In the Supreme Court of the State of Vermont, Docket No. 21-AP-275

State of Vermont, Appellee

v.

Joshua Boyer, Appellant

Appeal from the
Superior Court of Vermont – Criminal Division
Bennington County
Docket No. 370-4-18 Bncr

Brief of the Appellant

Matthew Valerio, Esq.
Defender General

On the Brief:
Jackson Samples, Appellate Clerk

Dawn Seibert, Esq.
Appellate Defender

Office of the Defender General
6 Baldwin Street, 4th Floor
Montpelier, VT 05633-3301
(802) 828-3168
Dawn.Seibert@vermont.gov

Attorneys for Appellant

Statement of the Issues

1. Whether the warrantless search of Mr. Boyer's home was unlawful where the State failed to establish valid consent from a fourteen-year-old who no longer lived at the home and thought the purpose of going to the house was to get her belongings.

2. Whether Mr. Boyer's speedy trial rights were violated where he was incarcerated for 1,197 days between his arraignment and conviction because of delays that were unattributable to him.

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Statement of Facts

On April 23, 2018, police conducted a warrantless search of Joshua Boyer's house, circumventing its locked doors and taking "the way in through the basement." 2/21/2019–TR–5-25; AV-786. Police urged M.B., Mr. Boyer's fourteen-year-old daughter, to accompany them to the house, even though she no longer lived there. AV-1327, 1351; 2/21/2019–TR–17. Police intentionally timed the search for when Mr. Boyer and his wife were at a mandatory court hearing. M.B. showed the police how to sneak into the house through the basement. AV-786, 1327.

Police were investigating allegations made by M.B. that Mr. Boyer, her father, had sexually assaulted her "many times" between the summer of 2017 and April 2018, during a tumultuous time for the family. 11/6/2019–TR–108; 8/2/2021–TR–11. M.B. also alleged that her father "threw [her] on the floor and choked" her. AV-775. Based upon those allegations, Mr. Boyer was charged with two counts of aggravated sexual assault of a child and one count of aggravated assault. 13 V.S.A. §§ 3252a(a)(8), 3253a(a)(1), 1024(a)(1); AV-1202-03.

At a trial in 2021, a jury finally rejected M.B.'s allegations as incredible, acquitting Mr. Boyer of the aggravated sexual assault of a child and aggravated assault charges.[1] He was found guilty of a single count of the lesser included offense of statutory rape. 8/2/2021–TR–97; 9/9/2021–TR–10-11.

A. Mr. Boyer's Childhood and Family

Joshua Boyer was born on October 7, 1986 in Rochester, New Hampshire. As a child, he lived in Massachusetts, Florida, and Vermont. When he was 8 years old, he was placed in Massachusetts DCF custody after being "threatened and hit" by his father. He shuffled between various foster

[1] After the prosecution rested, the court dismissed one of the charges for aggravated sexual assault of a child because the evidence was insufficient. 8/2/2021–TR–16.

homes throughout his adolescence. Times were not easy at these places either—Mr. Boyer remembers being beaten up by some of the other kids he lived with. Pre-Sentence Investigation (PSI[2]) 6.

Nevertheless, Mr. Boyer forged a path for himself as he grew up, giving back to his community. During high school, he worked with the Special Olympics, coached their basketball team, and worked as both a special education assistant and camp counselor. His strong work ethic continued into his adulthood. He is described by his friends as a "good helper" and "very responsible," and has held several jobs. PSI 4, 6–7.

Mr. Boyer became a father in 2003 when his daughter, M.B., was born. AV-121. He was only sixteen years old. AV-121. M.B. lived with her biological mother in Massachusetts until she was ten, when she came to live with Mr. Boyer in Vermont. AV-757. Mr. Boyer had spent time in jail when M.B. was young but once released, he fought hard to get custody. AV-1401. In some ways, he was too late. M.B.'s mother was an alcoholic and drug abuser. AV-1381. Her mother's boyfriends had abused M.B. AV-1401-02. As a result of the trauma she had suffered, M.B. had emotional issues. She would tell stories that turned out to be untrue. AV-1388. When she was angry, she would punch doors, or even attack Mr. Boyer or Christine. AV-1417.

To make matters more complicated, by this time, Mr. Boyer had married his current wife, Christine Sousis, and had two additional children. AV-757. Although Christine acknowledged M.B.'s "horrible" past, she could not get along with M.B. and "made her life miserable." AV-757, 1438. Eventually, Mr. Boyer recognized that Christine and M.B. needed a break from each other. Mr. Boyer moved out with M.B. so she could be away from the "hostile situation." AV-1109. The two of them spent a year living in a separate house. AV-1466. When the family reunified, moving in together at a house on Coleville Road, little had changed. Christine still called M.B. terrible names and would sometimes bring home food for only the two

[2] The PSI cannot be copied pursuant to V.R.Cr.P. 32(c)(5), but the report is part of the Court's file.

younger children. AV-813. Mr. Boyer and Christine continued to argue frequently. AV-1437.

Because he himself "had a broken family . . . as a child," Mr. Boyer attempted to remedy things. 8/2/2021–TR–23. He intervened in disputes between Christine and M.B., AV-1356, and put together "fires in the backyard" and "cookouts" for the family. 8/2/2021–TR–23–28. But the family decided they still needed a reset—by April 2018, there were "imminent" plans for Mr. Boyer and M.B. to move to Alabama, where Mr. Boyer's mother lived. AV-833–34.

M.B. was adamantly opposed to moving south. She liked her boyfriend and wanted to live with him. AV-1415, 1432. On April 17, 2018, M.B. and her boyfriend ran away together. AV-1107. Mr. Boyer reported M.B. missing, but she returned home within a few hours at her boyfriend's mother, Mrs. Mason's, urging. AV-992–93.

In response, Mr. Boyer confiscated M.B.'s phone and told her she was not allowed to see her boyfriend. AV-810–11, 1380. This was not the couple's first time getting into trouble, and he had had enough. AV-993. They had been kicked off the bus for "public display[s] of affection" and screaming at the bus driver. AV-1378. M.B. also accumulated thirteen tardies from school—she lied and told her parents that the tardies were the result of hanging out with a friend, but she was leaving campus to be with her boyfriend. AV-1378–80.

