

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

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STATE OF MARYLAND :

v. :

Case No. 109210015

SHEILA ANN DIXON :

-----X

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

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

The State's Opposition to the Defendant's Motion for New Trial, while lengthy, does not provide a satisfactory answer for any of the several reasons that were identified and discussed in her initial memorandum as to why Ms. Dixon did not receive a fair trial. While each of those reasons would be sufficient in and of itself to require a new trial, their cumulative effect was so obviously prejudicial to Ms. Dixon that there should be no doubt that she was deprived of her right to a fair trial and that a new trial is required.

**I. A New Trial Is Required Because Two Jurors Gave False Testimony
On Voir Dire**

Mistakenly relying upon *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), the very case that the Maryland Court of Appeals distinguished on the same basis apparent here, the State ignores the recent decisive decisions of the Court of Appeals in *Williams v. State*, 394 Md. 98 (2006), and *Owens v. State*, 399 Md. 388 (2007). As a result, the State misconceives the essential principles of Maryland law governing non-disclosure or false

statements by prospective jurors during *voir dire*.¹ To be sure, in *Williams*, the Court of Appeals stated:

where there is a non-disclosure by a juror of information that a *voir dire* question seeks and the record does not reveal whether the non-disclosure was intentional or inadvertent, the defendant is entitled to a new trial. That the disclosure would not automatically have required a strike for cause does not matter; it is the inability of the defendant to have the benefit of a further investigation by the court, he or she being deprived of the ability to delve into the juror's state of mind for bias and of a finding in that regard, that is decisive.

¹ The State cites *McDonough* for the proposition that a juror's innocent belief that its statements on *voir dire* were truthful cannot be a basis for a new trial and argues that the purpose of *voir dire* is not to ferret out reasons for peremptory challenges. See State Opposition at 2-3. The Court directly addressed both of these contentions in an extended footnote in *Williams*, 394 Md. at 114, n. 10 (emphasis added):

The dissent believes that a new trial should not be granted, that this case should only be remanded for a hearing to determine whether the appellant was prejudiced by the juror's non-disclosure. 394 Md. 98, 118-19, 904 A.2d 534, 546-47 (2006) (Raker, J., dissenting). It reasons that, because the scope of voir dire in Maryland is limited to exposing a cause for disqualification and does not encompass questions designed to elicit information in aid of peremptory challenges, the out of jurisdiction cases we cite do not support this holding, noting that, in these other states, the voir dire process does provide a basis for exercising peremptory challenges. 394 Md. at 121-24, 904 A.2d at 548-50 (Raker, J., dissenting). The dissent also notes that the Maryland standard does not force the trial court to decide whether, or not, the withheld information resulted in a lost peremptory strike, 394 Md. at 121-22, 904 A.2d at 548 (Raker, J., dissenting).

Whether the withheld information is used for juror disqualification or in aid of the use of peremptory strikes is besides the point. Whenever a relationship is not disclosed, the ability of a party to probe for bias is lost. Because bias is not apparent or discoverable during any stage, the defendant is prejudiced from the start. The primary case on which the dissent relies is *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984). 394 Md. at 118-19, 904 A.2d at 546 (Raker, J., dissenting). This case, to be sure, also deals with the loss by a party of the opportunity to exercise a peremptory strike, the very situation rejected by the dissent. 394 Md. at 118-19, 904 A.2d at 546 (Raker, J., dissenting). The juror in *McDonough* failed to respond when asked if he had ever sustained injuries similar to the plaintiff's, 464 U.S. at 550, 104 S.Ct. at 847, 78 L.Ed.2d at 667. The information that question sought to elicit was clearly not so prejudicial as a direct family relationship to a member of the State would be. Finally, *McDonough* holds specifically, "*Voir dire* examination serves to protect [the] right [to a fair trial by an impartial trier of fact] by exposing possible biases, both known and unknown, on the part of potential jurors," 464 U.S. at 554, 104 S.Ct. at 849, 78 L.Ed.2d at 671, and, in discussing when a new trial should be granted, clearly states that "reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." 464 U.S. at 556, 104 S.Ct. at 850, 78 L.Ed.2d at 671.

Williams, 394 Md. at 114-15 (footnotes omitted).

Where the non-disclosure is intentional, “the conclusion is inescapable that the defendant has been deprived of a fundamental right to a fair trial and that his conviction cannot stand.” *Id.* (quoting *State v. Thompson*, 142 N.J. Super. 274, 361 A.2d 104, 108 (App. Div. 1976)). In such cases, the prejudice to the defendant is presumed. *Id.* at 116 (quoting *People v. Blackwell*, 191 Cal. App. 3d 925, 929, 236 Cal. Rptr. 803 (Cal. Ct. App. 1987)) (“Intentional concealment of relevant facts or the giving of false answers by a juror during the *voir dire* examination constitutes misconduct ... and the occurrence of such misconduct raises a rebuttable presumption of prejudice Prejudicial jury misconduct constitutes grounds for a new trial.”).

Where the non-disclosure is inadvertent, however, the conviction still must nonetheless be reversed if “(a) actual prejudice to the accused is demonstrated, or (b) *the withheld information, in and of itself, gives rise to a reasonable belief that prejudice or bias by the juror against the accused is likely.* *Id.* at 102 (quoting *Burkett v. State*, 21 Md. App. 438, 445 (1974)). (emphasis added).

Furthermore, contrary to the State’s arguments, the issue of non-disclosure of information is not waived under Maryland law when, as here, the defense counsel asks in *voir dire* the very question calculated to reveal the non-disclosed information. *Owen*, 399 Md. at 426. In *Owens*, the Court of Appeals, in fact, ruled against the defendant who discovered that a sitting juror had not been a citizen of the United States, holding that the issue would have been preserved – and not waived – if counsel for the defendant had asked that the juror be questioned on *voir dire* as to whether he was a citizen:

Simply because *Boyd* did not require the citizenship question to be a mandatory one for the trial judge to pose to the venire does not excuse Owens of *exercising due diligence in requesting the question.* Had he done so, Owens's request most likely would have been granted and [the

juror] would have been excused. *Even if the trial judge had refused to pose the question, the issue would have been preserved for appellate review.* In either instance, the result is far better than the waiver we find due to Owens's lack of foresight in at least proposing the question.

Id. at 426. (emphasis added).²

A. Juror Number 6, Shiron Davis

Pointing selectively to certain inapplicable questions asked of the jury pool, while assiduously avoiding reference to the relevant, pointed and unmistakable questions that were posed, the State “proffers” that Shiron Davis, Juror Number 6, will testify that her non-disclosure of her criminal convictions was inadvertent. In fact, Ms. Davis was asked specific questions three times during *voir dire* that were designed to discover whether she recently had been a victim of, or charged with, the crime of theft; and, on each occasion she answered falsely.

