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 respective undersigned counsel, hereby moves pursuant to Maryland Rule 4-252(d) to dismiss Count V (Reckless Endangerment) for failure to charge a crime. In support thereof, Defendant states the following:

INTRODUCTION

Reckless endangerment, based solely upon the alleged failure of a police officer to seatbelt a prisoner during transport, is not a crime in the State of Maryland. Under Maryland law, the failure of a police officer to seatbelt a prisoner does not even constitute evidence of mere civil negligence, let alone the requisite gross criminal negligence needed to support a charge of reckless endangerment. Moreover, the failure of a police officer to seatbelt a prisoner has never been held to constitute criminal recklessness in any federal court in the country. To the contrary, every federal court to address the issue has held that the failure to seatbelt a prisoner, by itself, does not rise to the level of a constitutional violation.

In this case, the State is seeking to create criminal liability where none exists. By charging Defendant Lt. Rice with reckless endangerment solely for the failure to utilize a seatbelt, the State is creating a strict liability standard whereby any police officer, regardless of the outcome, is *per*

se guilty of reckless endangerment for failure to seatbelt.[1] The State asserts that not seatbelting an arrested individual is unto itself, absent additional circumstances, an inherently dangerous act that creates a substantial likelihood of death or serious bodily injury. This issue has been litigated and decided by multiple courts throughout the country. It is not.

The State has chosen to charge Defendant Lt. Rice with "reckless endangerment" based *solely* upon his failure to seatbelt Mr. Gray. Given that such an omission, *by law*, cannot constitute the offense, the State's charge is legally insufficient and must be dismissed pursuant Maryland Rule 4-252(d).[2]

PROCEDURAL BACKGROUND

On May 1, 2015, the Office of the State's Attorney for Baltimore City filed charges against the six police officers involved in this action. These charges fell under the umbrella of three principal issues: (1) the allegation that Mr. Freddie Gray was arrested by certain Defendants absent probable cause, (2) the alleged failure of certain Defendants to render medical aid to Mr. Gray, and (3) the alleged failure of certain Defendants to seatbelt Mr. Gray. This Motion addresses only the latter of these issues.

On May 21, 2015, a grand jury sitting in the Circuit Court for Baltimore City returned indictments against all Defendants. With respect to Defendant Lt. Rice, the grand jury returned the following counts: Count I – Manslaughter; Count II – Assault in the Second Degree; Count III –

[1] According to the State's logic, every Baltimore County Police Officer would be guilty of hundreds, if not thousands, of counts of reckless endangerment as their transport vans are not even equipped with seatbelts.

[2] With respect to Defendants Miller, Nero, and Rice, the **sole basis** for the State's charge of reckless endangerment is that the officer's allegedly failed to seatbelt Mr. Gray. With respect to Defendants Goodson, Porter, and White, the charge of reckless endangerment is based upon the alleged failure to seatbelt Mr. Gray, as well as the alleged failure of the officers to render medical care. While defense counsel is not challenging the State's charge of reckless endangerment for the latter Defendants, they maintain that a ruling on the present motion would apply to those counts to the extent that they are based on the failure of the officers to seatbelt Mr. Gray.

Misconduct in Office; Count IV – Misconduct in Office; and Count V – Reckless Endangerment.

With respect to Count V, the indictment reads as follows:

> **FIFTH 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 recklessly engage in conduct that created a substantial risk of death and serious physical injury to **Freddie Carlos Gray, Jr.,** in violation of Criminal Law Article, Section 3-204 of the Annotated Code of Maryland; against the peace, government and dignity of the State.
>
> [CR 3-201; CR 3-204(a)(1); CR 3-204; CR 3-206] 1 1425

Indictment of Lt. Brian Rice, p. 2 (emphasis in original).

On June 8, 2015, and in Response to Defendant Lt. Rice's Demand for Bill of Particulars, the State provided the following clarification with respect to the reckless endangerment count:

> As to the Defendant's Demand for particulars as to Count 5 of the Indictment (reckless endangerment), 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 that the Defendant recklessly engaged in conduct that created a substantial risk of death and serious physical injury to Freddie Carlos Gray, Jr., who was a hand-cuffed and legshackled 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**. As to further particularization, the State notes that CL § 3-206(d)(5) states that a defendant is only entitled to a bill of particulars "[i]f the general form of charging document described in paragraph (2) of this subsection is used to charge reckless endangerment under § 3-204 of this subtitle .... " The State, here, did not use the general form of the charging document, and so 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, ¶ 5 (emphasis added).

