

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

STATE OF MARYLAND

v.

SHEILA ANN DIXON

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Case No. 1092100015

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DEFENDANT'S OPPOSITION TO STATE'S MOTION FOR ORDER COMPELLING TESTIMONY

Defendant, Sheila Ann Dixon, by her undersigned attorneys, opposes the State's Motion for Order Compelling Testimony and in support says:

On November 10, 2009, the State Prosecutor submitted to this Court a Motion to Compel Testimony and grant immunity to Randell Finney, a witness the State intends to call at trial. Although submitted by the State Prosecutor, the Motion is curiously signed by Haven Kodeck, the Deputy State's Attorney for Baltimore City, while the certificate of service was executed by the Deputy State Prosecutor. The Motion recites that Mr. Finney has indicated that he will refuse to testify if called on the basis of his Fifth Amendment privilege, and the Motion seeks an Order from the Court, pursuant to Md. Code, Courts & Judicial Proceedings Section 9-123, compelling Mr. Finney to testify (not just in the pending case, but also in the perjury case presently scheduled for trial in March 2010) notwithstanding his claim of privilege. The State's Attorney's Office for Baltimore City, an independent office under the Maryland Constitution, is not a party to this proceeding. Indeed, it is only because that Office declined prosecution that the State Prosecutor is now vested with the authority to pursue this case. As will become more apparent

below, the State Prosecutor here has intentionally sought to evade the legislative limitations on the powers of his office and has sought to use the State's Attorney's powers to improperly expand his authority. The Court should not permit this charade to occur.

The Maryland Code, Courts & Judicial Proceedings, Section 9-123 provides a mechanism for a prosecutor to seek an order of court compelling a witness to testify over a claim of a fifth amendment privilege, and granting immunity to that witness. The statute provides that "the Court in which the proceeding is or may be held shall issue, on the request of the prosecutor made in accordance with subsection (d) of [Section 9-123] an order requiring the individual to give testimony" *Id.* § 9-123(c). The term "Prosecutor" is defined as: "The States Attorney for a County, a Deputy State's Attorney, the Attorney General of the State, or a Deputy Attorney General or designated Assistant Attorney General." *Id.* § 9-123(a)(3). The statute specifically excludes the State Prosecutor from those authorized to seek such an Order. And, "[i]t is a settled principle of statutory construction that the Legislature's enumeration of one item, purpose, etc., ordinarily implies the exclusion of all others." *Rucker v. Harford County*, 316 Md. 275, 294 (1989). *See also Office & Prof. Employees Int'l v. MTA*, 295 Md. 88, 96 (1982) ("where a statute authorizes or permits a person or agency to take a certain type of action in a particular manner, [the authorization] becomes a mandatory limitation, and the action must be taken in conformity with it").

The Office of State Prosecutor was established by Constitutional amendment and legislation in 1976 (Chapter 612, Acts of 1976, ratified Nov. 1976). After the first effort to create the statutory position was found unconstitutional, the legislature ultimately enacted the present version of the Office. But the legislature intentionally limited the powers and duties of

the Office, and the legislature's decision not to include the State Prosecutor among those who may invoke Section 9-123 is not happenstance. This limitation is consistent with the Maryland legislature's having "carefully delineated and limited the authority and the role of the State Prosecutor in criminal investigations, even where his participation in a matter was desired by a State's Attorney." *Goldberg v. State*, 315 Md. 653, 662 (1989). *See generally* MD. CODE ANN. CRIM. PROC. § 14-107-111 (setting forth the State Prosecutor's limited powers).