Three days later on Friday, April 20th, M.B. and her boyfriend ran away again. AV-985. This time, when Mrs. Mason found them, she told M.B. that she had only two choices: She either "needed to go to the police[,] or she was going to be taken home." AV-1018. M.B. chose the police. At the Bennington Police Department, she revealed for the first time to Detective Lawrence Cole that Mr. Boyer had been sexually assaulting her for several months. AV-1511. She also told Det. Cole, "I don't want to get my dad in trouble, I just want him to get help." AV-1326.

Det. Cole did not get a caseworker from the Department of Children

and Families (DCF) involved at the initial interview, citing the lateness of the hour, even though Mr. Boyer was M.B.'s sole legal custodian. Instead, M.B. was left on her own over the weekend, returning home again to her boyfriend's house. AV-1351. Critically, DCF case worker, Jason Hudson, had no contact with M.B. until Monday afternoon. AV-1335.

In the meantime, M.B. had to manage her interactions with law enforcement without an adult or guardian, much less counsel. At Det. Cole's request, M.B. signed a "Sworn Recorded Statement" authorizing police to record their conversations with her. AV-1225. In this document, she waived her right against self-incrimination. Because DCF had not yet taken any official action to protect M.B., she was without an attorney during all of her early interviews with the police.

B. The Warrantless Search of Mr. Boyer's Home

Over the weekend, Det. Cole realized that there might be DNA evidence at the Boyer home. 02/21/2019-TR-7-8. On Monday, April 23, 2018, he went to the Mason's to meet with M.B. AV-1334. He pressed M.B. about the presence of possible evidence at "[her] dad's home." AV-1335. Finally, M.B. mentioned "there could be something" like a used condom or clothing in her bedroom. AV-1327, 1341, 1348.

The record shows, however, that M.B. did not really understand the reason the officer wanted to take her to her dad's house. When Det. Cole urged her to go back to the house, she asked whether she would be able to get her "stuff." Det. Cole told her that he did not know if she could. AV-1350. Moreover, at both trials M.B. answered that on April 23rd she thought she was going to get some of her belongings from the Boyer home "because [she] didn't have any of [her] things." 11/6/2019–TR–66. She reiterated at the second trial, "I don't remember exactly why we were going there, but I remember grabbing my things when we got there." 7/30/2021–TR–49. Neither time she was asked did M.B. say that she was accompanying the police to search for evidence or that she gave them permission to search her room because she had not.

Although Det. Cole "knew that at the time . . . both [Mr.] Boyer and his wife were at Bennington District Court for Boyer's arraignment," according to his testimony, he asked M.B. "if she would be comfortable" returning to the Boyer residence. AV-1327. Going to look "for three different things," AV-1361, Det. Cole, Investigator Hudson, and M.B. then drove to the empty house, where they discovered the doors were locked. AV-786. M.B. did not possess a key to open the door—Christine was the only one who had a key. AV-1328. As a result, the officers "had to go in through the basement." 7/30/21-TR-24.

The officers entered the Boyer residence without a warrant and without the permission of Christine or Mr. Boyer. 2/21/2019–TR–28. Det. Cole and M.B. went upstairs to M.B.'s bedroom. When they got there, M.B. said the trash from her trashcan was missing. 2/21/2019–TR–10. She said "[didn't] even remember" if she had emptied it. 2/21/2019–TR–22. M.B. then went to the outside trashcan, which was located "outside the entrance door to the house." AV-1293, 1328; 2/21/2019–TR–12. M.B. lifted the cover off the trashcan, looked inside, and said that it "looked unusual." 2/21/2019–TR–12. Det. Cole "looked in [the trashcan] too" and noted that "it looked like trash" from his perspective. *Id.* Another police officer soon arrived at the house and loaded the outside trashcan into a pickup truck. *Id.*

Around this time, Christine came home. 2/21/2019–TR–14. Immediately, she asked what the officers were doing with the trash can. *Id.* The officers did not give her a direct answer, responding instead with "a line of questioning." *Id.* Getting no clear answer from them, Christine did not invite the officers back into the house, nor did they ask for her consent to take the trashcan. *Id*. at 15.

Confused, Christine went to the police barracks at Shaftsbury that afternoon demanding to speak with a State Trooper. AV-1472. She asked the Trooper why police officers "would be in her house without her permission." *Id.* The Trooper's only response was that "one explanation would be if BPD had a search warrant for the house." *Id*. Of course, that was not the case.

C. Police Officer's Subsequent Interviews of M.B. and the Search Warrant

Two days later, Det. Cole applied for and received a search warrant to search the trashcan that was taken during the warrantless search of the Boyer home. AV-1322–23. A condom wrapper was found in the trashcan. 2/21/19-TR-27.

At a meeting with M.B. on April 30, 2018, one week after the warrantless search, she said there was a rug under her bed that could have possible DNA on it. AV-1454. Det. Cole said it "would be a stretch" to return to Mr. Boyer's house to retrieve the rug, noting it "would be a big infringement on . . . someone's rights." AV-1456. Later in the conversation, however, Det. Cole remembered that he had found a rug in the trashcan seized during the original warrantless search. AV-1468.

D. The Suppression Hearing and Decision

Defense counsel filed a motion to suppress the evidence seized when the police entered the Boyer home. Counsel argued that the trial court needed "exclude evidence, *e.g.*, any and all materials, including human DNA, seized and obtained by the police from Mr. Boyer's outside trash-bin" because the search was not justified by any exception to the warrant requirement and the police did not have valid permission to enter the Boyer home without a warrant. AV-1313–20.

At the hearing, Det. Cole described how he "seized the trash can" from the Boyer residence. 2/21/2019–TR–12. He said he followed M.B. into various parts of the house: the basement, the kitchen, the hallway, and her bedroom on the second floor. 2/21/2019–TR–12-15. When cross-examined about his use of the phrase "a stretch" to describe the possibility of searching the home a second time for the rug, Det. Cole answered, "I guess, I'd have to listen to the recording to see the context and what we were talking about." 2/21/2019–TR–21. M.B., meanwhile, did not testify at the hearing.

Despite this omission, the court ruled that M.B. provided valid consent to the search, denying Mr. Boyer's motion to suppress. It held that under the Fourth Amendment and Article 11 of the Vermont Constitution, "a minor can consent to a warrantless search of his/her parent's house if the minor has

common authority over the home." AV-1214.

