IN THE MAGISTRATE COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

v. Case No. 19-M20M-10172

MICHAEL L. CAPUTO,

Defendant.

DEFENDANT'S SPECIAL APPEARANCE AND MOTION TO DISMISS CRIMINAL CHARGES BASED UPON LEGISLATIVE IMMUNITY

Defendant Michael L. Caputo makes this special appearance and respectfully moves the Court to dismiss the misdemeanor charge for allegedly violating W.Va.Code §61-2-9(c), based upon legislative immunity, for the following reasons:

1. On or about September 6, 2019, a criminal complaint was filed against Defendant in the Magistrate Court of Kanawha County.

2. Defendant is an elected Delegate from the 50th District and has been a member of the West Virginia Legislature continuously since 1996.

3. In the CRIMINAL COMPLAINT, this alleged crime occurred on March 1, 2019, when the West Virginia Legislature was in session and Defendant was present at the State Capitol carrying out his official duties as a member of the Legislature.

4. According to the CRIMINAL COMPLAINT:

> On the above date, the defendant walked toward the steps leading to the main door of the House of Delegates (HOD) Chamber, inside the State Capitol Building, Kanawha County, in Charleston, WV. The defendant was making a commotion, talking loud, and saying nasty things as he started up the steps. The defendant was observed walking up to the door of the chamber and according to witnesses raised his hands, and either pushed, hit, or kicked the door, and stated open the "GD" door and nobody keeps me out. The double door entrance of the chamber had glass windows in each door and would

have allowed for easy visibility into the same. The defendant pushed the chamber door into and struck the HOD doorman, Logan Casterline, as he entered the chamber. After the incident, Mr. Casterline complained of pain and sought medical attention, on site and at a local hospital. Delegate Sharon Malcolm was interviewed after the incident and stated that while she was in the chamber, as the session was starting, the defendant stepped around her and advised her to get the "F" out of his way. She stated he then took his elbow and pushed her out of his way. She stated that she was out of his way and that he had to come up behind her in order to hit her with his elbow. She stated that she was already around her and had to turn to strike her. Delegate Malcolm stated that she wasn't initially hurt, but she was sore, and later advised the Capitol Police that she had sought medical attention for pain that she had been experiencing on the right side of her chest and shoulder, which is the area the defendant struck her. Delegate Malcolm has further advised, that she has continued to experience pain, and is still under physician's care for this injury. Based on information obtained from witness statements, the complainant believes that a battery occurred on Sharon Malcolm and Logan Casterline.

5. While Defendant disputes many of the allegations made in the CRIMINAL COMPLAINT, there is no dispute that this alleged incident occurred while the West Virginia House of Delegates was in session, when Defendant was entering the chambers of the House of Delegates to participate in the session, and indisputably occurred while Defendant was acting within the legislative sphere.

6. The "legislative sphere" is defined in W.Va.Code §4-1A-4 as "all activities that are an integral part of the deliberative and communicative processes by which members of the Legislature participate in committee and house proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either house."

7. Being physically present in the chamber of the House of Delegates is an "integral part of the deliberative and communicative processes by which members of the

Legislature participate in committee and house proceedings."

8. Defendant was both permitted and obligated to be in the House Chambers when the bell rings calling the House to convene. In particular, House Rule 27 provides in pertinent part, "On a call of the House, the door shall not be closed against any member until his name shall have been called twice."

9. As a member of the House of Delegates entitled to be in the chamber, Defendant was trying to enter the House Chamber during the time between the prayer and the pledge of allegiance.

10. Under controlling West Virginia law, members of the Legislature are entitled to legislative immunity from civil and criminal prosecutions for all acts committed within the legislative sphere.

11. The facts alleged in the CRIMINAL COMPLAINT fall squarely within the legislative immunity mandated by W.Va.Code §4-1A-6, which provides:

> (a) Legislative immunity, affording protection under the Separation of Powers Doctrine and the Speech or Debate privilege, **extends to all of a legislator's legislative acts**, as defined in section three of this article.
>
> (b) The Speech or Debate privilege, when it applies, **is absolute** and has two aspects:
>
> > (1) A **member of the Legislature has immunity extending both to civil suits and criminal prosecutions for all actions within the legislative sphere, even though the conduct, if performed in other than a legislative context, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes**; and
> >
> > (2) A member of the Legislature is provided a testimonial privilege that operates to protect those to whom it applies from being compelled to give testimony as to privileged matters and from being

compelled to produce privileged documents. (Emphasis added).

12. Under W.Va.Code §4-1A-13, the legislative immunity described in W.Va.Code §4-1A-6, may be invoked to shield a legislator from judicially ordered relief, including but not limited to the following:

(1) **Criminal prosecution for his or her legislative acts;**

(2) Liability for damages for his or her legislative acts;

(3) Declaratory judgments with respect to his or her legislative acts;

(4) Injunctive relief with respect to his or her legislative acts; and

(5) Extraordinary writs with respect to his or her legislative acts.

