NO. 101041-9

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WARREN DIEGO BLOCKMAN,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

It is well-settled in Washington that if a party makes a prima facie showing that a peremptory challenge was exercised for racial reasons during jury selection, the peremptory strike must be denied if an objective observer could view race or ethnicity as a factor. The trial court tightly adhered to this standard in concluding that Warren Diego Blockman failed to make this requisite showing where the record demonstrates that the challenged juror was white, and the court determined that a reasonable person could not believe that he excluded on the basis of race. Because this Court has spoken on this issue and the lower courts have consistently applied this Court's rule, there is no conflict of authority or other basis for review.

The Court should also deny review of the remaining issues. First, the Court of Appeals properly applied well-settled law in holding that Blockman failed to establish prejudice in admission of the victim's medical records where admission of the records was not error and other evidence supported the jury's

finding of guilt for second-degree assault. Second, his contention that the First Amendment imposes a requirement that the prosecution prove that the speaker subjectively intended to convey a threat has already been twice rejected by this Court. In the absence of a request to abandon fidelity to stare decisis (let alone a showing that this Court's previous decision is both harmful and incorrect), review is unwarranted. This Court should deny review of all issues raised in Blockman's petition.

II. RESTATEMENT OF THE ISSUES

This case does not meet the criteria for review under RAP 13.4. If the Court were to accept the case, the issues on review would be:

A. Whether the rules barring use of a racially motivated, peremptory strike of a potential juror should be expanded to forbid all peremptory strikes, without allowing the Bar or public to participate in a rule making proceeding.

B. Whether defense counsel's decision to not object to admission of the victim's medical records indicating strangulation constituted ineffective assistance where the records were properly admitted under an established hearsay exception and there was other evidence of choking at trial.

C. Whether this Court should revisit the firmly rejected argument that the First Amendment imposes a requirement that the speaker subjectively intended to convey a threat.

III. STATEMENT OF THE CASE

A. Blockman Assaulted and Strangled His Girlfriend

Warren Blockman and Katrina Mandera began dating shortly after she moved to Washington. RP 376-77. Blockman became "very controlling." *Id*. at 379. During a visit with Blockman and some of his friends, Mandera made a comment to one of Blockman's friends which made him "very upset." *Id*. at 386. Mandera tried to leave, but Blockman grabbed her and told her that she couldn't leave. *Id*. at 386-87.

Later that evening, Mandera received a text message from a male friend. *Id*. Blockman saw the message and "flew off the handle," grabbed her phone, pretended to be Mandera, and texted with Mandera's friend, inviting him to come over to "have sex." *Id*. at 388-89. Mandera attempted to get her phone back and Blockman threw it across the room. *Id*. at 390. He then pinned her down on the floor, put a hand around her neck, and told her

that he was going to kill her "with a pin." *Id*. Mandera could not breathe and lost consciousness. *Id*. When she awoke, Blockman was still texting her friend. *Id*. at 392. As she sat up, Blockman kicked her in the head, held her down, and told her that she was "going to stay here." *Id*. at 392-93. Blockman told her that if she left, he would go to her friend's house and "kill everybody." *Id*. at 393.

Mandera believed Blockman's threat and stayed at the residence for the entire next day. *Id*. at 395. Blockman left and told her that she could not leave until he found somebody to come pick her up. *Id*. He eventually told her that he found somebody to meet her and Mandera spent all night with this individual driving to various locations. *Id*. at 395-96. Eventually, Mandera arrived home and went to the hospital for medical attention. *Id*. at 396-97. She subsequently reported the incident to law enforcement. *Id*. at 397.

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B. The Trial Court Denied Blockman's Objection to a Peremptory Strike Because an Objective Observer Could Not View Race as a Factor in the Strike

The State charged Blockman with second-degree assault, unlawful imprisonment, first-degree robbery, and two counts of felony harassment. CP 18-21. During jury selection, the State exercised a peremptory challenge on juror 9, to which Blockman objected under GR 37. RP 179. The court stated that it was "taken aback" by the objection because juror 9 was "not perceptively [a person of color] to the Court." *Id*. at 181. Blockman admitted that he "had the same questions" himself and was "not certain by any stretch of the imagination" whether juror 9 was "minority," but "just felt it incumbent upon [himself] to raise that issue." *Id*. at 182.

