IN THE
COURT OF APPEALS OF MARYLAND

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SEPTEMBER TERM, 2015

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NOs. 96, 97, & 98

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STATE OF MARYLAND,

Appellant,

v.

BRIAN RICE, EDWARD NERO, & GARRETT MILLER,

Appellees.

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

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# REPLY BRIEF OF APPELLANT

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## REPLY ARGUMENT

### A. OVERVIEW

Rice, Nero, and Miller have failed to identify any direct interest they have in the subject matter of these appeals sufficient to designate any of them as an "Appellee." Porter remains the only proper person to bear that title.[1] On the question of appealability, Appellee points to no compelling reason why this distinct order, which is collateral to the underlying criminal case and resolves all of the issues between Porter and the State, should be considered a "criminal case" for purposes of appeal. Moreover, Appellee's fear that reviewing the State's appeal on its merits would open the floodgates to new appeals is unfounded. The State has had the ability to appeal a narrow class of final, civil orders like the one here for over thirty years, yet no floodgates have opened.

Regarding the merits, Appellee's brief imbues Courts and Judicial Proceedings Article § 9-123 with ambiguity that does not exist. Trying to justify the circuit court's intrusion in the Executive branch's prosecutorial role, Appellee contends that the Legislature intended the word "shall" to

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[1] Consistent with this position, this reply brief will refer to these appeals as involving one appellee and will use that word in the singular, rather than the plural.

mean a mere "directory" suggestion to consider a prosecutor's proper immunity request as one of any number of possible factors a court might consider in deciding whether to issue an immunity order. There is no basis for this argument.

Finally, the record does not support Appellee's claim that the circuit court's findings and reasons for denying the State's motion to compel were grounded in constitutional concerns. The circuit court credited the prosecutor's legitimate need for Porter's testimony, but then refused to grant the motion to compel because it might result in another stay pending appeal and thereby change the court's schedule. In any event, the constitutional concerns discussed by Appellee belong to the defendants, not to him, and can be properly redressed through existing remedies.

Regardless of the reason proffered by the circuit court for substituting its discretion for the prosecutor's in considering whether to issue an order compelling Porter's testimony, § 9-123 does not allow such a substitution. When faced with a motion to compel that complies with the requirements of § 9-123, a circuit court must issue an order granting the witness use and derivative use immunity and compelling the witness to testify. The circuit court's failure to do so in this case was error.

### B. CONFERRING STANDING ON RICE, NERO, OR MILLER WOULD MEAN ANY DEFENDANT OR PROSPECTIVE DEFENDANT WOULD HAVE STANDING IN THE CIRCUIT COURT TO CHALLENGE A GRANT OF IMMUNITY TO A WITNESS

Rice, Nero, and Miller first refer to appellate standing as a "purely academic" non-issue given the consolidation of these appeals. Alternatively, they assert standing based on the impact this Court's ruling could have on "their speedy trial rights" and their "rights to request the exclusion of evidence that is not relevant." (Appellee's Brief at 6-7).

Standing is not an academic nicety; it is "the threshold question of the entitlement to litigate" a claim. *Bates v. State*, 64 Md. App. 279, 282 (1985). Rice, Nero, and Miller are not entitled to litigate the claim presented here. The State is not asking this Court to decide Rice's, Nero's, or Miller's speedy trial rights or to review a question of evidentiary relevance in their trials. The State asks the Court to decide a single legal question: does § 9-123 vest in the State's Attorney the discretion to compel Porter to testify so long as she determines that his testimony may be in the public interest, and he receives use and derivative use immunity.

Appellate standing does not attach based on the indirect, attenuated effects that Rice, Nero, and Miller contend could flow from this appeal. Criminal defendants have no right to be protected from immunized

testimony. Section 9-123 reflects this fact by giving defendants and grand jury targets no role in the statute's procedural scheme.

