

STATE OF MARYLAND

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IN THE

2016 MAY 31 P 4 02

Plaintiff

\*

CIRCUIT COURT, FINAL DIVISION

v.

\*

FOR

CAESAR GOODSON

\*

BALTIMORE CITY

Defendant

\*

Case No. 115141032

\* \* \* \* \*

**OFFICER GOODSON'S REPLY IN SUPPORT OF 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**

The State makes only one argument in response to Officer Caesar Goodson's motion *in limine* to preclude the State from eliciting, in any fashion, testimony or evidence regarding an out-of-court statement that Officer William Porter allegedly made to Detective Syreeta Teel on April 15, 2015. According to the State, "[t]he line of inquiry that would lead to th[e] potential impeachment [of Officer Porter based on his alleged statement to Detective Teel] cannot be fairly 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.'" Opp. at 7 (quoting *Bradley v. State*, 333 Md. 593, 604 (1994)). This very argument, however, is meritless under *Bradley*, where the Court of Appeals held that testimony regarding a telephone call is "independent" and "divisible" from testimony regarding the contents of that same call. By the same token, whether Freddie Gray told Officer Porter that he could not breathe at the fourth stop is "independent" and "divisible" from everything else that Officer Porter witnessed at that stop. The State's argument is also contrary to the State's prior representation to the Court of Special Appeals and the Court of Appeals that the testimony of Officer Porter that the State perceives as false is divisible from the testimony of Officer Porter that the State perceives is truthful. Finally,

allowing the State to elicit testimony that it believes is false would, according to the Court of Appeals' recent decision affirming this Court's order compelling Officer Porter to testify at Officer Goodson's trial, violate Officer Goodson's constitutional rights under the Fourteenth Amendment. For these and the other reasons presented below, this Court should preclude the State from making any mention at Officer Goodson's trial of Officer Porter's alleged April 15 hearsay statement to Detective Teel.

### ARGUMENT

**A. The State's acknowledgment that it intends to use Officer Porter's alleged April 15 statement to Detective Teel substantively confirms that this potential evidence falls squarely within the subterfuge limitation.**

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On page six of its opposition, the State acknowledges that it intends to use Officer Porter's alleged out-of-court statement at Officer Goodson's trial as substantive evidence to prove that, "in fact," Mr. Gray said he could not breathe at the fourth stop:

*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,<sup>1</sup> then the State will call Teel to the stand to impeach Porter with Teel's account of the prior 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.*

State's Opp. at 6 (emphasis added).<sup>2</sup> The State's proffered use of Officer Porter's alleged out-of-court statement—to establish "in fact" that Mr. Gray told Officer Porter that he could not breathe at the fourth stop—is as substantive evidence, *i.e.*, the State seeks to use Officer Porter's alleged

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<sup>1</sup> Because Officer Porter's alleged April 15 statement to Detective Teel was oral and not written, the State cannot "show" Porter his own prior statement. Presumably, the State is referring to Detective Teel's notes of her April 15 conversation with Officer Porter. But the State cannot impeach Officer Porter based on a copy of Detective Teel's notes. *See* Md. Rule 5-802.1.

<sup>2</sup> *See also* Opp. at 2 ([T]he statement undoubtedly lies at the heart of the issues in this case. . . .); *id.* at 7 ([T]he 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.); *id.* ([I]ndeed, Porter is at the heart of the government's case here.).

out-of-court statement to prove the truth of the matter asserted therein. The State expounded on this very point during a recent hearing that addressed Officer Porter's testimony in the trials of other defendants:

MR. SCHATZOW: And there is a dispute, as you're well aware, that -- between the State, which contends that the fatal injuries took place between the second stop and fourth stop, and the Defense, which contends that the injuries took place between the fifth stop and the sixth stop. *And part of what the State relies on and part of what the State's experts rely on are Officer Porter's description of what occurred at the fourth stop.*

Transcript of 1/20/16 hearing, attached as **Exhibit 1**, at 23:9-17 (emphasis added). In light of these statements by the State, it is beyond reasonable dispute that the State intends to use Officer Porter's alleged April 15 statement to Detective Teel for the truth of the matter asserted therein to resolve the dispute between the State and the defendants regarding when Mr. Gray's injuries occurred. Thus, the statement is plainly hearsay and subject to Maryland's hearsay rules.

