

STATE OF MARYLAND

2016 APR 18 P 12:31

IN THE
CIRCUIT COURT FOR
BALTIMORE CITY

v.

CRIMINAL DIVISION

EDWARD NERO

CASE No. 115141033

* * * * *

STATE'S MOTION TO QUASH THE SUBPOENA DUCES TECUM SERVED ON ASSISTANT STATE'S ATTORNEY PATRICK MOTSAI

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 pursuant to Rule 4-266(c), for the reasons outlined below, moves this Court to quash a defense subpoena served on Assistant State's Attorney Patrick Motsay compelling him to testify and to produce various records at the May 10, 2016, trial of the Defendant:

1. On April 11, 2016, the Defendant served a subpoena duces tecum on Assistant State's Attorney Patrick Motsay, who is the chief of the Charging Division for the Office of the State's Attorney for Baltimore City. The subpoena, attached herein as State's Exhibit 1, compels Mr. Motsay to appear and testify at the upcoming May 10, 2016, trial and to produce and permit inspection and copying of "[a]ll records of all cases reviewed by the SAO at CBIF from January 1, 2015, through July 1, 2015, including the charges presented, the charges declined, and the charges that were forwarded for prosecution."

2. Rule 4-265 provides each party with the broad right to subpoena witnesses for trial. That right, however, is not unqualified. Rather, the right to compulsory process "is only assertable where the witnesses to be called will offer competent and material

testimony.” *Darby v. State*, 47 Md. App. 1, 5 (1981). Where “the testimony sought to be elicited [is] irrelevant to the issues” in the case, enforcing subpoenas would serve “no useful purpose, but instead would only [waste] the resources of the State.” *Id.* at 8-9. To that end, Rule 4-266 permits a party for good cause shown to move to quash a subpoena when justice requires protecting the person subpoenaed from “annoyance, embarrassment, oppression, or undue burden or expense.” Rule 4-266(c). “[T]he Maryland Rules were, after all, established to promote—not to impede—the orderly and efficient administration of justice.” *Darby*, 47 Md. App. at 8.

3. Assessing the requirements of justice in enforcing a subpoena, thus, turns on the relevance of the compelled testimony or documentary production. To be deemed relevant, the evidence must have a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 5-401. A “consequential fact” is also called a “material proposition,” and “[m]ateriality looks to the relation between the proposition for which the evidence is offered and the issues in the case.” *Smith v. State*, 423 Md. 573, 590 (2011). Even when evidence is relevant, it “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 5-403.

4. Applying these principles, the subpoena duces tecum that the Defendant issued to Mr. Motsay unquestionably should be quashed. First, Mr. Motsay has had no involvement in the investigation of this case, he is not part of the trial team, and so he could offer no relevant testimony regarding Mr. Gray’s arrest and in-custody death.

Second, the documents that the Defendant has compelled Mr. Motsay to produce (and presumably to testify about) encompass materials so varied that they could have no conceivable relevance to any of the issues in this case. What competent and material testimony could Mr. Motsay offer about city-wide charging decisions that would bear on whether the Defendant violated the duties of his office or acted reasonably toward Mr. Gray? The jury will consider the reasonable-officer standard, not the reasonable-prosecutor standard, and the duties of a Baltimore police officer, not the duties of a Baltimore prosecutor. Furthermore, the volume of documents the Defendant has demanded would be unduly burdensome and, in some instances, impossible to produce. During the six-month span identified in the subpoena, the State's Attorney's Office reviewed approximately 7,431 cases—just counting on-view arrests. Moreover, besides bare statistics, many of the “records” associated with case reviews—draft statements of probable cause and CJIS code selections, for example—are not even possessed by the State's Attorney's Office once the review is completed; rather they are possessed, if at all, by the arresting officers themselves, the Department of Public Safety and Correctional Services, or the Commissioners of the District Court of Maryland. Third, in addition to subpoenaing Mr. Motsay, the Defendant has subpoenaed six other Assistant State's Attorneys in the Charging Division, along with the chief of the Misdemeanor Jury Trial Division, presumably all for the same purpose. Multiplying Mr. Motsay's immaterial testimony seven-fold will not make it any more relevant, but it will enable the improper “defense ploy [] of trying the prosecutor.” *Johnson v. State*, 23 Md. App. 131, 142 (1974). Rule 5-403 expressly aims to guard against such attempts to confuse the

issues, mislead the jury, and waste time. The subpoena served on Mr. Motsay, in short, is inappropriate, and its enforcement would frustrate the purpose of Rule 4-265.

