

STATE OF MARYLAND

* IN THE

* CIRCUIT COURT

v.

* FOR

* BALTIMORE CITY

OFFICER EDWARD NERO

* CASE NO. 115141033

* * * * *

**DEFENDANT'S RESPONSE TO STATE'S MOTION TO STAY PROCEEDINGS
PENDING APPEAL**

NOW COMES Defendant Edward Nero, by undersigned counsel and files this Response to the State's Motion to Stay Proceedings Pending Appeal and for reasons states:

1. Officer Edward Nero is pending second degree assault and related charges. The trial is currently scheduled to begin on February 22, 2016.
2. On January 13, 2016 the State filed a Motion to Compel Testimony of Officer William Porter.
3. On January 15, 2016, the State sent a letter to the Court expressing its intent to request a postponement of the trial date.
4. On January 20, 2016 this Court conducted a hearing on the State's dual requests. The Court denied both requests.
5. On February 4, 2016 the State filed a Notice of Appeal.
6. On February 5, 2016 the State filed a Motion to Stay Proceedings Pending Appeal. This Motion to Stay is yet another transparent subterfuge on the part of the State to obtain a postponement, in order to avoid trying the most legally and factually tenuous cases next.
7. The State does not cite to any Rule that enables the State to seek a stay of the proceeding, an extraordinary request at this stage of the proceedings. The Maryland Rules include

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 CRIMINAL DIVISION

provisions to seek a stay pending an appeal in a civil matter. It is instructive, however, that the Rules governing criminal proceedings are silent on this process. The State is relying on CJP §12-301 which allows an appeal only from a *final judgment*. The statute does not include any direction regarding a stay as this would be unnecessary after a final judgment has been rendered.

8. In addition, the filing of a Notice of Appeal does not divest this Court of jurisdiction to continue the proceedings. See e.g. *Pulley v. State*, 287 Md. 406 (1980). In that this Court does retain jurisdiction, “[w]hether to grant or deny a stay of proceedings in a matter is within the discretion of the trial court, and only will be disturbed if the discretion is abused.” *Vaughn v. Vaughn*, 146 Md. App. 264, 279 (2002).
9. The trial court is best equipped to decide if the trial should be stayed pending the State’s efforts to appeal. The trial court is quite familiar with the facts of this case and all of the issues arising from the litigation. The trial court is uniquely situated to assess the legitimacy of the State’s bald allegation that the ruling at issue is a final judgment.
10. This Court “shall consider the same factors that are relevant to the granting of injunctive relief by a circuit court.” Md. Rule 8-425. The four factors relevant to the issuance of an injunction are “(1) the likelihood that the plaintiff will succeed on the merits; (2) the ‘balance of convenience’ determined by whether greater injury would be done to the defendant by granting the injunction than would result by its refusal; (3) whether the plaintiff will suffer irreparable injury unless the injunction is granted; and (4) the public interest.” *Schade v. Maryland State Board of Elections*, 401 Md. 1, 36 (2007). It is the moving party’s burden to establish these four factors and “failure to prove the existence

of even one of the four factors will preclude the grant of preliminary injunction relief.”

Id.

11. With regard to the first factor, the State cannot win on the merits because the issue they seek to be reviewed is not a final judgment. This Court’s ruling is just one of many pre-trial rulings that have occurred in this case. In its Motion to Stay, the State outlines its underlying complaints about this court’s ruling but utterly fails to articulate the basis for its entitlement to file for an appeal at this stage of the proceedings. Simultaneously with the filing of this pleading, the defense has filed a Motion to Dismiss the Notice of the Appeal with the Court of Special Appeals. *See Exhibit 1*. In addition to the fact that this appeal has been filed without any legal authority, the trial court has already made a factual determination that the State's Motion to Compel was without merit and should be denied. For all of the reasons already litigated, the trial court's determination was correct and there is little to no likelihood that the appellate court would disturb this ruling.
12. It is the Defendant’s position that this court’s denial of the State’s Motion to Compel is not a final judgment and therefore the State has no chance to succeed on the merits of its appeal. The inquiry need go no further than here. However, with regard to the second and third factor, the State cannot show that it will suffer greater and irreparable injury if the stay is denied than the defendant will suffer if it is granted. The State claims that Officer Porter is a “valuable witness” in its case and that without him it “would cause irreparable harm to the State’s ability to prosecute this case.” The State has identified no less than 75 witnesses that it intends on calling in its prosecution of Officer Nero. The first time that the State indicated that it intended on calling Officer Porter was on January 13, 2016.

