STATE OF MARYLAND * IN THE
* CIRCUIT COURT FOR
v. * BALTIMORE CITY
* CASE No. 115141032
CAESAR GOODSON *
* * * * * * * * * * * * *

STATE'S RESPONSE TO DEFENDANT'S MOTION *IN LIMINE* TO PRECLUDE TESTIMONY AND EVIDENCE CONCERNING BALTIMORE POLICE DEPARTMENT GENERAL ORDERS AND POLICIES RELATED TO THE USE OF SEATBELTS IN POLICE VEHICLES

Now comes the State of Maryland, by and through Marilyn J. Mosby, the State's Attorney for Baltimore City; Michael Schatzow, Chief Deputy State's Attorney for Baltimore City; Janice L. Bledsoe, Deputy State's Attorney for Baltimore City; and Matthew Pillion, Assistant State's Attorney for Baltimore City; and responds herein to the Defendant's Motion *in Limine* to Preclude Testimony and Evidence Concerning Baltimore Police Department General Orders and Policies Related to the Use of Seatbelts in Police Vehicles.

I. Baltimore Police Department general orders and policies relating to the use of seatbelts in police vehicles are admissible as evidence to show criminal negligence and so should not be excluded from trial

The Defendant insists that the State should not be permitted to present evidence of the Baltimore Police Department's general orders and polices concerning the use of seatbelts in police vehicles in support of the charges of second degree murder, involuntary manslaughter, manslaughter by motor vehicle, reckless battery, and reckless endangerment (he does not list the misconduct charge in this part of his argument). He submits that *Pagotto v. State*, 361 Md. 528 (2000), precludes such evidence on the basis of those orders and policies being "geographically unique" to Baltimore and, therefore, supposedly irrelevant as to the Defendant's criminal

negligence. Alternatively, the Defendant suggests that such evidence is inadmissible under Rule 5-403 as being substantially more prejudicial than relevant.

On the contrary, the Court of Appeals has instructed that "[i]n determining whether an accused's actions were grossly negligent or criminally reckless, the standard against which a defendant's conduct must be assessed is typically the conduct of an ordinarily prudent citizen similarly situated," but "where the accused is a police officer, the reasonableness of the conduct must be evaluated not from the perspective of a reasonable civilian but rather from the perspective of a reasonable police officer similarly situated." *State v. Albrecht*, 336 Md. 475, 501 (1994). In *Albrecht*, a Montgomery County police officer had been convicted of involuntary manslaughter and reckless endangerment stemming from his unintentional discharge of a departmental shotgun into the chest of an unarmed suspect, killing her almost instantly. *Id.* at 481-82. At trial, the officer argued that he had acted reasonably under the circumstances, testifying that he "felt fairly threatened, because [he] had two [] people who had just been involved in a serious incident and [he] was told there might be a gun in the [suspects'] car." *Id.* at 495. Despite the State's evidence to the contrary, he insisted that his actions violated no "policy, practice, or directive of the Montgomery County Police Department." *Id.* at 502.

The officer renewed this argument on appeal, and in assessing whether there was insufficient evidence to support Albrecht's convictions, the Court of Appeals weighed the reasonableness of the officer's conduct using the standards set forth in the Departmental Directives of the Montgomery County Police Department's Field Operations Manual. *Id.* at 502-03. Those Directives provided "that an officer may draw a firearm when the officer has reason to fear for his safety or the safety of others" but stated "that officers must use caution when discharging a firearm to avoid endangering the lives of bystanders" and "must exercise extreme

caution when removing [a] shotgun from [a police] vehicle because of the danger that a discharge of the weapon may present to innocent bystanders." *Id.* at 503 (internal quotation marks removed). Although "Montgomery County's departmental directives afford[ed] police officers much discretion with respect to an individual officer's decision to use a firearm," the Court held that "a police officer must act in a reasonable manner" because "[g]ross negligence in the exercise of discretion is grounds for criminal liability." *Id.* at 503. In affirming the conviction, the Court found that "there was ample evidence from which the trial court could have concluded that Albrecht did not comply with standard police procedures" regarding the use of deadly force and the handling of shotguns; "thus, the trial court could have concluded that Albrecht . . . acted in a grossly negligent and reckless manner" because "a reasonable Montgomery County police officer would not have acted as Albrecht did on this occasion . . . ." *Id.* at 503-05.