The State's acknowledgement that it intends to use Officer Porter's alleged hearsay statement at Officer Goodson's trial as hearsay, *i.e.*, for its truth, highlights three intractable problems with the State's argument.

*First*, Officer Porter's alleged out-of-court statement simply cannot be offered as substantive evidence at Officer Goodson's trial because it does not fall within an exception to Maryland's prohibition against hearsay. Although the statement was properly admitted at Officer Porter's trial under Md. Rule 5-803(a), which creates an exception for an out-of-court statement that is offered against, and made by, a party-opponent, Officer Porter will not be a party-opponent at Officer Goodson's trial. No other hearsay exception even potentially applies, and the State makes no attempt to argue otherwise. Thus, Officer Porter's alleged out-of-court statement "is not admissible" as substantive evidence at Officer Goodson's trial. Md. Rule 5-802.

*Second*, the only other purpose for using Officer Porter's alleged out-of-court statement is not as substantive evidence but for impeachment purposes to attack Officer Porter's testimonial credibility. In *Nance v. State*, 331 Md. 549 (1993), the Court of Appeals held that:

[T]he factual portion of an inconsistent out-of-court statement is sufficiently trustworthy to be offered as substantive evidence of guilt when the statement is based on the declarant's own knowledge of the facts, is reduced to writing and signed or otherwise adopted by him, and he is subject to cross-examination at the trial where the prior statement is introduced.

*Id.* at 569 (footnote omitted). In this case, had Officer Porter's alleged prior statement been reduced to writing and signed, thus making it admissible as substantive evidence rather than solely impeachment evidence, it would be admissible in Officer Goodson's trial under Md. Rule 5-802.1. However, the alleged prior statement by Officer Porter was *not* reduced to a writing and signed or adopted by him and, thus, it is not admissible as substantive evidence in Officer Goodson's trial. Detective Teel simply made notes summarizing her conversation with Officer Porter. Thus, the only potential purpose in admitting Officer Porter's alleged prior inconsistent statement is not for the truth of that statement but to impeach and thereby neutralize Officer Porter's anticipated testimony.

*Third*, the State's proffered use of Officer Porter's alleged out-of-court statement—to establish that Mr. Gray told Officer Porter at the fourth stop that he could not breathe—brings this potential evidence squarely within the subterfuge limitation articulated in *Spence* and its progeny.

As the Court of Special Appeals explained, "[t]he heart of the thing we condemned in *Wright v. State*, 89 Md. App. 604 (1991) [another subterfuge case] was the potential misuse of impeaching evidence as substantive evidence of guilt." *Stewart v. State*, 104 Md. App. 273, 283 (1995). That potential for misuse exists here, as it does in all the subterfuge cases, because

"[t]here always lurk[s] in the evidentiary shadows . . . the fear that impeaching words, though not ostensibly offered for their truth, might nonetheless work, consciously or subconsciously, some spill-over substantive impact on the ears of the jurors." *Id.* at 279. This is precisely what the subterfuge limitation prohibits and, as the next section demonstrates, any attempt by the State to introduce evidence of Officer Porter's alleged April 15 statement to Detective Teel to impeach Officer Porter at Officer Goodson's trial would run afoul of that limitation and result in denying Officer Goodson "a fair trial." *Bradley*, 333 Md. 593, 604 (1994).

**B. Whether Mr. Gray told Officer Porter at the fourth stop that he could not breathe is an "independent area of inquiry"; consequently, the State may not question Officer Porter about that area under *Bradley* and its progeny.**

The State raises a single argument for the conclusion that the subterfuge limitation does not apply in this case. According to the State, "[t]he line of inquiry that would lead to th[e] potential impeachment [of Officer Porter] cannot be fairly 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.'" *Opp.* at 7 (quoting *Bradley*, 333 Md. at 604). This argument, however, is foreclosed by the Court of Appeals' decision in *Bradley*, the State's prior representations to the Court of Special Appeals and the Court of Appeals, and the recent Court of Appeals decision holding that Officer Porter can be compelled to testify at Officer Goodson's trial.

