

STATE OF MARYLAND

v.

ALICIA WHITE,

Defendant.

\* IN THE  
\* CIRCUIT COURT  
\* FOR  
\* BALTIMORE CITY  
\* CASE NO. 115141036

\* \* \* \* \*

**DEFENDANT ALICIA WHITE'S MOTION IN LIMINE  
TO EXCLUDE VIDEOGRAPHIC AND PHOTOGRAPHIC EVIDENCE  
RELATING TO MR. GRAY'S ARREST**

Comes now, Defendant, Sergeant Alicia White, by and through undersigned counsel, Ivan J. Bates, Esq., Tony N. Garcia, Esq., Mary M. Lloyd, Esq., and Bates & Garcia, LLC, Attorneys at Law, and hereby respectfully files this Motion in Limine to exclude video graphic evidence in the above-captioned matter, and in support states as follows:

**INTRODUCTION**

The above-captioned matter is scheduled for trial on February 8, 2016. The State has charged Defendant (herein, "Sgt. White") with manslaughter, second-degree assault, misconduct in office, and reckless endangerment. Sgt. White seeks to exclude video graphic evidence of the arrest of Freddie Gray that was obtained from civilians. These videos, taken by bystanders with their cellphones, depict the detainment and arrest of Mr. Gray. They show, from various points of view, the moments after Officers Edward Nero and Garrett Miller arrested Mr. Gray. Mr.

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Gray was placed into a Baltimore City Police Department transport van by further members of the Baltimore City Police Department. There is no allegation that Mr. Gray was injured during the course of his arrest. The videos have been broadly publicized in the media and on the Internet.

Pursuant to a request for discovery, the State provided videos from four civilian cell phones as well as footage from CCTV cameras. The defense now seeks to exclude these videos from being introduced in the State's case. The videos are identified in discovery as follows:

Cell\_Phone\_Video\_mp4  
(Presumed to have been taken by potential witness Brandon Ross)

Cell\_Video\_Daq\_Walker\_1of2\_20971021\_162421\_mp4  
(Presumed to have been taken by potential witness Daquantay Walker)

Cell\_Video\_Daq\_Walker\_2of2\_21230217\_195258\_mp4  
(Presumed to have been taken by potential witness Daquantay Walker)

Cell\_Video\_Gray\_Stepping\_into\_Van\_084308\_mp4  
(Presumed to have been taken by potential witness Brandon Ross)

Closed-Circuit Television footage  
(Taken by various cameras.)

The Defense seeks to exclude this evidence (any and all videos of the arrest and subsequent placement of Mr. Freddie Gray into the Baltimore City Police Department transport van), as it is irrelevant, immaterial, and highly prejudicial to the Defendant, as such inadmissible under the Maryland Rules of Evidence.

## **I. The Evidence is Irrelevant.**

Evidence, to be admissible, must be both relevant and material. *Lai v. Sagel*, 373 Md. 306, 319 (2003). Evidence is material if it tends to establish a proposition that has legal significance to the litigation; it is relevant if it is sufficiently probative of a proposition that, if established, would have legal significance to the litigation. *Id.*

It is easily apparent that the video evidence identified *supra* is irrelevant to the charges levied against the Defendant.

Maryland Rule 5-401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” Therefore, evidence is only relevant if it tends to establish a material fact. *Lesson v. State*, 293 Md. 425 (1982). The evidence is considered immaterial if a reasonable fact finder would not attach importance to it in deciding a contested issue. *Paige v. Manuzak*, 57 Md.App. 620, 632 (1984).

In determining the admissibility of any photograph, the trial judge must make a two-part assessment: first, whether the photograph is relevant, and second, the judge must balance its probative value against its prejudicial effect. *See Broberg* at 555. (In this instance, the evidence considered to be introduced by the State consists of video graphic images, or sequences of digital still photographs (or “frames”) that constitute, in their entirety, a chronological video graphic sequence).

