App. 1

IN THE COURT OF APPEALS OF MARYLAND

No. 84

September Term, 2017

CLEMENT REYNOLDS

v.

STATE OF MARYLAND

Barbera, C.J.,
Greene,
Adkins,
McDonald,
Watts,
Hotten,
Getty,

JJ.

Opinion by Hotten, J.

Filed: August 27, 2018

On May 29, 2014, Petitioner Clement Reynolds ("Reynolds") was indicted by the Grand Jury for Montgomery County on charges of first degree murder, conspiracy to commit first degree murder, and use of a handgun in the commission of a crime of violence, stemming from the killing of Wesley King on November 18, 2002. On October 20, 2014, the Circuit Court for Montgomery County held a hearing to address

Reynolds's Motion to Suppress Custodial Statements, which was granted in part and denied in part. Following a seven-day jury trial commencing on January 5, 2015, Reynolds was convicted of all counts. On March 31, 2015, Reynolds was sentenced to concurrent life sentences for each of the first degree murder and conspiracy to commit murder counts, and twenty years imprisonment for the use of a handgun in commission of a crime of violence, to be served consecutively. The first five years of his sentence for the use of a handgun charge was without parole, pursuant to Criminal Law ("Crim. Law") Article § 4-204[1] of the Maryland Code.

Thereafter, Reynolds noted an appeal to the Court of Special Appeals, which affirmed the judgment of the trial court in an unreported opinion on November 8, 2017. *Reynolds v. State*, No. 0182, Sept. Term, 2015, 2017 WL 5171593 (Md. Ct. Spec. App. Nov. 8, 2017), *cert. granted*, 457 Md. 399, 178 A.3d 1242 (2018). Reynolds now seeks this Court's review regarding whether he was "denied due process when the trial court permitted the prosecutor to question [him] about 'what he did *not* tell the police about his alibi defense, even though the omissions were a result of Reynolds['s] post-arrest, post-*Miranda*[2] invocation of silence and were not inconsistencies with his trial testimony." We

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[1] *See* Crim. Law § 4-204(c)(1)(i) requiring that a person guilty of using a firearm in a commission of a crime "shall be sentenced to imprisonment for not less than 5 years and not exceeding 20 years."

[2] In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), the Supreme Court held, *inter alia*, that an individual has a right to remain silent during a custodial interrogation.

answer this question in the negative and affirm the judgment of the Court of Special Appeals.

BACKGROUND

On April 14, 2014, Reynolds was arrested at John F. Kennedy International Airport in New York. An open warrant was issued on March 25, 2003 for "Kevin Reynolds" regarding the November 18, 2002 murder of Wesley King ("King") in Montgomery County, Maryland. King was shot and killed outside of his apartment in Silver Spring, Maryland. A warrant for Kevin Reynolds remained unserved until 2014, when it was discovered that Kevin Reynolds was using the name of Dennis Graham. Upon his arrest in New York, Reynolds was carrying a United States passport, a Connecticut driver's license, and other documents bearing the name of Dennis Graham. Although officers took Reynolds's fingerprints to ascertain whether he was the subject of the warrant, the analysis was not completed for several days. Reynolds was taken to a New York City precinct, where he was detained until Montgomery County Detectives Sean Riley and Frank Colbert arrived to interview him.

The detectives informed Reynolds that they wanted to interview him about a murder from 2002. Prior to advising Reynolds of his *Miranda* rights, Detective Colbert asked Reynolds his name, and he replied "Dennis Graham." Detective Colbert asked Reynolds for his date of birth, whether he was in good physical condition, whether he was sober, how far he

went in high school, and whether he spoke languages other than English. The detectives told Reynolds they believed he was using an alias, which the fingerprints would soon confirm.

Detective Colbert read Reynolds his *Miranda* rights at 2:17 a.m. Reynolds refused to sign an Advice of Rights form, but Reynolds answered affirmatively that he understood his rights. Detective Colbert asked Reynolds whether he had ever been to Maryland, to which Reynolds replied, "I've been through Maryland." When asked whether he had heard of Montgomery County, Maryland or of a cold case homicide from 2002, Reynolds replied that he knew of the County, but not the homicide. Eventually, the detectives asked Reynolds directly whether he was Kevin Reynolds, to which he replied no. Detective Colbert then told Reynolds that "[t]here's overwhelming evidence that you murdered somebody back in November of 2012 [sic]" and that this was Reynolds's "opportunity to talk this out." Reynolds replied, "[t]here's nothing I have to say."

The suppression court ruled that everything up to this point was admissible because Reynolds had not yet invoked his right to remain silent, but found that Reynolds's last reply was a clear and unambiguous invocation of Reynolds's right to remain silent.

Despite the fact, as the suppression court found, that Reynolds asserted the right to remain silent, the police interrogation continued. Detective Colbert told Reynolds he had a "list of evidence . . . [a]nd it's overwhelming . . . [i]t's your time to speak up about this."

Reynolds repeated, "[t]here's nothing I have to say. You're trying to solve a homicide and[.]" Detective Colbert interjected "our homicide is solved . . . I'd rather you just tell me to go to hell and get out of here." Detective Colbert asked Reynolds what country he was in during November of 2002. Reynolds responded, "November of 2002? I was probably in the Virgin Islands." Reynolds indicated that he had family there. Detective Colbert then asked Reynolds if he thought the evidence described by the detectives was enough to convict someone. Reynolds initially responded, "I don't know." When Detective Colbert added that Reynolds left the country after the homicide, Reynolds repeated, "I don't know. Nothing else to say."

Detective Colbert also engaged Reynolds in a conversation about Reynolds's life. Reynolds told Detective Colbert that he came to the United States and settled in Morris Plains, New Jersey, where he sold cars with a man named Byron Matamora. Reynolds told Detective Colbert that he resided in two other towns in New Jersey with Rose Lopez, who was his girlfriend at the time. Detective Colbert again asked, "[n]othing else you want to talk about?" Reynolds responded, "I guess not, no."

On April 30, 2014, the same detectives interviewed Reynolds in Montgomery County, Maryland. Reynolds immediately invoked his right to counsel.

Notwithstanding the invocation, Detective Colbert continued to interview Reynolds.[3]

The Suppression Hearing

On October 20, 2014, the Circuit Court for Montgomery County held a suppression hearing to consider the statements Reynolds made during the April 14, 2014 and the April 30, 2014 interviews. Reynolds's trial counsel argued that Reynolds repeatedly invoked his right to remain silent in the April 14 interview, when he indicated that he had "nothing to say" about the murder, and that his statements following the first invocation were inadmissible because they were taken in violation of *Miranda*. Additionally, Reynolds asserted that Detective Colbert acted in bad faith by continuing to question Reynolds after the invocations, so the statements were inadmissible at trial for any purpose. The State averred that Reynolds never unambiguously invoked his right to remain silent, and that Detective Colbert did not act in bad faith. According to Detective Colbert, Reynolds "was trying to get me to believe his spin on the story [that he was "Graham"], and it was my job to try to get the facts out. . . ."

The suppression court ruled that Reynolds invoked his right to remain silent the first time he stated that "[t]here's nothing I have to say[ ]" about the murder. The court held that a majority of the April 14 interview was in violation of *Miranda*, and therefore

[3] Reynolds's statements from the April 30 interview were not the subject of impeachment at trial.

inadmissible as substantive evidence. However, the court also determined that the statements elicited during the April 14 interview were voluntary and thus, admissible under *Harris*[4] and *Hass*[5] for impeachment purposes, should Reynolds elect to testify at trial. Regarding the April 30 interview, the State maintained that even if the statements were obtained in violation of *Miranda*, they were voluntarily made. The court ruled that the statements in the April 30 interview were involuntary and inadmissible, except for Reynolds's response to pedigree or booking questions. Ultimately, the suppression court precluded the State from introducing any statements after Reynolds's *Miranda* invocation in its case-in-chief. Before this Court, the State asserts that because Detective Colbert did not purposely violate *Miranda*, and Reynolds's statements were voluntary, the statements could be used for impeachment purposes.

The Trial

Wesley's daughter, Nickesha King ("Nickesha"), who was eleven years old at the time of the murder, testified that while walking with her father outside of

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[4] In *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643 (1971), the Supreme Court held that statements procured by law enforcement in violation of *Miranda* could be used for impeachment purposes at trial.

[5] The Supreme Court held in *Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1215 (1975) that information obtained by officers after *Miranda* warnings is admissible for impeachment purposes if an individual testifies inconsistently with the inculpatory information.

their apartment on the evening of November 18, 2002, they were approached by two men dressed in black. One man pulled Nickesha aside while the other man, who she identified as Reynolds, pinned King down and shot him. As King fell, the two men ran to a white van and drove away with the door open. At trial, Nickesha identified Reynolds as the shooter, who she recognized because he stayed with her family during the summer of 2002. Nickesha testified that there was no doubt in her mind that Reynolds was the man who shot and killed King.

Detective James Drewry testified that he recovered a cell phone from the murder scene, and eventually traced the cell phone number to a salon located in Brooklyn, New York. The salon was operated by Simone Smith ("Smith"), who was Reynolds's wife at the time of the murder.

Detective Scott Sube, an expert on cell mapping and network operations, also testified for the State. Detective Sube presented a detailed chart that tracked which towers registered pings from the subject cell phone on the day of the murder. The chart reflected that pings from a call at 5:18 p.m. registered to cell towers in Manhattan, New York. Subsequent pings from cell phone calls were registered with towers indicating that the phone traveled south on the I-95 corridor from New York, through New Jersey and Baltimore. Another chart displayed three cell phone calls being made between 10:10 p.m. and 10:43 p.m. The final call was made at 10:43 p.m., seventeen minutes before the murder occurred, pinged off a

Silver Spring cell tower located .54 of a mile from the scene of the murder.

Pursuant to the suppression court's ruling, no evidence relative to the April 14 or April 30 interviews was offered in the State's case-in-chief.[6]

Reynolds elected to exercise his right to testify. During direct examination, he testified regarding his personal and professional life. He was born in Jamaica, adopted by a prominent family, and completed two years of college. Reynolds was sixteen years old when he first met King, who was ten to twelve years his senior, while working for Reynolds's family business. Reynolds continued to stay in touch with King and his family after they migrated to the United States. Reynolds met his wife, Smith, in Jamaica before she moved to the United States in 1998. Reynolds followed Smith there a year later. The couple had a baby born in 2000 and settled in New York. Reynolds acquired a fake New York driver's license in the name of Kevin Reynolds.

Reynolds admitted that he used to deal drugs with King. He became involved in selling drugs with King and his family in California. Reynolds helped King move to an apartment in Maryland and bought him furniture. Reynolds would transport marijuana from

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[6] During trial, Reynolds and the State jointly stipulated that after Reynolds's arrest and subsequent interview on April 14, 2014, he stated that his name was Dennis Graham, denied that he was Kevin Reynolds, denied that he had ever been in the State of Maryland, and denied that he had a relationship with Simone Smith in 2002.

New York to Maryland in his minivan. Reynolds testified that he and King enjoyed a positive relationship, and he held no animosity against King at the time of King's death.

Reynolds testified that on the day of King's murder he was in Brooklyn, New York and picked up his daughter from daycare at 6:00 p.m. According to Reynolds, he arrived home around 6:30 p.m., where a babysitter, Karlene Gill, was present. Smith returned home shortly after 8:00 p.m. Reynolds testified that he had an appointment with Caroline George to conduct an estimate for repairs on her home. He left his apartment between 9:30 p.m. and 10:00 p.m. and arrived at George's house around 10:30 p.m. Reynolds left shortly after 11:00 p.m. and arrived home around midnight, where he saw both Smith and Gill.

Reynolds testified that around 1:00 a.m., the following morning, Smith began receiving phone calls and Reynolds learned that King had been killed. Following King's murder, Reynolds quickly learned that he was a suspect. Four days later, Reynolds created an alias, Dennis Graham, and ultimately left for Jamaica in December of 2002. Reynolds returned to the United States various times over the next decade. Upon Reynolds's return to the country in April of 2014, Reynolds was apprehended for King's murder.

On cross-examination, the State addressed inconsistent statements Reynolds made during the April 14 police interview, which were at odds with his trial testimony. The State asked Reynolds:

[STATE]: Didn't you tell the police, that in November of 2002, you were in the Virgin Islands?

[REYNOLDS]: Yes, I did.

[STATE]: And didn't you also tell the police that you had never been to Maryland more than passing through?

[REYNOLDS]: Yes, I did.

[STATE]: So, you didn't tell them what you're telling the jury today, that Wesley King was your great friend and you regularly saw him and shared an apartment with him?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[REYNOLDS]: No, I was uncertain the capacity [sic] of Dennis Graham at that time.

[STATE]: So you were pretending to be somebody else to the police and hoping you could convince them of that?

[REYNOLDS]: Right, I was hoping to preserve the identity of Dennis Graham. So, I was answering those questions with that in mind.

* * * *

[STATE]: And you told the police that when you first came to the United States, that you worked selling cars with Byron Matamora (phonetic sp.), correct?

[DEFENSE COUNSEL]: Objection

THE COURT: Overruled

[REYNOLDS]: Yes.

[STATE]: Now Byron Dwyer?

[REYNOLDS]: Correct.

[STATE]: Are there two Byrons?

[REYNOLDS]: No.

[STATE]: So, which is his correct last name?

[REYNOLDS]: His name is Dwyer.

[STATE]: And you didn't work selling cars with him, correct?

[REYNOLDS]: I helped him when he was, when I came back to the States in '03, and I was staying with him out in Jersey. I used to help him out, selling cars.

[STATE]: And you also told the police that you were living with a girl named Rose, correct?

[REYNOLDS]: Correct.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[STATE]: And when asked what Rosa's [sic] last name was, you said Lopez, correct?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[REYNOLDS]: Correct.

[STATE]: Is Rose Lopez a real person?

[REYNOLDS]: Yes, she is.

[STATE]: Who is Rose Lopez?

[REYNOLDS]: She was a neighbor of Byron Dwyer that I used to see back then.

[STATE]: And is it someone you've had a relationship with, or was that a lie, too?

[REYNOLDS]: I, we had relationships, yes.

[STATE]: So, instead of telling the police about Caroline George, or Karlene Gill, who could truly alibi you, you started naming Rose Lopez and Byron Matamora, who isn't even a real person?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[REYNOLDS]: Yes.

[STATE]: And just so we're clear, you never said anything about Caroline George or Karlene Gill?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[REYNOLDS]: Like I said, at that time, I was preserving my identity as Dennis Graham. So, I was answering in the capacity of Dennis Graham.

[STATE]: Because you were hoping the Dennis Graham cover would work first, correct?

> [REYNOLDS]: Correct.
>
> [STATE]: And when the Dennis Graham cover fell through, and we realized that you aren't Dennis Graham, now you create the second cover, which is the alibi, correct?
>
> [REYNOLDS]: I did not create the second cover.
>
> [STATE]: But you agree, you've never mentioned the alibi to the police?
>
> [DEFENSE COUNSEL]: Objection. May we approach.

At the bench, Reynolds's counsel moved for a mistrial, arguing that the State impermissibly cross-examined Reynolds regarding details he did not disclose to the detectives, even though Reynolds asserted his right to remain silent during the interview. The trial court denied the motion, but gave an instruction to the jury limiting prior witness statements to be considered only to aid the jury in determining the credibility of witness testimony.

On January 13, 2015, a jury convicted Reynolds on all counts and the trial court sentenced him on March 31, 2015. Thereafter, Reynolds noted a timely appeal to the Court of Special Appeals.

The Court of Special Appeals

Before the Court of Special Appeals, Reynolds challenged, *inter alia*, the trial court's decision to admit portions of his post-arrest statements and the denial of

his motion for mistrial. *See Reynolds*, 2017 WL 5171593, at *1 (querying "[d]id the trial court err in permitting any portion of either custodial statement to be used at trial and in denying Reynolds's motion for a mistrial as a result of such use?"). Reynolds argued that his request for a mistrial should have been granted, because the State cross-examined him regarding his failure to disclose the identity of certain alibi witnesses during the April 14 interview. *Id.* at 11. Reynolds asserted that such questions constituted the use of silence against him, and thus were violations of *Miranda*. *Id.* The State countered that it was not using his silence against him, but rather, was impeaching him regarding the conflict between his statements during the April 14 interview and his alibi testimony at trial. *Id.*

The Court of Special Appeals agreed with the State that the questions asked at trial were "classic impeachment, relating to what [Reynolds] *said* during the April 14 interview and how it differed from his trial testimony." *Id.* (Emphasis in original). The Court of Special Appeals noted that during Reynolds's initial interview, he "claimed to be Dennis Graham; denied knowing the victim; claimed to be in the Virgin Islands at the time of the murder; claimed to have only 'been through' Maryland in the past; said he worked with Byron Matamora; and stated that he was in a relationship with Rose Lopez at the time of the murder." *Id.* To the contrary, during Reynolds's direct examination, he admitted that he was Clement Reynolds; that he was married to Simone Smith at that time; that he was actually in New York at the time of the murder; and that

he never mentioned Caroline George or Karlene Gill as part of his alibi. *Id.* The Court assessed that the State was pointing out these discrepancies to contradict his in-court testimony, not to use his silence against him. *Id.* Finding that the State's use of Reynolds's inconsistent testimony was not error, the Court of Special Appeals affirmed his conviction. Reynolds filed a timely petition for *certiorari*, asking us to consider whether his right to due process was violated when the trial court allowed the State to cross-examine him regarding statements related to his alibi defense that were elicited after he invoked *Miranda*.

