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BALTIMORE CITY

STATE OF MARYLAND

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CRIMINAL DIVISION

IN THE

v.

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CIRCUIT COURT

KEITH DAVIS, JR.

*

FOR

CASE NO: 116090001; 121159010

*

BALTIMORE

* * * * *

DEFENDANT KEITH DAVIS, JR.'S MOTION TO DISMISS INDICTMENT FOR VINDICTIVE PROSECUTION

Defendant Keith Davis, Jr. ("Mr. Davis"), by and through undersigned counsel, Deborah Katz Levi, hereby moves this Honorable Court to dismiss the Indictment in the above-captioned matter on the basis of selective or vindictive prosecution in violation of the Due Process Clause of the United States Constitution; Articles 21 and 24 of the Maryland Declaration of Rights; and Maryland Rule of Criminal Procedure 4-252(d).¹

PROCEDURAL & FACTUAL BACKGROUND

During the last seven years, Ms. Mosby has tried and failed to secure a conviction against Mr. Davis. She has proceeded with vindictiveness and personal and political animus, and in doing so, she has denied Mr. Davis his right to due process. As a result, the indictments against Mr. Davis must be dismissed.

¹ To any extent that Marilyn Mosby or her prosecutors, who work under her direction and authority, assert that this Motion is unfounded, inappropriate, or not an action at law, this Motion is in large measure modeled after and taken from the Motion to Dismiss that Ms. Mosby filed on her own behalf in her own criminal prosecution for perjury, See United States v. Marilyn James Mosby, 1:22-cr-00007-LKG-1, filed January 13, 2022, Motion to Dismiss, Attached as Exhibit 1.

To be more specific, Marilyn Mosby has had five failed attempts to convict Mr. Davis: a robbery indictment ending in an acquittal, two murder trials ending with motions for new trial being granted based on prosecutorial error; and two hung juries. Notwithstanding her failures, Ms. Mosby continues to try, unsuccessfully, to gain a conviction. During her pursuit of a conviction, Ms. Mosby has proceeded with vindictive behavior towards Mr. Davis and his family; she has lashed out at Mr. Davis's supporters with profanity; and she has lied about her actions. She has also made false and misleading statements about Mr. Davis's criminal record in public in order to defend her vulgar behavior and she has taunted Mr. Davis's wife, Kelly C. Davis. In short, Marilyn Mosby has demonstrated through this entire prosecution that her motivation is based on personal and political animus. As a result, the only fair and just result is to dismiss both Indictments.

THE RISE OF MS. MOSBY'S ANIMUS, VINDICTIVENESS, & PERSONAL & POLITICAL MOTIVATION

On June 7, 2015, officers from the Baltimore Police Department (BPD) gunned down Mr. Davis, releasing 32 bullets from their department issued Glock-45's, and striking him three times, in the face, the arm, and the back. The police officers' bullets shattered Mr. Davis's jaw bone and the bones that line his sinus cavity, landing him in critical condition, fighting to survive for a week. Mr. Davis was one of the first people to be shot by the Baltimore police after the killing of Freddie Gray, while the city was still reeling from the community uprising and eventual riots that followed his death in police custody. Barely a month had passed since the Governor withdrew the Army National Guard from the streets of Baltimore, the city-wide curfew was lifted, and the national media turned off their cameras and went home. Marilyn Mosby was still basking in the glow of her career-defining decision to charge six Baltimore police officers in Mr. Gray's death; she had been in office less than six months when she was suddenly launched onto the national stage, branded a progressive hero and

a rising star in the Democratic Party. See Sheryl Gay Stolberg & Alan Blinder, *Marilyn Mosby, Prosecutor in Freddie Gray Case, Takes a Stand and Calms a Troubled City*, N.Y. Times, attached as Ex 2.

Davis's shooting was a nightmare for the BPD, which could not handle another uprising, and for the involved officers, who just saw six of their colleagues criminally charged and had every reason to fear they would be next. While Ms. Mosby had the support of the community, prosecuting six police officers was not only going to require a Herculean effort and untold resources, but it also put her agency at odds with its partner in local law enforcement, the Baltimore Police Department. Mr. Davis's shooting was inconvenient to say the least, and subjecting the BPD to further scrutiny would only complicate the already strained relationship between Baltimore's police and its top prosecutor. See Doug Donovan, *FOP Calls on Prosecutor to Recuse Herself, Defends Officers* Balt. Sun, May 1, 2015, attached as Exhibit 3. Since its inception, the prosecution of Keith Davis, Jr. has shielded the city's police department from accountability and prioritized the political aspirations of its chief prosecutor, whose motives have, over the course of seven years, become imbued with malicious personal, professional, and even racial animus.

Procedurally, the cases have wound their way through the criminal system in Baltimore in the following trajectory:

1. On June 7, 2015, shortly before 5 a.m., Kevin Jones was fatally shot eleven (11) times in the parking lot of the Pimlico Race Course in Northwest Baltimore.
2. On June 7, 2015, shortly before 10 a.m., the Baltimore police shot at Mr. Davis thirty two (32) times in a garage located at 5202 Eleanora Avenue in Northwest Baltimore. The officers struck Mr. Davis three times in the face, arm, and back, near fatally wounding him.

3. On June 13, 2015, Keith Davis Jr. was arrested on seventeen (17) charges, including the attempted armed robbery of hack driver Charles Holden, assault on police, and discharging a firearm. See Robbery SOPC, attached as Exhibit 4.
4. On July 27, 2015, Mr. Davis was indicted on sixteen (16) counts in Baltimore City Circuit Court Case number 115208019. See Robbery Indictment, attached as Exhibit 5.
5. On December 3, 2015, Mr. Davis was indicted on five additional charges of being a felon in possession of a firearm in case number 115337016. See Firearm Indictment, attached as Exhibit 6.
6. On February 25, 2016, following a week-long trial, a jury acquitted Mr. Davis of all counts submitted to them in case number 115208019, but convicted Mr. Davis of one count of possessing a firearm as a restricted person in case number 115337016. See Verdict Sheet I, attached as Exhibit 7; Verdict Sheet II, attached as Exhibit 8.
7. On March 3, 2016, nine months after Kevin Jones was murdered, but just a mere seven days after Mr. Davis was acquitted of the robbery, Mr. Davis was charged with the first-degree murder of Kevin Jones and six other charges. See Murder SOPC and Indictment, attached as Exhibit 9.
8. The charges came one week after Mr. Davis's acquittal, and, as will be explained further below, without any significant evidence having been produced during that nine month period of time.
9. On March 30, 2016, Mr. Davis was indicted on one count of first degree murder and one count of using a firearm during the commission of a crime of violence in Baltimore City Circuit Court case number 116090001. See id.

