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

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

SUPPLEMENT TO DEFENDANT'S MOTION TO DISMISS THE COUNT OF RECKLESS ENDANGERMENT FOR FAILURE TO CHARGE A CRIME

Defendant Brian Rice, by undersigned counsel, pursuant to Maryland Rule 4-252(d), respectfully submits this Supplement to Defendant's Motion to Dismiss the Count of Reckless Endangerment for Failure to Charge a Crime. In support thereof, Defendant states as follows:

INTRODUCTION

This Court has indicated that it will not require the State to try its case piecemeal with respect to those officers charged with reckless endangerment based upon their alleged failure to obtain medical aid for Freddie Gray on April 12, 2015, ***as well as*** their alleged failure to secure Mr. Gray with a seatbelt. However, Defendant Rice is not charged with failing to obtain medical aid for Mr. Gray. Defendant Rice is not charged with negligently driving the van in which Mr. Gray was transported. Instead, the Defendant's count of reckless endangerment rests ***solely upon*** his purported failure to secure Mr. Gray with a seatbelt.

Consequently, the issue of whether the alleged failure of a police officer to seatbelt a handcuffed and leg-shackled arrestee in a police transport van can constitute the crime of reckless endangerment is now squarely before this Court. The present Motion incorporates all of the arguments previously asserted in the Defendant's Motion to Dismiss for Failure to Charge a Crime. Additionally, since the filing of the initial Motion to Dismiss, the Defendant has engaged in a thorough and nation-wide search for ***any authority*** supporting the State's position that such a failure can possibly constitute the crime of reckless endangerment. The results of this search have

only confirmed what the Defendant already believed to be true: no such authority exists because such an omission cannot constitute the crime. Accordingly, Count V (reckless endangerment) must be dismissed for failure to charge a crime.

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. Gray was arrested by certain Defendants absent probable cause, (2) the alleged failure of certain Defendants to secure medical aid for Mr. Gray, and (3) the alleged failure of certain Defendants to seatbelt Mr. Gray. The present Motion only addresses 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 Rice, the grand jury returned the following counts: Count I – Manslaughter; Count II – Assault in the Second Degree; Count III – Misconduct in Office; Count IV – Misconduct in Office; and Count V – Reckless Endangerment. Count V of 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

Exhibit A, at p. 2.

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

> 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.

Exhibit B, at ¶ 5.

As indicated by the plain language of the charging documents, the only act or omission which with the State has charged Defendant Rice relative to the crime of reckless endangerment is his alleged failure to secure Mr. Gray with a seatbelt.

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.* However, in determining which offense (or whether an offense) is charged, it is the information stated in the charging documents, and not the caption or label of the crime as provided by the State, which is dispositive. *Smith v. State*, 62 Md. App. 670, 680 (1985). When the information alleged within the four corners of the charging documents fails to set forth a crime in the State of Maryland,

the court lacks fundamental jurisdiction and dismissal is mandated. *State v. Canova*, 278 Md. 483, 498 (1976).

In *State v. Kanavy*, the Court of Appeals of Maryland specifically examined the burden the State must meet to survive a 4-252(d) motion to dismiss when charging a defendant with reckless endangerment based upon his or her alleged ***failure*** to act (as opposed to an affirmative act). 416 Md. 1 (2010). In *Kanavy*, the defendants were charged with reckless endangerment based upon their alleged failure to contact emergency services for a juvenile in their care. *Id.* at 4. The defendants moved to dismiss the charge pursuant to Rule 4-252(d). *Id.* The Court of Appeals found that in order for the charging documents to be legally sufficient, and therefore survive the defendants' motion to dismiss, the State would have to show that: **(1) the defendants had a legal duty to act, and (2) the violation of that duty could render the defendants guilty of reckless endangerment.** *Id.* at 6–9. The court found that such a duty did exist under the Eighth and Fourteenth Amendments of the United States Constitution, as well as under the Annotated Code of Maryland. *Id.* Consequently, the court held that the language contained within the State's charging documents was legally sufficient to charge the crime of reckless endangerment. *Id.* at 13.

ARGUMENT

Even assuming the truth and validity of the facts as asserted by the State, there are three reasons why the State's charge of reckless endangerment is legally insufficient and must therefore be dismissed. First, Maryland's reckless endangerment statute specifically excludes any conduct involving the use of a motor vehicle. Given that the State has charged Defendant Rice with reckless endangerment based upon his alleged use of a police van to transport Mr. Gray, the conduct cannot constitute the crime. Second, the State asserts that the duty supporting its charge can be found under the administrative policies of the Baltimore Police Department; namely, Policy 1114 as it

relates to the transportation of arrestees in police custody. However, any duty to seatbelt arrestees under Policy 1114 is unique to Baltimore City and was enacted just days before the incident at issue. Consequently, such a duty cannot be used to support the State's charge of reckless endangerment under *State v. Pagotto*, 361 Md. 528 (2000). Third, outside of any duty imposed by Baltimore Police Department policies (which cannot be relied upon by the State to support its charge), the State cannot point to any other duty under which Defendant Rice was obligated to secure Mr. Gray with a seatbelt, the violation of which could render the Defendant guilty of the crime of reckless endangerment. To the contrary, every other authority to address the issue has held that either no such duty exists, or even if it does, the violation of the duty is not criminally reckless. For these reasons, Count V (reckless endangerment) is legally insufficient and must be dismissed pursuant to Rule 4-252(d) for failure to charge a crime.

