



entire office, the motion bounces from one ridiculous allegation to another, like a pinball on a machine far past “TILT.”

### **SUMMARY OF ARGUMENT**

First, the motion is premature. As Defendants have recognized, this case will proceed in the Circuit Court for Baltimore City, not in the District Court where this motion was filed. Second, the “conflicts” identified by the Defendants are not conflicts at all, which likely accounts for their inability to supply any authority deeming them conflicts. Third, the Defendants’ claim that the best evidence of the existence of the conflicts is the charging documents themselves reveals both a fundamental (and no doubt deliberate) misunderstanding of when the Defendants are allowed to challenge the sufficiency of the evidence against them, and a willful blindness to the more than sufficient nature of that evidence.

### **THE DEFENDANT’S MOTION IS PREMATURE**

As the Defendants acknowledged in footnote 1 of their Motion for Order Requiring Recordation of Grand Jury Testimony or Stenographer to Take and Transcribe Testimony Before the Grand Jury, they know full well that they will be charged in the Circuit Court. Thus, this Motion is premature, as the District Court lacks the authority to circumscribe the processes of the Circuit Court. While this begs the question of why the Defendants sought Circuit Court relief from the District Court, the answer is all too obvious: harsh rhetoric designed to generate negative pre-trial publicity about the prosecutors in order to taint the grand jury and petit jury pool.

**CONTROLLING AUTHORITY, IGNORED BY DEFENDANTS, AUTHORIZES  
THE STATE'S ATTORNEY'S OFFICE'S TO INVESTIGATE CRIMES AND GIVE  
TESTIMONY WITHOUT CREATING A CONFLICT**

In a broad, novel theory ignoring contrary controlling authority, Defendants claim that their asserted need to question investigators on the payroll of the State's Attorney's Office mandates recusal of the Office. No authority is cited for this proposition, nor could there be any. Lawyers in private practice use clerks and investigators on the payroll of the law firm to witness statements and provide testimony if the witness needs to be impeached with the prior statement. The Maryland Attorney General's Office employs investigators who testify in cases brought by the Attorney General. The Maryland United States Attorney's Office employs investigators who testify in cases brought by the U.S. Attorney. The U.S. Department of Justice includes the Federal Bureau of Investigation, the U.S. Marshall's Office, and other law enforcement agencies that employ investigators who testify in cases brought by the Department of Justice. Why should they be allowed to do so while the State's Attorney's Office is not?

Defendants fail to cite controlling authority that directly contradicts their contention. In Carr v. State, 50 Md. App. 209 (1981), the defendant contended that the State's Attorney's Office should have been disqualified from prosecuting him because his conviction was based on the testimony of an Assistant State's Attorney from that office who acted as an undercover operative. The argument was based on the then existing equivalent to the Rule of Professional Conduct that the defendants in the instant case rely on. Roundly rejecting that contention, the Court of Special Appeals specifically approved of the State's Attorney utilizing, for trial testimony, investigators employed by his office, whether lawyers or laymen. Noting the "'broad official discretion to institute and prosecute criminal causes,' Brack v. Wells, 184 Md. 86, 90 (1944)," enjoyed by a State's Attorney, the Court spoke to the precise issue Defendants raise

here: “In light of the broad authority given state's attorneys to assign duties to their deputies and assistants, State v. Aquilla, 18 Md. App. 487, 494, cert. denied, 269 Md. 755 (1973), whether lawyers or laymen, that constitutional officer cannot be charged with exceeding his authority by having investigators attached to his office.” Id. at 214.

Defendants’ abject failure to cite controlling authority that is contrary to their argument violates Rule 3.3(a)(3) of the Maryland Lawyers’ Rules of Professional Conduct, speaks volumes about the frivolity of their motion, and clearly identifies who is playing fast and loose with the rules that govern the legal profession.

**THE DEFENDANTS’ THREAT TO SELECT A PARTICULAR NON-ESSENTIAL DEFENSE WITNESS TO TESTIFY AT TRIAL TO SOMETHING THAT MANY OTHER WITNESSES COULD TESTIFY TO, IS NO BASIS FOR RECUSAL SIMPLY BECAUSE OF THE EXISTENCE OF A PERSONAL RELATIONSHIP BETWEEN A PROSECUTOR IN THE BALTIMORE CITY STATE’S ATTORNEY’S OFFICE AND THAT POTENTIAL WITNESS**

The effort by Defendants to create a conflict for the State’s Attorney’s Office by virtue of defendant created action after charging would be laughable were it not so personally offensive and improper. To create this artificial conflict, Defendants lay out a circuitous, unnecessary route, all the while ignoring key facts.

