

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

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STATE OF MARYLAND
:
v. : Case No. 109210015
SHEILA ANN DIXON :
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**MEMORANDUM IN SUPPORT OF MOTION OF
SHEILA ANN DIXON, DEFENDANT, FOR NEW TRIAL**

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**MEMORANDUM IN SUPPORT OF MOTION OF
SHEILA ANN DIXON, DEFENDANT, FOR NEW TRIAL**

Sheila Ann Dixon, by her undersigned counsel, hereby submits this Memorandum in Support of her Motion for New Trial pursuant to Maryland Rule 4-331.

I. Introduction

In the present case, where Ms. Dixon was found guilty of one misdemeanor count of a seven count Indictment, and where the jury deliberated for seven days after being instructed to disregard more than two-thirds of the testimony that had been presented to them, the interests of justice mandate that a new trial be granted.¹

There are several reasons why Ms. Dixon did not receive a fair trial, any one of which would be sufficient, in and of itself, to require a new trial. Among other things:

- Two jurors deliberately gave false testimony when questioned on voir dire, thereby compromising the primary mechanism for guaranteeing a fair and impartial trial.
- During deliberations, five jurors, including the two who testified falsely, communicated with one another outside the deliberation room, in violation of the Court's instructions and effectively formed their own caucus, separate from the other jurors, thereby enabling themselves to present a united front, and to exercise coercive influence, when they participated in the official deliberations with the other jurors.

¹ The count charges misappropriation by a fiduciary. The total amount of the alleged misappropriation, if the State's evidence is accepted at face value, is less than \$600.00.

- Other evidence, presently under investigation, strongly suggests that jurors violated the Court's instructions by communicating with third parties during deliberations and by receiving information, which they found significant, outside the record.
- After inundating the Jury with highly prejudicial evidence relating to three years of gift card transactions with Ronald Lipscomb, evidence that would otherwise not have been admissible, the State failed to call Mr. Lipscomb as a witness. As a result, the Court entered judgment for Ms. Dixon on the two counts of the Indictment concerning those transactions. The Lipscomb evidence so dominated the Opening Statements and the State's case that it could not possibly have been disregarded by the Jury. Ms. Dixon is entitled to a fair trial free of that taint.
- In a case where the theme of the prosecution was that Ms. Dixon was callous to the needs of the poor and misappropriated property intended for needy children and families in Baltimore, the Court erroneously ruled that evidence that Ms. Dixon possessed the character traits of generosity and charity were not pertinent to the charges. The Court refused to admit any such character evidence or any evidence on which those opinions were based. The Jury never learned anything of Ms. Dixon's history and practice of donating large proportions of her income to her Church, of her practice of making substantial (and anonymous) holiday gifts to families of incarcerated persons and others, and of her tireless efforts on behalf of homeless and disadvantaged persons.

- The Court erred in giving successive *Allen*-type instructions *sua sponte*, when the circumstances did not warrant any *Allen*-type charge and when one of the *Allen*-type charges failed to conform to the recommended ABA model.
- Ms. Dixon is entitled to an acquittal or a new trial on the misappropriation count of the Indictment because the State’s proof did not match the allegations of the Indictment.

II. The Court Should Grant a New Trial In the Interest of Justice

As explained in this Section of Memorandum in Support of Defendant’s Motion for New Trial, the Court should grant a motion for new trial whenever it is in the interests of justice to do so. We show in succeeding Sections that the present case presents facts and circumstances, both individually and in combination, that demonstrate that the interests of justice compel the grant of a new trial here.

Maryland Rule 4-331(a) provides:

On motion of the defendant filed within 10 days after a verdict, the court, in the interest of justice, may order a new trial.

“[T]here are no limits on the substantive content of what may be urged under subsection (a) as being ‘in the interest of justice.’” *See Isley v. State*, 129 Md. App. 611, 633 (2000), *rev’d on other grounds*, *Merritt v. State*, 367 Md. 17, 24 (2001). “A trial court has wide latitude in considering a motion for a new trial and may consider many factors, including” the weighing of evidence and the credibility of the witnesses. *Argyrou v. State*, 349 Md. 587, 599 (1998). As the Court of Special Appeals noted in *Argyrou*:

[T]he breadth of the trial court’s discretion to grant or deny a new trial is not fixed or immutable, it will expand and contract depending upon the nature of the factors being considered, and the extent to which its exercise depends upon the

opportunity the trial judge had to feel the pulse of the trial, and to rely on his or her own impression in determining the questions of fairness and justice.

Id. at 600; *see also*, *Wiggins v. State*, 324 Md. 551, 570 (1991), *cert. denied*, 503 U.S. 1007 (1992).

In *State v. Devers, et al.*, 260 Md. 360, 374 (1971), *overruled on other grounds*, *In re Petition for Writ of Prohibition*, 312 Md. 280, 326 (1998), the Court of Appeals quoted from *Hochheimer, The Law of Crimes and Criminal Procedure*, § 184 at 209-10 (2d ed. 1904), in setting out an illustrative list of possible grounds for a new trial:

[A]ccident and surprise; misconduct of jurors or the officer having them in charge; bias and disqualification of jurors (disqualification not entitling to a new trial, however, if there was opportunity to challenge); misconduct or error of the judge; fraud or misconduct of the prosecution, e.g., abuse of argument.

Id. The trial judge can also grant a new trial when the verdict, in the subjective opinion of the trial judge, is so against the weight of the evidence as to constitute a miscarriage of justice. *In re Petition for Writ of Prohibition*, 312 Md. at 326.

In the instant case, as will be set forth more fully below, there are numerous grounds that justify a new trial, any one of which, standing alone, would be sufficient. The combination of these errors, however, demonstrates without question that Ms. Dixon was denied a fair and impartial trial, such that the “interest of justice” compels a new trial.

III. Ms. Dixon is Entitled to a New Trial Because at Least Two Jurors Testified Falsely on Voir Dire

The Sixth Amendment of the United States Constitution, as applied to Maryland by the Fourteenth Amendment, and Article 21 of the Maryland Declaration of Rights guarantee criminal defendants an impartial jury. *Jenkins v. State*, 375 Md. 284, 299 (2003). “Critical in ensuring that the guarantee is meaningful is the voir dire of the venire, the purpose of which is to exclude from the venire potential jurors for whom there exists cause for disqualification, so the

jury that remains is capable of deciding the matter before it ... uninfluenced by extraneous considerations.” *Williams v. State*, 394 Md. 98, 107 (2006) (citing *Hill v. State*, 339 Md. 275, 279 (1995)). See *Curtin v. State*, 393 Md. 593, 600 (2006) (describing voir dire as “the primary mechanism” through which a defendant is guaranteed a “fair and impartial jury”).

Here, information regarding the voir dire process -- information that could not have been known to the State, the Defense or the Court -- has been discovered post-verdict. That information shows that at least two jurors intentionally withheld and made false statements under oath in response to essential inquiries during the voir dire. The evidence now shows that the fairness of the trial was undermined, and, as a result, the Court must order a new trial. *Williams*, 394 Md. at 116-118. See also *Owens v. State*, 399 Md. 388, 425, n.45 (2007).

A. The False Denial of Prior Theft Charges by Shiron Davis, Juror #6

The woman who was seated at the trial as Juror #6, and who was recognized as Juror #066 in the jury panel, publicly identified herself after the trial as Shiron Davis. She had been sworn to tell the truth and was in the courtroom when the Court asked the entire panel whether:

Within the past five years have you ever been the victim of a crime of theft or been charged with the crime of theft?

(Exhibit 1, 11/9/09, Tr. 34). The jurors had been previously informed that a failure to give a positive response would be understood by the Court as a negative response. Ms. Davis did not give a positive response, signaling that she was answering the question in the negative. (*Id.*).

Furthermore, when Ms. Davis was questioned individually at the bench she responded as follows:

THE COURT: Okay. Is there any other questions of this witness?

MR. KELBERMAN: Do you -- have you *ever* [been] involved in the criminal justice system yourself in any way?

JUROR NO. 066: No.

MR. KELBERMAN: No criminal charges or never been the victim of a crime is this.

JUROR NO. 066: No.

MR. KELBERMAN: Okay.

