Circuit Court for Washington County
Case No. 21-K-75-3768

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3109

September Term, 2018

MICHAEL KEITH HINES

v.

STATE OF MARYLAND

Meredith,
Berger,
Wells,

JJ.

Opinion by Meredith, J.

Filed: September 17, 2019

In this appeal, Michael Keith Hines, appellant, contends that the Circuit Court for Washington County erred in denying his motion to correct an illegal sentence pursuant to Maryland Rule 4-345(a). He presents a single question on appeal:

> Must Appellant's sentence for felony murder be reversed as it exceeds the maximum sentence for that offense permitted at the time of Appellant's sentencing hearing?

We conclude that the sentence of life imprisonment (suspended in part) was an illegal sentence because, on the date of sentencing, it "[wa]s not a permitted one *for the conviction upon which it was imposed*." *Colvin v. State*, 450 Md. 718, 725 (2016) (emphasis added). And, because a defendant may seek correction of an illegal sentence "even if the defendant . . . purported to consent to it," *id*., we conclude that the plea agreement appellant placed on the record on June 21, 2017, and the judgments entered thereon, were not enforceable. Accordingly, we will vacate the convictions entered on July 11, 2017, and remand the case to the Circuit Court for Washington County for further proceedings, including, if necessary, a new trial on the three counts that would have been covered by the guilty plea entered on June 21, 2017.

FACTS AND PROCEDURAL HISTORY

On June 23, 1975, appellant broke into a building belonging to the E.J. Fennell Company in Hagerstown, bludgeoned the night watchman to death, and set fourteen separate fires. Appellant was tried by a jury in the Circuit Court for Washington County on a six-count indictment, and was convicted on November 7, 1975, of five counts: storehouse burning, attempted storehouse burning, felony murder-storehouse burning,

storehouse breaking, and felony murder-storehouse breaking.[1] Appellant was sentenced to concurrent life sentences for the felony murder convictions, with twenty years consecutive for storehouse burning, two years consecutive for attempted storehouse burning, and ten years consecutive for storehouse breaking.

On direct appeal to this Court, we held that there was insufficient evidence that burning of the actual structure resulted from the fourteen separate fires set by appellant within the building, and we reversed his conviction for storehouse burning. This holding also meant that there was insufficient evidence to support his conviction for felony murder based on storehouse burning, resulting in the reversal of that conviction as well. *Hines v. State*, 34 Md. App. 612 (1977).

In 2012, appellant filed a Motion to Reopen his post-conviction proceedings based on the Court of Appeals's newly-filed opinion in *Unger v. State*, 427 Md. 383 (2012), but the Circuit Court for Washington County denied his motion. Appellant then filed an application for leave to appeal in this Court, which we granted.

The court in Hines's case had instructed the jury, in pertinent part, as follows:

> Now, Ladies and gentlemen of the Jury, all of the evidence has now been taken and it is now time for the Court to give some advisory instructions to the Jury. I remind you again, as we do everytime, that under the Constitution of Maryland, the jury in a criminal case is the Judge of the law as well as the facts. Therefore, anything which I may say about the law, including any instructions which I may give you, is merely advisory and you are not in any way bound by it. You may feel free to reject my advice on the law and to arrive at your own independent conclusion.

[1] Appellant was acquitted of the top count of the indictment, first-degree murder.

We reversed the denial of his motion to reopen, and remanded the case to the circuit court "with instructions to grant [the] motion to reopen post-conviction proceeding, vacate [Appellant's] convictions, and award a new trial." *Michael Keith Hines v. State of Maryland*, No. 0809, Sept. Term, 2013 (filed November 18, 2015).

After we remanded the case, appellant made his initial appearance in the circuit court on October 20, 2016, and his trial was scheduled for four days commencing July 11, 2017. On November 7, 2016, appellant filed a motion to dismiss the counts that had been reversed on appeal (Counts 2 and 4 of the original indictment), and count 1, of which appellant had been acquitted by his trial jury in 1975. The motion to dismiss Counts 1, 2, and 4 were heard on January 19, 2017. The State conceded that Count 1 had to be dismissed. The court took the balance of the motion under advisement, but eventually granted the motion to dismiss Counts 1, 2, and 4.[2]

On January 10, 2017, appellant filed a motion to dismiss Counts 5 and 6 of the original indictment (storehouse breaking and felony murder-storehouse breaking), asserting that the General Assembly had, in 1994, repealed former Annotated Code of

[2] Some muddiness exists in the record with regard to the numbering of the counts. Count 1 of the original indictment went away upon appellant's acquittal, and the record from the clerk's office indicated that it then moved the remaining counts up one position; *i.e.*, once appellant secured an acquittal on Count 1, Count 2 became Count 1, Count 3 became Count 2, and so forth. To eliminate confusion in this opinion, all references to the counts are as they existed in the original indictment. "Count 1" refers to "first-degree murder" for our purposes, despite the acquittal.

Maryland (1957), Art. 27, § 32, under which appellant had been charged.[3] In its place, the General Assembly enacted "a new provision which codified new offenses which are substantively different from the former offense codified in Art. 27, § 32 and charged in Count 5 of the indictment." Accordingly, appellant argued, "the crime of storehouse breaking formerly codified in Art. 27, § 32 is no longer a crime in Maryland, and is surely no longer a felony in Maryland." He argued that, not only Count 5, but also Count 6 (felony murder based on storehouse breaking), must be dismissed.

On January 31, 2017, appellant filed a motion to dismiss Count 6 (felony murder-storehouse breaking) on double-jeopardy grounds. He argued that he could not now be tried for felony murder because, in 1975, the jury had acquitted him of first-degree murder, and that therefore, appellant reasoned, it had acquitted him "of all forms of murder[.]" Appellant's motions were opposed by the State.

