STATE OF MARYLAND	*	IN THE
v.	*	CIRCUIT COURT
LT. BRIAN RICE	*	FOR
Defendant	*	BALTIMORE CITY
	*	CASE NO. 115141035

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

MOTION TO DISMISS FOR FAILURE TO CHARGE A CRIME

Defendant Lieutenant Brian Rice, by undersigned counsel, hereby moves pursuant to Maryland Rule 4-252(d) to dismiss Count II (second degree assault) for failure to charge a crime. In support thereof, Defendant states the following:

INTRODUCTION

The Defendant is charged with second degree assault based upon his alleged reckless battery of Mr. Gray. Specifically, the charging documents allege that the Defendant failed to seatbelt Mr. Gray in a police transport van, and as a result of this "reckless act," the van was caused to come into harmful contact with Mr. Gray.

The State's charge of second degree assault in this matter constitutes a legally unfounded theory of criminal prosecution that stretches and contorts the crime of assault to an unreasonable end. No court in Maryland has held a defendant criminally liable for assault based upon their alleged misuse of an inanimate object (i.e. a seatbelt) which at some later point in time causes another inanimate object (i.e. the wall of a van) to come into contact with another person. Such an attenuated form of assault simply does not exist.

However, even assuming arguendo that it is an offense, the charging documents in this matter utterly fail to properly charge the crime of second degree assault. In order for the State's

charge to be legally sufficient, the act or omission on the part of the Defendant alleged to have caused the battery must actually be reckless—it must rise to the level of gross or criminal negligence. In this matter, the State's charge of second degree assault is based solely upon the Defendant's alleged failure to seatbelt Mr. Gray. However, as explained in Defendant Garrett Miller, Edward Nero, and Lt. Brian Rice's previously filed motions and replies asking this Court to dismiss the charge of reckless endangerment, it is legally impossible for such an omission to constitute gross or criminal negligence.[1] As a result, the State's charge of second degree assault is legally insufficient. It charges conduct which cannot, as a matter of law, serve as the basis for the crime. Consequently, Count II (second degree assault) must be dismissed pursuant Maryland Rule 4-252(d).

PROCEDURAL BACKGROUND

On May 21, 2015, a grand jury sitting in the Circuit Court for Baltimore City returned an indictment against the Defendant. With respect to Count II (second degree assault), the indictment reads as follows:

> **SECOND COUNT**
>
> The Jurors of the State of Maryland for the body of the City of Baltimore, do on their oath present that the aforesaid DEFENDANT(S), late of said City, heretofore on or about the date(s) **April 12, 2015,** at the **1600-1700 Blocks of N. Mount Street,** in the City of Baltimore, State of Maryland, did assault **Freddie Carlos Gray, Jr.** in the second degree, in violation of Criminal Law Article, Section 3-203 of the Annotated Code of Maryland; against the peace, government and dignity of the State.
>
> [CR 3-20l; CR 3-203; CR 3-206] 1 1415

Indictment, p. 1.

[1] Defendant incorporates by reference, as if fully stated herein, the arguments and authorities contained in Defendant Garrett Miller, Edward Nero, and Lt. Brian Rice's Motions to Dismiss for Failure to Charge a Crime and subsequent Replies. These documents were filed on September 11, 2015 and October 13, 2015, respectively.

On June 8, 2015, and in Response to the Defendant's Demand for Bill of Particulars, the State provided the following clarification with respect to charge of second degree assault:

> As to the Defendant's Demand for particulars as to Count 2 of the Indictment (second degree assault), the State particularizes that the conduct charged occurred between 8:00 a.m. and 10:00 a.m. on April 12, 2015. The State further particularizes as to Count 2 that the Defendant 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 and supervisor of other government agents, **by failing to secure Mr. Gray with a seatbelt during the process of Mr. Gray being transported in a police vehicle; that the vehicle, an instrumentality of the Defendant and persons with whom he acted in concert, 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. As to further particularization, the State incorporates its argument outlined as to Count 1 above and avers that State has fully complied with its charging obligations.

State's Response to Defendant's Demand for Bill of Particulars, ¶ 2 (emphasis added).

