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

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STATE'S MOTION IN LIMINE TO ALLOW THE STATE TO PRESENT MEDICAL EXPERT TESTIMONY TO PROVE THAT THE DEFENDANT'S CONDUCT CREATED A SUBSTANTIAL RISK OF DEATH OR SERIOUS PHYSICAL INJURY

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 pursuant to Rule 4-252(d) respectfully moves this Court *in limine* to issue a pretrial order confirming that the State will be permitted to present medical expert testimony to prove that the Defendant's conduct created a substantial risk of death or serious physical injury to the victim in this case within the meaning of the reckless endangerment statute, Criminal Law Article § 3-204. In support of this Motion, the State avers the following:

1. Count 4 of the above-captioned indictment charges the Defendant with violating the reckless endangerment statute, Criminal Law Article § 3-204. On September 11, 2015, the Defendant filed a motion to dismiss this count in which he asserted that his alleged conduct could not as a matter of law create the type of risk needed to sustain a reckless endangerment conviction. The State filed a response to this motion on September 28, 2015, outlining the motion's lack of merit and procedural impropriety.

2. To carry its burden at trial on this count, the State intends to present medical expert testimony to prove that the Defendant did in fact create a substantial risk of death or serious physical injury to the victim in this case. The Defendant has disclosed that he

also intends to call medicals expert on this subject and has provided the names and opinions of five possible medical expert witnesses. Given this disclosure, the State could infer that the Defendant will have no objection to the State presenting medical expert testimony; however, Defendant Nero made a similar disclosure and then subsequently filed a motion to exclude medical experts, including his own. As such, the State seeks a pretrial order confirming that such testimony will be permitted so as to ensure an expeditious trial not interrupted by any dispute over the admissibility of such evidence.

2. Rule 5-702 permits expert testimony to be admitted to "assist the trier of fact to understand the evidence or to determine a fact in issue."

3. Regarding the facts in issue as to Count 4, Criminal Law Article § 3-204 proscribes that "[a] person may not recklessly . . . engage in conduct that creates a substantial risk of death or serious physical injury to another." "Reckless endangerment is . . . doubly inchoate" as a criminal offense, meaning "[a]t the *actus reus* level, it is one element short of consummated harm," and "[a]t the *mens rea* level, it is one element short of the specific intent necessary for either an attempt or for one of the aggravated assaults." *Williams v. State*, 100 Md. App. 468, 481 (1994). Although the offense "does not require that the defendant actually cause harm to another individual," the statute "is aimed at deterring the commission of *potentially* harmful conduct before an injury or death occurs." *State v. Albrecht*, 336 Md. 475, 500-01 (1994) (emphasis supplied).

4. When assessing whether the State has met its burden to prove this *potentiality* element, Judge Moylan, writing for the Court of Special Appeals, explained that "[w]hether the conduct in issue has, indeed, created a substantial risk of death or serious physical injury is an issue that will be assessed objectively on the basis of *the physical*

evidence in the case." *Williams*, 100 Md. App. at 495 (emphasis supplied). This "objective determination [is] to be made by the trier of fact from *all the evidentiary circumstances* in the case." *Minor v. State*, 326 Md. 436, 443 (1992) (emphasis supplied).

5. In *Minor*, 326 Md. at 442, the Maryland Court of Appeals agreed with the New York Court of Appeals's decision in *People v. Davis*, 526 N.E.2d 20, 22 (N.Y. 1988), which logically held that under this objective standard "factual impossibility eliminates the risk essential to commission of the crime." On the other hand, as long as the harmful result is not impossible, "[i]t is generally agreed that [the crime] does not require that the risk be almost certain to occur or that there is even a heavy probability that the undesired result may come about." *Williams*, 100 Md. App. at 505. Rather, to be a "substantial risk," the jury must be able to conclude only that the disregarding of the risk would objectively "constitute a gross departure from the standard of conduct that a law-abiding person would observe." *Minor*, 326 Md. at 443.[1]

6. In other words, under *Minor* and *Williams*, the State must at a minimum *always disprove the impossibility* of the defendant's risky conduct leading to the result of death or serious injury, but otherwise the substantiality of the risk is an objective question for the fact finder based on all the circumstances in the case. *See also Williams*, 100 Md. at 495-500 (discussing the *actus reas* of reckless endangerment and extensively analyzing *Minor*'s holding on causation); *and compare Wieland v. State*, 100 Md. App. 1, 28 (1994) ("brandishing a loaded and cocked weapon . . . could be deemed conduct that creates a substantial risk of death or serious physical injury to another person."), *with Moulden v.*

[1] Of course, "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." *Albrecht*, 336 Md. at 501.

State, 212 Md. App. 331, 358 (2013) ("Here, there is no evidence that the alleged weapon was either operable as a firearm or substantial enough to use as a bludgeoning instrument. Thus, there is no evidence to support a finding that appellant created a 'substantial risk of death or serious physical injury to another.'").

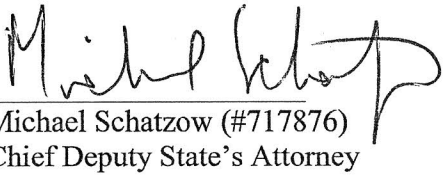
7. Accordingly, here the jury must assess the *actus reas* of Count 4 objectively from "all the evidentiary circumstances" and "physical evidence in the case" and must be satisfied that it is factually, objectively possible that Mr. Gray could have suffered death or serious physical injury as a result of the Defendant's conduct. The State's proposed medical experts have evaluated the complex circumstances and physical evidence surrounding Mr. Gray's injury and death and are prepared to explain to the jury how based on that medical evaluation they conclude from their expertise that the Defendant's conduct created the risk that led to the result Mr. Gray sustained. Because the jury must undertake the same medical evaluation and reach their own conclusion about the objective potential results of the Defendant's conduct, such medical expert testimony is not only appropriate under Rule 5-702 but is also necessary in order for the State to carry its burden as construed by Maryland's appellate courts. This is particularly true in a case like this, where, as set forth in his Motion to Dismiss, the Defendant intends to specifically contest whether his conduct created a criminally liable risk to the victim. To rule that such medical evidence is inadmissible would be to rule that in every trial involving an inchoate crime, the jury could not know whether the crime was completed. For example, in non-fatal shootings, should evidence that the bullet actually struck the intended victim in a vital organ be excluded as inadmissible on the question of whether the defendant fired the bullet *toward* a vital organ and thus manifested the requisite

specific intent to kill needed for attempted murder? While reckless endangerment is "doubly inchoate" and does not legally require either a specific intent or a completed harm to commit the crime, it does require that a specific type of harm be possible beyond a reasonable doubt. Just as evidence in a non-fatal shooting about where the bullet hit would not be excluded on the relevant question of where the defendant aimed the gun when he fired, so too should evidence of actual injury and death not be excluded on the relevant question of whether the defendant's conduct substantially risked injury or death. Proof of the result is admissible proof of risk of the result.

Wherefore, the State respectfully requests that this Court issue a pretrial order confirming that the State will be permitted to present medical expert testimony to prove that the Defendant's conduct created a substantial risk of death or serious physical injury to the victim in this case within the meaning of the reckless endangerment statute, Criminal Law Article § 3-204.

Respectfully submitted,

Marilyn J. Mosby



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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of February, 2016, a copy of the State's Motion *in Limine* to Allow the State to Present Medical Expert Testimony to Prove that the Defendant's Conduct Created a Substantial Risk of Death or Serious Physical Injury was mailed and e-mailed to:

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