Supreme Court No. 100712-4
Court of Appeals No. 37725-3-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LEVI FOGLEMAN

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ASOTIN COUNTY

The Honorable J. David Frazier (Pro Tem), Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Levi Fogleman, through his attorney, Lisa E. Tabbut, requests the relief designated in part B.

B. COURT OF APPEALS' DECISION

Mr. Fogleman seeks review of the February 3, 2022, unpublished opinion of Division Three of the Court of Appeals (See Appendix).

C. ISSUE PRESENTED FOR REVIEW

Covid-19 concerns compelled the trial court to hold Mr. Fogleman's trial not in a courtroom at the courthouse but at a church. Defense counsel failed to propose a limiting jury instruction telling the jury to disregard the religious overtones of the improvised "courtroom." Did the appellate court err in denying Mr. Fogleman's assertion on direct appeal that defense counsel's failure to have the jury so instructed denied Mr. Fogleman effective assistance of counsel?

D. STATEMENT OF THE CASE

By a second amended information, the state charged Levi Fogleman with six drug offenses: possession of a controlled substance with intent to deliver, methamphetamine (count 1), possession of a controlled substance, heroin (count 2), possession of a controlled substance with intent to deliver, hydrocodone (court 3), delivery of a controlled substance, methamphetamine (count 4), delivery of a controlled substance, methamphetamine (count 5), and delivery of a controlled substance, methamphetamine (count 6). CP ("Clerks Papers") 2-7.

Because of Covid-19 and concerns for social distancing of jurors, and with the explicit approval of the state supreme court,[1] Asotin County Judge Pro Tem David Frazier selected a

[1] Washington State Supreme Court's Amended Third Revised and Extended Order Regarding Court Operations (No. 25700-B-626).

location - a building - other than the county's one superior court courtroom in which a jury could socially distance from one another while hearing Mr. Fogleman's trial. Report of Proceedings ("RP"[2]) 28.

Judge Frazier notified the parties of using the alternative building and encouraged the prosecutor and defense counsel to check it out ahead of time. RP 66. The trial court expressed enthusiasm about the ability to spread out and keep prospective jurors and other parties safe. RP 67, 73.

On the first day of Mr. Fogleman's trial, July 23, 2020, the court noted that the parties were not in the Asotin County courtroom. Rather the parties were in a building owned by Fire District Number One. RP 73. Judge Frazier spoke enthusiastically about the temporary courtroom being larger than the Asotin County courtroom and that it accommodated

[2] The Report of Proceedings ("RP") consists of a single electronic volume.

social distancing for Covid-19 reasons. RP 73. It was the first time Asotin County held a jury trial since March 6, 2020. RP 73. Judge Frazier described the building as a "firehouse" and a "fire church." RP 66.

The chosen building served various purposes through the years to include a firehall, a community meeting space, and a church. RP 66. Church services were still held in the "fire church" when Judge Frazier found it appealing as a trial venue. RP 66, 181. The court noted it did not "feel" like a church to him but the court did take it upon itself to remove a sign from the church reading "one way to heaven." RP 181-82. The court did not indicate if the sign removal occurred before, or after, jurors arrived at the fire church. RP 181-82.

The court believed the building was leased for Sunday church services. RP 181.

Defense counsel objected to the trial being held in the church. RP 178. Counsel suggested a facility such as a school

would be a more appropriate alternative. RP 179. After jury selection, the court declined to change the trial's location. RP 178-82.

At trial, the state presented testimony from Detective Martin. RP 197-270. Detective Martin testified to working with an informant to buy controlled substances. RP 202-05.

The informant testified about three instances of purchasing drugs from Mr. Fogleman in October 2019. RP 297-300.

The informant always met with Detective Martin who searched him and gave him money by which to buy methamphetamine. RP 205-17. Task Force detectives then surveilled the informant and watched him enter, and subsequently leave, Mr. Fogleman's apartment. RP 208-17, 322-23. The surveillance continued until the informant met up again with the detectives. RP 208-17. In each instance, the informant handed a packaged substance to the detectives. RP

210, 215, 217. The informant told the detectives he received the package from Mr. Fogleman in exchange for the money provided to the informant by the detectives. RP 297-301. In each instance, the detectives searched the informant upon his return from Mr. Fogleman's apartment. RP 202-02, 208-19. In each instance, the substance the informant handed to the detective tested positive by the state crime lab as methamphetamine. RP 279-81.

Public Works GIS coordinator John Guillotte assisted the state with introducing a map of the area in and around Mr. Fogleman's apartment. RP 208, 215, 315. The map indicated Mr. Fogleman's apartment was within 1,000 of a designated school bus stop. RP 208, 312-19, 322-23.