If a desire to preclude an immunized witness from testifying at trial is sufficient to confer standing for appellate purposes, then it would also serve as a sufficient direct interest to claim standing at an immunity proceeding in the circuit court. If Rice, Nero, and Miller have standing in these appeals, then every defendant and prospective defendant has standing to challenge an immunity proceeding under § 9-123. This cannot be. The only party who has standing in this case is the party whose rights are being reviewed—William Porter.

### C. APPELLEE FAILS TO PROPERLY DISTINGUISH "CIVIL" FROM "CRIMINAL" CASES AS STATUTORILY DEFINED AND AS JUDICIALLY CONSTRUED, AND CONFLATES THIS DISTINCTION WITH THE SEPARATE ISSUE OF WHETHER THE APPEALED ORDER SUFFICIENTLY CONCLUDED THE DISPUTE BETWEEN THE PARTIES

The State agrees with Appellee that the State's statutory appellate rights are narrowly limited by Title 12 of Courts and Judicial Proceedings, but the State disagrees that those limitations bar this appeal. Appellee's primary argument comes down to whether the State has taken these appeals in a "criminal case" or in a "civil case." Appellee claims that the State has appealed from a "criminal case" because it sought a § 9-123 order after criminal charges had been filed rather than during a grand jury

investigation. (Appellee's Brief at 10-11). He also contends that witness immunity proceedings involve so many matters of criminal law that they are indelibly "criminal" for appellate purposes. (Appellee's Brief at 11-13).

Appellee's argument about the timing of the immunity action suggests that the legislature drew the "criminal/civil" line at the filing of formal charges. According to Appellee, if a defendant has been charged, the appeal is criminal. If the case is still under investigation, the appeal is civil. Appellee looks to the fact that "a grand jury proceeding is not included in the definition of a criminal case under CJP § 12-101(e)" as support for his position. (Appellee's Brief at 11).

The problem with this argument is that § 12-101(e)'s definition of a "criminal case" also does not include an indictment, information, statement of charges, or citation for virtually every felony and misdemeanor on the books. Instead, § 12-101(e) says that a "'criminal action,' 'criminal case,' 'criminal cause,' or 'criminal proceeding' includes a case charging violation of motor vehicle or traffic laws and a case charging violation of a rule or regulation if a criminal penalty may be incurred." Md. Code Ann., Cts. & Jud. Proc. § 12-101(e) (2015).

The word "includes" is not a synonym for the word "means." *Tribbitt v. State*, 403 Md. 638, 647-48 (2008) ("[W]hen statutory drafters use the term 'means,' they intend the definition to be exhaustive. By contrast, when the

drafters use the term 'includes,' it is generally intended to be used as illustration and not limitation.") (internal citations, quotations, and ellipses removed). By explaining that a "criminal case" includes cases charging motor vehicle or traffic violations, or the violation of a rule or regulation that carries a criminal sanction, § 12-101(e) clarified the scope of violations considered criminal for appellate purposes. It did nothing to change how a distinct action that is collateral to a criminal case is labeled.

Appellee next looks to § 9-123's reference to testimony "in a criminal prosecution or a proceeding before a grand jury of the State" to argue a distinction between the two for purposes of appeal. (Appellee's Brief at 11). He claims that the "[l]egislature specifically recognized, when enacting Section 9-123, that a criminal prosecution is different in kind than a grand jury proceeding" such that "reliance on cases addressing grand jury proceedings to support a right to appeal in a criminal case is misplaced." (Appellee's Brief at 11).

In referencing "criminal prosecution[s]" and "proceeding[s] before a grand jury of the State[,]" however, the legislature was doing nothing more than delineating the traditional forums for using immunized witness testimony, and making it clear that § 9-123 applied to both. Notably, there is no distinction between the process used to compel testimony before a grand jury, and the process used in a criminal proceeding.

Appellee relies on his shaky distinction between a grand jury investigation and a criminal prosecution to attempt to distinguish *In re Criminal Investigation No. 1-162*, 66 Md. App. 315, *rev'd* 307 Md. 674 (1986). Appellee claims that *No. 1-162* turns on the fact that the appeal there involved grand jury testimony and so "was not an appeal from a criminal proceeding." (Appellee's Brief at 10-11). But the appeal there was no more of an appeal from a grand jury investigation than the appeal here is from a criminal proceeding. Rather, both appeals are from an immunity action.

