

APPENDIX II

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

STATE OF MARYLAND

V.

SHEILA ANN DIXON

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CASE NO: 109009009

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STATE'S OPPOSITION TO THE MOTION TO DISMISS
FILED BY THE DEFENDANT, SHEILA DIXON

Respectfully submitted,

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VI. THE DEFENDANT'S ACTIONS ARE NOT PROTECTED BY THE SPEECH OR DEBATE CLAUSE OF THE MARYLAND CONSTITUTION

Identical to the argument raised by Helen Holton in her case, the Defendant contends that the use by the State of her actions as a member of the Board of Estimates and the City Council is precluded by a common law doctrine of legislative immunity and privilege which she argues is co-extensive with the privilege and immunity afforded to members of the General Assembly under the Speech or Debate Clause of the Maryland Constitution.⁷

Like Ms. Holton, the Defendant interchangeably uses the concepts in the Speech or Debate Clause and the common law official immunity. The Speech or Debate Clause in both the federal and Maryland constitutions pertain to civil and criminal actions and applies only to members of Congress and the Maryland General Assembly, respectively. Such Constitutional privilege and immunity does not extend to local legislators, as was discussed in the State's Opposition to the Motion to Dismiss filed by Helen Holton.

The common law official immunity doctrine has always been confined to civil matters and has never extended to criminal cases. This exact issue was addressed by the

⁷ Of course, if the media reports are correct, it is doubtful that the Defendant could make such an argument since she never even attempted to gain access to the list and probably never knew that maintenance of the list was required.

⁸ Since the Court has already reviewed Ms. Holton motion and the State's opposition, the State does not believe it is necessary to attach a copy of that opposition to this memorandum. Instead, the State's opposition in the Holton case is incorporated herein by reference.

United States Supreme Court in *United States v. Gillock*, 445 U.S. 360 (1980). In discussing its earlier opinion of *Tenney v. Brandhove*, 341 U.S. 367 (1951), the Court in *Gillock* stated,

“Although *Tenney* reflects this Court’s sensitivity to interference with the functioning of state legislators, we do not read that opinion as broadly as *Gillock* would have us. First *Tenney* was a civil action brought by private plaintiff to vindicate private rights. Moreover, the cases in this Court which have recognized an immunity from civil suit for state officials have presumed the existence of federal criminal liability as a restraining factor on the conduct of State Officials. As recently as *O’Shea v. Littleton*, 414 U.S. 488 (1974) we stated: ‘Whatever maybe the case with respect to civil liability generally...or civil liability for willful corruption... we have never held that the performance of the duties of judicial legislative or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights... On the contrary, the judicially fashioned doctrine of official immunity does not reach ‘so far as to immunize criminal conduct proscribed by an Act of Congress...’ *Gravel v. United States*, 408 U.S. 606, 627 (1972).’ *Id.*, at 503 (emphasis supplied) Accord, *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). **Thus, in protecting the independence of state legislators, *Tenney* and subsequent cases on official immunity have drawn the line at civil actions.**” (Gillock, 445 U.S. at 464-65, emphasis supplied)

As the Court pointed out in *Gillock*, 445 U.S. at 465, footnote 11, “[f]ederal prosecutions of state and local officials, including state legislators, using evidence of their official acts are not infrequent.”

Indeed, if there was a pervasive, blanket common law official immunity doctrine that would prevent the introduction of any legislative act in any federal or state criminal proceedings, that privilege would have been recognized by the Supreme Court. However, *Gillock* totally undermines any argument that a common law privilege against using legislative acts exists in criminal cases. The only such privilege (and evidentiary

prohibition) stems from the Constitutional Speech or Debate provisions which apply in Maryland only to the members of the General Assembly.

Since *Gillock*, federal criminal investigations and prosecutions of state officials based upon and using evidence of their legislative acts have consistently been upheld in the face of claims of legislative immunity and privilege. See, e.g., *In Re Grand Jury*, 821 F.2d 946 (3rd Cir. 1987); *United States v. Modesti*, 145 F. Supp. 2d 171 (D. P.R. 2001). It follows that if legislative acts can be used in federal criminal prosecutions against state officials, legislative acts can be used in state prosecutions against local officials since the official immunity doctrine is inapplicable to criminal cases and the State Constitutional Speech or Debate Clause does not apply to local officials.

The official immunity doctrine from civil suits has been extended to both State and local legislators as a matter of common law.⁹ *Tenney, supra*. In *Montgomery County v. Schooley*, 97 Md. App. 107, 114-115 (1993), the Court correctly noted that the common law doctrine of official immunity extends to members of local and regional legislative bodies in civil proceedings. However, any suggestion that the Speech or Debate Clause protection against criminal prosecutions has likewise been extended to criminal actions involving local or regional legislators is simply unsupported by legislation or judicial precedent. Indeed, even the authority cited by Judge Wilner in his *Schooley* opinion does not support the proposition that common law doctrine of official immunity extends to criminal prosecutions. On the contrary, *Thillens, Inc. v. Community Currency Exchange*, 729 F.2d 1128, 1129 (7th Cir. 1984) which was cited as authority in the *Schooley* opinion,

⁹ Cases suggest that there may be limits to the civil official immunity doctrine. Only legislative actions done in good faith or without corruption fall within the ambit of official immunity. See, e.g. *Bruce v. Riddle*, 631 F. 272, 276, n.2 (4th Cir. 1980), citing one of the earliest American cases of *Baker v. State*, 27 Ind. 485 (1867).

held that the common law doctrine of official immunity extends only to civil and not criminal liability. The court in *Thillens* specifically stated,

“The protection afforded state legislators from liability under federal law for actions within the sphere of legitimate legislative activity arises out of the common law doctrine of official immunity... **The immunity extends to civil, and not criminal liability in large part because civil immunity alone is deemed sufficient to promote the unfettered debate necessary for effective discharge of legislative duties.**” (Citations omitted and emphasis added, *Thillens*, 729 F.2d at 1129-30)

Schooley was a civil case. In that context, there was no reason or basis for Judge Wilner to have decided an issue not before the Court and extend the civil liability official immunity doctrine to criminal cases. To the extent that Judge Wilner suggested in *Schooley* that the doctrine articulated within the Federal and State constitutional immunity provisions have been “regarded as applicable to members of local and regional bodies”, it is respectfully suggested that Judge Wilner was referring to the civil immunity aspects within those constitutional Speech or Debate provisions.

This analysis of *Schooley* was essentially confirmed in *Manders v. Brown*, 101 Md. App. 191, 643 A.2d 931 (1994). There, in the context of a civil suit, the court cited *Schooley* for the proposition that “...in this context a statement of law regarding a Member of Congress is applicable to a local legislator”. 101 Md. at 205. This statement is completely consistent with *Gillock, supra*. As both the Supreme Court and the Maryland Court recognize, in the context of a civil case, legislative privilege protects local legislators.

Since the common law doctrine of official immunity does not extend to criminal prosecutions, the actions of the Defendant taken in her capacity as a member of the Baltimore City Council and the Board of Estimates were appropriately presented to the

grand jury and such minutes can be appropriately presented at trial, especially to establish the Defendant's knowledge about the commercial transactions involving Messrs.

Lipscomb and Turner.