

STATE OF MARYLAND

Plaintiff

v.

ALICIA WHITE

Defendant

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IN THE

CIRCUIT COURT

FOR

BALTIMORE CITY

Case No. 115141036

**DEFENDANT'S MOTION FOR SUBPOENA FOR TANGIBLE EVIDENCE  
REGARDING MEDICAL RECORDS**

Defendant Alicia White, through her counsel, moves pursuant to Md. Rule 4-264, and requests that this Court order the issuance of a subpoena commanding the production of medical records that are relevant to this case.

On December 7, 2015, the State provided Sergeant White with evidence that the deceased in this case, Mr. Gray, had a preexisting spine injury or condition. *See Ex. A*, Email and attached Memorandum of Sgt. John Herzog. The State contends that Mr. Gray died as a result of a spinal injury, and charges Sergeant White in Mr. Gray's death. The State's own investigation revealed information concerning past attempts by Mr. Gray to injure himself while in custody.<sup>1</sup> *See Ex. B*, Progress Reports for Case 15H0086 (May 17 & 22, 2015). However, only just recently, the State disclosed to Sergeant White a memorandum dated May 1, 2015 that states that Mr. Gray, in an interview on March 31, 2015 at the Western District Station, told police officers that, "I hurt my back," or "I have

<sup>1</sup> Sergeant White has filed a separate motion, concurrent with the instant motion, for a subpoena on the custodian of records of the Maryland Department of Public Safety & Corrections for any administrative, medical, or disciplinary records related to Mr. Gray for any period of incarceration, which the Defendant incorporates here.

RECEIVED FOR RECORD  
CIRCUIT COURT FOR  
BALTIMORE CITY  
2016 JAN 15 PM 4:27  
CRIMINAL DIVISION

a bad back." **Ex. A.** Sgt. Herzog informed the State's Attorney's Office, as well as a Detective on the FIT team who was part of the task force investigating Mr. Gray's death. *Id.*

In light of this just-disclosed evidence, Mr. Gray's medical records "may constitute or contain evidence relevant to the action" under Md. Rule 4-264. Accordingly, Sergeant White requests that this Court issue a subpoena duces tecum on the custodian of medical records for (1) the University of Maryland Medical Center (Downtown), (2) the University of Maryland Medical Center - Midtown Campus, and (3) Bon Secours Hospital, commanding each to produce for inspection and copying before trial any records of treatment that Mr. Gray received in the respective hospitals within five years of the events that are the subject of this trial.

### **LEGAL STANDARD**

Md. Rule 4-264 states:

On motion of a party, the circuit court may order the issuance of a subpoena commanding a person to produce for inspection and copying at a specified time and place before trial designated documents, recordings, photographs, or other tangible things, not privileged, which may constitute or contain evidence relevant to the action. Any response to the motion shall be filed within five days.

A person facing criminal charges is entitled to discovery of confidential records when his constitutional rights outweigh the interests of the party holding the protection of confidentiality. *Fields v. State*, 432 Md. 650, 666-67 (2013). The test for determining whether a defendant is entitled to discovery of otherwise protected information is well-established in Maryland. The "*Zaal* test" requires that the defendant demonstrate a "need

to inspect,' that is 'a reasonable possibility that review of the records would result in discovery of usable evidence.'" *Zaal v. State*, 326 Md. 54, 81 (1992); *Fields*, 432 Md. at 667 (noting that the test set forth in *Zaal* applies broadly to different types of information). "The sufficiency of the need to inspect depends upon factors such as '[t]he nature of the charges brought against the defendant,' '[t]he issue before the court,' and the 'relationship . . . between the charges, the information sought, and the likelihood that relevant information will be obtained as a result of reviewing the records.'" *Fields*, 432 Md. at 667 (quoting *Zaal*, 326 Md. at 81-82).

Once the defendant has carried the burden to demonstrate a need to inspect the records, the Court "may elect to review the records alone, to conduct the review in the presence of counsel, or to permit review by counsel alone, as officers of the court, subject to such restrictions as the court requires to protect the records' confidentiality." *Zaal*, 326 Md. at 87. The Court of Appeals has emphasized that defense counsel's participation is desirable, particularly to identify impeachment information. *Fields*, 432 Md. at 668; *Zaal*, 326 Md. at 86-87.

