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

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

STATE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO CHARGE A CRIME

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 responds herein to the Defendant's Motion to Dismiss for Failure to Charge a Crime. The State requests that the Court deny the Motion because (1) procedurally, it exceeds the permissible boundaries of this type of pre-trial motion to dismiss; and (2) substantively, it seeks erroneously to transform a police officer's qualified privilege to use force during a valid arrest from a permissible justification defense into an absolute immunity from prosecution for anything a police officer does to an arrestee. Police officers enforce the law; they are not above the law. When they act outside their privilege, they may be held criminally liable.

I. The Defendant's contention is based on what he assumes the evidence will be at trial and is not cognizable in a motion to dismiss under Rule 4-252(d)

The Defendant's Motion comes down to one argument: the First Count of the Indictment fails to charge the crime of second degree assault (in its intentional battery modality) because purportedly the State will not be able to prove that the Defendant police officer's battery of an arrestee, when based on the force used to effect an arrest without probable cause, amounts to

anything other than a basis to suppress evidence derived from the arrest pursuant to the exclusionary rule mandated in *Mapp v. Ohio*, 367 U.S. 643 (1961). Putting aside that this argument contravenes *Mapp*'s very foundation and discards over a hundred years of American common law (see Part II below), this argument asks the Court to exceed the inquisitional boundaries that Rule 4-252(d) permits during a pretrial motion to dismiss for failure to charge a crime.

The Court of Appeals in *State v. Taylor*, 371 Md. 617, 645 (2002), explained that "[a] motion to dismiss the charges in an indictment or criminal information [pursuant to Rule 4-252(d)] is not directed to the sufficiency of the evidence, i.e., the quality or quantity of the evidence that the State may produce at trial, but instead tests the legal sufficiency of the indictment on its face." Such a motion "may not be predicated on insufficiency of the State's evidence because such an analysis necessarily requires consideration of the general issue," and "where there are factual issues involved, a motion to dismiss on the grounds that the State's proof would fail is improper." *Id.* Whereas "[i]n a civil case, the trial court is permitted, in its discretion, to treat a motion to dismiss as a motion for summary judgment," "[t]here is simply no such analogue in criminal cases." *Id.* at 645-46. Accordingly, at this stage the only relevant question asks whether the Defendant has been informed of the State's second degree assault allegation by an indictment and bill of particulars "characterizing the crime" and "so describing it as to inform the accused of the specific conduct with which he is charged." *Dzikowski v. State*, 436 Md. 430, 445 (2013).

In this case, the Grand Jury's indictment alleged that the Defendant "did assault Freddie Carlos Gray, Jr. in the second degree" on April 12, 2015. The State also supplied the Defendant, as requested, with a Bill of Particulars informing him specifically that:

> [T]he Defendant caused offensive physical contact with and physical harm to Freddie Carlos Gray, Jr.; that the contact was the result of an intentional act of the Defendant and was not accidental; and that the contact was not legally justified in that the Defendant used force to place Mr. Gray under arrest without probable cause.

St. Response to Def. Demand for Bill of Particulars (filed June 8, 2015). The Defendant took no exception to the Bill of Particulars and, dispositively, makes no argument now that the State has failed to "characterize the crime" of second degree assault or has failed to describe the specific conduct that will be the subject at trial.

Rather, while acknowledging the narrow *Taylor* standard, the Defendant attacks Count 1's facial sufficiency on grounds that "the State has not demonstrated that a crime can even be committed under its theory of this case" because he believes that only proof of certain facts—*i.e.* "malice or excessive force"—will defeat his trial defense that the battery of Mr. Gray was legally justified; those facts not being pled, he deems the charge defective. Def. Mot. at 1-3. This attack quintessentially puts the cart before the horse. The logic the Defendant employs necessarily requires looking past the allegations, fast-forwarding to the end of trial, concluding that the State's proof ultimately will not meet its burden given his anticipated affirmative defense, and then rewinding to the pretrial phase to use that conclusion to argue that because the State will fail to *prove* the crime by *disproving* a valid defense to that crime, then the State, ipso facto, has failed to *charge* the crime.

