IN THE
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2015

NO. 99

CAESAR GOODSON & ALICIA WHITE,

Appellants,

v.

STATE OF MARYLAND,

Appellee.

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Caesar Goodson and Alicia White are pending criminal charges in the Circuit Court for Baltimore City (Case Numbers 115141032 and 115141036, respectively) stemming from the death of Freddie Gray. On January 6, 2016, the State sought orders compelling William Porter to testify as a witness in Goodson's and White's trials pursuant to Courts & Judicial Proceedings Section 9-123. The circuit court issued both orders. Porter noted a timely appeal, and sought to enjoin enforcement of the orders compelling him to testify pending resolution of the appeal.

On January 8, 2016, the Court of Special Appeals stayed the order compelling Porter's testimony in Goodson's trial. On January 11, 2016, the Court of Special Appeals stayed the trial of Caesar Goodson pending a resolution of Porter's appeal. The circuit court stayed Alicia White's trial, and the order compelling Porter to testify in White's trial, on January 20, 2016.

On February 10, 2016, the State asked this Court to issue a writ of certiorari and review the case prior to a decision by the Court of Special Appeals. On February 18, 2016, this Court

granted the State's petition and stayed all circuit court proceedings pending a resolution of the appeal.

QUESTION PRESENTED

Does Courts and Judicial Proceedings, Section 9-123 provide Porter sufficient protection against self-incrimination to allow his testimony to be compelled in the trials of Caesar Goodson and Alicia White?

STATEMENT OF FACTS

Freddie Gray was injured in police custody on April 12, 2015. He died from his injuries a week later. Six police officers were charged in connection with Gray's death: William Porter; Caesar Goodson; Alicia White; Garrett Miller; Edward Nero; and Brian Rice.

Pursuant to the prosecutor's request, Porter was tried first. (E. 93). Porter's trial began on November 30, 2015, and ended in a mistrial on December 16, 2015, after jurors were unable to reach a verdict. Porter's case is scheduled for retrial in June of this year.

Until they were stayed pending this appeal, Goodson's trial was scheduled to begin on January 11, 2016, and White's trial was scheduled to begin on February 8, 2016. One month prior to the start of Goodson's trial, the State served Porter with a subpoena to appear and testify as a witness for the prosecution in both trials. (E. 95-96). Porter moved to quash the subpoenas, which motion was denied at a hearing on January 6, 2016. (E. 458).

At that same hearing, Porter took the stand and testified that, if called as a witness in Goodson's or White's trials, he intended to invoke his Fifth Amendment privilege against self-incrimination. (E. 462). The State sought an order compelling Porter's testimony pursuant to Courts and Judicial Proceedings Article, § 9-123. (E. 97-106, 459-60). In its written motions, the State averred that Porter's testimony "may be necessary to the public interest," and that Porter was refusing to testify based upon his privilege against self-incrimination. (E. 97, 102).

Porter objected to being compelled to testify on a number of grounds, including that: 1) Section 9-123 does not protect his right against self-incrimination under Article 22 of the Maryland Declaration of Rights, (E. 143-45, 181-83, 466-68, 476); 2) Section

9-123 does not offer immunity coextensive with the Fifth Amendment because it did not protect against his testimony being used in a federal prosecution, (E. 138-42, 176-79, 469-70); and 3) Section 9-123 does not provide immunity coextensive with the Fifth Amendment because he could still be prosecuted for perjury. (E. 123-26, 161-64, 471, 475-76).

Porter also argued that the State should not be permitted to compel his testimony because doing so would be the equivalent of the State suborning perjury and would turn the prosecutors into witnesses. (E. 132-47, 120-85). Finally, Porter said that it would be impossible to prevent future jurors and the State from using his immunized testimony against him in a later trial. (E. 126-28, 164-66).

The State responded that Article 22 has been interpreted as *in pari materia* with the Fifth Amendment, that Supreme Court case law prevents compelled testimony from being used in a federal prosecution, and that Porter has no Fifth Amendment privilege to commit perjury. (E. 189-90, 192, 196-98, 477-81). The State also noted that, prior to any retrial, it would be obligated to prove that it was not using Porter's immunized testimony (or anything

derived from the testimony) in the case against him. (E. 195-96, 477-78).

Moreover, the State said, Porter's complaints about potential improper use of the immunized testimony were not a reason to deny the motion to compel. (E. 477-78). Any arguments about what effect Porter's immunized testimony would have on the ability for the State to retry him could be made by motion prior to that retrial. (E. 477-78).

After hearing argument, the court issued orders pursuant to the State's request. (E. 209-11). The orders stated that Porter must testify as a witness in Goodson's and White's cases, that he "may not refuse to testify on the basis of his privilege against self-incrimination," and that "no testimony of [Porter], compelled pursuant to this Order, and no information directly or indirectly derived from the testimony of Officer Porter compelled pursuant to this Order, may be used against Officer Porter in any criminal case, except in a prosecution for perjury, obstruction of justice, or otherwise failing to comply with this Order." (E. 209-11). This appeal followed.

ARGUMENT

COURTS AND JUDICIAL PROCEEDINGS, SECTION 9-123 PROVIDES PORTER SUFFICIENT PROTECTION AGAINST SELF-INCRIMINATION TO ALLOW HIS TESTIMONY TO BE COMPELLED IN THE TRIALS OF CAESAR GOODSON AND ALICIA WHITE.

In his brief to this Court, Porter levels a number of serious allegations against the State and the individual prosecutors involved in this case. Porter contends that the State is purposefully "ignoring [his] constitutional rights" to "overcome [a] lack of evidence" in the cases against Goodson and White. (Brief of Appellant at 1). He claims that the prosecutors are trying to force him to provide "helpful testimony to the State[,]" and whether that testimony "is *actually* true does not matter to the State." (Brief of Appellant at 17) (emphasis in original). According to Porter, not only are the prosecutors indifferent to the veracity of his immunized testimony, he suspects they plan to intentionally violate § 9-123 and his constitutional rights and use his immunized testimony against him. (Brief of Appellant at 23).