STANDARD OF REVIEW

"Subject to supervening constitutional mandates and the established rules of evidence, evidentiary rulings on the scope of witness testimony at trial are largely within the dominion of the trial judge[.]" *Crosby v. State*, 366 Md. 518, 526, 784 A.2d 1102, 1106 (2001). "Generally, appellate courts review the denial of a motion for a mistrial under the abuse of discretion standard[.]" *Dillard v. State*, 415 Md. 445, 454, 3 A.3d 403, 408 (2010). We will not disturb the trial court's ruling "unless there has been an abuse of discretion of a character likely to have injured the complaining party." *Grandison v. State*, 341 Md. 175, 243, 670 A.2d 398, 432 (1995). "[T]rial judges have wide discretion to admit or exclude items of evidence. . . ." *Gauvin v. State*, 411 Md. 698, 710, 985 A.2d 513, 520 (2009). Where the evidentiary ruling is a discretionary one, "a trial court's ruling on the admissibility of evidence is

reviewed pursuant to the 'abuse of discretion' standard." *Brown v. Daniel Realty Co.*, 409 Md. 565, 583, 976 A.2d 300, 310–11 (2009). However, "[w]here a party complains that the trial judge's action abridged a constitutional right," this Court's review is *de novo. Savage v. State*, 455 Md. 138, 157, 166 A.3d 183, 194 (2017). Although Reynolds alleges a due process violation of his Fifth and Fourteenth Amendment rights, the alleged violation occurred as a result of the trial judge's discretionary decision to allow impeachment questions. We will conduct our own appraisal of Reynolds's constitutional arguments and review the trial judge's admissibility determinations for an abuse of discretion.

DISCUSSION

Although Reynolds's claim rests upon constitutional rights as discussed in *Miranda* and its progeny, we address the rights afforded by the Federal constitution, the Maryland constitution, and Maryland common law. Reynolds claims that the trial court denied him due process by permitting the State to question him about his failure to disclose an alibi defense after he invoked *Miranda.* Reynolds asserts that a reading of *Miranda* dictates that an individual has a right to remain silent during a custodial interrogation. During the April 14 interview, when Reynolds told police officers "[t]here's nothing I have to say[,]" he avers that the State's cross-examination regarding what he did not tell the police following an invocation of his right to remain silence, constituted reversible legal error. The State counters that even statements taken in violation

of *Miranda* can be used to impeach a witness's prior inconsistent statement. Reynolds's claim requires us to interpret and apply *Miranda* and its progeny. As explained *infra*, an invocation of *Miranda* does not preclude the State from impeaching a witness concerning prior inconsistent statements, even after a suspect invokes his right to remain silent.

Constitutional Considerations

The Federal and State constitutions unequivocally protect the right to remain silent in the face of custodial interrogation by law enforcement. An individual's due process rights are the tenets of two foundational constitutional provisions: the Fourteenth and the Fifth Amendments. The Due Process Clause to the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV. Article 24 of the Maryland Declaration of Rights, a corollary to the federal Due Process Clause, similarly provides that "[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." Md. Const., Declaration of Rights, Art. 24. "The due process clause of Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment to the [United States Constitution] have the same meaning; and we have said that Supreme Court interpretations of the federal provision are authority for the interpretation

of Article 24." *Dep't of Transp. v. Armacost*, 299 Md. 392, 415–16, 474 A.2d 191, 203 (1984).

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V. The Fifth Amendment is applicable to the states through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489 (1964). Similarly, Article 22 of the Maryland Constitution provides "no man ought to be compelled to give evidence against himself in a criminal case." Md. Const., Declaration of Rights, Art. 22. Article 22, with its federal counterpart, the Fifth Amendment, provides a privilege against being compelled to be a witness against oneself. *Blum v. State*, 94 Md. 375, 382–83, 51 A. 26, 28 (1902); *Bass v. State*, 182 Md. 496, 500–01, 35 A.2d 155, 157 (1943); *Adams v. State*, 202 Md. 455, 460–63, 97 A.2d 281, 283 (1953), *rev'd on other grounds*, 347 U.S. 179, 74 S.Ct. 442, (1954); *Brown v. State*, 233 Md. 288, 292, 196 A.2d 614, 615 (1964); *State v. Panagoulis*, 253 Md. 699, 707, 253 A.2d 877, 881 (1969); *Hof v. State*, 337 Md. 581, 597, 655 A.2d 370, 378 (1995).

The Supreme Court held in *Miranda* that statements obtained from defendants during custodial interrogation or conditions that created similar circumstances, without the full warning of constitutional rights, and waiver of those rights, were inadmissible as having been obtained in violation of the Fifth Amendment privilege against self-incrimination. 384 U.S. at

478–79, 86 S.Ct. at 1630. For *Miranda* warnings to be required, the defendant must be both in custody and subject to interrogation. Within the scope of *Miranda*, "interrogation" applies "not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689–90 (1980) (internal footnotes omitted). These well-known *Miranda* warnings require an individual to be informed that "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda*, 384 U.S. at 479, 86 S.Ct. at 1630. The warnings act as procedural safeguards against compelled self-incrimination. Once an individual is apprised of these warnings, the individual has the right to invoke the constitutional safeguards or waive them and engage with law enforcement. An invocation of the right to remain silent must be unequivocal and unambiguous for the police to terminate the interrogation. *Williams v. State*, 445 Md. 452, 470, 128 A.3d 30, 40 (2015). However, "[a]ny and all requests by the person being questioned to exercise his or her *Miranda* right to silence must be 'scrupulously honored' by police, and have the effect of 'cut[ting] off questioning.'" *Williams v. State*, 219 Md. App. 295, 316, 100 A.3d 1208, 1220 (2014), *aff'd*, 445 Md. 452, 128 A.3d 30 (2015) (quoting *Michigan v. Mosley*, 423 U.S.

96, 103, 96 S.Ct. 321, 326 (1975)). *See also Davis v. United States*, 512 U.S. 452, 458–59, 114 S.Ct. 2350, 2355 (1994) (holding that where an individual unambiguously invokes the right to remain silent, there must be immediate cessation of all questioning). If an individual invokes the right to remain silent, all questioning must cease. *Crosby*, 366 Md. at 528–29, 784 A.2d at 1108.

In the event that officers continue to question an individual, any evidence flowing therefrom is illegally obtained and thus subject to exclusion as fruit of the unlawful conduct. *Miles v. State*, 365 Md. 488, 521, 781 A.2d 787, 806 (2001). "The rule is calculated to prevent, not to repair[ ]" an erosion of constitutional rights by precluding the State from using illegally obtained evidence. *Brown v. Illinois*, 422 U.S. 590, 599–600, 95 S.Ct. 2254, 2260 (1975). "[T]he exclusionary rule is perhaps the most effective and practical means of curbing lawless police[.]" *Williams v. State*, 375 Md. 404, 419, 825 A.2d 1078, 1086 (2003) (internal citations omitted). The caveat to generally excluding statements in violation of *Miranda* allows the evidence to be used for impeachment purposes. *Miranda*, 384 U.S. at 477, 86 S.Ct. at 1629. *See Harris*, 401 U.S. at 226, 91 S. Ct. at 646 (holding that statements taken in violation of *Miranda* could be used to impeach Harris's inconsistent trial testimony); *Hass*, 420 U.S. at 722, 95 S.Ct. at 1221 (allowing information obtained after *Miranda* warnings were given to be used for impeachment purposes). Allowing statements elicited in violation of *Miranda* for impeachment purposes, but not as substantive

evidence, strikes a "pragmatic balance between two competing public policies—the exclusionary rule precluding the use of confessions obtained in violation of *Miranda*, on the one hand, and not giving defendants a free ride to commit perjury[.]" *Wright v. State*, 349 Md. 334, 348, 708 A.2d 316, 323 (1998).

However, the Supreme Court has made clear that statements elicited during police custody and interrogation are inadmissible if there is coercive police action similar to that in *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515 (1986) or *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246 (1991). In *Connelly*, the Supreme Court determined that where the defendant confessed to a murder, but it was later revealed that he "was following 'the voice of God[,]'" the confession was involuntary. 479 U.S. at 161, 107 S.Ct. at 518. Likewise, the Court held in *Fulminante*, where the defendant confessed to an undercover agent in prison under the guise of receiving protection from prison violence, the confession was also coerced. 499 U.S. at 287, 111 S.Ct. at 1252. Supreme Court precedent clearly dictates that statements taken in violation of *Miranda* can be used to impeach an individual's trial testimony, so long as the statements were elicited voluntarily.

An individual's post-arrest silence is also protected by *Miranda* and generally cannot be admitted as substantive evidence at trial. The Supreme Court articulated this concept in *Doyle v. Ohio*, 426 U.S. 610, 617–18, 96 S.Ct. 2240, 2244–45 (1976), opining that following receipt of *Miranda* warnings, "post-arrest silence is insolubly ambiguous because of what the State

is required to advise the person arrested." In *Doyle*, the Supreme Court explored the obstacles that post-arrest silence can pose. Primarily, when an individual is silent following an arrest, it is ambiguous to the finder of fact whether the silence is a result of acquiescence or disagreement to questioning. "Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question." *United States v. Hale*, 422 U.S. 171, 176, 95 S.Ct. 2133, 2136 (1975). Notwithstanding an accusation or assertion, in the face of contemporaneous statements, *Miranda* warnings carry an implicit assurance that silence will not be penalized. *Doyle*, 426 U.S. at 618, 96 S.Ct. at 2245. Otherwise, the introduction of an individual's invocation of the constitutional right to silence, "would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.* However, "*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent." *Anderson v. Charles*, 447 U.S. 404, 408, 100 S.Ct. 2180, 2182 (1980) (per curiam).

Supreme Court precedent on post-*Miranda* silence "does not force any state court to allow impeachment[.] *Jenkins v. Anderson*, 447 U.S. 231, 240, 100 S.Ct. 2124, 2130 (1980). The principles enunciated by

the Supreme Court should be regarded as the minimum of constitutionally afforded protections, where each State may expand *Miranda's* constitutional rights as it deems fit. With the tenets of *Miranda* and its progeny, we now assess whether Reynolds's statements after invoking *Miranda* should be subject to the exclusionary rule.

Post-Arrest Silence: Permissible Uses of Inconsistent Statements for Impeachment Purposes

Case law developed in Maryland and in the United States Supreme Court following *Miranda* requires us to address the timeline of the statements elicited by detectives when Reynolds invoked the right to remain silent. Undisputedly, the April 14 interview constituted a custodial interrogation by the detectives, thus prompting the need for *Miranda* warnings. At issue is whether Reynolds's indication that he desired to remain silent was sufficient to invoke *Miranda's* protections. Although disputed by the State, the suppression court found that statements elicited after Reynolds indicated that there was "nothing I have to say[,]" were taken in violation of *Miranda.* The Court of Special Appeals concurred that although Reynolds's statements were made voluntarily, the continued questioning violated *Miranda. Reynolds*, 2017 WL 5171593, at *8. The detectives violated *Miranda* by continuing to question Reynolds after multiple indications that he desired to cease the interrogation. The detectives elicited statements related to his location on the night of King's murder and the identity of persons who could have

potentially verified his whereabouts. Detective Colbert asked Reynolds which country he was in during November of 2002, to which Reynolds responded that he was in the Virgin Islands. Reynolds also told detectives about two individuals, Byron Matamora and Rose Lopez, who were affiliated with Reynolds at the time. Where the suppression court rendered a reasonable factual determination that Reynolds's declarative statement was sufficient to invoke his right to remain silent, we decline to disturb that finding.

At trial, Reynolds testified on direct examination that he was actually in New York on the night of King's murder and that two witnesses, Caroline George and Karlene Gill, could serve as his alibi. On cross-examination, the State inquired "[s]o, instead of telling the police about Caroline George, or Karlene Gill, who could truly alibi you, you started naming Rose Lopez and Byron Matamora, who isn't even a real person?" Reynolds's objection to this question was overruled. The State continued, "just so we're clear, you never said anything about Caroline George or Karlene Gill?" Reynolds's counsel again objected, approached the bench, and moved for a mistrial, which was ultimately denied. Reynolds asserts that he omitted information about his alibi from police officers because he was exercising his right to remain silent pursuant to *Miranda*, and that the trial court's admission of his post-*Miranda* silence, was an impermissible infringement of Reynolds's right to due process.

Reynolds argues that Maryland liberally construes the right to be free from compulsory self-incrimination,

and thus, this Court should evaluate Reynolds's claim through the lens of post-arrest, post-*Miranda* silence. At issue is whether Reynolds's failure to apprise officers of the alibi he introduced during trial constituted silence. We have examined silence introduced against a criminal defendant on multiple occasions. Before this Court and the Court of Special Appeals, Reynolds relied on our decision in *Grier*, where we concluded that "[e]vidence of post-arrest silence, after *Miranda* warnings are given, is inadmissible for any purpose, including impeachment." *Grier v. State*, 351 Md. 241, 258, 718 A.2d 211, 219 (1998) (citing *Doyle*, 426 U.S. at 619, 96 S.Ct. at 2245 (1976)). The petitioner in *Grier* was arrested for forcibly stealing another's backpack and was charged with attempted robbery with a deadly weapon, in violation of Article 27, § 488 of the Maryland Code (1957, 1996 Repl. Vol., 1997 Supp.); statutory maiming, in violation of Article 27, § 3851 of the Maryland Code (1957, 1992 Repl. Vol.); and other related offenses. *Grier*, 351 Md. at 245, 718 A.2d at 213. During the direct examination of the arresting officer, the State inquired about whether Grier offered any explanation for the crime prior to the arrest, to which the arresting officer indicated that Grier did not. *Id.* at 248, 718 A.2d at 215. We rejected the State's proposition that a defendant's failure to come forward and tell the police his version of events was admissible as substantive evidence of guilt on the grounds that such silence was not probative. *Id.* at 255, 718 A.2d at 218. The Court rationalized that failure to speak up in the presence of police could be a result of numerous factors, thus, the evidence of post-arrest silence is more prejudicial than

probative and generally should not be admitted. *Id.* at 254–55, 718 A.2d at 218.

We reiterated the principle again in reference to post-*Miranda* silence in *Kosh v. State*, 382 Md. 218, 227, 854 A.2d 1259, 1265 (2004) (explaining "silence is evidence of dubious value that is usually inadmissible under either Maryland Rule 5-402 or 5-403[ ]") (footnote omitted); *Lupfer v. State*, 420 Md. 111, 132, 21 A.3d 1080, 1092 (2011) (reasoning "[e]vidence of post-arrest silence, after *Miranda* warnings are given, is inadmissible[ ]") (internal citations and quotations omitted); *Coleman v. State*, 434 Md. 320, 346, 75 A.3d 916, 931 (2013) (reversing a criminal conviction when trial counsel failed to object because "Coleman's post-*Miranda* silence 'so upset the adversarial balance between defense and prosecution that the trial was unfair and the verdict rendered suspect.' "). *Cf. Younie v. State*, 272 Md. 233, 244, 322 A.2d 211, 217 (1974) (concluding "[s]ilence in the context of a custodial inquisition is presumed to be an exercise of the privilege against self-incrimination from which no legal penalty can flow[.]"). The Supreme Court and our precedent is clear, evidence of a criminal defendant's post-*Miranda* silence cannot be introduced at trial.