While the Defendant can certainly argue about the sufficiency of the State's case under Rule 4-324 on motion for judgment of acquittal at the close of all evidence, the Defendant cites no case that requires the State to plead in a charging document the non-existence of every possible affirmative defense and the non-existence of the factual elements of those defenses. If the Defendant's position were correct, the State would have to charge in every assault case—and

with a detailed explanation—that the defendant "did not act in self-defense, in defense of others, in defense of property, while under duress, while insane, while involuntarily intoxicated, pursuant to a parental corporal punishment privilege, pursuant to a shop-keeper's privilege, pursuant to a police officer's privilege . . . ." The list could go on. Because the State has no such charging obligation, the Defendant's argument is nothing more than a disguised assertion that the State's factual evidence will fail at trial. *Taylor* squarely forecloses using a motion to dismiss for failure to charge a crime as a procedural mechanism to raise such an argument. Accordingly, the Motion should be denied.

II. Substantively, the Motion mischaracterizes a police officer's privilege to commit battery

Even assuming that the Defendant's procedural premises were correct, his overarching legal argument remains fatally flawed. The State has charged the Defendant with assaulting Mr. Gray by intentionally inflicting upon him the offensive physical contact of the force the Defendant used to arrest Mr. Gray without probable cause. The Defendant claims that his "defense counsel could not locate a single case in Maryland, any other state, or in the federal courts where a police officer has been charged criminally with second degree assault solely on the basis that he/she made an arrest allegedly without probable cause." Def. Mot. at 1. He insists that "[c]ommon sense dictates that officers would simply not make arrests if they were subject to criminal prosecution if it was later determined that probable cause did not exist," saying instead that "[t]he long term established remedy for a Fourth Amendment Constitutional violation has always been suppression of the evidence." Def. Mot. at 1.

Preliminarily, the Defendant's troubling implicit suggestion here is that police officers would refuse to do their jobs unless they could freely violate the laws they enforce, discarding

without criminal consequence the rights of citizens to remain free from unreasonable searches and seizures. As Justice Miller wrote for the Supreme Court long ago:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

United States v. Lee, 106 U.S. 196, 220 (1882). In that same spirit, Judge Stewart wrote for the Maryland Court of Appeals in 1876, considering an action for battery against a Baltimore police officer alleged to have arrested a citizen without probable cause, "if [police officers] fail in the performance of duty, or their conduct proceeds from a spirit of oppression or annoyance, they place themselves beyond the immunity afforded by law, and become offenders themselves, and are liable to the severest penalties." *Roddy v. Finnegan*, 43 Md. 490, 506 (1876). Indeed, American law has consistently limited a police officer's privilege to use force against citizens, and the long history of dutiful police officers in this country reflects the fact that most officers do not feel they can only do their jobs by being permitted to abuse the very communities they swear to protect and serve. Contrary to the Defendant's argument, the law has long punished—both civilly and criminally—those few officers who choose to act outside the trust of their privilege.

As set forth below, the definition of assault does not exempt police officers from prosecution for assaults committed in the line of duty. Instead, police are legally privileged to commit assault when—*and only when*—they do so within the confines of that privilege. When operative, the privilege provides a valid justification defense to a charge of assault. This policy existed at common law, and nothing about *Mapp*'s evidentiary exclusionary rule enlarged a police officer's privilege.

