

STATE OF MARYLAND

*

IN THE CIRCUIT COURT

*

OF MARYLAND

v.

*

FOR

HELEN L. HOLTON

*

BALTIMORE CITY

Defendant

*

Case No.: 109007007

* * * * *

SUPPLEMENTAL MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

Helen L. Holton, by her counsel, Joshua R. Treem, Richard C.B. Woods and Schulman, Treem, Kaminkow & Gilden, P.A., and pursuant to the United States Constitution, Articles 21 and 24 of the Maryland Declaration of Rights, and Rule 4-252 of the Maryland Rules of Criminal Procedure, hereby moves this Honorable Court to dismiss the Indictment returned herein against her and in support thereof states:

I. The Legal Requirements of an Indictment

The Due Process Clause of the United States Constitution, and its sister provisions in Articles 21 and 24 of the Maryland Declaration of Rights, establish certain fundamental thresholds that a charging document must meet in order to pass constitutional muster. The Supreme Court held in *Russell v. United States*, 369 U.S. 749, 763 (1962) that an indictment is insufficient if it does not “contain the elements of the offense intended to be charged, and sufficiently apprise the Defendant of what he must be prepared to meet.” In *Hamling v. United States*, 418 U.S. 87 (1974) the Court identified two constitutional requirements for an indictment: “first, [that it] contain the elements of the offense charged and fairly informs a Defendant of the charge against which he must defend, and, second, [that it] enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Id.* at 117. *See also, Brown v. State*, 285 Md. 105 (1979); *United States v. Loayza*, 107 F.3d 257, 260 (4th Cir. 1997) (“in order

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to be legally sufficient, an indictment must contain the elements of the offense charged, fairly inform a Defendant of the charge, and enable the Defendant to plead double jeopardy as a defense in a future prosecution for the same offense”) (citations omitted). *Accord United States v. Smith*, 44 F.3d 1259, 1263 (4th Cir. 1995).

As the Supreme Court recently observed, “while an indictment parroting the language of a federal criminal statute is often sufficient, there are crimes that must be charged with greater specificity.” *United States v. Resendiz-Ponce*, 127 S. Ct. 782, 789 (2007). As the Court held long ago, an elementary principle of criminal pleading requires that, where the definition of an offense includes generic terms, it is not sufficient to allege the offense in the same generic terms, but the indictment must “descend to particulars.” *United States v. Cruikshank*, 92 U.S. 542, 558 (1875). Put another way, an indictment not framed to apprise the Defendant “with reasonable certainty, of the nature of the accusation against him is defective, although it may follow the language of the statute.” *United States v. Simmons*, 96 U.S. 360, 362 (1877).

As the Maryland Court of Appeals has held, an indictment is measured by the “facts stated in the indictment.” *Duncan v. State*, 282 Md. 385 (1978). Indictments are subject to “strict scrutiny,” and for a valid indictment, “all matters material to constitute the crime [must be] alleged with such positiveness and directness, as not to need the aid of intendment or implication.” *Hall v. State*, 57 Md. App. 1, 468 A.2d 1015 (Md. App. 1983), citing *Deckard v. State*, 38 Md. 186, 201 (1873). ‘(A) criminal charge must so characterize the crime and describe the particular offense so as to give the accused notice of what he is called upon to defend and to prevent a future prosecution for the same offense.’ *State v. Canova*, 278 Md. 483 (1976), quoting *Corbin v. State*, 237 Md. 486, 490, 206 A.2d 809, 811 (1965).

Even if the charging document employs the statutory words, this does not mean that 'it is unnecessary to allege such facts in connection with the commission of the offense as will certainly put the accused on full notice of what he is called upon to defend, and establish such a record as will effectually bar a subsequent prosecution for that identical offense . . . However, it is clear that an indictment which charges the accused with the act prohibited by the statutory language, and does nothing more, would be fatally defective in failing to allege such other facts as would enable the accused to prepare his defense.

Id. at 499.

Rule 4-202 of the Maryland Rules of Criminal Procedure requires that the indictment contain a “concise and definite statement of the essential *facts* of the offense with which the defendant is charged.” (emphasis added). The Rule is designed to satisfy three constitutionally-required functions. First, it fulfills the Sixth Amendment guarantee that a defendant be informed of the nature and cause of the accusation. Second, it serves to define the offense to prevent any person from being placed in double jeopardy, in violation of the Fifth Amendment. And finally, the indictment insures the Fifth Amendment protection to guarantee that no person be held to answer “unless on a presentment or indictment by a Grand Jury.” Because Articles 21 and 24 of the Maryland Declaration of Rights are read *in para materia* with these federal requirements, *Lodowski v. State*, 307 Md. 233 (1983), Rule 4-202 also serves to satisfy the same Maryland Constitutional requirements.

“The rationale for these rules is clear: they guard against the possibility, however slight, that a Defendant could be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him. “ *United States v. Abrams*, 539 F. Supp. 378, 384 (S.D.N.Y. 1982) (*citing Russell v. United States*, 369 U.S. 749 (1962)). As the Fourth Circuit has described it, an important function of the indictment is to assure “that the indictment and prosecution were in fact for the same violations.” *Loayza, supra* at 261. The Maryland Court of

Appeals has adopted this principle as well, holding that a defendant may not be convicted of a crime with which he was not charged. *Turner v. State*, 242 Md. 408 (1966).

On the basis of these principles, Maryland courts have found indictments to be defective even where the indictment tracked the language of the statute. For example, in *State v. Canova*, *supra*, the Court of Appeals upheld the dismissal of criminal informations charging bribery, even though the charging documents included the statutory terms, where the alleged bribe recipients did not fall within the class of persons covered by the statute¹.

II. The Baltimore City Public Ethics Code

This case concerns the allegations that Baltimore City Councilwoman Helen L. Holton failed to disclose on her financial disclosure forms certain “gifts” allegedly received from a Baltimore City developer, Ronald H. Lipscomb. Consequently, an analysis of the Baltimore City Ethics Code is necessary to determine whether the instant indictment satisfies the threshold Constitutional requirements, and those set forth in Rule 4-202, described above.

