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

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STATE'S REPLY TO DEFENDANT'S RESPONSE TO STATE'S MOTION TO QUASH THE SUBPOENA SERVED ON ASSISTANT STATE'S ATTORNEY DOUG VEY[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 Doug Vey compelling him to testify 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 Doug Vey. Regarding the relevance of Mr. Vey's testimony, the Defendant specified that he intends to offer Mr. Vey as part of a strategy amounting to a selective prosecution claim, arguing that a key question in this case asks, "whether a proper or improper probable cause decision was made regarding the spring assisted knife carried by Mr. Gray." Def. Resp. at 3. The Defendant avers that Mr. Vey's testimony "will show that both before and after Nero's arrest, the Office of the State's Attorney for Baltimore City has continued to consistently find that probable cause exists to prosecute individuals who have been arrested with spring assisted knives." Def. Resp. at 3. The Defendant contends that Mr. Vey's

[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.

testimony will also "show that these state's attorneys have found there to be probable cause to prosecute people arrested with spring assisted knives, the very same decision they are prosecuting Officer Nero for making." Def. Resp. at 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 *Purohit*, permitting the Defendant here to call Mr. Vey 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. Vey, therefore, could serve no permissible purpose with regard to the State's Attorney's decision to charge the Defendant in this case.

5. Regarding the Defendant's other suggestion that Mr. Vey could testify in general regarding prosecutorial decisions in similar cases, the Defendant's actions will be judged by a reasonable-officer standard with consideration of the Defendant's own training and knowledge, making a prosecutor's charging decisions in similar situations completely

immaterial. Those prosecutorial decisions are even more immaterial when, as would be the circumstance here, the Defendant would be soliciting testimony about cases in which the Defendant played no part and of which he had no knowledge. In short, the Defendant has subpoenaed Mr. Vey 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 issued to Assistant State's Attorney Doug Vey for the May 10, 2016, trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th 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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