

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

-----X  
STATE OF MARYLAND :  
v. :  
SHEILA ANN DIXON :  
-----X

Case No. 109210016

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**MEMORANDUM IN SUPPORT OF MOTION OF SHEILA ANN DIXON,  
DEFENDANT, TO DISMISS INDICTMENT NO. 109210016 WITH PREJUDICE**

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**TABLE OF CONTENTS**

I. Introduction and Overview .....1

II. The Indictment Was Obtained With Substantive Evidence Of The Defendant’s Legislative Acts In Violation Of Ms. Dixon’s Legislative Privilege Under The Speech And Debate Clause And Maryland Common Law .....3

III. The New Indictment Fails To Allege The Element Of The Crime Charged .....10

    A. The Legal Requirements Of An Indictment.....10

    B. The Failure Of The Indictment To Allege Essential Elements.....13

IV. The Concept Of “Regulated By The City,” As Integrated Into The Prosecutor’s Instructions To The Grand Jury, And Into The Indictment Itself, Deprives Ms. Dixon Of Due Process Of Law Because They Embody An Interpretation Of The Ethics Statutes That Is Void For Vagueness .....15

V. To The Extent That The Ethics Code Requires Financial Disclosure Of Gifts From Persons Doing Business With The City, It Cannot Be The Basis Of a Criminal Perjury Charge Due to the City’s Failure Of The To Prepare And Maintain A Certified List Of Entities Doing Business With The City .....22

VI. Ms. Dixon Incorporates Herein The Other Arguments For Dismissal That She Made In Connection With Her Motion To Dismiss The First Indictment .....27

VII. Conclusion .....27

## TABLE OF AUTHORITIES

### Cases

<u>Baker v. Mayor and City Council of Baltimore,</u> 894 F.2d 679 (4 <sup>th</sup> Cir. 1990), <u>cert. denied</u> , 498 U.S. 815 (1990) .....	6, 7
<u>Berkley v. Common Council of City of Charleston,</u> 63 F.3d 295 (4 <sup>th</sup> Cir. 1995) .....	6
<u>Bogan v. Scott-Harris,</u> 523 U.S. 44, (1998).....	6
<u>Bronston v. U.S.,</u> 409 U.S. 352 (1973).....	21
<u>Brown v. State,</u> 225 Md. 610 (1961) .....	4, 11
<u>Bruce v. Riddle,</u> 631 F.2d 272 (4 <sup>th</sup> Cir. 1980) .....	4, 8
<u>Christensen v. State,</u> 33 Md. App. 635 (1976) .....	10
<u>Connally v. General Construction Co.,</u> 269 U.S. 385 (1926).....	18
<u>Corbin v. State,</u> 237 Md. 486 (1965) .....	12
<u>Deckard v. State,</u> 38 Md. 186 (1873) .....	12, 14
<u>District Heights v. Denny,</u> 123 Md. App. 508 (1998) .....	6
<u>Duncan v. State,</u> 282 Md. 385 (1978) .....	11
<u>Dunphy v. Sheehan,</u> 549 P.2d 332 (Nev. 1976).....	20
<u>Eanes v. State,</u> 318 Md. 436 (1990) .....	18
<u>Ethics Com'n v. Lennon,</u> 119 Md. App. 49 (1998) .....	19

<u>United States v. Loayza,</u> 107 F.3d 257 (4 <sup>th</sup> Cir. 1997) .....	11, 13
<u>United States v. McDonnell,</u> 696 F. Supp. 356 (N.D. Ill. 1988) .....	13
<u>United States v. Nance,</u> 533 F.2d 699 (D.C. Cir. 1976) .....	13
<u>United States v. Race,</u> 632 F.2d 1114 (4 <sup>th</sup> Cir. 1980) .....	21
<u>United States v. Resendiz-Ponce,</u> 549 U.S. 102 .....	11
<u>United States v. Rostenkowski,</u> 59 F.3d 1291 (D.C. Cir. 1995) .....	9
<u>United States v. Ryan,</u> 828 F.2d 1010 (3 <sup>rd</sup> Cir. 1987) .....	21
<u>United States v. Santos,</u> 128 S. Ct. 2020 (2008) .....	21
<u>United States v. Simmons,</u> 96 U.S. 360 (1877) .....	11
<u>United States v. Smith,</u> 44 F.3d 1259 (4 <sup>th</sup> Cir. 1995) .....	11
<u>United States v. Staiti,</u> 397 F. Supp. 264 (D. Mass. 1975) .....	13
<u>United States v. Swindall,</u> 971 F.2d 1531 (11 <sup>th</sup> Cir. 1992) .....	9
<u>United States v. Tomasetta,</u> 429 F.2d 978 (1 <sup>st</sup> Cir. 1970) .....	13
<u>United States v. Watts,</u> 72 F. Supp. 2d 106 (E.D.N.Y. 1999) .....	21
<u>Williams v. State,</u> 329 Md. 1 (1992) .....	18

**Statutes & Rules**

42 U.S.C.A. § 1983 .....	6
--------------------------	---

MD. CODE ANN., [STATE GOV'T] §§ 10-101, 15-607.....19  
MD. CODE ANN., [CRIM. LAW] §§ 9-101, 9-103.....1, 14  
MD. RULE 4-202.....12

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**MEMORANDUM IN SUPPORT OF MOTION OF SHEILA ANN DIXON,  
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**I. Introduction and Overview**

The Defendant in this case, Baltimore Mayor Sheila Ann Dixon, again moves this Court for dismissal of charges brought on July 26, 2009, in the State Prosecutor’s second attempt to indict her for alleged violations of the Maryland perjury statute, Criminal Law Article, § 9-101.<sup>1</sup> The State Prosecutor continues his misguided pursuit of Ms. Dixon by once again presenting evidence to the grand jury of Ms. Dixon’s legislative acts to establish elements of the alleged offenses and by trying once more to twist alleged violations of the Baltimore City Ethics Code into criminal violations. This Court dismissed the prior perjury charges against Ms. Dixon, and as this is the State Prosecutor’s second bite at the apple on these very same charges, Ms. Dixon asks that the new charges against her be dismissed with prejudice.