As articulated below, these documents fail to charge a crime in the State of Maryland and therefore dismissal of Count V (Reckless Endangerment) is mandated pursuant to Maryland Rule 4-252(d).

STANDARD OF REVIEW

In all criminal prosecutions, every resident in the State of Maryland has a right to be informed of the accusation against him or her. MD. CONST. DECLARATION OF RIGHTS art. 21. In order to satisfy this mandate, every charging document must contain both a characterization of the crime, and the particular act(s) alleged to have been committed. *Dzikowski v. State*, 436 Md. 430, 445 (2013) (citations omitted). When a charging document fails 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).

The mechanism by which a defendant in a criminal case challenges the sufficiency of a charging document is a motion to dismiss filed pursuant to Maryland Rule 4-252. Section (d) of the Rule provides the following:

> **Other Motions.** A motion asserting failure of the charging document to show jurisdiction in the court *or to charge an offense may be raised and determined at any time*. Any other defense, objection, or request capable of determination before trial without trial of the general issue, shall be raised by motion filed at any time before trial.

Md. Rule 4-252(d) (emphasis added). In determining whether a crime is charged under Rule 4-252(d), the court considers the charging document **in conjunction with the bill of particulars** filed by the State clarifying the alleged criminal conduct. *State v. Taylor* 371 Md. 617 (2002) (reviewing the charging document and bill of particulars in determining whether the State had failed to charge a crime); *State v. Hallihan*, No. 0886 (Md. Ct. Spec. App. Aug. 28, 2015) (reviewing the criminal information, bill of particulars, and oral argument from counsel in determining whether the State had charged a cognizable crime).

A 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." *Taylor*, 371 Md. at 645 (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 a 4-252(d) motion to dismiss, the court is bound by the face of the charging documents and must assume the truth and validity of the facts asserted by the State. *Id.* However, in determining which offense (or whether an offense) is charged, it is the information stated in the charging document, and not the caption or label of the crime provided by the State, which is dispositive. *Smith v. State*, 62 Md. App. 670, 680 (1985).

ARGUMENT

The standard of review requires this Court to look within the four-corners of the charging documents and analyze the legal sufficiency of the information contained therein. Even assuming the truth and validity of the facts asserted, the State has failed to charge Defendant Lt. Rice with a cognizable crime in the State of Maryland. The count of "reckless endangerment" asserted against Defendant Lt. Rice is based *solely* on his failure to seatbelt Mr. Gray in the transport van. There are no allegations that Defendant Lt. Rice failed to render medical aid to Mr. Gray or drove the van in which Mr. Gray was transported. Instead, the State's charge rests solely upon the alleged simple failure to seatbelt. However, as outlined in detail below, state and federal law clearly hold that the failure to seatbelt a prisoner, by itself, cannot constitute a criminally reckless omission. Given that the State has chosen to charge Defendant Rice for reckless endangerment based solely on conduct which does not, as a matter of law, constitute the offense, the State has failed to charge a cognizable crime.

I. ELEMENTS OF RECKLESS ENDANGERMENT

Defendant Lt. Rice is charged with the crime of reckless endangerment under § 3-204(a) of the Criminal Law Article of the Annotated Code of Maryland. This subsection provides that "[a] person may not recklessly engage in conduct that creates a substantial risk of death or serious physical injury to another." MD. CODE ANN., CRIM. LAW § 3-204(a) (West 2015). In order to convict an individual of reckless endangerment based solely upon the failure to act, the State must prove beyond a reasonable doubt that: (1) the defendant had a legal duty to act; (2) the defendant was aware of his or her obligation to perform that duty; (3) the defendant knew that his or her failure to perform that duty would create a substantial risk of death or serious physical injury to another; (4) under the circumstances, a reasonable person would not have disregarded his or her duty to act, and (5) the defendant consciously disregarded his or her duty. *State v. Kanavy*, 416 Md. 1, 12–13 (2010).

