

STATE OF MARYLAND

* IN THE

* CIRCUIT COURT

V.

* FOR

EDWARD NERO

* BALTIMORE CITY

Defendant

* Case No. 115141033

* * * * *

DEFENDANT'S RESPONSE TO STATE'S MOTION *IN LIMINE* TO PRECLUDE EVIDENCE OF, OR ARGUMENT ABOUT, OR REFERENCE TO CERTAIN INFORMATION REGARDING THE VICTIM

Defendant Edward Nero, by undersigned counsel, opposes the State's Motion *in Limine* to Preclude Evidence of, or Argument About, or Reference to Certain Information Regarding the Victim (the "Motion"). Evidence regarding Mr. Gray's past conduct and medical history is relevant and should be admissible in the trial of this case.

The State moved *in limine* to broadly preclude any reference to "Mr. Gray's criminal record, prior encounters with law enforcement or corrections officials, prior criminal cases and representation in those cases, prior hospitalizations, prior civil claims or settlements, and/or lead paint exposure as a child." State's Mot. at 1. The State argues that the introduction of such evidence will "confuse, mislead, and prejudice the jury." State's Mot. at 1. The State's Motion should be denied. Information about Mr. Gray's criminal record and prior encounters with law enforcement or corrections officials, is relevant to the charges against Officer Nero.

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Mr. Gray's criminal record is relevant and should be admissible to show that he was familiar with the process based on numerous prior experiences with law enforcement, that he had a habit of engaging in certain conduct when interacting with officers or when in custody, and that he acted in conformity with those habits on the date in question.

Furthermore, the State may seek to introduce hearsay statements made by Mr. Gray. If those statements are allowed into evidence, Defendant moves to allow the introduction of impeaching criminal convictions that would otherwise be allowed had Mr. Gray been able to testify as a witness. Specifically, Defendant moves to introduce evidence of Mr. Gray's April 23, 2009 and May 20, 2013 convictions for Possession with Intent to Distribute Narcotics. "When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked . . . by any evidence which would be admissible for those purposes if the declarant had testified as a witness." Md. Rule 5-806. "Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain." *Id.*

Maryland Rule 5-609 delineates the circumstances under which evidence of prior convictions is admissible for the purposes of impeachment against a witness. Under that Rule, a trial court must determine the admissibility of prior convictions for the purposes of impeachment using a three-part analysis. *King v. State*, 407 Md. 682, 698 (2009). First, the prior conviction "must be within the 'eligible universe' of crimes, which consists

of two categories: infamous crimes and other crimes relevant to a witness's credibility." *Cure v. State*, 195 Md. App. 557, 575 (2010) (citing *King v. State*, 407 Md. 682, 698 (2009)); *see specifically* Md. Rule 5-609(a). Next, the trial court must determine whether the prior conviction is less than 15 years old, was not reversed on appeal, and was not subject to a pardon or a pending appeal. *King*, 407 Md. at 699; *see specifically* Md. Rule 5-609 (b) and (c). Finally, once the first two steps are satisfied, the trial court must determine whether "the probative value of the prior conviction outweighs the danger of unfair prejudice to the witness or objecting party." *State v. Giddens*, 335 Md. 205, 214 (1994).

First, this Court must determine whether Mr. Gray's prior convictions are part of the "eligible universe" of crimes included in Md. Rule 5-609. More specifically, Md. Rule 5-609(a) states:

For the purposes of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if (1) the crime was an infamous crime or other crime relevant to the witness's credibility

The question of whether the distribution of illegal controlled substances is relevant to credibility has been definitively answered by the Court of Appeals in *State v. Woodland*, 337 Md. 519 (1995). The Court held, "A narcotics trafficker lives a life of secrecy and dissembling in the course of that activity, being prepared to say whatever is required by the demands of the moment, whether the truth or a lie." *Woodland*, 337 Md. at 523 (citing *Giddens*, 335 Md. at 217). The *Woodland* Court ultimately held that "a conviction for cocaine distribution is relevant to credibility, without regard to the specific facts

underlying the conviction." *Woodland*, 337 Md. at 523-24; *see also Giddens*, 335 Md. at 218 (holding that the trial court properly admitted evidence of a prior conviction of possession with intent to distribute for the purposes of impeaching credibility). Thus, consistent with the holdings in *Woodland* and *Giddens*, Mr. Gray's prior criminal convictions for "Possession with the Intent to Distribute/Manufacture/Dispense" is directly related to his credibility and, consequently, the introduction of those prior convictions would fulfill the first element of the Md. Rule 5-609 three-part test.

