STATE OF MARYLAND	*	IN THE
	*	CIRCUIT COURT FOR
v.	*	BALTIMORE CITY
	*	
WILLIAM PORTER	*	CASE No. 115141037
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STATE'S RESPONSE TO DEFENDANT'S MOTION *IN LIMINE* REGARDING PEREMPTORY STRIKES

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 as follows to the Defendant's Motion *in Limine* Regarding Peremptory Strikes:

1. The Defendant's Motion argues that Count 3 of the Indictment, charging him with the common law crime of misconduct in office, entitles him to ten peremptory strikes under Rule 4-313. He reasons that Rule 4-313's language is ambiguous in that it generally affords ten strikes if any one count could subject a defendant to at least twenty years in prison but affords only four strikes for any count that is a common law crime without a statutory penalty. He acknowledges that common law misconduct falls within this latter category but insists that he could face twenty years in prison if convicted of misconduct, thereby resulting in what he sees as an ambiguity in the Rule. He further reasons that there exists no clear answer in the Rule's history as to what the Court of Appeals intended in this situation; thus, he claims, under the rule of lenity, he should receive the higher number of strikes. Perhaps recognizing the problems with this argument, alternatively, he suggests that the degree of publicity in this case permits the Court to grant him ten strikes pursuant to some inherent authority to ignore Rule 4-313 in order to

protect some undefined federal constitutional umbrella of rights. Put simply, the Defendant's Motion not only contradicts his own prior pleadings but is wrong in every part of its reasoning.

2. Indeed, on May 27, 2015, the Defendant unequivocally stated in his Removal Memorandum that "Rule 4-313 will permit 10 peremptory challenges for the Officer driving the transport van," *i.e.* Officer Goodson, while "[t]he remainder of the cases will have four peremptory challenges for each Officer and the State." Def. Memo. in Support of Mot. for Removal and Req. for a Hearing at 70. The Defendant never acknowledges that he now makes the opposite argument. In any event, the Defendant's May 27 Memorandum correctly computed the result that Rule 4-313 requires.

3. Rule 4-313(a)(1) plainly states that "[e]xcept as otherwise provided in this section, each party is permitted four peremptory challenges." The exception that the Defendant highlights further states that "[e]ach defendant who is subject on any single count to a sentence of imprisonment for 20 years or more, but less than life, *except when charged with a common law offense for which no specific penalty is provided by statute*, is permitted ten peremptory challenges and the State is permitted five peremptory challenges for each defendant." Rule 4-313(a)(3). The Rule's "common law offense" clause clearly operates to exclude that category of crimes from section (a)(3)'s exception to the general four-strikes provision. Logically, thus, section (a)(1) continues to apply to any such "common law offense" because nowhere has the Rule "otherwise provided" a higher number of strikes for those offenses. This is not remotely ambiguous. The Rule simply does not allot extra strikes based on the non-statutory maximum common law penalty for a common law offense, no matter how high that penalty might legally go.

4. Turning to the offense in question here, the Court of Appeals has unequivocally held that "misconduct in office is a common law misdemeanor," and "[t]here [is] no statute in this State prescribing the punishment for committing the offense" such that "an offender is subject to the common law punishment . . . ." *Duncan v. State*, 282 Md. 385, 388 (1978). Misconduct in office, therefore, is "a common law offense for which no specific penalty is provided by statute." As such, Rule 4-313(a)(1) unambiguously provides a four-strike allotment of peremptory challenges.

5. Even assuming *arguendo* that ambiguity could somehow exist in the Defendant's proposed hypothetical situation, the Court of Special Appeals recently addressed the Defendant's concerns about Rule 4-313 in cases where a common law offense could subject a person to a penalty of at least twenty years. In *Walker v. State*, 224 Md. App. 659, 661 (Aug. 31, 2015), the defendant was charged with common law attempted distribution of cocaine, but, over a defense objection, the Circuit Court permitted the defendant only four peremptory challenges. On appeal after conviction, the defendant argued that attempted distribution, while a common law misdemeanor, is subject to a statutory twenty-year penalty derived from § 1-201 of the Criminal Law Article ("CL" hereinafter), which provides that "[t]he punishment of a person who is convicted of an attempt to commit a crime may not exceed the maximum punishment for the crime attempted." *Walker*, 224 Md. at 661. Because CL § 5-608(a), in turn, provides a twenty-year penalty for a completed distribution of cocaine, the defendant argued that the Circuit Court erred in not granting ten peremptory strikes. *Id.* at 662. The State countered that Rule 4-313(a)(1)'s four-strike provision applies to common law offenses in the absence of a "specific" statutory penalty, but the State argued that CL § 1-201 only sets forth a

general penalty, not a "specific" one. *Id.* at 663-64. In reversing the conviction, however, the Court of Special Appeals reviewed Rule 4-313's history, explaining that

> The clause, 'for which no specific penalty is provided by statute,' came into Maryland jury selection law with the adoption by the Court of Appeals on June 28, 1971, of the Forty-Second Report of the Standing Committee on Rules, effective September 1, 1971, by amendment to then Rule 746. [. . .] In 1971, there were common law crimes for which there was no specific penalty provided by statute and the sentence for those crimes was limited only by the constitutional prohibition against cruel and unusual punishment. Then the most common such crime was assault [. . .]. Then the penalty for the common law crime of attempt was 'anything in the constitutional discretion of the sentencing judge.' *Walker v. State*, 53 Md. App. 171, 186, 452 A.2d 1234, 1242 (1982). Other such offenses then included affray, *Baltimore & O. R. Co. v. Cain*, 81 Md. 87, 100, 31 A. 801, 803 (1895); false imprisonment, *Midgett v. State*, 216 Md. 26, 39, 139 A.2d 209, 216 (1958); and resisting arrest, *McNeal v. State*, 200 Md. App. 510, 526, 28 A.3d 88, 97 (2011), aff'd, 426 Md. 455, 44 A.3d 982 (2012).

