STATE OF MARYLAND	*	**IN THE**
	*	**CIRCUIT COURT**
v.		
	*	**FOR**
EDWARD NERO	*	**BALTIMORE CITY**
Defendant.	*	**CASE NO. 115141033**

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

Defendant, Edward Nero, by undersigned counsel, hereby submits this response to the State's motion to introduce evidence, or argument, of Mr. Gray's injuries through the use of medical experts. The evidence is inadmissible as irrelevant, or in the alternative, inadmissible as such evidence should be excluded since its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, by considerations of undue delay, waste of time, and needless presentation of cumulative evidence pursuant to both Maryland Rule 5-402 and 5-403. In support of this Response, the Defense avers the following:

1. On February 1, 2016 the State filed a "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." Many of the arguments against this testimony are covered within the Defendant's Motion in Limine

precluding evidence of Mr. Gray's injuries, however the Defense will further that argument.

2. It is clear that the trial judge is given wide latitude in making this determination. In *Crane,* the Court stated that the Rule "codifies the inherent powers of trial judges to exercise discretion to exclude relevant, probative evidence that is unduly prejudicial, confusing, or time-consuming." *Crane v. Dunn*, 382 Md. 83, 100 (2004). The Court of Appeals further clarifies that "[t]he judge must balance the probative value of the proposed evidence against the potential for undue prejudice, keeping in mind the possibility of ... undue delay or confusion of the issues." *Ebb v. State*, 341 Md. 578, 588 (1996).

3. The State maintains that the basis for the charge of reckless endangerment, as well as the charge of misconduct in office (nonfeasance), was the Defendant's *inaction*, of failing to secure Mr. Gray with a seatbelt in a police vehicle. Neither of these charges requires *any* showing of injury in order for the State to satisfy the elements of the offenses. Thus, any testimony from medical experts pertaining to Mr. Gray's injuries is irrelevant and prejudicial with no probative value. Discussing the untimely death of Mr. Gray, and the injuries which caused said death, bears no relevance to the pending charges against the Defendant under Maryland Rule 5-402 and 5-403.

4. In its Motion, the State strains to create relevance by arguing that medical testimony is needed to show that "the Defendant's conduct created the risk that led to the result Mr. Gray sustained." State's Mot. at ¶7. While such an argument may be proper had the Defendant been charged with involuntary manslaughter where causation is an element the State must prove, such an argument is entirely improper and irrelevant for the crime of reckless endangerment. The State also suggests that medical testimony concerning Mr. Gray's injuries is needed to prove to the jury that the crime was completed. However, as explained above, the crime of reckless endangerment is completed at the moment the criminally negligent conduct occurs. It is a crime aimed at punishing the conduct, not the result. The fact that an injury eventually did occur does not retroactively impact or transform the nature of the prior conduct for which the Defendant is charged.

5. The State intends to present medical expert testimony at trial in a veiled attempt to confuse the trier of fact with information that is ultimately irrelevant to the charges levied against the Defendant. According to the State's Motion the purpose of such testimony, is to show the injuries were the result of the Defendant's alleged conduct and that his conduct created a substantial risk of death or serious bodily injury. What the State fails to recognize in its filing is that the actual injuries are irrelevant to the reckless endangerment statute, Criminal Law Article 3-204. The Court of Special Appeals simplified this matter recently in *Moulden* where it states, quoting *Albrecht* that "[t]he reckless endangerment statute 'is aimed at

deterring the commission of potentially harmful conduct before an injury or death occurs. As a consequence, a defendant may be guilty of reckless endangerment even where he has caused no injury.'" *Moulden v. State*, 212 Md. App. 331, 355 (2013), *State v. Albrecht*, 336 Md. 475, 500-501 (1994). Furthermore, the Court of Appeals has determined, quoting in part the *Minor* decision, that "'it is the reckless conduct and not the harm caused by the conduct, if any, which the reckless endangerment statute as intended to criminalize.' Thus, the focus is on the conduct of the accused." *Holbrook v. State* 364 Md. 354, 364 (2001), *Minor v. State* 326 Md. 436, 441 (1992). As such, the focus should not be on the injuries suffered since, "reckless endangerment does not require that any actual harm occur to another," but on the conduct in and of itself. *State v. Pagotto*, 361 Md. 528, 548 (2000).

6. Contrary to the State's position, the Court of Special Appeals of Maryland has specifically recognized that any harm alleged to have resulted from the defendant's conduct cannot be considered by the factfinder in determining whether the defendant acted in a criminally negligent manner. *See Mills v. State*, 13 Md. App. 196, (1971) ("[W]hether an accused's conduct constituted gross negligence must be determined by the conduct itself and not by the resultant harm . . . Nor can criminal liability be predicated on every careless act merely because its carelessness results in injury to another.") (citations omitted); *see also Pagotto v. State*, 127 Md. App. 271, 300 (1999) (finding that the court must "scrupulously

avoid working backward" from the consequences of the defendant's conduct in determining whether that conduct constituted a gross departure from the applicable standard).

7. The State wants the trier of fact to be swayed by their emotions and not by relevant and material facts in this case. A medical expert testifying as to how the Defendant's actions, or inaction, could potentially cause injury falls into almost every category of inadmissible testimony under Maryland Rule 5-403. The discussion of Mr. Gray's injuries and, ultimately, his death has no bearing on the charges for which the State has brought against the Defendant, creating undue prejudice. The medical expert testimony would cause the trier of fact to confuse the issues as to what it is the State is actually trying to prove. The State's intent to bring in such medical testimony also misleads the trier of fact as to the purpose of its testimony as the Defendant is not charged with actually injuring Mr. Gray in any way.

