STATE OF MARYLAND	*	IN THE
	*	CIRCUIT COURT FOR
v.	*	BALTIMORE CITY
	*	CASE No. 115141033
EDWARD NERO	*	

* * * * * * * * * * * * *

STATE'S MOTION TO STAY PROCEEDINGS PENDING 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 the Court's inherent power requests that this Court issue a stay of the above-captioned proceedings pending resolution of the appeal filed by the State on February 4, 2016, from the final judgment of this Court entered on January 20, 2016, denying the State's Motion to Compel a Witness to Testify Pursuant to Section 9-123 of the Courts and Judicial Proceedings Article ("CJP" hereinafter).

I. Summary of Argument

Despite the Court's good intentions in seeking to avoid delay of the Defendant's trial, the Court's denial of the State's Motion to Compel Officer William Porter's testimony ran contrary to the plain language of CJP § 9-123 and to the Legislature's intent in enacting the immunity statute. It also violated separation of powers principles by appropriating to the Judiciary a discretionary power granted to the Executive Branch. The State is now appealing these errors given their ramifications on the State's ability to prosecute this and other cases here and throughout the State. As outlined below and previously argued, this Court had no authority to engage in judicial review of the State's Attorney's vested exercise of lawful discretion in determining that Officer Porter's testimony may be necessary to the public interest in the State's prosecution of the Defendant for his role in the fatal arrest and custodial transportation of Mr.

Freddie Gray. Instead, this Court had only the power to verify that the State's Motion to Compel complied with the procedural and pleading requirements of Section 9-123. Upon finding such compliance, the Court was required to follow the mandate of the Legislature and issue the immunity order.

Though the Court has disagreed with the State's assessment of the statute's mechanics, the State's arguments about Section 9-123's power distribution are strong. Moreover, the Court acted without any express authority or guidance on this issue from either of Maryland's appellate courts—and in the face of overwhelming precedent from other jurisdictions. If, as the State firmly maintains, this Court was, in fact, wrong in its denial of the State's Motion to Compel, to deny the State any meaningful opportunity for appellate review of that decision would potentially result in a miscarriage of justice in the Defendant's trial. The People of this State deserve that opportunity, and this Court has always demonstrated a commitment to giving both the Defendant and the People a fair trial. That commitment now requires allowing a higher court to review this Court's decision before moving forward in this case. As such, this Court should exercise a discretionary power it unquestionably possesses—the power to stay the proceedings pending the State's appeal.

II. Background

On January 14, 2016, the State filed in the above-captioned case a Motion to Compel a Witness to Testify Pursuant to Section 9-123 of the Courts and Judicial Proceedings Article. The witness in question was Officer William Porter. The State's Motion, submitted and signed by the State's Attorney herself, averred that the State may call Officer Porter to testify against the Defendant and set forth her determinations that Officer Porter's testimony may be necessary to the public interest and that he is likely to refuse to testify on the basis of his privilege against

self-incrimination given his similar refusal to testify in the related cases of *State v. Caesar Goodson* (No. 115141032) and *State v. Alicia White* (No. 115141036).

On January 15, 2016, the Defendant filed an Opposition to the State's Motion to Compel. The Defendant attacked the State's Motion as lacking an explanation of "why Officer Porter is either necessary or material to the trial of Defendant Nero or how it is necessary to serve the public interest." Def. Opp. at 1. The Defendant argued that Officer Porter's testimony is, in fact, *not* necessary to the public interest based on his assessment of the State's reasons for filing the motion and his view of the motion's effect on both his and Officer Porter's constitutional rights. Def. Opp. at 2-3. As such, he urged the Court to deny the motion. Likewise, on January 19, 2016, Officer Porter filed an Opposition to the State's Motion in which he too requested that the Court deny the State's Motion on grounds that the Court should find that compelling his testimony would not be necessary to the public interest and would violate his privilege against self-incrimination. Def. William Porter's Opp. at 8.

On the morning of January 20, 2016, the State filed a Response to the Defendant's Opposition, arguing that Section 9-123 granted neither the underlying defendant nor the witness standing to make such objections to the State's request for a grant of immunity and that under the plain terms of that statute, this Court lacked the discretion to deny a motion to compel immunized testimony when presented with a motion that complied with the statute's procedural requirements. Because the State's Motion to Compel unquestionably did comply with Section 9-123, the State urged this Court to follow the statute's mandates and issue the order to compel Officer Porter's testimony under a grant of use and derivative use immunity.

On the afternoon of January 20, 2016, this Court conducted a hearing on the State's Motion to Compel. At that hearing, the State repeated the arguments presented in its Response.

