STATE'S ATTORNEY
Marilyn J. Mosby

OFFICE *of the* STATE'S ATTORNEY *for* BALTIMORE CITY
120 East Baltimore Street Baltimore, Maryland 21202

DIRECT DIAL
443-984-6011

September 15, 2015

VIA HAND DELIVERY

The Honorable Barry G. Williams
Associate Judge
Circuit Court for Baltimore City
534 Courthouse East
Baltimore, MD 21202

Re: State v. Goodson, et al.,
Case Nos.: 115141032-37

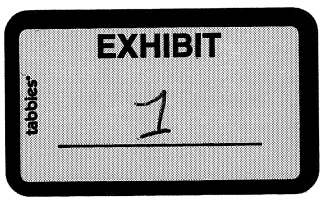
Dear Judge Williams,

I write as directed concerning the order and anticipated length of trials. The anticipated length of trial does not include the time for hearing and resolving pretrial motions, the time for jury selection, nor the length of the defense cases. Because the State has not yet received discovery from any of the Defendants, the anticipated length of trial also does not include possible additional time in the State's case from meeting anticipated defenses. The State would call the cases in the following order.

- First: William Porter, No. 115141037 Five days
- Second: Caesar Goodson, No. 115141032 Five days
- Third: Alicia White, No. 115141036 Four days
- Fourth: Garrett Miller, No. 115141034 Three days
- Fifth: Edward Nero, No. 115141033 Three days
- Sixth: Brian Rice, No. 115141035 Four days.

Defendant Porter is a necessary and material witness in the cases against Defendants Goodson and White, so it is imperative that Mr. Porter's trial takes place before their trials. Defendant Porter's counsel has known this since before the grand jury returned indictments in these cases. On July 24, 2015, counsel for Defendants Porter and Rice were advised by the State that Porter's case would be called first, either with Defendant Rice or without him, depending on the Court's ruling on the joinder sought by the State. Presumably, counsel for Defendants Porter and Rice so advised counsel for the other defendants. In any event, counsel for all Defendants were notified that the State intended to call the Porter case first during the chambers conference with the court on September 2, 2015.

The trial date of October 13, 2015 was ordered on June 19, 2015, based on the availability of the court and all counsel. As Judge Pierson requested, we had cleared that date with Dr. Carol Allan, the Assistant Medical Examiner who conducted the autopsy. We were advised by Dr. Allan this morning that she will be out of Maryland from November 16 through November 30. The State will be ready to begin the case against Mr. Porter on October 13. Counsel for Mr. Porter has expressed his intent to seek a continuance. The State informed counsel for Mr. Porter over the past weekend that it had no objection to a continuance of Mr. Porter's case of up to three weeks, *provided* that his remains the first case to be tried. However, given Dr. Allan's schedule,

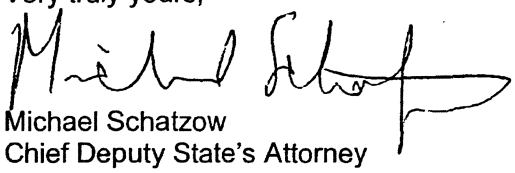


the State now believes that it cannot consent to a continuance beyond October 26. Given that no other Defendant is required to be ready for trial on October 13 (and the State has not received any discovery from any Defendant 30 days before October 13), a two week continuance would not unduly delay the time by which all six cases could be resolved. However, if the consequence of a continuance for Mr. Porter would be forcing the State to try a different Defendant first, then the State would vigorously oppose a continuance for Mr. Porter. Mr. Porter's counsel has been aware of the October 13 trial date for almost three months, and has known with certainty that Mr. Porter's case would be tried first for at least six weeks. In light of the long scheduled and agreed upon trial date, and the other background referenced above, Mr. Porter has no legitimate basis for a continuance, particularly one that would impact the State's traditional right to call cases in the order it chooses.

Finally, the Court directed the State to provide an alternative order in the event that Mr. Porter's case is not tried first. Without prejudice to the State's position that, in light of the facts of this case and the information in this letter, it should be able to call the cases in the order expressed above, the State's alternative order would be to try Mr. Miller first, and then, in order, Mr. Porter, Mr. Goodson, Ms. White, Mr. Nero and Mr. Rice. Without listing all the possible permutations, the State essentially seeks to have Mr. Porter tried before Mr. Goodson and Ms. White, to have Mr. Miller tried before Mr. Nero, and to have Mr. Miller and Mr. Nero tried before Mr. Rice.

Thank you for your consideration of these requests. Pursuant to your instructions, I have enclosed the transcript of each defendant's statement. I trust that this letter is clear and responsive to your direction. If you have any questions or think that a chambers conference would be useful, the State is available at the convenience of the Court.

Very truly yours,



Michael Schatzow
Chief Deputy State's Attorney
Baltimore City State's Attorney's Office

MS/tsr

Enclosures

Cc: Without Enclosures
Matthew B. Fraling, III, Esquire, Via Email
Marc L. Zayon, Esquire, Via Hand Delivery
Catherine Flynn, Esquire, Via Hand Delivery
Joseph Murtha, Esquire, Via Email
Ivan Bates, Esquire, Via Hand Delivery
Michael Belsky, Esquire, Via Hand Delivery
Andrew Jay Graham, Esquire, Via Hand Delivery
Gary Proctor, Esquire, Via Hand Delivery

CAESAR GOODSON	*	IN THE
Appellant,	*	COURT OF SPECIAL APPEALS
v.	*	OF MARYLAND
STATE OF MARYLAND	*	SEPTEMBER TERM, 2015
Appellee.	*	NO. 2308 (CC# 115141032)

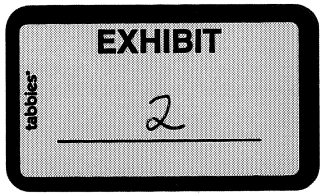
* * * * * * * * * * * * *

AFFIDAVIT OF JOSEPH MURTHA, ESQUIRE

I, Joseph Murtha, am over 18 years of age, am competent to testify, and have personal knowledge of the facts and other matters contained in this affidavit.

1. I am counsel for Officer William Porter in *State v. William Porter*, Circuit Court for Baltimore City, Case No. 115141037. Since the beginning of my involvement in this case starting in May of 2015, the State maintained that, if the trials of the six officers charged in connection with the death of Freddie Carlos Gray were severed, the State intended to try Officer Porter first and call him to testify in the trials of certain other defendants. I inquired as to how the State purported to force Officer Porter to testify. Deputy State's Attorney Janice Bledsoe responded that the State would grant Officer Porter immunity in order to secure his testimony in the trials of other officers. The Circuit Court for Baltimore City entered an order on September 2, 2015 granting the six defendant officers' motion for severance.

2. On or about November 23, 2015, this Court held a chambers conference in advance of Officer Porter's trial. Following that meeting, Chief Deputy State's Attorney Michael Schatzow stated to me, and to my co-counsel Gary Proctor, that the State intended to serve a trial subpoena on Officer Porter. I stated that Officer Porter would move to quash any subpoena served on him. Mr. Schatzow stated that Officer Porter would have no basis to quash such a subpoena. I responded that Officer Porter would move to quash based on his 5th Amendment rights.

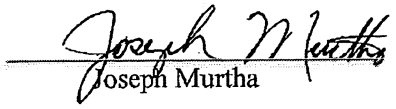


3. On December 11, 2015, during Officer Porter's trial, the State served him with a subpoena to testify in Officer Goodson's case, which was then scheduled to begin on January 6, 2016. My co-counsel Mr. Proctor stated on the record in a bench conference that Officer Porter would move to quash the subpoena. The Court stated on the record at that bench conference that Officer Porter would be allowed to wait until after a verdict in his trial to respond to the subpoena.

4. On December 16, 2015, Officer Porter's trial ended in a mistrial. On January 4, 2016, Officer Porter filed a Motion to Quash Trial Subpoena. On January 6, 2016, the Court ordered Officer Porter to testify in Officer Goodson's trial. The next day, Officer Porter noted his appeal.

I solemnly affirm under the penalties of perjury and upon personal knowledge that the foregoing is true and correct.

1/12/16
Date


Joseph Murtha

CAESAR GOODSON	*	IN THE
Appellant,	*	COURT OF SPECIAL APPEALS
v.	*	OF MARYLAND
STATE OF MARYLAND	*	SEPTEMBER TERM, 2015
Appellee.	*	NO. 2308 (CC# 115141032)

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

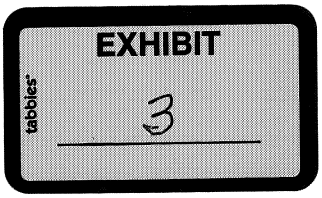
AFFIDAVIT OF GARY E. PROCTOR, ESQUIRE

I, Gary E. Proctor, am over 18 years of age, am competent to testify, and have personal knowledge of the facts and other matters contained in this affidavit.

1. I am counsel for Officer William Porter in *State v. William Porter*, Circuit Court for Baltimore City, Case No. 115141037. Since my involvement in the cases of the six officers charged in connection with the death of Freddie Carlos Gray began in late May and early June of 2015, the State maintained that if the trials were severed, it would seek to try Officer Porter first and then seek to compel him to testify in the trials of certain other defendants pursuant to a grant of immunity.

2. To the best of my recollection, following the trial court's September 2, 2015 Order granting the Defendants' Motion for severance, and throughout the fall of 2015, on any occasion that the State raised the issue of Officer Porter testifying in the trials of any other officers, counsel for Officer Porter maintained that the State could not force him to testify.

3. On or about November 23, 2015, the Court held a meeting in chambers in advance of Officer Porter's trial. After that meeting concluded, Chief Deputy State's Attorney Mr. Schatzow informed me, as well as my co-counsel Mr. Joseph Murtha, that the State intended to serve Officer Porter (during his own trial) with a subpoena to testify in Officer Goodson's trial. I stated to Mr. Schatzow that it was Officer Porter's position that the State should not be allowed



to call Officer Porter in Officer Goodson's trial. Mr. Schatzow responded that, if Officer Porter was acquitted, he could be compelled to testify in Officer Goodson's trial based on double jeopardy principles, or if Officer Porter was convicted, the State planned to compel him to testify in Officer Goodson's trial pursuant to a grant of immunity. Mr. Murtha told Mr. Schatzow that no matter the outcome of Officer Porter's trial, he would move to quash the subpoena based on the 5th Amendment.

4. On December 11, 2015, during his own trial, the State served Officer Porter with a trial subpoena to testify in Officer Goodson's trial, which was then scheduled to begin on January 6, 2016. During a bench conference, I stated on the record that Officer Porter would oppose any attempt by the State to compel him to testify, regardless of the result of the trial. However, because the appropriate response to the subpoena would depend on the outcome of the trial, Officer Porter reserved the right to file a response at the time when that result was known. The Court granted Officer Porter's request to brief the issue of the enforceability of the subpoena, and file any motion to quash and for a protective order upon the conclusion of Officer Porter's trial.

5. On December 16, 2015, Officer Porter's trial ended in a mistrial. In a scheduling conference held on December 22, 2015, I again stated to the Court and to the State that Officer Porter would move to quash the trial subpoena, and if the Court entered an order compelling Officer Porter to testify, Officer Porter would immediately appeal that ruling. On January 4, 2016, Officer Porter filed a Motion to Quash Trial Subpoena. On January 6, 2016, the Court ordered Officer Porter to testify in Officer Goodson's trial. The next day, Officer Porter noted his appeal.