Appellee also claims that "the statute at issue in *No. 1-162* was a predecessor statute to Section 9-123" such that "any reliance on that case would be unavailing." (Appellee's Brief at 11). Appellee fails, however, to identify a single difference impacting appealability between § 9-123 and the statute construed in *No. 1-162*.

Appellee next attempts to distinguish *State v. Strickland*, 42 Md. App. 357 (1979), and *State v. WBAL-TV*, 187 Md. App. 135 (2009), on the basis that a § 9-123 proceeding "has nothing to do with property or title" and could not be pursued as a "separate civil action." (Appellee's Brief at 12). Likewise, he summarily dismisses any precedential value in *In re Special Investigation No. 231*, 295 Md. 366 (1983), or *In re Special Investigation No. 236*, 295 Md. 573 (1983), because he claims those cases "turn on the fact that this Court

found that the judgments appealed by the State were, in fact, final judgments." (Appellee's Brief at 13).

In so doing, Appellee ignores the unifying logic in all of these cases: the ability of the State to take an appeal does not turn on whether the underlying judgment came from a court exercising criminal jurisdiction, but rather on whether the judgment involves the merits of the State's charges or direct litigation against a criminal defendant relating to those charges. Judgments separate and apart from the underlying criminal case may properly receive the "civil" label and, if final, may properly be appealed by the State as an ordinary party under § 12-301.

Indeed, Appellee acknowledges that *No. 231* and *No. 236* were proper State appeals because they involved final judgments. (Appellee's Brief at 13). He ignores, however, that those judgments must have been "civil" in nature (notwithstanding the fact that they stemmed from criminal investigations) because they fell far outside the State's appellate rights in criminal cases as outlined in § 12-302(c). An order denying a motion to compel under § 9-123 is likewise a "civil" order, as amply set forth in the State's initial Brief.

Having failed to offer any valid basis to distinguish the State's appeals here from similar appeals this Court and the Court of Special Appeals have allowed, Appellee claims that reviewing the merits of these appeals "would open the floodgates and cause the operation of the trial courts to come to a

halt in criminal matters" so that the State could pursue appeals from third party discovery orders, in limine witness orders, third party subpoena orders, and any other criminal order aggrieving the State. (Appellee's Brief at 15). But *Strickland* and *No. 231* were decided over thirty years ago, and the "floodgates" concern has not come to pass. In fact, in those three decades, only a handful of appeals have fallen within the narrow appellate category those cases represent.

Indeed, the examples Appellee provides are not appealable and would not be made appealable by virtue of a State win in this case. Appellee's hypotheticals are all evidentiary decisions that are part and parcel of the controversy between the State and a defendant. They are, therefore, both part of the criminal case (subjecting any appeal to the limitations of § 12-302(c)), and not final orders. *See Waterkeeper Alliance, Inc. v. Md. Dept. of Agric.*, 439 Md. 262, 278 (2014) (a final judgment "must adjudicate or complete the adjudication of all claims against all parties").

By contrast, § 9-123 contains no provision for defendants in the underlying criminal case to intervene, and, in fact, an immunity action under § 9-123 can be instituted before a "defendant" even exists. For these reasons, immunity proceedings pursuant to § 9-123 are not part of the criminal case for appellate purposes. Rather, such proceedings are separate and civil—and produce final orders from which the State may properly appeal.

### D. THE LEGISLATURE USED THE WORD "SHALL" IN § 9-123 TO CREATE A MANDATE, NOT A MERE DIRECTORY SUGGESTION ABOUT WHEN THE COURT SHOULD ISSUE AN IMMUNITY ORDER

Turning to the merits of the State's appeal, Appellee contends that § 9-123(c) is ambiguous when it provides that "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 [compelling the witness to testify under immunity]." (Appellee's Brief at 17-18) (quoting Md. Code Ann., Cts. & Jud. Proc. § 9-123(c) (2015)) (emphasis added). Appellee suggests that the word "request" makes the word "shall" ambiguous because one need not request that which is mandatory. Appellee urges this Court to resolve this perceived ambiguity in favor of interpreting the word 'shall' as "directory, rather than mandatory." (Appellee's Brief at 17-19). This was not the legislature's intent.