However, Reynolds asserts that making statements to the police, invoking the right to remain silent, testifying at trial, and having his silence used against him for impeachment purposes, is a matter of first impression for this Court. Reynolds argues that this scenario is factually distinguishable from our other decisions analyzing post-arrest, post-*Miranda* silence,

and encourages this Court to follow the analysis in *United States v. Caruto*, 532 F.3d 822 (9th Cir. 2008). In *Caruto*, the United States Court of Appeals for the Ninth Circuit held that cross-examination on the discrepancies between post-*Miranda* omissions and in-trial testimony is impermissible because it engenders meaning from constitutionally protected silence. *Id.* at 831. Caruto was arrested with seventy-five pounds of cocaine in her vehicle. *Id.* at 824. Caruto was advised of her *Miranda* rights and agreed to make a statement. *Id.* However, five to seven minutes into the interview, she invoked her right to counsel, thereby cutting her statement short. *Id.* at 824. All questioning ceased, and Caruto made no other statements. *Id.* Portions of her statement were memorialized as handwritten notes taken by one of the interrogating officers. *Id.*

At trial, the interrogating officer was asked, "[w]hat did she tell you about the truck?" *Id.* The officer explained that Caruto lent the vehicle to her friends in Mexico three to four weeks prior, and the vehicle was returned on the same day she drove to Los Angeles. *Id.* Caruto testified inconsistently with the officers' testimony that her friend, Jimenez, was interested in purchasing the truck, and asked to take it to a mechanic to "try it[,]" and upon returning from the mechanic Jimenez offered to buy it. *Id.* at 825. Jimenez was to pay her $1,000 immediately and $1,000 once Caruto drove the truck to Los Angeles. *Id.* During closing arguments the prosecutor argued that Caruto did not tell the agents that she lent the truck to Jimenez, did not tell the agents that Jimenez gave her the truck, did not

provide the agents with Jimenez's phone number, and did not tell the agents she was selling the truck. *Id.* at 826. Relying on *Doyle*, the *Caruto* Court held that where "it is a defendant's invocation of her *Miranda* rights that results in the omitted facts that create the difference between the two descriptions, cross-examination based on those omissions draws meaning from the defendant's protected silence in a manner not permitted by *Doyle*." *Id.* at 831. Factually distinguishable from *Caruto, inter alia*, is that the prosecution argued that Caruto failed to give officers pertinent information, unlike here where Reynolds told the officers facts that were inconsistent with his trial testimony. Missing from Reynolds's reliance on *Caruto* is a recognition of the distinction between silence and using affirmative inconsistent statements for impeachment.

The *Caruto* Court also considered the Supreme Court's rationale in *Anderson v. Charles*, 447 U.S. at 404, 100 S.Ct. 2180. Charles, the defendant, was arrested while driving a stolen car, and charged with murdering the vehicle's owner. *Id.* Charles was given *Miranda* warnings and then asked about the stolen vehicle. *Id.* at 405, 100 S.Ct. 2180. Charles told the police that he stole the car in Ann Arbor, Michigan, two miles from a bus station. *Id.* At trial, the arresting officer testified to the same facts Charles conveyed during the interrogation. *Id.* Later, Charles took the stand and testified that he took the vehicle from a parking lot next to the bus station, inconsistent with his statement that he took it from two miles away from the bus station. *Id.* On cross-examination, the State asked

Charles, "[d]on't you think it's rather odd that if it were the truth that you didn't come forward and tell anybody at the time you were arrested, where you got that car?" *Id.* at 406, 100 S.Ct. 2181. In light of *Doyle*, the Court reasoned that the State's cross-examination was proper because "[s]uch questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all." In the case at bar, Reynolds similarly testified inconsistently about the underlying subject of whom he saw on the night of King's murder. Like the questions posed towards Charles "were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement[,]" the questions regarding Reynolds's alibi were not pointed at highlighting his omissions from law enforcement. *Id.* at 409, 100 S.Ct. at 2182. Rather, the State's questions referred to Reynolds's prior inconsistent statements.

Consistent with the Supreme Court's determination in *Harris* and *Hass*, a defendant's voluntary and trustworthy statements obtained in violation of *Miranda* that are inconsistent with the defendant's direct examination testimony, can be used for impeachment. Reynolds argues that *Miranda* invoked silence cannot be used against a defendant even for impeachment purposes. In contrast, the State avers that Reynolds did not simply omit his alibi testimony by opting to remain silent. Rather, his statements to detectives and testimony at trial were inconsistent, and accordingly,

could be used by the State to impeach his credibility. In support of its argument, the State relies on United States Supreme Court precedent including *Harris*, 401 U.S. at 222, 91 S.Ct. at 643 and *Hass*, 420 U.S. at 714, 95 S.Ct. at 1215. Both *Hass* and *Harris* certainly stand for the proposition that an individual's post-*Miranda* statements can be used at trial for impeachment purposes.

Harris was charged in "a two-count indictment with twice selling heroin to an undercover police officer." *Harris*, 401 U.S. at 222–23, 91 S.Ct. at 644. Testifying in his own defense, Harris denied selling the undercover officer illegal drugs, and claimed that the substance sold to the undercover officer was baking powder. *Id.* On cross-examination, the State asked about statements he made immediately following his arrest that contradicted his direct testimony. *Id.* at 223, 91 S. Ct. at 644. Harris claimed that he could not remember any of his statements. *Id.* The Supreme Court held that Harris' voluntary statement, although procured in violation of *Miranda*, was properly used to impeach him when he testified inconsistently with his prior statement at trial. *Id.* at 226, 91 S.Ct. at 646.

Similarly, in *Hass*, the Court confirmed that the deterrence factor provided by the exclusionary rule is sufficiently maintained "when the evidence in question is made unavailable to the prosecution in its case in chief." 420 U.S. at 722, 95 S.Ct. at 1221. Hass was involved in the theft of two bicycles. *Id.* at 715, 95 S.Ct. at 1217. After Hass was apprehended and placed under arrest, officers gave Hass the prescribed *Miranda*

warnings. *Id.* Hass immediately admitted to taking the bicycles, but once placed in a patrol car he indicated he wanted to contact his attorney. *Id.* Hass then pointed out where one of the stolen bicycles was hidden in a nearby bush. *Id.* at 716, 95 S.Ct. at 1218. Hass testified at trial that he did not know the bicycle was stolen. *Id.* As a rebuttal witness, the State called the arresting officer who testified that Hass told officers where the bikes were stolen. *Id.* at 717, 95 S.Ct. at 1218. Applying *Harris*, the Court reiterated that a reading of *Miranda* does not require that evidence inadmissible against Hass in the prosecution's case-in-chief be barred for all purposes, always provided that "the trustworthiness of the evidence satisfies legal standards." *Id.* at 722, 95 S.Ct. at 1221 (internal citations and quotations omitted). "[T]he impeaching material would provide valuable aid to the jury in assessing the defendant's credibility; again, 'the benefits of this process should not be lost[.]'" *Id.*

Reynolds argues that despite the lengthy precedent built around *Harris* and *Hass*, these principles should not apply. Reynolds argues that *Harris* is distinguishable because *Harris* only considered the use of statements that the petitioner in *Harris* actually made to the police, not silence. Indeed, silence was not at issue in *Harris.* However, despite Reynolds's contention, the issue before this Court is not one of custodial silence. To the contrary, Reynolds provided detectives details about his personal life, which ran contrary to his trial testimony. These affirmative statements were then used for "classic impeachment"

purposes. *Reynolds*, 2017 WL 5171593, at *11. For that reason, the underlying application of a prior inconsistent statement in *Harris* is equally employable here. Much like Harris who provided police officers distinctly inconsistent statements from his trial testimony, Reynolds told the detectives that he was in the Virgin Islands at the time of King's murder. At trial, he testified that he was in New York. The identities of his two alibi witnesses who were also in New York, were necessarily related to the inconsistent statements about where he was on the night of the murder. The holding from *Harris*, that prior inconsistent statements that would otherwise be *Miranda* violative statements can be used to impeach a witness's in court testimony, is on par with the factual circumstances in this case.

For the same reasons Reynolds's claim that *Harris* is incongruous to the facts of this case fails, his criticisms of *Hass* should also fail. Reynolds argues that *Hass* is incongruous because Hass, like Harris, was impeached by what he told the police, not by what he failed to tell the police. Reynolds also asserts that Hass's testimony directly contradicted testimony that he told police, and alludes that Reynolds, somehow, did not. As Reynolds properly identifies, the *Hass* Court relied directly on *Harris*, which we follow here. Additionally, Reynolds's statements to the detectives about his whereabouts on the night of King's murder are directly inconsistent with the testimony he gave at trial. *Miranda's* premise as reiterated in both *Hass* and *Harris*, allows prior inconsistent statements to be used

directly for impeachment purposes. Therefore, it was not error for the State to inquire on cross-examination about the inconsistent statements Reynolds made to police officers after he invoked *Miranda*.

CONCLUSION

We conclude that it was not error for the trial court to permit the State to inquire about prior inconsistent statements made to detectives after Reynolds invoked *Miranda*. The State's use of Reynolds's prior inconsistent statements about what he did not tell the State were not post-arrest silence, but rather affirmative statements about his alibi. In accordance with *Miranda* and its progeny, it was appropriate for the State to impeach Reynolds about this testimony on cross-examination.

JUDGMENT OF THE COURT OF SPECIAL APPEALS IS AFFIRMED. COSTS TO BE PAID BY PETITIONER.

Circuit Court for Montgomery County
Case No. 125040

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 182

September Term, 2015

CLEMENT REYNOLDS

v.

STATE OF MARYLAND

Woodward, C.J.,
Kehoe,
Nazarian,

JJ.

Opinion by Woodward, C.J.

Filed: November 8, 2017.

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On April 14, 2014, appellant, Clement Reynolds, was arrested at John F. Kennedy International Airport ("JFK Airport") in New York City in connection with a Montgomery County cold case murder from 2002. Appellant was subsequently charged with first degree murder, conspiracy to commit first degree murder, and use of a handgun in the commission of a crime of violence. On January 13, 2015, after a seven-day jury trial in the Circuit Court for Montgomery County, appellant was convicted of all charges. Appellant received a sentence of life imprisonment for the first degree murder conviction, a concurrent life sentence for conspiracy to commit first degree murder, and a consecutive twenty years imprisonment for the handgun conviction.

Appellant challenges his convictions on appeal and presents four issues for our review, which we have rephrased as questions:[1]

[1] Appellant's issues, as stated in his brief, are as follows:

1. Whether the trial court erred in permitting any portion of either custodial statement to be introduced to the jury and erred in denying appellant's motion for a mistrial as a result of such instruction[.]
2. Whether the trial court erred in admitting a voicemail that had not been properly authenticated and did not meet an exception to the hearsay rules[.]
3. Whether the trial court erred in denying appellant the opportunity to introduce a statement of

1. Did the trial court err in permitting any portion of either custodial statement to be used at trial and in denying appellant's motion for a mistrial as a result of such use?

2. Did the trial court err or abuse its discretion in admitting the voicemail on a cellphone found at the crime scene?

3. Did the trial court err in denying appellant the opportunity to introduce a statement of the daycare worker and Simone Smith as rehabilitation evidence under Rule 5-616(c)(4)?

4. Did the trial court err in admitting on rebuttal the testimony of the State's expert on call mapping and network operations?

For the reasons stated below, we affirm the judgments of the circuit court.

BACKGROUND

On November 18, 2002, Wesley King ("Wesley") was shot and killed outside of his apartment in Silver Spring, Maryland. A warrant for "Kevin Reynolds[,]" also known as "Clement Reynolds[,]" sat unserved

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the daycare worker and Smith as rehabilitation evidence under Rule 5-616(c)(4)[.]

4. Whether the trial court erred in admitting expert testimony that lacked the necessary foundation that the expert's opinion was formed to a reasonable degree of scientific certainty[.]

from March 25, 2003 until 2014 when it was discovered that appellant was using the name "Dennis Graham." On April 14, 2014, appellant tried to leave the United States using a passport under the name of "Dennis Graham." He was arrested at JFK Airport on the outstanding warrant for Wesley's murder. Upon his arrest, appellant was taken to a New York City precinct and questioned by two cold case detectives from Montgomery County. On April 30, 2014, appellant was taken to Montgomery County where he was interviewed a second time by the same detectives.

On May 29, 2014, appellant was indicted on charges of first degree murder, conspiracy to commit first degree murder, and use of a handgun in the commission of a crime of violence. A motions hearing was held on October 20, 2014, in circuit court. At the hearing, defense counsel sought the suppression of the statements made by appellant to the detectives during interviews that took place on April 14, 2014 ("April 14 interview") and April 30, 2014 ("April 30 interview"). The trial court ruled that a majority of the April 14 interview was inadmissible for violating *Miranda*, but that the statements were made voluntarily and were thus admissible for impeachment purposes at trial. Regarding the April 30 interview, the State conceded that, although the statements in that interview were made voluntarily, they were obtained in violation of *Miranda*. The trial court disagreed with the State's voluntariness argument and ruled that the statements in the April 30 interview were involuntary and thus

inadmissible, except for appellant's answers to pedigree or booking questions.

A seven-day jury trial was conducted in the circuit court from January 5-13, 2015. Wesley's daughter, Nickesha King ("Nickesha"), who was eleven years old at the time of the murder, testified that she was with her father walking outside of their apartment on the evening of November 18, 2002. Wesley and Nickesha were approached by two men dressed in black around 11:00 p.m. One man pulled Nickesha aside while the other man, who she identified as "Clement," shot Wesley. As Wesley fell down, the two men then ran to a white van and drove off. Wesley eventually passed away. Nickesha called her mother and told her that "Clement killed Daddy." At trial, Nickesha identified appellant as the shooter. She stated that she knew appellant, because he had stayed with her family in the summer of 2002. She testified that there was no doubt in her mind that appellant was the man who shot and killed Wesley.

Detective James Drewry testified that he recovered a cell phone at the murder scene, and eventually traced its phone number to a salon located in Brooklyn, New York. The salon was run by a woman named Simone Smith, who was appellant's wife at the time of the murder. Detective Scott Sube was called by the State to testify as an expert on call mapping and network operations. He presented a detailed chart that tracked which towers registered pings from the subject cell phone on the day of the murder. The chart showed that pings from a call at 5:18 p.m. registered with

towers in Manhattan, New York. Subsequent pings from cell phone calls were registered with towers indicating that the phone traveled down the I-95 corridor from New York, through New Jersey and Baltimore. Another chart displayed three cell phone calls being made between 10:10 p.m. and 10:43 p.m. The final call made at 10:43 p.m., just seventeen minutes before the murder occurred, pinged off a Silver Spring tower located .54 miles from the murder scene.

At trial, appellant asserted an alibi defense that he was in New York during the time of the murder, and presented three witnesses, including Smith, who testified that they saw appellant in New York on the night of the murder. Appellant also took the stand and testified in his own defense. He claimed that, when he learned that he was a suspect in the murder, he changed his name from "Clement Reynolds" to "Dennis Graham" and left the area. With his new alias, appellant went undetected until his apprehension at JFK Airport in April 2014. The State used portions of appellant's April 14 interview to impeach him on cross-examination.

On January 13, 2015, appellant was convicted by a jury on all counts. On March 31, 2015, appellant was sentenced to life-imprisonment for first degree murder, life imprisonment for conspiracy to commit first degree murder, to run concurrently with the first sentence, and twenty years imprisonment for use of a handgun in a crime of violence, to run consecutive to the other sentences with the first five years without the possibility of parole. Appellant noted this appeal on that day.

DISCUSSION

I. Admissibility of Appellant's Custodial Statements

A. Standard of Review

> In reviewing the denial of a motion to suppress, we consider only those relevant facts produced at the suppression hearing that are most favorable to the State as the prevailing party on the motion. While we accept the factual findings of the trial court, unless those findings are clearly erroneous, we make our own independent constitutional appraisal as to whether an action was proper by reviewing the law and applying it to the facts of the case.

Wimbish v. State, 201 Md. App. 239, 249 (2011) (citations and internal quotation marks omitted), *cert. denied*, 424 Md. 293 (2012).

B. April 14 Interview

1. Did the questions asked before appellant was given his *Miranda* warnings violate *Miranda?*

On April 14, 2014, appellant was apprehended and arrested by U.S. Marshals at JFK Airport and was taken to a New York City precinct in Manhattan to meet with two cold case detectives from Montgomery County, Detectives Sean Riley and Frank Colbert.

Detective Colbert began the interview by asking appellant the following questions:[2]

Detective Colbert:	Dennis, we're up here from Maryland.
Appellant:	Could I get a bottle of water?
Detective Colbert:	I don't know if we have any—you guys got any water? Appreciate it. **So we're up here from Maryland and we just want to talk to you about a few things. Do you go by any other names? No? Nothing else? I'm sure you're wondering what the heck is going on, right?** You're getting ready to go out of the country, is that right? Where were you heading to?
Appellant:	(Unintelligible.)
Detective Colbert:	We need to do some housekeeping stuff. So what's your last name?
Appellant:	Graham.

[2] The transcript of the interview lists Detective Riley as the one conducting the interview, but it was actually Detective Colbert asking the questions, as clarified during the motions hearing.

Detective Colbert:	How do you spell that?
Appellant:	G-R-A-H-A-M.
Detective Colbert:	G-R-A-H-A-M? And your first name, spell that for me.
Appellant:	D-E-N-N-I-S.
Detective Colbert:	One N? And do you have a middle name?
Appellant:	(Unintelligible.)
Detective Colbert:	Okay, what's your date of birth?
Appellant:	May 26, '84.
Detective Colbert:	I'm sorry, one more time?
Appellant:	May 26, '84.
Detective Colbert:	Are you in good physical condition[] right now? Any health problems, broken bones or anything like that?
Appellant:	No.
Detective Colbert:	Okay, so how about your sobriety? You good on that?
Appellant:	(Unintelligible.)
Detective Colbert:	And how far did you go in school?
Appellant:	I went to high school.

