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

Reply Brief of the Appellant

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Statement of the Issues

Table of Contents

Table of Authorities

Cases

Other Authorities

Argument

I. M.B. did not give valid consent to the search of her father's home.

The prosecution argues that M.B.'s consent was valid because she had no restrictions or limitations in her use of the Boyer-Sousis home, suggesting that she had as much authority in the home as her parents. Appellee's Br. 16. But this Court cannot ignore the undisputed evidence that M.B., like most fourteen-year-olds, had exactly the authority that her parents gave her and no more. When M.B. ran away from home with her boyfriend on April 17, 2018, Mr. Boyer confiscated her phone and told her she was not allowed to see her boyfriend. AV-810–11, 1380.[1]

Also, M.B. no longer had any authority over her father's home because she had moved out on Friday, April 20, 2018. That is why she asked Officer Cole on April 23rd, "What about my stuff? Will I ever be able to get my stuff or something?" AV-1350. The prosecution presented no evidence that M.B. ever returned to the house after running away on April 20th, except for the visit with Officer Cole.

The prosecutor muddies the water by arguing that it was "reasonable" for M.B. to go stay with her boyfriend's family. The prosecution also points to the note M.B. left when she ran away, which said "I love you, but I hate my life. Don't worry about me, I'll be back." Appellee's Br. 16-17. But the reason that she moved out is not relevant to the question of whether she still lived there. And the angry note does not change the fact that M.B. never returned

[1] The prosecution accuses Mr. Boyer of relying on "items not admitted into evidence: transcripts of interviews with himself, his wife, and M.B.; the affidavit of probable cause; a sworn statement by M.B.; and a police report." Appellee's Br. 7 n.2. The prosecutor asks this Court to disregard factual assertions that relied on these documents.
This Court must decline to do so because the prosecution is clearly mistaken; these items were admitted into evidence at the suppression hearing. 02/21/19-TR-26-27 (admitting exhibits attached to suppression motion); AV-1321-1494 (exhibits attached to suppression motion). And in any event, the prosecution's accusations are baseless because its Brief relied on these same documents. *See* Appellee's Br. 17, 21 (citing AV-1431, 1328).

home after the ran away for the second time.

There was also significant evidence that M.B. was not a mature fourteen-year-old capable of making a voluntary waiver. The prosecutor repeats Officer Cole's conclusory statement that M.B. possessed a high level of maturity. Appellee's Br. 18. But there was plenty of evidence that indicated otherwise. She had been kicked off the school bus for "public display[s] of affection" and screaming at the bus driver. AV-1378. She had 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.

As discussed in the opening brief, Officer Cole failed to record the conversation where M.B. ostensibly gave verbal consent. He also failed to obtain written consent. He did not tell her that she could refuse consent to search, but still get a ride back to the house to get her "stuff."[2]

A fourteen-year-old accepting a ride from the DCF worker and the police to get her belongings does not equate with her consenting voluntarily to a search of her father's home. *See State v. Allis*, 2017 VT 96, ¶ 18, 205 Vt. 620, 178 A.3d 993 (girlfriend's vague gesture insufficient to establish that she had given consent to enter the home); *State v. Badger*, 141 Vt. 430, 435, 450 A.2d 336, 339 (1982) ("Do what you want to do," in response to officer suggestion that he would take the juvenile's shoes, did not establish consent to seize shoes).

In addition, to determine whether M.B.'s purported consent was voluntary, this Court must analyze whether a reasonable fourteen-year-old in

[2] The prosecution argues that Mr. Boyer misrepresented the record in the opening paragraph of his brief. Appellee's Br. 9 n.3. This refers to Mr. Boyer's cite to M.B.'s trial testimony that 1) she believed that the purpose of the visit to the Boyer-Sousis home was to get her belongings; 2) when she and the officer arrived at Mr. Boyer's home "[t]he doors were locked, so we had to go in through the basement;" and 3) the basement was not the way she usually entered. The prosecution is correct that the trial court did not consider this evidence as to M.B.'s consent because M.B. was not called to testify at the suppression hearing. Given the procedural posture, Mr. Boyer is not asking this Court to consider M.B.'s trial testimony. The record at the suppression hearing is insufficient on its own to demonstrate valid consent.

