

Exhibit 6

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

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STATE OF MARYLAND :
v. : Case No. 109009009
SHEILA ANN DIXON :
-----X

**REPLY TO STATE'S OPPOSITION TO THE MOTION BY
SHEILA ANN DIXON, DEFENDANT, TO DISMISS INDICTMENT**

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CRIMINAL DIVISION

TABLE OF CONTENTS

ARGUMENT IN REPLY2

I. The Perjury Counts Of The Indictment Fail To State Crimes And Cannot Be Rescued By Treating Essential Factual Allegations As If They Were Mere Surplusage2

II. The State Still Does Not Understand The Meaning Of Section 7-23 Of The City Ethics Code7

III. Because The State Prosecutor Erroneously Instructed The Grand Jury That Its Decision Should Be Made On The Basis Of Inapplicable Sections Of The Law, The Defendant Was Deprived Of Due Process Of Law Through A Grievous Error In The Indictment Procedure13

IV. The Disclosure Provisions Of The Ethics Code Are Void Because The Finance Director Failed To Prepare An Annula Certified List Of Entities “Doing Business With The City,” And The Ethics Board Failed To Keep Such A List On File20

V. This State Prosecution Violates Dixon’s Legislative Immunity.....25

VI. Counts Three And Four Are Internally Repugnant, And The Perjury Counts Are Contradictory Of, And Repugnant To, The Theft Counts29

VII. Theft Counts Seven, Ten And Eleven Fail To State An Offense32

CONCLUSION.....33

TABLE OF AUTHORITIES

Cases

<u>Archer v. State,</u> 145 Md. 128 (1924)	5
<u>Bartram v. State,</u> 280 Md. 616 (1977)	16, 17
<u>Beckwith v. State,</u> 320 Md. 410 (1990)	31
<u>Bronston v. U.S.,</u> 409 U.S. 352 (1973).....	11
<u>Carroll County Ethics Commission v. Lennon,</u> 119 Md. App. 49 (1998)	8
<u>Clark v. State,</u> 140 Md. App. 540 (2001)	16
<u>Clear Lake City Water Authority v. Salazar,</u> 781 S.W. 2d 347 (Tex. App. 1989).....	29
<u>Cohen v. Wilhelm,</u> 63 F.2d 543 (3 rd Cir. 1933)	30
<u>Costella v. United States,</u> 350 U.S. 359 (1956).....	15
<u>Cunningham v. Chapel Hill, ISD,</u> 438 F. Supp. 2d 718 (E.D. Texas 2006).....	29
<u>Danner v. State,</u> 89 Md. 220 (1899)	15
<u>Douglas v. Long,</u> 661 F.2d 747 (9 th Cir. 1981)	30
<u>Duncan v. State,</u> 282 Md. 385 (1978)	32
<u>Farris v. State,</u> 351 Md. 24 (1998)	10
<u>Fowler v. State,</u> 203 P. 900 (Okla. Crim. App. 1922).....	32

<u>Francis v. Franklin,</u> 105 S. Ct. 1965 (1985).....	14
<u>Helmus v. State,</u> 397 S.W. 2d 437 (Tex. Crim. App. 1965).....	32
<u>Hirsch v. Department of Natural Resources,</u> 288 Md. 95 (1980)	22, 23
<u>Holt v. United States,</u> 218 U.S. 245 (1910).....	16
<u>Humane Society v. City of New York,</u> 188 Misc. 2d 735 (Sup. Ct. N.Y. Co. 2001)	29
<u>In re Grand Jury,</u> 821 F.2d 946 (3 rd Cir. 1987)	27
<u>Ishola v. State,</u> 404 Md. 155 (2008)	10
<u>Kearney v. State,</u> 48 Md. 16 (1877)	6
<u>Lawn v. United States,</u> 355 U.S. 339 (1958).....	16
<u>Lykins v. State,</u> 288 Md. 71 (1980)	14
<u>Management Personnel Services, Inc. v. Sandefur,</u> 300 Md. 332 (1984)	21
<u>Manders v. Brown,</u> 101 Md. App. 191 (1994)	28
<u>Mattingly v. State,</u> 89 Md. App. 187 (1991)	31
<u>Montgomery County v. Schooley,</u> 97 Md. App. 107 (Md. App. 1992).....	27, 28, 29
<u>Newell v. Runnells,</u> ___ Md. ___, 2009 WL 638966 (March 13, 2009).....	7
<u>Oaks v. State,</u> 83 Md. App. 1 (1990)	6

<u>Palmisano v. State,</u> 124 Md. App. 420 (1998)	11
<u>People v. Calbud, Inc.,</u> 426 N.Y.S. 2d 238 (1980).....	14
<u>People v. Ferrara,</u> 370 N.Y.S. 2d 356 (Co. Ct. 1975)	14
<u>People v. Gnass,</u> 101 Cal. App. 4 th 1271 (5 th Dist. 2002).....	14, 18, 19
<u>People v. Loizides,</u> 473 N.Y.S.2d 916 (N.Y. 1984)	14
<u>Pridgeon v. Board of License Commissioners,</u> 406 Md. 229 (2008)	10
<u>Rasnake v. Board of County Commissioners,</u> 268 Md. 295 (1973)	23
<u>Samet v. Supervisor of Assessments of Baltimore City,</u> 290 Md. 347 (1981)	24
<u>State v. Bailey,</u> 289 Md. 143 (1980)	13
<u>State v. Burroughs,</u> 333 Md. 614 (1994)	31
<u>State v. Canova</u> 278 Md. 483 (1976)	6, 32
<u>State v. Dowdy,</u> 479 F.2d 213 (4 th Cir. 1973)	16
<u>State v. Jenkins,</u> 307 Md. 501 (1986)	32
<u>State v. McGraw,</u> 85 S.E.2d 849 (W. Va. 1955).....	5
<u>State v. Mims,</u> 385 P.2d 1002 (Or. 1963)	5, 6
<u>State v. Monfred,</u> 183 Md. 303 (1944)	5

<u>State v. Montoya,</u> 910 P.2d 441 (Utah Ct. App. 1996)	32
<u>State v. Neufeld,</u> 926 P.2d 1325 (Kan. 1996)	29
<u>State v. Ratcliff,</u> 165 So. 305 (La. 1936)	32
<u>State v. Salazar,</u> 521 P.2d 134 (N.M. 1974)	5
<u>Sunderland v. United States,</u> 19 F.2d 202 (8 th Cir. 1927)	32
<u>Thillens, Inc. v. Community Currency Exchange,</u> 729 F.2d 1128 (7 th Cir. 1984)	27
<u>Tribbitt v. State,</u> 403 Md. 638 (2008)	10
<u>United States v. Briggs,</u> 54 F. Supp. 731 (D. D.C. 1944)	30
<u>United States v. Calandra,</u> 414 U.S. 338 (1974)	16
<u>United States v. Cisneros,</u> 26 F. Supp. 2d 24 (D. D.C. 1998)	30, 31
<u>United States v. Critzer,</u> 498 F.2d 1160 (4 th Cir. 1974)	12
<u>United States v. D'Alessio,</u> 822 F. Supp. 1134 (D. N.J. 1993)	7, 11, 12, 14, 15, 19
<u>United States v. Gaddis,</u> 424 U.S. 544 (1976)	30
<u>United States v. Gillock,</u> 445 U.S. 360 (1980)	25, 26
<u>United States v. Hogan,</u> 712 F.2d 757 (2d. Cir. 1983)	14
<u>United States v. Jefferson,</u> 546 F.3d 300 (4 th Cir. 2008)	15, 16