As defined statutorily, second degree assault includes "the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings." Md. Code. Ann. Crim. L. Art., §§ 3-201(b), 3-203(a). The Court of Appeals has long recognized "the likeness of assault and battery as private and public wrongs," treating them uniformly "in our law of torts as in our criminal law." *Kellum v. State*, 223 Md. 80, 84-85 (1960). Relevant here, Maryland law considers it "well settled that any unlawful force used against the person of another, no matter how slight, will constitute a battery." *Id.* at 85. "Although intent is an element of the crime of battery, the intent need only be for the touching itself; there is no requirement of intent to cause a specific injury." *State v. Duckett*, 306 Md. 503, 510 (1986). "[T]he gist of the action is not hostile intent on the part of the defendant, but the absence of consent to the contact on the [victim's] part." *Ghassemieh v. Schafer*, 52 Md. App. 31, 38 (1982). To that end, "it is the State's burden to prove . . . that the contact was non-consensual" as a final element to the crime. *Elias v. State*, 339 Md. 169, 184-85 (1995).

On the other hand, even non-consensual contact will not create liability when legally justified by a recognized privilege. "If force against another is privileged, and the force is not excessive, there is no battery." Rollin Perkins & Ronald Boyce, *Criminal Law*, § 2 at 153 (3d ed. 1982). Several such privileges exist which a defendant may assert as a valid affirmative defense to a charge of battery. For example, in *Anderson v. State*, 61 Md. App. 436, 442-43 (1985), Judge Moylan described that in the context of "the special relationship between child and one *in loco parentis*," "[a]s a defense, by way of justification, to what would otherwise be an assault and battery, an individual *in loco parentis* may sometimes, but not always, establish that the force used upon the child was privileged as necessary and proper to the exercise of domestic authority." *Accord Bowers v. State*, 283 Md. 115, 126 (1978) ("So long as the chastisement was

moderate and reasonable, in light of the age, condition and disposition of the child, and other surrounding circumstances, the parent or custodian would not incur criminal liability for assault and battery or a similar offense."); *see also Maddran v. Mullendore*, 206 Md. 291, 300 (1955) ("We adopt the rule of law that the intentional infliction upon another of a harmful or offensive contact or other bodily harm by a means not intended to cause death or serious bodily harm is privileged for the purpose of preventing or terminating another's intrusion upon the actor's possession of land or chattels . . . .").

As applicable here, police officers have been historically privileged to commit battery upon an arrestee as long as the officer acts within the scope of the privilege. The Court of Special Appeals succinctly described that a police officer's

> use of reasonable force to effectuate an arrest defeats a battery or an assault claim. In other words, contact incident to an arrest cannot form the basis of a claim for battery. Indeed, officers are privileged to commit a battery pursuant to a lawful arrest, subject to the excessive force limitation. [] If an officer uses excessive force, or force greater than is reasonably necessary under the circumstances, the officer may be liable. In other words, an officer's nonprivileged use of force constitutes battery.

French v. Hines, 182 Md. App. 201, 265-66 (2008) (quoting Sonja Larsen & Thomas Muskus, 6A C.J.S. Assault § 35 (2008 Supp.)). The "privilege that a law enforcement officer possesses to commit a battery" requires that it be exercised "in the course of a legally justified arrest" or detention and "extends only to the use of reasonable force, not excessive force." *Id.* at 265. Put differently, "battery (when the force used is not excessive) can only occur when there is no legal authority or justification for the arresting officer's actions." *Williams v. Prince George's County*, 112 Md. App. 526, 554 (1996); *accord Ohio v. White*, 29 N.E.3d 939 (Ohio 2015) (a police officer charged with criminal assault for using excessive force during an arrest is entitled to a jury instruction on an "affirmative defense" excusing the assault "when a police officer is

justified in using deadly force."). Moreover, despite the Defendant's assertions, Maryland law has never treated the police officer's privilege as conferring general immunity from prosecution for all actions taken in the context of an arrest. Instead, the police privilege works like any other privilege—the officer is liable for actions taken *before* the privilege is triggered and for actions that *exceed* the privilege's bounds.