The reindictment of Ms Dixon in the present case, charging Ms. Dixon with two counts of perjury, again relates to the financial disclosure forms that Ms. Dixon filed with the Baltimore City Ethics Board in November 2004 and April 2005. Again, the underlying theory of each

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<sup>1</sup> On January 9, 2009, the State Prosecutor announced Indictment No. 109009009, charging twelve counts of perjury, theft, misappropriation and misconduct in office. After several of those counts were dropped, the State Prosecutor on July 29, 2009, announced two new Indictments – the first of which, Indictment No. 109210015, realleges the seven counts of theft, misappropriation and misconduct that had not been previously dismissed, and the second of which, Indictment No. 109210016, charging two counts of perjury based on the same statements alleged in charges the Prior Indictment that had been previously dismissed.

count of the new Indictment is that Ronald Lipscomb had an interest in corporations and other entities involved in real estate development that were “doing business with” or were “regulated by” the City; that, consequently, Ms. Dixon, as City Council President, was required to report any gift received from Mr. Lipscomb; and that Ms. Dixon made misstatements on two of her financial disclosure forms when she failed to report gifts from Mr. Lipscomb. As before, the procedures before the grand jury and the language of the new Indictment suffer from a multiplicity of deficiencies, any one of which, by itself, would require dismissal.

On May 28, 2009, this Court dismissed these same charges against Ms. Dixon on the basis that they were obtained by evidence of Dixon’s legislative acts in violation of the “speech and debate” clause of Article 10 of the Maryland Declaration of Rights and the common law legislative immunity. In securing the prior Indictment, the prosecutor had presented evidence to the Grand Jury of Ms. Dixon’s legislative acts to try to prove her awareness of the need to report gifts and her knowledge of Mr. Lipscomb’s alleged participation in real estate development projects supported by the City, particularly Frankford Estates (a.k.a. Strathdale Development) and Inner Harbor East.

In attempting to resurrect the dismissed charges, the State has committed the same errors that caused the first Indictment to be dismissed, has omitted essential allegations from the new Indictment, and has highlighted an interpretation of the underlying Ethics Code that causes the Ethics Code to be void for vagueness. First, notwithstanding this Court’s previous opinion and guidance on the subject, the prosecutor has once again trampled upon Ms. Dixon’s legislative privilege by presenting substantial evidence of her legislative acts to the Grand Jury, rendering the current Indictment just as defective as the prior one. Second, the State has omitted from the new Indictment the language of Ms. Dixon’s legislative acts that had been put in the first

Indictment to aver Ms. Dixon's knowledge, but, in doing so, the Prosecutor has not substituted any facts or allegations showing this critical element of perjury (*i.e.*, knowledge that Mr. Lipscomb was doing business with or was regulated by the City). Third, the Prosecutor has once again misled the grand jury in his legal instructions, this time by explicitly employing an unconstitutionally vague definition of the term "regulated" that causes the new Indictment to be likewise void for vagueness and to fail to provide adequate notice. Finally, the State could not cure lingering defects from the prior Indictment, including the defect related to the City's failure to provide a list of individuals doing business with the City in violation of Ms. Dixon's due process rights.

In moving to dismiss the first Indictment, Ms. Dixon had argued that the charges were based upon other misinterpretations of the Ethics Code. The State disputed Ms. Dixon's argument as to the meaning of the critical provisions of the Ethics Code. This Court denied Ms. Dixon's motion without resolving the dispute as to meaning of the underlying statute, declaring that, "The Defendant is certainly free to advocate the view of the Ethics Law that she has presented" and that "there may be merit to it . . . ." The State Prosecutor's new instructions to the Grand Jury, and the averments of the new Indictment, once again leave public officials devoid of any understanding of what is required of them and reopens this and the other issues that Ms. Dixon has previously raised and are therefore renewed herein.

**II. The Indictment Was Obtained With Substantive Evidence Of The Defendant's Legislative Acts In Violation Of Ms. Dixon's Legislative Privilege Under The Speech And Debate Clause And Maryland Common Law**

Having had his first Indictment dismissed because he introduced evidence before the grand jury that violated Ms. Dixon's Legislative Privilege, the State Prosecutor has remarkably repeated this same constitutional transgression in obtaining the new Indictment, as he has once

again presented and relied upon evidence of legislative acts to support the changes that the State has brought. Either out of perceived necessity because of the paucity or absence of proper evidence of Ms. Dixon's alleged knowledge that Mr. Lipscomb was doing business with or was regulated by the City, or because the prosecution failed again to comprehend the scope of the legislative privilege that protects Ms. Dixon, the prosecutor presented evidence to the Grand Jury of official meetings that Ms. Dixon allegedly attended with Mr. Lipscomb and other City officials in connection with her official legislative duties. Clear precedent expressly prohibits the use of such evidence to obtain an indictment or to secure a conviction. See e.g. Montgomery Co. v. Schooley, 97 Md. App. 107, 123 (1993) (citing Bruce v. Riddle, 631 F.2d 272, 279-80 (4<sup>th</sup> Cir. 1980)).

In order to obtain the New Indictment, the State Prosecutor was required to show that Ms. Dixon acted "willfully," that is, intentionally and not as a result of accident or mistake. State v. Levitt, 48 Md. App. 1 (1981). "Of the requirement of a wrongful intent, or willfulness, in the crime of perjury, the Court of Appeals has stated that 'the false oath must be deliberate and not the result of surprise, confusion or bona fide mistake.'" Palmisano v. State, 124 Md. App. 420, 428 (1999) (quoting State v. Devers, 260 Md. 360, 372, 272 A.2d 794 (1971), and citing Brown v. State, 225 Md. 610 (1961), overruled on other grounds by In re Petition for Writ of Prohibition, 312 Md. 280, 539 A.2d 664 (1988)).

In order to present evidence to the Grand Jury that might support this critical element, the prosecutor introduced substantial evidence of Ms. Dixon's legislative acts. Ronald Lipscomb was the only witness called to testify before the Grand Jury in connection with the charges that have been brought in the present case, and, in that connection, Mr. Lipscomb was asked to testify about several official meetings concerning the Strathdale Development that he alleged that Ms.

Dixon also attended as the City Council President. Ex. 1, Lipscomb June 30, 2009 trans. at 8-9.<sup>2</sup>

In particular, the State Prosecutor induced the following testimony from Mr. Lipscomb:

Q. Okay. Now in terms of the development of the Strathdale project, did you have meetings with, in 19—I'm sorry, in 2001, 2002 and 2003 with various public officials including Sheila Dixon and Martin O'Malley and others?

A. Yes, yes.

Q. Okay. And those occurred here in Baltimore; is that right?

A. Yes.

Q. ... And here is some appointment calendars, they are in 2001, October 2001 where you're attending with the mayor, Bill Struever and it involves Strathdale Development?

A. Yes.

Q. And Sheila Dixon is at that meeting?

A. Yes.

Q. And here's another one very similar October 3<sup>rd</sup>, the same thing, you're meeting with yourself, other representatives, Ted Rouse and Ms. Dixon I believe. It says Mayor's Office. So you remember these meetings?

A. Yes.

Q. Okay. And on the second one I don't see her name but certainly the first one that had her name on it and there were other meetings, were there not?