Initially, the entire jury pool was specifically asked, “Within the past five years have you ever been a victim of the crime of theft or *been charged with the crime of theft?*” *Voir Dire Questions – In Court No. 9* (emphasis added); (Exhibit 27, 11/09/09 at Tr. 34-35).³ Although twenty-one individuals responded affirmatively to this question, Ms. Davis did not. *Id.*

Then, at the bench, Mr. Kelberman specifically asked Ms. Davis, who in the jury pool was Juror 066, the following:

MR. KELBERMAN: Do you -- have you ever been involved in

² Rather than address the decisive and recent Court of Appeals opinion in *Owens*, the State cites only to the intermediate appellate court opinion in *Scott v. State*, 175 Md. App. 130 (2007), and the decade old opinion in *Hunt v. State*, 345 Md. 122 (1997). In *Scott*, a member of the jury panel, later seated as a juror, failed to disclose the adverse relationship between the defendant and members of the juror’s family. The defendant, who was also aware of this conflict, failed to tell this to his lawyer during *voir dire* and chose to inform his counsel only during the trial. Defense counsel, who never questioned the juror in *voir dire* about this adversarial relationship, waited until after the verdict to present the issue to the trial court. Under these very different facts, the appellate court held defendant had waived his right. In *Hunt v. State*, 345 Md. 122 (1997), the Court of Appeals held that the defendants had waived their right to raise the issues because of the procedural default provisions of Maryland Post Conviction Act, Md. Ann. Code, Crim. Proc. § 7-106(b)(1), provisions that are not applicable here.

³ Exhibits 1-26, which may be referenced to herein, are attached to Defendant’s Memorandum in Support of Motion of Sheila Ann Dixon, Defendant, for New Trial; Exhibits 27-29 are attached hereto.

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?

JUROR NO. 066: No.

MR. KELBERMAN: Okay.

(*Id.* at Tr. 84).⁴ Thus, twice at the bench, Ms. Davis was asked point blank questions regarding her criminal background, to which she responded with what are now known to be total falsehoods. As these statements can only be viewed as intentional, a new trial is presumptively warranted. *Williams*, 394 Md. at 114-16 (quoting *Thompson*, 361 A.2d at 108 and *Blackwell*, 191 Cal. App. 3d at 929)).

It is beyond belief that these three blatantly false answers to direct questions were anything but intentional. The facts are that Ms. Davis was arrested after charges had been filed against her by her own sister, Diniqua Davis. (*See* Exhibit 28, Affidavit of Diniqua Davis (formerly Diniqua Dunham) at ¶ 9). In 2007, Diniqua had left her sister, Shiron, to care for her home while Diniqua traveled to Myrtle Beach, South Carolina. (*Id.* at ¶ 4). When Diniqua returned home, she received a call from her bank that her account had been overdrawn. (*Id.* at ¶ 5). Upon investigation, Diniqua found that a number of checks were missing from her checkbook. Upon inspection of the cancelled checks at the bank, Diniqua realized that Shiron had stolen at least six checks from Diniqua's house, forged Diniqua's name on the checks, had made the stolen and forged checks payable to herself and had deposited them into her own bank account. (*Id.* at ¶¶ 5-7). On June 29, 2007, at the instructions of the bank, Diniqua brought criminal charges against her sister. (*Id.* at ¶¶ 8-9). Shiron was immediately arrested at her home

⁴ After a careful review of the tape recording of this exchange, the Court Reporter has issued a corrected transcript. A copy of the corrected transcript is attached hereto as Exhibit "27".

by Baltimore City Police Officers and brought before a commissioner at 1:30 a.m. for a bail hearing. She was informed at the time that she was charged with six counts of forgery and two counts of theft for allegedly forging signatures to six checks stolen from her own sister. On September 14, 2007, she appeared in the District Court for Baltimore City, was represented by counsel, was offered and accepted stet dispositions to all counts in open court; and, upon information and belief, made efforts to pay restitution to the victim – her sister. (*Id.* at ¶ 11; *see* Exhibits 2 and 3). These are not the sort of events that one might easily forget, and, in fact, over the past two years, Diniqua and Shiron have gotten into several heated discussions related to this theft. (Exhibit 28 at ¶ 12).

Moreover, the State’s proffer that Ms. Davis will testify that her omissions were inadvertent, cannot be deemed credible. Ms. Davis, who was under oath when she three times made false statements, now faces the prospect of perjury and obstruction of justice charges unless it is determined that her statements were not intentionally false. She is almost certainly aware of her legal predicament because, prior to this Court’s December 22, 2009 letter to the jurors that they should not discuss this case with anyone, the State Prosecutor had sent two investigators to meet privately with Ms. Davis at her home about this issue. All we know is that, based on the intervention of these investigators, Ms. Davis is apparently now prepared to claim that her false denials were honest mistakes.

Even if the Court were to accept the highly dubious justification that the State now proffers for Ms. Davis’ false answers to the three questions posed to her regarding the theft charges against her, the Court must nonetheless grant the Defendant a new trial because “the withheld information, in and of itself, gives rise to a reasonable belief that prejudice or bias by the juror against the accused is likely.” *Williams*, 394 Md. at 102 (quoting *Burkett*, 21 Md. App.

at 445). Theft and forgery are crimes of dishonesty, and no person would want to put their future in the hands of a person who had shown herself to be so dishonest and unreliable that she would be willing to steal from members of her own family. Moreover, as Ms. Davis was advised at a hearing in her own criminal proceeding, the fact that her case was kept on the “stet” docket meant that she was left open to further prosecution by the State. This fact alone gives rise to a reasonable belief that Ms. Davis would be predisposed to act favorably toward the State that still held her future in its hands. *Id.*; see *Brooks v. Dretke*, 418 F.3d 430, 430-31 (5th Cir. 2005) (conviction overturned on the basis of implied bias when a juror in a state criminal trial was charged with criminal charges); cf. *William Henry Lowrey v. State of Florida*, 705 So. 2d. 1367, 1370 (1998). Interestingly, the State has no answer for the fact that Shiron Davis knows that her theft and forgery case is on a stet docket and is subject to being reopened at the State’s request, and, as a result, avoids all reference to this inconvenient fact in its Opposition to the Defendant’s Motion for New Trial.

Faced with the inevitable prospect that Ms. Davis’ false answers on *voir dire* required a new trial, whether intentional or not, the State makes a desperate claim of waiver that has no basis either in law or in fact. As shown by the Affidavit of Dale Kelberman, attached hereto as Exhibit 29, defense counsel attempted to access publicly available information about prospective jurors during the jury selection process, but, because they did not have access to the jury list until the first day of trial, the process of attempting to gather such information was, at best, “rushed and haphazard.” (Exhibit 29 at ¶ 4).

From time to time, during the *voir dire* process, Mr. Kelberman was told that a quick check of the publicly available information contained a hint or suggestion that a particular prospective juror might have had some connection with the criminal justice system. (*Id.* at ¶ 5).

