STATE OF MARYLAND, Petitioner, v. GARRETT MILLER, Respondent	IN THE COURT OF APPEALS OF MARYLAND September Term, 2015 Petition Docket No. _____

PETITION FOR WRIT OF CERTIORARI
AND MOTION FOR EXPEDITED REVIEW

In *In re Criminal Investigation No. 1-162*, 307 Md. 674, 679-80 (1986), a circuit court refused to grant motions to compel immunized, witness testimony pursuant to former Article 27, § 262 on grounds that prosecutors had attempted to exceed their statutory immunity authority. The Court of Special Appeals affirmed the circuit court's refusal. Though the appeal had become moot, this Court exercised its discretion to decide the case on its merits and vacated the lower court's judgment. This Court held that "the public has an interest in the effective investigation and prosecution of violations of this State's criminal laws" and that the intermediate appellate court's judgment, "if correct, would severely hamper the State's ability to prosecute violations" of those laws in the future. *Id.* at 680-83.

Shortly after that decision almost thirty years ago, § 262 was repealed and replaced by § 9-123 of the Courts and Judicial Proceedings Article. 1989 Md. Laws 289. This Court has not yet had occasion to construe the successor statute, and that long silence has led to little dispute about the statute's mechanics—until now. This Petition

offers an opportunity to break the silence and provide guidance to trial courts and prosecutors alike. The case presents important disputes regarding § 9-123's distribution of discretion and authority between the Executive and Judicial Branches to determine which witnesses to immunize based on the public interest. Specifically, this appeal asks whether the statute mandates a court to order compelled, immunized witness testimony upon finding that the prosecutor's discretionary request is procedurally correct, or whether the statute instead permits a court to substitute its own judgment about whether compelling the witness's testimony is appropriate such that the court may refuse to issue an immunity order even if a prosecutor's request fully complies with the statute.

"Among the necessary and most important of the powers of the States . . . to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court or before grand juries or agencies." *Kastigar v. United States*, 406 U.S. 441, 444 (1972) (internal quotation marks removed). Because this appeal concerns the Legislature's delegation of the right to wield that broad power in every criminal case and grand jury investigation in the State, this case inextricably involves matters of fundamental public import. Section 9-123's provisions require both prosecutors and judges to respect the separation of powers enshrined in Article 8 of our Declaration of Rights, a respect which Petitioner suggests the circuit court here failed to maintain. Accordingly, this Court should issue a writ of certiorari and resolve this appeal before Maryland's witness immunity scheme fails to function as the Legislature intended.

QUESTION PRESENTED

Does Courts and Judicial Proceedings Article, § 9-123 require 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 does the statute instead permit 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 complies with the statute's pleading requirements?

PERTINENT PROVISIONS

Courts and Judicial Proceedings Article, § 9-123.

(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 (2015).

FACTS AND PROCEDURAL HISTORY

On January 14, 2016, the State filed a Motion to Compel a Witness to Testify Pursuant to Section 9-123 of the Courts and Judicial Proceedings Article (Attachment A) in the matter of *State of Maryland v. Garrett Miller*, pending trial in the Circuit Court for Baltimore City (Hon. Barry G. Williams) and docketed under case number 115141034. The witness in question was Officer William Porter, and the underlying criminal case involves a police officer indicted in connection with the death of Freddie Gray. The

State's motion, signed by the State's Attorney herself, 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.

On January 15, 2016, Garrett Miller, the defendant, filed an Opposition to the State's motion to compel, attacking it for failing to explain "why Officer Porter is either necessary or material to the trial of defendant Miller or how it is necessary to serve the public interest" and arguing instead that his testimony is in fact not necessary to the public interest. Def. Opp. at 1-3 (Attachment B). On January 19, 2016, Officer Porter filed an Opposition to the State's motion in which he too requested that the court deny the motion on grounds that compelling his testimony would not be necessary to the public interest. Def. William Porter's Opp. at 8 (Attachment C). The State filed a Response (Attachment D) to Miller's opposition on January 20, 2016, arguing that § 9-123 granted neither the underlying defendant nor the witness standing to make such objections and that under the plain terms of that statute, the circuit court lacked the discretion to deny a prosecutor's request to compel immunized testimony when presented as here with a motion that complied with the statute's procedural requirements.

Later that same day, the circuit court conducted a hearing on the State's motion to compel, at which the court not only considered objections from both Officer Porter and Miller but also required the Chief Deputy State's Attorney to explain in open court the reasons that the State's Attorney believed that Officer Porter's testimony may be necessary to the public interest. The Chief Deputy explained that the State sought to

elicit from Officer Porter testimony regarding two important aspects of the charges against the defendant.

