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CRIMINAL DIVISION

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

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STATE'S MOTION *IN LIMINE* REGARDING THE DEFENDANT'S PROPOSED EXPERT TESTIMONY AND REQUEST FOR HEARING

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, Rule 4-263, Rule 5-702, and Rule 5-705 respectfully moves this Court *in limine* to issue a pretrial order regarding the Defendant's proposed expert testimony (1) to bar expert witnesses from testifying to opinions that are contrary to Maryland law or that are not appropriately helpful to the jury, particularly opinions that police departmental policies may not form the basis of a criminal prosecution, opinions tantamount to jury instructions about the law, and opinions constituting legal conclusions about the Defendant's compliance with the law; (2) to require the disclosure of the facts or data underlying the Defendant's expert witnesses' opinions before those experts are permitted to testify to those opinions; (3) to preclude the Defendant from calling any expert witness about whom the Defendant has not provided a disclosure complying with Rule 4-263. In support of this Motion, the State submits the following:

1. The Defendant has recently disclosed that he intends to call a number of expert witnesses to testify as part of his defense. As relevant here, he has identified as such witnesses the following persons: (1) Detective William Boyd, (2) Detective Charles Anderson, (3) Detective Syreeta Teel, (4) Officer Zachary Novak, (5) Officer Mark

Gladhill, (6) Officer Matthew Wood, (7) Lieutenant Robert Quick, (8) Captain Justin Reynolds, (9) Colonel Stanley Branford, (10) Detective Dawnyell Taylor, (11) Sergeant Tashawna Gaines, (12) Timothy Longo, (13) John Ryan (14) Officer Joshua Rosenblatt, (15) Professor Byron Warnken, and (16) Detective Robert Ross. Def. Discovery Disclosures at 13-32.

2. Rule 5-702 only permits expert testimony to be admitted to "assist the trier of fact to understand the evidence or to determine a fact in issue," with the Court being required to consider before allowing such testimony "whether the witness is qualified as an expert by knowledge, skill, experience, training, or education," "the appropriateness of the expert testimony on the particular subject" and "whether a sufficient factual basis exists to support the expert testimony."

3. Moreover, "[g]enerally, witnesses cannot provide testimony presenting a legal conclusion," and this includes testimony "to a matter of law," testimony about the expert's "understanding of Maryland law or an explication as to what Maryland law requires," and testimony that "appl[ies] any law to the facts of [the] case." *Randall v. State*, 223 Md. App. 519, 576-77 (2015). As the Court of Appeals has firmly established:

> [W]herever opinion testimony is proper, the witness may express his opinion either as to the possibility, probability, or actuality of the matter of fact about which he is interrogated and the answer will not be an invasion or usurpation of the function of the jury, even though it passes upon an ultimate fact which the jury must determine. But this does not mean that the witness may in the guise of opinion upon a matter of fact include in it a matter of law or the application of a rule of law to the facts. [...] No witness should be permitted to give his opinion directly that a person is guilty or innocent . . . or that a person was negligent or not negligent or that he had capacity to execute a will or deed or like instrument or respecting whether a county attorney had probable cause to believe the plaintiff was guilty of the crime charged. But the reason is that such matters are not subjects of opinion testimony. They are mixed questions

> of law and fact. When a standard or a measure or a capacity has been fixed by law, no witness whether expert or nonexpert, nor however qualified, is permitted to express an opinion as to whether or not the person or conduct in question measures up to that standard. On that question the Court must instruct the jury as to the law, and the jury must draw its own conclusions from the evidence.

Franceschina v. Hope, 267 Md. 632, 643 (1973) (quoting Edmund M. Morgan, *Basic Problems of Evidence* at 218 (1962)) (internal quotation marks removed).

4. Here, the Defendant has proffered that many of his proposed expert witnesses, particularly Officer Rosenblatt, Detective Ross, and Professor Warnken, will offer extensive testimony and opinions about the substance and holdings of Fourth Amendment jurisprudence, about Officer's Miller's compliance with that jurisprudence, or about other conclusions of law. For example, the Defendant proposes to call Officer Rosenblatt to testify regarding "reasonable articulable suspicion, probable cause," and "how those legal concepts apply to the facts in this case," as well as to opine "that the weapon recovered from Mr. Gray is unlawful pursuant to the Baltimore City Code." Def. Discovery Disclosures at 16. Regarding this weapon, the Defendant also proposes to elicit from Detective Ross expert opinion testimony that "the weapon that was recovered from Freddie Gray was a spring assisted knife and is illegal under the Baltimore City Code." Def. Discovery Disclosures at 21. Furthermore, he intends to call Professor Warnken to "testify that the use of handcuffs does not cause a detention to rise to the level of arrest; rather, it is one factor that may be considered in determining whether a 'stop' is an involuntary detention requiring reasonable articulable suspicion, or conversely, whether the 'stop' rises to the level of an arrest requiring probable cause." Def. Discovery Disclosures at 19.

Additionally, many of the Defendant's experts share the opinion that police general orders and policies "are intended to provide internal guidance and discipline and not to form the basis of criminal prosecutions." Def. Discovery Disclosures at 13-14. As a threshold matter, the Maryland Court of Appeals has already squarely disagreed with such an opinion. *See State v. Albrecht*, 336 Md. 475, 502-03 (1994) (evaluating the reasonableness of a police officer's actions using the standards set forth in the Departmental Directives of the Montgomery County Police Department's Field Operations Manual); *accord Mayor of Baltimore v. Hart*, 395 Md. 394, 416-18 (2006) (quoting *Pagotto v. State*, 361 Md. at 557 (Bell, C.J., dissenting)) ("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"). This opinion is also irrelevant to the issues in this case. It makes no consequential fact in this case either more or less probable that the authors of police general orders and policies thought such materials could not form the basis of criminal prosecutions.