8. In granting the Defendant's Motion to Sever, the court recognized that the legal and factual analysis of the charges lodged against Defendant Nero must remain separate from the evidence of Mr. Gray's injury, thus acknowledging that evidence or argument as to the injuries sustained by Mr. Gray has no probative value. Even assuming, *arguendo*, that evidence of injuries is relevant to the

charges, its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Md. Rule 5-403.

9. The State contends that, under the *Minor* decision, the risk of injury within the meaning of Criminal Law Article 3-204, Reckless Endangerment, is an objective standard. However, if one probes the depths of the *Williams* case, oft cited by the State, it is abundantly clear that this is *anything* but clear. "The potential problem area is that several sentences by the Court of Appeals, perfectly correct if tightly confined to the issue (or issues) before it, are susceptible of being read overbroadly if taken out of context." *Williams v. State* 100 Md. App. 468, 492. The Court continues that the decision in *Minor* "can and probably will be heady wine for many a careless and casual reader. The casual reader will announce triumphantly, 'Aha, Maryland has adopted the objective test for the crime of reckless endangerment!' At that point the law is in trouble." *Id.* at 492. It is evident that the State may have had too much of the wine served by *Minor*. There are five questions one should ask prior to the determination of whether or not the objective or subjective standard should be used by this Court.

> 1) In assessing whether the defendant's conduct has created a substantial risk of death or serious physical injury to another person, the question has arisen as to whether that *actus reus* of actual risk should be measured objectively by the physical facts in the case or should take into account the subjective state of mind of the defendant. Even if the defendant subjectively thinks that he has created such a risk and consciously disregards it, is that enough if the evidence shows objectively that the risk has not actually been created? (This was the secondary issue before the

Court of Appeals in *Minor* and the one that prompted the dissent by Judge Bell).

2) Granted that the *actus reus* of the actual creation of risk is to be objectively measured, does the *mens rea* of reckless endangerment require that the defendant subjectively intend harm to those he has put at risk or is it enough that, objectively measured, his conscious disregard of the risk represents a gross departure or gross deviation from the standard of conduct that a lawabiding person would observe?

3) Granted that a defendant need not entertain a specific intent to harm the persons placed at risk, he must at least, in order to be deemed reckless, consciously disregard the risk he has created. One purported standard holds that in order to be reckless, he must believe that the risk he consciously disregards is one of almost certain death or harm to the possible victims. This standard of risk is contrasted with the fourth standard listed below. The choice between the two is sometimes referred to, for some unknown reason, as a choice between a subjective standard and an objective standard.

4) Granted that a defendant, in order to be deemed reckless, consciously disregard the risk that he has created, is it enough that he be aware that his conduct *might* cause harm even though there is not a great or almost certain likelihood that the harm will occur? The choice between this standard and the third standard listed above, sometimes referred to strangely as a choice between an subjective and an objective standard, was the only issue before this Court in our *Minor* and the primary issue before the Court of Appeals in its *Minor.*

5) This fifth possibility represents the misbegotten and uncritical application of the answer "objective test" to a different question than the one which initially gave rise to the answer. It would essentially eliminate any *mens rea* from the crime of reckless endangerment. If the defendant is guilty of the *actus reus* of creating a substantial risk of death or serious physical injury to another person, nothing *495 further by way of any conscious disregard of that risk would be required. The defendant would be guilty if, objectively measured, ordinary prudent persons would not disregard such a risk. It would not matter whether the defendant consciously disregarded any risk or not. *Id.* at 493-495.

"Once we recognize, at the threshold, that in reckless endangerment cases there are multiple possible issues, we can effectively isolate them for closer and more

particularized scrutiny." *Id.* at 495. When looking at these questions the Court continues its dissection of the case as to at what point an objective standard is used versus subjective. It continues, "[r]eckless endangerment is a crime that has not eliminated the requirement of a *mens rea.* It is not a strict liability crime." *Id.* at 503.

10. The Defendant reiterates that MD. RULE 5-402 states "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 that 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). The probative value of the evidence pertaining to the nature and extent of Mr. Gray's injuries, including any opinion as to the cause of death, and any opinion as to the manner of death, is substantially outweighed by the danger of unfair prejudice. Any testimony concerning the alleged cause or manner of Mr. Gray's death, or the nature and timing of his injuries, would not assist the jury in determining the guilt or innocence of the Defendant for the crime of reckless endangerment. Ultimately, such evidence would only serve to arouse the jury's

prejudice and hostility against the Defendant, and needlessly confuse the evidence and legal issues involved in this case.

WHEREFORE, Defendant Edward Nero, by undersigned counsel, hereby requests that this Honorable Court DENY the State's *Motion in Limine* allowing the State to present irrelevant and highly prejudicial testimony from its' medical experts in an attempt to prove that the Defendants conduct created substantial risk of death or serious bodily injury.

Respectfully Submitted,

MARC L. ZAYON
ALLISON R. LEVINE
Roland Walker & Marc L. Zayon, P.A.
201 N. Charles Street, Suite 1700
Baltimore, Maryland 21201
(410) 727-3710
Counsel for Defendant Edward Nero

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16 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.

MARC L. ZAYON