As stated by the Court of Appeals, this Court's "ultimate determination of whether to allow discovery of the sought-after information does not rest on whether the records themselves are admissible at trial, but rather on whether disclosing that material to the seeking party would reveal or lead to admissible evidence. *Fields*, 432 Md. at 668-69. The Court of Appeals held in *Zaal*:

[T]he court's review is not to determine whether, and, if so, what, is "directly admissible;" rather, it is to exclude from the parties' review material that

could not, in anyone's imagination, properly be used in defense or lead to the discovery of usable evidence.

326 Md. at 88. Therefore, "[o]nly when the records are *not even arguably relevant and usable* should the court deny the defendant total access to the records." *Fields*, 432 Md. at 669 (quoting *Zaal*, 326 Md. at 88 (emphasis in *Fields*)).

### **ARGUMENT**

This Court should issue the requested subpoenas and order production of Mr. Gray's medical records.

#### **I. Sergeant White has demonstrated the need to inspect the sought-after records.**

Sergeant White has demonstrated the need to inspect Mr. Gray's medical records. *Zaal*, 326 Md. at 81. Any record showing that Mr. Gray had a prior spinal injury is closely connected to the issues in this case. *See Fields*, 432 Md. at 669 (holding that the defense carried their burden to show "what they expected to discover within the [Internal Investigation Department] files and what in those files they hoped would be useful at [the murder] trial"). The requested subpoenas are limited to three hospitals within the immediate area where the deceased lived. In particular, emergency department records are likely to contain relevant information as to the nature and severity of any acute injuries Mr. Gray has suffered. If he had a serious injury or condition, it is likely that there are records of Mr. Gray having been admitted to the hospital. Moreover, even if records produced do not themselves relate to a spinal injury, such records are likely to contain Mr. Gray's medical history, which would include any past spinal injury. Indeed, the medical records in the instant case are even more closely connected to the nature of the charges, and the

issues before the court, than the Internal Investigations files in *Fields* were connected to the murder charges in that case.

For those reasons, the Defendant has demonstrated the "need to inspect" Mr. Gray's medical records, because there is a "reasonable possibility that review of the records would result in discovery of usable evidence." *Zaal*, 326 Md. at 81.

## **II. Sergeant White's constitutional rights outweigh any privacy interest in the requested records.**

Sergeant White's constitutional rights outweigh any privacy rights or other interests in the records she seeks. "[C]onfidentiality interest must yield, in the appropriate case, to the defendant's interest in having an opportunity to mount a defense and confront the witnesses against him." *Fields*, 432 Md. at 672 (police personnel records).<sup>2</sup> A "defendant has a due process right to discover and put before the fact finder evidence that might influence the determination of guilt." *Reynolds v. State*, 98 Md. App. 348, 364 (1993) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987)). Moreover, the Constitution guarantees a defendant the right to confront the witnesses against him. *Fields*, 432 Md. at 672 (citing *Robinson v. State*, 354, Md. 287, 308 (1999)).

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<sup>2</sup> The records that Sergeant White seeks are not privileged. "Communications made to a physician in his professional capacity are not privileged under the common law of Maryland, nor, with some exceptions in the case of psychiatrists, have they been made so by statute." *Franklin v. State*, 8 Md. App. 134, 141 (1969); see also *Butler-Tulio v. Scroggins*, 139 Md. App. 122, 142 (2001) (quoting *Franklin*). Sergeant White is not seeking mental health or substance abuse treatment records that may be subject to privilege or statutory protections. Therefore, the sought-after records are not subject to any (non-existent) doctor-patient privilege. To the extent that the records are confidential, the Health Information Portability Accountability Act and the Health General Article of the Annotated Code of Maryland expressly recognize that medical records, such as those Sergeant White seeks, should be produced in appropriate situations such as in the instant case. Md. Code Ann., Health Gen. § 4-306 (providing that health care providers must produce otherwise confidential records subject to a court order).

In the instant case, production of any medical records of Mr. Gray's treatment at the three area hospitals is necessary to protect Sergeant White's rights under the Constitution. Medical causation is a central issue in this case. Information in the medical records concerning a preexisting spine injury will undoubtedly influence the determination of guilt in a death resulting from a spine injury. The State's witnesses opine that Mr. Gray's injury occurred between Stops 2 and 4, while Sergeant White's witnesses will testify that the injury could not have occurred until after Stop 5. The records Sergeant White seeks will be essential for her to confront the witnesses against her, including, but not limited to, Dr. Allan and Dr. Soriano. Accordingly, Sergeant White's right to a fair trial compels production of the sought-after medical records.