(*Id.* at Tr. 88) (emphasis added). Counsel for Ms. Dixon accepted these answers as true. (*Id.*)

After the verdict, however, Ms. Dixon's attorneys were contacted by a member of the press, who asked if counsel were aware that Juror Number 6 had been charged with two charges of theft. Ms. Dixon's attorneys then searched records of the Maryland Judiciary System and compared Juror Number 6's identifying information with the records in *State of Maryland v. Davis*, in the District Court of Maryland for Baltimore City, Case No. 002B01889918 (2007). (Exhibit 2, Record of Case). As the Statement of Charges in that case states, Juror Number 6, Ms. Shiron Davis, was charged on June 29, 2007, with two counts of felony theft and six counts of forgery. The application for Statement of Charges alleges that, between May 15, 2007 and June 22, 2007, Ms. Davis stole six checks from her sister, forged her sister's signature on the checks, and negotiated the six forged checks in order to obtain, by theft, a total of \$3,720.00. The charging document averred that Ms. Davis stole, forged and cashed checks on the following dates in the following amounts: 5/15/07, \$840.00; 5/24/07, \$600.00; 6/1/07, \$800.00; 6/11/07, \$800.00; 6/15/07, \$400.00; and 6/22/07, \$500.00. (*Id.*)

The Maryland Judiciary Case Search shows that a warrant was issued for Ms. Davis' arrest on June 29, 2007, and that she was arrested that same day. (*Id.*) On June 30, 2007, she was taken before a commissioner at 1:30 a.m. and released on her own recognizance. (*Id.*) As a

condition of her pretrial release, Ms. Davis was subject to pretrial supervision and was restricted from contact with her sister, Diniqua Dunham, while the case was pending. (*Id.*).

A trial date was scheduled for September 14, 2007, at which time the cases were heard by the Honorable James N. Vaughan, who, on the agreement of the State and Ms. Davis, entered stets on all counts, including the two theft charges. The audio recording of that hearing shows that Ms. Davis was represented by Patricia Marie Lesnick, Esq., Public Defender. (Exhibit 3, Audio Disk of Hearing in *State v. Davis*). Ms. Lesnick advised Ms. Davis, the defendant, that the State had offered to put the case on the stet docket; that the stet docket is an “inactive docket” and that after one year the court could “open the stet for good cause.” (*Id.*). Ms. Davis stated that she was willing to accept the stet and give up her right to a speedy trial. (*Id.*).²

Beyond any doubt, Ms. Davis’ sworn answers to the voir dire questions put to her in this case were intentionally false. She could not possibly have forgotten that, in 2007, she was charged with forgery and theft *by her own sister*; that the charges involved multiple forgeries and thefts, committed over a period of more than a month, and yielding \$3,720.00; that she was arrested and taken from her home; that she was brought before a commissioner at approximately 1:30 in the morning; that she obtained the services of a public defender; and that she subsequently entered into an arrangement with the State whereby her case was put on an inactive docket, subject to being scheduled for trial for good cause. Ms. Davis deliberately provided answers to relevant voir dire examination about her own experiences with the criminal justice system, and, among other things, she concealed that she is subject to a stet for crimes of forgery and theft, which could be reopened at the State’s discretion and scheduled for trial at any time upon a showing of good cause. Ms. Davis made a mockery of her voir dire and she deprived Ms.

² The advice to Ms. Davis was certainly accurate. Md. Rule 4-248 provides explicitly that a stettered charge may be rescheduled for trial after one year “for good cause shown.”

Dixon of a fair and impartial trial. “If the guarantee of impartiality is to be meaningful, prospective jurors must be expected to answer the questions applicable to them, and to do so fully and truthfully,” and, “a defendant must be able to rely on that being the case.” *Williams*, 394 Md. at 112.

B. The False Responses by Shawana Ramirez Tyler, Juror #3, to the Questions About Knowing Mary Pat Fannon or Ms. Dixon and about Food Baskets from the City

Juror #3, who has now publicly been revealed as Shawana Ramirez Tyler, likewise concealed information during voir dire and, as demonstrated by her behavior since the verdict in this case, appears to have been far too eager to be a juror in this case. In her sworn answers to the Court’s questionnaire, she stated that, despite having achieved three years of college, she had not “read or heard anything about this case from any source including newspapers, TV, radio or internet sites.” She also stated falsely that neither she, nor any member of her family, “ever received any food baskets or gift cards from the City of Baltimore, the Office of the President of the City Council or the Mayor’s Office.” And, asked if she knew “Mary Pat Fannon, Consultant to Mayor,” she left the box blank, signifying that she did not know her.

The very first question during the voir dire of the entire panel was as follows:

The Defendant is Sheila Dixon. She is currently the Mayor of the City of Baltimore and formerly was the President of the City Council of Baltimore. Is there any member of the panel who knows Ms. Dixon or has had a business or personal relationship or other dealings with Ms. Dixon?

(Exhibit 1, 11/9/09, Tr. 30). The jurors were told to indicate a positive response by holding up a card on which their juror numbers were written. (*Id.*) Ms. Tyler refrained from holding up her card, thus signifying that she did not know Ms. Dixon.

During jury deliberations, Ms. Tyler exhibited erratic behavior that only now is

explained. On November 22, 2009, for example, Ms. Tyler sent a note to the Court, that she would not show to the Forelady causing the Forelady to complain that she “was not allowed to read” Ms. Tyler’s communication with the Court. (Exhibit 12, 11/23/09, Tr. 1-2).

Similarly, at 11:00 a.m. on November 30, 2009, the day before the verdict was entered in this case, Ms. Tyler sent a note to the Court stating:

Judge, after the trial is over, please don’t release my personal information to the public.

(Exhibit 6, 11/30/09, Tr. 8-10).

Ms. Tyler’s note came at such an odd time, and made such a personal plea to the Court, that defense counsel requested the Court to voir dire the juror to find out if she perceived that she was under “some ongoing influence.” (*Id.* at Tr. 10-11). Counsel asked that, in order to assure that the deliberations were fair and impartial, the Court should call the juror into chambers and question her. (*Id.* at Tr. 11).

The State objected to the requested questioning of Ms. Tyler. (*Id.* at 12). Counsel for the State asserted that, “clearly, at least this juror does not want to be pursued by the press and I think that’s the thrust of the note.” (*Id.*). Agreeing with the State, the Court declined to question Ms. Tyler. (*Id.* at 13-16).

We now know that Ms. Tyler had other reasons for wanting to have her name withheld, *i.e.*, fear that false answers that she gave on voir dire might come to light, and that counsel for the State was clearly wrong in believing that she was shy of the press. In fact, as soon as the verdict in this case was returned and the Jury was excused, Ms. Tyler immediately made her way to the front of the courthouse. Using only her first name, she announced that it was likely that she would be the only juror to speak about the case. And, in response to her invitation, she was interviewed by all of the television, radio and press reporters who would listen to her.

Ms. Tyler's yielding to the temptation for attention, notwithstanding her withholding of her last name, has brought to light the fact that Ms. Tyler gave false answers on the jury questionnaire and in response to oral questions addressed to the entire panel of potential jurors. Contrary to her sworn responses, Ms. Tyler did, in fact, know both Mary Pat Fannon and Ms. Dixon, and she received a basket of food from the City. The falsity of Ms. Tyler's answers is shown by the recollections of persons who were present when Ms. Tyler met Ms. Fannon and Ms. Dixon, by photographs that were taken of them while they were together and by correspondence and promotional literature sent to Ms. Tyler by the City. (Exhibit 4, Affidavit of Donna J. Langley and exhibits A through F thereto; Exhibit 5, Affidavit of Mary Pat Fannon).

Ms. Tyler met Ms. Fannon and Ms. Dixon, and received a basket of food from the City, under circumstances that would have certainly left an impression upon her and would not have easily been forgotten. In November 2006, Ms. Tyler entered a contest, administered by Baltimore Development Corporation, to be featured in a Supermarket Sweep, and she was picked by Baltimore Development Corporation to be the winner. (Exhibit 4, ¶¶5,6). On the day of the event, Ms. Dixon, who was then the Mayor-Designee, and Ms. Fannon, who supervised the event, spoke to a group that included Ms. Tyler and those who had come to witness Ms. Tyler fill her food basket. Ms. Tyler stood a few feet away while Ms. Dixon and Ms. Fannon spoke. (Exhibit 4, ¶¶7-9, and exhibits D(1) through (8) thereto). Ms. Dixon and Ms. Fannon also spoke to Ms. Tyler after she had filled her basket and talked with her about the items she had selected. (Exhibit 4, ¶10). After the event, Nick Rudolph of Baltimore Development Corporation, corresponded with Ms. Tyler and later sent her a promotional brochure containing photographs of Ms. Dixon and Ms. Tyler. (Exhibit 4, ¶¶11, 12 and exhibits E and F thereto).