The two motions to dismiss (regarding Counts 5 and 6) were heard together over two days, January 19, 2017, and April 19, 2017. At the January 19, 2017 hearing, there was a great deal of argument about whether the original indictment still existed and if, in

[3] Article 27, § 32, the law at the time a jury convicted appellant of storehouse breaking, provided:

> Every person, his aiders, abettors and counsellors, who shall be convicted of the crime of breaking a storehouse, filling station, garage, trailer, cabin, diner, warehouse or other outhouse or into a boat in the day or night with an intent to commit murder or felony therein, or with the intent to steal, take or carry away the personal goods of another of the value of one hundred dollars ($100.00) or more therefrom, shall be guilty of a felony, and upon conviction sentenced to the penitentiary for not more than ten years.

fact, it was what the jury had considered, or if it had been amended at some point prior to verdict. Appellant's counsel informed the court that the clerk's office had, at some time since 1975, destroyed the original file. The State had recreated what it could of the original file. The State took the position that, while what it produced was **an** indictment, it could not be sure it was **the** indictment in its final form that existed at the time of conviction, and objected when appellant tried to introduce as an exhibit the copy of the indictment that had been provided to him by the State in discovery:

> [THE STATE]: The State objects, Your Honor. He's accurate about the source of it. The point is this, the indictment that is in the State's Attorney['s] file could be – it is a copy of an indictment. But the indictment is a living document until the verdict comes out. It could be amended at any time. I don't know what that indictment says, and the transcript is incomplete. So we don't know about those proceedings. So I will stipulate that this is the document that came out of the State's file. But and that it's now in the court's file. That is---those things are correct. But it is not an indictment that holds a defendant in the Division of Correction. It is a verdict and commitment of this Honorable Court that is . . .
>
> [THE COURT]: Right. So your --- your issue is that it --- it may have been amended.
>
> [THE STATE]: It could have been amended. I don't know.
>
> [THE COURT]: But you're not disputing that it is an indictment . . . .
>
> [THE STATE]: Right but . . .
>
> [THE COURT]: . . . from this case?
>
> [THE STATE]: But it's not necessarily the indictment that --- that reflects the convictions herein because they could have been amended up to --- up to that time.

Appellant pointed out the dearth of evidence that the indictment had ever been amended and the fact that the trial transcript, in particular the jury instructions, tracked exactly with the indictment that the State produced in discovery. The court admitted the exhibit.

Urging the court to dismiss Count 6, appellant argued that the State was limited to the language of the charging document, which used the language of the short-form indictment. Appellant's argument, based upon his interpretation of cases analyzing the use of the short-form indictment for murder, was that "all modalities of murder" were encompassed within the short-form indictment for murder. At the April hearing, appellant argued:

> [APPELLANT'S COUNSEL]: . . . I attached just for reference, I know it's already an exhibit for the Court anyway, but I attached an additional copy [of the indictment] that I filed as to the language they actually used. And it does almost verbatim mirror the language in the short form indictment of first-degree murder that was in effect at the time, also in effect now pretty much. But at that time, it was Article 27, Section 616. I am absolutely cognizant of the fact that there's not a statutory reference on count one. But the language always controls anyway. The language that they used is the language of the short form indictment. And it says, "The grand jury," I mean I --- I don't really need to read this. I know Your Honor has it before you, but it mirrors it. **The substantive language that really matters is, "That Michael Hines aforesaid feloniously, willfully and deliberately [with] premediated malice aforethought, did kill and murder Roy Calvin Rowland, and against the peace, government and dignity of the State."** And I attached a copy of the statute then in effect, Article 27, [Section] 616, indictment for murder or manslaughter, for easy reference to illustrate and --- and make it easy for everyone to compare what was actually in the charge versus what was required at the time. And it is clear that the language is virtually identical and is a point that was made in two cases that I cite, one is *Wood v. State*. And that's at, I apologize, Your Honor, 191 Maryland 658 [(1948)], and also in *Ross v. State*, 308 Maryland 337 [(1987)]. Now in *Wood*, what it --- the context of

the appeal in *Wood*, because obviously the appeal was filed by the defense, was that the defendant had and made the --- had been charged with --- with language identical to this language. Matter of fact, it's at --- it's *Wood v. State*. It's at 191 Maryland, uh, it must be at 663 and 664, I believe. But it says, "The indictment that charged Wood on February 13th, 1948, at the city aforesaid, feloniously, willfully and deliberately premeditated malice . . . aforethought did kill and murder one Joseph D. Benedict." And then the court says, "It preci --- it followed precisely **the language set out in Section 665 of Article 27** of the Code," which at that time was their version of Section 616 at the time of Mr. Hines' trial, which provides, **"In any indictment for murder or manslaughter, or for being an accessory thereto, it shall not be necessary to set forth the manner or means of death.** It shall be sufficient to use a statutory formula substantially to the following effect: 'That A. and B. on the blank day of blank, 19 – and blank, at the county aforesaid, feloniously and willfully of deliberately premeditated malice aforethought did kill and murder." You know, so what happened in *Wood* is Wood claimed on appeal that they didn't understand that they were charged --- he was charged also with felony murder related to a robbery. That he argued that the State is only trying to proceed on a theory of premeditated murder. And it was rejected. That argument was rejected. And that holding as --- and that interpretation of that language has existed continuously to date. There is not a reported decision that I'm aware of that changes the interpretation of what that language means. And that, I think, is the gravamen of --- of --- of **my whole argument really, which is that if you only look at what's been charged and knowing that there's been an acquittal, that a jury has found him not guilty, under that language, how can we revisit that today and have a trial on that same language? If it included every modality of murder**, if that charge included every modality of murder, as I believe *Wood* says, and as *Ross v. State* also, which I've cited in my Motion, also says, **it makes no difference at this point what the jury was thinking**, what the parties to the litigation were thinking. It may be people mistakenly thought there was something less charged. But if a defendant can't argue on an appeal that he shouldn't be convicted on a felony-murder modality when he thought he was, under this language, on --- was only facing premeditated murder as an allegation, how can the State argue today that, "We didn't know what we charged? That we didn't know that the language that was used to charge him included ever[y] modality of murder."

[THE COURT]: Well I --- I --- I understand --- I understand what you're saying. But in this case, Mr. Hines can't say there wasn't one charge of murder. There was count six, felony murder storehouse breaking.

[APPELLANT'S COUNSEL]: I agree.

[THE COURT]: So there's a count of murder, but then there's also a specific count of felony murder storehouse breaking. So . . .

[APPELLANT'S COUNSEL]: You --- you . . .