<u>United States v. Johnson,</u> 419 F.2d 56 (4 th Cir. 1969)	16
<u>United States v. Lighte,</u> 782 F.2d 367 (2 nd Cir. 1986).....	11
<u>United States v. Llera Plaza,</u> 179 F. Supp. 2d 464 (E.D. Pa. 2001)	31
<u>United States v. Modesti,</u> 145 F. Supp. 2d 171 (D. P.R. 2001).....	27
<u>United States v. Peralta,</u> 763 F. Supp. 14 (S.D. N.Y. 1991)	14
<u>United States v. Race,</u> 632 F.2d 1114 (4 th Cir. 1980)	10, 11
<u>United States v. Ryan,</u> 828 F.2d 1010 (3 rd Cir. 1987)	11
<u>United States v. Santos,</u> 128 S. Ct. 2020 (2008).....	13
<u>United States v. Watts,</u> 72 F. Supp. 2d 106 (E.D. N.Y. 1999)	11
<u>Walker v. Superior Court,</u> 956 P.2d 1246 (Ariz. Ct. App. 1998).....	14
<u>Williams v. Public Service Commission,</u> 277 Md. 415 (1976)	23
<u>Williams v. State,</u> 302 Md. 787 (1985)	6

Statutes & Rules

U.S. CONST.	
art. I, § 6	29
amend. XIV	2, 33
18 U.S.C. § 1001	10
FED. R. EVID. 501	26
MD. CODE ANN., [CONST.]	
art. 10, 21, 24	2, 29, 33

MD. CODE ANN., [CRIM. LAW]	
§ 9-101.....	3, 6
MD. CODE ANN., RULES OF CRIMINAL PROCEDURE	
RULE 4-202.....	33
RULE 4-252.....	13
BALTIMORE CITY CODE, ARTICLE 8, §§ 2-5, 2-22, 2-35, 6-26, 6-27, 7-1, 7-9, 7-23	passim

Miscellaneous

2 CHARLES, W. Torcia, WHARTON'S CRIMINAL PROCEDURE,	
§ 244 (13 th ed. 1990)	5
§ 291 (1974).....	30
12 M.L.E. Indictments and Information § 20	5

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**REPLY TO STATE’S OPPOSITION TO THE MOTION BY
SHEILA ANN DIXON, DEFENDANT, TO DISMISS INDICTMENT**

The motion to dismiss in this case advances serious arguments that: (1) the indictment, in several significant respects, fails to charge offenses; (2) the perjury counts are based upon a fundamental misreading of the operative provisions of the Baltimore City Ethics Code; (3) the State committed grave errors in the indictment process, amounting to a deprivation of due process of law, by giving misleading instructions to the grand jury that were based on inapplicable provisions of the law; (4) the reporting provisions of the Ethics Code are void for failure of the City to certify and maintain annual lists of entities doing business with the City as required by law; (5) the indictment and the indictment process transgress Ms. Dixon’s speech and debate privilege; (6) counts of the indictment are internally repugnant; (7) the perjury and theft counts are mutually contradictory and repugnant; and (8) several of the remaining counts simply fail to state an offense.

The State’s opposition is an exercise in avoidance. Pretending that Ms. Dixon has questioned the sufficiency of the evidence, when, in reality, she has challenged the sufficiency of the allegations of the indictment and the constitutionally flawed indictment process, the State Prosecutor repeats, no less than two dozen times, the unexceptional proposition that a defendant

may not challenge the sufficiency or admissibility of evidence before the grand jury or use a motion to dismiss as if it were a motion for summary judgment. While the State's concerns regarding its ability to produce evidence are well-founded, Ms. Dixon's arguments, for purposes of this motion to dismiss, challenge the fundamental defects in the indictment process, in the institution of this prosecution and in the indictment itself that run afoul of the due process clause of the Fourteenth Amendment to the United States Constitution, Articles 21 and 24 of the Maryland Declaration of Rights and the Maryland Rules of Criminal Procedure, warranting dismissal of all charges.

ARGUMENT IN REPLY

I. The Perjury Counts Of The Indictment Fail To State Crimes And Cannot Be Rescued By Treating Essential Factual Allegations As If They Were Mere Surplusage

Remarkably, the State Prosecutor does not deny that he was under the misapprehension that the expansive provisions of Sections 6-26 and 6-27 of the Ethics Code provided the standard for reporting gifts by a public official when he drew the indictment in this case and that the perjury counts of the indictment are based primarily on that egregious legal error. The State offers no defense for the admittedly erroneous allegations of the indictment that Ms. Dixon was required by law to report (and committed perjury by not reporting) gifts allegedly received from Mr. Lipscomb and Mr. Turner because each of those two men "had a financial interest in real estate and land development projects in Baltimore which were affected by the Baltimore City Council and Sheila Dixon, in her capacity as President of the Baltimore City Council and as Chairman of the Baltimore City Board of Estimates, as well as in her capacity as Mayor." Indictment, ¶¶15, 17 (paraphrasing §§6-26 and 6-27 of the Ethics Code). Further, the State does

not dispute that this mistaken reliance upon the inapplicable criteria of Sections 6-26 and 6-27 provides the basis for the further allegations, in the same operative paragraphs of the indictment, that these two men, because of their alleged investments in “various corporations, limited liability companies” and other entities participating in such real estate projects, each personally “did business with and before Baltimore City and the Baltimore City Council” and “was regulated” by the City, for purposes of the reporting requirements of § 7-23 of the Ethics Code.

Id.

While the State would have this Court divorce these central, though grossly incorrect, allegations from the recitation of the elements of perjury in each of the first four counts of the indictment, the fact of the matter is that each perjury count incorporates this fatally flawed basis for the charge and builds upon it. In the first count, for example, paragraph 85 incorporates the allegations of the prior operative paragraphs; paragraph 87 alleges that Ms. Dixon was required, generally, to report gifts on her financial disclosure forms; paragraphs 88 and 89 allege that she did not disclose gifts on her financial disclosure forms and paragraph 92 alleges that Ms. Dixon made a false oath because she “knew that the gifts...which were paid by Developer A [Lipscomb] were required to be reported on her Fiscal 2004 Financial Disclosure Statement, in violation of §9-101 of the Criminal Law Article... .”¹

¹ In a glaring admission that the allegations of paragraph 92 are based on the erroneous theory that an individual investor in a real estate company is himself a “regulated” person, the State attempts to rescue the charge by making the blatant misstatement that, “Paragraph 92 specifically indicates that the Defendant...knew that the gifts she had received during the period July 1, 2003 through June 30, 2004...that had been paid by Mr. Lipscomb and his company, Doracon Contracting Company, Inc., were required to be disclosed.” State’s Opposition at p. 6. The words, “and his company, Doracon Contracting Company, Inc.” are nowhere to be found in paragraph 92. And, the fact that the State felt compelled to make such a misstatement about the language of a paragraph on which it places such reliance, only demonstrates that the State itself is keenly aware of the fact that the indictment, as written, fails to state a crime.

The indictment, reviewed within its four corners, fails to allege perjury because it alleges facts which, even if true, meet only the criteria of inapplicable Sections 6-26 and 6-27 of the Ethics Code, and not those of Section 7-23, the Section governing the reporting of gifts. The State Prosecutor admitted as much when he issued his press release to accompany the indictment and when he proclaimed that the indictment, which he himself had drafted, charges Ms. Dixon with perjury because she was “required to disclose any gifts...from any person who has a financial interest that might be substantially affected by the performance or non-performance of the public official’s duties.” The Prosecutor’s candid description of what the indictment alleges, voiced by him at a time when the charges were not yet under attack, is certainly more significant than any after-the-fact rationalization that he might now advance for the purpose of sustaining that grievously defective charging document. As we have explained to this Court, the indictment charges no crime because the Ethics Code contains no such requirement.²

When, as in this case, an indictment rests on allegations of essential facts that do not amount to a crime, the indictment cannot be salvaged by striking those allegations as if they were mere surplusage. As the treatise cited by the State for the definition of surplusage explains:

No allegation in an indictment or information can be treated as surplusage which, if true, contradicts or negates the commission of the offense sought to be charged, even if such allegation is superfluous or unnecessary. Such an allegation must be accepted as an admission of record by the state, which it cannot refute or ignore in its proof.