Ms. Tyler's refusal to give her last name to the press when interviewed after the verdict,

was not sufficient to prevent the facts relating to her false statements on voir dire from coming to light. When Ms. Fannon saw Ms. Tyler on television during the evening after the verdict, and saw her first name in the newspaper the next day, she recognized Ms. Tyler's distinctive voice and name and identified her as the woman who won the basket of food in November 2006 and met both the Mayor and Ms. Fannon. Ms. Langley, who had been a member of Ms. Fannon's staff in 2006, also recognized Ms. Tyler when she viewed one of Ms. Tyler's post-verdict television interviews.

Ms. Tyler, the same as Ms. Davis, put her own interests and agenda ahead of her public responsibilities as a prospective juror in this case. Her deliberate misstatements during voir dire had the same negative impact upon this case as those of Ms. Davis, and she, too, was so unmindful of her obligations to testify truthfully under oath that her actions likewise deprived Ms. Dixon of a fair and impartial jury trial to which she was entitled. Ms. Tyler's misstatements require that a new trial be granted. *Williams*, 394 Md. at 112.

IV. A New Trial is Required Because of Other Jury Misconduct, Including, Among Other Things, Private Communications About the Case Among Five of the Jurors and Communications by Jurors with Third Persons About the Case

A. The Facebook Friends

A few days after the verdict was returned in this case, the press began to report widely that five of the jurors became Facebook Friends during the deliberations in this case and that they made frequent references to the case in publicly available postings. The five jurors were identified as: Shawana Tyler (Juror #3); Shiron Davis (Juror #6); Chereese Barrett (Juror #8); Elaine Pollack (Juror #11) and James Chaney (Juror #12).

Subsequent review by defense counsel has shown that these five jurors did in fact

communicate with one another to become Facebook Friends during the jury deliberations. (Exhibits 20A, 20B, 20C, 20D and 20E). While most communications through the Facebook medium are made in private, it appears from the handful of comments that these five jurors posted on juror Chaney's publicly available electronic "wall" that there were doubtlessly other communications by these jurors about the case that are thus far protected from public view. Based on this evidence, there is a high degree of probability that a review of the private Facebook messages between and among these jurors will reveal that they discussed the case, and deliberated privately among themselves, in clear violation of the Court's repeated instructions.

Furthermore, these five jurors became a caucus, separate and apart from their seven fellow jurors, and, through their united actions, were able to overwhelm or neutralize any individual juror or jurors who would hold views or positions contrary to theirs. The creation and functioning of a separate subset of jurors outside the jury room is antithetical to the concept of unanimity. The Court of Appeals has cautioned that, "the concept of unanimity embraces not only numerical completeness but also completeness of assent, *i.e.*, each juror making his or her decision freely and voluntarily, without being swayed or tainted by outside influences." *Caldwell v. State*, 164 Md. App. 612, 635 (2005); *see also Wardlaw v. State*, 185 Md. App. 440, 451-52 (2009).

Throughout the trial, and particularly during deliberations, the Court repeatedly instructed the jurors that they should not communicate among themselves. On November 19, 2009, after the first day's deliberations, the Court told the jurors that it wanted "to reemphasize to you the importance of not discussing the case with anyone, family, friends, anyone else" (Exhibit 11, 11/19/09, Tr. 119-120). On Friday, November 20, 2009, when the Court adjourned for the first of the two weekends that interrupted the deliberations, the Court declared that, "It's important

that you not have any discussions with each other over the weekend;" that "you need to talk about this as a -- a group in the deliberation room;" and that the jurors were "not [to] engage in any discussions with each other over the weekend." (Exhibit 23, 11/20/09, Tr. 25).

The Court repeated these admonitions daily. On Monday, November 23, 2009, the Court stated, "please, don't begin any deliberations tomorrow until you're all here ...," and, "remember not to have any discussions with family, friends, or anyone else during the recess" (Exhibit 12, 11/23/09 Tr. 13; *see also* Exhibit 24, 11/24/09, Tr. 3; Exhibit 25, 11/25/09, Tr. 48-49).

It bears emphasizing that the trial was the dominant common interest that these five Facebook Friends shared and that, even in the communications left on Chaney's publicly available electronic wall, they showed little interest in adhering to the Court's instructions.

Among other things:

- On November 25, 2009, juror Shiron Davis contacted juror James Chaney, referring to herself by her juror number: "HEY BABY, I AM #6, DOES THAT COUNT?!!!! LOL
- On November 26, 2009, Shiron Davis invited James Chaney to her house for Thanksgiving: "HAPPY THANKSGIVING TO THE CHANEY FAMILY....PLEASE BRING A LUNCH AND A BETTER MOOD ON MONDAY....LOL....IF U AND THE WIFE WANT TO COME TO MY HOUSE TODAY THE OFFER STILL STANDS."
- On November 29, 2009, Elaine Pollack sought encouragement from her alliance of jurors, "Ready for round oh I lost count! See you tomorrow." Forty-two minutes later, James Chaney sent a message of encouragement back to Pollack by analogizing the jury deliberations to the end of a boxing match, "Yeah its probably round 12 or 13 but im ready I guess. Hopefully it will be the last round."
- These communications were not restricted to other jurors. On December 1, 2009, Chaney wrote to the Facebook juror friends: "Hopefully today will be the last." Chereese Barrett responded "James I feel you on this 1! I do! I really do!" But then, in response to the postings of these two jurors, a message arrived at 10:56a.m from a non-juror person identified as "Al Morgan." And, the non-juror joined in the discussion, challenging the jurors who were Facebook Friends by writing, "Not guilty" Morgan's

participation in the discussion shows that persons outside the jury knew that the Facebook Friends were deliberating jurors and that they were sufficiently acquainted with those deliberations, and with the Facebook Friends, to share their own views of what the ultimate verdict should be. Later the same day, Shiron Davis responded to Al Morgan and to her fellow jurors, "NO AL, GUILTY AS HELL."

(Exhibit 21, Facebook communications posted on James Chaney's publicly accessible Wall).

Further inquiry into the communications among the five members of the caucus is mandated for several important reasons. First, the publicly available communications, described above, were in clear violation of the Court's instructions. Second, it is apparent from the fact that these communications were on Chaney's electronic Wall, but not available on the electronic Walls of the other four Facebook Friends, that the other four have adjusted their privacy settings to conceal the information about their communications among one another from third persons. Third, after the fact of their communications had been made public, the five Facebook Friends sent publicly available communications to one another for the obvious purpose of mutual self-protection. In a classic, after-the-fact "reminder," Shiron Davis sought to refresh the recollections of the other four by writing that, "THEY KNOW THAT U, ME ELAINE AND CHEREESE [ARE] FRIENDS...AND WANT TO KNOW IF WE DISCUSSED THE CASE ON HERE DURING THE TRIAL AND [YOU] KNOW THAT WE DIDN'T..." (*Id.*) (emphasis added). The bona fides of the "reminder" are completely negated by the fact that Davis felt compelled to issue it.

Under these extraordinary circumstances, where the available evidence leads to the conclusion that a large group of jurors set themselves up as a separate group, with extraordinarily personal concerns over their own frustrations and well-being during their deliberations with the rest of their fellow jurors, the prejudice to Ms. Dixon is clearly apparent and, on the present state of the record, must be presumed. *Williams v. State*, 394 Md. 98, 107 (2006). The danger to the

effective functioning of the jury system posed by such extrajudicial alliances is far greater than some juror's isolated or casual glance at outside material. *Cf. Clark v. State*, No. 0953 (Md. Ct. Spec. App. Dec. 3, 2009) (Slip Op.).

B. Other Juror Misconduct

At the end of deliberations on November 30, 2009, the Jury sent a note to the Court stating that, "We feel that we need to return tomorrow to continue deliberations *due to new things brought to light*." (Exhibit 6, 11/30/09, at Tr. 22) (emphasis added). The evidence had been closed since November 18th; the Jury had not asked to review any testimony since November 25th; and the reference to "new things" being "brought to light" could only have referred to information from third parties or from outside sources. Counsel for Ms. Dixon renewed their motion for mistrial, stating that "after all this time deliberating, there is nothing within the record new that could come to light," and that the "only thing that could come to light that we could conceive would be outside the record" (*Id.* at Tr. 23).

After the verdict was returned in this case, moreover, the Court received two reports of alleged juror misconduct during the period of deliberations. One report relates to an allegation that a juror was discussing the case with a third person in the evening of November 30, 2009. The second report relates to an allegation that one of the jurors discussed the case with third persons at a Thanksgiving get-together. Counsel for Ms. Dixon are looking into these allegations and will bring to the Court's attention any pertinent facts that their efforts might reveal.

