Amicus Curiarum

VOLUME 35
ISSUE 7 JULY 2018

A Publication of the Office of the State Reporter

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https://mdcourts.gov/data/opinions/coa/2018/66a17.pdf

COURTS AND JUDICIAL PROCEEDINGS ARTICLE – STATUTE OF REPOSE – SCOPE

Facts:

On January 13, 2012, Sean McLaughlin arrived at the Chuck E. Cheese restaurant located at the Festival at Riva Shopping Center in Annapolis, Maryland to repair the HVAC unit on the restaurant's roof. McLaughlin placed a ladder on one of the restaurant's exterior walls that he presumably thought led up to the building's roof. The wall enclosed an open-air garbage area typically occupied by dumpsters or trash compactors. After McLaughlin climbed the ladder, he mounted the wall and fell 20 feet to the concrete pad on the other side. McLaughlin sustained severe injuries and died 12 days later.

Respondents Moreen Elizabeth Gilroy and McLaughlin's other survivors (collectively "Gilroy") filed a wrongful death action in the Circuit Court for Anne Arundel County against Petitioners SVF Riva Annapolis, LLC ("SVF"), the owner of the shopping center in which Chuck E. Cheese was located, Rappaport Management Corporation ("Rappaport"), the shopping center's property manager, and the tenant and restaurant owner, CEC Entertainment, Inc. ("CEC").

Petitioners moved to dismiss the complaint. They argued that Maryland's statue of repose, codified at Md. Code (1973, 2013 Repl. Vol.), § 5-108 of the Courts and Judicial Proceedings Article ("CJP"), barred the suit. Specifically, the Petitioners argued that CJP § 5-108(d)(2)(i), which provides that the statute of repose shall not shield from liability any defendant "in actual possession and control" or real property as owner, tenant, or otherwise when an injury occurred, applies only in cases involving exposure to asbestos. The Circuit Court agreed and, reasoning that McLaughlin's death did not arise from exposure to asbestos, dismissed the suit. The Court of Special Appeals reversed the ruling of the Circuit Court. Petitioners filed a petition for writ of certiorari and asked the Court of Appeals to consider whether CJP § 5-108(d)(2)(i) provides an exemption to the statute of repose applicable only in asbestos cases.

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Held: Affirmed.

CJP § 5-108(a) provides a 20-year limitation on actions against certain classes of defendants for injuries resulting from improvements to real property. CJP § 5-108(d)(2)(i) sets forth several exceptions to the statute's protection for defendants.

The Court of Appeals first assessed the plain language of CJP § 5-108(d)(2)(i). The Court examined all the exceptions enumerated at CJP § 5-108(d)(2). These exceptions are joined by "or" which has a disjunctive meaning. Further, while the other exceptions listed in subsection (d)(2)(ii)–(iv) mention asbestos, subsection (d)(2)(i) does not reference asbestos. The plain language of the statute therefore, supports the conclusion that subsection (d)(2) sets forth four independent exceptions to the statute of repose.

The Court also assessed the legislative history of the statute of repose in Maryland. Since the statute's inception in 1970, it has provided an exception for persons "in actual possession and control as owner, tenant or otherwise," of an improvement to real property. The General Assembly also made no mention of the possession and control exception when it amended the statute to provide further exceptions relating to injuries caused by asbestos.

The Court of Appeals held that CJP § 5-108(d)(2)(i) eliminates the statute of repose's protection for any defendant in actual possession or control of real property, regardless of whether the plaintiff's claimed injury arose from exposure to asbestos. The plain language of the statute requires such an interpretation and the legislative history of the statute does not contradict that interpretation.

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Albert Otto v. State of Maryland, No. 60, September Term 2017, filed June 21, 2018. Opinion by Hotten, J.

Watts, J., joins in judgment only.

https://mdcourts.gov/data/opinions/coa/2018/60a17.pdf

CRIMINAL LAW – EVIDENCE – COMMON LAW DOCTRINE OF VERBAL COMPLETENESS

CRIMINAL LAW – EVIDENCE – COMMON LAW DOCTRINE OF VERBAL COMPLETENESS – INDEPENDENT ADMISSIBILITY

Facts:

Albert Carl Otto ("Petitioner") was charged in two separate indictments with three counts of second-degree rape of S.L., the mother of his three children. S.L. accused Petitioner of raping her on January 1, 2015, January 8, 2015, and February 2, 2015. In November 2015, Petitioner was tried in a consolidated jury trial in the Circuit Court for Montgomery County. The jury found Petitioner not guilty of the January 1, 2015 charge, guilty of the January 8, 2015 charge, and a mistrial was declared regarding the February 2, 2015 charge.

Between January 8, 2015 and February 2, 2015, Montgomery County police officers responded to S.L.'s apartment multiple times, where S.L. reported forcible sexual intercourse between her and Petitioner. On February 2, 2015, D.L., the seven-year old daughter of Petitioner and S.L., placed a 911 call stating that "my dad is hurting my mom."

Prior to trial, D.L. was interviewed by a forensic interviewer employed by Montgomery County Child Welfare Services. During the videotaped interview, D.L. described how she watched through a crack in the door as Petitioner hurt S.L. On the first day of trial, the State called D.L. to the stand, anticipating that she would testify that she witnessed Petitioner hurt S.L. S.L said she did not remember talking to a forensic interviewer, and that her "dad did not hurt my mommy." Petitioner initially objected to the videotape's admission in its entirety. However, after hearing the testimony, he withdrew his objection but maintained objection to certain portions of the video recording being redacted as improper evidence of other crimes, wrongs, or acts. *See* Md. Rule 404(b). Ultimately, the videotape was admitted into evidence and played for the jury.

Petitioner was released pre-trial with the condition that he have no contact with S.L. Petitioner, however, violated the no contact order and married S.L. prior to trial. On the second day of trial, Petitioner requested that S.L. assert her spousal privilege in front of the jury.

On the fourth day of trial, the State sought to admit excerpted portions of telephone calls that Petitioner made to his mother during pre-trial detention. Over Petitioner's objection, the trial

court admitted the redacted paper transcript of the calls ("the redacted call transcript") into evidence as State's Exhibit 96 and the excerpted audio recording of the calls was played for the jury. During Petitioner's case-in-chief, he sought to admit the non-redacted paper transcript of the same calls, State's Exhibit 6 ("the non-redacted call transcript") pursuant to the doctrine of verbal completeness. Portions of the redacted call transcript included:

> I'm wanting to move her and the kid into my house if something - - my best chance out of this is for my family to help her out because she, you know, if she helps recant all this stuff if, if, you know, she's left in an entirely abandoned position right now too, then she's just going to want to cooperate with the State to get the State's assistance and that's going to screw me.
>
> ****
>
> The only chance I have is for my family to take them in, take care of those kids. If she wants to be part of this family, recant everything she said.
>
> ****
>
> [I]f our family opens their arms for her and helps out with these kids, I'm sure she'll be more than happy to help recant all this stuff. But if we screw her over, then she's not.

The non-redacted call transcript included statements about Petitioner's legal representation, a bond hearing, and other personal matters.

At trial, Petitioner objected to admission of the redacted call transcript, arguing that when he said he was "going to be screwed[,]" he was referring solely to an upcoming bond hearing, not the impending trial, and that the non-redacted call transcript would illuminate that issue for the jury. Denying Petitioner's motion, the trial judge opined that Petitioner's focus was not on S.L. recanting at the bond hearing, but rather, if his family did not provide amenities and support for S.L., she would be more compelled to testify against him.

The Court of Special Appeals affirmed Petitioner's conviction. The Court of Appeals granted *certiorari*.

Held: Affirmed.

The Court of Appeals held that the trial court properly denied admission of the non-redacted call transcript. This Court's decision in *Feigley v. Baltimore Transit Co.*, 211 Md. 1, 10, 124 A.2d 822, 827 (1956) requires:

> [1] No utterance irrelevant to the issue is receivable;

> [2] No more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part, is receivable;
>
> [3] The remainder thus received merely aids in the construction of the utterance as a whole, and is not in itself testimony.

(Emphasis omitted). Although portions of the non-redacted telephone transcript are relevant, it was just as reasonable to conclude that the remaining transcripts did not explain or aid in constructing the redacted portions admitted by the State. Assessing the second corollary from *Feigley*, the trial court did not abuse its discretion in determining that the remaining telephone calls did not concern the same subject or help to explain the partial statements. The redacted call transcript admitted by the State involved Petitioner's scheme to have his family take care of S.L. to convince her to recant her allegations. The remainder of the telephone call did not directly discuss the scheme, but references his finances, an upcoming bond hearing, and the presiding judge.

The parties disagreed about the third corollary in *Feigley*, regarding whether the evidence admitted pursuant to the common law doctrine of verbal completeness must be independently admissible. Petitioner argued that the trial court had no discretion to exclude the remaining telephone transcript because it was not independently admissible. Respondent asserted that the trial court did not deny Petitioner's request to admit the entire call because it was not otherwise admissible. The trial judge's colloquy with counsel demonstrated a consideration of common law precedent requiring that evidence admitted pursuant to the doctrine of verbal completeness, aid in construing or explaining the admitted evidence. In fact, the trial judge made no reference to independent inadmissibility. Thus, Petitioner's arguments about independent admissibility were misplaced.

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Robert Wheeler v. State of Maryland, No. 50, September Term 2017, filed June 25, 2018. Opinion by Hotten, J.

Adkins and Watts, JJ., concur.

https://mdcourts.gov/data/opinions/coa/2018/50a17.pdf

CRIMINAL LAW – EVIDENCE – ESTABLISHING CHAIN OF CUSTODY

CRIMINAL LAW – EVIDENCE – SUFFICIENCY OF THE EVIDENCE

CRIMINAL LAW – EVIDENCE – ADMISSION OF EVIDENCE

Facts:

Petitioner, Robert Wheeler, faced charges of distribution of controlled dangerous substances (to wit: heroin and cocaine) and related offenses in the Circuit Court for Baltimore City. He challenged the admission of the controlled dangerous substances pursuant to Maryland Code Annotated, Courts and Judicial Proceedings Article §10-1003,("Cts. & Jud. Proc."), arguing that strict compliance is required to establish chain of custody. The trial court disagreed and determined that the evidence was sufficient to establish chain of custody.

The following facts were adduced at trial. On September 21, 2015, Baltimore City Detective Ivan Bell, as part of an undercover drug operation, attempted to purchase controlled dangerous substances in the 5100 block of Park Heights Avenue in Baltimore City, Maryland. During the operation, Petitioner was observed advertising "space jam" for sale, a name given to the type of heroin sold in the area. Petitioner escorted Detective Bell behind several stores where two other individuals sold him three baggies of a suspected controlled dangerous substance, later identified as heroin. Two of the three baggies purchased were orange, while the third was clear with conspicuous blue writing.

Prior to the start of trial, Petitioner made a timely demand pursuant to Cts. & Jud. Proc. Art. § 10-1003, for all persons in the chain of custody to testify. The packaging officer was unavailable and not present at trial. Following the testimony of Detective Bell and the State chemist, the trial the court admitted the suspected controlled dangerous substances, concluding that the testimony negated the reasonable possibility of tampering and that the items presented at trial were in fact those recovered on September 21, 2015. At the conclusion of trial, the jury convicted Petitioner of conspiracy to distribute heroin and distribution of heroin, and acquitted him of the charges of possession with intent to distribute cocaine and possession of cocaine.

Held: Affirmed.

The Court of Appeals determined that when evaluating evidence of a controlled dangerous substance presented at trial, it must determine whether the integrity of the evidence was satisfied prior to its admission. The Court also determined that the establishment of chain of custody is a decision left to sound discretion of the trial court, and that it must consider whether the State satisfied its burden of establishing that the controlled dangerous substance was in substantially the same condition as when it was initially recovered. In reaching this conclusion, the Court examined the common law predating the enactment of Cts. & Jud. Proc. Art. §§ 10-1001, 10-1002, and 10-1003, where a suspected controlled dangerous substance was admissible upon a showing that such evidence was what it purported to be and exhibited no evidence of tampering.

