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STATE OF MARYLAND

v.

WILLIAM PORTER

\* IN THE  
\* CIRCUIT COURT FOR  
\* BALTIMORE CITY  
\*  
\* CASE NO.: 13-141037  
\*  
\* 2015 NOV 12 PM 12:30  
\* BALTIMORE CITY  
\* DIVISION

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**DEFENDANT’S RESPONSE IN OPPOSITION TO  
THE STATE’S MOTION FOR APPROPRIATE RELIEF**

Defendant, Officer William Porter, by undersigned counsel, files this Response in Opposition to the State’s Motion for Appropriate Relief. In support thereof, Defendant states the following:

The State seeks to protect from disclosure the following categories of materials: (1) investigative notes prepared by members of the State’s Attorney’s Office containing the State’s theory of the case and relevant factual support, (2) documents concerning State’s Attorney Marilyn Mosby’s interaction with members of the Press, (3) State’s Attorney Marilyn Mosby’s draft statements made in preparation for her announcement of the filing of charges against Defendant Officer Porter, and (4) drafts of the Statement of Probable Cause in support of the warrant to arrest Defendant Officer Porter.

This Court’s Order dated October 14, 2015 states that Defendant Officer Porter is entitled to “copies of any and all documents pertaining to the investigation and prosecution of Defendants, with the exception of attorney work product items created after May 1, 2015.” With respect to the first category of information, the State does not contend that the items should be protected from disclosure because they do not pertain to the investigation or prosecution of Defendant Officer Porter. Rather, the State contends that the materials should be shielded from disclosure because they constitute attorney work product. This Court has made clear both on the record and in its Order that only those materials prepared by the State after May 1, 2015 can

constitute attorney work product. By its own admission, it was not until May 1<sup>st</sup> that the State believed it possessed probable cause to bring charges against Defendant Officer Porter. Consequently, any materials prepared prior to this point were not created by the State in its role as an advocate, but rather as an investigator or detective searching for corroboration that might support a finding of probable cause. In comparing the actions of the State with the concurrent investigation conducted by the Baltimore Police Department, State's Attorney Mosby played the role of the Commissioner in that Office's independent investigation, Chief Deputy Schatzow played the role of Major Stan Brandford, and other Deputies from that Office played the roles of the Baltimore Police Department's Task Force. Just as any notes concerning the investigation, interviews, research, or factual and legal theory of the case from members of the Baltimore Police Department would unquestionably be discoverable, so too are the documents prepared by the State while occupying these roles.

With respect to the draft statements of probable cause and State's Attorney Marilyn Mosby's press conference, the State argues that these documents should not be produced because they are not "remotely relevant, admissible, or helpful to the defense." However, the State overlooks the fact that these documents constitute statements of a party opponent under Maryland Rule 5-803(a)(1), or alternatively Rule 5-803(a)(4). Rule 5-803(a)(1) excludes from hearsay a statement by a party-opponent when the statement is offered against a party and is "[t]he party's own statement, in either an individual or representative capacity." Rule 5-803(a)(4) excludes from hearsay a statement by a party-opponent when the statement is offered against a party and is "[a] statement by the party's agent or employee made during the agency or employment relationship concerning a matter within the scope of the agency or employment." The State in *State of Maryland v. Officer William Porter* is unquestionably Defendant Officer

Porter's party opponent. And the Baltimore City State's Attorney's Office is the agency responsible for representing the State's interest in criminal matters within the City of Baltimore, ostensibly serving as the voice of the state in those matters. Statements made by that Office in the course of the investigation and prosecution of Defendant Officer Porter are therefore statements of a party opponent.

The principle "that government agents are traditionally unable to bind the sovereign simply does not apply to prosecutors." *Bellamy v. State*, 403 Md. 308, 327 (2008). "Not only are prosecutors authorized to speak for the government in criminal cases, but they can also unquestionably bind the government on a range of legal matters through, for example, stipulations and plea agreements." *Id.* at 327 (quoting Anne Bowen Poulin, *Party Admissions in Criminal Cases: Should the Government Have to Eat Its Words?*, 87 MINN. L. REV. 401, 412 (2002)). "All of the motions, filings, pleadings, and arguments (or lack thereof) made by a prosecutor in a criminal case may serve to bind the government to a course of action or outcome." *Id.* at 327–28. In fact, "[t]here are many opportunities for a prosecutor to bind the government in the course of a criminal trial." *Id.* (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)). While the Baltimore City State's Attorney's Office has not necessarily bound the State to positions or contentions expressed in the documents addressed in the State's motion, that Office has made statements rightfully attributable to the State. Both the drafts of the Statement of Probable Cause in support of the arrest warrant which was latter given to Major Samuel Cogan to be signed, and the prepared remarks memorandum in made in preparation for her announcement of the filing of charges, should be considered such statements.<sup>1</sup>

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<sup>1</sup> While the State does not contend that the investigative notes prepared by members of that Office should be exempt from disclosure because they are irrelevant, these notes are likewise admissible at the trial of Defendant Officer Porter because they constitute statements of a party opponent.

