HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN: **BRETT CHRISTOPHER O'DEA**
Appellant

and

THE STATE OF WESTERN AUSTRALIA
Respondent

APPELLANT'S SUBMISSIONS

Part I: Publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Concise statement of issues

2. In circumstances in which the prosecution case was that, by operation of s 7(a) of the *Criminal Code* (WA) (**Code**), the appellant was guilty of an offence of unlawfully doing grievous bodily harm with intent to do grievous bodily harm (contrary to s 294 of the Code), on the basis he had acted in concert with his co-accused, each of them doing one or more acts which constituted the offence:

   (a) In considering whether the prosecution had proved that the appellant was guilty of the offence charged, was the jury required to be satisfied that both the appellant and his co-accused had acted unlawfully?

   (b) For the jury to find that the appellant and his co-accused were acting in concert, and were therefore guilty by operation of s 7(a) of the Code, was the prosecution required to prove that the two accused had reached an

understanding or arrangement amounting to an agreement between them (which may be inferred from all the circumstances) to commit a crime?

Part III: Certification

3. It is certified that notice is not required to be given in compliance with section 78B of the *Judiciary Act* 1903 (Cth).

Part IV: Citation

4. The internet citation of the reasons for judgment of the Court of Appeal is ***O'Dea v The State of Western Australia*** [2021] WASCA 61.

Part V: Narrative statement of facts

10 5. The following narrative of facts is based on the Court of Appeal's summary of the prosecution case and the defence case, at trial. The appellant did not accept all of the prosecution case. However, for the purposes of the grounds of appeal it does not appear to be necessary to identify all of the factual issues that were in contest at the trial.

6. Between 2.30 am and 2.50 am on 20 January 2018, Ms Tamara Dimer entered the Manning Bowling Club through a side door. Ms Dimer did not have permission to enter the bowling club. Once inside, Ms Dimer looked through the club looking for items of value to steal before she was disturbed by the complainant, Mr Koroma, who worked as a cleaner at the club. Ms Dimer then fled on foot, and Mr Koroma
20 followed her. (Core Appeal Book ('CAB') 129 – 130; Court of Appeal Decision ('CA') [8])

7. After confronting Mr Koroma with a house brick, Ms Dimer ran towards a house that was being occupied by the appellant. Also at the house were the appellant's partner, Ms Haydon-Wood, and the appellant's co-accused, Mr Webb. (CAB 130; CA [9])

8. The appellant woke up because Ms Dimer was screaming. He then woke Mr Webb, and told him to come outside. The appellant armed himself with a weapon, that was similar to a hockey stick, before going outside to see what was happening. (CAB 130; CA [10])

9. Once outside, the appellant and Mr Webb then saw that Ms Dimer and Mr Koroma were in the driveway of the house, and they both went to tackle Mr Koroma. The appellant swung the weapon in the direction of Mr Koroma, who was struck and then fell to the ground. While he was on the ground, Mr Koroma was punched, before he sat up, only for the appellant to kick him to the face, which caused him to fall to the ground once again. (CAB 130; CA [11])[1]

10. While Mr Koroma was lying on the ground the appellant raised the weapon and swung it down towards him, before he dropped the weapon and then repeatedly struck Mr Koroma in the face and head with a clenched fist. Mr Webb kicked Mr Koroma to the head twice before he approached Ms Dimer, who had been sitting near a letterbox. (CAB 130; CA [13]-[14])[2]

11. The appellant dragged Mr Koroma out onto the grass verge, where he pushed him down and punched him while he was laying on his back. Mr Webb was holding Mr Koroma on the ground. The appellant also raised his weapon and threatened to strike Mr Koroma again. (CAB 130; CA [15])

12. When Ms Dimer began to walk away the appellant and another man, Mr Thomas, followed her, telling her to return to the house. When she returned she rummaged though Mr Koroma's clothes before attempting to pull his body along the road by a lanyard that was around his neck. (CAB 130-131; CA [16])