With the enactment of Cts. & Jud. Proc. Art. §§ 10-1001, 10-1002 and 10-1003, the General Assembly created a procedural mechanism to shortcut the admission of a controlled dangerous substance into evidence. The Court determined that Cts. & Jud. Proc. Art. §§ 10-1001, 10-1002, and 10-1003 were intended to relax the formal requirements for requiring testimony from all persons in the chain of custody prior to admitting suspected controlled dangerous substances into evidence, but left unmodified the common law requirements relative to reliability. When Petitioner made his demand pursuant to Cts. & Jud. Proc. Art. § 10-1003, the State was precluded from availing itself of the statutory shortcut. At that point, the State was required to comport with authentication and admissibility requirements that demonstrated that the controlled dangerous substance was in the same or substantially the same condition as when it was recovered, and that there was no reasonable evidence of tampering. The trial court determined that the testimony of the Detective Bell, the seizing officer and the state chemist was sufficient to establish that the controlled dangerous substances presented at trial were in fact the drugs recovered on the day in question. The trial court did not abuse its discretion, because it properly considered all the evidence presented before rendering its ruling. Where there has been an invocation of the right to have all witnesses produced pursuant to Cts. & Jud. Proc. Art. § 10-1003, the State may not proceed under the streamlined procedure and instead, must negate a reasonable probability of alteration or tampering. This burden was satisfied.

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Brian Arthur Tate v. State of Maryland, No. 65, September Term 2017, filed June 25, 2018. Opinion by Greene, J.

https://mdcourts.gov/data/opinions/coa/2018/65a17.pdf

CRIMINAL LAW – CRIMINAL PROCEDURE – MARYLAND RULE 4-242(c) – VALIDITY OF A GUILTY PLEA

CRIMINAL LAW – CRIMINAL PROCEDURE – APPEAL OF A CONVICTION FOLLOWING A GUILTY PLEA

CRIMINAL LAW – CRIMINAL PROCEDURE – CRIM. PROC. § 7-104 – INTERESTS OF JUSTICE

Facts:

Petitioner Brian Arthur Tate pleaded guilty to first-degree murder and was sentenced to life in prison on November 2, 1992. After he did not appeal his conviction following his guilty plea, Mr. Tate filed for postconviction relief in 2005. He argued, in part, that his guilty plea was not entered knowingly and voluntarily. The postconviction court granted a stay of proceedings and permitted Mr. Tate to file a belated application for leave to appeal, which the Court of Special Appeals denied in 2009. After his application for leave to appeal was denied, the Circuit Court did not find Mr. Tate was entitled to postconviction relief for entering an unknowing and involuntary guilty plea, but the court did permit Mr. Tate to file for review of his sentence by a three-judge panel on the basis that he had received ineffective assistance of counsel at his plea hearing. The three-judge panel decided not to alter Mr. Tate's sentence in 2010, and he filed two applications for leave to appeal, one to appeal the denial of postconviction relief on the basis of his guilty plea and one to review the decision by the three-judge panel. The Circuit Court consolidated the applications for leave to appeal, and the Court of Special Appeals denied the applications in 2013.

Pending a determination on his applications for leave to appeal, Mr. Tate filed a motion to reopen his postconviction case pursuant to Section 7-104 of the Criminal Procedure Article of the Maryland Code (2001, 2008 Repl. Vol.). The Circuit Court reopened proceedings in 2014 on the basis the Court of Appeals' decision in *State v. Daughtry*, 419 Md. 35, 18 A.3d 60 (2011), and the hearing judge determined that Mr. Tate did not enter his guilty plea knowingly and voluntarily. The State appealed, and the Court of Special Appeals reversed the determination of the Circuit Court. The intermediate appellate court held that Mr. Tate entered his guilty plea knowingly and voluntarily. The Court of Appeals granted *certiorari*.

Held: Affirmed.

The Court of Appeals held that Mr. Tate entered his guilty plea knowingly and voluntarily. Pursuant to Maryland Rule 4-242(c), a court may not accept a guilty plea unless it is made knowingly and voluntarily. Whether a guilty plea is made knowingly and voluntarily is reviewed under the totality of the circumstances. *State v. Priet*, 289 Md. 267, 276, 424 A.2d 349, 354 (1981). Without needing to look outside the record of the plea hearing, Mr. Tate knowingly and voluntarily pleaded guilty to first-degree murder. Mr. Tate affirmed, on the record, that he had received a copy of the charges, that he read the charges, that he discussed the charges with his attorney, that he understood the charges, that he understood what he was pleading guilty to, that he told his attorneys all the facts about the case, that they told him what he could do in court, and that they had done everything they could in his defense. Mr. Tate confirmed that he and his attorneys discussed at length the plea negotiations, and that Mr. Tate chose to proceed with entering his guilty plea. Additionally, the facts of the crime would lead to no other reasonable conclusion other than that he committed first-degree murder.

Further, the Court of Appeals held that the postconviction hearing judge erred as a matter of law in misapplying the *Daughtry* opinion to the collateral review process in Mr. Tate's case. The Court of Appeals in *State v. Daughtry*, 419 Md. 35, 72–73, 18 A.3d 60, 82 (2011), held that a reviewing court must limit itself to the record before the plea hearing judge when assessing whether a guilty plea was made knowingly and voluntarily. *Daughtry* applied only in the context of appeals of a conviction following a guilty plea and not postconviction proceedings. *State v. Smith*, 443 Md. 572, 653–54, 117 A.3d 1093, 1141 (2015); *State v. Rich*, 454 Md. 448, 466–467, 164 A.3d 355, 366 (2017). The postconviction hearing judge who reviewed Mr. Tate's guilty plea applied *Daughtry* to the facts of the case before him despite the difference in procedural posture between *Daughtry* and Mr. Tate's case. The *Daughtry* opinion only applies to appeals of convictions after a guilty plea, whereas review in Mr. Tate's case was based upon his request to reopen his postconviction case pursuant to Section 7-104 of the Criminal Procedure Article of the Maryland Code (2001, 2008 Repl. Vol.).

Finally, the Court of Appeals held that the postconviction hearing judge abused his discretion in reopening Mr. Tate's postconviction proceedings on the basis of the *Daughtry* opinion. Section 7-104 of the Criminal Procedure Article of the Maryland Code (2001, 2008 Repl. Vol.) permits a court to reopen a postconviction proceeding when doing so would be in the interests of justice. Believing that the *Daughtry* opinion had changed the law, the hearing judge held that it was in the interests of justice to reopen Mr. Tate's postconviction proceedings. Because the *Daughtry* opinion did not alter the law applicable to Mr. Tate's case or this Court's guilty plea jurisprudence, the postconviction hearing judge abused his discretion in reopening Mr. Tate's case.

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Davon Wallace v. State of Maryland, No. 53, September Term 2017, filed June 4, 2018. Opinion by Moylan, J.

http://www.mdcourts.gov/opinions/cosa/2017/0053s17.pdf

ATTACHMENT OF THE SIXTH AMENDMENT RIGHT TO COUNSEL – BEING AN "ACCUSED" VS. BEING AT A "CRITICAL STAGE" – A CONTRACTUAL RIGHT TO COUNSEL IS NOT A CONSTITUTIONAL RIGHT TO COUNSEL

Facts:

On August 10, 2014, appellant, Davon Wallace was assaulted by Rashad Philpot and his friend Anthony outside of Rashad's house in Prince George's County. After retreating from the scene, appellant retrieved a loaded handgun from a friend's car. Upon returning to the scene, appellant fired six shots at the bedroom in which he believed Rashad and Anthony to have been. One of those shots struck and killed three-year-old Knijah Bibb.

That day, appellant retained defense counsel. His attorney informed Prince George's County prosecutors that appellant would surrender himself on August 12. When he failed to do so a manhunt ensued. Appellant ultimately was captured on September 16. During a taped police interview conducted without his attorney present, appellant made statements incriminating him in the death of Knijah Bibb. Though an arrest warrant had been issued prior to appellant's capture and subsequent interrogation, he was not formally indicted until November 18, 2014.

On the first day of his jury trial, appellant requested the court's permission to discharge his attorney. The court denied appellant's request, finding that there were no meritorious reasons for doing so. As trial proceeded, appellant objected to the admission in evidence of the incriminating statement he had made to the police, claiming that he had been denied his Sixth Amendment right to counsel at the time that the statement was made.

At the end of the State's case in chief, appellant moved for a judgment of acquittal, citing as the basis for his motion a jury instruction on second-degree felony murder to which appellant had excepted previously. Appellant "adopt[ed] and incorporate[d] all of those arguments" into his motion, and, in all other respects submitted on the evidence. The court denied appellant's motion. At the end of the case, appellant renewed his motion, submitting it "on prior argument." That motion was likewise denied.

The jury convicted appellant of second-degree murder and two related firearm counts.

Held: Affirmed.

Given that appellant's Sixth Amendment right to counsel had not yet attached at the time of his interrogation, the court properly admitted his incriminating statement in evidence. The court did not abuse its discretion in denying appellant's request to discharge counsel as that ruling was not "beyond the fringe of what [this] [C]ourt deems minimally acceptable." *Evans v. State*, 396 Md. 256, 277, 914 A.2d 25 (2006). Appellant failed to preserve for appellate review his exception to the court's instruction on second-degree felony murder. The commitment record shall be corrected to properly reflect appellant's having been convicted of second-degree—and not first-degree—murder.

Appellant contends that the court erroneously denied his motion to suppress an incriminating statement he made to the police, claiming that, at the time it was made, he had been denied his Sixth Amendment right to counsel. The Sixth Amendment right to counsel applies to "an accused" at a "critical stage." A suspect is eligible for the honorific "accused" only upon the State's having made a commitment to prosecute. Such a commitment is made by (i) a Grand Jury's filing an indictment, (ii) the State's Attorney's filing a criminal information, or (iii) the filing of an ultimate pleading. A suspect does not become "an accused" merely upon the issuance of a Statement of Charges or an arrest warrant—both purely investigative procedures. Given that appellant's statement was elicited prior to his having been indicted, his Sixth Amendment right to counsel had not yet attached at the time that statement was made. That appellant enjoyed a contractual right to counsel at the time his incriminating statement was made is irrelevant to the time at which his Sixth Amendment right attached.

Appellant next contends that the court erroneously ruled that he had no meritorious reason for discharging counsel. "Meritorious" means with "good cause." The Court reviews such rulings for abuse of discretion, and will affirm unless the court's decision was "beyond the fringe of what th[e] [C]ourt deems minimally acceptable." *Evans*, 396 Md. at 277. Here, appellant's principal gripe was with the infrequency of his and counsel's communications. He had, however, been represented by his attorney for two years without previously having brought a complaint before the court. Upon eliciting from counsel an explanation of his trial preparations, the court denied appellant's request, providing a cogent explanation for having done so. That finding did not constitute an abuse of discretion.

Appellant also challenges the sufficiency of the evidence to sustain a conviction for second-degree depraved heart murder. During both of his motions for judgment of acquittal, appellant referenced "prior argument." Doing so does not comply with Rule 4–324(a)'s requirement to "state with particularity all reasons why the motion should be granted." The Court interprets that requirement as demanding that appellant state those reasons with particularity *here and now*, and not by reference to some prior exception.

Even had appellant preserved his sufficiency challenge, the Court would hold that the evidence was sufficient to support a conviction for second-degree murder. Second-degree murder is a single crime capable of being committed via multiple modalities.

Appellant asks that the Court engage in "plain error" review of the court's erroneously having instructed the jury that first-degree assault could serve as the predicate felony for felony murder. The Court declines to exercise its discretion to do so.

Finally, appellant contends that the commitment record inaccurately reflects his having been convicted of first-degree murder. The record clearly indicates that appellant was acquitted of first-degree murder. The Court, therefore, directed the circuit court to correct the commitment record to reflect the crime for which appellant was, in fact, convicted.