Nevertheless, the Court considered objections from both Officer Porter and the Defendant and then required the Chief Deputy State's Attorney to explain in open court the reasons that prosecutors believed that Officer Porter's testimony may be necessary to the public interest. Though the State maintained that such a judicial inquiry was improper under Section 9-123 and separation of powers principles, the Chief Deputy explained that the State sought to elicit from Officer Porter testimony regarding two important aspects of the charges against the Defendant. Consequently, the State's Attorney had determined that such testimony may be necessary to the public interest. The Court then made its own determination that granting him immunity would *not* be in the public interest, irrespective of the State's Attorney's contrary determination as properly pled in her Motion to Compel, and the Court denied the Motion. From this denial, the State filed a Notice of Appeal on February 4, 2016.

III. This Court should stay the proceedings pending appellate review of the Court's erroneous denial of the State's Motion to Compel to avoid a miscarriage of justice

A. Denying the State's request for a stay would impermissibly frustrate an appellate court's ability to act

Pending appellate review of this Court's denial of the State's Motion to Compel Officer Porter, the State requests that the Court issue a stay of the proceedings. This Court has the full power to issue such a stay and has granted one in the related case of *State v. Alicia White* (No. 115141036). As the Court of Appeals has described, when such an appeal is taken, "the trial court retains its 'fundamental jurisdiction' over the cause, but its right to exercise such power may be interrupted by . . . a stay granted by an appellate court, or the trial court itself, in those cases where a permitted appeal is taken from an interlocutory or final judgment." *Pulley v. State*, 287 Md. 406, 417 (1980). Though this Court retains "fundamental jurisdiction" over this

proceeding, the Court of Appeals has also held that "the propriety of the exercise of that jurisdiction" is a separate matter. *In re Emileigh F.*, 355 Md. 198, 202 (1999). In that regard, "[a]fter an appeal is filed, a trial court may not act to frustrate the actions of an appellate court," and "[p]ost-appeal orders which affect the subject matter of the appeal are prohibited." *Id.* at 202-03; *see also State v. Peterson*, 315 Md. 73, 82, n.3 (1989) ("We think that a trial court ordinarily should not proceed with a hearing [when a writ of certiorari has been issued], thereby mooting an issue before an appellate court."); *accord Jackson v. State*, 358 Md. 612, 620 (2000) (While "a circuit court is not divested of fundamental jurisdiction to take post-judgment action in a case merely because an appeal is pending from the judgment," "[w]hat the court may *not* do is to *exercise* that jurisdiction in a manner that affects either the subject matter of the appeal or the appellate proceeding itself—that, in effect, precludes or hampers the appellate court from acting on the matter before it.") (emphasis in original). Were this Court to order that the Defendant's trial will not be stayed and that the State must proceed to trial without the testimony of Officer Porter, such an order would unquestionably frustrate the actions of an appellate court, effectively mooting the State's appeal and preventing any further review of this Court's denial of the Motion to Compel.

B. Denying the State's request for a stay would needlessly cause irreparable harm

Moreover, a decision by this Court not to stay the proceedings would cause irreparable harm to the State's ability to prosecute this case at no commensurate gain to Officer Porter or the Defendant. Indeed, Officer Porter, the appellee in the appeal, will not be affected by a stay. Despite the State's request to schedule his retrial soon after the December mistrial and before trial of the related cases, Officer Porter's retrial was set for June 13, 2016, due to the asserted unavailability of his counsel prior to that date. Consequently, the State's appeal should be

resolved by then. Regarding the Defendant, he will not be a party to this appeal. As such, granting the stay would cause the Defendant to lose only a legally insignificant short amount of time awaiting resolution of the appeal before starting his trial.[1] On the other hand, denying the stay would cost the State a valuable witness in its case. Officer Porter would provide key evidence regarding the Defendant's alleged misconduct and his alleged recklessness. Once the jury has been sworn in the Defendant's trial, however, the State will be foreclosed from seeking any meaningful remedy to this Court's denial of the Motion to Compel. If the Defendant were acquitted after a trial without Officer Porter's testimony, the damage would be done and could not be undone.

A stay would obviate the risk of such a potentially unfair result, a risk made all the more compelling given the public interest that abounds in this matter. At stake here is not only the outcome of one of the most high-profile criminal trials in Maryland history but also the very fiber of our State's constitutional separation of powers. This Court's denial of the Motion to Compel has deprived prosecutors of both a valuable witness in this case and also an indispensable prosecutorial tool that the Legislature provided to them over twenty-five years ago. Whether this Court's ruling is correct or whether the State's view is proper is a question which an appellate court should be permitted to timely answer. The public interest deserves no less, particularly in light of the strong merits of the State's case on appeal.

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[1] Even assuming that granting a stay would result in a trial delay of several months, the Defendant was indicted less than nine months ago and so would still come to trial on a date that would barely be sufficient to even trigger a legitimate speedy trial challenge, much less actually deprive the Defendant of that right given the complexity of the issues in this case. *See Glover v. State*, 386 Md. 211, 223 (2002) ("While no specific duration of delay constitutes a *per se* delay of constitutional dimension, we have employed the proposition that a pre-trial delay greater than one year and fourteen days was 'presumptively prejudicial' on several occasions.") (internal citations omitted).