Similarly here, the State will present evidence that the Defendant's failure to seatbelt Mr. Gray during custodial transportation constituted a deviation from Baltimore Police Department General Orders, and the State will then argue that this deviation contributed to the overall criminality of the Defendant's alleged conduct, which not only knowingly risked injury or death to Mr. Gray but actually resulted in it. The specific General Orders that the State would present at trial direct a relevant standard of care more than compatible with the analysis *Albrecht* employs. The first such Order, Baltimore Police Department Policy 1114, clearly directs that "[w]henever a detainee is transported in a police vehicle, [officers shall] ensure that [t]he detainee is secured with the provided seatbelt or restraining device," further directing that "[t]he seatbelt or restraining device [be] secured around the waist or upper body of the detainee," as "[t]his will prevent the detainee from maneuvering out of the restraint and possibly causing

injury to himself/herself or others." The second Order, numbered K-14, was the predecessor to 1114 and also mandated seatbelt use in a substantively identical fashion, except that it contained a discretionary clause allowing seatbelting to "be evaluated on an individual basis so not [sic] to place oneself in any danger." The Defendant is simply wrong when he suggests that *Pagotto* would bar such evidence even in the face of *Albrecht*'s clear holding to the contrary that such evidence is directly relevant toward evaluating the conduct of a reasonable officer similarly situated. *Pagotto* distinguished *Albrecht* but certainly did not overrule it, as the Defendant implies.

In *Pagotto*, the Court of Appeals considered the legal sufficiency of the evidence used to convict a Baltimore City police sergeant of the 1996 involuntary manslaughter of the driver of a vehicle that the officer shot and killed during a traffic stop, as well as the sufficiency of the evidence underlying the convictions for recklessly endangering the two passengers in that vehicle. "The State argue[d] that the officer was grossly negligent by violating Baltimore City Police Department guidelines in three respects: (1) closing on the victim with his gun drawn; (2) attempting a one-armed vehicular extrication with his gun in the other hand; and (3) placing his trigger finger on the slide of the gun, rather than under the trigger guard as he approached the decedent's car." *Id.* at 538-39. Importantly, the entire "prosecution was predicated upon the theory that . . . the alleged violations of departmental guidelines" constituted conduct that was *by itself* "both a gross departure from the standard of conduct that a reasonable police officer similarly situated would observe, thereby creating a substantial risk of death or serious physical injury to the two passengers, as well as such grossly negligent conduct that manifested a wanton or reckless disregard of [the] human life [of the driver]." *Id.* at 550. In affirming the intermediate appellate court's decision to reverse the convictions, the Court analyzed each of

these three alleged violations in detail and under all the circumstances agreed with the officer that his conduct was reasonable.

First, regarding the act of "closing on the victim with his gun drawn," the Court thought it "important to note that three of the State's experts stated that they did not feel that it was inappropriate for Pagotto to draw his gun when he did; the only problem was that he should not have closed with his gun drawn." *Id.* at 539. Indeed, of the State's witnesses as to this charge, two witnesses testified that "[o]nce Pagotto perceived a threat [from the driver's movements], he should have returned to his car and called for backup," one testified that "once Pagotto perceived a threat, he should not have drawn his weapon, should not have continued to close, and should have sought cover"; and one stated that "while it is inadvisable for an officer to close with a weapon in hand, it is inadvisable only because of the danger that it poses to the officer and that an officer may, therefore, do so if he chooses." *Id.* at 539-40. In assessing this evidence, the Court held that "Pagotto's act of closing with a drawn gun was not criminally negligent" because "there was nothing in [his] behavior to suggest a wanton or reckless disregard for human life." *Id.* at 551 (internal quotation marks removed). In the Court's view, the officer "approached an inherently dangerous confrontation with his weapon in hand," and "[i]f in a stress-laden situation and for his own self-protection Sergeant Pagotto violated a departmental guideline, he did not thereby commit an act of gross negligence." *Id.* at 551-52. Significantly, the Court did not base its decision on the fact that the charged conduct involved a violation of Baltimore Police policy, nor did the Court rule that the trial judge impermissibly allowed the jury to consider this local policy as evidence of criminal conduct; rather the Court based its holding on the fact that the officer's conduct in violating that policy did not rise to the level of criminal negligence.