² In Footnote 4 of the State’s opposition, the State Prosecutor complains that he had earlier shown a draft of his proposed indictment to counsel for Ms. Dixon and that counsel for Ms. Dixon had not edited the proposed indictment for him. While it is worthy of note that the Prosecutor chose to go outside the indictment to write that curious footnote after repeatedly urging that nothing beyond the four corners of the indictment be considered by this Court, the fact of the matter is that defense counsel, upon viewing the draft indictment, told the State Prosecutor that he was proceeding under a mistaken view of the Ethics Code, that Ms. Dixon had committed no crime and that she should not be indicted.

2 Charles, W. Torcia, *Wharton's Criminal Procedure*, § 244 (13th ed. 1990) (and cases cited therein). See State v. Monfred, 183 Md. 303 (1944) (discussed below); 12 M.L.E. Indictments and Informations §20 (“Matters essential to the description of the offense cannot be disregarded as surplusage.”) State v. Mims, 385 P.2d 1002 (Or. 1963) (en banc) (quoting above from prior edition of Wharton's; dismissing indictment for false pretenses where allegations stated the statements were not false); cf. State v. Salazar, 521 P.2d 134, 135 (N.M. 1974) (reversing burglary conviction because state identified act that took place on a date different than that identified in the indictment; “having charged defendant with a detailed statement of facts (the specific date), the prosecution was limited to establishing the facts so detailed”); State v. McGraw, 85 S.E.2d 849, 853-54 (W. Va. 1955) (dismissing indictment for receipt of stolen property; misidentification of the character of the stolen property could not be ignored as surplusage; “Unnecessary matter, of a sort or so averred as to negative the offense meant, or otherwise to show the prosecution not maintainable, cannot be rejected as surplusage.”).

In State v. Monfred, the Court of Appeals upheld the dismissal of six of eight counts brought jointly against six individuals for the sale of obscene publications. The first six counts alleged that the individuals “each” violated the anti-obscenity statute, but the seventh and eighth count alleged a conspiracy. 183 Md. at 306-07. When the defendants moved to dismiss the indictment based on misjoinder of individual defendants who acted independently, the State contended, that the word “each,” appearing in the first six counts, should be ignored as surplusage. Id. at 307. The Court of Appeals disagreed, ruling that the word “each” meant that each was acting separately and would not be ignored as surplusage because it “contradict[ed] the theory of the concert action” advanced by the prosecutor. Id. While the State finds it necessary to reach back to a 1924 decision, Archer v. State, 145 Md. 128 (1924) to find purported authority

for its surplusage argument, there can be no doubt that the Monfred case, decided decades later, completely undermines the State's argument.

The State also contends that it should be relieved of the consequences of the specific allegations of the indictment by contending that it could have drawn a bare bones charging document devoid of specifics. This contention lacks all merit because "it is an essential requisite in every indictment that it should allege all matters material to constitute the particular crime charged, with such positiveness and directness, as not to need the aid of intendment or implication." State v. Canova, 278 Md. 483, 498 (1976) (quoting Kearney v. State, 48 Md. 16, 23-24 (1877)). See also Williams v. State, 302 Md. 787, 790-91 (1985) (indictment must "inform the accused of the specific conduct with which he is charged..."). And, in any event, the grand jury did not return such a hypothetical indictment, and "since the pleader has chosen specific facts relied upon as constituting the crime, and, in doing so has only succeeded in showing that no crime was committed, these specific averments cannot be disregarded as surplusage." State v. Mims, 385 P.2d at 1004.³

Furthermore, the State is plainly wrong when it urges this Court to determine the sufficiency of perjury charges under Criminal Law Article, § 9-101, which applies to false statements made "in an affidavit required by law," without considering the requirements of the underlying law. It was just this sort of error that undid the State's pursuit of perjury causes, for an allegedly false oath in a campaign report, in Oaks v. State, 83 Md. App. 1, 6-7 (1990), cited in our initial memorandum and ignored in the State's response. What the State refuses to recognize is that, under the facts alleged in the indictment in this case, the Ethics Code, for a number of

³ The State oddly maintains that it is in a "no-win" proposition by submitting a fact-specific indictment. It is only a "no-win" proposition because the only facts the State can muster do not amount to crimes. More importantly, one would hope that the State Prosecutor would recognize his responsibility is to see that justice is done, and not simply to "win."

reasons explained in our initial memorandum, imposed no duty upon Ms. Dixon to report gifts allegedly received from Mr. Lipscomb or Mr. Turner. Accordingly, Ms. Dixon may not be charged with perjury for not having done so. See id.; United States v. D'Alessio, 822 F. Supp. 1134 (D.N.J. 1993) (mail fraud indictment of sheriff, based on erroneous interpretation of local rule regarding gifts to persons in sheriff's department, dismissed). Put simply, although the indictment alleges that Ms. Dixon was "required" to disclose the alleged gifts, the Ethics Law does not impose such a requirement.

II. The State Still Does Not Understand The Meaning Of Section 7-23 Of The City Ethics Code

Now that the State has learned, belatedly, that Sections 6-26 and 6-27 do not have anything to do with a public official's duty to report gifts, it urges this Court to read Section 7-23, the Section that does govern the reporting of gifts, as if it were coextensive with those other Sections. The State's argument is devoid of merit and must be rejected for several independent reasons: First, Sections 6-26 and 6-27 contain expansive language that the framers of the Ethics Code deliberately omitted from the far narrower requirements of Section 7-23. Sections 6-26 and 6-27, but not Section 7-23, concern gifts "from any person who...has a financial interest that might be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of the public servant's official duties." The use of this language in Sections 6-26 and 6-27, to cover those who invest in entities that do business with the City, shows that the framers of the Ethics Code knew how to describe such persons, and the omission of such language from Section 7-23 must be recognized as deliberate and of significance. See Newell v. Runnells, ____ Md. ____, 2009 WL 638966, at *30 (March 13, 2009) ("inclusio unius est exclusio alterius, the principle that 'the expression of one thing is the exclusion of the other.'").

Under the plain language of Section 7-23, when a business entity enters into a contract with the City, or acquires property that it undertakes to develop, the business entity is the “person” that does business with the City, or is regulated by the City, within the meaning of Section 7-23. The State misses the point entirely when it seizes upon the definitional Section 2-22 as the basis for its contrary argument. All that Section 2-22 means is that an individual or a trustee, the same as a business entity, may enter into a contract with the City or purchase a property for development, and, under such far different circumstances, the individual or trustee that is a party to a contract, or who takes title to property for development, is a person doing business with the City or is regulated by the City. See Carroll County Ethics Commission v. Lennon, 119 Md. App. 49 (1998) (husband and wife took title to property and made application in their names to county planning commission to extend water and sewer service to their property).

There is no dispute in this case that all of the business allegedly conducted with the City, and all of the real estate development allegedly regulated by the City, was by corporations, limited liability companies and other business entities. The indictment alleges as much and the bill of particulars now confirms it. Indictment, ¶¶15-17. See State’s Response To The Bill Of Particulars, ¶¶1-4 and chart attached as Exhibit “A” thereto. In the case of Mr. Lipscomb, the chart that is part of the State’s particulars shows that Mr. Lipscomb’s interests in those entities were, in the main, indirect, partial, and, in some cases, five steps removed. Under these alleged facts, Mr. Lipscomb might accurately have been described as having “had a financial interest in real estate and development project,” within the meaning of Sections 6-26 and 6-27 of the Ethics Code, but by no stretch of the imagination could he, personally, be deemed to have done business with, or to have been regulated by, the City.

