STATE OF MARYLAND	*	IN THE
	*	CIRCUIT COURT FOR
v.	*	BALTIMORE CITY
	*	
GARRETT MILLER	*	CASE No. 115141034

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STATE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO CHARGE A CRIME

Now comes the State of Maryland, by and through Marilyn J. Mosby, the State's Attorney for Baltimore City; Michael Schatzow, Chief Deputy State's Attorney for Baltimore City; Janice L. Bledsoe, Deputy State's Attorney for Baltimore City; and Matthew Pillion, Assistant State's Attorney for Baltimore City; and responds herein to the Defendant's Motion to Dismiss for Failure to Charge a Crime.[1] The State requests that the Court deny the Motion because (1) procedurally, it exceeds the permissible boundaries of this type of pre-trial motion to dismiss; and (2) substantively, it rests on an inaccurate factual portrayal of the conduct charged and relies on both an incorrect assessment of Maryland law and an invalid comparison to distinguishable federal precedents.

I. The Defendant's motion exceeds the boundaries of the procedure on which it seeks relief

The Defendant's twenty-page Motion comes down to one argument: the Fourth Count of the Indictment fails to charge the crime of reckless endangerment because purportedly a police officer's failure to seatbelt a prisoner during custodial transportation does not legally constitute an act that can ever create a substantial risk of death or serious physical injury to the prisoner. Putting aside that the Defendant premises his Motion on an inaccurate assessment of the facts that the State has actually alleged (see Part II.A below), this argument asks the Court to exceed

[1] Because the Defendant's Motion merely incorporates the arguments made in Defendant Rice's similar Motion "as if fully stated herein," this Response is substantively identical to the Response to Defendant Rice's Motion. Any citation below to the Defendant's Motion refers to the incorporated Motion filed by Defendant Rice.

the inquisitional boundaries that Rule 4-252(d) permits during a pretrial motion to dismiss for failure to charge a crime.

The Court of Appeals has explained that "[a] motion to dismiss the charges in an indictment or criminal information [pursuant to Rule 4-252(d)] is not directed to the sufficiency of the evidence, i.e., the quality or quantity of the evidence that the State may produce at trial, but instead tests the legal sufficiency of the indictment on its face." *State v. Taylor*, 371 Md. 617, 645 (2002). Such a motion "may not be predicated on insufficiency of the State's evidence because such an analysis necessarily requires consideration of the general issue," and "where there are factual issues involved, a motion to dismiss on the grounds that the State's proof would fail is improper." *Id.* Whereas "[i]n a civil case, the trial court is permitted, in its discretion, to treat a motion to dismiss as a motion for summary judgment," "[t]here is simply no such analogue in criminal cases." *Id.* at 645-46. Accordingly, the only relevant question at this stage asks whether the Defendant has been informed of the reckless endangerment accusation against him by an indictment and bill of particulars that alleges "the essential elements of the offense" and the "manner or means of committing the offense." *Dzikowski v. State*, 436 Md. 430, 445-46 (2013).

The Defendant makes no argument that the indictment fails to aver the essential elements of reckless endangerment, nor does he assert that the bill of particulars has not supplied him with the manner or means by which he allegedly committed reckless endangerment—indeed, he filed no exceptions to the bill of particulars. Rather, he insists that the manner or means alleged, even if taken as true, cannot amount to reckless endangerment as a matter of law. The logic he employs to make this claim, however, necessarily requires looking past the allegations, fast-forwarding through the State's case at trial, concluding that the State's proof ultimately will not

meet its burden, and then rewinding to the pretrial phase to use that conclusion to argue that because the State will fail to *prove* the crime then the indictment, ipso facto, fails to *charge* the crime. He quintessentially puts the cart before the horse. Strangely, he does so while simultaneously acknowledging the *Taylor* standard and citing the most recent case which applies that standard.