10. On April 20, 2016, Mr. Davis was sentenced to a mandatory five years in prison in case number 115337016, in which the jury had convicted him of possessing a firearm as a restricted person while simultaneously acquitting him of wearing, carrying or transporting a firearm.
11. On May 6, 2016, Mr. Davis filed an appeal to the Court of Special Appeals in case number 115337016.
12. On May 8, 2017, Mr. Davis's first murder trial in case number 116090001 began before the Honorable Alfred Nance.
13. On May 16, 2017, the jury reported they were deadlocked, and a mistrial was declared.
14. On June 12, 2017, the Court of Special Appeals affirmed Mr. Davis's conviction in case number 115337016 for one count of possessing a firearm.
15. On October 10, 2017, Mr. Davis's second murder trial began before the Honorable Lynn Stewart Mays.
16. On October 17, 2017, a jury found Mr. Davis not guilty of first degree murder, but guilty of both the lesser included offense of second degree murder and using a firearm during the commission of a crime of violence.
17. On October 27, 2017, Mr. Davis filed a Motion for a New Trial.
18. On December 4, 2017, following a two-day hearing, the Honorable Lynn Stewart Mays granted Mr. Davis's Motion for a New Trial in part because Ms. Mosby's office withheld exculpatory material.
19. On June 11, 2018, Mr. Davis's third murder trial in case number 116090001 began before the Honorable Althea Handy.

20. On June 18, 2018, the defense's motion for a mistrial with prejudice based on the State's discovery violation was heard and denied.
21. On June 21, 2018, the jury reported they were deadlocked and another mistrial was declared.
22. On July 12, 2019, Mr. Davis's fourth murder trial began before the Honorable Sylvester Cox.
23. On July 26, 2019, a jury found Mr. Davis guilty of second degree murder and using a firearm during the commission of a crime of violence. See Handwritten Docket Entry, attached as Exhibit 10.
24. On August 5, 2019, Mr. Davis filed a Motion for a New Trial. See Motion, attached as Exhibit 11.
25. On September 17, 2019, Mr. Davis filed a Motion to Complete the Record, asking that the State's Powerpoint be placed in the record. See Motion attached as Exhibit 12.
26. On January 24, 2020, Mr. Davis filed a Motion for Appropriate Relief for the same reason. See Motion attached as Exhibit 13, attached without exhibits.
27. On March 2, 2020, following a two-day hearing, Judge Cox denied Mr. Davis's Motion for a New Trial, Motion to Complete the Record and Motion for Appropriate Relief, and sentenced Mr. Davis to a total of fifty (50) years in prison.
28. On March 2, 2020, *mere hours* after the Court's ruling, Mr. Davis filed a Motion to Reconsider the Motion for a New Trial. See Motion to Reconsider, attached as Exhibit 14, without exhibits.
29. On March 5, 2020, Mr. Davis filed an appeal to the Court of Special Appeals.

30. On March 9, 2021, Mr. Davis filed an Unopposed Motion to Stay Appeal and Remand to Circuit Court to Resolve Record Dispute. See Motion to Stay, attached as Exhibit 15.
31. On March 22, 2021, the Court of Special Appeals granted the motion to stay Mr. Davis's appeal and remanded the case back to the Circuit Court for the purpose of holding an evidentiary hearing to determine if Ms. Mosby's office submitted a different Powerpoint on appeal than the one it had shown to the jury. See Court of Special Appeals Order, attached as Exhibit 16.
32. On May 17, 2021, Judge Cox granted the Defense's March 2, 2020 Motion to Reconsider, thereby granting Mr. Davis's Motion for a New Trial, which had been filed eighteen (18) months earlier on March 2, 2020. See Judge Cox Order, attached as Exhibit 17.
33. Eleven days later, on May 28, 2021, Mr. Davis was charged with attempted first degree murder for an allegation of a jail fight that is said to have occurred at the Maryland Reception Diagnostic and Classification Center in Baltimore one year earlier, on June 2, 2020. See Attempted Murder SOPC, attached as Exhibit 18.
34. On June 8, 2021, Mr. Davis was indicted on six counts, including attempted first degree murder, in case number 121159010. See Attempted Murder Indictment, attached as Exhibit 19.
35. Mr. Davis is currently scheduled to begin his fifth trial in case number 116090001 on May 16, 2022. His trial in case number 121159010 is also set for May 16, 2022.

As will be explained more fully below, in addition to a charging pattern that demonstrates vindictiveness on its face, Ms. Mosby has shown her personal disdain for Mr. Davis, his family, and

his supporters by charging Mr. Davis for crimes only after he received favorable rulings; using vulgar gestures towards Keith Davis supporters; then in an effort to hide her personal animus, lying about the vulgar gesture; she has also taunted Mr. Davis's family by using the State's Attorney's Twitter account to tweet her lie directly at Mr. Davis's wife. In another effort to hide her personal animus and vindictiveness, Ms. Mosby also went on public Baltimore radio and made material misstatements about Mr. Davis's criminal history, not just to justify giving the middle finger, but to poison the potential jury pool and win re-election. In short, Ms. Mosby's actions surrounding this prosecution are tainted with vindictiveness and personal animus for Mr. Davis and his family. As a result, there is no confidence in the propriety of this prosecution and this Court must dismiss both cases.

ARGUMENT

I. THIS HONORABLE COURT MUST DISMISS THIS TAINTED PROSECUTION BECAUSE IT IS BASED ON MARILYN MOSBY'S ANIMUS AND VINDICTIVENESS TOWARDS MR. DAVIS AND HIS FAMILY, WHICH IS EVIDENCED BY THE TIMING OF THE PROSECUTION; MS. MOSBY'S VULGAR GESTURE; AND HER LIES

This Honorable Court should dismiss both prosecutions against Mr. Davis because they are tainted by Marilyn Mosby's vindictive and unprofessional animus toward Mr. Davis and his family; her actual and objective vindictiveness; and her professional misconduct. "Vindictive and selective prosecutions (discriminatory prosecutions) violate constitutional due process and equal protection and threaten the rule of law." United States v. Torquato, 602 F.2d 564, 569 (3d Cir. 1979); see also Robinson v. State, 209 Md. App. 174, 188–89 (2012), overruled on other grounds by Dzikowski v. State, 436 Md. 430 (2013). "It is hornbook law that a federal [or state] court may dismiss an indictment if the accused produces evidence of actual prosecutorial vindictiveness sufficient to

establish a due process violation, or even if he demonstrates a likelihood of vindictiveness sufficient to justify a presumption.” United States v. Stokes, 124 F.3d 39, 45 (1st Cir. 1997).