Second, as to the violation of Departmental policy that allegedly occurred when "Pagotto attempted a one-armed vehicular extrication [of the suspect vehicle's driver] with his gun in the other hand," "[t]he only testimony that described any contact between [the driver] and Sergeant Pagotto was from Sergeant Pagotto" himself, who testified that as he was nearing the driver's side door with his gun drawn, "the door sprung open," and, believing he was about to be ambushed, he instinctively "pushed the door out of the way and grabbed [the driver's] hand" because "[he] was always trained to go into the ambush, drawing any fire towards that person." *Id.* at 541-43. Based on this evidence, the Court found that Sergeant Pagotto had actually "not violated" the Departmental policy against attempting to struggle with a suspect without having both hands free, but the Court added that "even if he had, it was not behavior that could legally rise to the level necessary to sustain a conviction of involuntary manslaughter" because his "behavior simply did not evidence a wanton or reckless disregard for human life." *Id.* at 552-53. Again, the Court did not find the evidence insufficient (much less the charge defective) merely because the allegation involved the violation of a local police guideline, nor did the Court find any impropriety in the jury's consideration of such a guideline as evidence of the criminality of the officer's actions.

Finally, regarding the officer's placing his trigger finger on the slide of the gun as he approached the decedent's car, rather than under the trigger guard as required by Baltimore Police guidelines, the Court considered the officer's training history extensively. In particular, the Court emphasized evidence that the State's primary witness in support of this charge

> testified that the current Baltimore City Police Department guidelines require an officer to place his trigger finger below the trigger guard. He further testified, however, that, when Sergeant Pagotto was trained in 1980, the Department issued revolvers. The guidelines at that time did not address the location or placement of the officer's trigger finger. He also stated that the Department first issued a

> guideline with respect to the trigger finger in 1990, when the Department switched to the Glock 17. He testified that, in 1990, police officers were taught to keep their trigger finger on the slide of the gun. According to [the witness], this standard was changed to the current one sometime in 1993 or 1994 [such that] that Baltimore City is the only police department in Maryland that has this particular requirement.

Id. at 544. The Court also stressed testimony "that, because Sergeant Pagotto had originally been trained to keep his trigger finger on the slide of the gun, his 'muscle memory' would have caused him, in a stress situation, to go back to his original training and past experience." *Id.* at 545.

In agreeing that this violation of the Departmental guideline, "at best, amounted to an actionable case in civil negligence," the Court adopted and quoted the intermediate appellate court's conclusion "as a matter of law, that the burden of production as to gross criminal negligence was not satisfied so as even to permit the jury to consider such a charge" because "[a]lthough Sergeant Pagotto may not have followed a recently imposed and geographically unique guideline, his action in that regard was not inherently wrong or of a *malum-in-se* character." *Id.* at 550-51. Further discussing this conclusion, the Court noted that but for the officer's actions occurring on a certain date and occurring in Baltimore City, the State would not have even been able to suggest the officer acted with criminal recklessness based on his violation of the Departmental trigger-finger-placement rule. The Court described the logical problem with extending the State's argument to its natural conclusion, namely "that a police officer placing his finger on the slide of the weapon [would be] criminally negligent behavior if committed by a Baltimore City Police Officer in Baltimore City, but acceptable, non-criminal behavior if committed by any other police officer anywhere else in the State." *Id.* at 551.

Although the State there attempted to rely on *Albrecht* to get around this flaw in its case, the Court found that *Albrecht* was distinguishable because

> [t]he State adduced sufficient testimony from which the trial court could have concluded that a reasonable Montgomery County police officer would not have acted as Albrecht did on [that] occasion, in drawing and racking a shotgun fitted with a bandolier and bringing it to bear, *with his finger on the trigger*, on an unarmed individual who did not present a threat to the officer or to any third parties, in a situation where nearby bystanders were exposed to danger.