I solemnly affirm under the penalties of perjury and upon personal knowledge that the foregoing is true and correct.

1-13-16
Date

Gary E. Proctor

RECEIVED FOR RECORD
CIRCUIT COURT FOR
BALTIMORE CITY
2016 JAN -6 P 4: 22
CRIMINAL DIVISION

STATE OF MARYLAND	*	IN THE
	*	CIRCUIT COURT FOR
v.	*	BALTIMORE CITY
CAESAR GOODSON	*	Case No. 115141032

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

ORDER

On January 6, 2016, during a pre-trial motions hearing for the above-captioned case, the State presented this Court with its written Motion to Compel a Witness to Testify Pursuant to Section 9-123 of the Courts and Judicial Proceedings Article. During this hearing, counsel for the Defendant incorporated their arguments from their Motion to Quash Trial Subpoena of Officer William Porter.

Based on the motions, arguments, and testimony presented during the hearing, this Court finds that Officer William Porter, D.O.B. 6/29/1989, has been called by the State as a witness to testify in the above-captioned case but that Officer Porter has refused to testify on the basis of his privilege against self-incrimination. This Court further finds that the State's Motion to Compel Officer Porter's testimony complies with the requirements of Section 9-123 of the Courts and Judicial Proceedings Article. For these reasons, it is this 6th day of January, 2016, by the Circuit Court for Baltimore City, hereby

ORDERED that the State's Motion to Compel a Witness to Testify Pursuant to Section 9-123 of the Courts and Judicial Proceedings Article is **GRANTED**, and further

ORDERED that Officer William Porter, D.O.B. 6/26/1989, shall testify as a witness for the State in the above-captioned case and may not refuse to comply with this Order on the basis of his privilege against self-incrimination, and further

EXHIBIT
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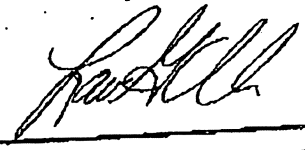
ORDERED that no testimony of Officer William Porter, D.O.B. 6/26/1989, compelled pursuant to this Order, and no information directly or indirectly derived from the testimony of Officer Porter compelled pursuant to this Order, may be used against Officer Porter in any criminal case, except in a prosecution for perjury, obstruction of justice, or otherwise failing to comply with this Order.

Judge Barry G. Williams
Circuit Court for Baltimore City
Signature appears on the original document

BARRY G. WILLIAMS
JUDGE, CIRCUIT COURT FOR
BALTIMORE CITY

TRUE COPY
TEST



LAVINIA G. ALEXANDER, CLERK

Clerk, please mail copies to the following:
Joseph Murtha, Attorney for William Porter
Janice Bledsoe, Deputy State's Attorney, Office of the State's Attorney for Baltimore City

STATE OF MARYLAND	* IN THE	RECEIVED FOR RECORD CIRCUIT COURT FOR BALTIMORE CITY
	* CIRCUIT COURT FOR	2016 JAN -7 A 11: 21
v.	* BALTIMORE CITY	CRIMINAL DIVISION
CAESAR GOODSON	* Case No. 115141032	

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

ORDER

On January 6, 2016, this Court granted the State's Motion to Compel a Witness to Testify Pursuant to Section 9-123 of the Courts and Judicial Proceedings Article. By this Court's order, Officer William Porter, D.O.B. 6/26/1989 is ordered to testify as a witness for the State in the above-captioned case and may not refuse to comply with this Court's order on the basis of his privilege against self-incrimination. This Court further ordered that no testimony of Officer William Porter, compelled pursuant to the Court's order, and no information directly or indirectly derived from the testimony of Officer Porter compelled pursuant to the Court's 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.

On January 7, 2016, this Court received Witness William Porter's Motion for Injunction Pending Appeal, asking this Court to stay its ruling pending Officer Porter's interlocutory appeal in this matter.

Having reviewed the motion, it is this 7th day of January, 2016, hereby

ORDERED that Witness William Porter's Motion for Injunction Pending Appeal is **DENIED**.

TRUE COPY
TEST

LAVINIA G. ANDERSON, CLERK

Judge Barry G. Williams
Circuit Court for Baltimore City
Signature appears on the original document

BARRY G. WILLIAMS
JUDGE, CIRCUIT COURT FOR
BALTIMORE CITY

CIRCUIT COURT BALTIMORE 1983

Clerk, please mail copies to the following:
Joseph Murtha, Attorney for William Porter
Janice Bledsoe, Deputy State's Attorney, Office of the State's Attorney for Baltimore City

EXHIBIT
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STATE OF MARYLAND	*	IN THE
	*	CIRCUIT COURT FOR
v.	*	BALTIMORE CITY
	*	CASE No. 115141032
CAESAR GOODSON	*	

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

STATE'S MOTION FOR CONTINUANCE PENDING RESOLUTION BY THE COURT OF SPECIAL APPEALS OF THE MOTION FOR INJUNCTION PENDING APPEAL BY OFFICER WILLIAM PORTER OR, IN THE ALTERNATIVE, TO RETRY OFFICER WILLIAM PORTER'S PENDING CRIMINAL CASE PRIOR TO THE TRIALS OF THOSE CASES IN WHICH HE IS A SUBPOENAED WITNESS

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 moves this Court for the reasons set forth below to grant a continuance of the above-captioned case until the resolution by the Court of Special Appeals of the Motion for Injunction Pending Appeal by Officer William Porter. In the alternative, the State moves this Court to allow the State to retry Officer Porter's pending criminal case prior to the trial of those cases in which he is a subpoenaed witness.

I. Background

Officer William Porter stood trial before a jury in the Circuit Court for Baltimore City on indictment number 115141037 beginning on November 30, 2015. The jury ultimately could not reach a unanimous verdict on any of the charges, resulting in the Court declaring a mistrial on December 16, 2015. Thereafter, on December 22, 2015, the State and counsel for Officer Porter appeared in Administrative Court, where the State announced its intent to retry Officer Porter. The Court set June 13, 2016, as the date for that retrial.

As a separate matter, on December 11, 2015, the State served Officer Porter with a trial subpoena to appear and testify as a witness in the above-captioned case involving Defendant Goodson[1], whose charges stem from the same events underlying Officer Porter's indictment. On January 4, 2015, Officer William Porter filed a Motion to Quash that trial subpoena, and the State filed a Response to the Motion on the morning of January 6, 2015, which was also the date on which the administrative judge had referred the case to this Court to begin pretrial proceedings. At a hearing that afternoon, this Court denied the Motion to Quash, at which time the State called Officer Porter to the witness stand and asked him if he would testify as a witness in Defendant Goodson's trial, which is scheduled to begin jury selection and testimony the week of January 11. Officer Porter stated that he would not testify and invoked his federal and state privileges against self-incrimination. The State then filed a Motion to Compel Officer Porter's testimony pursuant to Section 9-123 of the Courts and Judicial Proceedings Article ("CJP" hereinafter).

During oral arguments on the Motion to Compel, both Officer Porter and the State incorporated and reiterated their Motion to Quash pleadings. After carefully considering those arguments and the applicable law, the Court granted the Motion to Compel and issued an Order requiring Officer Porter to testify as a witness in Defendant Goodson's case in consideration of a grant of immunity against the government's use or derivative use of any such testimony. Immediately following the Court's ruling, Counsel for Officer Porter stated he would file an interlocutory appeal and orally asked the Court to enjoin the State from actually calling Officer Porter as a witness. The Court denied that request from the bench. The next morning, on January 7, 2015, Officer Porter filed both before this Court and before the Court of Special

[1] The State also served a subpoena on Officer Porter to testify in the related trial of Sergeant Alicia White under indictment number 115141036, currently scheduled for trial beginning February 8, 2015.

Appeals a request for Injunction Pending Appeal. This Court denied that request in an order issued later in the day on January 7. On January 8, 2015, however, the Court of Special Appeals issued an Order that "[b]ecause the State has not yet had an opportunity to respond to this 38-page motion that was filed just 24 hours ago, and because the trial in this matter is to commence shortly, on Monday, January 11, 2016," "the circuit court's order requiring William Porter to testify be and hereby is stayed pending the issuance of a decision by this Court on Appellant's motion." See Order attached as State's Exhibit 1. The Attorney General's Office plans to file a response to Officer Porter's appellate motion by 4:00 p.m. today, January 8.

II. This Court correctly decided the Motion to Compel Officer Porter as a Witness, such that granting the State a continuance pending the resolution of his appeal or rescheduling Officer Porter's trial to avoid the need to compel his testimony would avoid a miscarriage of justice in the State's prosecution of Defendant Goodson

Officer Porter's Motion for Injunction requested a stay of this Court's January 6 Order on the basis that he believes the purported lack of appellate guidance on this issue requires resolution of his appeal before he is made to testify because, otherwise, he suggests that the harm to his Fifth Amendment and Article 22 rights against compulsory self-incrimination will be "irreparable." In support of this argument, he asserted the same bases set forth in support of his Motion to Quash and against the State's Motion to Compel. Because this Court has already correctly recognized those arguments to lack any merit, the Court should grant the State a reasonable continuance pending the outcome of his appellate action or, alternatively, should reschedule Officer Porter's trial to a date prior to that of Defendants Goodson and White. An appeal doomed to fail should not result in an injustice pending such failure.

Regarding Officer Porter's first claim that this Court lacked sufficient appellate guidance in ordering him to testify as a witness in Defendant Goodson's case, the State's Response to Officer Porter's Motion to Quash already amply set forth the half-century of appellate precedent firmly supporting this Court's Order. The State incorporates that Response as if fully stated herein. In short, *Murphy v. Waterfront Commn. of N.Y. Harbor*, 378 U.S. 52 (1964), *Kastigar v. United States*, 406 U.S. 441 (1972), *In re Criminal Investigation No. 1-162*, 307 Md. 674 (1986), and *United States v. Balsys*, 524 U.S. 666 (1998), unquestionably imbue CJP § 9-123 with the constitutionally supported power that authorized this Court to compel Officer Porter's testimony as a witness in exchange for granting him immunity from any prosecutorial use and derivative use of the testimony.

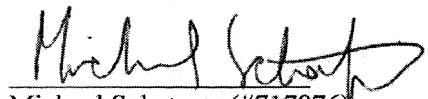
That grant of immunity dispenses with Officer Porter's second claim about irreparable harm flowing from his compelled testimony. Use and derivative use immunity leaves him with precisely the same rights as if he had not testified. Indeed, prior to the time when Officer Porter will face any criminal penalties related to his pending indictment, the State will bear the burden of demonstrating that the evidence it proposes to use against him derived from a source completely independent of his compelled testimony. Meeting this burden is the entire point of a *Kastigar* hearing. If the State fails to meet its burden and is thereby unable to offer untainted evidence sufficient to obtain a conviction, far from any harm coming to Officer Porter, he would be free and clear of the charges against him. Accordingly, the Court of Special Appeals will have no need to enjoin the State in order to safeguard Officer Porter's rights—this Court's grant of immunity, carrying with it *Kastigar*'s burden on prosecutors, has already imposed a powerful mechanism to do precisely that. Officer Porter's claim of "irreparable harm," implying some harm in the first place, is therefore simply unfounded and misleading.