II. EVERY FEDERAL COURT TO ADDRESS THE ISSUE HAS HELD THAT THE FAILURE TO SEATBELT A PRISONER DOES NOT, BY ITSELF, CONSTITUTE CRIMINALLY RECKLESS CONDUCT

The defense can find no precedent, anywhere in this country, in which a police officer has been prosecuted criminally for failing to seatbelt a prisoner. This void is because any charge based solely upon such an omission does not charge a crime. In the absence of controlling precedent, this Court must look toward federal constitutional claims that invoke the identical standard for guidance. This principal was specifically recognized by the Court of Appeals of Maryland in *State v. Kanavy*, in which the Court relied upon Eighth and Fourteenth Amendment claims as authority to determine whether the State's charge of reckless endangerment was legally sufficient to charge a crime. 416 Md. at 5–6. In *Kanavy,* the Defendants were charged with reckless endangerment based upon an alleged failure to provide medical care to an inmate in a juvenile facility. *Id.* at 1.

The Defendants filed a Motion to Dismiss alleging that the indictment failed to charge a crime in that the reckless endangerment statute does not include an act of omission. *Id.* The Court found that the wording of the indictment was sufficient to charge reckless endangerment. *Id.* at 5–11. The Court reached this decision by invoking an analysis under the Eighth and Fourteenth Amendment, finding multiple Section 1983 opinions holding that the failure to render medical aid could constitute a constitutional violation. *Id.* It is for this reason that defense counsel is not challenging the State's charge of reckless endangerment based upon the alleged failure to render medical aid. However, it is for this precise reason that this Honorable Court must dismiss the charges relative to the failure to seatbelt. When the constitutional analysis is invoked for the failure to seatbelt, it becomes evident that every federal court to decide this issue, in every circuit in which it has been presented, has held that the failure to seatbelt a prisoner, by itself, is not a criminally reckless omission and therefore cannot serve as the basis for reckless endangerment.

The issue of whether a law enforcement officer should be held liable for failing to seatbelt an inmate has been addressed by federal courts in the context of Eighth Amendment conditions-of-confinement claims. In such claims, the plaintiff must demonstrate that the officer was deliberately indifferent to conditions posing a substantial risk of serious harm. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). In describing the deliberate indifference standard, the United States Supreme Court equates it to recklessness:

> With deliberate indifference lying somewhere between the poles of negligence at one end and purpose or knowledge at the other, the Courts of Appeals have routinely equated deliberate indifference with recklessness. It is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk.

Id. at 836 (internal citations omitted). Specifically, the Court has held that the deliberate indifference standard mirrors that of criminal recklessness with which Defendant Lt. Rice is

charged. *Id.* at 837 (holding that a prison official cannot be found liable under the Eighth Amendment unless they know of, and disregard, a substantial risk to inmate health or safety). In evaluating these cases, primarily at the motion to dismiss stage, federal courts have uniformly held that failing to seatbelt a prisoner during transport does not, by itself, constitute criminally reckless conduct.

The Second Circuit addressed the issue in *Jabbar v. Fischer*, 683 F.3d 54 (2d Cir. 2012). In *Jabbar*, the prisoner was transported in wrist and ankle shackles, but was not secured by a seatbelt. *Id.* When the vehicle made a sudden turn, the prisoner's head struck another seat and he was rendered unconscious. *Id.* The prisoner asserted constitutional claims under Section 1983 for the injuries sustained to his face, head, and back in the accident. *Id.* The district court granted the defendant's motion to dismiss with respect to the alleged failure to seatbelt. *Id.* In affirming the district court's dismissal, the United States Court of Appeals for the Second Circuit held that "the failure of prison officials to provide inmates with seatbelts on prison transport buses does not, standing alone, violate the Eighth or Fourteenth Amendments." *Id.* at 57. The court found that the "the failure to provide a seatbelt is not, in itself, 'sufficiently serious' to constitute an Eighth Amendment violation." *Id.* at 58 (citing *Gaston v. Coughlin*, 249 F.3d 156, 164 (2d Cir. 2001)). As a result, any claim that the prison official disregarded a substantial risk of harm to inmate safety "[could not] be plausibly alleged." *Id.* at 58 (citing *Farmer*, 511 U.S. at 837). Moreover, the Court recognized that other federal circuit and district courts to address the matter had likewise held that failing to provide a seatbelt, without more, does not expose prisoners to an unreasonable risk of serious damage to their health. *Id.* at 58. The court also found that the decision not to use seatbelts when transporting prisoners is supported by legitimate penological concerns:

> While seatbelts may offer "reasonable safety" for the general public, on a prison bus their presence could present safety and security concerns. Inmates, even

> handcuffed or otherwise restrained, could use seatbelts as weapons to harm officers, other passengers, or themselves. A correctional facility's use of vehicles without seatbelts to transport inmates, when based on legitimate penological concerns rather than an intent to punish, is reasonable.