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Mynor Vargas-Salguero v. State of Maryland, No. 159, September Term 2017, filed June 1, 2018. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2018/0159s17.pdf

FIFTH AMENDMENT – RIGHT TO COUNSEL – INVOCATION

FIFTH AMENDMENT – RIGHT TO SILENCE – INVOCATION

Facts:

In September 2014, a man was killed in Langley Park by a single stab wound to the chest. A few days later, detectives obtained an arrest warrant for the defendant, Mynor Vargas-Salguero. Officers arrested Mr. Vargas-Salguero and brought him to an interrogation room. They advised him of his rights under *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), then began questioning him.

Mr. Vargas-Salguero's first language is Spanish and he speaks some English. Two of the detectives interrogating Mr. Vargas-Salguero spoke English and Spanish, and one spoke only English. Most of the interrogation was in Spanish, and the Spanish-speaking detectives occasionally translated or summarized for the non-Spanish-speaker.

Before trial, Mr. Vargas-Salguero moved *in limine* to suppress statements he made to the detectives on the grounds that his Fifth and Sixth Amendment rights to an attorney had been violated and his Fifth Amendment right to silence had been violated. The trial court considered testimony by the detectives during the hearing, the transcript of the interrogation, and the relevant excerpts of the recorded interrogation and denied the motion to suppress. After a jury trial, Mr. Vargas-Salguero was convicted of second-degree felony murder, robbery, and theft.

On appeal, Mr. Vargas-Salguero argued that the circuit court erred in denying the motion to suppress. He argued that he had invoked his Fifth Amendment right to an attorney when he said during the interrogation, in Spanish, "si me acusan de eso quiero un abogado mejor," which was translated as "if you accuse me of something I better want an attorney." Mr. Vargas-Salguero argued that he invoked his Fifth Amendment right to silence in a statement immediately preceding his invocation of counsel: "[t]hat's all I have to say to you. And if you accuse me of something I better want an attorney."

After he made that statement, the detectives left the room for a few minutes, and when they returned they re-advised Mr. Vargas-Salguero of his rights to silence and to an attorney before they re-initiated questioning.

Mr. Vargas-Salguero also argued that he invoked his right to silence a second time, about fifteen minutes later, when he said, in Spanish, "[i]n what moment did – did – I don't want to say anything else now. Because I have nothing else to say. I have nothing else to tell you. Me, killing

a poor man." After he made that statement, one of the detectives again re-advised him of his *Miranda* rights, and the interrogation continued.

Finally, Mr. Vargas-Salguero argued that his Sixth Amendment right to counsel was violated.

Held: Reversed and remanded.

The Court of Special Appeals held that the circuit court erred in denying his motion to suppress, and reversed the judgment and remanded to the circuit court.

With respect to the right to counsel, the statement at issue ("si me acusan de eso quiero un abogado mejor") has two components that the Court addressed: the conditional opening ("if I am being accused of something") and the request itself ("I better want an attorney"). The overarching principle in the anaylsis is that "[a] statement either is [] an assertion of the right to counsel or it is not." *Davis v. United States*, 512 U.S. 452, 459 (1994).

First, where a defendant invokes his right to counsel on a condition that in context would, to the reasonable police officer, have clearly been met, the request for counsel is unequivocal and unambiguous and further interrogation by officers after that point violates the defendant's Fifth Amendment rights. *Ballard v. State*, 420 Md. 480, 482, 485, 491, 492–93 (2011). Here, the Court concluded that the condition "if you accuse me of something" in the first half of Mr. Vargas-Salguero's statement had indisputably been met, at least in the way that a normal person—and a reasonable police officer—would consider himself "accused of something."

Second, the Court concluded that Mr. Vargas-Salguero's statement that he'd "better want an attorney" sufficiently invoked his desire for an attorney. *See, e.g., State v. Harris*, 305 S.W.3d 482 (Mo. Ct. App. 2010) (suspect invoked right to counsel by stating "I'd rather appoint a lawyer"); *McDaniel v. Commonwealth*, 506 S.E.2d 21 (Va. Ct. App. 1998) (suspect invoked right to counsel by stating "I think I would rather have an attorney here to speak for me").

Moreover, the testimony and actions of the detectives themselves demonstrated that Mr. Vargas-Salguero's request for counsel was sufficiently clear to them. Shortly after Mr. Vargas-Salguero said that he'd "better want an attorney," the detectives left the room for about three minutes. When they returned, one of them said "Hold up, just a moment ago you said **you wanted a lawyer** but you're willing to talk to us right now, right?" (The portions of the detective's statement in bold were omitted from the written transcript prepared by police; the Court viewed and relied on the video, which was part of the record before the circuit court and which did contain that language, in conducting its review of the case.) The detectives' decisions to pause the interview, re-enter the room, then re-administer the *Miranda* warning, after acknowledging that he had asked for a lawyer, demonstrated that Mr. Vargas-Salguero invoked his Fifth Amendment right to counsel with sufficient clarity. *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981).

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With respect to his right to silence, the Court found that both statements invoked that right. The same standard for an invocation of silence applies as for an invocation of counsel: the statement either invoked the right or it didn't. *In re Darryl P.*, 211 Md. App 112, 169 (2013). Both invocations were sufficiently clear. In addition, it was improper for the detectives to re-advise Mr. Vargas-Salguero of his *Miranda* rights and re-initiate the interrogation. *Edwards*, 451 U.S. at 484–85. (With respect to the second statement, the police omitted from their transcript the bolded text in the following response given by one of the detectives: "**Look, are you willing to talk? I thought you said you didn't want to talk to us.** Do you want to talk to me? Are you willing to talk to me?") And because the detectives re-initiated the questioning, Mr. Vargas-Salguero did not waive his right to remain silent when he answered their questions. *See Raras v. State*, 140 Md. App. 132, 153 (2001); *Davis*, 512 U.S. at 458.

The Court went on to find that admitting the statements was not harmless error because the partial confession that Mr. Vargas-Salguero had gotten into an altercation with the victim and stolen his phone on the night of the murder undoubtedly affected the outcome of his conviction.

The Court concluded by holding that Mr. Vargas-Salguero's Sixth Amendment right to counsel had not yet vested at the time of his arrest because, under Maryland law, that right did not vest until he was charged on October 30, 2014 by criminal indictment with murder, armed robbery, and carrying a dangerous weapon openly with intent to injure. *White v. State*, 223 Md. App. 353, 379 (2015); *see also* MD. CODE ANN., CTS. & JUD. PROC. § 4-302(a).

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Barkha Gurbani v. Johns Hopkins Health Systems Corp., et al., No. 1825, September Term 2016, filed June 1, 2018. Opinion by Arthur, J.

https://mdcourts.gov/data/opinions/cosa/2018/1825s16.pdf

EDUCATION – BREACH OF CONTRACT OR NEGLIGENCE IN ACADEMIC DECISIONS

Facts:

Barkha Gurbani, M.D., started an orthopaedic surgery residency at the University of Pennsylvania in 2009. After her first year in the program, she was placed on probation based on her performance. Dr. Dawn LaPorte, the program director for an orthopaedic surgery residency program at the Johns Hopkins University School of Medicine, invited Dr. Gurbani to transfer to Johns Hopkins.

In July 2011, Dr. Gurbani entered into a one-year contract with Johns Hopkins University. She was appointed as a second-year resident in the five-year program. The contract required her to provide clinical services at Johns Hopkins medical facilities in exchange for a stipend, liability insurance, and other benefits.

The residency contract also covered educational services. Among other things, it required the University to evaluate Dr. Gurbani's progress "on a regular and periodic basis." The contract authorized the program director to institute probation if she deemed Dr. Gurbani's performance to be deficient. The contract gave the program director sole discretion on whether to promote Dr. Gurbani to the next level of training. The contract specified that, if the University elected not to renew the one-year appointment, the University would give notice four months in advance or as far in advance as the circumstances would reasonably allow. The contract also required the University to follow its general polices for probation and for grievances by residents.

Beginning in July 2011, Dr. Gurbani progressed through a series of 10-week rotations focusing on different aspects of orthopaedic medicine. Faculty members completed formal evaluations that included numerical scores and written comments. Once a formal evaluation was submitted, Dr. Gurbani had access to the scores and comments.

During her first two rotations, the faculty generally praised Dr. Gurbani's performance. As the responsibilities and expectations increased, however, the faculty began to express concern about her progress. She encountered more serious difficulty after advancing to her third rotation, which focused on sports medicine.

The contract specified that the program director would "present to and discuss" with the resident "a written summary of the evaluations" every six months. Dr. LaPorte met Dr. Gurbani for that semi-annual evaluation meeting and afterwards prepared a memo to document their discussions

about Dr. Gurbani's lack of progress. Although Dr. Gurbani admits that the meeting occurred, she denies that Dr. LaPorte expressed any concerns or offered any written summary to her.

On her next rotation, which focused on pediatric orthopaedics, Dr. Gurbani received marginal scores in an evaluation from the head of that division. Two other faculty members submitted even less favorable evaluations of her performance on that rotation, but they neglected to submit their evaluations until several weeks after the rotation ended.

For her final rotation of the academic year, Dr. Gurbani worked on the orthopaedic trauma service with Dr. Greg Osgood and Dr. Erik Hasenboehler. A few weeks after the start of the rotation, both attending physicians told Dr. LaPorte that they had concerns about Dr. Gurbani's performance. Around the same time, Dr. Gurbani began making complaints to Dr. LaPorte about the way she was treated by those two attending physicians. Dr. Gurbani claims that she reported specific instances of sexist or inappropriate behavior by the two attending physicians. Dr. LaPorte claims that Dr. Gurbani expressed only a more general feeling that she was being treated unfairly.

Five weeks before the end of the academic year, the faculty met to discuss Dr. Gurbani's performance. Dr. Osgood, Dr. Hasenboehler, and six other faculty members expressed significant concerns about her performance. Soon after the meeting, Dr. LaPorte informed Dr. Gurbani that, if she wished to remain in the program, she would need to accept a four-month academic probation.

Dr. Gurbani requested an appeal or grievance at the time she was placed on probation. Dr. LaPorte referred Dr. Gurbani to the associate dean of graduate medical education. Dr. Gurbani claims, however, that the associate dean told her that the department was refusing to honor her request to appeal the probation decision.

Dr. LaPorte gave Dr. Gurbani a letter outlining the guidelines and expectations for her probation. The letter stated that she would spend two months on the pediatric orthopaedics service followed by two months on the orthopaedic trauma service. The letter stated that Dr. Gurbani would receive "formal verbal feedback" from an attending physician every week, that she would meet with Dr. LaPorte every two weeks, and that she would receive "written feedback" every two to four weeks.

In July 2012, Dr. Gurbani signed a new residency contract with terms similar to those of the first contract. She was reappointed at the second-year postgraduate level, but not promoted to the third-year level.

Dr. Gurbani repeated the pediatric orthopaedics rotation in July and August of 2012. The faculty members noted some significant improvement but they still identified deficiencies in her technical skills and decision making.

Neither Dr. Osgood nor Dr. Hasenboehler had submitted written evaluations from Dr. Gurbani's first attempt at the orthopaedic trauma rotation earlier in the year. When she started her second

attempt at the orthopaedic trauma rotation, Dr. Osgood belatedly submitted an evaluation in which he described several deficiencies in her performance.

Although the probation letter stated that Dr. Gurbani would receive formal verbal feedback every week, Dr. Osgood had only one meeting with Dr. Gurbani during the rotation outside of their day-to-day interactions. Dr. Osgood and Dr. Hasenboehler nevertheless continued to convey their impressions to Dr. LaPorte, who continued to meet regularly with Dr. Gurbani. Dr. Gurbani continued to complain about the lack of formal feedback and what she perceived as unfair treatment by the attending physicians.

The probation committee met ten days before the scheduled end of the probation period. Faculty members identified different combinations of deficiencies in Dr. Gurbani's medical knowledge, motor skills, decision-making, communication skills, and professionalism. They concluded that she was "not likely to progress to a point where she would be able to practice safely and independently without supervision." The committee immediately informed Dr. Gurbani that she was dismissed from the program. Dr. Osgood and Dr. Hasenboehler did not submit their written evaluations until over a month after the dismissal.