Of course, "Private communications between a third party and a deliberating juror raises a serious concern that the juror may reach a verdict on the basis of the matters communicated, rather than the trial evidence." *Eades v. State*, 75 Md. App. 411, 421 (1988). *See also Wardlow v. State*, 185 Md. App. 410, 451-452 (2009) (reversing conviction because of juror's misconduct

in conducting Internet research); *Clark v. State, supra*.

V. The Trial Court Erred in Failing to Declare a Mistrial After Dismissing Counts Two and Five Because of the Prejudicial Effect of the Lipscomb Evidence

Of the seven counts in the indictment, Counts Two and Five, dealing with the alleged donation of gift cards by Ronald Lipscomb and Doracon (the “Lipscomb Evidence”), were the linchpin of the State’s case. Starting with the indictment itself, the opening statements of counsel, and the abundant evidence presented through numerous witnesses and exhibits, the Jury was inundated with the Lipscomb Evidence for days throughout this entire trial. That evidence, of course, involved the alleged misuse of numerous gift cards, including the purchase of an X-Box and other items found in the Defendant’s residence, all of which left an indelible stain on the case. When the State failed to call Mr. Lipscomb as a witness, and the Court concluded that the State had failed to meet its burden of proof at the close of its case, the Court appropriately granted judgment of acquittal and dismissed Counts Two and Five. However, the effect of the Court’s ruling, brought about by the government’s utter failure of proof, made it impossible for the Jury to distinguish and extract the overwhelming evidence related to the Lipscomb counts from the evidence relating to the remaining counts. As a result of the Jury’s unavoidable consideration of the prejudicial “spillover” Lipscomb evidence, the Jury was hopelessly confused and tainted beyond redemption. The Court’s effort at curing this prejudice, by instructing the Jury to disregard more than a half dozen witnesses and more than twenty exhibits, however well-intentioned, was insufficient to insure that the Defendant was not prejudiced with respect to the count on which she was ultimately convicted. Indeed, the inordinate length of the Jury’s deliberations and one of the questions they posed, all point to the conclusion that the “spill over”

effect of the Lipscomb Evidence could not be erased, and as the caselaw indicates, Ms. Dixon is entitled to a new trial on this ground.

It was simply impossible for the Jury to ignore the Lipscomb Evidence. More than 44 paragraphs out of a total of 68 paragraphs in the Indictment relate to the Lipscomb counts. Ten of the eighteen witnesses called by the State at the trial testified about the Lipscomb Evidence, and more than twenty-five of the forty-one exhibits introduced into evidence in the case also related to the Lipscomb counts.

A recitation of the Lipscomb Evidence comprised three-quarters of the State's opening statement, according to the transcript (eighteen pages out of twenty-four). (Exhibit 10, 11/12/09, Tr. 1-25). More importantly, the State was not bashful about its efforts to link the Lipscomb Evidence with the other transactions in the case. The Prosecutor inextricably connected the Defendant's intent to steal or misappropriate the Turner and Holly Trolley gift cards with her intent to steal or misappropriate the Lipscomb gift cards, as follows:

[R]emember in 2006 Mr. Finney got 18 Best Buy gift cards? Well in 2005 Mr. Turner got 20 – 20 Best Buy gift cards *just like this, very similar to this*. Twenty for the needy children of Baltimore.

(*Id.* at Tr. 24) (emphasis added). Defense counsel also spent considerable time in opening statement addressing the Lipscomb Evidence.

Thereafter, over the course of the very first few days of the trial, the Jury was presented with the testimony of numerous witnesses and exhibits almost all of which related to the Lipscomb Evidence. When the State closed its case, having made the intentional decision not to call Mr. Lipscomb, the Court had no choice but to grant the Defendant's Motion for Judgment of Acquittal as to counts two and five. In granting that Motion, the Court was forced to instruct the Jury to somehow generally disregard the voluminous evidence relating to the Lipscomb counts

that dominated the trial. (Exhibit 11, 11/19/09, Tr. 15 and Attachment to Written Instructions). Notably, the Court instructed the Jury to generally disregard the testimony of ten of the eighteen witnesses that they heard relating to the Lipscomb counts. (*Id.*). Of those witnesses, the Court instructed the Jury to engage in the even more difficult task of only considering those portions of the testimony of Christopher Thesing, John Poliks, Rachel Lynch and Edward Anthony that did not relate to the Lipscomb counts. Yet, at no time did the Court parse through the testimony of those witnesses to identify which portions the jury could consider and which portions were verboten. (*Id.* at Tr. 15-16).

As a result, the Defendant was forced to seek a mistrial on the grounds that it would be impossible for the Jury to disregard the entire testimony of some witnesses and discern what testimony to disregard from other witnesses. (Exhibit 16, 11/17/09, Tr. 76-85). Defendant's motion for a mistrial was denied by this Court. (*Id.*).

As a prime indicator of the confusion, the Jury requested to review the transcripts of all of the witnesses during the first day of deliberations; however, that request was denied. (*Id.* at Tr. 108). Undoubtedly, from the outset, the jurors simply could not achieve the impossible task of segregating the Lipscomb Evidence from the evidence relating to the remaining counts, and their desire to review the transcripts appear to have been an attempt to ensure that they were considering the proper evidence.

Although the Court permitted the Jury to view a redacted version of Edward Anthony's testimony when it was later requested, the Jury did not get the benefit of reviewing the redacted versions of the testimony of the other witnesses whose testimony should have been redacted (Thesing, Poliks and Lynch). Obviously, this perversion of the deliberation process further confused the Jury and prejudiced the Defendant.

Predictably, the Jury was not able to parse through the evidence and segregate the overwhelming Lipscomb Evidence from the substantially lesser amount of evidence presented in connection with the remaining counts. This became apparent when, after several days of deliberation, the Jury sent out a note asking whether it should properly consider State's Exhibit 3. (Exhibit 12, 11/23/09, Tr. 8). State's Exhibit 3 was a chart prepared by Laretta Brown of the names and contact information for City residents who were given food or gift cards, and the chart included references to Giant and Circuit City. Because Giant and Circuit City were places where Lipscomb gift cards were purchased, the Jury was justifiably confused about whether that exhibit should be considered. The Jury deliberated for seven days, two days longer than the entire trial itself, and probably three times as many hours as it took to present the admissible evidence. It is hardly surprising that under such circumstances, the Jury compromised to reach a verdict and to conclude their arduous and confusing service.

When confronted with the problem of prejudicial spillover from evidence introduced in support of the invalidated counts, the Court "must 'consider whether the presence of the [invalidated] count had any spillover effect sufficiently prejudicial to call for reversal' of the remaining counts." *United States v. Rooney*, 37 F.3d 847, 855 (2d. Cir. 1994) (quoting *United States v. Ivic*, 700 F.2d 51, 65 (2d Cir. 1983), *overruled on other grounds*, *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994)).

Several cases dealing with this issue provide guidance. In *United States v. Jones*, 16 F.3d 487 (2d Cir. 1994), the United States Court of Appeals for the Second Circuit held that a defendant suffered prejudice from the district court's refusal to sever or bifurcate a felon in possession of firearm charge from other charges. In *Jones*, the court vacated the conviction on the felon in possession charge and remanded for a new trial on the other charges because of the

prejudicial spillover effect of the jury hearing evidence relating to the vacated count. *Id.* at 493. The trial court attempted to remedy the prejudicial spillover effect by cautioning the jury not to use evidence of the defendant's felony conviction in deciding the other counts. *Id.* The *Jones* court noted that in light of these circumstances, "it would be quixotic to expect the jurors to perform such mental acrobatics called for by the district judge." *Id.* (citing *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir.) (Hand, J.), *cert. denied*, 285 U.S. 556 (1932)). In mandating a new trial, the court held that "[p]rejudicial spillover from evidence used to obtain a conviction subsequently reversed on appeal may constitute compelling prejudice" that requires overturning remaining counts. *Id.*

Similarly, in *United States v. Guiliano*, 644 F.2d 85 (2d Cir. 1981), the Second Circuit held that a retrial was necessary on a bankruptcy fraud count because of the risk of prejudicial spillover evidence from a dismissed RICO count. The *Guiliano* court observed that although legally sufficient evidence existed to support the conviction, the potential for prejudicial spillover was high because "the evidence [on the remaining count] was barely sufficient to permit an inference of the disputed element of knowledge." *Id.* at 89.

In *Watkins v. Foster*, 570 F.2d 501 (4th Cir. 1978), the Fourth Circuit reached the same result as the cases cited above. The *Watkins* court recognized the prejudicial effect of evidence of other dismissed charges, holding that the defendant had been denied a fair trial and affirming the district court's grant of habeas corpus relief. *Id.* at 505. In so doing, *Watkins* noted that the "fact that the other evidence [relating to the count in question] was far from overwhelming is one factor buttressing the possibility" that the improper evidence did contribute to conviction. *Id.* at 506 n. 6.