[THE COURT]: . . . unlike what you're telling me in *Wood*, where there could be one count of murder, and the State doesn't have to specify what its theory is, here, the State was specific in county six, felony murder storehouse breaking.

[APPELLANT'S COUNSEL]: Well I understand Your Honor's concern, and I guess I would ask you to consider where we stand today procedurally versus where Mr. Hines and --- and counsel and the court stood in 1975. I certainly believe that it was improper to charge at that point, to have --- have separate counts. But that doesn't really matter right now. Because at that time, certainly that was the first trial. No one could raise the issue of double jeopardy. It was the first trial. **There's actually been an acquittal under language that includes that modality, every modality of murder.** There's actually been a jury finding of not guilty [as to Count 1]. You can't go back and que --- even --- there's a --- there's a ton of cases that stand for the proposition that even if there was an acquittal based upon some kind of erroneous, I think it's --- the exact language, there's a case *Daff*, I think, has pretty good language on this. Uh, **I think it's *Daff v. State*, it's at 317 Maryland 678.** But essentially, **it stands for the proposition [that] a defendant acquitted at trial be not retried on the same offense even when acquittal is based upon [an] egregiously erroneous foundation.** In other words, **it doesn't really matter why the jury chose to acquit**. The notice that the defendant had was that modality, all modalities of murder were included in the first count. I would note that as he stands today, there is no conviction. There's no convictions for anything. We're before this Court because all convictions have been overturned and reversed. So it's as if we're coming forward now for the first trial, which is why double jeopardy is an issue now. The arguments probably should have been made at the original trial that you can't have --- there's only one killing. There's no assertion --- every one of the counts, you --- I think there was three counts at that time, really only, excuse me, theoretically one count of --- of first-degree murder left, which would be count six. But they all list the same victim, the same date and time, the same premises. There is --- there's no contention by anybody that there's

any other victim. And so as we stand here today procedurally, there's no conviction for anything. And now you have to look at the procedural history of this case and --- and --- and what actually happened in this case. And I think it's undisputed, Your Honor has so ruled, he was found not guilty by jury on count one. If Your Honor agrees as I do that lawyers may have made mistakes, it doesn't matter. You can't go back behind the trial deliberations of the jury and say, "Did you consider anything else? Did you only consider premeditated murder or did you consider other forms of murder when you entered the not guilty verdict?" I --- I would say --- and I would say there's a lot of case law, even when judges make mistakes . . .

[THE COURT]: Right. No, I --- I agree with you there. There's no mechanism to go and --- and question the jury, "You found him guilty on which theory? Which --- what was your mind set on this particular count?" **But on count six, jury said, "Guilty, felony murder storehouse breaking."** So . . .

[APPELLANT'S COUNSEL]: Again, what I would suggest to Your Honor is that there is no conviction on that now. And I think that's the --- that's the important point. There's no conviction as we stand here today. The question is before Your Honor is, can he be tried for that now? And I would say the answer to that is no because that modality of murder was included in count one.

* * *

We have the record of the case. We have docket entries. We've had Your Honor's ruling that he was acquitted on count one. Nobody disputes that. And if the language is the language that was used, whatever the State's understanding then or now is about what should have been included in count one is irrelevant. It's not relevant because the notice --- the notice that a defendant is put on is the charging document. I agree with a portion of the State's argument and that they said you can't look at extrinsic evidence to determine the facts, the facts of a case in --- in analyzing whether something should be dismissed. But you certainly can always look at the procedural history because otherwise you could never, never have a motion to dismiss based upon double jeopardy. It's not an issue that's submitted to the jury. It's something the Court has to rule on. It's not a jury question as to whether there's been a prior trial and acquittal. It's Your Honor's decision. The language that they used encompassed every legal theory of first-degree murder, every theory. I don't --- I recognize it's --- it's certainly unusual and odd that other counts went forward. But,

> again, I --- I reiterate that as he sits right now before Your Honor, there is no conviction for anything. This is the first time he actually is in a position because of the Mandate remanding this matter, there are no convictions to answer a very fundamental question, **has this man been placed in jeopardy of first-degree murder as alleged in this charging document? And if so, can the State get a second bite at the apple when there's been a jury finding of not guilty on language that encompasses every modality of first-degree murder? And I would suggest to Your Honor that the unequivocal answer is he cannot be retried. Double jeopardy precludes this**. . . . I would ask Your Honor to find that double jeopardy as is contemplated under the federal Constitution and the Maryland Declaration of Rights, under --- a ton of case[s] in Maryland, would show that he cannot be retried for this offense.

(Emphasis added.) Regarding the motion to dismiss Counts 5 and 6, appellant argued:

> [APPELLANT'S COUNSEL]: In 1975, **Mr. Hines was charged with storehouse breaking** until [sic] **Section 32 of Article 27 and count six, a felony murder predicated solely on storehouse breaking under Section 32**. This crime was complete upon breaking and required no proof of entry into the storehouse. **In 1994, that crime was repealed.** It was **replaced with our present four degrees of burglary**, new substantive offenses which all require proof of entry. Mr. Hines was awarded a new trial by the Court of Special Appeals in 2015, was remanded after an unsuccessful certiorari petition in 2016. And the issue is, in 2017, may Mr. Hines be re-prosecuted for the crime of storehouse breaking, a crime which in [*sic*] non-existent in Maryland since 1994? The answer must be no.
>
> * * *
>
> So **after 1994, storehouse breaking is no longer an enumerated felony for first-degree felony murder.**
>
> That is the crux of this issue. Is the fact that in 1994, storehouse breaking is repealed and replaced with a substantively different offense. May a person be tried post-1994 for that event as storehouse breaking?
>
> * * *
>
> . . . In 1975, there were only the statutory forms of burglary and storehouse breaking under which was Section 32. As discussed, they were repealed in their entirety, replaced with new offenses including second-degree

> burglary. But one cannot in June of 1975 attempt to commit a crime which does not exist until October 1st of 1994. And certainly the contention that remains viable because today we might consider it attempted second-degree burglary just still doesn't answer the considerations of whether a person can be charged for --- charged with and certainly convicted of that --- that conduct in 1975.
>
> It is our position and conclusion that the only thing charged in count five is the scheming statutory offense in Section 32, complete upon breaking with no proof of entry. That that has been repealed, has been replaced with a substantively different offense and that Mr. Hines cannot be now presently convicted of that offense today in 2017.
>
> **Our position as to count six is simple. The only felony alleged in count six is the storehouse breaking alleged in count five. If count five is no longer viable, count six also must no longer be viable.**

(Emphasis added.)

