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CRIMINAL DIVISION

STATE OF MARYLAND

* IN THE

Plaintiff

* CIRCUIT COURT

v.

* FOR

CAESAR GOODSON

* BALTIMORE CITY

Defendant

* Case No. 115141032

* * * * *

**DEFENDANT CAESAR GOODSON'S OPPOSITION TO
THE STATE'S MOTION FOR CONTINUANCE**

Defendant Caesar Goodson ("Defendant" or "Officer Goodson"), through his counsel, opposes the State's Motion for Continuance Pending the Resolution by the Court of Special Appeals of the Motion for Injunction Pending Appeal by Officer William Porter or, in the Alternative, To Retry Officer William Porter's Pending Criminal Case Prior to the Trials of Those Cases in Which He Is a Subpoenaed Witness ("State's Motion"), for the reasons set forth below.

I. BACKGROUND

On May 21, 2015, Officer Goodson was indicted on charges relating to the death of Freddie Gray. 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.

On September 2, 2015, this Court granted the motion for severance filed by Officer Goodson and the other indicted officers. The 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 that same day, the State indicated that it intended to try Officer Porter first.

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. 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." Based on the State's litigation strategy (and perhaps the lack of independent evidence), the State concluded that Officer Porter's testimony was critical to its prosecution of Officer Goodson and Sergeant White. After consultation between the Court and all defense 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.

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

Prior to the start of the trial of Officer Porter, both of his attorneys had conversations with the State regarding his intention to assert his 5th Amendment privilege if called to testify in any subsequent trials.¹ As early as October 2015, Gary Proctor, Esq., advised the State that Officer Porter would be invoking his right not to testify in any trials other than perhaps his own. In November 2015, Joseph Murtha, Esq., had a conversation with the State, after meeting with the Court regarding the upcoming trial, and was told that the State would be subpoenaing Officer Porter for the trials of Officer Goodson and Sergeant White. In that same conversation, Mr. Murtha informed the State that Officer Porter would be moving to quash the subpoena on the grounds of his 5th Amendment privilege.

¹ Undersigned counsel has been advised that Messrs. Proctor and Murtha (counsel for Officer Porter) are prepared to execute affidavits should the Court find it necessary.

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. The State could not have thought that Officer Porter would change his mind about testifying after the mistrial, because on December 22, 2015 during a scheduling conference with the 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 Court's ruling if it entered an order compelling Officer Porter to testify. Despite this knowledge, the State elected to proceed with the trial of Officer Goodson on January 6, 2016. This was a strategic trial decision made by the State, and it now must live with its consequences.

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

At the hearing on Officer Porter's Motion to Quash the Subpoena and the State's Motion to Compel Testimony, the State openly acknowledged that there were no Maryland appellate decisions that squarely addressed the question faced by this Court, namely: can a defendant with a pending trial be compelled to testify in other trials involving the same facts and issues to be presented later at his own trial under a grant of use and derivative use immunity?² Indeed, the State commented to the effect that it would be nice to have appellate guidance in Maryland on the issue, but "someone has to go first." The Court also recognized that it was wading into

² 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 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), his federally and state afforded right to remain silent 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.

"uncharted territory." After acknowledging that there was a lack of precedence on this direct issue *and* that Officer Porter intended to appeal any order from the Court compelling him to testify, the State elected to proceed with its motion to compel and asked the Court to enter an order forcing Officer Porter to testify. The Court even warned the State about the potential consequences of the entry of the order before signing it. This was yet another intentional, tactical decision made by the State.

II. STATE'S REQUEST FOR A CONTINUANCE

Noticeably absent from the State's Motion to continue Officer Goodson's trial is any case law relating to the factors a court should consider when determining whether to grant a motion for continuance due to the absence of a witness. The law regarding this issue make it clear that the State cannot meet its burden for this request.

Under well-established Maryland law, a trial court's decision to grant or deny a request for continuance due to 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"). Based on the record to date, the State has failed to meet its burden and the motion should be denied.

A. **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 grounded in

the Maryland and United States Constitutions. In light of the State's (and the Court's) recognition that the State's request to compel Officer Porter to testify because of a grant use and derivative use immunity ventured into "uncharted territory" and that the request was made under unusual circumstances, the State cannot argue that it truly believed it had well established Maryland precedent on its side.³ Indeed, the Maryland cases and the 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* Md. Code Ann., Cts. & Jud. Proc. § 9-107.⁴ 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, nor its request for a continuance. 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. The defendant argued that he needed a

³ Because of the statements made by the State and the Court on January 6th regarding the lack of precedent on point, it is on that basis the State claims that Officer's Porter's appeal is "doomed to fail." *See* State's Motion at 3. However, the cases cited by the State on page 4 of its Motion do not involve a criminal defendant, with current charges pending and a trial date scheduled, being given use and derivative use immunity.

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

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.*

On appeal, the Court of Special Appeals held 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 308-309 (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 the evidence 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 has pleaded *and* could not be further incriminated by answering questions. *Id.* (citing *United States v. Gernie*, 252 F.2d 664 (2d Cir. 1958), *cert. denied*, 356 U.S. 968 (1958)).

In the case at bar, the State has failed to cite to the Court any law whatsoever relating to the factors to be considered when requesting a continuance, and the State comes nowhere near meeting its burden. 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 3. 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).

The State's request for a continuance will indeed paralyze the courts, and granting it would delay the case of Officer Goodson (as well as Sergeant White) and deny him his right to a speedy trial. In its relief requested, the State asks the Court *and* 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. That cannot be said to be a "reasonable amount of time."

