STATE OF MARYLAND	*	IN THE
	*	CIRCUIT COURT FOR
v.	*	BALTIMORE CITY
	*	
WILLIAM PORTER	*	CASE No. 115141037

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STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE REGARDING JUROR ISSUES

Now comes the State of Maryland, by and through Marilyn J. Mosby, the State's Attorney for Baltimore City; Michael Schatzow, Chief Deputy State's Attorney for Baltimore City; Janice L. Bledsoe, Deputy State's Attorney for Baltimore City; and Matthew Pillion, Assistant State's Attorney for Baltimore City; and responds herein to the Defendant's Motion In Limine Regarding Juror Issues.

Introduction

The measures the Defendant seeks would fail to increase the likelihood of a fair trial but would succeed in making jury service so unnecessarily burdensome and frightening that few would not seek to avoid it. While actively discouraging jury service might serve the Defendant's removal motion, it serves no legitimate purpose. The State and the Defendant are entitled to have this case decided by a representative cross-section of eligible jurors, selected on the basis of their ability to be fair and impartial, and not on their willingness to endure needless privation and misery.

A. The Defendant's request for a special instruction regarding juror anonymity is unnecessary

The Defendant's first request regarding juror procedures asks this Court to give the venire members and jurors a special instruction that their names will never be publicly revealed

and that they may remain anonymous. The Defendant provides no authority supporting the notion that the Court could or should give such an instruction. Instead, he cites the bare existence of Rule 4-312(d)'s shielding provision and suggests that venire members and jurors should be informed accordingly that the provision has been invoked so that they become aware of the measures taken to protect their identities. Purportedly, such extraordinary measures would somehow make jurors more likely to follow their oaths to render a fair verdict.

While the State agrees that juror names should not be made public, the Defendant's proposed special instruction is unnecessary, if not counterproductive. Rule 4-312 already prohibits the use of venire members' and jurors' names and also bars the public dissemination of the jury list in *any* criminal case. The Rule plainly provides, "[i]n any proceeding conducted in the courtroom or in chambers, a juror shall be referred to by juror number and not by name." Rule 4-312(b)(2). Regarding the jury list that contains personal information, "a party and any other person to whom the jury list is provided . . . may not disseminate the list or the information contained on the list to any other person," "copies of jury lists shall be returned to the jury commissioner," and "a jury list is not part of the case record." Rule 4-312(c)(2)-(3).

When appropriate, the Court can also utilize the additional restrictions outlined in Rule 4-312(d)'s shielding provision if extensive publicity surrounding a case legitimately risks juror intimidation or harassment, but that provision is largely intended for situations where the *defendant* poses a risk to juror safety. *See* Committee Note following Rule 4-312(d)(4) ("When dealing with the issues of juror security or tampering, courts have considered a mix of five factors in deciding whether such information may be shielded: (1) the defendant's involvement in organized crime, (2) the defendant's participation in a group with the capacity to harm jurors, (3) the defendant's past attempts to interfere with the judicial process, (4) the potential that, if

convicted, the defendant will suffer a lengthy incarceration, and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation or harassment."). In either situation, however, the Court must find "from clear and convincing evidence . . . that disclosure of the names . . . of prospective jurors will create a substantial danger that (i) the safety and security of one or more jurors will likely be imperiled, or (ii) one or more jurors will likely be subjected to coercion, inducement, other improper influence, or undue harassment." Rule 4-312(d)(1). Not only has the Defendant so far provided nothing more than a bald suggestion of risk to justify his request, but, even if he meets his burden at some future hearing, the Rule still says nothing about crafting a special instruction to inform the jurors of any possible risk. Rather, such an instruction would serve only to *create* juror anxiety by openly placing the Court's imprimatur on the idea that jurors might be subjected to intimidation or harassment. Accordingly, because Rule 4-312 already adequately protects venire members' and jurors' identities and because the Defendant has presented no evidence to even remotely support his assertions of juror safety concerns, his request should be denied.