I. MARYLAND'S RECKLESS ENDANGERMENT STATUTE SPECIFICALLY EXCLUDES ANY CONDUCT INVOLVING THE USE OF A MOTOR VEHICLE

The State's indictment and bill of particulars charge Defendant Rice with violating § 3-204(a)(1) of Maryland's reckless endangerment statute. 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)(1). However, the statute also enumerates certain types of conduct which are excluded from the crime. Specifically, the statute provides that "[Section 3-204(a)(1)] ***does not apply*** to conduct involving the ***use of a motor vehicle***, as defined in § 11-135 of the Transportation Article[.]" *Id.* § 3-204(c)(1) (emphasis added). The term "motor vehicle" for purposes of this provision includes "a vehicle that is self-propelled or propelled by electric power obtained from overhead electrical wires; and is not operated on rails." Md. Code Ann., Transp. § 11-135(a)(1). A police transport van clearly falls within this

definition. Therefore, the only issue that needs to be addressed in determining whether Defendant Rice's conduct falls within the § 3-204(c)(1) exception is whether he "used" the transport van.

The term "use" (or alternatively "used") is not defined under the general definitions provision of the Criminal Law article, or under the specific section in which the reckless endangerment provision appears. *See* Md. Code Ann., Crim. Law § 1-101; *Id.* § 3-201. Consequently, in order to effectuate the intent of the legislature, this Court must look towards the normal, ordinary meaning of the language. *Ray v. State*, 410 Md. 384, 404 (2009). If the language is clear and unambiguous, the analysis ends and the court applies the plain language of the statute as written. *Id.* at 405; *see also Tribbitt v. State*, 403 Md. 638, 646 (2008) ("If the plain language of the statute is unambiguous, the inquiry as to legislative intent ends; we do not then need to resort to the various, and sometimes inconsistent, external rules of construction, for the Legislature is presumed to have meant what it said and said what it meant.") (citations omitted). Moreover, when interpreting criminal statutes, the language must be "strictly construed against the State and in favor of the defendant, so that only punishment contemplated by the words of the statute is meted out." *Harris v. State*, 331 Md. 137, 145 (1993) (citations omitted).

In this case, the language of the § 3-204(c)(1) exception is clear and encompasses the conduct of Defendant Rice as alleged by the State in the charging documents. The natural and ordinary meaning of the word "use" is to put into service or employ for a purpose. *See, e.g.*, *Use*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003) (defining "use" as "the act or practice of employing something"). There is no indication anywhere within the statute that the legislature intended anything other than this commonsense definition. In applying the definition to the charging documents, the State is asserting that Defendant Rice is liable for the crime of reckless endangerment due to the manner in which he allegedly employed or utilized the police van in the

process of transporting Mr. Gray on April 12, 2015. The fact that the State is alleging that Defendant Rice used the police transport van on April 12, 2015 is further evidenced by the State's Bill of Particulars. With respect to the crime of second degree assault, the State claims that Defendant Rice is liable for the crime because "the [police transport van], "***an instrumentality of the Defendant*** and persons with whom he acted in concert, made harmful contact with Mr. Gray." **Exhibit B, at ¶ 2** (emphasis added). To say on the one hand that the van was an instrumentality of Defendant Rice for the crime of second degree assault, yet that the van was not used for the crime of reckless endangerment based upon the exact same conduct, is completely illogical. Consequently, the State's charge is legally insufficient as it is based upon conduct the statute itself explicitly excludes: conduct involving the use of a motor vehicle. For this reason alone the charge must be dismissed.

II. THE STATE CANNOT RELY UPON ANY DUTY IMPOSED BY THE POLICIES OR PROCEDURES OF THE BALTIMORE POLICE DEPARTMENT TO SUPPORT ITS CHARGE OF RECKLESS ENDANGERMENT

In response to the Defendant's initial motion to dismiss, the State asserted that it was relying upon the policies of the Baltimore Police Department to establish the duty under which Defendant Rice was obligated to secure Mr. Gray with a seatbelt on April 12, 2015. State's Resp. to Def. Mot. at 8. While the State did not identify the specific policy to which it was referring, it is abundantly clear that the State is relying upon Policy 1114 entitled "Persons in Police Custody." Even assuming the validity of the State's assertion that Policy 1114 imposed a duty on Defendant Rice to seatbelt Mr. Gray on April 12, 2015 (an issue which will be vigorously disputed by the parties at trial), any violation of such a duty cannot be used to establish the crime of reckless endangerment under the holding of the Court of Appeals of Maryland in *State v. Pagotto*, 361 Md. 528 (2000).

A. The State is precluded from relying upon Policy 1114 to support its charge of reckless endangerment under *State v. Pagotto*

As this Court is well aware, 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 trigger finger, which was located on the slide (or side) of the weapon, accidentally came into contact with the trigger causing the gun to fire. *Id.* at 538. The State argued that the officer's placement of his trigger finger on the slide of his weapon violated a Baltimore Police Department Guideline requiring officers to place their fingers underneath the trigger guard. *Id.* at 538–39. It was the violation of this and other departmental guidelines that the State relied upon to establish the criminal negligence needed for the crime of reckless endangerment. *Id.*

In rejecting the State's argument and reversing the defendant's conviction, the Court of Appeals 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 that police departmental guidelines change periodically and sometimes vary from jurisdiction to jurisdiction. *Id.* at 550–51. With respect to the guideline governing the placement of the officer's trigger finger, the guideline had been promulgated just three years prior to the incident and was unique to Baltimore City. *Id.* at 544–55. Officers in other jurisdictions were permitted to place their trigger fingers on the slide of their weapon to improve their reaction time in critical situations. *Id.* Based upon this information, the court ultimately held that a police officer's failure to follow a "recently imposed and geographically unique" departmental guideline, "whether considered alone or in combination with any other factor, **does not remotely generate a *prima facie* case of gross criminal negligence**." *Id.* at 550 (emphasis added).