In some instances, such as with prospective jurors Evans and Davis, there was no way of determining, from the public information available on the internet, whether the prospective juror was one of several persons who had the same name. (*Id.* at ¶ 7). Under such circumstances, the only prudent course for defense counsel was to make specific inquiry of the prospective jurors and to accept and rely upon their answers under oath. (*Id.*) Mr. Kelberman has specifically stated, in regard to Ms. Davis, that, “Under these circumstances, I accepted Ms. Davis’ responses as being truthful,” and, “Because Ms. Davis was under oath and standing in front of the judge and all counsel, I accepted her answers as truthful and we did not pursue the matter further, either then or later.” (*Id.*).

The *Owens* case holds unambiguously that the obligation of counsel is to make an effort to have the questions regarding the juror’s qualifications be asked by the judge or by counsel, so that the *voir dire* process operates as it is intended, and that, if a lawyer does so, he does not waive his or her right to object if information regarding a juror’s disqualification subsequently comes to light. *Owens*, 399 Md. at 418-428.

It is unfortunate that the State, apparently out of deep frustration, would make the baseless suggestion that Mr. Kelberman must have known that Ms. Davis perjured herself during *voir dire* and that he must have deliberately concealed this fact until after the trial. As Mr. Kelberman states in his affidavit:

I would never have concealed information from the Court with the purpose of using that information later to gain some advantage for a client, and I did not do so here. Furthermore, if I had known that Ms. Davis was the same person about whom we had information regarding theft charges, and if I had wanted to conceal that knowledge from the Court and the State, and “sandbag” the Court, I never would have asked Ms. Davis the direct questions about whether she had previous experience with the criminal justice system, including being charged with or the victim of theft. I of course did not know that Ms. Davis would give false answers to those questions, and had she been truthful, her prior charges would have been revealed to all parties at that time.

(Exhibit 29 at ¶ 8) (emphasis added).

Ms. Dixon's lawyers did not discover Ms. Davis' false testimony until after the trial. As Mr. Kelberman also explains, news reporters who were investigating the jurors after the verdict made a number of calls to counsel. One such reporter telephoned Mr. Weiner a few days after the verdict and informed Mr. Weiner that Ms. Davis had been involved in a theft case. (*Id.* at ¶ 10). Based upon that information, defense counsel investigated the file of the Shiron Davis theft and forgery case and found that the signature of Shiron Davis in that case matched the signature of Shiron Davis on the jury questionnaire in this case. (*Id.*).

Finally, there is no decided case that provides any support for the State's waiver argument. As noted above, the State relies upon cases in which lawyers or parties stood by silently during *voir dire*, and deliberately refrained from suggesting or asking questions on *voir dire* that addressed the subject. But there is no case that the State could cite in which a party was held to have waived an objection when his lawyer specifically suggested or asked questions to elicit information on the subject for which information later came to light. The reason there is no such case is because a lawyer who asks *voir dire* questions on a subject, and who accepts the prospective juror's answers as true, does precisely what the law expects of him and does not waive his right to object later if information contrary to the juror's sworn testimony is revealed. *Owens*, 399 Md. at 426.

B. Juror Number 3, Shawana Ramirez Tyler

Juror 3, Shawana Ramirez Tyler, also gave false answers repeatedly in response to *voir dire* questions. In the Jury Questionnaire, Ms. Tyler was asked the following:

- H. Do you, or your employer, have any direct business dealings with the City of Baltimore as a contractor, vendor or in any other capacity?

* * * * *

- J. Have you, or any member of your immediate 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?

* * * * *

CHECK BOX IF YOU KNOW THE FOLLOWING PERSON

* * * * *

22. Mary Pat Fannon
Consultant to Mayor

In each case, Ms. Tyler answered the question in the negative. Moreover, before the entire jury pool the Defendant was asked to stand while the Court asked:

“The Defendant is Sheila Dixon. She is currently the Mayor of the City of Baltimore and formerly 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.

Voir Dire Questions – In Court, No. 1 (Exhibit 1, 11/09/09 at Tr. 30). Again, Ms. Tyler demonstrated her negative response by remaining silent.

As it turned out, we now know that, contrary to her negative responses to these questions, Ms. Tyler had prior dealings with the City of Baltimore, Mayor Dixon and Mary Pat Fannon, a State's witness, all of which related to food baskets, in an event that no one could forget. Ms. Tyler had won a sweepstakes for a supermarket basket full of food sponsored by the Baltimore Main Streets Program, a program of the Baltimore Development Corporation, which is a semi-public agency of Baltimore City that is responsible for promoting economic development. As the evidence provided with the Defendant's Memorandum in support of her Motion for New Trial makes clear, the event was widely publicized as being sponsored by the Baltimore Main Street Programs and had promotional literature bearing the Baltimore City seal. Newspaper articles bearing Ms. Tyler's picture reported that both Ms. Dixon and Ms. Fannon, who was head of the Baltimore Main Streets Program, were prominent at the event, with Ms. Fannon directing

affairs and Ms. Dixon, who was then Mayor-designate, speaking before the crowd.⁵ The City corresponded with Ms. Tyler after the event and obtained releases from her to enable the City to use her likeness in promotional literature. The City also shared that literature with her. (*See* Exhibits 4 and 5).

As with Shiron Davis, any statements by Ms. Tyler that her non-disclosure of this information was inadvertent in light of the several inquiries related to this matter should be viewed with a great deal of skepticism. As a correctional officer, she is no doubt aware that her false statements under oath make her vulnerable to charges of perjury and obstruction of justice. If she was not aware of this fact, it is almost certain that she was made aware by the State Prosecutor's investigators who paid Ms. Tyler a visit in advance of her testimony before the Court.

Under these circumstances, it is simply difficult to believe that Ms. Tyler's false responses to these questions were not intentional and thus they are presumptively prejudicial. *Williams*, 394 Md. at 114-16 (quoting *Thompson*, 361 A.2d at 108 and *Blackwell*, 191 Cal. App. 3d at 929). Indeed, because it appears that these responses were intentionally false, the Court can have no confidence that Ms. Tyler was truthful when she remained silent or answered in the negative with regard to every other *voir dire* question, including her lack of knowledge of the facts of the case and her lack of a preconceived opinion of Ms. Dixon.

⁵ The State would like this Court to equate Ms. Fannon's failure to recognize Ms. Tyler while giving testimony, and not until she heard her voice and learned her name after trial, with Ms. Tyler's supposed failure to recognize Ms. Fannon during her testimony during trial. State Opposition at 13. Of course, the circumstances are completely incomparable. Ms. Fannon, who was being asked questions by the prosecution and defense counsel was not aware of the identity of the twelve members of the Jury. The jurors, however, were provided with Ms. Fannon's name in advance, and, presuming that they were attending to their duties, were told the identity of Ms. Fannon again as she took the stand and should have been focused on her directly. (Parenthetically, once Ms. Fannon heard Ms. Tyler's voice and learned her first name, she knew Ms. Tyler as the person who won the food basket giveaway.)