B. The Defendant's request for sequestration relies on pure speculation and seeks to impose draconian measures that would only thwart the ability to find and retain fair jurors

The Defendant's second requested juror procedure calls for sequestering jurors using measures so extreme that they threaten to undermine the ability to obtain a fair verdict. Seeking to impose almost prison-like conditions on the jurors, the Defendant wants sheriffs to escort jurors away immediately upon selection, separate them from their families and friends, cut them off from all news, strip them of their cell phones, and monitor all their personal communications with the outside world. The circumstances surrounding this case do not warrant such conditions.

Moreover, appellate courts have strongly cautioned against imposing strict sequestration because it may result in coercing a verdict, rather than protecting its integrity.

Attempting to justify his request, the Defendant foresees "bedlam" at the courthouse during the trial, with journalists "hounding most of the participants in the trial." Def. Mot. at 4. He envisions conditions even worse than those of the infamous *Sheppard v. Maxwell* case. *Id.* at 5. He offers not a hint of acknowledgment that the three prior hearings in this case have remained perfectly orderly and have garnered diminishing media and public attention, despite his insistence in July that the proceedings must be removed because "[t]he publicity of the Officers' case and the unrest regarding the untimely death of Freddie Gray has [*sic*] not subsided and shows [*sic*] no signs of stopping." Def. Reply to State's Resp. to Def. Mot. for Removal at 2. Indeed, he even complains once more about the State's Attorney's May 1 press conference in which she mentioned that some of the other Defendants gave statements, *id.* at 5, n. 4, citing this as an example of publicized material that will not be presented at trial.[1] He fails, however, to explain how a juror is in any imaginable way prejudiced by knowing of the existence of another defendant's statement without knowing anything about the statement's substance.

Far from recognizing the inaccuracy of his predictions and the irrelevance of his past complaints, the Defendant maintains that "[t]his Court's decision to keep the trial in Baltimore necessitates such" extreme sequestration. Def. Mot. at 3. Implicit, however, in claiming that sequestration is required only because the case will remain in Baltimore is a tacit admission that the true purpose of this Motion involves making jury service in this case so onerous that few otherwise qualified jurors could withstand such hardship, thereby strengthening a renewed

[1] He also claims that public knowledge of the other Defendants' statements "can be traced to the prosecution" as the source. This puzzling allegation ignores the news coverage given to the publicly litigated motions to suppress the statements, the source of which was the Defendants' own pleadings.

argument for removal. After all, if the effects of publicity are really the Defendant's concern, why would sequestration be required in Baltimore but not in another venue? The media presence will be the same no matter where the case is tried, and jurors' phones will work just as well outside of Baltimore as they will within the City. Plainly, the Defendant's proffered justification for extreme sequestration relies on baseless speculation about trial conditions, if not a poorly disguised attempt to create the conditions that would necessitate reconsideration of removal.

Moreover, such sequestration would fail to achieve commensurate fairness and would conflict with Maryland law, absent more compelling circumstances. First, the type of sequestration proposed, namely forcing jurors to stay in a hotel at night for the duration of the trial, would create such hardship that entire categories of otherwise qualified citizens would be unable to serve—single parents with children at home, caregivers with elderly or disabled relatives at home, single persons with a pet at home. The few people who would remain after voir dire could hardly be called a fair cross-section of the community.

Second, the Court of Appeals has expressly warned against unnecessary sequestration measures because they may have an effect opposite from that which they sought to ensure. In *State v. Magwood*, 290 Md. 615, 616-26 (1981), the Court noted that "[a]t common law, jurors were 'prisoners of the court . . . kept together without meat, drink, fire or candle till they [were] agreed,'" whereas "modern jury service is less onerous" in part because courts have come to recognize the "dangers to the integrity of the verdict when the jurors remain sequestered throughout a prolonged deliberative period." Among these dangers, sequestration raises concerns "about whether verdicts have been influenced by such outside pressures as reluctance to stay away from the family home overnight, weariness, [or] transportation problems . . . ." *Id.* at 626. The Court cautioned that "[a] juror's vote should be based on reasoned judgment—not