Essentially, Defendants claim that one Donta Allen was a passenger in the police wagon with Mr. Gray during part of the time that Mr. Gray was in the same wagon. Although Defendants have had no legitimate access to Mr. Allen’s recorded statement to the police, on the basis of a snippet of the statement in a search warrant affidavit they claim that his statement is helpful to them. Subsequent to his giving the statement, their story goes, television reporter Jayne Miller had an “exclusive” on air interview with Mr. Allen in which he “somewhat retracted” his statement to the police. Defendants’ Joint Motion to Dismiss and in the

Alternative for Recusal of Baltimore City State's Attorney's Office (hereafter "Defendants' Joint Motion), pp. 6, 13. Consequently, Defendants claim, Ms. Miller becomes a substantive or impeachment witness. Because Ms. Miller is in a relationship with a Deputy State's Attorney working on the above captioned cases, Defendants claim "there is no way around this conflict." *Id.* at 14. And for good measure, without any basis or evidence, Defendants insinuate that Ms. Miller learned the identity of Mr. Allen through her relationship with the Deputy. After detailing the existence of the personal relationship, Defendants write: "It is unclear *how* Jayne Miller of WBAL learned the identity of the otherwise anonymous passenger." *Id.* at 14.

This lurid tall tale about the Deputy violating her oath of office to leak confidential information to her domestic partner in order to change a witness' story lacks only one element: the truth. The fact of the matter is that Ms. Miller's interview was the second interview given by Mr. Allen. Michael Schuh, a television reporter for Channel 13, did an interview of Mr. Allen, substantively the same as Ms. Miller's, that took place before Ms. Miller interviewed him. Channel 13 boasted that Mr. Schuh was the first to speak with Donta Allen: "WJZ's Mike Schuh is the first to speak with Donta Allen about what he heard."

[http://baltimore.cbslocal.com/video/11447146-the-other-man-in-the-van-with-freddie-gray-breaks-his-silence/#.VVdmuf\\_caE.email](http://baltimore.cbslocal.com/video/11447146-the-other-man-in-the-van-with-freddie-gray-breaks-his-silence/#.VVdmuf_caE.email)

Defendants can get Mr. Allen's "changed" story from Mr. Schuh. If a court did not determine Ms. Miller's story to be cumulative evidence, they could get her interview without needing to call her as a witness. And if they want her as a witness to provide cumulative and redundant testimony, that does not create a conflict for the State's Attorney's Office.

**THE STATE'S ATTORNEY'S MARRIAGE TO A COUNCILMAN WHO IS NOT A WITNESS, DEFENDANT OR LAWYER IN THIS CASE PRESENTS NO CONFLICT.**

Defendants contend that Mrs. Mosby has a conflict of interest because her husband is the elected City Council representative of a district impacted by the riots. Without a scintilla of other evidence, they claim that the only reason the State's Attorney sought charges against these Defendants was to enhance the political career of her husband. This is a truly breath-taking non-sequitur. Putting to one side that it ignores the essential facts that (1) Mr. Gray was a healthy young man when arrested without probable cause but died as a result of his treatment while in police custody and (2) that a judicial officer found probable cause to support each and every one of the charges against each Defendant, if the Defendants' conflict theory were accepted it would mean that the Baltimore City State's Attorney's Office could prosecute no crimes in an entire Councilmanic District. Surely if that were the rule of prosecutorial conflicts it would exist in writing somewhere, yet Defendants are unable to cite any authority for this startling proposition.

Defendants credit Mrs. Mosby's announcement of the charges against them with quelling the riots that began in Baltimore during the last week of April, 2015. Even if that were true, given the independent judicial officers' findings of probable cause, we would have thought that it was in the best interest of every law abiding resident of Baltimore City – not just Mr. Mosby – for all of the rioting, looting, burning and acts of violence to come to an end.

