STATE OF MARYLAND	*	IN THE
	*	CIRCUIT COURT FOR
v.	*	BALTIMORE CITY
	*	
EDWARD NERO	*	CASE No. 115141033
	*	

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STATE'S REPLY TO DEFENDANT'S RESPONSE TO STATE'S MOTION TO QUASH THE SUBPOENA DUCES TECUM SERVED ON ASSISTANT STATE'S ATTORNEY PATRICK MOTSAY[1]

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 replies as follows to the Defendant's Response to the State's Motion 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 22, 2016, the Defendant responded to the State's Motion to quash the trial subpoena he served on Assistant State's Attorney Patrick Motsay. Regarding the relevance of Mr. Motsay's testimony and document-production, the Defendant specified that he intends to offer Mr. Motsay as part of a strategy amounting to a selective prosecution claim, arguing that a key question in this case asks, "if Officer Nero did not honestly and reasonably make a proper probable cause determination, is the remedy criminal prosecution?" Def. Resp. at 1. The Defendant avers that Mr. Motsay's testimony and records "will demonstrate that, in numerous cases since the arrest of

[1] The Defendant served subpoenas on multiple Assistant State's Attorneys. Because the subpoenas to those attorneys are identical, with the exception of the subpoena to ASA Motsay, the State's Replies are identical, with the exception of the Reply concerning Mr. Motsay.

Officer Nero, [Baltimore] prosecutors have consistently found probable cause in cases similar to this situation." Def. Resp. at 2. The Defendant contends that there exists no case among the requested records where "any officer who has submitted a statement of probable cause, which was then found to be insufficient upon review by a prosecutor, was subsequently arrested and criminally charged for their otherwise insufficient decision that probable cause existed at the time of the arrest." Def. Resp. at 2-3. In effect, he suggests that the charges brought against him involve some sort of unequal application of the law that a trial jury should be permitted to hear and to nullify.

2. Even if this claim had merit (which it does not), Maryland law squarely prohibits this type of defense trial tactic. In *Purohit v. State*, 99 Md. App. 566 (1994), the Court of Special Appeals considered and rejected the validity of such a defense. In that case, Bijal Purohit had been charged in Allegany County with distribution of obscene matter in relation to his operation of an adult video store. *Id.* at 569. Prior to trial, Purohit served subpoenas on the local State's Attorney and several Cumberland police officers, among others, in an attempt to raise a claim of discriminatory prosecution. *Id.* at 570. Purohit alleged "that the State's Attorney had failed to prosecute an individual who was distributing the same type of material, but who happened to be a former client of the State's Attorney." *Id.* at 584-85. After losing a pretrial hearing on the matter, Purohit sought to raise the claim for the jury's consideration, but the trial court did not permit it. *Id.* at 579.

3. On appeal, the Court agreed with the trial judge's decision. The Court held that a claim of "a discriminatory prosecution is a 'defect in the institution of the prosecution,' and therefore a claim of discriminatory prosecution must be raised in a mandatory motion

to dismiss pursuant to Rule 4-252(a)." *Id.* at 584. The Court approved and applied the view taken in other jurisdictions that "'[t]he claim of discriminatory enforcement should not be treated as a defense to the criminal charge, to be tried before the jury and submitted to it for decision, but should be treated as an application to the court for a dismissal or quashing of the prosecution on constitutional grounds.'" *Id.* at 579-582 (quoting *People v. Utica Daw's Drug Co.*, 16 A.D.2d 12 (1962)). Even when properly raised, the Court emphasized the heavy burden on a defendant to overcome the "well settled" rule "that a State's Attorney's power to institute a criminal prosecution is replete with broad discretion." *Id.* at 577. Indeed, "'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation'; selective prosecution must be both deliberate and 'based upon an unjustifiably standard such as race, religion, or other arbitrary classification.'" *Id.* at 578 (quoting *Oyler v. Boles*, 368 U.S. 448 (1962)).

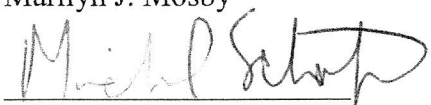
4. In light of *Perohit*, permitting the Defendant here to call Mr. Motsay as a witness would entail allowing the jury to hear irrelevant, and thereby inadmissible, evidence in violation of Rule 5-402. Moreover, even as a cognizable pretrial matter, the Defendant never raised his claim of selective prosecution in compliance with Rule 4-252's mandatory provision that such a purported defect in the institution of the prosecution be alleged in a written motion filed within 30 days of the earlier of the Defendant's or his attorney's first appearance before the circuit court. Rule 4-252(a)-(b). Enforcing the trial subpoena served on Mr. Motsay, therefore, could serve no permissible purpose with regard to the State's Attorney's decision to charge the Defendant in this case.

5. The Defendant also suggests that Mr. Motsay could testify on the question of "whether it was reasonable for Officer Nero to believe there was probable cause to arrest Mr. Gray," suggesting that Mr. Motsay and his Division members have "reviewed fact patterns strikingly similar to the case at hand involving spring assisted knives, and in those cases, learned state's attorneys found probable cause to exist sufficient to proceed with formal criminal charges." Def. Resp. at 1-2. Given that the Defendant's decisions will be judged by a reasonable-officer standard with consideration of the Defendant's own training and knowledge, a prosecutor's charging decisions in similar situations would be immaterial. The prosecutorial decisions sought here are even more immaterial because the voluminous records subpoenaed are in no way limited to charging decisions involving knives, nor to cases in which the Defendant played any role or had any knowledge. In short, the Defendant has subpoenaed Mr. Motsay for purposes that would directly contradict *Purohit* and basic tenets of relevance. Consequently, enforcing the subpoena would result in an "undue burden" on the witness as set forth in Rule 4-266(c).

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 26th day of April, 2016, a copy of the foregoing State's Reply to the Defendant's Response to the State's Motion to Quash was delivered by mail and email to the Defendant's counsel at:

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