Dr. Gurbani continued to receive salary and benefits until her contract term expired at the end of June 2013. A few months later, she initiated a formal grievance with the University. She accused Dr. Osgood, Dr. Hasenboehler, Dr. LaPorte, and the associate dean of violating University policies. Based on an extensive review of documents and a series of interviews, the grievance panel concluded that Dr. Gurbani should not be reinstated.

In June 2015, Dr. Gurbani filed a complaint in the Circuit Court for Baltimore City. She sought to recover damages resulting from her dismissal. In her first two counts, she alleged that the University breached the residency contracts and the implied covenants of good faith and fair dealing in those contracts. In the third count, she alleged that Dr. LaPorte, Dr. Osgood, and Dr. Hasenboehler had tortiously interfered with her residency contracts. In a final count, she alleged that the University negligently retained and supervised Dr. Osgood and Dr. Hasenboehler.

All defendants moved for summary judgment. After a hearing, the circuit court granted the motion as to all claims. The court concluded that Dr. Gurbani's claims against the University could not proceed in light of *Hunter v. Board of Education of Montgomery County*, 292 Md. 481 (1982). The court concluded that Dr. Gurbani's claims against Dr. LaPorte, Dr. Osgood, and Dr. Hasenboehler could not proceed because they were acting within the scope of their authority as University employees.

Dr. Gurbani appealed.

Held: Affirmed.

In *Hunter v. Board of Education of Montgomery County*, 292 Md. 481 (1982), the Court of Appeals established a policy of declining to entertain actions, either for negligence or for breach

of contract, based on an allegation that an educator improperly evaluated a student. Although *Hunter* concerned a minor child enrolled in public school, *Hunter* is only a single example of a deep collection of case law that overwhelmingly favors judicial noninterference in academic decisions at all levels of education. Generally, courts may not override an academic decision unless it is such a substantial departure from accepted academic norms that the decision maker did not actually exercise professional judgment.

A private medical school's decision to dismiss a surgical resident based on unfavorable assessments of the resident's clinical performance is an academic decision that is entitled to deference. In this case, the University dismissed Dr. Gurbani based on its determination that she was "not likely to progress to a point where she would be able to practice safely and independently without supervision." That academic decision, the result of a careful and deliberate exercise of professional judgment, is entitled to deference. Dr. Gurbani's s assertions that the faculty incorrectly assessed her performance could not serve as a basis to recover damages resulting from the allegedly improper dismissal.

In addition, Dr. Gurbani argued that the University breached specific and identifiable provisions of the 2011 and 2012 contracts. Generally, courts will not entertain contract claims that in fact attack the quality of educational services provided. To present a viable claim for breach of an educational services contract, the plaintiff must show that the educational institution failed to provide a particular service at all.

Citing several provisions, Dr. Gurbani contended that the University breached its obligations to provide timely feedback and supervision. Most of the provisions that she identified were neither specific nor meaningfully distinct from the University's general obligation to educate her. The evidence showed that the University did supervise her and evaluate her performance, but that some faculty members were less than prompt in submitting some evaluations. The contract provided no objective standard to assess the timeliness of those evaluations.

The probation letter was much more specific about the manner and timeline for formal feedback. The letter, however, was merely a list of guidelines. The letter created no contractual obligations in addition to those in the existing contracts.

Contrary to Dr. Gurbani's assertions, the 2011 contract did not require the University to give her four-months' notice or reasonable notice before placing her on probation. The contract required notice in the event that University elected not to "renew" the contract. The University did in fact renew the contract for 2012, but it merely declined to promote her to the next level of training.

Viewed in the light most favorable to Dr. Gurbani, the evidence generated a genuine dispute over whether the program director actually "presented" a "written summary" of her evaluations at the midyear meeting. The evidence also indicated that the University had denied Dr. Gurbani's request to initiate a grievance regarding the decision to place her on probation, before eventually honoring her request to take a grievance regarding the dismissal.

Even though Dr. Gurbani generated evidence that the University arguably breached one or two specific contractual undertakings, she failed to establish the necessary connection between those alleged breaches and the alleged damages resulting from the dismissal. The relationship between the irregularities of procedure and the academic dismissal was too speculative and subject to too many future variables to permit a finding that the academic dismissal resulted from those alleged breaches.

Hunter's prohibition on entertaining actions for negligent education also precluded Dr. Gurbani's separate claim that the University negligently retained and supervised Dr. Osgood and Dr. Hasenboehler.

Separately, Dr. Gurbani also alleged that University employees acted in bad faith when they evaluated her performance. Dr. Gurbani contended that evidence of bad-faith conduct by Dr. Osgood, Dr. Hasenboehler, and Dr. LaPorte would support her claims against the University for breach of contract or for breach of the implied covenant of good faith and fair dealing. She also contended that evidence of bad-faith conduct would support her claims against those three employees for tortious interference with contract.

Where a plaintiff alleges that a defendant acted in bad faith, the defendant is entitled to summary judgment absent a showing, supported by particular facts, sufficient to allow a fact finder to conclude that the defendant lacked good faith. Here, Dr. Gurbani failed to produce sufficient evidence of bad faith by the defendants.

Dr. Gurbani identified no direct evidence that any of the defendants evaluated her based on anything other than the honest use of professional judgment. Her mere suspicions about the supposed hidden motives of her evaluators were not evidence of bad faith. To the extent that she argued that the defendants knowingly made false reports, her mere denials of their reports were not sufficient evidence of bad faith. To the extent that she argued that the three defendants should have done a better job to help her advance in the program, their arguable failings were not sufficient evidence of bad faith.

The only factual basis that Dr. Gurbani offered for interpreting the defendants' actions as dishonest was her loose and flexible theory that her evaluators had some shared motive to lie about her performance. To rely on such a theory to fend off the summary judgment motion, Dr. Gurbani needed to present evidence of retaliatory motive in detail and with precision. At a minimum, she needed to connect the alleged retaliatory motive to the actions that it allegedly motivated. She failed to do so.

Dr. Gurbani theorized that Dr. Osgood and Dr. Hasenboehler decided to lie about her performance after she complained to Dr. LaPorte about their conduct. Yet her testimony regarding the timing of her complaints was vague. The University produced a contemporaneous memo showing that Dr. Osgood and Dr. Hasenboehler had already voiced concerns about her performance before she made her complaints. There was no evidence showing that Dr. Osgood or Dr. Hasenboehler knew about her complaints at that time. Even if such evidence did exist, that evidence would not have explained why Dr. LaPorte and other doctors would have agreed to

retaliate. Moreover, the assessments of Dr. Osgood and Dr. Hasenboehler were fully consistent with the independent assessments of other medical professionals who observed Dr. Gurbani around the same time.

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Travis Howell v. State of Maryland, No. 459, September Term 2017, filed June 27, 2018. Opinion by Berger, J.

https://mdcourts.gov/data/opinions/cosa/2018/0459s17.pdf

CRIMINAL LAW – CRIMINAL CONTEMPT – DURESS DEFENSE

Facts:

Howell was convicted of criminal contempt in the Circuit Court for Baltimore City pursuant to an agreed statement of facts. Howell's contempt conviction was based upon his refusal to testify in a murder trial. Howell had been granted use and derivative use immunity.

While in the courthouse hallway waiting to be called to testify, Howell, who was on electronic monitoring at the time, was approached by five or six unidentified men. The men threatened Howell with violence for "snitching." Courthouse security intervened and removed the men from the courthouse, but as the men were leaving, one of them told Howell, "you got to come out on the street sometime." Howell was subsequently called to the witness stand, and he refused to testify. The court informed Howell that he could be held in contempt, but he continued to refuse to testify. The court revoked Howell's electronic monitoring and he was transported to the Baltimore City Central Booking and Intake Facility. According to Howell, he was surrounded by a hostile group of detainees, some of whom called him a snitch and threatened him with violence.

The following day, Howell appeared in court for a contempt hearing. Howell again refused to testify. The circuit court ruled that Howell had committed direct contempt and ordered that Howell be held pending sentencing. Howell demanded a jury trial, and Howell was subsequently indicted by a grand jury on two counts of criminal contempt.

Prior to trial, the parties appeared for a motions hearing, at which they argued the issue of whether Howell would be permitted to raise a defense of duress to criminal contempt. The circuit court ruled that the defense of duress was not available to Howell. Howell ultimately agreed to plead not guilty pursuant to an agreed statement of facts. This appeal followed.

Held: Affirmed.

The Court of Special Appeals observed that the issue presented in this case implicates two foundational principles of American jurisprudence: the power of the government to compel witness testimony and the authority of the court to hold an individual in contempt for refusing to testify. The Court emphasized that the government's broad authority to compel witness testimony is integral to the functioning of the American judicial system, but observed that there are limitations to the government's power to compel witness testimony.

The Court of Special Appeals analyzed the United States Supreme Court's opinion in *Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961), in which the Court addressed this issue in dicta. *Piemonte* involved issues relating to procedural defects, but the Court opined in a footnote that fear for oneself or one's family is not a legal excuse for not testifying. The Court of Special Appeals discussed opinions from various United States Courts of Appeals that have adopted the reasoning of *Piemonte* and held that fear cannot excuse a witness's refusal to testify. The Court observed, however, that at least two United States Circuit Courts have indicated that the duress defense may, in certain circumstances, be invoked in a contempt case. *See Matter of Grand Jury Proceedings of Dec., 1989*, 903 F.2d 1167, 1170 (7th Cir. 1990); *In re Grand Jury Proceedings*, 652 F.2d 413, 414 (5th Cir. 1981).

The Court explained that although it agreed with the general principle that fear does not excuse a recalcitrant witness's refusal to testify, the Maryland Court of Appeals has held that duress "is a defense as to all crimes except taking the life of an innocent person." *McMillan v. State*, 428 Md. 333, 348 (2012). The Court of Special Appeals explained that it need not determine whether the duress defense is per se unavailable to a recalcitrant witness charged with contempt because, assuming arguendo that duress can be a valid defense for contempt, the defense was not generated by the evidence presented in this case.

The Court of Special Appeals emphasized that in order for duress to constitute a defense to the commission of an illegal act, "the duress by another person on the defendant must be present, imminent, and impending, and of such a nature as to induce well grounded apprehension of death or serious bodily injury if the act is not done." *McMillan*, 428 Md. at 348 (2012). The Court held that because the men who had threatened Howell with violence had been removed from the courthouse, Howell had failed to present evidence of an imminent or impending threat. Accordingly, Howell was not entitled to raise the defense of duress.

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In Re: S.K., No. 617, September Term 2017, filed June 5, 2018. Opinion by Fader, J.

https://www.courts.state.md.us/data/opinions/cosa/2018/0617s17.pdf

DISTRIBUTION OF CHILD PORNOGRAPHY – MD. CODE ANN., CRIMINAL LAW § 11-207(a)(4) – APPLICATION TO MINORS

CONSTITUTIONAL LAW – FIRST AMENDMENT – MD. CODE ANN., CRIMINAL LAW § 11-207(a)(4) – DISTRIBUTION OF CHILD PORNOGRAPHY BY A CONSENTING MINOR

STATUTORY CONSTRUCTION – MD CODE ANN., CRIMINAL LAW § 11-203 – DISPLAYING AN OBSCENE ITEM TO A MINOR – APPLICATION TO MINORS

STATUTORY CONSTRUCTION – MD CODE ANN., CRIMINAL LAW § 11-203 – DISPLAYING AN OBSCENE ITEM TO A MINOR

Facts:

The appellant, then-16-year-old S.K., sent a text message to two friends, both juveniles, containing an approximately one-minute-long digital video file of herself performing a sexual act on a presumably-adult male. The two juveniles shared a copy of the video with their school resource officer, who met with S.K. S.K. expressed concern to the officer that the video had been shared with and viewed by other students.

The State charged S.K. with distributing child pornography in violation of § 11 207(a)(4) of the Criminal Law Article and displaying an obscene item to a minor in violation of § 11 203(b)(1)(ii) of the Criminal Law Article. After an adjudicatory hearing, the Circuit Court for Charles County, sitting as a juvenile court, found S.K. involved in both offenses. In a subsequent disposition hearing, the court found S.K. to be delinquent and placed her on probation with several conditions, including that she undergo a psychiatric evaluation. S.K. appealed the findings of the juvenile court.

