

STATE OF MARYLAND

Plaintiff

v.

ALICIA WHITE

Defendant

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IN THE

CIRCUIT COURT

FOR

BALTIMORE CITY

Case No. 115141036

\* \* \* \* \*

**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 Alicia White, through her 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, prior encounters with law enforcement or corrections officials, and prior hospitalizations is relevant to the charges against Sergeant White.

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CRIMINAL DIVISION

### **A. Previous Injuries and Complaints**

As set forth more fully in Sergeant White's Motions for Subpoenas for Tangible Evidence Regarding Medical Records and Records of Incarceration, there is evidence that Mr. Gray may have had a previous back or spine injury, and that he had, on at least one prior occasion, engaged in self-injurious behavior while in custody.

On May 1, 2015, Sergeant John Herzog informed the State that he had met with Mr. Gray at Western District Headquarters and Mr. Gray had told police officers that, "I hurt my back," or "I have a bad back." *See Ex. 1* (Mem. of Sgt. Herzog).

In addition, Detective Dawnyell Taylor noted that on May 17, 2015, and again on May 22, 2015, the Police Department received anonymous tips that Mr. Gray had attempted to injure himself after being arrested and had to be restrained and disciplined for attempting to injure himself while in custody. *See Ex. 2*, Progress Report for Case 15H0086 (May 17, 2015 and May 22, 2015). Medical records and records of incarceration are likely to contain, or lead to the discovery of, additional admissible evidence about these issues.

Evidence that Mr. Gray had a pre-existing condition in his spine, faked injuries, and attempted to injure himself calls into question the reliability of any complaints he may have voiced during his arrest and transportation and makes it less probable that any act or omission by Sergeant White had any causal role in Mr. Gray's death. *See Md. Rule 5-401*. Specifically, the State alleges that the failure to seat belt Mr. Gray led to an injury between Stops 2 and 4, and the failure to provide medical assistance once Mr. Gray said he was injured and asked for assistance, led to his death. *See Bill of Particulars*. The Defendant

disputes the State's charges. Therefore, the timing of, and manner in which, Mr. Gray's injury happened, and whether he was faking injury or otherwise lying about his need for medical attention at one or more times on the date in question, are "consequential fact[s]" in this case. *Smith v. State*, 423 Md. 573, 590 (2011). These facts are admissible (among other bases) as character evidence; to show directly that Mr. Gray acted in conformity with his habits; and to confront the State's witnesses. Md. Rules 5-404, 5-405, 5-406.

Similarly, information concerning a possible previous injury, not considered by the Office of the Chief Medical Examiner, may cast doubt on the findings in the autopsy report. The State articulates no reason for why the jury should not have all of the medical facts that may be relevant to Mr. Gray's injuries.

The State has not identified any particular danger of prejudice or confusion under Md. Rule 5-403, much less any unfair prejudice or confusion that significantly outweighs the probative value of the evidence. Evidence of Mr. Gray's character or habit for self-injurious behavior, or lying about his medical condition, tends to refute the State's theory of the case, but is only "prejudicial" to the State because of its great probative value, and not due to any unfairness. On the contrary, precluding evidence regarding the victim would be unfair to Sergeant White, who has constitutional rights to due process, a fair trial, and to confront the witnesses against her, as well as the right to present relevant evidence on issues relating to her defense. In sum, the State's Motion sets forth no basis for its request to broadly preclude evidence that is so specifically relevant to the charges in this case.

## **B. Prior Criminal Record**

Mr. Gray's criminal record is also 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.<sup>1</sup>

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 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

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<sup>1</sup> 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.

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.

