

STATE OF MARYLAND

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IN THE CIRCUIT COURT

\*

OF MARYLAND

v.

\*

FOR

HELEN L. HOLTON

\*

BALTIMORE CITY

Defendant

\*

Case No.: 109007007

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**REPLY TO STATE'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

**INTRODUCTION**

The State's Opposition to Helen Holton's Motion to Dismiss by its silence concedes that the four counts of the indictment are based upon her legislative acts taken in the city council and that those acts, presented to the grand jury, were the basis for her prosecution. The State's argument in opposition is simply that while Maryland's Speech and Debate Clause would prevent the use of such acts as proof of criminal activity if Ms. Holton were sitting as a legislator in Annapolis, the privilege and immunity does not extend to city legislators. In support the State argues:

- 1.) The literal words of the Speech and Debate Clause do not cover her city council position; that only common law immunity provides protection for such posts and that
- 2.) The common law immunity that provides protection against liability extends to civil liability, but not criminal prosecution.

In making these arguments the State, not surprisingly in view of the concessions it must make based on the record in the grand jury, completely misreads and misconstrues Helen Holton's motion. Its argument ignores the historical underpinnings of the privilege, the common law principles upon which it was based, and Supreme Court and Maryland precedent. It fails to address the central issue

posed by Ms. Holton directed at the use of otherwise undisputed legislative acts as evidence in a criminal prosecution against a local legislator. Much like the Wizard in the *Wizard of Oz*, the State's argument when analyzed is without any substance or foundation and cannot stand on its own merit and must be rejected. Ms. Holton's motion must be granted.

## ARGUMENT

### I. The Defendant's Motion

It bears repeating that despite the State's attempt to characterize Ms. Holton's Motion to Dismiss as one based on a claim of immunity from criminal prosecution that is hardly the case. In fact, the motion very carefully notes that dismissal is warranted because the State used privileged acts to obtain the indictment and it is the reliance on such acts to indict that requires dismissal. Indeed pages 8-13 of the motion are devoted to the argument that **"The Speech and Debate Clause protects against use of legislative acts as evidence at trial and before the grand jury"**. Nowhere in her motion did Ms. Holton "contend that she is immune from criminal prosecution" (State's Opposition at 1). As the cases cited by Ms. Holton in her motion clearly note, she is not. She is however immune from having the evidence of her legislative acts used by the State Prosecutor to prosecute or convict her. The State's attempt to obfuscate the difference between immunity from prosecution and immunity from the use of legislative acts to indict and try a legislator, while understandable, is without any precedential support. Maryland caselaw makes it very clear that the scope of any "immunity" whether civil or criminal, that flows from Maryland's Speech and Debate Clause language is based on a functional test of whether the acts relied upon to prove the cause of actions are legislative and thereby protected or not. *See Manders v. Brown*, 101 Md. App. 191, 206-210, 643 A2d. 931 (1994).

## II. The State's Arguments

A.) With regard to the argument that the actual language of the clause does not extend to city council people, the short response is "so what?". The Supreme Court and, by force of *in pari materia* interpretation, Maryland Courts have given the Clause a broad reading to fulfill the historic purposes of the Clause. The claim that "there is no historical or logical basis to extend the Speech and Debate Clause to subordinate legislative bodies of political sub-divisions of the State" (State's Opposition at 3) demonstrates exactly the type of executive branch arrogance and vindictiveness the privilege attendant to the Speech and Debate Clause was designed to protect legislators from facing in the exercise of their legislative functions. There is every reason to extend the Clause to cover the legislative acts of local city and county councilmen who exceed in number state delegates and senators and whose legislative acts are subject to the same pressures of the local executive and judicial branches of government as are office holders in Annapolis. The Supreme Court has had no trouble extending the principle of the Clause to regional legislators or observing that the same considerations attend city legislators. *See Spallone v. United States*, 493 US 264, 278-279 (1990) (and cases cited therein). More importantly, Maryland caselaw does the same. *See Montgomery County v. Schooley*, 97 Md. App. 107, 627 A2d. 69 (1993); *Manders v. Brown*, *supra*.