(Emphasis added).

14. Thus, this legislative immunity shields a legislator from any criminal prosecution for legislative acts committed in the legislative sphere.

15. Under W.Va.Code §4-1A-3, "Legislative acts" means:

an act that is generally to be performed by the Legislature in relation to the investigative, deliberative and decision-making business before it. A "legislative act":

(1) **Is an integral part of the processes by which members participate in proceedings that come before the Senate or House of Delegates or a committee thereof**; and

(2) Relates to the consideration and passage or rejection of proposed legislation; or

(3) Relates to other matters that constitutional law places within the jurisdiction of either the Senate, the House of Delegates or the legislative branch of state government as a whole. (Emphasis added).

16. Consistent with the definition of "legislative sphere," being present in the chambers

of the House of Delegates when the Legislature is in session is "an integral part of the processes by which members participate in proceedings that come before the Senate or House of Delegates or a committee thereof."

17. The Legislature very broadly described the extent of legislative immunity in W.Va.Code §4-1A-7, as follows:

> The scope of legislative immunity includes, but is not limited to, the following legislative acts:
>
> (1) Introducing and voting for legislation;
> (2) Failing or refusing to vote or enact legislation;
>
> (3) Voting to seat or unseat a member;
>
> (4) Voting on the confirmation of an executive appointment;
>
> (5) Making speeches;
>
> (6) Enforcing the rules of the Senate or House of Delegates or the joint rules of the Legislature;
>
> (7) Serving as a member of a committee or subcommittee;
>
> (8) Conducting hearings and developing legislation;
>
> (9) Investigating the conduct of executive agencies;
>
> (10) Publishing and distributing reports;
>
> (11) Composing and sending letters;
>
> (12) Drafting memoranda and documents;
>
> (13) Lobbying other legislators to support or oppose legislation;
>
> (14) Abolishing personnel positions; and
>
> (15) Hiring and firing employees.

18. Not every act committed by a legislator is subject to legislative immunity. For

example, in W.Va.Code §4-1A-8, the Legislature identified the following actions by legislators that are not so protected:

> Legislative immunity does not extend to activities by legislators that are without lawful authority under constitutional law, statutory law or rules of the legislature, including, but not limited to, the following:
>
> (1) Using an unconstitutional procedure to enact legislation;
>
> (2) Conducting an illegal investigation or an unlawful search or seizure;
>
> (3) Performing another otherwise valid legislative act without proper legislative authority;
>
> (4) Filing a false or incomplete report, disclosure or claim regarding an otherwise valid legislative act; or
>
> (5) Using legislative office for private gain in violation of the provisions of chapter six-b of this code that define and enforce governmental ethics.

19. While this list is not all inclusive, there is nothing to suggest that a legislator, who is attempting to enter the chambers of the House of Delegates to be seated during the legislative session, is barred from asserting legislative immunity for doing so.

20. The West Virginia Supreme Court has never issued any decision applying and interpreting any of these legislative immunity statutes. Defendant has found a case from another jurisdiction where a legislator accused in a civil action of committing a battery on a witness appearing at a committee was successful in having the civil action dismissed based upon legislative immunity. *Allen v. Superior Court of California*, 171 Cal.App.2d 444, 340 P.2d 1030 (1959).

21. Our Constitution, legislative rules and our statutes grant unique privileges to legislators doing legislative sessions. Our founding fathers knew that protecting legislators to assure they are free to participate in legislative proceedings was critical.

and vital to our system of government. The most important privileges granted to all members is a right to enter, to be present to vote, and to otherwise participate in legislative activities. As stated above, House rules specifically say when a call of members to the House is made, members are required to attend. The Speaker even has authority to send out the Sergeant of Arms to compel members to attend. House rules further say that no one can bar member being present during a session. Defendant was trying to enter the House chamber in an effort to carry out his privileges and obligations as a member of the House of Delegates. Because this legislative act committed within the legislative sphere is statutorily protected activity, Defendant cannot be prosecuted criminally based upon the allegations made in the CRIMINAL COMPLAINT.

For the foregoing reasons, Defendant Michael L. Caputo respectfully moves this Court to dismiss the misdemeanor charges for allegedly violating W.Va.Code §61-2-9(c), based upon legislative immunity.

MICHAEL L. CAPUTO, Defendant,

–By Counsel--

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CERTIFICATE OF SERVICE

I, J. Timothy DiPiero, counsel for the defendant herein, do hereby certify that a true and correct copy of the foregoing **DEFENDANT'S SPECIAL APPEARANCE AND MOTION TO DISMISS BASED UPON LEGISLATIVE IMMUNITY** was served upon the following counsel of record, by hand-delivery the 5th day of December, 2019.

Morgan Switzer
Asst. Prosecuting Attorney
301 Virginia Street East
Charleston, West Virginia 25301

J. Timothy DiPiero (WV Bar # 1021)