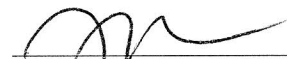
Wherefore, the State requests that this Court quash the subpoena duces tecum issued to Assistant State's Attorney Patrick Motsay for the May 10, 2016, trial.

Respectfully submitted,

Marilyn J. Mosby



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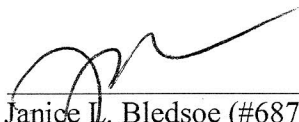
CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 2016, a copy of the foregoing State's Motion to Quash was delivered by hand and email to the Defendant's counsel at:

Marc L. Zayon
Roland Walker & Marc L. Zayon, P.A.
201 N. Charles Street, Suite 1700
Baltimore, Maryland 21201
(410) 727-3710
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Attorney for Officer Edward Nero

Respectfully submitted,

Marilyn J. Mosby



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STATE OF MARYLAND

v.

EDWARD NERO

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IN THE
CIRCUIT COURT FOR
BALTIMORE CITY

CASE No. 115141033

* * * * *

ORDER

Having considered the State’s Motion to Quash the Subpoena Duces Tecum Served on Assistant State’s Attorney Patrick Motsay and there being good cause for the Motion, it is this ____ day of _____, 2016, by the Circuit Court for Baltimore City

ORDERED that the subpoena duces tecum served on Assistant State’s Attorney Patrick Motsay for the May 10, 2016, trial before this Court be and hereby is **QUASHED**.

Judge
Circuit Court for Baltimore City



CIRCUIT COURT FOR BALTIMORE CITY
 100 N. Calvert Street, Baltimore, Maryland 21202
 Phone: (410) 333-3722 Maryland Relay call: 711

Case No. 115141033

STATE OF MARYLAND
 or

Plaintiff
 TO: ASA Patrick Motsay
 Name
Office of the State's Attorney
 Address
120 East Baltimore Street
 Address 2
Baltimore, Maryland 21202
 City, County, State, Zip

vs. Edward Nero
 Defendant

Issue Date: 04/06/2016
 Service Deadline: 60 days after Issue Date.

SUBPOENA

You are hereby compelled to appear at a court proceeding deposition at the following location:

Circuit Court for Baltimore City - 111 N. Calvert Street Rm. 234 On May 10, 2016 at 9:30 a.m. or p.m.
 Address of court or other location
Baltimore, Maryland 21202
 City, State, Zip

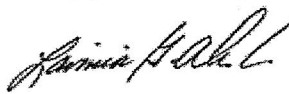
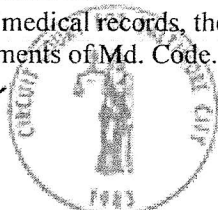
- To testify in the above case, and/or
 To produce the following documents, items, and information, not privileged: _____

- To produce, permit inspection and copying of the following documents or other tangible items: All records of all cases reviewed by the SAO at CBIF from January 1, 2015 through July 1, 2015 including the charges presented, the charges declined and the charges that were forwarded for prosecution.

Edward Nero requested issuance of this subpoena. Questions should be referred to:
 Requested By
Marc Zayon 201 North Charles Street Suite 1700
 Name Address
(410) 727-3710 or (410) 302-0776 Baltimore, Maryland 21201
 Phone City, State, Zip

Special Message: Please contact counsel to confirm the exact date and time that your testimony will be needed.

- If this subpoena compels the production of financial information, or information derived from financial records, the requestor of this subpoena hereby certifies having taken all necessary steps to comply with the requirements of Md. Code Ann., Fin. Inst. §1-304 and any other applicable law.
 If this subpoena compels the production of medical records, the requestor of this subpoena hereby certifies having taken all necessary steps to comply with the requirements of Md. Code. Ann., Health-Gen. §4-306 and any other applicable law.

Lavinia G. Alexander, Clerk
Circuit Court for Baltimore City

NOTICE:

1. YOU ARE LIABLE TO BODY ATTACHMENT AND/OR FINE FOR FAILURE TO OBEY THIS SUBPOENA.
2. This subpoena is effective for the date and time stated and any subsequent dates as directed by the court.
3. If this subpoena is for attendance at a deposition and the party served is an organization, notice is hereby given that the organization must designate one or more persons who will testify on its behalf, pursuant to Rule 2-412(d).
4. Serving or attempting to serve a subpoena more than 60 days after the date of issuance is prohibited.

RETURN OF SERVICE

I certify that I delivered the original of this Subpoena to the following person(s): _____
 on the following date: _____ by the following method (specified as required by Rule 2-126): _____

Signature

Printed Name