M.B.'s circumstances would have felt free to decline the officer's suggestion that they go together to the Boyer home. *State v. Weisler*, 2011 VT 96, ¶ 25, 190 Vt. 344, 35 A.3d 970. There are several reasons why a reasonable fourteen-year-old in M.B.'s situation would have felt compelled to acquiesce.

The first, and primary consideration, is simply her age:

> "[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." *J.D.B.,* —— U.S. at ——, 131 S.Ct. at 2403. . . .see also *Eddings v. Oklahoma,* 455 U.S. 104, 116, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (noting that "the normal 16–year–old customarily lacks the maturity of an adult"). As the high court has observed, adolescents "lack the experience, perspective, and judgment" of adults, *id.,* and thus "cannot be viewed simply as miniature adults." *J.D.B.,* —— U.S. at ——, 131 S.Ct. at 2404.

In re E.W., 2015 VT 7, ¶ 18, 198 Vt. 311, 114 A.3d 112.

Fourteen-year-olds are "more vulnerable or susceptible to outside pressures than adults." *J.D.B. v. N.C.*, 564 U.S. 261, 272 (2011). They are prone to making impetuous, ill-considered decisions. *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

A second and related factor is the immaturity or naivete of the child. *See Davis v. State*, 262 Ga. 578 (1992). The prosecution presented no evidence that fourteen-year-old M.B. was mature besides the conclusory statements by Officer Cole that she seemed to have a high level of maturity. 02/21/19-TR-14. This Court warned in *State v. Melchior*, 172 Vt. 248, 250–51, 775 A.2d 901, 903–04 (2001) that the trial court should not rubber stamp bare conclusions made by law enforcement when reviewing a motion to suppress. Officer Cole's vague conclusion about M.B.'s maturity did not give the court enough information to make an independent factual determination that M.B. was mature enough to voluntarily consent to the search. *See State v. Robinson*, 2009 VT 1, ¶ 8, 185 Vt. 232, 969 A.2d 127 (reversing suppression denial where judge relied on conclusory statements about an informant's

credibility). The trial court failed to weigh the objective facts in the record - skipping school and getting into trouble with the bus driver - and instead merely repeated Officer Cole's opinion that M.B. seemed mature.

Also, M.B. naively told Officer Cole at their first interview, "I don't want my dad to get in trouble, I just want him to get help." AV-1326. This, after she had just made allegations that if believed would have resulted in a minimum sentence of twenty-five years to life.

M.B.'s inability to comprehend the consequences of the search supports the conclusion that her consent was involuntary. See *Davis*, 262 Ga. at 581-82 (holding a child's consent to search his parent's house invalid where he "simply did not know or completely understand what the consequences of his consent would be. We cannot allow such an unknowing and uninformed surrender of constitutional rights.").

Third, the officer did not tell M.B. that she could refuse to allow him to enter the house with her. This weighs heavily against a finding of voluntary consent. Indeed, "a clear communication from the police to the person being questioned about his or her freedom is 'the most important factor' in determining whether a reasonable person would have felt free to terminate the interview and leave at any time." *E.W.*, 2015 VT 7, ¶ 18. This factor is even more important for a child. *Id.; see also State v. Sprague*, 2003 VT 20, ¶ 29, 175 Vt. 123, 824 A.2d 539 ("Furthermore, while a suspect's knowledge of the right to refuse is not essential to a finding of consent, it is plainly a factor to be taken into account.").

Finally, M.B. was in an extremely vulnerable position, where she was no longer living in her family home but had not been taken into state custody. She had run away from home abruptly and impetuously, leaving many of her possessions behind. She wanted desperately to get her things from the Boyer-Sousis home. Where a minor is in an unstable living situation, courts must "recognize the reality that [her] status was far less conducive to withstanding police authority than another minor in similar physical circumstances." *See J.D.B.*, 564 U.S. at 276.