Detective Colbert:	You went to high school in America? So what grade did you complete? 10th? 11th?
Appellant:	9th.
Detective Colbert:	Today is the 14th. Do you speak any other languages other than English?
Appellant:	No.
Detective Colbert:	Okay, so like I said, you're probably wondering why we're here. **You got any ties to Maryland at all?**
Appellant:	**No.**
Detective Colbert:	**No? You ever been to Maryland?**
Appellant:	**I've been through Maryland.**
Detective Colbert:	Been through Maryland? Okay.

(Emphasis added).

Appellant challenges two questions in particular as being violative of *Miranda*: (1) Did he go by any other name, and (2) Had he ever been to Maryland. Appellant contends that the questions and answers "should have been suppressed from the State's case-in-chief."

The importance of implementing procedural safeguards for defendants in a custodial interrogation was established by the Supreme Court in *Miranda v. Arizona*, 384 U.S. 436 (1966).

> In its *Miranda* opinion, the Court concluded that in the context of "custodial interrogation" certain procedural safeguards are necessary to protect a defendant's Fifth and Fourteenth Amendment privilege against compulsory self-incrimination. More specifically, the Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Those safeguards included the now familiar *Miranda* warnings—namely, that the defendant be informed "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires"—or their equivalent.

Rhode Island v. Innis, 446 U.S. 291, 297 (1980) (internal citations omitted).

For *Miranda* warnings to be required, the defendant must be both in custody and subject to an interrogation, *i.e.* custodial interrogation. *See id.* In the instant case, there is no argument that appellant was in custody at the time of the interview, given that

he was arrested and transported to a police station. The issue before this Court is whether the questions challenged by appellant on appeal constitute an "interrogation" for *Miranda* purposes. The term "interrogation," for purposes of *Miranda*, refers to "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are *reasonably likely to elicit an incriminating response* from the suspect." *Id.* at 301 (footnotes omitted) (emphasis added).

"Miranda does not apply to 'administrative questioning,' the routine questions asked of all arrestees who are 'booked' or otherwise processed." *Vines v. State*, 285 Md. 369, 376 (1979). "In order for this exception to apply, however, the questions must be directed toward securing 'simple identification information of the most basic sort;' that is to say, only questions aimed at accumulating 'basic identifying data required for booking and arraignment' fall within this exception." *Hughes v. State*, 346 Md. 80, 94-95 (1997). Typical booking questions include questions about "the suspect's name, address, telephone number, age, date of birth, and similar such pedigree information." *Id.* at 95. "[Q]uestions that are designed to elicit incriminatory admissions do not fall within the narrow routine booking question exception." *Id.* (internal quotation marks omitted). "Even if a question appears innocuous on its face, however, it may be beyond the scope of the routine booking question exception if the officer knows or should know the question is reasonably likely to elicit an incriminating response." *Id.*

The State contends that the two questions at issue fall under the routine booking question exception to *Miranda*. Appellant responds that these questions are not exempt from *Miranda*, because they were "designed to elicit incriminating admissions," and thus they should have been inadmissible in the State's case-in-chief. *See id.* at 100.

The first question challenged by appellant was whether he went by any names other than the one he provided to the police. Upon his arrest, appellant, whose real name is Clement Reynolds, identified himself using his false identity, Dennis Graham. During the interview later that day, Detective Colbert asked: "Do you go by any other names? No? Nothing else?" As established in *Hughes*, questions regarding a suspect's name fall under the routine booking exception. *See id.* at 95. Appellant argues that such exception does not apply to this particular instance, because Detective Colbert believed appellant was concealing his true identity under an assumed name; therefore, he was trying to elicit an incriminating response when he asked appellant whether he went by any other names.

Even if we assume that the identity question was not within the booking question exception, it was harmless beyond a reasonable doubt because there was no unfair prejudice to the appellant. *See Dorsey v. State*, 276 Md. 638, 648 (1976) ("In those circumstances where a violation of a right protected by the Federal Constitution occurs, the Supreme Court, as the ultimate arbiter in interpreting and implementing constitutional guarantees, has declared such error to be

'harmless,' where, upon a review of the evidence offered the '[C]ourt [is] able to declare a belief that it was harmless beyond a reasonable doubt.' ") (citation omitted) (alterations in *Dorsey*). Here, appellant did not give an incriminating response. In fact, according to the transcript of the interview, he did not respond at all to that specific question. Without an incriminating statement, there can be no unfair prejudice or harm. The trial court correctly concluded that there was no *Miranda* violation flowing from the asking of this specific question.

The second question challenged by appellant was Detective Colbert's question concerning whether appellant had ever been to Maryland. Appellant responded, "I've been through Maryland." Appellant contends that the question, "Have you ever been to Maryland?" does not fall under the booking exception to *Miranda.* At the motions hearing, Detective Colbert acknowledged that asking appellant if he had ever been to Maryland was not a booking question, and agreed that he was in the process of interrogating appellant at that point. Based on the fact that appellant was being questioned about a murder occurring in Maryland, appellant argues that the question was purposefully posed to elicit an incriminating response. Even if true, appellant did not give an incriminating statement in response to the second question. Appellant simply said, "I've been through Maryland." His statement does not connect him to the crime in any meaningful way and instead suggests that he had not spent significant time in Maryland, because he had

only "been through" it. With no incriminating response, there is no harm for this Court to remedy. *See Dorsey*, 276 Md. at 648.

2. Is this a *Seibert* Issue?

Appellant contends that statements made after he was given his *Miranda* warnings on April 14, but before he invoked his right to silence, should have been excluded in accordance with the United States Supreme Court's *Missouri v. Seibert* decision. 542 U.S. 600 (2004). In *Missouri v. Seibert*, the suspect was interrogated for 30-40 minutes until she confessed, given a short break, read her *Miranda* rights where a waiver was signed by her, and interrogated for a second time that elicited the same confession as previously obtained. *Id.* at 604-05. The trial court suppressed the prewarning statement but admitted the responses given after the *Miranda* recitation. *Id.* at 606. The Supreme Court held that the police tactics undermined *Miranda* and that the second confession was inadmissible based on

> the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

Id. at 615.

In *Cooper v. State*, this Court followed *Seibert* by holding that, if a deliberate two-step, question-first interrogation technique is used by a police officer, post-*Miranda*-warning statements that are related to the substance of pre-warning statements must be excluded unless curative measures are taken before the post-warning statement is made. 163 Md. App. 70, 96 (2005). *See also Seibert*, 542 U.S. at 602, 621.

Despite appellant's assertions to the contrary, this is not a *Seibert* case. There was no two-step interrogation technique used to undermine *Miranda*. The detective did not attempt to elicit a confession to the murder before advising appellant of his *Miranda* rights. Moreover, appellant did not give any statements regarding the offense prior to being given the *Miranda* warnings. Therefore, the court did not err in admitting statements made post-*Miranda* and pre-invocation of silence.

3. Was the statement involuntary?

"The trial court's determination regarding whether a confession was made voluntarily is a mixed question of law and fact. An appellate court undertakes a *de novo* review of the trial judge's ultimate determination on the issue of voluntariness." *Knight v. State*, 381 Md. 517, 535 (2004) (citations and internal quotation marks omitted).

Statements given in violation of *Miranda* are still admissible for impeachment purposes. *See Harris v. New York*, 401 U.S. 222, 226 (1971). Although the

evidence cannot be used in the State's case-in-chief, "the shield provided by Miranda is not to be perverted to a license to testify inconsistently, or even perjuriously, free from the risk of confrontation with prior inconsistent utterances." *Oregon v. Hass*, 420 U.S. 714, 722 (1975). In the instant case, the trial court ruled that the majority of the statements made during the April 14 interview were inadmissible due to appellant's invocation of his right to silence, which was not heeded by the detectives. Some of the statements made during the April 14 interview were, however, used to impeach appellant when he testified inconsistently at trial. On appeal, appellant contends that his statements should not have been admissible for impeachment purposes, because they were involuntary under Federal and State Constitutional law, as well as under Maryland common law.

a. Were the statements involuntary under Federal and State Constitutional law?

Except for the two questions regarding appellant's name and connections to Maryland, the interview began with Detective Colbert going through a series of booking questions. Detective Colbert then advised appellant of his *Miranda* rights, and appellant indicated that he understood them. From that point, Detective Colbert proceeded to ask questions about appellant's true identity, specifically if he was "Kevin Reynolds." When appellant continued to deny that his name was "Kevin Reynolds," Detective Colbert informed him that they had overwhelming evidence that appellant had

committed a murder in 2002. Detective Colbert told appellant that this was his opportunity to talk, to which appellant replied, "There's nothing I have to say." In response to that, Detective Colbert asked, "You don't know nothing about it?" At the motions hearing, the trial court found appellant's statement, "There's nothing I have to say," to be a clear and unambiguous invocation of his right to remain silent. The court found that, although all statements made up to that point were admissible, the rest of the interview was in violation of *Miranda* and should be suppressed.

Detective Colbert testified at the motions hearing that he interpreted appellant's responses as not invoking his right to silence. Instead, Detective Colbert understood appellant's statement, "There's nothing I have to say," as an attempt "to spin his story and to get [Detective Colbert] to believe something that wasn't what [he] believed" and "divert [the conversation] to a different topic." Detective Colbert further explained that after the second invocation, he felt appellant "was not trying to say I don't want to talk to you because he would talk to me on other topics[.]" According to Detective Colbert, he never felt that appellant was saying that he did not want to talk at all. With that mindset, Detective Colbert continued to question appellant. The trial court noted during the hearing that Detective Colbert "persisted in asking questions . . . because he didn't believe it was an unambiguous request to cease questioning."

From the point of the initial invocation of appellant's right to silence, the transcript continues for

another nineteen pages of questioning before the detective concluded the interview.[3] During the continued questioning, Detective Colbert reiterated that there was overwhelming evidence against appellant, to which appellant said, "There's nothing I have to say." Detective Colbert showed appellant photographs of appellant and Wesley together, and appellant continued to deny his identity, knowing Wesley, or shooting Wesley. Detective Colbert proceeded to layout the evidence that pointed to appellant as the perpetrator of the murder, and appellant continued to deny involvement. Detective Colbert then talked through what he called hypothetical scenarios, which consisted of the actual evidence in the case. Again appellant stated, "I don't know. Nothing else to say." When Detective Colbert switched to asking appellant about his job and where he lived, appellant began to answer the questions. Detective Colbert finished the interview with a series of questions about whether appellant was or knew "Clement," if he knew Wesley, if he ever dealt drugs, if he knew Simone Smith, and if he was in Maryland in November 2002. Appellant answered "No" to all of those questions.

After reviewing the transcript of the interrogation, the trial court concluded:

> As for the bad faith issue that's been raised by the defense with respect to the April 14 [interview], the Court finds that there's

[3] There is no timestamp specifying how long the interview was. The transcript of the entire interview is only twenty-four pages.

nothing to indicate that there was any bad faith. The detective is a cold case detective. The detective is called out of an Orioles game because he's advised that there's somebody that's been arrested in New York City on an old case. And as he indicated, he was on his way up to New York, called out of an Orioles game, and at that time of course, he had no way of knowing that they would be swept in the series championship. . . . In any event, the fact of the matter is, he had to drop everything he was doing even though he was off, find somebody to drive him up there. And as he said, as he was driving up there he's going over the case to see what the evidence is against this particular individual who is identifying himself not as Kevin Reynolds, or Clement Reynolds, [f]or whom the warrant has been issued. Rather, he's identifying himself as Dennis Graham, and so the detective may believe that he's attempting to evade or avoid being arrested, and he certainly has a right to inquire about that.

Now, the detective says when [appellant] says, there's nothing I have to say, he asks you don't know nothing about it. We plugged that in with respect to Detective Colbert knowing that he's denying that he's even Kevin Reynolds, and **I just don't find in the context of this particular situation that Detective Colbert is in any way intentionally violating his rights as a matter of bad faith**. I just don't believe that he did that and I think that his, his attempts to continue to question [appellant] about this are legitimate attempts

> to see if he can bring something out of [appellant]. And I don't believe he is to, to find out whether or not he may have some leads. Is he Clement? Page 9, "Say your name was Clement in 2002, say your name was Clement Reynolds, was Clement Reynolds in Maryland shooting somebody?" Mr. Graham, "I don't know that person. You don't know that name, all right. I'm not going to give up on you. Let's just keep rolling for a few minutes, okay. Let me tell you some of the evidence that's in this case."
>
> **I don't find, I don't find in light of the entire transcript of this case, and I don't find in light of [appellant's] answers, that there's anything involuntary about the statement. I do find it was voluntarily made, even though there [w]as indeed a technical violation of Miranda, and I believe and rule that the statement from April 14th, 2014, can be used for impeachment purposes.**

(Emphasis added).

A voluntary statement is a statement that is the product of free and rational choice. *See Mincey v. Arizona*, 437 U.S. 385, 401 (1978). To determine whether a statement is the product of free and rational choice, a court must consider the "totality of the circumstances." *Greenwald v. Wisconsin*, 390 U.S. 519, 521 (1968). Determination of whether a statement is involuntary "requires careful evaluation of all the circumstances of the interrogation." *Mincey*, 437 U.S. at

401. Involuntary statements cannot be used at trial for any purpose, including impeachment, because doing so would violate the defendant's due process rights. *See Mincey* 437 U.S. at 397-98. This Court has stated:

> [T]raditional involuntariness invariably contemplates a degree of malevolence and coercive influence that goes beyond the presumptive coercion of custodial interrogation, not something that falls short of it. Thus, for instance, a violation of only *Miranda*'s implementing rule—a "mere *Miranda*" violation—although calling for the suppression of the confession on the merits of guilt or innocence, does not trigger second-level suppression under the "fruit of the poisonous tree" doctrine, or preclude the use of the *Miranda*-violative statement for impeachment purposes. When the unconstitutional cut, on the other hand, goes deep enough to touch the raw central nerve of the undergirding constitutional guarantee itself, the offending statement may not be used for any purpose at all.

Reynolds v. State, 88 Md. App. 197, 217 (1991), *aff'd*, 327 Md. 494 (1992) (internal citations omitted).

Appellant argues that the statements made during the April 14 interview were involuntary under federal and state constitutional law because of the actions of the detective during the interview. Specifically, appellant asserts that Detective Colbert acted in bad faith by purposefully disregarding appellant's multiple invocations of silence.

In reviewing the denial of a motion to suppress, "we accept the factual findings of the trial court, unless those findings are clearly erroneous, [but] make our own independent constitutional appraisal as to whether an action was proper by reviewing the law and applying it to the facts of the case." *Wimbish v. State*, 201 Md. App. 239, 249 (2011) (internal quotation marks omitted), *cert. denied*, 424 Md. 293 (2012).

The transcript of the interview, coupled with Detective Colbert's testimony about his subjective beliefs regarding the interview, support the trial court's finding that there was no bad faith on the part of Detective Colbert, and conclusion that the statement was voluntary. We agree with the State that "Detective Colbert's honest belief that [appellant] was not saying that he did not want to speak with him at all, coupled with [appellant's] willingness to speak with the detectives on other topics" supports this conclusion. The trial court found Detective Colbert's testimony to be credible. The trial court determined that Detective Colbert did not view appellant's statements as invocations of his right to silence, and thus he did not intentionally disregard appellant's rights. Detective Colbert's conduct was not the "malevolence and coercive influence" necessary for an involuntary statement. *See Reynolds*, 88 Md. App. at 217. He held a brief interview with appellant devoid of any traditional coercive tactics.

Furthermore, appellant's answers and demeanor throughout the interview support a finding of voluntariness. Detective Colbert even commented during the interrogation on how calm and collected appellant

appeared to be in the face of such a serious charge, saying to appellant, "I'm telling you as a person that you're being charged with a murder that carries the death penalty in Maryland and you're just as calm and as cool as can be." Appellant also never wavered in his answers throughout the entire interview and stuck to his story that he was Dennis Graham. As appropriately noted by the State, appellant "never made a confession and his will clearly was not overborne."

b. Involuntary under Maryland Common Law?

Appellant contends that the statements made during the April 14 interview were also involuntary under Maryland common law, because the detective made improper promises that appellant relied upon in making his statements. Inculpatory statements must be "freely and voluntarily made" and "the product of neither a promise nor a threat." *Hillard v. State*, 286 Md. 145, 151 (1979). "'[I]f an accused is told, or it is implied, that making an inculpatory statement will be to his advantage, in that he will be given help or some special consideration, and he makes remarks in reliance on that inducement, his declaration will be considered to have been involuntarily made and therefore inadmissible.'" *Williams v. State*, 445 Md. 452, 478 (2015) (quoting *Hillard*, 286 Md. at 153). There is a two-pronged test for involuntariness by inducement. *Williams*, 445 Md. at 478. "'We look first to see if the police made a threat, promise, or inducement. If that prong is satisfied, we look next to see whether there was a nexus between the promise or inducement and the

defendant's confession.'" *Id.* (quoting *State v. Tolbert*, 381 Md. 539, 558, *cert. denied*, 543 U.S. 852 (2004)).

