STATE OF MARYLAND	*	IN THE
	*	CIRCUIT COURT
v.	*	FOR
OFFICER GARRETT MILLER	*	BALTIMORE CITY
	*	Case No.: 115141034

* * * * * * * * * * * * *

MOTION IN LIMINE TO PRECLUDE REFERENCE TO OR ARGUMENT ABOUT MR. FREDDIE GRAY'S INITIAL DETENTION NOT BEING SUPPORTED BY REASONABLE SUSPICION, MR. GRAY'S ARREST NOT BEING SUPPORTED BY PROBABLE CAUSE, OR MR. GRAY'S SEIZURE NOT BEING OTHERWISE LEGALLY JUSTIFIED

Defendant, Officer Garrett Miller, by undersigned counsel, pursuant to Maryland Rule 5-609, files this Motion in Limine to order the preclusion of any and all reference to or argument about Mr. Freddie Gray's initial detention not being supported by reasonable suspicion, Mr. Gray's arrest not being supported by probable cause, or Mr. Gray's seizure not being otherwise legally justified. In support, Defendant states the following:

The State seeks to introduce evidence and testimony and make arguments as to the legality of Mr. Freddie Gray's initial detention and/or arrest on April 12, 2015. The State may also seek to make reference to or argue about whether reasonable suspicion supporting that initial detention existed, whether and what probable cause existed, and the overall legality of Mr. Gray's seizure by law enforcement. Because Defendant Officer Miller had legal authority to seize Mr. Gray throughout the encounter on April 12, 2015, the State should be precluded from arguing or attempting to submit evidence to indicate otherwise,

as such argument or evidence would not be relevant and would be substantially more prejudicial than probative.

Legal Standard

MD. RULE 5-402 states that "evidence that is not relevant is not admissible." MD. RULE 5-401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "Even reliable evidence is admissible only if it is relevant in the particular case, *i.e.,* if it has a tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." *State v. Smullen*, 380 Md. 233, 268 (2004). Moreover, MD. RULE 5-403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Facts

On April, 12, 2015, Defendant Officer Garrett Miller of the Baltimore Police Department was on bike patrol with Lt. Brian Rice and Officer Edward Nero. As the three traveled, between 8:45 and 9:15 a.m., Lt. Rice made eye contact with Freddie Carlos Gray Jr. near the corner of North Avenue and Mount Street.

After making eye contact with Lt. Rice, a uniformed police officer, Mr. Gray began to run. Lt. Rice then dispatched over departmental radio that he was involved in a foot pursuit at which time Officer Miller and Defendant Officer Nero began to pursue

Mr. Gray. Mr. Gray subsequently surrendered to Officers Miller and Nero in the vicinity in the 1700 block of Presbury Street.

Officer Miller then handcuffed Mr. Gray and moved him to a location a few feet away from his surrendering location, as Defendant Officer Nero went to retrieve the two officer's bikes. Officer Miller then placed Mr. Gray in a seated position and found a knife clipped to the inside of his pants pocket. The knife was found by Officer Miller to be a spring-assisted, one hand operated knife. The knife was then removed and placed on the sidewalk.

Mr. Gray was then placed down on his stomach at which time Mr. Gray began to flail his legs and scream as Officer Miller placed Mr. Gray in a restraining technique known as a leg lace until the Baltimore Police Department transport wagon arrived to transport Mr. Gray.

I. The State Should be Precluded from Introduction of Evidence and Testimony or Making Arguments as to the Legality of Mr. Freddie Gray's Initial Detention Against Defendant Officer Miller

The initial pursuit and detention of Mr. Gray was lawful, as supported by *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000), *Terry v. Ohio*, 392 U.S. 1 (1968), *In re David S.*, 367 Md. 523 (2002), and their progeny. After making eye contact with Lt. Rice, a uniformed police officer, Mr. Gray took flight. After a brief foot pursuit, Mr. Gray surrendered in the vicinity of the 1700 block of Presbury Street. Mr. Gray's flight at the sight of a uniformed officer was unprovoked. The State cannot ethically or in good faith claim that the area from which Mr. Gray fled, the corner of North Avenue and Mount

Street, was not a high crime area. Therefore, the initial detention of Mr. Gray constituted a valid *Wardlow* stop.