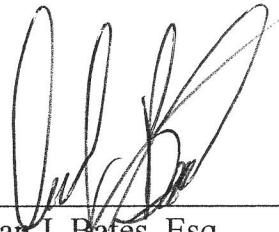
80 Md. App. 686, 693 (1989). The Court of Special Appeals concurred that the defendant's prior conviction for the manufacture of drugs was relevant to the issue of his credibility as the crime is inherently secretive, premeditated, often requires the use of violence, and must necessarily be shielded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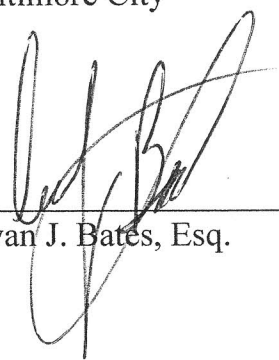
*Counsel for Sergeant Alicia White*



**CERTIFICATE OF SERVICE**

I hereby certify that on this 1st day of February 2016, a copy of the foregoing  
paper 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

  
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Ivan J. Bates, Esq.

POLICE DEPARTMENT  
BALTIMORE, MARYLAND

REPORT  
Form 92/95

DATE: 1 MAY 2015

ASSIGNMENT: Western District Detective Unit

TO: Major Dennis Smith  
VIA Official Channels  
FROM: Sgt. John Herzog  
SUBJECT: Freddie Gray

Sir,

I, Sgt. John Herzog, respectfully wish to inform you that during recent discussions with Sgt. Mileto, we recalled Freddie Gray mentioning to us that he had a hurt back. On March 31st, 2015, Freddie Gray voluntarily responded to the Western District Station at approximately 1800 hours to provide information regarding several Western District robbery cases. I walked into my office and Sgt. Mileto was engaged in a conversation with Freddie Gray. I sat down at my desk and immediately noticed that Freddie Gray was awkwardly sitting in the chair, leaning to the left. I asked Freddie Gray why he was sitting the way that he was and he stated something to the effect of "I hurt my back," or "I have a bad back." Sgt. Mileto and I continued with our conversation and Freddie Gray provided us with valuable intelligence regarding a robbery crew that operates in the area of North Avenue and Pennsylvania Avenue. I spoke with Freddie Gray for approximately five minutes. Freddie Gray walked out of the Western District after providing the information.

Sgt. Mileto and I did not recall this information until rumors/information was released that Freddie Gray possibly had been involved in a car accident. After hearing the information, it "jogged our memory." I was contacted by ASA Cynthia Banks in regards to this information on 5/1/15 at 0936 hours. Cynthia Banks informed me that Detective Lind spoke with her on 5/1/15 and that he reported to her that Freddie Gray told Sgt. Mileto and I something to the effect of "I hurt my back," or "I have a bad back." Cynthia Banks informed me that she would be divulging the information to the State's Attorney. In addition, I contacted Detective Michael Boyd, a member of the FIT team and task force investigating Freddie Gray's death and made him aware that Freddie Gray had stated something to the effect of "I hurt my back," or "I have a bad back" on March 31, 2015 when at the Western District. Detective Boyd was contacted on the afternoon of 5/1/15.

Please feel free to contact me with any questions regarding this administrative report.

Respectfully,



Sgt. John Herzog, I-248

Respond on Reverse Side ☐

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DEFENDANT'S  
EXHIBIT

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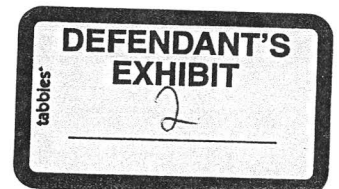
**Progress Report for Case 15H0086**Report Date  
05/17/2015Select Canned Text

ACTION TAKEN: 17. Request for Records

**General Synopsis of Incident**

I spoke with ASA Bledsoe and Palenger 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 he may have been incarcerated.

This entry was made by Det Dawnnyell Taylor

Photographs

**Progress Report for Case 15H0086**Report Date  
05/22/2015

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**ACTION TAKEN:** 14. Anonymous Tip**General Synopsis of Incident**

On 05/22/15 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 of 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...

This entry was made by Det Dawnyell Taylor

**Photographs**