As an example in the criminal context, *Wilson v. State*, 87 Md. App. 512 (1991), affirmed a police officer's conviction in the Circuit Court for Baltimore City for common law assault on the basis that the officer exceeded the permissible bounds of his privilege to use force in making an arrest. There, Malachi Wilson, a city police officer, pursued and arrested a man he believed stole the officer's sister's car. In doing so, as witnesses testified, Officer Malachi repeatedly struck the suspect and stated to him, "[y]ou think you're hurt now; we're going to make you talk 'Western District style.'" *Id.* at 516-17. The Court of Special Appeals held that the trial judge "enunciated the appropriate standard" for assessing liability in this context:

> We don't dispute the principle enunciated in *Wharton's* regarding the authority of the police to use adequate force to subdue a suspect, but he must use that force reasonably necessary to discharge his official duties. In so doing, he is not liable civilly or criminally for the assault or battery that may result, including, if necessary, the use of deadly force. And he may even use force to repel the objections of that person if he reasonably believes that he is in imminent danger of either losing his own life or suffering great bodily harm. The force he may use, of course, must be adequate for the circumstances. But in assessing that, we must judge the reasonableness from the perspective of a reasonable police officer and not from the perspective of a reasonable citizen not sworn to enforce the law.

Id. at 519.

On this question of whether the officer's conduct was reasonably necessary in the discharge of his duties, the Court answered "with a resounding no," holding that the officer's actions "went far beyond the bounds of conduct that this community, whether defined as police

or civilian, would accord as within the realm [of] reasonable." *Id.* at 520. "Officer Wilson was excessive in his behavior and for that must suffer the consequences." *Id.* Far from viewing the officer as immune from prosecution for assault because his conduct occurred in the context of making an arrest, the Court stressed the limitations on the police privilege to commit battery: "We hold that a police officer, from the perspective of a reasonable police officer, may use only that amount of force reasonably necessary under the circumstances to discharge his duties." *Id.*

Importantly, while *Wilson* involved an instance of excessive force during an arrest made upon probable cause, its holding recognizes the broader concept that in applying the police officer's privilege, "excessive force" is a relative term depending on the circumstances. *No amount of force* is "reasonably necessary under the circumstances to discharge [the officer's] duties" in the absence of probable cause or reasonable suspicion. Indeed, without the legal justification needed to detain a citizen, *any amount of force is excessive* because the officer in that context has no valid privilege to use force.

The Court of Appeals stressed this aspect of the privilege in *Mason v. Wrightson*, 205 Md. 481 (1954). In that case, a group of Baltimore City police officers entered a nightclub on Pennsylvania Avenue and, acting on orders from their captain and the Police Commissioner, "announced that the male patrons would be 'frisked' for concealed weapons." *Id.* at 485. When one patron (an attorney) objected that "there was no legal basis for the search" and refused to cooperate, an officer proceeded to search him anyway without his consent, leading the patron to later sue the officer for assault and battery and false imprisonment. *Id.* at 484-86. The Court concluded that "[t]he search under such circumstances constituted both an assault (and battery) and false imprisonment," saying that "[w]hen a peace officer goes beyond the scope of the law he may become liable civilly and is not shielded by the immunity of the law." *Id.* at 487.

At the time, the Fourth Amendment had not yet been fully incorporated against the States, and the officer defendant attempted to justify his actions by citing a Maryland law known as the Bouse Act, which "permit[ted] the use of evidence obtained through an illegal search or seizure in the prosecution of any person for unlawfully carrying a concealed weapon." *Id.* at 487-88. Finding no merit in this argument, the Court held that the

> Act does not enlarge the power of an officer to conduct searches which he could not otherwise make. The fact that evidence is admissible does not validate the means by which it was obtained. *'The Act offers to offending searchers and seizers no protection or immunity from anything—be it civil liability, criminal liability, or disciplinary action.'*

Id. at 488 (quoting *Salsburg v. Maryland*, 346 U.S. 545 (1954)) (emphasis supplied).