The prosecutor muddles the analysis by suggesting that the warrantless search was "reasonable" because M.B. had reported a crime and was seeking police assistance. Appellee's Br. 18. This is an invitation down a slippery slope. Mr. Boyer was presumed innocent at the time of this search. This Court cannot allow its analysis to be tainted by the fact that M.B. had alleged a serious offense. *See State v. Lussier*, 171 Vt. 19, 31-32, 757 A.2d 1017, 1026 (2000) (recognizing the importance of "bringing to justice those persons that violate our criminal laws" but holding that the public interest "may not be satisfied at the expense of our constitutional right to be free from unbridled government interference in our lives").

This case is not about empowering M.B. to protect herself. Officer Cole had every opportunity to insert her allegations about DNA evidence into an affidavit and obtain a search warrant. Instead, he chose to rely on a fourteen-year-old's dubious consent to search a home no longer her own.

II. Article Eleven should not permit a fourteen-year-old child to waive her parent's privacy rights in his home.

Under Article Eleven, warrantless searches are presumptively unconstitutional. *State v. Bauder*, 2007 VT 16, ¶ 14, 181 Vt. 392, 924 A.2d 38. This is because "the warrant requirement reflects the balance reached by the constitutional drafters, a balance in which the individual's interest in privacy outweighs the burdens imposed on law enforcement, such that those subjected to searches must be protected by advance judicial approval." (internal quotations omitted). *State v. Dupuis*, 2018 VT 86, ¶ 7, 208 Vt. 196, 197 A.3d 343.

The burden to justify a warrantless search of a home is especially heavy in Vermont, because a person's home is a sacred place that receives the highest level of constitutional protection. *State v. Bryant*, 2008 VT 39, ¶ 12, 183 Vt. 355, 950 A.2d 467 ("We have often noted the significance of the home as a repository of heightened privacy expectations, and have deemed those heightened expectations legitimate").

Another defining characteristic of Article Eleven is the high value it

places on an individual's right to privacy. 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." *State v. Morris*, 165 Vt. 111, 115, 680 A.2d 90, 93 (1996) (citing *State v. Savva,* 159 Vt. 75, 85, 616 A.2d 774, 779 (1991); *State v. Kirchoff,* 156 Vt. 1, 6–7, 587 A.2d 988, 992 (1991).

Montana's constitution is also far more protective of privacy rights than the federal charter. *See State v. Schwarz*, 136 P.3d 989, 990 (Mont. 2006) ("Unlike its federal counterpart, however, Montana's constitutional scheme affords citizens broader protection of their right to privacy. In Montana, therefore, we analyze search and seizure issues in light of our citizens' enhanced right to privacy.") (internal citations omitted). And, under the state constitution, a warrant is presumptively required to conduct a search; exceptions are narrowly construed against the prosecution. *Id.* at 992. Finally, a person's home receives special protection again a warrantless search. *State v. Ellis*, 210 P.3d 144, 158 (Mont. 2009) ("Indeed, the fundamental purpose—the *raison d'etre*—for the constitutional guarantee against unreasonable searches and seizures is to . . . safeguard the sanctity of the home against arbitrary invasions by governmental officials."). For these reasons, this Court should look to Montana when analyzing a novel issue under Article Eleven, especially where the question is whether the prosecution can justify a warrantless invasion into the privacy of a person's home.

Montana and Vermont are clearly "sibling states." Not only have Montana and Vermont both interpreted their constitutions to offer greater protection from government intrusion than the federal constitution, but each state has relied on the other's constitutional analysis along the way. Both states have rejected the "open fields" doctrine, holding that its citizens have a right to privacy in land outside the curtilage. *See State v. Bullock*, 901 P.2d 61 (Mont. 1995); *State v. Kirchoff,* 156 Vt. 1, 587 A.2d 988 (1991); *State v. Dupuis*, 2018 VT 86, ¶ 22, 208 Vt. 196, 197 A.3d 343 (citing *Bullock*, 901 P.2d 61). And in each state, a warrant is required to record face-to-face conversations in an individual's home, even where the other party to the

conversation consents. *See State v. Goetz*, 191 P.3d 489, 499 (Mont. 2008) (citing *State v. Blow*, 157 Vt. 513, 602 A.2d 552 (1991)).