Further, Maryland Courts have held that a defendant is entitled to a hearing on a motion to dismiss for prosecutorial vindictiveness “if he proffers *verifiable facts* amounting to ‘some evidence tending to show the existence of’ the State’s bad faith.” Robinson, 209 Md. App. at 188 (quoting McNeil v. State, 112 Md. App. 434, 465 (1996)). Even without direct evidence of animus, which actually exists in this case, a defendant can establish a rebuttable presumption of vindictiveness by showing that a “reasonable likelihood of vindictiveness exists.” United States v. Goodwin, 457 U.S. 368, 373 (1982). Once the defendant demonstrates evidence of animus, as Mr. Davis has done here, the burden then shifts to the Government to present objective evidence justifying its conduct. Id. at 384.

In McNeil v. State, the Court of Special Appeals held that at a minimum, “a defendant is entitled to a hearing, if timely requested, to prove or dispel his claim of misconduct if he proffers verifiable facts amounting to ‘some evidence tending to show the existence of’ the State’s bad faith. A mere general allegation of prosecutorial misconduct is not sufficient to warrant the granting of an evidentiary hearing.” 112 Md. App. at 465 (quoting United States v. Falk, 479 F.2d 616, 619 (7th Cir. 1973)).

While the Court of Special Appeals echoed the Seventh Circuit’s concern that courts should analyze carefully whether a hearing is necessary, to protect prosecutors from having to take the stand, “that does not mean that a criminal defendant is never to be afforded an opportunity to prove that the prosecution stems from an improper prosecutorial design or that he may never question a prosecutor under oath.” United States v. Falk, 479 F.2d 616, 620–21 (7th Cir. 1973). While prosecutors may enjoy a presumption that they are acting properly, “when a defendant alleges

intentional purposeful discrimination and presents facts sufficient to raise a reasonable doubt about the prosecutor's purpose, we think a different question is raised.” Id.

In the instant matters, Mr. Davis demonstrates significantly more than a general allegation to support his claim for prosecutorial misconduct and vindictive or selective prosecution, namely: (1) Ms. Mosby indicted Mr. Davis a year after the alleged crimes, but only after he prevailed on an acquittal and a motion for new trial, and even though no other significant evidence had been obtained; (2) she showed personal animus and a sheer lack of professionalism by giving the middle finger to a supporter of Mr. Davis; (3) displaying her own consciousness of guilt, Ms. Mosby then lied about her vulgar gesture to the public and taunted Mr. Davis and his family by tweeting her lie directly to Mrs. Davis; and (4) in an attempt to defend why she gave the middle finger to a Keith Davis supporter, Marilyn Mosby made material misstatements on a public radio station, popular in the Baltimore area, falsely asserting that Mr. Davis is a convicted murder.

Ms. Mosby demonstrates deep animus, prosecutorial misconduct, and vindictiveness. Her lack of objectivity violates Mr. Davis’s constitutional right to due process. Ms. Mosby’s personal, unprofessional, and vindictive animus towards Mr. Davis and his family infects this entire prosecution; reflects years of conflict and outright hostility by Ms. Mosby towards Mr. and Mrs. Davis; it infects the conduct of all her line prosecutors in these matters; and leads to the only just conclusion: that this prosecution is vindictive, and the Indictments must be dismissed.

A. The Timing of Both the Murder and Attempted Murder Prosecutions Demonstrate Animus and Vindictiveness

Ms. Mosby indicted Mr. Davis for Kevin Jones’s murder only after he was acquitted of the robbery. She did the same with the jailfight attempted murder, and even by her own official statement, only charged Mr. Davis because he won yet another motion for a new trial. Courts across the country have dismissed criminal prosecutions where, as here, the facts indicate that the

defendant would not have been charged but for his favorable ruling in another matter. See United States v. Eddy, 737 F.2d 564, 572 (6th Cir. 1984) (dismissing for vindictive prosecution where “the facts indicate no perjury indictment would have been brought had there been no acquittal of the defendant, a presumption of vindictiveness is raised.”); see also United States v. Andrews, 633 F.2d 449, 453 (6th Cir.1980) (en banc); United States v. McFadyen-Snider, 590 F.2d 654, 655 (6th Cir.1979) (perjury indictment would probably not have been brought had the defendant not succeeded in her appeal from an initial conviction); U.S. v. Jenkins, 504 F.3d 694 (9th Cir. 2007) (timing of the charges created the appearance of vindictiveness); U.S. v. Tobin, 598 F. Supp. 2d 125 (D. Maine 2009) (Granting defendant’s motion to dismiss for vindictive prosecution because defendant had presented circumstances--including sequence, the absence of any new factual developments, and exposure to more severe charges--that "reveal a sufficient likelihood of vindictiveness to warrant a presumption of vindictiveness."); People v. Puentes, 190 Cal. App. 4th 1480 (2010); U.S. v. LaDeau, 734 F.3d 561 (6th Cir. 2013); cf. United States v. Goodwin, 457 U.S. 368 (1982).

In United States v. Eddy, the Sixth Circuit held that a presumption of vindictiveness arose where the government charged the defendant with a new crime after he prevailed on another action. 737 F.2d at 572 (presumption of vindictiveness arose where the government brought a perjury indictment against a defendant who had been acquitted at trial). The same is true here. The only reason the State charged Mr. Davis with Kevin Jones’s murder was because he was acquitted of all counts associated with the robbery indictment. And the only reason the State charged Mr. Davis with the jailfight attempted murder was because he won his motion for new trial in the murder case.