Refusing to grant the relief herein requested *would*, however, result in irreparable harm to the People of Maryland by effectively gutting their government's prosecution against Caesar Goodson (and eventually Alicia White) for his alleged actions in the death of Freddie Gray. As the Supreme Court recognized, immunity statutes serve "the legitimate demands of government to compel citizens to testify," particularly in cases where "the only persons capable of giving useful testimony are those implicated in the crime." *Kastigar*, 406 U.S. at 446. Officer Porter is exactly such a person. He is the only witness able to testify to critical aspects of Defendant Goodson's alleged role in Mr. Gray's death. Declining to continue the entire *Goodson* trial pending resolution of Officer Porter's appeal or, alternatively, declining to reschedule Officer Porter's case to avoid the need to compel his testimony would work a grave injustice that would strip the State of a legislatively and constitutionally authorized tool—CJP § 9-123—for compelling the truth from an alleged witness to murder. Nothing in Officer Porter's Motion gives this Court any reason to take such drastic steps. His rights have been amply protected by this Court's January 6 Order, and that Order will eventually be approved by the Court of Special Appeals.

Wherefore, the State asks that this Court grant the State's Motion for Continuance Pending Resolution by the Court of Special Appeals of the Motion for Injunction Pending Appeal by Officer William Porter, or, in the alternative, to grant the State's Motion to retry Officer William Porter's pending criminal case prior to the trials of those cases in which he is a subpoenaed witness.

Respectfully submitted,

Marilyn J. Mosby



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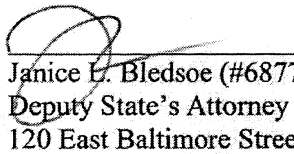

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mpillion@stattorney.org

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January, 2016, a copy of the STATE'S MOTION FOR CONTINUANCE PENDING RESOLUTION BY THE COURT OF SPECIAL APPEALS OF THE MOTION FOR INJUNCTION PENDING APPEAL BY OFFICER WILLIAM PORTER OR, IN THE ALTERNATIVE, TO RETRY OFFICER WILLIAM PORTER'S PENDING CRIMINAL CASE PRIOR TO THE TRIAL OF THOSE CASES IN WHICH HE IS A SUBPOENAED WITNESS was delivered as follows:

By mail and email to:
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Attorney for Officer William Porter

Respectfully submitted,

Marilyn J. Mosby

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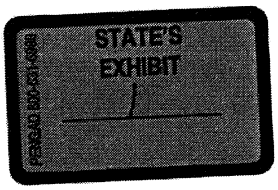
jbledsoe@stattorney.org

	*	IN THE
CAESAR GOODSON,	*	COURT OF SPECIAL APPEALS
Appellant,	*	OF MARYLAND
v.	*	September Term, 2015
STATE OF MARYLAND,	*	No. 2308
Appellee.	*	(CC # 115141032)

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

ORDER

On January 6, 2016, the Circuit Court for Baltimore City issued an order granting the "State's Motion to Compel a Witness to Testify Pursuant to Section 9-123 of the Courts and Judicial Proceedings Article" in *State of Maryland v. Caesar Goodson*, Case No. 115141032. On January 7, 2016, William Porter, the witness subject to the circuit court's order, noted an appeal after that ruling, and, on that same date, filed a "Motion for Injunction Pending Appeal by Officer William Porter" in this Court. Because the State has not as yet had an opportunity to respond to this 38-page motion that was filed just 24 hours ago, and because the trial in this matter is to commence shortly, on Monday, January 11, 2016, it is this 8th day of January, 2016, by the Court of Special Appeals,



ORDERED that the circuit court's order requiring William Porter to testify be and hereby is stayed pending the issuance of a decision by this Court on Appellant's[1] motion.

FOR A PANEL OF THIS COURT

CHIEF JUDGE'S SIGNATURE
APPEARS ON ORIGINAL ORDER

PETER B. KRAUSER, CHIEF JUDGE

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[1] Pursuant Maryland Rule 8-111, William Porter is designated as appellant in this appeal.

Circuit Court of Maryland

Go Back Now

Case Information

Court System: **Circuit Court for Baltimore City - Criminal System**
Case Number: **115141032** Case Status: **ACTIVE**
Status Date: **05/21/2015**
Tracking Number: **151001243260** Complaint No: **71504000**
District Case No: **6B02294452**
Filing Date: **05/21/2015** Incident Date: **04/12/2015**

Defendant Information

Defendant Name: **GOODSON, CAESAR R OFC**
Race:**BLACK** Sex: **MALE**
DOB:**07/26/1969**
Address:**242 W 29TH ST**
City: **BALTIMORE** State: **MD** Zip Code: **21211**

ALIAS: **GOODSON, CAESAR ROMERO JR**
Address:**DEF**

Charge and Disposition Information

(Each Charge is listed separately. The disposition is listed below the Charge)

Charge No: **1**
CJIS/Traffic Code: **1 0999**
Description: **MURDER-2ND DEGREE**

Charge No: **2**
CJIS/Traffic Code: **1 0910**
Description: **MANSLAUGHTER**

Charge No: **3**
CJIS/Traffic Code: **1 1415**
Description: **ASSAULT-SEC DEGREE**

Charge No: **4**
CJIS/Traffic Code: **1 0909**
Description: **MANSLAUGHTER AUTO/BOAT ETC**

Charge No: **5**
CJIS/Traffic Code: **1 1611**
Description: **CR NEG MANSLGHTR VEH/VESS**

Charge No: **6**
CJIS/Traffic Code: **2 0645**
Description: **MISCONDUCT IN OFFICE**

Charge No: **7**
CJIS/Traffic Code: **1 1425**
Description: **RECKLESS ENDANGERMENT**

Bail and Bond Information

EXHIBIT
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Bail Amount: **$350000** Bail Number: **FCS1000-1500223**
Set Date: **05/01/2015** Bail Set Location: **DC**
Bond Type: **SURETY**

Bail Bondsman: **HEAVENS, NICHOLAS H**
Street: **1101 NORTH POINT BLVD STE 121**
City: **BALTIMORE** State: **MD** Zip: **21224**
CompanyName: ***FINANCIAL CASUALTY & SURETY**

Related Person Information

Name: **ASKEW, AMY E**
Connection: **DEFENSE ATTORNEY**
Address: **1 SOUTH ST 26THFLR**
City: **BALTIMORE** State: **MD** Zip Code: **21202**

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Connection: **DEFENSE ATTORNEY**
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City: **BALTIMORE** State: **MD** Zip Code: **21218**

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City: **BALTIMORE** State: **MD** Zip Code: **21202**

Name: **BLEDSOE, JANICE L**
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City: **BALTIMORE** State: **MD** Zip Code: **21202**

Name: **SCHATZOW, MICHAEL**
Connection: **ASST STATES ATTORNEY**
Address: **120 E BALTIMORE ST 10TH FL**
City: **BALTIMORE** State: **MD** Zip Code: **21202**

Name: **TAYLOR, DAWNYELL S**
Connection: **POLICE OFFICER**
Address: **DET DIV HOMICIDE SECTION**

Event History Information

Event	Date	Comment
CASI	**05/21/2015**	**CASE ADDED THROUGH ON-LINE ON THIS DATE 20150522**
MOTF	**05/27/2015**	**MOTION FOR SPEEDY TRIAL**
MOTF	**05/27/2015**	**MOTION TO PRODUCE DOCUMENTS**

MOTF	05/27/2015	REQUEST FOR DISCOVERY
MOTF	05/27/2015	MOTION TO SUPPRESS PURSUANT TO MD 4-252 AND 4-253
MOTF	05/27/2015	MOTION FOR GRAND JURY TESTIMONY
MOTF	05/27/2015	DEMAND FOR CHEMIST
MPRO	06/15/2015	MOTION FOR PROTECTIVE ORDER ;TICKLE DATE= 20150703
FILE	06/15/2015	FILED ADF - GRAHAM, ANDREW JAY , ESQ 322413
FILE	06/18/2015	FILED ADF - FRALING, MATTHEW , ESQ 270545
HCAL	07/02/2015	P08;0930;509 ;ARRG; ;POST;OTH;PETERS, CHARLES;8E3
HCAL	07/02/2015	P08;0930;509 ;ARRG; ;OTHR; ;SFEKAS, STEPHEN;8E4
HCAL	07/02/2015	P08;0930;509 ;ARRG; ;TSET; ;WILLIAMS, BARRY;8C9
MTAN	07/09/2015	MOTION FOR SUBPOENA / TANGIBLE EVID;TICKLE DATE= 20150717
MPRO	07/16/2015	MOTION FOR PROTECTIVE ORDER ;TICKLE DATE= 20150803
MCOM	07/30/2015	MOTION TO COMPEL DISCOVERY ;TICKLE DATE= 20150807
MPRO	08/14/2015	MOTION FOR PROTECTIVE ORDER ;TICKLE DATE= 20150901
MPRO	08/14/2015	MOTION FOR PROTECTIVE ORDER ;TICKLE DATE= 20150901
MPRO	08/14/2015	MOTION FOR PROTECTIVE ORDER ;TICKLE DATE= 20150901
MPRO	08/14/2015	MOTION FOR PROTECTIVE ORDER ;TICKLE DATE= 20150901
MPRO	08/14/2015	MOTION FOR PROTECTIVE ORDER ;TICKLE DATE= 20150901
MPRO	08/14/2015	MOTION FOR PROTECTIVE ORDER ;TICKLE DATE= 20150901
MPRO	08/14/2015	MOTION FOR PROTECTIVE ORDER ;TICKLE DATE= 20150901
MPRO	08/14/2015	MOTION FOR PROTECTIVE ORDER ;TICKLE DATE= 20150901
MPRO	08/14/2015	MOTION FOR PROTECTIVE ORDER ;TICKLE DATE= 20150901
MPRO	08/24/2015	MOTION FOR PROTECTIVE ORDER ;TICKLE DATE= 20150911
MPRO	08/24/2015	MOTION FOR PROTECTIVE ORDER ;TICKLE DATE= 20150911
MPRO	08/24/2015	MOTION FOR PROTECTIVE ORDER ;TICKLE DATE= 20150911
MPRO	08/24/2015	MOTION FOR PROTECTIVE ORDER ;TICKLE DATE= 20150911
MPRO	08/25/2015	MOTION FOR PROTECTIVE ORDER ;TICKLE DATE= 20150912
MPRO	08/26/2015	MOTION FOR PROTECTIVE ORDER ;TICKLE DATE= 20150913
TRAK	09/02/2015	ASSIGNED TO TRACK C - 120 DAYS ON 09/02/2015
HCAL	09/02/2015	P31;0930;528 ;PMOT; ;OTHR; ;WILLIAMS, BARRY;8C9
HCAL	09/10/2015	P31;0930;528 ;HEAR;HR;DENI; ;WILLIAMS, BARRY;8C9
HCAL	09/10/2015	P31;0930;528 ;HEAR; ;OTHR; ;WILLIAMS, BARRY;8C9
MCOM	09/21/2015	MOTION TO COMPEL DISCOVERY ;TICKLE DATE= 20150929
MCOM	09/23/2015	MOTION TO COMPEL DISCOVERY ;TICKLE DATE= 20151001
FILE	09/24/2015	FILED ADF - ASKEW, AMY E , ESQ 24075
HCAL	09/29/2015	P31;0200;528 ;HEAR; ;POST;CAN;WILLIAMS, BARRY;8C9
HWNO	09/29/2015	POSTPONEMENT FORM FILED; HICKS (MD RULE 4-271) NOT WAIVED
HCAL	10/13/2015	P31;0900;528 ;JT ; ;POST;PWU;WILLIAMS, BARRY;8C9
FILE	12/31/2015	FILED ADF - REDD, JUSTIN A , ESQ 682551
HCAL	01/06/2016	P31;0930;528 ;JT ; ;CONT; ;WILLIAMS, BARRY;8C9
HCAL	01/11/2016	P31;0900;528 ;JT ; ;CONT; ;WILLIAMS, BARRY;8C9

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DATE
09/02/15

CIRCUIT COURT FOR BALTIMORE CITY

111 N. CALVERT ST., BALTIMORE, MD 21202
410-333-3811

CASE NUMBER
115141032

I.D. NUMBER
A32384

STATE OF MARYLAND VS. CAESAR R GOODSON DFC SID# 004207138

YOU ARE HEREBY NOTIFIED TO APPEAR AS DEFENSE ATTORNEY IN COURTROOM P31
IN THE COURTHOUSE EAST ON OCTOBER 13, 2015 ROOM 528 AT 09:00

TYPE OF PROCEEDING JURY TRIAL

FAILURE TO APPEAR ON TIME MAY CAUSE YOU TO BE CHARGED WITH CONTEMPT OF COURT OR A WARRANT TO BE ISSUED FOR YOUR ARREST. BRING THIS DOCUMENT WITH YOU TO COURT.

