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CRIMINAL DIVISION

STATE OF MARYLAND

v.

GARRETT MILLER

IN THE
CIRCUIT COURT FOR
BALTIMORE CITY
CASE No. 115141034
(Filed under seal)

* * * * *

STATE'S MOTION FOR APPROPRIATE RELIEF UNDER SEAL

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; Matthew Pillion, Assistant State's Attorney for Baltimore City; and Sarah Akhtar, Assistant State's Attorney for Baltimore City; and respectfully moves this Court for appropriate relief under seal as set forth below.

I. Background

On October 14, 2015, this Court granted in part the Defendant's Motion to Compel Discovery and ordered the State to "provide counsel for the [Defendant], as officers of the court, for use in their preparation for trial, with copies of any and all documents pertaining to the investigation and prosecution of the [Defendant], with the exception of attorney work product items created after May 1, 2015." For a period commencing on October 27 and ending on November 4, the State made available to defense counsel all of the documents covered by the Court's Order. These documents included over 3,500 emails and attachments from the network computer accounts of 13 members of the Office of the State's Attorney, nearly 1,500 non-email documents, as well as 52 multi-media files (CCTV, interview recordings, etc.), many of which, of course, had already been provided in discovery.

II. The Relief Requested

Counsel have now finished their review of these documents and have specified over a thousand pages of various materials they requested that the State provide, all of which the State

is mailing to counsel except a small fraction of items that comprise the subject of this Motion. Having facilitated counsel's examination of these documents as officers of the court, the State now respectfully requests that this Court review these remaining documents *in camera* and order that copies of these documents need not be provided to the Defendant's counsel. These items fall into the following categories: (A) documents that constitute attorney work product and/or executive deliberations; (B) documents related to the interaction between the Office of the State's Attorney and the Press; (C) State's Attorney Marilyn Mosby's May 1, 2015, public schedule and draft statements; (D) drafts of the Statement of Probable Cause used in the Application for the Statement of Charges originally filed in District Court; (E) records related to the Grand Jury's investigation in this case; (F) documents created after May 1, 2015 and thus outside the date specified by the Court's Order; and (G) a miscellany of emails and documents. As outlined below, these items are not even arguably relevant or admissible in the Defendant's trial, are not helpful to his defense, and/or are especially sensitive because of their potential impact if they ever somehow became public.

A. Documents that constitute attorney work product and/or executive deliberations

The first category of documents (page numbered A001-A167) that the State requests not be copied to the Defendant's counsel consists of ten items constituting classic attorney opinion work product and/or executive deliberations. Preliminarily, the State notes its full understanding and respect for the Court's ruling that a prosecutor's pre-charging investigative work product may be subjected to heightened disclosure requirements. The Supreme Court has long distinguished between "those aspects of the prosecutor's responsibility that cast [her] in the role of an administrator or investigative officer rather than that of advocate." *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976). Nevertheless, "the work of an advocate" extends to work "integral

to the initiation of the prosecution” and “involv[ing] the exercise of professional judgment,” including the prosecutor’s “drafting of the [charging document], her determination that the evidence [is] sufficiently strong to justify a probable-cause finding, her decision to file charges, and her presentation of the information” to the judicial body to initiate charges. *Kalina v. Fletcher*, 522 U.S. 118, 130 (1997). Put succinctly, even during the pre-charging stage, *some* of a prosecutor’s actions are “the work of an advocate” and, therefore, may constitute classic attorney opinion work product that is privileged from adversarial discovery.

Explaining this privilege, the Supreme Court has long held that “an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party’s counsel in the course of his legal duties . . . falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims.” *Hickman v. Taylor*, 329 U.S. 495, 510 (1946). Additionally, under Maryland’s constitutional separation of powers, “the judiciary . . . is not authorized to probe the mental processes of an executive or administrative officer,” and this “protection from disclosure clearly extends to confidential advisory and deliberative communications between officials and those who assist them in formulating and deciding upon future governmental action.” *Hamilton v. Verdow*, 287 Md. 544, 558-61 (1980).

It is through this lens that the State respectfully asks the Court to consider exempting the following items from being copied to the Defendant’s attorneys pursuant to the Court’s discovery order:

1. (A001- A004) This item contains an email dated April 30 sent from a Deputy State’s Attorney to the Chief Deputy State’s Attorney and an Assistant State’s Attorney, and contains an attachment listing possible charges against each of the six defendants, locations where alleged crimes occurred, as well as the relevant code sections.