Id. (internal citations omitted).

The issue was also addressed in the Second Circuit by the United States District Court for the Southern District of New York in *Carrasquillo v. City of New York*, 324 F. Supp. 2d 428 (S.D.N.Y. 2004). In *Carrasquillo*, the plaintiff was riding on a correction bus when it collided with a truck on an icy bridge. *Id.* at 434. At the time of the accident, the plaintiff was handcuffed but was not secured with a seatbelt. *Id.* As a result of his injuries, the plaintiff brought constitutional claims under § 1983 alleging a violation of his Eighth Amendment rights. *Id.* at 435. He argued that the driver had been reckless, and not merely negligent, "when he drove at an excessive speed in icy road conditions." *Id.* at 436. The court dismissed the claim finding that "[a]llegations of a public official driving too fast for the road conditions are grounded in negligence, *not criminal recklessness*." *Id.* (emphasis added) (quoting *Hill v. Shobe*, 93 F.3d 418, 421 (7th Cir. 1996)). The plaintiff also argued that the City was liable for his injuries "by failing to provide him with a seatbelt while he was forced to ride handcuffed in the ill-fated bus." *Id.* at 437. The court dismissed this claim after holding that the "failure to provide seatbelts to prisoners is not a constitutional violation under § 1983." *Id.* This holding was supported by Tenth Circuit jurisprudence finding that "'a failure to seatbelt does not, of itself, expose an inmate to risks of constitutional dimension' because the 'eventuality of an accident is not hastened or avoided by whether an inmate is seatbelted.'" *Id.* at 438 (quoting *Dexter v. Ford Motor Co.*, 92 Fed. App'x 637, 641 (10th Cir. 2004) (unpublished opinion)).

The issue was addressed in the Seventh Circuit by the United States District Court for the Central District of Illinois in *Fluker v. County of Kankakee*, 945 F. Supp. 2d 972 (C.D. Ill. 2013).

In *Fluker*, a prisoner was being transported to a detention facility in a transport van. *Id.* at 976. The van contained two long benches, one of which had six seatbelts. *Id.* During the ride, the prisoner's "hands were cuffed in front of him and attached to a chain around his waist, and his ankles were chained together. He was seated on one of the benches and was not secured by any seatbelt, even though seatbelts were available." *Id.* (internal citations omitted). During the transport, the driver of the van braked to avoid an accident, causing the prisoner to strike his head against the metal surface of the van. *Id.* As a result of the accident, the prisoner sustained a fracture to his vertebrae which required fusion surgery. *Id.* With respect to the prisoner's constitutional claims based upon the officer's alleged failure to fasten the prisoner's seatbelt, the court held that "all those claims . . . may be denied on the ground that the failure to seatbelt an inmate while being transported in a prison vehicle in and of itself neither creates an 'excessive risk to inmate health or safety' nor demonstrates a 'deliberate indifference to serious medical needs.'" *Id.* at 988. The court further stated that "[n]either party has proposed and this court cannot find any case" holding otherwise. *Id.*

The Eighth Circuit addressed the issue in *Spencer v. Knapheide Truck Equip. Co.*, 183 F.3d 902 (8th Cir. 1999). In *Spencer*, an intoxicated prisoner was handcuffed and placed in the back of a transport van. *Id.* at 904. The back of the van consisted of two steel benches which ran along each side of the interior. *Id.* The van was not equipped with seatbelts. *Id.* The prisoner alleged that, while in route, the stops and turns made by the driver caused the prisoner to lose his balance and be "thrown forward into the bulkhead of the compartment causing severe injuries and rendering him a quadriplegic." *Id.* In addressing the prisoner's claim with respect to the failure to seatbelt, the United States Court of Appeals for the Eighth Circuit held that

> [T]he Board's purchase of patrol wagons without safety restraints nor its manner of transporting individuals in these wagons were policies that obviously presented a

> "substantial risk of serious harm." This is particularly true in light of the fact that, at the time of Spencer's arrest, the Kansas City, Missouri, Police Department had guidelines in place which instructed its officers to exercise caution when transporting individuals in the patrol wagon. Though these guidelines may not have been adequate to prevent injuries, *their failures, if any, constitute negligence at most.*

Id. at 906 (emphasis added). The Court also found that the decision to use patrol wagons without seatbelts was supported by the fact that seatbelts can be used as weapons, even by prisoners placed in handcuffs. *Id.* at 907.

