IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

COMMONWEALTH   :

                             :

     v.   :   **CP-51-CR-0006367-2016**

                             :

DEMETRIUS D. MAYFIELD   :

ADDENDUM TO
MEMORANDUM IN SUPPORT OF
MOTION FOR COMPLIANCE WITH MANDATORY STAY

To its Memorandum of Law in Support of Motion for Compliance with Mandatory Stay, the Commonwealth respectfully adds the following:

The Commonwealth calls the Court's attention to the language employed by the Supreme Court in Smith v. Gallagher, 185 A.2d 135 (Pa. 1962). There, a Philadelphia judge convened a "special grand jury" to investigate corruption, displaced the District Attorney of Philadelphia, and appointed a "special prosecutor" to proceed in his place. In addition to finding that convening a "special grand jury" was improper, the Supreme Court granted the D.A.'s petition for a writ of prohibition. The Court stated, *inter alia*:

> The District Attorney may not be removed from his office except by impeachment. No judge may dictatorally order him to refrain from doing his work.

Smith, at 151-152. The Court further observed that:

> No Court may remove a District Attorney of its own volition, nor may it, by appointing someone else to act in its place, accomplish the same result of removal.

Id. at 151-52.

Smith was subsequently overruled on an unrelated question involving taxpayer standing, which in no way called into question the high court's explanation of the separate roles of the executive and the judiciary. *See* In re 35th Statewide Grand Investigating Jury, 112 A.3d 624, 628 (Pa. 2015).

Here, sound policy considerations justify the Commonwealth's exercise of its discretion to defer seeking punishment for Mayfield's violation of probation by committing a new crime, until after his conviction on the new charges.

First, as previously noted, this is the procedure preferred by the Supreme Court. *See e.g.* Commonwealth v. Burrell, 441 A.2d 744, 745-46 (Pa. 1982).

Second, deferring prosecution for a violation of probation until after conviction on the new charges will obviate the otherwise inevitable necessity for the Commonwealth to defend against a host of appellate claims, which the defense will unquestionably raise. Rightly or wrongly, if the Commonwealth seeks to impose punishment for a violation of probation prior to Mayfield's conviction on the new charges, it will have to defend against the following appellate claims:

1.   Rightly or wrongly, the defense will assert a due process violation because, in order to defend himself at his VOP hearing, Mayfield will be compelled to disclose his defense to the new charges, prior to his trial on those charges.

2.   Rightly or wrongly, if the Court finds him in violation of probation and imposes a new sentence prior to his conviction on the new charges, the defense will claim that Mayfield has been unconstitutionally subjected to

punishment for a criminal offense, each element of which has not been proven at trial beyond a reasonable doubt.

3.   Rightly or wrongly, the defense will claim that this Court's treatment of this matter—in particular its adamant preference for proceeding with a VOP hearing prior to trial—reflects an inability to fairly judge whether he has violated his probation.

Significantly, whether or not any of these claims are legally valid, the Commonwealth will be compelled to expend scarce time and resources to defend against them, possibly for years, in Pennsylvania's higher courts. All of this can be avoided (including the possibility that a higher court may agree with the defense) by deferring a VOP hearing until after conviction.

One additional point is also significant. A VOP hearing conducted prior to trial could potentially result in a finding that Mayfield did *not* violate his probation. If this were to occur, the Commonwealth's ability to proceed with the open criminal charges could potentially be compromised.

Respectfully submitted,

/s/ Peter Carr
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