More specifically, on June 13, 2015, nearly a week after the police shot Mr. Davis three times and while he was still in the hospital, he was arrested on seventeen charges, the most serious of

which was the attempted armed robbery of an unlicensed cab driver named Charles Holden, which was alleged to have precipitated the police shooting on July 7. See Robbery SOPC, attached as Exhibit 4. Mr. Davis was also charged with several counts of first and second degree assault on two of the officers who shot him, and with discharging a firearm that was recovered in the vicinity of his profusely bleeding body. While BPD's Statement of Probable Cause did not explicitly allege that Mr. Davis shot at the police, the indictment obtained by Ms. Mosby's office on July 27, 2015 included this charge, and that count served to justify the State's argument that the police shot Mr. Davis in self defense. See Robbery Indictment, attached as Exhibit 5. It also bolstered the State's demand that Mr. Davis be held without bail pre-trial, depriving him of much needed medical care and the ability to participate in his own defense against charges that Mr. Davis maintains were fabricated.² When the attempted armed robbery case proceeded to trial seven months later, on February 19, 2015, Ms. Mosby's office dismissed the charge for discharging a firearm before opening statements. See Robbery Trial Tr., 2-19-16, 63:3-8, attached as Exhibit 21.

The trial was a failure for the State for many reasons, but in part because the man who Mr. Davis is alleged to have robbed, Charles Holden, came down from the witness stand, looked Mr. Davis in the eye, and said, "[T]hat don't look like him much to me." Robbery Trial Tr., 2-22-16, 189-190, attached as Exhibit 22. Of the 17 *original* charges, only 15 made it back to the jury – and only one resulted in a conviction. See Verdict Sheets I and II, attached as Exhibits 7 and 8. The jury not only acquitted Mr. Davis of all charges related to the attempted robbery and assault on Mr. Holden, but after hearing testimony from six officers who were involved in or present for the shooting, found him not guilty of the alleged assault on police as well.

² Mr. Davis received such questionable medical care while being held without bail awaiting trial that the Circuit Court of Baltimore City granted his defense counsel's request that he be able to see his treating surgeon and receive much needed follow up care. See Order from the Honorable Christopher Panos, attached as Exhibit 20.

Unfortunately for Mr. Davis, the jury was given one more count to consider – possession of a firearm as a disqualified person, a charge the State added in December 2015. See Firearms 2015 Indictment, attached as Exhibit 6. While the jury acquitted Mr. Davis of every other firearm-related charge, including wearing, carrying or transporting a handgun, it found Mr. Davis guilty on this single count, which came with a mandatory minimum sentence of five years in prison. See Verdict Sheet II, Exhibit 8.

On March 3, 2016, one week after Mr. Davis was acquitted of all counts in the robbery indictment, the State charged Mr. Davis with murder in the first degree in the instant matter, for an incident that also happened on June 7, 2015, the same day the attempted robbery was alleged to have occurred. See Murder Indictment, attached as Exhibit 9. The State's circumstantial murder case relies on ballistic evidence, namely the BPD Crime Lab's conclusion that the gun from the attempted armed robbery case is also the murder weapon. But, according to the State's ballistic reports and testimony from several BPD firearms examiners called as witnesses in their case against Mr. Davis, the gun was allegedly identified as the murder weapon on June 11, 2015, two days before Mr. Davis was arrested for the attempted armed robbery and assault on police. See Ballistics Report, attached as Exhibit 23. Notwithstanding this fact, it was only in the wake of Mr. Davis's acquittal nine months after the alleged shooting, that the State charged him with murder, and four trials worth of discovery materials indicate that very little investigation was done in the intervening months.³

³ For example, on July 8, 2015 – one month after the murder and two weeks before the State indicted Mr. Davis on the attempted armed robbery – the sole eye witness to the murder was shown a photo array and did not identify Mr. Davis. See 5-11-17 Tr. 207-08, attached as Exhibit 24. In October 2015, the State's FBI cell phone expert concluded that Mr. Davis's phone was in the area, like several others, at the time of the murder. However, this merely confirmed what the State already knew, since five hours later, Mr. Davis was shot by police in that same vicinity, where by his own account, he had spent the previous evening at a friend's house. In January 2016, the lead Homicide detective filed his first request for DNA analysis, see 1-14-16 DNA request, attached as Exhibit 25, and Mr. Davis's DNA was not even tested until March 2017. Mr. Davis's DNA has never been found on any evidence collected at the murder scene. Lastly, the murder victim's two cellphones were collected from the crime scene by the lead homicide detective, who did not immediately submit

The murder case proceeded to trial in May 2017, but after several days of deliberations, the jury was deadlocked and a mistrial was declared. See Justin Fenton, *Jurors Deadlocked in Keith Davis, Jr. Trial, Mistrial Declared*, Balt. Sun, May 16, 2017, attached as Exhibit 27. When the State tried the case for a second time in October 2017, they relied on a jailhouse snitch—a practice Ms. Mosby now strongly prohibits—who testified that Mr. Davis confessed. See Justin Fenton, *Man convicted of murder questions 11th-hour jailhouse witness*, Balt. Sun, Oct. 25, 2017, attached as Exhibit 27; see also, Mosby Snitch Email, attached as Exhibit 28 (stating “We wish to strongly discourage the use of J[ail]I[n]formant[s] by ASAs because of their propensity to provide unreliable evidence, which, in turn, can lead to wrongful convictions.”). While the jury acquitted Mr. Davis of first degree murder, he was found guilty of the lesser included charge of second degree murder.

Within hours of the verdict, the official Twitter account for the State’s Attorney’s Office tweeted a photo of Ms. Mosby embracing someone. “Victory. Keith Davis Jr. was found guilty” the tweet read. See Mosby Victory Tweet, available at: <https://twitter.com/BaltimoreSAO/status/920729592322838529>, last visited March 7, 2022, attached as Exhibit 29. But the State’s victory was short-lived. See Justin Fenton, *Keith Davis Granted a Third Trial in Killing of Pimlico Security Guard*, Balt. Sun., Dec. 4, 2017, attached as Exhibit 30. It turned out that the State withheld crucial discoverable material regarding their unreliable jailhouse snitch, and the Court granted Mr. Davis’s Motion for New Trial in December 2017.