C. The State will likely prevail on appeal

The merits of the State's appeal will turn on the question of whether CJP § 9-123 requires a court to order compelled, immunized witness testimony after verifying that the statutory pleading requirements of the prosecutor's motion to compel have been met, or whether the statute instead permits a court to substitute its own discretion and judgment as to whether compelling the witness's testimony may be necessary to the public interest such that the court may deny a prosecutor's motion to compel even if the motion otherwise complies with the pleading requirements of the immunity statute. By its terms, CJP § 9-123 squarely answers this question, vesting the decision about whether to seek immunity for a witness squarely within a prosecutor's discretion and granting a court only the role of confirming that the prosecutor's pleadings are procedurally compliant and then issuing the immunity order as statutorily prescribed. In relevant part, § 9-123 states:

> (c) Order requiring testimony. --
>
> (1) If an individual has been, or may be, called to testify or provide other information in a criminal prosecution or a proceeding before a grand jury of the State, *the court in which the proceeding is or may be held shall issue, on the request of the prosecutor made in accordance with subsection (d) of this section, an order* requiring the individual to give testimony or provide other information which the individual has refused to give or provide on the basis of the individual's privilege against self-incrimination.
>
> (2) The order shall have the effect provided under subsection (b) of this section.
>
> (d) Prerequisites for order. -- If a prosecutor seeks to compel an individual to testify or provide other information, the prosecutor shall request, by written motion, the court to issue an order under subsection (c) of this section *when the prosecutor determines* that:
>
> (1) The testimony or other information from the individual may be necessary to the public interest; and
>
> (2) The individual has refused or is likely to refuse to testify or provide other information on the basis of the individual's privilege against self-incrimination.

Cts. & Jud. Proc. Art. § 9-123(c)-(d) (2015) (emphasis added). This language leaves no ambiguity about the prosecutor's and the judge's respective roles—the prosecutor makes the discretionary determination of the public's interest and then requests immunized testimony, while the judge determines only the request's accordance with the statute and then orders immunized testimony. Nowhere does this language permit the court to inquire into the prosecutor's decision-making, nor does the statute allow the subject of the immunity request or the underlying defendant to object to the manner in which the prosecution has exercised its discretion. The court has no discretion to deny a prosecutor's immunity request properly pled under subsection (d).

The history of § 9-123 confirms that this plain language achieves precisely the result that the legislature intended. As described by the House of Delegates, the immunity statute was intended

> FOR the purpose of authorizing certain prosecutors in certain circumstances to file a written motion for a court order compelling a witness to testify, produce evidence, or provide other information; specifying the effect of the order; prohibiting testimony or other evidence compelled under the order or certain information derived from the compelled testimony or evidence from being used against the witness except under certain circumstances; *requiring a court under certain circumstances to issue an order requiring a witness to testify or provide other information upon request by a prosecutor*; establishing procedures for enforcement of an order to testify or provide other information; defining certain terms; and generally relating to immunity for witnesses in proceedings before a court or grand jury.

1989 Md. Laws, Ch. 289 (H.B. 1311) (emphasis added). The phrase "requiring a court" does not equate with "allowing a court"; rather, the Legislature's purpose was to create a mandatory judicial action.

Moreover, a formal Position Paper contained within the legislative history bill file for HB 1311 similarly describes the procedural mechanism of the proposed new immunity statute:

> By far the most significant changes provided by the proposed statute are procedural. Immunity would no longer be conferred automatically or accidentally, but rather only through court order. To ensure coordinated, responsible requests for immunity, the decision to seek a court order requires approval by the State's Attorney, Attorney General, or State Prosecutor. The State's Attorney, Attorney General, or State Prosecutor will thereby have central control and ultimate responsibility for the issuance of grants of immunity.
>
> *The judicial role under this statute is ministerial. The judge verifies that:*
>
> *1. The State's Attorney, Attorney General, or State Prosecutor has approved the request for an immunity order;*
> *2. The witness has refused or is likely to refuse to testify;*
> *3. The prosecutor has determined that the witness's testimony may be necessary to be the public interest [sic].*
>
> *Once the judge concludes these three requirements are met, he issues a court order compelling testimony and immunizing the witness.*
>
> *The Judge will not himself determine whether the witness's testimony may be necessary to the public interest. To do so would transform the Judge into a prosecutor and require him to make delicate prosecutorial judgments which are inappropriate. Furthermore, a particular immunity grant may be a very small aspect to a large scale investigation, making it impossible for the judge to make any meaningful evaluation of the public interest.*

Position Paper on HB 1311, *Witness Immunity*, 8-9, 1989 Reg. Sess. (1989) (emphasis added) (attached as State's Exhibit 1).[2]

Additionally, the legislature's Division of Fiscal Research submitted a Fiscal Note for House Bill 1311, summarizing the proposed immunity statute as follows:

> SUMMARY OF LEGISLATION: This amended bill provides for the granting of 'use' immunity to witnesses compelled to testify regarding a criminal matter. Specifically, if a witness refuses to testify on a criminal matter, on the grounds of privilege against self-incrimination, the Court may compel the witness to testify or provide information by issuing a court order to that effect. *The court order would only be granted upon the written request of the prosecutor, who has found that the testimony or information of a witness may be necessary to the public interest, and that the testimony or information would not be forthcoming absent the order.*

[2] The Position Paper bears no author but was contained within the microfilm legislative bill history for HB 1311 on file at the Library of the Department of Legislative Services in Annapolis.