Certainly, the State's late recognition of Officer Porter's "value" undercuts its contention that the State would be irreparably harmed in its ability to prosecute Officer Nero for the pending misdemeanor charges. Additionally, this Honorable Court found the value of Officer Porter's testimony questionable at best after hearing the State's proffer of his "needed" testimony at the hearing on the Motion to Compel.

13. On the other hand, granting a stay in this case would delay Officer Nero's trial well beyond acceptable speedy trial dimensions. The State has consistently argued that any speedy trial violations are insignificant, that any delay in Officer Nero's trial would be a "legally insignificant short amount of time awaiting resolution of the appeal." This assertion ignores the real possibility that any ruling by the Court of Special Appeals would then be reviewed by the Court of Appeals. The State is asking that Officer Nero's trial be put back in the original line-up of cases which would arguably result in the case being scheduled in September, 2016, at the earliest.
14. The State suggests that the fact that this is "one of the most high-profile criminal trials in Maryland history" should figure into the public interest factor. The public interest is best served by the process continuing in the ordinary course of criminal litigation. The State has taken an extraordinary step in seeking to appeal in the midst of litigation, a decision that is not supported by the law. The public should be able to trust that each case prosecuted by this State's Attorney will be tried in a speedy and predictable manner, in accordance with the rules and the law.

WHEREFORE, the Defendant respectfully requests that this Honorable Court deny the State's Motion for Stay Pending the Appeal.

Respectfully submitted,



Marc L. Zayon

Allison Levine

Roland Walker and Marc L. Zayon, P.A.

201 North Charles Street

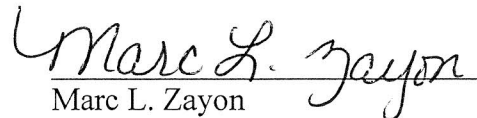
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Baltimore, Maryland 21201

410-727-3710

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on the 8th day of February 2016, a copy of the foregoing Motion was hand-delivered to Janice Bledsoe, Deputy State's Attorney for Baltimore City, 120 E. Baltimore Street, 9th Floor, Baltimore, Maryland 21202.



Marc L. Zayon

STATE OF MARYLAND

v.

OFFICER EDWARD NERO

* IN THE
* CIRCUIT COURT
* FOR
* BALTIMORE CITY
* CASE NO. 115141033

* * * * *

ORDER

HAVING READ AND CONSIDERED the Defendant's Response to the State's Motion to Stay the Proceedings Pending Appeal, it is hereby

ORDERED, that the State's Request for a Stay is **DENIED**.

Judge, Circuit Court for Baltimore City

STATE OF MARYLAND

* IN THE COURT OF

Appellant

* SPECIAL APPEALS

v.