The circuit court then made its own determination that granting Officer Porter immunity would *not* be in the public interest, irrespective of the State's Attorney's contrary determination. Accordingly, the circuit court denied the State's motion to compel Officer Porter. (Attachment E). From this judgment docketed January 20, 2016, the State filed a notice of appeal on February 4, 2016 (Attachment F). That appeal is still undecided and is pending before the Court of Special Appeals, No. ____, Sept. Term, 2015. At this time, no briefs have been filed, and no briefing schedule has been issued. The docket entries for case number 115141034 are attached hereto as Attachment G.

REASONS FOR GRANTING THE WRIT

A. THE STATE MAY APPEAL THE DENIAL OF A MOTION TO COMPEL UNDER § 9-123

As a preliminary matter, the denial of a motion to compel under § 9-123 constitutes a final judgment from which the State may appeal pursuant to § 12-301 of the Courts and Judicial Proceedings Article in full harmony with the restrictions on the State's appellate rights outlined in § 12-302(c). Both this Court and the intermediate appellate court in *In re Criminal Investigation No. 1-162*, 66 Md. App. 315, *rev'd* 307 Md. 674 (1986), permitted the State to directly appeal a circuit court's denial of a motion to compel immunized witness testimony. In that case, the State argued to the Court of Special Appeals that it could appeal a denied immunity request as either a final judgment or an appealable collateral judgment. *Br. of Appellant in In re Criminal Investigation No.*

1-162 at 3-4, n. 2 (1985) (Attachment H). At the time, the State's statutory appellate rights existed in materially the same form as today. *See* 1982 Md. Laws, Ch. 493 (S.B. 39); *see also State v. Manck*, 385 Md. 581, 589-97 (2005) (outlining the history of the State's appellate rights). Neither this Court nor the intermediate appellate court questioned the State's right to appeal. *See Office of the State Prosecutor v. Judicial Watch, Inc.*, 356 Md. 118, 125 (1999) ("[T]he issue of appealability is a threshold one . . . which must be addressed, and will be, by the Court on its own motion, whether raised [by a party] or not.").

Indeed, notwithstanding § 12-302(c)'s strict limitations on the State's right in "a criminal case" to appeal from judgments intertwined with the merits of the charges against a defendant, the "criminal" label does not apply to every judgment incidentally arising within a criminal case. As the Court of Special Appeals explained in *State v. Strickland*, 42 Md. App. 357 (1979), which allowed the State to appeal from a circuit court's order in a criminal case that granted a defendant's motion for the return of property, "[i]t does not follow . . . that simply because a motion is filed in a court that exercises criminal jurisdiction, that the proceeding arising from the motion must, *ipso facto*, be criminal in nature . . . ." *Accord State v. WBAL-TV*, 187 Md. App. 135 (2009) (applying *Strickland*'s reasoning to the State's appeal from the granting of a motion for press intervention and trial exhibit access). This Court has similarly permitted the State to appeal under § 12-301 in matters outside the confines of § 12-302(c). *See e.g. In re Special Investigation No. 231*, 295 Md. 366 (1983) (allowing the State to appeal the denial of a motion to disqualify an attorney from jointly representing four persons

subpoenaed to testify before a grand jury); *In re Special Investigation No. 236*, 295 Md. 573 (1983) (allowing the State to appeal from the grant of a motion to obtain the return of financial records from a grand jury).[1]

Here, the circuit court's order adjudicated all claims in the immunity action in their entirety, along with the rights and liabilities of the proper parties to that separate immunity action, *i.e.* the State and Officer Porter. The circuit court foreclosed the State's right to call Officer Porter to testify as a witness, and Officer Porter escaped liability for his refusal to give testimony about his knowledge of the relevant facts surrounding Mr. Gray's death. As the Court did in the context of § 9-123's predecessor in *In re Criminal Investigation No. 1-162*, this Court should review the lower court's action and reverse it.

B. THIS COURT SHOULD GRANT THE WRIT TO GIVE § 9-123 ITS FIRST APPELLATE CONSTRUCTION AND THEREBY RESOLVE THE SERIOUS CONSTITUTIONAL AND STATEWIDE PROBLEMS THAT THE CIRCUIT COURT'S ORDER HAS CREATED

The circuit court's order denying the State's motion to compel Officer Porter pursuant to § 9-123 has undermined the State's ability to prosecute one of the most high-profile criminal cases in Maryland's history. It has created a separation of powers crisis that subjects the discretion of prosecutors with a Constitutional Office to a form of judicial review that asks whether a trial court agrees with the lawful use of that discretion. It also threatens to permit every criminal defendant, every grand jury investigation

[1] While *Manck* in 2005 strictly construed the State's appellate rights, in *Fuller v. State*, 397 Md. 372 (2007), this Court discussed with approval both *In re Special Investigation No. 231* and *In re Special Investigation No. 236*. Likewise, in *Causion v. State*, 209 Md. App. 391 (2013), the Court resolved the question of appealability by citing and applying the reasoning of *In re Special Investigation No. 236*.

witness, and every grand jury investigation target in this State to file objections to a prosecutor's decision to immunize a particular witness and to litigate whether such immunity *really is in the public interest.*

By its terms, § 9-123 avoids all of these problems, squarely leaving 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 without consideration of any objections a witness or the defendant may have. In relevant part, § 9-123 states that the circuit court "*shall issue*, on the request of the prosecutor made in accordance with subsection (d) of this section, an order" compelling immunized testimony. Cts. & Jud. Proc. Art. § 9-123(c) (emphasis added).