The issue was addressed by the United States District Court for the District of Columbia in *Fouch v. District of Columbia*, 10 F. Supp. 3d 45 (D.D.C. 2014). In *Fouch*, police officers handcuffed a prisoner behind his back and placed him in a van for transport between detention facilities. *Id.* at 47. The van in which the prisoner was placed did not have seatbelts or restraints, even though vehicles containing such safety measures were readily available. *Id.* During the trip the van stopped abruptly, causing the prisoner to be thrown from his seat. *Id.* at 48. As a result of the sudden stop, the prisoner suffered severe spinal injuries resulting in partial paralysis. *Id.* The prisoner asserted a Section 1983 claim for his injuries based upon the failure of the officers to use a seatbelt. *Id.* In dismissing the claim, the Court recognized that other federal circuits addressing the issue had held that "transporting handcuffed persons in police custody in a vehicle without seatbelts does not" rise to the level of a constitutional claim. *Id.* at 50 (citations omitted). The Court further distinguished those cases in which the courts had concluded that the alleged failure of an officer to provide seatbelts, *combined with sufficient facts demonstrating that the officer also drove the van in a reckless manner*, were sufficient to survive a motion to dismiss. *Id.* at 50–51 (citations omitted). Given the absence of such additional allegations in the present case, the Court dismissed the prisoner's claim. *Id.* at 52.

In those cases in which the federal circuits have held that the prisoner's claim did rise to the level of a constitutional violation**, there were other allegations, in addition to the simple failure to seatbelt**, supporting the claim. For instance, in *Rogers v. Boatright* a prisoner was being transported from a detention facility to a hospital in a van. 709 F.3d 403, 406 (5th Cir. 2013). The prisoner was sitting on a narrow bench, without a seatbelt, in a caged portion of the vehicle. *Id.* The prisoner was also shackled in leg irons and handcuffs which were attached together by a chain. *Id.* It was alleged that during the trip, the driver of the van drove recklessly by "darting in and out of traffic at high speeds while [the prisoner] was caged in the back." *Id.* It was further alleged that at some point the driver was traveling "so fast that he had to brake hard to avoid hitting a vehicle in front of him." *Id.* As a result of the sudden stop, the prisoner was thrown forward into the end of the cage and sustained head, neck, spinal, vision, and hand injuries. *Id.* The prisoner also alleged that the driver of the van was aware that such incidents had occurred in the past, and in fact stated "[y]es that just the week before there had been a similar incident where [s]ix other inmates were injured due to having to slam on the brakes . . . it happens all the time, isn't a big deal." *Id.* (quotation marks omitted). In reviewing the lower court's dismissal of the claim, the United States Court of Appeals for the Fifth Circuit recognized that other federal circuits uniformly held that "the failure of prison officials to provide seatbelts to inmates riding in prison vehicles, standing alone, does not violate an inmate's Eighth Amendment rights." *Id.* at 408–09. However, in this case, the Court held that dismissal was improper because the failure to seatbelt the inmate was coupled with "the additional allegation that the prisoner was injured when the defendant *operated the prison vehicle recklessly knowing of the danger to the prisoner*." *Id.* at 409 (emphasis added).