Even if the Court were to conclude that Ms. Tyler's several negative answers to repeated questions regarding her dealings with or knowledge of Baltimore City, Ms. Dixon or Mary Pat Fannon, were somehow inadvertent, the Court should, nonetheless, again find them to be a basis for a new trial. Mary Pat Fannon turned out to be one of the State's primary witnesses and withholding information regarding her knowledge of and prior dealings with Ms. Fannon, especially dealings as unique as those here, in and of itself, gives rise to a reasonable belief that prejudice or bias by the juror against the accused is likely. *Williams*, 394 Md. at 102 (quoting *Burkett*, 21 Md. App. at 445).⁶

II. Five Jurors Engaged In Improper Communications, Requiring A New Trial

With respect to the evidence that several of the jurors used their Facebook accounts to communicate with one another during the trial, there are certain undeniable facts that the State seeks to avoid. First, there is no denying that five members of the Jury communicated openly on Facebook, a public forum where any number of third parties whom any of the five accepted as friends were privy, making references to this case in direct violation of this Court's repeated admonitions and instructions.⁷ Second, it is also beyond dispute that one of the jurors, James Chaney (Juror 12), communicated with an outside party about the essence of the case, *i.e.* the verdict, and received at least one communication from an outside person concerning the case during the jury deliberation process. And third, it is apparent that these facts require the Court to conduct a further inquiry, as it intends to do, and to do so by obtaining the full record of all the communications among those jurors, including communications among those jurors after they

⁶ Moreover, there is no contention that the defense waived its right to claim that Ms. Tyler's non-disclosure of information was in any way waived.

⁷ The text of all of these communications is set forth in the Defendant's initial Memorandum at 13-14.

were alerted to the fact that their communications during the trial had been discovered, to determine the extent of the juror misconduct.

In evaluating the present evidence, as well as any additional information the Court obtains as a result of its Order to the jurors to produce their Facebook communications, the Court must keep in mind certain principles which govern these circumstances. The recent decision of the Court of Special Appeals in *Wardlaw v. State*, 185 Md. App. 440 (Md. App. 2009) is instructive. In granting the defendant a new trial because a juror conducted her own research on the internet during jury deliberations, the court summarized the importance of the restrictions on outside influences that may affect jurors.

“A criminal defendant's right to have an impartial jury is one of the most fundamental rights under both the United States Constitution and the Maryland Declaration of Rights.” *Jenkins*, 375 Md. at 299, 825 A.2d 1008. “The potency of the Sixth Amendment right to a fair trial relies on the promise that a defendant's fate will be determined by an impartial fact finder who depends solely on the evidence and argument introduced in open court.” (citations omitted).

Id. In addition, the court held that:

“A motion for a mistrial or a new trial because of alleged jury misconduct must be granted if the evidence of misconduct indicates that a fair and impartial trial could not be had under the circumstances.” (citations omitted). “A right as fundamental as the right to an impartial jury cannot be compromised by even the hint of possible bias or prejudice that is not affirmatively rebutted.” *Jenkins*, 375 Md. at 319, 825 A.2d 1008.

In *Remmer v. United States*, 347 U.S. 227, (1954), the Supreme Court similarly held that:

In a criminal case, *any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial*, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Id. at 229. (citations omitted and emphasis added).

The present case is entirely distinguishable from a case where two jurors have a single, brief discussion over lunch. See State Opposition at 20-21 (citing *Summers v. State*, 152 Md. App. 362 (2002)). Even communications among jurors, without any contribution from a third party, are prejudicial if they are part of a sustained pattern of private contacts among a sub-set of the jury who become their own caucus and are thereby able to exert undue influence over other jurors not part of that group. Cf. *Summers*, 152 Md. App. at 379.

Here, too, it appears that these jurors also engaged in communications with outside parties, a course of conduct that, beyond question, was presumptively improper. See *Dorsey v. State*, 185 Md. App. 82, 104 (2009) (stating that prejudice is “presumed in circumstances concerning an outside influence”) (citing *Remmer v. United States*, 347 U.S. 227, 229 (1954), *supra*, *Stokes v. State*, 379 Md. 618, 631 (2004) (presuming prejudice based on the presence of alternate jurors in the jury room)).

Finally, the *Stokes* opinion is also significant, as it makes it clear that rebuttal of the presumption of prejudice may not be accomplished by inquiring of jurors as to the discussion that took place in the jury room or as to jurors’ mental processes:

In order to rebut prejudice, it must affirmatively appear that there was not, and could not have been, any prejudice. Because Rule 5-606 prevents a juror from impeaching the verdict, the presumption of prejudice which arises from the presence of the alternate jurors may not be rebutted by inquiring into the proceedings inside the jury room or into the juror's mental processes or any statements made during the deliberations. (citations omitted). To follow the State's logic, we would have to inquire into the jury deliberations. That we will not do.

Stokes, 379 Md. at 641-42.

III. The Prejudicial Effect of the Lipscomb Evidence Warrants a New Trial

The State's response fails to identify any relevant legal authority to demonstrate that the prejudicial effect of the Lipscomb evidence does not warrant a new trial. Instead, all of the cases cited by the State involve a relatively minimal amount of stricken evidence that was presented to the jury. As discussed in the Motion, the volume and the nature of the evidence here made it impossible for the Jury to follow the Court's instructions regarding the Lipscomb Evidence.

For example, the State cites *United States v. Bonner*, 302 F.3d 779 (7th Cir. 2002), in support of its argument that errors that are subject to curative instructions are usually harmless. In *Bonner*, the spillover evidence in dispute was a statement by a government witness that the defendant "was acting very deceptive in providing" handwriting samples. *Id.* at 782. The court immediately instructed the jury to disregard the answer. The trial judge then asked the defendant's attorney if he was satisfied with the curative instruction and he indicated that he was. *Id.* As discussed in the Motion, the prejudicial spillover evidence in this case includes several days of testimony from ten witnesses and over twenty-five exhibits, which is incomparable to the one brief statement at issue in *Bonner*.

Similarly, the State claims that the unpublished Fourth Circuit opinion in *United States v. Head*, 77 F.3d 472, 996 WL 60445 (4th Cir. 1996), is "virtually on all fours with this case." State's Opposition at 27. However, in *Head*, the spillover evidence at issue related to evidence presented to the jury in connection with just seven of fifty counts. *Id.* at *2. The evidence introduced with respect to the dismissed counts in *Head* was a small fraction of the evidence that was presented in connection with the other counts, which is not the case here. If anything, *Head* and its progeny, where the bulk of the evidence presented at trial did not relate to the dismissed counts, are the virtual opposite of this case. It is the volume and nature of the prejudicial

Lipscomb Evidence, especially in light of the lack thereof with respect to the remainder of the trial, that requires a mistrial here and that distinguishes this case from cases like *Head*.