13. Mr Koroma recovered and moved himself into a sitting position when Mr Webb grabbed him from behind and dragged him into a neighbouring driveway, where his head struck the ground. Once in the driveway the appellant and Mr Webb circled around Mr Koroma, and the appellant struck him on the right ankle with the weapon causing him to fall to the ground in the middle of the road. Mr Koroma eventually got up and walked away, with the appellant and Mr Webb following behind. (CAB 131; CA [17]-[18])

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[1] The Court of Appeal's description of this part of the incident appears to differ from the way in which it was put by the State prosecutor in his closing address, at T415-T416. There, the State prosecutor alleged that while it was hard to see from the CCTV footage what was happening, it appeared as though Mr Webb was punching Mr Koroma while he was lying on the ground.

[2] The CA suggested that the prosecution case was that the appellant struck Mr Koroma to the head with the weapon while he was lying on the ground. However, in his closing address the State prosecutor did not actually make an express allegation to that effect: T414.

14. Mr Koroma suffered a significant brain injury as a result of the alleged attack on him, which injury amounted to 'grievous bodily harm'.[3] (CAB 132; CA [20]-[21])

15. Dr Rasouli, gave evidence that the relevant brain injury could have been caused by any blunt trauma, and by one blow or multiple blows. However, it was not possible to say what act or acts caused the injury. (Appellant's Further Materials ('AFM') 23, 29)

16. Some of the interaction between the appellant, Mr Webb and Mr Koroma was recorded by CCTV via a camera that was situated at the appellant's house, and also via a camera located at an adjacent house in the same street. (CAB 132 – 134; CA [22]-[27])

17. The appellant did not give or adduce any evidence at the trial. He relied on what he had said in his electronic record of interview with the police after he was arrested. In essence, the appellant's case was that he believed that Mr Koroma was committing an offence by attacking Ms Dimer, and that he acted in her defence, that he was preventing an assault or likely assault of Ms Dimer, that he was lawfully overcoming force used by Mr Koroma in resisting arrest, and/or that he was lawfully preventing Mr Koroma's escape from arrest. CAB 158; CA [126] The appellant also argued that the jury should not be satisfied beyond reasonable doubt that he had caused Mr Koroma's injuries, which amounted to grievous bodily harm. CAB 134-135; CA [30]-[35].

18. Mr Webb also relied on the same arguments, except that he did not contend that he was lawfully preventing Mr Koroma's escape from arrest.

19. The appellant was found guilty. However, the jury were unable to reach a verdict in relation to Mr Webb.

Part VI: Argument

GROUND 1

20. In accordance with the prosecution case, the trial Judge directed the jury to determine whether the prosecution had established the appellant's guilt by reference to two

[3] *Criminal Code*, s 1(1).

alternative pathways. The 'first pathway' was that pursuant to s 7(a) of the Code he was guilty of the offence charged on the basis that he had acted in concert with Mr Webb, each of them doing one or more of the acts which together constituted the offence. The second pathway invoked s 7(c) of the Code.

21. The trial Judge ultimately found, for the purposes of sentencing, that the appellant had been found guilty by the jury by following the first pathway. The Court of Appeal also held that the jury could not have convicted the appellant by following the second pathway, and that he must have been convicted in accordance with the first pathway. (CAB 170; CA [185])

22. The trial Judge's directions in relation to 'the first pathway' were set out in a written jury handout (CAB 88 - 90), as well as being the subject of oral directions (commencing at CAB 19). Importantly, the third element of the jury handout required the jury to be satisfied that "*the relevant accused's acts were unlawful*" (CAB 90). However, the "*relevant accused*" meant the particular accused whose case the jury was considering (CAB 88), and not also the co-accused.

23. In the Court of Appeal the appellant argued that the trial Judge had erred because he had failed to direct the jury that in order for the appellant to be found liable under the first pathway the jury had to be satisfied that the co-accused's acts were unlawful, which failure occasioned a miscarriage of justice. The appellant contended that for either accused to have been found guilty under the first pathway, the acts of <u>both</u> accused had to have been unlawful.