Held: Affirmed in Part and Vacated in Part. Remanded for Further Proceedings on Disposition.

Criminal Law § 11-207(a)(4)(i) prohibits a "person" from knowingly distributing "any matter, visual representation, or performance . . . that depicts a minor engaged as a subject in . . . sexual conduct." The Court first found that the plain meaning of the language "engaged as a subject" applies to a minor who knowingly distributes material depicting his or her own consensual sexual conduct. The Court observed that the legislative history of the statute confirms this plain language interpretation, as the General Assembly intended to curtail the sexual exploitation of minors. The Court further determined that legislative history supports that § 11-207(a)(4)(i)

requires only that a minor appear as a participant in, or object of, sexual conduct; it does not require that there be an absence of lawful consent.

The Court further determined that § 11-207(a)(4)(i) does not contain an exception for material that depicts a minor who is legally engaged in consensual sexual activity. The Court observed that the unambiguous text of the statute does not contain such an exception, and further does not contain an exemption if the minor depicted in the material is also the distributor. To read into the statute a non-existent exception, the Court noted, would exceed the Court's proper role. The Court concluded that the legislative intent of the statute reflects the State's broad interest in protecting minors from exploitation, which includes self-produced child pornography.

The Court next held that the First Amendment to the United States Constitution did not protect S.K.'s conduct under § 11-207(a)(4)(i) of distributing a video of herself as a minor engaged as a subject in consensual sexual conduct. The Court examined the United States Supreme Court's jurisprudence regarding child pornography laws, first addressing *New York v. Ferber*, 458 U.S. 747 (1982), which held that child pornography constituted a category of speech that is not protected under the First Amendment. In discussing the *Ferber* Court's rationales for this holding, which included that child pornography produces a harmful, exploitative "permanent record" of a child's participation, this Court distinguished *Ferber* from *Ashcroft v. Free Speech Coal*., 535 U.S. 234, 240 (2002), which held unconstitutional a law that prohibited virtual pornographic images of children, as opposed to real children. The Court found that *Free Speech Coalition* and subsequent Supreme Court precedent have not disturbed the holding in *Ferber,* and so pornography involving real children remains unprotected speech.

Turning to Criminal Law § 11-203(b)(1)(ii), which prohibits any person from displaying an obscene item to a minor, the Court first found the plain meaning of "person" unambiguously includes minors, and thus S.K is subject to the statute. The Court found the plain meaning of the statute unambiguous, recognizing that the General Assembly defined "item" for purposes of the statute to include only specifically-enumerated items. Thus, to be covered under the statute, the digital video file S.K. transmitted must be fairly included in one of the four categories of things that the General Assembly defined as constituting an "item."

The Court determined that three of the four categories that the General Assembly defined as constituting an "item" did not apply to S.K.'s digital video. Under § 11-203(a)(4)(iii), the remaining category, an "item" is defined as: "a videodisc, videotape, video game, film, or computer disc." Examining this grouping in context and applying principles of statutory construction, the Court determined that S.K.'s digital video file did not fall within the definition of an "item." The Court concluded that because the digital video did not constitute a "film" or any other prohibited "item" under § 11-203, S.K. could not be found involved in the offense of displaying an obscene item to a minor.

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Rasherd Lewis v. State of Maryland, No. 1115, September Term 2017, filed June 28, 2018. Opinion by Graeff, J.

Nazarian, J., dissents.
Arthur, J., concurs.

https://www.courts.state.md.us/data/opinions/cosa/2018/1115s17.pdf

SEARCH INCIDENT TO ARREST – PROBABLE CAUSE – ODOR OF MARIJUANA

Facts:

Officer David Burch, Jr., an officer with the Baltimore City Police Department, received a tip that a black male with a certain clothing description and a red bag was in possession of a handgun in the area of Eutaw Street and Saratoga Street in Baltimore City. After receiving the tip, Officer Burch notified City Watch that there was a potentially armed individual in the 400 block of W. Saratoga. City Watch subsequently identified appellant, who matched the description provided, inside Bag Mart, located at 401 W. Saratoga Street, and advised Officer Burch of this location. Officer Burch and five other officers responded.

When Officer Burch entered the store, he smelled an odor of marijuana. He saw appellant with a red bag, located near the register. Officer Burch approached appellant. When he was immediately in front of appellant, Officer Burch smelled an odor of marijuana emanating from appellant's person. Officer Burch stopped appellant based on the odor of marijuana and the tip he had received. He searched appellant and recovered a firearm from the red bag. He also recovered a zip lock baggie, containing less than 10 grams of marijuana, and miscellaneous packaging material, believed to be for packaging marijuana, from appellant's jacket.

Appellant was charged with one count of wearing, carrying, or transporting a handgun. Appellant moved to suppress the evidence recovered from the search, arguing that there was no justification for a full-blown search of his person. The circuit court denied appellant's motion.

Held: Affirmed.

When analyzing whether probable cause existed to effectuate a warrantless arrest, "'we examine the events leading up to the arrest, and then decide "whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to" probable cause.'" *Barrett v. State*, 234 Md. App. 653, 666 (2017), *cert. denied*, 457 Md. 401 (2018). The Maryland appellate courts consistently have held that the odor of marijuana provides probable cause to believe that marijuana is present, and therefore, the smell of marijuana emanating from a vehicle provides probable cause to believe that contraband or evidence of a crime will be in the vehicle authorizing a search of the vehicle. In determining whether the smell of marijuana gives

probable cause to arrest a person, however, whether the person is in a vehicle or standing in a public place, the key inquiry is whether the circumstances sufficiently link that person to the suspected criminal activity. The odor of marijuana, if localized to a particular person, provides probable cause to arrest that person for the crime of possession of marijuana.

Here, the arresting officer smelled the odor of marijuana emanating from appellant's person. Although the possession of ten grams or less of marijuana has been decriminalized, the odor of marijuana remains evidence of a crime. Because the officer was able to localize the odor of marijuana to appellant, the officer had probable cause to arrest appellant and search him incident to that arrest.

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J. Reuben Rainey v. State of Maryland, No. 1362, September Term 2011, filed April 2, 2018. Opinion by Fader, J.

https://www.courts.state.md.us/data/opinions/cosa/2018/1362s11.pdf

MD. RULE 4-345(A) – MOTION TO CORRECT AN ILLEGAL SENTENCE – PRESUMPTION OF REGULARITY OF DOCKETS

Facts:

In 1987, after two earlier mistrials, a jury convicted Mr. Rainey of two counts of first-degree murder and two sets of handgun offenses. In 2011, Mr. Rainey filed a Rule 4-345(a) motion to correct an illegal sentence, arguing that a docket entry from his first trial that stated he had been acquitted of lesser-included offenses meant his subsequent trials and convictions for first-degree murder violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

After the circuit court denied Mr. Rainey's Rule 4-345(a) motion, the Court originally granted a remand to allow the circuit court to conduct fact-finding regarding the docket entry. On remand, the circuit court made a finding of fact that Mr. Rainey was not acquitted of the lesser-included offenses and that the clerk's entry regarding the purported judgments of acquittal was erroneous. The finding was based on the testimony of witnesses as well as the behavior of all parties and the court throughout the earlier three trials and a previous direct appeal. Accordingly, the circuit court's docket entry was corrected with an entry reflecting the court's finding that Mr. Rainey was not acquitted of the lesser-included offenses. Mr. Rainey appealed, arguing that the circuit court lacked a sufficient factual basis for its finding on remand.

Held: Affirmed.

The Court affirmed for two independent reasons: (1) the basis of the illegality claimed by Mr. Rainey is not cognizable under Rule 4-345(a); and (2) the Court perceived no error in the circuit court's factual finding that the original docket entry was erroneous.

The Court first concluded that Mr. Rainey's claim was not cognizable under Rule 4-345(a), as the purported illegality of a double jeopardy violation arising from a subsequent prosecution does not inhere in the sentence itself. Rule 4-345(a) allows a court to correct an illegal sentence at any time, but the scope of this rule is narrow and the illegality must inhere in the sentence itself. Rule 4-345(a) motions are not proper if they merely assert trial court error; they are not intended to become alternative methods of belated appellate review. Although the Court of Appeals's decision in *Johnson v. State*, 427 Md. 356 (2012), shows that the illegality of a sentence may sometimes stem from the illegality of a conviction itself, the Court read that

holding as limited to situations in which the illegality of the conviction exists because the trial court lacked the power or authority to convict. In contrast, if a defendant like Mr. Rainey waives his double jeopardy rights by failing to raise them, the trial court not only has the power to convict but the conviction will not be reversed even on direct appeal. Thus, Mr. Rainey's claim—that his underlying conviction violated double jeopardy protection from successive prosecution—did not allege a violation that deprived the court of the power or authority to convict and was not cognizable under Rule 4-345(a).

The Court further determined that even if Mr. Rainey's allegations were cognizable under Rule 4-345(a), his claim was without merit. On remand, the circuit court found that the docket entry on which Mr. Rainey relied was erroneous and that Mr. Rainey was not acquitted at his first trial. The testimony of the lead prosecutor from that trial supported the finding, as did the course of proceedings that followed the original, erroneous docket entry. The Court observed that although docket entries are entitled to a presumption of regularity and must be taken as true until corrected, that presumption may be rebutted. Here, the Court concluded, the trial court properly took evidence on remand, made a finding that the docket entry was incorrect, and ordered that it be corrected.

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Robert P. Smallwood v. State of Maryland, No. 2169, September Term 2016, filed June 4, 2018. Opinion by Fader, J.

https://mdcourts.gov/data/opinions/cosa/2018/2169s16.pdf

MD. RULE 4-345(A) – MOTION TO CORERCT AN ILLEGAL SENTENCE – RIGHT TO COUNSEL

Facts:

In 1982, a jury found Mr. Smallwood guilty of first-degree murder and use of a handgun in the commission of a crime of violence. After a dialogue in which the court made clear its intent to provide Mr. Smallwood with credit for 72 days he had served while awaiting trial, the court pronounced Mr. Smallwood's sentence on the murder count as "for the term of his natural life less 72 days," concurrent with a sentence of 15 years for the handgun conviction.

In 2013, Mr. Smallwood filed a pro se motion to correct an illegal sentence pursuant to Rule 4-345(a), arguing that the original sentence of "life less 72 days" was ambiguous and vague, and that the sentence required the State to calculate his remaining life expectancy so that it could set a release date 72 days before his expected death. The motions court judge granted his motion, then immediately imposed a new sentence. After imposing the new sentence, Mr. Smallwood was advised that he had no direct appeal right.

More than a year after the motions court hearing, Mr. Smallwood filed a pro se postconviction petition challenging the motions court's failure to provide him with counsel or advise him of his right to counsel at resentencing. The postconviction court rejected Mr. Smallwood's right-to-counsel claim but awarded Mr. Smallwood the right to file a belated direct appeal from the order imposing his new sentence.

Held: Sentence vacated and remanded for resentencing.

The Court first determined that the portion of the proceeding in which the motions court imposed a new sentence was a sentencing. The Court then held that Mr. Smallwood had a right to counsel at that sentencing for two reasons: first, because the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a right to counsel at the critical stages of a criminal proceeding; and second, because defendants have a due process right to counsel in any proceeding involving incarceration.

Within the context of the Sixth Amendment and Article 21, the Court observed that sentencing is a critical stage of a criminal proceeding at which the right to counsel attaches both because the results of sentencing can affect the fact and duration of a defendant's incarceration, and because counsel can assist a defendant to present a case and ensure that the defendant receives due

process. The Court added that, under the Sixth Amendment and Article 21, this right to counsel can apply even when the sentencing court has minimal discretion. Moreover, because the Court saw no ground for distinguishing a resentencing that followed the grant of a motion to correct an illegal sentence from other sentencings, it held that such a resentencing is a critical stage at which the right to counsel attaches.

