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

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

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

Defendant Lieutenant Brian Rice, by undersigned counsel, hereby submits this Reply to the State's Response to Defendant's Motion to Dismiss for Failure to Charge a Crime. In support thereof, Defendant states the following:

INTRODUCTION

The State's Reply to the Defendant's Motion to Dismiss for Failure to Charge a Crime distorts the appropriate standard of review. More importantly, it overlooks every case in this country holding that the failure of a police officer to seatbelt an arrestee, even when handcuffed and leg-shackled, does not constitute criminal recklessness. The State provides no legal authority to support the conclusion that such an allegation constitutes a criminal act. This void is because no such authority exists, and the allegation is simply not a crime.

In order to survive the present Rule 4-252(d) motion to dismiss, the State has the burden of demonstrating that: (1) the Defendant had a legal duty to seatbelt Mr. Gray, and (2) the failure to fulfill that duty renders the Defendant liable under Maryland's reckless endangerment statute. *State v. Kanavy*, 416 Md. 1 (2010). The State has failed to meet this burden.

There are three potential sources from which the State could argue that the Defendant had a legal duty to seatbelt Mr. Gray. First, the State could argue that the Defendant had a duty to

seatbelt Mr. Gray under the United States Constitution. However, federal courts have uniformly held that even if such a duty is breached, it does not constitute a criminally reckless act. Consequently, the State is precluded from relying upon the United States Constitution to support its charge of reckless endangerment.

Second, the State could argue that the Defendant had a duty to seatbelt Mr. Gray under the Annotated Code of Maryland. However, as the State seems to admit, no such statutory duty exists. Moreover, even if a duty existed, the Transportation Article plainly states that the failure to use a seatbelt cannot be considered evidence of simple negligence, let alone the gross or criminal negligence needed for the crime of reckless endangerment. Accordingly, the State cannot rely upon the Annotated Code of Maryland to support its charge.

Third, the State could argue that the Defendant had a duty to seatbelt Mr. Gray under the policies and regulations of the Baltimore Police Department. From its response, it appears that the State is relying upon this source to support its charge of reckless endangerment. Specifically, the State references a general order unique to Baltimore City which was published just days before the Defendant's interaction with Mr. Gray. Initially, the State is barred from relying upon this general order because it was not included within the four-corners of the charging documents. The consideration of such extrinsic evidence exceeds the permissible scope of review for a Rule 4-252(d) motion to dismiss. *See State v. Taylor*, 371 Md. 617 (2002). Moreover, the State cannot rely upon the alleged violation of such a geographically unique, and recently imposed, general order because it "does not remotely generate a *prima facie* case of gross criminal negligence." *State v. Pagotto*, 361 Md. 528, 550 (2000). As a result, the State cannot rely upon the policies and regulations of the Baltimore Police Department to support its charge.

There is absolutely no legal authority holding that a police officer is criminally reckless when he or she decides to transport an arrestee without a seatbelt. As a result, the State's charge of reckless endangerment is legally insufficient and must be dismissed pursuant to Maryland Rule 4-252(d).

ARGUMENT

I. THE FAILURE OF A POLICE OFFICER TO SEATBELT AN ARRESTEE IS NOT A CRIME UNDER THE UNITED STATES CONSTITUTION

The State does not appear to contend that the Defendant had a duty to secure Mr. Gray with a seatbelt under the United States Constitution. Moreover, the State dismisses the wealth of federal decisions holding that the failure of a prison official to seatbelt an arrestee (all of whom were handcuffed and many of whom were leg shackled) is not a constitutional violation.

In doing so, the State attempts to distinguish the elements of reckless endangerment from those needed to assert a constitutional claim. However, the State's attempt to differentiate the *actus reus* and *mens rea* of these matters lacks any true significance. Under both scenarios, the party asserting the action must prove that the accused knew of, and consciously disregarded, a substantial risk of harm to an individual in custody. *See Kanavy*, 416 Md. at 12–13; *Farmer v. Brennan*, 511 U.S. 825, 835–38 (1994). In evaluating these claims at the federal level, the courts have uniformly held that the failure to seatbelt a prison inmate during transport simply does not pose a substantial risk to that inmate's health or safety.