Remarkably, the State also claims that, like *Head*, two other cases, *United States v. Wallace*, 515 F.3d 327 (4th Cir. 2008), and *United States v. Dorsey*, 45 F.3d 809 (4th Cir. 1995), are also on “all fours” with this case. The evidence at issue in *Wallace* related to a brief reference by a government witness to an uncharged domestic dispute in violation of an *in limine* agreement between the defendant and the Government. *Wallace*, 515 F.3d. at 330. In addition, defense counsel did not immediately request a curative instruction from the court. *Id.* The court held that the brief reference to the domestic dispute was not prejudicial and that the defendant should have immediately requested a curative instruction if one was necessary. *Id.* at 331.

In *Dorsey*, the Government’s witness made a brief and general reference to defendant’s criminal history by stating that he checked the defendant’s driver’s license against his motor vehicle records and criminal history records. *Dorsey*, 45 F.3d at 816. Defense counsel did not object to the testimony, but moved for a mistrial at the end of the witnesses’ testimony. *Id.* The court held that the brief reference to defendant’s general history did not justify a mistrial. *Id.* at 817.

Suggesting that the relatively benign and miniscule evidence at issue in *Wallace* and *Dorsey* are somehow on “all fours” with the prejudicial and voluminous evidence presented in this case is indicative of the State’s misunderstanding of the relevant law regarding prejudicial spillover evidence as referenced in Defendant’s Motion. Simply put, the volume and nature of the prejudicial spillover evidence at issue in the cases cited in Defendant’s Motion are qualitatively and quantitatively far more unfairly prejudicial than the evidence at issue in *Bonner*, *Head*, *Wallace* and *Dorsey*. See *United States v. Jones*, 16 F.3d 487 (2d. Cir. 1994); *United*

States v. Guiliano, 644 F.2d 85 (2d. Cir. 1981); *Watkins v. Foster*, 5709 F.2d 501 (4th Cir. 1978); *Brooks v. State*, 299 Md. 146 (1984); *State v. Maurice Blackwell*, Case No: 103127026, 27 & 28 (April 8, 2005). As stated in the Motion, ten of the eighteen witnesses called by the State at trial testified about the Lipscomb Evidence, and more than twenty-five of the forty-one exhibits introduced into evidence in this case also related to the Lipscomb Counts. Unlike the brief and fleeting statements which were the subject of *Bonner*, *Head*, *Wallace* and *Dorsey*, here the evidence consumed most of the first several days of trial, and was the principal evidence referred to by both parties in their opening statements.

In addition, there were three witnesses whose testimony was left to be segregated by the Jury itself, guided only by the general instruction to disregard those portions of the testimony relating to the Doracon transactions. The State cites no case in which such a vague direction satisfied a defendant's right to a fair trial.

As noted in our Motion, this Court granted a motion for a new trial in *State v. Maurice Blackwell*, Case No. 103127026, 27 & 28 (Baltimore City Circuit Court April 8, 2005), because the Court found that the jury was unlikely to be able to follow the Court's instructions regarding the prejudicial evidence relating to another alleged victim and other alleged crimes. *Id.* at 9. In *Blackwell*, the prejudicial evidence was far less compelling or voluminous as in the instant case. Nevertheless, the Court concluded that, as the Supreme Court has noted, there are occasions where a curative instruction is simply humanly impossible to follow.

The State also argues that the Defendant somehow waived any argument relating to prejudicial spillover evidence because it failed to move to sever the Lipscomb counts. This argument is belied by the Court's ruling in this case that excluded the Charlow evidence, pursuant to Rule 5-404(b). The Court concluded that such evidence was not admissible, not only

because of the lateness of the discovery, but also because such evidence did not satisfy Rule 5-404(b). Moreover, it is curious for the State to now argue that the counts should have been severed, when by including the counts in the same indictment, the State necessarily took the position that those counts could be tried together, pursuant to Rule 4-203(a). The State fails to cite to any legal authority in support of its novel waiver concept. If followed to its logical conclusion, a defendant would not be entitled to a new trial unless she moved for severance in advance of trial, even if there were prejudicial spillover evidence and there was no way for the jury to follow the Court's instructions regarding that evidence. The law relating to prejudicial spillover evidence does not support the State's suggestion.

Finally, the State seeks to avoid the consequences of its decision not to call Mr. Lipscomb by contending that the Jury's verdicts demonstrate its ability to parse through the testimony. But the opposite is true. The Jury acquitted the Defendant of the theft charges because there was no evidence, even as part of the Lipscomb Evidence, that Ms. Dixon obtained any of the gift cards without authorization, a necessary element of all the theft charges. However, when it came to the misappropriation charges, the Jury asked for a definition of "misappropriation," asked a specific question about State's Exhibit number 3 and whether it should be considered, and deliberated for (7) days before reaching a compromise verdict. These are the hallmarks of the effect of improper spillover evidence, as the cases suggest, and therefore justify a new trial.

IV. The Exclusion Of Evidence Of Ms. Dixon's Character Traits For Generosity And Charity Deprive Ms. Dixon Of A Fair Trial

In opposing the Defendant's argument that the Court erred in refusing to allow Ms. Dixon to present evidence of her character traits for generosity and charity, the State's argument supports the Defendant's position rather than refutes it. The State completely ignores the first

five pages of the Defendant's argument, all of which demonstrate that the Court's decision to refuse to allow Ms. Dixon to present evidence of her good character for generosity and charity was error requiring a new trial.⁸ Instead, the State merely claims that the proffered evidence was somehow not pertinent to this case under Maryland Rule 5-404. As noted in the primary case cited by the State however, "an accused may advance more than one character trait as evidence, so long as each of those traits are *germane* to *some issues* in the trial." *U.S. v. Manfredi*, 2009 WL 3762966, *2-*3, 104 A.F.T.R.2d 2009-7375-76 (W.D.Pa. Nov 09, 2009) (quoting *U.S. v. Curtis*, 644 F.2d 263, 268, 64 A.L.R. Fed. 227 (3d Cir. 1981)) (emphasis added).

The Defendant is not required to prove that, had the evidence been admitted, a different result would have occurred, for that is not the standard. Rather, the issue is whether the proffered evidence was admissible, and whether the trial court's ruling was reversible error. *See* pages 3 and 4 of Defendant's initial Memorandum.

Under Maryland law, character evidence is admissible if it relates "to an attribute or trait the existence or nonexistence of which would be involved in the non-commission or commission of the *particular crime charged*." *Sahin*, 337 Md. at 311 (quoting *Braxton*, 11 Md. App. 435, 440 (quoting 1 Wharton's Criminal Evidence § 221, at 458-59)) (emphasis added). The State's opposition offers nothing to show that character traits for generosity and charity are not related to the State's charges of fraudulent misappropriation of "certain gift cards valued in excess of

⁸ These unanswered pages cite to no less than **two** United States Supreme Court cases (*Edgington v. United States*, 164 U.S. 391, 366 (1896); *Michelson v. U.S.*, 335 U.S. 469, 476 (1948)), **three** Maryland Court of Appeals opinions (*Sahin v. State*, 337 Md. 304, 310 (1995); *Void v. State*, 325 Md. 386, 392-93 (1992); *Kelly v. State*, 288 Md. 298, 302 (1980)), **five** Maryland Court of Special Appeals opinions (*Wilson v. State*, 103 Md. App. 722, 727 (1995); *Cardin v. State*, 73 Md. App. 200 (1987); *Hennessy v. State*, 37 Md. App. 559 (1977); *Beckett v. State*, 31 Md. App. 85, 94 (1976); *Braxton v. State*, 11 Md. App. 435, 441 *cert. denied*, 262 Md. 745 (1971)), and **three** respected Treatises (2A Charles Alan Wright & Peter J. Henning, FEDERAL PRACTICE & PROCEDURE (2009 supp.) § 492; 5 McLain, Maryland Evidence (2d ed., 2001, 2009 supp.), § 404:1.a.i; 1 McCormick on Evidence § 191, at 812-14 (John W. Strong ed., 4th ed. 1992)), to which the State provides no response.