> Criminal prosecution would be allowed against the witness for the crimes that were testified about; such testimony, however, would not be 'used' against the witness in any criminal case except those involving the failure to comply with the Court's order.

Md. Gen. Assembly Div. of Fiscal Research, *Fiscal Note Revised for H.B. 1311*, 1989 Reg. Sess. (Apr. 4, 1989) (emphasis supplied) (attached as State's Exhibit 2).

These materials make clear that the General Assembly intended CJP § 9-123 to grant to the Executive Branch the sole power to determine whether giving a witness immunity would in fact be in the public interest and to authorize the Judiciary to serve only the ministerial role of supervising the procedure of granting immunity. Consequently, this Court's attempt—however well intentioned—to limit and appropriate to itself the prosecutor's statutorily vested immunity authority violated Maryland's separation of powers principles. *See Md. Decl. of Rights, Art. 8* ("the Legislative, Executive, and Judicial powers of Government ought to be forever separate and distinct from each other . . . ."). This plain language and legislative history analysis of CJP § 9-123 by itself makes clear that the State will prevail on the merits of its appeal from this Court's denial of the Motion to Compel.

While Maryland's appellate courts have yet to construe CJP § 9-123's division of power, the statute's legislative history suggests that another ready source of guidance lies in federal law. As the Position Paper on HB 1311 correctly noted at the time § 9-123 was being considered, "[t]he proposed statute is based substantially on the federal immunity statutes: 18 U.S.C. §§ 6001-04 (1985)." *Position Paper, supra* at 2. That federal statutory scheme provides in relevant part:

> § 6003. Court and grand jury proceedings
> (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held *shall issue*, in

> accordance with subsection (b) of this section, *upon the request of the United States attorney for such district*, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title [18 USCS § 6002].
>
> (b) *A United States attorney may*, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General or any designated Assistant Attorney General or Deputy Assistant Attorney General, *request an order under subsection (a) of this section when in his judgment--*
>
> *(1) the testimony or other information from such individual may be necessary to the public interest*; and
>
> (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

18 U.S.C. § 6003 (emphasis added). This provision uses a materially identical procedure as that outlined in CJP § 9-123, and federal courts have amassed a substantial body of law construing this provision's distribution of power between the court and the prosecutor in a manner that strongly indicates that the State will prevail on appeal.

At the foundation of these federal precedents lies the Supreme Court's construction of a predecessor immunity statute in *Ullmann v. United States*, 350 U.S. 422 (1956). There the Supreme Court considered the question of whether a witness could properly request a judge to deny an immunity application that otherwise comported with the statutory pleading prerequisites, which at the time required an averment that "in the judgment of a United States Attorney, the testimony of [the] witness . . . is necessary to the public interest" and also required that the United States Attorney obtain "the approval of the Attorney General" before making an application to the court. *Id.* at 423-424. The Government argued "that the court has no discretion to determine whether the public interest would best be served by exchanging immunity from prosecution for testimony [and] that its only function is to order a witness to testify if it determines that the case is within the framework of the statute." *Id.* at 431. The Supreme Court agreed that "[a] fair reading of [the immunity statute] *does not indicate that the*

district judge has any discretion to deny the order on the ground that the public interest does not warrant it"; rather, the court's "duty under [the statute] is *only to ascertain whether the statutory requirements are complied with* by [prosecutors]." *Id.* at 432-34 (emphasis supplied).

After Congress enacted the procedurally similar present-day immunity scheme, the federal Circuit Courts of Appeal have uniformly construed those provisions in accordance with *Ullmann*. For example, *In re Kilgo*, 484 F.2d 1215 (4th Cir 1973), involved an appellant who had been held in contempt after refusing to testify despite being immunized and compelled under the federal immunity statute. He claimed, in part, "that the immunity order, on which the contempt citation rest[ed], [was] invalid [because] neither he nor the court was apprised of the basis of the United States Attorney's conclusion that his testimony was necessary to the public interest . . . ." *Id.* at 1217. The Fourth Circuit found no merit in this contention, explaining

