasonable; Jerquan's case would not be heard for months, and he would then have time to note exceptions, then file an appeal, and *otherwise exhaust all of the available remedies which must be exhausted before he could no longer invoke his Fifth Amendment right to remain silent*.

2012 WL 2153708, at *7 (emphasis added).

"Simple logic" compels the conclusion that the State's unreasonable hope of securing Officer Porter's testimony was not an adequate basis for a delay in Officer Goodson's trial. In essence, the State wants Officer Goodson to wait an indeterminate amount of time, either until Officer Porter has exhausted his appellate rights relating to this Court's Order to Compel (assuming it is ultimately upheld) or, if convicted, his appellate rights relating to his conviction. As held by this Court (and recognized by the State) in *Davis*, this cannot be said to be a "reasonable amount of time."

2. ***The State fails to meet its burden of showing that the evidence it wishes to elicit from Officer Porter is "competent" and "material."***

In its Motion for Continuance, the State argues that a failure to grant a continuance will "result in irreparable harm to the People of Maryland by effectively gutting their government's prosecution against Caesar Goodson (and eventually Alicia White) for his alleged actions in the death of Freddie Gray." **Ex. 6 at 5**. The State further argues that Officer Porter "is the only witness able to testify to critical aspects of Defendant

Goodson's alleged role in Mr. Gray's death." *Id.* These admissions by the State confirm that in the absence of Officer Porter's testimony, its case cannot proceed against Officer Goodson.¹⁴ At the same time, it fails to articulate what the competent evidence is and how it is material to the charges against Officer Goodson. No proffer has been made to date. In essence, the State expects the judiciary *not to question* its ill-conceived tactics and allow the State to conduct Officer Goodson's trial in any manner it sees fit. The State needs to be reined in and required to present the information required by law.

3. ***The State fails to demonstrate that it made diligent and proper efforts to secure the evidence.***

As to the third *Jackson* factor, the State does not explain what efforts it made to secure the evidence other than issuing a subpoena on December 11th, knowing since May of last year that Officer Porter was going to move to quash it. For months, the State made no efforts to get this issue resolved by any court, despite knowing that the law in this area was far from settled. The State never requested a hearing before the trial court in Officer Goodson's case to resolve or clarify the issue. The State could have served a subpoena upon Officer Porter at any point after the trials were severed, but it chose not to do so.¹⁵

¹⁴ The State's decision to charge Officer Goodson with seven crimes, including second degree murder, based solely on the testimony of an individual it has publicly called a liar is a decision it will have to live with.

¹⁵ In order to get this issue resolved, the State could have served a subpoena with the initial trial date (October 13, 2015) after this Court severed the cases on September 2, 2015 and then reserved a subpoena once the trial date was moved at its request. The State did neither.

The State did nothing to minimize any delay or potential impact on Officer Goodson's trial.¹⁶

The State's efforts to secure this evidence have been anything but diligent. If the State truly believes that it can deprive a criminal defendant with pending charges of his 5th Amendment rights so long as use or derivative immunity is offered, then the State has had many months to try to secure Officer Porter's testimony. Instead, the subpoena was not served until less than a month before the then-scheduled start of trial.

The delays in the case are a direct result of the State's choices. Because it would have been an abuse of discretion for the trial court to grant the State's Motion for Continuance, this Court likewise has no legal basis for staying Officer Goodson's trial.

D. This Court should lift the stay and direct the trial court to dismiss the indictment against Officer Goodson.

If this Court finds that it has jurisdiction over Officer Goodson's trial, then it should lift the stay and enter an order directing the trial court to dismiss the indictment against Officer Goodson for a violation of his right to a fair and speedy trial.

The State represents that without Officer Porter's testimony, its case against Officer Goodson will be "gutted." That may be, but it was the State's decision in the first instance to charge Officer Goodson with seven crimes, including murder, based solely on the testimony of a co-defendant, whom it has publicly declared to be a liar. It was the State's decision to schedule Officer Goodson's trial after Officer Porter's trial, despite

¹⁶ The State must have expected further delays if the trial court denied Officer Porter's motion to quash. The State does not dispute that Officer Porter had the right to appeal the order compelling him to testify. Given Officer Porter's consistent invocation of his 5th Amendment privilege, the State cannot credibly assert that it did not anticipate the current situation.

knowing he would move to quash the subpoena. It was the State's failure to appreciate the consequences that its actions would have upon Officer Goodson's constitutional rights.