In *Bradley*, the State called as a witness the defendant's cousin for a number of reasons helpful to the State's case. 333 Md. at 596. That case involved a prosecution for kidnapping, armed robbery, and related offenses (stemming from a carjacking and theft). After taking the stand, the cousin-witness established his relationship with the defendant, identified his phone number on the victim's car phone bill, and verified that he spoke to the defendant while the

defendant called from the victim's car phone. *Id.* at 601. The State asked the cousin-witness to relate the contents of the telephone conversation he had with the defendant. *Id.* In response, and over the defendant's objection, the cousin-witness denied telling detectives that the defendant bragged to him about stealing a car. *Id.* at 597. The State then called a detective to testify regarding the statement (inconsistent with the testimony at trial) that the cousin-witness made to him. Prior to that line of questioning, the prosecutor explained at a bench conference that he expected the cousin-witness to recant his prior statement about the defendant's bragging to detectives. *Id.* at 597-98. The trial court permitted the inquiry of the detective and ultimately gave a limiting instruction to the jury that the information was only to be used to assess the credibility of the witness.

Expanding on its reasoning in *Spence v. State*, 321 Md. 526 (1991), the Court of Appeals held that the State's impeachment was improper. *Id.* at 604. The *Bradley* Court recognized that the cousin-witness was not "call[ed]" for the "sole purpose" of introducing a prior inconsistent statement, *id.* at 601; nevertheless, the Court realized that the State had inquired about the content of the telephone call—an "independent area of inquiry"—to impeach the cousin-witness on that very point. *Id.* at 601-02. The Court concluded that "there is no reason to distinguish between the State requesting that a court's witness be called as a way to get inadmissible hearsay before the trier of fact . . . and the State questioning its own witness, in an independent area of inquiry, in order to get inadmissible hearsay before the trier of fact. . . . In both situations, the rationale of *Spence* dictates that a subterfuge to introduce the statements should not be permitted." *Id.* at 604.

The holding of *Bradley* is fatal to the State's argument here. In *Bradley*, the Court of Appeals held that the cousin-witness's testimony establishing his relationship with the defendant,

his phone number and the fact that he did speak to the defendant on the victim's phone (Area of Inquiry #1) was "independent" of the contents of that same phone call (Area of Inquiry #2). *Id.* at 601-02. By the same token, Officer Porter's statement of what Mr. Gray purportedly said to him at the fourth stop (Area of Inquiry #1) is independent from Officer Porter's testimony regarding everything else he witnessed on April 12 (Area of Inquiry #2). Simply put, whether Mr. Gray told Officer Porter at the fourth stop that he could not breathe is an "independent" area of inquiry, and if the State chooses to broach that area with Officer Porter and then call Detective Teel to introduce evidence of what Officer Porter allegedly told Detective Teel on April 15, Officer Goodson will be denied a fair trial under *Spence*, *Bradley*, and the other Maryland subterfuge cases.

This analysis also reveals the flaw in the State's argument that it must "choose between the Scylla of foregoing impeachment and the Charybdis of not calling the witness at all." *Opp.* at 3 (quoting *Bradley*, 333 Md. at 605). At Officer Goodson's trial, the State need not make any such choice because, as explained above, the State is free to call Officer Porter to testify about what happened at the fourth stop without inquiring into whether Mr. Gray said "I can't breathe" at that stop. This aspect of the State's argument is a red herring.

There are two other reasons for concluding that whether Mr. Gray told Officer Porter at the fourth stop that he could not breathe constitutes an "independent area of inquiry" under *Bradley*.

*First*, the State has already represented to the Court of Special Appeals and the Court of Appeals that whether Mr. Gray said "I can't breathe" at the fourth stop *is* a divisible, and therefore independent, area of testimony from the other aspects of Officer Porter's anticipated testimony. In the State's words:

The State argued at Porter's trial that portions of Porter's taped statement and trial testimony (specifically, his testimony regarding his inability to identify the other officers at one of the scenes, Gray's physical condition at one point in the series of events, and *where Porter first heard Gray say that he could not breathe*) were not credible. *The State has no intention of soliciting that testimony "as true" from Porter at Goodson's trial.*

The State is confident, however, that Porter will offer truthful testimony regarding other events that occurred the day of Gray's arrest. The State has a good-faith belief that, if compelled to do so, Porter will testify to conversations he had with Goodson regarding Gray's condition and whether to seek medical attention for Gray, and to conversations he had with White regarding the plan to seek medical attention for Gray. *It is that testimony that the State seeks to compel.*

State's Opening Brief before the Court of Appeals, *Goodson & White v. State*, No. 99, filed 2/29/16, attached as **Ex. C** to Officer Goodson's initial motion, at 31-32 (emphasis added);

State's Opening Brief to the Court of Special Appeals, *Goodson v. State*, No. 2308, filed 2/10/16, attached as **Ex. D** to Officer Goodson's initial motion, at 23-24 (same).