\$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 ¶ 61 (emphasis added)). Throughout the trial, beginning with opening statement and concluding with its closing argument, the State harped on the essence of its case as being Ms. Dixon’s intentional conversion to her own use of the Turner gift cards, depriving the needy of Baltimore. *See, e.g.*, State’s references to stealing from the needy in its Opening (Exhibit 10, 11/12/09 at Tr. 3-4, 5, 6, 7, 8-9, 12, 15, 17, 19, 20, 21, 22, 23, 24-25, 26, 27, 28). Character traits of generosity and charity are obviously relevant to such a charge, which is why such evidence has been admitted in the cases and treatise cited by the Defendant.

Rather than addressing the obvious and undeniable relationship between the State’s charges that Ms. Dixon stole from the needy and Ms. Dixon’s character traits for generosity and charity, the State contends, contrary to Maryland law, that the proffered evidence was somehow not pertinent because it was not related to the only *defense* for which Ms. Dixon was allowed to present evidence, the so-called “mistake of fact.” *See* State Opposition at 33-34. The State chooses to ignore the crucial issue that was central to the case, which was whether the State met its burden of proving that Ms. Dixon acted with the intent of depriving the needy, who were the alleged beneficiaries of the gift cards allegedly delivered to Ms. Dixon. Ms. Dixon’s character traits for generosity and charity were directly relevant and germane to the issue of criminal intent because they would have provided the basis for a jury finding that Ms. Dixon would not have intended to take property that she believed or understood to be for the needy.

Indeed, the State’s own proposed jury instructions, which the Court gave, included the requirement that the jurors find that Ms. Dixon acted intentionally and willfully, with the purpose of misappropriating the Turner gift cards to her own use. Because the State was required to

prove Ms. Dixon's intent, her character traits for generosity and charity were admissible to prove that she was not likely to have stolen from the needy when she has devoted her life to assisting the underprivileged. As the proffered evidence showed, Ms. Dixon personally donated more than \$30,000 to her church alone and contributed generously to a program that gives Christmas presents to needy children during the same period of time that she was alleged to have misappropriated a handful of gift cards intended for the poor.

The State's attempt to marry the evidence of Ms. Dixon's character traits for generosity and charity to the defense of "mistake of fact" unquestionably underscores the unfair prejudice that the Court's ruling had on Ms. Dixon in her ability to counter the charge that she acted with the requested criminal intent. As the jury instruction presupposes, character evidence is often associated with the criminal intent element that the State must prove for crimes such as misappropriation by a fiduciary. In particular, this Court instructed the Jury that, "To convict the defendant [of misappropriation of a fiduciary], the state must not only demonstrate the existence of a fiduciary relationship, but also the existence of a specific intent of fraud and willfulness by the Defendant." Md. Pattern Jury Inst. 4:22 (emphasis added). Indeed, the State's opposition makes clear that Ms. Dixon was unfairly precluded from showing through highly relevant and germane character evidence that she lacked the very criminal intent the State was required to prove.⁹

⁹ Because this issue first arose in the context of the State's motion in limine to exclude evidence of Ms. Dixon's character traits, the Defendant was hampered from the outset in presenting her defense. For example, though the State repeatedly described acts of Ms. Dixon as stealing from the needy, defense counsel were limited in opening statement and could not, based on this Court's ruling in limine, 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.

In order to avoid the unmistakable conclusion that the charges of misappropriation from the needy is pertinent to character traits for generosity and charity, the State wants the Court to re-write the law and rule that character evidence is only admissible if it related to “the nature of the defense in such a case.” State’s Opposition at 33. The State, however, cites no case for this remarkable and completely erroneous limitation.

In addition to being totally inconsistent with the scope of admissibility of character evidence as set forth by the Court of Appeals, *supra*, the State’s contention is also dramatically inconsistent with the very jury instructions it proposed, and which the Court followed.¹⁰ As this Court instructed, the Jury was permitted to “decide that it is unlikely that a person possessing these traits of good character would have committed the *crime charged*.” Md. Pattern Jury Inst. 3:20 (emphasis added). And, as the several authorities provided by the defense make clear, character evidence *alone* can be a defense to a criminal charge. *See* footnote 8 above.

The State’s effort to attempt to distinguish two of the cases offered by the defense is misguided. In particular, the State attempts to distinguish *United States v. Bonner*, 302 F.3d 776, 781-82 (7th Cir. 2002), and *United States v. Holloway*, 740 F.2d 1373, 1379 (6th Cir. 1984), by claiming that the character evidence in those cases either related to the defense or the prosecution did not object. Again, in each of these cases, the court allowed character traits for generosity and charity without any question. Moreover, the State has no answer for, and simply ignores, the case of *United States v. Nachamie*, 28 Fed. Appx. 13, 2002 WL 108341, *21 (2d Cir. 2001), in which the court ruled that charges that a defendant misappropriated funds intended for senior

¹⁰The defense objected and continues to contend that Maryland Pattern Jury Instruction 3:20 does not fully articulate the well-settled law of the Supreme Court and Maryland Courts, which state that character evidence *alone* is sufficient to raise reasonable doubt that a defendant would commit the crime alleged. *See Michelson v. U.S.*, 335 U.S. 469, 476 (1948); *Edgington v. United States*, 164 U.S. 391, 366 (1896); *Sahin*, 337 Md. at 310; *Hennessy v. State*, 37 Md. App. 559 (1977); *Cardin v. State*, 73 Md. App. 200 (1987).

citizens could be met with character evidence that the defendant engaged in charitable work for the elderly. Exchanging the term “elderly” with “needy” makes *Nachamie* completely indistinguishable from the present case – except that Ms. Dixon did not just work for the needy, she gave freely of her financial resources as well.

