STATE OF MARYLAND	*	IN THE
	*	CIRCUIT COURT FOR
v.	*	BALTIMORE CITY
	*	CASE No. 115141034
GARRETT MILLER	*	

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

STATE'S RESPONSE TO DEFENDANT GARRETT MILLER'S OPPOSITION TO THE STATE'S MOTION TO COMPEL A WITNESS TO TESTIFY PURSUANT TO SECTION 9-123 OF THE COURTS AND JUDICIAL PROCEEDINGS ARTICLE

Now comes the State of Maryland, by and through Marilyn J. Mosby, the State's Attorney for Baltimore City; Michael Schatzow, Chief Deputy State's Attorney for Baltimore City; Janice L. Bledsoe, Deputy State's Attorney for Baltimore City; and Matthew Pillion, Assistant State's Attorney for Baltimore City; and responds herein to Defendant Garrett Miller's Opposition to the State's Motion to Compel a Witness to Testify Pursuant to Section 9-123 of the Courts and Judicial Proceedings Article.

1. Background

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

On January 15, 2016, the Defendant filed his Opposition to the State's Motion to Compel. The Defendant attacks the State's Motion as lacking an explanation of "why Officer

Porter is either necessary or material to the trial of Defendant Miller or how it is necessary to serve the public interest." Def. Opp. at 1. The Defendant argues that Officer Porter's testimony is, in fact, *not* necessary to the public interest based on his assessment of the State's reasons for filing the Motion and his view of the Motion's effect on both his and Officer Porter's constitutional rights. Def. Opp. at 2-3. As such, he urges the Court to deny the Motion.

2. The Defendant Lacks Standing to Object that it is not Necessary to the Public Interest to Compel Officer Porter to Testify as a Witness

The Defendant's Opposition should pose no barrier to this Court's granting the State's Motion to Compel because, in short, the Defendant lacks standing to object that it is not necessary to the public interest to compel Officer Porter to testify as a witness. Indeed, nowhere in CJP § 9-123's provisions does there even exist any right for the subject of the criminal prosecution—or the witness to be compelled—to file a responsive pleading or otherwise be heard to object to the merits of the State's Motion to Compel. Instead, the statute sets forth the following as the only prerequisites to a court order compelling testimony:

> (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.

CJP § 9-123(c) (emphasis added). Subsection (d) outlines what such a prosecutorial request should entail:

> (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.

CJP § 9-123(d). Absent from this subsection is any requirement that the State even file the Motion with the Clerk, much less does the statute require that the State explain in any additional detail its determination to seek immunity and then permit the defendant or the witness to argue against the grant of immunity. So long as the State's immunity request complies with the pleading requirements under subsection (d), the Court "*shall* issue" an immunity order. The immunity statute does not grant a defendant or a witness standing to object, nor does the statute permit the Court to consider such objections, even if made.

While Maryland's appellate courts have yet to construe CJP § 9-123 on the question of standing to object, the federal courts have had occasion to consider standing under the federal immunity statutes—which are virtually identical to Maryland's § 9-123—and have viewed them as deliberately denying standing to a defendant or witness to object to a prosecutor's immunity decision and as limiting judicial review to verifying prosecutorial compliance with the statute's formal prerequisites. In *United States v. Herman*, 589 F.2d 1191, 1200-01 (3d Cir. 1978), the United States Court of Appeals for the Third Circuit rejected the notion that a defendant had standing to seek judicial review of the government's decision about whether it is in the "public interest" to seek compelled testimony under a grant of immunity authorized in 18 U.S.C. §§ 6002-6004. The Court considered that such review would not only involve an impermissible

intrusion into prosecutorial discretion in violation of separation of powers principles but that allowing review of such objections would be contrary to the purpose of immunity statutes:

> The legislative history of the immunity statutes also shows no sign of a purpose to benefit defendants. The narrow purpose of the use immunity provisions was twofold: to eliminate those federal immunity statutes that required conferral of transactional rather than use immunity and to reduce the number and complexity of immunity statutes. The shift to use immunity was intended to take advantage of the more favorable view of use immunity expressed by the Supreme Court in *Murphy v. Waterfront Commission*, 378 U.S. 52, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964). *See Kastigar v. United States*, 406 U.S. 441, 455-59, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). The clear intent of the shift to use immunity was to make it less costly for the United States Attorney to grant immunity, by allowing for fuller prosecution of both the defendant and the immunized witness. In broader perspective, it is apparent that the immunity statute was part of a massive program of legislation whose central purpose, as its opponents recognized, was to strengthen the hand of the prosecution and to weaken that of the criminal defendant, in many cases to the full extent permitted by the protections of the Bill of Rights.

Id. at 1202.

The Third Circuit also drew upon the reasoning of the Supreme Court's construction of a predecessor immunity statute in *Ullmann v. United States*, 350 U.S. 422 (1956). There the Supreme Court considered the question of whether a witness could properly request a judge to deny an immunity application that otherwise comported with the statutory pleading prerequisites, which at the time required an averment that "in the judgment of a United States Attorney, the testimony of [the] witness . . . is necessary to the public interest" and also required that the United States Attorney obtain "the approval of the Attorney General" before making an application to the court. *Id.* at 423-424. The Government argued "that the court has no discretion to determine whether the public interest would best be served by exchanging immunity from prosecution for testimony [and] that its only function is to order a witness to testify if it determines that the case is within the framework of the statute." *Id.* at 431. The

Supreme Court agreed that "[a] fair reading of [the immunity statute] does not indicate that the district judge has any discretion to deny the order on the ground that the public interest does not warrant it"; rather, the court's "duty under [the statute] is only to ascertain whether the statutory requirements are complied with by . . . the United States Attorney and the Attorney General . . . ." *Id.* at 432-34.

The reasoning of the Supreme Court and the Third Circuit holds true for CJP § 9-123. Certainly nothing within CJP § 9-123's provisions indicates that it was intended in any way to confer any rights on a defendant. The statute is a prosecutorial tool granted by the legislature requiring only a few prerequisites to its use. Here, the State's Motion to Compel unquestionably complied with § 9-123(d). The Motion was submitted in writing to the Court and signed by the State's Attorney herself, setting forth her averred determinations that Officer Porter's testimony may be necessary to the public interest but that he is likely to testify based on his prior refusal to do so in related cases. The Court needs no more before issuing its Order and, indeed, is statutorily required to issue the Order upon finding those facts properly presented. As such, the Defendant's Opposition—which does not dispute that the State has met the statutory pleading requirements—raises no cognizable objection and should not be considered by this Court.

Wherefore, the State requests that this Court grant the State's Motion to Compel a Witness to Testify Pursuant to Section 9-123 of the Courts and Judicial Proceedings Article notwithstanding the Defendant's Opposition thereto.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 2016, a copy of the State's Response to Defendant Garrett Miller's Opposition to the State's Motion to Compel a Witness to Testify Pursuant to Section 9-123 of the Courts and Judicial Proceedings Article was mailed and e-mailed to:

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