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STATE OF MARYLAND

v.

WILLIAM PORTER

* * * * *

IN THE
CIRCUIT COURT FOR
BALTIMORE CITY
CASE No. 115141037
(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; and Matthew Pillion, 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 1000 pages of emails, attachments, and other items they requested that the State provide in hard-

copy, most of which the State mailed overnight to counsel on November 9 (materials which could not be printed were emailed the same day). The State makes only the remaining fraction of these items the subject of this Motion. These items fall into four categories: (1) documents that constitute attorney opinion work product and/or executive deliberations; (2) documents related to the interaction between the Office of the State's Attorney and the Press; (3) State's Attorney Marilyn Mosby's May 1, 2015, public schedule and draft statements; and (4) drafts of the Statement of Probable Cause used in the Application for the Statement of Charges originally filed in District Court. Having facilitated counsel's examination of these documents as officers of the court, the State now respectfully requests that this Court review the documents *in camera* and order that copies of these documents need not be provided to the Defendant's counsel. As outlined below, these items, none of which are investigative material, 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 opinion work product and/or executive deliberations

The first category of documents (page numbered A001-A055) that the State requests not to copy for the Defendant's counsel consists of eight 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-A002) This item contains an email dated April 21 sent from a Deputy State's Attorney to another Deputy State's Attorney and their Chief Deputy State's Attorney outlining the Deputy attorney's analysis of Mr. Gray's detention, arrest, and search under the attorney's judgment of the relevant Fourth Amendment case law.
2. (A003-A005) This item contains 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.

3. (A006-A010) This item contains an email dated April 28 sent from a Deputy State's Attorney to another Deputy State's Attorney with an attachment that outlines the attorney's view of the possible charges that could be brought against Defendant Caesar Goodson and how the known evidence could support such charges.

4. (A011-A023) This item contains an email dated April 28 sent from a Deputy State's Attorney to the State's Attorney, the Chief Deputy State's Attorney, two other Deputy State's Attorneys, and the State's Attorney's Executive Assistant with an attachment that extends A007-A010 to outline the attorney's view of the supporting evidence and possible charges that could be brought against Defendants Porter, Goodson, Rice, Nero, Miller, and White.

5. (A024-A027) This item contains an email dated April 29 sent from a Deputy State's Attorney to the State's Attorney that contains an attachment that the Deputy created listing her assessment of what she thought might be important CCTV footage times/locations and also listing the Deputy's comments and questions about each piece of footage.

6. (A028-A029) This item contains an email dated April 30 sent from the State's Attorney's Executive Assistant to the State's Attorney and providing her with an agenda in advance of a regular morning meeting with her Executive Team, including an agenda section that morning with an update about the status of the investigation into Mr. Gray's death (the other updates were redacted because they do not pertain to the investigation or prosecution of this case, but the context of the redactions makes clear that all required information was included for review).

7. (A030-A043) This item contains another draft of the Deputy State's Attorney charging/evidence outline set forth in A012-A023.

8. (A044-A055) This item contains yet another draft of the Deputy State's Attorney charging/evidence outline set forth in A012-A023.

The State sincerely believes that even though these eight items were created prior to the charges being filed in this case, each of the items constitutes attorney opinion work product and/or the deliberative and advisory products of executive branch officials. Items 1, 3, 4, 7, and 8 are clearly the work of the 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. Item 5 reflects 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. Item 6 is an agenda outlining updates that members of the Executive Team give each morning to the State's Attorney as part of the inner functioning of the Office. Finally, Item 2 contains both explicit and obvious attorney opinion 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 about the interaction between the State's Attorney's Office and the Press

The second category of documents (page numbered B001-B095) 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 a series of three emails dated April 15 about an invitation for an interview with Comcast Newsmakers and does not even mention Mr. Gray.
2. (B003) This item contains a series of four emails dated April 19 between State's Attorney Mosby and her staff in which they are updated that Mr. Gray succumbed to his injuries and in which they discuss the expected and contemplated reaction both from and to the Press.
3. (B004-B005) This item contains three emails dated April 20; two are between State's Attorney Mosby and her staff editing the wording of a four-line press release giving a case

update; one is from a reporter asking if he can attribute the words to State's Attorney Mosby.

4. (B006) This item contains an email dated April 20 from the Director of Community Affairs for the Office of the State's Attorney providing a weekly update on public relations matters, only one of which mentions Mr. Gray and only to refer to the prior press release.

5. (B007-B008) This item contains an email dated April 21 between the State's Attorney's Chief of External Affairs and her Director of Communications, with an attachment listing seven press talking points about the case.

6. (B009-B010) This item contains an email dated April 21 sending B007-B008 to State's Attorney Mosby for her review.

7. (B011) This item contains an email dated April 22 sending the press release in B004 from the State's Attorney's Director of Communications to a CNN employee.

8. (B012-B040) This item contains an email dated April 22 from the State's Attorney's Executive Assistant to her Director of Communications sending a briefing memo for an upcoming meeting with the Baltimore Sun editorial board. The briefing memo attached was prepared by the State's Attorney's Special Assistant and contains information to help State's Attorney Mosby prepare for the Sun meeting and gives advice to her about fielding certain questions. The meeting had been pre-planned to discuss her first 100 days in office, but the memo was updated to assist the State's Attorney in answering any questions asked about Mr. Gray's death.

