IN THE CIRCUIT COURT
FOR BALTIMORE CITY

STATE OF MARYLAND	:	
	:	
v.	:	**CRIMINAL NO. 115141037**
	:	
OFFICER WILLIAM G. PORTER	:	
	:	
Defendant.	:	
	:	

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DEFENDANT MOTION IN LIMINE RE.
PEREMPTORY STRIKES

Comes now Defendant Officer William Porter, through his counsel, Joseph Murtha and Gary Proctor (hereinafter "Defendant") and respectfully submits this Motion in support of his contention that he is entitled to ten (10) peremptory challenges, with the state being given five (5).

1. Md. Rule 4-313(a) governs the number of strikes allotted to the parties in a criminal case, and says, in pertinent part:

> (1) *Generally.* Except as otherwise provided by this section, each party is permitted four peremptory challenges.
>
> (2) *Cases Involving Death or Life Imprisonment.* Each defendant who is subject on any single count to a sentence of death or life imprisonment, except when charged with a common law offense for which no specific penalty is provided by statute, is permitted 20 peremptory challenges and the State is permitted ten peremptory challenges for each defendant.
>
> (3) *Cases Involving Imprisonment for 20 Years or More, But Less Than Life.* Each defendant who is subject on any single count to a sentence of imprisonment for 20 years or more, but less than life, except when charged with a common law offense for which no specific penalty is provided by statute, is

> permitted ten peremptory challenges and the State is permitted five peremptory challenges for each defendant.

Id. In the case at bar, the State believes that each side is entitled to four challenges, whereas Defendant believes this is a ten and five case.

2. The offense for which Defendant is charged with, that he asserts entitles him to ten (10) strikes, is misconduct in office. "In Maryland, misconduct in office is a common law misdemeanor. It is corrupt behavior by a public officer in the exercise of the duties of his office or while acting under color of his office." Duncan v. State, 282 Md. 385, 387, 384 A.2d 456, 458 (1978).

3. As such:

> The common law misdemeanor...carries with it the common law penalty, which is anything in the discretion of the sentencing judge, provided only that it not be cruel and unusual. Because the constitutionality (the proportionality) of a sentence in terms of its length can never be judged in the abstract but must be determined on an *ad hoc,* case-by-case basis, the argument might be made that any crime punishable by common law sentencing carries the at-least theoretical possibility of life imprisonment, until the facts are fully developed. We do not believe, however, that the Legislature intended such a remote and theoretical possibility to vest initial jurisdiction in the criminal court for every crime with open-ended common law sentencing provisions. The crime now under review, however, does not need to rely upon such remote and theoretical possibilities so to qualify.

State v. Hardy, 53 Md. App. 313, 314-15, 452 A.2d 1299, 1301 (1982) aff'd, 301 Md. 124, 482 A.2d 474 (1984). Defendant does not contend that this is a case with the possibility of a life sentence, as that would be remote. That said: this is absolutely a case the gravamen of which means that he is entitled to ten (10)

strikes. There is a long history of persons received sentences of two decades in prison for common law misdemeanors:

> Both this Court [of Special Appeals] and the Court of Appeals have held that a sentence of 20 years' imprisonment for common law assault did not constitute cruel and unusual punishment. Roberts v. Warden, 242 Md. 459, 219 A.2d 254 (1966), cert. denied, 385 U.S. 876, 87 S.Ct. 156, 17 L.Ed.2d 104; Adair v. State, 231 Md. 255, 189 A.2d 618 (1963); Raley v. State, 32 Md.App. 515, 363 A.2d 261 (1976); Wilkins v. State, 5 Md.App. 8, 245 A.2d 80 (1968)

Brown v. State, 38 Md. App. 192, 195, 379 A.2d 1231, 1233 (1977).[1] As such, Defendant's argument is far from a "remote and theoretical possibilit[y]." Id.

4. Turning firstly to the statute itself. It reads, in relevant part that "[e]ach defendant who is subject on any single count to a sentence of imprisonment for 20 years or more, but less than life, except when charged with a common law offense for which no specific penalty is provided by statute, is permitted ten peremptory challenges and the State is permitted five peremptory challenges for each defendant." So the question that lies herein is: what happens when both are true?

5. This Court's starting point should be that:

> When a court construes a criminal statute, it may invoke a principle known as the "rule of lenity" when the statute is open to more than one interpretation and the court is otherwise unable to determine which interpretation was intended by the Legislature. Instead of

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1 See also Thomas v. State, 333 Md. 84, 102, 634 A.2d 1, 10 (1993) ("Although we believe the 30–year sentence imposed for this [common law] battery was harsh and severe, we do not find under the circumstances that it was so grossly disproportionate to the offense that it must be set aside.") Later partially abrogated by Legislature codifying assault.

> arbitrarily choosing one of the competing interpretations, the court selects the interpretation that treats the defendant more leniently. The rule of lenity is not so much a tool of statutory construction as a default device to decide which interpretation prevails when the tools of statutory construction fail.

Oglesby v. State, 441 Md. 673, 676, 109 A.3d 1147, 1149 (2015). Thus, given the ambiguity in the statute which, on the one hand says if you can receive twenty or more years in jail give ten strikes but, in the same sentence says if there is no specific sentence give four, the rule of lenity should inure to Officer Porter's benefit. Coupled with that, "[s]ince the early years of the Republic, Maryland courts have recognized the inherent authority of courts in numerous contexts." Wynn v. State, 388 Md. 423, 431, 879 A.2d 1097, 1102 (2005). Thus, this Court has wide latitude afforded it to fashion the remedy requested.

6. By the same token, this Court cannot look at this motion in a vacuum. It is aware of the unparalleled publicity of this case in our district. It is aware that the eyes of the world are watching Officer Porter's trial. It is aware that steps will be taken to protect jurors. It is aware that Defendant's request for lengthy voir dire has been considerably curtailed by this Court. Thus, by the same token: ten peremptory strikes are necessary to protect Officer Porter's Fifth, Sixth, and Fourteenth Amendment rights.

7. The Court of Appeals has said:

> [T]he importance of the peremptory challenge requires that any significant deviation from the prescribed procedure that impairs or denies the privilege's full exercise is error that, unless waived, ordinarily will require reversal without the necessity of showing prejudice.

King v. State Road Commission of State Highway Administration, 284 Md. 368, 371 (1979) (citing Swain v. Alabama, 380 U.S. 202, 219 (1965)). In other cases in which a defendant was given fewer than his allotted number of peremptory challenges, or the State was given more, both the Court of Special Appeals and the Court of Appeals have reversed as long as the defendant used all the challenges he was given. *See* Bundy v. State, 334 Md. 131, 147-49 (1994) (reversing where State was erroneously given two extra challenges); Sharp v. State, 78 Md. App. 320, 326 (1989) (reversing, without considering harm, where three defendants were given total of four peremptory challenges between them). *See also* State v. Tejada, 419 Md. 149 (2011) (reversing where trial court conducted bifurcated *voir dire* process, which denied defendant his right of informed and comparative rejection of jurors). To not allot Officer Porter ten (10) strikes, over his objection, will similarly mandate reversal.

WHEREFORE, for the reasons outlined above, and any others that may appear to this Honorable Court, Officer Porter prays that this Court allow him ten (10) peremptory strikes, and the state five (5).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2015, a copy of Defendant's Motion for Ten Peremptory Strikes was sent via United States Mail to Michael Schatzow, Chief Deputy State's Attorney for Baltimore City, 120 E. Baltimore Street, 9th Floor, Baltimore MD 21202, with proper postage affixed.

Gary Proctor/CT

GARY E. PROCTOR