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

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

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

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

The Defendant's Motion comes down to one argument: the Second 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,

[1] The Defendant's Motion avers that it incorporates by reference Defendant Miller's, Nero's, and Rice's Motions to dismiss the reckless endangerment counts, as well as their Replies to the State's Responses to those Motions. Accordingly, portions of this Response repeat and apply arguments made in the State's Responses to those other Motions; however, this Response differs somewhat, particularly in Sections II.A. and II.B., and addresses throughout each Section the rebuttal arguments raised in the reckless endangerment Replies, which this Defendant has now incorporated into his original Motion to dismiss the second degree assault count.

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 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.

St. Response to Def. Demand for Bill of Particulars (filed June 8, 2015). The Defendant took no exception to the Bill of Particulars and, dispositively, makes no argument now that the State has failed to "characterize the crime" of second degree assault or has failed to describe the specific conduct that will be the subject at trial. Rather, while purporting to apply the narrow *Taylor* standard, he attacks Count 2's facial sufficiency on grounds that the "State's charge of second degree assault in this matter constitutes a legally unfounded theory of criminal prosecution" because "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 . . . ." Def. Mot. at 1-2. 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*, 2015 Md. App. LEXIS 114 (Aug. 28, 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