Of course, Porter offers no support for these allegations of prosecutorial misconduct. The best Porter can do is refer to events

and documents not in the record, and claim that they prove his accusations. The State believes that Porter mischaracterizes the extraneous material he references, but that is irrelevant, because this Court cannot consider matters not in the record on appeal.

Porter's legal argument fares no better. He contends that § 9-123 cannot protect his federal and state constitutional rights because the State believed that he was untruthful during parts of his testimony at his own trial. (Brief of Appellant at 16). Compelling him to testify, Porter argues, would be akin to the State suborning perjury, and would "lay a foundation" for Porter's subsequent prosecution for perjury. (Brief of Appellant at 16, 30). Porter also claims that defendants are fundamentally different than witnesses, and § 9-123 cannot be used to compel the testimony of someone charged with a crime. (Brief of Appellant at 23-29). Finally, Porter claims that compelling his testimony will afford the State an "unequal playing field" in his case and others because the State can immunize witnesses, but the defense cannot. (Brief of Appellant at 38-40).

Most of Porter's arguments are tangential to the issue at hand. Some can be adequately addressed at Porter's retrial, others

seek to protect the rights of the defendants against whom Porter will be testifying, something Porter has no standing to do. Porter's arguments that actually address whether the order compelling him to testify protects his constitutional privilege against self-incrimination are without merit. The order compelling him to testify, which provides that neither Porter's testimony nor any information directly or indirectly derived from his testimony can be used against him in any criminal case, except in a prosecution for perjury, obstruction of justice, or violation of the order to compel, does not violate Porter's Fifth Amendment privilege and it does not violate Porter's rights under Article 22 of the Declaration of Rights.

A. Porter's references to "facts" not in the record should not be considered by this Court

It must be noted, preliminarily, that Porter repeatedly makes claims based upon events that have no factual support in the record. By way of example, Porter claims that the State "has in its possession a sworn statement" by a police officer who said he heard Gray say "'he was having trouble breathing'" during Gray's

arrest. (Brief of Appellant at 6, n.8, 40). He also contends that Detective Teel admitted that her report "contained errors, including the location of Gray's statement" that he could not breathe. (Brief of Appellant at 7, n.9). Later, Porter references selected facts outside of the record to suggest that the State accused Porter of lying about the very conversation to which the State wants Porter to testify. (Brief of Appellant at 32-33).

Porter freely acknowledges that nothing in the record supports his assertions, but he makes them nonetheless. It is a fundamental tenet of appellate procedure that the parties are bound to the record on appeal and the reviewing Court should not consider claims made without record support. *See Accrocco v. Splawn*, 264 Md. 527, 532 (1972) (Court would not "attempt to evaluate or comment upon" references to material not in the record); *Frazier v. Waterman S. S. Corp.*, 206 Md. 434, 446 (1955) ("The plaintiff's pretrial deposition is not in the record, and its contents consequently are not before us.").

The State disputes all of the unsupported allegations in Porter's brief.[1] As will be explained, *infra*, however, they are irrelevant to Porter's claim that use and derivative use immunity is insufficient to protect his Fifth Amendment privilege. Regardless, they are not properly before this Court and should not be considered for any reason.

B. The History of Immunity Statutes

Throughout this appeal, Porter has repeatedly cited the circuit court's remark that it was in "unchartered territory" when considering the State's § 9-123 request as support for his argument that the State's actions are unheard of and extraordinary. (*See, e.g.* Brief of Appellant at 38). In fact, while there are no Maryland cases

[1] The best example of the inaccuracies in Porter's allegations is his contention in footnote 20 that his "taped recorded statement and his trial testimony are consistent." (Brief of Appellant at 17, n.20). Ironically, Porter makes this claim after spending the majority of his statement of facts excerpting the State's closing remarks highlighting the inconsistencies between Porter's taped statement and his trial testimony. (*See* Brief of Appellant at 7 (summarizing the prosecutor's argument that Porter's trial testimony regarding Gray's physical condition was inconsistent with his statement); Brief of Appellant at 9-10 (excerpting the prosecutor's argument that Porter's testimony has changed from his previous statements)).

discussing the scope of the prosecutor's ability to immunize witnesses and compel testimony, the concept is commonplace in Anglo-Saxon jurisprudence, and has been for centuries.

"Immunity statutes have historical roots deep in Anglo-American jurisprudence[.]" *Kastigar v. United States*, 406 U.S. 441, 445 (1972). Indeed, "[t]he use of immunity grants to preclude reliance upon the self-incrimination privilege predates the adoption of the constitution." Wayne LaFave, 3 Crim. Proc. § 8.11(a) (4th ed.). In 1725, for example, after Lord Chancellor Macclesfield was accused of selling public appointments, the English Parliament passed a law immunizing Masters of Chancery and compelled those officeholders to testify regarding how they secured those positions. *See Kastigar*, 406 U.S. at 445 n.13 (discussing the origins of immunity statutes).

In the United States, New York and Pennsylvania passed immunity statutes in the late 1700's. *Id*. The first federal immunity statute was passed in 1857 — it offered immunity from criminal prosecution to "anyone required to testify before either House of Congress or any committee[.]" *The Federal Witness Immunity Acts In Theory And Practice: Treading The*

Constitutional Tightrope, 72 Yale L.J. 1568, 1610 n.15 (1963). A decade later, another statute was passed extending this immunity to testimony "in any judicial proceeding." *Id*. at 1572 (quoting 15 Stat. 37 (1868)). Now, every state and the federal government have a statute that allows for compelled testimony after the grant of immunity. *See* 1 WHARTON'S CRIMINAL LAW § 80 (15th ed.) (immunity statutes "are in force in the federal jurisdiction and in every state").

