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CIRCUIT COURT
BALTIMORE CITY
CRIMINAL DIVISION

STATE OF MARYLAND	*	IN THE
	*	CIRCUIT COURT FOR
v.	*	BALTIMORE CITY
	*	CASE No. 115141035
BRIAN RICE		

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

STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE TO PRECLUDE ANY REFERENCE TO AN OUT-OF-COURT STATEMENT THAT OFFICER PORTER ALLEGEDLY MADE TO DETECTIVE SYREETA TEEL ON APRIL 15, 2015[1]

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; and Janice L. Bledsoe, Deputy State's Attorney for Baltimore City; and responds herein to the Defendant's Motion In Limine to Preclude Any Reference to an Out-of-Court Statement that Officer Porter Allegedly Made to Detective Syreeta Teel on April 15, 2015.

I. Overview

Assessing the merits of the Defendant's Motion boils down to determining whether the State asking Officer Porter on direct examination about Mr. Gray's alleged statement at Stop 4, "I can't breathe," a statement which Porter may deny occurred, would constitute the State entering into an "independent area of inquiry" with Porter solely for the purpose of impeaching Porter with extrinsic evidence through Detective Teel of Porter's own prior inconsistent statement to her that Gray did, in fact, say those words at Stop 4. As the Defendant correctly notes, *Bradley v. State* holds that "in a criminal case, a defendant is denied a fair trial if the State, with full knowledge that its questions will contribute nothing to its case, questions a witness concerning *an independent area of inquiry* in order to open the door for impeachment and introduce a prior inconsistent statement." 333 Md. 593, 604 (1994) (emphasis supplied). The

[1] This Response is largely the same as the State's response to the identical motion filed in *State v. Goodson*, but it differs in Part III below.

State contends that asking Porter about Gray's statement, "I can't breathe," would *not*, for the reasons set forth below, constitute questioning Porter concerning "an independent area of inquiry" in violation of *Bradley* but would instead be a straightforward application of Rule 5-607 and Rule 5-613(b), which together permit the State to impeach its own witness with extrinsic evidence of a prior inconsistent statement which the witness has failed to admit having made and which concerns a non-collateral issue. To be sure, the Defendant does not contend here that such extrinsic evidence would not satisfy Rule 5-613(b)'s prerequisites in the absence of *Bradley*'s limitation—if Porter denies the statement and maintains that denial after reviewing his alleged prior words, the statement undoubtedly lies at the heart of the issues in this case and so is non-collateral and, thereby, permissible impeachment material. The central questions for resolving the Defendant's Motion, thus, are how to define "an independent area of inquiry" under *Bradley* and whether the State's intended line of questioning falls within that definition.

II. Defining "an independent area of inquiry" under *Bradley*

The *Bradley* Court went to great pains to stress that the case's "holding is a limited one." 333 Md. at 604. The State generally agrees with the Defendant's recitation of *Bradley*'s facts and so will focus this discussion on *Bradley*'s precise holding.[2] The basic iteration of the holding is the one quoted above: "a defendant is denied a fair trial if the State, with full knowledge that its questions will contribute nothing to its case, questions a witness concerning an independent area of inquiry in order to open the door for impeachment and introduce a prior inconsistent statement." *Id.* Immediately following that iteration, however, the Court added several important qualifications to its holding.

[2] For an excellent summary of *Bradley*'s pertinent facts and legal underpinnings, see *Walker v. State*, 373 Md. 360, 384-386 (2003).

First, the Court stated, "if the area of inquiry is not clearly independent, then the State may impeach those portions of a witness's testimony that do not comport with the prosecution's theory of the case." *Id.* The Court explained that this qualification meant that "in instances where a witness's testimony is not reasonably divisible into clearly separate areas of inquiry, the State may properly impeach any portion of the witness's testimony that disfavors the government's case." *Id.* As an example supporting this proposition, the Court cited *United States v. Eisen*, which explained:

> Where the Government has called a witness whose corroborating testimony is instrumental to constructing the Government's case, the Government has the right to question the witness, and to attempt to impeach him, about those aspects of his testimony that conflict with the Government's account of the same events. Here, the testimony of the hostile witnesses provided affirmative proof that was necessary to construct the Government's case, and thus the Government was entitled to question these witnesses and to invite the jury to disbelieve that portion of their accounts that contradicted the prosecution's theory of the case.