After a thorough review of all documentation provided by the State in the course of discovery, the investigative role of Major Samuel Cogan and the Baltimore City Sherriff's Department was limited to two items:

1. Major Cogan's drafting an inapplicable survey of Maryland knife law for use by the State despite the fact that Mr. Gray was arrested for, and ultimately charged with violation of the Baltimore City Ordinance.
2. Major Cogan's signing of the Statement of Probable Cause in support of the arrest of Defendant Officer Porter and the other defendant Officers.

Because Major Cogan, upon information and belief, had not taken any other action in the investigation of Defendant Officer Porter, Major Cogan was completely dependent upon the information put before him by the Baltimore City State's Attorney's Office in the drafted Statement of Probable Cause. Knowing that Major Cogan would be signing the drafted Statement of Probable Cause under penalty of perjury, the members of the Baltimore State's Attorney's Office who drafted this statements would be proffering the truth of the information contained within to Major Cogan. This proffer of truth should be just as attributed to the earlier drafts as it was to the final. State's Attorney Mosby's speech announcing the filing of that Statement of Probable Cause for arrest has been well chronicled and thoroughly briefed. Information prepared for that speech, to be delivered to the city, state, nation, and world, is also attributable to the Office and therefore the State. To the extent that a previous amended version of the Statement of Probable Cause or memoranda for State's Attorney Mosby's prepared remarks merely contained an edit for syntax or spelling error, production of a potentially irrelevant document to Defendant Officer Porter would not constitute any prejudice to the State. However, to the extent version contain substantial alterations of the factual allegations, these

previous version contain at least a prior admission by a party opponent, and potentially a prior inconsistent statement by a party opponent.

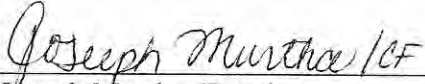
With respect to the materials documenting State's Attorney Marilyn Mosby's interaction with the Press, the State contends that the documents "serve no purpose to counsel's defense of their client[.]" It has been, and continues to be, defense counsel's position that the State's decision to bring charges against Defendant Officer Porter on May 1, 2015 was not based entirely on the alleged guilt or innocence of Defendant Officer Porter. Rather, defense counsel believes that the State's decision was driven, in part, by its perceived need to quell the riots and violence that had erupted throughout Baltimore. This conclusion was reinforced during the September 10<sup>th</sup> hearing on the Defendant's Motion to Dismiss for Prosecutorial Misconduct. During this hearing, Chief Deputy State's Attorney Schatzow defended the language chosen by State's Attorney Mosby during her press conference by asserting that it was supported by the "legitimate" governmental interest of stopping the rioting and violence. However, as the Defendants' argued, and as this Court recognized, consideration of such an interest by a prosecutor is entirely improper. In light of the State's admission at the September 10<sup>th</sup> hearing, it is defense counsel's belief that not only was the decision to bring charges improperly influenced by the rioting in Baltimore, but the charges were rushed in order to accomplish that illegitimate goal. Accordingly, any documents concerning the nature and extent of State's Attorney Mosby's communications with members of the Press leading up to the decision to file criminal charges would be both relevant and material to the defense of Defendant Officer Porter.


Finally, the State continually asserts in its Motion that producing the aforementioned documents to the Defendants would increase the risk that the materials would be released publically. Defense counsel, as officers of the court, understand and will abide by this Court's

Order that any materials produced by the State be treated confidential and not be disseminated except upon order of the Court. This, in itself, should be sufficient to allay any fear or worry on the part of the State that the documents will somehow become public.

**WHEREFORE**, Defendant Officer Porter respectfully requests that the State's Motion for Appropriate Relief be denied.


Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on this 12<sup>th</sup> day of November 2015, a copy of the foregoing Motion was emailed and hand-delivered to Janice Bledsoe, Deputy State's Attorney for Baltimore City, 120 E. Baltimore Street, 9<sup>th</sup> Floor, Baltimore, Maryland 21202.

  
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Gary E. Proctor, Esquire