

STATE OF MARYLAND

v.

ALICIA WHITE

2015 NOV -4 P 12:18

CRIMINAL DIVISION

IN THE
CIRCUIT COURT FOR
BALTIMORE CITY

CASE No. 115141036

* * * * *

**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 her 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 she 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 her that the specific conduct to which this charge refers occurred when she

caused physical harm to Freddie Carlos Gray, Jr., who was a hand-cuffed and leg-shackled detainee in the Defendant's custody in her 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 and at a time when the Defendant knew that Mr. Gray may have been in need of medical care; that the vehicle, an instrumentality of the Defendant and persons under her supervision, 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, she 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 substantial risk of death or serious physical injury to [the victim],” specifying in the bill of particulars that the risky conduct was “a sleeper hold” which “is an intentional act that by its very nature creates a substantial risk of serious physical injury or death because it cuts off the flow of blood to the head and flow of oxygen to the lungs.” *Id.* at 3-6.

In response to this charge, defense counsel filed a motion to dismiss for failure to state an offense, arguing “that the State had failed to set forth a ‘legally sufficient factual basis’ for showing that the defendant’s conduct ‘created a substantial risk’” under the reckless endangerment statute because “the sleeper hold did not subject the victim to the risk of death or serious bodily harm, even though the bill of particulars asserted otherwise.” *Id.* at 7-8. Although the trial judge accepted this argument as a matter of law and dismissed the case, the Court of Special Appeals reversed, rejecting this type of reasoning as a basis for pretrial dismissal because “Hallihan’s counsel focused not on what the criminal information said, but what defense counsel thought the State could prove if the case were tried,” concluding:

[His] argument ignored the fact that the criminal information complied with the pleading requirement set forth in the Criminal Law Article. And, as the *Taylor* case made clear, when a motion to dismiss is considered by the circuit court, the judge should concern himself or herself solely with whether the information or indictment charges a crime; the judge should not consider the issue of whether the State has sufficient evidence to prove that crime. *Taylor*, 371 Md. at 644-45.

Id. at 28-29 (citation in original).

The Defendant attempts to distinguish *Hallihan* by incorrectly asserting that the Worcester County Circuit Court strayed from the *Taylor* analysis “[b]y considering the sufficiency of the State’s evidence and prematurely resolving [the] factual dispute” over “whether a sleeper-hold subjects the victim to a risk of death or serious bodily harm.” Def. Mot.

at 2, n. 1 (incorporating by reference Def. Miller, Nero, & Rice's Reply to St. Response to Mot. to Dismiss at 9). The Court of Special Appeals held, however, that the trial judge made his ruling entirely as a matter of law. In the context of preliminarily considering whether the State even had a right to appeal the trial judge's decision in light of double jeopardy limitations, the Court expressly found that "the judge, prior to granting the motion to dismiss, had no evidence before him" and so "could not have weighed the sufficiency of the evidence," such that, consequently, the State could appeal because "jeopardy did not attach" *Hallihan*, 2015 Md. App. LEXIS at 18-24. The trial judge in *Hallihan*, thus, did not resolve factual sufficiency as the Defendant claims; rather, "all the judge heard was oral argument" about what the evidence would be at trial, *id.* at 23, after which she improperly decided that such evidence could not as a matter of law amount to reckless endangerment.

Likewise here, the Defendant asks the Court to employ indistinguishably flawed logic that moves for pretrial dismissal based, not on any lack of notice of the charges against him, but solely on her assessment of what she thinks the State will prove when the case is tried. Her claim regarding the reckless risk taken when a police officer fails to seatbelt a prisoner during custodial transport is legally identical to the *Hallihan* claim about the risk involved in putting someone in a sleeper hold. Because *Taylor* and *Hallihan* squarely foreclose using a motion to dismiss for failure to charge a crime as a procedural mechanism to raise such an argument, the Motion should be denied.

II. Substantively, the Motion presents both inaccurate facts and incorrect legal arguments

A. The Motion factually overlooks key components of the State's allegations

The factual foundation underlying the Defendant's entire argument premises that the State's sole allegation of conduct constituting the reckless act required to prove the form of second degree assault here alleged is her failure as a police officer to seatbelt a prisoner during custodial transportation. The Defendant states that "[n]o court in Maryland has held a defendant criminally liable for assault based upon their alleged misuse of an inanimate object (i.e., a seatbelt) which at some later point in time causes another inanimate object (the wall of a van) to come into contact with another person." Def. Mot. at 1. She insists that a prisoner in a case like this can only be assaulted "when the simple failure to seatbelt is combined with other conduct." Def. Mot. at 2, n. 1 (incorporating by reference Def. Rice's Sept. 11, 2015, Mot. to Dismiss at 14). She completely misconstrues the charge here and overlooks that the fact that other conduct has indeed been alleged.

As set forth above, the State did not just claim in its Bill of Particulars that the Defendant recklessly caused harm to the victim "by failing to secure Mr. Gray with a seatbelt." Rather, the State alleged that the Defendant, both personally and in her capacity as a supervisor of other officers, used a police vehicle as an instrumentality which made harmful contact with Mr. Gray. This harmful contact resulted from the Defendant's criminally reckless act of transporting Mr. Gray as her custodial prisoner inside that instrumentality without securing Mr. Gray with a seatbelt at a time when Mr. Gray was restrained precariously with hand-cuffs and leg-shackles and when the Defendant knew that Mr. Gray may have been in need of medical care. This case, thus, does not involve the simple misuse of a vehicle's seatbelt resulting in the vehicle making

harmful contact with a prisoner. It involves a multifaceted act of recklessness that resulted in fatal injuries to Mr. Gray. The Defendant simply ignores some of the central facts giving rise to the charge.