**III. If this Court believes that Sgt. White has yet to show a reasonable possibility that these records would result in the discovery of usable evidence, the Court should review the records in camera, with the participation of counsel.**

Because Sergeant White has demonstrated that there is a "reasonable possibility that review of the records would result in discovery of usable evidence," this Court must either order their production, or at least review the records *in camera*. *Fields*, 432 Md. at 670 ("Given Petitioners' proffer, the motion court ran afoul of the *Zaal* test by declining to review the content of the IID files and opting instead to examine *in camera* only the file summaries prepared by the Department."). Although, as noted above, Sergeant White's constitutional rights greatly outweigh any confidentiality interest in the records, such concerns of confidentiality can be protected through *in camera* review, and by ordering production of only those records that are pertinent to the Defendant's case. *Id.* at 672.

To help determine which records pertain to Sergeant White's case, her counsel requests that they be allowed to participate in any review of the records produced. *Id.* (outlining suitable review procedures, including "'permit[ting] the review of records by counsel in their capacity as officers of the court,' either alone or in the presence of the court" (quoting *Zaal*, 326 Md. at 86)). "The trial court's review should not only be aimed at discovering evidence directly admissible but also that which is usable for impeachment purposes, or that which would lead to such evidence." *Zaal*, 326 Md. at 88. Defense counsel is in the best position to identify such evidence. *Id.* Accordingly, counsel for Sergeant White request that this Court conduct a review of records obtained in response to the requested subpoenas with the participation of counsel.

WHEREFORE, the Defendant requests that this Court:

1. Order the issuance of a subpoena *duces tecum* commanding the custodians of medical records of the University of Maryland Medical Center, the University of Maryland Medical Center - Midtown, and Bon Secours Hospital to produce to the Parties all medical records related to Mr. Gray since April 12, 2010; and
2. In the alternative, order that the records produced in response to the subpoenas be produced to the Court and reviewed *in camera*, with the participation of counsel.



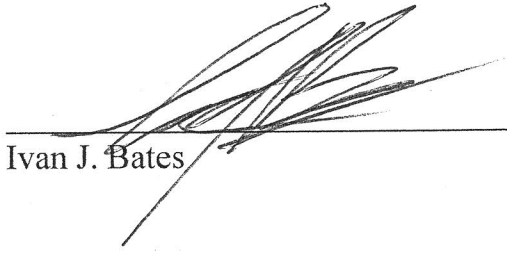
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Ivan J. Bates, Esq.  
Tony N. Garcia, Esq.  
Mary M. Lloyd, Esq.  
Bates & Garcia, LLC  
Attorneys at Law  
201 N. Charles Street, Suite 1900  
Baltimore, Maryland 21201

**CERTIFICATE OF SERVICE**

I hereby certify that on this 15th day of January 2016, a copy of the foregoing  
paper was sent by first class mail, postage prepaid to:

Michael Schatzow, Chief Deputy State's Attorney  
Office of the State's Attorney for Baltimore City  
120 East Baltimore Street  
Baltimore, Maryland 21202



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Ivan J. Bates



# **EXHIBIT A**

**Justin A. Redd**

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**From:** Andrew Jay Graham  
**Sent:** Monday, December 07, 2015 8:26 PM  
**To:** Amy E. Askew; M.Natalie McSherry; Justin A. Redd; Jane M. Walker  
**Subject:** Fwd: discovery  
**Attachments:** memo.pdf; ATT00001.htm

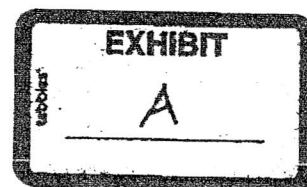
Andrew Jay Graham  
Kramon & Graham, P.A.

Begin forwarded message:

**From:** Janice Bledsoe <[JBledsoe@stattorney.org](mailto:JBledsoe@stattorney.org)>  
**Date:** December 7, 2015 at 8:21:58 PM EST  
**To:** "Matthew Fraling ([Matthew.fraling@mdlobbyist.com](mailto:Matthew.fraling@mdlobbyist.com))" <[Matthew.fraling@mdlobbyist.com](mailto:Matthew.fraling@mdlobbyist.com)>, "Catherine Flynn ([cflynn@meadandflynn.com](mailto:cflynn@meadandflynn.com))" <[cflynn@meadandflynn.com](mailto:cflynn@meadandflynn.com)>, "Mark Zayon ([mzayon@walkerzayon.com](mailto:mzayon@walkerzayon.com))" <[mzayon@walkerzayon.com](mailto:mzayon@walkerzayon.com)>, "Ivan Bates ([ivan@batesgarcia.com](mailto:ivan@batesgarcia.com))" <[ivan@batesgarcia.com](mailto:ivan@batesgarcia.com)>, "Andy Graham ([AGraham@kg-law.com](mailto:AGraham@kg-law.com))" <[AGraham@kg-law.com](mailto:AGraham@kg-law.com)>, Michael Belsky <[mbelsky@sbwlaw.com](mailto:mbelsky@sbwlaw.com)>  
**Cc:** Michael Schatzow <[MSchatzow@stattorney.org](mailto:MSchatzow@stattorney.org)>  
**Subject:** discovery

A formal filing will be made and filed in court but attached is additional discovery.