The Maryland Court of Appeals has also followed this line of reasoning. In *Brooks v. State*, 299 Md. 146 (1984), the Court found that the trial court had granted a judgment of acquittal as to a charge of conspiracy to commit robbery, but, nevertheless, sent the charge to the jury on the theory that its original ruling was merely “preliminary.” *Id.* at 156-57. The Appellate Court reversed, concluding that the trial court could not reverse its grant of an acquittal as to the conspiracy count. As a result, the Court concluded that two other related counts of armed robbery and carrying a deadly weapon also required reversal, based upon the impact of the error on the guilty verdicts returned by the jury on those counts.

In evaluating a claim of prejudicial spillover of evidence from an invalidated or dismissed count, courts look to several factors in determining whether the totality of the circumstances requires reversal of some or all of the remaining counts. *Rooney*, 37 F.3d at 855; *see also, Ivic*, 700 F.2d at 65 (considering whether evidence had a “decidedly pejorative connotation” that was “of the sort to arouse the jury”); *United States v. Head*, 77 F.3d 472, 1996 WL 60445 (4th Cir. 1996) (adopting the *Rooney* standard).

First, a court must examine whether the evidence on the reversed count would have tended to incite or arouse the jury into convicting the defendant on the remaining counts. *See Rooney*, 37 F.3d at 855. Second, a court is to look to the similarities and differences between the evidence on the reversed count and the remaining counts. *Id.* Courts have concluded that where the reversed and the remaining counts arise out of similar facts, and the evidence introduced would have been admissible as to both, the defendant has suffered no prejudice. *Id.* However, “in those cases in which evidence is introduced on the invalidated count that would otherwise be inadmissible on the remaining counts, and this evidence is presented in such a manner that tends

to indicate that the jury probably utilized this evidence in reaching the verdict on the remaining counts, then spillover prejudice is likely to occur.” *Id.* at 856.

Finally, courts also examine the strength of the government’s case on the counts of conviction. *See, e.g., United States v. Gjurashaj*, 706 F.2d 395, 400 (2d Cir. 1983) (reviewing the strength of the government’s evidence on the remaining counts in rejecting a claim of prejudicial spillover from invalidated count); *Guiliano*, 644 F.2d at 89. In *United States v. Guiliano*, the court ordered a new trial on the remaining count after dismissing two other counts. 644 F.2d at 89. The court noted that although legally sufficient evidence existed to support the conviction, the potential for prejudicial spillover was high because “the evidence [on the remaining count] was barely sufficient to permit an inference of the disputed element of knowledge.” *Id.*

Analyzing these factors in connection with the instant case reveals that a new trial is mandated. The State’s opening statement made it apparent that it sought to establish that the Lipscomb Evidence was “just like” the evidence of the other transactions. (Exhibit 10, 11/12/09, Tr. 24). It is difficult to imagine evidence that would incite or arouse a jury more than linking Count Four to the Lipscomb allegations to establish that the Defendant acted in conformity therewith, by allegedly stealing “similar” gift cards that were intended for the “needy children of Baltimore.”

It is this type of prejudicial evidence that is the basis for the black letter law that evidence of other criminal acts, or conduct involving other alleged victims, may not be introduced to prove guilt of the offense for which the defendant is on trial. Maryland Rule 5-404(b); *see also, Straughn v. State*, 297 Md. 329, 333 (1983) (citing cases); *State v. Faulkner*, 314 Md. 630, 633 (1989) (citing cases).

The Lipscomb Evidence was touted by the State as the centerpiece of its case, and it was the first evidence presented over the course of several days, involving numerous witnesses and exhibits. There is, therefore, no question that such evidence had the “pejorative connotation” which the courts have found contribute to unfair prejudice.

As discussed above, the second factor courts consider in determining the possible prejudice from “spill over” evidence is the similarities and differences between the evidence on the reversed count and the remaining counts. *See Rooney*, 37 F.3d at 855. The dismissed counts, counts two and five, do not arise from the same facts and the evidence introduced in connection with those counts would not have been admissible in a separate trial of the remaining counts. As a result, the admission of that evidence was highly prejudicial.

As discussed above, Maryland Rule 5-404(b) dictates that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” As the Court of Appeals explained in *Straughn*:

There are two reasons for the rule [excluding evidence of prior bad acts]. First, if a jury considers a Defendant’s prior criminal activity, it may decide to convict and punish him for having a criminal disposition. Second, a jury might infer that because the Defendant has committed crimes in the past, he is more likely to have committed the crime for which he is being tried.

Straughn, 297 Md. at 333. “Evidence of other crimes may tend to confuse the jurors, predispose them to a belief in the defendant’s guilt or prejudice their minds against the defendant.” *Faulkner*, 314 Md. at 633. Simply put, “there are few principles of American criminal jurisprudence more universally accepted than the rule that evidence which tends to show that the accused committed another crime independent of that for which he is on trial, even one of the same type, is inadmissible.” *State v. Taylor*, 347 Md. 363, 369 (1997) (quoting *Cross v. State*, 282 Md. 468, 473 (1978)); *see Behrel v. State*, 151 Md. App. 64, 123-26 (2003) (reversing

conviction on basis that trial court admitted testimony about other crimes of abuse thereby showing that defendant had propensity to commit the abuse crime charged).

Under Rule 5-404(b), the Lipscomb Evidence would be not have been admissible in a trial of just the Turner counts and the Holley Trolley counts. Indeed, after reviewing these principles, the Court excluded from evidence the Charlow transactions on this very ground.

The final issue courts examine in considering the effect of spill-over evidence is the strength of the government's case on the counts of conviction. *Gjurashaj*, 706 F.2d at 400. *Guiliano*, 644 F.2d at 89. The State's case can hardly be characterized as strong with respect to the lone count of conviction here. The Jury acquitted the Defendant on three of the remaining counts and was hung on the other count. The sole conviction was on the misdemeanor crime of misappropriation by a fiduciary, and required seven days of deliberation. The prejudicial effect of the Lipscomb Evidence is particularly egregious here, because the issue of guilt or innocence hinged on circumstantial evidence of knowledge or intent. The circumstances related to count four in this case are similar to the facts in *Guiliano* where the evidence on the remaining count was subject to prejudicial spillover relating to an inference of a disputed element of the crime. *Guiliano*, 644 F.2d at 89.

Another member of this Court was presented with an analogous issue in *State v. Maurice Blackwell*, Case No: 103127026, 27 & 28 (Balto. City Cir. Ct., April 8, 2005). A copy of the Memorandum Opinion is attached hereto as Exhibit 13. In that case, two witnesses made improper references to other alleged victims of the defendant. (*Id.* at 9-14). The court struck the improper references to the other victims during the trial, and directed the jury to disregard those statements. (*Id.* at 10-14). However, upon a motion for a new trial by the defendant, the court held that the "risk that the jury could not follow the Court's instructions was so great, that the

Court has no choice but to grant the Defendant a new trial.” (*Id.* at 9). The limited testimony of the two witnesses in *Blackwell* pales in comparison to the days of testimony and voluminous evidence that was presented in this trial, all relating to another alleged “victim” and other alleged crimes. As a result, this Court has no choice but to grant the Defendant a new trial here, just as it did in *Blackwell*.

As in *Blackwell*, the Court’s curative instructions to disregard the Lipscomb Evidence do not provide any solace in the sanctity of the verdict. In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held that the mistaken admission of evidence of significant magnitude cannot be cured by instructions to the jury to disregard certain testimony. The Supreme Court discussed, *inter alia*, a jury’s ability to follow an instruction from the trial court to disregard certain testimony. The Court in *Bruton* ruled:

Instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. ‘A defendant is entitled to a fair trial but not a perfect one.’ It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge’s instructions to disregard such information. Nevertheless, as was recognized in *Jackson v. Denro*, [378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 2d 908 (1964)] there are some contexts in which the risk that a jury will not, or cannot, follow instructions is so great that the practical and human limitations of the jury system cannot be ignored.

Id. at 135 (citations omitted) (emphasis added); *see also Behrel*, 151 Md. App. at 132 (quoting *Rainville v. State*, 328 Md. 398, 411 (1992) (quoting *Bruton*)).

The Court in *Bruton* quoted from Justice Frankfurter’s dissenting opinion in *Delli Paoli v. United States*, 352 U.S. 232 (1957), which reasoned:

The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell.