Refusing to accept responsibility for the defective prosecution that is the product of his failure to acquaint himself with the Ethics Code, the State makes the grievously wrong assertion that the defense is somehow hobbling his efforts to bring a prosecution under an “already feeble law.” Nothing could be further from the truth. Under Section 7-23, when an entity does business with the City or conducts activities regulated by the City during the reporting period, a public official is required to report a gift that is given to her “by or on behalf” of that entity. The State may very well bring perjury charges against a public official who receives such a gift, knowing that it was given by or on behalf of such an entity, and who willfully files a financial disclosure form, under oath, that fails to disclose the gift. The fatal flaws in the indictment in this case result from the Prosecutor’s lack of awareness of both the existence of Section 7-23 and the way that it operates. As a result, the indictment in this case contains none of the allegations necessary for a perjury case based on financial disclosure forms filed pursuant to that Section.⁴

Second, the State’s argument ignores the fundamental difference between regulatory provisions such as Sections 6-26 and 6-27, which can be interpreted broadly because a breach of their terms carries only a civil sanction, and provisions such as 7-23, which must be interpreted narrowly and in accordance with bright-line delineations, because violation of their terms bears substantial criminal penalties. Section 2-35 of the Ethics Code makes this important distinction, providing that the provisions of the Ethics Code “except those imposing criminal sanctions” be

⁴ It is also apparent from the face of the indictment that the State and the grand jury were unaware of the definition of “business with the City” in Section 2-5 of the Ethics Code. The indictment, which was undoubtedly drafted under the mistaken assumption that “doing business” could be given its colloquial meaning, speaks of doing business “with and before” the City. Indictment, ¶¶15, 17. Section 2-5, however, defines business with the City generally as the making of a contract or lease “during the reporting period for which a disclosure statement is required...” irrespective of the period over which the contract or lease is performed. *Id.* at (a), (b). As discussed in argument IV below, the allegedly false financial statement would also be required to have been filed for a reporting period for which a list of entities doing business with the City had been certified and filed with the City Ethics Board. Ethics Code, Section 7.1(e).

liberally construed. The State's response mentions only the liberal construction to be given to provisions that do not carry criminal penalties and avoids all reference to this critical qualification. It is well-recognized in Maryland and elsewhere, moreover, that statutes providing for criminal penalties "are to be construed narrowly so that courts will not extend the punishment to cases not plainly within the language used." Tribbitt v. State, 403 Md. 638, 646 (2008) (quoting Farris v. State, 351 Md. 24, 36 (1998)). See also Ishola v. State, 404 Md. 155, 162 (2008).

Third, the State's tortured reading of Section 7-23 is directly contrary to the administrative interpretation and application of that section by the City of Baltimore. The State has no answer to the fact that the City interprets and administers Section 7-23 in accordance with the plain meaning of the provisions and contrary to the interpretation urged upon this Court by the State. The State responds to the Affidavit of George Nilson, the City Solicitor, attesting to this administrative interpretation, by questioning Mr. Nilson's motives and veracity. The State's personal attack upon Mr. Nilson, who is only the messenger bringing information about the City's administrative interpretation of the Ethics Code, does not deserve further comment. More importantly, the State does not deny the basic principle, applicable here, that great weight should be accorded to the City's interpretation and administrative application of the Ethics Code. Pridgeon v. Board of License Commissioners, 406 Md. 229, 238 (2008).

Fourth, even if Section 7-23 were ambiguous, the rule of lenity would require this Court to accept the interpretation more favorable to the Defendant. In United States v. Race, 632 F.2d 1114, 1120 (4th Cir. 1980), the Fourth Circuit considered the problems inherent in false statement prosecutions under 18 U.S.C. §1001 when the underlying basis for the prosecution is an otherwise ambiguous statement. In Race, the defendants appealed their convictions for

submitting “false and fraudulent invoices” to a division of the Department of the Navy for reimbursement of certain expenses. The court concluded that the contract clauses, pursuant to which the defendants submitted their invoices, were ambiguous because they were susceptible to at least two reasonable constructions. Id. The court concluded that “[o]ne cannot be found guilty of a false statement under a contract beyond a reasonable doubt when his statement is within a reasonable construction of the contract” and, therefore, reversed defendants’ convictions. Id. at 1120.

The Race decision instructs that a defendant cannot be convicted of perjury or its sister provision of making a false statement when the allegedly false statement is, within a reasonable construction, factually correct. Id.; see also, 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 (3rd 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 (2nd 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 another case directly on point, United States v. D’Alessio, 822 F. Supp. 1134, 1138, 1140, 1142-3 (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 also 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 (4th 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 also 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.

In the present case, as in D'Alessio, there is no precedent for the interpretation of Section 7-23 that the State has fashioned for the purposes of this case. Even if the State's interpretation were plausible, and we respectfully submit that it is not, the rule of lenity would require this Court to accept the contrary interpretation of the Defendant that is supported by the plain language of Section 7-23, by the legislative scheme and by the City's administrative

interpretation. When a prosecution is brought pursuant to an ambiguous statute, Justice Scalia declared for the Court in United States v. Santos, 128 S.Ct. 2020, 2023, 2026 (2008), the statute must be interpreted “in favor of defendants, not prosecutors,” and, in any given case, “the tie must go the defendant.”

III. Because The State Prosecutor Erroneously Instructed The Grand Jury That Its Decision Should Be Made On The Basis Of Inapplicable Sections Of The Law, The Defendant Was Deprived Of Due Process Of Law Through A Grievous Error In The Indictment Procedure

In her Memorandum, Ms. Dixon showed, by reference to grand jury transcripts and the indictment itself, a serious defect in the indictment procedure and in the institution of the prosecution. The State Prosecutor, through testimony by the his lead investigator, misinformed the grand jury on the law, instructing the jurors that Ms. Dixon was required to disclose any gifts from any person who (1) seeks to do business of any kind with the City Council, or (2) has a financial interest that might be substantially or materially affected by the performance of the public official’s duties. The State neither denies nor explains this error. Instead, the State contends in its opposition that this is an error without a remedy; that the State gave further conflicting instructions; and that the error caused no prejudice.

The State is simply wrong when it asserts that a prosecutor is free to advise with impunity a grand jury incorrectly as to the law for which it intends to seek an indictment. As Maryland Courts have stated repeatedly, in cases including those cited by the State, “a motion to dismiss the indictment will properly lie where there is some substantial defect on the face of the indictment, or in the indictment procedure....” State v. Bailey, 289 Md. 143, 150 (1980) (emphasis added); see also Maryland Rule 4-252(a)(1) (a motion to dismiss shall raise “a defect in the institution of the prosecution”). Maryland Courts recognize that the prosecutor is the “legal advisor to the grand jury” and has the obligation to instruct the grand jury on the

applicable law in order that the grand jury might “intelligently decide whether a crime has been committed.” Lykins v. State, 288 Md. 71, 82 (1980). The law presumes that jurors in a criminal proceeding are “conscious of the gravity of their task” and “carefully follow instructions.” Francis v. Franklin, 471 U.S. 307, 359 (1985).

Courts that have addressed the issue of a prosecutor’s improper legal instructions to a grand jury have thus understood that such errors are errors in the indictment procedure, are directly prejudicial, are in violation of due process and warrant dismissal of the indictment. See United States v. Peralta, 763 F. Supp. 14, 18-21 (S.D.N.Y. 1991); People v. Gnass, 101 Cal. App. 4th 1271 (5th Dist. 2002); People v. Loizides, 473 N.Y.S.2d 916 (N.Y. 1984); Walker v. Superior Court, 956 P.2d 1246 (Ariz. Ct. App. 1998); People v. Calbud, Inc., 402 N.E.2d 1140, 1144-45 (N.Y. 1980) (an instruction may be so misleading due to mistakes or omissions that the ensuing indictment “will not be permitted to stand even though it is supported by legally sufficient evidence.”); People v. Ferrara, 370 N.Y.S. 2d 356, 357 (N.Y. Co. Ct. 1975) (failure to instruct the grand jury regarding affirmative defenses mandated dismissal of the indictment); (United States v. Hogan, 712 F.2d 757, 761 (2nd Cir. 1983) (“dismissal of an indictment is justified . . . to prevent prosecutorial impairment of the grand jury’s independent role”).

As discussed above, the case of United States v. D’Alessio, 822 F. Supp. 1134 (D.N.J. 1993), is strikingly similar to the present case. There, the prosecutor instructed the grand jury that a sheriff, who had allegedly converted campaign contributions for his own use, had violated a court rule that prohibited “any officer serving a court” from receiving such gifts, although it was unclear, and probably doubtful that the rule applied to the sheriff. Dismissing the indictment, the Court said:

The court cannot ascertain the extent to which reliance on the rule motivated the grand jury's decision to indict these defendants. The court cannot speculate as to what the grand jury would have done absent reliance on the subject rule. That answer can only be derived by resubmission of the matter to a grand jury, if the United States Attorney chooses to do so, without reference to or reliance upon the rule.