Although the court possesses broad discretion regarding the admission of photographs, this discretion does not authorize the judge to admit irrelevant photographs. For example, in *Buch v. Hulcher*, 180 Md. 309 (1941), an action for alienation of affections, the appellate court ruled that a photograph of "plaintiff's wife closely and affectionately surrounded by her daughter and twin sons, very nice looking children and of tender years" was irrelevant, given that the wife was present in court and testified on behalf of her husband. *Id.* at 313. In the matter *sub judice*, the videos also refer back to a state of "wholeness" in the past, which is presented merely to cast an emotionally charged prejudicial highlight on a later "damaged" state. Any information that could be asserted regarding Mr. Gray's state of health at his arrest can and will be introduced by other witnesses.

In the matter *sub judice*, the State's charges are based on Sgt. White's alleged interactions with Mr. Gray after she responded to a call from Officer Ceaser Goodson for a "prisoner check". This is the first moment in which Sgt. White was even in the proximity of Mr. Gray. The videos, conversely, portray the detainment, arrest and placement of Mr. Gray into the transport van near the Gilmore Homes, on April 10, 2015, at or around 9:00 AM.

Any act and/or conduct alleged by the State thus occurred well after Mr. Gray's arrest and long before Sgt. White's involvement. Unlike in *State v. Porter*, not a single frame in any one of the videos depicts the Defendant. Nor does any video, individually or cumulatively in any combination, provide any substantive support to any fact relevant to the current proceedings, such as evidence proving

what the Defendant may have observed during this early interaction. Sgt. White could not have observed anything about Mr. Gray simply because she was nowhere near the scene. It cannot possibly factor into the analysis of the reasonableness of the Defendant's later actions because it is extrinsic to the charged offense.

Furthermore, the State's case balances on the assertion that Mr. Gray suffered a fatal injury in police custody occurred during the transportation. Therefore, evidence that Mr. Gray could lift his neck and walk on his own prior to transport is as irrelevant to the actual timing of the injury for purposes of proving causation for manslaughter as would be a video depicting him at his high school prom: The mere fact that Mr. Gray was able to scream and raise his head at the time of his arrest has no bearing on (1) when specifically the injury occurred during the transport (as asserted by the State) and (2) what role Sgt. White played—considering that she had no involvement with the events depicted in the videos.

"Evidence which is... not probative of the proposition at which it is directed is deemed irrelevant." Joseph F. Murphy, Maryland Evidence Handbook § 501 (4th ed. 2010). The State's proposition is that Sgt. White's actions or omissions that occurred or did not occur twenty-plus minutes after the depicted events, at a different location. Hence, the video graphic evidence is irrelevant to the charges levied against the Defendant and should properly be excluded. It would be highly

and irresponsibly prejudicial for information to be presented to the triers of fact that is so irrelevant and so immaterial to the State's case against Sgt. White.

## **II. The Evidence is More Prejudicial than Probative.**

Pursuant to Maryland Rule 5-403, even if the evidence is relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. The Rule says, in its entirety

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

*Id.*

The Maryland rules require that the probative value of photographic evidence must not be substantially outweighed by its unfair prejudicial effect. Md. Rule 5-403. *See also* J. MURPHY, JR., MARYLAND EVIDENCE HANDBOOK § 1102, at Supp. 50 (2d ed. 1993 & 1995 Cum. Supp.). *See also, State v. Broberg*, 342 Md. 544, 552 (1996).

Even when photographs, or as here, series of photographic images, are relevant, the trial court must balance the probative value against the potential prejudice to the defendant. In *Broberg*, the court stated: "The general rule regarding admission of photographs is that their prejudicial effect must not substantially outweigh their probative value." *Id.* at 552; *see* Md. Rule 5-403. *See also, Roebuck v. State*, 148 Md. App. 563, 598-599 (2002).

