

IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2015

Docket No. 99

ALICIA WHITE and CAESAR GOODSON,
Appellants

v.

STATE OF MARYLAND,
Appellee

On Appeal from the Circuit Court
For Baltimore City, Maryland
The Honorable Barry G. Williams, Presiding

**BRIEF OF JUDICIAL WATCH, INC.
AS *AMICUS CURIAE* FOR
APPELLANT WILLIAM G. PORTER**

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**STATEMENT OF THE CASE AND INTERESTS
OF THE *AMICUS CURIAE***

The death of Freddie Carlos Gray, Jr. in police custody generated widespread outrage and caused weeks of tension and violence in the City of Baltimore. The scope of the rioting that plagued the city following Mr. Gray's death has no precedent in recent memory. Cars were set on fire, cinder blocks were thrown at police, stores across the city were looted, and buildings were burned. Baltimore was in a state of emergency. The National Guard had to be brought in to stop the violence.

Cities across the country had faced similar unrest following deaths in police custody or in confrontations with the police.¹ Unlike other cities, Baltimore immediately suspended six police officers and swiftly charged each officer with multiple felonies.²

Certainly, justice must be served and police brutality, misconduct, and racism must not be tolerated. Officers must be held accountable if they break the law. The interests of justice and public confidence in law enforcement require no less. These same interests are not served, however, by reactionary attempts to quiet unrest and appease violent protesters. Such efforts are short-sighted. They undermine the integrity of the judicial process and erode public confidence in both law enforcement and the courts.

¹ Eric Garner in Staten Island, New York; Michael Brown in Ferguson, Missouri.

² On April 30, 2015, Baltimore officials announced the investigation had been turned over to the state's attorney. The next day, May 1, 2015, all six officers were charged. Officer Caesar R. Goodson Jr., the driver of the van in which Mr. Gray had been transported, was charged with second-degree murder, three counts of manslaughter and assault. Lt. Brian W. Rice was charged with manslaughter, assault and false imprisonment. Sgt. Alicia D. White and Officer William G. Porter were charged with manslaughter and assault. Officers Garrett E. Miller and Edward M. Nero were charged with assault and false imprisonment. All six were charged with misconduct in office.

Judicial Watch, Inc. (“Judicial Watch”) is a not-for-profit, educational foundation that seeks to promote integrity, transparency, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs and has appeared as an *amicus curiae* before Maryland courts on other occasions. Judicial Watch seeks to participate as an *amicus curiae* in this matter to ensure that due care and the full protections of the law – not a hasty rush to judgment or short-sighted attempt to placate angry protesters – are afforded to all persons and entities involved. Of particular concern to Judicial Watch are the “uncharted” questions of law raised by the State’s efforts to compel Officer William G. Porter to testify at the trials of his fellow officers following his mistrial and before his retrial.³ Judicial Watch addresses two particular issues regarding the constitutional protections governing compelled, immunized testimony and the interplay between compelled, immunized testimony and the Sixth Amendment.

QUESTION PRESENTED

Whether Officer William G. Porter (“Officer Porter”), whose prosecution on criminal charges arising from the in-custody death of Freddie Carlos Gray, Jr. resulted in a mistrial and who now faces retrial, may be compelled to testify against his fellow officers while preserving his rights under the Fifth and Sixth Amendments to the United States Constitution.

³ The trial court declared itself in “uncharted territory” when ruling on the issues presently before this Court. Transcript, Jan. 6, 2016, at 65.

STANDARD OF REVIEW

The question presented is a question of law, which is reviewed under a non-differential, *de novo* standard of review. *Langley v. State*, 421 Md. 560, 567 (2011).

ARGUMENT

The Fifth Amendment to the United States Constitution grants witnesses a privilege against compelled self-incrimination. *In re Criminal Investigation No. 1-162*, 307 Md. 674, 683 (1986). A witness may assert the privilege in any proceeding in order to prevent disclosures the witness reasonably believes could be used in a criminal proceeding or as a lead to uncover other evidence for a criminal prosecution. *Id.* Despite this privilege, the government can compel a witness to testify if the witness obtains immunity coextensive with the privilege. *Id.*; *see also Kastigar v. United States*, 406 U.S. 441, 449 (1972). The immunity must be granted by statute; a court has no inherent power to compel testimony in the face of a witness' invocation of the privilege. *In re Criminal Investigation No. 1-162*, 308 Md. at 683. To be valid, the statutory immunity must leave government in substantially the same position with regard to prosecution of the witness as it would have been if the witness had asserted the privilege against self-incrimination. *Id.* at 683-84.