*Second*, the Court of Appeals relied on the above representations from the State in concluding that Officer Porter could be compelled to testify at Officer Goodson's trial:

The State informed the Circuit Court that the testimony it sought to elicit from Officer Porter did not concern the same subject matter to which the State believed Officer Porter previously testified untruthfully. We likewise have been assured that "[t]he State has no intention of soliciting that testimony 'as true.'"

*State v. Rice*, No. 96, 2016 WL 2941118, at \*21 (Md. May 20, 2016). Specifically, the Court of Appeals relied on the State's representations to "reject the notion that the State would be suborning perjury by compelling Officer Porter to testify under a grant of immunity." *Id.*

Having represented to two Maryland courts that the testimony of Officer Porter that the State views as "not credible" is divisible from the testimony of Officer Porter that the State perceives as "truthful," and having secured an order from the Court of Appeals affirming this Court's decision that the State can compel Officer Porter to testify at Officer Goodson's trial based in part on those representations, this Court should not allow the State to "walk back" its



prior representations and should reject the State's characterization in its opposition to this motion that these distinct areas of Officer Porter's testimony are "inextricably intertwined." Opp. at 6.

Finally, the Court of Appeals pointed out in its recent decision that the State cannot elicit testimony it knows to be false at Officer Goodson's trial without violating Officer Goodson's constitutional rights under the Fourteenth Amendment:

Any attempt by the State to introduce false testimony would violate Officer Goodson's and Sergeant White's constitutional rights (and those of Defendants as well), not Officer Porter's. "For the prosecution to offer testimony into evidence, knowing it or believing it to be false is a violation of *the defendant's* due process rights[.]" *United States v. Mills*, 704 F.2d 1553, 1565 (11th Cir. 1983) (emphasis added). And, as with Officer Porter's other arguments, this contention is premature because the State has not yet offered testimony previously labeled as not credible.

*State v. Rice*, No. 96, 2016 WL 2941118, at \*21 (Md. May 20, 2016) (emphasis in original). It is beyond reasonable dispute that the State believes that Officer Porter's testimony that Mr. Gray did *not* say "I can't breathe" at the fourth stop is false. As a result, if the State is permitted to do as it intends—*i.e.*, "[i]f Porter does not testify [that Gray said to Porter "I can't breathe" at the fourth stop], *the State intends to ask Porter whether Gray said those words,*" Opp. at 6—the State will be doing nothing less than attempting to introduce false testimony against Officer Goodson at his trial. This would amount to a straightforward violation of Officer Goodson's constitutional rights, and therefore constitutes an independent reason for granting the relief sought by this motion.

**C. The State's comments regarding the effect of "trial dynamics" on the above analysis.**

On pages five and six of its opposition, the State makes a number of statements about how "trial dynamics" may affect the above analysis:

[A]lthough 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.

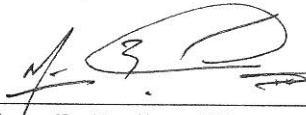
Opp. at 5-6 (emphasis in original). This Court need not risk a mistrial by letting the State question Officer Porter about an independent area of inquiry that—if Officer Porter testifies as he did in his own trial—would deny Officer Goodson a fair trial. Instead, this Court should simply ask Officer Porter's counsel to proffer what Officer Porter's anticipated testimony on this point will be before Officer Porter takes the stand.

### CONCLUSION

For the reasons presented above, Officer Caesar Goodson respectfully requests that this Court issue an Order precluding: (1) the State from making mention of Officer William Porter's alleged out-of-court statement to Detective Teel in opening statements; (2) the State from eliciting testimony regarding that alleged statement from Detective Teel or Officer Porter; and (3) the State's medical examiner, Carol Allan, M.D., from referring to, or relying on, that alleged statement in her testimony or in documents admitted through Dr. Allan, including her autopsy report.

