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February 5, 2021

Honorable Darlene J. Pereksta, J.S.C.
Mercer County Superior Court
400 South Warren Street
Trenton, New Jersey 08650

Re: State v. Andres Mejia
Indictment No. 20-10-0306
File No. 20-3048

Dear Judge Pereksta:

Please accept this letter in lieu of a formal brief in response to defendant's supplemental arguments in support of his Motion to Dismiss the Indictment.

Regarding his claim of selective enforcement, the defendant is using the umbrella term of the "State" to allege a nefarious motivation to filing these charges. The alleged bias that defendant claims is influencing the "State's" selective enforcement of his misconduct is not attributable to the Prosecutor's Office. He maintains that he was targeted because he is a plaintiff in a whistleblower lawsuit, however, that suit was filed against Lawrence Township. The Mercer

County Prosecutor's Office – who was primarily responsible for this investigation and the filing of charges - is not a party to that lawsuit. Defendant also alleges his prosecution is a cover up for some sort of liability for the murder of Williams. The Prosecutor's Office would hold no liability in that matter therefore defendant's argument is misplaced. As previously noted, this internal affairs investigation was commenced by the Internal Affairs Unit of the Prosecutor's Office only after the homicide investigation revealed inconsistencies with defendant's report and the body worn camera and MVR video. Defendant was not targeted nor sought out for prosecution by the Mercer County Prosecutor's Office until this fraudulent report came to light. When the facts were revealed during the internal affairs investigation, there was sufficient probable cause to charge the defendant, therefore "the decision whether or not to prosecute, and what charge to file or bring before a Grand Jury" was within the discretion of the Prosecutor. See Bordenkirscher v. Hayes, 434 U.S. 367, 363 (1977); State v. DiFrisco, 118 N.J. 253, 265–66 (1990).

Additionally, merely claiming that charges were brought in one case and not another is simply not enough to establish selective enforcement. The defendant must meet an initial burden of showing selective prosecution. The U.S. Supreme Court has described that "a selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." United States v. Armstrong, 517 U.S. 456, 463 (1996). The burden that a defendant must meet to establish such a claim "is a demanding one." State v. Ballard, 331 N.J. Super. 529, 539 (App. Div. 2000). "To prevail on a claim of selective prosecution, the defendant must provide "clear evidence" to overcome the presumption that the prosecutor has not acted unconstitutionally, given the general deference to which prosecutorial decisions are entitled." Id. (citing United States v. Armstrong, supra at 465). Defendant has not provided sufficient proof of "intentional selectivity"

in this case, nor evidence of any de facto policy, and he is not part of a protected class. See State v. DiFrisco, supra at 265; State v. Ballard, supra at 542. What he has done is listed unreliable evidence of other police officers who were accused of criminal conduct but where criminal charges were not filed. Different cases have different evidence, and some evidence is more reliable than others. As an example, in this matter, we have BWC and MVR evidence that contradicts Officer Mejia's report. This video evidence speaks for itself and does not require an evaluation of credibility or reliability, as would the statement of a witness. To require the State to produce evidence demonstrating why charges were not filed in the myriad of newspaper articles that defendant references would be overly burdensome, particularly since the defendant has offered nothing to show that he is similarly situated to the officers in those other cases, and would expose confidential information contained in wholly unrelated internal affairs files. The State submits that the defendant has not met his burden to establish a colorable claim of selective enforcement and no evidentiary hearing is required.

Defendant also argues that this indictment should be dismissed because it was presented to a virtual grand jury and the New Jersey Supreme Court exceeded its rule making authority by allowing virtual grand juries. As the defense notes, the Supreme Court recently took direct certification on this particular issue, pursuant to Rule 2:12-1, in the matter of State v. Omar Vega-Larregui, after that defendant filed a Motion to Dismiss the Indictment in Superior Court, Mercer County. Defendant raised a constitutional challenge to the Grand Jury proceedings that were conducted remotely pursuant to the Virtual Grand Jury program authorized by the Supreme Court Order from May 14, 2020. Oral argument in that matter is scheduled for the March 15-16, 2021 session. In light of the Supreme Court's order to directly certify this issue and the impending

argument, the State submits that this court should not consider this argument until the Supreme Court rules on this precise issue.