These videos were taken by civilian bystanders present at Mr. Gray's arrest. They depict Mr. Gray during his detainment, as he was lying prone and subdued

on the cold concrete, officers (not Sgt. White) kneeling on or near him, applying what looks like an painful leg lock. He is shown, and can be heard, screaming out in pain as he is being handcuffed (not by Sgt. White). When raised to his feet, he appears limp, dejected and subjugated, his feet drag on the asphalt as officers (again, not Sgt. White) half-carry, half-drag him to the police van. At the rear door of the van, a cluster of officers then appears to “gang up” on Mr. Gray, surrounding him, and forcing him by brute force into the interior.<sup>1</sup> Needless to say, at that moment, too, Sgt. White was literally not in the picture.

Indeed, Mr. Gray’s screams and passive conduct appeared so pitiful and inflammatory to viewers that they caused the media to speculate that Mr. Gary suffered his fatal injury during the arrest, which the State contends that he did not.

**(a) The Video Graphic Evidence Unfairly Prejudices the Defendant.**

Even assuming, *arguendo*, that there is some modicum of relevancy to this evidence, its probative value is outweighed by its prejudicial effect. The prejudicial effect of “witnessing” Mr. Gray’s dramatic arrest on the screen in real time and first hand conflates images and conduct unrelated to Sgt. White’s and/or her conduct with the visual and auditory footage of other officers’ actions.

The respective video graphic sequences also contain audio tracks that

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<sup>1</sup> The devastating emotional effect of these same videos was evident in *State v. Porter*, where members of the family, at trial, in the courtroom, cried out in despair on seeing Mr. Gray manhandled by police.

reflect the outrage and involved compassion of the surrounding citizens. Their and the videographers' sympathies are clearly with the arrestee. Their running commentary, hearsay by definition as it is made out of court and for the truth asserted, is based in part on mistaken or placatively false fact: In one of the videos, an unseen individual erroneously asserts that Mr. Gray had been "tased" by police. In another, a bystander exclaims that Mr. Gray has a "broke" leg. (He, of course, did not.) By and in themselves, these statements are hearsay, and must not be admitted in evidence.

But the videos' prejudicial effect is far more insidious. Quite naturally, they place a disproportionate selective focus on Mr. Gray and the officers surrounding him, without providing a "bigger picture", for example the hostile crowd that was beginning to assemble. These clips are entirely partisan. They lack the steady, detached, inclusively "neutral" depiction of regular surveillance cameras. The image sequences taken with the smartphones are unsteady and choppy, suggesting a scene that was far more chaotic and ominous than it was.<sup>2</sup> They contain expressions of compassion and sympathy with Mr. Gray's evident suffering, without accounting for the situational needs and legal justifications of the officers' conduct as they enforce the law. In short, these videos represent bias in its purest

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<sup>2</sup> Producers of television shows, movies, and "first-person shooter" video games use this technique intentionally to manipulate suspense and perceived situational danger in their products. The unsteady shift of images and frames suggests an intense first-person experience, immersing and placing, via deliberate choice of point-of-view, the viewer at the center of the action. By seeing the action from this fake first-person view, the viewer or juror no longer observes, but figuratively "becomes" the person at the scene, behind the camera. This is just the opposite of the detached, encompassing, reasoned perspective the American justice system relies on in its jury trials.



incarnation, casting an unbalanced, eminently partial, and highly emotional “vibe” upon the jurors—forcing them to perceive and interpret the action, unrelated as it is to the case *sub judice*, through the distorted, anti-police lens that the Prosecution wants the jurors to perceive it.

As pointed out above, Sgt. White is not visible on, at, or anywhere near the scene of the arrest, for the simple reason that she wasn’t present. However, by being “lumped in” with the seemingly rough, callous, maybe even brutal treatment of Mr. Gray at the hands of other police officers, and the anti-police sentiment apparent throughout the videos by and through the reactions of the bystanders, there is a very real, almost certain danger that Sgt. White will be painted with the same emotional “brush” as the acting officers, even though (1) she wasn’t present at the scene, (2) had absolutely nothing to do with Mr. Gray’s arrest and apparent rough treatment, (3) never laid hand on Mr. Gray, and (4) the State concedes that Mr. Gray was NOT injured during his arrest.