Statutes authorizing compelled testimony in exchange for immunity from prosecution are not only time-tested, they are important to the proper functioning of our criminal justice system. Far from running afoul of the values underpinning the right against self-incrimination, immunity statutes "seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify." *Kastigar*, 406 U.S. at 446. In fact, the Supreme Court has acknowledged that immunity statutes are "essential to the effective enforcement of various criminal statutes[;]"they "reflect[] the importance of testimony" and the reality that "many offenses

are of such a character that the only persons capable of giving useful testimony are those implicated in the crime." *Id.* at 446-47.

The last meaningful change in immunity statute jurisprudence occurred 43 years ago when the Supreme Court confirmed in *Kastigar* that offering a witness use and derivative use immunity (as opposed to blanket transactional immunity) was sufficient to protect the witness's Fifth Amendment privilege. In 1892, the Court struck down a statute that offered only use immunity in exchange for compelled testimony. *Counselman v. Hitchcock*, 142 U.S. 547, 564 (1892). That statute did not offer protection coextensive with the Fifth Amendment, the Court said, because it left open the possibility that the witness's testimony would be used "to search out other testimony to be used in evidence against him or his property[.]" *Id.*

For eighty years, the Court's decision in *Counselman* was interpreted to mean that only transactional immunity was sufficient to protect a witness's Fifth Amendment privilege. In *Kastigar*, however, the Court explained that the deficiency in the *Counselman* statute was its failure to offer protection against evidence derived from immunized testimony. *Kastigar*, 406 U.S. at

453-54. So long as a statute offered use *and derivative use* immunity, the Court said, it offers sufficient protection to pass constitutional muster. *Id*. Thus, the Court held that the federal statute under consideration in *Kastigar*, which compelled a witness to testify, but prevented his or her "'testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)'" from being used in any subsequent criminal proceedings, "is consonant with Fifth Amendment standards." *Id*. at 453.

C. Maryland's Immunity Statute

After *Kastigar* and its companion case *Zicarelli v. New Jersey*, 406 U.S. 472 (1972), were decided, roughly half the states amended their immunity statutes to offer use and derivative use immunity. 3 Wayne R. LaFave, *Criminal Procedure*, § 8.11(b) (4th ed.) Maryland's immunity statute, codified as Courts and Judicial Proceedings, § 9-123, was enacted in 1989. Modeled after the federal immunity statute upheld in *Kastigar*, it was passed in order to provide prosecutors an additional tool with which to fight

the war on drugs. *See Position Paper* on H.B.1311 at 1-2 (App. 9-10).

As with the federal statute, Maryland's immunity statute vests the prosecutor with broad discretion to decide upon whom to grant immunity. *Id.* at 8. Under § 9-123, once the prosecutor determines that a witness's testimony "may be necessary to the public interest," and requests that the court order the witness to testify on the condition of use and derivative use immunity, the court "shall" issue such an order. Md. Code Ann, Cts. & Jud. Proc., § 9-123(c)-(d). Senator Leo Green, in his statement before the House Judiciary Committee in favor of the legislation, explained that the statute "specifies that the circuit court must order a witness to testify upon the request of the State's Attorney or the Attorney General[.]" *Statement of Senator Leo Green before the House Judiciary Committee on SB27*, March 30, 1989 at 1.[2]

[2] Whether the circuit court retains any discretion to deny compliant § 9-123 requests is the subject of the appeal in *State v. Garrett Miller*, No. 98, Sept. Term, 2015; *State v. Edward Nero*, No. 97, Sept. Term, 2015; and *State v. Brian Rice*, No. 96, Sept. Term, 2015.

Save for minor changes not relevant here, Section 9-123 has remained the same since its passage in 1989. In its current form, it reads:

> (a) *Definitions*—(1) In this section the following words have the meanings indicated.
>
> (2) "Other information" includes any book, paper, document, record, recording, or other material.
>
> (3) "Prosecutor" means:
>
> (i) The State's Attorney for a county;
>
> (ii) A Deputy State's Attorney;
>
> (iii) The Attorney General of the State;
>
> (iv) A Deputy Attorney General or designated Assistant Attorney General; or
>
> (v) The State Prosecutor or Deputy State Prosecutor.
>
> (b) *Refusal to testify; requiring testimony; immunity*—(1) If a witness refuses, on the basis of the privilege against self-incrimination, to testify or provide other information in a criminal prosecution or a proceeding before a grand jury of the State, and the court issues an order to testify or provide other information under subsection (c) of this section, the witness may not refuse to comply with the order on the basis of the privilege against self-incrimination.
>
> (2) 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.

(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.

(e) *Sanctions for refusal to comply with order*—If a witness refuses to comply with an order issued under subsection (c) of this section, on written motion of the prosecutor and on admission into evidence of the transcript of the refusal, if the refusal was before a grand jury, the court shall treat the refusal as a direct contempt, notwithstanding any law to the contrary,

> and proceed in accordance with Title 15, Chapter 200 of the Maryland Rules.

Md. Code Ann., Courts & Jud. Proc., § 9-123.

D. Ordering Porter to testify under Section 9-123 does not violate his Fifth Amendment privilege

To comply with the Fifth Amendment's prohibition against self-incrimination, a grant of immunity "must afford protection commensurate with that afforded by the privilege." *Kastigar*, 406 U.S. at 453. In other words, the immunity must leave "the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege." *Id*. at 462.

The use and derivative use immunity granted to Porter is coextensive with the scope of a witness's Fifth Amendment privilege. The Supreme Court in *Kastigar* expressly held as much. *Id*. at 453; *accord United States v. Hubbell*, 530 U.S. 27, 40 (2000). This type of immunity is sufficient, the Court explained, because there is a "sweeping prohibition" of the use of any evidence derived from the immunized testimony, which safeguards against compelled testimony being used to provide investigatory leads or

otherwise assist the State in its prosecution of the witness. *Kastigar*, 406 U.S. at 460.