A. Yes.

Q. So Ms. Dixon was aware that you were involved with this Strathdale project?

A. Yes.

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<sup>2</sup> Notably, in interviews with the State Prosecutor, Lipscomb stated that during their personal relationship, Lipscomb and Dixon *never* discussed Strathdale Manor or any of his business. Ex. 2, Lipscomb June 17, 2009 Interview Memo at 2.

Id. (emphasis added).

As this Court has already recognized, “In virtually every state, public officials who act as legislators are entitled to assert an immunity in litigation that arises from the role they play.” State of Maryland v. Dixon, Criminal No. 109009009, Sweeney, J., Memorandum Opinion On Legislative Immunity (hereafter “Sweeney Opinion on Legislative Immunity”) at 4-5 (citing Bogan v. Scott-Harris, 523 U.S. 44, 48-49, 52 (1998)). “Maryland’s courts have recognized and held that if the conduct engaged in by a municipal official can be characterized as ‘legislative,’ the actor is absolutely immune from any liability or suit emanating from that action.” Id. at 5 (citing District Heights v. Denny, 123 Md. App. 508, 516 (1998)). “The public official enjoys the immunity even when the allegation is that the official took governmental action for the purpose of defrauding citizens.” Id. (citing Mandel v. O’Hara, 320 Md. 103, 133 (1990)). And, “Maryland’s federal and State courts have recognized that a city or county legislator is fully protected by the privilege.” Id. (citing Montgomery County v. Schooley, 97 Md. App. 107, 115 (1993) (quoting Baker v. Mayor and City Council of Baltimore, 894 F.2d 679, 681 (4th Cir. 1990), cert. denied, 498 U.S. 815 (1990)).<sup>3</sup> Judge Wilner, speaking for Court of Special Appeals, could not have been more direct: “The doctrine articulated in [the Speech and Debate Clause] has been ... regarded as applicable to members of local and regional legislative bodies ... as a matter of common law — the ‘common law doctrine of official immunity.’” Schooley, 97 Md. App. at 114-15 (citing Thillens, Inc. v. Community Currency Exchange, 729 F.2d 1128, 1129 (7th Cir.), cert. dismissed, 469 U.S. 976 (1984)).

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<sup>3</sup> Overruled on other grounds, Berkley v. Common Council of City of Charleston, 63 F.3d 295 (4th Cir. 1995). Berkley overruled Baker to the extent that Baker conflicted with the principal the Supremacy Clause mandate that federal civil rights statutes (namely 42 U.S.C.A. § 1983) supersede state law privileges. Berkley, 63 F.3d at 303.

Moreover, Schooley makes clear that the Legislative Immunity includes meetings within and beyond the walls of the legislature building and includes any meeting or activity undertaken in conjunction with the legislative process. In Schooley, the court held that when county council members of one party meet to discuss their legislative actions, the meetings are entitled to Legislative Immunity. Schooley, 97 Md. App. at 123.

In Schooley, Judge Wilner relied heavily on two federal court opinions applying Maryland law. In the first case, Baker v. Mayor and City Council of Baltimore, 894 F.2d 679, 681 (4th Cir. 1990), cert. denied, 498 U.S. 815 (1990), two former city employees brought an age discrimination action against Baltimore's Mayor and City Council for terminations that were brought about as part of a budget cutting initiative. The cutting of the plaintiff's positions required approval of the Baltimore City Board of Estimates and ratification by the Baltimore City Council. Because the plaintiff's actions did not seek damages from the Mayor and City Council directly, the case did not concern immunity from suit. The public officials did, however, contend that they were protected from testifying about their legislative activity, and with respect to the Mayor in particular, this legislative activity stemmed from his service on the Board of Estimates. After reviewing the Baltimore City budgeting process and noting that "The Board is vested with broad discretionary powers in formulating, determining and executing the City's fiscal policy," the Court concluded that the Board of Estimates' "role in the overall budget process ... is most properly characterized as legislative." Id. at 681, 682. The Court therefore held that the Mayor was protected from giving testimony, stating, "Should the plaintiffs make a *prima facie* case that age was a determining factor in the Board of Estimates' decision, we are unable to conceive of a viable defense which would not include testimony from the Board's members to the effect that they were not motivated by the plaintiffs' ages." Id. at 682.

In Bruce v. Riddle, 631 F.2d 272, 279 (4th Cir.1980), the other case relied upon heavily by Judge Wilner in Schooley, landowners brought suit against members of a county council, claiming that the county council improperly and unconstitutionally rezoned the landowner's property in a bad faith effort to devalue the property. The landowner claimed that the county council improperly met privately with influential citizens who selfishly wanted the property rezoned for the protection of their own property. These acts, however, were, as the Court held, protected by the legislative immunity. Id. at 280: "Meeting with 'interest' groups, professional or amateur, regardless of their motivation, is a part and parcel of the modern legislative procedures through which legislators receive information possibly bearing on the legislation they are to consider."

As Judge Wilner stated in reliance on Bruce, "It is obvious from this that the legislative process, for the purposes of the privilege, includes more than just proceedings at regularly scheduled meetings of a legislative body" and that it includes the very activities that the State Prosecutor seeks to require Ms. Dixon to answer for here. Schooley, 97 Md. App. at 123.

There is no doubting that the State placed before the Grand Jury evidence of Ms. Dixon's attendance at meetings for the purpose of attempting to establish a critical element of the perjury alleged in the two counts of the indictment. These meetings, which Ms. Dixon attended in her capacity as City Council President and for the purpose of deciding public policy, were well within Ms. Dixon's legislative activities, and were protected by the Legislative Privilege. Bruce, 631 F.2d at 279; see also Schooley, 97 Md. App. at 114-15; Baker, 894 F.2d at 681. Indeed, Exhibit 3 hereto, which was presented to the Grand Jury, is an excerpt from Ms. Dixon's calendar, maintained in the performance of her duties as President of the City Council, showing her attendance at one of the referenced meetings.

Mr. Lipscomb also testified to the Grand Jury that he attended a ground breaking ceremony for the Strathdale project, which Ms. Dixon attended in her capacity as President of the City Council. But this evidence does not aid the State Prosecutor's cause. To the contrary, this activity further demonstrates the State Prosecutor's violation of Ms. Dixon's Legislative Immunity. The email exhibit presented in connection with Mr. Lipscomb's testimony before the Grand Jury shows that Ms. Dixon was invited to the ground breaking *in her capacity as City Council President*. See Ex. 4, (Grand Jury Exhibit), email chain of 8/22/03 at p. 3.<sup>4</sup>

There is no question that the Court is required to look beyond the new Indictment and review the evidence presented to the Grand Jury. As this Court has noted, "The prohibitions on prosecutors using legislative activities to support a charge do not only apply to the trial of the case; they also apply to the grand jury process." Sweeney Opinion on Legislative Immunity at 16-17 (citing United States v. Rostenkowski, 59 F.3d 1291 (D.C. Cir. 1995); United States v. Swindall, 971 F.2d 1531 (11th Cir. 1992); United States v. Helstoski, 635 F.2d 200 (3<sup>rd</sup> Cir. 1980); United States v. Jefferson, 546 F.3d 300 (4th Cir. 2008)). See also United States v. Dowdy, 479 F.2d 213, 223 (4th Cir. 1973). Put simply, a legislator cannot be brought to trial on an indictment that is secured by the improper use of evidence presented to a Grand Jury that is privileged under the Speech or Debate Clause. Id.