B.) The State's second argument that any immunity from liability is limited to civil causes is a wishful, but substantively lifeless argument. The truncated historic analysis provided by the State and its reliance on a Rhode Island case fails to provide the appropriate historic context. A more detailed analysis demonstrates the lack of substance of the State's Opposition:

In *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783 (1951), Justice Frankfurter wrote:

The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth centuries. As Parliament achieved increasing independence from the crown, its statement of the privilege grew stronger. In 1523, Sir Thomas More could only make a tentative claim. Roper, *Life of Sir Thomas More*, in *More's Utopia* (Adams ed.) 10. In 1668, after a long and bitter struggle, Parliament finally laid [to rest] the ghost of Charles I, who had prosecuted Sir John Elliot [in 1629] and others for 'seditions' speeches in Parliament. Proceedings against Sir John Elliot, 3 How. St. Tr., 294, 332. In 1689, the Bill of Rights declared in unequivocal language: 'That Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.' 1 Wm. & Mary, Sess. 2, c.II. See *Stockdale v. Hansard*, 9 Ad. & El. 1, 113-114 (1839).

*Tenney v. Brandhove*, *supra*, 342 U.S. at 372.

The growth of the legislative privilege was caused by the need of members of the House of Commons to have some degree of protection from a Crown long accustomed to utilizing criminal prosecutions to silence legislative critics. The ultimate appearance of the legislative privilege language in the 1689 English Bill of Rights came as Parliament's reaction to King James II's criminal prosecution of Sir William Williams for sedition for his participation in the publication of Dangerfield's Narrative in the Commons Journal in 1686. Proceedings against Sir William Williams, 13 How. St. Tr. 1370 (1684-1695)<sup>1</sup>

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<sup>1</sup>For an interesting study of the evolution of the privilege in England, see Reinstein and Silvergate, *Legislative Privilege and the Separation of Powers*, 86 Harv.L.Rev. 1113, 1122-1136 (1973). The Dangerfield Narrative was a fact laden accusation that the Crown was an integral player in a secretive effort to outlaw the practice of any religion but Catholicism in England. *Id* at 1131. There were numerous criminal prosecutions initiated by the Crown against "seditions" members of the House of Commons. *Id*.

Justice Frankfurter correctly found that:

Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution. Article V of the Articles of Confederation is quite close to the English Bill of Rights.

*Tenney v. Brandhove*, *supra*, 341 U.S. at 372.

The critical importance of Justice Frankfurter's opinion in *Tenney* is that he found overwhelming historical support and English precedent for the position that the legislative privilege was part of English common law<sup>2</sup> and that the privilege at common law protected legislators in the exercise of their office from both criminal and civil prosecutions. Justice Frankfurter quoted with approval from an early Massachusetts case: "These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal." *Coffin v. Coffin*, 4 Mass. 1, 27 (1808). Indeed, Justice Frankfurter found that the Speech or Debate Clause in the United States Constitution was adapted with little debate because it represented a codification of a universally recognized privilege at common law. "The provision of the United States Constitution [U.S. Const., art. 1 § 6] was a reflection of political principles already firmly established in the States." *Id.* 341 U.S. at 373.

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<sup>2</sup>Justice Frankfurter held that the legislative privilege existed in the law of any State that adopted English common law. *Tenney v. Brandhove*, *supra*, 341 U.S. at 374, FN3. "In two State Constitutions of 1776, the privilege was protected by general provisions preserving English law. See S. Car. Const. 1776, Art. VII; N.J. Const. 1776, Art. XXII. Compare N. Car. Const. 1776, Part II, Art. XLV."

Maryland has a similar reception clause stating specifically that the common law and statutes of England as of July 4, 1776 are applicable in Maryland. Md. Const., Art. 5(a)(1).

Thus, the State's argument that the legislative privilege under common law applies only to civil actions is simply wrong. The State's reliance on *United States v. Gillock*, 445 U.S. 360, 100 S.Ct. 1185 (1980) and *United States v. Craig*, 537 F.2d 957 (7<sup>th</sup> Cir. 1976) [affirming en banc the concurring opinion in *United States v. Craig*, 528 F.2d 773 (7<sup>th</sup> Cir. 1976)] is misplaced and displays the State's basic misunderstanding of the different treatment of the legislative privilege in Maryland law as opposed to Federal law.