¹ Similarly, in *United States v. Curtis*, 506 F.2d 985, 992 (10th Cir. 1974), the court held that an indictment for mail fraud using only the statutory language was deficient because it gave no fair indication of the scheme or the false pretenses the defendant allegedly employed. In *United States v. Abrams*, 539 F. Supp. 378, 383-386 (S.D.N.Y. 1982), an indictment for obstruction of justice was dismissed where the indictment failed to identify the witness allegedly intimidated, or how, where or when the alleged acts had occurred. Similarly, a loan sharking indictment was dismissed in *United States v. Tomasetta*, 429 F.2d 978, 980-981 (1st Cir. 1970), because it did not identify the alleged victim or the means by which the threat was communicated. *See also*, *United States v. McDonnell*, 696 F. Supp. 356 (N.D. Ill. 1988)(RICO predicate insufficient for failing to identify bribe payors and other facts); *United States v. Staiti*, 397 F. Supp. 264 (D. Mass 1975)(indictment for stolen property dismissed for failing to identify property allegedly stolen); *United States v. Nance*, 533 F.2d 699 (C.A.D.C. 1976) (indictment insufficient for failing to allege specific false pretenses); *United States v. Conlon*, 481 F. Supp. 654 (D.D.C. 1979)(indictment contained insufficient facts to specify violation of conflict of interest statute). In *Loayza*, *supra*, the Fourth Circuit rejected a similar challenge to a mail fraud indictment, but only because the specific counts of the indictment specified the dates and the amounts of various checks mailed by the victims of the scheme, such that there was an assurance that the Defendant was convicted of the same crime found by the grand jury. *Id.* at 261.

Article 8 of the Baltimore City Code contains the Baltimore City Public Ethics Code. The Ethics Code contains two separate and distinct provisions which deal with a public official's acceptance of "gifts." The first of these provisions is found in Section IV, entitled "Gifts," and this section contains two provisions which prohibit a public official from soliciting or accepting gifts from certain classes of individuals. Section 6-26 provides in relevant part:

Except as permitted under subsection (b) of this section, a public servant may not solicit or facilitate the solicitation of a gift, whether on the public servant's own behalf or on behalf of another person, from any person who:

- (1) does or seeks to do business of any kind, regardless of amount:
 - (i) with the public servant's agency; or
 - (ii) if the public servant is a member or employee of the City Council, with the City Council;
- (2) engages in an activity that is regulated or controlled by the public servant's agency;
- (3) has a financial interest that might be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of the public servant's official duties; or
- (4) is a lobbyist with respect to matters within the jurisdiction of the public servant.

Section 6-27 contains a parallel provision which prohibits a public servant from accepting any gift from the same categories of persons. Significantly, neither of these provisions contains any penalty provision, such that a violation of either of these provisions is not a crime. Instead, a violation of either of these sections subjects the violator to the enforcement provisions in the Ethics Code itself, which includes a civil monetary penalty. See Baltimore City Ethics Code, Sections 9-1 to 9-9.

A separate part of the Ethics Code, Subtitle 7 of Article 8, establishes the requirement that certain City officials annually submit a Financial Disclosure statement to the City Ethics Board. That same section also identifies the information that is required to be disclosed. With respect to gifts, Section 7-23(b) provides:

The statement must include a schedule of each significant gift² that was, at any time during the reporting period:

- (1) accepted by the public servant or by any other person at the direction of the public servant; and
- (2) given by or on behalf of, directly or indirectly, any person that was:
 - (i) a lobbyist;
 - (ii) a person regulated by the City; or
 - (iii) a person *doing business with the City*. (emphasis added).

Because the phrase “doing business with the City” is rather vague and capable of different meanings, the Ethics Commission defined the phrase. Section 2-5(a) of the Ethics Code states that:

“Business with the City” means any 1 or combination of sales, purchases, leases, or contracts to, from or with the City or any agency that:

- (1) is made or entered into during the reporting period for which a disclosure statement is required by Subtitle 7 (“Financial Disclosure”) of this article; and
- (2) involves consideration of \$5,000 or more on a cumulative basis.

Given the thousands of contracts, leases, and purchases the City makes annually, the Ethics Commission recognized that it would be impossible for each person required to file a disclosure statement to know whether any particular person or entity satisfied the criteria of “doing business with the City” as defined above. To resolve this problem, the Ethics Commission enacted Section 7-1(d) of the Code. That Section, labeled “Entities Doing Business with the City,” requires that the City “Finance Director *must* annually certify to the Ethics Board a list of all business entities doing business with the City,” and further requires that “the Ethics Board *must* keep this list on file and available to all persons subject to this subtitle.” (emphasis added). These mandatory provisions are designed to provide those who file financial disclosure

² “Significant gift” is defined in the Code as “any gift with a value of more than \$50 and any gift in a series of gifts with a cumulative value of \$150 or more given by or on behalf of the same person during the reporting period.” Art. 8 §7-23(a).

statements with the means to determine whether particular gifts are required to be disclosed, and to avoid the ambiguity and uncertainty in the absence of such a list.

It is important to recognize there are significant differences between Section 6, which prohibits the acceptance of gifts, and Section 7, which requires the disclosure of certain gifts. Among other things, Section 6 prohibits the solicitation or acceptance of gifts from a person who has “a financial interest that might be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of the public servant’s official duties.” Section 7, however, which requires the reporting of gifts on financial disclosure statements, includes a narrower category of donors whose gifts must be disclosed, and does *not* include those who have a “financial interest” in a matter. With these legal principles and City ordinances as a backdrop, we address the myriad defects in the instant indictment.

III. Argument

A. The Indictment Fails to Satisfy the Due Process Clause and Rule 4-202 of the Maryland Rules of Criminal Procedure.

1. Counts Three and Four Fail to Allege an Offense

“It is a denial of due process of law to convict a person of a crime because he violated some bureaucrat’s secret understanding of the law.”

United States v. Farinella, ___ F.3d ___, (7th Cir. March 12, 2009)(Posner, J.)