Another aspect of this "very substantial protection," the Court explained, is that the witness is "not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." *Id.* There is "an affirmative duty on the prosecution, not merely to show that its evidence is not tainted by the prior testimony, but 'to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.'" *Hubbell*, 530 U.S. at 40 (quoting *Kastigar*, 406 U.S. at 40). Once the prosecution compels testimony pursuant to use and derivative use immunity, it shoulders the "heavy burden" of proving "that its evidence against the immunized witness has not been obtained as a result of his immunized testimony." *United States v. Turkish*, 623 F.2d 769, 775 (2d Cir. 1980).

This Court has acknowledged, albeit in dicta, the sufficiency of use and derivative use immunity to protect a witness's Fifth Amendment privilege. In *In re Ariel G.*, 383 Md. 240, 243-44 (2004), the Court considered whether a mother could be held in

contempt for refusing to answer questions regarding the whereabouts of her child when it was suspected that the mother had kidnapped the child from the custody of child protective services. This Court held that the mother had a Fifth Amendment right to refuse to answer questions about the child's disappearance. *Id*. at 253. The Court went on to add, however, that the mother could have been given § 9-123 immunity and then she would have had to testify "or face contempt of court charges." *Id*. at 255. Citing *Kastigar*, this Court said that once a witness has use and derivative use immunity, the court can "punish a parent who refuses to testify without offending the constitutional guarantees of the Fifth Amendment." *Id*. "In doing so, the court balances its interest in prosecuting unlawful conduct and providing for the welfare of abused and missing children, all while respecting the accused's constitutional rights." *Id*.

Although Porter acknowledges *Kastigar*, and concedes that § 9-123 immunity may be sufficient to protect a witness's Fifth Amendment privilege in some cases, he argues that, in his case, it is insufficient. (Brief of Appellant at 14, 26). Porter proffers five reasons for this: 1) he is currently pending criminal charges

stemming from the same incident about which he is being compelled to testify; 2) the State will prosecute him for perjury regardless of his testimony because it attacked his credibility in his first trial; 3) he is being investigated federally; 4) the State has failed to establish safeguards to avoid making derivative use of his immunized testimony; and 5) if the State is allowed to compel his testimony the defendants will be deprived of a fair trial. None of Porter's complaints render the immunity conferred by § 9-123 insufficient.

1. *Porter's Fifth Amendment privilege is not enhanced because he is currently pending criminal charges*

Porter repeatedly contends that he is not a "witness," he is a "defendant." Porter argues that "[t]here are witnesses, and there are defendants with pending homicide trials[,]" and urges this Court to hold that "the twain shall [never] meet." (Brief of Appellant at 42). Porter's insistence on labeling himself a defendant, and not a witness, misses the point. To be sure, in the case of the State of Maryland versus William Porter, Porter is the

defendant. But in the other five cases related to the death of Freddie Gray, Porter is a witness.[3]

The cases Porter cites in support of his contention that a person carries the label of "defendant" outside of their own criminal case actually support the opposite conclusion.[4] (Brief of

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[3] In his brief before the Court of Special Appeals, Porter cited the State's desire to try him before any of the other officers as recognition that "Porter had to go first in order that he not have a Fifth Amendment privilege." (Brief of Appellant, Ct. Sp. App. at 3). Perhaps in recognition of its irrelevance, Porter seems to have abandoned this argument in his brief to this Court.

To the extent Porter continues to suggest that the State's request to try him first is evidence of wrongdoing, it was not. It was a simple matter of judicial economy. Had Porter been convicted, the State would have provided him with § 9-123 immunity and compelled him to testify. The difference is that, unless Porter's convictions were reversed on appeal, the State would have avoided a *Kastigar* hearing because it concluded its case against Porter prior to hearing the immunized testimony. Had Porter been acquitted, he would no longer have had a Fifth Amendment privilege, and the State could have compelled him to testify. In that case, a *Kastigar* hearing would not be necessary because the State could not place Porter twice in jeopardy for any crime related to the death of Freddie Gray. Trying Porter first was a matter of common sense, not malice.

[4] Even Porter's introductory statement that "[i]t was not well settled that the Fifth Amendment even applied to witnesses other than the accused" until the 1924 case of *McCarthy v. Arndstein*, 266 U.S. 34 (1924), is incorrect. In *Counselman v. Hitchcock*, 142

Appellant at 25). *United States v. Echeles*, 352 F.2d 892, 897 (7th Cir. 1965), held that severance was required in a case where joinder prohibited Echeles from calling his co-defendant to the stand. It is against this backdrop that the court said that a "universally held" interpretation of the Fifth Amendment is the "right prohibiting any person *who is on trial for a crime* from being called to the witness stand." *Id*. (emphasis added).

State v. Maestas, 272 P.3d 769 (Utah Ct. App. 2012), also involved a claim that the defendant should have been permitted to call his co-defendant to the witness stand. Maestas claimed that his counsel was ineffective for failing to call his co-defendant and force him to invoke his Fifth Amendment privilege before the jury. *Id*. at 785-86. The Utah Supreme Court said Maestas's counsel would not have been permitted to do that if he tried, because "a defendant is even prohibited from calling a co-defendant to the

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U.S. 547, 562 (1892), the Court said: "It is impossible that the meaning of the [Fifth Amendment] can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them." The privilege against self-incrimination, the Court held, "is as broad as the mischief against which it seeks to guard." *Id*.

stand to force him to invoke his privilege against self-incrimination. . . . This is true even if the testimony of the co-defendant would help the other defendant's cause." *Id*. at 786. Neither of these cases support the notion that a person facing criminal charges is precluded from testifying as a witness.

In fact, for purposes of the Fifth Amendment, it makes no difference whether the person claiming the privilege was indicted the day before he was called to testify, or might be indicted in the days, weeks, or months after. The Second Circuit, in *Goldberg v. United States*, 472 F.2d 513, 515 (2d Cir. 1973), agreed with this assessment. Goldberg was charged with possessing money stolen from a bank. *Id*. at 514. While his charges were pending, he was given use and derivative use immunity and brought before a grand jury to answer questions about the theft of the bills. *Id*. at 514-15. Goldberg argued that the federal immunity statute was not intended to apply to "a person who was already the subject of a criminal complaint for the transaction into which the grand jury was inquiring[,]" or, if it did, such application was unconstitutional. *Id*. at 515.