In elaborating upon the absurdity of the State's argument that a police officer's conduct could be lawful in one jurisdiction, but criminally reckless in another merely due to the presence of a unique policy or guideline, the court adopted the reasoning as articulated by the Court of Special Appeals:

> Although Sergeant Pagotto may not have followed a recently imposed and geographically unique guideline, his action in that regard was not inherently wrong or of a *malum-in-se* character. 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 reckless, as the State alleged, then police officers were being authorized to freely 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.*

Policy 1114 is the exact type of recently enacted and geographically unique departmental policy which *Pagotto* holds cannot serve to establish the crime of reckless endangerment. Policy 1114 was published on April 3, 2015, just nine days before Mr. Gray's arrest. Moreover, the Policy is unique to Baltimore City. In Baltimore County, for instance, police transport vans are not even equipped with seatbelts. Accordingly, any officer transporting a handcuffed and leg-shackled arrestee in a van in Baltimore County cannot be prosecuted for reckless endangerment based upon his or her failure to use a seatbelt where none exist. Therefore, even if Policy 1114 imposed a duty on Defendant Rice to seatbelt Mr. Gray on April 12, 2015, the State's charge fails the second prong

of the test established in *Kanavy*; namely, that a violation of the alleged duty could render the defendant guilty for the crime of reckless endangerment. For this reason the State's charge of reckless endangerment must be dismissed.

B. The case law cited by the State in support of its charge is easily distinguishable from the present matter

In support of its argument that Policy 1114 can serve as the basis for the charge of reckless endangerment, the State relies primarily upon two decisions. State's Resp. to Def. Mot. at 6–8, 10–12. The first decision is that of the Court of Appeals in *State v. Albrecht*, 336 Md. 475 (1994). In *Albrecht*, a police officer accidentally shot a suspect with a shotgun during the course of an arrest near a playground. *Id.* at 479–81. The officer testified that he had drawn the shotgun, racked a round in the chamber, pointed the shotgun directly at the suspect, and placed his finger on the trigger despite the fact that he did not believe that the suspect posed any sort of danger to himself or others in the area. *Id.* In determining whether the officer had acted recklessly, the court permitted the State to rely upon policies and procedures of the Montgomery County Police Department. *Id.* at 487. These policies stated that an officer's decision to draw, aim, and place his or her finger on the trigger of a loaded weapon must be supported by a belief that the officer or others in the area are in clear and present danger. *Id.* at 487–89.

The *Albrecht* decision, which was issued six years before *Pagotto*, is easily distinguishable from the present matter given that it ***did not*** involve a recently enacted or geographically unique departmental guideline. Accordingly, unlike the present matter, the conduct at issue was prohibited whether it occurred in Montgomery County, Baltimore County, Baltimore City, or any other jurisdiction in Maryland. This fundamental difference was specifically recognized by the Court of Special Appeals in the portion of it *Pagotto* opinion distinguishing the *Albrecht* decision:

> [T]he quality of gross criminal negligence has to be something inherently dangerous, something of a *malum in se* character, rather than a mere *malum-prohibitum-type* of regulatory violation that may vary from year to year and from county to county. **The placement of the trigger finger in *Albrecht* was generally, if not universally, prohibited; the placement of the trigger finger in this case was almost universally accepted. It is obviously not deemed to be an inherently reckless and wanton and thereby criminal act.**

127 Md. App. at 332 (emphasis added). Given there can be no dispute that Policy 1114 is both recently enacted and geographically unique, the State's reliance on *Albrecht* is misplaced and the court's reasoning and analysis in *Pagotto* controls.

The State also relies upon the decision of the Court of Appeals in *Mayor of Baltimore v. Hart*, 395 Md. 394 (2006). In *Hart*, a Baltimore Police Department officer, responding to a call, drove a marked police car through a red light and collided with another vehicle. *Id.* at 398–401. In the subsequent ***civil action***, the Court of Appeals held that internal departmental regulations of the Baltimore Police Department were admissible to show that the police officer's failure to bring his vehicle to a complete stop before entering the intersection was evidence of negligence. *Id.* at 416. However, the Court explicitly limited its ruling to the context of a civil claim based upon simple negligence: "We hold that a police department's internal rules and guidelines are admissible **in specific situations in a vehicular negligence case** when they are relevant to whether an officer's conduct in that particular situation was reasonable." *Id.* at 398 (emphasis added). Consequently, the *Hart* decision in no way overruled or altered the holding in *Pagotto*. Rather, it reinforces the finding in *Pagotto* that departmental guidelines may be used in certain situations to establish civil, as opposed to criminal, negligence.