Officer Goodson is constitutionally guaranteed the right to a fair trial before an impartial jury. He has the right to prepare and present a defense, and to confront and examine witnesses. Officer Goodson's attorneys were prepared to proceed to trial on January 11th. Expert witnesses spent time reviewing the evidence and reserved certain dates on their busy schedules to testify on his behalf. Fact witnesses made arrangements to be present at trial. Because of this stay by the Court, whether these witnesses will be available in the future is unknown. Witnesses may relocate or their memories may fade. Additional expense will be necessitated for preparation and possible retention of new experts. Depending on when this case is re-set for trial, Officer Goodson's counsel may not be available and new counsel may have to be engaged. It may be the case that in order for Officer Goodson to be able to present his defense—a defense he was prepared to give with a January 11 start date—he will be forced to sacrifice his right to a fair and speedy trial.

Unfortunately, Officer Goodson's rights have already been irreparably harmed by the simple grant of this stay. One judge has been assigned to the cases arising out of Mr. Gray's death and the trials of the other officers have been scheduled. If the stay is lifted, the task of rescheduling Officer Goodson's trial will be fraught with practical problems and constitutional violations. A three week window of time will be needed and, based on the currently scheduled trials of the other officers, that time is not available for months.

Further, the other co-defendants will argue that it is not just or reasonable to violate their rights to speedy trials in order to accommodate the rights of Officer Goodson. There is also the practical consideration of having a sufficient jury pool in order to impanel a fair and impartial jury.

Officer Goodson is facing this precarious and untenable situation solely because of the State's litigation strategy. A criminal defendant should not be penalized because of a prosecutor's lack of foresight. The State could not know with any certainty the outcome of Officer Porter's trial. But, the State knew in advance that Officer Porter would move to quash any subpoena and appeal any order compelling him to testify. The State knew it lacked appellate guidance directly supporting its position, yet chose to proceed into these "uncharted waters," apparently with the unreasonable and naïve assumption that Officer Porter would suddenly have a change of heart.

After a little over two weeks of "investigation," the State, in a rush to judgment, charged Officer Goodson with the most serious crimes related to Mr. Gray's death. Now, the State, after hurriedly issuing charges, is dragging its heels, unwilling to try Officer Goodson's case. Without question, Officer Goodson's right to a speedy trial means nothing to the State. The Court must put an end to this bizarre circus that the State has created.

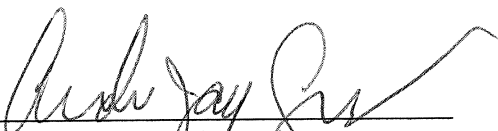
Officer Goodson's right to a speedy trial is actively being violated by virtue of this stay. He has had no role in the delay. When his trial will be re-scheduled is unknown.¹⁷

¹⁷ On January 13th, the State made it known to the circuit court and counsel for all defendants that it wanted to delay all of the defendants' trials until Officer Porter's appeal is

Officer Porter should be accorded the right to pursue his appeal and vindicate his rights under the 5th Amendment. In the meantime, the only appropriate remedy for the violation of Officer Goodson's rights, and as a sanction against the State for deliberately causing the delay, is to lift the stay and direct the trial court to dismiss the indictment.

IV. CONCLUSION

This Court should grant Officer Goodson's Motion to Lift Stay and order the trial court to dismiss the indictment.


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resolved. The State also requests that upon final resolution, Officer Porter's re-trial be scheduled first, whenever that may be. Whether or not the stay is lifted, the State is determined to delay the trial of Officer Goodson, without regard for the additional prejudice he will undoubtedly experience, much less the further violation of his constitutional rights. Officer Goodson does not know if this request will be granted.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January 2016, a copy of the foregoing paper was sent via electronic mail and mailed, first-class postage prepaid to:

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CAESAR GOODSON

Appellant,

v.

STATE OF MARYLAND

Appellee.

* IN THE
* COURT OF SPECIAL APPEALS
* OF MARYLAND
* SEPTEMBER TERM, 2015
* NO. 2308 (CC# 115141032)

ORDER

Upon consideration of Officer Caesar Goodson's Motion to Lift Stay and Request for Order Dismissing Indictment, any opposition thereto, the applicable law, the record in this case and for good cause shown, it is this _____ day of _____, 2016,

ORDERED that Officer Goodson's Motion to Lift Stay is GRANTED; and it is further,

ORDERED, that Officer Goodson's rights under the 6th Amendment to the United States Constitution and Article 21 of the Maryland Constitution have been violated; and it is further,

ORDERED, in the interests of justice, that the trial court is directed to **DISMISS** the indictment against Officer Goodson with prejudice.

Judge,
Court of Special Appeals of Maryland