The State opposed both motions. It argued that the law of the case doctrine settled the question of the viability of counts five and six, because in our 1977 and 2015 opinions "the Court of Special Appeals put its stamp of approval on the law of the case says those are viable charges and they now proceed." The State also argued that the charging document provided appellant in 1975 with clear notice of the charges he faced, and that appellant remained on notice at present. As to the 1994 recodification of the burglary statutes, the State argued that the attempted breaking and entering in this case "was a crime then, and it is still a crime now . . . There's been recodification, however, that hasn't changed the law[.]"

The court took both motions under advisement, but, before the court ruled, appellant and the State negotiated a resolution. On June 21, 2017, with appellant's motions still undecided, the parties appeared in court for entry of a guilty plea: appellant

would plead guilty to counts three, five, and six (the remaining counts from the charging document). In return, the State "accede[ed]" to the court imposing a single sentence of life, with all but time served suspended, to be followed by a period of five years' supervised probation.

At the June 21, 2017 plea hearing, the State and appellant's counsel together informed the court of the negotiated sentence:

> [THE STATE]: Your Honor, this is the matter of State of Maryland against Michael Hines, 21-K-75-3768, called for guilty plea to remaining counts at this time, original six-count indictment. There has been, uh, three remaining counts, which are count three, attempted storehouse burning, count five, storehouse, uh . . .
>
> [APPELLANT'S COUNSEL]: Breaking.
>
> [THE STATE]: . . . breaking, and count six, felony murder arising from the storehouse breaking which was a felony in 1975. The State although nominally this carries a life term, in light of the time he has spent incarcerated and the review of a --- an agreement, I mean not agreement, of an investigation compiled by the Parole and Probation Department, and especially in consideration of five years of supervised probation, the State will accede to the Court imposing a sentence at a future but soon date, I believe we decided on July 11th, that Mr. Hines will be released with credit for forty-one odd years served, for --- almost forty-two years served. And the State would also put on the record that it has not been able to find any, uh, survivors of the --- of the decedent, uh, or --- and no one's come to --- there's been several articles in the paper, and no one's come to our office in the meantime about that. So, uh, the sentence for, uh, attempted storehouse breaking would have been deemed served. It would be a concurrent sentence and would be . . .
>
> [APPELLANT'S COUNSEL]: Storehouse breaking would sort of be subsumed within the . . .
>
> [THE STATE]: Oh, I'm sorry. It's burning would be --- would be --- would be, uh, deemed served. He got a --- originally he had a two-year

> sentence concurrent. He has served that sentence. And storehouse breaking would be subsumed into the felony murder.
>
> [APPELLANT'S COUNSEL]: Correct.
>
> [THE STATE]: It would be --- it would be included in the *Blockburger* test as all the elements.
>
> [APPELLANT'S COUNSEL]: **We're expecting life, suspend all but time served at sentencing.**

(Emphasis added.)

During the plea colloquy, the court and appellant's counsel explained to appellant the elements of the crimes to which appellant was pleading guilty and their maximum penalties:

> [THE COURT]: And, [appellant's counsel], if you could outline the elements of those offenses.
>
> [APPELLANT'S COUNSEL]: Yes, Your Honor. In regard to count six, which is the most significant in your case, that's the sixth count of the indictment in as it says on its face, it says that you on the 23rd of June, 1975, with force and arms in Washington County did kill and murder Roy Calvin Rowland in the perpetration of a storehouse breaking as defined in Article 27, Section 23 of the Annotated [C]ode of Maryland. Uh, then it goes on to --- to the location. But what the elements of the offense entails that it was the killing of another person during the commission of the storehouse breaking. It's the breaking of the structure with the intent to steal at least $100 worth of value therein. You understand that? **And that's a crime that carries the maximum statutory penalty of life. You understand that?**
>
> [APPELLANT]: Right.
>
> [APPELLANT'S COUNSEL]: And the lesser included offense of that, which is count five that the Court has spoken about, is the storehouse breaking itself. Because the additional element in count six is the killing of another person during the commission of that felony. So, again, they would

have to prove beyond a reasonable doubt that you broke the storehouse with the intent to steal at least $100. You understand that?

[APPELLANT]: Yes.

* * *

[THE COURT]: The State's Attorney has indicated that . . .

[APPELLANT'S COUNSEL]: It won't oppose . . .

[THE COURT]: . . . won't oppose --- the State will not oppose the sentence which has been negotiated.

[APPELLANT'S COUNSEL]: **It would be life, suspend all but . . .**

[THE COURT]: Life . . .

[APPELLANT'S COUNSEL]: **. . . time served**.

[THE COURT]: Life, suspend all but time served. Other than that, has anyone made any other promises, understandings, commitments or inducements to you to influence you to plead guilty?

[APPELLANT]: No, they haven't.

[THE COURT]: **Do you understand that if I accept your plea of guilty, you could he sentenced to a maximum term of life?**

[APPELLANT]: **Yes, I do**.

* * *

[THE COURT]: Are you pleading guilty, sir, because you are in fact guilty?

[APPELLANT]: Yes, I am.

(Emphasis added.)

The court accepted appellant's guilty plea to: (1) attempted storehouse burning; (2) storehouse breaking; and (3) felony murder committed in the course of a storehouse breaking. Following the court's acceptance of appellant's guilty plea, the court informed appellant that his sentencing would occur on July 11. The following colloquy then ensued:

> [THE STATE]: Your Honor, I was carefully listening to the --- the Court's very thorough voir dire of the Defendant. And there would be one thing I would ask you to --- to also ask Mr. Hines if he understands. **That is that in a first-degree murder, uh, it is a mandatory sentence of life, although the Court can suspend a portion**. Sometimes that is a, uh, important aspect of --- of any sentence that that mandatory aspect of sentence be explained to him. I think he understands it.
>
> [APPELLANT'S COUNSEL]: **It's the only lawful sentence. We understand that.** I think I've explained it to him actually earlier but . . .
>
> [THE COURT]: Right. You understand, sir, because the top count, the --- the felony murder count, count six, to which you're pleading guilty, the sentence is life. And then the Court can suspend a portion of that.
>
> [APPELLANT]: Yes, I can --- yeah, I do understand that.