Turning next to due process, the Court held that Mr. Smallwood had an independent right to counsel at his resentencing under Article 24 of the Declaration of Rights. The Court pointed out that the Court of Appeals, in *DeWolfe v. Richmond*, 424 Md. 444 (2013), interpreted the right to counsel under Article 24 to attach in any proceeding that may affect a defendant's incarceration; Mr. Smallwood's resentencing was such a proceeding. Moreover, Mr. Smallwood's resentencing also met the criteria for attachment of the right to counsel as set forth by the dissent in *DeWolfe*: it was an in-court proceeding, conducted by a judge, and it had the potential to result in a judge-ordered term of incarceration that was final, subject to appeal.

Because Mr. Smallwood did not have counsel present at his resentencing, and the Court did not ensure that he had knowingly and intelligently waived the right to counsel, remand for resentencing was required.

Donovan Bynes v. State of Maryland, No. 1318, September Term 2017, filed June 4, 2018. Opinion by Moylan, J.

http://www.mdcourts.gov/opinions/cosa/2017/1318s17.pdf

SECOND-DEGREE ASSAULT – SELF-DEFENSE AT THE NON-DEADLY LEVEL – SELF-DEFENSE HAS A CRITICAL SUBJECTIVE COMPONENT – THE EVIDENCE DID NOT GENERATE THE ISSUE

Facts:

This case arose from a domestic dispute between appellant and Ruth Chavez—his fiancé, cohabitant, and the mother of his two children. Following a family dinner on the evening of July 31, 2016, Ms. Chavez requested that appellant retrieve a bottle of wine and turn off the lights in the bedroom so that they could "have sex." Appellant declined, stating that he no longer wanted to be sexually intimate with Ms. Chavez. She responded by accusing appellant of infidelity. According to appellant, Ms. Chavez then threw appellant's phone at him, breaking it, and stormed out of the room. According to appellant, she returned shortly thereafter and slapped him, leaving a scratch on his face. Appellant demanded that she vacate the apartment. When Ms. Chavez refused, appellant retrieved pairs of her pants and shoes from the bedroom, and threw them into the hallway outside the front door of their apartment. When Ms. Chavez again refused to leave the apartment, appellant, by his own admission, grabbed her by the arms and pushed her outside.

At trial, Ms. Chavez testified, *inter alia*, that after appellant had begun pushing her she tried to call the police from an "emergency phone that [she] had bought because of previous incidents." Appellant objected to this testimony. Sustaining appellant's objection, the court instructed the jury to disregard the testimony. Unsatisfied with the curative instruction, appellant moved for a mistrial. The court denied appellant's motion.

On cross-examination, the defense sought to impeach Ms. Chavez by underscoring her having omitted certain details from her application for a statement of charges. On redirect, the State sought to rehabilitate Ms. Chavez by showing her lack of expertise in preparing court documents. In the course of the State's attempt to do so, Ms. Chavez testified that she had had previously filed charges against appellant. Appellant objected. The court sustained appellant's objection, and instructed the jury to disregard the testimony. Appellant moved for a mistrial. Once again, the court denied appellant's motion.

Prior to deliberations, appellant requested that the court instruct the jury on his claim of self-defense. The court declined to do so.

The jury convicted appellant of second-degree assault, for which the court sentenced him to ten years' incarceration, all but three of which were suspended.

Held: Affirmed.

Given that, in this two-witness trial, appellant never expressed a subjective belief that he was in immediate or imminent danger of bodily harm, a self-defense instruction was not generated by the evidence.

Appellant contends that the court erroneously declined to instruct the jury on his claim of self-defense. In order to generate a jury instruction on self-defense, "[t]here must be *'some evidence,' to support each element* of the defense's legal theory . . . ." *Marquardt v. State*, 164 Md. App. 95, 131, 882 A.2d 900 (2005). Accordingly, in order to generate a self-defense instruction in a case not involving deadly force, either the defendant or the State must introduce *some evidence* that:

> (1) the defendant actually believed that he or she was in immediate or imminent danger of bodily harm;
> (2) the defendant's belief was reasonable;
> (3) the defendant must not have been the aggressor or provoked the conflict; and
> (4) the defendant used no more force than was reasonably necessary to defend himself or herself in light of the threatened or actual harm.

Jones v. State, 357 Md. 408, 422, 745 A.2d 396 (2000).

While Ms. Chavez's testimony that appellant struck her twice was sufficient to establish the corpus delicti of the assault, it could not establish appellant's actual subjective belief that he "was in immediate or imminent danger of bodily harm." *Jones*, 357 Md. at 422. Appellant's testimony, moreover, evinced that his immediate response to having been slapped was verbal and retaliatory—not physical and self-defensive. Although appellant's testimony regarding Ms. Chavez's actions may have made reasonable a belief that he was in "imminent danger of bodily harm," it did not establish that appellant actually harbored such a belief in the first place. At no point did he express a fear for his safety. To the contrary, appellant testified that he had grabbed Ms. Chavez's arms because (i) she had recently "kicked [him] out" of the apartment and (ii) she had slapped him. Such testimony indicates a retaliatory—and not a self-defensive—motive for the assault.

Appellant next contends that the court erroneously denied his motions for a mistrial. The Court of Special Appeals reviews rulings on a motion for mistrial for abuse of discretion. The Court owes such deference to the decisions of the trial judge because it is he or she who is best situated to assess the prejudicial impact of errors and "to determine if the extraordinary remedy of a mistrial is appropriate." *Hunt v. State*, 321 Md. 387, 422, 583 A.2d 218 (1990). Accordingly, a trial court does not abuse its discretion in denying a motion for a mistrial absent compelling and extraordinary circumstances. There were no extraordinary or egregious errors in this case. The trial court did not, therefore, abuse its discretion.

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Arlene Q. Stevens, et al. v. Prettyman Manor Mobile Home Park Wastewater Treatment Plant, No. 487, September Term 2017, filed June 27, 2018. Opinion by Berger, J.

https://mdcourts.gov/data/opinions/cosa/2018/0487s17.pdf

ENVIRONMENTAL LAW – NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMITS – WASTEWATER TREATMENT

Facts:

Arlene Q. Stevens and Mildred Quidas ("Stevens and Quidas") divert water from Little Creek to irrigate their farmland in Caroline County, Maryland. Their farmland is located near a mobile home park owned by Prettyman Manor, LLC ("Prettyman Manor"). In 2012, Prettyman Manor decided to build an on-site wastewater treatment plant ("WWTP") that would discharge treated wastewater into Little Creek.

In April 2012, Prettyman Manor submitted an application ("the 2012 Application") for a National Pollutant Discharge Elimination System ("NPDES") permit. The 2012 Application specified that the proposed WWTP would discharge up to 40,000 gallons of treated wastewater into Little Creek per day. In August 2012, the Maryland Department of the Environment ("MDE") published notice of the 2012 Application ("the 2012 Notice").

MDE advised Prettyman Manor that the 2012 Application was not consistent with the Caroline County Water and Sewer Plan. On July 21, 2014, Prettyman Manor submitted a revised permit application ("the 2014 Revision"). In the 2014 Revision, Prettyman Manor proposed a new design for the WWTP that would lower the treatment capacity to 20,000 gallons per day. Prettyman Manor also changed the outfall location to a different point on Little Creek.

In August 2015, MDE published a notice of tentative determination regarding the 2014 Revision. During the comment period, Stevens and Quidas sent a letter to MDE expressing their concern about the potential environmental impact of the project. After the comment period, Stevens and Quidas sent a letter to MDE with additional questions and comments. MDE responded with a detailed letter addressing each issue raised by Stevens and Quidas.

On October 27, 2015, MDE issued an NPDES permit for Prettyman Manor's WWTP. Thereafter, Stevens and Quidas filed a petition for judicial review in the Circuit Court for Caroline County. Stevens and Quidas argued that the NPDES permit was invalid because MDE had not published notice of the 2014 Revision. Stevens and Quidas further argued that the Permit unlawfully allowed Prettyman to discharge total suspended solids ("TSS") into a body of water already impaired by excess TSS levels. The circuit court upheld the permit. Stevens and Quidas timely appealed.

Held: Affirmed

The Court held that MDE was not required to publish a second notice of application after Prettyman Manor submitted the 2014 Revision. Under Env't Law § 1-603 and § 9-324, MDE is required to publish notice of each application for a discharge permit. The plain language of the statutes does not address whether a revised application should be treated as a new application for the purposes of the notice requirement. In MDE's view, a new notice of application is unnecessary if the revision does not substantially change the permitted activity.

The Court held that MDE's interpretation of the notice requirement was reasonable. The parties agreed that a new notice of application would be necessary if the changes were significant. Further, the Court noted that the "substantial change" standard was consistent with *Proffitt v. Rohm & Haas*, 850 F.2d 1007 (3d Cir. 1988), in which the U.S. Court of Appeals for the Third Circuit held that an amendment to an existing NPDES permit requires public notice if the amendment "effects a substantial change in the terms of the permit." Accordingly, the Court deferred to MDE's reasonable interpretation of the notice requirement.

The Court agreed with MDE that the 2014 Revision did not substantially change the permitted activity. The Court noted that the volume of discharge in the 2014 Revision was actually lower than the volume listed in the 2012 Notice. Although the exact outfall point had been moved, the discharge would be located along the same tributary listed in the 2012 Notice. In addition, the 2012 Notice made it clear that members of the public could ask to be notified of further action concerning the application. The Court concluded that the 2012 Notice was sufficient to place the public on notice of the permitted activity.

The Court further held that Stevens and Quidas could not challenge the TSS limit in the permit because they failed to raise that issue in the comment period. Under Env't Law § 1-601, judicial review of a permit decision by MDE is generally limited to objections raised during the public comment period. The only comment made by Stevens and Quidas in that time was a letter expressing general concerns about the environmental impact of the project. The Court determined that the letter was not sufficient to put MDE on notice that Stevens and Quidas objected to the proposed TSS limit.

The Court rejected the appellants' assertion that the TSS issue was not reasonably ascertainable during the comment period. The Court noted that the appellants had nearly three years to review the TSS limit, study the relevant law, and formulate a specific objection. By failing to do so, they waived their right to raise the issue on appeal.

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Lyonel Jose, Jr. v. Sandra Jose (Farnham), No. 782, September Term 2017, filed June 27, 2018. Opinion by Kenney, J.

https://mdcourts.gov/data/opinions/cosa/2018/0782s17.pdf

FAMILY LAW – CHILD CUSTODY – PHYSICAL CUSTODY

Facts:

Father was in the military and stationed in California when Daughter was between ages two and seven. During this time, and when his deployment schedule permitted, under a voluntary separation agreement, Daughter spent four months a year with Father in California; primary physical custody was with Mother in Maryland. In 2015, after Father's military obligations concluded, he moved back to Maryland and sought joint legal and shared physical custody. In January 2016, pending resolution of litigation, the parties agreed to an interim visitation schedule that Mother proposed, which she later advanced at the hearing. The circuit court granted Father visitation on alternating weekends and some holidays and school breaks, but limited his summer visitation to two weeks and eliminated a weeknight dinner visit.

Held:

Once it was determined that Father moving back to Maryland to be closer to the child was a material change in circumstances, the trial court had to consider the best interests of the child in determining a physical custody and visitation schedule, by evaluating the guiding factors laid out in *Montgomery County Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406 (1977) and *Taylor v. Taylor*, 306 Md. 290 (1986).

The Court held that the circuit court's findings as to legal custody were not clearly erroneous and it did not abuse its discretion in awarding joint legal custody with a tie-breaker to Mother.

But, as to physical custody, the Court held that in considering the *Sanders-Taylor* factors related to the fitness of the parents, their adaptability to the tasks of custody, the previous length of separation, and the past agreements between the parties, the circuit court made findings either without a basis in the record or without adequately explaining the relevance of its findings to the totality of the present-day circumstances. And, the circuit court did not adequately explain its resolution of Father's overall access to Daughter and its rejection of Mother's access proposal.