More to the point for purposes of this type of Motion, the State is not required to prove the case on paper in order to give the Defendant adequate notice of the charges the case entails. The indictment and the bill of particulars do not function to explain to the Defendant the State's legal theory as to why the alleged factual situation amounts to second degree assault, nor do they function to list out every additional fact the State intends to present to convince the jury of the criminality of the Defendant's conduct. Rather, the indictment need only "contain a concise and definite statement of the essential facts of the offense," and a bill of particulars, even in supplementing a short-form indictment, need not specify "all the evidence that the State may adduce to prove" the charge. *Dzikowski*, 436 Md. at 446-47. That the Defendant has failed to acknowledge all of the facts that the State will prove provides no basis for him to move pretrial to dismiss the charges stemming from those facts.

B. The Defendant overlooks the relevant Maryland precedent supporting the reckless battery form of second degree assault charged in this case

Even assuming that the Defendant's procedural and factual premises were correct, her underlying legal argument flows from an incomplete and inaccurate assessment of Maryland law regarding the criminal significance of the facts alleged. The Defendant claims that "[s]uch an attenuated form of assault simply does not exist," Def. Mot. at 1, and she insists that she "can find no precedent anywhere in this country in which a police officer has been prosecuted criminally for failing to seatbelt a prisoner," concluding that because of this purported "absence

of controlling precedent, this Court must look toward federal constitutional claims” for guidance about whether the State has properly charged reckless assault, Def. Mot. at 2, n. 1 (incorporating by reference Def. Rice’s Sept. 11, 2015, Mot. to Dismiss at 6). This argument views the concept of precedent as requiring complete similitude of both law and fact and prohibiting the application of settled law to new facts. Maryland’s appellate courts do not construe their cases so rigidly. *See e.g. Denisjuk v. State*, 422 Md. 462, 478 (2011) (“if the subject case merely applies settled precedents to new facts, the case . . . is viewed as not changing the law in any material way”) (quoting *Warrick v. State*, 108 Md. App. 108, 113 (1996)). While the reckless modality of second degree assault may be its least commonly litigated form, a proper review of Maryland’s jurisprudence about this crime shows that the State’s charge here merely applies the law as it has been established to the facts of this case, leaving no need to strain to analogize to inapposite federal law.

As defined statutorily, second degree assault includes “the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings.” Md. Code. Ann. Crim. L. Art., §§ 3-201(b), 3-203(a). “[T]he term of art ‘battery’ may connote either of two forms of offensive touching or other application of force: [a]n intended battery [or an] unintended battery.” *Lamb v. State*, 93 Md. App. 422, 445-46 (1992). “The recognition of unintended battery as a form of battery is a relatively recent development,” and “the crime of unintended battery has not yet emerged from the future [appellate] mists with sufficient clarity to permit fine calibration” of the crime’s every possible contour. *Williams v. State*, 100 Md. App. 468, 485-88 (1994). As Maryland’s appellate courts have basically described, however, “[a]n unintentional battery can arise from contact that is the result of a person’s criminal negligence that legally causes injury to another.” *Elias v. State*, 339 Md. 169, 184 (1995). “The requisite criminal

negligence necessary for conviction of an unintentional battery may be equated to the culpability required for a conviction of involuntary manslaughter (without the death).” *Id.*

“It is by no means clear, however, that unintended battery is not broader in its sweep” than a mere “nonfatal analogue of unintended criminal homicide,” and the crime’s elements do “not seem to draw a distinction between the degree of harm that may be the result of an unintended battery and the broad sweep of offensive touching and nonserious harm that is the *actus reus* of intentional battery.” *Williams*, 100 Md. App. at 489. In this regard, although “[a]t the *mens rea* level . . . the quality of recklessness required for reckless endangerment is indistinguishable from the quality of recklessness required for unintended battery,” “[w]hat is less sure is whether the creation of ‘a substantial risk of death or serious bodily harm’ that is part of the *actus reus* of reckless endangerment goes beyond the degree of risk or threat of harm implicitly contemplated by the recklessness necessary to convict one of unintended battery.” *Id.* at 488-89. Consequently, when the Defendant analogizes that the reckless conduct necessary to prove an unintended battery “must rise to the level of gross or criminal negligence needed to support the crime of reckless endangerment,” Def. Mot. at 5, the case law supports the comparison only as to a defendant’s state of mind during the conduct but not necessarily as to the conduct itself.

In any event, the test for distinguishing an unintended battery from non-criminal harmful contact asks “whether a defendant’s actions constitute gross criminal negligence [or] recklessness” *Elias*, 339 Md. at 184. This question “turns on whether those actions under all the circumstances amounted to a disregard of the consequences which might ensue to others.” *Id.* Of particular relevance to the Defendant’s claim, the Court of Appeals has instructed that “[i]n determining whether an accused’s actions were grossly negligent or criminally reckless, the

standard against which a defendant's conduct must be assessed is typically the conduct of an ordinarily prudent citizen similarly situated," but "*where the accused is a police officer, the reasonableness of the conduct must be evaluated not from the perspective of a reasonable civilian but rather from the perspective of a reasonable police officer similarly situated.*" *State v. Albrecht*, 336 Md. 475, 501 (1994) (emphasis added).

In *Albrecht*, a Montgomery County police officer had been convicted of involuntary manslaughter and reckless endangerment stemming from his unintentional discharge of a departmental shotgun into the chest of an unarmed suspect, killing her almost instantly. *Id.* at 481-82. At trial, the officer argued that she had acted reasonably under the circumstances, testifying that she "felt fairly threatened, because [he] had two [] people who had just been involved in a serious incident and [he] was told there might be a gun in the [suspects'] car." *Id.* at 495. Despite the State's evidence to the contrary, she insisted that his actions violated no "policy, practice, or directive of the Montgomery County Police Department." *Id.* at 502.