The trial court decision ignored several key facts raised squarely by the defense that compelled a finding that M.B. did not have the authority to consent to a search of the Boyer residence:

> 1) M.B. had moved out prior to the search;
>
> 2) M.B. lacked a house key;
>
> 3) M.B. and the officers tried the front door, and, finding it locked, went in through the basement; and
>
> 4) M.B. asked the officers *for permission* to go to the house to get her belongings. 2/21/2019–TR–15-17; AV-786, 1328, 1350–51.

The court's analysis also failed to address that the police conceded they went to the Boyer-Sousis home when were fully aware that no adults were present. AV-1328. The decision also omitted that the police did not ask Christine for her permission to seize the trashcan upon her arrival. 2/21/2019–TR–14-15. The court's decision began and ended with the conclusion that a fourteen-year-old's permission to enter without a warrant was valid, even where M.B. later professed she had no knowledge that she was consenting to a search. AV-1213–17, 1456–57.

E. The 1,197 Days Mr. Boyer Spent Incarcerated Between His Arraignment and the Conclusion of His Second Trial

Between arraignment and his first trial, Mr. Boyer was incarcerated for 562 days. 11/6/2019–TR-1.

Actions completely within the control of the government then derailed that trial—a "bike gang" named "Bikers Against Child Abuse" walked M.B. into the courtroom wearing intimidating attire.[3] 11/6/2019–TR–14-16.

[3] The official logo of Bikers Against Child Abuse contains a closed fist, positioned to look like it is punching forward, with a skull and crossbones symbol. https://bacaworld.org/.

Although Mr. Boyer's defense attorney repeatedly argued—before the jury entered the courtroom—that this insignia would prejudice the jurors, the State disagreed, and the court ruled in the State's favor. *Id.* at 19–20.

But the defense was correct. A few days later, a juror reported that three jurors thought the bike gang was coaching M.B. on what to say and that one juror "knew what the [bike gang] was about." Now the State joined the defense in its request for a mistrial, which was granted. 11/8/2019–TR–8-12. Where precious judicial resources had been squandered, the court mandated that next trial no prejudicial insignia would be allowed in. AV-638–40.

Unfortunately, that trial did not happen for almost two more years. In March 2020, the courts shut down in response to COVID-19. In June, Mr. Boyer told the court "[h]is main concern is to get the trial scheduled as soon as possible." 6/2/2020–TR–3. On August 26, 2020, Mr. Boyer filed a motion to dismiss on speedy trial and due process grounds. AV-505. Mr. Boyer was outraged by the lack of urgency and resource allocation within the judicial system dedicated to restarting jury trials. AV-511. Mr. Boyer told the court how became infected with COVID-19 while incarcerated and was suffering from severe, long-term symptoms. AV-512–13. He explained that he received only Tylenol for his pain and was unable to shower or shave at all during his initial quarantine. AV-395. Further adding to his isolation, stress, and confusion, every time Mr. Boyer made an in-person appearance for a hearing, he was required to spend 14 days in *de facto* segregation because of forced quarantining when he returned to jail. 11/10/2020–TR–2-3. Engaging in his own defense meant committing himself to solitary confinement.

Meanwhile, the U.S. District Court for the District of Vermont and other states' courts reopened, beginning to host jury trials in September 2020. Geoffrey W. Crawford, Chief Judge of the District of Vermont, General Order No. 93 (Sep. 25, 2020) https://www.vtd.uscourts.gov/sites/vtd/files/GeneralOrder%2393.pdf; Katie Mettler, *Sanitizer, face shields and a plexiglass maze: What jury trials look like in a pandemic*, THE WASHINGTON POST (Sep. 18, 2020)

https://www.washingtonpost.com/local/legal-issues/sanitizer-face-shields-and-a-plexiglass-maze-what-jury-trials-look-like-in-a-pandemic/2020/09/18/0ed75970-f8fc-11ea-89e3-4b9efa36dc64_story.html.

On November 23, 2020, the court denied Mr. Boyer's motion to dismiss. AV-229. The court noted that "the delay [was] sufficient" to warrant speedy trial review, but because "there has been no deliberate attempt by the State to delay the trial" and Mr. Boyer did not assert his speedy trial rights aggressively enough, there was no violation. AV-229–36. The court concluded that Mr. Boyer's lengthy, frightening and stressful incarceration had not impaired his defense. AV-233. Mr. Boyer promptly followed the denial with a request for bail review. In Bennington County, trials remained indefinitely postponed as of November 17, 2020. AV-220–21. The trial court denied this motion too on January 11, 2021, AV-211, and this Court affirmed that denial soon after. *State v. Boyer*, 2021 VT 19, ¶ 1, 252 A.3d 804, 805.

On June 2, 2021, at a pre-trial conference, counsel reiterated that Mr. Boyer's "main concern is having a trial." 6/2/2021–TR–3. The defense emphasized that "this case has been set . . . for trial for a long time," and they were "ready to go." *Id.* at 5.

Finally, two months later, and 1,193 days after his arraignment, Mr. Boyer was tried. 7/29/2021–TR. The jury acquitted Mr. Boyer of both aggravated sexual assault of a child and aggravated domestic assault, instead finding him guilty of one count of the lesser included offense of statutory rape under 13 V.S.A. § 3252 (c). 8/2/2021–TR–97; 9/9/2021–TR–10-11.

Mr. Boyer was sentenced on November 23, 2021. Many testified on Mr. Boyer's behalf, including his mother and stepfather who came from Alabama. 11/23/2021–TR–14. His mother hoped the judge "would consider letting Joshua go home to his family," and his stepfather said he was "a good parent." *Id.* at 15, 18. His two youngest children also sent letters on his behalf, and Mr. Boyer himself said, "I accept and take responsibility for the jury's decision." *Id.* at 29, 33. The court imposed a seven-to-twenty-year prison sentence. *Id.* at 40.

This timely appeal followed.

Standard Of Review

This Court has "adopted a two-step approach for reviewing motions to suppress." *State v. Huston*, 2020 VT 46, ¶ 9, 212 Vt. 363, 236 A.3d 1291. Factual findings receive a clear-error standard, while conclusions of law are reviewed *de novo*. *Id.* The same respective standards apply for speedy trial claims. *See State v. Turner*, 2013 VT 26, ¶ 6, 193 Vt. 474, 70 A.3d 1027.

The "trial court's decision on the question of the voluntariness of a consent to search, and thus the ultimate constitutional validity of the search, must be reviewed independently by this Court on appeal." *State v. Weisler*, 2011 VT 96, ¶ 26, 190 Vt. 344, 35 A.3d 970.