Three types of immunity are possible. Use immunity protects against the future use of the witness' compelled testimony in a criminal prosecution of the witness; use and derivative use immunity prohibit the use of the witness' testimony to uncover other evidence for use against the witness; and transactional immunity bars any future prosecution of the witness for offenses based on the compelled testimony. *In re Criminal*

Investigation No. 1-162, 307 Md. at 684. Use immunity alone is not broad enough to defeat the privilege, as the danger remains that the compelled testimony might be used indirectly or derivatively to place the witness in a more incriminated posture than before such testimony. *Id.* at 684. To withstand a constitutional challenge, an immunity statute must provide either use and derivative use immunity or transactional immunity. *Id.* Any statutory immunity afforded a witness by one state also binds other states and the federal government. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 78 (1964).

In addition, in any subsequent prosecution of the witness, the government has the burden of demonstrating that its evidence is derived from a source wholly independent of the compelled testimony. *In re Criminal Investigation No. 1-162*, 307 Md. at 684, n.4; *Kastigar*, 406 U.S. at 460. This burden has been described as “heavy,” if not “insurmountable.”⁴ *Kastigar*, 406 U.S. at 461; *Graves v. United States*, 472 A.2d 395, 405 (D.C. 1984).

The statutory immunity at issue in Officer Porter’s case is Section 9-123 of Maryland’s Courts and Judicial Proceedings Article. Section 9-123 provides, in pertinent part:

No testimony or other information compelled under the order, and no information directly or indirectly derived from the testimony or other information, may be used against the witness in any criminal case, except in a prosecution for perjury, obstruction of justice, or otherwise failing to comply with the order.

⁴ If, as it appears, the State is intent on re-trying Officer Porter, it will have to satisfy this heavy burden.

MD. CODE ANN., CTS. & JUD. PROC. § 9-123(b)(2). Judicial Watch has found no reported Maryland case applying this provision directly, but the language of the statute, enacted in 1989, mirrors that of the federal immunity statute on which it appears to have been modeled. *See* 18 U.S.C. § 6002.⁵ In *Kastigar*, the U.S. Supreme Court determined that the federal immunity statute granted both use and derivative use immunity, and, consequently, was coextensive with the protections of the Fifth Amendment privilege. *Kastigar*, 406 U.S. at 452-53. Assuming there are no material differences between Section 9-123 and the federal statute, the Court should find that the Maryland statute also extends both use and derivative use immunity and, accordingly, is coextensive with the protections of the Fifth Amendment privilege.⁶

Given the unique circumstances of Officer Porter's case, however, further analysis is required. Both Section 9-123 and the federal statute contain an exception for perjury-related prosecutions. Both statutes are silent about whether this exception is forward looking, backward looking, or both. With respect to Officer Porter, this silence is important because Officer Porter already testified on the same subject matter – the events

⁵ “No testimony of other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.” 18 U.S.C. § 6002.

⁶ Officer Porter also invokes his rights under Article 22 of the Maryland Declaration of Rights, which “grants the same privilege against compulsory self-incrimination.” Because Article 22 is *in pari materia* with the Fifth Amendment, it provides protection identical to that provided by the Fifth Amendment privilege. *In re Criminal Investigation No. 1-162*, 307 Md. at 683, n.3.

surrounding Mr. Gray's death – on which the State now seeks to compel him to testify.⁷ Moreover, the record is clear that the State repeatedly accused Officer Porter of lying under oath at his earlier trial, essentially alleging that Officer Porter perjured himself. As applied to Officer Porter, the Court must decide whether the immunity provided by Section 9-123 is prospective, retrospective, or both, as he has more than reasonable cause to fear that the State may seek to charge him with perjury based on his testimony at his earlier trial. *Choi*, 316 Md. at 536-37 (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (“a witness is entitled to invoke the privilege against self-incrimination if ‘the witness has reasonable cause to apprehend danger from a direct answer.’”)). If the exception applies retrospectively, the State would not be “in substantially the same position” as if Officer Porter had asserted the privilege against self-incrimination. *In re Criminal Investigation No. 1-162*, 307 Md. at 683-84. It would be allowed to use or make derivative use of Officer Porter's immunized testimony to prosecute him for perjury based on his testimony at his first trial. Such a result would be inconsistent with the Fifth Amendment.