(Emphasis added.)

On July 11, 2017, the court sentenced appellant in accordance with the terms put on the record on June 21, 2017. At sentencing, the State noted that appellant had gotten "a lucky break" due to *Unger*, and asked that the court hold appellant to account if he violated probation:

> So this is a --- a --- the only thing we would ask in this disposition given that Mr. Hines has been lucky in this disposition is that the Court hold him to a very high standard of performance on probation and that you make a commitment to the State and to all those other people who accepted the consequences of their actions back in the 70s, who were dying in

> prison, that if he steps off the line that the Court draws for him, that you commit to him that he gets the balance of his life sentence because that too would be fair given the lucky break he's got [sic] today. Thank you.

Appellant's counsel also thanked the court for helping to "resolv[e] this case in non-acrimonious manner," and argued that appellant had changed in his decades of incarceration:

> [APPELLANT'S COUNSEL]: And I think that the result that we are expecting today is a fair outcome given the age of the case, given Mr. Hines' history and the factual legal issues that were in play in this case, and it gives everyone a certainty in outcome. And at the same time, Mr. Hines has stepped up to the plate, so to speak, and through his own mouth when he entered a plea of, I think it was on the --- it was last month, June --- June 21st, I believe, uh, he said, "I did it." He entered a plea of guilty to first-degree murder, felony murder and to, uh, felony breaking and to attempted burning of a storehouse. And it is a --- it was a tough thing for him to do. And he is a different man today than he was when he was a young man back on June 23rd of 1975.
>
> * * *
>
> No one could ever give a guarantee of the future, but it's [the court-ordered psychological evaluation report that found appellant to be a low risk to reoffend] as good as it gets in terms of showing that this is a changed man and a man that has --- recognizes that he has to behave from here on out because what he reasonably anticipates based upon all of our discussions is that he's going to receive a life sentence, suspend all but the time he has served, which is a little over forty-two years in prison, and the rest of his life is essentially hanging over his head were he not to behave.
>
> * * *
>
> **And with that, we would ask Your Honor to go ahead and impose the sentence that we spoke about**. And I think the most important thing is the --- obviously the top count. I know we called it count six when we were first here, but we meant count five. I remember very vividly that Your Honor asked me to do --- to qualify him on the elements of each crime so I know it's on the record. There's no --- whether we misnumbered or not, **he knew what he was pleading to, and he knew it was felony**

> **murder. And we are asking Your Honor to impose life, suspend all but the time served, supervised probation for --- for five years.**

(Emphasis added.)

Appellant was warned by the court that, if he returned to court on a violation of probation, the court might not hesitate to reincarcerate him. The court addressed appellant on this point directly at sentencing:

> [THE COURT]: Mr. Hines, I'm --- the sentence here will --- is no surprise. We've discussed it. Your counsel has done an outstanding job for you, not only legally but to reach out to the community and --- and do their best to create a supportive structure for you when you leave here. I'm --- **the sentence is going to be what it will be because of a few things. One is the negotiations that took place to get to this point** that I haven't been directly a part of, but I realize how much work went into it from your counsel and the State to get to this point. And **I don't intend to derail that**. The other reason, another reason that I'm going along with --- with this, I don't want to say, "Agreement," **I don't think the State is in agreement but** is not . . .
>
> [THE STATE]: **Acquiescence, I would characterize** …
>
> [THE COURT]: All right.
>
> [THE STATE]: . . . it as acquiescence.
>
> [THE COURT]: Yes. In addition to that, the information that I gained from the Special Court Investigation that I ordered was the information that I gained about you from the psychological evaluation that I ordered. And I won't touch on the specifics, your counsel did that, but that gave me hope. And the other part that gave me hope was that your history of infractions, your history of any crimes committed was of interest to me. And I specifically ordered Parole and Probation to --- to list that. I wanted to know how you behaved you --- whether or not you behaved yourself in the Division of Correction. And other than a few relatively minor Division of Correction infractions, and those infractions took place earlier in your incarceration and in recent years, there haven't been infractions. And there are certainly those that are in the Division of Correction and commit crime and are charged with crimes and that has not been the case for you. All of

> that gives me hope that you can obey the laws of our community to which you are returning. **But I'm going to give you a word of caution, Mr. Hines.** You will be tempted in our community. Some of the temptations will be the same temptations that you encountered in the Division of Correction. But then on top of that there are going to be a whole slew of new temptations, ones that you're not accustomed to seeing. It's going to be on you to resist them. **It's going to be on you to be a law-abiding citizen. Because if you are not and you return before me on a violation of probation, I may not hesitate to return you to the Division of Correction.** And I'm asking you now, Mr. Hines, please don't force my hand.
>
> [APPELLANT]: I understand.
>
> [THE COURT]: **The sentence of this Court for the charge that was known as count six is now count five, felony murder, the sentence is life, suspend all but time served beginning June 23rd, 1975.** The count that was previously count five, which is now **count four, felony storehouse breaking, merges into what was count six is now count five. And the count that was** count three is now count two, **attempted storehouse burning, the sentence of this Court is two (2) years**, Division of Correction, credit for two years, time served.
>
> Upon your release, you will be on five (5) years supervised probation through the Department of Parole and Probation. I'm going to waive all fees to the extent that I can. All standard conditions of probation are to apply except the condition that indicates work or attend school regularly. Because of your health, your age and your criminal history, sir, I'm not sure if you're going to be able to do that. But I'm substituting in that condition's place the condition that you seek employment. In other words, keep trying. Okay?
>
> [APPELLANT]: I will.

(Emphasis added.)

The court further informed appellant that it was ordering that he be released that day. Appellant's incarceration, which began on June 23, 1975, ended on July 11, 2017. But, as the sentencing court foreshadowed, Appellant's freedom was short-lived.