BY ORDER OF COURT

GRAHAM, ANDREW JAY
ONE SOUTH STREET #2600
BALTIMORE, MD 21202

LAVINIA G. ALEXANDER, CLERK
CIRCUIT COURT FOR BALTIMORE CITY

DEPUTY NO._____ ASSOC. CASES ▶

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DATE
09/29/15

CIRCUIT COURT FOR BALTIMORE CITY

111 N. CALVERT ST., BALTIMORE, MD 21202
410-333-3811

CASE NUMBER
115141032

I.D. NUMBER
A32384

STATE OF MARYLAND VS. CAESAR R GOODSON OFC SID# 004207138

YOU ARE HEREBY NOTIFIED TO APPEAR AS DEFENSE ATTORNEY IN COURTROOM P31
IN THE COURTHOUSE EAST ON JANUARY 06, 2016 ROOM 528 AT 09:30

TYPE OF PROCEEDING JURY TRIAL

FAILURE TO APPEAR ON TIME MAY CAUSE YOU TO BE CHARGED WITH CONTEMPT OF COURT OR A WARRANT TO BE ISSUED FOR YOUR ARREST. BRING THIS DOCUMENT WITH YOU TO COURT.

BY ORDER OF COURT

LAVINIA G. ALEXANDER, CLERK
CIRCUIT COURT FOR BALTIMORE CITY

GRAHAM, ANDREW JAY
ONE SOUTH STREET #2600
BALTIMORE, MD 21202

DEPUTY NO._____

ASSOC. CASES ▶

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CIRCUIT COURT FOR
BALTIMORE CITY
2016 JAN 15 A 10: 49
CRIMINAL DIVISION

STATE OF MARYLAND	*	IN THE
	*	CIRCUIT COURT
v.	*	FOR
CAESAR GOODSON	*	BALTIMORE CITY
	*	Ind. #115141032

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

DEFENDANT'S OBJECTION TO APPELLATE COURT'S ORDER
AND RESULTANT POSTPONEMENT OF OFFICER GOODSON'S TRIAL

Defendant, Caesar Goodson, ("Defendant" or "Officer Goodson") through his counsel, files for the record this objection to the Court of Special Appeals' Order directing this Court to stay the above captioned matter and the resultant indefinite postponement of his trial. In support thereof, Officer Goodson avers:

1. On May 22, 2015, Officer Goodson was indicted with seven charges, including second degree murder relating to his operation of the van in which Freddie Gray was transported.

2. On September 2, 2015, this Court granted the motion for severance filed by Defendant Caesar Goodson and the other indicted officers. The Court directed the State to identify the order in which it wished to try the defendants, as well as the anticipated length of each trial. On that same day, the State affirmatively informed this Honorable Court of the State's decision to try Officer Porter first.

3. On September 15, 2015, the State advised the Court in writing that after it tried Porter, the order of defendants would be: Goodson, White, Miller, Nero and Rice. The State represented to the Court that, "Defendant Porter is a necessary and material witness in the cases against Defendants Goodson and White, so it is imperative that Mr. Porter's trial takes place before their trials." Based on the State's litigation strategy (and perhaps the lack of independent evidence),

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the State concluded that Officer Porter's testimony was critical to its prosecution of Officer Goodson and Sergeant White. In acceding to the State's request, this Court scheduled the trials of Porter and Goodson in the order that the State had requested. The trials of Officer Porter and Officer Goodson were scheduled for November 30, 2015 and January 6, 2016, respectively.[1]

4. On January 6, 2016, the Court heard and ruled upon pretrial motions filed by both sides and set January 11, 2016, as the date on which Officer Goodson's trial would commence. Accordingly, all of the intended defense witnesses, including medical and other experts, were advised of the pending commencement of trial. In advance of January 6th, these witnesses had made personal scheduling commitments for the trial.

5. Among the Court's rulings on January 6, 2016, this Honorable Court issued an order granting the "State's Motion to Compel a Witness to Testify Pursuant to Courts and Judicial Proceedings Article § 9-123".

6. On January 7, 2016, Officer William Porter, the witness subject to the Court's order:

   i. noted an interlocutory appeal to the Court of Special Appeals of Maryland from this Honorable Court's order compelling him to testify; and,

   ii. filed a "Motion for Injunction Pending Appeal."

7. On January 8, 2016, the Court of Special Appeals issued an order temporarily staying this Honorable Court's order granting of the State's Motion to Compel, pending a decision by the Court of Special Appeals on Officer Porter's Motion for Injunction.

8. On January 8, 2016, the State responded to Officer Porter's Motion for Injunction and Officer Porter, in turn, filed a reply to the State's response to the Motion for Injunction.

9. On the same day in the case of *State v. Caesar Goodson*, the State filed a Motion for Continuance Pending Resolution by the Court of Special Appeals of the Motion for Injunction

---

[1] During a subsequent scheduling conference in December, the Court advised that a motions hearing would take place on January 6th and jury selection would begin on January 11th.

Pending Appeal by Officer William Porter or, In the Alternative, to Retry Officer William Porter's Pending Criminal Case Prior to the Trials of Those Cases in Which He is a Subpoenaed Witness.

10. On the morning of January 11, 2016, Officer Goodson filed a Motion in Opposition to the State's Motion for Continuance.

11. On January 11, 2016, the Court of Special Appeals ordered that the trial of *State v. Caesar Goodson* be stayed pending resolution of Officer Porter's interlocutory appeal or further order by the Court of Special Appeals ("the Stay").

12. In accordance with the order of the Court of Special Appeals, on January 11, 2016, this Honorable Court stayed the trial of *State v. Caesar Goodson*, noted the respectively filed pleadings of the State's motion for continuance and the Defendant's opposition to same, determined the State's request to be moot and then recessed the proceedings.

ARGUMENT

This Honorable Court's rendering of its ruling lasted approximately two (2) minutes, after which the Court immediately recessed the proceedings. Given the extreme brevity of the entire proceeding, neither the State nor the Defense was able to address this Honorable Court. As such, the Defense was not able to place, on the record, its reasons for opposition to the stay imposed upon these proceedings and the concomitant postponement that results. Preliminarily, the defendant would respectfully wish to incorporate all of the arguments propounded in the defendant's motion in Opposition to the State's Motion for Continuance that was filed on January 11, 2016.

Under Maryland law, Officer Goodson's trial was required to start within 180 days after his or his counsel's initial appearance, *i.e.*, November 23, 2015. *See* Md. Code Ann., Crim. Proc.

§ 6-103 (formerly Article 27 § 591); Md. Rule 4-271(a)(1); *State v. Hicks*, 285 Md. 310 (1979) (holding that the 180-day requirement is mandatory) ("*Hicks*"). Officer Goodson's trial was already postponed once to January 6th, well past the *Hicks* date (without waiver). In addition to the statutory requirement that he be tried within 180 days, Officer Goodson's right to a speedy trial is guaranteed by Article 21 of the Maryland Declaration of Rights and the Sixth Amendment to the United States Constitution. As of the filing of this objection, Officer Goodson's trial has been suspended indefinitely. The uncertainty of a future trial date is the antithesis of his constitutional rights.

Officer Goodson is prejudiced by the Stay due to the very real specter that he will not be able to mount the structured defense that has been developed by his attorneys based on the scheduling of this matter as set by this Honorable Court. A host of expert witnesses have been garnered, prepared, and have made accommodations to their respective schedules in order to appear and testify in Officer Goodson's defense based on the scheduled date and timetable that was required and established by this Honorable Court for the trial of these matters. Particularly with regard to the numerous expert witnesses that Officer Goodson intended on calling, to lose any one due to unavailability occasioned by scheduling uncertainty will adversely impact Officer Goodson's defense. A change of the trial at this time significantly impinges upon and hampers Officer Goodson's ability to put on the defense that has been crafted on his behalf.

In the matter *sub judice*, it is Officer Goodson's position that the State has chosen a course and strategy of litigation relative to all of the charged defendants that to this point has created chaos, uncertainty as to the process and, most importantly, abjectly disregarded Officer Goodson's constitutionally guaranteed due process right to a speedy trial. Officer Goodson has played no role in the morass that the State has created. All that he desired was to have his case

tried on the date set by this Honorable Court more than three (3) months ago. The State made its election at its own peril. The State, in its discovery, has listed in excess of one-hundred (100) potential witnesses. The State is now contending that Officer Porter is the sole and ultimate linchpin in its prosecution of Officer Goodson. The defense would merely query -- should Officer Goodson's constitutionally guaranteed rights to due process and a speedy trial be cast aside because of the State's erroneous assessment of the strength, *vel non*, and tactical course of their case? As such, the mere fact that the State's strategy has not inured to its benefit thus far is hardly good cause for postponing or continuing Officer Goodson's case. Juxtaposed against Officer Goodson's constitutionally guaranteed fundamental due process right to a speedy trial, the postponement of this trial that has been occasioned solely by the State's flawed litigation strategy woefully fails to even approximate a semblance of good cause that is a necessary requisite for this Honorable Court to exact the action that it has taken.

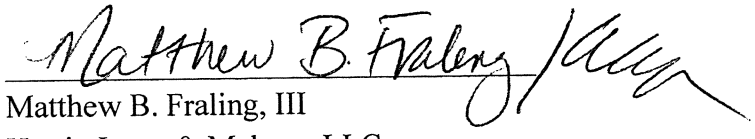
Besides the constitutional considerations, the Stay most notably serves to effectively exact further terrible emotional and psychological tolls on the defendant, his wife and children. Officer Goodson has suffered a particularly onerous detriment as a result of the charges and allegations levied against him. In addition to the significant and substantial financial deficit that he and his family have suffered, the continued pendency of these matters without resolution has weighed heavily on his psyche as well as his public image. The unfair circumstances can only be remedied -- albeit imperfectly-- through a prompt trial and a final disposition of the charges.