Beyond question, the State Prosecutor has used, and intends to continue to use, Ms. Dixon's protected legislative acts to fill in the knowledge requirement he must satisfy to prove

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<sup>4</sup> The State Prosecutor obviously recognized that he was intruding yet again on Ms. Dixon's legislative privilege, because he also introduced before the Grand Jury copies of newspaper articles citing Mr. Lipscomb's participation in various development projects in an alternative attempt to establish the defendant's "knowledge" for his perjury charges. But there was no evidence presented to show that Ms. Dixon ever saw or read any of those articles, which Mr. Lipscomb barely noticed, or that these development projects in themselves constituted "doing business with" or being "regulated by" the City.

his case. Indeed, the only fact witness before the Grand Jury that returned the indictment in this case testified as to protected legislative activity, making this issue not one “of a mere technical or inconsequential nature.” Sweeney Memorandum Opinion on Legislative Immunity at 24. As this Court has stated, Ms. Dixon is “entitled to have the Grand Jury consider the matters without the taint of reviewing evidence that is absolutely privileged under Maryland Law.” *Id.* The State Prosecutor’s presentation of substantial evidence of Ms. Dixon’s protected legislative acts to the Grand Jury is, thus, a substantial defect in the indictment procedure that warrants dismissal of this case.

### **III. The New Indictment Fails To Allege the Elements of the Crime Charged**

#### **A. The Legal Requirements of an Indictment**

As this Court has stated, motions to dismiss criminal indictments may be granted where “there is some substantial defect on the face of the indictment, or in the indictment procedure, or where there is some specific statutory requirement pertaining to the indictment that has not been followed.” *State of Maryland v. Dixon*, No. 109009009, Sweeney J., Memorandum (“Sweeney Memorandum”) at 2 (citing *State v. Taylor*, 371 Md. 617, 645 (2002); *State v. Deleon*, 143 Md. App. 645 (2001); *State v. Bailey*, 289 Md. 143 (1980)). Maryland courts have held that an indictment that violates certain privileges, or asserts a non-existent crime or omits essential allegations must be dismissed. See *Christensen v. State*, 33 Md. App. 635, 643 (1976) (upholding dismissal of count in indictment on grounds that “the third count in part asseverated a non-existing crime, *i.e.*, an attempt to commit an assault ...”).

The Due Process Clause of the United States Constitution, and its sister provisions in Articles 21 and 24 of the Maryland Declaration of Rights, establish certain fundamental thresholds that a charging document must meet in order to pass constitutional muster. The

Supreme Court held in Russell v. United States, 369 U.S. 749, 763 (1962), that an indictment is insufficient if it does not “contain the elements of the offense intended to be charged, and sufficiently apprises the Defendant of what he must be prepared to meet.” In Hamling v. United States, 418 U.S. 87 (1974), the Court identified two constitutional requirements for an indictment: “first, [that it] contain the elements of the offense charged and fairly informs a Defendant of the charge against which he must defend, and, second, [that it] enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. Id. at 117. See also, Brown v. State, 285 Md. 105 (1979); United States v. Loayza, 107 F.3d 257, 260 (4th Cir. 1997) (“in order to be legally sufficient, an indictment must contain the elements of the offense charged, fairly inform a Defendant of the charge, and enable the Defendant to plead double jeopardy as a defense in a future prosecution for the same offense”) (citations omitted). Accord United States v. Smith, 44 F.3d 1259, 1263 (4th Cir. 1995).

The Supreme Court long stated that an elementary principle of criminal pleading requires that, where the definition of an offense includes generic terms, it is not sufficient to allege the offense in the same generic terms, but the indictment must “descend to particulars.” United States v. Cruikshank, 92 U.S. 542, 558 (1875). Put another way, an indictment not framed to apprise the Defendant “with reasonable certainty, of the nature of the accusation against him is defective, although it may follow the language of the statute.” United States v. Simmons, 96 U.S. 360, 362 (1877). See also United States v. Resendiz-Ponce, 549 U.S. 102, 109.

In this regard, the Maryland Court of Appeals has held that an indictment is measured by the “facts stated in the indictment.” Duncan v. State, 282 Md. 385, 391 (1978). Indictments are subject to “strict scrutiny,” and for an indictment to be valid, “all matters material to constitute the crime [must be] alleged with such positiveness and directness, as not to need the aid of

intendment or implication.” Hall v. State, 57 Md. App. 1, 7 (1983) (citing Deckard v. State, 38 Md. 186, 201 (1873)). “[A] criminal charge must so characterize the crime and describe the particular offense so as to give the accused notice of what he is called upon to defend and to prevent a future prosecution for the same offense.” State v. Canova, 278 Md. 483, 498 (1976) (quoting Corbin v. State, 237 Md. 486, 490 (1965)):

Even if the charging document employs the statutory words, this does not mean that 'it is unnecessary to allege such facts in connection with the commission of the offense as will certainly put the accused on full notice of what he is called upon to defend, and establish such a record as will effectually bar a subsequent prosecution for that identical offense ... . However, it is clear that an indictment which charges the accused with the act prohibited by the statutory language, and does nothing more, would be fatally defective in failing to allege such other facts as would enable the accused to prepare his defense.

Id. at 499 (emphasis added).

Rule 4-202 of the Maryland Rules of Criminal Procedure requires that an indictment contain a “concise and definite statement of the essential facts of the offense with which the defendant is charged.” Md. Rule 4-202. The Rule is designed to perform three constitutionally-required functions. First, it fulfills the guarantee that a defendant be informed of the nature and cause of the accusation. Second, it serves to define the offense to prevent any person from being placed in double jeopardy. And third, the indictment insures protection to guarantee that no person be held to answer felony charges “unless on a presentment or indictment by a Grand Jury.” Because Articles 21 and 24 of the Maryland Declaration of Rights are read in para materia with federal constitutional requirements, Rule 4-202 also serves to satisfy the same Maryland Constitutional requirements. See Lodowski v. State, 307 Md. 233 (1983).