In the summer of 2018, a warrant was issued for appellant's arrest for violating probation. On November 13, 2018, the parties appeared in court, where appellant admitted that, since being placed on probation, he had been subsequently convicted of another crime and had therefore violated his probation in the instant case. But appellant requested that sentencing be delayed because his counsel had filed, on November 5, 2018, a motion to correct illegal sentence. The court granted a brief continuance and set sentencing on the violation of probation and argument on the motion to correct illegal sentence on December 13, 2018.

In the motion to correct, appellant contended that the court had imposed an illegal sentence on him when it sentenced him on July 11, 2017, in accordance with the terms he had requested on June 21, 2017: that he would plead guilty to attempted storehouse burning, storehouse breaking, and felony murder arising therefrom. The sentence was illegal, argued appellant, because "on 7-11-2017, no said labelled crime '<u>breaking</u>' existed. There is no crime based on felony murder-breaking." (Emphasis in original.) Appellant contended that, because he pled guilty to a crime that is "NOT an enumerated felony and thus is not felony murder," what he actually pled guilty to was second-degree murder, for which a life sentence was not authorized. (Emphasis in original.) Appellant "demand[ed]" in the motion that the court impose (instead of the life sentence) a sentence of thirty years, the maximum penalty for second-degree murder.

At argument on the motion, appellant contended that he was entitled to be sentenced according to the law as it existed on July 11, 2017, and that the conduct to

which he actually pled guilty on that date "at most would be second-degree murder." The State vigorously opposed the motion, pointing out, *inter alia*, that appellant was seeking relief from a sentence he specifically asked the court to impose.

The court denied the motion, noting that the sentence was the product of negotiations and compromise:

> [THE COURT]: And then there were a number of motions. One of the motions was the argument that's at the heart of this matter, this issue of 1974, 1975 law versus the law today and that was put before me. I took the matter under advisement. And before I had a chance to rule, I was advised that the State and defense had reached a plea agreement. And that agreement involved the Defendant pleading guilty, according to court's notes to three counts, one of them being the felony murder count. And there was no argument at that time. There was no issue raised at that time as to what variety of felony murder we were talking about. It was clear from my recollection that we were talking about the felony murder that carries life, not the second-degree murder, but the first-degree murder variety of felony murder. And the arguments that were made very eloquently by the defense up to that point became moot. As I noted earlier, the Defendant had the ability to appeal, to not enter the --- the guilty plea to the count that was in dispute, but to proceed through motions, possibly proceed to trial and preserve those issues for appeal. That didn't happen. The Defendant opted to enter a guilty plea and accept from this Court a life sentence that was suspended. And now when the Defendant is facing a violation of probation, we see this argument coming up again. I don't --- I don't believe it's an illegal sentence. And as I stated earlier, I think it screams invited error. Motion to Correct Illegal Sentence is denied.

This appeal followed.

STANDARD OF REVIEW

Maryland Rule 4-345(a) provides that the court may correct an illegal sentence at any time. Such a claim is not subject to waiver. *Johnson v. State*, 427 Md. 356, 371

(2012). In *Carlini v. State*, 215 Md. App. 415, 443 (2013), we observed that appellate review is *de novo*:

> Rule 4–345(a) appellate review deals only with legal questions, not factual or procedural questions. Deference as to factfinding or to discretionary decisions is not involved. Once the outer boundary markers for a sentence are objectively established, the only question is whether the ultimate sentence itself is or is not inherently illegal. That is quintessentially a question of law calling for *de novo* appellate review.

DISCUSSION

In his Brief, appellant argues that storehouse breaking is no longer an enumerated predicate felony for first-degree felony murder because "storehouse breaking" was repealed as a crime in Maryland as part of the 1994 recodification of the Criminal Law Article. Appellant contends that, while second- and fourth-degree burglary are "the closest modern analogues to the crimes set forth in Article 27, § 33 at the time of the offense in this case," there is "no modern analogue to the crime of storehouse breaking [previously proscribed] in Article 27, § 32," and so "it follows that a murder committed during the course of that crime would no longer be considered a first degree felony murder" as it is not specifically enumerated in Md. Code, Criminal Law Article ("CL"), § 2-201.[4] But appellant also recognizes that a murder committed during a second-degree

[4] As noted, appellant was charged with and convicted of having broken into a storehouse in violation of Article 27, § 32. In appellant's brief, he argued that there is no "modern analogue" to the crime of storehouse breaking under Art. 27, § 32, and that "second and fourth degree burglary thus represent the closest modern analogues to the crime set forth in Art. 27, § 33 at the time of the offense in this case." But appellant was not charged with a violation of Art. 27, § 33 in 1975.

burglary, or an attempt to commit a second-degree burglary, is an enumerated predicate felony giving rise to a charge of first-degree felony murder. And the record reflects, as noted above, that appellant actually did plead guilty on June 21, 2017, to first-degree felony murder, which carries a penalty of life imprisonment.

When appellant was indicted by the Grand Jury in 1975, Counts 5 and 6 provided:

> FIFTH COUNT
>
> And the Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that Michael Keith Hines, late of Washington County aforesaid, on the 23rd day of June, A.D., 1975, with force and arms, at Washington County aforesaid, the manufacturing plant and warehouse of the E.J. Fennel Co., Inc., Robert J. Fennel, President, situate at 324 East Antietam Street, Hagerstown, Maryland, **unlawfully did break, with intent** the property, goods and chattels of the said E.J. Fennel Co. Inc., Robert J. Fennel, President, **then and there being to feloniously steal,** take and carry away, contrary to the form of the Act of Assembly in such case made and provided, ands against the peace, government and dignity of the State.
>
> Article 27, Section 32
>
> SIXTH COUNT
>
> And the Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that Michael Keith Hines, late of Washington County aforesaid, on the 23rd day of June, A.D., 1975, with force and arms, at Washington County aforesaid, **did kill and murder Roy Calvin Rowland, in the perpetration of, storehouse breaking as defined in Article 27, Section 32 of the Annotated Code of Maryland,** of the E.J. Fennel Co. Inc., manufacturing plants and warehouse, Robert J. Fennel, President, situate at 324 East Antietam Street, Hagerstown, Maryland, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.
>
> Article 27, Section 410.

(Emphasis added.)