Argument

I. The search was unconstitutional because M.B. was a child who no longer lived at her father's home and did not give voluntary consent to the search.

Article 11 of the Vermont Constitution is the state's strongest bulwark against invasive government action. The people of Vermont "have a right to hold themselves, their houses, papers, and possessions, free from search or seizure," Vt. Const. Ch. I, Art. 11, and are protected from "unreasonable government intrusions into legitimate expectations of privacy." *State v. Ford*, 2010 VT 39, ¶ 10, 188 Vt. 17, 998 A.2d 684 (quotations omitted). Homes receive special Article 11 security as "repositor[ies] of heightened expectations," *State v. Geraw*, 173 Vt. 350, 353, 795 A.2d 1219, 1221 (2002), and anything within the home's curtilage, *State v. Calabrese*, 2021 VT 76A, ¶ 20, __ Vt. __, 268 A.3d 565, as well as garbage deposited at the curb, is protected, *State v. Morris*, 165 Vt. 111, 126, 680 A.2d 90, 100 (1996).

Central to Article 11 jurisprudence is the warrant requirement. Warrantless searches are presumptively unconstitutional. *Ford*, 2010 VT 39, ¶ 10. There are only "a few narrowly drawn and well-delineated exceptions" to this rule. *Id.* (quotations omitted). One of these is valid consent to the

intrusion, which must be fully voluntary and can only be provided by persons who possess common authority over the property. *United States v. Matlock*, 415 U.S. 164, 170 (1974); *see also State v. Chenette*, 151 Vt. 237, 250, 560 A.2d 365, 374 (1989).

Here, the brazen, warrantless search of Mr. Boyer's home fails the test set forth in *Matlock*, as well as *Chenette*, which holds that the voluntariness of third-party consent is "a factual question based upon the totality of the circumstances." 151 Vt. at 249–50. This inquiry focuses on two elements: whether (1) the consenting party could have permitted the search in her own right; *and* whether (2) the defendant "assumed the risk" that a third party could consent to the search. *Id.* M.B.'s supposed "consent" does not come close to meeting this threshold.

A. M.B. did not have sufficient common authority over her father's house to consent to the warrantless search.

Children do not possess the same level of authority over the home as their parents. Everyone can remember what it is like being a child—especially a teenager—living under a parent or guardian. You need to ask for permission to do things. Parents will establish clear-cut rules, prohibiting their children from inviting friends over or staying out too late.

Our nation's courts have long recognized this dynamic. The Supreme Court has referred to parent-child relations as a "recognized hierarchy" that warrants special attention when determining whether valid consent to enter a home was obtained. *See Georgia v. Randolph*, 547 U.S. 103, 114 (2006). "A child is not a roommate" and "our third-party consent doctrine should recognize this fact." *United States v. Sanchez*, 608 F.3d 685, 692 (10th Cir. 2010) (Lucero, J., concurring). Indeed, the *predominant assumption is that minor children are "not allowed to invite guests into the home*," *Id.* at 694, including police officers who wish to obtain entry, *see Saavedra v. State*, 622 So.2d 952, 963 (Fla. 1993) (Kogan, J., concurring) (emphasis added).

The fact that Mr. Boyer had the authority to determine who M.B. could see, AV-810–11, 1380, is an important consideration. *See Commonwealth v.*

Garcia, 387 A.2d 46, 55 (Pa. 1978) (holding that a sixteen-year-old daughter's consent to search was "ineffective" because her father "had the power to determine the extent of her daughter's authority to admit people to the house"). Mr. Boyer had recently forbade his daughter's relationship. AV-1380. Indeed, if it was not already clear, once they arrived at the Boyer home, Det. Cole saw firsthand that M.B. did not have a key and that she could only access the home by sneaking in through the basement. AV-786.

Any uncertainty as to M.B.'s authority does not cut in favor of a warrantless search; rather it imposed an obligation to "investigate further before relying on the consent" given by a third party. *U.S. v. Waller*, 426 F.3d 838, 847 (6th Cir. 2005) (quotations omitted); *see also U.S. v. Cos*, 498 F.3d 1115, 1128 (10th Cir. 2007). Det. Cole's squirrely response was that M.B. was comfortable going to her house. Yet, a week after the warrantless search, Det. Cole described his ability to rely on M.B.'s consent a second time as "a stretch." AV-1456. It was just as much a stretch the first time, and, as a consequence, the trial court should have suppressed where M.B. clearly did not have shared authority.

B. The court's finding that M.B. "lived full time on the premises and had joint access to the house along with its other occupants" was clearly erroneous.

The trial court erred when it found that M.B. "lived full time on the premises and had joint access to the house along with its other occupants." AV-1218. The facts simply failed to establish that because at the time of the search, M.B. *was no longer living at the Boyer residence*. 2/21/2019–TR–17; AV-1351. The negligible amount of authority she had over the home as a fourteen-year-old became null when she went to live with her boyfriend's family. *See May v. State*, 780 S.W.2d 866, 873 (Tex. App. 1989) (holding that the defendant's stepdaughter had "absolutely *no* authority" to consent because "she was not living in the house at the time of the first search").

First, the very allegation of abuse in this case arose when Mrs. Mason told M.B. that she would have to return to the house she had twice run away from. AV-1018. The police knew that M.B. had moved out because on the day

of the search, officers referenced Mr. Boyer's house to M.B. as "your *dad's* home." AV-1335 (emphasis added). Mrs. Mason told them explicitly that M.B. was staying in her boyfriend's room. AV-1351. At the interview, M.B. asked the DCF caseworker where she was going to live after she left the Mason's home, and it was abundantly clear that she was not going back to the Boyer/Sousis residence. AV-1351–52. M.B. also asked Det. Cole if she could get her "stuff" from the house. AV-1350. If she still lived there and had access to the home, she would not have asked for permission to get her belongings. Finally, police knew that M.B. did not possess a key to the house. AV-1328. M.B. was thus no longer a co-inhabitant "having joint access or control for most purposes" capable of consenting to a search. *Matlock*, 415 U.S. at 171.

Therefore, this Court must reverse the trial court's decision. *See Ford*, 2010 VT 39, ¶ 8 (reversing a denial of a suppression motion where the trial court's finding that footprints were "recent" was clearly erroneous).

