IN THE CIRCUIT COURT FOR BALTIMORE CITY

State of Maryland	*	
vs.	*	Case No. 109009009
Sheila Ann Dixon	*	

* * * * * * * * * * * * * * * * *

State of Maryland	*	
vs.	*	Case No. 109007007
Helen L. Holton	*	

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MEMORANDUM ON

LEGISLATIVE IMMUNITY

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MEMORANDUM

Introduction

This memorandum considers the issue of whether the doctrine of legislative immunity is applicable to the cases of Defendants Sheila Ann Dixon and Helen L. Holton, and, if so, what the scope of the privilege is under Maryland law and whether the State Prosecutor has shown compliance with it.[1]

Both of the Defendants have argued in their separately-filed Motions to Dismiss that they are protected by legislative immunity and that, before the Baltimore City Grand Jury, the State Prosecutor presented evidence barred from consideration under that doctrine that has prejudiced them. As a result, Defendant Dixon argues that Counts One through Four and Twelve in the indictment she faces must be dismissed, and Defendant Holton argues that all counts in the indictment brought against her must be dismissed.

[1] Memoranda filed simultaneously with this one discuss the other grounds for dismissal raised by the parties in their motions to dismiss.

Both Defendants raised this issue in their respective motions to dismiss and presented similar arguments. The State has responded in virtually identical fashion to their arguments, asserting, without reservation, that the doctrine has no application to a State prosecution of a Baltimore City Council legislator, and thus, there was no need for the State to comply with State and federal cases which have defined the doctrine and established pathways by which criminal prosecutions must proceed. The State has presented no alternative argument that, assuming the doctrine's application, its prosecution of the affected counts can survive.

The Law of Legislative Immunity in Maryland

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. The doctrine has been described as follows:

> The principle that legislators are absolutely immune from liability for their legislative activities has long been recognized in Anglo-American law. This privilege "has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries" and was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." The Federal Constitution, the Constitutions of many of the newly independent States, and the common law thus protected legislators from liability for their legislative activities.

Bogan v. Scott-Harris, 523 U.S. 44, 48-49 (1998) (citations omitted).

The reasons for the rule applying to local government legislators is described in the same opinion:

> The rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators. Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability. Furthermore, the time and energy required to

> defend against a lawsuit are of particular concern at the local level, where the part-time citizen legislator remains commonplace. And the threat of liability may significantly deter service in local government, where prestige and pecuniary rewards may pale in comparison to the threat of civil liability.

Id at 52.

Maryland's courts have recognized the doctrine 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. *See*, e.g., *District Heights v. Denny*, 123 Md. App. 508, 516 (1998). The public official enjoys the absolute immunity even when the allegation is that the official took governmental action for the purpose of defrauding citizens. *Mandel v. O'Hara*, 320 Md. 103, 133 (1990).

Defendants Dixon and Holton Are Entitled to Invoke the Immunity

There is no doubt that Defendants Dixon and Holton are presumptively able to invoke the protections of the doctrine. At the times covered by the indictments in these cases, Defendant Dixon was the President of the Baltimore City Council, the legislative body of the City of Baltimore. Defendant Holton was a member of that body.

Maryland's federal and State courts have recognized that a city or county legislator in Maryland is fully protected by the privilege. *See*, *Montgomery County v. Schooley*, 97 Md. App. 107, 115 (1993) (It is "beyond dispute that municipal legislators enjoy the protection of immunity when acting in the sphere of legitimate legislative activity," quoting *Baker v. Mayor and City Council of Baltimore*, 894 F.2d 679, 681 (4th Cir. 1990), *cert*. denied, 498 U.S. 815 (1990)).

The Scope of the Doctrine in Maryland

The State Prosecutor does not argue that the Defendants are not entitled to a degree of legislative immunity. He argues that the immunity applies in civil cases only, and that it has no application to criminal cases such as the ones before this Court. This argument requires an analysis of the scope of the doctrine as it applies to local legislators.