* OF MARYLAND

EDWARD NERO

* SEPTEMBER TERM, 2015

Appellee

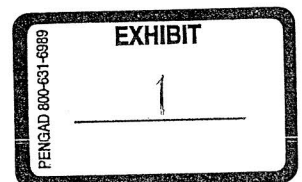
* NO. (115141033)

* * * * *

APPELLEE'S MOTION TO DISMISS THE STATE'S NOTICE OF APPEAL

The Appellee, Edward Nero, through his counsel, Marc L. Zayon and, Roland Walker and Marc L. Zayon, P.A., hereby files this Motion to Dismiss the Notice of Appeal filed by the State, and in support thereof states:

1. On May 1, 2015 Officer Edward Nero was charged in a Four Count Indictment alleging the misdemeanor charges of second degree assault, misconduct in office and reckless endangerment.
2. The trial was originally scheduled for October 13, 2015. That trial date was postponed at the State's request to February 22, 2016.
3. On January 13, 2016 the State filed in the Circuit Court for Baltimore City, a Motion to Compel Testimony of Officer William Porter and by letter dated January 15, 2016 the State indicated an intent to request a postponement from the trial judge, the Honorable Barry G. Williams.
4. On January 20, 2016, the Court conducted a hearing to consider the State's motion. After hearing a proffer of the anticipated testimony and



argument from the State, the trial court denied the State's request for the Motion to Compel and denied the State's request for postponement.

5. In denying both of the State's requests, the Court found the State's sudden need for Officer Porter's testimony and the timing of the request, "questionable" and believed at minimum, a partial purpose of the request was to create grounds for a postponement of Officer Nero's trial. In addition, the Court found that the testimony would most likely not be admissible pursuant to Maryland Rule 5-403.
6. On February 1, 2016 the parties filed pre-trial motions, pursuant to the court's scheduling order. These motions included evidentiary motions and proposed voir dire.
7. On February 4, 2016, fifteen days after the hearing, the State filed a Notice of Appeal in the above captioned matter. *Exhibit 1*. The State tethered its alleged right to appeal this evidentiary ruling on Courts and Judicial Proceedings Article §12-301 which provides:

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

8. The Appellate Courts of Maryland have unequivocally and consistently found that a ruling on a pre-trial evidentiary motion is clearly not a final judgment under CJP §12-301.
9. On January 27, 2016, in *Seward v. State*, No. 12, 2016 Md. LEXIS 11, (Jan. 27, 2016). the Court of Appeals reiterated the definition of a final judgement as follows:

one that “either determine[s] and conclude[s] the rights of the parties involved or den[ies] a party the means to ‘prosecut[e] or defend[] his or her rights and interests in the subject matter of the proceeding.’ “ Important is whether “any further order is to be issued or whether any further action is to be taken in the case.”

Id. at 171, 31 A.3d at 259 (citations omitted). An interlocutory order, on the other hand, exists when “ ‘there are pending proceedings in which issues on the merits of the case remain to be decided.’ “ *Id.* at 172, 31 A.3d at 260 (citation omitted). **Moreover, the purpose of CJP § 12–301 is to permit appeals only from final judgments “to ‘prevent piecemeal appeals and ... the interruption of ongoing judicial proceedings.’ “** *Id.*, 423 Md. 156, 31 A.3d at 259 (citations omitted)(emphasis added).

10. The trial court’s order was simply one of a multitude of pre-trial evidentiary rulings in this case which is not immediately subject to appeal and is interlocutory in nature, “a final judgment exists when the rights of litigants have been established conclusively at the trial level. The general rule in criminal cases is that no final judgment exists until after conviction and sentence has been determined, or, in other words, when only the execution of the judgment remains.” *Sigma Reproduction Health Center v. State*, 297 Md. 660, 665 (1983).

11. The *Sigma* Court further stated, “[o]rdinarily, therefore, an appeal from a pretrial or trial order will not be heard where there are pending proceedings in which issues on the merits of the case remain to be decided. Such orders are interlocutory, not final, and nonappealable until after entry of a final judgment.” *Id.* At 666.

12. Generally the State’s right to appeal is very limited and is governed by Courts and Judicial Proceedings Article §12-302 which specifies the parameters of the State’s right to appeal a trial court’s evidentiary ruling. This ruling does not fall under any of the parameters that would allow an interlocutory appeal under that section.