With respect to the claim of exculpatory evidence not being presented to the grand jury, defendant claims that the affidavit of probable cause that he authored in support of the charges against Ms. Williams is exculpatory and should have been presented to the grand jury. The State acknowledges that in that affidavit the defendant does not mention the witness that he wrote about in his investigation report, but the State does not agree that this is exculpatory evidence. On the contrary, the fact that he did not include the witness in the affidavit, which is a sworn document submitted to the court, but did describe encountering a witness in his report is further evidence that he knew the witness did not exist. As previously stated, when Sgt. Laird instructed defendant that the witness which the defendant told him about was important evidence for the case, the defendant included it in his report, knowing that it was in fact untrue. Defendant wants to place the blame on his Sergeant for this inclusion, but the fact is that the Sergeant was unaware that the defendant lied about this witness when he advised him to include it in the report.

Additionally, defendant now claims that the grand jury should have been told that Sgt. Laird advised the defendant to charge an indictable offense of theft from the person, instead of a disorderly persons offense. First and foremost, whether the specific charges that Williams faced were indictable or disorderly persons offenses has no bearing on the official misconduct charge against the defendant. The fact is, the Sergeant was properly advising a subordinate officer of the appropriate charges for the conduct alleged; specifically, that Williams was alleged to have taken the phone from Hayes' hands, which constitutes a third-degree theft from the person charge instead of a disorderly persons theft offense. The Sergeant advised him to charge what was fitting based on the facts as relayed to him. All of this was based upon the defendant's version as he told it to

his Sergeant. As noted above, unbeknownst to the Sergeant, the defendant lied when he told him about the witness. The charges filed against Williams would not have changed anything if it was a disorderly persons offense instead of an indictable offense because the defendant still manufactured a witness to the initial confrontation. That is the crux of the official misconduct in Count One and that is what was relevant for the grand jury to consider.

According to his sworn affidavit of probable cause for the charges against Williams, defendant verified that Hayes placed a call to 911, but there is no evidence that he actually listened to the call himself, as defense now suggests. He wrote that he confirmed with Ewing Police Department that the 911 call was placed, but he does not state that he reviewed the call. In the affidavit, he simply summarized – paraphrased actually – exactly what was relayed in the CAD report.

Finally, defendant misread or misunderstood the affidavit of probable cause charging Hayes with murder when he claims that the prosecution was aware that Williams did steal Hayes' phone. A careful reading of that affidavit shows that when Williams was apprehended for the theft of the phone, she did not possess it. That is consistent with the discovery in this case and what was presented to the grand jury. That same affidavit references a recorded jail call between Hayes and his mother wherein she tells him that she was in contact with Williams using his phone. Firstly, this statement by Hayes' mother was never corroborated and the phone was never determined to be in Williams' possession. Evidence must be submitted to a grand jury only if it "squarely refutes an element of the crime in question" and is reliable within the context of the evidence. State v. Hogan, 144 N.J. 216, 237 (1996); See State v. Womack, 145 N.J. 576, 588 (1996), cert. denied, 519 U.S. 1011 (1996). The State submits that this single hearsay statement from Hayes' mother is neither reliable in its context, nor does it directly negate this defendant's guilt for the charges of

Official Misconduct. The Assistant Prosecutor and Detective at grand jury were unaware of the contents of those jail calls at the time of the grand jury presentation because neither is assigned to the prosecution of Hayes for murder. Regardless, the State offered no proposition in the presentation of the evidence for this case that Williams was innocent of the theft charges but merely pointed out that Williams was not in possession of the phone at the time of her arrest. The defendant is placing undue weight on what he construes as an improper emphasis on a particular word by the testifying officer.

Additionally, although just a footnote in defendant's second letter addendum, the State feels obligated to respond to defendant's suggestion that the State destroyed evidence, in particular the first report drafted by the defendant and the note from Sgt. Laird to the defendant regarding the information about the witness. As the defendant is already aware, these two items were overwritten in Lawrence Township Police Department's record system on August 16, 2020, the date that the defendant's report was finalized and approved. There is no mystery to the removal; that is how their records system is set up. Those items were overwritten prior to this internal affairs investigation even commencing, let alone prior to the notice of preservation received from defendant's previous counsel in September, 2020. The State has been in continuous contact with Lawrence Township Police as they attempt to retrieve the initial report and note from their backup system. To date, Lawrence Township, working with the software company, has been unable to retrieve the backup files, but they continue to work on it. When and if those documents are able to be retrieved from the backup system, they will be promptly provided to the defendant in discovery.

For all of the aforementioned reasons and those submitted in the State's December 22, 2020 letter in lieu of formal brief, the State respectfully requests that defendant's Motion to Dismiss the Indictment be denied.

Respectfully submitted,

ANGELO J. ONOFRI
Mercer County Prosecutor

A handwritten signature in black ink, appearing to read 'Kathleen M. Petrucci', written in a cursive style.

KATHLEEN M. PETRUCCI
Assistant Prosecutor

cc: Robin Lord, Esquire