Indeed, the Defendant notes that on August 28, 2015, the Court of Special Appeals issued its opinion in *State v. Hallihan*, 2015 Md. App. LEXIS 114 (2015), yet he cites the case, not for its *Taylor* application, but only for the unremarkable proposition that in assessing whether an indictment charges a crime the court should look at the indictment, review the bill of particulars, and consider arguments from counsel. What the Defendant fails to discuss is that *Hallihan*'s ultimate holding squarely rejects the very argument the Defendant's Motion now advances. In *Hallihan*, the State's Attorney for Worcester County charged by information that the defendant "did recklessly engage in conduct . . . that created a substantial risk of death or serious physical injury to [the victim]," specifying in the bill of particulars that the risky conduct was "a sleeper hold" which "is an intentional act that by its very nature creates a substantial risk of serious physical injury or death because it cuts off the flow of blood to the head and flow of oxygen to the lungs." *Id.* at 3-6.

In response to this charge, defense counsel filed a motion to dismiss for failure to state an offense, arguing "that the State had failed to set forth a 'legally sufficient factual basis' for showing that the defendant's conduct 'created a substantial risk'" under the reckless endangerment statute because "the sleeper hold did not subject the victim to the risk of death or serious bodily harm, even though the bill of particulars asserted otherwise." *Id.* at 7-8. Although the trial judge accepted this argument and dismissed the case, the Court of Special Appeals

reversed, rejecting this type of reasoning as a basis for pretrial dismissal because "Hallihan's counsel focused not on what the criminal information said, but what defense counsel thought the State could prove if the case were tried," concluding:

> [His] argument ignored the fact that the criminal information complied with the pleading requirement set forth in the Criminal Law Article. And, as the *Taylor* case made clear, when a motion to dismiss is considered by the circuit court, the judge should concern himself or herself solely with whether the information or indictment charges a crime; the judge should not consider the issue of whether the State has sufficient evidence to prove that crime. *Taylor*, 371 Md. at 644-45.

Id. at 28-29 (citation in original).

Likewise here, the Defendant employs indistinguishably flawed logic that moves for pretrial dismissal based, not on any lack of notice of the charges against him, but solely on his assessment of what he thinks the State can prove when the case is tried. His claim regarding the risk taken when a police officer fails to seatbelt a prisoner during custodial transport is substantively identical to the *Hallihan* claim about the risk involved in putting someone in a sleeper hold. Because *Taylor* and *Hallihan* squarely foreclose using a motion to dismiss for failure to charge a crime as a procedural mechanism to raise such an argument, the Motion should be denied.

II. Substantively, the Motion presents both inaccurate facts and incorrect legal arguments

A. The Motion factually overlooks key components of the State's allegations

The factual foundation underlying the Defendant's entire argument premises that the State's sole allegation of conduct constituting reckless endangerment is his failure as a police officer to seatbelt a prisoner during custodial transportation. He insists that a prisoner can only be exposed to the requisite risk "when the simple failure to seatbelt is combined with other

conduct." Def. Mot. at 14. He completely overlooks, however, that other conduct has indeed been alleged in this case.

The State did not just claim in its bill of particulars that the Defendant created a substantial risk of death or serious physical injury "by failing to secure Mr. Gray with a seatbelt"; rather the State also alleged that Mr. Gray "was a handcuffed and legshackled detainee in the Defendant's custody in his capacity as a government agent." Def. Mot. at 3 (quoting State's bill of particulars). As such, while the State agrees with the Defendant that "Maryland's reckless endangerment statute was enacted to prohibit only that conduct so reckless and dangerous that it warrants punishment merely for the act or omission itself," Def. Mot. at 17, this case does not involve the risk that a prisoner may be injured or killed during a simple ride in the back of a police cruiser without a seatbelt. This case involves the risk to a prisoner created by transporting him in a police vehicle resembling a steel cage without a seatbelt—while his hands and legs are physically restrained from movement. The Defendant ignores some of the central facts giving rise to the charge.

Moreover, the State need not explain to the Defendant in the indictment or the bill of particulars the State's legal theory as to why the alleged factual situation amounts to reckless endangerment, nor need the State inform him of every additional fact the State intends to present to explain the risk inherent in the Defendant's conduct. A bill of particulars "is not to be used as an instrument to require the State to elect a theory upon which it intends to proceed" or to specify "all the evidence that the State may adduce to prove" the charge. *Dzikowski*, 436 Md. at 447. That the Defendant has failed to acknowledge all of the essential facts alleged or to understand their importance to the State's case simply provides no basis for him to move pretrial to dismiss the charges stemming from those facts.