Ms. Mosby did not relent. In June 2018, just days before Mr. Davis’s third murder trial and while Ms. Mosby was running for reelection, Mr. Davis’s wife, Mrs. Kelly Davis, called out Ms. Mosby during a debate that was being broadcast live on the internet. In response, Ms. Mosby paused, and then remarked – in reference to either Mrs. Davis, Mr. Davis or both – “violent repeat

them to evidence control, and then waited until February 23, 2016 – the day after Mr. Holden’s testimony – to do any cell phone analysis. See Cell Phone Extraction cover page, attached as Exhibit 26. Nothing on the victim’s phone implicates Mr. Davis.

offenders do not like me.” Then Baltimore Sun reporter Luke Broadwater later posted a tweet fact-checking the statement, which was false regardless of who Ms. Mosby was referring to, as Mrs. Davis was free from conviction, and Mr. Davis was not convicted at that time of anything violent. See Luke Broadwater Tweet, attached as Exhibit 31, available at:

<https://twitter.com/lukebroadwater/status/1005924502985957376>, last visited March 7, 2022.

The third murder trial, in June 2018, ended in a hung jury, but only after the State committed a serious discovery violation mid-trial that utterly impugned the credibility of the lead homicide detective. See Brandon Block, *For second time, Keith Davis Jr. trial ends with a hung jury*, Balt. Fishbowl, June 21, 2018, attached as Exhibit 32. At the fourth murder trial in July 2019, the State made their case without calling that detective, or a single witness who actually investigated the murder; the jury returned a guilty verdict, but it did not last. Mr. Davis immediately noted an appeal, and while that appeal was pending, the trial court granted Mr. Davis’s motion for new trial in May 2021, a full eighteen months after it had been filed. See Judge Cox Order, attached as Exhibit 17.

Frustrated at their lack of success and inability to secure a conviction, the State responded just as it had in 2016 when Mr. Davis was acquitted of robbery: it filed charges in a new case, for attempted murder stemming from a jailhouse fight that happened a year earlier, in June 2020. See Attempted Murder Statement of Probable Cause, attached as Exhibit 18. The State’s motivation, as stated by their own spokesperson, was to respond to Mr. Davis’s success on his Motion for New Trial. According to Ms. Mosby’s spokesperson Zy Richardson, “prosecutors were waiting on the decision from the courts that overturned Davis’ latest conviction before proceeding with new charges.” Richardson went on to state that “once his sentence was disturbed we reviewed the DPSCS allegations for legal sufficiency and moved forward.” See Tim Prudente, *Keith Davis Jr. charged with attempted murder over prison stabbing last year; state’s attorney decides to prosecute*, Balt. Sun May 28,

2021, attached as Exhibit 33; Zy Richardson Text Messages to Baltimore Sun Reporter Tim Prudente, attached as Exhibit 34.

In the attempted murder jail fight case, the records demonstrate that Ms. Mosby's office ordered the Department of Public Safety and Correctional Services Officers (DPSCS) to charge Mr. Davis only because he won the Motion for New Trial in the murder, not for any other reason. In fact, the DPSCS records demonstrate that the DPSCS officers who investigated the jail fight met with Ms. Mosby's office on two occasions. On the first, Ms. Mosby's prosecutor instructed them to do nothing even though they already had the alleged victim's medical records; and on the second occasion, just four days after Mr. Davis won his motion for new trial, Ms. Mosby's prosecutors ordered the DPSCS officers to charge Mr. Davis. See DPSCS Document Acting at the Direction of the State's Attorney, Attached as Exhibit 35. No new evidence had been generated.

Adding additional evidence to the vindictive and selective motivations, Ms. Mosby's office instructed the DPSCS officers to charge Mr. Davis with attempted murder even though the sworn statement of the corrections officer who witnessed the entire event said that it was a closed fist fight and no weapon was recovered. See Sworn Statement, Attached as Exhibit 36. The second person who witnessed the fight also confirmed that it was a closed fist fight and he added that it was his belief that the alleged victim started the fight. Ms. Mosby apparently did not care. She wanted to punish Mr. Davis for winning his motion for new trial; to justify her decision to re-prosecute Mr. Davis; she wanted to make him look like a monster; and she wanted to keep him in jail.

Both the murder and the attempted murder prosecutions were the result of animus and vindictiveness, and as a result, must be dismissed. At a minimum, however, these facts demonstrate a likelihood of animus and entitle Mr. Davis to an evidentiary hearing where the State has the burden to show objective reasons for the prosecution and Mr. Davis is entitled to discovery, on among other

relevant factors, how many murders do they wait a year to indict and how many prison fights do they choose to indict a year later, or at all.

B. Ms. Mosby's Animus Toward Mr. Davis and His Family Span the Course of Several Years and is Demonstrated by Her Flipping Off⁴ a Keith Davis, Jr. Supporter and then Lying About It

The deep-seated animus Ms. Mosby has toward Mr. Davis and his family is well documented, has unfortunately played out in public, and demonstrates that this prosecution is infected with her own personal interest. Although prosecutors are “traditionally accorded wide discretion . . . in the enforcement process,” nevertheless, “[a] scheme injecting personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.” Marshall v. Jerrico, Inc., 446 U.S. 238, 248–50 (1980). A prosecutor with a conflict of interest “creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general.” Young v. United States ex rel. Vuitton Et Fils S. A., 481 U.S. 787, 811 (1987). A vindictive prosecution such as this one is a clear due process violation. See generally Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (holding that a vindictive prosecution or investigation is a due process violation “of the most basic sort.”).

As the preceding facts demonstrate, Ms. Mosby's animus for Mr. Davis and his family stems back years. Leading up to the robbery trial, Mr. Davis's wife, ever her husband's champion, began speaking publicly about the police's attempt to kill her husband, and the State's efforts to take his liberty instead of holding them accountable. In doing so, Mrs. Davis attracted a growing following of

⁴ According to Wikipedia, “In Western culture, “the finger”, or the middle finger (as in giving someone the (middle) finger, the bird or flipping someone off) is an obscene hand gesture. The gesture communicates moderate to extreme contempt, and is roughly equivalent in meaning to “fuck me”, “fuck you”, “shove it up your ass/arse”, “up yours” or “go fuck yourself”. It is performed by showing the back of a hand that has only the middle finger extended upwards, though in some locales, the thumb is extended. Extending the finger is considered a symbol of contempt in several cultures, especially in the Western world.” https://en.wikipedia.org/wiki/The_finger, last visited March 7, 2022.

supporters, often referred to as Team Keith. In December 2015, a small group of Mr. Davis's local supporters began delivering letters to the State's Attorney's Office, calling on Ms. Mosby to drop the charges and return Mr. Davis to his family in time to celebrate the holidays. Mrs. Davis and Mr. Davis's supporters held several peaceful protests in front of the State's Attorney's Office. See, e.g., Baltimore Bloc Video, available at: <https://www.youtube.com/watch?v=zYeaM6GQ-8k>, last visited, March 1, 2022.