C. The prosecution failed to meet its burden to show that M.B. voluntarily consented to the search.

The burden to prove voluntary consent falls squarely on the prosecution. *State v. Allis*, 2017 VT 96, ¶ 10, 205 Vt. 620, 178 A.3d 993. This Court owes no deference to the trial court on this point, but instead reviews the question *de novo*. *Weisler*, 2011 VT 96, ¶ 26. "As with the facts surrounding a confession, the voluntariness of a consent to search focuses on a variety of objective factors relating to the suspect's age, mental ability, and experience and the environment in which the consent was obtained, including the location and length of the stop, the use of physical restraint, threats or intimidation, and whether the suspect was informed of his or her right to withhold consent." *Id*. at ¶ 25.

Here, the only evidence the prosecution presented was the testimony of Det. Cole that he asked whether M.B. was "comfortable" going to the house. According to Cole, M.B. said she would be. 2/21/2019–TR–9; AV-1327. M.B. did not testify at the suppression hearing. On its face, this question and answer fails to address permission to search—whether or not M.B. felt comfortable going to the house with the police does not establish that she

consented to a search, nor is it clear from the equivocal wording used that Det. Cole was requesting permission to search. The prosecution did not present a written consent to search, because they did not obtain it. Nor is there a recording of the conversation where M.B. purportedly consented. Det. Cole did not tell M.B. that she could refuse consent. The officers' question and M.B.'s answer were vague and wholly insufficient to meet the prosecution's burden to prove voluntary consent. *See Allis*, 2017 VT 96, ¶ 18 (finding that a co-tenant's "gesture" towards police seeking to enter a home was "so ambiguous" that it failed to establish consent).

M.B.'s age and inexperience count heavily against the prosecution's argument that she gave voluntary consent. M.B. was fourteen. *See Davis v. State*, 422 S.E.2d 546, 550 (Ga. 1992) ("Most compelling . . . is [the minor's] youth. The younger a child the less likely that [they] can be said to have the minimal discretion required to validly consent to a search, much less waive important constitutional rights."). There was no evidence that she had any prior experience with these types of decisions.

And although Det. Cole described M.B. as mature, 2/21/2019–TR–14, a reasonable officer in his position would think otherwise. Det. Cole knew that M.B. ran away from home twice with her boyfriend, got into trouble at school for misbehaving on the bus, and skipped class thirteen times. AV-1375–80. He also knew from both her parents that M.B. had long wanted to move into her boyfriend's house. AV-1415, 1432. Because "maturity and responsibility directly impact[] the question of actual or apparent authority," *Abdella v. O'Toole*, 343 F. Supp. 2d 129, 135 (D. Conn. 2004), Det. Cole should have known that M.B. was not mature enough to comprehend the officers' serious and invasive request to search Mr. Boyer's home.

While there was no overt evidence of intimidation, it was clear that M.B had things she wanted to retrieve from the house, and Det. Cole preyed upon that. M.B. asked early in the interview whether she could get her "stuff." Det. Cole initially said, "I don't know if you'll be able to go get it." AV-1350. Soon thereafter, Det. Cole dangled an opportunity for her to get her possessions, assuming she "was comfortable going to the house." As M.B.

later testified, in both trials, she thought she was going to the house with the police to get her stuff. 11/6/2019–TR–66; 7/30/2021–TR–24. M.B.'s willingness to accompany the officers to the house to get her "stuff" is no substitute for voluntary consent to search. *See United States v. Bosse*, 898 F.2d 113, 115 (9th Cir. 1990) (finding the Fourth Amendment is violated when an officer obtains entry "by affirmative or deliberate misrepresentation of the nature of the government's investigation.") (quotations omitted).

II. By timing the search to coincide with Mr. Boyer's arraignment, the police functionally removed Christine from the home, rendering the search illegal under *Georgia v. Randolph*.

There is another distinct reason that the April 23rd search was unconstitutional: police openly and unreasonably timed the search to coincide with Mr. Boyer's mandatory arraignment hearing when they knew Christine would not be home. AV-1446–48.

In *Georgia v. Randolph*, the U.S. Supreme Court held that a present, objecting co-tenant wins out over a co-tenant who gives permission to a police search. 547 U.S. 103, 106 (2006). A non-present, potentially objecting co-tenant will lose, but only if "there is no evidence" that police removed them to avoid a potential objection. *Id.* at 121.

Here, there is ample evidence that the *de facto* removal of Christine was unreasonable. First, Christine was the only remaining parent living in the house and the only person who possessed a key to the house at the time. AV-1328. And it was M.B.'s lack of a key that forced the probing officers to enter the house through the basement. AV-786. It is plainly unreasonable as the investigating officer to avoid the only person with full authority over the house, let alone to put yourself in a situation where you are sneaking into a house via the basement.

Second, there was no pressing need to schedule the search when Christine was removed. The search took place midday on a Monday and could have occurred any other time that day or the following morning. Christine in fact came home when the search was ending, demonstrating she was

available. 2/21/2019–TR–14.

Accordingly, timing the police search to coincide with Mr. Boyer's mandatory arraignment hearing—when police knew that Christine would be with him—was not "objectively justified." *Fernandez v. California*, 571 U.S. 292, 302 (2014). Mr. Boyer did not forego his Article 11 and Fourth Amendment rights by attending his arraignment and having his wife drive him there. The police decision was calculated to take advantage of a 14-year-old who was obviously not inhabiting the house.

III. This Court has long protected the status and constitutional rights of minors, and under any test M.B. could not provide valid third-party consent to a search of her father and stepmother's home.

A. The consent was invalid because M.B. did not have the opportunity to consult with an impartial adult before waiving fundamental constitutional rights.

Under Article 11, this Court must find that minors possess a constitutional right to consult with an impartial adult prior to permitting a warrantless search of their family home. After all, minors cannot waive their other constitutional rights—let alone the rights of their parents—without safeguards in place.

The foremost example of such a right in Vermont is established by *In re E.T.C.*, 141 Vt. 375, 449 A.2d 937, 940 (1982), which provides strict standards for when a minor can waive their right against self-incrimination and right to counsel under Article 10. Before waiving these rights, three conditions must be met: (1) the minor must be given the chance to consult with an adult; (2) the adult must be a "genuinely interested" party and not affiliated at all with the prosecution; *and* (3) the adult must be informed and aware of the minor's guaranteed rights. *Id*. at 379.