Task Force members served a search warrant on the apartment. RP 219-221. During the service of the warrant, Detective Sergeant Brad Hudson saw a bag tossed from Mr.

Fogleman's apartment window land in a neighboring driveway. RP 355. A detective collected the bag. RP 355.

The state charged Mr. Fogleman with multiple drug crimes. A jury heard the evidence.

Despite the peculiarity of the venue and defense counsel's awareness that the facility was a church, defense counsel did not propose a limiting jury instruction to help blunt the impact of a trial in a church. CP 72-95.

The jury otherwise found Mr. Fogleman guilty on all the charges. CP 227-29; RP 397-401. The jury also found the deliveries occurred within 1,000 feet of a school bus stop. CP 29.

Mr. Fogleman is serving a 144-month concurrent sentence on counts 1 and 4 and received lesser sentences on his remaining counts which are being served concurrent to counts 1 and 4. CP 51.

Defense counsel filed a written objection to the trial in the church but only in a post-verdict motion. CP 30-36.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Defense counsel's failure to take action to limit the visual impact of the trial held in a church, or to propose a limiting instruction telling the jury to disregard any inferences or assumptions from hearing a trial in a church, denied Mr. Fogleman effective assistance of counsel.

Covid-19 forced courts across Washington state to improvise and use creative spaces, other than traditional courtrooms, where jurors could safely socially distance while still hearing a trial and carrying the case through deliberation and to a verdict. The state supreme court recognized Covid-19 required creative use of spaces to accommodate necessary court activities to include jury trials: "[C]ourt operations are recognized as essential, and may often be conducted by alternative means, in alternative settings, and with extra measures taken for public safety[.]" in its Amended Third

Revised and Extended Order Regarding Court Operations (No. 25700-B-626) at page 3.

In Mr. Fogleman's case, the creativity of the space went too far. The jury heard the evidence and deliberated on Mr. Fogleman's fate in what, by its appearance and use, was a church. CP 30-31.

Defense counsel failed to protect Mr. Fogleman from the harm of trial in a church. Counsel's failure deprived Mr. Fogleman effective assistance of counsel for failing to object to, or otherwise blunt, the visual impact and appearance of trial in a church.

Ineffective assistance of counsel is established when an attorney's performance is deficient and the deficiency prejudices the defendant. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson,* 129 Wn.2d 61, 77–78, 917 P.2d 563 (1996). Deficient performance is performance falling "below an

objective standard of reasonableness based on consideration of all the circumstances." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *State v. McFarland,* 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995).

To prevail on a claim of ineffective assistance, the defendant must show both that his counsel erred and that the error was so significant, given the entire trial record, that it deprived him of a fair trial. *State v. Yallup*, 3 Wn. App. 2d 546, 558, 416 P.3d 1250 (2018).

For the deficiency prong of ineffective assistance of counsel, the court gives great deference to trial counsel's performance and begins its analysis with a strong presumption that counsel was effective. *State v. West,* 185 Wn. App. 625, 638, 344 P.3d 1233 (2015). Deficient performance is performance that fell below an objective standard of reasonableness based on consideration of all the circumstances. *McFarland,* 127 Wn.2d at 334-35. It is the

appellant's burden to prove ineffective assistance of counsel. *McFarland,* 127 Wn.2d at 335; *State v. Crow*, 8 Wn. App. 2d 480, 507, 438 P.3d 541, 556, *review denied*, 193 Wn.2d 1038 (2019).

While courts cannot exhaustively define the obligations of counsel or form a checklist for judicial evaluation of attorney performance, effective representation entails certain basic duties, such as the overarching duty to advocate the defendant's cause and the more particular duty to assert such skill and knowledge as will render the trial a reliable adversarial testing process. *In re Personal Restraint of Yung-Cheng Tsai,* 183 Wn.2d 91, 100, 351 P.3d 138 (2015). *Crow*, 8 Wn. App. 2d at 507.

First, defense counsel failed to take reasonable actions to remove the religious overtones from the makeshift courtroom. Nothing in the record suggests counsel made any effort to blunt

the impact by diminishing the visual qualities of the courtroom as a church.

Second, defense counsel should have taken additional proactive action by proposing a solution that would at least blunt the impact on Mr. Fogleman. RP 180-82. The ready solution was proposing a limiting instruction advising the jury to disregard the religious quality of the space.[3] Defense counsel failed Mr. Fogleman in failing to blunt the obvious. Defense counsel's failure deprived Mr. Fogleman effective assistance of counsel and a fair trial.