Id. at 1135-36 (emphasis added).

The State has no basis for its claim that no Maryland law supports the Defendant's position. The defense position relies on sound and honored legal principles of due process that run throughout Maryland common law. See, e.g., Danner v. State, 89 Md. 220 (1899) ("It is a right of every citizen to be secure from accusation of crime, and from trouble, expense, and anxiety of a public trial, before probable cause is established by the presentment and indictment of a grand jury"). While it is not surprising that only a handful of cases across the nation specifically address the consequences of a prosecutor's instructing a grand jury on the wrong law, whenever the issue has arisen, courts have uniformly dismissed the indictments.

None of the cases on which the State relies to try to immunize the indictment from the Prosecutor's plainly wrong legal instructions concern the propriety of the instructions of law, and nearly all of them deal with issues regarding the admissibility of evidence presented to a grand jury. In Costello v. United States, 350 U.S. 359 (1956), the Court upheld an indictment that was based on hearsay evidence before the grand jury. In fact, the State is quick to admit that the case of United States v. Jefferson, 546 F.3d 300 (4th Cir. 2008), cited Costello for proposition that a court will not inquire into the adequacy, sufficiency or nature "of the evidence upon which the

grand jury acted.” State’s Opposition at 15.⁵ See also U.S. v. Calandra, 414 U.S. 338 (1974) (witness summoned to appear and testify before the grand jury may not refuse to answer questions on the ground that they are based on tainted evidence obtained from unlawful search and seizure); Lawn v. U.S., 355 U.S. 339 (1958) (defendants were not entitled to press unsupported suspicions that grand jury had made use of illegally obtained material used in procuring indictment.); Holt v. U.S., 218 U.S. 245 (1910) (holding that indictment need not be quashed because grand jury considered testimony of admissions by prisoner that were obtained under circumstances that made them incompetent.); U.S. v. Johnson, 419 F.2d 56, 58 (4th Cir. 1969) (“Of course, the tainted evidence would not be admissible in the trial of the case, but this presents no problem here.”) (emphasis added); Clark v. State, 140 Md. App. 540 (2001) (after conviction defendant admitted to murder; holding that prosecutor has no duty to present all arguably exculpatory evidence to the grand jury where such evidence would not have established innocence).

In the one case that the State cites related to a prosecutor’s legal instruction given to a grand jury, the Court did go behind the indictment and consider the proceedings of the grand jury in deciding that the prosecutor had not incorrectly advised the jury on the law. Bartram v. State, 280 Md. 616 (1977). In Bartram, a woman appealed her conviction for killing her husband on the basis of three alleged “imperfections in the grand jury proceeding,” one of which was her claim that the prosecutor attempted to influence the grand jury by telling it that the case “was

⁵ In Jefferson, the appeals court approved of the trial court’s exercise of discretion to review proceedings before a grand jury to determine if a Congressman’s Speech and Debate privilege had been violated. 546 F.3d at 313-14. The case for reviewing the grand jury proceedings here is even stronger than in Jefferson, where there was no indication that the indictment relied on legislative acts or that the proof would require legislative acts. As the Jefferson court noted, in such instances, it would be “necessary to go beyond the indictment to obtain the full meaning of what appear facially to be perfectly proper allegations.” Id. at 313 (quoting State v. Dowdy, 479 F.2d 213, 223 (4th Cir. 1973)).

either murder or a triple shot suicide” Id. at 621. The trial judge heard extensive testimony regarding the proceedings before the grand jury before deciding that the prosecutor had done nothing wrong. Importantly, the Court of Appeals found that the prosecutor had given correct legal instructions to the grand jury and that his allegedly offending statement was “nothing more than a recitation of Mrs. Bartram's defense and the legal opinion of the grand jury's duly constituted legal adviser that if the grand jury concluded that this was not suicide but homicide, then the facts were legally sufficient to support an indictment for murder.” Id. at 632. Bartram is thus supportive of the Defendant's position that the propriety of a prosecutor's legal instruction to the grand jury may be a basis of a motion to dismiss the indictment.

Unable to deny the fact of the erroneous instruction to the grand jury, the State points to other portions of the transcript, hoping to find a cure for the error, State's Opposition at 18-19, but the additional instruction cited in the State's opposition only highlighted and exacerbated the impact of the initial mistaken instruction. On January 8, 2009, the State Prosecutor instructed the grand jury through Agent Thesing by asking the following: “Now in connection with the financial disclosure statements that Ms. Dixon was required to file . . . what were the prohibitions about receiving gifts and soliciting gifts?” Dixon Memorandum, Exhibit 2, at p. 4. Thesing, in response, read and paraphrased Sections 6-26 and 6-27. Later that day, the State Prosecutor again referenced language from these wrong sections and further compounded the wrong legal instructions by having Thesing tell the grand jurors that the prohibitions of Sections 6-26 and 6-27, and that none of the exceptions in those sections was applicable. State's Opposition, Exhibit A at 25. On January 9, 2009, after having given the grand jury these erroneous instructions on the law, the State Prosecutor had Thesing walk the grand jury through each financial disclosure form, emphasizing that the jurors were signed under the penalty of perjury, while failing to make

even passing mention of Section 7-23 or the necessary elements and criteria of that governing section. See id. at 26-34.

In an even more desperate defense of the defective indictment process in this case, the State, without authority, reasons that there was no prejudice because the grand jury, in the State's view, was not confused. The State draws this conclusion, as a matter of asserted "plain logic," from the meaningless fact that the grand jurors accepted the prosecutor's erroneous legal instructions and posed no further questions regarding the law. State's Opposition at 19-20. The "plain logic" advanced by the State, however, defies common sense and, in the one previous case, when the same suggestion was made by the prosecutor, it was flatly rejected. See People v. Gnass, 101 Cal. App. 4th 1271 (5th Dist. 2002).

In Gnass, as here, the prosecutor instructed the grand jury on the wrong law, citing a civil section of the statute without reference to the applicable criminal section. Unable to deny the error in his instructions on the law, the prosecutor argued that because the grand jurors asked no questions, they somehow must have understood the applicable law. Rejecting that faulty logic, the Court stated:

The same can be said about the People's argument in this case . . . that the grand jury need only have asked for advice from the district attorney if it had questions about the instructions. 'That the grand jury in the instant case did not request further instructions indicates it did not desire [sic] additional advise [sic] or instructions. Consequently, it cannot be said that the lack of instructions resulted in prejudicial error.'

However, what was missing here was not simply an explanation or clarification of an instruction that was given (although, for reasons discussed below, we believe that was a problem too), but any instruction at all about an essential element of the offense to be charged in the indictment. The grand jurors had no cause to suspect the instructions they had been given were incomplete, and so no reason to request additional ones. Therefore, the more plausible explanation for their silence is they assumed, as they were justified

in doing under the circumstances, that they had been instructed on all the elements. They were, in other words, misled into believing there were no others when, of course, there were. As a result, the grand jurors were not called upon to decide whether Gness acted knowingly and willfully.

Id. at p. 1309 (emphasis added).

Likewise here, the grand jury had no reason to suspect that the instructions the State had provided were not applicable and, therefore, the grand jurors had no reason to ask questions.⁶ The State furthermore has no explanation for how the grand jury, having no access to the applicable law, could have possibly known or surmised the criteria of Section 7-23.⁷ Indeed, in this case there can be no doubt that the improper instructions infected the grand jury process, because, as noted above, the indictment itself contains allegations that relate only to Sections 6-26 and 6-27, the improper sections about which the grand jury was instructed. Because there is no understanding the degree to which the grand jury was misled by the State's undisputed incorrect instructions of law, which also appear on the face of the indictment, the only option is for this Court to dismiss the perjury and misconduct counts. See D'Alessio, 822 F. Supp. at 1135-36.