This case closely traces *State v. Burris*, where the Court of Appeals dealt with the introduction of evidence relating to the defendant’s gang affiliation during a murder trial. No evidence had been presented to the jury that the murder had anything to do with the defendant being in a gang, just as there is no even an insinuation that Sgt. White had anything to do with the arrest. The Court of Appeals rejected the introduction of that evidence because, “the probative value of [the] testimony was substantially outweighed by the danger of unfair prejudice and

in some instances cumulative of other evidence adduced at trial.” *Burris v. State* 435 Md. 370, (2013). So it is here.

*Burris* furthered this view by citing to the prior decision in *Odum*, that, “we keep in mind that ‘the fact that evidence prejudices one party or the other, in the sense that it hurts his or her case, is not the undesirable prejudice referred to in Rule 5-403.’” *Odum v. State*, 412 Md. 593, (2010), *quoting* Lynn McLain, *Maryland Evidence: State and Federal*, § 403:1(b) (2d ed. 2001). Rather, evidence is considered unfairly prejudicial when “it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged”. *Id.*

It is obvious and evident that these videos, individually, in combination, or in their entirety will unfairly prejudice Sgt. White. For this reason alone, they must be excluded from evidence.

**(b) The Videographic Evidence Has a Propensity to Confuse the Jury.**

Not only are the videos overtly prejudicial, they have the propensity to confuse the issue presented to the triers of fact.

Specifically, in this case, the legality of Mr. Gray’s arrest is not at issue, nor is the conduct of other members of the Baltimore City Police Department involved in the arrest. As indicated *supra*, the evidence is also not relevant to any of the allegations against Sgt. White, who had no contact with Mr. Gray until some 20 minutes later, after the arrest, after a lengthy transportation of Mr. Gray, and at a different location.

Aside from its unfairly prejudicial effect, showing a jury one, two, three or four separate prejudicial videos of Mr. Gray 's uncontested arrest, by persons who are NOT Sgt. Alicia White, is almost certain to confuse the jury: By being shown the video graphic evidence, any reasonable juror must needs assume that the footage is causally related or at least relevant to Sgt. Whites conduct—and thus confuse, conflate, and commingle the vivid but entirely unrelated images with the issues to be tried.

### **III. The Evidence, Individually and Collectively, is Unnecessarily cumulative.**

Defendant submits that none of the above-referenced videos should be shown. As in *Burris*, the video graphic evidence, separately and collectively, is cumulative of other evidence adduced at trial.

In *Marshall v. State*, 174 Md. App. 572 (2007), the defendant had introduced evidence supporting the theory that the victim had been killed by one of two other suspects, while relevant, was needlessly cumulative and that the trial court was entitled to exclude it.

Sgt. White submits that to allow this video graphic evidence individually or in its entirety into evidence will be cumulative, and violate Maryland Rule 5-403: Whatever even remotely pertinent information contained in each individual video graphic document will be entered into evidence through witness testimony and thus is repetitive, superfluous, and unnecessarily cumulative.

## CONCLUSION

In the case at hand, the State is likely to attempt to present video graphic evidence of events that occurred prior to the Defendant's actual involvement with the case. As argued *supra*, this case closely resembles the prejudicial effect discussed in *Burris*, as well as the needlessly cumulative effect in *Marshall*: The effect of the video graphic evidence is irrelevant to the matter *sub judice*, is likely if not certain to confuse the jury, and is unnecessarily cumulative. Most importantly, however, it is inadmissible because of the severe and unfairly prejudicial effect it will have on the jury.

For the foregoing reasons, Defendant respectfully requests that this Honorable Court grant this Motion in Limine.

Respectfully Submitted,



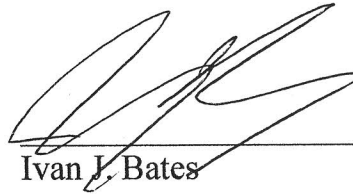
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 15<sup>th</sup> day of January, 2016, a copy of the foregoing Motion was mailed, first class 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.



Ivan J. Bates