III. THE STATE CANNOT POINT TO ANY OTHER DUTY UNDER WHICH DEFENDANT RICE WAS OBLIGATED TO SECURE MR. GRAY WITH A SEATBELT, THE VIOLATION OF WHICH COULD RENDER THE DEFENDANT GUILTY OF RECKLESS ENDANGERMENT

Having found that the State cannot rely upon the policies or procedures of the Baltimore Police Department to establish the duty necessary to survive the Defendant's present motion to dismiss, the only remaining question is whether such a duty exists under any other legal authority. As previously described, this was the same analysis invoked by the Court of Appeals in *Kanavy* in determining whether the State's charge of reckless endangerment based upon the failure of a juvenile official to render medical aid was legally sufficient. In that case, the court recognized that there is a wealth of federal jurisprudence establishing that an official at a juvenile facility has a duty to provide adequate medical care to a juvenile in his or her custody, and that a violation of that duty can subject the juvenile to a substantial risk of serious harm. *See, e.g., DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 (1989); *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239 (1983); *Estelle v. Gamble*, 429 U.S. 97 (1976). The court also found that such a duty existed under the Human Services Article of the Annotated Code of Maryland. *See, e.g.*, Md. Code. Ann., Hum. Servs. § 9-237. Consequently, a duty existed to support the State's charge.

However, when the same analysis utilized by the court in *Kanavy* is invoked in the present matter, it is clear that no duty necessary to support the State's charge exists. Whether at the federal or state level, every authority to address the issue has held that either a police officer does not have a duty to seatbelt an arrestee, or even if such a duty exists, the violation of that duty cannot rise to the level of criminal recklessness. Accordingly, the State cannot carry its burden of establishing the duty necessary to support its charge, and the count of reckless endangerment asserted against Defendant Rice must be dismissed.

A. The State cannot rely upon any duty imposed by the United States Constitution to support its charge of reckless endangerment

While federal courts have recognized that a prison official may have a duty to seatbelt a prisoner during transport under the United States Constitution, the courts have also held that a violation of that duty cannot rise to the level of criminal recklessness. Consequently, the State cannot rely upon any duty imposed by the United States Constitution to support its charge.

The issue of whether the failure to use a seatbelt can constitute a reckless omission under the United States Constitution has been addressed by federal courts in the context of Eighth Amendment conditions-of-confinement claims brought under 42 U.S.C. § 1983. In asserting such claims, the plaintiff must demonstrate that the law enforcement 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). In evaluating these claims, federal courts have uniformly held that even if a prison official has a duty to seatbelt a prisoner, the violation of that duty cannot constitute reckless behavior. Consequently, even assuming the validity of the allegations as pled and viewing the facts in a light most favorable to the prisoner, any § 1983 claim based upon the failure of an official to seatbelt a prisoner **fails to state a claim and is subject to dismissal pursuant to Federal Rule 12(b)(6).**

The Second Circuit has addressed the issue on at least two occasions. In *Jabbar v. Fischer*, a prisoner was injured when the van in which he was traveling suddenly swerved, causing his head to strike a metal seat. 683 F.3d 54 (2d Cir. 2012). At the time of the incident, the prisoner was in

wrist and leg shackles, but was not secured by a seatbelt. *Id.* In dismissing the prisoner's § 1983 claim, 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 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). In *Carrasquillo v. City of New York*, the plaintiff was injured when the prisoner van skidded on the icy road and collided with a truck. 324 F. Supp. 2d 428 (S.D.N.Y. 2004). At the time of the accident, the prisoner was in handcuffs but was not secured with a seatbelt. *Id.* at 434. In dismissing the prisoner's § 1983 claim, the United States District Court for the Southern District of New York held that the "failure to provide seatbelts to prisoners is not a constitutional violation under § 1983." *Id.* The court adopted the reasoning of the Tenth Circuit, stating 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 Seventh Circuit addressed the issue in *Fluker v. County of Kankakee*, 945 F. Supp. 2d 972 (C.D. Ill. 2013). In *Fluker*, a prisoner was injured when the van suddenly braked, causing his head to strike the metal divider. *Id.* at 976. At the time of the accident, the prisoner was in **handcuffs and leg shackles**, but he was not secured by the available seatbelts. *Id.* In dismissing the prisoner's § 1983 claim, the United States District Court for the Central District of Illinois held that all of the claims based upon the prison official's failure to seatbelt "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, but was not secured by a seatbelt. *Id.* at 904. While in route, the can made sudden stops and turns which 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 dismissing the prisoner's § 1983 claim, the United States Court of Appeals for the Eighth Circuit held that

> Even using an objective standard, **we do not think that the the 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 District of Columbia addressed the issue in *Fouch v. District of Columbia*, 10 F. Supp. 3d 45 (D.D.C. 2014). In *Fouch*, a prisoner was injured when the van made a sudden stop, causing the prisoner to be thrown from his seat. *Id.* at 47–48. At the time of the incident, the prisoner was in handcuffs but was not secured by a seatbelt. *Id.* In dismissing the prisoner's § 1983 claim, the United States District Court for the District of Columbia 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 only cases in which the federal circuits have held that the failure of an official to seatbelt a prisoner can possibly constitute a § 1983 claim is when the prison official fails to seatbelt the prisoner, **and recklessly drives the van in which the prisoner is being transported.** *See, e.g., Rogers v. Boatright*, 709 F.3d 403 (5th Cir. 2013); *Brown v. Fortner*, 518 F.3d 552 (8th Cir. 2008). However, these cases recognize that absent allegations of reckless driving, the claim would otherwise have been subject to dismissal. *See Rogers*, 709 F. 3d at 408–09 ("[T]he failure of prison officials to provide seatbelts to inmates riding in prison vehicles, standing alone, does not violate an inmate's Eighth Amendment rights."). In this case, the State's charging documents do not allege that Defendant Rice recklessly drove the van in which Mr. Gray was transported. Consequently, these cases do not support the State's proposition that an officer can be held criminally liable for his or her simple failure to seatbelt an arrestee.