In an opinion of the Court of Special Appeals in 1993, then-Chief Judge Alan Wilner discussed legislative privilege in Maryland for members of local legislative bodies. *Montgomery County v. Schooley*, 97 Md. App. 107 (1993). He noted that neither the federal constitutional Speech or Debate clause (Article I, §6), nor the Maryland Constitution's provisions, Article 10 of the current Maryland Declaration of Rights and Article III, §18, directly protect local legislators such as the county councilman who was the subject of the case. *Id*. at 114. Judge Wilner stated, however, that the "immunity, conferred as a matter of common law, appears to be 'co-extensive' in scope with the Constitutional immunities enjoyed by members of Congress and the Maryland General Assembly". *Id* at 115. Additionally, Judge Wilner described the immunity as "absolute". *Id*.

The *Schooley* opinion was followed a year later by another Court of Special Appeals opinion, *Manders v. Brown*, 101 Md. App. 191 (1994), that reaffirmed the statements and reasoning found in *Schooley* and went so far as to say,

> [d]espite the common law origins of legislative privilege as it applies to local legislative bodies, federal and local privileges are essentially co-extensive. Thus, in this context, a statement of law regarding a Member of Congress is applicable to a local legislator.

Id. at 205 (internal citations omitted).

In effect, *Schooley* and *Manders* overlay the federal Speech and Debate law upon the State constitutional Speech or Debate law, and then in turn, upon the doctrine of legislative immunity applicable to local and regional legislators. This unification of the doctrines by the Maryland appellate courts should not be surprising since the effort to do so had already been well-established decades before by *Blondes v. State*, 16 Md. App. 165 (1972).

In *Blondes*, a county delegate to the Maryland General Assembly was charged with bribery after accepting a $5,000 retainer to represent an association of bowling alley proprietors. The association was seeking legislation to overturn a ban on the sale or consumption of alcoholic beverages on bowling alley premises. Evidence presented at trial by the prosecution indicated that the delegate was the primary sponsor of a bill to allow alcoholic beverages at bowling alleys in Montgomery County. Evidence was also presented that the delegate discussed the bill with other members of the General Assembly and sought their support for the bill's passage. *Id*. at 169-71. Blondes appealed his conviction for bribery to the Court of Special Appeals, arguing that the charges against him should have been dismissed because the evidence presented in the case was privileged under the Speech and Debate Clause of the Maryland Declaration of Rights.

The Court of Special Appeals, in an opinion by Chief Judge Robert C. Murphy writing for the court, agreed with Blondes, and reversed and remanded the case for a new trial. The court found that the Circuit Court's finding of guilt was predicated upon the delegate's acts of sponsoring a bill and his seeking support for the bill from his

colleagues. This was held to be reversible error, as these "are all legislative acts protected by the legislative privilege." *Id.* at 179, fn. 3. In reaching this result, the court found that the Maryland Speech and Debate Clause shall be held in *pari materia* with the Speech or Debate Clause of the federal constitution, and specifically relied on U. S. Supreme Court and federal appellate cases applying the federal provision to conclude that Blondes' legislative acts were privileged and inadmissible in a criminal proceeding. Blondes' conviction was overturned, and a new trial was ordered where the offending evidence could not be considered.

With the precedent of the *Blondes* court melding the Maryland constitutional privilege into the template of the federal constitutional privilege, it is no surprise that the *Schooley* and *Manders* courts continued the consolidation process by interpreting the common law doctrine of legislative immunity similarly. These cases form for Maryland courts a single unified theory dominated by the approach taken under the federal law, where the law on the subject has been most fully developed. At least until the Court of Appeals speaks differently, it appears that the doctrine of legislative immunity in Maryland as it applies to local legislators has the same contours to it as the federal law pertaining to the Speech or Debate Clause.

The Doctrine of Legislative Immunity Applies in Criminal Prosecutions in State Courts

In its memorandum, the State asserts that the doctrine of legislative or official immunity has no application to this case, since it is a criminal prosecution. Its position is clearly stated in its memorandum:

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

> Supreme Court in *United States v. Gillock*, 445 U.S. 360 (1980).

State's Opposition Dixon's Motion to Dismiss pp.25 -26.

The State's brief then discusses and cites several federal cases where the courts held that state or local officials could not raise legislative immunity as a defense in *federal* court when faced with a *federal* prosecution. They cite no case where a Maryland State court has determined that legislative immunity has no application when a legislator is prosecuted for criminal violations of State law in a State court.