In *Brown v. Fortner*, a prisoner was being transported to a detention facility in the second van of a five van convoy. 518 F.3d 552, 556 (8th Cir. 2008). The prisoner was "fully shackled with

belly chains, handcuffs, leg chains, and a black box covering the handcuffs." *Id.* As the prisoner entered the van, he asked the officers to fasten his seatbelt. *Id.* In response, the "officers refused to secure [the prisoner's] seatbelt and instead replied with taunts." *Id.* While in transit, the vans travelled in close proximity and at speeds exceeding the posted speed limit of fifty miles per hour, instead reaching a speed of seventy-five miles-per-hour. *Id.* During the trip, prisoners repeatedly asked the driver to slow down, however the driver not only ignored their requests, but at one point deliberately increased the volume of the radio. *Id.* At some point, the driver of the van "slammed on the brakes and swerved" to avoid hitting the lead vehicle in the convoy. *Id.* As a result, the third vehicle slammed into the back of the van in which the prisoner was riding while going approximately thirty miles per hour, causing him to suffer injuries. *Id.* Following the accident, the driver of the van was cited with inattentive driving and an investigation revealed that the vans had been traveling too close together. *Id.* In holding that the prisoner had presented sufficient evidence that the driver's actions may have violated his Eighth Amendment rights, the United States Court of the Appeals for the Eighth Circuit specifically recognized that the prisoner's claim was not based solely upon the driver's alleged failure to seatbelt the prisoner. *Id.* at 559. Rather, it was based upon the officer's failure to seatbelt the prisoner, driving at excessive speeds, following too closely to another vehicle, crossing over double-yellow lines, passing non-convoy cars despite road markings prohibiting such an act, and ignoring the prisoner's requests to slow down. *Id.* It was this *combination of acts and omissions* which constituted the claim. *Id.*

There is no case holding that the failure of a law enforcement officer to seatbelt a prisoner is enough to constitute criminal recklessness. This is true of both the reported and unreported

opinions issued by federal courts throughout the country.[3] Rather, every court to address the issue has held that a prisoner is only exposed to a risk of constitutional dimension when the simple failure to seatbelt is combined with other conduct, such as driving in a reckless manner or actually causing a motor vehicle accident. Yet, in this case, the only act Defendant Lt. Rice is charged with is failing to seatbelt Mr. Gray. He is not charged with driving recklessly, or causing a motor vehicle accident of which there was none. As a result, his alleged omission in failing to seatbelt Mr. Gray does not, as a matter of law, rise to the requisite level of criminal recklessness needed to serve as the basis for his charge of "reckless endangerment."

III. THE FAILURE TO USE IS A SEATBELT IS NOT, AS A MATTER OF LAW, NEGLIGENT CONDUCT IN THE STATE OF MARYLAND

Even putting aside the fact that every federal court to address the issue has held that the failure to seatbelt a prisoner does not constitute criminal recklessness, Maryland statutory authority indicates that such an omission **cannot even constitute evidence of mere *civil* negligence**.

Again, the court's reasoning in *Kanavy* is instructive in guiding this Court's analysis of the present Motion to Dismiss. After evaluating whether a charge of reckless endangerment could be premised upon a duty provided under the United States Constitution, the Court of Appeals of Maryland looked to see if such a charge could be founded in Maryland law. *Kanavy*, 416 Md. 1, 6 (2010). The court found that such a claim could arise under the Human Services Article of the Annotated Code of Maryland. *Id.* However, the same analysis dictates a different result in the instant matter given that the failure to seatbelt an individual, under Maryland law, is not even evidence of civil negligence.

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[3] Omitted from the present motion are the numerous unreported federal opinions holding that the failure to seatbelt a prisoner, by itself, does not rise to the level of a constitutional claim. These decisions have instead been included in the attached Table of Federal Cases Not Selected for Publication for this Honorable Court's reference.

The statutory authority governing the use of seatbelts in Maryland is found in the Transportation Article of the Annotated Code of Maryland. Section 22-412.3 governs the use of seatbelts in motor vehicles. The term "motor vehicle," for the purpose of the statute, includes the following:

> (2)(i)"Motor vehicle" means a vehicle that is:
>
> 1. Registered or capable of being registered in this State as a Class A (passenger), Class E (truck), Class F (tractor), Class M (multipurpose), or Class P (passenger bus) vehicle; and
>
> 2. Required to be equipped with seat belts under federal motor vehicle safety standards contained in the Code of Federal Regulations.
>
> (ii) "Motor Vehicle" does not include a Class L (historic) vehicle.

MD. CODE ANN., TRANSP. § 22-412.3(a)(2)(i)–(ii). With respect to an alleged failure to use a seatbelt in a motor vehicle, the statute provides the following:

> **Failure to use seatbelt not considered negligence**
> (h)(1) Failure of an individual to use a seat belt in violation of this section 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.

Id. § 22-412.3(h)(1) (emphasis in original).