B. The Defendant overlooks the relevant Maryland precedent supporting the reckless endangerment charge

Even assuming that the Defendant's procedural and factual premises were correct, his underlying legal argument flows from an incomplete assessment of Maryland law regarding the criminal significance of the facts alleged. The Defendant states that he "can find no precedent anywhere in this country in which a police officer has been prosecuted criminally for failing to seatbelt a prisoner" and concludes that because of this purported "absence of controlling precedent, this Court must look toward federal constitutional claims" for guidance about whether the State has properly charged reckless endangerment. Def. Mot. at 6. This argument views the concept of precedent as requiring complete similitude of both law and fact and prohibiting the application of settled law to new facts. Maryland's appellate courts do not construe their cases so rigidly. *See e.g. Denisyuk v. State*, 422 Md. 462, 478 (2011) ("if the subject case merely applies settled precedents to new facts, the case . . . is viewed as not changing the law in any material way") (quoting *Warrick v. State*, 108 Md. App. 108, 113 (1996)). Without even needing to strain to analogize to inapposite federal law, a proper review of Maryland's reckless endangerment jurisprudence shows that the State's charges here merely apply established law to the facts of this case.

In describing Maryland's reckless endangerment statute, the Court of Appeals has stated, "[u]nquestionably, the proscription against recklessly endangering conduct is, and was intended to be, a broad one." *Kilmon v. State*, 394 Md. 168, 174 (2006). The Court has "tended to construe the Maryland statute" in line with the intended reach of the statute's conceptual parent in Section 211.2 of the Model Penal Code, which sought "to 'replace the haphazard coverage of prior law with one comprehensive provision' that 'reaches any kind of conduct that places or

may place another person in danger of death or serious bodily injury.'" *Id.* (quoting Model Penal Code and Commentaries, Part II at 195-96 (1980)). A reckless endangerment charge may apply to any "misconduct, viewed objectively, [that] was so reckless as to constitute a gross departure from the standard of conduct that a law-abiding person would observe, and thereby create the substantial risk that the statute was designed to punish." *Minor v. State*, 326 Md. 436, 443 (1992).

Of particular relevance to the Defendant's claim, the Court has instructed that "[i]n determining whether an accused's actions were grossly negligent or criminally reckless, the standard against which a defendant's conduct must be assessed is typically the conduct of an ordinarily prudent citizen similarly situated," but "*where the accused is a police officer*, the reasonableness of the conduct must be evaluated not from the perspective of a reasonable civilian but rather *from the perspective of a reasonable police officer similarly situated.*" *State v. Albrecht*, 336 Md. 475, 501 (1994) (emphasis added). In *Albrecht*, a Montgomery County police officer had been convicted of, among other crimes, reckless endangerment stemming from his unintentional discharge of a departmental shotgun into the chest of an unarmed suspect, killing her almost instantly. *Id.* at 481-82. At trial, the officer argued that he had acted reasonably under the circumstances, testifying that he "felt fairly threatened, because [he] had two [] people who had just been involved in a serious incident and [he] was told there might be a gun in the [suspects'] car." *Id.* at 495. Despite the State's evidence to the contrary, he insisted that his actions violated no "policy, practice, or directive of the Montgomery County Police Department." *Id.* at 502.

The officer renewed this argument on appeal, and in assessing whether there was insufficient evidence to support Albrecht's convictions, the Court of Appeals weighed the

reasonableness of the officer's conduct using the standards set forth in the Departmental Directives of the Montgomery County Police Department's Field Operations Manual. *Id.* at 502-03. Those Directives provided "that an officer may draw a firearm when the officer has reason to fear for his safety or the safety of others" but stated "that officers must use caution when discharging a firearm to avoid endangering the lives of bystanders" and "must exercise extreme caution when removing [a] shotgun from [a police] vehicle because of the danger that a discharge of the weapon may present to innocent bystanders." *Id.* at 503 (internal quotation marks removed). In affirming the conviction, the Court found that "there was ample evidence from which the trial court could have concluded that Albrecht did not comply with standard police procedures" regarding the use of deadly force and the handling of shotguns; "thus, the trial court could have concluded that Albrecht . . . acted in a grossly negligent and reckless manner" because "a reasonable Montgomery County police officer would not have acted as Albrecht did on this occasion . . . ." *Id.* at 503-05.