Applying this new rule, this Court in *E.T.C.* reversed the trial court's denial of the fourteen-year-old defendant's suppression motion. The minor gave inculpatory statements after being pressed to "come clean" and only able

to speak with the director of his group home who was "not paying attention." *Id.* at 379–80. Part of the court's rationale for developing this rule was that children are denied the ability to do many things in society:

> It would indeed be inconsistent and unjust to hold that [a minor] whom the State deems incapable of being able to marry, purchase alcoholic beverages, or even donate their own blood, should be compelled to stand on the same footing as an adult when asked to waive important . . . rights at a time most critical to him and in an atmosphere most foreign and unfamiliar.

Id. at 379 (quoting *Lewis v. State*, 288 N.E.2d 138, 141–42 (Ind. 1972)). A fourteen-year-old who is pressed by police to open up the family home to an invasive search is in a similar, "critical" position.

And of course, there are compelling policy reasons for why minors receive procedural protections in the law. It is well-known that minors "lack the capacity and responsibility to realize the full consequences of their actions." *E.T.C.*, 141 Vt. at 379–79 (quoting *Lewis*, 288 N.E.2d at 141). It is also "beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave." *J.D.B. v. North Carolina*, 564 U.S. 261, 264–65 (2011). Studies have found that 70% of minors between ages 11–13 and 48% of minors between ages 14–15 show "impaired understanding of at least one right" they possess in the interrogation context. Naomi E. S. Goldstein, et al., *Waiving Good-Bye to Waiver: A Developmental Argument Against Youths' Waiver of* Miranda *Rights*, 21 N.Y.U. J. Legis. & Pub. Pol'y 1, 31 (2018).

Knowing this, it is unsurprising that fourteen-year-old M.B. did not understand what the police were seeking from the warrantless search conducted on April 23rd. At the interrogation before the search, M.B. asked if she could grab her belongings from the Boyer house. AV-1350. And when asked about the goal of the visit at both trials, M.B. answered both times that it was "[t]o get some of [her] belongings" or "because [she] didn't have any of [her] things." 11/6/2019–TR–66; 7/30/2021–TR–24. M.B. was plainly confused about the purpose of the visit—to gather evidence while the police knew the

parents had to be gone—and the extent to which she was waiving Mr. Boyer's Article 11 rights. M.B., after all, "just want[ed] him to get help." AV-1326. The interests of M.B. and the probing officers were not aligned, and M.B. was on her own to advocate for her interests.

Troublingly, too, it was the police themselves who placed M.B. in such a precarious position to begin with. Det. Cole waited until Monday to get DCF involved, leaving the fourteen-year-old without a legal guardian over the weekend. Had DCF been summoned to take action to protect M.B. when Mr. Boyer was arrested, M.B. would have had an attorney appointed to advise her about her rights and to help her make decisions.

B. The search was unconstitutional under a multifactor, third-party consent test designed to protect minors.

Neither the U.S. Supreme Court nor this Court has ruled on the issue of whether *minors* can provide valid third-party consent to a search. Many other states, however, have created special, multifactor tests to determine whether a minor consented voluntarily to a search under the federal constitution. *See, e.g., Saavedra v. State*, 622 So.2d 952 (Fla. 1993).

In *Saavedra*, police showed up to a house without a warrant, pounding on the door. *Id.* at 961. A boy who looked "about 12 to 13" opened the door and let the officers in while "scared and shaken up." *Id.* at 958, 961–62. Recognizing the severity and unreasonableness of such intrusions, the court adopted a special test for when minors can provide third-party consent to a warrantless entry. They held that the prosecution must prove "1) the minor shares the home with an absent, nonconsenting parent; 2) the police officer conducting the entry into the home reasonably believes, based on articulable facts, that the minor shares common authority with the parent to allow entry into the home; *and* 3) by clear and convincing evidence that the minor's consent was freely and voluntarily given under the totality of the circumstances." *Id.* at 954. Given the core values of Article 11, such a protective test is required, at minimum, under our state charter.

The *Saavedra* court then easily found that the search was

unconstitutional under the second prong. The invading officer acted unreasonably because he did not ask the adolescent child any questions relating to whether he had common authority over the home. *Id.* at 959.

The facts of this case would also certainly fail the *Saavedra* test. First, M.B. was no longer sharing "[her] dad's house" at the time of the search. 2/21/2019–TR–17; AV-1331, 1351. Second, there were no articulable facts showing M.B. had common authority to allow entry into the home. Police knew that she had no key and had not been allowed to see her boyfriend. AV-1328, 1378–80. When they arrived at the home, moreover, M.B. and the police had to sneak in through the basement to get into the house. AV-786. Third, there was no clear and convincing evidence that her consent was freely and voluntarily given. She was only fourteen years old, and investigators asked her simply if "she would be comfortable" with the officers coming over to the house. 2/21/2019–TR–9. She also showed later confusion about the purpose of the search. *See* 11/6/2019–TR–66; 7/30/2021–TR–24. Failing all three prongs, the police search of Mr. Boyer's home was therefore unconstitutional.

C. The search was unconstitutional because minors under sixteen cannot waive the constitutional rights of their parents.

In addition to Florida's protective test under the Fourth Amendment, minors in Montana under the age of sixteen are *per se* unable to provide valid consent to a search of their parents' home under the state constitution. *State v. Ellis*, 210 P.3d 144, 150 (Mont. 2009).[4] In *Ellis*, the Montana Supreme Court found a warrantless home invasion—"consented to" by a thirteen-year-old girl—to be unconstitutional, holding that "a child cannot waive the privacy rights of her parents." *Id.* (quoting *State v. Schwarz*, 136 P.3d 989, 992 (Mont. 2006)). The Court said it was "obvious that a child generally does not share mutual use of the property with a parent to the same extent" as

[4] Courts in two additional states have found that minors cannot provide valid third-party consent: Mississippi and Delaware. *May v. State*, 199 So. 2d 635, 639 (Miss. 1967) (involving fifteen-year-old son); *State v. Malcom*, 203 A.2d 270, 273 (Del. Super. Ct. 1964) (involving sixteen-year-old son).

spouses or cohabitating adults. *Id.* (quoting *Schwarz*, 136 P.3d at 992). Integral to the *Ellis* decision was that the Montana Constitution goes beyond the federal constitution in providing privacy protections for state citizens. *See* 210 P.3d at 148.

