

STATE OF MARYLAND

v.

EDWARD NERO

* IN THE
* CIRCUIT COURT FOR
* BALTIMORE CITY
* CASE NO.: 115141033
*

* * * * *

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

Defendant, Edward Nero, by undersigned counsel, hereby submits this Response in Opposition to the State’s Motion *in Limine* regarding the Defendant’s Proposed Expert Testimony and Request for Hearing. In support thereof, Defendant states as follows:

1. The State’s Motion *in Limine* Regarding the Defendant’s Proposed Expert Testimony and Request for Hearing is nothing more than an fishing expedition intended to waste the Court’s time and further delay the Defendant’s trial. Any objections the State may have regarding the Defendant’s experts can, and should, be addressed during the *voir dire* process. The State’s Motion is thus premature and should be denied on this ground alone.
2. However, even assuming (without conceding) that the issues raised by the State are the proper subject of a motion *in limine*, the State’s Motion must be denied on its merits. The State’s first contention is that testimony from several of the Defendant’s expert witnesses, namely Professor Byron L. Warnken and Officer Joshua Rosenblatt, should be excluded because their opinions merely represent conclusions of law. State’s Mot. at ¶ 4. However, the State misinterprets the import of the testimony offered by these witnesses.

Professor Warnken is not merely a law professor who will opinion upon Fourth Amendment jurisprudence generally. Instead, as explained in the Defendant’s Initial Discovery Disclosure, Professor Warnken has been employed by both the Baltimore City and Baltimore County Police Departments to provide legal training to police officers, most recently upon the recommendation of State’s Attorney Marilyn Mosby. Accordingly,

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Professor Warnken is able to provide testimony as to the manner in which Baltimore City police officers are trained in subjects including, but not limited to: the reasonable suspicion standard; what factors should be considered in a police officer's formation of reasonable suspicion; how unprovoked flight in a high crime area impacts the formation of reasonable suspicion; when it is appropriate to use force or handcuffs in effecting an investigative detention; the probable cause standard; what factors go into a police officer's formation of probable cause; and what factors go into a police officer's decision to elevate an investigative detention into a formal arrest. Such testimony would undoubtedly assist the jury in determining whether the actions of the Defendant were in conformance with that training, and thus consistent with those of a reasonable Baltimore City police officer, similarly situated. Moreover, such testimony would not encroach upon the province of the jury in determining the ultimate legal issue: whether Officer Edward Nero corruptly arrested Mr. Freddie Gray without legal justification.

Officer Rosenblatt, like Professor Warnken, has also been given the responsibility of instructing Baltimore Police Department officers at the training academy. Moreover, Officer Rosenblatt served as an officer of the Baltimore Police Department when the incident at issue occurred. Accordingly, Officer Rosenblatt can not only provide testimony consistent with that of Professor Warnken, but he can also provide testimony as to: whether the area where Mr. Gray was arrested is a high crime area; how seatbelts are generally used (or not used) by Baltimore Police Department Officers in transport vans; what factors police officers are taught to consider in determining whether to secure an arrestee with a seatbelt; how internal policies and general orders should be disseminated; and whether Police 1114 was properly disseminated. Moreover, Officer Rosenblatt can explain that,

based upon his own experience, individuals can be, and are, arrested and prosecuted for possessing the knife found on Mr. Gray on April 12, 2015. Such testimony would undoubtedly assist the jury in determining the guilt or innocence of the Defendant for the crimes charged.

3. The State's next argument is an attempt to prevent the Defendant from providing his own law enforcement experts is both hypocritical and contrary to the case law they have cited. The State alleges that the Defendant's expert's opinion that police general orders and policies "are intended to provide internal guidance and discipline and not to form the basis of criminal prosecutions" is both irrelevant and contrary to the law. State's Mot. at ¶ 4. The State would have the Court believe that the purpose of the General Orders makes no consequential fact in this case more or less probable, yet they have based the bulk of their case on the belief that a violation of the General Order is evidence of the Defendant's alleged guilt. The State in their argument to allow the introduction of the General Orders in the Co-Defendant's case, *State v. Porter*, noted that the General Orders are relevant to the case as the Court of Appeals has instructed that "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" and that "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." *State v. Albrecht*, 336 Md. 475, 501 (1994); *Pagotto v. State*, 361 Md. 528, 557 (2000).

