

could hear Mr. Gray banging against the walls in such a way that Mr. Allen thought that Mr. Gray was trying to hurt himself.

During the investigation of Mr. Gray's death, the Baltimore Police Department and the State's Attorney's Office received information that Mr. Gray had, on a prior occasion, tried to hurt himself following an arrest. On May 17, 2015, Detective Dawnyell Taylor noted:

I spoke with ASA Bledsoe and Psienger 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 her may have been incarcerated.

See **Ex. A**, Progress Report for Case 15H0086 (May 17, 2015). Again, on May 22, 2015, Detective Taylor noted:

On 5/22/15 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 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

See **Ex. B**, Progress Report for Case 15H0086 (May 22, 2015).

Because there is clear evidence that such records may exist, and such records are relevant to Officer Goodson's case, the defense requests that this Court issue:

(1) a subpoena *duces tecum* to the custodian of records of the Department of Public Safety & Corrections ordering the production of all administrative, medical and discipline records related to any period of incarceration of Freddie C. Gray, DOB:

8/16/89 (including base, housing and location files, bed assignment, movement within facility, and rejections regarding medical issues, etc.) and

(2) a subpoena *duces tecum* to the custodian of records of the Maryland Department of Detention & Correctional Services - Central Booking, ordering the production of all administrative, medical and discipline records related to any period of incarceration of Freddie C. Gray, DOB: 8/16/89, CID #3080619, including but not limited to bed assignment, movement with facility and rejections due to medical issues, for Mr. Gray during any period that he was incarcerated.

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 v. State*, 432 Md. 650, 668-69, 69 A.3d 1104, 1114-15 (2013). 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*, (quoting *Zaal* (emphasis in *Fields*)).

ARGUMENT

This Court should issue the requested subpoena and order production of records related to Mr. Gray's incarceration.

I. Officer Goodson has demonstrated the need to inspect the requested records of incarceration.

Officer Goodson has demonstrated the need to inspect records of Mr. Gray's incarceration. *Zaal*, 326 Md. at 81. Any record of Mr. Gray's conduct while in police custody, and in particular, any evidence of self-injurious behavior, 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").

Records of Mr. Gray's incarceration likely contain, or will lead to the discovery of, relevant and admissible character and habit evidence.¹ "Subject to the limitations in Rule 5-412, an accused may offer evidence of an alleged crime victim's pertinent trait of character. If the evidence is admitted, the prosecutor may offer evidence to rebut it." Md. Rule 404(a)(2)(B). The manner in which such a character trait may be proven is

¹ In addition, these records may contain evidence of a previous spinal injury or condition that is relevant to medical causation issues, as set forth more fully in the Defendant's Motion for Subpoena for Tangible Evidence Regarding medical records.

generally limited to "testimony as to reputation or . . . testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." Md. Rule 5-405(a). "Where character evidence is otherwise relevant to the proceeding, no person offered as a character witness who has an adequate basis for forming an opinion as to another person's character shall hereafter be excluded from giving evidence based on personal opinion to prove character, either in person or by deposition, in any suit, action or proceeding, civil or criminal, in any court or before any judge, or jury of the State." Md. Code Ann., Cts. & Jud. Proc. § 9-115. *Jensen v. State*, 355 Md. 692, 706-07 (1999), sets forth the limits for the method of proving character, holding that the witness is "entitled to some latitude in informing the jury as to the basis for an opinion, so long as that person avoids venturing into the troublesome area of specific instances."

Documents obtained through the requested subpoenas presumably will contain the names of individuals who have knowledge of information that is relevant to Mr. Gray's character for self-injurious behavior while in custody. The anonymous tip that the Police Department received specifically states that Mr. Gray tried to hurt himself after he was arrested and in custody. Such evidence is relevant because it tends to show that on April 12, 2015 Mr. Gray caused his own injury as indicated by the statement of Donta Allen. Additionally, the documents produced may reveal the identity of witnesses who can testify to Mr. Gray's character for truthfulness in the specific circumstance of requesting medical attention. Individuals identified in the records produced in response to the requested subpoena may have knowledge of information showing that Mr. Gray

demonstrated a character for misrepresenting his medical condition to law enforcement. Such evidence impeaches Mr. Gray's credibility, making it more likely that in his statement at Stop 4 saying that he needed a medic, he was not being truthful and was not actually injured at that time. All of this information is relevant to the charges against Officer Goodson.

Moreover, the requested records may reveal relevant habit evidence. "Evidence of the habit of a person or of the routine practice of an organization is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." Md. Rule 5-406. "How many times an action must be taken for it to be a habit and how invariable a routine must be before it is considered a routine practice must be determined on a case by case basis by the trial judge. If the situation in question is highly unusual, consistent actions on a few prior occasions may suffice." Lynn McLain, 5 *Maryland Evidence*, § 406:1 (emphasis added).