13. On February 5, 2016 the State filed a Motion to Stay Proceedings Pending Appeal in the Circuit Court, in an attempt to divest the Circuit Court of its fundamental jurisdiction of this case.

14. As the Court emphasized in *Pulley v. State*, 287 Md. 406 at 418 (1980), “If fundamental jurisdiction was lost, it would be unnecessary to require stays since the court could not act in any event. Moreover, particularly with regard to what may be termed as appealable interlocutory orders, a policy contrary to that which we announce today could play havoc with the trial of cases in this State. What we said nearly fifty years ago in support of the then policy against allowing piecemeal appeals applies with equal force in preventing abuse with regard to those that are presently permitted:

If, on a question left to the court’s discretion, upon a suggestion for removal, a prisoner (or other party) is permitted to take an immediate appeal, then proceedings in every criminal (or civil) case, great or small, may be stopped and delayed while the (party) prosecutes an appeal on this preliminary matter And this would add just so much to

the resources of those who might find vexatious delays advantageous, and would multiply appeals in criminal (and civil) cases, often when (a judgment in the appealing party's favor), in the end, would render them profitless. (*Lee v. State*, supra, 161 Md. at 434, 157 A. at 724.)

15. The State's right to appeal is a statutory right, and as previously stated is detailed in Courts and Judicial Proceedings §12-302:

Appeals by State in criminal cases

(c)(1) In a criminal case, the State may appeal as provided in this subsection.

(2) The State may appeal from a final judgment granting a motion to dismiss or quashing or dismissing any indictment, information, presentment, or inquisition.

(3) The State may appeal from a final judgment if the State alleges that the trial judge:

(i) Failed to impose the sentence specifically mandated by the Code; or

(ii) Imposed or modified a sentence in violation of the Maryland Rules.

(4)(i) In a case involving a crime of violence as defined in § 14-101 of the Criminal Law Article, and in cases under §§ 5-602 through 5-609 and §§ 5-612 through 5-614 of the Criminal Law Article, the State may appeal from a decision of a trial court that excludes evidence offered by the State or requires the return of property alleged to have been seized in violation of the Constitution of the United States, the Maryland Constitution, or the Maryland Declaration of Rights.

(ii) The appeal shall be made before jeopardy attaches to the defendant. However, in all cases the appeal shall be taken no more than 15 days after the decision has been rendered and shall be diligently prosecuted.

(iii) Before taking the appeal, the State shall certify to the court that the appeal is not taken for purposes of delay and that the evidence excluded or the property required to be returned is substantial proof of a material fact in the proceeding. The appeal shall be heard and the decision rendered within 120 days of the time that the record on appeal is filed in the appellate court. Otherwise, the decision of the trial court shall be final.

(iv) Except in a homicide case, if the State appeals on the basis of this paragraph, and if on final appeal the decision of the trial court is affirmed, the charges against the defendant shall be dismissed in the case from which the appeal was taken. In that case, the State may not prosecute the defendant on those specific charges or on any other related charges arising out of the same incident.

(v) 1. Except as provided in subsubparagraph 2 of this subparagraph, pending the prosecution and determination of an appeal taken under this paragraph or paragraph (2) of this subsection, the defendant shall be released on personal recognizance bail. If the defendant fails to appear as required by the terms of the recognizance bail, the trial court shall subject the defendant to the penalties provided in § 5-211 of the Criminal Procedure Article.

2. A. Pending the prosecution and determination of an appeal taken under this paragraph or paragraph (2) of this subsection, in a case in which the defendant is charged with a crime of violence, as defined in § 14-101 of the Criminal Law Article, the court may release the defendant on any terms and conditions that the court considers appropriate or may order the defendant remanded to custody pending the outcome of the appeal.

B. The determination and enforcement of any terms and conditions of release shall be in accordance with the provisions of Title 5 of the Criminal Procedure Article.

(vi) If the State loses the appeal, the jurisdiction shall pay all the costs related to the appeal, including reasonable attorney's fees incurred by the defendant as a result of the appeal.