Count Three of the Indictment purports to charge Councilwoman Helen L. Holton with the offense of perjury, in violation of Md. Code, Criminal Law Article, Section 9-101, relating to the financial disclosure statement she filed with the City Ethics Board for the reporting period from January 1, 2007 through December 31, 2007. Specifically, Count Three incorporates by reference paragraphs 1-38 of the indictment, and in paragraph 44 of the Indictment alleges that:

On or about April 30, 2008, at Baltimore City, Maryland, HELEN L. HOLTON who was then and there a duly elected member of the

Baltimore City Council, filed and caused to be filed, under oath subject to the penalties of perjury, a signed statement titled "Financial Disclosure Statement" for the reporting period January 1, 2007 through December 31, 2007 (hereinafter "Calendar 2007 Financial Disclosure Statement") which Calendar 2007 Financial Disclosure Statement was required by law to be submitted and filed with the Baltimore City Ethics Board, and which was willfully, materially and knowingly false in that the said HELEN L. HOLTON, did wifully and knowingly fail to disclose on her annual financial disclosure statement filed with the Baltimore City Ethics Commission a gift of TWELVE THOUSAND FIVE HUNDRED DOLLARS (\$12,500.00) paid to Company Z on behalf of the Helen L. Holton by Ronald H. Lipscomb and Doracon Contracting, Incorporated, who were then and there persons seeking to do business with the Baltimore City Council, engaged in activity regulated and controlled by the Baltimore City Council, and with financial interests that might be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or non-performance of official duties of Councilwoman Helen L. Holton, in violation of Criminal Law Article, § 9-101 and against the peace and dignity of the State.

Count Four purports to charge Councilwoman Helen L. Holton with Misconduct in Office, in violation of the common law, but it too relates to the Councilwoman's financial disclosure statement for calendar year 2007, and simply seeks to charge a different offense for the very same conduct alleged in Count Three. Specifically, Count Four alleges that the Councilwoman committed "nonfeasance in office" by submitting to the Baltimore City Board of Ethics her calendar year 2007 Financial Disclosure Statement, which failed to include the Twelve Thousand Five Hundred Dollar (\$12,500.00) gift she received from Ronald H. Lipscomb and Doracon Contracting, Incorporated,

"who were then and there persons seeking to do business with the Baltimore City Council, engaged in activity regulated and controlled by the Baltimore City Council, and with financial interests that might be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or non-performance of

official duties of Councilwoman Helen L. Holton, against the peace and dignity of the State.”

Each of these Counts suffers from the same multiple defects. First, as noted above, the City Ethics Code only required the Councilwoman to disclose gifts received from those persons “doing business with the City,” as that phrase is defined in the Ethics Code. Nowhere in the indictment does it allege that the grand jury found that Ronald H. Lipscomb or Doracon Contracting, Incorporated had a contract, sale, lease, etc. with the City or one of its agencies, initiated during the identified reporting period, which would qualify them as “doing business with the City” under the definition in the Ethics Code. Instead, the indictment alleges, at paragraph 6, that “Ronald H. Lipscomb was a person seeking to do business with the Baltimore City Council, was engaged in activity regulated and controlled by the Baltimore City Council, and had financial interests that might be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or non-performance of official duties of Councilwoman Helen L. Holton.” And in paragraph 1 of the Indictment it is alleged Ronald H. Lipscomb “owned, controlled and operated various business entities which did work, directly and indirectly, with and for the City of Baltimore including Doracon Contracting, Inc.”

But the City Ethics Code limits the definition of “doing business with the City” only to an entity that *itself directly* has a contract, lease, purchase, etc. with the City, not an entity that has a vicarious relationship with the City, as the indictment alleges. The State may contend that “doing business with the City” includes entities whose relationship in joint ventures, partnerships, or limited liability companies is sufficient to bring them within the Ethics Code definition. The rules governing statutory interpretation do not permit such a view.

In interpreting a statute or regulation, the first principle is to consider the language of the statute itself. If it is plain and unambiguous on its face, no further analysis is necessary. *Bowen v. Annapolis*, 402 Md. 587, 937 A.2d 242, 258 (Md. App. 2007). Here, the plain language of the ordinance is clear and unambiguous, and permits but one interpretation: it applies only to those persons who have a contract, sale or lease with the City, not those who have an “interest in” such contract, sale or lease.

Moreover, in interpreting the language the Ethics commission chose, the distinction between Section 6 and Section 7 of the Code is instructive. As noted above, Section 6 of the Ethics Code prohibits the solicitation or acceptance of gifts from certain categories of donors, including those with a “financial interest that might be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of the public servant’s official duties.” In Section 7, the Ethics Commission decided to require disclosure of only those gifts received from those “doing business with the City,” as the Ethics Code defined that phrase. Those with a “financial interest” in a matter were excluded from the category of donors whose gifts must be reported. Therefore, it is inconsistent with this distinction to interpret the phrase “doing business with the City” to include those with a “financial interest” in a matter, the very language excluded from the provision at issue.

In addition, interpreting the language of this provision to include those who have a “financial interest” in some matter before the City is also inconsistent with the Code’s requirement that the Finance Director prepare and certify a list of those persons “doing business with the City” on an annual basis. There simply is no way for the Finance Director to identify those who might have a “financial interest” in a matter, and the financial disclosure requirements

are limited to disclosing only gifts received from those identified on the Finance Director's certified list.

But even if the Court should conclude that the language is ambiguous, the ambiguity must be resolved in the defendant's favor. In *United States v. Race*, 632 F.2d 1114, 1120 (4th Cir. 1980), the Fourth Circuit considered the problems inherent in false statement prosecutions under 18 U.S.C. § 1001 when the underlying basis for the prosecution is an otherwise ambiguous statement. In *Race*, the defendants appealed their convictions for submitting "false and fraudulent invoices" to a division of the Department of the Navy for reimbursement of certain expenses. The court concluded that the contract clause, pursuant to which the defendants submitted their invoices, was, at best, ambiguous, because the clauses were susceptible to at least two reasonable constructions. *Id.* The court concluded that "[o]ne cannot be found guilty of a false statement under a contract beyond a reasonable doubt when his statement is within a reasonable construction of the contract" and, therefore, reversed defendants' convictions. *Id.*

The *Race* decision instructs that a defendant cannot be convicted of perjury or its sister provision of making a false statement when the allegedly false statement is, within a reasonable construction, factually correct. *Id.*; see also *United States v. Ryan*, 828 F.2d 1010, 1015 (3rd Cir. 1987)("[I]f a question is excessively vague or fundamentally ambiguous, then the answer to such question may not, as a matter of law, form the basis of a perjury or false statements prosecution.")(internal quotations omitted); *United States v. Lighte*, 782 F.2d 367, 375 (2nd Cir. 1986)(same); *United States v. Watts*, 72 F.Supp.2d 106, 109 (E.D. N.Y. 1999)("Where the statement may fairly be characterized as ambiguous, difficult issues arise concerning whether the government has met its burden of proving the element of falsity.").