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Harleysville Preferred Insurance Company, et al., v. Rams Head Savage Mill LLC, et al., No. 2409, September Term 2016, filed June 28, 2018. Opinion by Fader, J.

https://www.courts.state.md.us/data/opinions/cosa/2018/2409s16.pdf

INSURANCE – PLEADINGS – DUTY TO DEFEND

INSURANCE – POLICY INTEREPRETATION

DECLARATORY JUDGMENT – EXTRINSIC EVIDENCE

INSURANCE – APPLICATION OF CRIMINAL ACTS EXCLUSION

Facts:

Rams Head at Savage Mill, LLC ("Rams Head") owns and operates a restaurant and tavern known as the Rams Head Tavern. Harleysville Preferred Insurance Company ("Harleysville") insured Rams Head under a commercial general liability policy. In 2015, the general manager and majority owner of Rams Head, Kyle Muehlhauser, pleaded guilty to visual surveillance with prurient intent under § 3-902 of the Criminal Law Article, following the discovery that he had mounted a camera in the single-occupancy women's restroom at the Rams Head Tavern. Two class action complaints were brought against Rams Head and Mr. Muehlhauser seeking damages.

Harleysville sought a declaratory judgment that it did not owe a defense to Rams Head or Mr. Muehlhauser in the underlying litigation, arguing, among other things, that the complaints did not allege injuries covered by the policy's "personal and advertising injury" provision and that exclusions applied. Harleysville further argued that Mr. Muehlhauser was not an "insured" for purposes of the claims at issue. Following the circuit court's ruling that Harleysville had a duty to defend both Rams Head and Mr. Muehlhauser, Harleysville appealed.

Held: Affirmed in Part and Reversed in Part. Remanded for Entry of a Declaratory Judgment.

Under the insurance policy's coverage for "personal and advertising injury," Harleysville is required to defend against claims based on the "wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor." Using contract interpretation principles, the Court determined that the plain language of this coverage grant unambiguously encompassed the underlying complaints' allegations. The Court found that the plain meaning of "right of private occupancy" covers the right of an individual who is occupying a single-occupancy restroom in a restaurant for its intended purpose to do so in private. Further, analogizing to the tort of intrusion upon seclusion, the Court determined that nonconsensual video surveillance of a person in a restroom constitutes an "invasion" of that right.

The Court next examined the coverage grant in its broader context, specifically analyzing whether the language "wrongful eviction from" and "wrongful entry into" in the coverage grant limits the "invasion of the right of private occupancy" to cases in which a claimant claims a possessory interest in the room. The Court applied the canon of construction *ejusdem generis*, which holds that when a general phrase follows a list of specifics, the general phrase is interpreted to include only items of the same class as the specifically listed items. Based on the language in the policies, the Court declined to read into the phrase "invasion of the right of private occupancy" a requirement that a claimant assert a possessory interest in the property.

The Court then turned to Harleysville's argument that Rams Head was not the "owner, landlord or lessor" of the restroom. The Court relied on the common and popular understanding of the word "owner" in finding that it encompassed Rams Head, which possessed and had control over the restroom, including authority to grant its customers the right to occupy the restroom.

The Court rejected Harleysville's contention that coverage for Rams Head is precluded under a "recording and distribution" policy exclusion, which bars coverage for injury arising out of statutes that protect consumers from unwanted solicitations or the distribution of financial information. The exclusion did not encompass the type of "recording" alleged by the plaintiffs.

The Court also addressed whether Mr. Muehlhauser was an insured under the policy. The Court found that the circuit court had properly excluded extrinsic evidence as to whether Mr. Muehlhauser had acted within the scope of employment because that was also an issue in the underlying litigation. Accordingly, based on the allegations of the underlying complaints, the Court found that Mr. Muehlhauser qualified as an insured for purposes of the duty to defend.

However, the Court concluded, Harleysville was not obligated to defend Mr. Muehlhauser based on the policies' Criminal Acts exclusion. The Court analyzed *Bailer v. Erie Ins. Exch.*, 344 Md. 515 (1997), in which the Court of Appeals declined to apply an exclusion for "expected or intended" injury to a claim for intrusion upon seclusion; because intrusion upon seclusion is always intentional, the *Bailer* Court had held, applying the exclusion would render coverage illusory. Here, however, the Criminal Acts exclusion carved out only criminal conduct. A claim for intrusion upon seclusion does not always involve criminal conduct and, therefore, enforcing the exclusion will not render coverage illusory. The Court held that the exclusion applied to the claims against Mr. Muehlhauser.

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Gary Dolan, et al. v. Kemper Independence Insurance Company, No. 84, September Term 2017, filed June 28, 2018. Opinion by Arthur, J.

https://www.courts.state.md.us/data/opinions/cosa/2018/0084s17.pdf

INSURANCE – EXAMINATION UNDER OATH

Facts:

Mr. Dolan sustained injuries from a car accident. He claimed underinsured motorist ("UIM") benefits as a "family member" under his parents' insurance policy with Kemper Independence Insurance Co. ("Kemper"). The Kemper policy stated that Kemper had no duty to provide coverage unless the person seeking coverage cooperated in the investigation of the claim. A common feature of many insurance policies is a requirement that the claimant submit to an examination under oath ("EUO"). Kemper's policy further stated that: "No legal action may be brought against us until there has been full compliance with all the terms of this policy."

Upon becoming aware of Mr. Dolan's injury, and in anticipation that he would make a claim for UIM benefits, Kemper requested that Mr. Dolan give a recorded statement. Mr. Dolan's counsel denied the request. When Kemper asked for an EUO, Mr. Dolan's counsel responded that Mr. Dolan had not yet initiated his UIM claim, so Kemper was not entitled to an EUO. Once Mr. Dolan made his UIM claim, Kemper requested an EUO. Mr. Dolan's counsel again refused the request, asserting that Mr. Dolan would instead submit to a deposition. Due to his repeated refusals to sit for an EUO, Kemper formally denied Mr. Dolan's claim for UIM benefits.

In a declaratory judgment action, the Circuit Court for Anne Arundel County ruled that submitting to an EUO was a condition precedent to receiving benefits under the Kemper policy and that Mr. Dolan's refusal to submit to an EUO amounted to a material breach of the insurance contract. Thus, Mr. Dolan was not entitled to receive UIM benefits under the insurance policy.

Held: Affirmed

The Court of Special Appeals held that by refusing to submit to an EUO, Mr. Dolan breached the insurance contract with Kemper and failed to satisfy a condition precedent for recovering benefits.

In short, the willingness of an insured to sit for a deposition does not satisfy the insured's obligation to sit for an EUO. An EUO differs from a deposition in several respects: the purpose of an EUO is to assist the insurer in evaluating whether to pay or deny a claim, not to evaluate the claims or defenses in civil litigation; the insurer's right to an EUO is contractual, and not based in the rules of civil procedure; and the rules of civil procedure do not strictly apply.

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This Court previously held that a party commits a material breach of an insurance contract by appearing for an EUO but failing to answer some relevant and material questions. *Phillips v. Allstate Indemn. Co.*, 156 Md. App. 729, 743 (2004). Thus, a complete failure to submit to an EUO certainly constituted a material breach.

It is also beyond dispute that an insured cannot pursue a claim against an insurer if he or she has failed to satisfy a condition precedent to coverage. *Huntt v. State Farm Mut. Auto. Ins. Co.*, 72 Md. App. 189, 198 (1987). Therefore, no legal action may be brought against Kemper for a refusal to pay benefits until Mr. Dolan has submitted to an EUO, if Kemper has requested one before the action was filed, as was the case here.

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Baltimore Police Department v. Serge Antonin, No. 443, September Term 2017, filed June 1, 2018. Opinion by Eyler, D. S., J.

https://mdcourts.gov/data/opinions/cosa/2018/0443s17.pdf

LAW ENFORCEMENT OFFICERS BILL OF RIGHTS – DUE PROCESS – RIGHT TO HEARING BOARD BEFORE OFFICERS OF ANOTHER DEPARTMENT – *ACCARDI* DOCTRINE – PREJUDICE REQUIRED.

Facts:

Vehicle being chased by police in Baltimore City veered off the road and crashed. Multiple Baltimore Police Department ("BPD") officers surrounded the vehicle and two removed the sole occupant from the vehicle and placed him on the ground. Thereafter, Officer Antonin, who had been driving a transport vehicle and was not in the group of officers surrounding the stolen car, walked quickly through the group to the arrestee, slapped him on the head, walked away, and then returned and slapped him on the head several more times. The police chase and events immediately following were videotaped by WBAL-TV and portions, including the slapping incident, were aired that evening. A BPD Deputy Commissioner commented about the incident that night, stating, "We did not like what we saw" and that a personnel action was being commenced immediately. A Use of Force Report was not prepared, as required by a BPD procedural rule, but the Internal Affairs Division ("IAD") of the BPD was notified early the next morning and began its investigation. Within slightly more than three months after the incident, the IAD had interviewed all the officers involved in the arrest, including two who had witnessed Antonin slap the arrestee. Antonin was charged criminally, at which time the Deputy Commissioner commented that the BPD "will not tolerate the actions of any officer that breaks the law in order to enforce the law." Eventually Antonin entered an Alford plea to one charge and the others were dismissed. The IAD interviewed him after the criminal charges were resolved.

Administrative charges were brought against Antonin. Shortly before his hearing board was scheduled to begin, he filed a written request that the hearing board be composed of officers from another jurisdiction, asserting that BDP officers would not be fair and impartial. The request was denied. During the hearing, he argued that the BPD violated the *Accardi* doctrine by not following its own rule, to his detriment, and that he was entitled to findings in his favor on that basis. The hearing board rejected that argument as well and found against Antonin. It recommended termination. The Police Commissioner adopted that recommendation and terminated Antonin.

Antonin brought an action for judicial review, in which he argued, among other things, that the hearing board had erred by denying his request for a hearing board composed of non-BPD officers and that the BPD had violated the *Accardi* doctrine. The circuit court ruled in Antonin's favor on both those issues. The BPD noted this appeal.

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Held: Reversed

The circuit court judgment was reversed and termination by BPD was reinstated.

This case stands in contrast to *Sewell v. Norris*, 148 Md. App. 122 (2002), in which we held that a BPD officer could not be fairly tried by a hearing board composed of BPD officers because, as widely covered in the press, the Mayor of Baltimore City and the Police Commissioner had publicly criticized his alleged misconduct in ways that made clear to BPD officers that they did not want him on the police force and would not tolerate findings in his favor. Here, the public comments by the Deputy Commissioner were not widely covered, were benign, and did not suggest that there could be retaliation by the police command if the hearing board found in Antonin's favor. In addition, there had been a complete turnover in the police command by the time of the hearing board.

Among other elements, Maryland's version of the *Accardi* doctrine requires proof that the agency's failure to follow its own rule resulted in prejudice. Here, Antonin made no showing that he suffered prejudice as a consequence of the BPD's failure to follow its procedural rule on use of force.

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Stanley Dunham, et al. v. University of Maryland Medical Center, et al., Nos. 260 & 1443, September Term 2017, filed June 28, 2018. Opinion by Graeff, J.

https://www.courts.state.md.us/data/opinions/cosa/2018/0260s17.pdf

MEDICAL MALPRACTICE – CERTIFICATE OF QUALFIED EXPERT – HEALTH CARE PROVIDER WHO BREACHED STANDARD OF CARE MUST BE IDENTIFIED – EXTENSION TO FILE PROPER CERTIFICATE OF QUALFIED EXPERT

Facts:

On October 14, 2016, pursuant to Healthcare Malpractice Claims Act (the "Act"), Md. Code (2013 Repl. Vol.) §§ 3-2A-01 *et seq*. of the Courts and Judicial Proceedings Article ("CJP"), Stanley and Renee Dunham filed a statement of claim in the Health Care Alternative Dispute Resolution Office ("HCADRO"). On November 16, 2016, they filed a certificate of qualified expert and report and waived arbitration, transferring the case to the Circuit Court for Baltimore City. The certificate of qualified expert asserted, in pertinent part, that Maryland General Hospital, Inc., d/b/a University of Maryland Medical Center Midtown Campus ("Midtown"), and the University of Maryland Medical System Corporation ("UMMS") (collectively, appellees), through their agents, servants, and/or employees, breached the applicable standard of care in their care and treatment of Mr. Dunham. Neither the certificate of qualified expert nor the report identified the specific agents, servants, or employees whose care was at issue. Appellees filed a motion to strike the certificate and dismiss the case for failure to comply with the filing requirements of the Act, which requires a certificate of qualified expert to "mention explicitly the name of the licensed professional who allegedly breached the standard of care." *Carroll v. Konits*, 400 Md. 167, 196 (2007). Although the Dunhams requested that the court grant them an extension pursuant to CJP § 3-2A-04(b)(1)(ii) to file a proper certificate of qualified expert, the court dismissed the case without prejudice ("*Dunham I*"). The Dunhams then returned to the HCADRO, and using the same claim number as the initial claim, they filed a motion for extension of time for filing a certificate of qualified expert. The HCADRO granted an extension, the Dunhams filed a second certificate, and the claim was transferred to the circuit court, which again dismissed the claim ("*Dunham II*").