The officer renewed this argument on appeal, and in assessing whether there was insufficient evidence to support Albrecht's convictions, the Court of Appeals weighed the reasonableness of the officer's conduct using the standards set forth in the Departmental Directives of the Montgomery County Police Department's Field Operations Manual. *Id.* at 502-03. Those Directives provided "that an officer may draw a firearm when the officer has reason to fear for his safety or the safety of others" but stated "that officers must use caution when discharging a firearm to avoid endangering the lives of bystanders" and "must exercise extreme caution when removing [a] shotgun from [a police] vehicle because of the danger that a discharge of the weapon may present to innocent bystanders." *Id.* at 503 (internal quotation marks removed). Although "Montgomery County's departmental directives afford[ed] police

officers much discretion with respect to an individual officer's decision to use a firearm," the Court held that "a police officer must act in a reasonable manner" because "[g]ross negligence in the exercise of discretion is grounds for criminal liability." *Id.* at 503. In affirming the conviction, the Court found that "there was ample evidence from which the trial court could have concluded that Albrecht did not comply with standard police procedures" regarding the use of deadly force and the handling of shotguns; "thus, the trial court could have concluded that Albrecht . . . acted in a grossly negligent and reckless manner" because "a reasonable Montgomery County police officer would not have acted as Albrecht did on this occasion" *Id.* at 503-05.

Similarly here, the State will present evidence that the Defendant's failure to seatbelt Mr. Gray during custodial transportation constituted a deviation from Baltimore Police Department General Orders, and the State will then argue that this deviation contributed to the overall criminal recklessness of the Defendant's alleged conduct, which not only knowingly risked injury or death to Mr. Gray but actually resulted in it. The specific General Order that the State will present at trial directs a relevant standard of care more than compatible with the analysis *Albrecht* employs, and the Defendant has been on notice since the Statement of Probable Cause was filed in this case that the State intends to cite police General Orders as to her duty to seatbelt Mr. Gray. Despite *Albrecht's* clear precedent that the State may present evidence of such a violation of police policy to the jury for their use in evaluating the reasonableness of the Defendant's actions, the Defendant insists that "the consideration of such policies fall [*sic*] beyond the four-corners of the charging documents and therefore cannot be relied upon to support the State's charge." Def. Mot. at 6.

Putting aside the Defendant's continued—and already amply discussed—conflation of notice of the charges with proof of the charges, the Defendant goes on to cite *State v. Pagotto*, 361 Md. 528 (2000), for the supposed proposition that “the alleged violation of such a policy cannot, as a matter of law, serve as the basis for gross or criminal negligence.” Def. Mot. at 6-7. She then characterizes *Pagotto* as also holding “that the State is barred from relying upon a recently enacted and geographically unique general order to establish gross or criminal negligence.” Def. Mot. at 2, n. 1 (incorporating by reference Def. Miller, Nero, & Rice's Reply to St. Response to Mot. to Dismiss at 7). If these statements were true, *Pagotto*'s holding would be so broad that it would overrule *Albrecht*. Instead, an analysis of the *Pagotto* opinion shows only that the Defendant has utterly misrepresented its holding.

In *Pagotto*, the Court of Appeals considered the legal sufficiency of the evidence used to convict a Baltimore City police sergeant of the 1996 involuntary manslaughter of the driver of a vehicle that the officer shot and killed during a traffic stop, as well as the sufficiency of the evidence underlying the convictions for recklessly endangering the two passengers in that vehicle. “The State argue[d] that the officer was grossly negligent by violating Baltimore City Police Department guidelines in three respects: (1) closing on the victim with his gun drawn; (2) attempting a one-armed vehicular extrication with his gun in the other hand; and (3) placing his trigger finger on the slide of the gun, rather than under the trigger guard as she approached the decedent's car.” *Id.* at 538-39. Importantly, the entire “prosecution was predicated upon the theory that . . . the alleged violations of departmental guidelines” constituted conduct that was *itself* “both a gross departure from the standard of conduct that a reasonable police officer similarly situated would observe, thereby creating a substantial risk of death or serious physical injury to the two passengers, as well as such grossly negligent conduct that manifested a wanton

or reckless disregard of [the] human life [of the driver].” *Id.* at 550. In affirming the intermediate appellate court’s decision to reverse the convictions, the Court analyzed each of these three alleged violations in detail and under all the circumstances agreed with the officer that his conduct was reasonable.

First, regarding the act of “closing on the victim with his gun drawn,” the Court thought it “important to note that three of the State’s experts stated that they did not feel that it was inappropriate for Pagotto to draw his gun when she did; the only problem was that she should not have closed with his gun drawn.” *Id.* at 539. Indeed, of the State’s witnesses as to this charge, two witnesses testified that “[o]nce Pagotto perceived a threat [from the driver’s movements], she should have returned to his car and called for backup,” one testified that “once Pagotto perceived a threat, she should not have drawn his weapon, should not have continued to close, and should have sought cover”; and one stated that “while it is inadvisable for an officer to close with a weapon in hand, it is inadvisable only because of the danger that it poses to the officer and that an officer may, therefore, do so if she chooses.” *Id.* at 539-40. In assessing this evidence, the Court held that “Pagotto’s act of closing with a drawn gun was not criminally negligent” because “there was nothing in [his] behavior to suggest a wanton or reckless disregard for human life.” *Id.* at 551 (internal quotation marks removed). In the Court’s view, the officer “approached an inherently dangerous confrontation with his weapon in hand,” and “[i]f in a stress-laden situation and for his own self-protection Sergeant Pagotto violated a departmental guideline, she did not thereby commit an act of gross negligence.” *Id.* at 551-52. Significantly, the Court did not base its decision on the fact that the charged conduct involved a violation of Baltimore Police policy, nor did the Court rule that the trial judge impermissibly allowed the jury to consider this local policy as evidence of criminal conduct; rather the Court based its holding

on the fact that the officer's conduct in violating that policy did not rise to the level of criminal negligence.

Second, as to the violation of Departmental policy that alleged occurred when "Pagotto attempted a one-armed vehicular extrication [of the suspect vehicle's driver] with his gun in the other hand," "[t]he only testimony that described any contact between [the driver] and Sergeant Pagotto was from Sergeant Pagotto" himself, who testified that as she was nearing the driver's side door with his gun drawn, "the door sprung open," and, believing she was about to be ambushed, she instinctively "pushed the door out of the way and grabbed [the driver's] hand" because "[he] was always trained to go into the ambush, drawing any fire towards that person." *Id.* at 541-43. Based on this evidence, the Court found that Sergeant Pagotto had actually "not violated" the Departmental policy against attempting to struggle with a suspect without having both hands free, but the Court added that "even if she had, it was not behavior that could legally rise to the level necessary to sustain a conviction of involuntary manslaughter" because his "behavior simply did not evidence a wanton or reckless disregard for human life." *Id.* at 552-53. Again, the Court did not find the evidence insufficient (much less the charge defective) merely because the allegation involved the violation of a local police guideline, nor did the Court find any impropriety in the jury's consideration of such a guideline as evidence of the criminality of the officer's actions.