Maryland courts have strictly construed these statutory limitations. For example, in *Goldberg, supra*, the Court of Appeals considered a case in which members of the State Prosecutor's office appeared before the grand jury in case not within the Office's circumscribed jurisdiction. Judge Eldridge, writing for the Court, observed:

If a State's Attorney and the State Prosecutor could expand the categories [of crimes for which the State Prosecutor has jurisdiction] by the simple expedient of having the State's Attorney's request accompanied by a designation of "Special Assistant State's Attorney," it would render meaningless the General Assembly's purpose of limiting the State Prosecutor's jurisdiction to specified categories of offenses. If this circumvention of the statutory limitations were permitted, the State Prosecutor, as "Special Assistant State's Attorney," could investigate any offense within the domain of the State's Attorney, which extends to "all cases in which the State may be interested." Art. 10, § 34. This would render the General Assembly's restriction upon the State Prosecutor's role a sham.

In another case, before the State Prosecutor was named among the narrowly restricted class of persons permitted to apply for and obtain wiretap orders under the Maryland wiretap statute, the Court of Special Appeals affirmed the dismissal of an indictment based on evidence gathered under a wiretap application found illegal because the State Prosecutor was not authorized under the statute. *State v. McGhee*, 52 Md. App. 238 (1982).¹

¹ In 1982, after McGhee's case was decided, the General Assembly amended the Maryland wiretap statute to include the State Prosecutor. *See* Md. Code Ann., Ct. & Jud. Proc. § 10-406.

In his web site (Exhibit 1), the State Prosecutor acknowledges his limited powers, noting that “in investigating and prosecuting cases in which he is authorized to act, the State Prosecutor has all the powers and duties of a State's Attorney *except the power to offer immunity to witnesses in non-bribery cases.*” (Emphasis added). And, in his most recent Report, for the Fiscal Year ending June 30, 2008, the State Prosecutor announced that effective October 1, 2008, *for the first time*, he was given the same subpoena power as a State’s Attorney. But, as the State Prosecutor himself lamented, he does not have the power to seek court ordered immunity to compel reluctant witnesses to testify. In the same report, the State Prosecutor bemoans the fact that, *two years ago, the legislature specifically rejected a proposal that would have given the State Prosecutor such power.* See Report of the Maryland State Prosecutor, fiscal Year 2008, at pages 5-6. Exhibit 2.

In the instant case, the Motion signed by the Baltimore City State’s Attorney’s Office (SAO) is all the more unseemly because the State Prosecutor’s authority to pursue this case only arises once the Baltimore City SAO has declined prosecution. Under MD. CODE ANN., CRIM. PROC. § 9-109 (a)(1), the State Prosecutor may only pursue charges in a case after the State’s Attorney declines to do so. Here, the Baltimore City State’s Attorney specifically declined to prosecute the instant case, a precondition for the State Prosecutor’s having done so. But now, in a blatant attempt to circumvent the very limitations the legislature has imposed upon his office, the State Prosecutor seeks to make an end run around Section 9-123’s limitation by illegally conscripting Haven Kodeck, the Baltimore City Deputy State’s Attorney, to file the instant Motion.

The decision to grant immunity to a witness is one of the most important decisions a

prosecutor makes. Therefore, in order to obtain such an Order, the prosecutor must recite, as required by the statute, that “the testimony or other information from the individual may be necessary to the public interest. . .” Section 9-123 (d). Such an assessment can only be made by a prosecutor involved in the case, and one who is accountable to the public for such an assessment. Because the State’s Attorney’s Office has declined to pursue these charges and has not been involved in this case, it is apparent that this assessment must be that of the State Prosecutor, who is not authorized to engage the statute.