⁶ There is no doubt that the State Prosecutor himself was unaware that Section 7-23 governed the financial disclosure form reporting requirements until after the indictment was issued. As noted in Ms. Dixon's Memorandum, at page 4, the State Prosecutor's Press Release accompanying the return of the indictment included the same mistaken declarations of applicable law that misinformed the grand jury and that are found in the indictment itself.

⁷ The State Prosecutor further suggests that it makes no difference that the grand jury was given erroneous instructions because Ms. Dixon must have known the law on which the prosecutor himself was confused. State's Opposition at 20. The State jumps to this conclusion based on the allegation that Ms. Dixon introduced a revision to the ethics law in 2003. By advancing this curious argument, the State seems to be making the astounding suggestion that Ms. Dixon, as the subject of the investigation, had the obligation to advise the grand jury as to the applicable law. In fact, before the grand jury, the State only mentioned that "there was an amendment to the ethics disclosure law in 2004," without detailing the nature of the amendment or even identifying which sections of the ethics laws were amended. Ms. Dixon's knowledge of the law, whatever that may be, is completely irrelevant.

IV. The Disclosure Provisions Of The Ethics Code Are Void Because The Finance Director Failed To Prepare An Annual Certified List Of Entities “Doing Business With The City,” And The Ethics Board Failed To Keep Such A List On File

The Baltimore City Ethics Code, Subtitle 7 – the Financial Disclosure Section – is a comprehensive statutory structure under which persons subject to the law must make financial disclosures, including disclosures of certain gifts. The Subtitle’s foundation is Section 7-1, which lists the various preliminary certifications that must be made annually as the basis for the required disclosures, for example: each agency head must certify names of all public servants who are required to file Financial Disclosure Statements (§ 7-1(b)); the Director of Human Resources must identify and certify by agency all procurement, legislative, and enforcement positions held by persons required to file Financial Disclosure Statements by Section 7-9 (§ 7-1(c)); the Ethics Board must certify and keep on file a list of all registered lobbyists (§ 7-1(e)); and – of relevance here – the Financial Director must annually certify to the Ethics Board a list of all business entities “doing business with the City.” (§ 7-1(e)). Together, these certification requirements form the basis for the required Financial Disclosures.

It is undisputed that, during the relevant period covered by the indictment, the Finance Director did not certify a list of entities “doing business with the City.” See Dixon Memorandum, Exhibit 4, Nilson Affidavit. The State brushes aside the importance of the certification required in the Code by suggesting that, “prior to the indictment in this case, it is highly doubtful that any person, including the City Solicitor, was even aware of the requirement [that the City maintain a list of entities doing business with the City].” From this speculative proposition, the State concludes that “[c]ertainly, the failure to maintain such a list did not inhibit the filing of the disclosure forms by hundreds of Baltimore City employees.” State’s Opposition at 22.

Making much of the fact that, even in the absence of the certified list, many public servants, including Ms. Dixon, actually did file disclosure forms, the State reaches the unremarkable conclusion that “the Defendant was able to complete the [Financial Disclosure Forms] without regard to any list which the financial director of Baltimore was to certify annually to the Ethics Board.” *Id.* at 22. But, this is a non sequitur. Ms. Dixon is not charged with failing to file Financial Disclosure Forms; and she does not argue that she could not file disclosure forms. She is charged with the failure to include in her filing alleged gifts from a person “doing business with the City.” Absent a certified list, she was not fairly notified, in accordance with due process, of what disclosures the law required.

“Logically,” the State suggests, the list was intended only as an aid to those without “actual knowledge” of whether a person was “doing business with the City.” *Id.* at 23. But this “logic” ignores the statute’s clear command that, as a basis for requiring public servants to file disclosure forms, the Financial Director “must” certify a list of all entities doing business with the City, just as agency heads “must” certify those procurement, legislative, and enforcement personnel who are required to file disclosure forms. The State’s interpretation renders the entire Certification Section of the statute (§ 7-1) meaningless surplusage, a construction that this Court must avoid. See, e.g., Management Personnel Services, Inc. v. Sandefur, 300 Md. 332, 341 (1984) (“Absent a clear indication to the contrary, a statute, if reasonably possible, is to be read so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless, or nugatory.”).

The State’s theory – i.e., that the mandatory certified list of persons doing business with the City is only “to assist individuals in meeting their reporting obligations . . . in those instances where they lacked actual knowledge concerning whether a person or entity was ‘doing business

with the City” – was soundly rejected in Hirsch v. Department of Natural Resources, 288 Md. 95 (1980). In Hirsch, the owner of waterfront lots was cited for placing fill dirt in areas designated by the Department of Natural Resources as private wetlands.⁸ But, the landowner had not received from the Department of Natural Resources the statutorily required notice and map delineating the wetland boundaries. Nor, did the Department file the maps in the County land records, as required by the statute. Nonetheless, there was evidence at trial that the landowner had received a phone call from a Department of Natural Resources representative informing him that his land was within the wetlands area.

On appeal, the Court of Special Appeals held that because the landowner had received actual knowledge of the wetlands, the Department’s failure to provide public notice of the designated wetlands did not affect the validity of the regulations. The Court of Appeals, however, overturned the holding of the intermediate court. Ruling that the purpose of the filing requirement was to provide notice to prospective purchasers that the real estate was subject to the private wetlands regulations, the Court turned aside the State’s suggestion that sanctions for misuse of wetlands could be imposed regardless of whether the State complied with the statutory notice requirements. If that were the case, reasoned the Court, “little purpose would be served by the statutory requirement... . Such a construction would render the statutory language, and its underlying purpose, surplusage...a result that courts strive to avoid.” Id. at 116. As a result, the Court reversed the restoration action.

Likewise here, the State’s contention that no list is required because Ms. Dixon had “actual knowledge” must fail. The mandatory requirement of a certified list of all businesses

⁸ The Department filed a complaint for injunction requiring the landowner to restore the wetlands. The alleged violation also carried a potential criminal penalty. Hirsch, 288 Md. at 104.

“doing business with the City” within the meaning of the statute is a due process notification requirement that cannot be supplanted by the State’s assumed “actual knowledge” of whether an entity is “doing business with the City.” In other cases as well, the Court of Appeals has consistently struck down even administrative actions where specific notice was required before such action could be taken. See Williams v. Public Service Commission, 277 Md. 415 (1976) (where statute specifically required Public Service Commission to provide public notice of hearing, failure to provide such notice rendered action taken at hearing illegal, even though aggrieved party received actual notice); Rasnake v. Board of County Commissioners, 268 Md. 295 (1973) (because proposed ordinance substantially changed zoning requirement, failure to give notice of hearing invalidated the law).

In its attempt to distinguish Hirsch, the State betrays a misunderstanding of the Court of Appeals’ teaching with regard to notice statutes. The State acknowledges that the Hirsch Court invalidated a regulation prohibiting the filling of wetlands because of the Department of Natural Resources’ “failure to follow the mandatory provisions of a statute intended to provide notice upon which landowners could rely to determine whether the regulations applied to their property.” State’s Opposition at 23 (emphasis added). But, missing the point entirely, the State asserts that “By contrast, there is nothing in the Baltimore City Code to suggest that the list required by Section 7-1 of the Baltimore City Ethics Code was intended to be a comprehensive notice to financial filers in Baltimore City.” To construe the mandated list as “no more than a resource to assist those who had received gifts,” (State’s Opposition at 24) is to relegate an entire statutory subsection to mere directory surplusage, a result that this Court must “strive to avoid.” See Hirsch, 288 Md. at 116.

Finally, the State argues that the “utility of Hirsch as a precedent was undercut in Samet v. Supervisor of Assessments of Baltimore City, 290 Md. 357 (1981).” State’s Opposition at 24. In Samet, the Court in no way disapproved Hirsch, but simply distinguished the facts of the cases. The Samet property owners sought a reduction in the assessed value of their home based on, inter alia, the fact that the tax assessor failed to physically inspect the property in the relevant time period.⁹ The property owners, however, conceded that the price they paid for the home in the preceding year represented a fair market value and that the “current value” figure used by the assessor in his calculations of the assessment was less than the price that they paid for the property. Thus, the Samet Court held that the property could not have been overassessed regardless of whether a physical inspection had been done. Id. at 360.