Similarly here, the State will present evidence that the Defendant's failure to seatbelt Mr. Gray during custodial transportation constituted a reckless deviation from police orders that not only knowingly risked injury or death to Mr. Gray but actually resulted in it. Given the Parties' mutual concerns about pretrial publicity impacting the trial's fairness, the State will not quote the specific police General Order that the State intends to present to the jury. If the Court would like to review its provisions *in camera*, the State will provide a copy on request. Suffice it to say, however, the General Order directs a relevant standard of care more than compatible with the analysis *Albrecht* employs, and the Defendant has been on notice since the Statement of Probable Cause was filed in this case that the State intends to cite police General Orders as to his duty to seatbelt Mr. Gray. Moreover, in the State's June 23, 2015, Opposition to the Defendants' Joint

Motion to Dismiss for Prosecutorial Misconduct, the State cited *Albrecht*'s reliance on police directives in establishing an officer's duty of care. *Albrecht* clearly establishes precedent that a violation of police General Orders may form the basis of criminal liability if the violation recklessly risks injury or death to another person. Whether the Defendant violated those General Orders and whether the violation, if any, entailed risk rising to the level of criminal recklessness will be matters thoroughly litigated to the jury. Those matters, however, play no role in assessing the narrow question of whether the State has properly charged the crime of reckless endangerment. As to that question, even using the Defendant's flawed cart-before-the-horse methodology, *Albrecht* unequivocally answers in the affirmative.

C. The Defendant erroneously relies on a seatbelt statute governing civil negligence

Besides ignoring Maryland appellate precedent, the Defendant's argument for dismissal additionally relies on statutes preventing the failure to use a seatbelt from being considered evidence of negligence in a civil action, reasoning that these statutes implicitly also prevent the failure to use a seatbelt from contributing to proof of recklessness in a criminal case. The Defendant's logic incorrectly presupposes that these statutes—rather than the police departmental order discussed above—provide the governing authority regarding a police officer's duty to seatbelt a prisoner. Moreover, the Defendant overlooks the statutes' history as laws aimed at preventing the harsh application of Maryland's contributory negligence rules during a time in the 1980s when seatbelts were not widely used.

The statutes in questions are codified in the Transportation Article ("TA" hereinafter) of the Annotated Code of Maryland. As the Defendant recites, TA § 22-412.3 requires operators and passengers of certain motor vehicles to use a seatbelt but provides that the failure to do so

"may not (i) be considered evidence of negligence; (ii) be considered evidence of contributory negligence; (iii) limit liability of a party or an insurer; or (iv) diminish recovery for damages arising out of the ownership, maintenance, or operation of a motor vehicle." TA § 22-412.3(b)-(c),(h)(1). The statute further warns that normally "a party, witness, or counsel may not make reference to a seatbelt during a trial of a civil action," though the statute clarifies that it does not "prohibit the right of a person to institute a civil action for damages . . . arising out of an incident that involves a defectively installed or defectively operating seatbelt." TA § 22-412.3(h)(2)-(3). The Defendant also cites TA § 22-412.4, which provides the same evidentiary limitations on the fact of a person's failure to use a seatbelt but applies only to certain fire and rescue vehicles and does not actually requires the use of seatbelts—just that those vehicle be equipped with seatbelts. TA § 22-412.4(a)-(c). The Defendant's attorney concedes that neither of these statutes by their terms actually apply to the police transportation van used in this case, but he insists that these laws demonstrate a "strong legislative intent that the failure to use a seatbelt is not evidence of civil negligence" such that "it cannot as a matter of law rise to the level of criminal recklessness needed [to] support the State's charge of reckless endangerment." Def. Mot. at 15-17.

Whatever legislative intent underlies TA § 22-412.3 and TA § 22-412.4, the more important intent is that of the Baltimore City Police Commissioner, who promulgated the order requiring police officers to seatbelt prisoners during custodial transport. The Defendant is not the first person to argue that a statute should trump a police commissioner's order as to the legal standard of care to which officers are held. The argument failed then, and it fails now.