23. The Court of Appeal rejected the appellant's argument, holding that the jury only had to find that the appellant's acts were unlawful, and that they were not required to be satisfied that the co-accused's acts were unlawful. (CAB 161 – 163; CA [139] – [149]). In reaching this conclusion, the Court of Appeal relied on part of what was said by this Court in ***Pickett v The State of Western Australia***[4] and ***R v Barlow***[5].

24. It is submitted that in so doing the Court of Appeal erred.

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[4] ***Pickett v The State of Western Australia***[4] [2020] HCA 20; (2020) 94 ALJR 629.
[5] ***R v Barlow*** ([1997] HCA 19; (1997) 188 CLR 1.

25. The reasoning of the Court of Appeal at CA [140] – [149], can be summarised as follows. Chapter V of the Code, which is headed 'Criminal responsibility', sets out the circumstances in which a person is not criminally responsible for an act or omission. In terms of s 1(1) of the Code, 'criminal responsibility' means 'liability to punishment as for an offence'. In ***Pickett*** it was held that an offence within the meaning of s 7 of the Code may be committed even though the person who did the act or made the omission that constituted the offence is not criminally responsible for the offence by reason of Ch V of the Code. It is the doing of the act or the making of the omission by the actor that is attributed to another person, not the criminal responsibility of the actor. The circumstance that one of the persons may not be criminal responsible by reason of his or her personal circumstances addressed in Ch V of the Code does not prevent the operation of s 7 in relation to other persons. In the present matter it was therefore open to the jury "*to convict the appellant of the charged offence, even if the jury was not satisfied beyond reasonable doubt that Mr Webb's acts were unlawful*."

26. However, unlike this matter, ***Pickett*** was concerned with the "*excuses*" that arise under Ch V of the Code, and in particular with the issue of whether the criminal conduct of a person who is guilty of an offence by operation of s 7(a) (the 'principal') can be attributed or imputed to a person who is alleged to be liable by operation of s 7(b) or s 7(c) of the Code, or to another party to an unlawful common purpose, where the principal enjoys the benefit of an excuse under Ch V.[6]

27. In this case issues were clearly raised about whether the prosecution had proved that certain 'defences', that are provided for under Ch XXVI of the Code, did not apply in relation to the case against ***both*** the appellant and his co-accused, Mr Webb. Specifically, the jury were directed to consider whether the prosecution had proved that the appellant (and Mr Webb) had not acted in defence of Ms Dimer (s 248 of the Code), and/or that they had not lawfully acted to overcome force used by Mr Koroma in resisting arrest (s 231 of the Code).[7] It also raised a question about whether their

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[6] ***Pickett*** concerned the excuse provisions in s 29 of the Code. Other such excuse provisions which operate only to avoid criminal responsibility appear in the Code in sections 228, 229, 230, 246, 259(1), 259(2), 259A, 305(5) and 441(3).

[7] In the case of the appellant, the jury were also directed to consider whether the prosecution had proved that he had not acted lawfully in using force to prevent the escape of Mr Koroma, for the purposes of s233 of the Code. (CAB 137-138; CA [43])

actions were lawful because they were carried out to prevent an assault or likely assault of Ms Dimer, for the purposes of s 24(1) of the *Criminal Investigation Act* 2006 (WA) (the 'CIA'). CAB 93-104; CA [43] and [133]

28. In contrast to the excuse provisions in Ch V, which were considered in ***Pickett*** and which operate to avoid criminal responsibility, the defences in s 248 and s 231 of the Code concern the lawfulness of certain acts. Further, acts falling within s 24(1) of the CIA are lawful, as was reflected in the trial Judge's directions and the jury handout, and as was referred to by the Court of Appeal (at CAB 137-138; CA [43])

29. In ***Pickett*** this Court expressly drew attention to the different effect of the excuse provisions in Ch V of the Code, which operate to avoid criminal responsibility, when compared to the defences under Ch XXVI of the Code, which negative unlawfulness. Importantly, the plurality in ***Pickett*** said:[8]

> The provisions of Ch V of the Code do not alter the terms of the Code's proscriptions or defences. ***If PM, as the hypothetical killer of the Deceased, had struck the lethal blow in self-defence in accordance with s 248(4), which is to be found in Ch XXVI of the Code, his assault upon the Deceased would not have been unlawful. It might be said that PM's act was not the conduct element of an offence because his assault was a lawful act under s 248(4).*** But there was no suggestion that PM acted in self-defence and so no issue arises in that regard. Nor, for that matter, was there any suggestion that the stabbing occurred in any of the other circumstances that might make an assault lawful under Ch XXVI of the Code. (emphasis added).