Id. at 554 (quoting *Albrecht*, 336 Md. at 505) (emphasis in original). As the Court viewed it, the State's case in *Pagotto*, "key factor by key factor, [was] the diametric opposite of *Albrecht*," and "[t]he contrast, moreover, highlights the deficiency of the evidence of gross negligence in this case." *Id.* at 555. Ultimately, the Court concluded, "perhaps Sergeant Pagotto should have acted differently" and "[h]is actions in circumstances that are tense, uncertain, and rapidly evolving may even amount to ordinary civil negligence, but they are not such a gross deviation from the actions of an ordinary police officer similarly situated so as to evidence the wanton or reckless disregard for human life necessary to . . . rise to the level of gross negligence." *Id.* at 555-56.

Given this detailed analysis and having reviewed the context of the Court's discussions of the permissible uses of local police policies to demonstrate criminal negligence under state-wide law, the Defendant's characterization of *Pagotto*'s holding simply does not ring true. *Pagotto* does not overrule *Albrecht,* as he implies, nor does *Pagotto* hold, as he claims, that the alleged violation of a local police policy cannot, as a matter of law, serve as the basis for gross or criminal negligence and that the State is barred from relying upon a recently enacted and geographically unique general order to establish gross or criminal negligence. Indeed, the Court of Appeals six years afterwards summarized *Pagotto* as being consistent with *Albrecht* and as holding only that while "'a violation of a police guideline is not negligence *per se*, it is, however, a factor to be considered in determining the reasonableness of police conduct.'" *Mayor of Baltimore v. Hart*, 395 Md. 394, 416-18 (2006) (quoting *Pagotto*, 361 Md. at 557 (Bell, C.J., dissenting)).

The Court in *Pagotto* simply found the State's evidence insufficient to prove that the particular actions violating police policy under the circumstances of that case rose to the level of constituting criminally negligent conduct. The Court's discussion of the trigger-finger policy's geographic uniqueness and recent enactment mattered in *Pagotto* only because it demonstrated the State's failure in that case to prove the violation of a policy setting forth objectively reasonable standards of police conduct, the violation of which would be objectively criminally negligent. As evident, however, in the *Pagotto* Court's re-affirmance of the *Albrecht* decision, the violation of a local police policy, such as Montgomery County's rules for handling firearms during encounters with suspects and bystanders, most certainly can form the basis for criminal liability if the violation, either alone or in conjunction with other evidence, constitutes a gross deviation from the actions of a reasonable police officer similarly situated so as to show the wanton or reckless disregard for human life or safety.

In short, *Pagotto* in no way undermines *Albrecht*'s clear holding that the State may use a police officer defendant's violation of local General Orders to help establish criminal liability under state-wide law where the violation is relevant evidence that the officer objectively criminally risked or criminally caused injury or death to another person. Here, the State maintains that the Defendant's alleged actions would be criminally negligent whether they had been committed in Baltimore City, Baltimore County, or anywhere else in the State of Maryland. The Defendant's duty of care toward Mr. Gray is set forth in the state-wide law establishing his duty not to kill, assault, or recklessly endanger Mr. Gray. A violation of Baltimore City Police Department General Orders about seatbelting prisoners will be offered as proof of a violation of those laws, but the failure to seatbelt is not the sole basis of criminal negligence.

If there were any doubts about the continued vitality of *Albrecht* and the permissible use of violations of local police policy in establishing a police officer's negligence, the Court of Appeals's post-*Pagotto* decision in *Hart* should dispel them. In *Hart*, 395 Md. at 396, a Baltimore police officer responding to an emergency "drove a marked police car through a red traffic signal without stopping and collided" with another vehicle, whose driver then sued the City for damages. The issue on appeal was the relevant standard for judging the officer's duty of care and whether that duty should be governed by § 21-106 of the Transportation Article ("TA" hereinafter) of the Annotated Code of Maryland, which permits police cars in such situations to pass through a red light "after slowing down as necessary for safety," or should instead be governed by the local Baltimore Police General Order 11-90, which provides that before passing through a red light the officer must bring the vehicle "to a full stop and ensure the intersection is safe to enter before proceeding." *Id.* at 403-05. The City argued that the statute's standard should govern, "describing the statute as a 'law' and the General Order as an internal standard" that could not be used to prove the officer's duty to other drivers. *Id.* at 414.