Finally, regarding the officer's placing his trigger finger on the slide of the gun as she approached the decedent's car, rather than under the trigger guard as required by Baltimore Police guidelines, the Court considered the officer's training history extensively. In particular, the Court emphasized evidence that the State's primary witness in support of this charge

testified that the current Baltimore City Police Department guidelines require an officer to place his trigger finger below the trigger guard. she further testified, however, that, when Sergeant Pagotto was trained in 1980, the Department issued revolvers. The guidelines at that time did not address the location or placement of the officer's trigger finger. she also stated that the Department first issued a guideline with respect to the trigger finger in 1990, when the Department switched to the Glock 17. she testified that, in 1990, police officers were taught to keep their trigger finger on the slide of the gun. According to [the witness], this standard was changed to the current one sometime in 1993 or 1994 [such that] that Baltimore City is the only police department in Maryland that has this particular requirement.

Id. at 544. The Court also stressed testimony “that, because Sergeant Pagotto had originally been trained to keep his trigger finger on the slide of the gun, his ‘muscle memory’ would have caused him, in a stress situation, to go back to his original training and past experience.” *Id.* at 545.

In agreeing that this violation of the Departmental guideline, “at best, amounted to an actionable case in civil negligence,” the Court adopted and quoted the intermediate appellate court’s conclusion “as a matter of law, that the burden of production as to gross criminal negligence was not satisfied so as even to permit the jury to consider such a charge” because “[a]lthough 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.” *Id.* at 550-51. Further discussing this conclusion, the Court noted that but for the officer’s actions occurring on a certain date and occurring in Baltimore City, the State would not have even been able to suggest the officer acted with criminal recklessness based on his violation of the Departmental trigger-finger-placement rule. The Court described the logical problem with extending the State’s argument to its natural conclusion, namely “that a police officer placing his finger on the slide of the weapon [would be] criminally negligent behavior if committed by a Baltimore City Police Officer in Baltimore City, but acceptable, non-criminal behavior if committed by any other police officer anywhere else in the State.” *Id.* at 551.

Although the State attempted to rely on *Albrecht* to get around this flaw in its case, the Court found that *Albrecht* was distinguishable because there

[t]he State adduced sufficient testimony from which the trial court could have concluded that a reasonable Montgomery County police officer would not have acted as *Albrecht* did on [that] occasion, in drawing and racking a shotgun fitted with a bandolier and bringing it to bear, *with his finger on the trigger*, on an unarmed individual who did not present a threat to the officer or to any third parties, in a situation where nearby bystanders were exposed to danger.

Id. at 554 (quoting *Albrecht*, 336 Md. at 505) (emphasis in original). As the Court viewed it, the State's case in *Pagotto*, "key factor by key factor, [was] the diametric opposite of *Albrecht*," and "[t]he contrast, moreover, highlights the deficiency of the evidence of gross negligence in this case." *Id.* at 555. Ultimately, the Court concluded, "perhaps Sergeant Pagotto should have acted differently" and "[h]is actions in circumstances that are tense, uncertain, and rapidly evolving may even amount to ordinary civil negligence, but they are not such a gross deviation from the actions of an ordinary police officer similarly situated so as to evidence the wanton or reckless disregard for human life necessary to . . . rise to the level of gross negligence." *Id.* at 555-56.

Given this detailed analysis and having reviewed the context of the Court's discussions of the permissible uses of local police policies to demonstrate criminal negligence under state-wide law, the Defendant's characterization of *Pagotto*'s holding simply does not ring true. *Pagotto* does not overrule *Albrecht*, as she implies, nor does *Pagotto* hold, as she claims, that "the alleged violation of [a local police] policy cannot, as a matter of law, serve as the basis for gross or criminal negligence" and "that the State is barred from relying upon a recently enacted and geographically unique general order to establish gross or criminal negligence." Indeed, the Court of Appeals six years afterwards summarized *Pagotto* as being consistent with *Albrecht* and as holding only that while "a violation of a police guideline is not negligence *per se*, it is,

however, a factor to be considered in determining the reasonableness of police conduct.” *Mayor of Baltimore v. Hart*, 395 Md. 394, 416-18 (2006) (quoting *Pagotto*, 361 Md. at 557 (Bell, C.J., dissenting)).

The Court in *Pagotto* simply found the State’s evidence insufficient to prove that the particular actions violating police policy under the circumstances of that case rose to the level of constituting criminally negligent conduct. The Court’s discussion of the trigger-finger policy’s geographic uniqueness and recent enactment mattered in *Pagotto* only because it demonstrated the State’s failure in that case to prove the violation of a policy setting forth objectively reasonable standards of police conduct, the violation of which would be objectively criminally negligent. As evident, however, in the *Pagotto* Court’s re-affirmance of the *Albrecht* decision, the violation of a local police policy, such as Montgomery County’s rules for handling firearms during encounters with suspects and bystanders, most certainly can form the basis for criminal liability if the violation, either alone or in conjunction with other evidence, constitutes a gross deviation from the actions of a reasonable police officer similarly situated so as to show the wanton or reckless disregard for human life or safety.

