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STATE OF MARYLAND

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IN THE

Plaintiff

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CIRCUIT COURT

v.

CIRCUIT COURT
BALTIMORE CITY
CRIMINAL DIVISION

*

FOR

GARRETT MILLER

*

BALTIMORE CITY

Defendant

*

Case No. 115141034

* * * * *

MOTION TO DISMISS INDICTMENT(S) FOR DEFECT IN THE INSTITUTION OF THE PROSECUTION AND REQUEST FOR A HEARING

NOW COME, Defendant, Garrett Miller, by and through his undersigned counsel, pursuant to Maryland Rule 4-252, and file this Motion to Dismiss based on a defect in the institution of the prosecution and in support thereof state as follows:

Introduction

Maryland Rule 4-252 provides that, a motion to dismiss based on a defect in the institution of the prosecution must be made within 30 days of the appearance of counsel or, if discovery discloses the basis of a motion, within five days after the discovery is furnished. Md. Rule 4-252(b). Undersigned counsel received certain belated disclosures, only upon Order from this Court, from the Office of the State’s Attorney on Monday June 20, 2016. Some of those disclosures form support for this motion but undersigned counsel has been instructed by this Court not to use those disclosures without leave of this Court. Undersigned counsel would like those disclosures made part of the record for this motion, under seal if directed by this Honorable Court.

Subsequent to the disclosures the State made on June 20, 2016, an affidavit of Sheriff Sam Cogan was unsealed in federal court and an article was published in the Baltimore Sun regarding information relevant to the charging of the officers at both the District Court and Circuit Court levels.

It has been revealed through this recent discovery and the leaks published by the Baltimore Sun that there were defects in the institution of the prosecution of the Officers charged in the death of Freddie Gray. These defects occurred at both the District Court and Circuit Court levels and rise to a level which would violate the Officers' rights of due process secured by the United States Constitution as well as the Maryland Declaration of Rights.

The District Court Defect

Maryland Rule 4-211 prescribes the way in which a peace officer may properly apply for charges. It provides that "a judicial officer may file a statement of charges in the District Court against a defendant who has not been arrested for that offense upon written application containing an affidavit showing probable cause that the defendant committed the offense charged. If not executed by a peace officer, the affidavit shall be made and signed before a judicial officer." Md. Rule 4-211(b)(1).

In *Shaefer*, the Court of Special Appeals described the oath requirement for a peace officer, as well as the knowledge required for the peace officer to sign under oath for charges against a defendant. *Schaefer v. State*, 31 Md. App. 437, 444-47 (1976). The Court of Special Appeals stated that,

[i]n determining the existence vel non of probable cause, *the judicial officer may give consideration to the special significance which objects, happenings, and individuals may have conveyed to a trained, experienced and knowledgeable person swearing to the facts set out.* Those sworn facts may be based on hearsay information even from an unidentified informant, and need not reflect the direct personal observations of the affiant, *but they must contain some of the underlying circumstances from which the affiant could be reasonably justified in a belief that the hearsay information was reliable* or the informant was credible." *Id.* (emphasis supplied).

Id.

In *Schaefer*, a Deputy State's Attorney signed the application for statement of charges under oath. The Court of Special Appeals determined that, because the Deputy State's Attorney had the requisite knowledge to be able to provide the application under oath, there existed no infirmity in the process. The *Schaefer* Court based this requisite knowledge finding on the fact that the Deputy State's Attorney had reviewed the evidence himself and had physical possession of the evidence that he had sworn to in the affidavit. The Court of Special Appeals observed,

They were known to the affiant [Deputy State's Attorney] *because of his personal observation* of articles of incorporation of the subject corporations, ledgers and records of accounts for the corporations, and cancelled checks drawn on the corporate accounts payable to Schaefer, *all of which were in the possession of the State's Attorney* [the affiant's own office]. This recounting under oath of facts obtained by the personal observation of the affiant was sufficient to establish their trustworthiness in the context of probable cause.

Id. (emphasis supplied).