Even where not explicitly cross-referencing the other, Vermont and Montana have proceeded in lockstep to protect their citizens' privacy rights. In Montana, as in Vermont, police may not conduct a warrantless "search incident to arrest" as a matter of course. *See State v. Hardaway*, 365 P.3d 900 (Mont. 2001); *State v. Medina*, 2014 VT 69, 197 Vt. 63, 102 A.3d 661. Both states have also rejected the "automobile exception" to the warrant requirement. *See State v. Elison*, 14 P.3d 456 (Mont. 2000); *State v. Savva,* 159 Vt. 75, 616 A.2d 774 (1991). Even where the driver has been arrested and the car impounded, law enforcement in both states is forbidden from conducting an "inventory search" without a warrant. *See State v. Sawyer*, 571 P.2d 1131 (Mont. 1977); *State v. Bauder*, 2007 VT 16.

In *Schwarz*, the Montana Supreme Court determined on similar facts that a minor did not have the actual authority to consent to a search of her parents' home. The court relied on the enhanced privacy protections in Montana's constitution to hold that "a youth under the age of sixteen does not have the capacity or the authority to relinquish her parents' privacy rights." *Schwarz*, 136 P.3d at 992. The court reasoned that the state was seeking an expansion of third-party consent, and that the privacy protections of the state constitution did not allow this warrantless intrusion into the home. *Id*.

Montana, like Vermont, normally evaluates the voluntariness of consent using a "totality of the circumstances" test. *State v. Clark*, 198 P.3d 809 (Mont. 2008). In holding that a *per se* rule was appropriate in this circumstance, the Montana Supreme Court relied, in part, on a state statute that categorically required consultation with a parent or attorney before a child under sixteen could waive her right against self-incrimination. *Schwarz*, 136 P.3d at 992. Crucially, Vermont provides similar categorical protections to juveniles. *See In re E.T.C.*, 141 Vt. 375, 449 A.2d 937 (1982) (requiring consultation with an interested and informed adult before a juvenile can waive her right against self-incrimination). Like Vermont's constitutional emphasis on individual privacy, this statutory recognition of

the cognitive limitations of minors is a factor that weighs in favor of this Court's adoption of the Montana holding.

The prosecutor argues that *Schwarz* was based on Montana's rejection of the doctrine of "apparent authority." Appellee's Br. 18. But that is a red herring. The Montana court noted that courts in other jurisdictions had held that minor consent was valid under the "apparent authority" doctrine, *see Schwarz*, 136 P.3d at 992, but the Montana court's holding was based on whether or not a child had actual authority, just as the trial court's decision was in this case.

A. This Court should adopt a rule like Montana's because the social science and policy concerns support doing so.

A categorical rule in this situation makes sense because it is very difficult to determine the maturity of any given fourteen-year-old. This difficulty is the basis for using age as an objective criterion for when juveniles may engage in various activities, such as driving a car, voting, drinking alcohol, and joining the Armed Forces. *See Bellotti v. Baird*, 443 U.S. 662, 643 n.23 (1979) (explaining that age limits make sense because it is difficult both to define and assess maturity).

Even with a clear definition of maturity and standards for making the determination, it is not one that can be accomplished by an untrained police officer in a relatively brief interaction with a child. "An accurate assessment of a teenager's maturity requires observations in various clinical settings because human behaviors in some cases are more closely related to the interaction between situational demands and personal characteristics . . . than to personal characteristics alone." Katherine M. Waters, *Judicial Consent to Abort: Assessing a Minor's Maturity*, 54 Geo. Wash. L. Rev. 90, 98 n.55 (1985) (internal quotations omitted).