No reported Maryland case applying Section 9-123 appears to have addressed this issue, but federal cases applying the federal immunity statute have done so. Federal cases make clear that the federal immunity statute's perjury exception “refers to future perjury, future false statements or future failure to comply with the immunity order, rather than previous acts.” *United States v. Watkins*, 505 F.2d 545, 546 (7th Cir. 1974). “[T]he

⁷ Maryland law makes clear that no waiver exists under these circumstances. *Choi v. State*, 316 Md. 529, 545 (1989).

testimony remains inadmissible in all prosecutions for offenses committed prior to the grant of immunity that would have permitted the witness to invoke his Fifth Amendment privilege absent the grant.” *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980). The Court should conclude that, at least as applied to Officer Porter, Section 9-123’s exception for perjury-related charges applies only prospectively to any compelled, immunized testimony, not retrospectively to any past testimony. The Fifth Amendment prohibits the State from making any use or derivative use of compelled, immunized testimony in any perjury charge against Officer Porter arising from his testimony at his first trial.

The unique circumstances of Officer Porter’s case also give rise to another “uncharted” issue regarding any compelled, immunized testimony. The Sixth Amendment to the U.S. Constitution guarantees a criminal defendant a fair opportunity to present whatever defense he believes might sway the jury in his favor. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). Fundamental to any defense is “an accused’s right to present his own version of the events in his own words.” *Rock v. Arkansas*, 483 U.S. 44, 52 (1987). “A defendant’s opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness.” *Id.*

Officer Porter still faces charges directly related to the subject-matter of the compelled, immunized testimony the State seeks. The State seeks to compel Officer Porter to testify against all five of the other officers charged in Mr. Gray’s death,⁸ yet it

⁸ In addition to compelling Officer Porter to testify at the trials of Sgt. White and Officer Goodman, the State seeks to compel Officer Porter to testify at the trials of Lt.

circumstances surrounding Mr. Gray's death. He also has already been accused by the State of lying under oath at his first trial. Yet Officer Porter must still defend himself again against the State's criminal charges. *Pillsbury Co.*, 459 U.S. at 256. If Officer Porter is compelled to testify, he will be faced with the untenable choice of deciding whether to take the stand at his retrial and risk having his compelled, immunized testimony used against him in a later perjury charge or foregoing his Sixth Amendment right to testify in his own defense. Officer Porter has more than reasonable cause to fear a perjury charge arising from any compelled, immunized testimony given that the State has already accused him of lying under oath on the same subject matter as the testimony it seeks to compel from him. *Choi*, 316 Md. at 536-37.

The dilemma in which the State will have placed Officer Porter impermissibly chills Officer Porter's constitutional right to testify on his own behalf. *See People v. DeFreitas*, 140 Cal.App.3d 835, 839 (Cal. Ct. App. 1983) (noting the chilling effect of compelled, immunized testimony on the constitutional right to testify on one's own behalf). Officer Porter certainly would not be in "substantially the same position" as if he had not been compelled to testify. *In re Criminal Investigation No. 1-162*, 308 Md. at 683-84; *Kastigar*, 406 U.S. at 462 (witness also must be left in "substantially the same position"); *Murphy*, 378 U.S. at 79 (same). Under the unique circumstances presented by this case, the State cannot accuse Officer Porter of lying under oath, compel him to testify against his fellow officers, and seek to retry him without violating his Fifth and Sixth Amendment rights.

CONCLUSION

For the foregoing reasons, the trial court's January 6, 2016 order compelling Officer Porter to testify under immunity granted pursuant to Section 9-123 should be vacated.

Dated: February 25, 2016

Respectfully submitted,



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**CERTIFICATE OF WORD COUNT AND COMPLIANCE
WITH RULE 8-112**

1. This brief contains 3,004 words, excluding parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type face requirements stated in Rule 8-112. Specifically, the brief has been prepared in a 13-point, proportionally spaced Times New Roman font with 2.0 spacing between lines.


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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2016, I caused a true and correct copy of the foregoing BRIEF OF JUDICIAL WATCH, INC. AS *AMICUS CURIAE* FOR APPELLANT WILLIAM G. PORTER to be served, via first class U.S mail, postage prepaid, on the following:

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