Second, this Court must determine whether the prior conviction is less than 15 years old, was not reversed on appeal, was not subject to a pardon or a pending appeal. Mr. Gray's numerous charges, guilty pleas, and cases disposed via nolle prosequi, were all adjudicated or otherwise disposed of after 2001, which falls within the 15-year period provided by Md. Rule 5-609(b). Moreover, there is no evidence that any of Mr. Gray's cases were reversed or pending on appeal nor is there any evidence that Mr. Gray's previous sentences will be pardoned.¹

Third, as the first two steps are satisfied, this Court must determine whether "the probative value of the prior conviction outweighs the danger of unfair prejudice to the witness or objecting party." *State v. Giddens*, 335 Md. 205, 214 (1994). The fact that a witness has been convicted of a crime can be important as a person who has engaged in criminal activity involving "some element of dishonesty or significant lack of moral commitment may have a lesser propensity to tell the truth than one who has not engaged

¹ Mr. Gray pled guilty to possession with the intent to manufacture/distribute/dispense a controlled dangerous substance on April 23, 2009. Mr. Gray again pled guilty to possession with the intent to manufacture/distribute/dispense a controlled dangerous substance on May 20, 2013.

in such activity." *Carter v. State*, 80 Md. App. 686, 692 (1989) (citing *Burrell v. State*, 42 Md. App. 130, 135 (1979)). In *Carter v. State*, the trial judge weighed the probative value of the defendant's prior conviction for manufacturing a controlled substance versus the prejudice the defendant would face by its admittance, and stated:

The manufacturing of a CDS has no connection to the current offense, so it's not prejudicial the way other convictions would be. . . . I think manufacturing comes into the class or category where it does show or is relevant to the issue of truthfulness. The manufacturing is a scheme. It's thought out. It's not a spur of the moment, and it has as its purpose gain that's outside the law, and that, certainly to me, is an issue that relates to the issue of honesty, so my ruling will be that it's within the court's discretion to allow or disallow questioning on that particular offense. . . . I feel that there is sufficient probative value, and that the prejudice is not so great to disallow it.

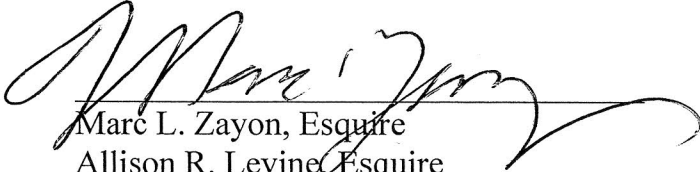
80 Md. App. 686, 693 (1989). The Court of Special Appeals concurred that the defendant's prior conviction for the manufacture of drugs was relevant to the issue of his credibility as the crime is inherently secretive, premeditated, often requires the use of violence, and must necessarily be shielded from the view of law enforcement. *Id.*

In the case at bar, Mr. Gray was twice convicted of Possession with the Intent to Manufacture/Distribute/Dispense of a Controlled and Dangerous Substance. Significantly, the *Woodland* Court deemed that both intent to manufacture and intent to distribute could be used to attack a witness's credibility. 337 Md. at 524-26. As such, regardless of whether Mr. Gray manufactured or intended to distribute narcotics, it would still be appropriate to introduce the evidence of his prior convictions as both the manufacture and distribution of narcotics are relevant to his credibility. Moreover, it also bears noting that only the name of the conviction, the date of the conviction, and the

sentence imposed may be introduced to impeach a witness. *Foster v. State*, 304 Md. 439, 469-70 (1985). As such, in the case at hand, the jury will only be introduced to "Possession with Intent to Manufacture/Distribute/Dispense of a Controlled and Dangerous Substance," and will not be introduced to the particular facts surrounding Mr. Gray's prior convictions. No unfair prejudice will result from admitting the convictions.

Evidence of Mr. Gray's prior convictions should be admitted as his prior convictions of possession with the intent to distribute/manufacture/dispense are within the "eligible universe" of crimes that is relevant to the Mr. Gray's credibility. Mr. Gray's prior convictions are within 15 years of this trial and there is no evidence of any appeal or pardon. Finally, the probative value of introducing Mr. Gray's prior convictions significantly outweighs any hint of prejudice that the State might incur.

For the reasons stated above, the Defendant requests that this Court deny the State's Motion *in Limine* to Preclude Evidence of, or Argument About, or Reference to Certain Information Regarding the Victim.

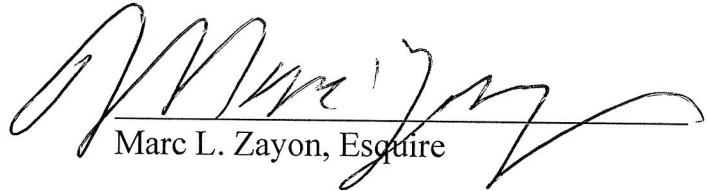


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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, a copy of the foregoing response
was hand-delivered to:

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