Law enforcement officers are not trained generally to deal with juveniles, and certain types of training, like the Reid Technique, actually correlate with a *decreased* ability to assess the maturity of a child:

> A research study comparing police officers trained in the Reid Technique and officers not trained in the Reid Technique found that Reid-trained officers were less sensitive to the developmental differences between adolescents and adults than non-Reid-trained officers. The data from this study indicates that Reid-trained officers "perceive[d] adolescents to be as mature as adults and treat them as such during interrogation."

Allison Stillinghagan, Note, *The Kids Aren't Alright, The Road to Abandoning Deceptive Interrogation Techniques for Juvenile Suspects in Maryland*, 81 Md. L. Rev. 1084, 1106 (2022).

For all these reasons, a rule that a fourteen-year-old may not consent to a search of her parent's home is required under Article Eleven. Alternatively, this Court should require that a fourteen-year-old be permitted an *E.T.C.*-type consultation with an interested adult before making the decision to waive her (or her parent's) constitutional rights by consenting to a search.

III. Even if Article Eleven and this Court's emphasis on privacy does not justify a prohibition on allowing fourteen-year-olds to consent to searches on behalf of their parents, the trial court's reliance on *Georgia v. Randolph* is misplaced because the historical analysis demonstrates that "widely shared social expectations" do not justify divergence from the warrant requirement on these facts.

The prosecution seeks to expand the scope of third-party consent to include a police officer visiting a child and asking for consent in the context of helping her to retrieve her things when the child no longer lives in the residence. In *Georgia v. Randolph*, 547 U.S. 103, 112 (2006), the Supreme Court stated that this determination depends upon two critical facts: the minor's age and the scope of consent given. And, those facts are considered in light of current widely shared social expectations.

Certainly, minor consent to search a parent's home would not have been recognized when the federal constitution was ratified. *See Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 834 (2011) (Thomas, J., dissenting)

("The history clearly shows a founding generation that believed parents to have complete authority over their minor children"); *Bellotti v Baird*, 443 U.S. 622, 638 (1979) ("[C]entral to many of these theories, and deeply rooted in our Nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children. Indeed, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

Even if a minor could consent to a search, *Georgia v. Randolph* requires that the child's right to consent to a search is analyzed as subordinate to that of the parent because it recognizes that the social understanding of a parent-child relationship is one of superior-inferior. 547 U.S. 103, 114 (2006) ("Unless the people living together fall within some recognized hierarchy, like a household of parent and child or barracks housing military personnel of different grades, there is no societal understanding of superior and inferior, a fact reflected in a standard formulation of domestic property law, that "[e]ach cotenant ... has the right to use and enjoy the entire property as if he or she were the sole owner, limited only by the same right in the other cotenants.").

Although *Randolph* mentions the possibility that a child might be permitted to allow the police to "cross the threshold," that is not what happened here. The police didn't just enter the home at the invitation of a child who opened the door. Here, they approached M.B. at her boyfriend's house. They accompanied her in a police car to the Boyer-Sousis residence, entered the home, walked through the first floor, upstairs to M.B.'s bedroom, then back downstairs to explore the laundry room, and finally to the trash can outside the back door.

Also, given the timeline, it seems likely that Officer Cole purposely bypassed Mr. Boyer to get consent from his fourteen-year-old daughter. Officer Cole had developed an interest in DNA evidence at the Boyer home over the weekend. 02/21/19-TR-7-8. But he waited to schedule a meeting with M.B. until Monday, at the time of Mr. Boyer's arraignment. The office saw

Mr. Boyer at the police station, dressed up for his arraignment, but the officer did not seek consent from Mr. Boyer. AV-1336. Then, the officer met with M.B. and asked her to accompany him to the house, noting that at that time Mr. Boyer would not be there because he was at court. 02/21/19-TR-9 ("I was aware that, at the time I'm talking to her, was Josh's arraignment"). On these facts, Officer Cole's timing seems anything but coincidental.