Ms. Mosby probably did not like the negative attention, especially with all eyes on Baltimore once again; the trial of Officer William Porter, the first officer to be prosecuted for the killing of Freddie Gray, was also in December 2015, and BPD was on high alert for any civil disobedience that may follow a verdict. (After two days of deliberations, the jury was deadlocked at 11-1 in favor of acquittal, and the judge declared a mistrial). See Justin Fenton and Kevin Rector, *Mistrial declared in trial of Officer William Porter in death of Freddie Gray*, Balt. Sun, Dec. 16, 2015, available at: baltimoresun.com/news/crime/bs-md-porter-trial-jury-wednesday-20151216-story.html, last visited March 7, 2022. Ms. Mosby eventually dropped the charges against Officer Porter rather than pursuing a retrial. See Kevin Rector, *Charges dropped, Freddie Gray case concludes with zero convictions against officers*, Balt. Sun Jul, 27, 2016, available at: baltimoresun.com/news/crime/bs-md-ci-miller-pretrial-motions-20160727-story.html, last visited Mar. 7, 2022.

In April 2016, several members of Team Keith attended a public safety town hall held by Ms. Mosby, and took the opportunity to ask her how she could decline to prosecute the officers who shot Mr. Davis without ever even interviewing them. Although her office appears to have never attempted to interview the officers, Ms. Mosby responded, "There's something called the 5th Amendment," and she implied that the officers had invoked their Fifth Amendment privilege against

self-incrimination even though there is no evidence she ever tried to interview them. See Townhall Video, available at: https://www.youtube.com/watch?v=X_1o0JJUlnM, last visited March 7, 2022.

This was the first of many public statements made by Ms. Mosby that contain misleading information surrounding Mr. Davis's case. Also in April 2016, Mrs. Davis attended another community event where Ms. Mosby was scheduled to speak, and posed questions while defending her husband's innocence and challenging Ms. Mosby's political brand of progressive prosecutor. See Town Meeting Video, available at: https://www.youtube.com/watch?v=MiwVnxp_bOc&t=63s, last visited March 7, 2022. Rather than responding to Mrs. Davis's critique or questions, Ms. Mosby turned her back and walked out, surrounded by her security detail, ending the event early. It was likely at that point, nearly six years ago, that Marilyn Mosby's personal vindictiveness became the overwhelming force behind her continued prosecution of Mr. Davis.

C. Ms. Mosby Gives the Finger to Keith Davis Supporter and then Lies About It

Ms. Mosby has become so full of animus and vindictiveness, she has begun to lie in public. Since the State's last failed prosecution (the fifth, including the robbery trial), Ms. Mosby has unleashed a flurry of statements to the media expressing her vindictiveness and her passionate disdain for Mr. Davis, and she has done so likely in violation of the Maryland Rules of Professional Conduct Rule 3.6, Trial Publicity; Rule 3.8, Special Duties of Prosecutors, and 4.1, Truthfulness in Statements to Others. Committing prosecutorial misconduct in a case, on its face, violates the defendant's right to due process and warrants dismissal, but in addition, it demonstrates the vindictive nature of the prosecution. All of these actions, taken together, constitute direct evidence of prosecutorial animus. They also indicate that, absent this animus, this prosecution would not have been initiated. See United States v. Koh, 199 F.3d 632 (2d Cir. 1999) (holding that vindictive prosecution can be shown when a prosecutor harbored genuine animus towards the defendant and

the defendant would not have been prosecuted except for the animus). It is admittedly rare for a court to question the motives of a prosecutor, and generally prosecutorial discretion is a key part of the criminal justice system. However, if there were ever an example of facts that demonstrate prosecutorial vindictiveness requiring dismissal, it is this case.

On May 19, 2021, while Ms. Mosby was at an outdoor bar, drinking with her friends and colleagues, a Team Keith supporter rode by her on his bicycle, chanting peacefully, “Free Keith Davis, Junior.” In what could not be more evidence of disdain and personal vindictiveness, Ms. Mosby responded with vulgarity by giving the Keith Davis Jr. supporter the middle finger:



Baltimore City State's Attorney Marilyn Mosby makes an obscene gesture toward Sean Gearhart after he rushed her at a restaurant while recording. Images taken from video shot by Sean Gearhart.

See Tim Prudente, *After denial, Baltimore State's Attorney Mosby acknowledges obscene gesture toward Keith Davis Jr. supporter*, Balt. Sun, May 28, 2021, attached as Exhibit 37; see also Twitter, <https://twitter.com/jewstein3000/status/1395438426783064069/photo/4>, last visited March 7, 2022, attached as Exhibit 38..

Adding insult to injury, and showing consciousness of guilt, Ms. Mosby then lied about the vulgar gesture on Twitter, from the official account for the State's Attorney's Office, and tweeted that lie *directly to Mr. Davis's wife*, whose Twitter handle is @50ShadesofKellz:



Ms. Mosby falsely tweeted from her official Baltimore City State's Attorney twitter account, "This is clearly a thumb guys - enough already. Let's move on." See Mosby Tweet to Mrs. Davis, available at: <https://twitter.com/BaltimoreSAO/status/1395193113166155779>, last visited March 7, 2022, attached as Exhibit 38. She accompanied her tweet with a strategically chosen screenshot from the video where the finger in question does appear to be a thumb. This prompted other Twitter users to post even more screenshots from the video, which proved Ms. Mosby had, in fact, held up her middle finger. The media confirmed that Ms. Mosby lied, and from there, Ms. Mosby went on to explain, in different variations, why she gave the Keith Davis Supporter the middle finger. See Tim Prudente, *After denial, Baltimore State's Attorney Mosby acknowledges obscene gesture toward Keith Davis Jr. supporter*, Balt. Sun, May 28, 2021, attached as Exhibit 37; Baltimore Sun Editorial Board, *Marilyn Mosby's middle finger: The gesture wasn't as bad as the failure to acknowledge it*, Balt. Sun, May 21, 2021, attached as Exhibit 40.