“The rationale for these rules is clear: they guard against the possibility, however slight, that a Defendant could be convicted on the basis of facts not found by, and perhaps not even presented to, the Grand Jury which indicted him.” United States v. Abrams, 539 F. Supp. 378,

384 (S.D.N.Y. 1982) (citing Russell v. United States, 369 U.S. 749 (1962)). As the Fourth Circuit has described, an important function of the indictment is to assure “that the indictment and prosecution were in fact for the same violations.” Loayza, 107 F.3d at 261. The Maryland Court of Appeals has adopted this principle as well, holding that a defendant may not be convicted of a crime with which he was not charged. Turner v. State, 242 Md. 408 (1966).

On the basis of these principles, Maryland courts and numerous others have found indictments to be defective even where the indictment tracked the language of the statute. For example, in Canova, the Court of Appeals upheld the dismissal of criminal informations charging bribery, even though the charging documents included the statutory terms, where the alleged bribe recipients did not fall within the class of persons covered by the statute. 278 Md. at 491-92. Similarly, in United States v. Abrams, 539 F. Supp. 378, 383-386 (S.D.N.Y. 1982), an indictment for obstruction of justice was dismissed where the indictment failed to identify the witness allegedly intimidated, or how, where or when the alleged acts had occurred. Likewise, a loan sharking indictment was dismissed in United States v. Tomasetta, 429 F.2d 978, 980-981 (1st Cir. 1970), because it did not identify the alleged victim or the means by which the threat was communicated.<sup>5</sup>

#### **B. The Failure Of The Indictment To Allege Essential Elements**

As noted above, in eliminating averments of the first Indictment relating to Ms. Dixon’s legislative acts, the State failed to provide a substitute to allege essential elements of the offense

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<sup>5</sup>See also, United States v. McDonnell, 696 F. Supp. 356 (N.D. Ill. 1988) (RICO predicate insufficient for failing to identify bribe payers and other facts); United States v. Staiti, 397 F. Supp. 264 (D. Mass. 1975) (indictment for stolen property dismissed for failing to identify property allegedly stolen); United States v. Nance, 533 F.2d 699 (D.C. Cir. 1976) (indictment insufficient for failing to allege specific false pretenses); United States v. Conlon, 481 F. Supp. 654 (D.D.C. 1979) (indictment contained insufficient facts to specify violation of conflict of interest statute).

of perjury and otherwise failed to meet the statutory requirements for a Maryland perjury Indictment. In Md. Code Ann., Crim. Law, § 9-103(a), the General Assembly has set forth the minimum requirements for sufficiently allegations the offense of perjury. The statute contains a clear mandate to prosecutors, stating that such charges should be alleged as follows:

“(name of defendant) on (date) in (county), on examination as a witness, duly sworn to testify in (proceeding) by (court or other person administering oath) with authority to administer the oath, willfully, unlawfully, and falsely swore (facts), the matters so sworn were material, and the testimony of (name of defendant) was willfully and corruptly false, in violation of (section violated) against the peace, government, and dignity of the State.”.

Md. Code Ann., Crim. Law, § 9-103(a).

First, the new Indictment does not allege that Ms. Dixon’s testimony was “willfully and corruptly false.” As noted above, indictments are subject to “strict scrutiny,” and for an indictment to be valid, “all matters material to constitute the crime [must be] alleged with such positiveness and directness, as not to need the aid of intendment or implication.” Hall v. State, 57 Md. App. 1, 7 (1983) (citing Deckard v. State, 38 Md. 186, 201 (1873)). The failure of the indictment to allege this essential element renders the charges defective.

Moreover, while the new Indictment alleges that Mr. Lipscomb “did business with” and was “regulated by” the City, there are no allegations that Ms. Dixon knew these crucial facts. Without averments of facts in the new Indictment that could be said to allege such knowledge and with the related omission of the statutory element that “the testimony ... was willfully and corruptly false,” the new Indictment is clearly insufficient.

It does not appear that the failure of the new Indictment to contain averments that would meet this critical element was inadvertent. It is apparent from the materials recently disclosed that the State Prosecutor had hoped to obtain significant evidence from Mr. Lipscomb that would enable these averments to be made. The memoranda of Mr. Lipscomb’s interviews and the

transcript of Mr. Lipscomb's Grand Jury testimony show that Mr. Lipscomb disappointed the prosecutors in this regard by stating that the most significant evidence of such alleged knowledge was Ms. Dixon's attendance at official meetings and that he did not have any informal or personal discussions with Ms. Dixon about his business apart from her attendance at such official meetings and events. See Ex. 2 at 2. Since the prosecutors were trying to avoid further reference to legislative acts in their new Indictment, they dealt with this problem by omitting all allegations from the new Indictment that Ms. Dixon had knowledge of facts that Mr. Lipscomb did business with, or was regulated by, the City and that Ms. Dixon's financial disclosure forms were "willfully and corruptly false." In their attempt to sidestep their problem, however, the prosecutors crafted an Indictment that failed to allege the essential elements of the crime with which they have charged Ms. Dixon.

**IV. The Concept Of "Regulated By The City," As Integrated Into The Prosecutor's Instructions To The Grand Jury, And Into The Indictment Itself, Deprives Ms. Dixon Of Due Process Of Law Because They Embody An Interpretation Of The Ethics Statutes That Is Void For Vagueness**

Extending further the State's discomfort with basing the charges in this case on allegations that Mr. Lipscomb did business with the City, and building on the State's consequent emphasis that Mr. Lipscomb was "regulated by the City," the State has now explicitly incorporated the broadest possible meaning of "regulated by the City" into the new Indictment. In doing so, the State has created charges that not only misinterpret the statute and violate the rule of lenity but, also, now clearly rest on a concept of "regulated" that is so vague and undefined as to be void for vagueness. See e.g. Fowler v. Nebraska Accountability & Disclosure Com., 330 N.W.2d 136 (Neb. 1983), and other cases cited below;

Subtitle 7 of Article 8 of the Ethics Code, entitled, "Financial Disclosure," establishes requirements for certain City officials annually to submit a Financial Disclosure statement to the

City Ethics Board. Subtitle 7 identifies the information that City public official are required to disclose. With respect to gifts, Section 7-23(b) provides:

The statement must include a schedule of each significant gift<sup>6</sup> that was, at any time during the reporting period:

- (1) accepted by the public servant or by any other person at the direction of the public servant; and
- (2) given by or on behalf of, directly or indirectly, any person that was:
  - (i) a lobbyist;
  - (ii) a person regulated by the City; or
  - (iii) a person doing business with the City.

Ethics Code, § 7-23(b) (emphasis added).

The phrase “Business with the City” is well defined by the Ethics Code, and means “any 1 or combination of sales, purchases, leases, or contracts to, from, or with the City or any agency that: (1) is made or entered into during the reporting period for which a disclosure statement is required by Subtitle 7 { ‘Financial Disclosure’ } of this article; and (2) involves consideration of \$5,000 or more on a cumulative basis.” Ethics Code § 2-5. Moreover, the Ethics Code provides that “The Finance Director must annually certify to the Ethics Board a list of all business entities doing business with the City.” Ethics Code § 7-1(d). The phrase “regulated by the City,” however, is not defined anywhere in the Ethics Code, and the certified list requirement does not apply to persons who are “regulated by the City.”