At his plea hearing on June 21, 2017, appellant's counsel explained to him on the record the elements of the counts to which he was pleading guilty and, as illustrated by the following colloquy (quoted above), appellant indicated that he fully understood that he was pleading guilty to a first-degree felony murder committed in the course of a storehouse breaking, which carried a maximum statutory penalty of life:

> [APPELLANT'S COUNSEL]: Yes, Your Honor. In regard to count six, which is the most significant in your case, that's the sixth count of the indictment in as it says on its face, it says that you on the 23rd of June, 1975, with force and arms in Washington County did kill and murder Roy Calvin Rowland in the perpetration of a storehouse breaking as defined in Article 27, Section 23 [sic] of the Annotated Code of Maryland. Uh, then it goes on to --- to the location. **But what the elements of that offense entail is that it was the killing of another person during the commission of the storehouse breaking. It's the breaking of the structure with the intent to steal at least $100 worth of value therein. You understand that? And that's a crime that carries the maximum statutory penalty of life**. You understand that?
>
> [APPELLANT]: Right.
>
> [APPELLANT'S COUNSEL].: And the lesser included offense of that, which is count five that the Court has spoken about, is the storehouse breaking itself. Because the additional element in count six is the killing of another person during the commission of that felony**. So, again, they would have to prove beyond a reasonable doubt that you broke the storehouse with the intent to steal at least $100.** You understand that?
>
> [APPELLANT]: Yes.
>
> [APPELLANT'S COUNSEL]: In count number three, which they've already indicated you served the sentence for that though, it is a crime that requires you to attempt to burn the structure. And, you know, an attempt --- I would call today attempted arson, but essentially it requires you to make a substantial step beyond mere preparation in burning the structure. Do you understand that?
>
> [APPELLANT]: Yes.

Appellant further demonstrated his understanding of what his plea entailed:

> [THE COURT]: **Do you understand that if I accept your plea of guilty, you could be sentenced to a maximum term of life?**
>
> [APPELLANT]: **Yes, I do.**
>
> * * *
>
> [BY THE STATE]: Your Honor, I was carefully listening to the --- to the Court's very thorough voir dire of the Defendant. And there would be one thing I would ask you to --- to also ask Mr. Hines if he understands. That is that in a first-degree murder, uh, **it is a mandatory sentence of life, although the Court can suspend a portion**. Sometime that is a, uh, important aspect of --- of any sentence that that mandatory aspect of sentence be explained to him. I think he understands it.
>
> [APPELLANT'S COUNSEL]: **It's the only lawful sentence. We understand that.** I think I've explained it to him actually earlier but . . .
>
> [THE COURT]: Right. You understand, sir, because the top count, the --- **the felony murder count, count six, to which you're pleading guilty, the sentence is life.** And then the Court can suspend a portion of that.
>
> [APPELLANT]: Yes, I can --- yeah, **I do understand that**.

(Emphasis added.)

In his Brief, appellant argues that modern-day second-degree burglary requires both a breaking *and* an entry, whereas "storehouse breaking" under former Art. 27, § 32 required only a breaking. As the above colloquy demonstrates, appellant did not plead guilty to a crime involving an entry. Instead, appellant asserts, in effect, that he pled guilty to a crime that no longer exists: a murder committed in the course of a breaking into a storehouse, **without entry**, with the intent to commit a felony theft therein. If such a crime no longer exists, then it is not an enumerated felony for first-degree felony

murder. If any "modern analogue" exists, according to appellant, it is second- or fourth-degree burglary. Appellant urges this Court to disregard the former statutory offenses to which he pled guilty because the recodified statutory crimes covering that conduct today require proof of an extra element, namely, entry. Instead, he asserts, we should recognize that appellant was guilty under the law in effect in 2017 of no more than second-degree murder, and we should, therefore, limit his sentence to no more than thirty years. He asserts in his brief: "[T]his Court should vacate the sentence imposed on that count [felony murder-storehouse breaking] and remand for resentencing."

Appellant cites *Waker v. State*, 431 Md. 1 (2013), and *Webster v. State*, 221 Md. App. 100 (2015), in support of his argument in this case, characterizing them as "control[ling]." In *Waker*, the defendant was arrested for theft over $500 at a time when that crime was a felony carrying a maximum penalty of fifteen years' imprisonment and/or a fine of up to $25,000. Maryland Code (2002), Criminal Law Article ("CL"), § 7-104(g). But by the time Waker was tried and convicted, the penalty provisions of § 7-104(g) had changed; at that time, Waker's crime was a misdemeanor carrying a maximum penalty of just eighteen months' imprisonment and/or a $500 fine. Maryland Code (2002, 2009 Repl. Vol.), CL § 7-104(g). After the trial court sentenced him to ten years in accordance with the former version of § 7-104(g), Waker appealed to this Court, and we affirmed the judgment of the circuit court. Upon the grant of Waker's petition for *certiorari*, the Court of Appeals held that Waker's sentence was illegal "because it was not authorized by the statute *in effect at the time of his trial and sentencing*." (Emphasis

added.) The General Saving Clause did not apply in *Waker* because the Court did not view Waker as having "incurred" a penalty or liability until after his conviction and sentence, and he was therefore entitled to be sentenced pursuant to the law in effect at the time of sentencing, not at the time of his initial arrest.[5]

The holding in *Webster* was to the same effect. Webster was arrested for possession of a half-gram of marijuana on April 27, 2012. At that time, the penalty for possession of marijuana was one year. Webster was not tried, however, until after a change in the law reducing the maximum penalty for possession of that quantity of marijuana to no more than 90 days' incarceration and/or a $500 fine. For the reasons

[5] Before the trial court in this case, the State also argued that the General Saving Clause should compel the denial of appellant's motion to correct illegal sentence. The General Saving Clause is codified at Maryland Code (1957, 2011 Repl. Vol.), Article 1, § 3, which provides:

> The **repeal**, or the repeal and reenactment, or the revision, amendment or consolidation of any statute, or **of any section or part of a section of any statute, civil or criminal**, **shall not have the effect to release, extinguish, alter, modify or change, in whole or in part, any penalty, forfeiture or liability, either civil or criminal, which shall have been incurred under such statute, section or part thereof**, unless the repealing, repealing and reenacting, revising, amending or consolidating act shall expressly so provide; and such statute, section or part thereof, so repealed, repealed and reenacted, revised, amended or consolidated, shall be treated and held as still remaining in force for the purpose of sustaining any and all proper actions, suits, proceedings or prosecutions, civil or criminal, **for the enforcement of such penalty, forfeiture or liability**, as well as for the purpose of sustaining any judgment, decree or order which can or may be rendered, entered or made in such actions, suits, proceedings or prosecutions imposing, inflicting or declaring such penalty, forfeiture or liability.