The same is true of Vermont's Constitution, where Article 11 accords Vermont citizens greater protection than its federal counterpart in several areas and for good reason. One of these is Article 11's focus on the protection of privacy and individual liberties. *See State v. Bauder*, 2007 VT 16, ¶ 10, 181 Vt. 392, 924 A.2d 38 (2007) (although "the Fourth Amendment and Article 11 both seek to protect our freedom from unreasonable government intrusions into . . . legitimate expectations of privacy, we have also long held that our traditional Vermont values of privacy and individual freedom—embodied in Article 11—may require greater protection than that afforded by the federal Constitution") (internal citations and quotations omitted). In keeping with its duty to enforce the state constitution, this Court has taken great pains to "discover and protect the core value of privacy embraced by Chapter 1, Article 11 of the Vermont Constitution." *Morris*, 165 Vt. at 115 (citing *State v. Savva*, 159 Vt. 75, 85, 616 A.2d 774, 779 (1991)).

Here, the Bennington police decision to take shameless advantage of a situation involving a fourteen-year-old illustrates the need for a bright line rule to protect the values enshrined by Article 11 and articulated in this Court's jurisprudence. Minors cannot waive their Article 10 rights unless strict conditions are met. Minors cannot convey property, vote in elections, or purchase alcohol. Minors under age sixteen cannot be deposed in sexual assault cases. V.R.Cr.P 15(e)(5). Adult parents, meanwhile, have a fundamental liberty interest in raising their children, *Troxel v. Granville*, 530 U.S. 57, 66 (2000), and can sometimes waive their minor children's rights. *See Justice v. Marvel, LLC*, 965 N.W.2d 335, 341 (Minn. 2021) (finding that the fundamental right identified in *Troxel* "implies that a parent has authority to act on behalf of a minor child when interacting with third parties."). Therefore, it would be grossly inconsistent with other areas of the law to hold that minors can waive their parents' integral Article 11 rights.

This Court should reach the same conclusion under the Fourth Amendment. *Randolph* instructs courts to use the framework of "widely shared social expectations," and gives an example of the parent/child relationship as a "recognized hierarchy" with a "societal understanding of superior and inferior." *Randolph*, 547 U.S. at 114. Under *Randolph*, this Court must conclude that children under sixteen do not have common authority over their parents' home. *Id.* at 111. Minor children simply "do not have coequal dominion over the family home." *People v. Jacobs*, 729 P.2d 757, 763 (Cal. 1987).

Parents lay the ground rules and can veto a child's decision regarding invitations into the home. Minors thus should not be able to greenlight a life-altering government intrusion into the home by providing valid third-party consent to search.

IV. Because the warrantless search of Mr. Boyer's home was unconstitutional, the evidence pilfered from the home must be suppressed pursuant to the Vermont and federal exclusionary rules.

The police searched Mr. Boyer's home without valid consent and without a warrant. Thus, the trashcan seized from the Boyer home—located within the curtilage and obtained only as a result of the officers searching the inside of the home—was the fruit of a warrantless, illegal search. This means the trashcan and the evidence therein should have been suppressed under both the Vermont and federal exclusionary rules. *See State v. Oakes*, 157 Vt. 171, 173, 598 A.2d 119, 120–21 (1991) (holding that the exclusionary rule requires the suppression of evidence obtained as a result of a search that violates the Fourth Amendment or Article 11). Evidence obtained in violation of the Vermont Constitution may not be admitted at a criminal trial because such evidence "eviscerates our most sacred rights, impinges on individual privacy, perverts our judicial process, distorts any notion of fairness, and encourages official misconduct." *State v. Walker-Brazie*, 2021 VT 75, ¶ 37, __ Vt. __, __ A.3d __ (quoting *State v. Badger*, 141 Vt. 430, 453, 450 A.2d 336, 349 (1982)). To vindicate Mr. Boyer's critical privacy rights, this Court must find that the trial court erred by not suppressing the evidence taken from his

home without a warrant and without valid consent.

V. The prosecution cannot show that the admission of the evidence from the trashcan was harmless beyond a reasonable doubt.

To establish that the error was harmless, the prosecution must show that there was "overwhelming evidence to support the conviction and the evidence in question did not in any way contribute to the conviction." *State v. Cameron*, 2016 VT 134, ¶ 29, 204 Vt. 52, 163 A.3d 545 (2016) (quotations omitted). The prosecution cannot meet that burden here.

This case turned on the government's presentation of DNA evidence from a rug and condom wrapper, which were taken from the illegally seized trashcan. 7/29/2021–TR–45-46. These were the only two pieces of physical evidence cited by the prosecuting attorney in his opening and closing statements. *Id*. at 15-18; 8/2/2021–TR–52-56. Moreover, expert testimony regarding this evidence took up the largest portions of the trial. 7/29/2021–TR–93-186; 7/30/2021–TR–65-122.

There was little else supporting Mr. Boyer's conviction. Not a single person corroborated M.B.'s allegations. M.B.'s little sister—who M.B. claimed witnessed one of the assaults where Mr. Boyer was on top of her—testified at trial that she never saw that. 7/30/2021–TR–61. The jury did not credit most of M.B.'s allegations—she claimed that Mr. Boyer assaulted her in the five-to-six member Boyer home—where sound travelled easily—"many times" over a period of months, but Mr. Boyer was acquitted of the aggravated counts. 7/30/2021–TR–11, 18, 37.

The admission of the evidence from the trashcan was clearly not harmless. *See State v. Hiltl*, 2021 VT 60, ¶ 45, __ Vt. __, 261 A.3d 1148 (admission of surveillance videos not harmless error where jury might have relied on them, despite corroborating testimony from multiple witnesses); *see also State v. Tester*, 2009 VT 3, ¶¶ 45–58, 185 Vt. 241, 968 A.2d 895 (a "close" case where this Court found a harmless error in admitting DNA evidence where the evidence was relied upon "only secondarily" and there were a

corroborating co-complainant and witness, "significant" results from a physical examination, and unchallenged testimony from the complainants).

VI. With 1,197 days between his arraignment and conviction, Mr. Boyer's constitutional right to a speedy trial was violated.