The Prosecutor has used this vagueness in the law unconstitutionally to stretch this case into a crime. In the first Indictment, the State relied heavily on the “doing business” provision in contending that Lipscomb and Doracon had a “financial interest that might be substantially and materially affected by the performance of” Ms. Dixon’s duties. See prior Indictment at ¶¶ 11, 15. After it was pointed out that this standard came from the Conflicts of Interest Sections of the

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<sup>6</sup> “Significant gift” is defined in the Code as “any gift with a value of more than \$50 and any gift in a series of gifts with a cumulative value of \$150 or more given by or on behalf of the same person during the reporting period.” Ethics Code, § 7-23(a).

Ethics Code (§§ 6-26 and 6-27), the State in midstream changed the focus of its charges to contend that Lipscomb and Doracon were covered by the “regulated by” language of § 7-23. In so doing, the Prosecutor resorted to “ordinary” definitions found in places such as “Google.” The Prosecutor proudly proclaimed that, “We went to the highest authority that we knew that defines that term and that’s Google.” Hearing, March 6, 2009, at Tr. 32. In response, the Court inquired whether it would not be true that “every person in the City” would be “regulated” under that broadest of concepts. Id.

On June 30, 2009, when he instructed the Grand Jury in connection with the new Indictment that he was seeking, the State Prosecutor told the Grand Jurors that they were to use the same concept as was in his “Google” definition. The State Prosecutor instructed the Grand Jury for the new Indictment that:

Basically the report has to disclose any significant gift that was provided to that person, and a significant gift is defined as any gift of value of fifty dollars or cumulative value of a hundred fifty dollars or more.

That does not include any campaign contribution but other than that it has not to be disclosed provided, as it’s set forth 7-23 is either given or received. I’m sorry, is given or received by or on behalf of directly or indirectly any person that is a lobbyist, a person that is regulated by the city, or a person doing business with the city, the term regulated is not defined in the statute. So it’s simply the ordinary meaning of the word regulated.

Ex. 1, Lipscomb trans. at 3:6-7 (emphasis added).

The Grand Jury, thus incorporated this “ordinary” definition into the charges when, as so instructed, it returned the new Indictment that alleges that Mr. Lipscomb was “regulated by the City.” The State Prosecutor’s “ordinary” definition leaves public officials to guess at the meaning of the term “regulated by the City” at the peril of criminal sanctions. Under the State’s definition, the disclosure of gifts provision of the Ethics Code could conceivably apply to gifts

from every person or business who lives, works, owns property, sells goods and services, does business or visits in Baltimore City, as they would be “regulated” by a myriad of rules, laws or authorities that are promulgated by the City. This is an unconstitutional standard. See Galloway v. State, 365 Md. 599, 612 (2001) (“if it is established that a statute is vague-offends due process ... then the statute is unconstitutional.”) (citing Williams v. State, 329 Md. 1, 8 (1992) (stating that the vagueness doctrine is “rooted in the fourteenth amendment’s guarantee of procedural due process”); Eanes v. State, 318 Md. 436, 459 (1990) (discussing how the vagueness doctrine is “based on fourteenth amendment due process or fairness concerns”), cert. denied, 496 U.S. 938; Laurence H. Tribe, American Constitutional Law (2d.1988) § 10-8, at 684 (“Life, liberty and property could not, furthermore, be taken by virtue of a statute shows terms were ‘so vague, indefinite and uncertain’ that one cannot determine their meaning.” (footnote omitted)); id. § 12-31, at 1033 (“As a matter of due process, a law is void on its face if it is so vague that persons ‘of common intelligence must necessarily guess at its meaning and differ as to its application.’”); Connally v. General Construction Co., 269 U.S. 385, 391 (1926)).

Though, in the prior proceedings, this Court wished to avoid “the nuances of interpretations of the Ethics Law at this juncture,” the State has now put its concept of “regulated by the City” squarely before the Court in connection with the new Indictment. Ms. Dixon respectfully submits that the issue must now be addressed because the new Indictment clearly incorporates a concept of “regulated” that is so vague that it cannot, as a constitutional matter, be a basis for a criminal Indictment. This is made all the more ironic because, in the prior proceedings, Ms. Dixon pointed out that the term “regulated” has been interpreted by the Court of Special Appeals, in the context of the Carroll County ethics law, and is understood by the City, to mean that a developer is regulated when an agency deliberates and renders a decision on

an application by the developer. See Ethics Com'n v. Lennon, 119 Md. App. 49 (1998) (attorney who served on planning and zoning commission violated ethics code and was subject to civil penalty for representing clients who had business before the planning and zoning commission and simultaneously voting on issues related to clients).

There are other good reasons for rejecting the State's interpretation of the concept of "regulated by the City." In addition to being inconsistent with Lennon, the State's concept is inconsistent with the detailed definition of "regulation" as including the requirement that such regulations be "adopted by a unit", which is provided in the State Administrative Proceedings Act, Md. Code Ann., State Gov't, § 10-101 et seq.<sup>7</sup> That Act sets forth an entire proposal and adoption scheme before a regulation can be enforced as part of COMAR. Md. Code Ann., State Gov't, § 15-607(e)(2)(ii)(2). Notably, the Baltimore City Code has an Article that is entitled, "Licensing and Regulation" akin to COMAR. Balto. City Code, Art. 15. That Article has 17 categories of business and entities that are licensed and regulated, none of which applies to Lipscomb or Doracon.

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<sup>7</sup> Section 10-101 of the State Government Article defines regulation as follows:

(g)(1) "Regulation" means a statement or an amendment or repeal of a statement that:

- (i) has general application;
- (ii) has future effect;
- (iii) is adopted by a unit to:
  - 1. detail or carry out a law that the unit administers;
  - 2. govern organization of the unit;
  - 3. govern the procedure of the unit; or
  - 4. govern practice before the unit; and
- (iv) is in any form, including:
  - 1. a guideline;
  - 2. a rule;
  - 3. a standard;
  - 4. a statement of interpretation; or
  - 5. a statement of policy.

In fact, nowhere in the new Indictment or in the evidence the before the Grand Jury did the State Prosecutor point to any section of the Baltimore City Code, Ordinance or Regulation under which Lipscomb or Duracon were “regulated.” Instead, the State Prosecutor was relegated to introducing to the Grand Jury a document entitled “Development Guidebook – Requirement for Building in Baltimore City,” the same publication to which the State made reference during the proceedings in connection with the first Indictment. Such a “guidebook” does not come close to being a “regulation” adopted by an administrative unit, as is contemplated by the Code. Further, if this guidebook were akin to a regulation, it would mean that any gift from any Baltimore City property owner would be subject to the disclosure requirement. Again, this is, as a matter of law, too far to stretch the definition of “regulated.”