Rejecting the City's contention, the Court, citing to *Albrecht*, held that "General Order 11-90 is relevant because it is directly applicable to the specific conduct of the Baltimore City police officer in this case . . . and the issue of [the] reasonableness" of the officer's conduct. *Id.* at 416-17. In reaching this conclusion, the Court acknowledged that "§ 21-106 is less stringent in its requirements than General Order 11-90" but held that "the fact that the General Assembly has enacted § 21-106 of the Transportation Article, governing the operation of emergency vehicles throughout the State, does not prohibit the Baltimore City Police Department Commissioner . . . from promulgating regulations and guidelines which enact additional requirements for the operation of emergency vehicles by Baltimore City police officers within

Baltimore City, so long as the additional provisions do not allow conduct the state statute prohibits," are not otherwise inharmonious with state law, and are not promulgated on a subject expressly pre-empted by the General Assembly. *Id.* at 406-09. Ultimately, the Court mirrored *Albrecht* in holding that the General Order's higher standard applied because "[the officer's] conduct must be held to the standard of what a reasonable Baltimore City police officer's (as opposed to what an ordinary driver's) conduct would have been under similar circumstances." *Id.* at 414.

Like in *Hart*, here the Police Commissioner's seatbelt orders that the State seeks to present at trial in no way conflict with state-wide law regarding seatbelt use, even though the Transportation Article does not expressly require seatbelt use for prisoners in police transport wagons. The fact that the Commissioner filled a void and enacted a rule for Baltimore City police that does not exist under state law in no way clashes with the General Assembly's intent in enacting the seatbelt statutes. The Transportation Article neither expressly nor impliedly purports to pre-empt the law of seatbelt use and limit the power of regulating that subject to the General Assembly. Certainly, no argument can be made that the state laws expressly *permit* police officers to transport prisoners without a seatbelt. Moreover, the General Assembly, when it enacted Maryland's current mandatory seatbelt laws, described the goal of those laws as being firstly "for the purpose of providing that, unless certain occupants . . . of certain motor vehicles are restrained by a seatbelt, a person may not operate the motor vehicle." 1986 Md. Laws 1208. The Commissioner's policy states, "[t]he purpose of this policy is to provide procedures required

for the safety and security of detainees, officers, facility staff members, and the public." No conceivable disharmony exists between these two purposes.[1]

Having failed to even attempt to address *Hart*, the Defendant tries to bolster his *Pagotto* argument by citing a Baltimore Sun article which he says concludes that "prisoner transport vans used by county law enforcement agencies in the Baltimore region generally are not equipped with seat belts." Def. Mot. at 3. Putting aside that the Defendant cites this article having missed *Pagotto*'s point entirely that the issue is not whether the police defendant violated a general order that is locally unique but whether the violation constitutes conduct rising to the level of criminal negligence, the Defendant ignores important aspects of the Sun article dealing with police use of prisoner seatbelts generally and the fact that other locations seldom use wagons for prisoner transport. For example, the author writes, "[i]n Baltimore County, suspects arrested on the street usually are driven to a precinct in a police cruiser, where they are placed in seat belts, police spokeswoman Elise Armacost said," while "[i]n Harford County, prisoners are taken to the Interagency Processing Center near Bel Air in a police cruiser or SUV 99.9 percent of the time" and "are buckled in seat belts," "according to Maj. John Simpson of the county sheriff's office." Alison Knezevich & Pamela Wood, *Most police vans in Baltimore region lack seat belts*, Baltimore Sun (May 10, 2015). The authors also report that the "Maryland State Police do not have vans, said Sgt. Marc Black," and "[a] person in custody typically rides in the front seat, next to a trooper, and must be seat belted." *Id.* Moreover, "[i]n Carroll County," the article continues, "vans are used on for taking prisoners between the county detention center and the

[1] As a specific appellate example of a jury being permitted to hear evidence of a defendant police officer's violation of a Baltimore Police seatbelt General Order, the State notes *Leake v. Johnson*, 204 Md. App. 387 (2012) (J. Heard presiding in Circuit Court). Although the issues appealed in *Leake* dealt with public official immunity and damage limitations, General Order K-14, in effect at the time, required that arrestees be restrained by a seatbelt during transport, and the jury was permitted to consider evidence of K-14 because, like in *Hart*, it established a duty of care affirmatively requiring seatbelt use. *Pagotto* posed no limitation where the issue of seatbelt use arose in the context of a police officer's failure to perform an official duty.