2. (A005-A007) This item contains an email dated April 30 sent from a Deputy State's Attorney to the Chief of External Affairs with an attachment containing an outline of possible charges against each of the six defendants, including the relevant code sections and maximum penalties for each charge.
3. (A008-A011) This item contains an email labeled "Privileged and Confidential" and "Contains Attorney Work Product" dated April 25 forwarded from the Chief Deputy State's Attorney to two Deputy State's Attorneys, an email that he prefaced as "an effort to get down on paper some of my thoughts about where we are and what needs to be considered/done" and that then outlines the Chief Deputy's thoughts about the strengths/weaknesses of the case, potential trial strategies, possible charges that could be brought based on ways the evidence could meet the elements, and whether the Office *should* bring such charges. The email also includes the Chief Deputy's instructions about prioritizing/verifying the gathering and examination of evidence.
4. (A012-A079) This item contains an email dated April 27 sent from a Deputy State's Attorney to the State's Attorney, the Chief Deputy State's Attorney, other Deputy State's Attorneys, and an Assistant State's Attorney, and cc'd to the State's Attorney's Executive Assistant. Attached to the email are LexisNexis copies of four appellate opinions gathered as case preparation research by the Deputy: *Simpkins v. State*, 88 Md. App. 607 (1991); *Williams v. State*, 100 Md. App. 468 (1993); *State v. Albrecht*, 336 Md. 475 (1993); and *State v. Kanavy*, 416 Md. 1 (2009).
5. (A080-A116) This item contains an email dated April 27 sent from a Deputy State's Attorney to herself. It consists of legal research conducted by a Deputy State's Attorney during the Office's deliberations regarding the charges to bring in this case and is simply a LexisNexis copy of *State v. Kanavy*, 416 Md. 1 (2010), and two copies of *Simpkins v. State*, 88 Md. App. 607 (1991).
6. (A117-A142) This item contains an email from the LexisNexis research system to a Deputy State's Attorney with an attached copy of *Williams v. State*, 100 Md. App. 468 (1993), which the Deputy gathered as part of the Office's legal research prior to charging.
7. (A143-A145) This item contains the original email listed in A008-A011, which is an email labeled "Privileged and Confidential" and "Contains Attorney Work Product" dated April 25 sent from the Chief Deputy State's Attorney to a Deputy State's Attorney and cc'd to the State's Attorney, an email that he prefaced as "an effort to get down on paper some of my thoughts about where we are and what needs to be considered/done" and that then outlines the Chief Deputy's thoughts about the strengths/weaknesses of the case, potential trial strategies, possible charges that could be brought based on ways the evidence could meet the elements, and whether the Office *should* bring such charges. The email also includes the Chief Deputy's instructions about prioritizing/verifying the gathering and examination of evidence.
8. (A146-A147) This item contains an email dated April 21 sent from a Deputy State's Attorney to another Deputy State's Attorney and the Chief Deputy State's Attorney outlining the Deputy State's Attorney's analysis of Mr. Gray's detention, arrest, and search under the attorney's judgment of the relevant Fourth Amendment case law.

9. (A148-A157) This item contains legal research from a Deputy State's Attorney's hard drive examining the law of several crimes with which the defendants could be charged, and was created during the Office's deliberations regarding the charges to bring in this case.

10. (A158-167) This item is a document outlining a Deputy State's Attorney's view of the supporting evidence and possible charges that could be brought against Defendants Porter, Goodson, Rice, and White, along with his research about the elements and jurisprudence of the crimes alleged.

The State sincerely believes that even though these items were created prior to the charges being filed in this case, each of the items constitutes attorney work product and/or the deliberative and advisory products of executive branch officials. For example, many of the items are clearly the work of a Deputy State's Attorney acting as an advocate and outlining his professional judgment about what charges the Office of the State's Attorney could bring based on particular evidence. Other items reflect another Deputy State's Attorney acting as an advocate and executive advisor collaborating with the City's elected chief prosecutor on the eve of the decision to charge about what particular evidence might mean or depict. Likewise, items 3 and 7 contain both explicit and obvious attorney work product as well as intimate executive deliberations, with the Chief Deputy State's Attorney candidly sharing with his closest colleagues his personal thoughts about the merits of the case, how best to prosecute it, and whether certain charges should be filed at all as a matter of official prosecutorial discretion. Ordering such materials to be copied to a criminal defendant's attorneys would not only contravene the very fiber of *Hickman* and *Hamilton* but would set a chilling precedent with no commensurate benefit to this Defendant's fair ability to prepare for trial.

B. Documents related to the interaction between the Office of the State's Attorney and the Press

The second category of documents (page numbered B001-B011) that the State requests not to copy for the Defendant's counsel consists of the following emails and documents about the Office of the State's Attorney's interaction with the Press:

1. (B001-B002) This item contains an email dated April 30 sent from the State's Attorney to herself containing an attachment of various personal notes related to possible remarks to the press following the next day's press conference.
2. (B003-B005) This item contains an email exchange dated from April 15 through April 20 between the State's Attorney's Director of Communications and a reporter from a newspaper requesting to set up an informal meeting between the State's Attorney and the newspaper, and includes a statement on the death of Freddie Gray. Attached to the email is a blurred image of the seal of the Office of the State's Attorney.
3. (B006) This item is another copy of a document listed in B002.
4. (B007-B008) This item is a document that contains possible talking points the State's Attorney could make to the press related to the Grand Jury's indictments returned against each of the six officers, including the criminal charges against each of the six officers.
5. (B009-B011) This item contains an email exchange dated April 22 sent between the Director of Communications and a newspaper reporter, which was in turn forwarded with comments to the Chief of External Affairs and cc'd to the State's Attorney, the Chief Deputy State's Attorney, and two Deputy State's Attorneys.