"As this Court and the intermediate appellate court have reiterated on numerous occasions, the word 'shall' indicates the intent that a provision is mandatory." *Harrison-Solomon v. State*, 442 Md. 254, 269 (2014). On the other hand, "the word 'shall' is not treated as signifying a mandatory intent if the context in which it is used indicates otherwise," in which case the word is "directory." *Resetar v. State Board of Education*, 284 Md. 537, 547 (1978). The fact that a prosecutor must "request" the order that the statute says that

the court "shall" issue does not make the court's order a mere optional directive. That conclusion is apparent from the fact that nothing else in the statute contextually indicates anything other than a mandatory intent. Section 9-123 lists no factors for a court to consider in deciding whether to permit immunized testimony, nor does it speak of any person other than the prosecutor making a "determination" about whether calling an immunized witness is appropriate. The court's role is to verify "accordance" with the statute's pleading requirements.

The statute's legislative history confirms this interpretation. The formal Position Paper accompanying HB 1311 noted that § 9-123 "is based substantially on the federal immunity statutes: 18 U.S.C. §§ 6001-04 (1985)." App. at 43.[2] The "request-shall" language comes directly from the federal immunity statute. As the State's original brief outlines, the Supreme Court and every federal Circuit Court to construe 18 U.S.C. §§ 6001-04 or its predecessors has held that upon receiving a procedurally compliant

[2] Appellee attacks the importance of this Position Paper because it bears a note indicating that the Attorney General may have been its author. Even if that authorship is correct, this Court has stated that "courts are not bound by an Attorney General's Opinion, but that when the meaning of legislative language is not entirely clear, such legal interpretation should be given great consideration in determining the legislative intention." *Chesek v. Jones*, 406 Md. 446, 463 (2007).

prosecution request, the court must issue an immunity order. (Appellant's Brief at 35-38). These federal precedents existed prior to the enactment of § 9-123, so the legislature presumably understood how the "request-shall" language would likely be interpreted. If the legislature intended to vest more discretion in the circuit courts than exists in the federal statute, it would not have adopted the federal language.

Moreover, five of the six cases that the Appellee cites deal with statutes providing for time tables by which a court or other arbiter must reach a decision on a given matter before it. (Appellee's Brief at 17). By contrast, § 9-123 does not involve a time limit on judicial action. As such, the statute should be interpreted to have the same mandatory meaning as this Court found Rule 4-325(c)'s similar "request-shall" scheme to carry in *Binnie v. State*, 321 Md. 572 (1991) (jury instructions) or Rule 4-215(e)'s "request-shall" language to require in *Williams v. State*, 321 Md. 266 (1990) (discharge of counsel).

Furthermore, Appellee's out-of-state authority in no way supports his position. (Appellee's Brief at 24). The Georgia immunity statute at issue in *State v. Mosher*, 461 S.E.2d 219 (Ga. 1995), does not contain any provision requiring that the court "shall" do anything. The Louisiana case Appellee cites, *In re Rebar Steel Antitrust Investigation*, 343 So.2d 1377 (1977), held that a prosecutor could not grant immunity outside the terms of the state's

immunity statute, not that the statute authorized a court to deem that statute directory in its requirements for an immunity order.

In short, the legislature meant what it said when it drafted § 9-123. The word "shall" carries its ordinary, mandatory meaning. The circuit court was not authorized to reduce that mandate to a mere suggestion and then apply its own discretion.