Moreover, when dealing with a statutory provision that is ambiguous, the rule of lenity

requires that the Court accept the defendant's narrower version of the phrase. Just last year, in *United States v. Santos*, 128 S.Ct. 2020, 2023 (2008), the Supreme Court explained the rule of lenity in dealing with the federal money laundering statutes. In *Santos*, the Supreme Court was called upon to interpret the meaning of the word "proceeds" in the federal money laundering statute, a term that appears repeatedly in sections 1956 and 1957, but left undefined by Congress. Subsequent to Santos' conviction, the Seventh Circuit concluded that the term "proceeds" in the federal money laundering statute meant profits derived from a specified criminal activity, not merely receipts. Santos filed a motion under 28 U.S.C. section 2255 challenging his conviction, based upon the Seventh Circuit's interpretation of the term "proceeds." Because there was no evidence that Santos' money laundering conviction was based on transactions involving criminal profits (as opposed to criminal receipts), the district court vacated that conviction. The Seventh Circuit affirmed, and the Supreme Court granted certiorari. The Court's opinion, authored by Justice Scalia, found that the meaning of the term "proceeds" in the federal money laundering statutes were truly ambiguous; and concluded that in such instances, "the tie must go to the defendant." *Id.* 2025. The Court invoked the rule of lenity, explaining that "no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." *Id.* "Because the 'profits' definition of 'proceeds' is always more defendant-friendly than the 'receipts' definition, the rule of lenity dictates that it should be adopted." *Id.* "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Santos*, 128 S.Ct. at 2026 (quoting *Bell v. United States*, 349 U.S. 81, 83 (1955)). The rule of lenity requires courts to "interpret ambiguous criminal statutes in favor of defendants, not prosecutors." *Id.* at 2028. *See also United States v. Farinella*, ___ F.3d ___ (7th Cir. 2009)(in misbranding case,

phrase “best when purchased by” is ambiguous and government interpretation insufficient to sustain conviction).

The reason that the language of the indictment does not conform with the specific provisions of the Ethics Code is because the State prosecutor hopelessly confused the grand jury in the presentation of evidence. Attached hereto as Exhibit 1 is an excerpt from the grand jury testimony of Special Agent (SA) John Poliks, who was called as a summary witness before the grand jury on January 7, 2009, the day this indictment was returned. He described his position as an investigator with the Office of the State Prosecutor, and later summarized the elective positions held by Councilwoman Helen L. Holton. The State Prosecutor himself asked SA Poliks, “what were the prohibitions that were about solicitation, accepting gifts from any person who do business with the City or City Council?” (Ex. 1, p. 6). SA Poliks responded that he had with him Article 8 and he read that to the Grand Jury. (Ex. 1, p. 6). SA Poliks then proceeded to read to the Grand Jury the provisions of Section 6 of Article 8, which includes the prohibition for the solicitation and acceptance of gifts, including by those who have a “financial interest that might substantially or materially [be] affected in a manner distinguishable from the public generally by the performance or non-performance of the public servant’s official duties . . .” (Ex. 1, p. 4). The State Prosecutor then proceeded to ask SA Poliks about Mr. Lipscomb. SA Poliks then described two of Mr. Lipscomb’s projects, Parcel D and Parcel B of the Harbor East Limited Liability Partnership, L.L.P. in which Mr. Lipscomb had an ownership interest. (Ex. 1, p. 3-5).

Thus, the Grand Jury was never informed that the provisions of the Ethics Code governing gifts required to be disclosed on the financial disclosure forms were contained in Section 7 of the Code, not Section 6! The Grand Jury was never informed of the definition of

“doing business with the City,” which is defined in Section 2-5(a) of the Code. The Grand Jury was never presented with any evidence whatsoever that Mr. Lipscomb had a contract, sale or lease with the City which was entered into in 2007, the year in question. The Grand Jury was never informed about the Code’s requirement that the Finance Director prepare and certify a list of “entities doing business with the City,” and the absence of such a list.

As a result, the indictment does not allege facts, i.e. that Ronald H. Lipscomb or Doracon Contracting, Incorporated was “doing business with the City,” sufficient to constitute the purported offense charged.³ Because the indictment does not allege that the grand jury found that the Mayor received any gifts from someone “doing business with the City,” she was not required to disclose the information on her disclosure statements. Here, there is a “grave danger” that the Councilwoman might be prosecuted based upon facts not found by, or even presented to, the grand jury. *See Russell v. United States, supra, and State v. Turner, supra.* Because the indictment does not allege facts which required the Councilwoman to disclose the alleged gift, the 2007 financial statement was accurate. Count Three therefore fails to allege the crime of perjury, which requires an allegation of a material false statement. Md. Code, Criminal Law Article, Section 9-101; *State v. Levitt*, 48 Md. App. 1 (Md. App. 1981).

Moreover, as noted above, the Ethics ordinance requires the City Finance Director to annually certify to the Ethics Commission, and make available to filers, a certified list of entities “doing business with the City,” to eliminate the guesswork otherwise attendant to completing the financial disclosure forms. Yet the indictment does not allege that Ronald H. Lipscomb or Doracon Contracting, Incorporated, nor any entity associated with Ronald H. Lipscomb, was included on the mandatory list of entities “doing business with the City.” In the absence of such a

³ The indictment similarly fails to allege any facts showing that Ronald H. Lipscomb or Doracon Contracting, Incorporated was “regulated by the City,” because there was no evidence presented to the grand jury on this point.

list, the Councilwoman may not be held answerable for failing to disclose information which was not available to her, because such a lack of notice violates due process.