In short, not a single one of the above items constitutes a statement of any trial witness, and none of them are relevant, admissible, or helpful to the defense. Instead, these items reflect the public relations actions and deliberations of an elected public official and her advisers. The State willingly made them available for defense counsel's review pursuant to this Court's Order, but providing copies of these documents to persons outside the Office of the State's Attorney would serve no purpose related to counsel's defense of their client and would merely heighten the potential that those copies would somehow become public. Accordingly, the State respectfully asks that these documents not be ordered copied to the Defendant's attorneys

C. State's Attorney Marilyn Mosby's May 1, 2015, public schedule and draft statements

The third category of documents (page numbered C001-C022) that the State requests not to copy for the Defendant's counsel consists of the following two items comprising State's Attorney Marilyn Mosby's May 1, 2015, draft statements:

1. (C001-C011) This item contains an email dated April 30 sent from the Chief Deputy State's Attorney to the State's Attorney and her Chief of External Affairs and includes an attachment with edits to a draft of possible remarks the State's Attorney planned to deliver at the upcoming press conference, including a Statement of Probable Cause and charges against each of the defendants.

2. (C012-C022) This item contains a draft of possible remarks the State's Attorney planned to deliver at the May 1 press conference, including a Statement of Probable Cause, charges against each of the defendants, and the bases for those charges.

None of these drafts or documents are remotely relevant, admissible, or helpful to the defense. The Defendant's attorneys have viewed and even transcribed the State's Attorney's actual May 1 comments. These items merely show an elected public official's internal drafts and notes considering variations on a speech to constituents, items which further no legitimate defense purpose and which should not be copied to the Defendant's counsel.

D. Drafts of the Statement of Probable Cause used in the Application for the Statement of Charges originally filed in District Court

The fourth category of specific documents (page numbered D001-D116) that the State requests not to copy for the Defendant's counsel consist of multiple separate drafts of and corresponding emails about the Statement of Probable Cause used in the Application for the Statement of Charges originally filed in District Court written and edited largely by attorneys within the Office of the State's Attorney. These various drafts are attorney work product or executive deliberative materials and/or are not even arguably relevant or admissible in the

Defendant's trial, are not helpful to his defense, and are not investigative material. Moreover, these documents do not constitute statements of any trial witness or party opponent and have since been superseded by the Grand Jury's Indictment. Instead, these documents (a) show the writing, grammatical, and typographical skills and mistakes of their attorney authors; (b) reflect the deliberations and thought processes of members of the State's Attorney's Office; and (c) contain attorney opinions about the significance of certain facts in the case. Accordingly, the State respectfully asks that these documents not be ordered copied to the Defendant's attorneys.

E. Records related to the Grand Jury's investigation in this case

The fifth category of materials (page numbered E001-E006) contains drafts of subpoenas to compel various witnesses to appear before a Baltimore City Grand Jury. These subpoenas are mere drafts but reflect the actual activities of the Grand Jury's investigation into this matter. Such matters are secret and not open to public inspection absent a court order. *See e.g. In re Criminal Investigation No. 437*, 316 Md. 66 (1989) ("Secrecy is the lifeblood of the grand jury."); *see also* Rule 4-642(a) ("Files and records of the court pertaining to criminal investigations shall be sealed and shall be open to inspection only by order of the court."). As such, these materials should not be copied to Defendant's counsel.

F. Documents created after May 1, 2015, and thus outside the date specified by the Court's order

The sixth category of materials contains a map (page numbered F001) created after May 1 that details key events that took place on the day of Freddie Gray's arrest. The document falls outside the date range specified by the Court's order issued on October 14, 2015, and thus should not be copied to the Defendant's counsel.

G. A Miscellany of Emails and Documents

The final category of materials (page numbered G001-G002) that that the State requests not to disclose to the Defendant consists of the following miscellaneous items:

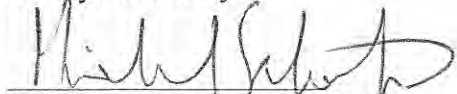
1. (G001) This item contains an email dated April 29 sent from a Sheriff to a Deputy State's Attorney stating that his email account is active.
2. (G002) This item contains an email dated April 19 sent from the State's Attorney to her Executive Assistant, and cc'd to the Director of Communications, the Chief of External Affairs, the Chief Deputy State's Attorney, and Deputy State's Attorneys, commenting on a forwarded email exchange regarding a press conference held by the Mayor's office about Mr. Gray's death.

These items are not even conceivable relevant, admissible, or helpful to the defense. They further no legitimate defense purpose and should not be copied to the Defendant's counsel.

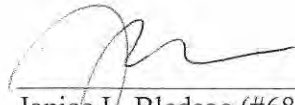
Wherefore, the State respectfully requests that this Motion for Appropriate Relief Under Seal be granted in its entirety.

Respectfully submitted,

Marilyn J. Mosby



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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of February, 2016, a copy of the State's Motion for Appropriate Relief Under Seal was mailed and e-mailed to:

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