A close examination of *United States v. Gillock*, 445 U.S. 360 (1980), the main case relied on by the State, shows that it has limited sway in defining the scope of Maryland's doctrine of legislative immunity when applied in Maryland State courts. 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. *Id.* at 360. The court concluded that such a state-created privilege was not a part of the federal common law, and its recognition in federal court 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 in federal courts. *Id*. at 369.

The *Gillock* court acknowledged that this was an exercise of federal power to trump a state law:

> [I]n 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.

Simply put, the Supreme Court was not deciding the reach of the Tennessee Speech and Debate Clause as applied to criminal prosecutions of all types. It was merely refusing to recognize the application of it in federal criminal prosecutions, because the Supremacy Clause of the U. S. Constitution allowed it to do so. There is no attempt in the *Gillock* decision to say that the Tennessee clause could not have effect in a state court considering a state criminal prosecution against a state or local official.

Indeed, despite the Supreme Court's decision in *Gillock*, the Tennessee Court of Appeals in 2001 had no trouble in finding that the Tennessee Speech and Debate Clause shielded those covered by it from state criminal prosecutions. *Mayhew v. Wilder*, 46 S.W. 3d 760, 775 (Tenn. Ct. App. 2001) ("Thus, we are convinced that under the Speech and Debate Clause of our Constitution, individual legislators are immune from any kind of suit, including criminal prosecutions and suits for damages, injunctions, and declaratory judgments -- so long as the legislator's act is part of the Legislature's deliberative process.")

As noted above, the *Blondes* case applied the Maryland Speech and Debate Clause to a State criminal prosecution and reversed the conviction because the clause was not recognized or complied with by the prosecutor or the trial court. If the legislative immunity doctrine is indeed co-extensive with this privilege, as the *Schooley* and *Manders* panels tell us, it is hard to see why the legislative immunity doctrine would not have purchase to some degree to promote the public purposes behind the doctrine when a State criminal prosecution is mounted.

In other states, it is common for the doctrine of legislative immunity to be applied to criminal prosecutions. For example, in *D'Amato v. Superior Court*, 167 Cal. App. 4th 861, 84 Cal. Rptr. 3d 497 (2008), the district attorney prosecuting a city official contended, as has the State Prosecutor here, that legislative immunity applies only to civil suits and did not extend to criminal prosecutions. The Court of Appeal disagreed saying:

> The level of intimidation against a local legislator arising from the threat of a criminal proceeding is at least as great as the threat of a civil suit. Accordingly, we concluded in Steiner that even if section 3060 were considered a criminal statute, it still would violate the separation of powers doctrine because the statute's broad proscriptions against willful or corrupt misconduct in office "would put the district attorney in the position of a super-governor in the county," causing supervisors to "look over their shoulders before taking any discretionary action for fear the district attorney would find they had not passed muster....

Id. at 872.

A few states have limited the doctrine's application, holding as a matter of state law that the doctrine does not apply to criminal cases. For example, in *People v. Scharlau*, 565 N.E. 2d 1319 (Ill.1991), the Illinois Supreme Court refused to extend the doctrine to apply to criminal cases. Because the issue was not preserved for appeal, the court's discussion was limited and conclusory.

Given the history of the doctrine in Maryland's appellate courts as discussed above, it is virtually certain that the Court of Appeals, when faced squarely with the issue, will find that a prosecutor must recognize and apply the doctrine in prosecuting a local legislator to the same extent a prosecutor needs to do so in a prosecution of a state legislator where the Maryland Speech and Debate Clause is implicated or that a

United States Attorney needs to do so when the federal Speech or Debate Clause comes into play in the prosecution of a federal legislator. This approach would make the three doctrines "co-extensive", as Judge Wilner described in *Schooley* and the subsequent *Manders* panel endorsed. In short, a unified theory of legislative immunity is in play for consideration at all levels of government.

Accordingly, this Court will assume that the case law developed under the Maryland Speech and Debate Clause and the federal Speech or Debate Clause governs how the Court should respond to the issues raised.