In short, when a police officer commits a battery outside the scope of his privilege—be it by using force that exceeds the privilege's bounds or by forcibly detaining someone before the privilege is triggered—Maryland law has long made the officer subject to remedial action, up to and including criminal prosecution. The police officer's privilege to use force in the exercise of his duties is just that—a privilege, not a right. Maryland's law of assault will forgive officers for justified actions but will hold them to account for unjustified ones. *See also Heinze v. Murphy*, 180 Md. 423, 425-29 (1942) (affirming judgment against a Baltimore City police officer for assault and battery after the officer arrested a citizen for disorderly conduct without probable cause, saying that the officer's "action in arresting the appellee, under the circumstances as detailed in the evidence, and charging him with disorderly conduct, does not seem to have been fully justified."); *Anderson*, 61 Md. App. at 446, n. 10 ("The justification of privileged force available to one *in loco parentis* to a minor child is only available within the context of punishing or chastising the child; to wit, in the actual exercise of 'domestic authority.' [...] In the case of [a] gratuitous and not even arguably justifiable attack, the assailant is guilty of assault

and battery whether the force employed is moderate or immoderate. In this context, the parent or custodian stands as a legal stranger in relation to the child and not within any privileged status.").

Having established that the police officer's common law privilege has historically operated in an assault case like any other justification defense, the only remaining questions as to the substance of the Defendant's argument involve *Mapp* and its impact on State law. Did full incorporation of the Fourth Amendment against the States by *Mapp*'s creation of a nationwide evidence exclusionary rule enlarge, as the Defendant suggests, the police officer's privilege into legal immunity? Did *Mapp* and its progeny otherwise change the privilege for purposes of criminal prosecution of police officers? *Mapp*'s underlying rationale answers the first question with a clear "no." Regarding the second question, subsequent Supreme Court cases have simply provided a better-defined standard by which to judge an officer's use of force, making liability turn on the reasonableness of the officer's actions rather than on an officer's good or bad faith.

Mapp v. Ohio, 367 U.S. 643, 655 (1961), created what is now black-letter criminal law: "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." In announcing this rule, however, the Supreme Court overruled a decision to the opposite effect made just twelve years before in *Wolf v. Colorado*, 338 U.S. 25 (1949). Understanding *Wolf*—and why it was overruled—is key to understanding *Mapp*'s impact on police prosecutions. Indeed, the *Wolf* Court came very close to reaching *Mapp*'s holding, reasoning:

> The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. [...] Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But

> the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.

338 U.S. at 27-28.

In declining to mandate a uniform, nationwide remedy of excluding evidence derived from illegal searches and seizures, the Court surveyed that sixteen States already did so as a matter of local law, whereas other States admitted such evidence but provided alternative deterrents in the form of civil actions against offending officers, disciplinary action on an administrative level, *or criminal prosecution of the officer*. *Id.* at 29-39. The Court specifically noted New York's approach as outlined in the *People v. Defore*, 150 N.E. 585 (1926), where then-Judge Cardozo noted that in such circumstances, though the illegally obtained evidence was admissible, "[t]he officer might have been resisted, or sued for damages, or even prosecuted for oppression." 338 U.S. at 31-32. Given these other remedies, the Court concluded, "[g]ranting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective." *Id.* at 31.

It is important at this juncture to note that Maryland followed New York's approach at the time of *Wolf* and in the years leading up to *Mapp*. In *Meisinger v. State*, 155 Md. 195 (1928), the defendant had been convicted of illegally possessing alcohol in Cecil County. The evidence used against him at trial unquestionably derived from an illegal seizure of the alcohol by the local sheriff. *Id.* at 199. Nevertheless, Maryland law at the time held that "when evidence

offered in a criminal trial is otherwise admissible, it will not be rejected because of the manner of its obtention . . . ." *Id.* As such, the Court upheld the conviction but in doing so, stated, "[t]he warrant should not have been issued, and the sheriff in serving the warrant was a trespasser." *Id.* The Court supported this statement by citing to Judge Cardozo's opinion in the *People v. Defore* and to a Massachusetts case, *Commonwealth v. Tibbetts*, 32 N.E. 910 (Mass. 1893), that also suggested criminal prosecution as a deterrent to illegal searches and seizures. *Id.* Likewise, as earlier discussed, the Court of Appeals in *Mason v. Wrightson*—decided five years after *Wolf* in 1954—stated that even though Maryland law permitted illegally obtained evidence to be admitted under the Bouse Act, the Act offered no protection from "civil liability, criminal liability, or disciplinary action." 205 Md. at 488.