30. Further, after considering the relevance of the distinction between "excuses" and "justifications" in certain contexts, Nettle J observed[9] (citations omitted):

> More pertinently for present purposes, however, the distinction also determines the scope of principal and accessorial liability arising from conduct that is prima facie criminal but subject to a defence.

[8] ***Pickett*** at [43].
[9] ***Pickett*** at [102] – [103].

> ***Specifically, because justifiable conduct is not unlawful, a person who aids or abets another in its commission, or who participates in a joint criminal enterprise extending to its commission, or who counsels, procures or commands another to commit it, is not liable to punishment***. By contrast, because excusable conduct remains unlawful, a person who aids or abets its commission, or who participates in a joint criminal enterprise extending to its commission, or who counsels, procures or commands another to commit it, is liable to punishment, unless he or she is also excused, even if the other person is an innocent agent**.**
>
> For example, as self-defence is properly regarded as a justification for this purpose, a person who aids another to wound in self-defence, or who is a participant in a joint criminal enterprise in the course of which another participant wounds a third person in self-defence, may be entitled to plead that his or her actions in aiding the other person to wound or participating in the joint criminal enterprise that resulted in the wounding were, to that extent, not unlawful, and hence that he or she is not criminally liable for the wounding. By contrast, as insanity and *doli incapax* are invariably regarded as excuses, a person who aids or procures a person of unsound mind, or a child lacking in criminal capacity, to wound a third person is not entitled to plead that his or her actions in aiding or procuring the wounding were not unlawful (although, of course, he or she might be independently entitled to be excused from criminal responsibility – for example, if he or she were also insane or *doli incapax*). (emphasis added)

31. These passages are consistent with the approach that was adopted in ***R v Wyles; Ex parte Attorney General***[10], where criminal liability was alleged to arise in a manner that was consistent with the 'first pathway', in the context of the offence of breaking and entering (s 419(1) of the Queensland Code), which involved more than one physical element and where one offender did the breaking and the other did the

[10] ***R v Wyles; Ex parte Attorney General*** 1977 Qd R 169.

entering. In ***Wyles***, Lucas J (Matthews J agreeing) held that the Queensland equivalent of s 7(a) of the Code applied where several persons acting pursuant to a "*common unlawful purpose*"[11] or a "*common unlawful intention*"[12] undertake separate acts which, in combination, comprise all the elements of an offence. This basis of liability was premised on both (or all) participants acting unlawfully.

32. It is significant that the Court of Appeal did not refer to either of the passages from ***Pickett*** that have been set out above, notwithstanding that they concerned the issue raised by the appellant's ground of appeal. It is instead apparent that the Court assumed, based on ***Pickett***, that as s 7 of the Code is not concerned with the criminal responsibility of any person who is a party to an offence, it is also not concerned with the lawfulness of an act or omission by an actor that might otherwise be attributed to another person.

33. It is respectfully submitted that the Court of Appeal's assumption was erroneous

34. Contrary to the Court of Appeal's conclusion at CA [147] (CAB 163), ***Pickett*** (and ***Barlow***, which was explained in ***Pickett***) are not authority for a conclusion that the appellant could be guilty on the basis of the 'first pathway' even if the prosecution failed to prove, beyond reasonable doubt, that Mr Webbs's acts were unlawful, having regard to the defences that he raised under Ch XXVI of the Code, and under s24(1) of the CIA.

35. Under the first pathway, the guilt of either accused depended upon conduct or acts by both offenders which constituted the offence while they were acting in concert. The first pathway depended on the attribution of the conduct of each accused to the other. Unless the acts of both accused were found to have been unlawful, the necessary conduct element for liability under this pathway would not have been established.[13]

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[11] ***R v Wyles*** at 177.
[12] ***R v Wyles*** at 178.
[13] Cf ***Pickett*** at [43] and [51].