> No case interpreting the public interest provision of the 1970 Act [enacting the immunity scheme] has been called to our attention. However, cases construing analogous requirements in earlier immunity statutes establish that the district court is not empowered to review the United States Attorney's judgment that the testimony of the witness is necessary to the public interest. The leading case is *Ullmann v. United States*, 350 U.S. 422, 100 L. Ed. 511, 76 S. Ct. 497 (1956), which construed the Immunity Act of 1954 [18 U.S.C. § 3486] dealing with grand jury inquiries involving national security. That Act also limited grants of immunity to witnesses whose testimony, in the judgment of the United States attorney, was necessary to the public interest. The Court, recognizing the potential constitutional question that would arise if the judiciary reviewed the merits of immunity, construed the statute to withhold from the district court 'any discretion to deny the order on the ground that the public interest does not warrant it.' 350 U.S. at 432. It held that the function of the district court was limited to ascertaining whether the application complied with the statutory requirement -- that is, had the United States attorney certified that in his judgment the testimony of the witness was in the public interest. [...] The drafters of the 1970 Act left no doubt that the construction given to the public interest provision in previous immunity acts was to be applied to § 6003, and the legislative history confirms the limited role of the court. Because the Act does not authorize the district court to review the United States attorney's judgment that the testimony of the witness may be necessary to the public interest, no evidence pertaining to this judgment need be offered.

Id. at 1218-19.

Similarly, the Third Circuit described the procedural operation of the federal immunity statutes in *In re Grand Jury Investigation*, 486 F.2d 1013, 1016 (3rd Cir. 1973), saying, "[u]nder the language of [18 U.S.C. § 6003] the judge is required to issue the order when it is properly requested by the United States Attorney," and "[h]e is given no discretion to deny it." Likewise, the First Circuit in *In re Lochiatto*, 497 F.2d 803, 805 (1st Cir. 1974), construed § 6003 in accordance with *Ullmann* as using language that "does not indicate that the district judge has any discretion to deny the order on the ground that the public interest does not warrant it." *Accord In re Maury Santiago*, 533 F.2d 727, 728-29 (1st Cir. 1976) ("The U.S. Attorney filed a letter from a proper official of the Justice Department authorizing him to request immunity for Maury. He stated in open court that Maury's testimony was, in his opinion, necessary to the public interest. The judgment of the U.S. Attorney is unreviewable in this matter . . . and we see no reason to require that this representation be put in affidavit form."); *United States v. Levya*, 513 F.2d 774, 776 (5th Cir. 1975) (holding that the witness was not entitled to notice and a hearing before an immunity order is granted and construing that "since the court's duties in granting the requested order are largely ministerial, when the order is properly requested the judge has no discretion to deny it."); *Urasaki v. United States District Court*, 504 F.2d 513, 514 (9th Cir. 1974) ("In passing upon an immunity application, the district court is confined to an examination of the application and the documents accompanying it for the purpose only of deciding whether or not the application meets the procedural and substantive requirements of the authorizing statute. [...] Adversary procedure is not a part of the legislative scheme in connection with the district court's performance of its limited duties in granting or denying the application for immunity."). Lastly, in *Ryan v. Commissioner*, 568 F.2d 531, 541 (7th Cir. 1977), the Court rejected an appellant's

claim that an immunity order was invalid because the record "did not contain facts showing that the prosecutor had any basis for making the judgment that the grant of immunity would be in the public interest." As the Court explained, "[s]ince that judgment is entirely a matter for the executive branch, unreviewable by a court, there is no need for the record to contain any facts supporting the decision of the United States Attorney." *Id.*

In addition to this guidance from the federal courts, the New Jersey Supreme Court has squarely considered the propriety of the judiciary questioning a prosecutor's decision that there exists a public need to grant immunity to a witness. In *In re Tuso*, 376 A.2d 895 (N.J. 1977), the appellant was a lawyer who had been subpoenaed to testify before a grand jury considering an indictment. When the lawyer asserted his privilege against self-incrimination, the New Jersey Attorney General petitioned the court to compel his testimony under New Jersey's similar use and derivative use immunity statute, which provides that upon such a petition "the court shall so order and that person shall comply with the order." *Id.* at 896. Before the court could rule on that petition, a different state grand jury indicted the lawyer on charges involving the same subject matter as the testimony that the Attorney General sought to compel. *Id.* When the court nevertheless granted the petition and ordered the lawyer to testify, the lawyer appealed to New Jersey's intermediate Appellate Division, which reversed the trial court's order as improper. *Id.* "The principal basis for the conclusion of the Appellate Division was that the State did not need the information it was seeking from Tuso" because the "Attorney General conceded at oral argument he had sufficient information for an indictment against D'Anastasio but wanted Tuso's testimony to assure a conviction." *Id.* at 896-97. Moreover, though the "Appellate Division conceded that the federal cases uniformly construe the parallel federal immunity statute to withhold any discretionary right in the court to deny an order to testify when the prosecuting

officer has met the prerequisites of the statute . . . the Appellate Division felt the federal cases were not authoritative where the order sought was 'basically unfair, inequitable or totally unnecessary.'" *Id.* at 896.

On subsequent appeal to New Jersey's highest court, the Attorney General challenged the Appellate Division's intrusion into his authority, and the Supreme Court agreed with his position. In reversing the Appellate Division, the Supreme Court explained regarding the state's immunity scheme:

> [I]t is clear that the statute cited above delegates the function of determining need in such a situation *to the Attorney General* (or prosecutor, with the approval of the Attorney General), *not the court*, conformably with the duty of that officer to attend to the enforcement of the criminal laws. Upon request by the Attorney General, the statute directs that the court 'shall' order the witness to testify. [. . .]