Appellant claims that Detective Colbert made improper promises to appellant. Appellant specifically points to the following statements made by Detective Colbert: "So honesty goes a long way with me personally. And you know, also it will go a long way with you as a person, you know, with your character." "[I]f we get through all this and you're not this guy, then it's a good night for you." "[I]t's your time to shine right now. It's your time to speak up about this." Contrary to appellant's assertions, these were not promises or inducements. As the Court of Appeals held in *Williams*, "an appeal to the inner psychological pressure of conscience to tell the truth does not constitute coercion in the legal sense." *Id.* at 480. Therefore, Detective Colbert's appeal to appellant to tell the truth does not constitute a promise or inducement.

Detective Colbert also tried to downplay the severity of the situation by suggesting that the murder may have been a mistake. During the interview, Detective Colbert stated: "So not only do you kill a man that was probably it probably turns out that it was a mistake anyway, because you and him were boys at one time . . . you kill a man probably by accident[.]" This too was not a promise or inducement. In *Williams*, the Court of Appeals held that a detective's characterization of a murder as a robbery gone bad was not an inducement. *Id.* at 481. The Court reasoned that the "presentment of two different ways of characterizing the situation was not an inducement," and that the detective was

"merely advising appellant of the possible legal consequences." *Id.* The same reasoning applies here. Detective Colbert's characterization of the crime as a mistake was not an inducement for appellant to confess.

The second prong of involuntariness is not met as well, because appellant never responded with an incriminating statement. Throughout the interview, appellant maintained his false identity and lack of knowledge about the murder. Because the involuntariness test requires a nexus between the inducement and an inculpatory statement, and there was no such statement here, the second prong cannot be satisfied. Therefore, appellant's statements made during the April 14 interview were not involuntary under Maryland common law.

4. Should the trial court have granted appellant's motion for mistrial?

"Generally, appellate courts review the denial of a motion for a mistrial under the abuse of discretion standard[.]" *Dillard v. State*, 415 Md. 445, 454 (2010). When appellant took the stand at trial, the State used parts of the April 14 interview for impeachment purposes during cross-examination. Defense counsel objected and moved for a mistrial, arguing that the State was improperly using appellant's post-arrest silence against him. The trial court denied the motion.

"Evidence of a person's silence is generally inadmissible[.]" *Grier v. State*, 351 Md. 241, 252 (1998).

With regard to silence after *Miranda* warnings have been given, the Supreme Court has said:

> Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. Moreover, while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. **In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.**

Doyle v. Ohio, 426 U.S. 610, 617-18 (1976) (emphasis added) (citations omitted).

When he took the stand at trial, appellant presented an alibi defense that he was in New York at the time of the murder. Appellant claimed that he met with Caroline George about remodeling her basement, after which he returned home where his wife, Simone Smith, and a live-in babysitter, Karlene Gill, both resided. Appellant also testified that he began using the alias "Dennis Graham" shortly after the murder in 2002; that he was a good friend of Wesley; and that he traveled to Maryland regularly to transport marijuana shipments to Montgomery County.

During its cross-examination of appellant, the State impeached appellant repeatedly with statements

he made during the April 14 interview. Such impeachment included the following:

[STATE]: And you would agree with me that actually what happened in this case is horrific?

[APPELLANT]: It is horrific.

[STATE]: And that shooting and killing someone, whether you know the person or not, in front of an 11[-]year[-]old is horrific, correct?

[APPELLANT]: It is horrific.

[STATE]: But that's not the answer you gave to the police after you [were] arrested, when they asked you about this, is it?

* * *

[STATE]: Isn't it true when you met with the police, you denied even knowing Wesley King?

[APPELLANT]: That's true.

[STATE]: And they show[ed] a picture of him to you, and you said, you didn't know who that was?

* * *

[APPELLANT]: Yes, I did.

[STATE]: [A]nd they showed a picture of you, actually, and you denied that that was you?

[APPELLANT]: Yes, I did.

* * *

[STATE]: [Y]ou said in the interview that in November of 2002, you were in the Virgin Islands, correct?

[APPELLANT]: That's correct.

[STATE]: So, that was a lie?

[APPELLANT]: That was –

* * *

[STATE]: And didn't you also tell the police that you had never been to Maryland more than passing through?

[APPELLANT]: Yes, I did.

[STATE]: So, you didn't tell them what you're telling the jury today, that Wesley King was your great friend and you regularly saw him and shared an apartment with him?

* * *

[APPELLANT]: No, I was uncertain the capacity of Dennis Graham at that time.

[STATE]: So, you were pretending to be somebody else to the police and hoping you could convince them of that?

[APPELLANT]: Right, I was hoping to preserve the identity of Dennis Graham. So, I was answering those questions with that in mind.

* * *

[STATE]: And you told the police that when you first came to the United States, that you worked selling cars with Byron Matamora [], correct?

* * *

[APPELLANT]: Yes.

[STATE]: Now Byron Dwyer?

[APPELLANT]: Correct.

[STATE]: Are there two Byrons?

[APPELLANT]: No.

[STATE]: So, which is his correct last name?

[APPELLANT]: His name is Dwyer.

[STATE]: And you didn't work selling cars with him, correct?

[APPELLANT]: I helped him when he was, when I came back to the

States in '03, and I was staying with him out in Jersey. I used to help him out, selling cars.

[STATE]: And you also told the police that you were living with a girl named Rose, correct?

[APPELLANT]: Correct.

* * *

[STATE]: And when asked what Ros[e]'s last name was, you said Lopez, correct?

* * *

[APPELLANT]: Correct.

[STATE]: Is Rose Lopez a real person?

[APPELLANT]: Yes, she is.

[STATE]: Who is Rose Lopez?

[APPELLANT]: She was a neighbor of Byron Dwyer that I used to see back then.

[STATE]: And is it someone you've had a relationship with, or was that a lie, too?

[APPELLANT]: I, we had relationships, yes.

[STATE]: **So, instead of telling the police about Caroline George, or Karlene Gill, who could truly alibi you, you started**

naming Rose Lopez and Byron Matamora, who isn't even a real person?

* * *

[APPELLANT]: Yes.

[STATE]: **And just so we're clear, you never said anything about Caroline George or Karlene Gill?**

* * *

[APPELLANT]: Like I said, at that time, I was preserving my identity as Dennis Graham. So, I was answering in the capacity of Dennis Graham.

[STATE]: Because you were hoping the Dennis Graham cover would work first, correct?

[APPELLANT]: Correct.

[STATE]: And when the Dennis Graham cover fell through, and we realized that you aren't Dennis Graham, now you create the second cover, which is the alibi, correct?

[APPELLANT]: I did not create the second cover.

[STATE]: **But you agree, you've never mentioned the alibi to the police?**

(Emphasis added).

Appellant then objected and moved for a mistrial. Appellant argued that a mistrial should be granted, because the State questioned him about why he did not mention certain alibi witnesses during the April 14 interview. Appellant claimed that such questions constituted the use of silence against him.[4] The State countered that it was not using his silence against him, but rather was impeaching him with the differences between what he *said* during the interview and his alibi testimony at trial. The trial court denied the motion, but instructed the State to stay away from the alibi question.

We agree with the State that appellant "has mistakenly applied the prohibition against using post-arrest *silence* as evidence of guilt with the permissible use of voluntary, *inconsistent statements* to impeach a defendant who testifies at trial." Appellant relies primarily on *Grier v. State* for his argument that the mistrial should have been granted. 351 Md. 241 (1998). In *Grier*, the Court of Appeals rejected the proposition that a person's failure to come forward and tell the police his or her version of events was admissible as substantive evidence of guilt. *Id.* at 253-54. The Court found that "such evidence carries little or no probative

[4] Appellant further argued that the State's lead up questions were also prejudicial for the same reason.

value" and "is substantially outweighed by the danger of unfair prejudice." *Id.* Unlike this case, however, *Grier* involved the admission of pre-arrest and post-arrest silence as substantive evidence of guilt in a case where Grier did not testify, and the Court of Appeals held that the use of Grier's silence violated due process and was fundamentally unfair. *Id.* at 245, 248, 252-58.

The majority of the State's questions to appellant in this case were classic impeachment, relating to what appellant *said* during the April 14 interview and how it differed from his trial testimony. During the April 14 interview, appellant denied being "Clement Reynolds" and instead claimed to be Dennis Graham; denied knowing the victim; claimed to be in the Virgin Islands at the time of the murder; claimed to have only "been through" Maryland in the past; said he worked with Byron Matamora; and stated that he was in a relationship with Rose Lopez at the time of the murder. At trial, appellant admitted that he was not "Dennis Graham"; worked with Byron Dwyer and that Bryon Matamora did not exist; was married to Simone Smith at that time; claimed he was in New York instead of the Virgin Islands at the time of the murder; and conceded that he never mentioned Caroline George or Karlene Gill as part of his alibi. By pointing out these discrepancies, the State was not using appellant's silence against him, but instead, was using appellant's own words from the April 14 interview to contradict his in court testimony.

Furthermore, only the questions relating to appellant's alibi witnesses touched on what appellant *did*

not say to the detectives. Specifically, the State asked appellant, "And just so we're clear, you never said anything about Caroline George or Karlene Gill?" Although the State was highlighting that appellant did not mention his alibi witnesses during his pre-trial interrogation, the State was not using appellant's silence against him. Instead, the State was contrasting the alibi witnesses named by appellant at trial, George and Gill, with the alibi witnesses that he mentioned in his April 14 interview, Matamora and Lopez. The question focused on the difference in what appellant said in the interview from what he said at trial, not his silence.

The State later asked appellant, "But you agree, you've never mentioned the alibi to the police?" This question also raises the issue of silence; however, appellant did not answer the question. When an objection was made by defense counsel, the trial court told the State to move away from the question, which the State did. Therefore, any potential harm was avoided. We thus see no error by the trial court.

C. April 30 Interview

Detective Colbert conducted a second interview with appellant on April 30, 2014. At the beginning of the interview, appellant immediately invoked his right to counsel, stating: "I would love to talk to counsel before we talk. I'd like to exercise that right." Despite this invocation, Detective Colbert proceeded with the interview and attempted to elicit information about appellant's general background. After appellant repeatedly

invoked his right to counsel, Detective Colbert made contact with appellant's lawyer by phone. Appellant was given the phone and told his lawyer that the detectives wanted his background information. Detective Colbert also talked to the lawyer and told him that he was trying to get appellant's background information. After both appellant and Detective Colbert finished talking with appellant's lawyer, Detective Colbert proceeded to ask appellant again for his background information. At that point, appellant answered the detective's questions. Detective Colbert then read appellant his *Miranda* rights. When Detective Colbert tried to interrogate appellant further, appellant repeatedly asserted his right to counsel. Detective Colbert ignored the requests and continued with the interview.

At the hearing on appellant's motion to suppress the statement, Detective Colbert admitted that he purposefully ignored appellant's repeated requests for counsel in an attempt to obtain information to be used either in the investigation or for impeachment purposes. The trial court found Detective Colbert's conduct to be egregious and ruled that the statement was involuntary and inadmissible. The court, however, did find that the general booking information was still admissible.

Detective Colbert testified that the booking questions were asked as they were trying to fill out the processing form that would be used to place appellant in jail. As detailed above, Detective Colbert made contact with appellant's attorney and explained the situation

to him before asking appellant the booking questions. Routine booking questions fall outside the protections of *Miranda* and are admissible even when a suspect's *Miranda* rights are violated. *See Pennsylvania v. Muniz*, 496 U.S. 582, 601-02 (1990). Thus the trial court did not err in finding that those statements were admissible. More importantly, the State never used the booking information from the April 30 interview at trial. Therefore, there is no harm to appellant to be addressed.

II. Voicemail Evidence

At trial, the State introduced and played a recording of a voicemail that was left on the cell phone recovered at the murder scene. The voicemail was from a woman, Sharina, asking to speak with appellant. The recording included a timestamp of 11:08 a.m. on November 18, 2002, the day of the murder, and included the following message:

> Hello [Clement], this is Sharina. I need to talk to you. This is very important. Let me talk to you. Thank you. (Unintelligible [ ]) you can call me back. (Unintelligible [ ]) around 3 o'clock, then call me back. Okay? All right.

On appeal, appellant argues that admitting the voicemail in this case was error on the part of the trial court, because the voicemail was not properly authenticated and contained inadmissible hearsay.

A. Was the voicemail properly authenticated?

The general provision of Maryland Rule 5-901(a) states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." "Whether there is sufficient authenticating evidence to admit [ ] proffered [evidence] is a preliminary question to be decided by the court" that is reviewed for abuse of discretion. *Carpenter v. State,* 196 Md. App. 212, 230 (2010) (internal quotation marks and citation omitted).

Appellant contends that "there was no evidence presented or testimony by a witness with knowledge that demonstrated definitively that this voicemail was accessed through a phone number and passcode linked with the target phone number, or what the process was to obtain it." We disagree and hold that the trial court did not abuse its discretion by ruling that the voicemail at issue was sufficiently authenticated.

The voicemail was authenticated through the testimony of two State witnesses, Detective Kevin Pugh and Ricardo Leal, Sprint's Custodian of Records. Detective Pugh testified that he prepared the search warrant for the voicemail. He explained that back in 2002 voicemails were saved on the telephone company's servers; therefore, he needed Sprint to provide an access number to reach the server and a passcode to access the specific mailbox. Sprint responded to the warrant by providing Detective Pugh with those two

numbers. He accessed the mailbox and recorded the voicemail on a cassette. Detective Pugh's notes detailing the steps that he took to obtain the voicemail were also entered into evidence.

Leal testified as Sprint's Custodian of Records. Leal stated that he started working at Sprint as a subpoena analyst and confirmed that the warrant in this case was typical of the demands that he regularly received. He also confirmed that Detective Pugh's testimony regarding the procedure for accessing a voicemail in 2002, which was a combination of an access number and a passcode, was accurate and that Sprint's regular practice was to provide both of those numbers in response to a search warrant. Although Leal was not the individual who responded to this specific search warrant in 2002, after consulting with his staff in his position as custodian of records, he was able to confirm that Sprint's records had a case number for this search warrant and that Sprint had complied with the warrant by providing the codes to the authorities.

The State correctly summarized the above evidence: "The combined testimony of Detective Pugh and Leal was that a search warrant was issued for the voicemail, it was received by Sprint, Sprint provided the access number and passcode in the regular course of business, and Detective Pugh entered the access number and passcode provided by Sprint to access the voicemail." Accordingly, there was sufficient evidence for the trial court to conclude that the voicemail was what the State claimed it to be and thus was properly authenticated.

B. Was the voicemail inadmissible hearsay?

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). "[H]earsay is not admissible" unless an exception to the hearsay rule set forth in the rules applies or unless permitted by applicable constitutional provisions or statutes. Md. Rule 5-802. One of those exceptions is what is referred to as the "residual" exception found in Rule 5-803(b)(24).

Maryland Rule 5-803(b)(24), the residual exception, states:

> Under exceptional circumstances, the following are not excluded by the hearsay rule: A statement not specifically covered by any of the hearsay exceptions listed in this Rule or in Rule 5-804, but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to

> offer the statement and the particulars of it, including the name and address of the declarant.

"[A] circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility. Whether evidence is hearsay is an issue of law reviewed *de novo*." *Bernadyn v. State*, 390 Md. 1, 8 (2005). "Moreover . . . to ensure that such decisions [regarding the residual exception] by trial judges receive meaningful appellate review, thereby assuring that uniformity and predictability are present in this new and developing area of the law, we will apply a *de novo* review of whether the trial judge erred as a matter of law." *Walker v. State*, 107 Md. App. 502, 517-18 (1995) (footnote omitted), *aff'd*, 345 Md. 293 (1997).

