

STATE OF MARYLAND

\* IN THE

\* CIRCUIT COURT

v.

\* FOR

EDWARD NERO

\* BALTIMORE CITY

Defendant.

\* CASE NO. 115141033

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**DEFENDANT'S MOTION IN LIMINE TO EXCLUDE VIDEO EVIDENCE  
RELATING TO MR. GRAY'S ARREST, OR IN THE ALTERNATIVE, TO EXCLUDE  
AUDIO EVIDENCE ACCOMPANYING VIDEO EVIDENCE**

Comes now, Defendant, Officer Edward Nero, by and through undersigned counsel, Marc L. Zayon, Esq., Allison R. Levine, Esq., and Roland Walker & Marc L. Zayon, P.A., and hereby respectfully files this Motion *in Limine* to exclude video and audio evidence relating to Mr. Gray's arrest, the above-captioned matter, and states the following in support thereof:

**INTRODUCTION**

The above-captioned matter is scheduled for trial on February 22, 2016. The State has charged the Defendant as follows: (i) second degree assault which the State avers is supported by effectuating an arrest without probable cause; (ii) misconduct in office, by malfeasance, "by corruptly arresting Freddie Gray without probable cause; (iii) misconduct in office, by way of nonfeasance, "in that he corruptly . . . failed to secure Mr. Gray with a seatbelt during the process of Mr. Gray being transported in a police vehicle," and (iv) reckless endangerment which the State avers is supported by the defendant's failure to "secure Mr. Gray with a seatbelt during the process of Mr. Gray being transported in a police vehicle."

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:

RECEIVED FOR RECORD  
CIRCUIT COURT FOR  
BALTIMORE CITY  
2016 FEB -1 P 1:44  
CRIMINAL DIVISION

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 as it is irrelevant, immaterial, and highly prejudicial to the Defendant, as such inadmissible under Maryland Rule §5-401 and Rule §5-403.

**I. The Video Evidence is Irrelevant, Prejudicial and has no Probative Value**

Evidence, to be admissible, must be both relevant and material. Lai v. Sagel, 373 Md. 306, 319 (2003). 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.” It is easily apparent that the video evidence identified herein is irrelevant to the charges levied against the Defendant as a reasonable fact finder would **not** attach importance to any of the videos in deciding a contested issue. Paige v. Manuzak, 57 Md.App. 620, 632 (1984).

**A. The Assault and Misconduct by Malfeasance Counts**

The videos do not show Officer Nero either prior to, or during, the involuntary detention and subsequent arrest of Mr. Gray. Rather, they show, from various points of view, the period of time after the involuntary detention and arrest of Mr. Gray. These videos are irrelevant to the issue of whether Mr. Gray was arrested without probable cause, the basis for which the State has charged the Defendant with second degree assault and misconduct in office (malfeasance).

## **B. The Reckless Endangerment and Misconduct by Nonfeasance Counts**

None of the videos, which have been broadly publicized in the media and on the Internet, show the Defendant inside the transport van, going inside the van, or even coming out of the van, and as such, are of no probative value and are irrelevant to the issue of whether Officer Nero failed to seat belt Mr. Gray, the basis for which the State has charged the Defendant with reckless endangerment and misconduct in office (nonfeasance).

Not only does Officer Nero give a recorded statement in which he admits that he did not secure Mr. Gray with a seatbelt, but if this fact remains in dispute, counsel on behalf of Officer Nero will stipulate that Officer Nero did not secure Mr. Gray with a seatbelt, thus quashing any need for the State to offer the video evidence in an attempt to support this contention. Through both the Defendant's statement, as well as counsel's offer to stipulate to this fact, the video evidence is of no probative value and thus, the probative value is not outweighed by the danger of unfair prejudice to the Defendant. As such, the Defendant requests that this court preclude the State from offering the video and audio evidence.

## **II. The Audio Evidence is Irrelevant, Prejudicial and has no Probative Value**

The videos the State intends to introduce contain audio which consists of Mr. Gray screaming and hearsay statements from citizens in the community. This audio has no probative value and is unfairly prejudicial. The Defendant requests that the court exclude the accompanying audio evidence.

At a minimum, the audio will serve to confuse the issues and mislead the jury into considering whether Mr. Gray was injured during the course of his arrest, thus causing irreparable prejudice to the Defendant. There is no allegation from the State that Mr. Gray was injured during the course of his arrest; however, the audio includes screams from Mr. Gray,