The Maryland Court of Appeals, in *Hirsch v. Department of Natural Resources*, 288 Md. 95 (1980) dealt with an analogous circumstance. In *Hirsch*, the Court was called upon to interpret provisions of the Wetlands Act of 1970, which required the Secretary of the Department of Natural Resources to identify certain property as containing wetlands, among other things. The Act required the Secretary to file among the land records of each county an order listing the boundaries of the wetlands. However, the Secretary failed to record his order among the land records, and Plaintiff Hirsch acquired his parcel of waterfront property in Anne Arundel County without notice of the wetlands boundaries which the Secretary had designated. When Hirsch sought to fill in the property, the Department of Natural Resources ordered him to restore the property to its prior condition, contended that the property was wetlands. The Court of Appeals concluded that because the Secretary failed to file the order as required, Hirsch lacked notice of the order and could not be held to comply with it. The Court noted:

In many situations where a statute mandates specific notice requirements in connection with finalizing proposed administrative action, this Court has held that the failure to comply with such requirements invalidates the administrative action. *See, e.g., Garrett County v. Bolden*, 287 Md. 440, 413 A.2d 190, 194 (1980); *Williams v. Public Service Comm'n*, 277 Md. 415, 354 A.2d 437 (1976); *Bethesda Management Serv. v. Dep't*, 276 Md. 619, 626-629, 350 A.2d 390 (1976); *Rasnake v. Bd. Of County Comm'rs*, 268 Md. 295, 300 A.2d 651 (1973); *Md. Tobacco Grow. v. Md. Tob. Auth.*, 267 Md. 20, 296 A.2d 578 (1972).

This case is no different from *Hirsch* and the cases cited therein. The indictment does not allege that the Director of Finance ever complied with the notice requirements preparing and

certifying a list of those “doing business with the City,”⁴ and therefore the Councilwoman had no notice that Ronald H. Lipscomb or Doracon Contracting, Incorporated, or any of their entities, did “business with the City.” Without that notice, due process prohibits a finding of guilty knowledge and renders the indictment defective.

B. The Bribery Count (Count One) and the Counts of Malfeasance in Office (Count Two), Perjury (Count Three) and Nonfeasance in Office (Count Four) are Mutually Inconsistent

As noted above, Rule 4-202 of the Maryland Rules of Criminal Procedure requires that the indictment contain a “concise and definite statement of the essential facts of the offense with which the defendant is charged.” One of the purposes of this Rule is to inform the defendant of the specific acts found by the grand jury to constitute the offense, and to insure that a defendant is tried only on that same conduct. Counts One on one hand and Counts Two, Three and Four on the other hand, however, fail to satisfy this fundamental requirement. Count One charges the defendant with receiving a bribe “on or about June 30, 2007” in connection with the payment for the poll, Count Two charges the Defendant with soliciting and accepting a gift in connection with the payment of the bill for the poll between January and June 2007 and Counts Three and Four charge the defendant with failing to report the payment of the bill for the poll as a gift in April 2008, on financial disclosure statements. The indictment alleges mutually inconsistent acts: on the one hand, the indictment alleges that the Twelve Thousand Five Hundred Dollar (\$12,500.00) payment for the poll was a gift, and was required to be disclosed as such on her Financial Disclosure statement; while alleging that the same act, the Twelve Thousand Five

⁴ The Indictment does not allege anything about the list, because none was ever prepared or filed with the City Ethics Commission, nor was such a list made available to the Councilwoman, or any other required filer.

Hundred Dollar (\$12,500.00) payment represented the acceptance of the bribe allegedly paid by Mr. Lipscomb for which he is separately charged⁵.

Just last year, in *Price v. State*, 405 Md. 10, 949 A.2d 619 (2008), the Court of Appeals put to rest any lingering doubt regarding inconsistent verdicts in Maryland. Tracing the history of cases addressing inconsistent verdicts, the Court noted that “inconsistent jury verdicts of guilty have long been held to be invalid, citing *Shell v. State*, 307 Md. 55 . . .” *Id.*, 949 A.2d at 625. The Court observed that it has “consistently stated that inconsistent jury verdicts are ‘contrary to law,’ and the trial court should instruct the jury that it cannot return inconsistent verdicts.” (citations omitted) *Id.* at 627. The Court concluded that “inconsistent verdicts shall no longer be allowed.” *Id.* at 630.

While this motion is raised in the context of a grand jury return, the inconsistency can only be resolved by either dismissing the indictment in its entirety or compelling the State to select its theory now. Otherwise, the State will be presenting mutually inconsistent theories to a jury based on exactly the same evidence. That is unfair to the defendant and denies her due process. Furthermore, not only is the defendant deprived of the notice to which she is entitled under the Constitution and Rule 4-202, there is obviously no guarantee that she will be tried on the same acts found by the grand jury.⁶ This deprivation is compounded by the State’s refusal to

⁵ The Defendant filed a *Demand for a Bill of Particulars* on February 5, 2009 with this court. Specifically, Councilwoman Holton demanded for the State to specify whether the \$12,500.00 payment to Company Z (Indictment at paragraphs 30-32) was a “gift” alleged in Counts Ii, III, and IV, or a “bribe” as alleged in Count (Demand at paragraph 6). The State has refused to answer in its *Answer to Defendant’s Demand for a Bill of Particulars*. This “gift” or “bribe” is a very important distinction that the State seems to have no interest in answering. A “bribe” is money or a reward given to an official to influence her performance in her official duties. A “gift” is merely that: a gift. The two are not interchangeable in a prosecution such as this, nor are they reconcilable as indicated in the Indictment. The State must answer whether this \$12,500.00 alleged payment is a “gift” or a “bribe” and proceed on that theory. It cannot use the definition that it finds most convenient for a particular count in the Indictment.