"Neither the Rule nor case law, however, require[ ] that a trial court procedurally make findings as to each factor of the Rule in excluding the admission of a hearsay statement. Rather, the Rule and case law mandate *only* that a trial court procedurally address each factor when it *admits* the hearsay statement." *Wood v. State*, 209 Md. App. 246, 331 (2012) (emphasis added), *aff'd on other grounds*, 440 Md. 276 (2013). Accordingly, the trial court must make five findings with regard to admissibility of evidence under the residual exception. "The first prerequisite to admissibility under the Maryland residual exception, and the one that is determinative in this case, is that there be 'exceptional circumstances.'" *Walker*, 345 Md. at 325. "Exceptional circumstances" are "new and presently unanticipated situations[.]" *Id.* Second, "the statement must not be

specifically covered by any of the other exceptions[.]" *Id.* at 318. Third, "it must have "equivalent circumstantial guarantees of trustworthiness[.]" *Id.* at 319. The Court in *Walker* noted that the language of "exceptional circumstances" must not be ignored and that "[t]he fact that the evidence at issue may have equivalent, or even superior, circumstantial guarantees of trustworthiness does not alone suffice to warrant admission under the Maryland residual exception." *Id.* at 326. Fourth, the court must determine that:

> (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Md. Rule 5-803(b)(24); *Walker*, 345 Md. at 319. Fifth, and finally, "the proponent of the statement has given the requisite advance notice of its intention to use the statement[.]" 345 Md. at 319.

The trial court stated that the voicemail was hearsay, but determined that it fell within the residual hearsay exception. The court stated: "I think [the voicemail] falls into an exception of the hearsay rule, and I also think that it's reliable[,]" and that "it seems to me it's far more reliable than the average amount of hearsay. And I think there's a catch-all exception to the hearsay rule, anyway, that says if something's inherently reliable, you know, then it's an exception anyway."

Appellant argued at trial that the requirements of the residual exception were not met, while the State argued that the voicemail was not hearsay, because it was being offered for "the effect on the hearer."

On appeal to this Court, appellant argues that the voicemail was inadmissible hearsay and did not fall under the residual exception. The State counters that the voicemail was not hearsay; rather, it "was circumstantial crime scene evidence."

We agree with appellant that the requirements of the residual exception to the hearsay rule were not met here. Although the trial court found the voicemail to be "inherently reliable[,]" the court did not make any of the five findings required by Rule 5-803(b)(24) for the voicemail to be admissible under the residual exception. For that reason alone, we determine that the trial court erred.

Nonetheless, we conclude that the voicemail was admissible as non-hearsay. As previously stated, Detective Drewry recovered the subject cell phone at the scene of the murder. The truth of the matter asserted by the State at trial was not that Sharina called appellant and stated the words contained in the voicemail; rather, the State's intended use was to show, circumstantially, that appellant was the owner or possessor of the phone and that appellant was present at the time and place of the murder. Such circumstantial evidence was relevant, because appellant argued at trial that he was robbed of the phone on November 15, 2002,

making it impossible that he was in possession of the phone at the time and location of the murder.

This Court's recent opinion in *Darling v. State* addressed the same issue as presented here. 232 Md. App. 430, *cert. denied*, 454 Md. 655 (2017). In *Darling*, a cell phone service receipt was recovered from the police search of a van driven by the appellant at the time of his arrest. *Id.* at 441-42. The cell phone service "receipt memorialize[d] a transaction on July 25, 2014, in which $30 worth of minutes was bought for cell phone number 760-774-5871." *Id.* at 457. Cell phone records for such cell phone number "show[ed] that between 4:07 a.m. and 4:50 a.m. [on the day after the victim was kidnapped], that cell phone was in the area where [the victim's] body was later found." *Id.* at 444. This Court determined that the cell phone receipt was not inadmissible hearsay, because it was not used "to assert that [the] appellant's phone number was the number on the receipt. Rather, the State used the receipt to link [the] appellant to the phone to establish [the] appellant's whereabouts and cell communications with [a State's eyewitness] before, during, and after the murder." *Id.* at 460. This Court concluded that, "[b]ecause there was no assertion 'to prove the truth' of any matter contained in the receipt, the receipt was properly admitted into evidence as non-hearsay evidence."[5] *Id.* at 460.

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[5] We also held that appellant did not preserve this issue for appellate review, "because he did not object to the admission of the receipt at trial." *Darling v. State*, 232 Md. App. 430, 457 (2017).

Just like the cell phone receipt in *Darling* was used to link the appellant to the cell phone, the voicemail in this case was used to link appellant to the cell phone found at the murder scene. The cell phone records in *Darling* indicated that the appellant was in the vicinity of the victim's body the day after the victim was kidnapped, whereas here, the abandoned cell phone with its voicemail indicated that appellant was present at the crime scene at the time and place of the murder.[6] There was no assertion to prove the truth of any matter contained in the voicemail found on the cell phone recovered at the crime scene. The voicemail was used as circumstantial evidence to link appellant to the cell phone. Thus the voicemail was not hearsay evidence.

For the foregoing reasons, we conclude that, although the trial court erred by admitting the voicemail under the residual exception to the rule against hearsay, such voicemail was circumstantial crime scene evidence and thus non-hearsay evidence. Accordingly, its admission was not error.

III. Rehabilitation Evidence

At trial, the State argued that appellant picked up his daughter from her day care center in New York at

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[6] As stated above, the evidence at trial also showed that (1) the cell phone's number belonged to a salon in New York City run by appellant's wife; and (2) the cell phone traveled from New York City to the murder scene in Maryland on the day of the crime.

approximately 5:00 p.m. on the day of the murder. Appellant testified, however, that he picked his daughter up at 6:00 p.m. that day. The time difference was important, because the cell phone found at the murder scene was tracked to the Holland Tunnel in New York at 5:40 p.m. Appellant argues in this appeal that, if he picked up his daughter at 6:00 p.m., he "could not have been the [one] with the [cell] phone" in the Holland Tunnel at 5:40 p.m. Therefore, according to appellant, someone else was in possession of the cell phone that was tracked from New York to a location near the scene of the murder in Montgomery County.

At trial, appellant attempted to elicit from Detective Drewry that, when he spoke to Simone Smith and a day care worker in 2002, they confirmed appellant's story. The trial court prohibited the question on hearsay grounds. Appellant contends that the court erred by excluding testimony that was being offered as rehabilitation evidence under Maryland Rule 5-616(c)(4),[7] specifically that Smith and the day care worker told Detective Drewry that appellant picked his daughter up from day care around 5:30-6:00 p.m. We do not reach the merits of this issue, because it has not been preserved for appeal.[8]

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[7] Maryland Rule 5-616(c) provides in part that "[a] witness whose credibility has been attacked may be rehabilitated by . . . [o]ther evidence that the court finds relevant for the purpose of rehabilitation."

[8] Maryland Rule 8-131(a) states in part: "Ordinarily, the appellate court will not decide any other issue unless it plainly

Detective Drewry testified twice at trial, once in the State's case-in-chief and again in the State's rebuttal case. During the State's case-in-chief, Detective Drewry testified on cross-examination that he did speak with Simone Smith and day care personnel when he went to New York in 2002. The court did not permit defense counsel to ask Detective Drewry if Smith had "confirmed that [appellant] had picked his daughter up" on the day of the murder. As pointed out by the State, "defense counsel did not proffer that he wanted to elicit from the detective that Smith told the officers *when* [appellant] picked up their daughter."

Detective Drewry was called to testify in the State's rebuttal case solely to provide the address of the day care center, which was used to show that appellant's cell phone pinged off of cell towers in the vicinity of the day care center before it traveled from New York to Maryland. Such evidence was relevant to rebut appellant's claim that he had nothing to do with the cell phone found at the murder scene. On cross-examination, defense counsel asked: "Detective Drewry, when you went [to the day care center], it was for purposes of confirming that [appellant] had picked up his daughter at day care, as [] Smith had told you, correct?" The State objected and the trial court sustained the objection. During the ensuing bench conference, defense counsel told the court: "I think the testimony is also admissible to rehabilitate under 5-616." The court

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appears by the record to have been raised in or decided by the trial court. . . ."

disagreed that such testimony could be used to rehabilitate appellant.

"The preservation rule applies to evidence that a trial attorney seeks to develop through cross-examination. . . . [W]hen challenged, counsel must be able to describe the relevance of, and factual foundation for, a line of questioning." *Peterson v. State*, 444 Md. 105, 125 (2015). At no point did defense counsel ask Detective Drewry *when* appellant was at the day care center, nor did defense counsel proffer to the court that he sought to elicit that testimony. Because the issue of *when* appellant went to the day care center to pick up his daughter was never raised at the trial level, it was not preserved for our review. *See* Md. Rule 8-131(a).

IV. Expert Witness Testimony

A. Standard of Review

The Court of Appeals has set forth the standard of review for the admissibility of expert testimony:

> [T]he admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal. It is well settled, however, that the trial court's determination is reviewable on appeal, and may be reversed if founded on an error of law or some serious

> mistake, or if the trial court has clearly abused its discretion.

Gutierrez v. State, 423 Md. 476, 486 (2011) (quoting *Raithel v. State*, 280 Md. 291, 301 (1977)).

B. Analysis

As discussed above, the location of appellant's cell phone on the day of the murder was a key part of the State's case. Detective Scott Sube was called in the State's rebuttal case to counter appellant's testimony that he had nothing to do with the cell phone found at the murder scene. On appeal, appellant argues that the trial court erred in admitting such rebuttal expert testimony, because Detective Sube "could not testify to a reasonable degree of scientific certainty that the calls originated in the specific locations reflected [in] the exhibits."

Detective Sube was originally called in the State's case-in-chief as an expert in call mapping and network operations. Detective Sube described his call mapping process as follows:

> What I would do is take records provided from the carrier with proper legal orders, look at the information that they've given us. In addition, we get cell tower records from the carrier showing us the actual locations of the individual towers.
>
> So I'll . . . match the call detail records and the towers that are liste[d] in those call detail records, the tower and the facing, or the

side of the tower, with the carrier's records as to the location on the ground where that particular cell tower is located, and plot that onto a map.

Detective Sube described network operations as:

> How the phones work. How a handset generally talks to a tower, how that works. You know, whether it's depending on the technology. There are two major technologies used by the cellular industry. One's GSM and one is CDMA, so the difference between those two, the handsets communicate differently. So we look at that information and the nearest tower or the best available signal, how the headsets communicate with that, and that gives us the towers that the carriers give us from the records, from the call detail records.

He further elaborated:

> So essentially what it is, it is understanding the technology as to how the cell phone communicates with a tower, how the cell phone transfers from one tower, basically, to another one as it moves along in its path, and how that call is completed through the path. So from the tower, to the switching center, to the public telephone network, back to either the same switching center or another carrier's switching center—learning that path as well and understanding how that works.

Detective Sube was accepted as an expert in both call mapping and network operations.[9] He could not give an exact range for how close a cell phone needs to be to ping off of a specific tower, but described the range of cell towers "[i]n an urban environment" as "three to five miles possibly, depending on whether it's raining, whether it's snowing, summertime, wintertime, a lot of buildings around."

Detective Sube then plotted the calls made by the cell phone on November 18, 2002, from 5:18 p.m. through 10:43 p.m., by locating on a map each cell tower that the cell phone pinged off of during that time frame. The complete call records and map showed that the phone pinged off of a cell tower in Manhattan, New York at 5:18 p.m. The cell phone pings then proceeded to move down I-95, registering with cell towers in New Jersey, Delaware, and Maryland, before registering its final call off a cell tower in Silver Spring, Maryland at 10:43 p.m.

Detective Sube's testimony during the State's case-in-chief concerned only calls made after 5:18 p.m. on the day of the murder. After appellant took the stand and testified that he was not in possession of the cell phone on the day of the murder, Detective Sube

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[9] Defense counsel did not object to Detective Sube being accepted as an expert in network operations. Defense counsel did not believe that call mapping was an area of expertise. During Detective Sube's voir dire, defense counsel asked if call mapping was "taking your two sets of records, extracting the data from the record, and putting it on a chart?" To which Detective Sube answered, "Yes, sir."

was called by the State as a rebuttal witness to testify that, in the hours prior to the phone traveling down the I-95 corridor to the murder scene, the cell phone pinged off of towers in the vicinity of appellant's home and appellant's daughter's day care center.

The State had Detective Sube plot calls on maps just as he had done during his earlier testimony, but this time for pings prior to 5:18 p.m. The first map depicted appellant's home with rings drawn around it displaying distances of half a mile, one mile, and one and a half miles. In addition, the map identified cell towers in the vicinity of appellant's home that the cell phone had pinged off of on the day of the murder prior to 5:18 p.m. The second map depicted the day care with similar distance rings drawn around it and labels identifying cell towers that the cell phone had been pinged off of that day.

When asked about the location of the cell phone during this time frame, Detective Sube began to answer "[t]here's a fair chance that the phone could be within this juncture[,]" at which point defense counsel objected and moved to strike. The court sustained the objection. A bench conference ensued where after a brief discussion on what Detective Sube was going to testify to, the court asked the State:

> COURT: And how can you show the cell locations, if he's not going to say it to a reasonable degree of his –within a reasonable degree of his expertise –

[STATE]: He's already –

COURT: – that the cell phone was in that area?

[STATE]: He's already testified prior [during State's case-in-chief] that it's usually within a certain amount of miles. I forget what he said. So, he's already done that on his direct testimony. So, we are just going to ask him –

* * *

COURT: If he's going to testify within a reasonable degree of his area of expertise, that at these times, there is already testimony that's come in, with the phones pinged down 95, all the way in to Silver Spring, I think.

If he's going to testify that before they plotted those calls, that there were other calls that were plotted in this area, I don't have any problem with that.

[STATE]: That's his testimony.

COURT: I think he's already testified as to 95, so.

* * *

COURT: I'm going to allow the exhibit in for him to testify that he plotted anything that's within this area. If you want to ask him questions about, you know, is it possible it could have been pinging from 20 miles away, you know, you can ask him that question. **But he's already testified as to tracking the cell phone down this area, when your client says he didn't have the cell phone, and they obviously want to put in that the cell phone was in the vicinity of New York City in the very vicinity of the day care center.**

* * *

[DEFENSE COUNSEL]: All right, just so the record is clean then. We object to it, and we would strike all of his testimony on the grounds that we stated before. That it is not proper rebuttal, and now that there's not a proper foundation laid for him to offer the testimony that they propose to offer in this matter.

COURT: Well, as I understand it, he's been qualified as an expert in this area, and I understand it

he is at one, two, three—I'm still confused as to where the cell phone towers are. Are there like six cell phone towers?

[STATE]: Yes.

* * *

COURT: Okay, so what's he saying? That these calls, when they were made, pinged off towers that were in—

[STATE]: **The general vicinity of where (unintelligible) is and [the day care] is, and where [appellant's] home is.**

COURT: Yes, I think he's qualified to say that. The objection's overruled.

(Emphasis added).

The substance of Detective Sube's rebuttal testimony did not differ significantly from that which he testified to previously. He plotted calls on a map according to the cell towers that the cell phone had pinged off of, just as he had done before, only this time it was for calls made earlier in the day prior to 5:18 p.m. Appellant argues that the testimony should not have been allowed, because Detective Sube "could not testify to a reasonable degree of scientific certainty that the calls originated in the specific locations reflected in the exhibits." We note that the specific

location of the cell phone was not the subject of Detective Sube's testimony. As pointed out by the State, "the location of the cell towers and network operations were the subjects of his expertise, not the precise location of the cell phone." Detective Sube's expert testimony during the State's case-in-chief and rebuttal case was limited to mapping which cell towers were pinged off of by the cell phone at specific times. Furthermore, during his rebuttal testimony, the trial court sustained defense counsel's objection when Detective Sube began to opine on the location of appellant's cell phone, and instructed the jury to disregard his answer. Therefore, Detective Sube never went beyond the scope of his expertise of call mapping and network operations.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; APPELLANT TO PAY COSTS.

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

STATE OF MARYLAND v. CLEMENT REYNOLDS, Defendant.	Criminal No. 125040

JURY TRIAL

Rockville, Maryland January 12, 2015

DEPOSITION SERVICES, INC.
12321 Middlebrook Road, Suite 210
Germantown, Maryland 20874
(301) 881-3344

* * *

[109] because you were afraid someone would get your license plate number when driving the white van after you killed Wesley, and this was your cover story for where the van would be?

A The van was stolen on the 15th. Wesley got killed on the 18th.

Q Right, and that was in your mind when you made this report, correct?

A That's, that's bullshit. That doesn't make sense to me.

Q Now, I want to talk about, you said that Wesley was a really close friend, correct?

A Yes, yes.

Q And you were really upset when he died, right?

A Yes.

Q And you would agree with me that actually what happened in this case is horrific?

A It is horrific.

Q And that shooting and killing someone, whether you know the person or not, in front of an 11 year old is horrific, correct?

A It is horrific.

Q But that's not the answer you gave to the police after you arrested, when they asked you about this, is it?

A Refresh my memory.

Q Isn't it true –

[110] MR. BONSIB: Objection. May we approach?

THE COURT: Okay.

(Bench conference follows:)

MR. BONSIB: This appears to be going in to an area of a statement that was suppressed.

THE COURT: I don't know, because I don't know what they're –

MS. AYERS: Not for impeachment purposes.

THE COURT: I don't know.

MR. BONSIB: Well, there isn't any impeachment here. The question was –

THE COURT: There is no impeachment. Not on that statement.

MS. AYERS: Well, no –

THE COURT: Not after he has asked 10 times for an attorney, no.