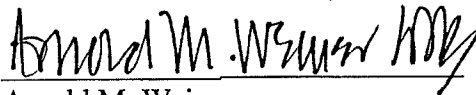
The State Prosecutor cannot avoid the law’s clear limitation on his authority by seeking indirectly – through the State’s Attorney – what it cannot do directly. *Poore v. State*, 39 Md. App. 44 (1978) offers an apt analogy. *Poore* was decided before enactment of the Maryland wiretap statute, when Maryland law authorized certain state prosecutors to apply for wiretaps under federal law, 18 U.S.C. § 2516 (commonly referred to as “Title III”). *Id.* at 46. The federal law specifically limited those state prosecutorial authorities authorized to apply for wiretaps as follows: “The principal prosecuting authority of any State, or the principal prosecuting attorney of any political subdivision thereof . . .” *Id.* at 56. Pursuing an investigation of Poore, the State’s Attorney for Baltimore City made initial application for a wiretap, but application to extend the wiretap’s authorization was made by an Assistant State’s Attorney. The Court framed the technical question presented on appeal as “does [Title III] require the principal attorney to seek an extension . . . just as [it] mandates his making application for the original intercept order or may he delegate that task?” *Id.* at 52. Strictly construing the statute, the Court reversed Poore’s conviction, holding that the statutory language does not confer upon those specifically authorized to seek wiretap authority the power to delegate that authority, even to an assistant. *Id.*

at 57.

Likewise here, the General Assembly has specifically named those authorized to apply for motions to compel testimony; and if the legislature so intended, it would have included the State Prosecutor, just as it has now done in the wiretap statute and in the statute granting subpoena power. The General Assembly has specifically rejected granting the State Prosecutor this power, and it is therefore inconceivable that the lawmakers intended for him to accomplish the same result, indirectly, simply by hijacking the authority of the State's Attorney to do his bidding and avoid the legal limitation he clearly knows exists. As Judge Eldridge pointed out in *Goldberg*, "[t]his would render the General Assembly's restriction upon the State Prosecutor's role a sham."

WHEREFORE, the Defendant respectfully requests that the Court deny the State's Motion for an Order to Compel Testimony of Randell Finney.

Respectfully submitted,



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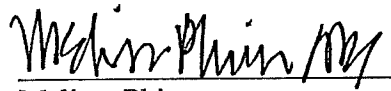
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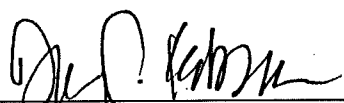
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Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY certify that on this 12th day of November, 2009, copies of the foregoing Opposition to the State's Motion to Compel were sent, via email and hand delivery to:

Robert A. Rohrbaugh, State Prosecutor
Thomas M. McDonough, Deputy State Prosecutor
300 E. Joppa Road, Suite 410
Towson, Maryland 21286



Dale P. Kelberman

MISSION

The Office of State Prosecutor was established by Constitutional amendment and legislation in 1976 (Chapter 612, Acts of 1976, ratified Nov. 1976). The State Prosecutor's Office began operation January, 1977.

The State Prosecutor may investigate on his own initiative, or at the request of the Governor, the Attorney General, the General Assembly, the State Ethics Commission, or a State's Attorney, certain criminal offenses. These include: 1) State election law violations; 2) State public ethics law violations; 3) State bribery law violations involving public officials or employees; 4) misconduct in office by public officials or employees; and 5) extortion, perjury, or obstruction of justice related to any of the above.

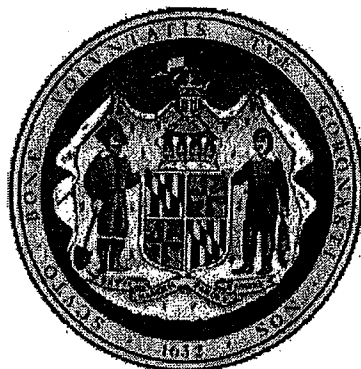
At the request of the Governor, Attorney General, General Assembly, or a State's Attorney, the State Prosecutor also may investigate alleged crimes conducted partly in Maryland and partly in another jurisdiction, or in more than one political subdivision of the State.