As an initial note, "a police officer's conduct should be judged not by hindsight but should be viewed in light of how a reasonably prudent officer would respond faced with the same difficult emergency situation." *Richardson v. McGriff*, 361 Md. 437, 453 (2000) (quoting *Boyer v. State*, 323 Md. 558, 589 (1991)). The officer "is the person who has to evaluate the potential seriousness of the [situation] and determine an appropriate response, the only caveat being that the evaluation and response must be reasonable from the perspective of a reasonable police officer similarly situated." *Richardson v. McGriff*, 361 Md. 437, 447 (2000). The Court looks to whether a "reasonable officer on the scene," at the moment of the incident, without the benefit of 20/20 hindsight would have done the same act. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

"[C]onsiderable credit can be given to the expertise of law enforcement officers in conducting investigations into illegal drug activity." *Williams v. State*, 188 Md. App. 78, 92 (2009) cert. denied, 411 Md. 742, 985 A.2d 539 (2009) (internal citations and quotations omitted). "[C]ontext matters: actions that may appear innocuous at a certain time or in a certain place may very well serve as a harbinger of criminal activity under different circumstances." *Id.* (internal quotations and citations omitted).

The United States Supreme Court has held that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

"[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." *Id.* at 125.

In *Illinois v. Wardlow*, a case bearing striking resemblance to this present matter with respect to the initial detention and arrest, the Court also faced a situation in which a defendant was arrested after fleeing police. *Id.* When the police officers caught up with the defendant, they conducted a pat-down and found weapons on him. *Id.* The Court held that the actions of those officers constituted a legal stop and that the fact that the defendant ran away was sufficient reasonable suspicion that the detention did not violate the Fourth Amendment to the United States Constitution. *Id.* The Court further stated:

> [I]n *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L.Ed.2d 229 (1983), where we held that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. *Id.*, at 498, 103 S. Ct. 1319. And any "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Florida v. Bostick*, 501 U.S. 429, 437, 111 S. Ct. 2382, 115 L.Ed.2d 389 (1991). *But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.*

Id. (emphasis added). Therefore, because the initial pursuit and detention of Mr. Gray was lawful, the State should be precluded from introduction of evidence and testimony or the making arguments as to the legality of Mr. Gray's initial detention.

II. The State Should be Precluded from Introduction of Evidence and Testimony or the Making Arguments as to the Legality of Mr. Freddie Gray's Arrest Against Defendant Officer Miller

With respect to the warrantless arrest of individuals, Maryland law provides, in pertinent part, as follows:

> (a) A police officer may arrest without a warrant a person who commits or attempts to commit a felony or misdemeanor in the presence or within the view of the police officer.
> (b) A police officer who has probable cause to believe that a felony or misdemeanor is being committed in the presence or within the view of the police officer may arrest without a warrant any person whom the police officer reasonably believes to have committed the crime.

Md. Crime Proc. Code Ann. §2-202 (2002). A pat-down search by Officer Miller revealed that Mr. Gray was in possession of a spring-assisted, one hand operated knife. Possession of that knife, in violating Baltimore City Code Art. 19, § 59-22, subjected Mr. Gray to arrest.

Article 19, § 59-22 holds that "[i]t shall be unlawful for any person to sell, carry, or possess any knife with an automatic spring or other device for opening and/or closing the blade, commonly known as a switch-blade knife." Violation of that ordinance allows for a penalty of up to $500 or imprisonment of up to a year or both. Clearly, a spring-assisted knife would have "an automatic spring or other device for opening and/or closing the blade" and therefore be illegal under Baltimore City law. Defendant Officer Miller's participation in the arrest of Mr. Gray for such a violation would therefore be completely lawful.

Even if, as the State alleges, Mr. Gray's spring-assisted, one hand operated knife did not violate Baltimore City law, a mistake of law as to that issue would have been completely reasonable. A recent Supreme Court decision discussed that very issue.