Being arrested is, by any measure, a highly unusual situation. Evidence of Mr. Gray's conduct while in police custody on a prior occasion may show that he habitually resisted arrest, faked injury, falsely represented that he needed medical attention, thrashed his body, or otherwise acted in such a manner to cause himself injury. There is evidence, from multiple witnesses who observed, at different times, that Mr. Gray was banging around inside the back of the van in a manner in which he could have caused himself injury. One of the possible causes of Mr. Gray's injury on April 12, 2015, and therefore his death, is that he injured himself between Stops 5 and 6. Therefore, the records that

the Defendant seeks are relevant to show that Mr. Gray acted in accordance with a habit of self-injurious behavior on April 12, 2015.

Likewise, any previous misrepresentations Mr. Gray made to health care providers would constitute admissible habit evidence. Statements to health care providers are normally given great credence because it is considered so unusual to lie to a person who will provide the declarant with medical care. *See* Md. Rule 5-802(b)(4) (excepting from the hearsay rule "Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment."). Any prior statements that Mr. Gray has made in the circumstance of seeking medical care following arrest are relevant to show his habit for seeking to avoid jail in favor of being transported to the hospital. Accordingly, this Court should order the Department of Public Safety & Corrections to produce the requested records to the parties.

II. Officer Goodson's constitutional rights outweigh any privacy interest in the requested records.

Officer Goodson's constitutional rights outweigh any privacy rights or other interests in the records he 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).² 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)).

In the instant case, production of any records of Mr. Gray's incarceration is necessary to protect Officer Goodson's rights under the Constitution. The State charges Officer Goodson based on not seat belting Mr. Gray in the back of the van, and based on not obtaining medical assistance for Mr. Gray. *See* Bill of Particulars. Evidence that Mr. Gray previously attempted to injure himself while in custody, or previously misrepresented his need for medical attention, directly refutes the State's theory. The records Officer Goodson seeks will be essential for him to confront the witnesses against him, including, but not limited to, Dr. Allan and Dr. Soriano. Accordingly, Officer Goodson's right to a fair trial compels production of the sought-after records related to his incarceration.

² To the extent that the DPS is in possession of any medical records, those records 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*). Officer Goodson 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 Officer Goodson 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).

III. If this Court believes that Mr. Goodson 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 Mr. Goodson 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, Officer Goodson'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 Officer Goodson's case, his 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

Officer Goodson 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 custodian records of the Maryland Department of Public Safety & Corrections to produce all administrative, medical, and disciplinary records related to Mr. Gray's incarceration, including but not limited to base files, location files, and housing files; and
2. Order the issuance of a subpoena *duces tecum* to the custodian of records of the Maryland Department of Detention & Correctional Services - Central Booking, ordering the production of all administrative, medical and discipline records related to any period of incarceration of Freddie C. Gray, DOB: 8/16/89, CID #3080619, including but not limited to bed assignment, movement with facility and rejections due to medical issues, during any period that Mr. Gray was incarcerated.



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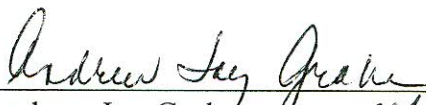
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Counsel for Officer Caesar Goodson

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December 2015, a copy of the foregoing Motion for Revised Subpoenas and proposed Order 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


Andrew Jay Graham *nm*

RECEIVED FOR RECORD
CIRCUIT COURT FOR
BALTIMORE CITY
2015 DEC 23 P 3:12
CRIMINAL DIVISION

STATE OF MARYLAND

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IN THE

Plaintiff

*

CIRCUIT COURT

v.

*

FOR

CAESAR GOODSON

*

BALTIMORE CITY

Defendant

*

Case No. 115141032

* * * * *

ORDER

Upon consideration of the Motion of Defendant that this Court order the issuance of subpoenas commanding the production of records of incarceration that are relevant to this case, and any opposition thereto from the State, it is this ____ day of December, 2015 ORDERED, that the clerk:

1. Issue a subpoena *duces tecum* commanding the custodian records of the Maryland Department of Public Safety & Corrections to produce all administrative, medical, and disciplinary records related to Mr. Gray's incarceration, including but not limited to base files, location files, and housing files; and
2. Issue a subpoena *duces tecum* to the custodian of records of the Maryland Department of Detention & Correctional Services - Central Booking, ordering the production of all administrative, medical and discipline records related to any period of incarceration of Freddie C. Gray, DOB: 8/16/89, CID #3080619, including but not limited to bed assignment, movement with facility and rejections due to medical issues, during any period that Mr. Gray was incarcerated.

Date:

Judge
Circuit Court Baltimore City

Clerk, please mail copies to the following:

Matthew Fraling, III, Attorney for Caesar Goodson
Janice Bledsoe, Deputy State's Attorney,
Office of the State's Attorney for Baltimore City