Walker, 224 Md. at 664-65 (internal brackets omitted). The Court further noted that after the General Assembly in 1973 codified the maximum penalty for common law attempt now contained in CL § 1-201, nothing in the history of any of the later changes to what is now Rule 4-313 indicated that the crime of attempt was still intended to fall within the "common law offense" clause. *Id.* at 665-66. The Court, thereby, disposed of the State's "specific/general" dichotomy argument, holding that because CL § 1-201 provided a specific statutory limitation on the maximum penalty for attempt, the common law crime of attempt falls outside of Rule 4-313's "common law offense" clause, even though the actual penalty for attempt is still technically the common law penalty. Here, no similar statute exists for misconduct in office. Moreover, the Court of Special Appeals listed common law assault as being among the crimes originally intended to fall within the "common law offense" clause and then cited to *Walker v. State*, 53 Md. App. 171 (1982), in further explaining the clause. That 1982 appeal by the same name happened to involve

the very situation that the Defendant suggests creates ambiguity in Rule 4-313—the defendant received a twenty-year sentence for common law assault, which at the time had no statutory penalty. *Walker*, 53 Md. App. at 192-93. Implicit, thus, in the intermediate appellate court's 2015 *Walker* decision is a rejection of the construction of Rule 4-313 that the Defendant proposes. Were the Defendant correct, the Court would not have needed to analyze CL § 1-201's terms or Rule 4-313's history because the Court would simply have held that whenever a common law crime could carry a penalty of at least twenty years, such as attempted distribution of cocaine, Rule 4-313 requires ten strikes. Instead, in exploring Rule 4-313's history, the Court cited the 1982 *Walker* case, offering it as part of the jurisprudence underlying the "common law offense" four-strikes rule. If nothing else, this analysis clearly outlines that the Court of Appeals intended Rule 4-313's "common law offense" clause to apply even when the common law crime might carry a common law penalty of twenty or more years. Given that the rule of lenity, which the Defendant invokes, requires both ambiguity in a rule and an inability to determine the rule's drafters' intent, the Defendant's reliance on that doctrine is simply misplaced.

6. Equally misplaced is the Defendant's suggestion that this Court's inherent authority somehow could and should be invoked to override Rule 4-313 on constitutional grounds due to publicity in this case. Unsurprisingly, the Defendant cites no direct authority for his request; he also fails to mention the clear authority rejecting his position. Indeed, the Court of Special Appeals has stated, "[t]here is no relationship between the issue of pretrial publicity and the use of peremptory challenges." *Garland v. State*, 34 Md. App. 258 (1976). Moreover, "[peremptory] challenges are afforded by state law, and are not required by the Constitution[;][n]or are they guaranteed by our Declaration of Rights" but

instead are "conferred upon an accused and the State by the common law, case law, statute, and rule of court." *Whitney v. State*, 158 Md. App. 519, 531 (2004). To that end, our appellate courts have "cautioned that the Maryland Rules are not guides to the practice of law but precise rubrics established to promote the orderly and efficient administration of justice and that they are to be read and followed." *State v. Harris*, 428 Md. 700, 720 (2012). The Defendant would have the Court violate this dictate in order to fulfill a supposed higher legal requirement for which the Defendant has offered zero proper authority and which, instead, has been resoundingly rejected by Maryland's courts. No amount of publicity and no vague appeals to federal constitutional protections can change the simple fact that Maryland law allots the Defendant and the State four peremptory challenges each in this case.

Wherefore, the State asks that this Court deny the Defendant's Motion *in Limine* Regarding Peremptory Challenges.

Respectfully submitted,

Marilyn J. Mosby

Michael Schatzow (#717876)
Chief Deputy State's Attorney
120 East Baltimore Street
The SunTrust Bank Building
Baltimore, Maryland 21202
(443) 984-6011 (telephone)
(443) 984-6256 (facsimile)
mschatzow@stattorney.org

Janice L. Bledsoe (#68776)
Deputy State's Attorney
120 East Baltimore Street
The SunTrust Bank Building
Baltimore, Maryland 21202
(443) 984-6012 (telephone)
(443) 984-6256 (facsimile)
jbledsoe@stattorney.org

Matthew Pillion (#653491)
Assistant State's Attorney
120 East Baltimore Street
The SunTrust Bank Building
Baltimore, Maryland 21202
(443) 984-6045 (telephone)
(443) 984-6252 (facsimile)
mpillion@stattorney.org

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 2015, a copy of the State's Response to the Defendant's Motion *in Limine* Regarding Peremptory Challenges was mailed and e-mailed to:

Joseph Murtha
Murtha, Psoras & Lanasa, LLC
1301 York Road, Suite 200
Lutherville, Maryland 21093
(410) 583-6969
jmurtha@mpllawyers.com
Attorney for Officer William Porter

Gary Proctor
Gary E. Proctor, LLC
8 E. Mulberry St.
Baltimore, MD 21202
410-444-1500
garyeproctor@gmail.com
Attorney for Officer William Porter

Respectfully submitted,

Marilyn J. Mosby

Janice L. Bledsoe (#68776)
Deputy State's Attorney
120 East Baltimore Street
The SunTrust Bank Building
Baltimore, Maryland 21202
(443) 984-6012 (telephone)
(443) 984-6256 (facsimile)
jbledsoe@stattorney.org