In short, *Pagotto* in no way undermines *Albrecht*’s clear holding that the State may use a police officer defendant’s violation of local General Orders to help establish criminal liability under state-wide law where the violation is relevant evidence that the officer objectively recklessly risked or recklessly caused injury or death to another person. Here, the State maintains that the Defendant’s alleged actions would be criminally negligent whether they had been committed in Baltimore City, Baltimore County, or anywhere else in the State of Maryland. The Defendant’s duty of care toward Mr. Gray is set forth in the state-wide law establishing her duty not to assault Mr. Gray in the second degree. A violation of Baltimore City Police

Department General Orders about seatbelting prisoners will be offered as proof of a violation of that law, but the failure to seatbelt is not the sole basis of criminal negligence. Whether the Defendant here actually violated those General Orders and whether the violation, if any, actually helps establish conduct rising to the level of criminal recklessness will be matters thoroughly litigated to the jury. Those matters, however, play no role in assessing the narrow question of whether the State has properly charged the crime of reckless second degree assault. As to that question, even using the Defendant's flawed cart-before-the-horse methodology, both *Albrecht* and *Pagotto* answer in the affirmative. Under Maryland jurisprudence dealing with unintentional injuries resulting from recklessness, a police officer, like any person, must act in a reasonable manner, and her gross negligence or recklessness in the exercise of official duties, even discretionary ones, "is grounds for criminal liability." *Albrecht*, 336 Md. at 503. Such misconduct is precisely what the State here has alleged and what the State intends to prove at trial.

C. The Defendant erroneously relies on a seatbelt statute governing civil negligence

Besides ignoring Maryland appellate precedent, the Defendant's argument for dismissal additionally relies on statutes preventing the failure to use a seatbelt from being considered evidence of negligence in a civil action, reasoning that these statutes implicitly also prevent the failure to use a seatbelt from contributing to proof of recklessness in a criminal case. The Defendant's logic incorrectly presupposes that these statutes—rather than the police departmental order discussed above—provide the only permissible evidence of a police officer's basic duty to seatbelt a prisoner. Moreover, the Defendant overlooks the statutes' history as laws aimed at preventing the harsh application of Maryland's contributory negligence rules during a time in the 1980s when seatbelts were not widely used.

The statutes in questions are codified in the Transportation Article (“TA” hereinafter) of the Annotated Code of Maryland. As the Defendant recites, TA § 22-412.3 requires operators and passengers of certain motor vehicles to use a seatbelt but provides that the failure to do so “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.” TA § 22-412.3(b)-(c),(h)(1). The statute further warns that normally “a party, witness, or counsel may not make reference to a seatbelt during a trial of a civil action,” though the statute clarifies that it does not “prohibit the right of a person to institute a civil action for damages . . . arising out of an incident that involves a defectively installed or defectively operating seatbelt.” TA § 22-412.3(h)(2)-(3). The Defendant also cites TA § 22-412.4, which provides the same evidentiary limitations on the fact of a person’s failure to use a seatbelt but applies only to certain fire and rescue vehicles and does not actually require the use of seatbelts—just that those vehicle be equipped with seatbelts. TA § 22-412.4(a)-(c). The Defendant concedes that neither of these statutes by their terms actually applies to the police transportation van used in this case, but she insists that these laws demonstrate a “strong legislative intent that the failure to use a seatbelt is not evidence of civil negligence” such that “it cannot as a matter of law rise to the level of criminal recklessness needed [to] support the State’s charge of reckless endangerment” or, by extension, second degree assault. Def. Mot. at 2, n. 1 (incorporating by reference Def. Rice’s Sept. 11, 2015, Mot. to Dismiss at 15-17).

Whatever legislative intent underlies TA § 22-412.3 and TA § 22-412.4, the more important intent is that of the Baltimore City Police Commissioner, who promulgated the order requiring police officers to seatbelt prisoners during custodial transport. The Defendant is not

the first person to argue that a statute should trump a police commissioner's order as to the legal standard of care by which officers may be judged. The argument failed then, and it fails now.

In *Mayor of Baltimore v. Hart*, 395 Md. 394, 396 (2006), a Baltimore police officer responding to an emergency “drove a marked police car through a red traffic signal without stopping and collided” with another vehicle, whose driver then sued the City for damages. The issue on appeal was the relevant standard for judging the officer's duty of care and whether that duty should be governed by TA § 21-106, which permits police cars in such situations to pass through a red light “after slowing down as necessary for safety,” or should instead be governed by Baltimore Police General Order 11-90, which provides that before passing through a red light the officer must bring the vehicle “to a full stop and ensure the intersection is safe to enter before proceeding.” *Id.* at 403-05. The City argued that the statute's standard should govern, “describing the statute as a ‘law’ and the General Order as an internal standard” that could not be used to prove the officer's duty to other drivers. *Id.* at 414.

Rejecting the City's contention, the Court, citing to *Albrecht*, held that “General Order 11-90 is relevant because it is directly applicable to the specific conduct of the Baltimore City police officer in this case . . . and the issue of [the] reasonableness” of the officer's conduct. *Id.* at 416-17. In reaching this conclusion, the Court acknowledged that “§ 21-106 is less stringent in its requirements than General Order 11-90” but held that “the fact that the General Assembly has enacted § 21-106 of the Transportation Article, governing the operation of emergency vehicles throughout the State, does not prohibit the Baltimore City Police Department Commissioner . . . from promulgating regulations and guidelines which enact additional requirements for the operation of emergency vehicles by Baltimore City police officers within Baltimore City, so long as the additional provisions do not allow conduct the state statute

prohibits,” are not otherwise inharmonious with state law, and are not promulgated on a subject expressly pre-empted by the General Assembly. *Id.* at 406-09. Moreover, the Court emphasized that the officer was obligated to follow General Order 11-90, despite his claim that he had no knowledge of its existence, because “Code of Public Local Laws of Baltimore City, § 16-7 provides that rules promulgated by the Baltimore City Police Commissioner ‘shall be binding on all members of the Department.’” *Id.* at 417, n. 11. Ultimately, the Court mirrored *Albrecht* in holding that the General Order’s higher standard applied because “[the officer’s] conduct must be held to the standard of what a reasonable Baltimore City police officer’s (as opposed to what an ordinary driver’s) conduct would have been under similar circumstances.” *Id.* at 414.

