

STATE OF MARYLAND

v.

ALICIA WHITE

Defendant.

* IN THE
* CIRCUIT COURT
* FOR
* BALTIMORE CITY
* CASE NO. 115141036

* * * * *

**DEFENDANT'S RESPONSE TO STATE'S MOTION *IN LIMINE* TO
PRECLUDE DEFENDANT FROM CALLING PROSECUTORS AS
WITNESSES DURING DEFENDANT'S TRIAL AND
REQUEST FOR AN EVIDENTIARY HEARING**

NOW COMES Defendant, Alicia White, by and through her attorneys, Ivan J. Bates, Esquire, Tony N. Garcia, Esquire, Mary M. Lloyd, Esquire, and Bates & Garcia, LLC, and pursuant to Maryland Rules 4-252(d), files this Response to State's Motion in limine to preclude Defendant from Calling Prosecutors as Witnesses during Defendant's trial and Request for a Hearing and in support thereof states the following.

INTRODUCTION

The State seeks *in limine* to preclude Defendant White from calling prosecutors as witnesses based solely on the ground that the questions that the State believes Defendant's counsel will ask would not yield relevant or admissible evidence. In support of its argument, the State posits a number of areas into which it believes Defendant's counsel would inquire and argues why those areas of inquiry may not be relevant or admissible at Defendant White's trial.

The State, *again*, seeks to lead this Honorable Court through a treacherous constitutional minefield unconcerned with whether this Court inadvertently triggers a detonation along the way. The State's exact argument has been squarely rejected by the Court of Appeals as it constitutes, without question, a violation of a Defendant's rights secured by the Sixth and Fourteenth

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Amendments of the United States Constitution and Maryland's Constitutional provisions read in tandem with their federal counterparts. Maryland precedent makes clear that the proper time for determining the question of admissibility of witness testimony is upon the examination of the witness and not the proffer of counsel as to what the questions and answers may or may not yield. This Honorable Court should properly hold an evidentiary hearing and, after said hearing, DENY the State's Motion.

Argument

THE PROSECUTORS THAT CONDUCTED OR PARTICIPATED IN THE INVESTIGATION INTO THE DEATH OF FREDDIE GRAY ARE COMPETENT WITNESSES THAT CAN PROVIDE EVIDENCE MATERIAL AND RELEVANT TO THE DEFENDANT'S CASE. THIS HONORABLE COURT SHOULD NOT RULE ON THE RELEVANCE OR ADMISSIBILITY OF SUCH EVIDENCE PRIOR TO CONDUCTING AN EVIDENTIARY HEARING. A PREMATURE RULING WOULD VIOLATE DEFENDANT'S CONSTITUTIONAL RIGHTS SECURED BY THE UNITED STATES AND MARYLAND CONSTITUTIONS AND REPRESENT THE TRIAL COURT'S DEPARTURE FROM ITS ROLE AS AN IMPARTIAL ARBITER OF THESE ADVERSARIAL PROCEEDINGS.

We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

United States v. Nixon, 418 U.S. 683, 709 (1974).

"The Supreme Court of the United States has held that 'the right of a defendant in a criminal case under the Sixth Amendment to have compulsory process for obtaining witnesses in his favor is applicable to the States through the Fourteenth Amendment.'" *Kelly v. State*, 392 Md. 511, 532 (2006) (quoting *Washington v. Texas*, 388 U.S. 14, 14-15 (1967)). "In addition to the federal protection under the Sixth Amendment, the right to compulsory process is protected under Article

21 of [the] Maryland Declaration of Rights, which states "[t]hat in all criminal prosecutions, every man hath a right ... *to examine the witnesses for and against him on oath.*" *Id.* at 533 (emphasis in original).

"[T]he right to compulsory process and the right to present one's witnesses are fundamental rights essential to due process." *Id.* at 534. "The right to compulsory process does not end with the ability to subpoena witnesses to show up in court ... [t]hat right encompasses the defendant's ability to elicit testimony from those witnesses present at trial." *Id.* at 535. This right goes to the heart of a defendant's fundamental right to present a defense. *Id.* This well-settled right is equally applicable to any competent witness. As the State recognized in its motion, the prosecutor is a competent witness. *Johnson v. State*, 23 Md. App. 131, 140 (1974).

Although the right to compulsory process is fundamental, it is not absolute. *Kelly*, 392 Md. at 537. "The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Id.* "[T]he defendant must at least make some plausible showing of how the testimony would have been both material and favorable to his defense." *Id.* (internal citations omitted) (internal quotations omitted). However, "an accused's right to call relevant witnesses and to present a complete defense may not be abrogated for the sake of trial convenience or for the purpose of protecting a [prosecutor] from possible embarrassment while testifying if he possesses information vital to the defense." *Johnson*, 23 Md. App. at 142 (internal quotations omitted) (internal citations omitted).

The proper time for the defendant to make this showing is upon examination of the witnesses. The Court of Appeals "has previously held that 'the proper time for the judge to determine the admissibility of witnesses' testimony was upon their examination.'" *Kelly*, 392 Md. at 538 (emphasis supplied) (citations omitted). The Court of Appeals has previously observed,

[t]he short of it is that the trial judge should have heard from the subpoenaed witnesses, either at a pretrial hearing or at the trial out of the presence of the jury ... [the court] could, at that time, determine whether the witnesses had admissible testimony to offer ... [the court] erred in short-circuiting the common law and statutory rights of [the defendant] by quashing the subpoenas.

Id. at 539. *See also Wardlaw v. State*, 185 Md. App. 440, 464 (2009) (witness being examined in court outside the presence of the jury was appropriate prior to trial court ruling on the admissibility of the witness testimony).