In *Gillock*, the Defendant was a state legislator in Tennessee under indictment in the United States District Court for the Western District of Tennessee for bribery and racketeering. Gillock had moved to suppress the evidence against him on the basis of legislative privilege. The District Court and the Court of Appeals for the Sixth Circuit both acknowledged the existence of a legislative privilege applicable to State legislators. The United States Supreme Court reversed in an opinion authored by Justice Rehnquist. The sum and substance of the *Gillock* opinion was that Rule 501 of the Federal Rules of Evidence controlled the application and consideration of privilege issues in Federal criminal cases.<sup>3</sup> The entire opinion in *Gillock* dealt with the application of Federal privilege

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<sup>3</sup> "Rule 501 provides in full:

'Except as otherwise required by the Constitution of the United States as provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as that may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law.'

*United States v. Gillock*, 445 U.S. at 368, F.N.6.

law in criminal cases brought in Federal courts. In that context, State privilege law was irrelevant. “Thus, the fact that there is an evidentiary privilege under Tennessee Constitution, Art. II, § 13, which Gillock could assert in a criminal prosecution in state court does not compel an analogous privilege in a federal prosecution.” *United States v. Gillock*, 445 U.S. at 368. Rule 501 differentiates between criminal and civil actions in the treatment by the Federal courts of State privilege law. This difference of treatment of State privilege law in civil and criminal cases is a result of the 1975 creation of the Federal Rules of Evidence. There is no corresponding limitation on the application of Maryland privilege law to criminal cases tried in Maryland courts.

The basis of the opinion of the United States Court of Appeals for the Seventh Circuit in *United States v. Craig, supra*, was also Rule 501 and the refusal of Federal courts in criminal cases to recognize any official immunity for State legislators based in Federal common law. *Id.* 528 F.2d at 781. *Gillock* and *Craig*, as well as *Thillens, Inc. v. Community Currency Exchange of Illinois, Inc.*, 729 F.2d 1128 (7<sup>th</sup> Cir. 1984), *cert. dismissed*, 429 U.S. 976 (1984) and the other Federal cases cited by the State (for the proposition that common law official immunity does not extend to criminal liability) are absolutely inapplicable to the treatment to be given to a claim of legislative privilege made by a local legislator in a criminal case in a Maryland court.

### III. Maryland Case Law

To ascertain the extent and applicability of the legislative privilege to a Maryland case tried in the courts of Maryland the proper law to be examined is the law of Maryland. *Montgomery County v. Schooley*, 97 Md. App. 107, 627 A.2d 69 (1992), acknowledges the applicability of the common law doctrine of official immunity to members of local and regional legislative bodies. *Id.*, 97 Md. App. 114-115.<sup>4</sup> Neither *Schooley* nor any other Maryland case has ever held the common law legislative privilege does not apply to the defense of a Maryland criminal prosecution.

Given *Schooley's* recognition of the common law privilege, its application to local legislators and the absolute absence of any Maryland precedent making the privilege inapplicable in Maryland criminal cases, there is no support in Maryland law for the State's position. The common law and English history of the privilege establishes its applicability to criminal cases in States preserving and adopting English common law and statutes. Maryland is such a State.

Of course, as Ms. Holton specifically stated in her motion, she acknowledges that the

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<sup>4</sup> In *Schooley*, Chief Judge Wilmer acknowledged that the common law legislative privilege was inapplicable in Federal criminal prosecutions. "The source, nature, and scope of this common law privilege are not altogether clear and, to some extent, may depend on the context in which the privilege is asserted. When invoked in defense of a Federal criminal prosecution, for example, the common law privilege has been held to be inapplicable-'trumped' by the Supremacy Clause in the U.S. Constitution. *United States v. Gillock*, 445 U.S. 360, 100 S.Ct. 1185, 63 L.Ed.2d 454 (1980). When there is no such paramount Federal interest, however, the privilege has been respected by both Federal and State courts." *Id.* at 73. The intellectual dishonesty of the State's argument is encapsulated in its 'quote' from *Schooley, infra* at page number 3 of its Opposition. There the state quotes "...the State or Federal Constitutional immunity provisions....apply only to the members of the legislative bodies formed mentioned within them." In the very next sentence the court unequivocally states "the doctrine articulated in those provisions has, however, been regarded as applicable to members of local and regional bodies....as a matter of common law...." *Id.*