In a misguided resort to Hirsch, the Samet property owners broadly argued that where the State fails to comply with mandatory actions required by statute, administrative actions must be struck down. Id. at 362. The Court readily distinguished Hirsch, pointing out that there, the “obvious purpose of the statutory requirement that private wetlands maps and order be filed among the land records was to provide notice to a prospective buyer that the real estate was subject to the private wetlands regulations... .” Id. at 363. The Court noted that in Hirsch the Court “held that the litigant there was not bound by that concerning which he had no notice.” Id. (emphasis added). By contrast, Samet had nothing to do with notice to a property owner. Rather, “the purpose of the inspection [in Samet] was to arrive at a correct assessment, which purpose, by the concession, has been satisfied.” Id.

⁹ The homeowners’ additional complaint – not relevant here – was that their neighbors’ homes appeared to have been assessed at lower values.

Here, the purpose of the certification statute is the same as that in Hirsch: to provide fair notice to those who must comply with the law, namely the identity of those entities “doing business with the City” within the meaning of the statute.

V. **This State Prosecution Violates Dixon’s Legislative Immunity**

In its Opposition, the State is unabashed in its belief that it could, and did, present to the grand jury evidence of Ms. Dixon’s legislative acts to establish essential elements of the crimes for which it would be seeking an indictment; and that it can, and will, use Ms. Dixon’s legislative acts to allege and prove elements of its case. Indeed, in its Opposition, the State admits that it has relied upon Ms. Dixon’s legislative acts to establish the element of knowledge necessary to prove perjury. On page 8 of its Opposition, for example, under the heading that the “Defendant was fully aware of her legal obligations and duties,” the State refers to paragraphs 8, 10 and 11 of the indictment, all of which refer to Ms. Dixon’s actions on the City Council in introducing legislation. Similarly, the State acknowledges that it used Ms. Dixon’s legislative acts in its presentation to the grand jury. State’s Opposition at 18.

Thus, rather than take issue with any of these points, the only issue the State raises to defend the indictment is to contend that the Speech and Debate Clause and the common law legislative privilege do not apply to Ms. Dixon. The State is not correct.

The State takes the position that the Supreme Court’s decision in United States v. Gillock, 445 U.S. 360 (1980), controls this decision. State’s Opposition at 26. According to the State, because the Supreme Court found in Gillock that the state Speech and Debate Clause should not be recognized in federal criminal prosecutions of local officials, Maryland’s sister provision in its Constitution and the common law immunity should not be applied to indictments of local public officials either. Ignoring the Supremacy Clause of the United States Constitution,

the State contends that there is no distinction between the Federal Speech and Debate Clause inapplicability to local officials and the common law legislative privilege and would have this Court conclude that the common law immunity for local officials, as articulated in the Speech and Debate clause of the Maryland Declaration of Rights, protects local officials of civil liability only. State's Opposition at 27-28.

But the State misapprehends Gillock, as it does not stand for such a broad proposition as the State would like. In Gillock, the Supreme Court was confronted with the issue of whether the Tennessee Speech and Debate clause should be recognized as a privilege within the scope of Rule 501 of the Federal Rules of Evidence. 445 U.S. at 360. The Court analyzed the history and language of Rule 501 and concluded that such a privilege was not a part of the federal common law, and was not compelled by principles of federalism. In addition, the Court found that the Separation of Powers doctrine, one of the policy considerations underlying the Clause, did not support such an evidentiary privilege for local officials. Id. at 369. As the Court held: "in those areas where the Constitution grants the Federal Government the power to act, the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power." Id. The Court concluded that "our cases disclose that where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields." Id. at 373. Put simply, the Gillock Court found that the state Speech and Debate clause was not a privilege which federal courts were willing to recognize as within the ambit of Rule 501, based upon the Supremacy Clause. There is no reason to apply Gillock beyond its holding regarding the scope of Rule 501

of the Federal Rules of Evidence, as it has no bearing on the application of the state common law legislative privilege to state criminal proceedings.¹⁰

Indeed, in Montgomery County v. Schooley, 97 Md. App. 107 (1993), a case cited by the State, Chief Judge Wilner recognized the limitation of the holding in Gillock. In Schooley, the appellees challenged the councilmanic redistricting plan adopted by the County Council following the 1990 census. The plaintiffs sought to take the deposition of a member of the County Council, and the County sought a protective order, citing the councilman's legislative privilege. After tracing the history of the Maryland Constitutional Speech and Debate Clause, Judge Wilner recognized that:

Members of local legislative bodies in Maryland, like the Montgomery County Council, are not directly within the ambit of either the State or Federal Constitutional immunity provisions, which apply only to the members of legislative bodies mentioned within them. The doctrine articulated in those provisions has, however, 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.”

Id. at 114-15 (emphasis added).

Judge Wilner also pointed out that “when invoked in defense of a Federal criminal prosecution, for example, the common law privilege has been held to be inapplicable – ‘trumped’ by the Supremacy Clause in the U.S. Constitution.” Id. (citing Gillock). But as Judge Wilner importantly continued: “When there is no such paramount Federal interest, however, the privilege has been respected by both Federal and State courts.” Id. (emphasis added). As Judge Wilner explained:

¹⁰ The other cases cited by the State, In re Grand Jury, 821 F.2d 946 (3rd Cir. 1987), United States v. Modesti, 145 F. Supp. 2d 171 (D.P.R. 2001) and Thillens, Inc. v. Community Currency Exchange, 729 F.2d 1128, 1129 (7th Cir. 1984), all involve federal decisions that rely upon Gillock and for which the Supremacy Clause are applicable, and are inapplicable to this case for the same reason that Gillock is inapplicable.

In Baker [v. Mayor and City Council of Baltimore], 894 F.2d 679 (4th Cir. 1990)], the Court . . . declared it “beyond dispute that municipal legislators enjoy the protection of immunity when acting in the sphere of legitimate legislative activity.” Subject to the consequences of the Supremacy Clause, that immunity, conferred as a matter of common law, appears to be co-extensive in scope with the Constitutional immunity enjoyed by members of Congress and the Maryland General Assembly. . . . In various cases, the Supreme Court has construed the Federal provision as immunizing members of Congress against both criminal and civil liability based on their legislative conduct, whether the action is for prospective relief or damages.

Id. 115-16 (emphasis added).

Later in the same opinion, Judge Wilner addressed the question of whether the County was entitled to invoke the privilege when the public official himself has not done so. “When the legislator himself is the defendant or target, whether in a criminal prosecution or a civil action, the privilege is obviously a personal one that he may exercise.” Id. at 120 (emphasis added). Thus, it is apparent that the privilege afforded to legislators under the Speech and Debate Clause is “coextensive” with the common law privilege, and both apply with equal vigor in state court proceedings to both criminal and civil actions.

Lest there be any doubt about the interpretation of Schooley and its recognition that the common law privilege and the Speech and Debate clause have the same reach, the Court of Special Appeals put it to rest in Manders v. Brown, 101 Md. App. 191 (1994) stating:

The privilege as it applies to Congress is found in the Speech or Debate Clause of the United States Constitution, Art. I, § 6; as to the Maryland General Assembly, the privilege is found in Article 10 of the Maryland Declaration of Rights and Art. III, § 18 of the State constitution. The majority of the Supreme Court case law focuses on the application of the federal constitutional privilege as it applies to Congress. Despite the common law origins of legislative privilege as it applies to local legislative bodies, federal and local privileges are essentially co-extensive. Schooley, 97 Md.App. at 115, 627 A.2d 69.

Id. at 205 (emphasis added). Accord, State v. Neufeld, 926 P.2d 1325, 1332 (Kan. 1996) (holding that the “state common-law doctrine of legislative immunity and [the Speech and Debate Clause] of the Kansas Constitution provide protection to Kansas legislators equivalent to the protection provided to federal legislators under Article I, § 6 of the United States Constitution because they are based on the same origin and rationale.”).