In *Mayor of Baltimore v. Hart*, 395 Md. 394, 396 (2006), a Baltimore police officer responding to an emergency "drove a marked police car through a red traffic signal without stopping and collided" with another vehicle, whose driver then sued the City for damages. The

issue on appeal was the relevant standard for judging the officer's duty of care and whether that duty should be governed by TA § 21-106, which permits police cars in such situations to pass through a red light "after slowing down as necessary for safety," or should instead be governed by Baltimore Police General Order 11-90, which provides that before passing through a red light the officer must bring the vehicle "to a full stop and ensure the intersection is safe to enter before proceeding." *Id.* at 403-05. The City argued that the statute's standard should govern, "describing the statute as a 'law' and the General Order as an internal standard" that could not be used to prove the officer's duty to other drivers. *Id.* at 414.

Rejecting the City's contention, the Court, citing to *Albrecht*, held that "General Order 11-90 is relevant because it is directly applicable to the specific conduct of the Baltimore City police officer in this case . . . and the issue of [the] reasonableness" of the officer's conduct. *Id.* at 416-17. In reaching this conclusion, the Court acknowledged that "§ 21-106 is less stringent in its requirements than General Order 11-90" but held that "the fact that the General Assembly has enacted § 21-106 of the Transportation Article, governing the operation of emergency vehicles throughout the State, does not prohibit the Baltimore City Police Department Commissioner . . . from promulgating regulations and guidelines which enact additional requirements for the operation of emergency vehicles by Baltimore City police officers within Baltimore City, so long as the additional provisions do not allow conduct the state statute prohibits," are not otherwise inharmonious with state law, and are not promulgated on a subject expressly pre-empted by the General Assembly. *Id.* at 406-09. Moreover, the Court emphasized that the officer was obligated to follow General Order 11-90, despite his claim that he had no knowledge of its existence, because "Code of Public Local Laws of Baltimore City, § 16-7 provides that rules promulgated by the Baltimore City Police Commissioner 'shall be binding on

all members of the Department.'" *Id.* at 417, n. 11. Ultimately, the Court mirrored *Albrecht* in holding that the General Order's higher standard applied because "[the officer's] conduct must be held to the standard of what a reasonable Baltimore City police officer's (as opposed to what an ordinary driver's) conduct would have been under similar circumstances." *Id.* at 414.

Like in *Hart*, here the Police Commissioner's orders that the State will present at trial in no way conflict with either of the seatbelt statutes the Defendant cites. As the Defendant acknowledges, neither statute even directly applies to police prisoner transport vans. The Commissioner's order merely filled a void in the law, and Code of Public Local Laws of Baltimore City, § 16-7 authorized him to do so. The fact that the Commissioner enacted a rule for Baltimore City police that does not exist under state law in no way clashes with the General Assembly's intent in enacting the two seatbelt statutes. Neither statute expressly or impliedly purports to pre-empt the law of seatbelt use and limit the power of regulating that subject to the General Assembly. Certainly, no argument can be made that the state laws expressly *permit* police officers to transport prisoners without a seatbelt. Moreover, the General Assembly described the goal of its mandatory seatbelt laws as being firstly "for the purpose of providing that, unless certain occupants . . . of certain motor vehicles are restrained by a seatbelt, a person may not operate the motor vehicle." 1986 Md. Laws 1208. The Commissioner's policy, which the Court is free to review in detail, states a purpose directed toward the safety and security of all persons involved during prisoner transport. No conceivable disharmony exists between these two purposes.[2]

[2] As a specific appellate example of a jury being permitted to hear evidence of a defendant police officer's violation of a Baltimore Police seatbelt General Order, the State notes *Leake v. Johnson*, 204 Md. App. 387 (2012) (J. Heard presiding in Circuit Court). Although the issues appealed in *Leake* dealt with public official immunity and damage limitations, General Order K-14, in effect at the time, required that arrestees be restrained by a seatbelt during transport, and the jury was permitted to consider evidence of K-14 because, like in *Hart*, it established a duty of

Finally, the Defendant ignores the history and purpose of Maryland seatbelt law with his assertion that the General Assembly's restrictions on the use of evidence regarding seatbelts in civil cases were intended to effect a similar proscription on such evidence in criminal cases. For one thing, both statutes expressly govern only evidence of seatbelts in civil actions, not criminal prosecutions. Any ambiguity in the bare provision that the lack of a seatbelt "may not be considered evidence of negligence" disappears within the context of the overall statutory scheme that repeatedly refers to evidence in a "civil action" but not to any other type of action. More to the point, the General Assembly expressly noted that the law's purpose in this regard was "establishing that [the] failure of an individual to use a seatbelt in violation of this Act may not be considered evidence of negligence or contributory negligence, limit certain liability, or diminish recovery for certain damages in a *civil action for damages*." 1986 Md. Laws 1208 (emphasis added). This law must be viewed in the context from which it emerged, not as isolated words in a book of statutes.