STANDARD OF REVIEW

A Rule 4-252(d) motion to dismiss for failure to charge an offense is not a challenge to "the quality or quantity of evidence that the State may produce at trial." *State v. Taylor*, 371 Md. 617, 645 (2002) (quoting *State v. Bailey*, 289 Md. 143, 149 (1980)). Rather, it is a challenge to the legal sufficiency of the charging documents themselves. *Id.* The issue that must be resolved is whether the documents, on their face, set forth a cognizable crime in the State of Maryland. *Id.* Accordingly, in deciding whether to grant the motion, the court is bound by the four-corners of the charging documents and must assume the truth and validity of the facts asserted by the State. *Id.* When the documents fail to charge a cognizable crime under the laws of Maryland, the court lacks fundamental subject matter jurisdiction to render judgment and dismissal is required. *State v. Canova*, 278 Md. 483, 498 (1976).

ARGUMENT

I. THE DEFENDANT IS CHARGED WITH SECOND DEGREE ASSAULT BASED UPON HIS ALLEGED RECKLESS BATTERY OF MR. GRAY

There are three forms of second degree assault in Maryland. The first form of assault is intent to frighten, under which a defendant can be convicted only if the State proves that he or she committed an act with the **specific intent** to place another in fear of immediate offensive physical contact or harm. *Wieland v. State*, 101 Md. App. 1, 38 (1994). The second from of assault is attempted battery, under which the State has to prove that the defendant completed a substantial step towards an act **specifically intended** to bring about immediate offensive physical contact or harm to another. *Hickman v. State*, 193 Md. App. 238, 251 (2010). The third form of assault is battery, under which the State has to prove that the defendant caused physical contact or harm with another, the contact was the result of an **intentional or reckless act**, and the contact was not consented to or legally justified. *United States v. Royal*, 731 F.3d 333, 341 (2013) (emphasis added) (citing *Nicholas v. State*, 426 Md. 385, 396 (2012)).

The charging documents in this matter do not allege that the Defendant specifically intended to frighten or harm Mr. Gray. Rather, the State's charge of second degree assault is based solely upon an unintentional battery resulting from the Defendant's alleged "reckless act." Specifically, the charging documents assert that the Defendant acted recklessly when he failed to seatbelt Mr. Gray in the police transport van, and as a result of this omission, the van came into harmful contact with Mr. Gray.

II. THE RECKLESS ACT OR OMISSION ALLEGED BY THE STATE MUST RISE TO THE LEVEL OF GROSS OR CRIMINAL NEGLIGENCE REQUIRED FOR THE CRIME OF RECKLESS ENDANGERMENT

In order for the State's charge of second degree assault based upon a reckless battery to be legally sufficient, the failure of a police officer to seatbelt a detainee must constitute a reckless

omission. Specifically, **this omission must rise to the level of gross or criminal negligence needed to support the crime of reckless endangerment.** *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).") (citing *Duckworth v. State*, 323 Md. 532, 540 (1991); *Lamb v. State*, 93 Md. App. 422, 454–455 (1992)); *see also Wiredu v. State*, 222 Md. App. 212, 219 (2015) (finding that the unintentional battery form of second-degree assault requires the State to prove the battery was caused by the defendant's criminal negligence).

Accordingly, the analysis used to evaluate the sufficiency of the second degree assault charge in this matter is the same used to evaluate a charge of reckless endangerment. The issue that must be resolved is whether a police officer's failure to seatbelt a detainee can be considered so reckless as to constitute a gross departure from the standard of conduct a reasonable police officer would observe. *Id.* (citing *State v. Albrecht*, 336 Md. 475, 500 (1994)). If it cannot, the omission cannot serve as the basis for the crime and the charge of second degree assault must be dismissed. *See id.* at 184–885. ("[T]he presence of a specific intent or criminal negligence is a **necessary component** of the crime of battery[.]") (emphasis added).

III. THE STATE'S CHARGE OF SECOND DEGREE ASSAULT IS LEGALLY INSUFFICIENT BECAUSE THE FAILURE OF A POLICE OFFICER TO SEATBELT AN ARRESTEE CANNOT CONSTITUTE A GROSS OR CRIMINALLY NEGLIGENT OMISSION

As explained in detail in Defendant Garrett Miller, Edward Nero, and Lt. Brian Rice's previously filed Motions to Dismiss for Failure to Charge a Crime and subsequent Replies, the failure of a police officer to seatbelt a detainee cannot constitute a gross or criminally negligent omission.