The Sixth Amendment to the United States Constitution guarantees people accused of crimes a speedy trial. *Barker v. Wingo*, 407 U.S. 514, 515 (1972). The right attaches upon arrest or formal accusation and continues "through trial." *Betterman v. Montana*, 578 U.S. 437, 439 (2016). *Barker* established a four-factor balancing test for assessing when a defendant has been deprived of the right to a speedy trial. 407 U.S. at 530. It examines the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id*., *accord State v. Turner*, 2013 VT 26, ¶ 7, 193 Vt. 474, 477, 70 A.3d 1027, 1030–31 (2013).

A. The 1,197 days between Mr. Boyer's arraignment and conviction constitutes an egregious length of delay.

The sheer length of delay in this case weighs heavily in favor of Mr. Boyer's speedy trial claim. He was arraigned on April 23, 2018, and convicted on August 2, 2021, making the length of delay in his case 1,197 days or approximately *3 years and 3 months*. This is an egregious amount of time for someone who is presumptively innocent to spend behind bars. Indeed, this Court has held that delays of much shorter lengths trigger consideration of the remaining speedy trial factors. *See State v. Unwin*, 139 Vt. 186, 195, 424 A.2d 251, 257 (1980) (delay of six months for an incarcerated defendant sufficient to consider the other factors).

B. The extraordinary delay in this case resulted from choices unattributable to Mr. Boyer.

The second factor also weighs in favor or Mr. Boyer because the significant delays in this case resulted from government actions and not his own. Mr. Boyer's defense counsel repeatedly objected to the Bikers Against Child Abuse being allowed in the courtroom and can bear no responsibility for the first mistrial. Furthermore, the trial court waited *six months* before

ruling on Mr. Boyer's motion to depose M.B. Mr. Boyer filed his motion to depose on January 23, 2019, with the trial court ruling on the motion on July 18, 2019. AV-1204. Communications dated June 17, 2021 between the prosecution and defense were submitted to the trial court that reflected the defense's "vast preference to have had [the deposition] done already." AV-1208. This lengthy delay must also be attributed to the government.

Mr. Boyer's trial was also delayed because the judicial system shut itself down in March 2020 in the wake of COVID-19. These pandemic-related delays must be attributed to the government. *See State v. Labrecque*, 2020 VT 81, ¶ 26, 213 Vt. 635, 641, 249 A.3d 671, 680 (holding that "the government bears the responsibility of bringing the defendant to trial, even when it is delayed . . . by a public health emergency.").

Other courts have held that "a court cannot deny an accused his right to a jury trial even if conducting one is difficult." *United States v. Henning*, 513 F. Supp. 3d 1193, 1198 (C.D. Cal. 2021). In *Henning*, the court decried that local courts were holding dozens of jury trials in late 2020 while the federal courts in California's Central District imposed an indefinite suspension. *Id.* at 1197. The same was true here—federal courts in Vermont and elsewhere in the country restarted jury trials in September 2020, *over a year* before Mr. Boyer's second trial began in November 2021.

From the disastrous mistrial to costly administrative decisions around COVID-19, the government is responsible for the significant delays in Mr. Boyer's case.

C. Mr. Boyer continuously asserted his speedy trial rights.

Mr. Boyer first invoked his desire for a speedy trial on June 2, 2020, shortly after the onset of the COVID-19 pandemic. At that hearing, Mr. Boyer told the court his main concern was to have a trial "as soon as possible." 6/2/2020–TR–3. Mr. Boyer filed a written demand on August 13th and a motion to dismiss on speedy trial grounds on August 26th, AV-505–17. A hearing on that motion was not scheduled for another two months. On November 10th, the court denied Mr. Boyer's motion. AV-229. On June 2,

2021, the defense exhaustedly reiterated that Mr. Boyer's "main concern is having a trial." 6/2/2021–TR–3. He emphasized that "this case has been set . . . for trial for a long time" and that he was "ready to go." *Id*. at 5.

Barker holds that "a defendant has *some* responsibility to assert a speedy trial claim," which Mr. Boyer assuredly satisfied. 407 U.S. at 529 (emphasis added).

D. Mr. Boyer was grossly prejudiced by the delay.

As for the final component of the last *Barker* factor, it is clear that Mr. Boyer's defense was also "impaired." 407 U.S. at 532. He faced a Hobson's choice at every hearing, worrying whether he needed to appear at hearings to advocate for himself when doing so meant more mind-numbing segregation when he returned. Mr. Boyer also experienced severe limitations regarding his access to counsel while incarcerated—he was incarcerated over an hour away from his attorney and could only have conversations with his attorney in a non-confidential setting. AV-394–96, 513.

Given "affirmative proof of particularized prejudice is not essential," *Doggett v. United States*, 505 U.S. 647, 655 (1992), the horrific conditions Mr. Boyer experienced and his diminished access to both court proceedings and his own representation make the fourth *Barker* factor weigh strongly in his favor.

The excessive delay of 1,197 days in this case rests almost entirely with the government. It took almost half a year for the trial court to rule on Mr. Boyer's motion to depose. Despite Mr. Boyer's repeated warnings, a mistrial occurred on the government's watch. The court system then shut down from administrative decisions wholly unattributable to Mr. Boyer. Mr. Boyer raised his speedy trial rights multiple times, all while experiencing horrific conditions and limits on his access to counsel and proceedings. Because there were no justifiable reasons for these delays and no justifiable reason to inflict this prejudicial and punitive treatment on Mr. Boyer, his conviction should be dismissed.

Conclusion

Wherefore, Mr. Boyer's conviction for sexual assault must be vacated and dismissed because the trial court failed to vindicate his right to a speedy trial. In the alternative, this Court should reverse and remand because the contents of the trashcan should have been suppressed.

Dated in Montpelier this 29th day of July, 2022.

Dawn Seibert, Esq.
Counsel for Appellant
Office of the Defender General
6 Baldwin Street, 4th Floor
Montpelier, VT 05633-3301
(802) 828-3168
Dawn.Seibert@Vermont.gov

/s/ Jackson Samples

Jackson Samples
Appellate Clerk
Office of the Defender General
6 Baldwin Street, 4th Floor
Montpelier, VT 05633-3301
(802) 828-3168
Dawn.Seibert@Vermont.gov

Certificate of Compliance

I certify that the above brief submitted under V.R.A.P. 32 was typed using Microsoft Word for Office 365 and the word count is 8,911.

Dated at Montpelier, Vermont this 29th day of July, 2022.

Anthony Bambara
Appellate Legal Assistance

cc: Alexander Burke, Esq.