The State’s reliance upon *United States v. Manfredi*, 2009 U.S. Dist. LEXIS 104109, 104 A.F.T.2d (RIA) 7372 (2009), is a thin reed upon which to stand. The State cites this case for the unremarkable statement that, “The Government’s burden is not [to] prove that the Defendant is greedy.” State Opposition at 35. In *Manfredi*, the defendant was charged with stealing a large amount of government funds. In affirming the conviction, the court ruled that the defendant was not allowed to answer these charges with evidence of his nonspecific generosity. Unlike the facts in the present case and in *Nachamie*, however, there was in *Manfredi* no relationship between the charge of stealing from the government and the proffered character trait of generosity generally to others. In contrast, in *Nachamie* and in the current case, there were direct relationships between charges that defendants misappropriated funds from particular classes of victims (*i.e.*, the elderly and needy) and their character traits for giving to those classes of victims (*i.e.*, the elderly and needy). Thus, *Manfredi* and *Nachamie*, read together, fully support Ms. Dixon’s position that she was entitled to present such character evidence.

Realizing the weakness of the position it has staked out, the State seeks to backstop its argument by tossing up Maryland Rule 5-403, even though it never raised this point before.

Rule 5-403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Md. Rule 5-403 (emphasis added).

Appellate courts in Maryland will reverse trial court errors in applying Rule 5-403 where the appellate court cannot conclude, “beyond a reasonable doubt that error in no way influenced the verdict.” *Pickett v. State*, 120 Md. App. 597, 607, 707 (1998) (quoting *Graves v. State*, 334 Md. 30, 43 (1994) and citing *Dorsey v. State*, 276 Md. 638 (1976)). This should be especially so for a defendant offering evidence of her good character, which as discussed above, can raise reasonable doubt. *See* cases cited in Footnote 8 above; *see also Brown v. Haynes*, 385 F. Supp. 285 (D. Mo. 1974) (citing *Michelson v. United States*, 335 U.S. 469, 476 (1948)) (“A defendant in turn, to whom the law does not invest with a presumption of good character, is accorded the privilege or option of initially introducing evidence of his good character on the theory that such circumstantial evidence might bear on the probability that he did not commit the act charged.”).

In misapplying Rule 5-403, the State claims that the probative value of the proffered evidence of Ms. Dixon’s character traits for generosity and charity are “negligible” and that the introduction of such evidence “may mislead the jury or confuse the issue at hand.” State’s Opposition at 36. The State posits a balancing exercise that is simply inaccurate and contrary to settled law. The Court obviously recognized that character evidence had probative value, as it permitted the Defendant to offer such evidence as to her “honesty.” To suggest, as the State does, that admitting evidence of her charity and generosity would have either confused or misled the Jury is simply baseless. As noted above, the proffered character evidence alone would have been enough to raise reasonable doubt, belying any contention that its probative effect would have been “negligible.” Clearly, the proffered evidence that Ms. Dixon gave generously to a program designed to give Christmas presents to needy children “constitutes circumstantial evidence that the accused is unlikely to” commit the alleged crime of misappropriation of funds intended for the needy, making it probative. *Sahin*, 337 Md. at 312 (citing *United States v.*

Jackson, 588 F.2d 1046, 1055 (5th Cir.), *cert. denied*, 442 U.S. 941 (1979); *Grant v. State*, 55 Md. App. 1, 39, *cert. granted*, 466 A.2d 39 (1983), and *cert. dismissed*, 299 Md. 309 (1984)).

Moreover, in claiming that the prejudicial effect of evidence of Ms. Dixon's good character traits for generosity and charity *may* outweigh its probative value, the State attempts to re-invent the case that it presented to the Jury. Without referencing the universal theme, in which the State described Ms. Dixon's acts as "stealing from the needy," the State now characterizes "the evidence of what transpired" as "the solicitation, receipt and use of gift cards in question and not [] the performance of Sheila Dixon as Mayor or as an active church contributor." State Opposition at 36-37. This revision of the State's case can only be understood to mean that the State is aware that the evidence of the disputed character traits would not be unfairly prejudicial to the State in light of its charges – much less in a way that "substantially outweighs" its probative value.

And, as the State reminds the Court, its original rationale for opposing character evidence of Ms. Dixon's generosity and charitable giving was only to prevent a "referendum on her performance as a public official." State Opposition at 36 (quoting State's Motion in Limine at 1). Yet, the State tries to gloss over the fact that the witnesses who Ms. Dixon offered to demonstrate her character traits were members of her church who played no part in Ms. Dixon's mayoral administration. The State further wishes to overlook the important detail that the proffered evidence related purely to Ms. Dixon's personal, selfless and, heretofore, completely private and unpublicized acts.

When one steps back and views the inflammatory nature of the State's allegations, after accounting for three days of the excluded Lipscomb testimony, one is hard-pressed to find any prejudice to the State whatsoever by the admission of the proffered evidence. To the contrary,

the Court's exclusion of the evidence of Ms. Dixon's good character traits for generosity and charity unfairly prejudiced her ability to present her full defense to the Jury, and was reversible error that mandates a new trial.

V. A New Trial Should Be Granted Because Of Error In The Giving Of Repeated *Allen*-Type Charges

The State suggests that the defense has taken the Court's impromptu statement to the members of the Jury that they "should attempt, to the best of your ability, to see if you're able to resolve all of the counts" out of context and that the instruction should be "read as a whole." But the surrounding circumstances do not diminish the thrust of the Court's instruction: that the Jury should renew its deliberation with the goal of reaching an agreement on all counts. In fact, after stressing that the jurors should resolve all counts, the Court also told the Jury that if it engaged in that discussion and could not resolve all counts, "the Court will then decide the next step," and, in addition, gave a further instruction that, as the defense then observed, served to "aggravate things." (Exhibit 26, 12/1/09 at Tr. 9).

The Court's initial improvised instruction was similar in nature to a statement in *Thompson v. State*, 371 Md. 473 (2002), in which the Court of Appeals reversed a criminal conviction for possession and distribution of a controlled substance. The Court held that the judge deviated from the pattern "duty to deliberate" jury instruction by including in its instruction to the jury that "the final test of the quality of your service will lie in the verdict which you return to the Court, not in the opinions any of you may hold as you retire." *Id.* at 486. Though, as here, the trial judge believed that he was merely emphasizing the duty to deliberate, the Court of Appeals held that:

The language of this instruction does not "reasonably adhere to" the ABA Standards. This is especially true of the language that suggests "the final test of the quality of your service will lie in the verdict which you return to

the Court, not in the opinions any of you may hold as you retire.” This concept of a “final test” implies that there is a standard of service to which a juror should aspire, one that requires a verdict to be reached rather than one that requires consideration of individual conviction and whether individual conviction thoughtfully can be reconciled with collective judgment.

Id. at 486. When this Court told the Jury to try to reach a unanimous verdict on all counts, the implication, the same as the express statement in *Thompson*, was that the Jury would be measured by its ability to accomplish that goal.

The State concedes that it was the Court’s initial extemporaneous instruction that led the Court to follow that instruction immediately with a full ABA *Allen*-type charge. In other words, after the Defendant’s attorneys pointed out the effect of the Court’s impromptu remarks, the Court felt compelled to attempt to fix the problem. The Court’s solution, however, only further instilled in the Jury the recognition that the Court desired a verdict. Judge Eldridge’s quotation from *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen charge*, 53 Va. L. Rev. 123, 143 (1967), is appropriate here:

If the *Allen* charge in fact influences a juror to vote for conviction notwithstanding a conscientiously held belief that the state has not proved its case beyond a reasonable doubt, the defendant has been denied due process of law, since he has been convicted not on the basis of evidence presented in court but rather because of the juror's response to what he takes to be the desires of the judge.