First, it should be noted that police officers have no statutory duty to seatbelt a prisoner in a back of a transport van because a transport van does not fall within the class of vehicles requiring the use of seatbelts under § 22-412.3. A police transport van is not a passenger car, truck, tractor, multipurpose passenger vehicle, or passenger bus. *See id.* § 13-901, *et. seq.* Moreover, a police transport van is also not required to be equipped with seatbelts under the federal motor vehicle

safety standards. *See* 49 C.F.R. § 571.208 (applying only to passenger cars, multipurpose passenger vehicles, trucks, and buses). However, even if such a duty existed, an omission of that duty cannot even be considered evidence of mere *civil* negligence, let alone the criminal recklessness needed to support the State's charge.

This is further supported by Section 22-412.4 of the Transportation Article which governs the use of seatbelts in emergency vehicles. The statute provides the following definition of the term "emergency vehicle":

> 3) "Vehicle" means an emergency vehicle purchased or leased by the State, a county, municipality, or volunteer fire department or rescue squad and operated by a:
>
> (i) State, county, or municipal fire department;
>
> (ii) Volunteer fire department; or
>
> (iii) Rescue squad.

MD. CODE ANN., TRANSP. § 22-412.4(a)(3). With respect to an alleged failure to use a seatbelt or restraining device in an emergency vehicle, the statute provides the following:

> **The failure of a person to use a seat belt or restraining device**
> (c)(1) The failure of a person to use a seat belt or restraining device required under this section may not:
>
> (i) Be considered evidence of negligence;
>
> (ii) Be considered evidence of contributory negligence;
>
> (iii) Limit liability of a party or an insurer;
>
> (iv) Diminish recovery for damages arising out of the ownership, maintenance, or operation of a motor vehicle; or
>
> (v) Be considered a moving violation for purposes of § 16-402 of this article.

Id. § 22-412.4(c)(1) (emphasis in original). While defense counsel concedes that this statutory provision does not specifically include police transport vans, it demonstrates the strong legislative

intent that the failure to use a seatbelt is not evidence of civil negligence, even in those situations where the individual being transported is ill or injured.

Given that the alleged failure of Defendant Lt. Rice to seatbelt Mr. Gray cannot constitute civil negligence, it cannot as a matter of law rise to the level of the criminal recklessness needed support the State's charge of reckless endangerment. To hold otherwise would allow the State to fabricate crimes under the label of "reckless endangerment," even though the underlying conduct does not even rise to the level necessary to impose *civil* liability. Such charges are unquestionably incompatible with the language, nature, and purpose of Maryland's reckless endangerment statute. *See Minor v. State*, 326 Md. 436, 441 (1992) (holding 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, regardless of whether there is a resulting harm).

CONCLUSION

The State's charge of reckless endangerment, based upon the alleged failure of a police officer to seatbelt a prisoner during transport, is not a crime in the State of Maryland. This conclusion is based on firmly-established law holding that any alleged failure to seatbelt a prisoner is not gross or criminal, and does not manifest a wanton or reckless disregard for human life. As a result, it does not fall within the type of conduct the Maryland reckless endangerment statute prohibits. Given that the State has charged Defendant Lt. Rice with conduct that, by law, cannot constitute the offense, the charging documents are legally insufficient and Count V (Reckless Endangerment) must be dismissed pursuant to Maryland Rule 4-252(d).

Respectfully submitted,

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TABLE OF FEDERAL CASES NOT SELECTED FOR PUBLICATION

Federal Circuit Court Opinions

Bell v. Norwood, 325 F. App'x 306 (5th Cir. 2009)

Brown v. Morgan, 39 F.3d 1184 (8th Cir. 1994)

Cooks v. Crain, 327 F. App'x 493 (5th Cir. 2009)

Dexter v. Ford Motor Co., 92 Fed. App'x. 637 (10th Cir. 2004)

Federal District Court Opinions

Barela v. Romero, No. CIVIL 06-41 JBDJS, 2007 WL 2219441 (D.N.M. May 10, 2007)

Bryant v. Downs, No. 6:09-CV-1670-ORL-28KRS, 2010 WL 2593564, at *1 (M.D. Fla. June 28, 2010)

Byerlein v. Hamilton, No. 1:09-CV-841, 2009 WL 3255478, at *1 (W.D. Mich. Oct. 7, 2009)