Defense counsel noted in his post-conviction pleadings that the Life Center Foursquare Church in Clarkson, Washington, included a sign and a large cross indicating the building served as a church. CP 30. On the stage behind the

[3] A review of the court file indicated defense counsel proposed one jury instruction. It advised the jury Mr. Fogleman had no obligation to testify. CP 74.

makeshift bench there was a structure resembling a religious symbol, the Holy Trinity. CP 30-31. Although the building had been purchased by Asotin County, church services were still held there and the building displayed religious references one would never see in a courthouse or a courtroom. CP 30-36. Defense counsel supported his observations with photos of the church. CP 33-36.

Defense counsel also knew where the trial would be held before the fact as the trial court encouraged the prosecutor and defense counsel to tour the building before the trial. RP 66.

Jury trial rights are obviously important. Trials in Washington are purposely held in a secular space, i.e., the courtroom in a courthouse.

Defense counsel failed to proactively remove the religious symbols from the "fire church." Counsel waited until the case was over to urge an objection on the court. In this

respect, counsel helped create the problem. Ineffective assistance occurred because defense counsel failed to take proactive measures to assure fairness for Mr. Fogleman. Defense counsel acknowledged the harm in his after-the-fact objection.

Defense counsel compounded the problem by failing to propose a jury instruction telling the jurors to make no mind of, and to draw no negative inferences from, trial in a church. Defense counsel should have at least blunted the problem by offering a jury instruction telling the jury to disregard the religious overtones, symbolism, and "messages." Note that counsel did propose one instruction but it only told the jury Mr. Fogleman did not have to testify. CP 74.

Defense counsel's failure to propose a limiting instruction fell below a reasonable standard of care in his lack of reasonable proactive efforts to blunt the religious overtones. Accordingly, prejudice to the client occurred in

being tried in a church versus a neutral place such as a courthouse.

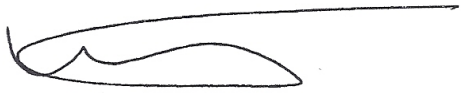
Mr. Fogleman is entitled to reversal of his convictions.

F. CONCLUSION

This court should accept review of Mr. Fogleman's case and ultimately reverse his convictions.

This document contains 2180 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted March 3, 2022.



LISA E. TABBUT/WSBA 21344
Attorney for Levi Fogleman

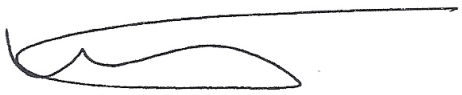
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares:

On today's date, I efiled the Petition for Review to (1) Asotin County Prosecutor's Office, at bnichols@co.asotin.wa.us; (2) the Court of Appeals, Division III; and (3) I mailed it to Levi Fogleman/DOC#357783, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed March 3, 2022, in Winthrop, Washington.



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February 3, 2022

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CASE # 377253
State of Washington v. Levi Allen Fogleman
ASOTIN COUNTY SUPERIOR COURT No. 1910015602

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review of this decision by the Washington Supreme Court. RAP 13.3(b), 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact that the moving party contends this court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration that merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of a decision. RAP 12.4(b). Please file the motion electronically through this court's e-filing portal. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of the decision (should also be filed electronically). RAP 13.4(a). The motion for reconsideration and petition for review must be received by this court on or before the dates each is due. RAP 18.5(c).

Sincerely,

Tristen L. Worthen
Clerk/Administrator

TLW:btb
Attachment

c: **E-mail** Tammy L. Tenny, Asotin County Superior Court Administrator
(Judge Pro Tem J. David Frazier's case)

c: **E-mail** Levi Allen Fogleman (DOC #357783 – Coyote Ridge Corrections Center)

FILED
FEBRUARY 3, 2022
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. LEVI A. FOGLEMAN, Appellant.	)))))))))	No. 37725-3-III UNPUBLISHED OPINION

PENNELL, C.J. — Levi Fogleman appeals his convictions for possession, distribution, and possession with intent to distribute controlled substances. We reverse Mr. Fogleman's conviction for simple possession of a controlled substance and remand for resentencing and for correction of scrivener's errors. We otherwise affirm.

FACTS

In the fall of 2019, law enforcement obtained a warrant to search Levi Fogleman's home. Probable cause was based on several undercover drug sales. Upon executing the warrant, a detective saw Mr. Fogleman throw a plastic baggie out of the back door of his residence. The baggie was later determined to contain 103 grams of methamphetamine.