To comply with subsection (d), "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) [t]he testimony or other information from the individual may be necessary to the public interest; and (2) [t]he 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." § 9-123(d) (emphasis added). Nowhere does this language permit the court to inquire into the prosecutor's decision-making, nor does the statute contain any provision allowing the subject of the immunity request or the underlying defendant to object to the manner in which the prosecutor has exercised her 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 General Assembly, the immunity statute was intended "for the purpose of *requiring* a court under certain circumstances to issue an order requiring a witness to testify or provide other information *upon request by a prosecutor* . . . ." 1989 Md. Laws, Ch. 289 (H.B. 1311) (emphasis added). 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:

> 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.

Position Paper on HB 1311, *Witness Immunity*, 8-9, 1989 Reg. Sess. (1989) (Attachment I).[2]

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[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.

The statute's legislative history also suggests that another source of guidance in construing § 9-123 lies in federal law. As the Position Paper on HB 1311 noted, "[t]he proposed statute is based substantially on the federal immunity statutes: 18 U.S.C. §§ 6001-04 (1985)." *Position Paper, supra* at 2. Indeed, § 9-123 uses a procedure materially identical to the federal statute, and federal courts have amassed a substantial body of law construing the federal statute's distribution of power between the court and the prosecutor.

The foundational federal precedent is the Supreme Court's construction of a predecessor immunity statute in *Ullmann v. United States*, 350 U.S. 422 (1956). There the Court considered whether a witness could properly request a judge to deny an immunity application that otherwise comported with the statute's pleading prerequisites, which were substantively identical to § 6003. The Supreme Court held 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 18 U.S.C. §§ 6001-04, 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 immunized witness held in contempt after refusing to testify, claiming on appeal that the underlying immunity order 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 that "because the Act [creating the immunity statutes] 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, saying that "[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." *In re Grand Jury Investigation*, 486 F.2d 1013, 1016 (3rd Cir. 1973). Likewise, the First Circuit 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." *In re Lochiatto*, 497 F.2d 803, 805 (1st Cir. 1974); *accord United States v. Levya*, 513 F.2d 774, 776 (5th Cir. 1975); *Ryan v. Commissioner*, 568 F.2d 531, 541 (7th Cir. 1977); *Urasaki v. United States District Court*, 504 F.2d 513, 514 (9th Cir. 1974).

In summation, every source of authority—from § 9-123's plain text and legislative history to its federal corollary's extensive appellate construction—demonstrates that the circuit court erred in replacing the State's Attorney's determination of the public interest with its own. The court's attempt—however well intentioned—to limit and appropriate to itself the prosecutor's statutorily vested immunity authority impermissibly undermined the State's case in a pending proceeding, violated Maryland's separation of powers

principles, and threatens to impede criminal prosecutions and investigations throughout the State.

MOTION FOR EXPEDITED REVIEW

In keeping with its efforts to expedite the appellate process in these cases, the State respectfully requests that this Court consider this petition as soon as practicable and, if the petition is granted, the State requests that this Court expedite its review of the issue presented.

Garrett Miller's trial is scheduled to begin on March 7, 2016. Along with this petition, the State has filed a motion to stay the trial court proceedings pending resolution of this appeal. While the State's ability to seek appellate review of the denial of the motion to compel Porter is critical, the State is also mindful of its obligation to bring Miller to trial in a timely manner. In order to balance those two interests, the State respectfully seeks expedited review of this appeal.

CONCLUSION

For the foregoing reasons, issuance of the writ is desirable and in the public interest. The State therefore respectfully requests that its Petition for Writ of Certiorari and motion for expedited review be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 10, 2016, a copy of the Petition for Writ of Certiorari and Motion for Expedited Review was delivered via electronic mail and first-class mail, postage pre-paid to Gary E. Proctor, 8 East Mulberry Street, Baltimore, Maryland 21202, and delivered via electronic mail to Joseph Murtha, 1301 York Road, Suite 200, Lutherville, Maryland 21093.

CARRIE J. WILLIAMS

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

This petition complies with the font, line spacing, and margin requirements of Md. Rule 8-112 and contains 3653 words, excluding the parts exempted from the word count by Md. Rule 8-503.

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