The State appears to have abandoned this argument on appeal.

expressed in *Waker*, *Webster* was entitled to be sentenced in accordance with the law in effect at the time of his sentencing.

In this case, appellant appears to argue both that he pled guilty to and was convicted of a nonexistent crime, and that he was sentenced in excess of what was allowed under the replacement "statute" at the time of his actual sentencing, as in *Waker*. In *Waker*, the substantive elements of the theft did not change, but the amounts in controversy and penalty provisions did. Here, appellant pled guilty to all of the substantive elements of second-degree burglary except for the element of entry, which was not a required element of storehouse breaking in 1975, although his simultaneous plea to felony murder appears to have been an admission that he bludgeoned the night watchman to death after entering the building.

The State argues on appeal that appellant pled guilty to attempted arson, which would provide an alternative predicate for a first-degree felony murder charge. But our review of the record indicates that the State did not press this argument before the trial court, and we will not consider it.

The State also asserts that the sentence the court imposed is not illegal for the crime to which appellant pled guilty; appellant, in fact, pled guilty to first-degree felony murder, and does not argue that the penalty for first-degree felony murder is something other than life imprisonment. He was explicitly so advised at the plea hearing and indicated his understanding several times.

The record in this case demonstrates that appellant fully briefed and argued the issue of the "existence," *vel non*, of storehouse breaking as a cognizable crime in Maryland post-1994; that, before receiving a ruling on that issue, the appellant knowingly and willingly pled guilty to first-degree felony murder, and waived a panoply of rights; that he asked the court to sentence him to life with the acquiescence of the State; that appellant was released from prison forthwith; and that appellant did not seek to be relieved of his guilty plea or sentence until after his violation of probation. But, when we pointed out at oral argument that the circuit court had commented that the situation in which appellant now finds himself "screams invited error," appellant responded that he could not consent to an illegal sentence.

Before the circuit court, the State also argued that appellant should not profit from any error he induced the court to make. And it is apparent from the record that appellant obtained a benefit from the plea he entered, inasmuch as he was released from prison (and, with good behavior, would have remained free for the balance of his life). The doctrine of invited error is based upon the principle that "[a] defendant should not be able to take advantage of an error that he invited or requested the trial court to make." *Nash v. State*, 191 Md. App. 386, 402-03 (2010). It "'stems from the common-sense view that where a party invites the trial court to commit error, he cannot later cry foul on appeal.'" *State v. Rich*, 415 Md. 567, 575 (2010) (quoting *United States v. Brannan*, 562 F.3d 1300, 1306 (11th Cir. 2009)). There appears to be no reported case in Maryland applying

the doctrine of invited error to a claim of an illegal sentence, but this appears to be a case in which it could rationally apply.

In *Bailey v. State*, 464 Md. 685 (2019), however, the Court of Appeals quoted a statement it had made in *Chaney v. State*, 397 Md. 460, 466 (2007), noting that, "**[i]f the sentence is illegal, it is not subject to preservation requirements and may be corrected even if**: '(1) no objection was made when the sentence was imposed, (2) **the defendant purported to consent to it**, or (3) the sentence was not challenged in a timely-filed direct appeal.'" 464 Md. at 696 (emphasis added). And, in *State v. Crawley*, 455 Md. 52, 67 (2017), the Court of Appeals stated: "The principle that a substantively illegal sentence must be corrected applies regardless of whether the sentence has been negotiated and imposed as part of a binding plea agreement." Because the Court of Appeals has indicated that a defendant may seek correction of an illegal sentence even if the defendant purported to consent to it, we surmise that the Court of Appeals would be reluctant to rule that a defendant cannot seek correction of an illegal sentence if the defendant had requested it as part of a plea negotiation. Consequently, in the absence of guidance from the Court of Appeals applying the doctrine of invited error to a motion to correct an illegal sentence, we will not deny relief on the grounds that this sentence was imposed as a result of an invited error.

The Court of Appeals has emphasized repeatedly that, in order to be an issue that is addressable under Rule 4-345(a), the illegality must be one that inheres in the sentence itself, and is not a procedural error that arose during the sentencing, *see, e.g., Bailey,*

supra, 464 Md. at 696-97, but the Court of Appeals has also recognized that an illegal sentence exists if "the sentence is not a permitted one *for the conviction upon which it was imposed*." *Colvin v. State*, 450 Md. 718, 725 (2016) (emphasis added). This definition of illegality is applicable to the argument appellant makes regarding the life sentence that was imposed for his plea to felony murder based upon storehouse breaking. To the extent appellant agreed to be sentenced to life for that crime in 2017, his plea agreement was not legally enforceable.

Although we agree that the sentence must be vacated, we do not agree with appellant's assertion that the correct remedy is for him simply to be resentenced to a lesser analogous offense, at least not without the State's agreement to that outcome. At this point in time, the State has not indicated that it is willing to accept the result proposed by appellant. By attacking the legality of the sentence he agreed to as a condition of his plea, appellant is essentially asking that his plea agreement be set aside. We will remand the case to the circuit court with instructions to void appellant's plea agreement and return the case to the status that existed immediately prior to the guilty plea appellant placed on the record on June 21, 2017.

We vacate the judgments of conviction entered on July 11, 2017, and remand the case to the Circuit Court for Washington County for further proceedings, including, if necessary, a new trial on the three counts that would have been covered by the guilty plea entered on June 21, 2017.

JUDGMENTS ENTERED JULY 11, 2017, ARE VACATED, AND THE CASE IS REMANDED TO THE CIRCUIT COURT FOR WASHINGTON COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY WASHINGTON COUNTY.