Burnette v. State, 280 Md. 88, 94 (1977).

It is clear from *Burnette* and the several other cases cited by the defense, for which the State has no answer in opposition, that the giving of a second “dynamite charge” without any indication from the Jury that they were at “loggerheads” and with no request from counsel for an *Allen*-type instruction (to the contrary, over the objection of defense counsel), in order to correct a prior coercive instruction, is itself unduly coercive and grounds for reversal. See Defendant’s Memorandum at 35-36 (citing *Butler v. State*, 392 Md. 169 183 (2006) (reversing conviction on

basis that trial court's sua sponte comments to the jury made as a result of a note and not requested by the State or the defense were coercive); *Thompson*, 371 Md. at 486; *Burnette*, 280 Md. at 99-100 (reversing criminal conviction because trial court deviated from ABA *Allen*-type instruction in substance); *Fowlkes v. State*, 53 Md. App. 39, 45 (1982), *cert. denied*, 295 Md. 301 (1983) (holding issuance of ABA compliant *Allen*-type instruction prior to jury expressing a deadlock to be coercive and reversible error); *Pinder v. State*, 31 Md. App. 126, 130-37 (1976) (reversing criminal conviction where trial court *sua sponte* gave *Allen*-type instruction that deviated from ABA standards).

The Maryland appellate courts have scrupulously examined cases in which an *Allen* charge was given, and have reversed convictions under similar circumstances to those present here. In *Fletcher v. State*, 8 Md. App. 153, 154-157 (Md. App. 1969), the court reversed a conviction where the trial judge issued an *Allen*-type charge before the jury indicated it was deadlocked. In *Miller v. State*, 10 Md. App. 157 (Md. App. 1970), the court reversed yet another case where the trial judge sua sponte issued its *Allen*-charge.

Even if the State had been correct that the Court's first statement to the Jury did not constitute an *Allen* charge, it is nonetheless, subject to "a high level of scrutiny." *Butler*, 392 Md. at 181. In *Butler*, the trial judge received two notes from the jury in succession, similar to the course of deliberations here. In the first note, the jurors asked to view videotape of the closing arguments. While the court and counsel were considering this issue, a juror sent a second note that stated the juror's belief that one of the other jurors would not trust police no matter the circumstances. Subsequently, the trial judge summoned the jury to the courtroom to discuss the first note, but in doing so, stated with respect to the second note the judge's belief that any juror deliberating with a distrust of the police might be violating his or her oath as a

juror. *Id.* at 178. Though the trial judge believed this to be, “a very gentle mention of the fact” (*id.* at 179), the Court of Appeals disagreed and reversed the conviction, stating:

The judge's actions need not be intentional to inappropriately influence the jury.

* * * * *

In the present case, the trial judge stated that he considered the statement to the jury “a very *gentle* mention of” the alleged illegality of the juror's position and that, therefore, the statement was not coercive. As gentle as the admonishment may have appeared to the judge, it may have carried great weight in the minds of the jurors (especially the mind of the juror who allegedly held certain views about police officers) who may be very susceptible to a judge's words and instructions.

Id. at 182. (emphasis in original).

Quoting prior authority, the Court of Appeals admonished trial judges to “*zealously guard against any actions or situations which would raise the slightest suspicion that the jury in a criminal case had been [improperly] influenced ... so as to be favorable to either the State or the defendant*” and to “remain ever vigilant in order to avoid conveying any idea as to what he thinks the jury's verdict should be or suggesting the slightest partiality” *Id.* at 181-82 (quoting *Jenkins v. State*, 375 Md. at 339-40 and *State v. Hutchinson*, 287 Md. 198, 206 (1980)) (emphasis in original). In *Butler*, the Court of Appeals reversed the trial court's conviction, stating further that:

The right to a fair trial guaranteed by the Sixth Amendment of the United States Constitution and Article 21 of Maryland's Declaration of rights requires that judges refrain from making comments which potentially may improperly influence the jury or a specific juror or jurors. The judge's comment, made during jury deliberations in the case *sub judice*, was potentially coercive and, as a result, petitioners may have been denied their constitutional right to a fair trial.

Butler, 392 Md. at 192.

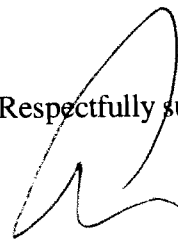
In addition to issuing the instruction when it was not called for, the language employed by the Court came nowhere close to the ABA approved language. In *Kelley v. State*, 270 Md.

139 (1973), the Court of Appeals laid out guidelines for trial courts to follow with regard to issuing an *Allen* charge. Among other things, the Court directed that after the jury retires, “the trial court should closely adhere to the wording of the American Bar Association recommended instruction; and that in the absence of such adherence a reviewing court will carefully scrutinize the language of the charge to determine whether the jury has been coerced or its province invaded,” *Id.* (quoting *Burnette*, 280 Md. at 97).

One of the most important factors courts examine to determine whether an *Allen* charge was coercive is the time period that the jury deliberated before and after the charge was given. *See, e.g. Taylor v. State*, 17 Md. App. 41, 299 A.2d 841 (1973). Here, the Jury had deliberated for almost seven days and were unable to reach a verdict with respect to essentially two transactions. Yet, after the Court’s unsolicited *Allen* charge, the Jury returned with its verdict in a mere two hours. Thus, the timing of the instruction and the Jury’s verdict demonstrate the coercive effect, such that a new trial is warranted.

The Jury understood that the Court wanted a verdict. The Jury complied and, after having been deliberating for seven days, quickly returned a verdict within just two hours. Though the Court may not have intended its comments made during jury deliberations to have been coercive and may have believed that they were innocuous, it is clear from the above-cited authorities that these comments had the potential of improperly influencing the Jury, and, as taught in *Butler*, a defendant is entitled to a new trial when such a statement “may have” deprived the defendant of a fair trial.

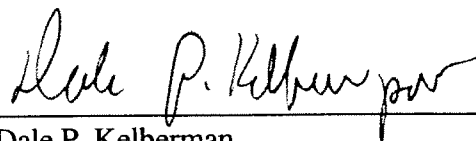
Respectfully submitted,



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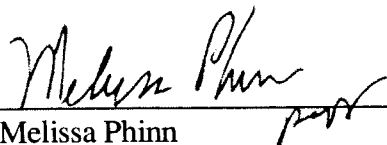
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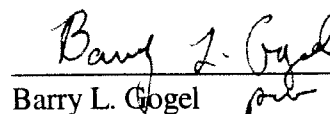
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CERTIFICATE OF SERVICE

I HEREBY certify that on this 29th day of December, 2009, copies of the foregoing Reply 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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