Held:

Judgment in *Dunham I* vacated and remanded. Appeal in *Dunham II* dismissed as moot.

Pursuant to the Healthcare Malpractice Claims Act (the "Act"), Md. Code (2013 Repl. Vol.) §§ 3-2A-01 *et seq*. of the Courts and Judicial Proceedings Article ("CJP"), a person with a medical malpractice claim must file a certificate of qualified expert within 90 days after the person files a statement of claim with the Health Care Alternative Dispute Resolution Office ("HCADRO").

CJP § 3-2A-04(b)(1)(i)1. The certificate of qualified expert must "mention explicitly the name of the licensed professional who allegedly breached the standard of care." *Carroll v. Konits*, 400 Md. 167, 196 (2007). *Accord Retina Grp. of Wash., P.C. v. Crosetto*, __ Md. App. __, No. 2385, Sept. Term, 2016, slip op. at 17 (filed Apr. 27, 2018). If the certificate of qualified expert fails to comply with the filing requirements of the Act, the "'failure to file a proper certificate is tantamount to not having filed a certificate at all.'" *Puppolo v. Adventist Healthcare, Inc*., 215 Md. App. 517, 532 (2013) (quoting *D'Angelo v. St. Agnes Healthcare, Inc*., 157 Md. App. 631, 645 (2004)).

If a certificate of qualified expert is not filed, as required, within the 90 days following the filing of a statement of claim, the Act mandates dismissal, without prejudice, unless the person obtains a statutory extension of time to file the certification. *Walzer v. Osborne*, 395 Md. 563, 575-76 (2006). The statutory extension sought here was pursuant to CJP § 3-2A-04(b)(1)(ii), which states that, "[i]n lieu of dismissing a claim or action," "the court shall grant an extension of no more than 90 days for filing the certificate required," if two conditions are shown, i.e., "[t]he limitations period applicable to the claim or action has expired," and "[t]he failure to file the certificate was neither willful nor the result of gross negligence."

When the two enumerated conditions are met, this provision is mandatory and is granted automatically in lieu of dismissal. The extension, however, is limited. Pursuant to the automatic extension made available by CJP § 3-2A-04(b)(1)(ii), a plaintiff must file a proper certificate of qualified expert within the second 90-day period. If a proper certificate of qualified expert is not filed within this combined 180-day period provided by the Act, a medical malpractice claim is properly dismissed.

Here, the certificate of qualified expert filed with the statement of claim in *Dunham I* stated that appellees, acting through their agents, servants, or employees, breached the standard of care, but it did not specifically identify any individuals who breached the standard of care. The certificate of qualified expert, therefore, failed to conform to the filing requirements of the Act. Because the applicable limitations period for the claim had expired, there was no allegation that the failure to file a proper certificate of qualified expert was willful or the result of gross negligence, and there were 35 days left in the 180-day time period to file a proper certificate, the court erred in dismissing *Dunham I*.

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Justin Stine v. Montgomery County, Maryland, No. 578, September Term 2017, filed June 1, 2018. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2018/0578s17.pdf

WORKERS' COMPENSATION – AMOUNT AND PERIOD OF COMPENSATION – COMPUTATION OF AVERAGE WEEKLY WAGE – EVIDENCE – EXPERT TESTIMONY

WORKERS' COMPENSATION – AMOUNT AND PERIOD OF COMPENSATION – COMPUTATION OF AVERAGE WEEKLY WAGE

WORKERS' COMPENSATION – AMOUNT AND PERIOD OF COMPENSATION – COMPUTATION OF AVERAGE WEEKLY WAGE – PROCEEDINGS TO SECURE COMPENSATION – REVIEW BY COURT – RIGHT TO TRIAL DE NOVO – RIGHT TO JURY TRIAL

Facts:

Justin Stine, a volunteer emergency medical technician for Montgomery County, injured his foot as he stepped off an ambulance while on duty. His injury required surgery, and he was unable to work for approximately two months. At the time of the injury, Mr. Stine was a university student studying nursing and had approximately two years left before he would earn his degree. He was also a part-time emergency medical technician for a private ambulance company, Lifestar, during the school year (when the injury occurred) and he worked full-time during the summer. He filed a claim with the Maryland Workers' Compensation Commission for lost wages. The Commission held a hearing and found that Mr. Stine's average weekly wage is $64.65, the average of the wages he earned in the fourteen weeks preceding his injury.

Mr. Stine appealed the Commission's determination of his average weekly wage to the Circuit Court for Montgomery County and requested a jury trial. In the meantime, Mr. Stine had retained a vocational expert to support his argument that under MD. CODE ANN., LABOR & EMPL. § 9-602(a)(3), his average weekly wage should be based on what he likely would earn after finishing nursing school, working full-time as an emergency medical technician or nurse. The County argued that LE § 9-602(a) does not apply to his situation, and that LE § 9-602(g)—which addresses computation of the average weekly wage of volunteer EMT's—applies instead.

On the day of trial, the court granted the County's motion *in limine* to exclude the testimony of Mr. Stine's vocational expert and the County's motion to strike the jury, then remanded the case to the Commission.

Held: Affirmed in part, reversed in part, and remanded.

The Court of Special Appeals affirmed the circuit court's exclusion of testimony from Mr. Stine's vocational expert. Expert testimony about wage increases that Mr. Stine might expect at some point in the future, after earning a bachelor's degree in nursing and passing the requisite licensing examinations, was not relevant to the computation of his average weekly wage under LE § 9-602(g), which applied to Mr. Stine because of his status as volunteer emergency medical technician for a fire department. The circuit court was not required to apply LE § 9-602(a)(3), which allows for consideration of wages that a workers' compensation claimant may expect to earn in the future given her age and experience.

The Court of Special Appeals reversed the circuit court's grant of Montgomery County's motion to strike the jury. *First*, the circuit court erred in holding that COMAR 14.09.03.06 compelled the Commission to calculate the average weekly wage based on average wages earned during a fourteen-week period. As this Court recently clarified in *Richard Beavers Constr. v. Wagstaff*, that regulation "does not purport to restrict the Commission in any manner from utilizing a different time period [than fourteen weeks] if the Commission deems it appropriate to do so." 236 Md. App. 1, 24–25 (2018) (quoting *Gross v. Sessinghause & Ostergaard, Inc*., 331 Md. 37, 50 (1993)).

Second, the circuit court erred in entering an order affirming the decision of the Workers' Compensation Commission that set the claimant's average weekly wage. The circuit court instead should have proceeded with a jury trial, which Mr. Stine had requested pursuant to LE § 9-745(d). Judicial review in workers' compensation cases can follow one of two "modalities": an unadorned administrative appeal or an essential trial *de novo*. In this case, Mr. Stine opted for an essential trial *de novo* and requested a jury, and the exclusion of his expert's testimony did not terminate his right to have a jury decide the factual question of his average weekly wage under LE § 9-602(g).

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ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated May 14, 2018, the following attorney has been indefinitely suspended by consent, effective June 1, 2018:

JOSEPH ROBERT LAUMANN

*

By a Per Curiam Order of the Court of Appeals dated June 1, 2018, the following attorney has been disbarred:

ROGER NORMAN POWELL

*

By an Order of the Court of Appeals dated June 12, 2018, the following attorney has been indefinitely suspended by consent:

MAXWELL CLIFFORD COHEN

*

By an Order of the Court of Appeals dated May 15, 2018, the following attorney has been indefinitely suspended by consent, effective June 14, 2018:

RACHEL A. SMITH

*

This is to certify that the name of

MIKE MEIER

has been replaced upon the register of attorneys in this State as of June 19, 2018.

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By an Opinion and Order of the Court of Appeals dated May 21, 2018, the following attorney has been disbarred, effective June 20, 2018:

WILLIAM MICHAEL JACOBS

*

This is to certify that the name of

BENJAMIN COYLE SUTLEY

has been replaced upon the register of attorneys in this state as of June 20, 2018.

*

By an Opinion and Order of the Court of Appeals the following attorney has been suspended for thirty (30) days:

DANA PAUL

*

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JUDICIAL APPOINTMENTS

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On June 6, 2018, the Governor announced the appointment of **CATHERINE CHEN** to the District Court of Maryland – Baltimore City. Judge Chen was sworn in on June 21, 2018 and fills the vacancy created by the retirement of the Honorable Timothy D. Murphy.

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On June 6, 2018, the Governor announced the appointment of **KAREN ANN PILARSKI** to the District Court of Maryland – Baltimore County. Judge Pilarski was sworn in on June 27, 2018 and fills the vacancy created by the retirement of the Honorable Norman R. Stone, III.

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UNREPORTED OPINIONS

The full text of Court of Special Appeals unreported opinions can be found online:

https://mdcourts.gov/appellate/unreportedopinions

	Case No.	*Decided*
3411 Pennsy Drive Ltd. v. Bahena	0337	June 19, 2018
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ADP Totalsource Services v. Reffell	0303	June 7, 2018
Alleman, Robert v. Alleman	0006	June 11, 2018
Armistead, Robert v. State	1230	June 14, 2018
Awah, Edmund v. Southern Management	2314 *	June 14, 2018
B.		
Beamon, Jeramiah v. State	0602	June 25, 2018
Bellosi, Enrick v. State	0505	June 11, 2018
Benson, Marcus Anthony v. State	2478 **	June 7, 2018
Brooks, James v. State	1039	June 8, 2018
Brooks, Paul Randall v. State	0773	June 14, 2018
C.		
Conway, Richard v. State	0695	June 29, 2018
Cottingham, Antonio L. v. State	0054	June 29, 2018
Cushman & Wakefield of Md. v. DRV Greentec	0369	June 18, 2018
D.		
Denton, Leslie v. Itezz, Inc.	1680 *	June 22, 2018
Devine, James Michael v. DLLR	0663	June 14, 2018
DiFranco, Michael v. Green Tomato	2305 *	June 29, 2018
Dorsey, David v. State	2597 **	June 18, 2018
Dorsey, David v. State	2632 **	June 18, 2018
E.		
Egwu, Chukwuemeka v. Allstate Insurance	0512	June 12, 2018
Ervin, James v. Kennedy Krieger Inst.	2401 *	June 22, 2018

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Fisher, Michael K. v. Estate of Fisher	1873 *	June 1, 2018
Fletcher, Kurt v. State	0212	June 8, 2018
Foster, Javon v. State	0118 **	June 22, 2018
G.		
Gallagher, Michele v. Mercy Medical Center	0634	June 28, 2018
Garris, Eric v. State	0518 *	June 1, 2018
George, Anne v. Baltimore Co.	0047 *	June 12, 2018
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Gomez, Elizabeth v. Parrish Services	2089 *	June 6, 2018
H.		
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In re: Adoption/G'ship of Mi.F.	2104	June 21, 2018
In re: F.G., Jr.	2031	June 22, 2018
In re: H.R., E.R., & J.R.	1742	June 28, 2018
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In re: Motion to Withdraw by Cooper & Tuerk	0607 *	June 5, 2018
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Jones, Barbara v. Schindler Elevator	0534	June 25, 2018

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