Like in *Hart*, here the Police Commissioner’s orders that the State will present at trial in no way conflict with either of the seatbelt statutes the Defendant cites. As the Defendant acknowledges, neither statute even directly applies to police prisoner transport vans. The Commissioner’s order merely filled a void in the law, and Code of Public Local Laws of Baltimore City, § 16-7 authorized him to do so. The fact that the Commissioner enacted a rule for Baltimore City police that does not exist under state law in no way clashes with the General Assembly’s intent in enacting the two seatbelt statutes. Neither statute expressly or impliedly purports to pre-empt the law of seatbelt use and limit the power of regulating that subject to the General Assembly. Certainly, no argument can be made that the state laws expressly *permit* police officers to transport prisoners without a seatbelt. Moreover, the General Assembly described the goal of its mandatory seatbelt laws as being firstly “for the purpose of providing that, unless certain occupants . . . of certain motor vehicles are restrained by a seatbelt, a person may not operate the motor vehicle.” 1986 Md. Laws 1208. The Commissioner’s policy, which the Court is free to review in detail, states a purpose directed toward the safety and security of all

persons involved during prisoner transport. No conceivable disharmony exists between these two purposes.²

Finally, the Defendant ignores the history and purpose of Maryland seatbelt law with her assertion that the General Assembly's restrictions on the use of evidence regarding seatbelts in civil cases were intended to effect a similar proscription on such evidence in criminal cases. For one thing, both statutes expressly govern only evidence of seatbelts in civil actions, not criminal prosecutions. As to this point, the Defendant claims the statutes "contain[] no such restrictive terms," quoting in isolation TA § 22-412.3(h)(1)(i)'s bare language that the lack of a seatbelt "may not be considered evidence of negligence," and urging the Court to ignore the remaining words of the statute and its legislative history under the "rule of statutory interpretation" that "[w]here there is no ambiguity or obscurity in the language of the statute, there is usually no need to look elsewhere to ascertain legislative intent." Def. Mot. at 2, n. 1 (incorporating by reference Def. Miller, Nero, & Rice's Reply to St. Response to Mot. to Dismiss at 4-5). This rule, quoted with as little context as the Defendant's proposed reading of the Transportation Article, must be read together with the Court of Appeals's other statutory construction principles, particularly the one requiring that "in interpreting a statute, the context in which the statute appears must be considered," and "that context may include related statutes, pertinent legislative history, and 'other material that fairly bears on the fundamental issue of legislative purpose or goal.'" *Mayor & C.C. of Balto. v. Chase*, 360 Md. 121, 129 (2000) (internal citations and quotation marks removed). Here, the overall statutory scheme repeatedly refers to evidence in a

² As a specific appellate example of a jury being permitted to hear evidence of a defendant police officer's violation of a Baltimore Police seatbelt General Order, the State notes *Leake v. Johnson*, 204 Md. App. 387 (2012) (J. Heard presiding in Circuit Court). Although the issues appealed in *Leake* dealt with public official immunity and damage limitations, General Order K-14, in effect at the time, required that arrestees be restrained by a seatbelt during transport, and the jury was permitted to consider evidence of K-14 because, like in *Hart*, it established a duty of care affirmatively requiring seatbelt use. The Transportation Article's evidentiary statutes posed no limitation where the issue of seatbelt use arose in the context of a police officer's failure to perform an official duty.

“civil action” but not to any other type of action. More to the point, the General Assembly expressly noted that the law’s purpose in this regard was “establishing that [the] failure of an individual to use a seatbelt in violation of this Act may not be considered evidence of negligence or contributory negligence, limit certain liability, or diminish recovery for certain damages in a *civil action for damages*.” 1986 Md. Laws 1208 (emphasis added). This law must be viewed in the context from which it emerged, not as isolated words in a book of statutes.

As Maryland civil law scholars have noted, “the General Assembly passed the compulsory seat belt use statute reluctantly in order to comply with a federal regulation pressuring states to enact seat belt mandates,” and “plaintiffs’ trial lawyers lobbied for the inadmissibility provision.” Donald G. Gifford & Christopher J. Robinette, *Apportioning Liability in Maryland Tort Cases: Time to End Contributory Negligence and Joint and Several Liability*, 73 Md. L. Rev. 701, 766 (2014). “Under Maryland’s doctrine of contributory negligence, even if the jury believes that the defendant’s negligence is far more culpable (or contributed far more to the injury) than the victim’s own contributory negligence, that is, the plaintiff’s failure to use reasonable care to protect herself or himself, the plaintiff still recovers nothing.” *Id.* at 708. “Even though the failure to use a seat belt does not contribute to causing the accident itself (a necessary precondition for the application of the current doctrine of contributory negligence), the failure to use a seatbelt often causes an enhanced injury that is a foreseeable consequence of the failure to use a seatbelt.” *Id.* at 767. At the time the General Assembly enacted these mandatory seatbelt laws in 1986, the Maryland Court of Appeals had already warned that the failure to use a seatbelt might one day constitute contributory negligence, commenting in *Cierpisz v. Singleton*, 247 Md. 215, 227 (1967), “[s]ome future case in which the availability of the belt will be known to the plaintiff and in which there will be evidence

indicating the failure to use it was a substantial factor in producing or aggravating the plaintiff's injuries may require us to consider holding that the issue, with proper instructions, ought to be submitted to a jury." *Cierpisz* only declined to permit the jury to factor the plaintiff's failure to use a seatbelt because at the time, in 1967, "[i]n spite of the overwhelming scientific evidence supporting the beneficial results of seatbelt use, acceptance of the safety belt by the public has not been achieved"; and "[t]he social utility of wearing a seatbelt must be established in the mind of the public before failure to use a seatbelt can be held to be negligence." *Id.* at 226.