The court found "no basis" for the distinction. *Id*. Referring to Goldberg's reliance on the word "witness" in the statute, the court said: "[I]t seems clear that this includes a witness before the grand jury, which Goldberg surely is, even if he is also a potential defendant at a later trial." *Id*. While the court acknowledged that the risks of prosecution might be "more immediate and less theoretical" for a person already facing criminal charges, there was no distinction in terms of the sufficiency of use and derivative use immunity.[5] *Id*. at 516. *See also Graves v. United States*, 472 A.2d 395, 402 (D.C. 1984) ("Once granted a duly authorized assurance of immunity, an indicted but untried defendant must testify, as ordered, and then challenge the government's compliance at a later *Kastigar* hearing before his or her own trial.").

[5] Porter's attempt to distinguish *Goldberg* is misleading. Porter says that *Goldberg* is inapposite because "it involved a grand jury investigation." (Brief of Appellant at 28). It is true that Goldberg was compelled to testify in a grand jury investigation, but the issue in the case is that he was so compelled *while facing criminal charges stemming from the same incident*. *Goldberg*, 472 F.2d at 514-15. It is doubtful that Porter would consider his situation materially different if he were called to testify before a grand jury about Freddie Gray's death rather than in Goodson's and White's trials.

The court applied this reasoning to a convicted defendant pending appeal in *United States v. Schwimmer*, 882 F.2d 22, 23 (2d Cir. 1989). There, the court held that, consistent with the Fifth Amendment, "a defendant who has been tried, convicted, and whose appeal is pending may be granted use immunity and then be compelled to testify before a grand jury on matters that were the subject of his conviction[.]"

The possibility that Schwimmer's conviction might be reversed on appeal and he would be subject to retrial did not sway the court's decision. Should this happen, the court said, the government would be required to prove that any evidence used at Schwimmer's retrial was derived from sources independent of the immunized testimony. *Id*. at 24.

Indeed, the court noted, Schwimmer's first trial helps ensure the government's compliance with the dictates of *Kastigar*. The first trial provides a record against which to compare the prosecution's proof at the second trial. *Id*. "Armed with that record, the trial court could readily determine whether the government had deviated from the proof offered during the first trial[,]" and if they had, "could then require the government to carry its burden

of proving that any evidence not presented at the first trial was derived from sources wholly independent of the immunized testimony."[6] *Id*. *Accord In re Grand Jury Proceedings*, 889 F.2d 220, 222 (9th Cir. 1989) ("a witness whose appeal is pending may be compelled to testify by a grant of use immunity").

Porter enjoys the same insurance against derivative use of his compelled testimony that Schwimmer did. Porter's first trial memorialized the State's evidence against him. If the State seeks to introduce additional evidence against him at retrial, it will carry the "heavy burden" of showing that it was not derived from his immunized testimony. Contrary to Porter's claim, the fact that he "faces a pending manslaughter trial" does not make the State's application of § 9-123 "a foul blow[,]"(Brief of Appellant at 1), and the prosecutors involved in this case have not violated their duty to "refrain from improper methods calculated to produce a

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[6] Porter's attempt to distinguish *Schwimmer* also fails. Porter says *Schwimmer* is different because when Schwimmer was "subpoenaed at a grand jury[,]" he had already been convicted, and he elected not to testify at his own trial. (Brief of Appellant at 28). Porter fails to explain why any of these facts matter one whit to the court's holding that use and derivative use immunity was sufficient to protect Schwimmer's Fifth Amendment privilege.

wrongful conviction" while using "every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935).

To be clear about Porter's position, he contends that while a person is charged with a crime, he or she cannot be compelled to testify in any forum, under any circumstances, whether or not immunity is conferred upon him or her. (Brief of Appellant at 24). This makes no sense. Under Porter's theory, a person can be compelled to testify (after being granted use and derivative use immunity) the day before an indictment is handed down, but, immediately upon being indicted, that person is no longer compellable. Yet nothing about the person's Fifth Amendment privilege has changed over the course of those two days. Indeed, if Porter's position is correct, the State could simply enter a *nolle prosequi* in his case, thus eliminating his status as "defendant," compel him to testify, and then reinstitute charges after his testimony was complete. Neither the law nor logic supports this contention.

Porter's reliance on Courts and Judicial Proceedings § 9-107 as support for his position is misplaced. Section 9-107 reads: "A person may not be compelled to testify in violation of his privilege

against self-incrimination. The failure of a defendant to testify in a criminal proceeding on this basis does not create any presumption against him." Md. Code Ann., Cts. & Jud. Proc., § 9-107 (2015). The plain language of 9-107 says nothing about a defendant enjoying blanket protection from compulsion even in the face of immunity. It only restates the right against self-incrimination, and adds that a defendant's decision to remain silent cannot be used to infer guilt or create a negative presumption.

Porter instead looks to what he refers to as the statute's "title," and compares it to the "title" of § 9-123. (Brief of Appellant at 24). According to Porter, § 9-107 is "specifically titled 'Defendant in a criminal trial[,]'" while § 9-123 is titled "Witness immunity for compulsory testimony." (*Id.*).

These titles are not part of the statutes, however. It appears that they were added by LexisNexis, the official publisher of the Maryland Code. When these same statutes are accessed via Westlaw, the titles are different. Both § 9-107 and § 9-123 are called "Privilege Against Self-Incrimination." And the official statutory text that appears on the website for the General

Assembly has no titles at all.[7] The "titles" Porter relies upon have no meaning and cannot be considered in interpreting the statutes. *See Canaj Inc. v. Baker and Division Phase III, et. al*, 391 Md. 374, (2006) (titles, headings and subheadings can shed light on legislative intent only "when they are part of the process of enacting the statute by the Legislature").