The State Prosecutor’s definition of “regulated” cannot stand because such an interpretation would make the Ethics Code, especially the financial disclosure provisions, which can give rise to criminal prosecutions for perjury, unconstitutionally vague and therefore unenforceable. In a similar manner, other states have held that financial disclosure laws have been unconstitutionally vague. See Dunphy v Sheehan, 549 P.2d 332 (Nev. 1976) (use of term “jurisdiction of the officer’s public agency” in financial disclosure law unconstitutionally vague); see also Slevin v New York, 477 F. Supp. 1051 (S.D.N.Y. 1979) (noting that lack of guidelines or regulations to assist public employees in interpreting the reporting requirements could make disclosure requirements unconstitutionally vague, but were correctible).

In order to avoid the State’s doubtful interpretation, particularly because that interpretation would cause the statute to be void for vagueness, this Court should hold that the new Indictment impermissibly incorporates an incorrect interpretation of the concept of “regulated by the City” by applying the well known rule of lenity which requires Courts in

criminal cases to resolve doubts as to the meaning of a statute by adopting the interpretation favorable to the defendant. United States v. Santos, 128 S. Ct. 2020, 2028 (2008); United States v. Race, 632 F.2d 1114, 1120 (4<sup>th</sup> Cir. 1980); Palmisano v. State, 124 Md. App. 420 (1998) (reversing perjury conviction based on testimony that was non-responsive but literally correct); Bronston v. U.S., 409 U.S. 352 (1973) (same); United States v. Ryan, 828 F.2d 1010, 1015 (3<sup>rd</sup> Cir. 1987) (“[I]f a question is excessively vague or ‘fundamentally ambiguous,’ then the answer to such question may not, as a matter of law, form the basis of a perjury or false statements prosecution.”) (internal quotations omitted); United States v. Lighte, 782 F.2d 367, 375 (2<sup>nd</sup> Cir. 1986) (same); United States v. Watts, 72 F. Supp. 2d 106, 109 (E.D.N.Y. 1999) (“Where the statement may fairly be characterized as ‘ambiguous,’ difficult issues arise concerning whether the government has met its burden of proving the element of falsity.”).

In a case directly on point, United States v. D’Alessio, 822 F. Supp. 1134 (D.N.J. 1993), the government prosecuted a county sheriff for mail fraud for having solicited personal gifts in violation of a court rule that prohibited “any office serving a court” from accepting any gratuity or gift from any person who has had, or is likely to have, an official transaction with the court. Determining that the underlying court rule was ambiguous, because it might be interpreted as applying to the sheriff’s office, but not to the sheriff who was an independently elected constitutional officer, the court applied the rule of lenity and dismissed the indictment, stating:

the grand jury was advised by the government that defendant D’Alessio, as a county sheriff, was prohibited by court rule from soliciting and receiving personal gifts. It is unclear (but probably doubtful) that the rule applies to sheriffs. The uncertainty renders it an inappropriate basis for criminal charges.

Id. at 1135. The court thus held that the rule of lenity applies not only to interpretations of the criminal statute on which a case is brought, but, also, to any underlying statute or court rule

inherent in the prosecution. Id. The same concerns “motivating the rule of lenity” in connection with a criminal statute “suggest that any uncertainty regarding the applicability of the [court] rule should be resolved in favor of the defendants.” Id. at 1143.

The court further found it significant that the prosecution could not point to any court decision (or secondary sources) that supported the prosecutor’s interpretation of the court rule. Citing United States v. Critzer, 498 F.2d 1160, 1164 (4<sup>th</sup> Cir. 1974), the court ruled that, “a criminal prosecution is not the place to decide pioneering interpretations of the law.” D’Alessio, 822 F. Supp. at 1144. In Critzer, the Fourth Circuit had declared that, “It is settled that when the law is vague or highly debatable, a defendant - actually or imputedly - lacks the requisite intent to violate it.” Critzer, 498 F.2d at 1162.

Under either interpretation of the concept of “regulated by the City,” the new Indictment must be dismissed. If the Court determines that Ms. Dixon’s interpretation is correct, and that the statute must be narrowly construed, the indictment process and the new Indictment itself, are defective because they incorporate the broad and incorrect interpretation. On the other hand, if the Court were to accept the State’s interpretation, the statutory language would be so broad, vague and ill-defined as to be void for vagueness.

**V. To The Extent That The Ethics Code Requires Financial Disclosure Of Gifts From Persons Doing Business With The City, It Cannot Be The Basis Of a Criminal Perjury Charge Due to the City’s Failure Of The To Prepare And Maintain A Certified List Of Entities Doing Business With The City**

As with State’s loose use of the term “regulated by”, the term “doing business with” the City is, as acknowledged by the statutory requirement that there be a certified list of such persons, otherwise vague. The new Indictment, to the extent that it charges Ms. Dixon with failure to report gifts from persons doing business with the City, must be dismissed because without a list of such entities there was no notice and the City’s failure to certify a list of entities

doing business with the City left officials guessing as to which entities were covered by this requirement. While this Court did not accept Ms. Dixon's previous contention that this failure to make and keep a certified list requires dismissal, Ms. Dixon asks the Court to reconsider its prior ruling on this point.

While Section 7-1 of the Ethics Code mandated that the City's "Finance Director must annually certify to the Ethics Board a list of all business entities doing business with the City," and that, "The Ethics Board must keep this list on file and available to all persons subject to this subtitle," it is now well understood that no such list was certified during any of the years at issue in the present case. See Ex. 5, Dixon Motion to Dismiss, April 2, 2009. As this Court has noted, the list requirement provided a "'safe harbor' for those filing." Sweeney Memorandum at 9. Without such a safe harbor, the lack of a list is akin to the State failing to post speed limit signs on the highways and then allowing troupers to pull over drivers at random. Without the list, there was no notice to Ms. Dixon (or any other City official) that Lipscomb's and Duracon's activities constituted doing business with the City (if they in fact where). In short, this is a violation of due process.

The State previously recognized that it believes that, without the list, the State is relegated to pleading and proving that Ms. Dixon "actually knew" that Lipscomb and Doracon were doing business with the City. Sweeney Memorandum at 9. As discussed above, the State cannot do this without violating Ms. Dixon's Legislative Immunity. And, even if the State could present such proof, it is clear that the draftsman of the financial disclosure law intended for the list be a crucial part of the scheme when it provided that disclosures be signed under the penalty of perjury. Without the list, there can be no assumption that the City legislative body would

have provided such a penalty and make public officials guess whether or not they were committing a crime.