Id. at 896 (emphasis supplied).

In summation, on the question of the State's likelihood to prevail here on appeal as it bears on the issue of whether to grant a stay of the proceedings, every source of authority—from CJP § 9-123's plain text and legislative history to its federal corollary's extensive appellate construction—demonstrates that this Court erred in replacing the State's Attorney's determination of the public interest with its own and that the State will prevail on appeal accordingly. The clear intent of the Legislature was that the Executive Branch, not the Judiciary, should have the discretion to determine whether a particular witness's testimony may be necessary to the public interest under Maryland's general immunity statute.

Wherefore, the State requests that this Court grant the State's Motion to Stay Proceedings Pending Appeal.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February, 2016, a copy of the State's Motion to Stay Proceedings Pending Appeal was mailed and e-mailed to:

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POSITION PAPER

WITNESS IMMUNITY

I. INTRODUCTION

A. The Problem

There are basically two types of immunity: transactional and use and derivative use immunity (hereinafter "use immunity"). Transactional immunity means that once a witness has been compelled to testify about an incident, he may never be prosecuted for offenses arising out of that transaction even if independent evidence of the offense(s) -- from a source other than the witness -- comes to light. Use immunity, a shorthand term for use and derivative use immunity, means that once a witness has been compelled to testify about an offense, neither that testimony nor any evidence derived from that testimony may be used against the witness. If independent evidence is discovered, or has been preserved, the witness theoretically may still be prosecuted for the offense.

Obviously, in situations in which insider information about criminal activity is necessary in order to prosecute criminal activity, the prosecutor is faced with untenable alternatives when only transactional immunity is available.

For example, assume a scenario in which a narcotics network is functioning effectively with a hierarchy in which the first echelon leader is a prosperous, "white collar" professional who has never been convicted of a crime. That individual, who we can refer to as "Kingpin", provides the capital necessary to purchase the narcotics which is distributed to users. He never has his hand on the narcotics and enters only into cash transactions. Kingpin, however, relies upon a certified public account ("A") and an individual who monitors the actual narcotics trafficking network ("B").

Kingpin may never be successfully prosecuted without information from "A" or "B". There may not be enough evidence against "A" or "B" to prosecute them for their role in the

STATE'S EXHIBIT

conspiracy.

A resourceful prosecutor, who could be investigating Kingpin for narcotics violations or criminal violations of the income tax code would subpoena "A" or "B" before the grand jury at which time "A" and "B" would invoke their privilege against self-incrimination. Under the present law, the prosecutor would then face the dilemma of having to give "A" or "B" transactional immunity or a total exemption from liability for their misdeeds. "A" or "B", then, could conceivably not be prosecuted for their role in the conspiracy on either the state or federal level. If granted transactional immunity, they also conceivably may not incur civil liability for their involvement. "A" or "B" conceivably may not incur civil tax liability in the form of penalties and "A" conceivably may not face professional discipline in the form of license suspension or revocation by his professional licensing authority. To permit "A" or "B" to walk away from their misdeeds would truly be a miscarriage of justice.

B. The Resolution

The resolution of the dilemma is to provide the prosecutor with use immunity to permit the prosecutor to build a tax prosecution case against Kingpin by immunizing "A" from the use of "A's" testimony against him, or a narcotics case by immunizing "B" from the use of his testimony against him. "A" and "B" could still be prosecuted for their involvement in the conspiracy, could still be forced to pay civil tax penalties and "A" could still be subject to discipline on a professional basis. Certainly, consideration of appropriate sanctions against "A" and "B" should and must include all possibilities given the magnitude of their involvement in the crime.

II. PROPOSED GENERAL IMMUNITY STATUTE

The proposed statute is based substantially on the federal immunity statutes: 18 U.S.C. §§6001-04 (1985). Changes made in the language are primarily those required by the differences

between the organizational structure of law enforcement agencies in the federal and state systems.

The proposed general immunity statute differs substantively from existing Maryland statutes in three ways:

1. It provides for use and derivative use instead of transactional immunity;

2. It is generally available rather than limited to specific crimes;

3. It has built-in procedural safeguards which must be complied with prior to its utilization. Generally, the present statutes operate automatically.

The proposed immunity statute would replace the immunity provisions for specific crimes. Presently, Maryland has separate immunity provisions for the following crimes: Article 27, §23, Bribery of Public Officials;[1/] Article 27, §24, Bribery of Athletic Participants; Article 27, §39, Conspiracy to Commit Bribery,[2/] Gambling or Lottery Violations; Article 27, §298, Controlled Dangerous Substances; Article 27, §262, Gambling; Article 27, §371, Lottery Violations; Article 27, §400, Selling Liquor to Minors; Article 27, §540, Sabotage Prevention; Article 33, §26-16, Election Irregularities; Financial Institutions §9-

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[1/] Article III, §50 of the Constitution of Maryland requires the General Assembly to adopt a bribery statute conferring transcational immunity. Article 27, §§23 and 39 are the response to the mandate. Consequently, absent a constitutional amendment, immunity for bribery must continue to be "transactional" as opposed to the more limited "use and derivative use" immunity.

