STATE OF MARYLAND	2016 MAY 27 P 2:3[illegible]	IN THE
	*	CIRCUIT COURT FOR
v.	* CRIMINAL DIVISION	BALTIMORE CITY
	*	CASE No. 115141032
CAESAR GOODSON	*	

* * * * * * * * * * * * *

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. 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 Motion comes down to one argument: the Third Count of the Indictment fails to charge the crime of second degree assault (in its reckless battery modality) because purportedly a police officer's failure to seatbelt a prisoner during custodial transportation does not constitute an act that can ever legally amount to criminal negligence, regardless of any resulting harm to the prisoner. Putting aside that the Defendant premises the 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 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 in *State v. Taylor*, 371 Md. 617, 645 (2002), 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." 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, at this stage the only relevant question asks whether the Defendant has been informed of the State's second degree assault allegation by an indictment and bill of particulars "characterizing the crime" and "so describing it as to inform the accused of the specific conduct with which he is charged." *Dzikowski v. State*, 436 Md. 430, 445 (2013).

In this case, the Grand Jury's indictment alleged that the Defendant "did assault Freddie Carlos Gray, Jr. in the second degree" on April 12, 2015. The State also supplied the Defendant, as requested, with a Bill of Particulars informing him that the specific conduct to which this charge refers occurred when he

> caused physical harm to Freddie Carlos Gray, Jr., who was a hand-cuffed and leg-shackled detainee in the Defendant's custody in his capacity as a government agent, by failing to secure Mr. Gray with a seatbelt while transporting Mr. Gray in a police vehicle; that the vehicle, an instrumentality of the Defendant, made harmful contact with Mr. Gray as a result of a reckless act of the Defendant and was not accidental; and that the contact was not legally justified.

St. Response to Def. Demand for Bill of Particulars (filed June 8, 2015). The Defendant took exception to the Bill of Particulars, but this Court denied his exceptions by order entered on August 10, 2015, finding that the State's description was sufficient.

The present Motion first attempts to relitigate the Defendant's exceptions to the Bill of Particulars, arguing again that "the vague and elusive reference to 'a reckless act of the Defendant' utterly fails to inform Officer Goodson of the specific conduct with which he is charged." Def. Mot. at 9. This Court having already ruled on this issue, the Defendant's argument is moot. Next, the Defendant's Motion argues exactly that which *Taylor* holds is not cognizable at this stage of the proceedings: he claims that "the sufficiency of the charge in Count III turns on whether a police officer's failure to seatbelt a detainee can ever be legally sufficient so reckless [*sic*] as to constitute a gross departure from the standard of conduct that a reasonable police officer would observe." Def. Mot. at 6. This attack quintessentially puts the cart before the horse. The logic the Defendant employs 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 State, ipso facto, has failed to *charge* the crime. While the Defendant can certainly make this argument under Rule 4-324 on motion for judgment of acquittal after the State's case, Rule 4-252(d) prohibits a hypothetical trial from preventing an actual trial.

Indeed, the Court of Special Appeals recently reiterated this limitation in *State v. Hallihan*, 224 Md. App. 590 (2015), which squarely rejects the very reasoning 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 592-96.

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 597. Although the trial judge accepted this argument as a matter of law 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 610-11 (citation in original).

The Defendant makes no attempt to distinguish *Hallihan*, yet he asks the Court to employ 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 will prove when the case is tried. His claim regarding the reckless risk taken when a police officer fails to seatbelt a prisoner during custodial transport is legally 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 the reckless act required to prove the form of second degree assault here alleged is his failure as a police officer to seatbelt a prisoner during custodial transportation. The Defendant states that his counsel "has not found a decision in this State where a defendant was found criminally liable for assault based solely on an alleged failure to use one inanimate object, which later causes another inanimate object to come into contact with a person." Def. Mot. at 1. He completely misconstrues the charge here and overlooks the fact that other conduct has indeed been alleged.

As set forth above, the State did not just claim in its Bill of Particulars that the Defendant recklessly caused harm to the victim "by failing to secure Mr. Gray with a seatbelt." Rather, the State alleged that the Defendant used a police vehicle as an instrumentality which made harmful contact with Mr. Gray. This harmful contact resulted from the Defendant's criminally reckless act of transporting Mr. Gray as his custodial prisoner inside that instrumentality without securing Mr. Gray with a seatbelt at a time when Mr. Gray was restrained precariously with hand-cuffs and leg-shackles. This case, thus, does not involve the simple misuse of a vehicle's seatbelt resulting in the vehicle making harmful contact with a prisoner. It involves a multifaceted act of

recklessness that resulted in fatal injuries to Mr. Gray. The Defendant simply ignores some of the central facts giving rise to the charge.