Of course, even if the titles to which Porter refers were part of the statutes, Porter's argument does not hold water. Section 9-107 says that a defendant cannot be made to testify "in violation of his right against self-incrimination." Md. Code Ann., Cts. & Jud. Proc. § 9-107. As discussed at length in the State's briefs, Porter's right against self-incrimination is protected by the use and derivative use immunity he has received.

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[7] *See* http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gcj&section=9123&ext=html&session=2015RS&tab=subject5; http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gcj&section=9107&ext=html&session=2015RS&tab=subject5 (last visited February 28, 2016).

2. *Porter has no Fifth Amendment right to commit perjury, and the State's arguments at Porter's first trial regarding his credibility are irrelevant*

Porter next accuses the State of providing "the farce of a grant of immunity" in order to "lay a foundation for evidence that the State has already deemed as constituting an obstruction of justice and perjury." (Brief of Appellant at 16). Porter seems to be arguing that because the State contended at his first trial that portions of his testimony were not credible, if he testifies consistently at Goodson's and White's trials, the State will have suborned perjury, and, moreover, could charge Porter with committing perjury. Porter's claim is without merit.

First, contrary to Porter's contention, the truthfulness *vel non* of a witness's testimony is not an all-or-nothing proposition. The State argued at Porter's trial that portions of Porter's taped statement and trial testimony (specifically, his testimony regarding his inability to identify the other officers at one of the scenes, Gray's physical condition at one point in the series of events, and where Porter first heard Gray say that he could not breathe) were not credible. The State has no intention of soliciting that testimony "as true" from Porter at Goodson's trial.

The State is confident, however, that Porter will offer truthful testimony regarding other events that occurred the day of Gray's arrest. The State has a good-faith belief that, if compelled to do so, Porter will testify to conversations he had with Goodson regarding Gray's condition and whether to seek medical attention for Gray, and to conversations he had with White regarding the plan to seek medical attention for Gray. It is that testimony that the State seeks to compel.

Porter's argument that Goodson's or White's cross-examination of him will elicit testimony that the State believes is false, and that this is akin to suborning perjury, is likewise unpersuasive. (Brief of Appellant at 30-34). To be sure, "[f]or the prosecution to offer testimony into evidence, knowing it or believing it to be false is a violation of the defendant's due process rights." *United States v. Mills*, 704 F.2d 1553, 1565 (11th Cir. 1983). And "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. People of State of Ill.*, 360 U.S. 264, 269 (1959). But the prosecution is not seeking to offer false evidence, nor to obtain a conviction through the use of false

evidence. The State cannot control what Porter is asked during cross-examination or how he answers. The possibility that Porter might perjure himself is not a reason to preclude the State from compelling his testimony.

If it is Porter's intention to testify falsely at Goodson's or White's (or anyone else's) trial, however, he will find no succor in the Fifth Amendment. "[T]he Fifth Amendment privilege against compulsory self-incrimination provides no protection for the commission of perjury[.]" *United States v. Apfelbaum*, 445 U.S. 115, 127 (1980). Moreover, "[t]here is 'no doctrine of anticipatory perjury,' and a 'future intention to commit perjury' does not create a sufficient hazard of self-incrimination to implicate the Fifth Amendment privilege." *Earp v. Cullen*, 623 F.3d 1065, 1070 (9th Cir. 2010) (quoting *Apfelbaum*, 445 U.S. at 131). If Porter offers immunized testimony at any future trial that is false, the State can charge him with perjury.

What the State cannot do is use Porter's immunized testimony to prove that he committed perjury in the past, or use his past testimony to show that his immunized testimony created

an irreconcilable inconsistency with his previous statements. [8] "The law is settled that a grant of immunity precludes the use of immunized testimony in a prosecution for past perjury (though affording no protection against future perjury)." *United States v. Cintolo*, 818 F.2d 980, 988 n.5 (1st Cir. 1987). Indeed, the State will be "precluded from relying upon any contradiction which may appear as between [Porter's] new testimony and his past testimony." *Kronick v. United States*, 343 F.2d 436, 441 (9th Cir. 1965). *Accord United States v. Doe*, 819 F.2d 11, 12 (1st Cir. 1987) (immunized grand jury testimony could not be used to prove witness perjured himself in his previous grand jury testimony).

The Seventh Circuit confronted this issue in *United States v. Patrick*, 542 F.2d 381 (7th Cir. 1976). There, Patrick refused to testify even after receiving statutory immunity because, he argued, if his trial testimony was inconsistent with his testimony before the grand jury, he could be prosecuted under 18 U.S.C.

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[8] To be clear, the State can charge Porter with perjuring himself at his first trial. It just cannot use his immunized testimony as evidence of that perjury.

§ 1623 for making "inconsistent declarations."[9] *Id*. at 385. The Seventh Circuit assured him that he could not. While Patrick's "immunized testimony may be used to establish the fact that he committed perjury in the giving of such testimony," the Court held that his testimony "could not also be used to establish the corpus delicti of an inconsistent declarations prosecution." *Id*. The perjury exception was intended to cover only "future" perjury, and to allow immunized testimony to prove a crime that occurred prior to the granting of immunity would be giving the perjury exception too broad a reading. *Id*.

The Fifth Circuit came to a similar conclusion in *In re Grand Jury Proceedings Appeal of Frank Derek Greentree*, 644 F.2d 348, 350 (5th Cir. 1981). After testifying in his own defense at trial, Greentree was convicted of several drug offenses. *Id*. at 349. While Greentree's convictions were pending appeal, he was compelled to testify before a grand jury about the same events for which he was

[9] 18 U.S.C. §1623 punishes making "irreconcilably contradictory declarations material to the point in question" in a proceeding before a court or grand jury. There is no obligation for the prosecution to prove which statement was false. 18 U.S.C. § 1623 (2015).

convicted. *Id.* at 350. Greentree refused to testify, claiming that "if he testifie[d] truthfully to the grand jury under immunity, the answers to the questions asked will be inconsistent with the answers he earlier gave at his criminal trial[,]" and he would be subject to perjury charges.