Janice Bledsoe  
Deputy of Criminal Intelligence  
Office of the State's Attorney for Baltimore City  
120 E. Baltimore Street, 9<sup>th</sup> Floor  
Baltimore, Maryland 21202  
[JBledsoe@stattorney.org](mailto:JBledsoe@stattorney.org)  
443-984-6012



POLICE DEPARTMENT  
BALTIMORE, MARYLAND

REPORT  
Form 82/85

DATE: 1 MAY 2015

ASSIGNMENT: Western District Detective Unit

TO: Major Dennis Smith  
VIA: Official Channels  
FROM: Sgt. John Herzog  
SUBJECT: Freddie Gray

Sir,

I, Sgt. John Herzog, respectfully wish to inform you that during recent discussions with Sgt. Mileto, we recalled Freddie Gray mentioning to us that he had a hurt back. On March 31st, 2015, Freddie Gray voluntarily responded to the Western District Station at approximately 1800 hours to provide information regarding several Western District robbery cases. I walked into my office and Sgt. Mileto was engaged in a conversation with Freddie Gray. I sat down at my desk and immediately noticed that Freddie Gray was awkwardly sitting in the chair, leaning to the left. I asked Freddie Gray why he was sitting the way that he was and he stated something to the effect of "I hurt my back," or "I have a bad back." Sgt. Mileto and I continued with our conversation and Freddie Gray provided us with valuable intelligence regarding a robbery crew that operates in the area of North Avenue and Pennsylvania Avenue. I spoke with Freddie Gray for approximately five minutes. Freddie Gray walked out of the Western District after providing the information.

Sgt. Mileto and I did not recall this information until rumors/information was released that Freddie Gray possibly had been involved in a car accident. After hearing the information, it "jagged our memory." I was contacted by ASA Cynthia Banks in regards to this information on 5/1/15 at 0936 hours. Cynthia Banks informed me that Detective Lind spoke with her on 5/1/15 and that he reported to her that Freddie Gray told Sgt. Mileto and I something to the effect of "I hurt my back," or "I have a bad back." Cynthia Banks informed me that she would be divulging the information to the State's Attorney. In addition, I contacted Detective Michael Boyd, a member of the FIT team and task force investigating Freddie Gray's death and made him aware that Freddie Gray had stated something to the effect of "I hurt my back," or "I have a bad back" on March 31, 2015 when at the Western District. Detective Boyd was contacted on the afternoon of 5/1/15.

Please feel free to contact me with any questions regarding this administrative report.

Respectfully,



Sgt. John Herzog, 1-248

Respond on Reverse Side ☐

Page 1 of 1

# **EXHIBIT B**

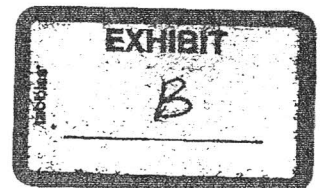
**Progress Report for Case 15H0086**Report Date  
05/17/2015

Select Canned Text

**ACTION TAKEN:** 17. Request for Records**General Synopsis of Incident**

I spoke with ASA Bledsoe and Palenger concerning anonymous tip information related to Grey's conduct in jail. I requested a subpoena to obtain administrative, medical, and disciplinary records for Freddie Grey for any period he may have been incarcerated.

This entry was made by Det Dawnyell Taylor

**Photographs**

**Progress Report for Case 15H0086**Report Date  
05/22/2015Select Canned Text**ACTION TAKEN:** 14. Anonymous Tip**General Synopsis of Incident**

On 05/22/15 an anonymous tip came in on the command line in the BPD homicide office. This female caller stated that Freddie Gray had attempted to injure himself in the past when arrested and that there was an incident inside of the CBIF where he had to be restrained and disciplined for his attempts to hurt himself. I contacted the ASA's office to request a subpoena to Department of Public Safety (DPS) for an administrative, medical, and disciplinary records related to Gray to verify this claim. This caller refused to leave any personal contact information and called from an unidentified line. This will be investigated further....

This entry was made by Det Dawnyell Taylor

**Photographs**