The State's request for a continuance fails because it cannot meet the first of the *Jackson* factors and its motion must be denied.

B. 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, 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." *See* State's Motion 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.* Although these admissions by the State confirm that in the absence of Officer's Porter's testimony, its case cannot proceed against Officer Goodson,⁵ it fails to articulate what the competent evidence is and how it is material to the charges against Officer Goodson. For this reason alone, the State has failed to meet its burden under the second *Jackson* factor.

C. 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 that Officer Porter was going to move to quash it. Further, the State does not deny that Officer Porter had a right to appeal this Court's order compelling him to testify.⁶ Yet the State has known since October 2015 that Officer Porter was going to invoke his 5th Amendment right. For months, the State made no efforts to get this issue resolved by the Court, despite knowing that the law in this area was far from settled. The State never requested a hearing before the 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 this Court's order severing the trials.⁷ The State failed to do so.

⁵ 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 chose to make and will have live with.

⁶ Instead, the State argued that Officer Porter's request for an injunction was not properly before the Court of Special Appeals and, even if it were before the Court, he had failed to meet his burden in establishing that an injunction of the enforcement of this Court's order was necessary pending the outcome of the appeal. On Thursday, January 7th, the Court of Special Appeals granted the Officer Porter's request for a stay pending the issuance of a decision on his motion.

⁷ 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 of these options.

The background of this case demonstrates that 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 diligently 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 State has been anything but diligent in this regard and its motion should be denied.

III. THE STATE'S REQUEST VIOLATES OFFICER GOODSON'S RIGHT TO A SPEEDY TRIAL

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.'" State's Motion at 5 (citation omitted). However, the State has failed to identify any case indicating that the "legitimate demands of government" trump a defendant's constitutional right to a speedy trial. In requesting a continuance, the State is asking this Court to ignore state and federal law.

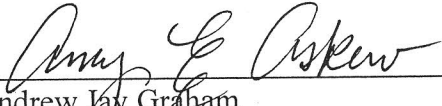
Under Maryland law, the State must bring a criminal defendant to trial no later than 180 days after the earlier of the first appearance of the defendant in circuit court or the appearance of his counsel, namely November 23, 2015. Md. Code Ann., Crim. Proc. § 6-103 (formerly Article 27 § 591); Md. Rule 4-271(a)(1); *State v. Hicks*, 285 Md. 310 (1979) (holding that the 180-day requirement is mandatory). Although this deadline may be extended for good cause, "[a] case postponed for good cause may yet run afoul of the statute and rule if, after a valid postponement, there is inordinate delay in bringing the case to trial." *Rosenbach v. State*, 314 Md. 473, 479 (1989). Thus, even after a good cause postponement, if "trial is not begun with reasonable promptness," dismissal is warranted. *Id.* On September 29, 2015, the State requested its first

postponement of Officer Goodson's trial. As a result of the postponement granted "for good cause," Officer Goodson's trial was rescheduled to January 6, 2015. Now the State asks Officer Goodson to wait for an unknown period of time for his trial to begin. If the State is unable to try Officer Goodson now because its litigation strategy failed, it is the State's own fault, and the Court should order the dismissal of all of the charges against Officer Goodson.

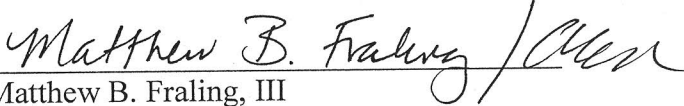
Over and above the statutory requirement that he be tried within 180 days, Officer Goodson's right to a speedy trial is guaranteed by Article 21 of the Maryland Declaration of Rights and the Sixth Amendment to the United States Constitution. To determine whether a defendant has been deprived of his constitutionally guaranteed speedy trial rights, the Court of Appeals has adopted the four factors set forth by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *Divver v. State*, 356 Md. 379, 388 (1999) (citation omitted). Officer Goodson objects to the suggested delay of an indefinite period of time due to the State's unsuccessful litigation tactics and its reliance on a single witness to substantiate the charges against him. The requested delay would prejudice Officer Goodson. *Id.* (noting that prejudice can result from delay, as well as anxiety or concern, and impairment of the defense). He would be further prejudiced by continuing to suffer fear, anxiety, and exposure to public scrutiny and criticism, and the evidence that he is prepared to offer in his defense may turn stale, as witnesses may relocate or forget critical information with the passage of time. *Id.* Additionally, because the State chose to charge him with a felony, Officer Goodson has been suspended without pay since May 1, 2015. The State's request for a continuance not only violates Officer Goodson's constitutional and statutory rights, but any stay will impact his livelihood and the welfare of his family.

IV. CONCLUSION

The Court should deny the State's Motion, and the trial should commence on January 11, 2016.



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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January 2016, a copy of the foregoing paper was sent via electronic mail and mailed, first-class postage prepaid to:

Michael Schatzow, Chief Deputy State's Attorney
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120 East Baltimore Street
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Amy E. Askew

STATE OF MARYLAND

Plaintiff

v.

CAESAR GOODSON

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* IN THE
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* * * * *

ORDER

Upon consideration of the State of Maryland's Motion for Continuance filed January 8, 2016, Officer Caesar Goodson's Opposition, the applicable law, the record in this case and for good cause shown, it is this _____ day of _____, 2016,

ORDERED that the State of Maryland's Motion for Continuance is **DENIED**.

Judge
Circuit Court for Baltimore City