Mosby then went on to do a radio interview, in which she made material misstatements again, while, ironically, justifying the fact that she had lied about giving a Keith Davis supporter the middle finger and defending her position to re-prosecute Mr. Davis for murder for the fifth time. She also likely told this misstatement in an attempt to poison the jury pool and to win her upcoming election.

More precisely, on May 24, 2021, Ms. Mosby went on Baltimore's 92Q radio station, a popular radio station specializing in rhythm and blues, hip-hop, and talk radio. She appeared on the afternoon show, *Quicksilver Show with Dominique da Diva* (the *Quicksilver Show*), to defend the fact that she lied; to disparage Mr. Davis, to defend her decision to re-prosecute for a fifth time; and to attempt to win her upcoming election. See Mosby Quicksilver Interview, available at: <https://web.archive.org/web/20210524163857/https://kysdc.com/4201273/marilyn-mosby-talks-new-policies-summer-youth-program-addresses-middle-finger-incident/>, last visited March 7, 2022; see also <https://www.instagram.com/tv/CPQyh1Aje7g/?hl=en>, last visited March 7, 2022.

While on the radio show, Ms. Mosby appears to have engaged in professional misconduct in violation of Maryland Attorneys' Rules of Professional Conduct Rule 3.6, Trial Publicity; Rule 3.8, Special Duties of Prosecutors; and Rule 4.1 Truthfulness of Statements to Others, by making a false, public, extrajudicial comment neither necessary to inform the public, nor for a legitimate enforcement purpose. Despite Ms. Mosby's extensive professional knowledge of the facts and circumstances of Mr. Davis's case; or that she signed the indictments against Mr. Davis, and that she managed the prosecutors who failed to secure a conviction, Ms. Mosby declared that her rude, vulgar gesture displaying her animus was necessary because, as she falsely asserted, "**Keith Davis**

is a convicted murderer, he's been convicted on three occasions.” DJ Quiksilver Transcript, Attached as Exhibit 40.⁵

It is a basic fundamental legal principle that a conviction is not final before sentencing, while a case is pending on appeal, or when a new trial or appeal has been granted. See Griffith v. Kentucky, 479 U.S. at 321 n. 6, (“By ‘final,’ we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.”). Once Mr. Davis’s Motion for New Trial was granted, his sentence was vacated, and he converted to a pre-trial status. Mr. Davis has not ever had valid murder conviction, as no jury verdict was affirmed on appeal or been able to survive a motion for new trial. As the top prosecutor in Baltimore City, Ms. Mosby is charged with knowing this basic fundamental legal principle.

Thus, when Ms. Mosby stated that Mr. Davis was “*a convicted murderer*, he’s been convicted on three occasions,” that was not true. While Mr. Davis was convicted of possessing a firearm as a restricted person, the first murder trial ended in a hung jury; the second murder trial ended with an acquittal for first degree murder and a guilty verdict for second degree murder, but that verdict was set aside when Mr. Davis won his motion for new trial; the third murder trial ended in a hung jury; and the fourth murder trial also ended with a guilty verdict, which was set aside in May of 2021 on another motion for new trial. Ms. Mosby’s false, misleading and prejudicial statements illustrate her animus towards Mr. Davis. Moreover, that she appears to have committed misconduct in this case in

⁵ While undersigned counsel immediately contacted the radio station and alerted them to her damaging statements about Mr. Davis, and the clip was cut from radio show, presumably because the producers were afraid of being sued, the radio personality, apparently a personal friend of Ms. Mosby’s, continued to circulate the interview on the internet, where it remains today. See Instagram, <https://www.instagram.com/tv/CPOvh1Aje7g/?hl=en>; <https://twitter.com/DJQUICKSILVA/status/1396863589458321413>, last visited March 7, 2022.

violation of the prohibition against extrajudicial statements, further illustrates the vindictive nature of both prosecutions against Mr. Davis and warrants dismissal.

D. The Misconduct Infects the Conduct of Ms. Mosby's Prosecutors

The animus goes beyond Ms. Mosby herself and extends to her prosecutors. For example, Ms. Mosby's Deputy State's Attorney, now Chief Deputy, has repeatedly engaged with the public on social media to discuss in great detail, her version of the evidence in the case to defend her boss and promote Ms. Mosby's version of the evidence. See Facebook Posts, attached as Exhibit 41. The Deputy State's Attorney also sent disparaging messages about Mrs. Davis, which messages contain facts she alleges to have learned in a confidential professional relationship. More specifically, in October 2017, the Deputy sent unsolicited text messages to then journalist Amelia McDonell-Parry, in which she attacked Mrs. Davis's credibility and her parenting, alleging that Mrs. Davis "pulled the wool over all of your eyes . . . she treats her kids like crap.. . she yells profanity at them and screams at them . . . she was once my student⁶" See Affidavit of Amelia McDonell-Parry and Redacted

⁶ The text messages have been redacted because Ms. Mosby's Deputy discloses in them, without permission, private medical information pertaining to Mrs. Kelly Davis, and any unauthorized re-disclosure of that information could be a criminal misdemeanor. More specifically, pursuant to Maryland's Health General code, a medical record includes any oral, written, or other transmission in any form or medium of information that is either 1) entered in the record of a patient or recipient; 2) identifies a patient or recipient; or 3) relates to the health care of a patient or recipient. See Maryland Code, Health-General Article §4-301 (j). Health-General Article §4-302 (d) prohibits the re-disclosure of a medical record without the consent of the person in interest, unless it is otherwise permitted under Subtitle 3 of the Health-General Article. A medical record may be disclosed pursuant to compulsory process, defined as subpoena, summons, warrant or court order in §4-306(a), only directly from the original source—a "health care provider," and then only if the notification process set forth in §4-306 (b) (6), including written notice to the person whose medical records are sought, is first complied with. Under Health-General Article §4-309(e) (1), a person who knowingly and willfully requests or obtains or knowingly and willfully discloses a medical record in violation of Subtitle 3 of the Health-General Article is guilty of a misdemeanor.

Text Messages from Deputy Bledsoe to Ms. McDonell-Parry, October 17, 2017, attached as Exhibit 42.