In *Heien v. North Carolina.*, 135 S. Ct. 530, 540 (2014), the Supreme Court determined that the Fourth Amendment is not violated when a police officer makes a mistake of law, so long as such an error is objectively reasonable. In *Heien*, a sergeant in North Carolina stopped a vehicle after observing that one of the vehicle's two brake lights was not working properly. *Id.* at 534. During a consent search of the vehicle, a bag of cocaine was recovered. *Id.* The vehicle's owner was charged under North Carolina law with attempted cocaine trafficking. *Id.* at 535. The owner moved to suppress the evidence seized from the car, contending that the stop violated the Fourth Amendment. *Id.* The trial court denied the suppression motion, concluding that the faulty brake light had given the officer reasonable suspicion to initiate the stop. *Id.* The car owner pleaded guilty but reserved his right to appeal the denial of his motion to suppress. *Id.* On appeal, the North Carolina Court of Appeals determined that driving with a single brake light was not illegal under North Carolina law and concluded that the officer lacked reasonable suspicion to initiate the stop in violation of the Fourth Amendment. *Id.* The North Carolina Supreme Court reversed. *Id.* It concluded that the officer who initiated the stop "could have reasonably, even if mistakenly," interpreted the statute to require that both brake lights be operational. *Id.* The United States Supreme Court granted certiorari to consider "whether [an officer's] mistake of law can nonetheless give rise to the

reasonable suspicion necessary to [stop a vehicle and] uphold the seizure under the Fourth Amendment." *Id.* at 534.

The Court held that just as mistakes of fact can establish reasonable suspicion, so too can mistakes of law. It explained, *Id.* at 536:

> [R]easonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion. Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground. Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law. Moreover, the Court highlighted "the reality that an officer may suddenly confront a situation in the field as to which the application of a statute is unclear—however clear it may later become."

Id. at 539 (internal quotation marks omitted). An officer may "have to make a quick decision on the law . . . ." *Id.* Accordingly, the *Heien* Court concluded that so long as such a decision is objectively reasonable, it may give rise to reasonable suspicion. *Id.* at 540. To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them "fair leeway for enforcing the law in the community's protection." *Heien*, 135 S. Ct. at 536 citing *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949).

Here, the understanding of the officers that "automatic spring or other device for opening and/or closing the blade" defined the scope of legality of a knife under the statute would be completely reasonable. Therefore, even if the Court finds that the knife in question was legal, Defendant Officer Miller cannot be held legally responsible for his

part in Mr. Gray's arrest for his possession of the knife, and the State should be precluded from introduction of evidence and testimony or the making arguments as to the legality of Mr. Gray's arrest.

III. Even If the Court Determines That There Is A Question Of Fact As To The Legality Of the Initial Detention, It Is Not Legally Attributable To Defendant Officer Miller

With respect to the legality of an action of a law enforcement officer, "liability will only lie where it is affirmatively shown that the official charged acted *personally* in the deprivation of rights." *Vinnedge v. Gibbs,* 550 F.2d 926, 928 (4th Cir. 1977) (citing *Bennett v. Gravelle,* 323 F.Supp. 203, 214 (D.Md. 1971)(emphasis added). The considerations for an officer's legal authority to arrest are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *Doering v. State*, 313 Md. 384, 403 (1988). In this matter, Defendant Officer Miller, as an assisting officer, acted in reasonable reliance that Lt. Rice had legal authority to initiate the pursuit of Mr. Gray.

The Supreme Court in *Whiteley v. Warden*, 401 U.S. 560 (1971) addressed the argument that "to prevent arresting officers from acting on the assumption that fellow officers who call upon them to make an arrest have probable cause for believing the arrestees are perpetrators of a crime would… unduly hamper law enforcement." *Id.* at 568. ("We do not, of course, question that the Laramie police were entitled to act on the strength of the radio bulletin") "In determining the lawfulness of a warrantless arrest as to an assisting officer, the inquiry turns not on events that occurred before the officer's arrival of which the officer was unaware, but on whether the officer's decision to assist in

the arrest was 'objectively reasonable in light of the circumstances'—i.e., the circumstances known to the assisting officer at the time of the arrest—'and existing law.'" *Jackson v. City of Hyattsville*, Civil Action No. 10-cv-00946-AW, 2012 U.S. Dist. LEXIS 36544, at *10-11 (D. Md. Mar. 19, 2012) quoting *Carter v. Jess*, 179 F. Supp. 2d 534, 544 (D. Md. 2001). "When an assisting officer arrives late to the scene, the lawfulness of his or her arrest can be predicated on information relayed by officers already at the scene." *Jackson*, 2012 U.S. Dist. LEXIS 36544, at *11 citing *Ware v. James City Cnty.*, 652 F. Supp. 2d 693, 703 (E.D. Va. 2009) (assisting officers not required to conduct an independent investigation to establish probable cause prior to making arrest where they were told by officer already at the scene that probable cause existed, as "[s]uch a requirement would be unworkable in the environments in which the police operate."); see also *Guerrero v. Deane*, 750 F. Supp. 2d 631, 652-53 (E.D. Va. 2010) (same).