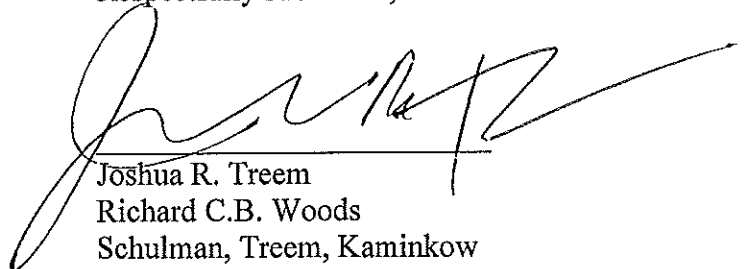
⁶ An offense which is inconsistent with another is to be distinguished from an offense which merges into another offense. The true test of merger is whether one crime necessarily involves another, or is a lesser included offense of another. See *Tender v. State*, 2 Md. App. 692, 237 A.2d 65 (Md. App. 1968), and cases cited therein. These two counts do not merge, as they are mutually inconsistent and one is not a lesser included part of the other.

provide the "Particulars" sought by Ms. Holton. *See, e.g. Tapscott v. State*, 106 Md. App 109 (Md. App. 1995)(jury instruction and verdict sheet altered crime alleged so that appellate court unable to determine whether defendant convicted of crime for which he was charged). For these reasons, the Indictment must be dismissed.

IV. Conclusion

The indictment in this case fails to satisfy the fundamental requirements mandated by the Due Process Clause of the U.S. Constitution, the Maryland Declaration of Rights, and Rule 4-202 of the Maryland Rules of Criminal Procedure. Because the State Prosecutor has misread the City Ethics Code, the grand jury was misled with respect to the requirements for disclosing gifts on the Councilwoman's 2007 financial disclosure statement. As a result, the indictment fails to set forth facts to show that the alleged gifts received were "required" to be disclosed, because neither Ronald H. Lipscomb or Doracon Contracting, Incorporated is alleged to have done "business with the City" as defined in the Ethics provisions. Finally, the count of the indictment which purport to charge perjury are legally inconsistent with the remaining three counts that treat the payment of the bill for the poll as a gift. For the foregoing reasons, the indictment must be dismissed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of March, 2009, a copy of the foregoing *Supplemental Motion to Dismiss and Memorandum in Support* was sent via first class mail, postage paid to:

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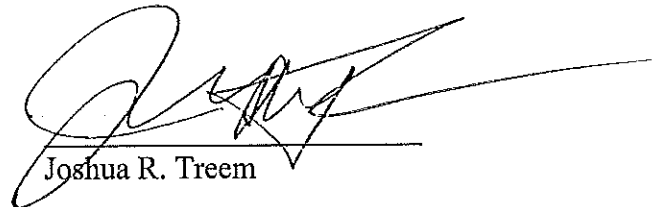

Joshua R. Treem

EXHIBIT 1

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S E C R E T

IN THE CIRCUIT COURT FOR BALTIMORE CITY
GRAND JURY PROCEEDINGS

IN RE

SPECIAL INVESTIGATION

_____ /

TRANSCRIPT OF PROCEEDINGS

Grand Jury Room
207 Mitchell Courthouse
Baltimore, Maryland
Wednesday, January 7, 2009

The Grand Inquest for the State of Maryland
for the Body of Baltimore City, was convened at 1:00
o'clock p.m., MONZELLA CRUISE, Foreperson, presiding.

PRESENT:

ROBERT ROHRBAUGH, ESQUIRE
STATE PROSECUTOR
THOMAS M. MCDONOUGH, ESQUIRE
DEPUTY STATE PROSECTOR
DIANE R. WALKER, COURT REPORTER TO THE
GRAND JURY

S E C R E T

1 PROCEEDINGS

2 JUROR: Do you solemnly declare and affirm under
3 the penalties of perjury that the testimony that you shall
4 give shall be the truth, the whole truth and nothing but the
5 truth?

6 THE WITNESS: Yes.

7 JOHN POLIKS

8 having been first duly sworn, was examined and testified as
9 follows:

10 THE OATH CLERK: State your name please.

11 THE WITNESS: Special Agent John Poliks,
12 P-o-l-i-k-s.

13 BY MR. ROHREBAUGH

14 Q. Agent Poliks, by whom are you employed?

15 A. Office of the State Prosecutor, State of Maryland.

16 Q. And for how long have you been employed there?

17 A. About twelve and a half years.

18 Q. In what capacity?

19 A. As a special agent.

20 Q. And what do you do generally?

21 A. Investigate allegations of corruption.

22 Q. Now prior to your being employed at the Office of
23 the State Prosecutor where were you employed?

24 A. The Baltimore Police Department for a little over
25 twenty years. I retired as a detective in 1995.

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1 Q. And then what did you do?

2 A. Actually went to the Attorney General's Office for
3 about a year and a half investigating Medicaid fraud and then
4 I went to the State Prosecutor's office.

5 Q. In connection with the investigation at the State
6 Prosecutor's office have you had an occasion to investigate
7 allegations of possible corruption involving Ronald Lipscomb
8 and Helen Holton?

9 A. Yes, I actually personally became involved in that
10 investigation late summer/early fall of 2007.

11 Q. And the Grand Jury has already heard many of these
12 witnesses involving Mr. Lipscomb and Ms. Holton so I'm not
13 going to repeat all of that, but let me just ask you
14 generally do you know who Ronald Lipscomb is?

15 A. Yes, I do.

16 Q. And generally describe what he did?

17 A. He owned, excuse me, formed and owns Doracon
18 Contracting and subsidiaries of that company that do business
19 developing properties in the City of Baltimore and other
20 places in the State of Maryland also.

21 Q. And was he also a member of the Presidential
22 Investors Limited Partnership LLP?

23 A. Yes, he had an ownership in that organization.

24 Q. And how are you familiar with that?

25 A. Through records we've obtained by subpoena and

1 other means during this investigation. Actually on November
2 28th of 2007 we executed a search warrant at Doracon
3 Contracting and a lot of the E-mail evidence that we have we
4 took from there, three of their four servers. We also seized
5 numerous documents that we've used in this investigation. So
6 those documents and E-mails and other telephone records and
7 stuff have provided the information that we know in this
8 case.

9 Q. And was Mr. Lipscomb to your knowledge a member of
10 the Presidential Investors Limited Partnership from at least
11 roughly 2003 through 2007?

12 A. Yes, that's correct.

13 Q. Okay. And involved in that investment group are
14 you familiar with what is known as the Inner Harbor East
15 project?