These federal cases also demonstrate that placing a prison inmate **in handcuffs and leg-shackles**, and transporting the inmate without a seatbelt, does not constitute criminally reckless conduct. All of the cases cited by the Defendant is his previous motion involve transporting a handcuffed prisoner without a seatbelt. Moreover, a number of these cases involve the additional allegation that the prisoner was in leg shackles. However, even under these circumstances, the

failure of the prison official to seatbelt a handcuffed and leg-shackled inmate is simply not a constitutional violation. *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 only instances in which the conduct of the prison official rose to the level of a constitutional claim is when he or she failed to seatbelt the inmate and recklessly drove the vehicle in which the prisoner was transported. *See, e.g.*, *Rogers v. Boatright*, 709 F.3d 403 (5th Cir. 2013); *Brown v. Fortner*, 518 F.3d 552 (8th Cir. 2008).

The Defendant did not drive Mr. Gray to the Western District Police Station on April 12, 2015. As a result, he cannot be charged with reckless endangerment based upon a violation of any duty imposed under the United States Constitution.

II. THE FAILURE OF A POLICE OFFICER TO SEATBELT AN ARRESTEE IS NOT A CRIME UNDER THE ANNOTATED CODE OF MARYLAND

The State does not contend that the Defendant had a duty under the Annotated Code of Maryland to seatbelt Mr. Gray. However, even assuming that such a duty existed, the plain language of the Transportation Article holds that the failure of a police officer to seatbelt an arrestee is not a negligent omission. *See* MD. CODE ANN., TRANSP. § 22.412.3 (West 2015).

The State tries to distinguish the statutory provisions cited by the Defendant by arguing that the legislative history demonstrates they were meant to apply to civil claims, rather than criminal actions. First, the statute contains no such restrictive terms. Second, an exploration of the statute's history is unnecessary given that the language of the statute is unambiguous: "[f]ailure of an individual to use a seatbelt in violation of this section may not be considered evidence of negligence." *Id.* § 22.412.3(h)(1)(i). It is this plain language which must be enforced. *See Bd. of Sup'rs of Elections of Baltimore City v. Weiss*, 217 Md. 133, 136 (1958) (citations omitted) ("[T]he cardinal rule of statutory interpretation is that the intent of the legislature is to be sought in the first instance in the words of the statute. Where there is no ambiguity or obscurity in the language of

the statute, there is usually no need to look elsewhere to ascertain the legislative intent."). By arguing that the statute is meant to apply only to civil matters, the State is simply trying to "create ambiguity where none exists." *Latray v. State*, 221 Md. App. 544, 556 (2015). The State is free to lobby to the General Assembly that the statute should be amended to only apply to civil matters. However, to date, the statute says what it says: the failure to use a seatbelt is not evidence of negligence.

III. THE FAILURE OF A POLICE OFFICER TO SEATBELT AN ARRESTEE IS NOT A CRIME UNDER THE RULES AND REGULATIONS OF THE BALTIMORE POLICE DEPARTMENT

The State alleges that "the Defendant's failure to seatbelt Mr. Gray during custodial transportation constituted a reckless deviation from police [general] orders that not only knowingly risked injury or death to Mr. Gray but actually resulted in it." State's Mot. at 8.

Initially, it must be noted that the Defendant was not charged with violating a Baltimore Police Department general order. Nowhere in the indictment or bill of particulars does the State indicate that a general order was the authority from which the Defendant had a duty to seatbelt Mr. Gray. Certainly, these allegations could have been (and often are) included in the language of the charging documents. The State choose not to do so in this case. Accordingly, the State is precluded from relying upon the general order because it falls beyond the four-corners of the charging documents and constitutes extrinsic evidence. *Taylor*, 371 Md. at 645. The applicable standard of review does not permit the consideration of such evidence.