36. Under the first pathway, where (as here) it cannot be determined which act or acts caused the relevant injury, the pathway must necessarily rely on the attribution of the conduct or acts of each accused to the other.

37. In relation to the second element of the first pathway, his Honour directed the jury that to be satisfied that the relevant accused was guilty they must be satisfied that the two accused "*were acting in concert, each of them doing one or more of the acts which caused the traumatic brain injury to be done to Mr Koroma*." (CAB 90; CAB 23). This was a direction that the jury would need to be satisfied that the totality of the acts of the two accused or, expressed another way, their acts collectively or in aggregate, caused the relevant injury; not that the individual act or acts of each accused did so. The Court of Appeal held that this was the effect of this direction. (CA [157] – [161]), and therefore held that the second element of the trial Judge's direction required the jury to be satisfied that the acts of the two accused "in aggregate", not individually, caused the traumatic brain injury.

38. It is submitted that the Court of Appeal was correct as to the effect and import of the direction by the trial Judge as to the second element. This was in conformity with the State's case at the trial,[14] and as confirmed by the respondent at the hearing of the appeal in the Court of Appeal.[15]

39. The failure to direct the jury that it was necessary to find that the acts of both accused were unlawful occasioned a miscarriage of justice. In that regard it is important to note that the Court of Appeal held in relation to the jury's failure to reach a verdict in respect of Mr Webb, that it was not *"unreasonable that some members of the jury were not satisfied beyond reasonable doubt that the State had negatived all of the defences relied upon by Mr Webb."* (CAB 168; CA [174]). The respondent also maintained in the appeal that the jury may have been unable to reach a verdict in respect of Webb because "*they may have had a real issue in relation to defences relied on by Mr Webb*." (AFM 56).

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[14] **AFM** 7, 9, 10, 11, 30, 33 - 53.
[15] **AFM** 55 – 56.

40. If the jury were unable to be satisfied that the State had disproved the various 'defences' in Ch XXVI, and in s 24(1) of the CIA, that arose in respect of Mr Webb, the appellant's guilt could not be established on the basis of the first pathway.[16]

GROUND 2

41. When the trial judge first directed the jury he did not explain the meaning of the phrase "*acting in concert*", that was used in the jury handout (CAB 89) and on numerous occasions in the oral directions (CAB 19.4, 21.2, 21.3, 23.1, 42.3, 43.6, and 60.9), other than to say that it meant that the two accused had to be "*acting together*".

42. After the trial judge's directions the jury asked for further clarification about the meaning of the phrase "*in concert*". In further directions the trial judge re-iterated what he had previously been said, to the effect that "*in concert*" referred to the accused doing 'an act that forms part of the offence which act is part of a series of acts committed with another person while they are acting together. What you do is you look at the totality of the acts and if it can be said that the relevant accused was acting together or in concert with the other accused.' CAB 84.

43. In ***McAuliffe v The Queen***[17] it was held that the concept of joint criminal enterprise, at common law, was interchangeable with the concepts of "*common purpose*", "*common design*" and "*concert*". This court said[18] that a common purpose *"arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The understanding or arrangement need not be express and may be inferred from all the circumstances."*

44. In ***Campbell v The State of Western Australia*** [19] McLure P said[20] that: "*It is well accepted that the concept of joint criminal enterprise is interchangeable with the*

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[16] ***Pickett*** at [43], [102] – [103].
[17] ***McAuliffe v The Queen*** (1995) 183 CLR 108 at [12].
[18] ***McAuliffe*** at [12].
[19] ***Campbell v The State of Western Australia*** (2016) 50 WAR 331.
[20] ***Campbell*** at [20].