16 A. Yes, I am.

17 Q. And what does that project involve?

18 A. Several different parcels. The most significant
19 buildings down there are the Four Seasons Hotel, the Legg
20 Mason office building, Homewood Suites, Laureate Education.
21 I actually have a copy of the map for the grand jurors if you
22 want to pass those out. We have plenty of copies there.

23 Q. Parcel D of the Inner Harbor East project that
24 included the Four Seasons Hotel, Legg Mason office tower
25 building; is that correct?

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1 A. That's correct.

2 Q. And parcel B of the Inner Harbor East project that
3 included the Homewood Suites, Laureate Education project; is
4 that right?

5 A. That's correct.

6 Q. Again, based upon your review of the records and
7 your investigation did Mr. Lipscomb have any role in
8 attempting to obtain a pilot for parcel B and parcel D?

9 A. Yes, his role was to manage and deliver public
10 incentives, including TIFS and pilots, and we gleaned that
11 from a memorandum that we seized in the documents.

12 Q. Now, in terms of Mr. Lipscomb's role did
13 Presidential Investors Limited Partnership have any business
14 before the Baltimore City Council?

15 A. Yes, they did.

16 Q. And what was that generally?

17 A. That was applying for these pilots to get actually
18 public financing to help out with the development of the
19 project. The pilot is a payment in lieu of taxes, which
20 means instead of paying property taxes on the project while
21 it was being developed that would be deferred. They would
22 make smaller payments. That was usually done over the course
23 of a twenty year period so that more of the public financing
24 was going into the project than money out of the developer's
25 pockets.

1 Q. And are you familiar with Helen L. Holton?

2 A. Yes.

3 Q. And who is she?

4 A. She's a City Council person in Baltimore.

5 Q. And prior to January of 2007 do you know what
6 committees or sub-committees she served on?

7 A. Yes, prior to January of '07 she was the
8 Chairperson of Economic Development and Public Financing
9 Subcommittee, and then after January of '07 she became
10 chairperson of the Taxation and Finance Committee.

11 Q. And I believe in the course of your investigation
12 you have also had an opportunity to interview Keifer
13 Mitchell?

14 A. Yes.

15 Q. And I believe Mr. Mitchell has testified here in
16 front of the Grand Jury?

17 A. Yes, he has.

18 Q. And in terms of the ethics requirements involving a
19 council person, are you familiar with those?

20 A. Yes, I am, and I have a copy of them with me.

21 Q. And in terms of the ethics what are the
22 prohibitions about solicitation, accepting gifts from any
23 person who do business with the City or the City Council?

24 A. Article 8, Section 626, which is the Baltimore City
25 Code part four, gifts, says solicitation is prohibited. Part

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1 A in general except as permitted under subsection B of this
2 section a public servant may not solicit or facilitate the
3 solicitation of a gift whether on the public servant's own
4 behalf or on behalf of another person from any person who,
5 one, does or seeks to do business of any kind regardless of
6 amount, one, with public service agency or, two, if the
7 public servant is a member or employee of the City Council --
8 with the City Council, or, two, engages in any activity that
9 is regulated or controlled by the public servant's agency;
10 three, has any financial interest that might be substantially
11 and materially affected in any manner distinguishable from
12 the public generally by the performance or non-performance of
13 the public servant's official duties or, number four, is a
14 lobbyist with respect to matters within the jurisdiction of
15 the public servant.

16 Q. So you've reviewed the entire ethics code in the,
17 or at least the pertinent portions of the ethics code of
18 Baltimore City; is that correct?

19 A. That's correct.

20 Q. And are you familiar with legislative file number
21 050301 which was bill number 050301?

22 A. Yes, I am.

23 Q. And generally among other things what did that
24 relate to?

25 A. That bill was introduced to the City Council to

1 authorize those public financing tax incentives for the
2 parcel B portion of the Inner Harbor East project, and the
3 bill actually authorized a pilot, a payment in lieu of taxes,
4 and was assigned to the Economic Development and Public
5 Financing Committee, which at that time was chaired by Helen
6 Holton.

7 Q. And during May of -- specifically May 23rd, 2006
8 were there meetings between Councilwoman Holton and
9 representatives of the Inner Harbor East project regarding
10 that proposed pilot?

11 A. Yes, there were. We learned that from E-mail
12 records and other documents that we obtained.

13 Q. And on May 31 at 6:04 p.m. was there a two minute
14 telephone call between the office of Helen Holton and Mr.
15 Lipscomb's telephone?

16 A. Yes, there was.

17 Q. And how do you know that?

18 A. Again, from telephone records that we subpoenaed in
19 this investigation.

20 Q. The next day on June the 1st, 2006 what happened?

21 A. There was actually a public hearing by the Economic
22 Development and Public Financing Subcommittee on that
23 proposed pilot for the parcel B part of the Inner Harbor East
24 project.

25 Q. And on June 12th at 2006 at 2:47 p.m. was there a

1 telephone call from Ms. Holton to Mr. Lipscomb?

2 A. Yes, and that's actually thirteen minutes before
3 the scheduled meeting of the City Council.

4 Q. And on that date did you review the records as to
5 what action the City Council or the subcommittee took
6 involving bill 050301?

7 A. Yes, Councilwoman Holton as the chairman of her
8 committee reported that bill favorably to the entire City
9 Council.

10 Q. And during that following month in June of 2006
11 were there various telephone calls to and from Ms. Holton and
12 Mr. Lipscomb?

13 A. Yes, between June 13th and 20th there were seven
14 phone calls between the two people and/or Lipscomb's
15 business.

16 Q. Now, in July of 2006 do you know what happened?

17 A. Yes.

18 Q. And what was that?

19 A. That the pilot that had been proposed for that
20 parcel was authorized by the City Council.

21 Q. Now, I think you've already mentioned that on
22 January 30, 2007 Ms. Holton was appointed as chairperson of
23 the Taxation and Finance Committee; is that correct?

24 A. That's correct.

25 Q. And between January and June was there contact

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1 between Ms. Holton and Mr. Lipscomb?