[2/] Transactional immunity for conspiracy to commit bribery also would not be affected since it has constitutional overtones.

910, Savings and Loan Prosecution.[3/]

III. BASES FOR USE IMMUNITY

A. Legal Basis for Use Immunity

In 1892, the Supreme Court held unconstitutional a federal immunity statute which barred the introduction of compelled testimony but permitted it to be used to locate other evidence.[4/] The Court reasoned -- correctly -- that such derivative use of the tainted evidence rendered the immunity meaningless. But rather than simply stating that the Constitution required derivative use immunity; i.e., immunity from both the introduction of compelled testimony and exploitation of the testimony to find leads, the opinion spoke in broad language which seemed to require transactional immunity. Consequently, Congress enacted a transactional immunity statute which was upheld by the Supreme Court,[5/] and which became the model for state legislation. In 1970, Congress repealed the transactional immunity statutes and enacted a new use immunity statute, 18 U.S.C. §§6001-04 (1970). When the Supreme Court reviewed the new statute, it held that the transactional immunity language in Counselman which had been relied on for almost one hundred years was dicta. Thus, the Court held that the new statute which bars the use and derivative use of information obtained under a grant of immunity provides the protection required by the Fifth Amendment.[6/]

Maryland's transactional immunity statutes, like the federal

[3/] Immunity in the savings and loan situation would remain the same since the duration of the immunity accorded to the investigation of the pending matters would be limited to one more extension of the sunset provisions.

[4/] Counselman v. Hitchcock, 142 U.S. 547 (1892).

[5/] Brown v. Walker, 161 U.S. 591 (1896).

[6/] Kastigar v. United States, 406 U.S. 441 (1972).

immunity statutes repealed in 1970, are based upon an incorrect interpretation of the 1892 decision. It is now clear that use immunity will meet constitutional requirements. Maryland's laws are, therefore, outdated.

B. Practical Bases for Use Immunity

In addition to providing the possibility that a witness given use immunity may be subject to subsequent prosecution for his criminal activity, i.e., the Oliver North prosecution, and would be subject to collateral consequences, use immunity provides for more complete disclosure of evidence than transactional immunity. As Professor G. Robert Blakely stated at the 1974 Seminar of the National Associations of Attorneys General:

> With transactional immunity all the witness has to do is mention the transaction; he does not have to fill in the details. So his attorney can tell him to just mention it, and then say, "I don't remember." But with a "use" statute, a smart attorney advises his client to tell all he knows, because the more he tells, the less can be later used against him. So "use" statutes encourage fuller disclosure by witnesses, and that is what they are really all about.

As a result, individuals testifying under a grant of use immunity have greater reason to disclose their involvement.[7/]

Further, a general immunity statute, instead of the present patchwork quilt of immunity statutes for particular crimes, would likewise be more conducive to full disclosure of evidence by an immunized witness. Often testimony about a drug transaction will encompass other crimes, such as violations of criminal tax statutes. Under the present system, a witness subpeonaed to testify pursuant to the immunity provisions of Article 27, §298

7/Whether transactional or use witness immunity does not preclude prosecution for perjury or making false statements under oath.

(Controlled Dangerous Substances) may not refuse to testify because testimony regarding the controlled dangerous substances transaction would simultaneously implicate him in the commission of other crimes, e.g., tax perjury.[8/] Yet this circumstance presents the possibility of a trap for the unwary prosecutor inquiring into drug violations and inadvertently granting transactional immunity for some previously unknown criminal activity.

Further, there are no procedural safeguards in the present immunity statutes and consequently their operation is triggered haphazardly, without identification of when a witness begins to receive immunity. The statutes also provide an "automotic immunity bath". Across the nation,[9/] witnesses subpoenaed before the grand jury must either assert the privilege against self-incrimination or else notify the prosecutor that it is their intention to do so. The prosecutor then asks the court to order testimony and certifies that the immunity conferred thereby is in the public interest. This is the procedure set out in this proposed statute and is the procedure incorporated in the recently adopted savings and loan immunity legislation. In sharp contrast, most present Maryland statutes immunize everyone who answers questions in the grand jury.[10/] No assertion of the privilege is required, nor is there any requirement of a certification that the immunity is in the public interest. The uncertainty of when the statute is applicable, coupled with the blanket automatic transactional immunity bath, makes Maryland immunity statutes both haphazard and dangerous. Unless a

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[8/] In re: Criminal Investigation No. 1-162, 307 Md. 622 (1987).

[9/] Witness Immunity, National Association of Attorneys General, August, 1978.