Against this backdrop, the Supreme Court reconsidered in *Mapp* the remedy that *Wolf* left the States to decide. The Court noted that *Wolf*'s refusal to apply an exclusionary rule against the States was "bottomed on factual considerations," and so the Court examined "the current validity of [those] factual grounds . . . ." 367 U.S. at 650-51. The Court found that "[w]hile in 1949, prior to the *Wolf* case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now [in 1961], despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted" the exclusionary policy. *Id.* at 651. On the other hand, the Court surveyed that "[l]ess than half the States have any criminal provisions relating directly to unreasonable searches and seizures." *Id.* at 653, n. 7. The Court also found it significant that among the States that had come to favor exclusion post-*Wolf* was California, "which, according to its highest court, was 'compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions . . . .'" *Id.* at 651-52 (quoting *People v. Cahan*, 282 P.2d 905 (Ca.

1955)). Finding that "[t]he experience of California that such other remedies have been worthless and futile [was] buttressed by the experience of other States," the Court decided to finally discontinue "[t]he obvious futility of relegating the Fourth Amendment to the protection of other remedies." *Id.* at 652.

Significantly, the *Mapp* Court did not hold that States could no longer employ existing remedies to punish officers who engage in illegal searches and seizures. Rather, the Court recognized that an additional uniform, national remedy was required to actually give meaning to the Fourth Amendment's requirements. As Justice Douglas explained in his concurring opinion,

> When we allowed States to give constitutional sanction to the 'shabby business' of unlawful entry into a home [], we did indeed rob the Fourth Amendment of much meaningful force. There are, of course, other theoretical remedies. One is disciplinary action within the hierarchy of the police system, including prosecution of the police officer for a crime. Yet as Mr. Justice Murphy said in *Wolf v. Colorado* [in dissent], 'Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered.'

Id. at 670.

In other words, the *Mapp* Court acted because States' self-enforcement had failed to protect the Constitution, not because States' self-enforcement was itself unconstitutional.[1] Consequently, *Mapp* did nothing to displace Maryland's common law tradition of holding police

[1] Indeed, many States make police officers' Fourth Amendment violations criminally punishable by specific statute rather than the common law. *See e.g.* N.J. Stat. § 33:1-64 (2016) ("Any person who shall maliciously and without probable cause procure a search warrant to be issued and executed shall be guilty of a misdemeanor."); Rev. Code Wash. § 10.79.040 (2015) ("(1) It shall be unlawful for any police officer or other peace officer to enter and search any private dwelling house or place of residence without the authority of a search warrant issued upon a complaint as by law provided. (2) Any police officer or other peace officer violating the provisions of this section is guilty of a gross misdemeanor."); *see also Washington v. Groom*, 947 P.2d 240 (Wash. 1997) (upholding a police officer's conviction under § 10.79.040, *supra*). Also, the federal government prosecutes police officers for Fourth Amendment violations under 18 U.S.C. § 242 ("Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined . . . or imprisoned . . . .").

officers responsible for illegal searches and seizures using any combination of civil, administrative, and criminal remedies that the circumstances are deemed to warrant. As it bears on the Defendant's charges, the Office of the State's Attorney for Baltimore City and the Grand Jury have elected to employ the latter of those remedies.