The court held that Greentree's fears were unfounded. The immunity statute, the court held, "forecloses the government from prosecuting an immunized witness for perjury based upon prior false statements." *Id.* Moreover, the court said, "[n]ot only could he not be prosecuted for perjury on the ground the prior statements were false[,]" but "the prior statements could not be used as prior inconsistent statements to prove perjury in the testimony before the grand jury." *Id.*

The court went on to explain that the immunity statute "is not a license to commit perjury before the grand jury but is a direction that he tell the truth. If telling the truth creates inconsistency with [Greentree's] prior testimony at his criminal trial, the prior testimony is not admissible . . . to prove him guilty of perjury." *Id.* at 350-51. The "sole purpose" of the contempt powers of the immunity statute "is to force [a witness] to tell the

truth[.]" *Id.* at 351. If he or she does so, there is "nothing further to fear" from any earlier inconsistent statements under oath. *Id.* The witness "cannot be prosecuted for perjury for those prior statements" nor can he be prosecuted for perjury for his immunized testimony "solely because of his inconsistent prior statements."[10] *Id. See also In re Bonk*, 527 F.2d 120, 125 (2d Cir. 1975) (an immunized witness "can presumably avoid a perjury indictment by answering . . . questions truthfully" whether or not the answers are inconsistent with previous testimony).

3. *Immunity provided under § 9-123 protects Porter from federal prosecution*

While Porter never expressly argues that he believes § 9-123 fails to protect him against a federal prosecution, he discusses the "federal investigation" into the death of Gray in his statement of facts,[11] and has a section in his argument entitled "Porter has not

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[10] As such, Porter's claim that if he were to testify "to something that the State believes is inconsistent with his testimony in his own trial, the State would not have to prove which is false" is wrong. (Brief of Appellant at 18).

[11] It is worth noting that none of the facts set forth in this section are in the record. Counsel's affidavit, attached to Porter's brief, is not properly part of the record.

been immunized federally." (Brief of Appellant at 11-12, 29). To the extent that Porter contends that his immunized testimony could be used against him in a federal prosecution, he is wrong.

"[A] state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits may not be used in any manner by federal officials in connection with a criminal prosecution against him." *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 79 (1964) *abrogated on other grounds by United States v. Balsys*, 524 U.S. 666 (1998). "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *Id.* at 79 n.18. *Accord United States v. Jones*, 542 F.2d 186, 198 (4th Cir. 1976); *United States v. Hampton*, 775 F.2d 1479, 1485 (11th Cir. 1985). The federal government will not be able to use Porter's immunized testimony against him.

4. *Porter's complaints about the lack of a "taint team" can be resolved, if necessary, prior to his retrial*

Porter claims that if he is compelled to testify at Goodson's, White's, or anyone else's trial, it will prevent him from getting a fair trial at his later criminal proceedings. (Brief of Appellant at 19-23, 36-38). Potential jurors, he argues, will be aware of his compelled testimony and could use it against him. (Brief of Appellant at 36-37). Moreover, he says, the prosecution has failed to create a "taint team," and, as such, the "spill-over effect will be instantaneous and indelible." (Brief of Appellant at 19). For that reason alone, Porter says, this Court must prohibit the State from calling Porter as a witness. (*Id*.).

Neither of these concerns, to the extent they are legitimate, should prevent Porter from being compelled to testify. Both of these issues can be litigated prior to Porter's retrial. The circuit court successfully voir dired a venire panel and selected a jury prior to Porter's first trial, there is no reason that the same procedures will not be effective at his second trial.

Furthermore, Porter's allegations regarding the prosecution's handling of the immunized testimony have no

support in the record or anywhere else.[12] Porter is not privy to the State's handling of his retrial, and has no idea whether "walls will be erected around [his immunized] testimony[.]" (Brief of Appellant at 19). When the State is called upon to fulfill its "affirmative duty" "to show that its evidence is not tainted by the [Porter's immunized] testimony," and to "prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony[,]" *Hubbell*, 530 U.S. at 40 (quotations omitted), then the State will have to show the steps it took to prevent taint and Porter is free to argue that whatever steps were taken were insufficient.

Porter's argument that "this Court must disallow" him to be called as a witness because the State failed to create a taint team is putting the cart before the horse. Even if his allegations were based on something other than speculation, the remedy for the State's failure, to the extent Porter is entitled to one, is not to

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[12] Porter's statement that it is his "information and belief[,]" that the same prosecutors will litigate his second trial has no place in an appellate brief. (Brief of Appellant at 19). This Court does not rule based on counsels' (or anyone else's) "information and belief." It rules based upon the record created in the court below.

prevent him from testifying against Goodson, but to find that the State failed to prove that its evidence at retrial stems from a source independent of Porter's immunized testimony.

Porter's hand-wringing about the way in which the State is handling his subsequent prosecution is unfounded and premature. The State shoulders the heavy burden of proving that it is not making use or derivative use of Porter's immunized testimony at any subsequent trial. Porter will have ample opportunity, at that point, to argue that the State's handling of his immunized testimony and subsequent prosecution was improper and created an "indelible taint" that makes exclusion of the State's evidence necessary. Now, however, is not the time for such complaints.

5. *Porter has no standing to complain about how this application of § 9-123 will affect the rights of future defendants*

Finally, Porter claims that there is "an inherent unfairness" in allowing the State to compel an otherwise unavailable witness to testify. (Brief of Appellant at 39-41). The heart of Porter's complaint seems to be that because the State has the authority to immunize a witness, but the defense does not, "a defendant's

ability to call an exculpatory witness may be foreclosed." (Brief of Appellant at 40).

Whether a defendant's due process rights are violated by the immunizing of certain witnesses, but not others, has nothing to do with the issue in this appeal. That is, it does not have any relevance to whether use and derivative use immunity is sufficient to protect Porter's Fifth Amendment privilege against self-incrimination.