Even assuming (without conceding) that the State can rely upon the general order to support its charge, the violation of this regulation **cannot serve** as the basis for the crime of reckless endangerment. This issue was specifically addressed by the Court of Appeals of Maryland in *State v. Pagotto*, 361 Md. 528 (2000). In *Pagotto*, a police officer was convicted of involuntary

manslaughter and reckless endangerment after his gun accidentally discharged during a traffic stop, killing the driver of the vehicle. *Id.* at 534–36. The gun had discharged during a struggle with the driver after the officer's right hand struck the side of the car. *Id.* at 538. The primary issue on appeal was whether the State had produced sufficient evidence demonstrating that the officer's conduct amounted to a gross and wanton deviation from that of a reasonable police officer similarly situated. *Id.* The State argued that the police officer was grossly negligent by violating Baltimore Police Department Guidelines; specifically, guidelines pertaining to: (1) closing on a suspect with a gun drawn, (2) attempting a one-armed vehicular extraction, and (3) placing the trigger finger on the slide of the gun rather than underneath the trigger guard. *Id.* at 538–39. The officer maintained that his conduct was reasonable in light of the circumstances he encountered. *Id.* at 539. The Court of Special Appeals of Maryland reversed the conviction finding that the evidence presented by the State was legally insufficient to sustain the officer's conviction. *Id.* at 532.

In affirming the intermediate appellate court's ruling, the Court of Appeals of Maryland held that "the State's alleged violations of departmental guidelines, at best, amounted to an actionable case in *civil negligence*." *Id.* at 550 (emphasis added). The court recognized, as did Judge Moylan in his opinion below, that departmental guidelines change periodically and vary from jurisdiction to jurisdiction. *Id.* at 550–51. With respect to the guideline governing the placement of an officer's trigger finger, the policy had been promulgated just three years prior to the incident and was unique to Baltimore City. *Id.* at 544–55. As a result, the court held that the police officer's failure to follow such a "recently imposed and geographically unique" departmental guideline "[did] not remotely generate a *prima facie* case of gross criminal negligence." *Id.* at 550. The court further held that it would be "illogical" to deem as grossly

negligent conduct by a police officer in Baltimore City when the exact same conduct is non-criminal and authorized in other jurisdictions throughout the state. *Id.* at 551. Specifically, the court relied upon the following language from the Court of Special Appeals of Maryland:

> Had a Maryland State Trooper or a Baltimore County Officer, for instance, ridden along with Sergeant Pagotto on February 7, 1996, and engaged in precisely the same conduct that Sergeant Pagotto did, that State Trooper or County Officer would have been acting with complete propriety with respect to the placement of the trigger finger on a weapon. Had Sergeant Pagotto himself placed his trigger finger on the "slide" of his weapon on February 7, 1993, instead of on February 7, 1996, he would then have been acting with complete propriety. Except for a criminal violation of a local municipal or county ordinance, **precisely the same act under precisely the same circumstances cannot be a crime in Baltimore City but not a crime in Baltimore County**.

Id. (emphasis added) (quoting *Pagotto v. State*, 127 Md. App. 271, 311 (1999)). If the behavior was actually criminally negligent, as the State alleged, then police officers were being authorized to engage in conduct manifesting a wanton and reckless disregard for human life on a daily basis with absolute impunity merely because of the jurisdiction they happened to serve. *Pagotto v. State*, 127 Md. App. at 311. The court found such reasoning absurd. *Id.*

The Defendant acknowledges that Baltimore Police Department general orders, policies, protocols, and guidelines may under certain circumstances serve as the basis for a claim grounded in simple negligence. *See Mayor of Baltimore v. Hart*, 395 Md. 394 (2006) (holding that a police department's internal rules and guidelines were admissible in a civil action to show that a police officer was negligent in running a red light and striking a civilian's vehicle). However, *Pagotto* holds that the State is barred from relying upon a recently enacted and geographically unique general order to establish gross or criminal negligence. The general order at issue in this case is the exact type of order prohibited by *Pagotto*. It is a regulation which is unique to Baltimore City, and deviates significantly from what other counties use. Moreover, the order was published just

days before the Defendant's interaction with Mr. Gray. Accordingly, under *Pagotto*, it cannot serve as the legal basis for the State's charge of reckless endangerment.

IV. DEFENDANT'S MOTION FALLS WITHIN THE SCOPE OF A RULE 4-252(D) MOTION TO DISMISS FOR FAILURE TO CHARGE A CRIME

The State also claims that the Defendants' Motion should be denied procedurally because it "exceed[s] the inquisitional boundaries that Rule 4-252(d) permits during a pretrial motion to dismiss for failure to charge a crime." State's Mot. at 2. The basis for this assertion appears to be the State's belief that the Defendant is challenging the quality and quantity of evidence the State may put forth to prove its case. However, the Defendant is not challenging the sufficiency of the evidence the State may present at trial. As explained above, the failure of a police officer to seatbelt an arrestee cannot, *as a matter of law*, constitute a criminally reckless omission. Accordingly, there is no need to engage in a factual dispute because it is *legally impossible* for the Defendant to commit the offense as charged.