### E. THE RECORD DOES NOT SUPPORT APPELLEE'S CLAIMS ABOUT THE CIRCUIT COURT'S FINDINGS AND REASONS FOR DENYING THE MOTION TO COMPEL, AND CONSTITUTIONAL CONCERNS ABOUT IMMUNITY HAVE EXISTING REMEDIES

Appellee lastly attempts to claim that the circuit court denied the State's motion to compel on constitutional grounds, having "specifically found that if it compelled Officer Porter to testify as requested by the State, Miller's, Nero's, and Rice's constitutional right to a speedy trial . . . would be violated." (Appellee's Brief at 31). The record simply does support this claim. In its ruling, the circuit court stated: "I do not believe that based on the proffer presented by the State [ ], the concerns that this Court has with the speedy trial rights of the Defendants, and the concern that this Court has with the position that Mr. Porter will be placed in [ ], [and] finding that the request for immunity has more to do with getting around the Court's [sic] postponement request than anything else, I do not find it is appropriate, and the request for immunity for Mr. Porter for Miller, Nero, and Rice is denied."

(E. 140). The court's expression of "concern" can hardly be characterized a specific finding of a speedy trial violation.

Given this lack of support in the record, the Court need not consider Appellee's arguments about the lower court having applied constitutional principles it did not actually apply. To the extent that any constitutional or other rights of the Appellee or of Nero, Rice, and Miller may be implicated in the future, their remedies will then be available.

If the defendants ever do suffer a speedy trial violation, the defendants can move for dismissal of the indictments pursuant to the Sixth Amendment or Article 21. If some portion of the immunized witness's testimony turns out to be irrelevant, the defendants can move to exclude such testimony under Rule 5-402. Or if the State attempts to make improper use of Porter's immunized testimony against him, Porter can move to remedy such use by excluding tainted evidence in a *Kastigar*[3] hearing. All of these remedies can be implemented without the need to superimpose onto § 9-123 a new immunity prerequisite that tests why a prosecutor determined that seeking particular testimony was in the public interest.[4] The legislature did not

[3] *Kastigar v. United States*, 406 U.S. 441 (1972).

[4] The federal courts have also refused to damage the power structure of the federal immunity scheme. Appellee cites several federal cases that he

authorize such an intrusion into Executive branch decision-making, and this Court should not allow such an intrusion to occur.

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suggests are precedent for the circuit court's actions here. (Appellee's Brief at 32). Three out of four of the cases he cites—*United States v. Taylor*, *United States v. Frans*, and *United States v. Hooks*—all involved a prosecutor's decision *not* to grant immunity to a defense witness, which the Seventh Circuit has held could implicate due process principles. The fourth case, *In re Perlin*, merely assumed for the purposes of argument that a court could consider whether a grant of immunity could violate due process, before deciding that it did not. 589 F.2d 260, 269 (7th Cir. 1978). Indeed, the Third Circuit recently reaffirmed the lack of discretion granted to courts in considering immunity requests and good reasons for that lack of discretion:

> There are good reasons for immunity decisions to reside with the Executive Branch. [. . .] Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.

*United States v. Quinn*, 728 F.3d 243, 253-54 (3rd Cir. 2013) (en banc decision).

## CONCLUSION

The State respectfully asks the Court to reverse the judgment of the Circuit Court for Baltimore City and to direct the court to issue an order compelling Porter to testify.

Dated: March 2, 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 3572 words, excluding the parts exempted from the word count by Md. Rule 8-503.

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**CERTIFICATE OF SERVICE**

I certify that on this day, March 2, 2016, three copies of the Reply Brief of Appellant were delivered electronically and mailed by first-class U.S. Postal Service, postage prepaid, to Gary Proctor, 8 Mulberry Street, Baltimore, Maryland 21202; Michael J. Belsky, Schlachman, Belsky & Weiner, 300 East Lombard Street, Suite 1100, Baltimore, Maryland 21202; Marc L. Zayon, Esquire, 201 North Charles Street, Suite 1700, Baltimore, Maryland 21201; Catherine Flynn, One North Charles Street, Baltimore, Maryland 21201; and Joseph Murtha, 1301 York Road, Suite 200, Lutherville, Maryland 21093.

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