Delli Paoli, 352 U.S. at 247 (Frankfurter, J., dissenting). See also *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (“The naive assumption that prejudicial effects can be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction.”).

The prejudicial effect of permitting the Jury to hear and see the abundant Lipscomb Evidence, in a case where the Jury deliberated for so long, cannot be overstated. As the cases teach us, the Court cannot have confidence that the compromise verdict that this Jury reached was not tainted by the impossible task of “remembering what the Jury should forget.” As the Supreme Court observed in *Bruton*, Ms. Dixon is not entitled to a perfect trial, but she is entitled to a fair one. The prejudicial effect of the Lipscomb Evidence deprived her of that cherished right. For these reasons, a new trial must be granted.

VI. The Trial Court Erred In Refusing To Allow The Jury To Hear Evidence of Sheila Dixon’s Character Traits for Generosity and Charity

In this case, where Ms. Dixon was charged with intentionally stealing and/or misappropriating property allegedly destined for “needy” persons in Baltimore, the Court erred by refusing to allow Ms. Dixon to produce any evidence that she possesses the character traits of generosity and charity and by refusing to permit character witnesses to testify as to these opinions and as to explain, in any way, the basis or foundation for such opinions. Under established law, the excluded evidence of these highly relevant character traits would have been sufficient to justify a juror having a reasonable doubt, and, therefore, the Court’s ruling deprived Ms. Dixon of a fair trial.

On November 3, 2009, the State moved to preclude Ms. Dixon from offering or “utilizing” evidence that would support opinions that she possesses the character traits of

generosity and charity. (Exhibit 14, State's Motion in Limine). Disregarding such evidence as amounting to no more than "a referendum on her performance as a public official," the State asked the Court to refuse to allow the Jury to learn of Ms. Dixon's substantial contributions to her church over the years as well as her considerable efforts on behalf of such disadvantaged and needy persons as the homeless, at risk and jobless youth and victims of juvenile and adult crime. (*Id.* at pp. 1-3). A copy of the documentary evidence that the State sought to preclude, which was described in the Motion only by Bates numbers, is attached hereto as Exhibit 15.

On November 12, 2009, before counsel made their Opening Statements, the Court heard argument on the State's Motion. (Exhibit 10A, 11/12/09, Tr. 49). Counsel for Ms. Dixon explained that the defense sought to admit evidence relating to Ms. Dixon's "character trait for generosity and charity ... and ... we think there's more than just honesty as a character trait that is a relevant character trait." (*Id.* at Tr. 52). Counsel urged that "honesty is not the only character trait in a theft case, particularly when the allegations here and the State's case is about stealing from people who are underprivileged," and that, "When somebody ... demonstrates a lifetime of working for people who are underprivileged, a commitment to them, whether it's in office or before office, ... [h]er character exists from when she's a young woman" (*Id.* at Tr. 53-54). Counsel also stressed that a character witness should be able to give his or her opinion as to those traits and to "demonstrate the basis for that witness's opinion." (*Id.* at Tr. 56).

The Court ruled that defense counsel would not be permitted to make any reference in opening statement to the evidence that the State had described in its Motion, that counsel should be "very wary of [even] trying to summarize it" (*Id.* at Tr. 57). The Court also warned that, "I take a narrow view of this so far;" and that the Court would rule further when the defense sought to offer character evidence during the defense case. (*Id.* at Tr. 58).

Later that day, when counsel for the respective parties made their Opening Statements, the State Prosecutor portrayed Ms. Dixon as callous and *repeatedly* characterized her, no less than two dozen times, as someone who would, and did, steal or misappropriate property “intended for needy families in Baltimore” that “should have gone to the needy families and children in Baltimore” (Exhibit 10, 11/12/09, Tr. 3-4, 5, 6, 7, 8-9, 12, 15, 17, 19, 20, 21, 22, 23, 24-25, 26, 27, 28). Counsel for Ms. Dixon, who was severely restricted by the Court’s ruling, was unable to forecast for the Jury that they would hear any opinion testimony that Ms. Dixon possessed the character traits of generosity and charity; that those opinions were based on a solid foundation of years of devotion to the needs of the unfortunate; and that such demonstrated character traits made it highly unlikely that Ms. Dixon would steal or misappropriate property intended for needy persons. Instead, the State’s portrayal of Ms. Dixon as uncaring and insensitive to needy persons was required to go unanswered.

As required by the Court’s ruling, counsel for Ms. Dixon revisited the issue when the defense opened its case and sought to elicit testimony as to Ms. Dixon’s generosity and charity from two character witnesses, Karen Daniels of Bethel Church and Frank Reid, Ms. Dixon’s Pastor and lifelong friend. (Exhibit 16, 11/17/09, Tr. 117-21). Defense counsel maintained that evidence of “character traits for ... charity and generosity ... are plainly admissible” in Maryland in defense of the theft and misappropriation charges in this case. (*Id.* at Tr. 118-19). Counsel proffered that the foundation for those such opinions included evidence, which the defense also sought to introduce, that Ms. Dixon was in fact generous and charitable. Among other things:

- In the years from 2004 through 2007, the same period when Ms. Dixon is charged with theft crimes in the case, Ms. Dixon made annual contributions to her church in the

respective amounts of \$8,504.00, \$8,786.00, \$7,582.00 and \$11,990.00. (*Id.* at Tr. 120; Exhibit 17, Defendant's Exhibits for Identification, Nos. 144, 145, 146, 147 and 148).

- During these same several years, Ms. Dixon sponsored needy families and purchased gifts for needy families at holiday times as part of the Angel Program operated by Bethel Church. (Exhibit 16, 11/17/09, Tr. 120-21; Exhibit 18, Defendant's Exhibits for Identification Nos. 135, 136).
- In addition, Ms. Dixon was "very generous ... with her own time and with her money and has contributed to help other people in need in special programs that the church operates from time to time as needed." (Exhibit 16, 11/17/09, Tr. 121).

The Court reaffirmed its prior ruling, however, continuing to preclude the defense from presenting evidence, or arguing, that Ms. Dixon possessed the character traits of generosity and charity. (*Id.* at Tr. 117).

This Court's refusal to admit evidence of Ms. Dixon's traits of charity and generosity toward the needy was contrary to Maryland law and prevented Ms. Dixon from providing evidence that the Jury could have considered significant in deciding that it was unlikely, and therefore, doubtful, that she committed the crimes with which she was charged. Professor McClain, for example, explains that:

The term "character evidence" refers to *proof* either of a person's general moral character or of a *specific character trait*, such as honesty, carefulness, *generosity*, violence, sobriety, or truthfulness.

5 McLain, Maryland Evidence (2d ed., 2001, 2009 supp.), § 404:1.a.i (emphasis added). The excluded evidence of Ms. Dixon's character traits was particularly relevant to the only charge for which the Jury found Ms. Dixon guilty, namely, fraudulent misappropriation of "certain gift cards valued in excess of \$500.00 donated to the City by Patrick Turner for distribution to the

use and benefit of *needy and underprivileged* families in the City of Baltimore.” Indictment at ¶ 61 (emphasis added). See *Braxton v. State*, 11 Md. App. 435, 441 *cert. denied*, 262 Md. 745 (1971); 2A Charles Alan Wright & Peter J. Henning, FEDERAL PRACTICE & PROCEDURE (2009 supp.) § 492 (citing *Edgington v. United States*, 164 U.S. 391, 366 (1896) and *Michelson v. U.S.*, 335 U.S. 469, 476 (1948)).