Once seatbelt use became mandatory in 1986, the General Assembly—and the plaintiffs' lawyers lobbying before it—might reasonably have worried that *Cierpisz*'s "future case" would quickly come to pass. Indeed, "[a]ccording to the National Highway Traffic Safety Administration (NHTSA), only about 10% of vehicle occupants used seatbelts in the late 1960s and early 1970s," rising nationally "from less than 15% in 1984 to 86% in 2012." Jacob E. Daly, *The Seat-Belt Defense in Georgia*, 65 Mercer L. Rev. 19, 21-23 (2013). Given that the General Assembly's 1986 bill not only mandated seatbelt use but also required the State Police to "establish prevention and education programs to encourage compliance" with the new seatbelt law, 1986 Md. Laws 1211, this rapid increase in seatbelt use could not have been unanticipated. As such, the General Assembly's firmly expressed intent to prevent seatbelt use from being considered evidence of civil negligence can be viewed only as a measure designed to prevent the Court of Appeals from following through with *Cierpisz*'s suggestion that an increase in the public's seatbelt use might cause the Court to modify Maryland's common law contributory negligence rules and make the failure to wear a seatbelt a complete bar to recovering damages after an accident, even if the victim was otherwise faultless. Contrary to the Defendant's suggestion, no reading of the law's terms and its history can reasonably divine any legislative

expression of policy on whether the lack of a seatbelt coupled with other factors might constitute criminal recklessness. The Defendant simply takes TA § 22-412.3 and TA § 22-412.4 out of their context and ascribes to them meaning they were never intended to hold.

Because her entire premise is that Maryland law provides no authority for the State's reckless battery charge here, the Defendant's failure to correctly interpret the Transportation Article's seatbelt provisions, coupled with her failure to recognize *Albrecht* as applicable precedent, renders her Motion substantively devoid of any merit. The crime of second degree assault in Maryland clearly can embrace the conduct that the State has alleged the Defendant committed in this case. As such, her misunderstanding of Maryland law obviates any need to examine federal law for further guidance.

D. The Defendant improperly proposes comparing federal constitutional cases to Maryland's reckless endangerment law as a tool to construe the crime of unintentional battery

Even if the Court considers it appropriate to look to federal law, the Defendant's analogies to Eighth Amendment constitutional civil actions are misplaced. The Defendant spends page after page of her Motion (with incorporated other pleadings) reciting the facts and holdings of various reported federal conditions-of-confinement cases and then even more pages listing citations for similar unreported opinions (despite their lack of precedential value). She does so because she argues that the federal civil "deliberate indifference standard mirrors that of criminal recklessness" as defined under Maryland's reckless endangerment law, Def. Mot. at 2, n. 1 (incorporating by reference Def. Rice's Sept. 11, 2015, Mot. to Dismiss at 7-8), and in her view, "the analysis used to evaluate the sufficiency of the second degree assault charge in this

matter is the same used to evaluate a charge of reckless endangerment,” Def. Mot. at 5. As earlier noted, *Williams*, 100 Md. App. at 488-89, suggests that the two crimes are not entirely analogous in this regard, but even accepting the validity of the comparison, the “deliberate indifference” state of mind defined in Eighth Amendment jurisprudence differs from the *mens rea* required for reckless endangerment in Maryland. Moreover, the Defendant ignores that Eighth Amendment cases only attach liability to a range of defendant actions much narrower than the broad *actus reas* component of Maryland’s reckless endangerment law. As such, federal cases holding that a government agent does not act with deliberate indifference in failing to seatbelt a prisoner do not even provide persuasive authority as to whether the same act constitutes reckless endangerment under Maryland law.

In *Farmer v. Brennan*, 511 U.S. 825 (1994), the Supreme Court described the elements that a plaintiff must prove to succeed in a civil action based on an alleged Eighth Amendment violation of the right to remain free from cruel and unusual punishment. As to the conduct itself, “the deprivation alleged must be, objectively, sufficiently serious.” *Id.* at 834 (internal citations and quotation marks omitted). “For a claim . . . based on a failure to prevent harm, the inmate must show that she is incarcerated under conditions posing a substantial risk of serious harm.” *Id.* In assessing the risk presented by those conditions, however, “a prison official’s act or omission must result in the denial of the minimal civilized measure of life’s necessities.” *Id.* (internal quotation marks omitted). Construed by the federal Circuit Courts, this “objective element” contains “no ‘static test’ to determine whether a deprivation is sufficiently serious; [rather] the conditions themselves must be evaluated in light of contemporary standards of decency.” *Jabbar v. Fischer*, 683 F.3d 54, 57 (2nd Cir. 2012).

By comparison, under Maryland law “[t]he *actus reus* of the crime of reckless endangerment is conduct that creates a substantial risk of death or serious physical injury to another person.” *Williams*, 100 Md. App. at 495. “[W]hether the accused’s conduct, which created the substantial risk, was reckless . . . is a matter for objective determination, to be made by the trier of fact from all the evidentiary circumstances in the case.” *Minor v. State*, 326 Md. 436, 443 (1992). The crime’s scope, however, can apply to virtually any type of action meeting the statute’s elements, as “the proscription against recklessly endangering conduct is, and was intended to be, a broad one.” *Kilmon v. State*, 394 Md. 168, 174 (2006). “[T]he General Assembly enacted the statute with a clear policy goal in mind,” “focused on deterring reckless behavior that posed a risk of serious injury or death before the injury or death occurred.” *Jones v. State*, 357 Md. 408, 426 (2000). For example, in *Wieland v. State*, 101 Md. App. 1 (1994), the defendant was convicted of reckless endangerment for brandishing a handgun while drunk and accidentally shooting his brother. In a variation of this conduct, the defendant in *Minor* was convicted of reckless endangerment for handing his brother, with whom she had been drinking alcohol throughout the day, a loaded shotgun and daring him to play Russian roulette. Aside from conduct involving guns, the defendant in *Holbrook v. State*, 364 Md. 354 (2001), was convicted of eight counts of reckless endangerment for setting fire to a home occupied by eight persons. The *Williams* defendant was convicted of reckless endangerment for intervening in a bar fight by stabbing a person twice with a knife. In *State v. Kanavy*, 416 Md. 1 (2010), the Court construed the reckless endangerment statute as applying to a defendant’s failure to contact emergency services for a person in the defendant’s care and custody and to whom the defendant had a duty to provide appropriate medical care.