The Court of Appeals, in Hirsch v. Department of Natural Resources, 288 Md. 95 (1980), is highly instructive in explaining the purpose of the notice requirement that statutory mandated lists may serve. In Hirsch, the Court was called upon to interpret provisions of the Wetlands Act of 1970, which required the Secretary to identify private properties containing wetlands and required the Secretary to file among the land records of each county an order listing the properties and the boundaries of the wetlands. The Secretary sent his order and maps of the boundaries to the Clerk of the Circuit Court for Anne Arundel County but the Clerk placed them in a file cabinet and not among the land records. When Hirsch purchased the property in 1974, the wetlands designation had been completed and certified, but it did not appear in the land records of Hirsch's property. A DNR representative, responding to a complaint, warned Hirsch that he required a wetlands permit, but Hirsch ignored the warning and continued to fill. DNR brought suit against Hirsch, seeking an order to restore the property to its prior condition.

The trial court dismissed the restoration action; the Court of Special Appeals reversed the trial court; and the Court of Appeals, on certiorari, reinstated the dismissal. The Court of Special Appeals held that, although DNR had not filed the list of wetland properties and maps among the county land records, as required by the statute, the wetlands regulations were nevertheless enforceable against Hirsch because, "Hirsch had received actual notice, before any filling occurred, from [DNR's] call to Mrs. Hirsch advising her that it would be necessary to secure a wetlands permit." Hirsch, 288 Md. at 109-10 (summarizing Hirsch, 42 Md. App. 457, 483-84 (1979)).

The Court of Appeals held that because Hirsch had been deprived of notice of the wetlands designation when he purchased the property, the statute could not be enforced against him. Id. at 116. The Court stated that, “In many situations when a statute mandates specific notice requirements with finalizing proposed administrative action, this Court has held that the failure to comply with such requirements invalidates the administrative action. Id. at 118.

In the present case, the lack of a list giving notice to public officials is even more crucial than in Hirsh. Hirsch merely concerned property rights where this case concerns criminal penalties of imprisonment up to ten years. Nonetheless, as in Hirsch, Subtitle 7 of the Ethics Code, the financial disclosure subtitle, has as its keystone, the requirement that the Finance Director “must” certify an annual list of entities doing business with the City and that the Ethics Board “must keep this list on file and available to all persons” required to file financial disclosure forms. Ethics Code, § 7-1(d). The Ethics Code, in unambiguous terms, mandates the preparation and filing of the certified lists “on or before February 1 of each year.” Ethics Code, § 7-1(a).

The underlying purpose of the required list is to provide notice in one reliable place to public servants of who is “doing business with the City.” The importance of the list is underscored by the fact that “doing business,” as defined in Section 2-5 of the Ethics Code, is a highly technical concept, and the guidance of a certified list is necessary for public officials to be able to complete their disclosure forms with confidence. The Ethics Code requires the certified list so that a public official, filing the disclosure form under penalty of perjury, not be “required to guess the meaning of a question posed to her upon peril of perjury.” United States v. Farmer, 137 F.3d 1265, 1269 (10th Cir. 1998). Cf. Ferro v. Lewis, 348 Md. 593, 610-11 (1998) (holding the absence of required State produced list of approved motorcycle helmets did not make helmet

law unconstitutionally vague because motorcyclists had practical ability to obtain notice by way of publicly available federal list of approved helmets). Without the statutorily required notice of persons doing business with the City, it is simply unfair and unconstitutional to enforce criminal perjury charges based on the City's financial disclosure law.

The case of Samet v. Supervisor of Assessments of Baltimore City, 290 Md. 357 (1981), on which the State and this Court previously relied, does nothing to the analysis with respect to this failure of statutorily required notice. In Samet, which the Court characterized as “yet another skirmish in the never ending battle on the part of taxpayers to reduce that which they are obligated to pay for the maintenance of their government; the issue of notice is non-existent. There the property owners sought a reduction in the assessed value of their homes based, inter alia, the fact that the tax assessors failed to physically inspect the property during the relevant time period.”<sup>8</sup> The taxpayers also complained that the assessors did not use a prescribed valuation method and argued that Hirsch mandated that the assessments be set aside for this failure to comply with the statutory requirement. As the Court said in distinguishing Hirsch, “we held that the litigant there was not bound by that concerning which he had no notice.” Id. at 63 (citing Hirsch, 288 Md. at 114).

Here, in contrast to Sammet, here, and as in Hirsch, the State is attempting to hold Ms. Dixon to a standard of reporting for which she had not notice. The failure to certify and make available a certified list to public officials telling them what was required of them operates to void the criminal penalties associated with the disclosure requirements relating to gifts from persons doing business with the City. Thus, the perjury charges, insofar as they charge failure to report such gifts, must fail. An alleged false statement cannot constitute perjury unless it is

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<sup>8</sup> The homeowners' additional complaint – not relevant here – was that their neighbors' homes appeared to have been assessed at lower values.

material, and, unless a statement is required by law, it is not material. Oaks v. State, 83 Md. App. 1, 6-7 (1990).

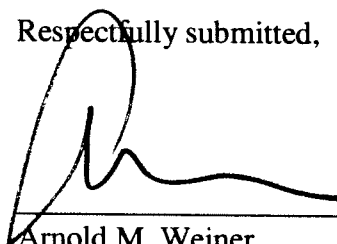
**VI. Ms. Dixon Incorporates Herein The Other Arguments For Dismissal That She Made In Connection With Her Motion To Dismiss The First Indictment**

Without repeating at length the other arguments that Ms. Dixon made for dismissal in connection with the first Indictment, Ms. Dixon incorporates those arguments herein. In support of those incorporated arguments, Ms. Dixon submits, as Exhibit 5, the Memoranda and Exhibits that she filed in support of her first Indictment.

**VII. Conclusion**

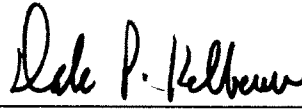
As described in detail above, the new Indictment in this case fails to satisfy the fundamental requirements of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, Articles 10, 21 and 24 of the Maryland Declaration of Rights, and Rule 4-202 of the Maryland Rules of Procedure, and, in addition, each count fails to state an offense. The defendant respectfully submits that the new Indictment, and each count thereof, should be dismissed with prejudice.

Respectfully submitted,



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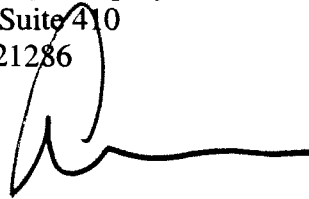
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY, on this 8th day of September, 2009, that copies of the within Memorandum In Support Of Motion Of Sheila Ann Dixon, Defendant, To Dismiss Indictment was sent by e-mail 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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