Separation of Powers Concerns Are Relevant to these Prosecutions

The State Prosecutor appears to make an argument that separation of powers concerns, one of the foundations of the legislative immunity doctrine, are not in play in these prosecutions since the State Prosecutor is a State official and member of the State executive branch, and the Defendants are legislators of a subordinate political subdivision of the State, thus residing at a different and inferior level of government. *See*, State's Opposition to Holton's Motion to Dismiss, p.6.

The State Prosecutor articulates the argument in this fashion:

> Nothing in our history suggests that there is a threat of *state* executive interference with the independence of *local* legislatures that would warrant extending the judicially developed doctrine of official immunity beyond its traditional boundaries.

Id..(emphasis in original). While there is a superficial attraction to the argument that the State Prosecutor is at one level of the government and the Defendants are at another, so that the separation of powers concerns dissolve, a closer examination shows the argument to be a chimera.

The doctrines of legislative immunity and its Speech and/or Debate cousins are not constraints merely on prosecutors. They also constrain the judicial branch of government. This is recognized in the cases that have analyzed the issue. For example, in *Blondes*, the court recognized the "impropriety of executive or *judicial inquiry* into the motives of legislators." *Blondes*, *supra* at 183 (emphasis added). The need to avoid the intrusion into the co-equal legislative process applies equally to the judiciary, as it does to the executive branch. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502-503 (1975).

The State Prosecutor did not himself bring the charges currently before the Court. The charges were brought by the Baltimore City Grand Jury, a body whose jurisdiction is limited to crimes committed in Baltimore City. The cases are being tried, not before a court of statewide territorial jurisdiction such as the District Court, *see Birchead v. State*, 317 Md.691 (1989), but by the Circuit Court for Baltimore City, a court whose territorial jurisdiction is exercised only as to matters pertaining to Baltimore City. Maryland Constitution Article IV, §20. For separation of powers purposes, the Grand Jury[2] and the Circuit Court for Baltimore City are at the local level that is consistent with the need to respect the privileges of a member of the Baltimore City Council.

Thus, even assuming the State Prosecutor is not at the level that generates primary separation of powers concerns, the Grand Jury and the Circuit Court are, and they must enforce the legislative immunity doctrine. To the extent that the State Prosecutor, as the legal advisor to the Grand Jury, did not so advise the jurors that they must not consider or use legislative material, he was in error.

[2] A grand jury possess powers and duties coextensive with the jurisdiction of the circuit court of which it is an integral part. *In re Special Investigation No.244*, 296 Md. 80 (1983)]

Even if the separation of powers argument raised by the State Prosecutor had some purchase, it would not be dispositive. The case most prominently cited by the State, *United States v. Gillock*, 445 U.S. 360 (1980), even notes that interference between coequal branches of government was only one of two rationales that underlie the doctrine of legislative immunity. The second rationale was a "desire to protect legislative independence". *Id.* at 371. Given the strong endorsement of the concept of legislative independence in the *Blondes*, *Schooley* and *Manders* cases, it is hard to calculate that the Court of Appeals, when they face the issue, will accord no protection to local legislators embroiled in criminal investigations simply because their prosecutor is a State official.

<u>There Is No Indication that Maryland Statutory Law Has Altered the Common Law Doctrine of Legislative Immunity.</u>

The State Prosecutor does not point to any state legislation that has in any way weakened the doctrine of legislative immunity in Maryland or provided him with authority to ignore it. There is nothing in the statutes setting up the State Prosecutor's position and office that indicate an intent to abolish or weaken common law legislative immunity. Indeed, the only relevant indication in the statute is that it was incumbent on the State Prosecutor to recognize established common law doctrines. Criminal Procedure Article, §14-110(e). ("This section [Subpoena Authority] does not allow the contravention, denial, or abrogation of a privilege or right recognized by law.")

Unlike the federal Speech or Debate Clause protections or the Maryland Speech and Debate Clause protections, the legislative immunity doctrine is not one of direct constitutional dimension. It is a common law doctrine and could thus be altered by the

enactment of Maryland law. There is no indication suggested in this case that the General Assembly has done so.