As proffered by the defense, the testimony as to Ms. Dixon’s character traits for generosity and charity could not have been more pertinent to the issues in this case. (Exhibit 16, 11/17/09, Tr. 120-21). The foundation for that testimony would have included a description of the Angel Tree Program, and Ms. Dixon’s longtime participation in that Program, whereby the Church provides substantial Christmas gifts for children and families of prison inmates and whereby sponsors, such as Ms. Dixon, generously and anonymously provide for such families. (*Id.*) Other foundations evidence would have shown that Ms. Dixon regularly donated approximately 10% of her annual income to her Church, a true tithing, to enable the Church to carry forth its own programs for the needy and disadvantaged. (*Id.*)

The Court’s decision to exclude Ms. Daniels’ testimony and the documents, and to limit the testimony of Dr. Reid, was not mere harmless error. The law is clear that, if presented at trial, the Jury could have relied upon this evidence in deciding that there was reasonable doubt as to whether Mayor Dixon misappropriated gift cards that were for “needy and underprivileged” families in the City of Baltimore. The Court of Special Appeals, in *Hennessy v. State*, 37 Md. App. 559 (1977), stated that:

As pointed out in *Edgington v. United States*, 164 U.S. 361, 367, 17 S.Ct. 72, 74, 41 L.Ed. 467, *evidence of good character*:
“is not proof of innocence, although it *may be sufficient to raise a doubt of guilt.*”

Id. at 56. (emphasis added). Likewise, in *Cardin v. State*, 73 Md. App. 200 (1987), the Court, observing that character evidence may be presented to show that it is “unlikely that [the defendant] a crime such as the one with which he is charged,” went on to state that, “The phrase ‘unlikely that he would commit’ conveys basically the same idea as ‘raise a doubt of guilt,’ since a determination that it is *unlikely* that the defendant committed the crime necessarily means that there is *reasonable doubt* that the defendant is guilty as charged.” *Id.* at 219. (emphasis in original). See also *Sahin v. State*, 337 Md. 304, 310 (1995) (citing 1 McCormick on Evidence § 191, at 812-14 (John W. Strong ed., 4th ed. 1992)) (noting it to be “well established doctrine that a criminal defendant may always offer evidence of his or her good character for a trait relevant to the crime charged as circumstantial evidence of innocence”).

This rule has been fully articulated by the Legislature, as follows:

Where character evidence is otherwise relevant to the proceeding, *no person offered as a character witness* who has an adequate basis for forming an opinion as to another person's character *shall hereafter be excluded from giving evidence based on personal opinion to prove character*, either in person or by deposition, in any suit, action or proceeding, civil or criminal, in any court or before any judge, or jury of the State.

MD. CODE ANN., CTS & JUD. PROC., § 9-115 (emphasis added). See *Void v. State*, 325 Md. 386, 392-93 (1992) (reversing criminal conviction and remanding case for new trial on basis that trial court erred in excluding character witness testimony; defendant was “entitled under the statute, subject to its restriction, to elicit the person opinion of his witnesses to prove the character of the witness against him.”); *Kelly v. State*, 288 Md. 298, 302 (1980) (reversing conviction for receipt of stolen goods; the statute “permits the admission of a broad range of testimony”); *Wilson v. State*, 103 Md. App. 722, 727 (1995) (reversing conviction on basis that Court excluded evidence of defendant’s good character); *Beckett v. State*, 31 Md. App. 85, 94 (1976) (“Courts § 9-115

modifies the common law and permits the introduction of character evidence grounded on personal knowledge.”). Thus, Ms. Daniels and Dr. Reid should have been allowed to fully testify as to their opinions of Ms. Dixon’s good character for charity and generosity, as well as the evidence on which those opinions were based. (*See* Exhibits 16 and 19).

The only limitation on a criminal defendant’s ability to offer character evidence is the requirement from the Rules of Evidence that the character trait be “pertinent.” Md. Rule 5-404(a)(1)(A); Fed R. Evid. 404(a)(1). As the Maryland Courts have stated, character evidence is pertinent if it relates “to an attribute or trait the existence or nonexistence of which would be involved in the noncommission or commission of the *particular crime charged.*” *Sahin*, 337 Md. at 311 (quoting *Braxton*, 11 Md. App. 435, 440, 274 A.2d 647, 650 (1971) (quoting 1 Wharton's Criminal Evidence § 221, at 458-59)) (emphasis added); *Harris v. State*, 81 Md. App. 247, 262 (1989). *rev'd on other grounds*, 324 Md. 490 (1991) (noting “the universally recognized rule that a defendant may introduce evidence of his good character, at least with respect to a pertinent trait, to show the unlikelihood that he would have committed the crime charged.”).

Here, the particular crime charged by the State Prosecutor is fraudulent misappropriation of “certain gift cards valued in excess of \$500.00 donated to the City by Patrick Turner for distribution to the use and benefit of *needy and underprivileged* families in the City of Baltimore.” Indictment at ¶ 61 (emphasis added). Having a character trait for giving to needy and underprivileged children (*i.e.*, being generous and charitable) is the antithesis of the specific charge of this crime, and Ms. Dixon should have been allowed to present evidence of her generous and charitable nature and to argue that these character traits made it unlikely that she would have committed the crime as it was charged.

Other courts, construing the Federal Rules of Evidence (on which the Maryland Rules are based), have, without question, accepted evidence of an accused's character for generosity in cases where such a character trait was not nearly as pertinent to the crimes charged here. In *United States v. Bonner*, 302 F.3d 776, 781-82 (7th Cir. 2002), for example, the accused in a criminal case for mail fraud and theft of government funds introduced evidence of his generosity, thereby opening the door to evidence of his bad character. And, in *United States v. Holloway*, 740 F.2d 1373, 1379 (6th Cir. 1984), the defendant charged with making false, fictional or fraudulent claims was allowed to offer two character witnesses to testify about his character traits of honesty and generosity, making any error in precluding a minister to testify about the same, harmless.

Similarly, in *United States v. Nachamie*, 28 Fed. Appx. 13, 2002 WL 108341, *21 (2d Cir. 2001), the Court held that the defendant, who was charged with health care fraud and false statements in connection with health care benefits for the elderly, was afforded sufficient opportunity to present character evidence that she had provided charity for the elderly because the trial judge "did permit some testimony as to specific instances of [the defendant's] charity toward senior citizens, enabling [the defendant] to argue [to the jury] that (contrary to the government's allegation), [the defendant] could not have intended 'to take advantage of the elderly.'" The court also noted that other witnesses were given "wide leeway" to testify about the defendant's "charitable acts" and other "charitable works involving the elderly." *Id.* at n.1.

The holding in *Nachamie* is that a defendant charged with criminally depriving needy and vulnerable persons of property is entitled to introduce evidence of her character traits for generosity and charity toward needy persons, and, also, to introduce evidence that serves as the foundation for opinions as to those character traits, as proof that the defendant was unlikely to

have formed the criminal intent necessary for conviction. Where, as in this case, the Defendant is precluded from introducing such evidence, the Defendant unquestionably prejudiced and is deprived of a fair trial.

VII. The Giving of Two *Allen*-Type Charges in Quick Succession, When the Circumstances Did Not Call for the Giving of Either *Allen*-Type Charge, and When One of Those Charges was Contrary to the ABA Approved Form, Deprived Ms. Dixon of a Fair Trial

Ms. Dixon is entitled to a new trial because the Court, *sua sponte*, gave two *Allen*-type charges to the Jury in quick succession, under circumstances in which no such charge was appropriate, and because one of those charges departed substantially from the form recommended by the ABA. *Goldsberry v. State*, 182 Md. App. 394, 415 (2008) (citing *Thompson v. State*, 371 Md. 473, 485-87 (2002)); *Goodmuth v. State*, 302 Md. 613, 622 (1985).

On December 1, 2009, as soon as the Jury convened for the seventh day of deliberations, one juror sent a note to the Court through the Forelady. The juror asked, “Does the jury need to be unanimous on all five counts?” (Exhibit 26, 12/1/09, Tr. 2). Counsel for Ms. Dixon, with the concurrence of counsel for the State, suggested that the Court respond in writing, the same as the Court had done in responding to other notes from the Jury. (*Id.* at Tr. 2-4). Counsel also suggested that the written response state that, “yes, you must be unanimous as to any count before you may return a verdict, but you may return a partial verdict as to some counts even if you cannot agree as to all counts,” and, in addition, that, “any verdict must be in accordance with the instructions on the verdict sheet.” (*Id.* at Tr. 4-5).

The Court, however, expressed a concern that the jurors may be “at loggerheads,” and, contrary to the suggestions of counsel, brought the jurors to the courtroom. (*Id.* at Tr. 3, 5). In addition to answering the juror’s question, the Court, *sua sponte*, instructed the jury that:

You should attempt, to the best of your ability, to see if you're able to resolve all the counts.

(*Id.* at Tr. 7). Counsel for Ms. Dixon objected to this additional instruction, which had not been suggested by counsel or the Court when they had previously discussed the response that should be given to the juror's note. (*Id.* at Tr. 9). Counsel for Ms. Dixon objected to the instruction as having been a modified *Allen*-type charge that was not in proper form and coercive under the circumstances. (*Id.*).

Over the further objection of counsel for Ms. Dixon that it would just "aggravate things," the Court gave the Jury a *second Allen*-type charge, this time in the same MJPI form that had been used in its original instructions before deliberations had begun. (*Id.* at Tr. 11). In doing so, however, the Court, in the course of just a few minutes; emphasized the notion that the jurors should deliberate with a view to reaching an agreement. (*Id.*).