The State attempts to distinguish the § 1983 cases summarized above by arguing that the *actus reus* and *mens rea* of the deliberate indifference standard differ slightly from that of reckless endangerment. However, this is a meaningless distinction. 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. In addressing these claims at the federal level, courts have uniformly held that the failure to use a seatbelt is not reckless and does not subject the detainee to a substantial risk of harm. This answer remains true whether the prisoner is in handcuffs, leg-shackles, or full-body chains. Accordingly, whatever constitutional duty Defendant Rice may have had to seatbelt Mr. Gray on April 12, 2015, the breach of that duty

cannot support a claim that he acted criminally reckless. As a result, the State cannot rely upon any duty imposed by the United States Constitution to support its charge of reckless endangerment.

B. The State cannot rely upon any duty imposed by the Annotated Code of Maryland to support its charge of reckless endangerment

Finding that no duty exists under the United States Constitution to support the State's charge, it is next necessary to determine whether such a duty exists under the Annotated Code of Maryland. However, in looking at the plain language of the statute, it is clear that Defendant Rice was under no statutory obligation to seatbelt Mr. Gray on April 12, 2015. Moreover, even if such a duty existed, a breach of that duty cannot constitute civil, let alone criminal, negligence.

The statutory authority governing the use of seatbelts in Maryland is found under § 22-412 of the Transportation Article of the Annotated Code of Maryland. Section 22-412.1 provides that seatbelts are required for motor vehicles used by nursery school, camps, or day care centers. Section 22-412.2 provides that seatbelts must be used when transporting children under the age of 16 in any motor vehicle. Section 22-412.3 provides that any front seat passenger in a motor vehicle must be secured by a seatbelt. Section 22-412.4 provides that emergency vehicles must be equipped with seatbelts.[1]

Initially, it must be noted that none of these statutory provisions impose a duty on a police officer to seatbelt an arrestee in the back of a transport van. The State seems to concede this fact in its Response to the Defendant's Motion to Dismiss. *See* State's Resp. to Def. Mot. at 12 ("[N]either statute even directly applies to police prisoner transport vans."). However, even assuming that the provisions were construed as imposing such a duty, the statute explicitly states

[1] While the statute requires certain emergency vehicles to be equipped with seatbelts, it does not require that the seatbelts be used by emergency personnel during transportation.

that the any breach of the duty to seatbelt cannot be considered evidence of civil negligence. For instance, § 22-412.3 provides as follows:

> **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.

Md. Code Ann., Transp. § 22-412.3(h)(1). *See also id* § 412.2(i); 412.4(c)(1).

Given that the failure of an individual cannot be considered as evidence of civil negligence, it is manifest that such an omission cannot rise to the level of gross negligence needed to support the crime of reckless endangerment. While this issue has not been addressed in Maryland, it has been analyzed by the Supreme Court of Kentucky. In *Commonwealth v. Mitchell*, the defendant caused a motor vehicle accident which resulted in the death of his infant daughter. 41 S.W.3d 434 (2001). At the time of the accident, the infant was placed in a child seat which was not buckled or fastened to the vehicle. *Id.* During the collision, the infant sustained her fatal injuries when she was thrown from her seat. *Id.* The prosecution argued that the defendant's failure to seatbelt his daughter constituted the recklessness needed to sustain a conviction of reckless homicide. *Id.* In reversing the defendant's conviction, the court recognized that the statute governing the use of seatbelts included the following language: "Failure to wear a child passenger restraint shall not be considered as contributory negligence, nor shall such failure to wear said passenger restraint system be admissible in the trial of any civil action. Failure of any person to wear a seatbelt shall not constitute negligence per se." *Id.* at 435 (citation omitted). The court held that "if the legislature recognized that failure to restrain did not constitute civil negligence per se, then the violation could not satisfy the gross deviation requirement of recklessness." *Id.* at 436. Consequently, in the

absence of any other evidence of recklessness, the court held that there was insufficient evidence to support the defendant's conviction. *Id.*

As in *Mitchell*, the State has brought a criminal charge based upon conduct which the legislature has declared cannot even support a finding of civil liability. Consequently, even if the Annotated Code of Maryland did impose a duty on Defendant Rice to secure Mr. Gray with a seatbelt on April 12, 2015, any alleged violation of that duty cannot support the State's charge of reckless endangerment.

IV. EVERY OTHER AUTHORITY TO ADDRESS THE ISSUE HOLDS THAT THE FAILURE OF A POLICE OFFICER TO SEATBELT AN ARRESTEE DOES NOT CONSTITUTE A CRIMINALLY RECKLESS OMISSION AND IS MOTIVATED BY LEGITIMATE PENOLOGICAL CONCERNS

As previously articulated, the Defendant has undertaken an exhaustive review of all potential sources from which a police officer could be held liable for his or her failure to seatbelt an arrestee. During the course of this review, the Defendant discovered a number of federal circuit decisions holding that the failure to use a seatbelt does not constitute reckless endangerment as it pertains to the application of the United States Federal Sentencing Guidelines. The Defendant also became aware that the National Highway Traffic Safety Administration and Department of Transportation have excluded vehicles designed for the transport of passengers under physical restraint from its recently enacted rule requiring passenger seatbelts in buses. This exemption is motivated by the impracticability of seatbelt use in these vehicles, as well as the danger seatbelt use poses to transporting officers. While the Defendant acknowledges that these authorities are in no way binding on this Court, a brief summary of these findings is provided below to help explain why no duty exists to support the State's charge of reckless endangerment in this case.