Since the doctrine is one established by the common law, it is presumed to remain in effect absent "an express, specific declaration" by the General Assembly that it is altering the law. *Brown v. State*, 359 Md. 180, 216 (2000); *Hardy v. State*, 301 Md. 124, 131 (1984). As these cases note, the reason for this protection of common-law principles from implicit statutory erosion is based on Article 5 of the Maryland Declaration of Rights, which guarantees to Maryland citizens the common law of England.

The State does not suggest that the General Assembly has acted expressly, or even implicitly, to alter the historic common law doctrine of legislative immunity, and the Court does not find that it has occurred.

The Constraints on a Prosecutor in Bringing a Criminal Case

Under Maryland law, a legislator, even when protected by the full force of immunities, does not enjoy a freedom from being prosecuted. She does enjoy the privilege of not having her legislative acts be part of the evidence arrayed against her. In *Blondes*, the court allowed the bribery prosecution of a State delegate to go forward but did not allow the prosecutor to present evidence of the delegate's legislative activities which, in that case, were the sponsoring of a bill and seeking support for the bill from his legislative colleagues.

In order to preserve the independence of the legislative process, "the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *United States v. Brewster*,

408 U.S. 501, 525 (1972). The protection against prosecutorial inquiry applies to all acts within the "legislative sphere". *United States v. Gravel*, 408 U.S. 606, 624 (1972). The Speech or Debate Clause extends the privilege beyond actual speech or debate on the floor of the legislature to all matters

> that are an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Id. at 625.

As the *Blondes* court noted, the privilege protects members of the legislative body

> against prosecutions that directly impinge or threaten the legislative process; that committee reports, resolutions, and the act of voting are protected legislative acts; that a member's conduct at legislative committee hearings, although subject to judicial review in various circumstances, as is legislation itself, may not be made the basis for a civil or criminal judgment against a member because that conduct is within the 'sphere of legitimate legislative activity; and that legislative acts, to be protected, must be integral part of the deliberative and communicative process by which members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Blondes, *supra,* at 178-79 (internal quotations omitted). This listing provides a ready road map and guide to the prosecutor attempting a prosecution of a State or local legislator for criminal activity of the subjects that need to be avoided and that a Grand Jury needs to be shielded from.

The prohibitions on prosecutors using legislative activities to support a charge do not only apply to the trial of the case; they also apply in the grand jury process. In

United States v. Rostenkowski, 59 F.3d 1291 (D.C. Cir. 1995), then-Judge (now U.S. Supreme Court Justice} Ruth Bader Ginsburg, writing for the majority, condemned the practice of prosecutors putting Speech or Debate material before a grand jury. and noted that the federal circuit courts which had considered the practice all agreed that it should not be used. In *United States v. Swindall*, 971 F.2d 1531 (11th Cir. 1992), the court noted that it was error for the Assistant United States Attorney to have brought protected matters before the Grand Jury, and that the remedy for the violations of the privilege was dismissal of the affected counts. *Id*. at 1543. *See also*, *United States v. Durenberger*, Crim. No. 3-93-65, 1993 WL 738477 (D. Minn. 1993).

Violations of the rule preventing Speech or Debate Clause material from being considered by a Grand Jury was the subject of *United States v. Helstoski (Helstoski II)*, 635 F.2 200 (3rd Cir. 1980). The district court dismissed the indictment charging a congressman with soliciting and receiving bribes in connection with an agreement to sponsor private bills for immigrants to the United States. The dismissal came because,

> evidence violating the speech or debate clause was so extensive that it completely infected these proceedings...it is totally unrealistic to cull out single counts of this indictment. The receipt of evidence in violation of Helstoski's speech or debate privileges permeated the entire grand jury process. The entire proceeding was tainted by such evidence.

Helstoski II, 635 F.2d at 202.

US v. Jefferson, 546 F.3d 300 (4th Cir. 2008) *cert.* denied, ___U.S. ____, 2009 WL 434823 (May 18, 2009) is an example of the steps which prosecutors pursuing legislators for criminal conduct must go to in cases before the Grand Jury to avoid the taint of bringing in privileged Speech and Debate material. In that case, a congressman was charged in a multi-count indictment with soliciting and receiving bribes in exchange

for promoting the products and services of the alleged bribers to governmental officials in Africa. The congressman asserted that the indictment was based on "legislative acts" immunized by the Speech or Debate Clause, and the matter was considered by the District Court.