If the Court is inclined to admit the General Orders, over the Defendant's objection, it is extremely relevant for those most familiar with the Baltimore City General Orders, *i.e.* the Defendant's experts, to be allowed to explain the purpose behind those General Orders

so that the jury may better understand what a reasonable officer's conduct would have been. This point was specifically recognized by the Court of Special Appeals in its *Pagotto* decision, in which the court addressed the importance of expert testimony concerning the legal significance (or insignificance) of not following a Baltimore Police Department guideline:

All of the testimony of all of the experts, save one, made no mention of a key link in the chain of logic that was an indispensable but unspoken part of the State's case. Even granting, *arguendo*, the failure of an officer to follow a departmental guideline, what is the significance of such a failure? The missing premise was vital to the validity of the State's ultimate syllogism of guilt.

127 Md. App. at 325. In *Pagotto*, the defense presented expert testimony from Lieutenant Charles Key, the author of the Baltimore Police Department guidelines at issue. *Id.* at 325–39. Lt. Key testified that the guidelines were not intended to bind the actions of Baltimore City police officers, but rather serve as discretionary guides for which the sanction was purely administrative in nature. *Id.* The court found such testimony significant in determining that there was insufficient evidence to support the defendant's conviction. *Id.* Given that the testimony expected to be offered by the Defendant's experts in many ways resembles that of Lt. Key in *Pagotto*, the State's argument as to the relevance of the Defendant's law enforcement experts is completely without merit.

The State further alleges that the experts' shared opinion regarding the policies behind the General Orders is contrary to Maryland law. However, the State once more is without merit to their argument and is intentionally misleading the Court in regards to what the Defendant's expert would actually testify to. As clearly articulated in the Defendant's Disclosures, if called to testify it is expected that the Defendant's law enforcement experts would opine that the General Orders are intended to provide internal

guidance and discipline, and not to form the basis of criminal prosecutions. The Disclosure in no way suggests that the experts would opine as to whether or not the general orders could, or would, be a factor to consider in determining whether or not an officer has violated Maryland law. In fact, the experts would solely express their opinion of what the General Orders are intended to be used for. The State's attempt to cite case law regarding the use of General Orders as evidence regarding the reasonableness of police conduct has absolutely no significance or bearing on the expert's ability to give opinions as to the intention behind these policies. The Defendant agrees with the State in that whether or not the police conduct was reasonable is for the jury's consideration only, and as such evidence regarding the reasons and intentions behind the very policies the State wishes to introduce are highly relevant to the jury understanding whether a violation of those policies would or would not be reasonable. Therefore, the State has not presented sufficient argument to prevent the Defendant's law enforcement experts from testifying as to the opinions cited in the Defendant's Disclosures.

4. The State's final argument asserts that the Defendant has insufficiently disclosed the opinions of the proposed legal experts, the bases of those opinions, and the materials reviewed in reaching those opinions. The State's argument is both without merit and disingenuous given the detail in which the Defendant's Initial Disclosure clearly outlines the opinions of the experts and materials they reviewed. Moreover, the State's insincere motive in filing the present Motion is best illustrated through the State's own expert disclosures.

By way of example, the State argues that the Defendant's disclosure with respect to Chief Timothy Longo is deficient because it states that his opinions are based upon the following:

Chief Longo's opinion will be based on his education, training, and experience, as well as his review of the discovery produced in this case, including any 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.