A. The failure of a police officer to seatbelt an arrestee cannot constitute a reckless omission under the United States Sentencing Guidelines

The issue of whether the failure to use a seatbelt can constitute a reckless omission has been addressed by the Fifth Circuit in determining whether a criminal offense qualifies under the "reckless endangerment" enhancement provision of the United States Sentencing Guidelines. These cases unfirmly hold that the failure to use a seatbelt, by itself, is insufficient to support the crime of reckless endangerment.

In *United States v. Solis-Garcia*, the defendant pled guilty to transporting illegal aliens within the United States. 420 F.3d 511, 512 (2005). Four of the individuals being transported by the defendant were found lying side-by-side on the floor of a minivan. *Id.* at 513. In the presentence report, the probation officer recommended that the defendant's sentence be enhanced under the "reckless endangerment" provision of the United States Sentencing Guidelines, which applies if the offense involves "intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person." *Id.* (quoting U.S.S.G. § 2L1.1(b)(5)). Specifically, it was asserted that transporting individuals on the floor of a minivan without seatbelts and while traveling at highway speeds constitutes reckless endangerment. *Id.* The United States Court of Appeals for the Fifth Circuit rejected this argument, and held that such conduct does not constitute "an inherently dangerous practice such as to create a substantial risk of death or serious bodily injury[.]" *Id.* at 516. The Court further provided the following:

> The only dangers we consider to be associated with riding in the cargo area of the minivan are generally the same dangers that arise from an individual not wearing a seatbelt in a moving vehicle. The [reckless endangerment] enhancement as written, one would think, does not extend so far as to increase punishment for offenders simply for transporting illegal aliens without requiring them to wear seatbelts.

Id.

The Fifth Circuit has affirmed that holding and rationale of *Solis-Garcia* on several occasions. *See, e.g., United States v. Rodriguez*, 630 F.3d 377 (2011) (per curiam) (holding that

transporting passengers in the cargo area of a sports utility vehicle without seatbelts does not justify the reckless endangerment enhancement); *United States v. Torres*, 601 F.3d (2010) (holding that transporting several individuals, including an nine year-old child, without seatbelts in the sleeping compartment of a tractor trailer did not qualify for the reckless endangerment sentencing enhancement); *United States v. Zuniga-Amezquita*, 4687 F.3d 886, 890 (2006) ("The application of [the reckless endangerment enhancement] is warranted if a method of transportation exposes aliens to a substantial risk, in the event of an accident, of death or serious bodily injury. The risk must, however, be greater than that of an ordinary passenger not wearing a seatbelt in a moving vehicle.").

B. Vehicles designed for the transport of passengers under physical restraint are explicitly excluded from the recently enacted requirement to provide passenger seatbelts in buses

On November 25, 2013, the National Highway Traffic Safety Administration (NHTSA) and Department of Transportation (DOT) passed a final rule amending the Federal Motor Vehicle Safety Standards to require passenger seatbelts in new buses. 78 Fed. Reg. 70,416 (Nov. 25, 2013) (to be codified at 49 C.F.R. pt. 571). In finalizing this rule, NHTSA and DOT were specifically tasked with determining whether prison buses used to transport passengers under physical restraint should be excluded from the new requirement. *Id.* at 70,437. Commenters argued that the use of seatbelts in such vehicles was "impractical in most cases" and could pose a danger to the transporting officers. *Id.* In agreeing with the commenters, NHTSA and DOT ultimately held that such vehicles would be excluded from the new requirement. *Id.* The agencies based this decision on the fact that the design features of prison buses used to transport persons subject to involuntary restraint or confinement was inconsistent with seatbelt use. *Id.* Specifically, the agency found as follows:

> With regard to the passenger seats, we agree that the seats and safety belts could pose sufficient risk to the safety of guards and detainees that compliance with the final rule for passenger seating positions could result in an overall reduced level of safety compared to prison buses without the belts.

Id.

CONCLUSION

There is absolutely no legal authority supporting the State's proposition that Defendant Rice had a duty to seatbelt Mr. Gray on April 12, 2015, the violation of which could constitute the crime of reckless endangerment. Accordingly, the State's charge is legally insufficient and must be dismissed pursuant to Rule 4-252(d).

For the reasons set forth above and in the previously-filed Motion to Dismiss, Defendant Brian Rice requests that this Court dismiss Count V (reckless endangerment) for failure to charge a crime.