In support of its argument, the State cites *State v. Hallihan*, No. 0886 (Md. Ct. Spec. App. Aug. 28, 2015). In *Hallihan*, the defendant was charged with reckless endangerment based upon his intentional act of placing the victim in a type of choke-hold called a "sleeper hold." *Id.* at 3. The State alleged that such a hold could constitute a substantial risk of serious physical injury or death because it blocks the flow of blood and oxygen in a person's body. *Id.* at 4. The defendant moved to dismiss the charge claiming that "the State had failed to set forth a 'legally sufficient *factual* basis' for showing that the defendant's conduct 'created a substantial risk of serious bodily harm.'" *Id.* at 6 (emphasis added). The defendant pointed to the fact that sleeper holds were commonly used by professional athletes and law enforcement officers. *Id.* Accordingly, in order to support the charge of reckless endangerment, the defendant argued that the State was required to allege *additional facts* showing that the defendant had taken a "substantial step towards" a risk

of serious injury or death. *Id.* at 7. Specifically, the defendant argued that the following facts were needed:

> The substantial step forward that they have to allege is that there was some sort of choking, gasping for air, something that would suggest he created a risk of death and took a substantial step towards it. There are *no facts presented* that there was any substantial step taken to create that risk.

Id. (emphasis added). The circuit court granted the defendant's motion to dismiss with respect to the charge of reckless endangerment. *Id.* In holding that the lower court erred in dismissing the charge, the Court of Special Appeals of Maryland recognized that a motion to dismiss filed pursuant to Rule 4-252(d) "test[s] the *legal sufficiency* of the indictment on its face." *Id.* at 16 (emphasis added). However, the court found that the circuit court had strayed from this analysis by resolving a *factual dispute* between the parties; namely, whether a sleeper-hold subjects the victim to a risk of death or serious bodily harm. *Id.* at 19.

While the matter before this Court, like *Hallihan*, involves a Rule 4-252(d) challenge to a count of reckless endangerment, this case is clearly distinguishable. In *Hallihan*, there was no legal authority presented to the court holding that the use a sleeper hold could not constitute a criminally reckless act. Accordingly, in order to decide the defendant's motion, the court was required to resolve a factual and legal question of first impression. The question was whether the intentional act of placing another person in a sleeper hold was sufficiently dangerous to fall within the conduct prohibited by the reckless endangerment statute. In order to resolve this issue, the court was required to consider the evidence both parties were expected to present at trial concerning whether locking one's arm around another's neck and squeezing could create a substantial risk of death or serious physical injury. By considering the sufficiency of the State's evidence and prematurely resolving this factual dispute, the lower court exceeded the boundaries of a Rule 4-252(d) motion to dismiss.

In this case, the charge of reckless endangerment is not based upon the Defendant's intentional act, but rather upon his alleged failure to act. Accordingly, in order for the charge to survive a Rule 4-252(d) motion to dismiss, the State must show some legal authority for the proposition that the Defendant had a duty to seatbelt Mr. Gray and that a violation of that duty can render the Defendant guilty of reckless endangerment. *Kanavy*, 416 Md. at 12–13. However, as explained in detail above, the State has failed to meet its burden. It can point to no authority holding that a police officer is criminally reckless when he or she fails to seatbelt an arrestee. Consequently, unlike *Hallihan*, the State's charge of reckless endangerment is legally, rather than factually, insufficient and must be dismissed pursuant to Maryland Rule 4-252(d).

CONCLUSION

There is absolutely no legal authority holding that a police officer's failure to seatbelt an arrestee can constitute a criminally reckless omission. As a result, the State's charge of reckless endangerment based upon the Defendant's failure to seatbelt Mr. Gray is legally insufficient and must be dismissed pursuant to Maryland Rule 4-252(d).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of October, 2015, a copy of the forgoing Reply was 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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