974 F.2d 246, 263 (2nd Cir. 1992) (internal citations omitted).

Next, the Court of Appeals wrote, "[w]e are in general agreement with the United States Court of Appeals for the Seventh Circuit's comment that, 'when a government witness provides evidence both helpful and harmful to the prosecution, the government should not be forced to choose between the Scylla of foregoing impeachment and the Charybdis of not calling the witness at all.'" *Bradley*, 333 Md. at 605.[3] The Court here was quoting *United States v. Kane*, 944 F.2d 1406, 1412 (7th Cir. 1991). *Kane*, in turn, was citing and quoting *United States v. Webster*, 734 F.2d 1191, 1193 (1984), in which Judge Posner, critiquing an approach suggested

[3] Scylla and Charybdis, in Greek mythology, were two immortal and irresistible monsters who beset the narrow waters traversed by the hero Odysseus in his wanderings described in Homer's Odyssey, Book XII. Scylla was often rationalized in antiquity as a rock or reef. Charybdis was the personification of a whirlpool. Both gave poetic expression to the dangers confronting Greek mariners when they first ventured into the uncharted waters of the western Mediterranean. To be "between Scylla and Charybdis" means to be caught between two equally unpleasant alternatives. Eds. of Encyclopedia Britannica, *Scylla and Charybdis*, *Greek Mythology*, http://www.britannica.com/topic/Scylla-and-Charybdis (last accessed May 27, 2016).

by Professor Graham in the *Handbook of Federal Evidence* § 607.3 (1981 and Supp. 1983), more fully explained:

> Suppose the government called an adverse witness that it thought would give evidence both helpful and harmful to it, but it also thought that the harmful aspect could be nullified by introducing the witness's prior inconsistent statement. As there would be no element of surprise, Professor Graham would forbid the introduction of the prior statements; yet we are at a loss to understand why the government should be put to the choice between the Scylla of forgoing impeachment and the Charybdis of not calling at all a witness from whom it expects to elicit genuinely helpful evidence.

The Maryland Court of Appeals believed that the "independent area of inquiry" test would avoid forcing the State to choose between "these two extremes" because the *Bradley* holding would apply only "[w]hen it is *completely unnecessary* for the State to elicit neutral or unfavorable testimony." 333 Md. at 605 (emphasis supplied). "Impeachment may be thought of as a shield [that] protects a party from unfavorable testimony by neutralizing that testimony," but, the Court explained, "[i]mpeachment should not be used as a sword to place otherwise inadmissible evidence before the jury when there is *no reason whatsoever* for eliciting the unfavorable testimony upon which the need for impeachment is predicated." *Id.* at 605-06 (emphasis supplied).

Upon these qualifications, the Court further added, "[w]e wish to emphasize that our holding is not applicable where there is no clearly independent area of inquiry or where failure to inquire into a possibly independent area of inquiry could create a gap in the witness's testimony such that a negative inference may arise against the prosecution." *Id.* at 606. Moreover, the Court stressed that its "holding does not prohibit the State from attempting to fill such a gap by questioning and then impeaching the witness." *Id.* The Court narrowed its holding even more by clarifying that "the State is still entitled to impeach a witness with a prior inconsistent

statement if the witness's testimony comes as a surprise" or "if the State did not create the need to impeach." *Id.* at 606-07.

Nine years later, the Court of Appeals revisited its holding in *Bradley* and stressed that the State being "surprised" should not be viewed as a prerequisite to impeachment in this context. *Walker v. State*, 373 Md. 360, 387 (2003). The focus remained on whether the prosecutor called the witness purely as subterfuge to draw the witness into recanting on the stand or, if there is no subterfuge, whether the area of inquiry that led to the recanting was clearly independent:

> If the witness's testimony is relevant to matters other than the 'recanting' statements, then the witness was not called as a subterfuge and the question eliciting the 'recanting' statements must be scrutinized to determine whether the question concerned an 'independent area of inquiry.' When the area of inquiry is clearly not independent, then the State may impeach those portions of a witness's testimony that do not comport with the prosecution's theory of the case.

Id. at 388.

III. Would eliciting Porter's denial of "I can't breathe" violate *Bradley*?

Having set forth this nuanced description of *Bradley*'s limited holding, the remaining question is whether the State would violate *Bradley* in its direct examination of Porter. Preliminarily, it must be noted that the trial dynamics may affect the analysis considerably even before Porter takes the stand. Likewise, although the Defendant takes for granted that the State believes Porter will deny telling Teel that Gray said, "I can't breathe," at Stop 4, that assumption may be unwarranted. While Porter testified *in his own trial* that he did not tell Teel this information, the State always maintained that he was not truthful on this detail. To that end, the State has now secured an immunity order against Porter such that he can tell the truth without worrying that his prior statement, if untruthful, could be used against him in a perjury

prosecution. Indeed, the existence of an immunity order was a significant fact in the *Walker* Court's analysis in finding no *Bradley* violation there. 373 Md. at 390. If Porter embraces the immunity grant and testifies consistently with Teel's account of his prior statement, then the Defendant's entire Motion becomes a moot point.