16. It is clear that the statutory scheme strictly limits the circumstances under which the State may appeal and affirmatively requires a certification that “the appeal is not taken for purposes of delay.” *Courts and Judicial Proceedings §12-302(c)(3)(iii)*.
17. In this case, the provisions of §12-302(c)(3)(i) do not apply as the crimes charged are neither crimes of violence nor narcotics crimes.
18. The State has no legal recourse available to appeal this non-final judgment, and therefore, the purpose of this appeal is a veiled attempt to obtain a postponement which the State has been unable to obtain despite their continuous efforts.

19. For the foregoing reasons, the Appellee respectfully requests that this Honorable Court Dismiss the State's Notice of Appeal.

WHEREFORE, Appellee Officer Edward Nero requests that this Honorable Court Dismiss the State's Notice of Appeal.

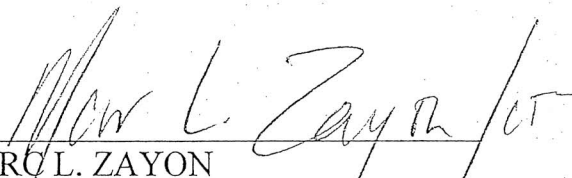
Respectfully submitted,

A handwritten signature in cursive script that reads "Marc L. Zayon" followed by a flourish.

Marc L. Zayon, Esquire
Law Office of Roland Walker & Marc L. Zayon
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of February 2016, a copy of the foregoing Motion was hand-delivered to Janice Bledsoe, Deputy State's Attorney for Baltimore City, 120 E. Baltimore Street, 9th Floor, Baltimore, Maryland 21202 and mailed to Joseph Murtha, Murtha, Psoras, & Lanasa, LLC, 1301 York Road, Suite 200, Lutherville, Maryland 21093



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BALTIMORE CITY

STATE OF MARYLAND

2016 FEB * 4 / A 11: 29 IN THE
* CIRCUIT COURT FOR
* CRIMINAL DIVISION BALTIMORE CITY
* CASE No. 115141033
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v.

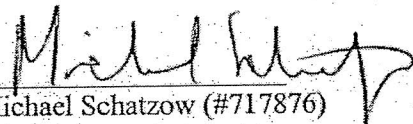
EDWARD NERO

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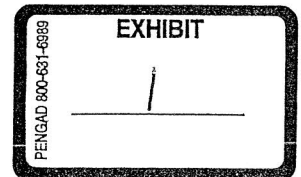
STATE'S NOTICE OF APPEAL

NOW COMES the State of Maryland, by and through Marilyn J. Mosby, the State's Attorney for Baltimore City; Michael Schatzow, Chief Deputy State's Attorney for Baltimore City; Janice L. Bledsoe, Deputy State's Attorney for Baltimore City; and Matthew Pillion, Assistant State's Attorney for Baltimore City; and pursuant to Section 12-301 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland hereby notes an appeal on behalf of the State from a final judgment of the Circuit Court for Baltimore City entered on January 20, 2016, in the above-captioned case denying the State's Motion to Compel a Witness to Testify Pursuant to Section 9-123 of the Courts and Judicial Proceedings Article.

Respectfully submitted,
Marilyn J. Mosby



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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2016, a copy of the State's Notice of


Appeal was mailed and e-mailed to:

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Respectfully submitted,
Marilyn J. Mosby


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STATE OF MARYLAND

Appellant

v.

EDWARD NERO

Appellee

* IN THE COURT OF

* SPECIAL APPEALS

* OF MARYLAND

* SEPTEMBER TERM, 2015

* NO. (115141033)

* * * * *

ORDER

Upon consideration of the Appellee's Motion to Dismiss Appeal, it is this
_____ day of _____, 2016 hereby **ORDERED** that the Appellee's Motion
to Dismiss Appeal is **GRANTED**.

Judge