The trial court found *United States v. Sanchez*, 608 F.3d 685 (10th Cir. 2010) persuasive. AV-1217. But in that case, the parole officers who approached defendant's home did not purposely bypass the parent to get to the child. It was mere happenstance that the fifteen-year-old daughter was home alone when the police knocked at the door. *Sanchez*, 608 F.3d at 687. Here, the police intentionally approached M.B. and offered to escort her to the home while neither Mr. Boyer nor Ms. Sousis were home. Officer Cole would later tell M.B. that he did not think they would be able to get away with that again. AV-1456 (describing a second consent search as a "stretch").

State v. Hembree, 546 S.W.2d 235 (Tenn. Crim. App. 1976) is a much closer parallel to this case than *Sanchez*. There both parents were in police custody and available to consent to a search of their home. As they did in this case, the police bypassed the parents who would almost certainly have refused and sought consent from their son (who was no more than eighteen years old). The court held "that when parents are in custody of the law along with their son and are equally accessible to give or withhold consent to search, the consent and cooperation to a search by the son does not waive constitutional rights of his parents." *Id.* at 241. This Court should do the same under a federal test because societal expectations dictate that when balancing M.B.'s age and her vague acquiescence in a plan to get her possessions, there is simply no justification for dispensing with the need for a warrant.

IV. The prosecution concedes that if the search was unlawful, the exclusionary rule applied and the error in admitting the evidence was prejudicial.

Mr. Boyer argued that the exclusionary rule applied to the evidence

obtained from the search of the trash can and that the failure to exclude it from the jury's consideration was reversible error. Appellant's Br. 27-29. The prosecutor failed to rebut these arguments, and so concedes those points. *Swanton Village v. Town of Highgate*, 128 Vt. 401, 403, 264 A.2d 804, 805 (1970) (failure to respond to issues on appeal waives determination of them)*; accord Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011) (same).

V. The trial court did not find that the search was supported by exigent circumstances and this Court cannot affirm on that ground.

The prosecution argues for a separate ground of affirmance – exigency – that the trial court did not find. Appellee's Br. 21-22. The trial court could not have found exigent circumstances because this search was conducted in the middle of a weekday when the court was open. In fact, the judge was on the bench handling Mr. Boyer's arraignment. *See State v. Neil*, 2008 VT 79, ¶ 14, 184 Vt. 243, 958 A.2d 1173 (rejecting exigent circumstances argument where the warrantless search occurred on a weekday while the courthouse was open).

VI. Mr. Boyer's right to a speedy trial was violated where he spent thirty-nine months in prison awaiting trial.

A speedy trial claim requires this Court to weigh various factors. *See Barker v. Wingo*, 407 U.S. 514 (1972). But where a defendant spends an extraordinary amount of time in pretrial detention, the presumptive prejudice that stems from this factor can weigh so heavily that it tips the scales in favor of a speedy trial violation. *See Kennedy v. Superintendent SCI Dallas*, 50 F.4th 377 (3d Cir. 2022).

In *Kennedy*, the defendant waited longer than Mr. Boyer - fifty months - for his day in court. *Id*. at 382. But unlike Mr. Boyer, he did not spend the entire period in prison; he was released to house arrest after only six months of pretrial detention. *Id*. at 384. The fifty-month delay was largely due to court congestion. *Id.* at 383. This was held against the prosecution but was deemed a relatively "neutral" reason and so did not weigh heavily in Mr.

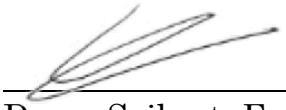
Kennedy's favor. Still, the combination of the exceptionally lengthy delay and the resulting presumptive prejudice required a finding of a speedy trial violation, even though Mr. Kennedy did not allege that his defense was impaired by the delay. *Id*. at 386.

Here, where Mr. Boyer spent thirty-nine months in jail waiting for his trial, his right to a speedy trial was violated.

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 10th day of November, 2022.



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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 4,497.

Dated at Montpelier, Vermont this 10th day of November, 2022.

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cc: Evan Meenan, Esq.