More to the point for purposes of this type of Motion, the State is not required to prove the case on paper in order to give the Defendant adequate notice of the charges the case entails. The indictment and the bill of particulars do not function to explain to the Defendant the State's legal theory as to why the alleged factual situation amounts to second degree assault, nor do they function to list out every additional fact the State intends to present to convince the jury of the criminality of the Defendant's conduct. Rather, the indictment need only "contain a concise and definite statement of the essential facts of the offense," and a bill of particulars, even in supplementing a short-form indictment, need not specify "all the evidence that the State may adduce to prove" the charge. *Dzikowski*, 436 Md. at 446-47. That the Defendant has failed to acknowledge all of the facts that the State will prove 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 battery form of second degree assault charged in this case

Even assuming that the Defendant's procedural and factual premises were correct, his underlying legal argument flows from an incomplete and inaccurate assessment of Maryland law regarding the criminal significance of the facts alleged. The Defendant questions whether "such an attenuated form of assault [is] acceptable under Maryland law" and erroneously looks to federal due process cases for guidance to conclude that it is not. Def. Mot. at 1. While the reckless modality of second degree assault may be its least commonly litigated form, a proper review of Maryland's jurisprudence about this crime shows that the State's charge here merely

applies the law as it has been established to the facts of this case, leaving no need to strain to analogize to inapposite federal law.

As defined statutorily, second degree assault includes "the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings." Md. Code. Ann. Crim. L. Art., §§ 3-201(b), 3-203(a). "[T]he term of art 'battery' may connote either of two forms of offensive touching or other application of force: [a]n intended battery [or an] unintended battery." *Lamb v. State*, 93 Md. App. 422, 445-46 (1992). "The recognition of unintended battery as a form of battery is a relatively recent development," and "the crime of unintended battery has not yet emerged from the future [appellate] mists with sufficient clarity to permit fine calibration" of the crime's every possible contour. *Williams v. State*, 100 Md. App. 468, 485-88 (1994). As Maryland's appellate courts have basically described, however, "[a]n unintentional battery can arise from contact that is the result of a person's criminal negligence that legally causes injury to another." *Elias v. State*, 339 Md. 169, 184 (1995). "The requisite criminal negligence necessary for conviction of an unintentional battery may be equated to the culpability required for a conviction of involuntary manslaughter (without the death)." *Id.*

Though the Defendant challenges the legal existence of the type of indirect contact battery here alleged, *Lamb* discusses this type of battery extensively, saying that "[t]he application of force may be indirect as well as direct." 93 Md. App. at 448. The *Lamb* Court expanded on this point by quoting from W. LaFave and A. Scott, Criminal Law 685-686 (2d ed. 1986), which explained:

> The force used need not be applied directly to the body of the victim, as in the usual case where one shoots at another or strikes him with knife, club or fist. It may also be indirectly applied to the victim, as where one whips the horse on which the victim is riding, causing the horse to bolt and throw his rider, or where

> one compels another to touch him in a way offensive to the other. So too a battery may be committed by administering a poison or by infecting with a disease.

Id. The Court continued, describing how "[w]ith slightly different examples, the same thought was expressed by R. Perkins, Criminal Law 153-154 (3d ed. 1982):

> Force may be applied to the person of another in many ways, as by striking another with the fist or a stick or a stone, by kicking or tripping, lassoing with a rope, cutting with a knife, or shooting. As has been said, a battery is an application of force to the person of another 'by the aggressor himself, or by some substance which he puts in motion.' It may be committed by administering a poison or other deleterious substance, by applying a caustic chemical, or by communicating a disease. It may be perpetrated in even more indirect forms, as by exposing a helpless person to the inclemency of the weather, or by threatening sudden violence and thereby causing another to jump from a window or a moving vehicle or other place. A battery may be committed by directing a dog to attack a victim.

Id.

In any event, whether the contact is direct or indirect, the test for distinguishing an unintended battery from non-criminal harmful contact asks "whether a defendant's actions constitute gross criminal negligence [or] recklessness . . . ." *Elias*, 339 Md. at 184. This question "turns on whether those actions under all the circumstances amounted to a disregard of the consequences which might ensue to others." *Id.* Of particular relevance to the Defendant's claim, the Court of Appeals 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 involuntary manslaughter and 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). Although "Montgomery County's departmental directives afford[ed] police officers much discretion with respect to an individual officer's decision to use a firearm," the Court held that "a police officer must act in a reasonable manner" because "[g]ross negligence in the exercise of discretion is grounds for criminal liability." *Id.* at 503. 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 deviation from Baltimore Police Department General Orders, and the State will then argue that this deviation contributed to the overall criminal recklessness of the Defendant's alleged conduct, which not only knowingly risked injury or death to Mr. Gray but actually resulted in it. The specific General Order that the State will present at trial 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. Whether the Defendant here actually violated those General Orders and whether the violation, if any, actually helps establish conduct 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 second degree assault. As to that question, even using the Defendant's flawed cart-before-the-horse methodology, *Albrecht* answers in the affirmative. Under Maryland jurisprudence dealing with unintentional injuries resulting from recklessness, a police officer, like any person, must act in a reasonable manner, and his gross negligence or recklessness in the exercise of official duties, even discretionary ones, "is grounds for criminal liability." *Albrecht*, 336 Md. at 503. Such misconduct is precisely what the State here has alleged and what the State intends to prove at trial.