Defendants offer nothing beyond speculation as to Mr. or Mrs. Mosby having any different interest than any other law abiding Baltimore City resident in peace and an end to violence, and they offer no legal authority for their fact-less assertion of conflict of interest. If an elected prosecutor is prohibited from prosecuting cases that may indirectly impact the legislative

district of her husband who is also a publicly elected official, one supposes that prohibition would exist elsewhere than in the overwrought writing of the Defendants.

**THE FRIVOLOUS AND INACCURATE TORT CLAIMS NOTICES SERVED BY  
THE DEFENDANTS AFTER THEY WERE CHARGED DO NOT GIVE THE STATE'S  
ATTORNEY FOR BALTIMORE CITY "A DIRECT FINANCIAL AND  
PROFESSIONAL INTEREST IN THE OUTCOME OF THE CASE."**

Six days after charges were filed against the Defendants, they filed Tort Claims Notices with Baltimore and the State of Maryland. The gravamen of these Notices is that the charges are not supported by probable cause because the facts asserted are patently false. Here, too, Defendants' argument fails completely because their "facts" are wrong and the law is against them. First, the facts:

The Tort Claims Notices echo the chorus of Defendants' attorneys' deliberate distortions of the Application for Statement of Charges (hereafter "Application") supporting the charges: "The charges state that the knife, *which was the basis of Freddie Gray's arrest*, was legal and therefore no probable cause existed to arrest him. If in fact the knife was illegal, as the [Defendants] contend that it was, then the underlying facts that form the basis of the statement of charges would be false." Defendants' Joint Motion, Exhibit 3 (emphasis added).

But the Application does not say that the "knife was the basis of Freddie Gray's arrest." Although the Application accurately points out that the knife was legal under Maryland law, it makes clear that Mr. Gray was arrested well before the arresting officers knew he possessed a knife. Mr. Gray was handcuffed at his surrendering location, moved a few feet away, and placed in a prone position with his arms handcuffed behind his back, all before the arresting officers found the knife. Application at 2. See, e.g., Pyon v. State, 2015 Md. App. LEXIS 50 (Md. Ct. Spec. App. Apr. 6, 2015).

Thus, the factual basis for the Claims Notices is wrong as a matter of fact, and could not possibly represent a financial threat to the State's Attorney. Legally, the Claim is not against her and for that reason also presents no financial threat. Moreover, the Application for Statement of Charges initiates a prosecution, and the State's Attorney has absolute immunity for initiating a prosecution. Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128, 1976 U.S. LEXIS 25 (U.S. 1976).

Finally, the notion that Mrs. Mosby would face disciplinary charges for reading from the publicly available Application for Statement of Charges betrays a fundamental misunderstanding of the Gansler case, wishful thinking, or both. "To receive the benefit of the 'public record' safe harbor, the lawyer must not provide information beyond quotations from or references to public government records." Atty. Griev. Comm'n v. Gansler, 377 Md. 656 (Md. 2003). Mrs. Mosby provided no information that was not in the Application for Statement of Charges, and she therefore has nothing to fear from the Grievance Commission or frivolous civil suits from the Defendants.

**MRS. MOSBY'S PAST CONNECTIONS TO THE ATTORNEY FOR THE  
VICTIM'S FAMILY DO NOT REQUIRE RECUSAL**

After the Baltimore City State's Attorney's Office began to look into the arrest of and injury to Mr. Gray, his family retained William H. "Billy" Murphy, Jr. to represent them. In looking at the conflicts alleged by Defendants it must be kept in mind that Mr. Murphy represents no one in the criminal cases being pursued by Mrs. Mosby, and that Mrs. Mosby represents no one in the civil cases that Mr. Murphy may bring on behalf of the victim's estate and/or family. The notion that Mrs. Mosby would bring baseless criminal charges with the entire nation watching just so that Mr. Murphy might have some advantage in the civil case is ludicrous. It is particularly so when one considers that the only advantage to Mr. Murphy



posited by Defendants is if Mrs. Mosby obtains convictions. How will that happen if the charges are baseless?

First, defendants claim that Mr. Murphy made a “significant” contribution to Mrs. Mosby’s election campaign. In fact, Mr. Murphy donated \$4,000, approximately 1.3% of the campaign funds raised by Mrs. Mosby. This hardly seems significant. Viewed from the perspective of Mr. Murphy, one of Baltimore’s most successful attorneys, it is no doubt even less significant.

