

# MILES & STOCKBRIDGE P.C.

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October 29, 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

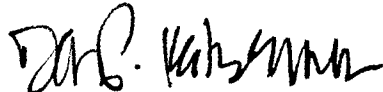
Re: *State of Maryland v. Sheila A. Dixon*  
Case No. 109210015

Dear Ms. Soto:

Enclosed herewith please find *Defendant's Response to State's Motions in Limine* 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/kac  
Enclosure

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



## **II. The State's Motion in Limine Regarding Calling of Witnesses Will Prejudice the Defendant.**

The indictment in this case contains seven (7) counts of theft, misappropriation by a fiduciary and misconduct in office. Those three related crimes involve a number of gift cards which were allegedly stolen in 2004, 2005, 2006, and 2007. The indictment describes in chronological order the allegations as to each set of gift cards in each calendar year and the evidence the State intends to adduce to prove those counts.

In its motion regarding the calling of witnesses, the State has requested the approval of the Court for an unorthodox and highly unusual procedure whereby the State would be allowed "to call certain witnesses at two or more different points in the course of its case in chief." Motion ¶ 4. The State contends that this is necessary for a "clearer understanding of voluminous evidence." Motion ¶ 3.

While the Court has discretion under Maryland Rule 5-611(a) to control the mode and order of witnesses and the party's presentation of evidence, the Court's authority is not unbridled. An abuse of discretion can occur when the trial judge's action "impairs the ability of the Defendant to answer and otherwise receive a fair trial." *Meyer v. State* 403 Md. 463 (Md. App. 2008), citing *State v. Hepple*, 279 Maryland 265, 270 (1977)(trial court abused its discretion in precluding defendant from recalling witness for cross-examination). See also *Sanders v. State*, 1 Maryland App. 630 (Md. App 1967)(new trial granted for refusal to allow defense counsel to recall witness for cross-examination).

In the instant case, there is no good reason to allow the State to call the same witnesses on multiple occasions to testify to bits and pieces of evidence and every reason to refuse to do so. The indictment, as well as opening and closing arguments, will allow

the State to marshal its evidence and present it to the jury in an understandable fashion. The risk attendant to allowing the State to call witnesses and to recall them on various occasions is that it will either create confusion rather than enlightenment or will sanction an artificially segmented presentation that, itself, will serve to unfairly argue the State's case to the prejudice of the Defendant. Will the defense be allowed to cross-examine a witness about his first session on the stand if the witness is called the second time? What will be the scope of redirect under such circumstances? How will the defense be able to impeach a witness, if that witness is then permitted to be recalled and testify again, after the defense has presented impeachment evidence. Moreover, by calling and recalling witnesses on multiple occasions, the trial of this case will be extended unnecessarily.

This is not a case involving dozens of counts and multiple complex transactions. On the contrary, the seven counts are rather straight forward and direct. Allowing the State to recall time and again the same witnesses will impair the defendant's ability in cross-examining those witnesses and others, and will deny her a fair and impartial trial. For these reasons, we urge the Court to deny the State's motion regarding the calling of witnesses.

### **III. The State's Motion to Preclude the Use of Information Obtained from Grand Jury Subpoenas Which Have Been Withdrawn is Without Merit**

In another of the State's pretrial motions in limine, it seeks to create and enforce its own exclusionary rule which it conjures up out of whole cloth. The State contends that in response to the Defendant's Motion to Compel Discovery, it was required to provide the defense with copies of grand jury subpoenas that were later withdrawn. The State complains that the defense never filed a motion to dismiss, which was the putative basis for the defendant's request. As a result, and citing no authority for this novel

sanction, the State contends that the defense should be precluded from offering evidence about the issuance of the subpoenas or their results. This argument is wholly without merit.

As the Court will undoubtedly recall, the defense learned that the State had issued grand jury subpoenas to a number of witnesses after the first indictment, in which the State sought the production of documents related to the then-pending charges. The defendant's original motion to quash those subpoenas was denied by the Court when the State Nolle Prossed the pending charges and re-indicted the defendant with the very same offenses. It was not until the Court ruled on the defendant's Motion to Compel the Production of Additional Discovery that the Defendant learned that there was only one additional outstanding grand jury subpoena and that no information had been gathered from those subpoenas. This discovery, of course, had been promised by the State as part of its "open file" discovery from the beginning of these proceedings.

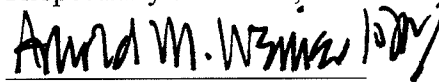
Nevertheless, the admissibility of the evidence has no relationship to whether the Defendant filed a motion to dismiss or not. The fact remains that the defense should have the opportunity to question witnesses about their possession of any documents relating to the gift cards.

One of the issues in this case is whether the State can prove that the Defendant knew of the source of any particular gift cards and any limitations on their use. Indeed, the particular grand jury subpoenas involved were issued for the very purpose of showing whether such documents existed to prove this point. The Defendant has every right to question witnesses about the absence of such records, as the absence of such records tends to prove the Defendant's absence of knowledge of the source and any limitations on

the use of such gift cards. This evidence is the equivalent of the police crime lab technicians dusting for fingerprints and finding none at the scene of a burglary. Surely under such circumstances the defendant in such a case would be able to present evidence that the State looked for fingerprints but found none. So to, the fact that the State sought the production of documents relating to the existence and distribution of gift cards, and the absence of any such records, is equally admissible evidence for the same purpose.

For these reasons, the State's Motion in Limine to Preclude the Use of Information Obtained from Grand Jury Subpoenas Which Have Been Withdrawn should be denied.

Respectfully submitted,



Arnold M. Weiner

Barry L. Gogel

Norman L. Smith

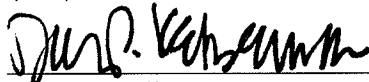
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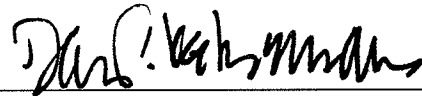
(410) 244-0850

Attorneys for Defendant

## CERTIFICATE OF SERVICE

I HEREBY certify that on this 29<sup>th</sup> day of October, 2009, copies of the foregoing Response to State's Motions in Limine was sent, via email and first class mail, postage prepaid, to:

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



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Dale P. Kelberman