The District Court noted in its opinion, 534 F. Supp.2d 645, that the government filed a response to the motion to dismiss affirmatively representing that no Speech or Debate material had been presented to the grand jury. The government's representations were specific and detailed, describing the testimony of each witness in question and how steps were taken to avoid protected subjects. The court was also provided by the prosecutor with full transcripts of all the relevant witnesses, along with briefing by the prosecutor about how the testimony before the Grand Jury was consistent with the strictures of the Speech or Debate Clause. Based on the prosecutor's submissions, the District Court was able to determine that there had been no invasion of the privilege. It is clear from reading the opinions of both the District Court and the Court of Appeals that the prosecutors, having gone to school on cases like *Swindall* and *Helstoski* had taken careful prophylactic measures at the beginning of their investigation and throughout presentation to the Grand Jury to avoid endangering the prosecution or tainting the Grand Jury by invasion of the privilege.

Apparently, in the cases before this Court, because of the State Prosecutor's certainty that legislative immunity had no possible application to these cases, he took no similar precautions. He simply doubled-down on his theory that criminal prosecutions of local legislators did not require the safeguards employed when other legislators are being prosecuted, and proceeded as if the doctrine did not exist.

Prohibited Material was Used before the Grand Jury and placed in the Indictments

Defendants have made a compelling and, to this date, entirely unrebutted case that prohibited legislative material was used and relied on in bringing the indictments in these cases.

In Defendant Dixon's case, the indictment makes repeated references to the Defendant's legislative position and legislative acts that she was involved with. For example, the following paragraphs discuss such matters:

> ¶3. As the President of the Baltimore City Council, SHEILA DIXON served as the President of the Board of Estimates, which body is responsible for approving various actions, including certain contracts and zoning changes involving the City of Baltimore.
>
> ¶10. On July 14, 2003, a Bill was introduced in the Baltimore City Council by then Baltimore City Council President SHEILA DIXON to revise certain specific portions of the Ethics laws, including changing the reporting period from a fiscal year to a calendar year.
>
> ¶12. SHEILA DIXON voted in favor of the revised legislation and on July 8, 2004, the revised law was enacted.

Paragraphs 15 and 17 of the indictment note that the two developers who are discussed in the indictment had

> a financial interest in real estate and land development projects in Baltimore which were affected by the Baltimore City Council and SHELIA 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.

Having been provided access to certain portions of the Grand Jury transcripts, Defendant Dixon also points out many occasions where prohibited legislative material was presented to the Grand Jury. Among these are the following:

• The State Prosecutor called Special Agent Christopher Thesing of the Office of the State Prosecutor who testified about Ms. Dixon's key role in enactment of the current Baltimore City Ethics Law;

• The State Prosecutor called a former member of the Baltimore City Council who presented testimony regarding Defendant Dixon's actions as president of the City Council in connection with the project known as Inner Harbor East;

• Minutes of a December 8,2005 City Council meeting over which Defendant Dixon presided and considered a resolution relating to one of the developments in question were presented;

• Minutes of a June 12, 2006 meeting were introduced showing that Defendant Dixon presided over the second reading of a Council bill authorizing the economic development project for the PILOT agreement "with Harbor East Parcel B-Commercial, LLC, its successor and assigns.";

• Minutes of a July 10, 2006 meeting that Defendant Dixon presided over were introduced pertaining to the economic development project for the PILOT for Harbor East Parcel B;

and,

• Extensive testimony and documents were presented regarding five city council bills sponsored by Defendant Dixon that dealt with aspects of the Strathdale Manor development and its financing and tax status.

As Defendant Dixon notes in her memorandum, pp. 39-40, the State Prosecutor has continued unabated to use legislative material to pursue the indictment, even after the legislative immunity defense was raised. At the March 25, 2009, hearing which dealt with discovery issues, the State Prosecutor presented minutes of Board of Estimates meetings which Defendant Dixon attended in her role as City Council President. While this was done to demonstrate Defendant Dixon's knowledge, it highlights the fact that the State Prosecutor is unabashed about presenting evidence of legislative matters even after the issue has been squarely put on the table.