As an individual who is cloaked with a constitutional presumption of innocence, Officer Goodson deserves nothing less than an expeditious opportunity to have his day in court. Continuing the delay of the commencement of Officer Goodson's trial will make meaningless his

rights to due process and justice as embodied and guaranteed in the U.S. Constitution and the Maryland Declaration of Rights.

For the reasons set forth above, Officer Goodson respectfully re-asserts his objection to the continuation of a stay of his trial and the concomitant abrogation of Officer Goodson's constitutionally guaranteed rights to a speedy trial.

Respectfully submitted,



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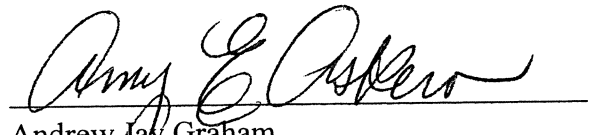

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Counsel for Officer Caesar Goodson

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 2016, a copy of the foregoing Objection was sent via electronic mail and by first class mail, postage prepaid to the following:

Michael Schatzow, Chief Deputy State's Attorney
Office of the State's Attorney for Baltimore City
120 East Baltimore Street
Baltimore, Maryland 21202

Amy E. Askew

2012 WL 2153708 (Md.App.) (Appellate Brief)
Maryland Court of Special Appeals.

Travon David DAVIS, Appellant,
v.
STATE OF MARYLAND, Appellee.

No. 953.
September Term, 2011.
March 15, 2012.

Appeal from the Circuit Court for Montgomery County
(John W. Debelius, III, Judge)

Brief of Appellee

Douglas F. Gansler, Attorney General of Maryland.

Robert Taylor, Jr., Assistant Attorney General, Office of the Attorney General, Criminal Appeals Division, 200 Saint Paul Place, Baltimore, Maryland 21202, (410) 576-6419, rtaylor@oag.state.md.us, Counsel for Appellee.

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*1 STATEMENT OF THE CASE

Appellee, the State of Maryland, accepts the Statement of the Case set forth in the brief of Appellant, Travon David Davis.

QUESTIONS PRESENTED

1. Was the trial court within its discretion in denying a defense continuance request?

*2 2. If considered, was there prejudice to Davis in allowing the jury to hear, during the State's case-in-chief, evidence that Davis sought to put before the jury?

3. If considered, did the court properly accept a verdict which was, at most, factually inconsistent?

4. Did the State produce sufficient evidence to sustain Davis's conviction?

STATEMENT OF FACTS

The State accepts the Statement of Facts set forth in the brief of Davis, as supplemented and modified in the following Argument, and with the following additions:

Davis was indicted in this case on February 4,2011. (Docket entries at 2). Davis filed a written motion demanding a speedy trial on February 11, 2011. (*Id.* at 3) His trial date was set at a scheduling conference on February 25, 2011. (*Id.* at 4). Counsel for Davis appeared before the trial court at a "resolution hearing" on March 9,2011. *(Id.).* Davis and his attorney appeared again at a pre-trial conference on March 25,2011. (*Id.* at 6). Counsel for Davis appeared at another pre-trial conference in this case on April 1, 2011. *(Id.).* Davis and his attorney appeared for a motions hearing on April 7, 2011. (*Id.* at 7). While only the transcript of the April 7 hearing has been made a part of *3 the appellate record, there is no indication that Davis requested a postponement of his case at any time prior to April 27, 2011 - the day of trial.

The docket entries further reflect that all discovery was completed by February 18, 2011. (Docket entries at 4). Thus, Jerquan H.'s [1] statement was known to Davis for at least 68 days prior to his postponement request. (See H.3-4). [2]

At the hearing on Davis's oral motion to postpone, counsel for Davis indicated that his first available trial date after Jerquan's scheduled June 28th hearing was August 8. (H.19). When denying Davis's request, the hearing court noted that the State "is willing to stipulate to substantially everything that you wanted the witness to have said if he didn't assert the 5th." (H.21).

At trial, Mildred Detwiler testified that the two strangers who came to her house rang her doorbell, then moved to the back of her house, (T1.174), where one of the men "tried to push open" her locked back window. (*Id.* at 177). The two then walked around to her elevated, screened-in back porch and peered through the latticework around the porch. (*Id.* at 178). The two then *4 climbed the steps onto her back porch, where one of them - wearing a glove - forced his hand through the screen and grabbed the door latch. (*Id.* at 182). At that point, Detwiler - who had called 911 - left her house through the front door, and

the police arrived "almost immediately." (*Id.* at 184). The police officers observed the two men in Detwiler's yard and ran after them, (id. at 194), ultimately pursuing them into a nearby house. (*Id.* at 200-201). An off-duty police officer saw the chase, and managed to confront the two as they ran into the other house; he positively identified Davis as one of the two people whom he saw running from the police. (T1.210).

Police surrounded the house and ordered the occupants outside. (T1.204). The two suspects - Davis and his cousin, Jerquan H. (a juvenile) - then emerged wearing "drastically different" clothing. (*Id.* at 205). Detwiler was not able to identify them as the two people she had seen at her front door, at her back window, and on her back porch. (T1.185-186).

After they were arrested, both suspects gave recorded statements to the police. Jerquan H. admitted that they did crawl through a broken screen onto Detwiler's porch, (T2.29), but also stated that Davis was "not really in this." (T2.25). Davis told police that he and Jerquan went to the house, that they rang the doorbell to ascertain whether the house was empty because "our intentions wasn't to hurt nobody," (T2.51), that they had "messed up," and they were leaving when the police arrived. (T2.52-53).

***5** After the first day's testimony, the parties discussed the use of Jerquan H.'s statement. The parties and the court agreed that it would be introduced in its entirety during the State's case-in-chief. (T1.236-237).

ARGUMENT

I.

THE TRIAL COURT WAS WITHIN ITS DISCRETION IN DENYING A DEFENSE CONTINUANCE REQUEST.

Davis's alleged co-felon, seventeen-year-old Jerquan H., was arrested at the same time as Davis. Jerquan essentially confessed to the crime, but in his confession stated that Davis, while present, was unaware that Jerquan was planning on breaking into Mildred Detwiler's home. (T2.25). Davis was charged as an adult, but Jerquan was charged as a juvenile, and the juvenile proceedings in his case were not scheduled until at least two months after Davis's trial. (H.19). The parties agreed that this rendered Jerquan "unavailable" for testimonial purposes in Davis's trial, as Jerquan would invoke his Fifth Amendment right not to testify in Davis's case. Because of Jerquan's earlier statements to the police, Davis wished to postpone his case until such time as Jerquan was no longer able to exercise his Fifth Amendment privilege. (H.3). The motions court declined to grant the postponement.

The postponement court did not abuse its discretion in declining to grant a postponement. This Court has held that a trial court does not abuse its discretion in refusing to postpone a trial to garner the testimony of a witness ***6** who is expected to invoke his Fifth Amendment privilege. There is, additionally, no requirement that the State try co-defendants in any particular order, which is essentially what Davis was demanding. Moreover, Davis had available for use as substantive evidence the very statement that he wished to introduce through Jerquan. Accordingly, he suffered no harm whatsoever by the court's exercise of discretion.

"The decision whether to grant a request for continuance is committed to the sound discretion of the court." *Abeokuto v. State,* 391 Md. 298, 329 (2006). When appraising a trial court's exercise of discretion, this Court has stated that "discretionary rulings by the trial court carry a presumption of validity." *Cox v. State,* 51 Md. App. 271, 282, *affd,* 298 Md. 173 (1982).

The test frequently referred to when appraising the court's exercise of discretion in denying a postponement consists of three components. The party seeking the continuance must show" (1) "that he had a reasonable expectation of securing the evidence or witness in a reasonable time;" (2) "that the evidence was material and necessary;" and (3) "that he had made diligent and proper efforts to secure the evidence." *Jackson v. State,* 214 Md. 454, 458 (1957), *cert. denied,* 356 U.S. 940 (1958). *See also Jackson v. State,* 288 Md. 191 (1980) (same). This Court has squarely held that a trial court does not abuse its discretion when it refuses to grant a postponement because a ***7** defendant desires to secure the Fifth-Amendment-protected testimony of a co-defendant.

In *Tann v. State,* 43 Md. App. 544, 548 (1979), this Court ruled: "[W]e hold that where the absent witness is also a co-defendant and there is no showing that he will waive his privilege against self-incrimination and exonerate the appellant, the trial judge may deny the postponement of a trial." Here, of course, the parties agreed that Jerquan was not going to waive his Fifth Amendment privilege, and indeed, he did not. (T1.244).

In *Tann,* the witness/co-defendant had escaped from prison and his trial was severed from Tann's; by the time of Tann's trial, the co-defendant was in federal custody in North Carolina. 43 Md. App. at 546. Here, the witness/co-defendant was similarly unavailable, by virtue of being within the exclusive original jurisdiction of the juvenile court. In *Tann,* there was no showing that the co-defendant would have waived his Fifth Amendment privilege. Here, the parties agreed that Jerquan was going to invoke his right to remain silent. (H.6). Tann only sought a postponement to bring his witness back from North Carolina; here, Davis requested a postponement until after his co-defendant's adjudication was finished and all appeals had run.

Moreover, the basis for Davis's postponement request cannot, as a matter of simple logic, be an adequate basis for a postponement. Davis was demanding, essentially, that he not be tried until after his co-defendant had ***8** been tried, so that his co-defendant could be available to testify in his case. If both co-defendants took the same position, no trial could ever be held. Here, Davis's co-defendant was a juvenile, and therefore could not be tried jointly with Davis. *See* Md. Code Ann., Cts. & Jud. Proc. Art. §3-8A-03 (2006 Repl. Vol.) (juvenile court has exclusive jurisdiction over minors). Davis, like Jerquan, also gave an exculpatory statement to the police. (T2.36-54). Had Jerquan H. demanded that his proceeding be halted until Davis was available to testify (on the grounds that he wished to take advantage of Davis's exculpatory statement), the courts would have been paralyzed if, as a matter of law, a desire to wait for a co-defendant's case to conclude constitutes grounds to an automatic continuance.

In terms of the three *Jackson* requirements noted above, Davis has categorically failed to show that he had a "reasonable expectation of securing the evidence or witness in a reasonable time." His "expectation of securing" Jerquan's testimony was itself was unreasonable; one co-defendant has no right to be tried before or after another. And the time required to "secure" the witness was not reasonable; Jerquan's case would not be heard for months, and he would then have time to note exceptions, then file an appeal, and otherwise exhaust all of the available remedies which must be exhausted before he could no longer invoke his Fifth Amendment right to remain silent.

***9** Davis has further failed to show that the evidence was "necessary" because, he agreed, there was a recorded statement from Jerquan purporting to exonerate Davis. The basis for Davis's desire to have Jerquan testify was his belief that Jerquan's trial testimony would be substantially the same as his recorded statement to the police. (H.21). The necessity for Jerquan's live testimony was therefore diminished - it was available from an alternate source. [3]

Thus, the court was well within its discretion in denying Davis's postponement request. Davis had no reasonable expectation to the testimony, he had no means of assuring the court it could be obtained in a reasonable amount of time, and the same evidence was available from another source. Davis's claim of error is unfounded.