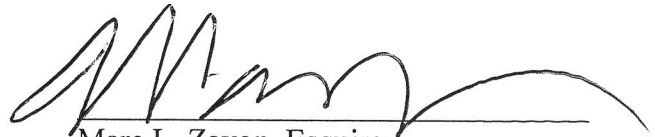
State's Mot. at ¶ 7. In disclosing its own legal expert, Stanford O'Neill Franklin, the State provided the following regarding the basis of his opinions:

Mr. Franklin's opinions will be based on his education, training, and experience, as well as on his review of discovery produced in this case, including written and recorded statements, other audio and video recordings, reports, photographs, maps, diagrams, Mr. Gray's presentation while in police custody during all police transport vehicle stops, including those at Druid Hill Avenue and Dolphin Street, and at North Avenue and Pennsylvania Avenue and relevant Baltimore City Police Department General Orders and Policies, as well as generally accepted policies, procedures, practices, training; and custom throughout the United States.

State's Supplemental Disclosure (attached as **Exhibit 1**). Given that these disclosures are nearly identical, it is clear that the State argument that the Defendant's disclosure is improperly "broad and vague" is disingenuous and lacks merit.

WHEREFORE, the Defendant, Edward Nero, by undersigned counsel, respectfully requests that this Court deny the State's Motion *in Limine* regarding the Defendant's Proposed Expert Testimony and Request for Hearing.

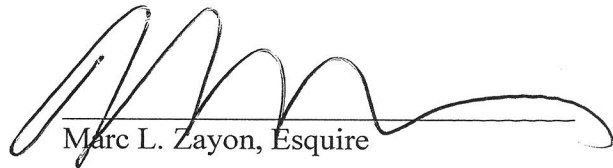
Respectfully submitted,



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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on the 16 day of February 2016, a copy of the foregoing Response was hand-delivered to Janice Bledsoe, Deputy State's Attorney for Baltimore City, 120 E. Baltimore Street, 9th Floor, Baltimore, Maryland 21202.



Marc L. Zayon, Esquire

Stanford O'Neill Franklin has been the Executive Director of Law Enforcement Against Prohibition (L.E.A.P.) since 2010. Prior to taking that position, Mr. Franklin has served in various command and supervisory roles for law enforcement agencies within the State of Maryland. A copy of Mr. Franklin's curriculum vitae is attached as Exhibit I.

Mr. Franklin's opinions will be based on his education, training, and experience, as well as on his review of discovery produced in this case, including written and recorded statements, other audio and video recordings, reports, photographs, maps, diagrams, Mr. Gray's presentation while in police custody during all police transport vehicle stops, including those at Druid Hill Avenue and Dolphin Street, and at North Avenue and Pennsylvania Avenue and relevant Baltimore City Police Department General Orders and Policies, as well as generally accepted policies, procedures, practices, training; and custom throughout the United States. If called to testify, Mr. Franklin is expected to testify regarding police training, policies, general orders, practices, customs, safety, transportation, retaliatory prisoner transportation practices, and law enforcement generally. Mr. Franklin is expected to testify that the actions of Officer Goodson were unreasonable and inconsistent with the actions of a reasonable officer with similar training and experience. Mr. Franklin is expected to testify that Officer Goodson's actions in denying the request for medical attention and/or treatment by Mr. Gray were unreasonable and inconsistent with Officer Goodson's duties, training and experience, as well as with the general orders, directives, procedures and policies in place at the time of Mr. Gray's arrest. In particular, Mr. Franklin is expected to testify regarding an officer's training in evaluating an arrestee's need for medical care, whether requested or not. Mr. Franklin is further expected to testify as to the relationship between an arrestee's request or need for medical care, and police booking procedures.

Mr. Franklin is further expected to testify that Mr. Goodson acted unreasonably and inconsistent with his training as well as with the general orders, directives, procedures and policies in place at the time, relative to the transportation of Mr. Gray. Mr. Franklin is expected to testify that Officer Goodson's actions relative to the use of a seat belt were unreasonable, under the totality of the facts and circumstances of this case. Mr. Franklin is expected to testify that directives from the Baltimore City Police Commissioner are to be followed, and are not discretionary, particularly those that concern the safety of those in custody.

Moreover, Mr. Franklin is expected to opine that if a directive provides for an officer to utilize discretion, that discretion will be specified and that an officer must conduct himself in accordance with all directives promulgated by the Police Department under which one is employed.