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July 27, 2009

VIA HAND-DELIVERY

Marian Soto, Criminal Clerk Manager
Circuit Court for Baltimore City
Clarence M. Mitchell, Jr. Courthouse
100 N. Calvert St., Room 200
Baltimore, MD 21202

Re: *State of Maryland v. Sheila A. Dixon*
Case No. 109009009

Dear Ms. Soto:

Enclosed herewith please find Defendant's Reply Memorandum in Support of Motion to Quash Grand Jury Subpoenas and for other Appropriate Relief to be filed in the above-referenced case.

Thank you for your attention with respect to this matter.

Very truly yours,



Dale P. Kelberman

DPK/klf
Enclosure

Cc: Hon. Dennis M. Sweeney
Robert A. Rohrbaugh, State Prosecutor
Thomas M. McDonough, Deputy State Prosecutor
Arnold M. Weiner, Esquire

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

STATE OF MARYLAND

*

v.

*

CASE NO. 109009009

SHEILA ANN DIXON

*

*

**REPLY MEMORANDUM IN SUPPORT OF
MOTION TO QUASH GRAND JURY SUBPOENAS
AND FOR OTHER APPROPRIATE RELIEF
FOR ABUSE OF GRAND JURY PROCESS**

Sheila A. Dixon, by her undersigned counsel, and pursuant to the United States Constitution, Articles 21 and 24 of the Maryland Declaration of Rights, and Rules 4-266 and 4-643 of the Maryland Rules of Criminal Procedure, submits this Reply Memorandum in support of her Motion to Quash Grand Jury Subpoenas, and for other Appropriate Relief.

I. Introduction

Six months after obtaining an indictment against the defendant in January 2009, the State Prosecutor issued grand jury subpoenas to at least three individuals commanding them to appear before the Baltimore City Grand Jury and compelling them to produce documents solely related to the charges already part of the pending indictment. The subpoenas were issued several months after the defendant's motion to dismiss identified various holes in the prosecution's case. As such, the subpoenas are an obvious effort to improve the State's case, to conduct secret discovery, and to shore up what the prosecutor now realizes are serious defects in the remaining charges.

When the defendant learned about these subpoenas and the evident abuse of the grand jury process, she filed a Motion to Quash those subpoenas, and for further

appropriate relief. The State then withdrew the grand jury subpoenas which were the subject of the Motion. Nonetheless, this Court directed the State to file a response, which was submitted to the Court on July 20, 2009.

The State's paltry two-page response addresses none of the issues raised by the defendant. Rather, scurrying behind the cloak of grand jury secrecy, the State claims that it will "respond in more detail at an appropriate hearing" and that it is "inappropriate for the State to respond with specificity in the public forum at this time." The State then states that the issues "will be more fully discussed at a more appropriate time and in the appropriate forum." In an exercise of obfuscation and evasion, the State attacks the defendant, arguing that she has somehow violated grand jury secrecy and procedure, that she lacks standing to raise these issues, and that the issues raised are moot.

By withdrawing the subpoenas, the State impliedly admits that it abused the grand jury process by issuing them in the first place. Yet, in what can only be described as the height of irony, the State Prosecutor complains that the defendant has wrongfully exposed his abuse of the process by filing her motion on the public record. Significantly, the prosecutor does not defend the issuance of those subpoenas; nor does he deny the existence of other post-indictment subpoenas.

Because the Court has an overriding obligation to ensure that the defendant receives a fair trial, free from evidence gathered through an abuse of the grand jury process, it should reject the State's efforts to sweep its admitted abuse under the rug, and should grant the relief the defendant requests, viz. require the State to produce copies of

any other post-indictment grand jury subpoenas which it has issued,¹ and prevent the State from profiting by any such abuse by prohibiting the State from using any improperly obtained evidence, or fruits thereof.

II. Argument

Rather than respond directly to the issues raised in the defendant's Motion, the State argues that the defendant improperly has filed her motion in the pending case in which she has been charged. The prosecutor contends that such a procedure is inconsistent with the provisions of Maryland Rule 4-642(a) and (b), which provide that records relating to "criminal investigations" shall be sealed, and proceedings relating to such matters shall be "conducted out of the presence of all persons except those whose presence is necessary." The State's argument is misguided.