This claim of error is not even Porter's to make. If Goodson, or White, or any other defendant, believes his or her due process rights are violated by the State's refusal to immunize a particular witness, they are free to argue that point at trial and on appeal.[13] Regardless of the outcome of that argument, it is of no moment to the propriety of the circuit court's issuance of an order compelling

[13] Although this Court has never considered such a claim, all of the federal circuits have, and all have adopted some test involving an evaluation of the prosecutor's conduct in refusing to offer immunity to the witness in question, or the effects of that refusal on the defendant's ability to receive a fair trial. *See, e.g. United States v. Quinn*, 728 F.3d 243, 251 (3d Cir. 2013) (listing cases from the federal circuits that set forth that circuit's test).

Porter to testify, and whether that order violated Porter's privilege against self-incrimination.

E. Ordering Porter to testify under § 9-123 does not violate his rights under Article 22 of the Maryland Declaration of Rights

Finally, Porter contends that even if compelling him to testify after providing him with use and derivative use immunity does not violate the Fifth Amendment, it does violate Article 22 of the Maryland Declaration of Rights. (Brief of Appellant at 34-36). With regard to the scope of a witness's ability to refuse to testify, however, this Court has said that Article 22 provides protection identical to that of its federal counterpart. Section 9-123 does not infringe Porter's Article 22 rights.

Generally speaking, this Court has interpreted Article 22 *in pari materia* to the Fifth Amendment. *See, e.g.*, *Marshall v. State*, 415 Md. 248, 259 (2010); *Choi v. State*, 316 Md. 529, 535 n.5 (1989) *Adkins v. State*, 316 Md. 1, 6 n.5 (1989); *Ellison v. State*, 310 Md. 244, 259 n.4 (1987). Article 22 is, however, an independent constitutional provision and has, on limited occasions, been construed as providing broader protections than the Fifth

Amendment. *See Marshall*, 415 Md. at 259 (noting that on occasion Article 22 has been found to offer broader protections than the Fifth Amendment); *Crosby v. State*, 366 Md. 518, 528 (2001) (same); *Choi*, 316 Md. at 535 n.5 (identifying two discrete circumstances, not relevant here, where the appellate courts have found broader Article 22 protection).

Notwithstanding the rare occasions when Article 22 has been found to offer more protection than the Fifth Amendment, with regard to when a witness can invoke his or her right against self-incrimination when called to testify, this Court has said that the Fifth Amendment and Article 22 are one and the same. This was explained by the Court in *Ellison v. State*, 310 Md. 244 (1987). In *Ellison*, this Court considered whether a witness who had been convicted, but whose direct appeal rights had not yet been exhausted, could be compelled to testify about the facts that supported his conviction. 310 Md. at 249. The Court of Special Appeals had held that once a witness is sentenced, the risk of incrimination becomes too "remote" to be protected by the Fifth Amendment. *Id*. at 248. This Court reversed the decision, and held

that a witness retains his or her Fifth Amendment privilege through the appellate process. *Id*. at 257-28.

In so doing, this Court took the opportunity to correct what it perceived as a misunderstanding by the intermediate appellate court. In footnote four of the opinion, this Court noted that in an earlier case, *Smith v. State*, 283 Md. 187 (1978), it distinguished another opinion as inapposite "because it was concerned with the self-incrimination privilege under the Maryland Declaration of Rights," while *Smith* "relied solely on the self-incrimination privilege under the Fifth Amendment to the federal constitution." *Ellison*, 310 Md. at 259 n.4. This "unfortunate" statement, the Court said, led the Court of Special Appeals to conclude that the Maryland Declaration of Rights should be viewed "one way and the Fifth Amendment a different way." *Id*. This is wrong, the Court said. With respect to the scope of the privilege against self-incrimination this Court said it "perceive[d] no difference between Article 22 of the Declaration of Rights and the Fifth Amendment's Self-Incrimination Clause." *Id*.

The order compelling Porter to testify does not violate his federal or state constitutional right of self-incrimination. Like its

federal counterpart, Courts & Judicial Proceedings, § 9-123 adequately safeguards Porter's rights by granting him use and derivative use immunity before compelling him to testify. Pursuant to this immunity, the State will be obligated to prove that any evidence it intends to use against Porter is independent from Porter's immunized testimony. Moreover, while § 9-123 is not a license to commit perjury, the State will not be able to use Porter's immunized testimony to prove past perjury, and will not be able to use past testimony alone to prove that Porter committed perjury while immunized.

Porter is no different than any of the countless witnesses over the centuries to whom the government granted immunity in exchange for their compelled testimony. He is not a "pawn[,]"and the State is not seeking to alter the history of Anglo-Saxon jurisprudence. The reality is far more mundane — the State has chosen to use one of the many tools in its toolbox to prosecute the officers charged in the death of Freddie Gray. It has granted a witness immunity and sought to compel his testimony. The State has done nothing unusual and nothing wrong. This Court should affirm the order compelling Porter to testify.

CONCLUSION

The State respectfully asks the Court to affirm the judgment of the Circuit Court for Baltimore City.

Dated: February 29, 2016

Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND
COMPLIANCE WITH MD. RULE 8-112.

This brief complies with the font, line spacing, and margin requirements of Md. Rule 8-112 and contains 9139 words, excluding the parts exempted from the word count by Md. Rule 8-503.

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PERTINENT PROVISIONS

CAESAR GOODSON & ALICIA WHITE, Appellant, v. STATE OF MARYLAND, Appellee.	IN THE COURT OF APPEALS OF MARYLAND September Term, 2015 No. 99

CERTIFICATE OF SERVICE

I certify that on this day, February 29, 2016, a copy of the Brief of Respondent was delivered electronically, and three copies of the Brief of Respondent was mailed by first-class U.S. Postal Service, postage prepaid, to Gary Proctor, 8 East Mulberry Street, Baltimore, Maryland 21202 and Joseph Murtha, 1301 York Road, Suite 200, Lutherville, Maryland 21093.

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