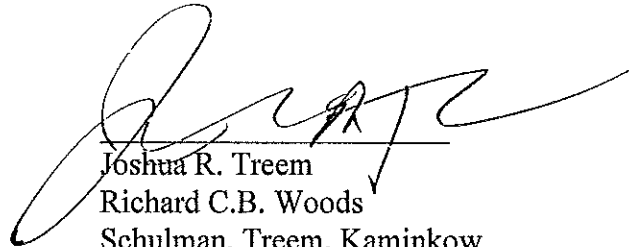
legislative privilege does not mean local legislators cannot be prosecuted for criminal acts. Acts in contravention of Maryland criminal statutes are not immune from prosecution simply because the alleged perpetrators are local legislators. However, in initiating and prosecuting such criminal actions, the State cannot obtain an indictment or secure a conviction based on evidence protected by the legislative privilege. *Blondes v. Maryland*, 16 Md. App. 165, 177, 294 A.2d 661, 667 (1972). This is the same principle articulated in *United States v. Brewster*, 408 U.S. 501, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972) and *Gravel v. United States*, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583(1972), and most recently in *United States v. Jefferson* 546 F.3d 300 (4<sup>th</sup> Cir. 2008). The criminal prosecution of a legislator is not prohibited by the privilege, but neither the indictment nor the trial can be based upon evidence of or inquiry into a legislative act or the motivation for a legislative act. *Blondes v. Maryland, supra*, 16 Md. App. at 177.

In Maryland, this concept of legislative privilege as an evidentiary privilege, (as opposed to blanket immunity) is firmly established not only in criminal prosecutions but also in civil actions against local legislators. *Manders v. Brown, supra*. (Not surprisingly the State completely ignores *Manders* in its Opposition.) Persons, including state officials, acting under color of state law are not immune from civil liability. See e.g. 42 U.S.C. § 1983. Similarly they are not immune from suits alleging tortious conduct. See e.g. *Manders, supra*. However, such cases cannot be based upon legislative acts. The limitations placed on the scope of the privilege do not turn on the status of the legislator, but rather on whether the acts upon which the civil cause of action or criminal prosecution is based legislative in nature. If the acts are within the legislative function they are protected, and cannot be used to find civil liability or to convict.

## CONCLUSION

The “unworthy acts” in the civil case based on alleged bribery and fraud in *Thillens, supra*, differ from those alleged in *Brewster, supra*, only in the name of the party bringing the action. It is the function of the legislator and nature of the acts that triggers the privilege. If the State wishes to convene a new grand jury, present evidence not privileged under the Speech and Debate Clause, obtain an indictment and try Ms. Holton without violating her Constitutional protections, the State can try. However, on this record and at this stage of the case it is undisputed that the State used extensive evidence of the legislative acts (including voting records and council minutes) to persuade the Grand Jury to return an Indictment that contained specific allegations centered on protected legislative acts. The privilege applies and the acts cannot be used to indict Ms. Holton. They were. The grand jury presentment was defective and the indictment invalid.

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 31<sup>st</sup> day of March, 2009, a copy of the foregoing *Reply to State's Opposition to Defendant's Motion to Dismiss* was sent via first class mail, postage paid to:

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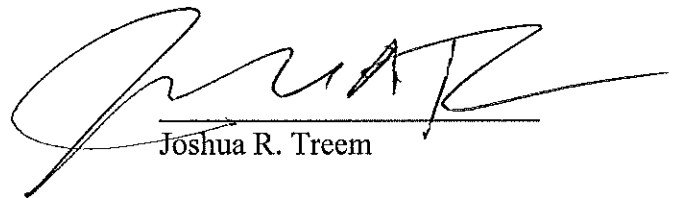
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