In the first place, it is axiomatic that rules governing grand jury secrecy do not apply to a defendant already charged with a crime, nor do those rules apply to witnesses who appear before the grand jury or who receive subpoenas to do so.

[G]rand jury witnesses are under no legal obligation of secrecy. A grand jury witness is legally free to tell, for example, his or her attorney, family, friends, associates, reporters, or bloggers what happened in the grand jury. For that matter, the witness can stand on the courthouse steps and tell the public everything that was asked and answered.

In re Grand Jury, 490 F.3d 978, 989 (D.C. Cir. 2007). In Maryland, "Rules 4-641 through 4-644 apply to circuit court procedures relating to criminal investigations. 'Criminal investigation' means inquiries into alleged criminal activities conducted by a grand jury or by a State's Attorney. (Emphasis added). Md. Rule 4-641. Here, the thrust

¹ The Court should also require the State to disclose copies of any memoranda of interview of witnesses who agreed to be interviewed only after being informed that the State intended to issue a post-indictment grand jury subpoena.

of the defendant's Motion is that the State did not issue the subpoenas in connection with a legitimate investigation, but rather as a private discovery mechanism. The State has withdrawn the subpoenas, and in its Response, does not attempt to defend their issuance as part of a proper investigation.

Moreover, the rules cited by the State Prosecutor support the defendant's filing as proper. Rule 4-643(b), relating to the enforcement of grand jury subpoenas, provides that "the witness or a person asserting a privilege" to prevent disclosure by the witness may apply for a protective order pursuant to Rule 4-266(c). Rule 4-266(c), which governs protective orders for subpoenas, does not require that a motion pursuant to that rule be filed under seal.

"The Grand Jury serves an independent investigatory function, and is 'not meant to be the private tool of the prosecutor.'" *United States v. Under Seal*, 714 F.2d 347, 349 (4th Cir. 1983) citing *United States v. Fisher*, 455 F.2d 1101, 1105 (2nd Cir. 1972).

The State does not and cannot supply authority in support of its opposition. Indeed, the only Maryland case to address the issue, *Erman v. State*, 49 Md. App. 605 (1981), involved a defendant's motion to dismiss his pending case based on allegations that the State abused the grand jury process by issuing post indictment subpoenas for the purpose of further preparing the ongoing case. *Id.* at 627. The Court restated the principle that "use of the grand jury process to gather evidence as to those charges for which a defendant has been indicted cannot be condoned," but found the evidence insufficient to show such grand jury misuse. In the process, the Court noted with approval the trial court's order requiring the State to provide to the defendant copies of all grand jury subpoenas issued after indictment. The Court further opined that upon a

finding of grand jury abuse, one appropriate sanction would be suppression of any evidence derived from the improperly issued subpoenas. *Id.* at 629.

While Rule 6(e) of the Federal Rules of Criminal Procedure governing grand jury secrecy is perhaps even more stringent than Maryland Rule 4-643, the numerous federal cases in which the issue of abuse of the grand jury process has arisen have also been considered by the trial judge in the context of the case under indictment. *See, e.g. United States v. Moss*, 756 F.2d 329, 331 (4th Cir. 1985); *United States v. Flemmi*, 245 F.3d 24 (1st Cir. 2001); *United States v. Kovaleski*, 406 F.Supp. 267 (E.D. Mich. 1976); *United States v. Zarattini*, 552 F.2d 753 (7th Cir. 1977); *United States v. Woods*, 544 F.2d 242 (6th Cir. 1976); *United States v. Sellaro*, 514 F.2d 114 (8th Cir. 1973); *United States v. Gibbons*, 607 F.2d 1320 (10th Cir. 1979).²

The State also questions the defendant's standing to raise these issues, and whether they are "ripe" for consideration. Response at 2. As the above cases, including *Erman*, make abundantly clear, the prosecutor's misuse of the grand jury process affects the defendant's rights to due process and a fair trial, which is why courts have considered the issues under similar circumstances. *See, e.g., United States v. Woods, supra* at 250 (addressing merits of defendant's grand jury abuse arguments in spite of government's contention that defendant lacked standing.)