9. (B041) This item contains two emails dated April 26; the first is from a reporter to the State's Attorney's Director of Communications and Special Assistant requesting an interview with State's Attorney Mosby; the second is the Director forwarding that email to State's Attorney Mosby and her Chief of External Affairs with questions, comments, and recommendations.

10. (B042-B043) This item contains a series of emails from the early morning hours of April 28 between State's Attorney Mosby and her Executive and Communications Teams discussing possible press statements about the night's unrest and planning for some of the Office's immediate next steps, such as bail reviews for those arrested during the night.

11. (B044-B046) This item contains a series of emails from later in the day on April 28 between the State's Attorney's Director of Communications and a reporter discussing the Office's position regarding persons arrested during the unrest and mentioning the ongoing nature of the investigation into Mr. Gray's death.

12. (B047) This item contains two emails dated April 30 between State's Attorney Mosby, her Chief of External Affairs, and her Director of Communications discussing the wording of a possible press release giving an update about the case.

13. (B048-B055) This item contains an email dated April 30 from the State's Attorney's Chief of External Affairs to her Director of Communications with an attachment outlining

potential questions from the press and suggesting the wording of possible answers to those questions should they arise in light of the next day's planned announcement of charges.

14. (B056-B083) This item is a second copy of the memo contained in B013-B040.

15. (B084-B092) This item is an early draft of the attachment contained in B049-B055.

16. (B093-B095) This item contains a series of possible comments that State's Attorney Mosby could make at the May 1 press conference.

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-C025) that the State requests not to copy for the Defendant's counsel consists of the following four items comprising State's Attorney Marilyn Mosby's May 1, 2015, public schedule and draft statements:

1. (C001-C008) This item contains an email dated April 30 sent from the State's Attorney's Chief of External Affairs to the State's Attorney and her Chief Deputy providing an attachment for their review containing a proposed draft of the State's Attorney's planned May 1 public statement.

2. (C009-C010) This item contains an email dated the morning of May 1 sent from the State's Attorney's Executive Assistant to the State's Attorney and her Executive Protection officers listing the day's schedule of events from 9:30 a.m. through 4:00 p.m.

3. (C011-C021) This item contains another draft of the State's Attorney's planned May 1 public statement.

4. (C022-C025) This item contains yet another draft of the State's Attorney's planned May 1 public statement, along with notes related to the draft (page C024 is blank in the original document and was left in its original form for this review).

None of these drafts or scheduling 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, along with an itinerary for her security detail, items which further no legitimate defense purpose and which should not be copied to the Defendant's counsel.

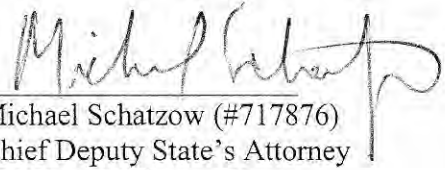
D. Drafts of the Statement of Probable Cause

The fourth category of documents (page numbered D001-D068) that the State requests not to copy for the Defendant's counsel consists of twenty separate drafts of the Statement of Probable Cause, along with eighteen sets of emails that were used to send the drafts between the State's Attorney and members of her Executive Team and used to exchange comments about the drafts. These documents do not constitute statements of any trial witness, have since been superseded by the Grand Jury's Indictment, and are not relevant, admissible, or helpful to the defense. Instead, these documents (a) show the writing, grammatical, and typographical skills and mistakes of their 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.

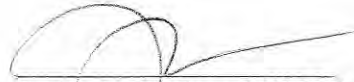
Wherefore, the State respectfully requests that this Motion for Appropriate Relief Under Seal be granted in its entirety.

Respectfully submitted,

Marilyn J. Mosby



Michael Schatzow (#717876)
Chief Deputy State's Attorney
120 East Baltimore Street
The SunTrust Bank Building
Baltimore, Maryland 21202
(443) 984-6011 (telephone)
(443) 984-6256 (facsimile)
mschatzow@statorney.org



Janice L. Bledsoe (#68776)
Deputy State's Attorney
120 East Baltimore Street
The SunTrust Bank Building
Baltimore, Maryland 21202
(443) 984-6012 (telephone)
(443) 984-6256 (facsimile)
jbledsoe@statorney.org



Matthew Pillion (#653491)
Assistant State's Attorney
120 East Baltimore Street
The SunTrust Bank Building
Baltimore, Maryland 21202
(443) 984-6045 (telephone)
(443) 984-6252 (facsimile)
mpillion@statorney.org

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November, 2015, a copy of the State's Motion for Appropriate Relief Under Seal was mailed and e-mailed to:

Joseph Murtha
Murtha, Psoras & Lanasa, LLC
1301 York Road, Suite 200
Lutherville, Maryland 21093
(410) 583-6969
jmurtha@mpllawyers.com
Attorney for Officer William Porter

Gary Proctor
Gary E. Proctor, LLC
8 E. Mulberry St.
Baltimore, MD 21202
410-444-1500
garyeproctor@gmail.com
Attorney for Officer William Porter

Respectfully submitted,

Marilyn J. Mosby



Janice L. Bledsoe (#68776)
Deputy State's Attorney
120 East Baltimore Street
The SunTrust Bank Building
Baltimore, Maryland 21202
(443) 984-6012 (telephone)
(443) 984-6256 (facsimile)
jbledsoe@stattorney.org