In *Swager v. Sheridan*, Civil Action No. RDB-08-2289, 2011 U.S. Dist. LEXIS 71766, at *43 (D. Md. July 5, 2011), a matter in which the Court found that "a reasonable police officer would not have realized that the arrest of the Plaintiffs had been or could have been illegal," the Maryland United States District Court addressed the issue of the assisting officer liability. The Court in *Swagler* reasoned that "an assisting officer would only be concerned with the rationale for the arrest itself; he would not anticipate that he would be held responsible for the mistakes of law enforcement agents that had previously occurred and in which he had not participated." *Id.* In coming to that opinion, the *Swagler* Court surveyed other federal decisions in which the issue was addressed:

> In fact, other courts have held that assisting officers are not automatically liable for the mistakes of the primary officer even if those mistakes are mistakes of law. *Liu v. Phillips*, 234 F.3d 55 (1st Cir. 2000) (noting that an officer is immune from suit when "the agent who directs or authorizes the arrest has made a mistake [41] of law . . . invisible to the assisting officer"); see also *Bilida v. McCleod*, 211 F.3d 166, 174-75 (1st Cir. 2000) ("Plausible instructions from a superior or fellow officer support qualified immunity where, viewed objectively in light of the surrounding circumstances, they could lead a reasonable officer to conclude that the necessary legal justification for his actions exists (e.g. a warrant, probable cause, exigent circumstances"); *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1348-49 (7th Cir. 1985) (suggesting that "extraordinary circumstances" might exist where officers acted upon instructions from superior officers who were removed from the scene but seemingly made the decision to arrest).

Id. at 40-41.

In addressing an issue similar to this present matter, the Maryland United States District Court found that "a reasonable person in the circumstances of the Other Officers could have believed that he would not be violating Plaintiff's constitutional rights by utilizing reasonable force to assist in ending the incident – even though [Primary Officer] was effecting an illegal arrest – if the only alternative was to stand by and let [Primary Officer] and the Plaintiff 'fight it out among themselves.'" *Smith v. Balt. City Police Dep't*, No. MJG-13-1352, 2014 U.S. Dist. LEXIS 175431, at *9 (D. Md. Dec. 19, 2014)

Because Defendant Officer Miller acted in reasonable reliance that Lt. Rice, in calling out a foot pursuit had observed an action on the part of Mr. Gray that arose a reasonable suspicion, Officer Miller cannot be legally responsible for the initial detention of Mr. Gray.

WHEREFORE Defendant Officer Garrett Miller respectfully requests this Honorable Court to order the preclusion of any and all reference to or argument about Mr. Freddie Gray's initial detention not being supported by reasonable suspicion, Mr. Gray's arrest not being supported by probable cause, or Mr. Gray's seizure not being otherwise legally justified.

Respectfully submitted,

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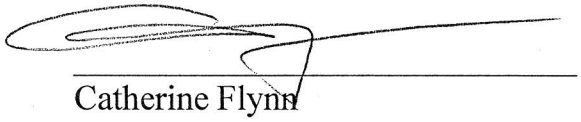
CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on the 12th day of February 2016, a copy of the foregoing Motion was hand-delivered to Janice Bledsoe, Deputy State's Attorney for Baltimore City, 120 E. Baltimore Street, 9th Floor, Baltimore, Maryland 21202.



Catherine Flynn

STATE OF MARYLAND	*	**IN THE**
	*	**CIRCUIT COURT**
v.		
	*	**FOR**
GARRETT MILLER	*	**BALTIMORE CITY**
Defendant.	*	**CASE NO. 115141034**

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REQUEST FOR HEARING

Defendant respectfully requests a hearing on the Motion *in Limine*.

Respectfully submitted,

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ORDER

Upon consideration of the Defendant's Motion *in Limine*, it is this _____ day of _____, 2016 hereby **ORDERED** that the Defendant's Motion is **GRANTED**.

_____
Judge, Circuit Court for Baltimore City