Even if Porter maintains his trial testimony, the State would not violate *Bradley* by eliciting his denial of "I can't breathe" and then impeaching him through Teel because the line of questioning that would lead to the impeachment would be inextricably intertwined with a perfectly permissible area of inquiry, namely what happened and what Gray said at Stop 4 that led officers to decide Gray needed to go to the hospital only a short time after the wagon left Stop 2, where Gray had been left by the Defendant unbuckled but as yet uninjured inside the wagon. The State intends to elicit from Porter in the Defendant's trial testimony similar to what Porter stated in his own trial regarding Stop 4:

> The doors are opened, and I see Mr. Freddie Gray laying chest down or stomach down. His head is to the – toward the cabin of the vehicle, and his feet are to the rear of the door. I then said to him, 'what's up,' and he says, 'help.' From saying 'help,' I say 'how can I help you; what's wrong with you.' And then he says, 'can you help me up.' I think I help him up. Or – or we're just kneeling, and I'm talking to him. [ ] After then, then I – I get out of the wagon. And I'm talking with Officer Goodson, and I said that guy's asking to go to the hospital. [ ] I suggest to Officer Goodson to take him to Bon Secours or to a hospital.[4]

The State believes that Gray also said to Porter, "I can't breathe," when the wagon doors were opened. If Porter does not testify to that effect, the State intends to ask Porter whether Gray said those words. If Porter denies that Gray did so even after showing Porter his own prior statement, then the State will call Teel to the stand to impeach Porter with Teel's account of the prior

[4] These quotes are taken from the trial testimony of Porter in his own trial. A transcript of this testimony will be provided to the Court if the Court would like to review it.

conversation she had with Porter in which she would testify that Porter told her that Gray did, in fact, say, "I can't breathe," at Stop 4.

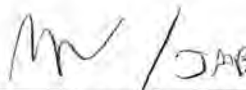
The line of inquiry that would lead to this potential impeachment cannot fairly be characterized as "independent," *i.e.*, "reasonably divisible into clearly separate areas of inquiry," from the line of inquiry about everything else Gray said at Stop 4. Certainly, the Defendant may not like testimony about Gray's words at Stop 4, but the Court can have no doubt about the relevance and admissibility of such testimony to the State's case against the Defendant. Porter, therefore, also would not be called to testify merely as *Bradley*-forbidden "subterfuge" to elicit otherwise inadmissible impeachment about that one statement of Gray—indeed, Porter is at the heart of the government's case here. The Defendant would have the Court rule that the State could inquire about all of the statements Gray said at Stop 4 that prompted the decision that Gray needed to go to the hospital—rather, all of the statements except one: the damaging statement, "I can't breathe," verbalizing an unmistakable manifestation of injury that would link the cause of death back to the Defendant's actions at Stop 2. This one statement the Defendant would have this Court bar inquiry into and impeachment of merely because this is the one statement about which Porter would give an inconsistent answer. To claim that this one statement constitutes an independent area of inquiry for that sole reason, however, would be an absurd reading of *Bradley*. Indeed, as the *Bradley* Court stressed, "when a government witness provides evidence both helpful and harmful to the prosecution, the government should not be forced to choose between the Scylla of foregoing impeachment and the Charybdis of not calling the witness at all." 333 Md. at 605. Rather, calling Teel to impeach Porter, if he recants, would be precisely the type of permissible "shield-impeachment" *Bradley* condones that "protects a party from unfavorable testimony by neutralizing that testimony."

Moreover, even if the Court deems that one statement to be an independent area of inquiry, barring the State from inquiring into the statement, "I can't breathe," and then impeaching Porter if necessary, would contravene one of *Bradley*'s clearly articulated exceptions: the need to avoid the judiciary artificially creating "a gap in the witness's testimony such that a negative inference may arise against the prosecution." In this regard, granting the Defendant's Motion would create the negative inference that Gray was only faking injury and displayed no apparent objective symptoms of injury at Stop 4. This would lend credence to the notion that Mr. Gray was injured between Stops 5 and 6 rather than between Stops 2 and 4, thereby potentially removing the Defendant from the chain of proximate causation between his actions and Mr. Gray's injuries.

Wherefore, the State asks that this Court deny the Defendant's Motion In Limine to Preclude Any Reference to an Out-of-Court Statement that Officer Porter Allegedly Made to Detective Syreeta Teel on April 15, 2015.[5]

Respectfully submitted,

Marilyn J. Mosby



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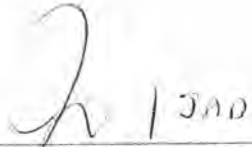
[5] The Defendant's Motion also includes a brief section at the end that asks for any reference to "I can't breathe" to be excluded from Dr. Allan's expert testimony. The State does not address this argument here because the Defendant has filed a separate motion on this very subject (Defendant's Motion in Limine to Preclude the Admission of the Autopsy Report of Carol H. Allan, M.D., in Unredacted Form), to which the State has filed a separate response that the State incorporates herein as its answer to that section of the Defendant's Motion.



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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 2016, a copy of the State's Response to the Defendant's Motion In Limine to Preclude Any Reference to an Out-of-Court Statement that Officer Porter Allegedly Made to Detective Syreeta Teel on April 15, 2015, was mailed and e-mailed to:

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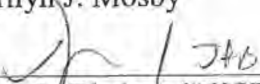

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