MS. AYERS: This isn't that statement. There were two statements.

THE COURT: Okay.

MS. AYERS: This is the New York City statement, where he –

THE COURT: Is this –

MS. AYERS: Where you allowed it to come in for impeachment purposes.

THE COURT: Okay.

[111] MS. AYERS: And his statement here –

THE COURT: Well, I think that's what Mr. Bonsib wants to check on?

MS. AYERS: If that's what – this is the New York City one.

MR. BONSIB: Well, there's two parts to it. First of all, that, because I wasn't sure, in my own mind, which one it was. But assuming it's the first one, she has simply asked a question about what his present position is as to whether that it's horrific or not. And that doesn't set up an impeachment for a statement, frankly, as I recall –

THE COURT: I don't know how it would, either. I agree with you.

MS. AYERS: Well, you know, what he says in his statement is the police give him that exact scenario, and then say, what do you think about somebody who would shoot someone in front of their 11 year old child, and he says, I don't know

MR. BONSIB: Well, that's –

MS. AYERS: Here, he said it's horrific.

THE COURT: I'm not going to allow that.

(Bench conference concluded.)

BY MS. AYERS:

Q Isn't it true when you met with the police, you denied even knowing Wesley King?

A That's true.

[112] Q And they show a picture of him to you, and you said, you didn't know who that was?

MR. BONSIB: Objection.

THE COURT: Overruled.

THE DEFENDANT: Yes, I did.

BY MS. AYERS:

Q And I want to – and they showed a picture of you, actually, and you denied that that was you?

A Yes, I did.

Q If I can have a moment. Sorry, I just spill all the exhibits, but I got what I wanted. Sorry.

THE COURT: Well, that's all right. You found it.

MS. AYERS: Okay.

THE COURT: That's why they my clerk the big bucks.

MS. AYERS: I'm sorry.

BY MS. AYERS:

Q I'm going to show you – that's the picture they showed of you, correct?

A Yes, it was.

Q And that is you, correct?

A It is me.

Q And you denied that that was you?

A I did.

Q And that's you wearing an earring? You work an earring back then, right?

[113] A Yes, I did.

Q That's something you normally did?

A Yes.

Q And then they also showed you Clivvy, and that's Clivvy, right?

A Yes, but I was never shown a picture of Clivvy.

Q But you denied knowing Clivvy?

A I was never asked about Clivvy.

Q Now, you also – now you testified that, well you said in the interview that in November of 2002, you were in the Virgin Islands, correct?

A That's correct.

Q So, that was a lie?

A That was –

MR. BONSIB: Objection. May we approach, Your Honor?

(Bench conference follows:)

MR. BONSIB: Your Honor, there was a stipulation regarding what was admissible in the first six pages of that interview. I don't see anything about the Virgin Islands in the first six pages of that interview. To say –

MS. COLEMAN: Or about Clivvy.

MR. BONSIB: Or about Clivvy.

MS. AYERS: I'm doing this for impeachment purposes.

MR. BONSIB: You cannot ask –

THE COURT: Well, I understand, but there, I thought [114] I already respect to what portions of the statement you could use –

MS. AYERS: In our case in chief.

THE COURT: – and which you could use for impeachment purposes. It's got to be voluntary for it to be used even for impeachment purposes.

MS. AYERS: Judge you ruled that the statement was voluntary.

THE COURT: Okay, if I ruled it, I rule it.

MR. BONSIB: But you can't say, didn't you tell them in a statement. Certain things, when that portion of the statement has been ruled *Miranda* violative. They have not shown that he said something on another occasion that permits them to go in to this statement for impeachment.

What they're basically doing, is going in to the statement. They're asking him, did you go in to this statement.

THE COURT: Yes, I don't have a problem with that. I think in fact, he's already testified he was

hear, and he he's testified – he testified that he was here.

He testified, I mean, his alibi witnesses, if you believe them, there was a contract. I mean, he was right here. He was in New York city. There was a contract that was executed. He got $2,500 in cash. He's a businessman, you know, where's the contract? Why doesn't he go to the police [115] and say, you know, what do you mean? I was with three other people, two other people that day. Now he's telling the police when he comes back, that he was in the Virgin Islands when in fact, he's got alibi witnesses that were prepared to say, without question, that he was in New York at the time of the killing.

I think it's absolutely proper impeachment to ask him, didn't you tell the police you were in the Virgin Islands, so now he's given them a story. He's given you folks a story. He's given alibi witnesses a story. I disagree with you. I think it's appropriate to ask at this point.

MR. BONSIB: May we have a proffer as to whether there are other areas that they think are impeachment in this suppressed portion of the statement? Because we're going to be going through a litany of questions about what did you tell the police in the portion of the statement the Court has suppressed.

I don't think that that is proper, and that seems to be where we're going. You can't set up the impeachment in the manner in which they're doing it.

THE COURT: Well, he set up the impeachment by saying he was in New York. Now, he's telling the police – he's told this jury that at the time of this murder, he was in New York and there were two people, Julio and this woman, I forget her name now, but the 22 and a half year employee, who turns out to [116] be his girlfriend and that has visited him in the jail, that they're vouching for where he was the night of the murder. And he was in New York.

Now, he runs from the police 11 days later. He could have gone to the police and said, what are you talking about?

I got a contract. This woman signed a contract. She gave me $2,500 a couple days ago. What are you, nuts? Let's go find Julio. He didn't do any of that. He took off, he changed his identity, and he went to the Virgin Islands.

Now, he's telling the police, when he comes back and he gets arrested, that he was the Virgin Islands. It's absolutely appropriate impeachment. He's given different stories to everybody. I absolutely disagree. That's proper impeachment.

MR. BONSIB: Well, just so the record's clear, I move to strike any questions that go to that portion of the statement that the Court has ruled are involuntary.

MS. AYERS: No, the Court did not rule that the statement was involuntary.

MR. BONSIB: I mean, that they were *Miranda* violative which is basically, from the middle of page 6 of the transcript on.

THE COURT: Okay.

MR. BONSIB: I don't think impeachment has been set up. I think these are –

[117] THE COURT: I disagree with you. I think they set impeachment up with his story right here as alibi.

MR. BONSIB: Yes, well, I move to strike it –

THE COURT: He doesn't come back in to the country and say to the police, when they do catch him, look, I got scared. I changed my identity. Let me just tell you, here are the people, right here, right now that you can go to, you can check with them, because I was in New York at the time of this murder. But I was in X, Y, I was doing X, Y and Z.

MR. BONSIB: All right.

THE COURT: And he says, nope, I wasn't even here. I was in the Virgin Islands.

MR. BONSIB: I move to strike the testimony.

THE COURT: All right. Objection's overruled.

MR. BONSIB: I move for a mistrial.

THE COURT: All right, that request for a mistrial is denied.

MR. BONSIB: Thank you.

(Bench conference concluded.)

BY MS. AYERS:

Q Didn't you tell the police, that in November of 2002, you were in the Virgin Islands?

A Yes, I did.

Q And didn't you also tell the police that you had never been to Maryland more than passing through?

[118] A Yes, I did.

Q So, you didn't tell them what you're telling the jury today, that Wesley King was your great friend and you regularly saw him and shared an apartment with him?

MR. BONSIB: Objection.

THE COURT: Overruled.

THE DEFENDANT: No, I was uncertain the capacity of Dennis Graham at that time.

BY MS. AYERS:

Q So, you were pretending to be somebody else to the police and hoping you could convince them of that?

A Right, I was hoping to preserve the identity of Dennis Graham. So, I was answering those questions with that in mind.

Q And you were hoping to avoid the –

A Not to be discovered.

Q Correct?

A I was hoping not to be discovered as Kevin Reynolds, yes.

Q Because of this case?

A Yes.

Q And you told the police that when you first came to the United States, that you worked selling cars with Byron Matamora (phonetic sp.), correct?

MR. BONSIB: Objection.

[119] THE COURT: Overruled.

THE DEFENDANT: Yes.

BY MS. AYERS:

Q Now Byron Dwyer?

A Correct.

Q Are there two Byrons?

A No.

Q So, which is his correct last name?

A His name is Dwyer.

Q And you didn't work selling cars with him, correct?

A I helped him when he was, when I came back to the States in '03, and I was staying with him out in Jersey. I used to help him out, selling cars.

Q And you also told the police that you were living with a girl named Rose, correct?

A Correct.

MR. BONSIB: Objection.

THE COURT: Overruled.

BY MS. AYERS:

Q And when asked what Rosa's last name was, you said Lopez, correct?

MR. BONSIB: Objection.

THE COURT: Overruled.

THE DEFENDANT: Correct.

BY MS. AYERS:

[120] Q Is Rose Lopez a real person?

A Yes, she is.

Q Who is Rose Lopez?

A She was a neighbor of Byron Dwyer that I used to see back then.

Q And is it someone you've had a relationship with, or was that a lie, too?

A I, we had relationships, yes.

Q So, instead of telling the police about Caroline George, or Karlene Gill, who could truly alibi you, you started naming Rose Lopez and Byron Matamora, who isn't even a real person?

MR. BONSIB: Objection.

THE COURT: Overruled.

THE DEFENDANT: Yes.

BY MS. AYERS:

Q And just so we're clear, you never said anything about Caroline George or Karlene Gill?

MR. BONSIB: Objection.

THE COURT: Overruled.

THE DEFENDANT: Like I said, at that time, I was preserving my identity as Dennis Graham. So, I was answering in the capacity of Dennis Graham.

BY MS. AYERS:

Q Because you were hoping the Dennis Graham cover would [121] work first, correct?

A Correct.

Q And when the Dennis Graham cover fell through, and we realized that you aren't Dennis Graham, now you create the second cover, which is the alibi, correct?

A I did not create the second cover.

Q But you agree, you've never mentioned the alibi to the police?

MR. BONSIB: Objection. May we approach.

(Bench conference follows:)

MR. BONSIB: Move for a mistrial. The Court, this has nothing to do with impeachment. This is now asking the defendant, after he has asserted his right to counsel and his right to remain silent, why he didn't say things. And Court has found that after the first pages of that transcript, that he had a *Miranda* invoked situation, and they're now asking him about why did didn't say things after invoked *Miranda.* I move for a mistrial.

THE COURT: All right. I think you're in that, I'm going to deny the motion for a mistrial but you need to get away from this area.

MS. AYERS: Okay. Just to make my own record, he testified that he was in New York or that he was in New York at the time of the crime, and in the statement, he is saying that he is Dennis Graham in the Virgin Islands. And that he had [122] relations with Rose Lopez, and this Byron Matamora.

THE COURT: I think it might be fair argument to the jury that he didn't mention it at the time,

or something light that. But I, you know, I don't, I just think you'd better stay awake from it.

MS. AYERS: Okay. It's just that he was giving a lot of information to the police, not the alibi.

MR. BONSIB: Your Honor, this is not the only question. This question becomes prejudicial because of all of the lead up questions. It suggests now that he did not tell the police something, at a time when he did not have to tell them something, where the court has already ruled he had invoked his right to remain silent. You have to put it in the context of everything that lead up.

It is prejudicial. It is not curable. it is error, and the Court should grant a mistrial.

THE COURT: Thank you. Motion denied.

(Bench conference concluded.)

BY MS. AYERS:

Q Now, you've said that burner phone called you on the night of Wesley's murder, and it was Clivvy, correct?

A Correct.

Q And you talked for a few minutes. What did you talk about?

A I don't recall the nature of the conversation.

* * *

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

STATE OF MARYLAND v. CLEMENT REYNOLDS, Defendant.	Criminal No. 125040

MOTIONS HEARING

Rockville, Maryland October 20, 2014

DEPOSITION SERVICES, INC.
12321 Middlebrook Road, Suite 210
Germantown, Maryland 20874
(301) 881-3344

* * *

[197] strictly for biographical reasons, or rather for investigatory reasons. Thank you.

THE COURT: Okay. All right. Let me take a ten minute recess and I'll be right back. I need to use the men's room too.

THE CLERK: All rise. The Court stands in recess. (Recess)

THE COURT: All right. We have the defendant back in the courtroom and we only took a brief break here, and I would just note that it's almost 5 o'clock.

I appreciate your patience folks, and I know it's been a long day, and the Court's heard a lot of testimony. In addition to that, there's a lot of argument on both sides which is, none of which is frivolous.

JUDGE'S RULING

So, let me do what I have to do, which is to make a call on this case and let's start with the first statement on April the 14th of 2014.

The Court believes that everything that happens up to page 6 of that statement is admissible. Thereafter, at page 6, line 11, Mr. Graham in no uncertain terms, clearly and unequivocally, despite the Clintonesque interpretation that Ms. Ayres would like me to give that statement, unambiguously and clearly invokes his right to remain silent by saying and I quote "There's nothing I have to say." Thereafter, the Court [198] finds that any continuing discussion and questioning of the defendant should be suppressed as a violation of Miranda. And just to demonstrate that he wants, he says there's nothing I have to say, Detective Riley goes on and ignores that. I'm sorry, it's not Detective Riley, it's Detective Colbert. It's Colbert, right? Not Colbert?

MR. BONSIB: Yes, Your Honor

MS. AYRES: Yes.

MS. COLEMAN: Yes, it is Colbert, yes.

THE COURT: Not like the TV personality?

MR. ROSLUND: No, sir.

THE COURT: And then again, on page 7, shortly thereafter again, "Okay, like I said, I mean, I'm here more for you because like I just explained to you my case is, I've made a list of the evidence we've got in this case, okay? And it's overwhelming, so like I said, it's your time to shine right now," that's the second time he uses that expression, time to shine. "It's your time to speak up about this. It's been many years, I can see your brain working. Mr. Graham, There's nothing I have to say, you're are trying to solve a homicide and" and then Detective Colbert says, "No our homicide is solved." And he actually even says on page 8, he says, "But if it goes like I think, you turn out to be Kevin Reynolds and, you know, I'd rather you just tell me to go to hell and get out of here." And Mr. Graham says, "Well I don't have to [199] disrespect you." Detective Riley says, "Well I appreciate that" and then he goes on. And this is in response to, there's nothing I have to say, you are trying to solve a homicide and he cuts him off. He cuts him off after, there's nothing I have to say and that's the invocation the second time of his right to remain silent.

If he indeed understood his right, the advice of right form which has been admitted into evidence and everybody agrees that he does, which is State's Exhibit No. 7, says "You have the right now and at any time to remain silent. Anything you say may be used against you. You have the right to a lawyer before and during any questioning. If you cannot afford a lawyer, one will be appointed for you. Do you understand what I have

just said?" Answer, "Yes." I don't know how else you would understand what he just said than to say, there's nothing I have to say.

So, the Court finds that anything after that violates Miranda, and I guess the next issue was with respect to that, was whether or not this was involuntary. And, I guess I didn't address this issue of his failure, the failure to ask the questions did he, was he willing to waive those rights, did he want to talk to them without an attorney being present. He didn't ask that question, the form was signed, the Court is bound that he understood and knew his rights. And I know that he understood and knew his rights because I've already found on [200] page 6, that he unambiguously invoked those rights. So the fact that that question wasn't asked in the waiver, the Court finds is not determinative in this case at all.

As for the issue of, I think I've made it pretty clear that I know that there was something raised in the defense, I believe it was also with respect to the statement on the 14th of April of 2014, with respect to improper inducement of promises. And the Court has already indicated that I don't find in any way that there was ever at any time any offering of any bad faith inducement on April 14th of 2014, or any promise, I mean, bad faith inducement. I mean, any inducement to make a statement or promise to make a statement.

As for the bad faith issue that's been raised by the defense with respect to the April 14th, the Court finds that there's nothing to indicate that there was any bad

faith. The detective is a cold case detective. The detective is called out of an Orioles game because he's advised that there's somebody that's been arrested in New York City on an old case. And as he indicated, he was on his way up to New York, called out of an Orioles game, and at that time of course, he had no way of knowing that they would be swept in the series championship, division championship, lead championship. In any event, the fact of the matter is, he had to drop everything he was doing even though he was off, find somebody to drive him up there. And as he said, as he was driving up there he's going [201] over the case to see what the evidence is against this particular individual who is identifying himself not as Kevin Reynolds, or Clement Reynolds, or whom the warrant has been issued. Rather, he's identifying himself as Dennis Graham, and so the detective may believe that he's attempting to evade or avoid being arrested, and he certainly has a right to inquire about that.

Now, the detective says when Mr. Graham says, there's nothing I have to say, he asks you don't know nothing about it. We plugged that in with respect to Detective Colbert knowing that he's denying that he's even Kevin Reynolds, and I just don't find in the context of this particular situation that Detective Colbert is in any way intentionally violating his rights as a matter of bad faith. I just don't believe that he did that and I think that his, his attempts to continue to question him about this are legitimate attempts to see if he can bring something out of him. And I don't believe he is to, to find out whether or not he may have some

leads. Is he Clement? Page 9, "Say your name was Clement in 2002, say your name was Clement Reynolds, was Clement Reynolds in Maryland shooting somebody?" Mr. Graham, "I don't know that person.