Two hours later, the Jury returned a verdict on four counts of the Indictment, declaring Ms. Dixon not guilty on counts one, three and seven, but guilty on count four. (*Id.* at Tr. 19-24).

The Court's repeated *Allen*-type instructions, which were given without the request of either the Defendant or the State, and when the Jury had neither reported itself deadlocked nor requested, was error that deprived Ms. Dixon of a fair trial. Maryland has been so explicit in requiring that an *Allen*-type charge, even when given just *once*, not depart from the form recommended by ABA because of the real danger that, as in this case, such instructions may cause jurors to render a verdict in response to the perceived desires of the judge and not their consciously held beliefs. *Burnette v. State*, 280 Md. 88, 94 (1976) (quoting *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge*, 53 Va. L.Rev. 123,

143 (1976)). *See also Fowlkes v. State*, 53 Md. App. 39, 43 (1982), *cert. denied*, 295 Md. 301 (1983); *Pinders v. State*, 31 Md. App. 126, 131-34.³

In situations similar to those here, the Maryland appellate courts have not hesitated to reverse convictions as being the result of coercion. *See Fowlkes*, 53 Md. App. at 45. (holding issuance of ABA compliant *Allen*-type instruction prior to jury expressing a deadlock to be coercive and reversible error); *Pinder*, 31 Md. App. at 130-37 (reversing conviction where trial court *sua sponte* gave *Allen*-type instruction that deviated from ABA standard); *Smoot v. State*, 31 Md. App. 138, 148-52 (1976) (reversing conviction where trial court *sua sponte* gave *Allen*-type instruction though it did not substantially deviate from ABA standard); *Burnette*, 280 Md. at 99-100 (reversing criminal conviction because trial court deviated from ABA-*Allen* type instruction in substance); *cf Ruffin v. State*, 394 Md. 355, 372-73 (2006) (reversing conviction on the basis that judge deviated from standard instruction regarding presumption of innocence); *Butler v. State*, 392 Md. 169, 183 (2006) (reversing conviction on basis that trial court's comments to the jury were coercive); *Thompson v. State*, 371 Md. at 486 (reversing conviction because trial court's statement regarding the "final test of the quality of" the jurors's service would lie in the verdict returned was coercive); *Goldsberry v. State*, 182 Md. App. 394, 415-416 (2008) (reversing conviction because court's suggestion that "[a]nything short of a unanimous verdict is not acceptable" was coercive).

³ Throughout the deliberations, the Court stressed the "great importance" of the Jury's work and expressed the hope that "you'll be able to conclude your deliberations and reach a unanimous verdict if that's possible." (Exhibit 23, 11/20/09, Tr. 25; Exhibit 24, 11/24/09, Tr. 2; Exhibit 6, 11/30/09, Tr. 2-3).

VIII. The Evidence at Trial Failed to Show That Ms. Dixon Received Gift Cards From Patrick Turner as a Fiduciary For The City Of Baltimore as Alleged In Count Four

It is well-established that “the evidence in a criminal case must not vary from those allegations in the indictment which are essential and material to the offense charged.” When there is a material variance between the *allegata* and the *probata*, the judgment must be reversed. *Green v. State*, 32 Md. App. 567, 571 (1976) (where defendant was charged with forgery of a check but the evidence showed forgery of an indorsement to the check, the conviction was reversed for insufficiency of the evidence). *See also Harris v. State*, 67 Md. App. 92, 93-94 (1986) (“fatal variance between the crime established at trial and crime for which [defendant] stands committed.”); *Prior v. State*, 10 Md. App. 161, 167 (1970) (conviction reversed for fatal variance between *allegata* and *probata* where indictment alleged that the owner of stolen goods was Clinton Gosnell t/a I.G.A. Food Store, but evidence at trial showed that the owners were Clinton Gosnell and John Stricker); *Sizemore v. State*, 5 Md. App. 507, 513 (1968) (conviction for theft may not be had under an allegation that the goods stolen were the property of a certain person but the proof showed that the goods were the property of another). *See also Stickney v. State*, 124 Md. App. 642, 647-48 (1999) (reversing conviction on uncharge offense).

Here, as acknowledged in the Verdict Sheet, count four of the Indictment alleged as follows:

Sheila Dixon, as the duly elected President of the Baltimore City Council, while acting for and on behalf of the City of Baltimore, received in her fiduciary capacity certain gift cards ... donated to the City of Baltimore by Patrick Turner for distribution to the use and benefit of needy and underprivileged families in the City of Baltimore, and in violation of her fiduciary duty to the City and the citizens of Baltimore, fraudulently and willfully appropriated said gift cards for her own use and benefit.

Verdict Sheet, Count Four (emphasis added).

The evidence, however, failed to match this allegation or to prove that Ms. Dixon received the subject cards as a part of her duties and responsibilities as City Council President. Laretta Brown, the City Council President's Constituent Services Manager, who was called as a witness for the State, testified that she herself was in charge of distributing the gift cards. (Exhibit 10B, 11/12/09, Tr. 13). And, she readily agreed, on cross examination, that "this was not part of any kind of City official program or anything" and that "Ms. Dixon started it on her own with the assistance of people on the staff" (*Id.*). And, on re-direct by the State, Ms. Brown agreed that "this was a rather informal program ... that started between basically [Ms. Brown] and Ms. Dixon." (*Id.* at 30). For his part, Patrick Turner testified only that Ms. Dixon asked that he contribute to a "program for the needy" and that he does not remember how, when or to whom he delivered the cards. (Exhibit 22, 11/16/09, Tr. 8, 28).

The fact that Ms. Dixon was the City Council President at the time she solicited these gift card donations does not, without more, show that she received them as a fiduciary for "the City and the citizens of Baltimore." While the President of the City Council may have certain fiduciary obligations to the citizenry, not every act taken by a public official falls within the scope of that relationship. *Cf. Bowling v. Brown*, 57 Md. App. 248 (1984) (legal fees for the defense of official misconduct charges were denied because the conduct of the town Mayor and a City Council member – converting to their personal use the services of a city employee for the benefit of their own private company – were outside the scope of their official duties); *Lovelace v. Anderson*, 366 Md. 690 (2001) (where policeman working part time as hotel security guard shot hotel guest while trying to prevent a robbery, court held that the arrest attempt was not a part of the policeman's official duties).

Here, Ms. Brown's undisputed testimony is that these cards were solicited "as not part of any kind of City official program," that "Ms. Dixon started it on her own with the assistance of people on the staff," and that this "rather informal program" was "started between basically [Ms Brown] and Ms. Dixon." (Exhibit 10B at Tr. 13, 30).

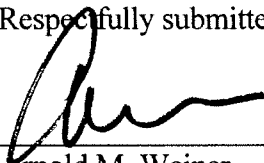
The State presented absolutely no evidence regarding Ms. Dixon's duties and responsibilities as City Council President, and there was no proof whatsoever that the informal solicitation was any part of or within the scope of such duties. Furthermore, nothing in the Baltimore City Charter prohibits a City Council President from soliciting charitable donations on her own. Indeed, Article 1, Section 3 of the Baltimore City Charter provides that the Board of Finance, not the City Council President, is responsible for receiving and disposing of gifts to the City. At best, the State's evidence suggests that Ms. Dixon may arguably have had a fiduciary duty to Patrick Turner but not, in connection with these gift cards, to the City or its residents.

Because the evidence at trial did not match the allegations of the Indictment, the evidence was insufficient to sustain a guilty verdict on count four and the Court must strike the guilty finding or, in the alternative, order a new trial.

IX. Conclusion

Ms. Dixon respectfully submits that, for the reasons stated herein, the Court should grant her a new trial in the interests of justice.

Respectfully submitted,



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Barry L. Gogel

Norman L. Smith

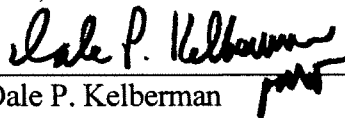
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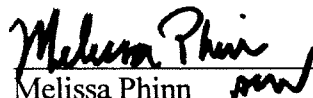
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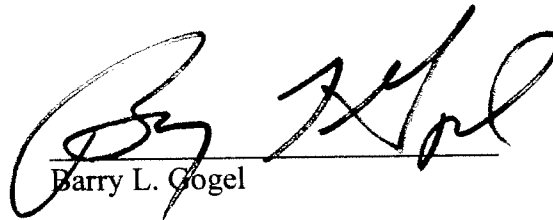
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CERTIFICATE OF SERVICE

I HEREBY certify that on this 11th day of December, 2009, copies of the foregoing Memorandum in Support of Motion of Sheila Ann Dixon, Defendant, for New Trial were sent, via email and hand delivery to:

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