More to the point, all of these types of opinions constitute precisely that which the Court of Appeals has explicitly forbidden in *Franceschina*. No expert witness can tell the jury what the law of this jurisdiction provides—that is for this Court to do—nor opine that the Defendant's conduct adhered to the law—that is for the jury to decide. Allowing this type of testimony would permit defense experts to invade and usurp core judicial and jury functions.

5. Separately, Rule 4-263(e)(2)(A) requires the Defendant to disclose to the State as to each expert he intends to call "the substance of the findings and the opinions to which the expert is expected to testify" and to provide "a summary of the grounds for each

opinion." Because of this required advanced notice, Rule 5-705 generally allows expert witnesses to offer their opinions to the jury "without first testifying to the underlying facts or data." As Professor McClain explains, however, "[i]f the opposing party, having been aided by discovery, believes that an expert's opinion lacks a sufficient basis, counsel may ask the court to exercise its discretion under Rule 5-705 . . . to require the expert to testify to the basis of the opinion first, before stating the opinion or inference." Lynn McLain, *Maryland Rules of Evidence*, 173 (3d ed. 2007). "If the court finds that the requirements of Rule 5-702 and 5-703 are not met, it will not permit the opinion testimony." *Id.*

6. Regarding Detective Boyd, Detective Anderson, Detective Teel, Officer Novak, Officer Gladhill, and Officer Wood, the Defendant has not provided a specific disclosure about their opinions or the bases for their opinions other than to say that they "may be called upon to testify that the actions of Garrett Miller were reasonable and/or in accordance with accepted police practices, procedures, custom, and/or protocols" and "may be called upon to testify that [police general orders, guidelines, and procedures] are intended to provide internal guidance and discipline and not to form the basis of criminal prosecutions." *Id.* at 13-14.

7. For the remaining experts, the Defendant has disclosed more specific opinions but has provided only vague descriptions of the bases for those opinions. Lieutenant Quick's and Captain Reynolds's opinions are said to be based on their "review of the records produced during discovery, any written and recorded statements, reports, photographs, maps, diagrams, and other documents relevant to the actions of the officers," *id.* at 25-26, with no description of which specific materials they reviewed or how and by whom items

were deemed "relevant." The Defendant states that Colonel Branford's, Detective Taylor's, and Sergeant Gaines's opinions are based varyingly upon their "review of the entire investigation file in the matter of the death of Mr. Gray." *Id.* at 27-30. At no point does the Defendant clarify what he means by "the entire investigation file."

Similarly, Mr. Longo's and Mr. Ryan's "opinions will be based . . . on [their] review of the discovery produced in this case, including written and recorded statements, other audio and video recordings, reports, photographs, maps, diagrams, and relevant Baltimore Police Department General Orders and Policies, as well as generally accepted policies, procedures, practices, training, and custom throughout the United States." *Id.* at 22, 31. The State can only guess at what Mr. Longo and Mr. Ryan actually reviewed given this broad and vague description.

8. In this case, because the Defendant has not provided a proffer of *any* factual basis, much less a sufficient one, for his proposed expert witnesses Detective Boyd, Detective Anderson, Detective Teel, Officer Novak, Officer Gladhill, or Officer Wood, the Court should preclude their expert testimony for the Defendant's failure to comply with the disclosure requirements under Rule 4-263.[1] Regarding the remaining experts listed in paragraph 1, the Defendant's disclosures only vaguely and cryptically identify what, if any, materials these witnesses actually reviewed in formulating their opinions. Without knowing what these expert witnesses reviewed, neither the State nor the Court can

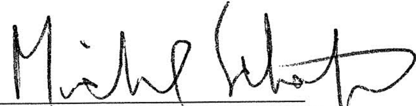
[1] The State would likewise object to these witnesses providing lay opinion that backdoors expert opinion about whether or not Officer Nero's actions were reasonable. For example, in the trial of *State v. William Porter*, police officers were called as lay witnesses and testified that they believe themselves to be "reasonable" and that they always do the same thing that the defendant there did. A witness's subjective opinion about his own reasonableness is not remotely relevant toward the legally proper question of whether the witness is objectively reasonable. Allowing a witness to self-identify as "reasonable" and then align his actions with that of the Defendant would merely permit the jury to be prejudiced by irrelevant, misleading testimony by someone without the qualifications to opine about the objective reasonableness of the Defendant's actions.

properly evaluate the appropriateness or validity of their opinions.[2] As such, this Court should exercise its discretion by requiring these witnesses under Rule 5-705 to explain the full bases for their opinions before they are permitted to share potentially inadmissible testimony with the jury.

Wherefore, the State asks that this Court grant a hearing on this Motion and issue a pretrial order granting the relief herein requested regarding the Defendant's expert witnesses.

Respectfully submitted,

Marilyn J. Mosby



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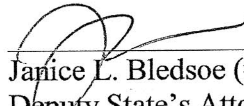

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[2] The State, of course, has previously heard testimony from Mr. Longo and Captain Reynolds during the *Porter* trial, but that testimony concerned their assessment of Officer Porter's actions and related to general matters that Officer Porter's attorneys raised. This prior testimony does little to supplement Defendant Miller's deficient disclosure about these witnesses' opinions about the reasonableness of *his* actions or about the matters that *his* attorneys may raise at trial.

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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 Regarding the Defendant's Proposed Expert Testimony and Request for Hearing was mailed and e-mailed to:

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Respectfully submitted,

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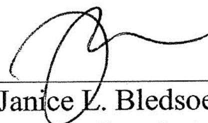

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