In Defendant Holton's case, the use of legislative material is apparent in a review of the indictment. It recites that Defendant Holton is and has been a duly elected member of the Baltimore City Council. ¶ 7. It notes that she was Chairperson of the Economic Development and Public Financing Subcommittee, and that after January 2007, she served as the Chairperson of the Taxation and Finance Subcommittee. At that time, she additionally served as chairperson of the Taxation and Finance Committee. ¶¶ 8 and 9. The indictment describes the efforts of Ronald Lipscomb to communicate with Defendant Holton in her capacity as a member of the Baltimore City Council, and then as the chairperson of the Taxation and Finance Committee, regarding those projects. ¶ 11-21.

More specifically, the indictment alleges that beginning on or about June 4, 2007, Bill 07-0700 relating to Parcel D was introduced to the City Council and assigned to Ms. Holton's Committee. ¶¶ 22 and 23. Shortly thereafter, Ms. Holton commissioned an election survey to be prepared for her. ¶ 25. Eventually, Doracon Contracting Inc. paid $12,500.00 to Company Z for the survey. ¶ 31. Subsequently, Ms. Holton received the results of the survey, and thereafter, in the City Council, reported Bill 07-0700 favorably to the City Council on behalf of her committee and later voted for the bill in the City Council. ¶ 33-36.

Legislative material pertaining to Defendant Holton is specifically referenced in many counts of the indictment. For example:

> ¶15. On or about June 12, 2006, at the regularly scheduled 3:00 p.m. meeting of the Baltimore City Council, Councilwoman Helen L. Holton, acting for the Economic Development and Public Financing Subcommittee, reported favorably to the City Council on Bill 05-0301, the proposed PILOT for Parcel B portion of the Inner Harbor East project.

> ¶17. On or about July 10, 2006, Bill 05-301, the proposed PILOT for the Parcel B portion of the Inner Harbor East project was authorized by the City Council with Councilwoman Helen L. Holton abstaining.
>
> ¶28. On or about July 19, 2007, the Taxation and Finance Committee of the Baltimore City Council held a public hearing on Bill 07-0700. Of the five members of the Committee, Chairperson Helen L. Holton and two other committee members voted to report favorably on the Bill with amendments. One member was absent and the fifth member abstained.
>
> ¶34. On or about August 13, 2007, Helen L. Holton reported Bill O7-0700 favorably with amendments to the City Council.
>
> ¶36. On or about September 24, 2007, the City Council approved Bill O7-0700 authorizing tax relief benefits in the form of a Payment in Lieu of Taxes (PILOT) for Parcel D of Inner Harbor East with Councilwoman Helen L. Holton casting her vote in favor of the Bill.

These legislative acts are realleged in each of the four counts of the indictment. They form the factual predicate for the charge in Count I that the payment by Doracon Contracting Inc. of $12,500.00 for the survey constituted the receipt of a bribe. ¶40; in Count II, that the alleged solicitation and acceptance of that same money constituted a gift and malfeasance in office. ¶.42; in Count III, that the failure to list the receipt of the $12,500.00 gift on Ms. Holton's 2007 Financial Disclosure Form constituted perjury, ¶.42; and in Count IV, that this failure also constituted nonfeasance in office. ¶.46.

The State Prosecutor does not attempt to justify his use of legislative material in the Grand Jury and indictment process as consistent with the doctrine of legislative immunity.

In this litigation, the State Prosecutor has taken a single and consistent position on the subject of legislative immunity; that is, that it has no application of any type when a criminal investigation and prosecution has been undertaken. As a result, the prosecutor contends he could pursue the investigation and prosecution of the case without regard to the strictures discussed in this opinion. From the record before this Court, it appears that that was exactly what he did. As noted above, this Court's analysis is that the Prosecutor's position is not correct under Maryland law.

The State makes no fall-back or alternative argument that its conduct of the prosecution could be shown to have complied with the State and federal law cited above. For example, cases have indicated that the State may, without violating the privilege, rely on some acts "casually or incidentally related to legislative affairs but not part of the legislative process itself." *United States v. Brewster*, 408 U.S. 501, 528 (1972). This doctrine provides prosecutors with some leeway to make incidental references to legislative matters without impairing the privilege.