2 A. Yes, there were.

3 Q. And do you know about that?

4 A. By way of E-mail and telephone calls.

5 Q. And did those communications relate to the pilots
6 for parcels B and D?

7 A. Yes, they did.

8 Q. Now, on June 19th, 2007 was there a meeting
9 scheduled between Ms. Holton and Mr. Lipscomb?

10 A. Yes, there was.

11 Q. And how are you familiar with that?

12 A. From Mr. Lipscomb's calendar records that we
13 obtained from the search warrant.

14 Q. And on April 19th was there a telephone call
15 between Ms. Holton at least to the office of Doracon?

16 A. Yes, there was a, at 2:45 p.m. there was a -- 2:43
17 p.m., I'm sorry, a call that lasted 8 minutes.

18 Q. And on June 7th was there another bill introduced
19 before the City Council?

20 A. Yes, there was.

21 Q. And what bill was that?

22 A. I believe actually it was June 4th.

23 Q. I'm sorry.

24 A. And it was bill 07-0700 pertaining to the partial D
25 portion of that Inner Harbor East project.

1 Q. Now, on June, around June 15th was there a meeting
2 between Ms. Holton and representatives including Mr. Lipscomb
3 about the Inner Harbor East project?

4 A. Yes, there was.

5 Q. And was that cancelled later?

6 A. Yes, it was.

7 Q. And approximately in June or July was there a
8 meeting or was there a conversation between Ms. Holton and
9 Ronald Lester?

10 A. Yes.

11 Q. And Ronald Lester, I believe the Grand Jury has
12 already heard testimony from him, but can you briefly
13 describe who he is?

14 A. He is a person that takes election polls for
15 people. Actually he does it all over the country. I
16 interviewed him and he also testified before the Grand Jury,
17 and he ended up doing a poll for Helen Holton.

18 Q. And for purposes of this indictment his company is
19 referred to as company Z, is that right?

20 A. That's correct.

21 Q. And did Mr. Lester meet with Ms. Holton in June or
22 July?

23 A. Yes, he did.

24 Q. And how do you know that?

25 A. Again, from interviewing Mr. Lester and from

1 reviewing his Grand Jury testimony.

2 Q. And in July of 2007 did Mr. Lester send an invoice
3 to Ms. Holton in the amount of twelve thousand five hundred
4 dollars for this survey that Mr. Lester was going to be
5 performing?

6 A. Yes, he originally sent the invoice to Helen
7 Holton.

8 Q. And on July 19th, 2007 was there a vote taken on
9 bill number 070700?

10 A. Yes, there was. Of the five committee members that
11 would have voted on that bill Helen Holton and two other
12 committee members voted for the bill. The fourth member
13 abstained and the fifth member was absent.

14 Q. And I believe the fourth member, I believe that was
15 Keifer Mitchell; is that right?

16 A. Yes, that's correct.

17 Q. And on July 27th, 2007 did Mr. Lester reissue his
18 invoice that he had done for the survey?

19 A. Yes, as I stated before, he originally sent the
20 invoice to Helen Holton. Helen Holton requested that he
21 instead send that invoice to Doracon Contracting. We have
22 reviewed records that show that from her campaign account she
23 submitted a receipt for actually having lunch with Mr. Lester
24 on that day and after that that invoice was then sent to
25 Doracon instead of to Helen Holton.

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1 Q. And are there any notes about Mr. Lester picking up
2 the check at Doracon?

3 A. Yes, actually there's a -- we've obtained from Mr.
4 Lester the actual invoice that he sent to Doracon, but in
5 reviewing the E-mail records of Doracon, Mr. Lester
6 apparently called to Doracon on July 29th, excuse me, July
7 27th, which was a Friday and Claudia Fields who was Mr.
8 Lipscomb's secretary forwarded those phone messages to Mr.
9 Lipscomb in an E-mail and that E-mail said call number six
10 happened to be from Ron Lester in parentheses for Helen
11 Holton. Gave Mr. Lester's phone number and the message was
12 please call when the check for twelve thousand five hundred
13 dollars is ready for pick up on Monday.

14 Q. To your knowledge, was that twelve thousand five
15 hundred dollar check issued by Doracon?

16 A. Yes, I have a copy of it here. It was issued on
17 July 30th which was the Monday that he was referring to in
18 the phone message.

19 Q. And between approximately July, the end of July and
20 the beginning of August did Mr. Lester's company to your
21 knowledge perform the survey?

22 A. Yes, they did and he actually E-mailed the results
23 to Helen Holton who in turn E-mailed them to Ron Lipscomb.

24 Q. And on August 8th, 2008 was there action by the
25 City Council on bill number 070700. August 18, I'm sorry,

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1 13th.

2 A. 13th.

3 Q. I'm sorry.

4 A. Yes, Ms. Holton reported favorably to the City
5 Council that bill with some amendments.

6 Q. And that was shortly after Ms. Holton had received
7 the results of the survey from Mr. Lester; is that correct?

8 A. That's correct.

9 Q. And on September 12th, 2007 was there action taken
10 by the Baltimore City Board of Estimates?

11 A. Yes, they approved the funding agreements for that
12 pilot, for parcel B of that Inner Harbor East project.

13 Q. And on September 24th, 2007 was there any other
14 action taken with regard to bill 070700?

15 A. The City Council itself approved that bill.

16 Q. And have you reviewed the financial disclosure
17 records that Councilwoman Holton has prepared and filed with
18 the Baltimore City Board of Ethics?

19 A. Yes, I have.

20 Q. And those forms are required to be filed under oath
21 on a yearly basis; is that right?

22 A. That's correct.

23 Q. And specifically for the year, calendar year 2007,
24 what did you determine insofar as Helen Holton's financial
25 disclosure statements are concerned?

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1 A. She did not disclose the twelve thousand five
2 hundred dollar payment.

3 Q. And did she mention anything about gifts?

4 A. Only that she had only received gifts that the
5 other council people received.

6 Q. And she never mentioned anything about any payments
7 on her behalf made by Doracon?

8 A. No, she did not.

9 MR. ROHRBAUGH: Any questions?

10 (No response.)

11 MR. ROHRBAUGH: Thank you.

12 CONCLUSION OF PROCEEDINGS

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