II.

IF CONSIDERED, THERE WAS NO PREJUDICE TO DAVIS IN ALLOWING THE JURY TO HEAR, DURING THE STATE'S CASE IN CHIEF, EVIDENCE THAT DAVIS SOUGHT TO PUT BEFORE THE JURY.

With Davis's consent, the State introduced into evidence a statement which Davis otherwise intended to introduce in his own case. Davis's consent, and related failure to object, to the State's introduction of the statement ***10** constitutes a waiver of his current claim of error. This waiver of the error and its obvious harmlessness are intertwined. Davis and his attorney had expressed the absolute intention, from the beginning, of introducing Jerquan's largely exculpatory statement to the jury, so there would have been no reason to object to the State introducing it instead. Davis waived the "error" he now challenges because at

the time he didn't consider it "error" at all. He wanted the statement into evidence and was going to introduce it himself if the State did not. (T2.5). Therefore even if "error," it is harmless beyond a reasonable doubt. [4]

Acquiescence to a trial court's ruling waives the right to challenge that ruling on appeal. *Uzzle v. State,* 152 Md. App. 548, 583 (2001); *see also Whittingon v. State,* 147 Md. App. 496, 537 (2002) (acquiescence to the trial court's ruling precludes appellate review of the issue). The Court of Appeals has noted, in *Parker v. State,* 402 Md. 372, 405 (2007):

> It is a firmly established principle of Maryland law... that a party may not obtain appellate review of a judgment to which the party consented. In addition, acquiescence implies consent. A litigant who acquiesces in a ruling is completely deprived of the right to complain about that ruling[.]

***11** (citations omitted). Moreover, of course, the failure to object to a trial court's action fails to preserve any claim of error for appellate review. Md. Rule 8-131. Thus, "when a party has the option of objecting, his failure to do so while it is still within the power of the trial court to correct the error is regarded as a waiver estopping him from obtaining a review of the point or question on appeal[.]" *Lohss v. State,* 272 Md. 113, 119 (1974).

When Davis requested a postponement on the morning of trial, he proferred that Jerquan H. would testify that Davis "had no involvement in this incident." (H.4). The State noted that under the civil rules, a postponement to obtain an additional witness was not necessary if the parties could stipulate to the testimony. (H.8). The State was willing to stipulate to the recorded statement Jerquan had already given, stating that Davis was not a part of any criminal enterprise. (H.9). Counsel for Davis indicated that he preferred to have the witness testify live, because he "suspect[ed]" that the witness could testify to additional matters not in his statement - the "things leading up to it [,]" including "[w]hy they were together[]" and "[w]hat they had been doing together." (H.10). The court ultimately declined to grant a postponement, as discussed in Part I, *supra.* The court found that "the State is willing to stipulate to substantially everything that you wanted the witness to have said." (H.21).

The parties thereupon reported to a different judge for trial, and the same issue of Jerquan's testimony and recorded statement was raised. (T1.6). ***12** At that time, counsel for Davis indicated that - while he still preferred to have Jerquan testify live, and was not waiving any objections he had made to having his postponement request denied - he would agree to the stipulation the State had previously offered during the postponement hearing. (T1.7). Initially, the State argued that it was no longer bound to that stipulation because Davis rejected it at the postponement hearing. (T1.13, 15). Defense counsel immediately countered that he believed that the postponement judge only denied the continuance because of the stipulation, and therefore he was entitled to have the statement introduced notwithstanding the fact that the parties had reached no agreement earlier. (T1.16).

The trial court then suggested that the recorded statement was admissible after Jerquan exercised his Fifth Amendment right, "not by stipulation" but by "some other evidentiary way[.]" (T1.17). The court pointed out that the statement was admissible under Rule 5-804 as a statement against interest, and if offered by the defense, there was no Sixth Amendment barrier to the admission of the statement. (*Id.* at 19). Defense counsel indicated that he would present the statement however he could, but did not want to waive any objection to the denial of his postponement request. (T1.20-22).

After the jury was excused at the end of the first day of trial, the subject of Jerquan H. and his recorded statement came up again. The State indicated that it would be introducing the statement the next day. (T1.235). The ***13** prosecutor proffered a summary of the statement to the court. (Id. at 236). Then the following exchange took place between the parties and the court: THE COURT: So, the State wants the entire statement. How about you? We started this that you wanted at least a piece of it.

[DEFENSE COUNSEL]: I, I - okay. I'm accepting the statement being played, but I'm not giving up any rights that I had as a result of the continuance, when I wanted the live body here. So, yes, I want the entire statement in answer to your question.

THE COURT: Does State want to play the statement in its case-in-chief?

[THE STATE]: Yes.

THE COURT: Okay. So, what else do I need to do? I mean, I can, I can let him [Jerquan H.] invoke. He'll invoke. He'll be unavailable. It'll come in -

[DEFENSE COUNSEL]: Under that rule.

THE COURT: - since both sides want it. There's something in it for everybody, as I'm hearing it.

(T1.237). Jerquan was then brought to the courtroom, and as expected, invoked his right to remain silent. (T1.243-244).

At the start ofthe next day's trial proceedings, the State summarized the rest of its evidence for the court, including its plan to play the recorded statement of Jerquan. (T2.4-5). Defense counsel told the court that he did not anticipate presenting any evidence "other than this statement that's played in ***14** the State's case in chief." (T2.5). The statement was, ultimately, introduced by the State during its case in chief with no objection from Davis. (T2.23-24). [5]

In his brief before this Court, Davis acknowledges that "defense counsel did not specifically object to the admission of the tape." (Brief of Appellant at 13). This is understatement. Not only did Davis not object, but he actively agreed to the tape being presented by the State in its case in chief. The "error" claimed on appeal has nothing whatsoever to do with the denial of Davis's postponement request. Indeed, Davis ignores his active acquiescence in the way in which the statement was presented, and offers an excuse for his failure to object that is flatly wrong as a matter of both law and fact. Davis claims that the only way he could present the recorded statement was by "waiving his [Sixth Amendment] rights under *Crawford [v. Washington,* 541 U.S. 36 (2004)]." (*Id.*). This is simply incorrect. As the trial court noted, Davis could have presented the statement in his own case. Indeed, the sum and substance of Davis's appellate complaint on this issue is not that the tape was introduced, but that it was introduced by the State, and not by Davis himself. The State does not have a Sixth Amendment right to confront a defendant's witnesses. The court had ruled that Jerquan's statement was admissible under the "statement against interest" exception to the hearsay rule. (T1.19). Insisting ***15** that he, Davis, introduce the statement in his own case, rather than having the State introduce it a few minutes earlier in its case, would not have waived Davis's objection to the denial of his continuance in any fashion. The grounds Davis presents to this Court for not considering his appellate claim waived are without merit. As the Court of Appeals has stated, "most rights, whether constitutional, statutory or common-law, may be waived by inaction or failure to adhere to legitimate procedural requirements." *State v. Rose,* 345 Md. 238, 248 (1997).

For the same reason, any error here is harmless. Harmless error exists when "a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict[.]" *Dorsey v. State,* 276 Md. 638, 659 (1976). Thus, "[e]very error committed by a trial court is not grounds for a new trial. Reversible error will be found and a new trial warranted only if the error was likely to have affected the verdict below. If the error is merely harmless error, then the judgment will stand." *Conyers v. State,* 354 Md. 132, 160, cert. denied, 528 U.S. 910 (1999) (citations omitted). Even errors of constitutional dimension are subject to harmless error analysis. *See Earhart v. State,* 48 Md. App. 695, 710 (1981) (Confrontation Clause violation found harmless where co-defendant's improperly admitted confession merely mirrored defendant's own confession).

***16** The "error" in this case is, at worst, that the statement was introduced by the State at the end of its case-in-chief rather than by Davis a few moments later. (T2.5). It was still the same statement going before the same jury for the same purposes. The procedural difference - that it was presented by the State with Davis's consent, rather than by Davis himself under Rule 5-804 - could not possibly have any effect on the outcome of the case. Therefore, even if there could be "error" in doing what the parties agreed in advance to do, it was harmless beyond a reasonable doubt.

III.

IF CONSIDERED, THE COURT PROPERLY ACCEPTED A VERDICT WHICH WAS, AT MOST, FACTUALLY INCONSISTENT.

Davis was convicted of burglary and acquitted of conspiracy to commit burglary. (T2.176). On appeal, he claims that the verdicts were inconsistent. As Davis did not voice any objections to the verdict when it was taken, he has waived any claim of error. Moreover, the verdicts are not inconsistent. The jury could find a defendant guilty of one offense and not guilty of another. Lastly, even if inconsistent, the inconsistency is purely a question of fact, not law, and therefore is allowed under Maryland law.

*17 A. The failure to object is fatal to Davis's claim.

This Court has squarely held that to preserve a challenge to the consistency of a jury's verdict, a defendant must object before the verdict is made final. In *Tate v State,* 182 Md. App. 114 (2008), this Court held:

> When inconsistent verdicts are rendered, the judge may not, sua sponte, send the jury back to resolve the inconsistency, because it is the defendant who is entitled, should he so wish, to accept the benefit of the inconsistent acquittal. By the same token, the prosecutor may not ask to have the jury sent back to resolve the inconsistency, because it is the defendant, once again, who is entitled, should he so wish, to accept the benefit of the inconsistent acquittal. The defendant is authorized to call the shots at that critical moment, but the defendant must call them before the moment passes. After that, the jury will be gone beyond recall. The defendant may not stand mute and later complain about the verdicts he did nothing to cure at the only time a cure was still possible.

Id. at 135. Thus, this Court concluded, the requirement that an alleged inconsistency be raised by the defendant before the verdict is made final, outlined in the concurring opinion in *Price v. State,* 405 Md. 10,40 (2008), "is the only procedure which make sense." *Tate,* 182 Md. App. at 136. In *Hicks v. State,* 189 Md. App. 112, 129 (2009), this Court reiterated its commitment to the preservation requirements discussed in Tate and the Price concurrence, refusing to consider an unpreserved claim of inconsistency.

Davis claims that *Tate, Hicks,* and the *Price* concurrence are all incorrect. (Brief of Appellant at 23). He bases his argument on a supposition ***18** that no timely motion was made in Price's original trial, and on a deeply flawed comparison to the civil case of *Southern Mgmt. Corp. v. Taha,* 378 Md. 461 (2003), referred to by the Court of Appeals in *Price.*

The fact is that the *Price* majority contains no discussion whatsoever of preservation, either in Price's case or in subsequent cases. The Court of Appeals-like this Court- certainly has the discretionary authority to consider an unpreserved issue, and *Price* provided the Court of Appeals with an opportunity to announce a stark break with decades of well-established common law. Because the *Price* concurrence was a concurrence, and not a partial dissent, it seems plain that the *Price* Court itself did not consider the Price majority to constitute a holding that claims of inconsistency need not be raised before the verdict is final.