As Maryland civil law scholars have noted, "the General Assembly passed the compulsory seat belt use statute reluctantly in order to comply with a federal regulation pressuring states to enact seat belt mandates," and "plaintiffs' trial lawyers lobbied for the inadmissibility provision." Donald G. Gifford & Christopher J. Robinette, *Apportioning Liability in Maryland Tort Cases: Time to End Contributory Negligence and Joint and Several Liability*, 73 Md. L. Rev. 701, 766 (2014). "Under Maryland's doctrine of contributory negligence, even if the jury believes that the defendant's negligence is far more culpable (or contributed far more to the injury) than the victim's own contributory negligence, that is, the plaintiff's failure to use reasonable care to protect herself or himself, the plaintiff still recovers

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care affirmatively requiring seatbelt use. The Transportation Article's evidentiary statutes posed no limitation where the issue of seatbelt use arose in the context of a police officer's failure to perform an official duty.

nothing." *Id.* at 708. "Even though the failure to use a seat belt does not contribute to causing the accident itself (a necessary precondition for the application of the current doctrine of contributory negligence), the failure to use a seatbelt often causes an enhanced injury that is a foreseeable consequence of the failure to use a seatbelt." *Id.* at 767. At the time the General Assembly enacted these mandatory seatbelt laws in 1986, the Maryland Court of Appeals had already warned that the failure to use a seatbelt might one day constitute contributory negligence, commenting in *Cierpisz v. Singleton*, 247 Md. 215, 227 (1967), "[s]ome future case in which the availability of the belt will be known to the plaintiff and in which there will be evidence indicating the failure to use it was a substantial factor in producing or aggravating the plaintiff's injuries may require us to consider holding that the issue, with proper instructions, ought to be submitted to a jury." *Cierpisz* only declined to permit the jury to factor the plaintiff's failure to use a seatbelt because at the time, in 1967, "[i]n spite of the overwhelming scientific evidence supporting the beneficial results of seatbelt use, acceptance of the safety belt by the public has not been achieved"; and "[t]he social utility of wearing a seatbelt must be established in the mind of the public before failure to use a seatbelt can be held to be negligence." *Id.* at 226.

Once seatbelt use became mandatory in 1986, the General Assembly—and the plaintiffs' lawyers lobbying before it—might reasonably have worried that *Cierpisz*'s "future case" would quickly come to pass. Indeed, "[a]ccording to the National Highway Traffic Safety Administration (NHTSA), only about 10% of vehicle occupants used seatbelts in the late 1960s and early 1970s," rising nationally "from less than 15% in 1984 to 86% in 2012." Jacob E. Daly, *The Seat-Belt Defense in Georgia*, 65 Mercer L. Rev. 19, 21-23 (2013). Given that the General Assembly's 1986 bill not only mandated seatbelt use but also required the State Police to "establish prevention and education programs to encourage compliance" with the new seatbelt

law, 1986 Md. Laws 1211, this rapid increase in seatbelt use could not have been unanticipated. As such, the General Assembly's firmly expressed intent to prevent seatbelt use from being considered evidence of civil negligence can be viewed only as a measure designed to prevent the Court of Appeals from following through with *Cierpisz*'s suggestion that an increase in the public's seatbelt use might cause the Court to modify Maryland's common law contributory negligence rules and make the failure to wear a seatbelt a complete bar to recovering damages after an accident, even if the victim was otherwise faultless. Contrary to the Defendant's suggestion, no reading of the law's terms and its history can reasonably divine any legislative expression of policy on whether the lack of a seatbelt coupled with other factors might constitute criminal recklessness. The Defendant simply takes TA § 22-412.3 and TA § 22-412.4 out of their context and ascribes to them meaning they were never intended to hold.