Dated: May 31, 2016

Respectfully submitted,



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*Counsel for Officer Caesar Goodson*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 31st day of May 2016, a copy of Defendant Caesar Goodson's Reply in Support of 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 served via first class mail, postage prepaid upon:

Michael Schatzow, Esquire  
Chief Deputy State's Attorney for Baltimore City  
120 E. Baltimore Street  
9<sup>th</sup> Floor  
Baltimore, Maryland 21202

  
\_\_\_\_\_  
Amy E. Askew

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 31st day of May 2016, a copy of Defendant Caesar Goodson's Reply in Support of 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 served via first class mail, postage prepaid upon:

Michael Schatzow, Esquire  
Chief Deputy State's Attorney for Baltimore City  
120 E. Baltimore Street  
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\_\_\_\_\_  
Amy E. Askew



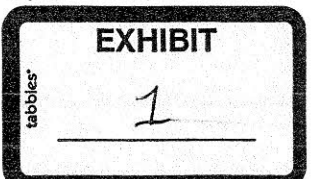
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State v. Nero, Miller, Rice, White  
January 20, 2016 BEFORE JUDGE BARRY G. WILLIAMS

STATE OF MARYLAND,	*	IN THE
	*	
v.	*	CIRCUIT COURT
	*	
	*	FOR
	*	
EDWARD MICHAEL NERO,	*	BALTIMORE CITY
	*	
Defendant.	*	115141033
	*	
* * * * *	*	* * * * *
	*	
STATE OF MARYLAND,	*	IN THE
	*	
v.	*	CIRCUIT COURT
	*	
	*	FOR
	*	
GARRETT EDWARD MILLER,	*	BALTIMORE CITY
	*	
Defendant.	*	115141034
	*	
* * * * *	*	* * * * *
	*	
STATE OF MARYLAND,	*	IN THE
	*	
v.	*	CIRCUIT COURT
	*	
	*	FOR
	*	
BRIAN RICE,	*	BALTIMORE CITY
	*	
Defendant.	*	115141035
	*	
* * * * *	*	* * * * *
	*	
STATE OF MARYLAND,	*	IN THE
	*	
v.	*	CIRCUIT COURT
	*	
	*	FOR
	*	
ALICIA WHITE,	*	BALTIMORE CITY
	*	
Defendant.	*	115141036
	*	
* * * * *	*	* * * * *

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State v. Nero, Miller, Rice, White  
January 20, 2016 BEFORE JUDGE BARRY G. WILLIAMS

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TRANSCRIPT OF OFFICIAL PROCEEDINGS  
(Motions Hearing)

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BEFORE: THE HONORABLE BARRY G. WILLIAMS, JUDGE

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HEARING DATE: January 20, 2016

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APPEARANCES:

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State v. Nero, Miller, Rice, White  
January 20, 2016 BEFORE JUDGE BARRY G. WILLIAMS

1 MR. SCHATZOW: Yeah. This continues on.

2 THE COURT: Okay.

3 MR. SCHATZOW: Yes.

4 THE COURT: Go ahead.

5 MR. SCHATZOW: Okay. So that's one discrete  
6 area. And the second area, Your Honor, the second  
7 discrete area involves the place of injury.

8 THE COURT: Okay.

9 MR. SCHATZOW: And there is a dispute, as you're  
10 well aware, that -- between the State, which contends  
11 that the fatal injuries took place between the second  
12 stop and the fourth stop, and the Defense, which contends  
13 that the injuries took place between the fifth stop and  
14 the sixth stop. And part of what the State relies on and  
15 part of what the State's experts rely on are Officer  
16 Porter's description of what occurred at the fourth  
17 stop --

18 THE COURT: And you're talking about in his  
19 statement or in the trial testimony?

20 MR. SCHATZOW: In both.

21 THE COURT: Okay.

22 MR. SCHATZOW: In both. In both. And so we  
23 don't contend, Your Honor, that it is legally dispositive  
24 of every single charge against each of Mr. -- Messrs.  
25 Miller, Nero and Rice. But we do think it's important,