Dade v. Kennard, No. 2:06-CV-869TC, 2008 WL 4879168, at *1 (D. Utah Nov. 3, 2008)

Foreman v. Unnamed Officers of the Fed. Bureau of Prisons, No. CIV.A. DKC-09-2038, 2010 WL 2720817, at *1 (D. Md. July 7, 2010)

Grisby v. Cotton, No. CV408-214, 2009 WL 890543, at *1 (S.D. Ga. Mar. 31, 2009)

Harris v. Benson, No. 8:07CV395, 2009 WL 1740593, at *1 (D. Neb. June 17, 2009)

Hughes v. Widup, No. 2:07-CV-290, 2008 WL 56003, at *1 (N.D. Ind. Jan. 3, 2008)

Ingram v. Herrington, No. 4:06-CV-P65-M, 2007 WL 2815965 (W.D. Ky. Sept. 26, 2007)

Jones v. Collins, No. 05-663-JPG, 2006 WL 1528882, at *1 (S.D. Ill. June 1, 2006)

King v. San Joaquin Cnty. Sheriff's Dep't, No. CIV S-04-1158GEBKJMP, 2009 WL 577609, at *1 (E.D. Cal. Mar. 5, 2009)

Mitchell v. Briggs, No. 5:10-CT-3028-D, 2011 WL 2470728, at *1 (E.D.N.C. June 20, 2011)

Mojet v. Transp. Driver, No. 1:06-CV-321 TS, 2006 WL 3392944, at *1 (N.D. Ind. Nov. 22, 2006)

Oliver v. Georgia Dep't of Corr., No. 5:06CV320 CAR, 2006 WL 3086792, at *1 (M.D. Ga. Oct. 27, 2006)

Otero v. Catalogne, No. 08-282 ERIE, 2010 WL 3883444, at *1 (W.D. Pa. Sept. 28, 2010)

Pendleton v. Schroeder, No. C980791FMS, 1998 WL 273000, at *1 (N.D. Cal. May 22, 1998)

Riddick v. Reiger, No. 203CV462FTM29SPC, 2006 WL 2644924, at *1 (M.D. Fla. Sept. 14, 2006)

Russell v. Stroleny, No. 2:13-CV-142, 2014 WL 357408, at *1 (S.D. Tex. Jan. 31, 2014)

Seelye v. Fisher, No. CIV. 06-2848 RHKRLE, 2007 WL 951604, at *1 (D. Minn. Mar. 29, 2007)

Shanklin v. Seals, No. 3:07CV319, 2010 WL 2942649, at *1 (E.D. Va. July 27, 2010)

Shepard v. Daviess Cnty. Det. Ctr., No. 4:10CV-105-M, 2011 WL 9342, at *1 (W.D. Ky. Jan. 3, 2011)

Smith v. Sec'y For Dep't of Corr., 252 F. App'x 301 (11th Cir. 2007)

Stewart v. Livingston, No. H-14-1483, 2014 LEXIS 140734, at *1 (S.D. Tex. Oct. 3, 2014)

Turner v. Unknown Parties No. 1, No. 1:11-CV-1128, 2012 WL 443017, at *1 (W.D. Mich. Feb. 9, 2012)

Vinson v. U.S. Marshals Serv., 459 F. App'x 221 (4th Cir. 2011)

Walls v. Kaho, No. CIV.A. 5:06-CV-188DC, 2008 WL 508618, at *1 (S.D. Miss. Feb. 20, 2008)

Worthington v. Cnty. of Northampton, No. CIV.A. 13-6292, 2013 WL 6077438, at *1 (E.D. Pa. Nov. 18, 2013)

Young v. Hightower, No. 04-10309, 2007 WL 2214520, at *1 (E.D. Mich. July 27, 2007)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of September, 2015, a copy of Defendant Lt. Brian Rice's Motion to Dismiss for Failure to Charge a Crime was 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.

Michael J. Belsky, Esquire

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

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

REQUEST FOR HEARING

Defendant Lt. Rice respectfully requests a hearing on his Motion to Dismiss for Failure to Charge a Crime.

Michael J. Belsky, Esquire

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

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

ORDER

Upon consideration of Defendant Lt. Brian Rice'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 Five of Reckless Endangerment is **DISMISSED**.

_____
Judge