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 only permissible evidence of a police officer's basic 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 notes, 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 require the use of seatbelts—just that those vehicle be equipped with seatbelts.

TA § 22-412.4(a)-(c). The Defendant glosses over the fact that neither of these statutes by their terms actually applies to the police transportation van used in this case, but he insists that these laws somehow are intended to mean that "the failure of a police officer to seatbelt a detainee cannot constitute criminal recklessness . . . ." Def. Mot. at 8.

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 by which officers may be judged. 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. Indeed, 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.[1]

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. Likewise, the overall statutory scheme 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.

[1] 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 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.

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 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 battery charge here, the Defendant's failure to correctly interpret the Transportation

Article's seatbelt provisions, coupled with his failure to recognize indirect unintentional battery as a crime, renders his Motion substantively devoid of any merit. The crime of second degree assault 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 improperly proposes comparing federal constitutional cases to Maryland's reckless endangerment law as a tool to construe the crime of unintentional battery

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 "deliberate indifference" state of mind defined in Eighth Amendment jurisprudence differs from the *mens rea* required for reckless battery 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 battery 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 battery 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, as Judge Moylan has described under Maryland law, "[i]t is by no means clear [ ] that unintended battery is not [even] broader in its sweep" than its "nonfatal analogue of unintended criminal homicide," as the crime's elements do "not seem to draw a distinction between the degree of harm that may be the result of an unintended battery and the broad sweep of offensive touching and nonserious harm that is the *actus reus* of intentional battery." *Williams*, 100 Md. App. at 489. The *Lamb* Court's citations to LaFave's and Perkins's wide-ranging examples, quoted above, also underscore the factual variety of circumstances that would justify a conviction for reckless battery. Such examples contrast starkly with Eighth Amendment cases, which 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 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 recklessness cases 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 battery 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 described, "[a]t the *mens rea* level . . . the quality of recklessness required for reckless

endangerment is indistinguishable from the quality of recklessness required for unintended battery . . . ." *Williams*, 100 Md. App. at 488. In this regard,

> 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 [legally sufficiently risky], 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 [sufficient]. 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 [sufficient]. The *mens rea* of reckless endangerment [or reckless battery], thus parsed, has both a subjective and an objective component. It is the subjective disregard of an objective phenomenon.

Id. at 506; *see also Elias* 339 Md. at 184 ("[W]hether a defendant's actions constitute gross criminal negligence/recklessness turns on whether those actions under all the circumstances amounted to a disregard of the consequences which might ensue to others. More specifically, 'the test is whether the [defendant's] misconduct, viewed objectively, was so reckless as to constitute a gross departure from the standard of conduct that a law-abiding person would observe.'") (quoting *Albrecht*, 336 Md. at 501).

Under Maryland's test of the mental state required for reckless battery, 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 sufficiently serious, but he could then simply testify that he subjectively did not appreciate the seriousness 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 seriousness 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, objectively reckless.

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 battery 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 asks that this Court deny the Defendant's Motion to Dismiss for Failure to Charge a Crime.

Respectfully submitted,

Marilyn J. Mosby

Michael Schatzow (#717876)
Chief Deputy State's Attorney
120 East Baltimore Street
The SunTrust Bank Building
Baltimore, Maryland 21202
(443) 984-6011 (telephone)
(443) 984-6256 (facsimile)
mschatzow@stattorney.org

Janice L. Bledsoe (#68776)
Deputy State's Attorney
120 East Baltimore Street
The SunTrust Bank Building
Baltimore, Maryland 21202
(443) 984-6012 (telephone)
(443) 984-6256 (facsimile)
jbledsoe@stattorney.org

Matthew Pillion (#653491)
Assistant State's Attorney
120 East Baltimore Street
The SunTrust Bank Building
Baltimore, Maryland 21202
(443) 984-6045 (telephone)
(443) 984-6252 (facsimile)
mpillion@stattorney.org

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May, 2016, a copy of the State's Response to the Defendant's Motion to Dismiss for Failure to Charge a Crime was mailed and e-mailed to:

Matthew B. Fraling, III
Sean Malone
Harris Jones & Malone, LLC
2423 Maryland Avenue, Suite 100
Baltimore, MD 21218
(410) 366-1500
matthew.fraling@mdlobbyist.com
Attorneys for Officer Caesar Goodson

Andrew Jay Graham
Amy E. Askew
Kramon & Graham, P.A.
1 South Street, Suite 2600
Baltimore, MD 21202
410-752-6030
AGraham@kg-law.com
Attorney for Officer Caesar Goodson

Respectfully submitted,

Marilyn J. Mosby

Janice L. Bledsoe (#68776)
Deputy State's Attorney
120 East Baltimore Street
The SunTrust Bank Building
Baltimore, Maryland 21202
(443) 984-6012 (telephone)
(443) 984-6256 (facsimile)
jbledsoe@stattorney.org