Because his entire premise is that Maryland law provides no authority for the State's reckless endangerment charge here, the Defendant's failure to correctly interpret the Transportation Article's seatbelt provisions, coupled with his failure to recognize *Albrecht* as applicable precedent, renders his Motion substantively devoid of any merit. The crime of reckless endangerment in Maryland clearly can embrace the conduct that the State has alleged the Defendant committed in this case. As such, his misunderstanding of Maryland law obviates any need to examine federal law for further guidance.

D. The Defendant's cited federal constitutional cases define liability using both an *actus reas* and a *mens rea* distinguishable from Maryland's reckless endangerment elements

Even if the Court considers it appropriate to look to federal law, the Defendant's analogies to Eighth Amendment constitutional civil actions are misplaced. The Defendant

spends nearly eight pages of his Motion reciting the facts and holdings of various reported federal conditions-of-confinement cases and then another two pages listing citations for similar unreported opinions (despite their lack of precedential value). He does so because he argues to the Court that the federal civil "deliberate indifference standard mirrors that of criminal recklessness" as defined in the charge against the Defendant. Def. Mot. at 7-8. In actuality, the "deliberate indifference" state of mind, as defined in Eighth Amendment jurisprudence, differs from the *mens rea* required for reckless endangerment in Maryland. Moreover, the Defendant ignores that Eighth Amendment cases only attach liability to a range of defendant actions much narrower than the broad *actus reas* component of Maryland's reckless endangerment law. As such, federal cases holding that a government agent does not act with deliberate indifference in failing to seatbelt a prisoner do not even provide persuasive authority as to whether the same act constitutes reckless endangerment under Maryland law.

In *Farmer v. Brennan*, 511 U.S. 825 (1994), the Supreme Court described the elements that a plaintiff must prove to succeed in a civil action based on an alleged Eighth Amendment violation of the right to remain free from cruel and unusual punishment. As to the conduct itself, "the deprivation alleged must be, objectively, sufficiently serious." *Id.* at 834 (internal citations and quotation marks omitted). "For a claim . . . based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm." *Id.* In assessing the risk presented by those conditions, however, "a prison official's act or omission must result in the denial of the minimal civilized measure of life's necessities." *Id.* (internal quotation marks omitted). Construed by the federal Circuit Courts, this "objective element" contains "no 'static test' to determine whether a deprivation is sufficiently serious; [rather] the

conditions themselves must be evaluated in light of contemporary standards of decency." *Jabbar v. Fischer*, 683 F.3d 54, 57 (2nd Cir. 2012).

By comparison, under Maryland law "[t]he *actus reus* of the crime of reckless endangerment is conduct that creates a substantial risk of death or serious physical injury to another person." *Williams v. State*, 100 Md. App. 468, 495 (1994). "[W]hether the accused's conduct, which created the substantial risk, was reckless . . . is a matter for objective determination, to be made by the trier of fact from all the evidentiary circumstances in the case." *Minor v. State*, 326 Md. 436, 443 (1992). As previously noted, the crime's scope, however, can apply to virtually any type of action meeting the statute's elements, as "the proscription against recklessly endangering conduct is, and was intended to be, a broad one." *Kilmon v. State*, 394 Md. 168, 174 (2006). "[T]he General Assembly enacted the statute with a clear policy goal in mind," "focused on deterring reckless behavior that posed a risk of serious injury or death before the injury or death occurred." *Jones v. State*, 357 Md. 408, 426 (2000). For example, in *Wieland v. State*, 101 Md. App. 1 (1994), the defendant was convicted of reckless endangerment for brandishing a handgun while drunk and accidentally shooting his brother. In a variation of this conduct, the defendant in *Minor* was convicted of reckless endangerment for handing his brother, with whom he had been drinking alcohol throughout the day, a loaded shotgun and daring him to play Russian roulette. Aside from conduct involving guns, the defendant in *Holbrook v. State*, 364 Md. 354 (2001), was convicted of eight counts of reckless endangerment for setting fire to a home occupied by eight persons. The *Williams* defendant was convicted of reckless endangerment for intervening in a bar fight by stabbing a person twice with a knife. In *State v. Kanavy*, 416 Md. 1 (2010), the Court construed the reckless endangerment statute as applying to

a defendant's failure to contact emergency services for a person in the defendant's care and custody and to whom the defendant had a duty to provide appropriate medical care.