Circuit Court, which are in the same complex," so while "[o]nly one of the [sheriff's office's] two vans has seat belts," "[d]uring longer rides, sheriff's deputies use a vehicle with seat belts . . . ." *Id.* To the extent the Defendant believes this article shows that Baltimore is unique in mandating seat belt use for prisoners during transport, the article plainly says otherwise and actually undermines his attempt to use it to show the reasonableness of failing to belt Mr. Gray.

Finally, the Court need not pause long to dismiss the Defendant's notion that *Pagotto* prevents local police orders from being used to show criminal negligence, such that the admission into evidence of such orders would be substantially more prejudicial than probative under Rule 5-403. Because his entire premise in this argument requires reading *Pagotto* as barring the use of local orders to show the reasonableness of a similarly situated local police officer and because that premise is entirely wrong, there would simply be no basis on which to predicate a finding of prejudicial effect within the meaning of Rule 5-403. Such evidence certainly might go a long way toward establishing the Defendant's guilt, but this is not the type of prejudice with which Rule 5-403 is concerned.

II. The Defendant is simply wrong when he asserts that Baltimore Police Policy 1114 must be excluded from trial because the State cannot show that Officer Goodson had actual knowledge of the policy

The Defendant also tries to extend his proposed exclusion of Baltimore Police general orders to bar the State from using such orders to show that the Defendant engaged in misconduct in office. He insists that the State will offer Policy 1114 as evidence against the Defendant but will be unable to show that the Defendant had "actual knowledge" of the policy, thereby mandating its exclusion as irrelevant. First, the State notes that the hypothetical sufficiency of

the State's proof at trial forms no basis to move *in limine* before trial to preclude the State from offering *any* evidence at trial regarding the Defendant's knowledge of his General Orders. Rule 4-252(d) specifically prohibits the use of pretrial motions to resolve matters not "capable of determination before trial without trial of the general issue," and the Defendant's knowledge is an elemental part of the general issue in this case. Second, the State notes that although the Defendant seeks to exclude "any and all reference to or argument concerning Baltimore Police Department General Orders and Policies as they relate to the use of seatbelts in vehicles," Def. Mot. at 5, the Defendant does not move to exclude Policy 1114's predecessor, General Order K-14, on the basis of ignorance. As earlier noted, that policy sets forth virtually identical requirements for the circumstances of this case.

In any event, the Court of Appeals has already held that an officer may not plead ignorance of his general orders. In *Hart*, faced with the identical argument that ignorance of the police policy requires exclusion of the policy, the Court held that the relevant local Baltimore Police policy was admissible, emphasizing that the officer was obligated to follow the general order in question there, despite his claim that he had no knowledge of its existence, because "Code of Public Local Laws of Baltimore City, § 16-7 provides that rules promulgated by the Baltimore City Police Commissioner 'shall be binding on all members of the Department.'" 395 Md. at 417, n. 11. Section 16-7 remains in full force today, so ultimately the Defendant's cry of ignorance goes to weight, not admissibility of the General Orders relevant to assessing the Defendant's conduct here.

Wherefore, the State requests that this Court deny the Defendant's Motion *in Limine* to Preclude Testimony and Evidence Concerning Baltimore Police Department General Orders and Policies as Related to the Use of Seatbelts in Police Vehicles.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 2015, a copy of the State's Response to the Defendant's Motion *in Limine* to Preclude Testimony and Evidence Concerning Baltimore Police Department General Orders and Policies as Related to the Use of Seatbelts in Police Vehicles was mailed and e-mailed to:

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