If the trial court fails to make this inquiry upon examination of the witnesses and rule on proper timely objections by the State, "the court leaves its role as an arbiter and assumes another role as a party to the proceedings, placing into question the defendant's right to a fair trial." *Id.* at 541. This is especially true where the trial court "requires a pre-examination proffer" as to a defendant's witnesses without requiring the same from the State. *Id.* "In this situation, the trial court was becoming an advocate for the State." *Id.* "When the court assumes the role of a party by ruling on the admissibility of evidence in the absence of appropriate objections, the court departs from the adversarial nature of our system where the State, not the court, bears the burden of objecting to the testimony offered by the opposing party." *Id.* at 542-43.

A defendant "is entitled to present and conduct his defense unhampered by the judge's idea of what that defense is or how it should be presented." *Id.* at 542. "The responsibility of the trial court to control the proceedings before it does not extend to the right to take over a party's case." *Id.* at 542-43. "When that occurs the court risks denying to a defendant the fair trial guaranteed to him by both the United States Constitution and Maryland Constitution." *Id.* at 543.

In *Kelly*, "the defendant was denied even the right to present the witnesses he chose to call who were in court at the time." *Id.* at 535. Defendant Kelly's trial counsel attempted to call two officers who were involved in the investigation of the defendant's case to testify about the

investigation. *Id.* at 519-20. The trial court, based on proffers of counsel, ruled that the evidence would likely not be admissible and denied the defendant the right to call the witnesses to the stand. *Id.* at 519-30.

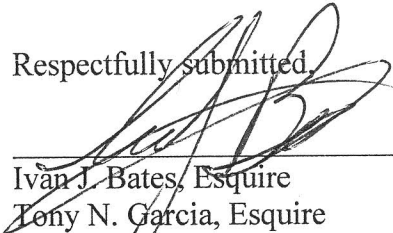
The Court of Appeals, while reversing Kelly's conviction, observed that "[w]hile the right to elicit certain types of testimony by opposing counsel, upon proper objection, may be denied, the right to present the witnesses in the first instance should not be." *Id.* at 535. This is particularly true when "defense counsel specifically informs the court that she only knows what questions she will ask of a witness, but not the answers." *Id.* The Court of Appeals observed that even though proffers are helpful, "they are not a substitute for the witnesses' testimony when the witnesses are present and able to testify." *Id.* at 532.

In Defendant's case, the prosecutors acted as investigators *prior* to charging and conducted an "independent investigation" into the circumstances surrounding the death of Freddie Gray. This investigation allegedly occurred outside of the Baltimore City Police Department's investigation into Mr. Gray's death and was independent of the police investigation, as represented by Ms. Mosby at her first press conference announcing charges. When prosecutors deviated from the normal investigative channels and the traditional partnership with the Baltimore City Police Department and its investigators, they made themselves witnesses in the case they were investigating. No other witness could possibly be able to testify to the parallel independent investigation and evidence uncovered except those who conducted or participated in that investigation. Defendant incorporates by reference as if fully stated herein all of the arguments made in Defendant's Motion for Recusal of the Prosecutors in this case and any supplements thereto.

CONCLUSION

It is for the above-stated reasons that Defendant hereby respectfully moves this Honorable Court to hold an evidentiary hearing on this matter where the witnesses can be examined outside the presence of the jury to determine the relevancy and admissibility of their testimony and, after said hearing, DENY the State's Motion.

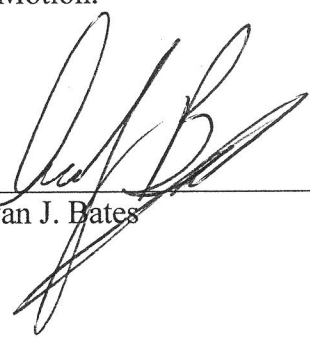
Respectfully submitted,



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REQUEST FOR A HEARING

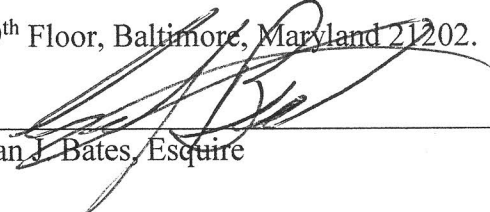
Defendant, by and through undersigned counsel, hereby respectfully requests an evidentiary hearing on this matter where the witnesses may be questioned outside the presence of the jury and argument can be made to this Court for this Court to properly rule on the admissibility of the testimony of each witness at issue in the State's Motion.



Ivan J. Bates

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Defendant's Response to the State's Motion in Limine was this 1st day of February, 2016, Michael Schatzow to the Office of the State's Attorney for Baltimore City, 120 E. Baltimore Street, 9th Floor, Baltimore, Maryland 21202.



Ivan J. Bates, Esquire

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ORDER

Upon consideration of the State's Motion *In Limine* to Preclude Defendant from Calling Prosecutors as Witnesses during trial and Defendant's Response thereto, it is this ____ day of _____, 2016,

HEREBY ORDERED, that an evidentiary hearing be held on the State's Motion *In Limine*, on the ____ day of _____, 2016, in Part ____ of the Circuit Court for Baltimore City at _____ a.m./p.m. where the witnesses under subpoena from the State's Attorney's Office for Baltimore City may be questioned by counsel for the defense and State outside the presence of the jury to determine the admissibility of their testimony.

Judge Barry Williams,
Circuit Court for Baltimore City

Cc: Clerk of the Court
Office of the State's Attorney
Ivan J. Bates, Esquire