The factual variety of these convictions demonstrates the intentionally wide reach of Maryland's reckless endangerment crime and contrasts starkly with the narrow standard of conduct judged in the federal cases the Defendant cites. Rather than being concerned with deterring *any* reckless behavior that might risk injury or death to another person, Eighth Amendment cases assess liable conduct through the lens of decency standards in prison conditions and of meeting "the minimal civilized measure of life's necessities" for prisoners. Handcuffing, legshackling, and then transporting a prisoner without a seatbelt might not objectively deprive the prisoner of life's minimal necessities under the Eighth Amendment's amorphous constraints on government actions, but this conclusion says nothing about whether such conduct objectively creates a substantial risk of injury or death to the prisoner under Maryland law, particularly where a police order binding on the defendant specifically requires that the prisoner be seatbelted.

Turning to the required *mens rea*, an even larger distinction emerges between an Eighth Amendment civil violation and criminal reckless endangerment in Maryland. The Supreme Court requires that the second element a plaintiff must prove under *Farmer*'s test is that "a prison official must have a sufficiently culpable state of mind . . . [that] is one of deliberate indifference to inmate health or safety." *Farmer*, 511 U.S. at 834 (internal citations and quotation marks omitted). While the Court described "deliberate indifference [as] lying somewhere between the poles of negligence at one end and purpose or knowledge at the other" and as being "routinely equated . . . with recklessness," the Court cautioned that "the term recklessness is not self-defining." *Id.* at 836. In fashioning the constitutional standard, the Court held that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an

excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and she must also draw the inference.” *Id.* at 837. Moreover, although a “claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate,” *id.* at 842, “[b]ecause . . . prison officials who lacked knowledge of a risk cannot be said to have inflicted punishment, it remains open to the officials to prove that they were unaware even of an obvious risk to inmate health or safety . . . or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent,” *id.* at 844.

Although Maryland’s reckless endangerment law obviously also requires recklessness, the *mens rea* associated with the reckless act is not assessed using *Farmer*’s purely subjective standard; rather it is determined using a combination of subjective and objective judgments. As Judge Moylan explained in *Williams*, 100 Md. App. at 506,

The awareness of some risk and then the conscious disregard of that risk must, as a matter of course, be subjective. Whether the risk that is known and then disregarded is substantial, however, is to be measured objectively. If the disregarding of such a risk would represent a gross deviation or gross departure from the standard of conduct that a law-abiding person would observe in the actor’s situation, then the risk, objectively measured, is ipso facto substantial. If, on the other hand, the disregarding of such a risk would not represent a gross deviation or a gross departure from the standard of conduct that a law-abiding person would observe in the actor’s situation, then, objectively measured, it ipso facto is not substantial. The *mens rea* of reckless endangerment, thus parsed, has both a subjective and an objective component. It is the subjective disregard of an objective phenomenon.

Under Maryland’s test of the mental state required for criminal reckless endangerment, therefore, a police officer could be found guilty of criminally reckless conduct but nevertheless escape liability for the exact same conduct in an Eighth Amendment civil action. *Farmer*’s test would permit the police officer to acknowledge that the risk of harm was, indeed, objectively

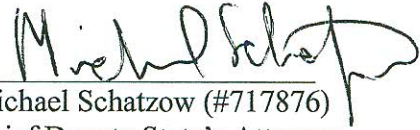
substantial, but she could then simply testify that she subjectively did not appreciate the substantiality of the risk. If believed, this is a valid defense to such a federal claim. *Williams*, however, clearly forecloses such a defense for a defendant in Maryland. If the jury found the substantiality of the risk to be objectively clear to a police officer similarly situated and found that the officer was subjectively aware of at least some degree of risk, it would not matter in this state whether the officer on trial actually understood that the degree of risk presented by his actions rose to the level of being criminally substantial.

Although Maryland's courts and the Supreme Court both use the word *reckless* in their tests, the Defendant has simply read each book of law by its cover and has failed to acknowledge the different definition each jurisdiction actually ascribes to the word. Her reliance on federal constitutional claims to understand Maryland's reckless endangerment crime—and by flawed analogy, second degree assault—turns out to employ specious logic dependent on superficial but not legally significant similarities. Therefore, even if the Court looks to federal law for guidance in resolving the Defendant's Motion, none of the cases she cites provide an appropriate analogy. Her Motion is as substantively meritless as it is procedurally improper.

Wherefore, the State requests that this Court deny the Defendant's Motion to Dismiss for Failure to Charge a Crime on any or all of the grounds discussed herein.

Respectfully submitted,

Marilyn J. Mosby



Michael Schatzow (#717876)
Chief Deputy State's Attorney
120 East Baltimore Street
The SunTrust Bank Building
Baltimore, Maryland 21202
(443) 984-6011 (telephone)
(443) 984-6256 (facsimile)
mschatzow@stattorney.org



Janice L. Bledsoe (#68776)
Deputy State's Attorney
120 East Baltimore Street
The SunTrust Bank Building
Baltimore, Maryland 21202
(443) 984-6012 (telephone)
(443) 984-6256 (facsimile)
jbledsoe@stattorney.org



Matthew Pillion (#653491)
Assistant State's Attorney
120 East Baltimore Street
The SunTrust Bank Building
Baltimore, Maryland 21202
(443) 984-6045 (telephone)
(443) 984-6252 (facsimile)
mpillion@stattorney.org

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2015, a copy of the State's Response to the Defendant's Motion to Dismiss for Failure to Charge a Crime was delivered to the Defendant's counsel as listed below:

By mail and email to:

Ivan Bates
Tony Garcia
201 N. Charles Street, Suite 1900
Baltimore, Maryland 21201
(410) 814-4600
ivan@batesgarcia.com
Attorney for Sergeant Alicia White

Respectfully submitted,

Marilyn J. Mosby


Janice L. Bledsoe (#68776)
Deputy State's Attorney
120 East Baltimore Street
The SunTrust Bank Building
Baltimore, Maryland 21202
(443) 984-6012 (telephone)
(443) 984-6256 (facsimile)
jbledsoe@stattorney.org