If a violation of the criminal law has occurred, and the State Prosecutor recommends prosecution, he makes a confidential report of his findings and recommendations to the Attorney General and the State's Attorney having jurisdiction to prosecute the matter. Such a report need not be made to the State's Attorney, however, if the State Prosecutor's findings and recommendations contain allegations of offenses committed by the State's Attorney. If the State's Attorney to whom the report is rendered fails to file charges within 45 days in accordance with the State Prosecutor's recommendations, the State Prosecutor may prosecute such offenses. The State Prosecutor may immediately prosecute offenses set forth in the report and recommendations if they are alleged to have been committed by a State's Attorney.

Where no violation of the criminal law has occurred or prosecution is not recommended, the State Prosecutor reports his/her findings to the the agency mentioned in paragraph one above that requested the investigation. The report is made available to the public if the subject of the investigation so requests.

In investigating and prosecuting cases in which he is authorized to act, the State Prosecutor has all the powers and duties of a State's Attorney except the power to offer immunity to witnesses in non-bribery cases.

The State Prosecutor is nominated by the State Prosecutor Selection and Disabilities Commission and appointed by the Governor for a term of six years and until his successor is appointed and qualifies. He may be removed only for misconduct in office, persistent failure to perform the duties of the office, or conduct prejudicial to the proper administration of justice. (State Government Article, Sections 9-1201 thru 1213, Annotated Code of Maryland).



**REPORT
OF THE
MARYLAND STATE PROSECUTOR**

FISCAL YEAR 2008

(July 1, 2007 – June 30, 2008)

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Significant Events Within the Office of the State Prosecutor During the Past Fiscal Year

A. The State Prosecutor Was Provided With The Same Subpoena Power As The County State's Attorneys

When the Office of the State Prosecutor was established in 1978, the law provided that the State Prosecutor "has all the powers and duties of a State's Attorney, including the use of the grand jury in any county or Baltimore City." However, there have been two (2) notable exceptions to that law. First, the State Prosecutor did not have the same power as a State's Attorney to issue a subpoena for records. Second, unlike a State's Attorney, the State Prosecutor could not seek court ordered "use immunity" to compel a witness to testify, either before a grand jury or at a trial.

After thirty (30) years, the General Assembly eliminated one of those exceptions and passed a Bill granting the State Prosecutor the same authority as a County State's Attorney to issue subpoenas for records and documents. The Bill was signed by the Governor and, effective October 1, 2008, the State Prosecutor will have the ability to issue its own subpoena for records. The effect of the statute will be a more efficient use of the tight resources of the Office. Investigators and attorneys will no longer have to travel miles to various counties throughout the State to get a Circuit Court Clerk to stamp a grand jury subpoena or to obtain a subpoena from a County State's Attorney.

The second benefit is that there is less likelihood that confidential investigations will become public. It is the policy of the Office of the State Prosecutor that all investigations shall remain confidential unless and until charges are initiated. In those

instances where charges do not result, it would be unfair to the individual under investigation if the investigation itself became public when no charges are ever filed. Using a subpoena issued by the Office instead of a third-party reduces the number of people who have access to the investigation and protects the reputations of those who are not charged.

In the coming years, efforts will be made to correct the second deficiency and provide the State Prosecutor with the authority to seek court-ordered "use immunity" to compel reluctant witnesses to testify. Two years ago the "Article 27 Committee" chaired by then Chief Judge Murphy of the Court of Special Appeals recommended legislation to provide the State Prosecutor with this authority. The proposal was not adopted at that time by the General Assembly. Hopefully, it will not take another thirty (30) years to get a Bill passed so that the State Prosecutor will truly have "all the powers and duties of a State's Attorney."

B. Continued Maintenance of the In-House Computer Forensics Laboratory

With the assistance of the United States Department of Justice, the Office's computer forensics laboratory has become fully operational and has provided invaluable information in several investigations. The federal funds permitted the Office to purchase software and hardware to keep pace with the ever-changing technology. The Office was also able to send two (2) additional analysts to an intensive two week seminar for certification training. With these resources, the computer forensics laboratory has become a major asset in the public corruption investigations being conducted by the Office of the State Prosecutor.