In summary, every federal court to address the issue has held that the failure to seatbelt a handcuffed detainee cannot constitute a gross or criminally negligent omission because it does not expose the detainee to a substantial risk of harm. *See, e.g.*, *Spencer v. Knapheide Truck Equip. Co.*, 183 F.3d 902 (8th Cir. 1999); *Fouch v. District of Columbia*, 10 F. Supp. 3d 45 (D.D.C. 2014); *Fluker v. County of Kankakee*, 945 F. Supp. 2d 972 (C.D. Ill. 2013); *Carrasquillo v. City of New York*, 324 F. Supp. 2d 428 (S.D.N.Y. 2004). This remains true even when the detainee is also restrained by leg shackles. *See, e.g.*, *Jabbar v. Fischer*, 683 F.3d 54 (2d Cir. 2012); *Fluker v. County of Kankakee*, 945 F. Supp. 2d 972 (C.D. Ill. 2013). Instead, the actions of a prison official only rise to the level of gross or criminal negligence when the simple failure to seatbelt is combined with reckless driving. *See, e.g.*, *Rogers v. Boatright*, 709 F.3d 403 (5th Cir. 2013); *Brown v. Fortner*, 518 F.3d 552 (8th Cir. 2008).

The Annotated Code of Maryland also holds that the failure to use a seatbelt is not a gross or criminally negligent omission. Specifically, section 22-412.3 of the Transportation Article provides that the failure of an individual to use a seatbelt cannot constitute evidence of simple negligence. MD. CODE ANN., TRANS. § 22-412.3 (West 2015). Moreover, section 22-412.4 holds that the failure to use a seatbelt is not evidence of negligence even when the individual being transported is ill or injured. *Id.* § 22-412.4.

Finally, the failure of a police officer to seatbelt an arrestee cannot constitute criminal negligence under the general orders, policies, or guidelines of the Baltimore Police Department. Initially, the consideration of such policies fall beyond the four-corners of the charging documents and therefore cannot be relied upon to support the State's charge. *See State v. Taylor*, 371 Md. 617 (2002). Moreover, any policy requiring a Baltimore police officer to seatbelt an arrestee is geographically unique and recently enacted. Accordingly, the alleged violation of such a policy

cannot, as a matter of law, serve as the basis for gross or criminal negligence. *State v. Pagotto*, 361 Md. 528 (2000).

CONCLUSION

The State has failed to allege in the charging documents any act or omission on the part of the Defendant which can rise to the level of gross or criminal negligence. As a result, the charge of second degree assault is legally insufficient and must be dismissed pursuant to Maryland Rule 4-252(d).

Respectfully submitted,

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REQUEST FOR HEARING

Defendant respectfully requests a hearing on the Motion to Dismiss for Failure to Charge a Crime with respect to the charge of second degree assault.

Respectfully submitted,

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

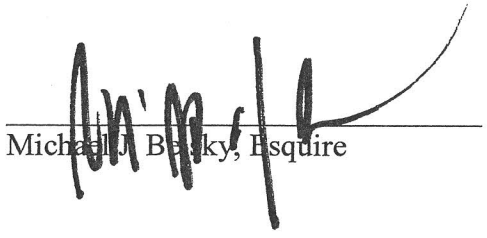
ORDER

Upon consideration of the Defendant's Motion to Dismiss for Failure to Charge a Crime, it is this _____ day of _____, 2015, pursuant to Maryland Rule 4-252(d), hereby **ORDERED** that the Defendant's Motion is **GRANTED**, and it is further **ORDERED** that Charge Number Two of Second Degree Assault is **DISMISSED**.

_____
Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of October, 2015, a copy of the foregoing Motion, Request for a Hearing, and Proposed Order were emailed and hand delivered to Janice Bledsoe, Deputy State's Attorney, Office of the State's Attorney for Baltimore City, 120 East Baltimore Street, 9th Floor Baltimore, Maryland 21202.



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