The only remaining question concerns the extent to which *Mapp* and its progeny affected the way a criminal court applies the police officers' line-of-duty privilege as an affirmative defense to an assault charge. Though the Defendant asserts that the State must now prove that an officer acted "with malice or with excessive force" to overcome the justification defense, Def. Mot. at 3, the actual test involves only a reasonableness inquiry. As the Supreme Court explained in *Graham v. Connor*,

> all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other seizure of a free citizen should be analyzed under the Fourth Amendment and its reasonableness standard, rather than under a substantive due process approach. [...] As in other Fourth Amendment contexts, however, the reasonableness inquiry in an excessive force case is an objective one: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

490 U.S. 386, 395-97 (1989) (internal citations and quotation marks omitted). Maryland's appellate courts have incorporated *Graham* into civil and criminal claims based on State law and have applied its test when assessing police officer's alleged to have committed battery during an arrest. *Richardson v. McGriff*, 361 Md. 437, 452 (2000) (The test outlined in *Graham* "is the appropriate one to apply [to] the common law claims of battery and gross negligence."); *State v. Pagotto*, 361 Md. 528, 555 (2000) ("The Supreme Court has explained [in *Graham*] the proper prospective from which we must view a police officer's use of force . . . ."); *Wilson v. State*, 87

Md. App. 512, 520 (1991) ("In *Graham v. Connor*, [i]n determining whether the force used to accomplish a particular seizure was reasonable under the Fourth Amendment, the Court adopted an objective reasonableness standard, as did the trial judge in the case at bar. We hold that a police officer, from the perspective of a reasonable police officer, may use only that amount of force reasonably necessary under the circumstances to discharge his duties.").[2]

What emerges from this review of the relevant case law is the inescapable conclusion that the Defendant's Motion to Dismiss the assault charge against him derives from an entirely faulty argument about the privileges to which his job as a police officer entitled him when he encountered Mr. Gray. The State does not minimize the difficulty inherent in the split-second judgments police officers make every day, nor does the State seek to criminalize every technical violation of the Fourth Amendment; but here, the State has alleged that the Defendant's conduct was objectively, criminally unreasonable. That is not, as in a suppression hearing, a question of law to be decided in a pretrial motion. That is a question of fact for the jury.

Wherefore, the State requests that this Court deny the Defendant's Motion to Dismiss for Failure to Charge a Crime on any or all of the grounds discussed herein.

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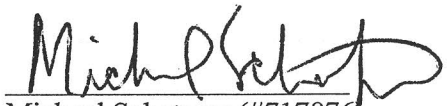
[2] The Defendant's assertion that only allegations of "malice" and "excessive force" can properly make out a charge of assault against a police officer conflates civil immunity concepts with criminal defenses. As the Court of Appeals made clear in *Smith v. Danielczyk*, 400 Md. 98, 129-30 (2007), Maryland's common law qualified immunity doctrine applies in civil actions but does not protect a police officer from liability for intentional torts, such as battery. Likewise, the Local Government Tort Claims Act, which requires a local police officer to have acted with actual malice before the plaintiff can execute on a judgment against the officer, does not subject the complaint to dismissal; rather the immunity will have relevance if and only after a judgment is entered. *Id.* Moreover, *Smith* provides another rebuke of the Defendant's assertion here that Fourth Amendment violations are only remedied post-*Mapp* by way of suppression of evidence. Indeed, *Smith* involved police officers' allegedly defamatory statements made in an application for a search warrant, and the Court ordered that the complaint should proceed notwithstanding the officers' assertion that such statements are entitled to absolute immunity. Such defamatory statements, being false by definition, would constitute a Fourth Amendment violation, but *Mapp's* exclusionary remedy posed no barrier to the officers' liability.

Respectfully submitted,

Marilyn J. Mosby



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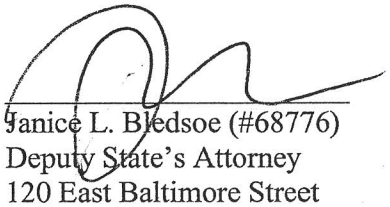

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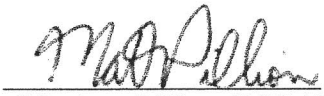

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2016, a copy of the State's Response to the Defendant's Motion to Dismiss for Failure to Charge a Crime was delivered by mail and email to the Defendant's counsel at:

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