Mr. Fogleman was arrested inside his home along with three other individuals. All the occupants were read their *Miranda*[1] rights. Upon subsequent questioning, Mr. Fogleman admitted to throwing the bag of methamphetamine out of his back door. A search of Mr. Fogleman's home uncovered heroin, hydrocodone pills, and other indicia of distribution, such as a scale and packaging materials.

The State charged Mr. Fogleman with one count of possession of a controlled substance (methamphetamine) with intent to distribute, one count of possession of a controlled substance (heroin), one count of possession of a controlled substance (hydrocodone) with intent to distribute, and three counts of delivery of a controlled substance (methamphetamine).

The case proceeded to a jury trial on July 23, 2020. Several months earlier, Washington's governor had declared a state of emergency due to the COVID-19 pandemic. The Washington State Supreme Court subsequently issued an order approving jury trials in noncourthouse locations to facilitate social distancing. The Supreme Court subsequently approved Asotin County Superior Court's choice of the "Asotin County Fire District Building in Clarkston" (the Fire Hall) as an appropriate trial venue. Clerk's Papers at 42-43. The county had purchased the building from a church in June 2014.

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The church thereafter paid rent to the county so that it could continue to use the building for office space and Sunday gatherings. The county had utilized the building for fire district training, town hall meetings, an emergency evacuation center, and also made it available for rent to the community for other events. At the time of Mr. Fogleman's trial, the court had removed most religious imagery from the Fire Hall. A church office sign, a shallow bas relief sculpture of a four-pointed star appearing to be set above eye level, and triangular stage decorations remained in the Fire Hall.

At trial, immediately after the jury was empaneled, defense counsel raised an objection to the Fire Hall location.[2] Counsel argued the nature of the Fire Hall could improperly influence the jurors, raising issues regarding the separation of church and state. Defense counsel noted that while the only obvious religious imagery was a "Church Office" sign, the Fire Hall nevertheless "[felt] like a church, [and] it look[ed] like a church . . . ." Report of Proceedings (RP) (Jul. 23, 2020) at 179.

The court overruled the objection. The court explained it had been involved in venue selection and concluded the Fire Hall was the best option in terms of spacing, acoustics, and air conditioning. Furthermore, the court noted it neither saw any indication the Fire Hall was used as a church nor any religious symbols or imagery that might have

[2] The objection was voiced outside the presence of the jury.

influenced the jury. Nevertheless, the court offered to cover up the "church office" sign. *Id*. at 182.

The court also held a brief CrR 3.5 hearing to determine the admissibility of Mr. Fogleman's post-arrest statements. The State elicited testimony from the arresting detective who explained that after he seized Mr. Fogleman and the other occupants of the home, he read everyone their *Miranda* rights. The detective testified that no one had any questions about their rights and everyone was willing to waive their rights, including Mr. Fogleman. On cross-examination, Mr. Fogleman's attorney asked four questions aimed at clarifying the detective's testimony. Defense counsel did not present any argument against the admissibility of Mr. Fogleman's statements. Instead, counsel commented he was "really not all that concerned about the statements." *Id*. at 192.

At the conclusion of the CrR 3.5 hearing, the court found

> based on the testimony that was presented here, it does appear to me that at the time that the warrant was executed on the 23rd of October, [Mr. Fogleman] then, with three other individuals, were present. The Detective testified to an extent where the Court feels he must have felt that they were in custody at the time, under arrest. *Miranda* warnings were provided, not individually but to the group.
>
> [Mr. Fogleman] in particular acknowledged that he understood those rights and agreed to answer questions, did answer questions, and it's the Court's conclusion here that the Miranda obligation was honored here and that [Mr. Fogleman] understood what his rights were and knowingly, voluntarily, and intelligently waived the rights and made the statements that were testified to.

Id. No written findings of fact or conclusions of law were entered by the trial court following the CrR 3.5 hearing.

The jury convicted Mr. Fogleman as charged. The court sentenced Mr. Fogleman to 144 months in prison and 12 months of community custody. Mr. Fogleman timely appeals.

ANALYSIS

Assistance of counsel

Mr. Fogleman contends he was deprived of his constitutional right to effective assistance of counsel because his attorney did not adequately address the religious imagery on display in the Fire Hall. Mr. Fogleman claims trial counsel should have taken further steps to conceal or remove religious symbols from the Fire Hall. He also argues his trial counsel should have proposed a limiting instruction to blunt the impact of the trial taking place at a religious site.

To establish a claim of ineffective assistance of counsel, a defendant must prove both (1) deficient performance and (2) prejudice. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to establish either prong precludes relief from conviction. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Here, Mr. Fogleman fails on the first prong, requiring him to show deficient performance.