because uneasiness or discomfort has prodded him to an early end to a case," concluding that "there is much to be said for the view that jurors, even as judges, are more likely to perform their duty fairly and correctly when they are not subjected to extended periods of arbitrary and pointless personal confinement." *Id.* "[T]he coercive aspect of the doctrine [of sequestration] is an anachronism which should be rejected by modern courts." *Id.* at n. 6. Nevertheless, the Defendant would have the Court return to that rejected view and quite literally make the jurors prisoners of the Circuit Court for Baltimore City. In the same way that this Court rejected the Defendant's alarmist views about juror impartiality in his Motion for Removal, the Court should likewise decline his request to prejudge whether the jurors can follow their oaths to render a fair and impartial verdict without being cut off from the world, particularly given that these jurors will already have been carefully questioned and screened as to whether publicity has influenced or will influence their view of the Defendant's guilt or innocence.

In that regard, the Court of Appeals has instructed that "[t]he protection against the evil of the jurors being influenced by outside contacts is ordinarily provided by an appropriate admonition from the judge and presumed adherence thereto by a jury impressed with their solemn duty." *Id.* at 625. The *Maryland Pattern Jury Instructions* ("MPJI-Cr" hereinafter) provide carefully crafted and judicially approved admonitions about outside influences and publicity.[2] MPJI-Cr 1:00 sets forth as a pretrial introductory instruction a warning to jurors that

> Until you retire to deliberate and decide this case, you may not discuss this case with anyone, even your fellow jurors. You should not express any opinion about the case or discuss the case with anyone including courtroom personnel, spectators, or anyone participating in the trial.

[2] As the Court of Special Appeals stated, "we say for the benefit of trial judges generally that the wise course of action is to give instructions in the form, where applicable, of our Maryland Pattern Jury Instructions," as "[t]hose instructions have been put together by a group of distinguished judges and lawyers who almost amount to a 'Who's Who' of the Maryland Bench and Bar." *Green v. State*, 127 Md. App. 758, 771 (1991).

> Many of you use cell phones, smart phones or other electronic devices to communicate with family, friends, co-workers, or others. During this trial, you must not communicate any information or opinions about this case or the individuals involved in it by any method to anyone, including by sending electronic messages.
>
> You may also be involved in social media or networking sites such as Facebook, MySpace, LinkedIn, YouTube or Twitter, and may be accustomed to communicating on these sites. During this trial, you must not communicate anything, or receive any information, about this case or the individuals involved in it.
>
> You should not allow anyone to talk to you or communicate with you about the case. Outside the courtroom, avoid parties to the case, the lawyers and the witnesses and reporters. Do not read, watch or listen to any media reports about the case such as newspaper, television, radio, or internet reports. Do not visit any internet sites where there may be reports or discussions of the case.
>
> Relying on information from any other source outside the courtroom, including social media sources, is unfair because the parties do not have the opportunity to refute, explain or correct it, and the information may be inaccurate or misleading. You must base your decision only on the evidence presented in this courtroom.
>
> If anyone tries to communicate with you about the case or if you learn of any information during the trial that is not part of the evidence presented in this courtroom or that violates the rules I have just explained, please write me a note and give it to the bailiff as soon as possible and do not discuss it with anyone else.

In a case like this one that has been the subject of large amounts of publicity, MPJI-Cr 1:02 suggests that at the beginning of the case the Court should inform jurors that

> There may be public interest in this case and news coverage or other discussion of it. For that reason, do not read any article or any other report, or watch or listen to any television or radio news report, about the case. If anything occurs contrary to these instructions, please write me a note and give it to the bailiff as soon as possible and do not discuss it with anyone else.