Finally, the Court should reject the State's suggestion of mootness. The Court should not permit the State to conceal other potential similar violations merely by withdrawing those improper subpoenas which have surfaced. Even if the Court concludes that the rules governing criminal investigations applies, the defendant has

² Of course, the proper mechanism for filing the instant motion has absolutely no bearing on its merits, nor should it affect the Court's determination of the appropriate relief to be granted.

presented a sufficient basis for the Court to require the State to disclose the existence of any other post-indictment subpoenas, and to take other appropriate steps to ensure the defendant receives a fair trial.

Rule 4-642(d) addresses the filing of a motion for disclosure of grand jury information. Although the Rule itself does not provide a standard for courts to consider in ruling on such a motion, the Court of Appeals has held that there must be a showing of “particularized need” to justify disclosure. In particular, a party “must show that:

- (1) the material they seek is needed to avoid a possible injustice; and
- (2) the need for disclosure is greater than the need for continued secrecy; and
- (3) their request is structured to cover only material so needed.

In Re Criminal Investigation No. 437, 316 Md 66, 82-85 (1989); *Office of the State Prosecutor v. Judicial Watch, Inc.*, 356 Md. 118, 134 (1999).

Here, the defendant has demonstrated the “particularized need” that the Rule contemplates. The State has already made improper use of the grand jury. The material sought -- any other grand jury subpoenas issued post-indictment -- must be disclosed to determine the extent of the abuse and to prevent the State from gaining unfair advantage from that abuse.

In addition, the second criteria, weighing the “need for disclosure” against the “need for continued secrecy,” also supports disclosure here. The usual rationales for grand jury secrecy at this point should carry little weight. Because an indictment has already been returned and pretrial motions have been heard, the concern of prospective witnesses who might be hesitant to testify, the risk of flight of those who might be charged, the potential that targets might try to influence the grand jury, and the assurance

that those exonerated will avoid embarrassment, have no application to the present case. *See Office of the State Prosecutor, supra* at 133 (quoting *In Re Criminal Investigation No. 518*, 119 Md. App. 112, 117 (1998), summarizing the reasons for grand jury secrecy).

Finally, the defendant's request is narrowly tailored to only cover "the material needed" to avoid the potential injustice.

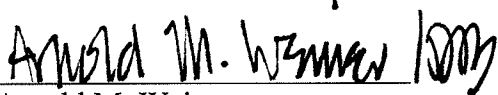
III. Conclusion

The State's Response to the Motion to Quash only serves to underscore the need for the Court to intervene to insure the defendant receives a fair trial, and that the State has not abused the grand jury process beyond that which it has already conceded. The State has not denied that it has abused the grand jury, and has refused to certify that there are no other offending subpoenas. Its efforts to hide behind the presumption of regularity and secrecy of grand jury proceedings is without merit, and in any event should have no bearing on the merits of the issues raised by the defendant. For these reasons, the Court should order the State Prosecutor to suspend any further use of the grand jury, including the attendance of these witnesses and the production of any responsive documents, and should direct the State Prosecutor to produce for the defendant copies of any and all post-indictment grand jury subpoenas, a procedure employed with approval in *Erman v. State, supra*.


Once the State Prosecutor complies with this procedure, the Court will then be in a position to determine what sanctions to impose. But at the very least, the Court should not permit the State to trample on the defendant's rights under due process to a fair trial, based upon evidence gathered pursuant to the rules. The grand jury is not the

prosecutor's private discovery cell, and he should not be permitted to undermine the integrity of the Court's processes to his own advantage, nor hide behind the veil of grand jury secrecy for that purpose. As noted in the defendant's original Motion, the Court should impose some sanction on the prosecutor which acts as a deterrent to him, and other prosecutors, from abusing the grand jury process.

Respectfully submitted,


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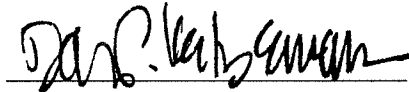
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July 27, 2009

CERTIFICATE OF SERVICE

I hereby certify this 27th day of July, 2009, that a copy of the foregoing Reply Memorandum in Support of Motion to Quash Grand Jury Subpoenas was sent by electronic and regular mail to Robert Rohrbaugh, Esq., Office of the State Prosecutor, Towson, Maryland.

A handwritten signature in black ink, appearing to read "Dale P. Kelberman", is written over a horizontal line.

Dale P. Kelberman