Further demonstrating animus, Ms. Mosby's Deputy went on to text private confidential medical information about Mrs. Davis to Ms. McDonell-Parry, who was then a freelance journalist. Ms. Mosby's deputy appears to have obtained the confidential medical information while she was employed as Mrs. Davis's teacher and Mrs. Davis was a juvenile. Maryland's public policy protects people from the unauthorized dissemination of their private medical and educational information. See Md. Ann. Code Health-General Article §4-309(e) (1) (a person who knowingly and willfully requests or obtains or knowingly and willfully discloses a medical record in violation of Subtitle 3 of the Health-General Article is guilty of a misdemeanor."); see also 20 U.S.C.A. §1232g (j) (stating that Educational records may be disclosed without the written consent of the parents (or the student upon reaching the age of eighteen), but only if the issuing courts finds good cause shown). The animus from Ms. Mosby's office towards the Davis family was so intense that Ms. Mosby's Deputy was willing to disclose private information to a reporter in an attempt to disparage Mrs. Davis and defend Ms. Mosby's prosecution.

Ms. Mosby's animus towards Mr. Davis and his wife also extends to her line prosecutors who themselves engaged in questionable conduct in their effort to secure a conviction. More specifically, the first prosecutor on the case withheld material evidence, namely snitch information and surveillance video. See Justin Fenton, *Keith Davis granted a third trial in killing of Pimlico security guard*, Balt. Sun., Dec. 4, 2017, attached as Exhibit 30.

Ms. Mosby's second prosecutor who appeared at the fourth murder trial in July 2019, mocked Mr. Davis's wife during closing arguments. He also repeatedly misstated facts and law, including telling the jury that Mr. Davis was "not presumed innocent" while presenting a

Powerpoint that he refused to enter into evidence. When the case was pending on appeal on this alleged error as well as many others, Ms. Mosby's prosecutor was pressed to turn over the Powerpoint that he had shown to the jury, and appears to have handed in a doctored version that omitted the slide that asserted Mr. Davis was not presumed innocent.

In response to the glaring discrepancy between the Powerpoint that her office showed the jury and the one they presented while the case was pending appeal, the Court of Special Appeals remanded the case specifically for an evidentiary hearing to determine the accuracy of what Ms. Mosby's office handed in: "ORDERED that the appeal is remanded to the Circuit Court for Baltimore City, without affirmance or reversal, *with instructions to hold an evidentiary hearing to determine whether the Powerpoint provided by the State to the appellant for inclusion in the record is the same Powerpoint used by the State during closing argument.*" Court of Special Appeals Order, attached at Exhibit 16 (emphasis added). The assigned prosecutor left Ms. Mosby's office before the hearing was scheduled. Soon thereafter, a mere eighteen months after it had been originally filed, the Court granted Mr. Davis's motion for new trial.⁷ See Court Order, Attached as Exhibit 17. In sum, Ms. Mosby has deep personal animus and the successive prosecutions of Mr. Davis are the result of vindictiveness. This vindictiveness runs down the chain of command to her Deputy and her line prosecutors.

The Indictments returned against Mr. Davis, and the decision to re-prosecute after multiple failed attempts is the culmination of a long-running crusade to vindicate herself and retaliate against Mr. Davis's faithful and passionate wife, Kelly Davis. This conduct highlights the ongoing animosity toward the Davis family by Ms. Mosby, her Deputy, and her prosecution team. Such animosity demonstrates that the prosecution against Mr. Davis is not fair and just, and that he has not and will not receive a fair day in court, as due process requires. The lack of due process is reflected in how

⁷ Ms. Mosby's line prosecutors also denigrated Mrs. Davis during trial, and sarcastically stated that "we wouldn't be here if it wasn't for her." See generally, Transcript attached as Exhibit 43.

the prosecution has been handled. In this regard, Ms. Mosby is driven by her own personal animus and for the reasons previously mentioned, it is clear that the entire prosecutorial process has been so thoroughly tainted by animus that the extraordinary relief of dismissing the Indictments is appropriate.

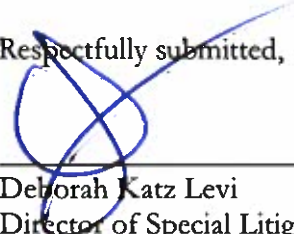
II. The Taint of Animus Shifts the Burden to the Government To Provide An Alternative Explanation for Its Motives

At the very least, the conduct of Ms. Mosby and her team gives rise to a “rebuttable presumption of vindictiveness.” United States v. Goodwin, 457 U.S. 368, 373 (1982). And this presumption has yet to be rebutted. The burden thus lies with the Government to explain these facts and to present evidence justifying the prosecutor’s acts, for which the most likely explanation is pure animus. Id. at 384. To erase the taint of vindictiveness, the Government must explain its reasons for delay; its personal attacks; and other prosecutorial misconduct. It should also be required to show how many other homicides it delays charging for a full year, and how many alleged jail fights it waits to file for an entire year. At a minimum, Mr. Davis is entitled to a hearing and meaningful discovery and if the Government is unable to rebut the presumption of animus, the Indictments in both cases must be dismissed as fatally tainted by prosecutorial animus.

CONCLUSION

The clear animus towards Mr. Davis and his family speaks to the lack of integrity and improper nature of this prosecution. The foregoing facts and sequence of events that gave rise to this Indictment demonstrate the clear inappropriateness of the origin of the Indictment and why it should be dismissed. And further, absent this Honorable Court’s immediate grant for dismissal, Mr. Davis is entitled to a hearing and meaningful discovery on the prosecution’s motives.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of March, 2022, a copy of the foregoing Motion to Dismiss was emailed to ASAs Noelle Newman and Rita Wisthoff-Ito , at the Baltimore City State's Attorney's Office, 120 E. Baltimore Street, Baltimore, MD 21202, at NNewman@statorney.org and [Rita Wisthoff-Ito](mailto:Rita.Wisthoff-Ito@Statorney.org) , at Rwisthoff-ito@Statorney.org



Deborah Katz Levi
Assistant Public Defender

STATE OF MARYLAND

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IN THE

v.

*

CIRCUIT COURT

KEITH DAVIS, JR.

*

FOR

CASE NO: 116090001; 121159010

*

BALTIMORE CITY

* * * * *

ORDER

It is hereby ordered this ____ day of _____, 2022 that the Defendant's Motion to Dismiss for Vindictive Prosecution is HEREBY GRANTED;

Or, in the alternative,

A hearing is hereby GRANTED, and SCHEDULED for the ____ day of _____, 2022.

Circuit Court Judge
Baltimore City