Prior to any recess, MPJI-Cr 1:03 offers the instruction,

> Do not discuss this case with anyone or let anyone discuss this case with you or in your presence. This includes other jurors, courtroom personnel, friends, relatives, or anyone else. In addition, you should avoid any contact with the parties, witnesses, and lawyers involved in this case.
>
> Please remember that you should not research or investigate the case or the individuals involved in it. Do not conduct any searches relating to this case in books, newspapers or on the internet, websites, blogs, or any other source of

> information. Do not visit or do any research about locations or places related to the case.
>
> You also must not express any views, comments or opinions about the case to anyone.
>
> If anyone tries to discuss this case with you or if you learn that my instructions are not being followed, please write me a note and give it to the bailiff as soon as possible, and do not discuss it with anyone else.

Finally, at the end of the trial, MPJI-Cr 1:02 suggests telling jurors,

> You must completely disregard any information that you may have read, seen, or heard concerning this case from any source including newspapers, television, radio, or internet sites. Such information is not evidence and you may not consider it or be influenced by it.

As clearly set forth, these instructions provide ample initial safeguards against outside influences and establish a simple protocol for jurors to inform the Court if anyone attempts to discuss the case with them. In such a situation, additional safeguards might at that point become appropriate. At this stage, however, no reason exists to believe that jurors will fail to follow the Court's instructions. The Defendant's proposed sequestration would be out of sync with modern jury procedures and with Maryland's preference for admonitions as the first line of defense against juror contamination.

C. The Defendant's proposal to drive jurors to court from a remote location is also unnecessary

The Defendant's final requested juror procedure would require jurors to congregate at a remote location and be driven to court by deputy sheriffs. The only cited justification for this procedure is the Defendant's notion that Courthouse East has only one public entrance such that jurors would be forced to traverse "media and protesters" to enter the building. Def. Mot. at 6. While the State joins in the request to ensure that jurors can enter the building without interacting with any demonstrators or journalists, the State notes that Courthouse East has entrances on all

sides of the building and is centrally located in an area with ample, affordable parking and ready access to mass transit. Indeed, the Defendant himself used one of the non-public side entrances to the building on the October 13 hearing. Given the Court's prior record of successfully facilitating the pretrial hearings in this case without incident, the State has full confidence that the Court can devise a method for jurors to enter and exit the building without improper interactions but also without requiring them to congregate in a location that may result in undue expense or inconvenience.

D. Sequestration is not a constitutional requirement

At the end of his Motion, the Defendant claims that his requests "are made pursuant to his right to Due Process under the Fifth and Fourteenth Amendments to the United States Constitution and . . . [pursuant to] the Maryland Declaration of Rights." Def. Mot. at 7. From this purported authority, he then insists that "any mistrial in this case, due to actions that could have been prevented by the action requested," will result in a bar to any retrial based on double jeopardy principles. *Id.* *Magwood* plainly rejects this type of reasoning, holding that "the ancient common law doctrine prohibiting jury separation is not generally thought to be such an integral part of the right to a jury trial that sequestration has constitutional status" and declining to find any fundamental right to sequestration. *Magwood*, 290 Md. at 624. Indeed, Rule 4-311 commits the question of sequestration to this Court's good discretion, without any mandatory factors or considerations to balance and weigh. *See also Graef v. State*, 1 Md. App. 161, 170 (1967) ("The trial court was very careful in her admonitions to the jury and there is nothing to show they were not heeded" such that "[w]e find no abuse of the court's discretion in refusing to sequester the jury."); *Hounshell v. State*, 61 Md. App. 364, 379 (1985) (finding no abuse of discretion in the trial court's refusal to sequester the jury based on press coverage about the case

where the judge admonished the jury not to read any articles about the case, polled the jury mid-trial about whether any of them had read a challenged article, and where the judge found that the article simply presented "a fair reflection of testimony which had already been given in the case"). Given this non-constitutional, discretionary status and Maryland's strong preference for admonition over sequestration, concerns over the Defendant's hypothetical mistrial should give the Court no cause to deviate from the firmly rooted, common sense protocols outlined in the Maryland Rules and the *Maryland Pattern Jury Instructions*.

Wherefore, the State asks that this Court deny the requests outlined in the Defendant's Motion in Limine Regarding Juror Issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 2015, a copy of the State's Response to the Defendant's Motion In Limine Regarding Juror Issues was mailed and e-mailed to:

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