In contrast to *Schaefer*, Sheriff Cogan has signed an affidavit that was recently unsealed in federal court that he had no role in the investigation into the death of Freddie Gray. Prior to this revelation, it was represented that a thorough and independent investigation had been conducted jointly by the Office of the State's Attorney and Sheriff Cogan's office. Sheriff Cogan states in his affidavit that he was simply presented a narrative by the State's Attorney's Office and, at most, retyped the narrative, signed it under oath, and presented it for charges and arrest warrants for the six Officers. He had no personal observations or information to establish that the information he was swearing to was reliable, nor was any of the evidence being held by the Baltimore City Sheriff's Office. As a result of the improper Statement of Charges sworn to under oath and filed by Sheriff Cogan, the Officers were charged with varying misdemeanor and felony counts, had arrest warrants issued for them, and were processed through Baltimore City Central Booking and Intake Center before bail determinations were made.

The defect in the institution of the prosecution at the District Court level was substantial. However, compounding the defect at the District Court, further defects occurred at the Circuit Court level when the State sought Indictments against the six Officers.

The Circuit Court Defect

The grand jury returned the following charges by way of indictment against the Officers in this case: Officer Garrett Miller - assault in the second degree, two counts of misconduct in office, and reckless endangerment; Officer William G. Porter - manslaughter, assault in the second degree, misconduct in office, and reckless endangerment; Lieutenant Brian Rice - manslaughter, assault in the second degree, two counts of misconduct in office, and reckless endangerment; and Sergeant Alicia White - manslaughter, assault in the second degree, misconduct in office, and reckless endangerment.

It has been learned through discovery that there were defects in the institution of the prosecution before the grand jury. It was also reported in the Baltimore Sun on Saturday, June 25, 2016, that, not only was a script given to the lead detective in this case to present to the grand jury, that script had material misrepresentations of fact contained within it. Further, it was reported that prosecutor Jan Bledsoe gave unsworn testimony before the grand jury. The report details that, instead of the lead detective in the police investigation answering questions under oath posed by the grand jurors, it was instead the prosecutor giving testimony when she had not been sworn as a witness before the grand jury.

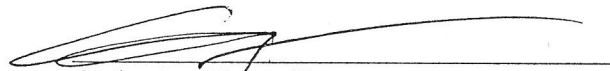
Undersigned counsel believes that the State has provided this Court with the transcripts of testimony of Detective Taylor before the grand jury to let the court determine whether it should be disclosed. It is undersigned counsel's position that this testimony, the script that it was based on, and the testimony of Jan Bledsoe, and any other witnesses who presented testimony (sworn or

unsworn) must be disclosed to the defense in this case. This meets the particularized need requirement provided by the U.S. Supreme Court as well as Maryland's appellate courts as detailed in the accompanying Motion for Disclosure of Grand Jury Proceedings.

It is only through (1) disclosure of grand jury transcripts, (2) leave of court to use sealed information belatedly provided in discovery by the State, (3) and an evidentiary hearing on this motion that the defense will be able to demonstrate to the Court that there were multiple defects in the institution of the prosecution of this case that, individually and collectively, rose to the level of prosecutorial misconduct and a violation of the Officers' rights to due process.

WHEREFORE, Defendant, Garrett Miller, hereby respectfully moves this Honorable Court to permit Defendant to supplement this motion as necessary, schedule a hearing on this matter, and, after said hearing, Dismiss the Indictment with Prejudice.

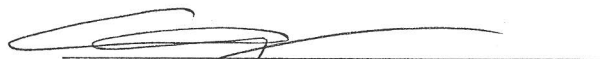
Respectfully submitted,



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REQUEST FOR A HEARING

Defendant, by and through his counsel, request a hearing on this Motion.


Catherine Flynn

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing Motion was this 27th day of June, 2016, a copy of the foregoing Motion was hand delivered to the Office of the State's Attorney for Baltimore City, 120 E. Baltimore Street, 9th Floor, Baltimore, Maryland 21202.


Catherine Flynn