*concepts of 'common purpose', 'common design' and 'in concert': **McAuliffe v The Queen** (1995) 183 CLR 108, 114; **Likiardopoulos v The Queen** (2012) 247 CLR 265 [19].”*

45. In ***Osland v The Queen***[21] Gaudron and Gummow JJ referred to parties who “*act in concert*” as doing so pursuant to an understanding or arrangement that they will commit the crime in question. McHugh J[22] referred to the principles relating to “*carrying out a criminal enterprise*” and “*acting in concert*” as being the same. ***Osland*** concerned a common law jurisdiction, Victoria.

46. The passages in ***R v Wyles; Ex parte Attorney General*** at 177 and 178, refer to the operation of this pathway in circumstances where several persons are acting pursuant to a “*common unlawful purpose*” or a “*common unlawful intention*”.

47. On the facts of the present matter, and in the light of the above authorities, it was of particular importance for the trial judge, when directing the jury about the need for the accused to have been acting in concert, to direct them that there had to have been an understanding or arrangement amounting to an agreement between them to commit a crime.

48. In circumstances in which it was open to the jury to find that the appellant and Mr Webb did not initially plan or intend to act unlawfully, in order to find the appellant guilty the jury had to be able to exclude the reasonable possibility that the injury constituting the grievous bodily harm occurred at a point in time before the appellant and Webb commenced to act unlawfully in concert.[23] It was necessary for the learned Judge to direct the jury of the need to find that at the point in time when the relevant injury was inflicted, there was an understanding or arrangement amounting to an agreement (which might be inferred) to act unlawfully.

49. In dismissing this ground, the Court of Appeal held (CAB 161; CA [137]) that the jury would have understood that it was necessary for the State to prove that *“the appellant or Mr Webb, as the case may be, was acting in combination or was*

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[21] ***Osland v The Queen*** [1998] HCA 75; (1998) 197 CLR 316 at 327[22].
[22] ***Osland v The Queen*** at 343[74].
[23] In circumstances in which the CCTV footage was only of a limited duration, it was taken at night, it was of a grainy nature, and there was a limited opportunity to see physical movements, as the trial judge pointed out to the jury. CAB 22.

collaborating with the other of them or that the appellant and Mr Webb had joined forces". However, even if this were the case, "*acting in combination*" or "*collaborating*" or "*joining forces*" does not entail acting unlawfully or "*acting in concert*". All of those things can be done for a lawful purpose, as the trial Judge found was the case at the commencement of what occurred (see par. 73 above). The issue, however, was whether such collaboration had become an unlawful one when the relevant injury was inflicted.

Part VII: Orders sought

The orders sought by the appellant are:

10 1. Appeal allowed.

2. Set aside the orders of the Court of Appeal of the Supreme Court of Western Australia made on 13 April 2021 and in lieu thereof substitute the following orders:

(a) appeal allowed;

(b) the appellant's conviction be quashed.

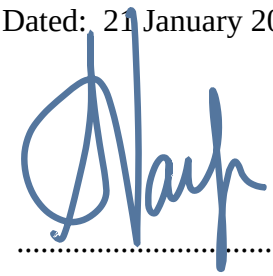
(c) a judgment of acquittal is entered.

(d) in the alternative to (c), there be a new trial.

Part VIII: Anticipated duration of appellant's argument

It is estimated that 2 hours are required for the presentation of the appellant's oral argument.

20 Dated: 21 January 2022



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ANNEXURE – STATUTORY PROVISIONS

No.	Legislation	Sections	In Force	Version
1.	*Criminal Code* (WA)	ss 1, 2, 7, 8, 228, 229, 230, 231, 246, 248, 259, 259A, 294, 305, 441	Yes	22 September 2017 to 29 October 2018 (Reprint 19) (As at 20 January 2018)
2.	*Interpretation Act* 1984 (WA)	s 10(c	Yes	21 January 2017 to 11 September 2020 (Reprint 7) (As at 20 January 2018)
3.	*Criminal Investigation Act* 2006 (WA)	s 24(1)	Yes	1 July 2017 to 18 April 2018 (Reprint 3) (As 20 January 2018)
4.	*Criminal Code* (Qld)	ss 7, 8. 419	Yes	1 December 2017 to 28 January 2018 (As at 20 January 2018)