Despite knowing of the Defendants' positions since the indictments in these cases, the State makes no alternative argument that its conduct of the prosecution could be shown to have complied with the State and federal case law cited above. The State knew about the contentions at least as early as the filing of Defendant Holton's first Motion to Dismiss in early March. Having had several opportunities to brief the matter since, the State has not argued that its presentation before the Grand Jury was in any way consistent with the case law as described in this opinion. Unlike the

prosecutors in the *United States v. Jefferson* case, the State Prosecutor has not proffered to the Court that its presentation before the Grand Jury complies with Speech and Debate standards; nor has it provided or offered to provide a Grand Jury record to the Court that supports compliance or that shows that any tainted evidence can be reasonably excised from the record or the indictments.

The Court reads the failure of the State Prosecutor to make such a showing or proffer, despite being provided several opportunities to do so, including at oral argument on the motion on April 23rd, as a functional concession and admission that, on the current record, it cannot show compliance with the requirements to screen the grand jury from prohibited and prejudicial legislative related evidence in either of these cases.

It Is Not Clear to the Court that the Grand Jury Would Have Indicted If the Prohibited Evidence Was Not Before It.

The Court must be careful not to usurp the considered judgment of the Baltimore City Grand Jury because of an issue that is of a mere technical or inconsequential nature. On the other hand, the Defendants are entitled to have the Grand Jury consider the matters without the taint of reviewing evidence that is absolutely privileged under Maryland law. In this case, the Court is not convinced that the Grand Jury would have brought the charges it did in Counts 1 to 4 and 12 of the Dixon case, and all the counts in the Holton case, if the evidence had been properly presented.

The Court is aware that it does not have before it the full transcript of the Grand Jury proceedings, and that it is proceeding in this motion upon the significant portions that the State Prosecutor released to the defense as part of the discovery in this case, and which they have attached to the Motion to Dismiss. If the State Prosecutor was making an argument that the full record when reviewed would show compliance with the

legislative immunity principles, the Court would afford him an opportunity to do so, as was done in the *US v. Jefferson* case.

This, however, is not the case, and it appears that the State Prosecutor proceeded without regard to the potential application of the legislative immunity doctrine. As noted above, the Court finds that the State Prosecutor, by failing to present the argument, has functionally conceded that he cannot surmount the hurdles of proving that the indictments in this case can satisfy legislative immunity standards. The Court believes it has seen enough to convince it that the prosecution cannot proceed on the current indictments as to the affected counts. Instead. it appears that the tainted evidence was a substantial factor underlying the indictment. "[T]he infection cannot be excised" and the indictments saved as to the challenged counts. *United States v. Helstoski*, 635 F.2d 200, 205 (3rd Cir. 1980).

Conclusion

For centuries, the English and American courts have consistently found the need, in the public interest, to provide legislators with freedom to act without fear of civil or criminal liability because of the positions they take in enacting laws. Over 200 years ago, an early case in this country, *Coffin v. Coffin*, 4 Mass. 1 (1808), explained why it was important to have the protection in law:

> These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal.

Id. at 27. The protections have become important pillars of our federal and State constitutions, and have been enshrined in Maryland's common law. This Court must

enforce the protections they provide. On the basis of the record before this Court, Defendants Dixon and Hilton are entitled by law to legislative immunity under Maryland law, and the Court has no choice but to recognize it and act accordingly.[3]

For these reasons, the Court will grant Defendant Dixon's Motion to Dismiss as to Counts One to Four and Twelve; and the Court will grant Defendant Holton's Motion to Dismiss all counts arrayed against her.

___May 28, 2009____________	____________/S/_________________________
Date	Dennis M. Sweeney Circuit Court Judge

[3] The Court expresses no view as to whether the State Prosecutor may reinitiate the matters pertaining to the Defendants before a new Grand Jury and proceed in a fashion that fully recognizes legislative immunity. That issue was not briefed or argued before this Court, and in any event, it would be premature for the Court to consider such an issue.