Respectfully submitted,

Michael J. Belsky, Esquire
Chaz R. Ball, Esquire
Schlachman, Belsky & Weiner, P.A.
300 East Lombard Street, Suite 1100
Baltimore, Maryland 21202
(410) 685-2022

Counsel for Lieutenant Brian Rice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of June, 2016, a copy of Defendant Brian Rice's Supplement to Defendant's Motion to Dismiss the Count of Reckless Endangerment for Failure to Charge a Crime and referenced exhibits were emailed and mailed first class, postage pre-paid, 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,

City of Baltimore, to wit:

IN THE CIRCUIT COURT FOR BALTIMORE CITY

The State of Maryland **-vs-** **LT. BRIAN RICE** **Defendant(s):**	Date of Offense: **April 12, 2015** Complainant: **DETECTIVE DAWNYELL S. TAYLOR**

INDICTMENT

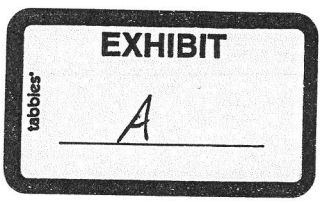
The Jurors of the State of Maryland for the body of the City of Baltimore, do on their oath present that the aforesaid DEFENDANT(S), late of said City, heretofore on or about the date(s) **April 12, 2015**, at **various locations**, in the City of Baltimore, State of Maryland, feloniously did act in a grossly negligent manner and that DEFENDANT'S grossly negligent conduct did cause the death of **Freddie Carlos Gray, Jr.**, in violation of the Common Law of Maryland and section 2-207 of the Annotated Code of Maryland;; against the peace, government and dignity of the State.

[Common Law; CR 2-207; CR 2-208] 1 0910

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 3-201; CR 3-203; CR 3-206] 1 1415



THIRD 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 **1700 Block of Presbury Street**, in the City of Baltimore, State of Maryland, that a public officer, while acting under color of his office, corruptly did an unlawful act and corruptly failed to do an act required by the duties of his office and corruptly did a lawful act in violation of the common law of Maryland; against the peace, government and dignity of the State.

Common Law 2 0645

FOURTH COUNT

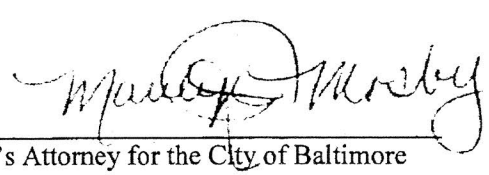
The Jurors of the State of Maryland for the body of the City of Baltimore, do on their oath present that the aforesaid DEFENDANT(S), late of said City, heretofore on or about the date(s) **April 12, 2015**, at the **1600-1700 Blocks of N. Mount Street**, in the City of Baltimore, State of Maryland, that a public officer, while acting under color of his office, corruptly did an unlawful act and corruptly failed to do an act required by the duties of his office and corruptly did a lawful act in violation of the common law of Maryland; against the peace, government and dignity of the State.

Common Law 2 0645

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



The State's Attorney for the City of Baltimore

6/26

0000182

LINK WITH: CODEFENDANTS

Officer Edward Michael Nero
SID# 0003783293

Officer Garrett Edward Miller
SID# 0003746701

ARR. DATE:

NOTICE TO THE DEFENDANT

1. This paper charges you with committing a crime.
2. If you have been arrested, you have the right to have a judicial officer decide whether you should be released from jail until trial.
3. You have the right to have a lawyer.
4. A lawyer can be helpful to you by:
   (A) explaining the charges in this paper;
   (B) telling you the possible penalties;
   (C) helping you at trial;
   (D) helping you protect your constitutional rights; and
   (E) helping you get a fair penalty if convicted.
5. Even if you plan to plead guilty, a lawyer can be helpful.
6. If you want a lawyer but do not have the money to hire one, the Public Defender may provide a lawyer for you. The court clerk will tell you how to contact the Public Defender.
7. If you want a lawyer but you cannot get one and the Public Defender will not provide one for you, contact the court clerk as soon as possible.
8. **DO NOT WAIT UNTIL THE DATE OF YOUR TRIAL TO GET A LAWYER.** If you do not have a lawyer before the trial date, you may have to go to trial without one.

115141035

STATE OF MARYLAND
vs.
LT. BRIAN RICE
1034 N. Mount Street
Baltimore, MD 21217
D.O.B. 10/17/1973
BPI# SID# 0004205239
Trkg.# 151001323885
District Ct# 2B02294448
CC# 7150400000

Indictment

(TRUE BILL)

,Foreman

Filed

JANICE L. BLEDSOE 68776
Police Integrity Unit

WITNESSES

DETECTIVE DAWNYELL S. TAYLOR, G932
BCPD
242 W. 29TH STREET
BALTIMORE, MARYLAND 21211

6/26

0000182

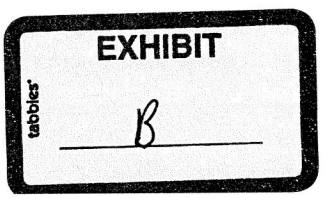
STATE OF MARYLAND	*	IN THE
	*	CIRCUIT COURT FOR
v.	*	BALTIMORE CITY
	*	
BRIAN RICE	*	CASE No. 115141035
	*	

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

STATE'S RESPONSE TO DEFENDANT'S DEMAND FOR BILL OF PARTICULARS

Now comes the State of Maryland, by and through Marilyn J. Mosby, the 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 pursuant to Rule 4-241 responds to the Defendant's Demand for Bill of Particulars as follows:

1. As to the Defendant's Demand for particulars as to Count 1 of the Indictment (involuntary manslaughter), 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 avers that the language used in the Indictment as to Count 1 comports with Article 21 of the Maryland Declaration of Rights and the Fourteenth Amendment of the United States Constitution "by first, characterizing the crime, and second, by 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). The Indictment charges that Lt. Rice "on or about the date(s) April 12, 2015, at various locations, in the City of Baltimore, State of Maryland, feloniously did act in a grossly negligent manner and that [the Defendant's] grossly negligent conduct did cause the death of Freddie Carlos Gray, Jr. . . . ." This language clearly charges the Defendant with involuntary manslaughter. *See Maryland Criminal Pattern Jury Instruction* 4:17.8 (2013) ("Involuntary manslaughter—Grossly Negligent Act: The defendant is charged with the crime of involuntary manslaughter. In order to convict the defendant of involuntary manslaughter, the State must prove: (1) that the defendant acted



in a grossly negligent manner; and (2) that this grossly negligent conduct caused the death of [the victim]."). The Indictment language also clearly specifies the victim whose death Lt. Rice is alleged to have caused, and with the above particularizations, the State has also informed the Defendant of the date, time, and location of the offense charged. Maryland law discourages further specification in a charging document for this crime. Indeed, Criminal Law Article, Section 2-208, states that "[a]n indictment for murder or manslaughter, or for being an accessory to murder or manslaughter, need not set forth the manner or means of death." *Md. Code Ann., Crim. Law Art.*, § 2-208(b)(2014) (hereinafter "CL"). Moreover, as the Court of Appeals has noted, "[t]his Court has looked with favor upon the general trend of relaxing the formal requirements of indictments to avoid the prolix and often overly technical rules of common law pleading in favor of the shorter and simpler forms." *Ross v. State*, 308 Md. 337, 346 (1987). The *Ross* case involved an indictment that utilized the legislatively authorized short-form indictment prescribed in what is now CL § 2-208(a), alleging that the defendants "on or about the 9th day of May, in the year of our Lord nineteen hundred and eighty one, at Prince George's County aforesaid, feloniously, willfully and of their deliberately premeditated malice aforethought, did kill and murder [the victim] . . . ." *Id.* at 343. The appellant in *Ross* argued that this language failed to notify him that the State was proceeding on a felony murder theory and, therefore, denied his due process rights to be informed of the charges against him. *Id.* at 342. The Court of Appeals upheld the sufficiency of the charging language, holding that "[a] defendant charged in the statutory language employed in this case is clearly apprised that he may be convicted of murder in either degree, or manslaughter," noting that the defendant was "told when and where the

homicide occurred, and the identity of the victim." *Id.* at 345. The Court went on to explain that although the defendant was "not told whether the State will proceed upon one or another, or upon several theories concerning the particular malevolent state of mind alleged to have been present, . . . neither is he entitled to this information as a matter of constitutional due process." *Id.* Significantly, the Court re-affirmed that "[w]e have held that even where it is proper or desirable to require the State to furnish a defendant with additional facts by means of a bill of particulars, that procedure may not be employed to require the State to select or announce the theory upon which it will proceed." *Id.* Furthermore, the crime of involuntary manslaughter does not carry a statutory right to a bill of particulars. Absent such a statute, "as a general rule, particulars are not granted as a matter of right." *Hadder v. State*, 238 Md. 341, 350 (1965); *see also Spector v. State*, 289 Md. 407, 422 (1981) (quoting *Hadder* with approval); *accord Martin v. State*, 218 Md. App. 1, 32 (2014) (citing and quoting *Spector* for the proposition that "while an accused has a right to a charging document that meets constitutional requirements, he 'is not entitled as of right to particulars'"). The State avers that the Defendant, to the extent he seeks to utilize his Demand for Bill of Particulars to obtain information beyond that which has been described in the Indictment and this Response, should await the State's response to his Demand for Discovery. A Bill of Particulars provides due process notice of the charges lodged, but that process does not entail presenting the State's case via public, pre-trial pleadings such that the entire possible jury pool has heard, considered, and potentially prejudged the evidence before the first witness has even entered the courthouse. This is particularly so where, as here, the Defendant has complained about the amount of pre-trial publicity and sought to

remove the case to another jurisdiction. The Defendant must receive a fair trial, even if he now seeks to create the very publicity which he will later argue prevents him from receiving a fair trial.

2. 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.

3. As to the Defendant's Demand for particulars as to Count 3 of the Indictment (misconduct in office), 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, a police officer, committed misconduct in office by malfeasance by arresting Freddie Carlos Gray, Jr., without probable cause. 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.

4. As to the Defendant's Demand for particulars as to Count 4 of the Indictment (misconduct in office), 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 committed misconduct in office by way of nonfeasance in that he corruptly omitted to do an act which is required by the duties of his office. Specifically, the Defendant failed to ensure the safety of Freddie Carlos Gray, Jr., a detainee in the Defendant's custody in his capacity as a police officer and supervisor of other police officers, 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 incorporates its argument outlined as to Count 1 above and avers that State has fully complied with its charging obligations.

5. 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 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. 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.

6. The State respectfully reserves the right to move to amend this Response pursuant to Rule 4-241(d) and requests a hearing prior to the Court ruling on any exceptions to this Response pursuant to Rule 4-241(c).

Respectfully submitted,

Marilyn J. Mosby

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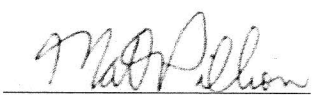

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mpillion@stattorney.org

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 2015, a copy of the State's Response to Defendant's Demand for Bill of Particulars was mailed and e-mailed to Mr. Michael Belsky, Esq., counsel for the Defendant.

Respectfully submitted,

Marilyn J. Mosby

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