The *Price* Court noted the fact that the bar on inconsistent jury verdicts which it was announcing was only followed in a handful of other states, notably New York, Alaska, and Florida. 405 Md. at 28. While not mentioned in *Price,* New York and Alaska require an objection to be made before the verdict is final. *See, e.g., People v. Satloff,* 437 N.E.2d 271, 272 (N.Y. 1982) (objection to "repugnant" verdict "must be registered prior to the discharge of the jury properly to preserve the issue for review in this court"); *Roberts v. State,* 680 P.2d 503,507 (Alaska Ct. App. 1984) ("Absent plain error, a timely objection is required for other types of error that occur during the course of a ***19** trial. We see no reason why the same rule should not apply to inconsistent jury verdicts." (Footnote omitted)).

Florida requires a timely objection in civil cases, *Florida DOT v. Stewart,* 844 So.2d 773, 774 (2003), but also allows for legally inconsistent verdicts to be challenged by a "motion for arrest of judgment" in criminal cases. *Conrad v. State,* 977 So. 2d 766, 768 (Fla. Dist. Ct. App. 5th Dist. 2008). However, in Florida, the State is entitled to appeal from the grant of a motion in arrest of judgment. Fla. R. App. P. 9.140 (2012). In Maryland, the State is effectively precluded from seeking review of the grant of a motion for new trial. Md. Code Ann., Cts. & Jud. Proc. Art. § 12-302 (2006 Repl. Vol.); *In re Petition for Writ of Prohibition,* 312 Md. 280, 285 (1988).

Analogies to *Taha* are particularly inapt. Taha was a civil case. A jury found Southern Management liable for wrongful prosecution under a theory of respondeat superior. However, it found Southern Management's invididual employees not liable - a legal impossibility. The nearest criminal analog (if there is one) is to the "Rule of Consistency," which holds that when all of the alleged participants in a crime requiring more than one actor - such as conspiracy, fornication, riot, and dueling - are tried together, and all but one ***20** of the defendants is acquitted, the remaining defendant also must be acquitted. *See, e.g., State v. Johnson,* 367 Md. 418, 424 (2002). [6]

However, the decision to reach the question of inconsistency in Taha was a close one, and ultimately depended upon key factors that do not exist in criminal cases. Chief Judge Bell and Judge Raker dissented on the issue of preservation. 378 Md. at 496. The *Taha* majority recognized that the issue was arguably unpreserved because Southern Management did not raise the question of inconsistent verdicts until after the jury was discharged. However, the majority held that because Taha also had the power to challenge, either on appeal or in a motion for new trial, the jury's findings regarding the individual employees, it would be "fair" to address the inconsistency on appeal. 378 Md. at 491-492. Moreover, the majority ruled, the issue presented was raised in "the absence of a guiding court rule" on preservation, *id.* at 492, and even if the matter had been unpreserved, it was the reason the Court had granted certiorari in the first place, and therefore the Court "would have exercised [its] discretion in this case to resolve this important question of public policy and to provide guidance to the trial courts." *Id.* at 492 n.10.

***21** Here, the State has no right to appeal an inconsistent acquittal. There is a clear "guiding court rule" on preservation, announced by this Court in Tate and *Hicks,* and described by the concurrence in *Price.* Lastly, unlike Price itself, there is no new public policy or revision of the common law to be announced here. Even if these verdicts had been inconsistent (but see Part B, infra), in the case of inconsistent verdicts, "it is unclear whose ox has been gored." *United States v. Powell,* 469 U.S. 57, 65 (1984). Plain error review is inappropriate when there are sound tactical reasons to refuse to object (because had he objected, Davis might have been convicted of conspiracy as well), and where it is at least as likely that he was helped by the "error" as harmed by it. As this Court stated in *Brown v. State,* 169 Md. App. 442, 460 (2005) :

When defense counsel's trial tactics may have been the reason that defense counsel failed to correct an error by the trial judge, we are reluctant to recognize "plain error" because, absent such reluctance, defendants would be in a "heads I win, tails you lose" position and would benefit by intentionally failing to object. This would create judicial inefficiency and reward lawyerly non-diligence.

See Robinson v. State, 410 Md. 91 (2009) ("if the failure to object is, or even might be, a matter of strategy, then overlooking the lack of objection simply encourages defense gamesmanship.")

The issue is unpreserved. It is grossly unfair to wait until after the claimed error cannot be corrected before objecting. The asymmetrical rights of appeal in criminal cases make any analogy to civil cases inapt on issues of ***22** preservation. And plain error review should not be exercised when the defendant has already gained a clear advantage from his failure to object. [7]

B. There is no legal inconsistency in the verdict.

Even if this Court were to consider Davis' s unpreserved claim of inconsistent verdicts, it would fail. The claims are not legally inconsistent; arguably they are not even "factually" inconsistent. Only legally inconsistent verdicts are barred in Maryland. *McNeal v. State,* 200 Md. App. 510,517, *cert. granted,* 424 Md. 55 (2011) (argument scheduled for April 9, 2012).

Davis was acquitted of conspiracy to commit burglary, but he was convicted of burglary. The two findings are not inconsistent. The jury could have determined that Davis decided to assist Jerquan with the burglary without Jerquan's agreement - such as by taking it upon himself to serve as a lookout. *See Apostoledes v. State,* 323 Md. 456, 463 (1991)("It is well settled that aiding and abetting does not always require a conspiracy and that they are not the same offense.") Thus, any objection would have been fruitless. Just as Davis could have been sentenced consecutively for the conspiracy (which requires an agreement, but no act) and the burglary (which requires an act, but no agreement), the jury could find him guilty of one but not the other.

***23** A verdict which appears illogical under the circumstances of a particular case is not the sort of inconsistency with which the Court of Appeals was concerned in Price. What the concurring opinion in *Price* referred to as a "factual inconsistency" is not, in fact, a true "inconsistency" at all, and does not involve the same policy considerations or raise the same concerns as a true "legal" inconsistency. Unlike a true "legal" inconsistency, the very determination of the existence *vel non* of a "factual inconsistency" requires speculation and conjecture about the jury's deliberative process. Moreover, any attempt at revising a "factually inconsistent" verdict would risk significant Sixth Amendment problems that do not arise when a trial court addresses a legally inconsistent verdict.

"Factual inconsistency" is a term of art used to describe an illogical verdict; its "inconsistency" is purely speculative. People not involved in the jury's deliberations - judges, lawyers, defendants - are required to speculate as to what the jury did and did not find in order to determine that the verdict is or is not inconsistent. As this Court noted in *Tate, supra,* 182 Md. App. at 130, "the distinction... between a true legal inconsistency and a mere factual inconsistency is indispensable to any reasonable application of P*rice v. State.*" The Tate Court described a "legal inconsistency" as "something that does not involve speculation about possible or probable factual findings." *Id.* at 131.

***24** While the concurring opinion in *Price* analyzed the factual/legal distinction in much greater detail, the majority opinion tacitly acknowledged the distinction as well. The opinion referred to eliminating the traditional acceptance of *"certain types* of inconsistent verdicts by a jury in a criminal trial[,] 405 Md. at 23 (emphasis added), and noted that "[t]his Court has consistently stated that inconsistent jury verdicts are 'contrary to law,' and that the trial court should instruct the jury that it cannot return inconsistent verdicts." *Id.* at 24. The *Price* majority's exclusive discussion of jury verdicts "contrary to the law and contrary to the trial court's instructions," *id.* at 21, did not touch upon verdicts that were *not* contrary to the law or the instructions, but simply seemed to express internal factual discrepancies. Tellingly, the jury in this case was instructed that it was to "consider the charges separately, and return a separate verdict as to each charge." (T2.105). Yet on appeal, Davis asks this Court to consider his conviction for burglary only in relation to his acquittal for conspiracy, precisely what the jury was told not to do when determining his guilt or innocence.

The concurrence in *Price* discussed the distinction between "factual" and "legal" inconsistency at some length, stating that it was important to note explicitly that the Majority's holding applies only to "legally inconsistent" verdicts, not "factually inconsistent" verdicts. The Court should continue to recognize factually or "logically" inconsistent verdicts rendered by juries in criminal cases.

***25** A factually inconsistent verdict is one where a jury renders "different verdicts on crimes with distinct elements when there was only one set of proof at a given trial, which makes the verdict illogical." Ashlee Smith, Comment, *Vice-A-Verdict: Legally Inconsistent Jury Verdicts Should Not Stand in Maryland,* 35 U. Bait. L. Rev. 395, 397 n. 16 (2006). The feature distinguishing a factually inconsistent verdict from a legally inconsistent verdict is that a factually inconsistent verdict is merely illogical. By contrast, a legally inconsistent verdict occurs where a jury acts contrary to a trial judge's proper instructions regarding the law.

Price, supra, 405 Md. at 35 (Harrell, J., concurring). The *Price* concurrence then observed that of the minority of states forbidding inconsistent jury verdicts, only one - Alaska - appears to forbid "factually" inconsistent verdicts; all others bar legally inconsistent verdicts but allow factually inconsistent verdicts. *Id.* at 36 n.3.

As noted above, *Price* also refers to decisions in Florida and New York barring inconsistent verdicts. Neither Florida nor New York regularly use, as terms of art, the adjectives "factual" and "legal" to describe these distinct phenomena. These two states specifically distinguish between "factually" and "legally" inconsistent verdicts, and continue to allow the former - but they use different terms of art to distinguish the two. Florida uses the terms "inconsistent" and "truly inconsistent" to describe what *Price* and *Tate* referred to as "factual inconsistencies" and "legal inconsistencies." Florida has reiterated that the "general rule is that inconsistent verdicts are permitted in Florida," *State v. Connelly,* 748 So. 2d 248, 252 (Fla. 1999), and that only ***26** "truly inconsistent" verdicts - cases "in which an acquittal on one count negates a necessary element for conviction on another count," Fayson v. State, 698 So. 2d 825, 827 (Fla. 1997) - are prohibited. Verdicts in which an acquittal may simply be an act of leniency by the jury are allowed. *Connelly, supra.* "Factually inconsistent verdicts are permissible in Florida." *Shavers v. State,* 2011 Fla. App. LEXIS 19533 (Fla. Dist. Ct. App. 2d Dist. 2011)(filed Dec. 7, 2011).

While Florida ordinarily uses the terms "inconsistent" and "truly inconsistent" to distinguish between factual and legal inconsistencies, New York uses the terms "inconsistent" and "repugnant" to describe factually and legally inconsistent verdicts, allowing the former and barring the latter. As the New York Court of Appeals put it:

> When there is a claim that repugnant jury verdicts have been rendered in response to a multiple-count indictment, a verdict as to a particular count shall be set aside only when it is inherently inconsistent when viewed in light of the elements of each crime as charged to the jury. Review of the entire record in an attempt to divine the jury's collective mental process of weighing the evidence is inappropriate.

People v. Tucker, 431 N.E.2d 617, 617 (N.Y. 1981). Recently, the New York Court of Appeals compared its jurisprudence on improper "repugnant" verdicts to the analysis applied to lesser-included offenses. An improper "repugnant" conviction was one which was rendered legally impossible by an acquittal on a necessary lesser included offense. ***27** *People v Muhammad,* 2011 N.Y. LEXIS 3130 (filed October 20, 2011), slip op. at 10. The New York court described the analysis as one taken in the abstract - the question of consistency is "viewed from a theoretical perspective without regard to the evidence presented at [ ] trial[]" *Id.* at 13. "Because our repugnancy analysis requires that we review the elements of the offenses as charged to the jury *without regard to the proof that was actually presented at trial,* we cannot say that the convictions were repugnant." *Id.* at 15 (emphasis added).