With respect to the religious imagery, Mr. Fogleman's attorney brought the issue to the trial court's attention through an objection to the Fire Hall venue. The court assessed the surroundings and determined the only nonsecular imagery was a sign on the building that read "church office." RP (Jul. 23, 2020) at 182. The court overruled the objection and indicated that it would "hide" the sign and anything suggesting the building was being used as a church. *Id*. Given the trial court's assessment of the Fire Hall venue, it is not clear what more defense counsel could have done with respect to any perceived religious imagery at the Fire Hall. Counsel was not deficient in this regard.

As for the lack of a curative instruction, we agree with the State that counsel's actions were reasonably strategic. *See State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995) (no deficient performance if defense counsel's decision was arguably strategic). Curative instructions are not always helpful, in that they can draw the jury's attention to potentially damaging information. *See State v. Humphries*, 181 Wn.2d 708, 720, 336 P.3d 1121 (2014) (no limiting instruction for defendant's stipulation to a prior offense); *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (no limiting instruction for defendant's prior fights). Because curative instructions often function as double-edged swords, we generally defer to counsel's decision not to seek a curative instruction as tactical. *See, e.g.*, *Humphries*, 181 Wn.2d at 720; *State v. Yarbrough*,

151 Wn. App 66, 90-91, 210 P.3d 1029 (2009); *State v. Price,* 126 Wn. App. 617, 649, 109 P.3d 27 (2005), *abrogated on other grounds by State v. Hampton*, 184 Wn.2d 656, 665, 361 P.3d 734 (2015). Here, requesting a curative instruction would have amplified defense counsel's concern that the jurors may have noticed religious imagery at the Fire Hall. The decision not to seek a curative instruction was reasonably strategic.

Conviction for simple possession

As the parties agree, Mr. Fogleman's conviction for unlawful possession of heroin (Count 2) must be reversed in light of the Supreme Court's ruling in *State v. Blake*, 197 Wn.2d 170, 481 P.3d. 521 (2021). We reverse Mr. Fogleman's conviction for Count 2. Because the reversal for the conviction for Count 2 also impacts Mr. Fogleman's offender score, we also remand for resentencing.

CrR 3.5 written findings of fact and conclusions of law

Mr. Fogleman contends the trial court erred when it failed to enter written findings of fact and conclusions of law in violation of CrR 3.5(c). The State agrees the trial court erred by not making written findings, but contends the error was harmless and remand is unnecessary because the court's oral findings are sufficient to allow appellate review. We agree with the State.

CrR 3.5 establishes a pretrial process for assessing the admissibility of a defendant's statements at trial. The rule requires entry of written findings of fact and conclusions of law. CrR 3.5(c). Written findings and conclusions facilitate and expedite appellate review of the issues. *State v. Head,* 136 Wn.2d 619, 622-23, 964 P.2d 1187 (1998). However, the failure to enter written findings and conclusions does not necessarily require reversal. The lack of written findings and conclusions is harmless error if the trial court's oral findings are sufficient to allow appellate review. *State v. Thompson*, 73 Wn. App. 122, 130, 867 P.2d 691 (1994).

Here, the trial court's failure to enter written findings and conclusions was harmless. None of the facts surrounding Mr. Fogleman's post-arrest statements were contested at the time of the CrR 3.5 hearing. For the first time on appeal, Mr. Fogleman suggests the detective's *Miranda* warning may have been inaccurate or incomplete. This unpreserved argument is not well taken. *See* RAP 2.5(a). While it would have been better practice for the State to clarify the contents of the detective's *Miranda* warning, either by entering the advice card into evidence or reciting its contents, these practices are not required. Under the circumstances here, the detective's testimony that Mr. Fogleman was read his *Miranda* rights and agreed to waive his rights without asking for

clarification was sufficient to justify the court's finding of a valid waiver. The record does not support the need to remand for written findings.

Scrivener's errors

The parties agree that the dates listed on Counts 4 and 5 of Mr. Fogleman's judgment and sentence form are incorrect. This matter can be remedied on remand.

CONCLUSION

We reverse Mr. Fogleman's conviction for Count 2, possession of a controlled substance (heroin), and remand for resentencing and for correction of scrivener's errors. We otherwise affirm the remaining convictions.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, C.J.

WE CONCUR:

Siddoway, J.

Staab, J.

LAW OFFICE OF LISA E TABBUT

March 03, 2022 - 2:10 PM

Transmittal Information

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Superior Court Case Number:	19-1-00156-1

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