

MILES & STOCKBRIDGE P.C.

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August 31, 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
Criminal Case Nos. 109210015 & 109210016

Dear Ms. Soto:

Enclosed please find Defendant's Reply Memorandum in Support of Motion to Compel Discovery in connection with the above-captioned cases. Should you have any questions, please do not hesitate to contact me.

Very truly yours,



Dale P. Kelberman

DPK/klf

cc: Honorable Dennis M. Sweeney
Robert A. Rohrbaugh, Esquire
Arnold Weiner, Esquire

IN THE CIRCUIT COURT FOR BALTIMORE CITY

STATE OF MARYLAND

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CASE NOS. 109210015
109210016

v.

*

SHEILA ANN DIXON

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* * * * *

**DEFENDANT'S REPLY MEMORANDUM
IN SUPPORT OF MOTION TO COMPEL DISCOVERY**

Now comes the Defendant, Sheila A. Dixon, by her undersigned counsel, and in support of her Motion to Compel Discovery, respectfully submits the following:

The State has now submitted an untimely response to the Defendant's Motion to Compel Discovery. That response is simply a combination of confusion, obfuscation, and irrelevancy. The response fails to address the heart of the Defendant's argument and it does not even mention the one appellate case directly on point. For the reasons which follow, the Court should reject the misguided response, and grant the Defendant's Motion to ensure that she receives a fair trial.

1. Pursuant to Rule 4-623 of the Maryland Rules of Criminal Procedure, the State had five (5) days within which to file a response to the Defendant's Motion to Compel, which was filed on August 18, 2009 and served on the State the same day. It was not until after the Defendant wrote a letter to the Court, asking the Court to grant the unopposed motion, that the State filed its belated response. The delay may prejudice the Defendant in that the discovery she seeks is relevant to her filing of pretrial motions, so that the State's failure to abide by the time limit in the rule is by itself grounds for granting the State's motion and rejecting the untimely

response. However, even if the Court considers the merits of the State's arguments, the response is unavailing.

2. The State seems to be confused about the case in which the Defendant is seeking discovery. The State argues that because it previously dismissed the original indictment in this case, it somehow is protected from disclosing possible grand jury abuse in connection with the new charges that were filed. The discovery that the Defendant seeks is in connection with the new charges and the Motion to Compel was filed in those new cases. Therefore, the dismissal of the original indictment is simply irrelevant to the Defendant's request for discovery in connection with the new charges.

3. The State maintains that the discovery sought should not be produced because "no subpoenas for testimony or evidence were issued by any grand jury after the indictment was returned in case number 109009009 in January 2009 for the purpose of preparing for trial of that indictment." Response at page 4. The State alleges that the May Term 2009 Baltimore City Grand Jury is the body that returned the new charges and it was that body which issued additional subpoenas. Yet as the Defendant's Motion to Compel demonstrates, in July 2009, the May 2009 grand jury issued subpoenas to Zoe Michal, and others, which were the subject of a previously filed Motion to Quash. On the heels of that Motion to Quash, the State Prosecutor withdrew the two known subpoenas. The State maintains that the additional subpoenas issued by the new grand jury were proper, but it has yet to explain why those two grand jury subpoenas (and any others unknown to the defense at this point) were withdrawn. If there was nothing improper about those subpoenas, why were they withdrawn? How many more such subpoenas were issued? What information did the State Prosecutor obtain by those subpoenas, either before

or outside of the grand jury? Why is the State Prosecutor hiding this information from the Defendant?

While the State has cited several cases for mostly irrelevant issues, it has not even mentioned the one Maryland appellate case to address this issue, *Erman v. State*, 49 Md. App. 605 (Md. App. 1981), in which the Court of Special Appeals approved of the trial court's decision to require the State to provide the defendant with all grand jury subpoenas issued.

4. The State maintains that it has provided the defense with thousands of pages of discovery in this case. However, the fact that the State has abided by its obligations to produce discovery to the Defendant does not relieve it or excuse it from producing materials which it concedes are "within the spirit of *Brady*." The State cannot distinguish between the grand jury subpoenas previously disclosed to the defense and the grand jury subpoenas she now seeks. The State attempts to distinguish the subpoenas that have already been disclosed from those which it is hiding by suggesting that "what was disclosed by the State in discovery was evidence, that is, the response to each subpoena." Response at 8. Yet as the original Motion to Compel demonstrated, the State has produced copies of grand jury subpoenas which produced no evidence whatsoever.

5. In its response, the State maintains that the defense has not satisfied the requirement of demonstrating "particularized need" in order to obtain access to "grand jury" information. No citation is necessary for the proposition that exculpatory information is required to be produced without a demonstration of particularized need, pursuant to Maryland Rule 4-263, the *Brady* rule, and the Due Process Clause. Put another way, the Due Process requirements of both the Maryland and the Federal Constitution supersede the rule requiring a showing of particularized need to obtain grand jury information. Indeed, the State makes no attempt to, and

cannot, draw any distinction between the grand jury information that has already made available to the defense, such as the grand jury testimony of Mr. Lipscomb and others, and the grand jury subpoenas that the defense now seeks.