You don't know that name, all right. I'm not going to give up on you. Let's just keep rolling for a few minutes, okay. Let me tell you some of the evidence that's in the case."

I don't find, I don't find in light of the entire [202] transcript of this case, and I don't find in light of the defendant's answers, that there's anything involuntary about the statement. I do find it was voluntarily made, even though there as indeed a technical violation of Miranda, and I believe and rule that the statement from April 14th, 2014, can be used for impeachment purposes. As for April 30th, 2014, we are not post-April 14th, 2014. The detective has now had time to find out that he is not, he being Kevin Reynolds is not Dennis Graham, he knows he's not Dennis Graham. He also knows that Mr. Graham, excuse me, Mr. Reynolds, the defendant in this case, didn't wish to speak to him before about the facts of the murder. He said he didn't know anything about the facts of the murder, now he knows that he's Kevin Reynolds and he says but he didn't know that he is Clement Reynolds.

I do find first, with respect to the pedigree information, that I still believe he had the right to inquire without advising him of Miranda about the pedigree information, and the pedigree information only. To the

extent there were some other additional responses that are posing as pedigree information, then I agree with Mr. Bonsib. I think that those matters can be cleared up, but the things that Ms. Ayres initially talked about with respect to pedigree information, name, date of birth, is he Clement Reynolds, what's his mother's name and those types of things that are generally used for booking information, he certainly had the right to ask him [203] those questions. And to the extent that he answered those questions, I think we can certainly cull the biographical information out, the pedigree information and so on.

Now, in connection with the Miranda, the State has already conceded with respect to the issue of Miranda that there's a violation of Miranda. And, I have to take a look at the page, at the situation as a whole again just like I did when he drove up to New York City, got called out of the Orioles game, where is he now? Well, now the defendant has been printed. Now the prints have confirmed that he's Kevin Reynolds. Now he's been served with a warrant. Now he's been extradited to the State of Maryland. And now, pursuant to that extradition, Detective Colbert is alerted to the fact that he's here. And so, Detective Colbert starts off right on page 2, "Do you remember me? Yeah." Detective Colbert, "It was early morning hours, I don't remember too much about that night, you were just out of the country, right? The 14th? So, how was your trip coming down, all right? It was okay. Okay. We are just touching base again. I wanted to chat a bit and just get things off your chest. Is there anything you want to get out

there? We're still, you know, working our way through the process and we want to get you through it as well, don't want to waste your time. I know you've got a family wanting to see you, your kids want to see you. So the first time we talked, you know, we're very big on not wasting each other's time. I [204] don't want to waste your time, so let's get some basic info, if you don't mind. What's your last name?" Mr. Reynolds, "I would love to talk to counsel before we talk. I'd like to exercise that right." Detective Colbert, "You certainly have that right, but there's basic information that we need to get going, just to even put you into the process. Just general bio information, name, date of birth, phone number, address, things like this. So, what's your last name?" Mr. Reynolds, "I would rather exercise my right to," and then he gets cut off because he knows what he's going to say. "We're good with that man, okay, we are cool with that. Nobody is trying to trick you or anything like that, okay?"

Well, sure they are. There's absolutely no question that they don't want him to get an attorney, he's already indicated that he doesn't want to speak to him when he went up to New York. And, they absolutely, positively are trying to trick him, and there's nothing wrong with trying to trick somebody with respect to that. But, it's pretty clear here that he hasn't reinitiated any kind of interrogation in this case, and right from the get go he says, "I would love to talk to counsel before we talk. I'd like exercise that right." So, it's very clear that they knew now, not only did he not want to talk, but he didn't want to talk to a lawyer. He didn't

even want to give them any booking information without talking to a lawyer. "Uh-huh," Detective Colbert, "Just spell your last [205] name for me." Mr. Reynolds, "I want to request counsel." Detective Colbert, "Okay. We can have one-sided conversation. That's fine with me, because I think it's important for you to know where we stand, okay?" Mr. Reynolds, "Okay."

Wait a minute, is there a one-sided conversation exception when you invoke the right to counsel? Say, okay, "I want to talk to an attorney before I answer questions. All right. Well, just, let's just have a one-sided conversation. I know you've invoked your right to counsel, but we're just going to have a one-sided conversation. I know you've had a couple of weeks to think about things, talk to family. Now, I'm not sure if you know we are aware of everything that's gone on, on the outside since your arrest. There's been a lot happening in this case and other cases that you are involved in. And in the sake of being fair, I'm all about giving you an opportunity, okay? I was mistaken when we spoke last time, and I said this will be the last opportunity. The way this worked out today, kind of a bonus that we get to meet you, no kidding."

There's a gift been presented in his lap, and Detective Colbert, as any good detective would, wants to go ahead and take another crack at seeing whether or not he can get a confession from him. And I would be ashamed of him if he didn't. I'm sure anybody would, any citizen would, any prosecutor would, certainly. "I thought we wouldn't see each [206] other after last time so, and again, to be honest with you this is in

the interest of being fair. In the interest of putting anything out there. Have you about Doctor Ford getting arrested? Are you aware of that? Are you aware of, you know, because of the fact we can't even get past the point of knowing who you are, we're going to have to go to other measures as far as identifying who you are whether that's DNA, through children, or whatever else. It's going to take this as delaying the entire process," and so on, and so on, "and I'm just trying to let you know where we stand." I guess this is all part of the one-sided conversation exception. "I need you to tell you your name of birth, I don't know all of that, okay? You want to try it again?" And, Mr. Reynolds, "It's a process that we can do after I speak with counsel, right?" Detective Colbert, "No, once your attorney who is representing you, the likelihood of me being able to talk to you again is pretty much zero, okay?"

Correct me if I'm wrong, but didn't he already say that on April 14th? I think he did. Detective Roslund, how did you get in this Mr. Roslund?

MR. ROSULND: I don't know, Your Honor

THE COURT: "He ain't going to let it happen. He just ain't going to let it happen now, not even to get any kind of back ground." Detective Colbert, "You got a lot of shit going on, I mean, you got not only our case, I mean, you won't [207] even share our stuff. I mean, (unintelligible), he goes on, and on, and on. He's laying at it again with the one-sided conversation, now we're only on page 5. Mr. Reynolds, "I would like to assert my right to counsel. You know, you just throw a lot

at me and, you know, I don't know where you're getting all your information, or where this is coming from. I would like to exercise my right to counsel." Detective Colbert, Roslund, Roslund Colbert, "Let's go and just get him printed now." Detective Colbert, I'm sorry, what's the other detective?

MR. ROSLUND: Drewry.

THE COURT: Drewry, right. It's Detective Drewry, is now Detective Roslund. Detective Colbert, "We will give you Detective Drewry, or you can see if you can get the DB-50, which is your advice of rights form, okay? And we need certain information from you in order to allow your advice of rights form." Mr. Reynolds, "Why don't you come follow me to talk to you guys after I speak with him." Detective Drewry, "Well he's up in New York. I mean, I have no problem if you want to do the call. You get on the telephone and say look, the dudes, you know, the cops down here want my name and my date of birth, where I was born, certain biographical information, is it okay for me to talk to them. I've got no problems with that, (unintelligible)?" Detective Colbert, "No, you have counsel down here yet or just in New York?"

Now, he even mentions Mr. Kemp's (phonetic sp.) name [208] in connection with that, and they try and call Mr. Kemp here. And apparently, he's tied up on the phone. I suspect nobody ever told him he might have a live one on the line or, he probably would have gotten on so he wouldn't lose the fee and Mr. Bonsib. But in any event, the fact of the matter is that there are

attempts made to contact him and there's apparently nobody else in his firm available. And so, they move on and they actually call a lawyer in New York. And he, and he, Detective Colbert tells him, "I'm going to, all I'm going to do is ask him is name and his date of birth, no big deal." Now, I believe this is after the expert comes in and takes his fingerprints. Page 9, "Have you ever been fingerprinted like this? You can stand up, just relax your hand let me do the work, let me press. All right. We're going to do the same hand, just stay there for a second," handcuff again, put your forefingers together, and so on. Mr. Parks, this is the expert "Your right hand, we only took your right. I think you took it twice but there's characteristics in there, from my experience, I've been doing this almost 35 years starting with the FBI. Your right thumb is a double loop world and the right index finger is a central pipe loop, and from my experience, there's no question as to the FBI card is the same fingerprints that are on the cards that he took of you today." Detective Colbert, "That's for you, that's the original FBI print card, okay? And, there's cleanup." Mr. Parks, "We're good." [209] Detective Colbert, "You're good."

Then, according to the DBD, you can look and you can see that they've the fingerprint card, and they give him a chance to take a look at the loops and see whether or not those loops compare to his print card. You've got to be kidding me. This is after he's exercised his right to counsel. Is this part of the one-way conversation exception that the State's trying to foist off in this case? And then, what's he say? He comes back in.

"I wasn't sure, I wasn't too sure to the chart we were looking at, so Reynolds last name, what is your middle name because I've seen it a few different ways, Oswald?" And then Detective Drewry, "Seriously." Mr. Reynolds, "I will talk to you guys as soon as I talk to counsel first. Not saying I won't, I will, you know, I don't think you guys are investigating, counsel has to let me talk to you guys."

Now, this is, I'm sorry, these loops with the print cards and everything else, this all happens after he asked to speak to counsel, after he says he's not going to talk and he submits to the fingerprinting. Still says he wants to talk to counsel, still hasn't said anything to anybody in particular about this case. And then they try to call Mr. Kemp, and they then get another attorney on the telephone from New York and he says, again at page 12, "Why can't I wait for my, can't I wait until I talk to somebody?" Detective Colbert, "Okay you have that right be we can't wait, you know what I'm saying? So, [210] we're," and Mr. Reynolds says, "I'm going to be here." And Detective Drewry says, "You ain't going nowhere." And Reynolds says, "So, you know, why can't I wait until I talk to somebody and talk to you guys?" Detective Colbert, "Then you have to express to your attorney that you want to talk to us." Mr. Reynolds, "I will." And Detective Colbert says to himself, sure you will. Detective Colbert, "Okay." Mr. Reynolds, "I just want somebody to, you know, you guys have been fair, you've been very respectful, you know, I have no problem with talking to you, I just need to get counsel's advice." And, and then he, they go and they say, Detective

Colbert on page (unintelligible), "My phone rang off the hook telling me you killed this person, you killed that person, you did this, you did that, you're an animal, you know, you're a monster, and I'm hearing this from everybody. You hit it on the head, there's a lot of gossip." And he says, "Right, you know, I requested to talk to you because I think that, you know, there's a lot of misconceptions or a lot of wrong information that you have." And he says, Detective Colbert says, "I have to clear it up," and Mr. Reynolds says, "To clear up, you know, I'd love to have my counsel's advice on this." This is page 14.

And then he gives him finally the name of his original attorney, they call the original attorney, who I guess is the guy that represented him in New York on the extradition, and he talks to him. And so, and then, the detectives tell the [211] attorney, who obviously doesn't trust them with just cause and says, okay, that's all it's going to be, just the standard booking questions that you are entitled to ask him. He puts his client on the phone and says, go ahead and speak to them but only speak to them about these booking questions. And I think that, I have looked at an awful lot of case law over the years with respect to the invocation of counsel. And it's pretty clear that once you invoke the right to counsel, all questioning is to cease.

The defendant is extradited down here, after he's already indicated he doesn't want to talk to them, and he's already spoken in New York. The first thing he says, the first words out of his mouth are, I want to talk to counsel and he never gives up on that until the very,

very end, until it's pretty clear. That even after talking to his attorney on the phone and promising his attorney that they are not going to ask him anything other than booking questions, they get right back into the facts of the case. And it's, there's absolutely no questions in the Court's mind that the purpose of that was to get something from him, even though the officer knew he had exercised his right to counsel. He'd said it about 14 times. They were not going to stop until they got him to answer some questions. There was nothing, there was nothing that prevented, there's nothing that they honored with respect to any of his requests to speak to counsel before he talked to [212] them. And, I don't know how anybody in custody would think for one second that any questioning was going to cease until such time as it got to counsel in light of this kind of persistence.

And I don't know that there's a single case anywhere that's remotely close to this with respect to the number of times he's asserted his right to counsel. I've never read one that's anything anywhere remotely close to that and I've never seen anything remotely close to that. And the detective has been honest, he said quite honestly that his intent was at that point in time to try and get some statement with respect to what happened, to see if he can get some leads, to see if he can get something to keep off the stand. And I believe that they may be a new training tool the police use, I don't know, but clearly they are taught what the case law says. And the case law says all questions are supposed to cease, they didn't cease.

And, what's difficult for the Court and it's something that I really wrestle with, is when there's a statement made, when there's a statement made at the end about you guys. And this is after additional statements and he doesn't want to discuss it without counsel being, I don't know how many times he invoked it. It certainly would seem to be nine times or something like that, or seven times. I've never seen it invoked this many times, but eventually he does say, that I wasn't supposed to say anything, I did it. I guess it's [213] page 46. Okay. Mr. Reynolds, "It wasn't me and at this point in time, I have nothing to offer." Detective Drewry, "Okay, because we can't force you, we can't make you talk to us, you know, can't like, you know, try to trick you. We can't offer you no deal, if you do this, we'll do that." Mr. Reynolds, "I understand that, you know, understand that but, you know, you know, I already talked too much. My lawyer was very adamant that, you know, I say nothing beyond my date of birth, and none of that, not to discuss the music business, not to do none of that." Detective Colbert, "But it's your choice. I say, Colbert, Colbert. "But it's your choice." Mr. Reynolds, "Yeah and I've chosen to do that with you guys, you know? But there's just some things that, you know, because I know why I'm here, do you know what I mean? And I know you guys are, you know, I want to say I know you guys are not on this team, you know what I mean? So, I, I, you know." Detective Colbert, "Okay, let me tell you something. There's nothing worse in the world, there's not a worst feeling in the world to put somebody in jail that doesn't belong in jail, you know what I'm saying?" Mr. Reynolds, "Uh-huh,

but from what I've learned from you, you think you have your man, detective."

And there's no question about that. There's no question that the detective believed that he had his man. There's no question that he persisted and continued to persist in asking Mr. Reynolds questions after he had on a number of [214] occasions clearly invoked his rights under the Miranda law.

And there was nothing that would lead any reasonable individual to believe that Detective Colbert and Detective Drewry were going to stop asking questions until they got some answers to some questions.

I find that the violation of his right to counsel in this case is so egregious, that I have no doubt in my mind that neither the Court of Special Appeals, nor the Court of Appeals would condone it and find voluntariness in this case. And so for that reason, I find that the entire statement on April 30th, is, not only was Miranda violated, but the statement was involuntary and the Court will now allow the State to use it for any purpose.

All right. Now, where are we with respect to -

MR. ROSLUND: I guess the request we would have is, what does Your Honor's calendar look like on Thursday? I think Mr. Bonsib and Ms. Coleman are available on Thursday. We may be able, we haven't been able to reach Detective McDonough (phonetics sp.) today, but I'm optimistic that we could reach him

in the next few days. Is Your Honor available to do his part of testimony by phone on Thursday?

THE COURT: They changed my password or something. All right. Why don't we do this, can we, let's just jump into my chambers real quick, and come the shortcut way. I don't know why this, hang on one second, let me try again. Thursday

* * *

CLEMENT REYNOLDS	*	**IN THE**
	*	**COURT OF APPEALS**
	*	**OF MARYLAND**
	*	**Petition Docket No. 428**
v.	*	**September Term, 2017**
	*	**(No. 182, Sept. Term, 2015 Court of Special**
	*	**Appeals)**
STATE OF MARYLAND	*	

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, the conditional cross-petition and the answer filed thereto, in the above entitled case, it is this 5th day of February, 2018

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, granted, limited, to the following issue:

> "Was Reynolds denied due process when the trial court permitted the prosecutor to question Reynolds about 'what he did *not* tell the police' about his alibi defense, even though the omissions were a result of Reynolds's post-arrest, post-*Miranda* invocation of silence and were not inconsistencies with his trial testimony?"

and a writ of certiorari to the Court of Special Appeals shall issue; and it is further

ORDERED, that the conditional cross-petition be, and it is hereby denied; and it is further

ORDERED, that said case shall be transferred to the regular docket as No. 84, September Term, 2017; and it is further

ORDERED, that counsel shall file briefs and printed record extract in accordance with Md. Rules 8-501 and 8-502, petitioner's brief and record extract to be filed on or before March 19, 2018; respondent's brief to be filed on or before April 18, 2018; petitioner's reply brief (if any) to be filed on or before April 30, 2018; and it is further

ORDERED, that this case shall be set for argument during the May session of Court.

/s/ Mary Ellen Barbera
Chief Judge