Moreover, the Fraternal Order of Police donated \$3,250 to Mrs. Mosby’s campaign. The \$750 difference in contributions makes risible the defendants’ contention that Mrs. Mosby is indebted to Mr. Murphy for his contribution.

Second, Defendants point to Mr. Murphy’s service as a member of Mrs. Mosby’s transition team. Mr. Murphy, a former Baltimore City Circuit Judge and one of the most experienced and successful criminal defense attorneys in Baltimore’s state courts, was a natural for the position. Of course, there were thirteen (13) other members of the transition team. Mr. Murphy’s service as one of fourteen does not satisfy the closeness of personal relationship required for recusal.

Third, Mr. Murphy represented Mrs. Mosby in connection with a frivolous complaint made to Bar Counsel during Mrs. Mosby’s campaign. The matter involved little work, was resolved in Mrs. Mosby’s favor, and is over.

Fourth, Mrs. Mosby is criticized for meeting with Mr. Gray’s family and their attorney, Mr. Murphy. Mrs. Mosby takes quite seriously her obligation to pursue justice for the victims of crimes. Either she or one of her assistants make every effort to meet with the family of all

homicide victims of homicides occurring since she took office. That Mr. Murphy is the Gray family lawyer had nothing to do with the meeting.

Finally, and most despicably, Defendants rely on a motion filed in a completely unrelated case, State of Maryland v. Jeffrey Bolger, Case No. 614227006. In that case, two police officers were charged with the killing of a dog. According to the Defendants and the motion they rely on, one officer's charges were dismissed because he was represented by Mr. Murphy's law firm, while the other still faces charges because he is represented by a lawyer who supported Mrs. Mosby's unsuccessful opponent in the election campaign. As will be shown in excruciating detail when the opposition to that motion is soon filed, the contention of favoritism is not only untrue, but is or should be known to be untrue by the lawyers who made it.

The fact of the matter is that one defendant's charges were dismissed because the dismissed defendant agreed to cooperate against Mr. Bolger. As discovery material provided to Mr. Bolger's counsel reveals, the dismissed defendant's proffer was made before Mrs. Mosby's term began. The decision to dismiss the charges against the co-defendant was made for good reason by the previous administration. Moreover, the co-defendant was not represented by Mr. Murphy, but by a member of his law firm who has been nominated to be a federal judge.

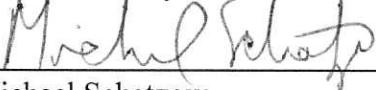
Defendants have regrettably adopted the tactics and smear campaign of Mr. Bolger's lawyers, willing to say anything regardless of the facts, and completely indifferent to who is unfairly swept up in their baseless allegations. It is time to put a stop to these tactics.

## CONCLUSION

WHEREFORE, because the Defendants have not demonstrated even the appearance of a conflict, let alone an actual conflict; because the Defendants have not cited controlling authority that approves the very conduct that they condemn; because Defendants cite no authority in support of their baseless theories; and because Defendants distort and ignore the facts relevant to their claims, the State's Attorney's Office for Baltimore City respectfully requests that this Honorable Court DENY the Defendants' Joint Motion.

Respectfully submitted,

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### Table of Authorities

**Cases:**

Brack v. Wells, 184 Md. 86, 90 (1944)

Carr v. State, 50 Md. App. 209 (1981)

Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128, 1976 U.S. LEXIS 25 (U.S. 1976)

Pyon v. State, 2015 Md. App. LEXIS 50 (Md. Ct. Spec. App. Apr. 6, 2015)

State v. Aquilla, 18 Md. App. 487, 494, cert. denied, 269 Md. 755 (1973)

**Rules:**

Md. Lawyer's R. Prof'l Conduct 3.3

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on this 18<sup>th</sup> day of May, 2015, a copy of the Office of The State's Attorney for Baltimore City's Opposition to Plaintiffs' Joint Motion to Dismiss and In the Alternative for Recusal of the Baltimore City State's Attorney's Office was sent by U.S. Postal Mail and emailed to:

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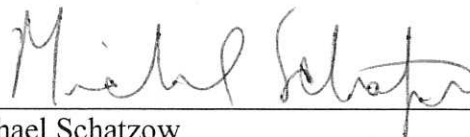
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