In order for this Court or the lower court to determine whether these verdicts are factually consistent or not, it must engage in sheer speculation about which factual findings the jury did or did not make in this case. This is not the role of the court in a jury trial. The jury's role as a fact-finder rests at the core of the right to a trial by jury, guaranteed by the U.S. Constitution and the Maryland Declaration of Rights. A trial judge's comments to the jury are strictly scrutinized to make sure that the jury's independent fact-finding is not compromised. *Butler v. State,* 392 Md. 169, 183-184 (2006). What transpires between jurors in the sanctity of the jury room is essentially outside the power of the courts or any party to examine or second-guess. *See, e.g., Stokes v. State,* 379 Md. 618, 642 (2004) (refusing to "inquire into the deliberations and mental processes of the jurors"); Md. Rule 5-606 (2012) (jurors may not present evidence regarding their own verdict). Yet a claim of factual ***28** inconsistency may only be resolved by instructing the jury, in essence, "one of your factual findings is wrong. Go back and correct it."

Any such communication with a jury would violate the right to a jury trial. As the Court of Appeals stated in *Allen v. State,* 423 Md. 208, 228 (2011): "When a jury is impaneled, it must discharge all of its constitutional-fact finding duties in order to fulfill the guarantee of the Sixth Amendment. The right to a jury in a criminal trial necessarily includes the right to have the same trier of the fact decide all of the elements of the charged offense." (citation omitted.) Any attempt at correcting what the court and/or the parties perceive to be "factual errors" runs afoul of this fundamental concept. Accordingly, this Court was correct in *Tate* and *McNeal* when it held that "factually inconsistent" verdicts are acceptable after *Price.*

IV.

IF PRESERVED, THE STATE PRODUCED SUFFICIENT EVIDENCE TO SUSTAIN DAVIS'S CONVICTIONS.

Davis argues that the State failed to produce sufficient evidence of his guilt because the jury acquitted him on the conspiracy count. (Brief of Appellant at 26). The sufficiency of the State's evidence at the close of its case has nothing whatsoever to do with the ultimate conclusions made by the jury. There was abundant evidence of Davis's guilt, a fact he does not seem to directly contest on appeal; rather, he engages in post-hoc reasoning to attempt to find retroactive error on the court's part. His position is illogical and ***29** contrary to both law and fact. Moreover, because the premise of his argument is that the subsequent findings of the jury rendered erroneous the earlier ruling by the trial court, his complaint is by definition unpreserved. He could not have made the argument he makes now (and the trial court could not have considered it), because it does not rest upon the actual evidence presented by the State at trial, but upon Davis's speculation regarding possible factual findings by the jury after all evidence had been presented.

Without engaging in a lengthy history of the rise of the "sufficiency" appeal - made possible by an amendment to the Maryland Constitution effective December 1, 1950 - it suffices to say that an appeal on sufficiency grounds is not rooted in the concept of "jury error." "[A]n appellate review of the sufficiency of the evidence in a criminal case tried by a jury is predicated on the refusal of the trial court to grant a motion for judgment of acquittal." *Lotharp v. State,* 231 Md. 239, 240 (Md. 1963). As this Court has held, "[o]nly a judge can commit error.... Jurors do not commit error. The Fates do not commit error." *De Luca v. State,* 78 Md. App. 395, 397 (1989). What is being reviewed, when this Court reviews a case on sufficiency grounds, is not the jury's verdict, but the State's evidence - and more specifically, the trial court's ruling on the defendant's motion regarding the State's evidence. Hence the existence of Maryland Rule 4-324 (2012), requiring defendants in a jury ***30** trial to challenge the sufficiency of the evidence at the close of the State's case and again at the close of all evidence.

Thus, no reviewing court can or should look at the ultimate findings of fact of the jury to determine whether - well before the jury ever rendered its verdict - the trial court erred in its determination that the State has presented sufficient evidence to make out a prima facie case. Whether the State has met its burden of production is considered by the court when a motion for judgment is made. Whether the State has met its burden of persuasion is another matter entirely, and that is for the jury to determine. The mere fact that a jury was not persuaded, beyond a reasonable doubt, of the existence of an advance agreement between Davis and Jerquan does not mean that the State did not present sufficient evidence that a reasonable finder of fact could have made such a finding. To hold that the burdens of presentation and persuasion are identical is to effectively eliminate the role of the jury in criminal cases.

Accordingly, the fact that a jury acquitted Davis of conspiracy is irrelevant. The only question is whether there was sufficient evidence presented that would allow a reasonable finder of fact to conclude that Davis was guilty of burglary, beyond a reasonable doubt.

When the sufficiency of the evidence is challenged by an appellant, the State's burden is simply one of production - of showing that evidence was produced from which the finder of fact could reasonably find the necessary ***31** elements of the crime. A jury's verdict will not be disturbed if "after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). *Accord Wiggins v. State,* 324 Md. 551, 567 (1991), cert. denied, 503 U.S. 1007 (1992). The record need only show that "the verdicts were supported with sufficient evidence -- that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offense charged beyond a reasonable doubt." *State v. Albrecht,* 336 Md. 475, 479 (1994). This Court succinctly summarized the standard of review in *Skidmore v. State,* 166 Md. App. 82, 85 (2005): "The standard for our review of the sufficiency of the evidence is whether after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

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For a charge of burglary to be submitted to the jury, the State must present evidence that the accused broke into the dwelling of another with the intent to commit theft or a crime of violence. Md. Code Ann., Crim. Law §6-202 (2002). If proceeding under a theory of aiding and abetting, the State also must present evidence that, as the jury was instructed in this case, the alleged aider and abettor participated by "knowingly associating with the criminal ***32** venture with the intent to help commit the crime, being present when the crime is committed, and seeking by some act to make [t]he crime succeed." (T2.109). *See Maryland State Bar Ass'n, Maryland Criminal Pattern Jury Instructions* §6.01 at 491 (2005).

The evidence in this case supported a finding that Davis and Jerquan first rang Detwiler's bell to see if anyone was home, (T2.51), and then, receiving no answer, (T1.174), walked behind the house and tried to open her back window, (T1.176-177); when that proved unsuccessful, they climbed onto her back porch, pushed through a screen panel, and while one stood lookout, the other attempted to unlatch the back door. (T1.179-180). Jerquan and Davis both then crawled through the broken screen onto the enclosed porch, (T2.29), and then fled together when police arrived.

This evidence supported an inference that Jerquan and Davis had conspired to burglarize Detwiler's home, and that Davis at the very least assisted Jerquan when they first "cased" and then broke into the home. The jury was permitted to infer consciousness of guilt from Davis's flight; while his "mere presence" alone was is insufficient evidence, the testimony as to his and Jerquan's behavior gave rise to the permissive inference that Davis, minimally, was aware of what Jerquan was attempting and was assisting him in this endeavor. When the accused is in the precise spot where a crime is being committed, at the precise moment it is being committed, the fact-finder ***33** is "not required to believe that the appellant[was a] mere observer[] of a crime that was being committed." *Tasco v. State,* 223 Md. 503, 509 (1960). Davis himself confessed that the reason they rang the bell to the home was to see if anyone was home, because they didn't want to hurt anyone. (T2.51).

In *Clemons v. State,* 228 Md. 237 (1962), the Court of Appeals addressed a sufficiency claim that was factually similar. There, as here, the suspect had entered the private home of another but then fled emptyhanded when one of the homeowners yelled at him. *Id.* at 238. The Court of Appeals ruled that "an inference of intent can be drawn from the circumstances... It is not without significance that no other motive was shown... [T]he facts that the house contained articles of value, and the accused was accosted while ascending to the second floor and thus deprived of the opportunity to take anything, are relevant. We think the circumstances support the inference of a larcenous intent[.]" *Id. See also Pennington v. State,* 53 Md. App. 538, 551 (1983) (fact that defendant was found leaving locked tavern with crowbar, immediately after burglar alarm had sounded at tavern, sufficient to give rise to inference that purpose of break-in was to steal), *rev 'don other grounds,* 299 Md. 23 (1984). The Court of Appeals has stated that "[i]t is generally held that there must be proof of some fact or circumstance or act or declaration of the prisoner in addition to the proof of the mere breaking and entering from which the trier of the facts can find the intent." ***34** *Felkner v. State,* 218 Md. 300, 307 (1958). The fact that the breaking was done surreptitiously, after attempting to confirm that the house was empty, with one of the participants standing lookout while the other attempted to force the door, provides ample additional circumstances to allow the jury to determine that Davis and Jerquan had an improper intent when breaking into Detwiler's home. As this Court has observed,

Inevitably, inquisitive jurors may ask themselves, "Why was the appellant at that particular place at that particular time?" They will then proceed to answer the question for themselves, particularly in the total absence of either denial or explanation by the defense. Inquisitive fact finders might suppose that no explanation was forthcoming because there was no innocent explanation.

Molter v. State, 201 Md. App., 155, 162 (2011).

In this case there was no evidence of any conversation or prior planning involving both suspects. While such evidence is not necessary for a jury to find a conspiracy, *see, e.g., Cooper v. State,* 128 Md. App. 257, 267 (1999) ("the State is not required to offer proof of any formal arrangement; rather, a conspiracy can be inferred from the actions of the accused."), a jury is similarly free to conclude that absent some tangible evidence of prior agreement, it is not persuaded beyond a reasonable doubt that the conspiracy took place. Nonetheless, just as the jury could infer from Jerquan's actions that he intended to commit a theft, it

could infer that Davis made a similar inference after observing Jerquan's actions first-hand and in real time, and ***35** decided to assist his *soi-disant* "cousin" in his endeavor. The evidence presented was sufficient to allow a reasonable finder of fact to make this determination. Accordingly, Davis's conviction should stand.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the judgment of the Circuit Court for Montgomery County be affirmed.

Footnotes

1 The State will refrain from using the juvenile's entire name. See, e.g., Md. Rule 11-121 (Confidentiality in juvenile proceedings). The State requests that all references to the juvenile's last name, including those in Davis's brief, be stricken from the appellate record.

2 The State will refer to the transcripts as follows: H: April 27, 2011 hearing; T1: April 27, 2011 trial proceedings; T2: April 28 2011 trial proceedings; S: June 15, 2011 sentencing hearing.

3 Nor does the State concede that Davis was diligent in his efforts to obtain the witness; it is unclear if the defendant subpoenaed Jerquan H. at all, and if he did, it was the day before trial commenced.

4 The State is not conceding "error" in this case. Under other circumstances, it would indeed be error to introduce the prior recorded statement of a witness who was not available for cross-examination. It is not error, however, when the statement is introduced by the mutual consent of the parties.

5 In fact, counsel for Davis specifically stated "[n]o objection" when the recording was offered into evidence. (T2.24).

6 While Maryland retains this rule, some states and most federal circuits have abandoned the Rule of Consistency in light of the Supreme Court's recognition that there is no Constitutional right to a consistent verdict. See Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law Of Inconsistency,* 111 Harv. L. Rev. 771, 788-789 (1998).

7 If such unpreserved claims are to be considered, fairness would dictate that any grant of appellate relief entail retrial on both the convicted count AND the acquitted count. *See* Forrest G. Alogna, *Double Jeopardy, Acquittal Appeals, And The Law-Fact Distinction,* 86 Cornell L. Rev. 1131 (2001).

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