Other courts have found that the legislative immunity contained within the various State constitutional Speech and Debate clauses apply to local officials. See Cunningham v. Chapel Hill, ISD, 438 F. Supp. 2d 718 (E.D. Tex. 2006) (legislative privilege protects school district trustee); Clear Lake City Water Authority v. Salazar, 781 S.W.2d 347 (Tex. App. 1989) (Speech and Debate clause of State constitution protects members of water authority commission); Humane Society v. City of New York, 729 N.Y.S. 2d 360 (Sup. Ct. N.Y. Co. 2001) (state Speech and Debate clause protects City Health department employees and Mayor).

In the instant case, Ms. Dixon, as a member of the Baltimore City Council, is entitled to the same privileges and immunities that are part and parcel of the Maryland Constitutional Speech and Debate clause, which is “coextensive” with the common law legislative privilege. As such, her “legislative actions” may not be “impeached in any Court of Judicature” and may not be used in a grand jury proceeding, or as part of an indictment, against her. See Md. Const. Decl. of Rights, Art. 10. Consequently, Counts One through Four and Twelve of the indictment must be dismissed.

VI. Counts Three And Four Are Internally Repugnant, And The Perjury Counts Are Contradictory Of, And Repugnant To, The Theft Counts

The State’s opposition points out that there is nothing improper about an indictment charging a defendant with alternative facts in support of different counts of an indictment. The

cases cited by the State, Douglas v. Long, 661 F.2d 747 (9th Cir. 1981) and United States v. Gaddis, 424 U.S. 544 (1976), certainly support that proposition. But the State's response is wide of the mark. There is a significant difference between allegations of an indictment that are merely alternatives alleged in separate counts, and those that are mutually inconsistent in a single count and therefore are "repugnant." A single count with inconsistent allegations must be dismissed because a defendant is not informed of the charges against her and cannot prepare a defense. As the Douglas case confirms, "[i]nconsistent charges within a count have long been condemned... ." Douglas, 661 F.2d at 749; (citing 2 Wharton's Criminal Procedure § 291 at 126-27 (Torcia ed. 1974)). See United States v. Cisneros, 26 F. Supp. 2d 24 (D.D.C. 1998), ("a count of an indictment is "repugnant" and must be dismissed if there is a "contradiction between material allegations...") (citing United States v. Briggs, 54 F. Supp. 731, 732 (D.D.C. 1944); Cohen v. Wilhelm, 63 F.2d 543, 545 (3rd Cir. 1933).

In its opposition, the State simply ignores the repugnant allegations identified in our initial memoranda. As discussed previously, paragraph 57 of the indictment, which is incorporated by reference in all of its counts, alleges that Ms. Dixon obtained gift cards from Mr. Turner in December 2005 by telling him that they were "for the needy families in Baltimore." In other words, pursuant to paragraph 57, the gift cards obtained from Mr. Turner were not gifts to Ms. Dixon. Counts three and four incorporate this allegation and inconsistently assert that Ms. Dixon failed to report the same gift cards as gifts. These internal inconsistencies create "repugnant" counts that must be dismissed.

As the Motion to Dismiss makes clear, the allegations of the indictment do not simply allege alternative theories of committing the same offense. Instead, the allegations are mutually inconsistent – the same property, the gift cards, are alleged to have been gifts to the Defendant

for her personal use, and at the same time, property intended for others which she is alleged to have stolen. Because proof of one of these allegations necessarily disproves the other, the charges are “repugnant” and cannot stand.

In State v. Burroughs, 333 Md. 614 (1994), the Court of Appeals explained how those who receive gifts cannot also be alleged to be thieves. Expounding on the Court of Special Appeals decision in Mattingly v. State, 89 Md. App. 187 (1991), the Maryland high court discussed the circumstances under which the offenses of theft and misappropriation are inherently inconsistent. In Mattingly, the defendant “could not be guilty of fraudulent misappropriation by a fiduciary, because he, in fact, had stolen the checks. His status as a thief preempts his status as a fiduciary.” Burroughs, 333 Md. at 621 (quoting Mattingly, 89 Md App. at 200). The Court of Appeals explained that:

in order to find the defendant guilty of the offense of theft charged the jury was required to find that the defendant obtained the money by deception, and if that were so he could not have received the money as a fiduciary.

Burroughs, 333 Md. at 621-22.

As in the case here, the State in Mattingly did not use a statutory form indictment, but, instead, restricted itself by charging the more specific theft by deception.¹¹ Therefore, it was inconsistent that property that the defendant received by deception was the very same property that he held as a fiduciary. See also Cisneros, 26 F. Supp. 2d at 24.

Other courts have also recognized this defect in charges. In United States v. Llera Plaza, 179 F. Supp. 2d 464, 480 (E.D. Pa. 2001), the court considered the government’s alternative

¹¹ See Beckwith v. State, 320 Md. 410, 414-15 (1990) (while State may charge a violation of two subsections by referring only to the general section in the charging document, it loses that option by specifying one of the two subsections).

theories of the defendant's mental state in a federal death penalty proceeding. In permitting the government to attempt to prove more than one mental state, the court noted:

This rule accords with the general practice in evaluation of criminal indictments; alternative allegations in a single count of an indictment are impermissible only when they are inconsistent – that is, when proof of one would necessarily disprove the other. Citations omitted (emphasis added).

Id. See also State v. Ratcliff, 165 So. 305 (La. 1936) (at common law, repugnancy in allegations of indictment render it defective); State v. Montoya, 910 P.2d 441, 443-444 (Utah App. 1996) (where proof of one theory disproves the other, allegations are “repugnant” and must be dismissed); Sunderland v. United States, 19 F.2d 202, 208 (8th Cir. 1927); Fowler v. State, 203 P. 900 (Okla. Crim. 1922); Helmus v. State, 397 S.W. 2d 437, 438 (Tex. Crim. App. 1965).

Ms. Dixon is also faced with inconsistent material allegations in the individual counts. When the inconsistent material allegations create two intents that cannot coexist at the same time, the count is defective as a matter of law. See State v. Jenkins, 307 Md. 501, 516 (1986).

VII. Theft Counts Seven, Ten And Eleven Fail To State An Offense

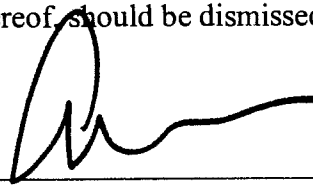
The Defendant's memorandum in support of the motion to dismiss explained that counts seven, ten and eleven of the indictment fail to allege facts essential to the offenses purportedly charged. The State opposes the motion by stating, erroneously, that the defendant is questioning the sufficiency of the evidence to support the charges.

The State's Opposition flatly contends that the allegations in Counts Seven, Ten, and Eleven are sufficient because they include the elements of the offense. However, as noted in Ms. Dixon's initial motion, an indictment is to be judged on the facts alleged, and merely parroting the statutory language is insufficient to put the defendant on notice of what she must defend. See State v. Canova, 278 Md. 483 (1976); Duncan v. State, 282 Md. 395 (1978). The State

Prosecutor has chosen to simply ignore the facts alleged in his own indictment, apparently recognizing that those facts do not constitute an offense, for the reasons stated in Ms. Dixon's initial memorandum. But in the absence of those facts, the simply conclusory language of the counts alone do not satisfy the pleading requirements of the Maryland Rules and Due Process.

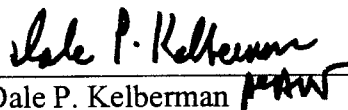
CONCLUSION

As described in detail in the Ms. Dixon's initial memorandum, and as amplified in this reply, each count of the 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, fails to state an offense. The Defendant respectfully submits that the indictment, and each count thereof, should be dismissed.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, on this 20th day of April, 2009, that copies of the within Reply to State's Opposition to the Motion by Sheila Ann Dixon, Defendant, to Dismiss Indictment was sent by e-mail and first class mail, postage prepaid, to:

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