The factual variety of these convictions demonstrates the intentionally wide reach of Maryland's reckless endangerment crime and contrasts starkly with the narrow standard of conduct judged in the federal cases the Defendant cites. Rather than being concerned with deterring *any* reckless behavior that might risk injury or death to another person, Eighth Amendment cases assess liable conduct through the lens of decency standards in prison conditions and of meeting "the minimal civilized measure of life's necessities" for prisoners. Handcuffing, legshackling, and then transporting a prisoner without a seatbelt might not objectively deprive the prisoner of life's minimal necessities under the Eighth Amendment's amorphous constraints on government actions, but this conclusion says nothing about whether such conduct objectively creates a substantial risk of injury or death to the prisoner under Maryland law, particularly where a police order binding on the defendant specifically requires that the prisoner be seatbelted.

Turning to the required *mens rea*, an even larger distinction emerges between an Eighth Amendment civil violation and criminal reckless endangerment in Maryland. The Supreme Court requires that the second element a plaintiff must prove under *Farmer*'s test is that "a prison official must have a sufficiently culpable state of mind . . . [that] is one of deliberate indifference to inmate health or safety." *Farmer*, 511 U.S. at 834 (internal citations and quotation marks omitted). While the Court described "deliberate indifference [as] lying somewhere between the poles of negligence at one end and purpose or knowledge at the other" and as being "routinely equated . . . with recklessness," the Court cautioned that "the term recklessness is not self-defining." *Id.* at 836. In fashioning the constitutional standard, the Court

held that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837. Moreover, although a "claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate," *id.* at 842, "[b]ecause . . . prison officials who lacked knowledge of a risk cannot be said to have inflicted punishment, it remains open to the officials to prove that they were unaware even of an obvious risk to inmate health or safety . . . or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent," *id.* at 844.

Although Maryland's reckless endangerment law obviously also requires recklessness, the *mens rea* associated with the reckless act is not assessed using *Farmer*'s purely subjective standard; rather it is determined using a combination of subjective and objective judgments. As Judge Moylan explained in *Williams*, 100 Md. App. at 506,

> The awareness of some risk and then the conscious disregard of that risk must, as a matter of course, be subjective. Whether the risk that is known and then disregarded is substantial, however, is to be measured objectively. If the disregarding of such a risk would represent a gross deviation or gross departure from the standard of conduct that a law-abiding person would observe in the actor's situation, then the risk, objectively measured, is ipso facto substantial. If, on the other hand, the disregarding of such a risk would not represent a gross deviation or a gross departure from the standard of conduct that a law-abiding person would observe in the actor's situation, then, objectively measured, it ipso facto is not substantial. The *mens rea* of reckless endangerment, thus parsed, has both a subjective and an objective component. It is the subjective disregard of an objective phenomenon.

Under Maryland's test of the mental state required for criminal reckless endangerment, therefore, a police officer could be found guilty of criminally reckless conduct but nevertheless

escape liability for the exact same conduct in an Eighth Amendment civil action. *Farmer*'s test would permit the police officer to acknowledge that the risk of harm was, indeed, objectively substantial, but he could then simply testify that he subjectively did not appreciate the substantiality of the risk. If believed, this is a valid defense to such a federal claim. *Williams*, however, clearly forecloses such a defense for a defendant in Maryland. If the jury found the substantiality of the risk to be objectively clear to a police officer similarly situated and found that the officer was subjectively aware of at least some degree of risk, it would not matter in this state whether the officer on trial actually understood that the degree of risk presented by his actions rose to the level of being criminally substantial.

Although Maryland's courts and the Supreme Court both use the word *reckless* in their tests, the Defendant has simply read each book of law by its cover and has failed to acknowledge the different definition each jurisdiction actually ascribes to the word. His reliance on federal constitutional claims to understand Maryland's reckless endangerment crime turns out to employ specious logic dependent on superficial but not legally significant similarities. Therefore, even if the Court looks to federal law for guidance in resolving the Defendant's Motion, none of the cases he cites provide an appropriate analogy. His Motion is as substantively meritless as it is procedurally improper.

Wherefore, the State requests that this Court deny the Defendant's Motion to Dismiss for Failure to Charge a Crime on any or all of the grounds discussed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September, 2015, a copy of the State's Response to the Defendant's Motion to Dismiss for Failure to Charge a Crime was delivered to the Defendant's counsel as listed below:

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