But even if the Court accepts the State's argument that a "particularized need" is necessary, the evidence here satisfies any such requirement. In order to demonstrate "particularized need," a party must show that:

(a) the material they seek is needed to avoid a possible injustice;

(b) the need for disclosure is greater than the need for continued secrecy; and

(c) the 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).

To the extent it is necessary, the Defendant here has demonstrated the particularized need that the rule contemplates. In order to determine whether there is a possible injustice, the grand jury subpoenas sought are obviously necessary. The State has already withdrawn at least two grand jury subpoenas, without any reason or justification. To the extent that there are other grand jury subpoenas which have similarly been issued, even if withdrawn, the defense is entitled to that discovery to prevent the "possible injustice" that may have occurred but gone undetected, and which may continue. Furthermore, the need for disclosure obviously outweighs any need for continued secrecy here. As noted above, the State has already disclosed grand jury information to the defense, including transcripts and other grand jury subpoenas. The usual rationales for grand jury secrecy, such as the concern for the risk of flight of those who might be charged, etc., have little application here where a superseding indictment has already been

returned. Finally, the request that the defense has made is narrowly tailored only to obtain the material necessary to avoid the possible injustice.

6. As the Defendant argued in her original motion, the State should not be able to cover up its grand jury abuse by dismissing one indictment and re-filing the very same charges in a new indictment in order to cover up its possible grand jury abuse. Here, a comparison of the charges in case number 109210015, the new indictment alleging theft and related offenses involving the gift cards, with the earlier charges shows that the new charges are the same as the charges that were dismissed in the original indictment:

- Count I of the new indictment alleges theft of gift cards from Patrick Turner during the period December 13, 2005 – January 29, 2006. The very same charge was alleged in Count V of the original indictment.
- Count II of the new indictment alleges theft of gift cards from Ron Lipscomb during the period December 18, 2006 – December 6, 2007. The very same charge was alleged in Count VI of the original indictment.
- Count III of the new indictment alleges the theft of gift cards under \$500.00 from the Baltimore City Housing Authority during the period December 12, 2007 – June 17, 2007 (sic) (should be 2008). Count VII of the original indictment alleged the very same charge.
- Count IV of the new indictment alleges fraudulent misappropriation by a fiduciary with respect to gift cards of Patrick Turner during the period December 13, 2005 – January 29, 2006. Count VIII of the original indictment contained the very same allegations.

- Count V of the new indictment alleges fraudulent misappropriation by a fiduciary with respect to the gift cards of Ron Lipscomb during the period December 18, 2005 – December 6, 2007. This was the very same charge contained in Count IX of the original indictment.
- Count VI of the new indictment alleges fraudulent misappropriation of a fiduciary with respect to the gift cards financed by the Baltimore City Housing Authority during the period December 12, 2007 – June 17, 2008. This is the identical charge contained in Count X of the original indictment.
- Count VII of the new indictment alleges misconduct in office with respect to the gift cards financed by the Baltimore City Housing Authority during the period December 21, 2007 – June 17, 2008. Once again, this is the very same charge that was contained in Count XI of the original indictment.

Thus, as is readily apparent, the superseding indictment contains the identical charges to the gift card charges in the original indictment which were dismissed.¹ One of the principal analyses courts undertake to determine whether the grand jury process has been abused is to compare the superseding charges with those of the original indictment to see if there are new defendants or new charges which are the product of the new grand jury. See *United States v. Flemmi*, 245 F3d. 24, 28 (1st Cir. 2001). In this case, that comparison demonstrates the strong likelihood that the grand jury process has been abused.

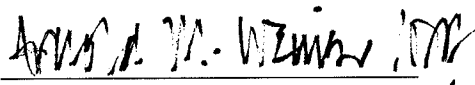
Surely there is more than sufficient evidence for the Court to warrant requiring the defense to produce the copies of the grand jury subpoenas at issue. Only after the defense has an

¹ While the new indictment may contain a few additional factual allegations, the charges themselves are a mirror image of the original dismissed counts. Indeed, the new factual allegations are further evidence that the additional grand jury subpoenas were issued to shore up the original charges, which have now reemerged in a new indictment containing the same offenses.

opportunity to review all of the relevant evidence on the issue and present it to the Court will the Court be in a position to decide whether the grand jury process has been abused. The Court should not cede this decision to the State Prosecutor who simply, *ipse dixit*, proclaims his innocence.

For the foregoing reasons, the Defendant respectfully urges this Court to grant her Motion to Compel Discovery and to order the State to produce the grand jury subpoenas at issue.

Respectfully submitted,



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Jeffrey Nusinov

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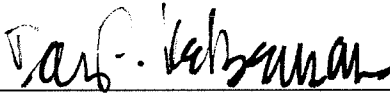
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August 31, 2009

Attorneys for Defendant Sheila A. Dixon

CERTIFICATE OF SERVICE

I hereby certify this 31st day of August, 2009, that a copy of the foregoing Reply Memorandum in Support of Motion to Compel Discovery was sent by electronic and regular mail to Robert Rohrbaugh, Esq., Office of the State Prosecutor, Towson, Maryland.


Dale P. Kelberman