[10/] State v. Panagoulis, 253 Md. 699 (1969) (Witness who appeared voluntarily before grand jury to make statement and was then asked questions was "compelled" to testify within meaning of bribery immunity statutes).

prosecutor is very conversant in the vagaries of investigative grand jury law, he or she accidentally may immunize potential targets. As a consequence of the risks arising from the broad automatic immunity received by anyone subpoenaed before a grand jury investigating drugs, gambling and election laws, the grand jury frequently becomes unusable as an investigative tool in these areas. The result is that the financial aspects of large drug operations cannot be investigated by Maryland grand juries.

Finally, despite the broad brush immunization the present statutes provide, they may ironically deprive potential defendants of the opportunity to provide exculpatory evidence to a grand jury. A prosecutor who might otherwise consent to the appearance of a defendant who want to testify before an investigative grand jury or -- the more common occurance -- a prosecutor who is willing to call a witness supportive of the defense, may decline to do so because he fears automatic immunization. There are no immunity waiver statutes and the question of whether the automatic immunity can be waived has yet to be resolved by the appellate courts.

IV. PROPOSED STATUTE

The proposed statute substitutes use for transactional immunity[11/] because of the additional fact-finding utility that use immunity provides. It would automatically bring the Maryland law into accord with the Supreme Court's current view of the breadth of the Fifth Amendment.

The proposed statute is made generally applicable primarily for two reasons. It assures the compellability of the testimony regarding a transaction which may involve a variety of interrelated crimes and thus circumvents any constitutional

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11/ Transactional immunity for the crime of bribery is retained because of its constitutional underpinning and for the savings and loan investigation because of its limited duration.

problem which may presently exist.[12/] Secondly, it is now apparent that a grand jury may be an inappropriate forum for the investigation of a variety of crimes, particularly large scale drug operations, money laundering, and tax perjury. The existence of a generally available but limited immunity statute would remedy the dual problems of no immunity for most crimes and too much immunity for drugs, gambling and elections offenses.

By far the most significant changes provided by the proposed statute are procedural. Immunity would no longer be conferred automatically or accidentally, but rather only through court order. To ensure coordinated, responsible requests for immunity, the decision to seek a court order requires approval by the State's Attorney, Attorney General or State Prosecutor. The State's Attorney, the Attorney General or State Prosecutor will thereby have central control and ultimate responsibility for the issuance of grants of immunity.

The judicial role under this statute is ministerial. The judge verifies that:

> 1. The State's Attorney, the Attorney General, or State Prosecutor has approved the request for an immunity order;
>
> 2. The witness has refused or is likely to refuse to testify;
>
> 3. The prosecutor has determined that the witness's testimony may be necessary to be the public interest.

Once the judge concludes these three requirements are met, he issues a court order compelling testimony and immunizing the witness.

The Judge will not himself determine whether the witness'

[12/] Cf. In re Criminal Investigation No. 1-162, supra. n.6, (witness must reasonably fear prosecution for one of enumerated offenses).

testimony may be necessary to the public interest. To do so would transform the Judge into a prosecutor and require him to make delicate prosecutorial judgments wheih are inappropriate. Furthermore, a particular immunity grant may be a very small aspect to a large scale investigation, making it impossible for the judge to make any meaningful evaluation of the public interest.

MARYLAND GENERAL ASSEMBLY
DEPARTMENT OF FISCAL SERVICES
DIVISION OF FISCAL RESEARCH
JOSEPH M. COBLE, DIRECTOR

FISCAL NOTE
REVISED

HB 1311

House Bill 1311 (The Speaker, et al) (Delegate Menes, Chairman, Special Committee on Drug and Alcohol Abuse)

Judiciary

Referred to Judicial Proceedings

SUMMARY OF LEGISLATION: This amended bill provides for the granting of "use" immunity to witnesses compelled to testify regarding a criminal matter. Specifically, if a witness refuses to testify on a criminal matter, on the grounds of privilege against self-incrimination, the Court may compel the witness to testify or provide information by issuing a court order to that effect. The court order would only be granted upon the written request of the prosecutor, who has found that the testimony or information of a witness may be necessary to the public interest, and that the testimony or information would not be forthcoming absent the order.

Criminal prosecution would be allowed against the witness for the crimes that were testified about; such testimony, however, would not be "used" against the witness in any criminal case, except those involving the failure to comply with the Court's order.

STATE FISCAL IMPACT STATEMENT: No effect.

LOCAL FISCAL IMPACT STATEMENT: No effect.

STATE REVENUES: No effect.

STATE EXPENDITURES: The Administrative Office of the Courts advises that the cost of any additional Court orders necessary under this legislation could be absorbed within existing resources. State expenditures are not affected by this change in procedural requirements for compelling testimony from witnesses claiming self-incrimination privileges.

LOCAL REVENUES: No effect.

LOCAL EXPENDITURES: No effect.

INFORMATION SOURCE: Administrative Office of the Courts, Department of Public Safety and Correctional Services (Division of Correction), Department of Fiscal Services

ESTIMATE BY: Department of Fiscal Services

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