Although the court did not "necessarily see a race issue," it asked the State to provide the basis for its peremptory challenge pursuant to GR 37. *Id*. at 183. The prosecutor stated that she was "surprised" by the GR 37 objection because juror 9 appeared to be "white" and that when she questioned the juror,

"[h]e didn't seem to be paying attention. He didn't really answer the question." *Id*.

Blockman responded that although he was "not saying that Juror Number 9 is African-American," the challenge would be prohibited "if the Court has felt the first prong of the [GR 37] analysis has been satisfied," meaning that juror 9 "is a member of an ethnic group." *Id*. at 185. The State replied that although it believed that juror 9 was "white," if juror 9 was indeed a "person of color," the court should not allow the peremptory challenge. *Id*. at 189. The court responded that although "honest to God, this person does not appear to me to be a person of color," it would be guided by "whether an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge" and would ask individual questions of juror 9 so that the court and parties could "lay eyes on him." *Id*. at 187-89.

The court asked juror 9 where he lived and what his trade or occupation was. *Id*. at 203-04. Following the court's questions, the State argued that the court could not make a

finding that race or ethnicity was a factor in the use of the peremptory challenge because juror 9 appeared to be white. *Id*. at 204-05. Blockman responded that he could "only tell the Court what [his] own observations [were]," and "ultimately, it's up to what the Court's conclusions are." *Id*. at 205.

The court denied Blockman's objection, stating that it did not find "that an objective observer could view race or ethnicity as a factor" in the State's peremptory challenge "because there's nothing noteworthy about the race or ethnicity of this person." *Id*. at 206-07.

C. The State Presented Multiple Sources of Evidence of Strangulation, Including Mandera's Medical Records

At trial, the State called Mandera as a witness. She testified that after Blockman discovered that a male friend had sent her a text message, he called her a "whore" and a "bitch" prior to throwing her phone across the room. RP 388-390. He then "[p]inned [her] down on the floor, on the mattress, and put his hands around [her] neck, and told [her] that he was going to kill [her] with a pin." *Id*. at 390. She explained that he put a hand

around her neck, applied enough pressure to "[k]nock[ ]" her out for a "couple of minutes," that she could not breathe, and that she "blacked out." *Id*.

The State also called Sharon Lemoine, a nurse practitioner who treated Mandera. RP at 347. During her testimony, the court admitted Mandera's medical records without objection. *Id*. at 350-51. The State used the medical reports to explain Mandera's injuries, including "[p]ositive hematoma" or "swelling" to the side of Mandera's head. *Id*. at 356-61. Lemoine's notes also indicated "bruising and swelling to the left side of the neck." *Id*. at 369.

The State asked Lemoine to explain a line in her notes that read, "[s]tatus post-assault with choking," although her initial notes did not indicate choking. *Id*. at 359. Lemoine explained that sometimes, as patients are being treated, they give additional information and she "assum[ed] something must have been said for me to put in my order on the CAT scan of the neck." *Id*. at 359-60. She also testified that she typically added a note for the

radiologist to explain her concerns and outline the types of injuries she was looking for in the scans. *Id*. at 360.

D. The Jury Instructions Set Forth the Standard Definition of a "Threat"

The jury instructions provided a definition of the term "threat" that comported with the Washington Pattern Jury Instructions (WPIC). Jury instruction 15 stated:

> Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person.
>
> To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

CP 52; 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 2.24 (4th ed. 2016) (WPIC). Blockman agreed to this instruction. RP 599-607.

The court also instructed the jury on the definition of "knowledge," using the WPIC instruction:

> A person acts knowingly or with knowledge with respect to a fact, circumstance, or a result when he or she is aware of that fact, circumstance, or result. It is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful or an element of the crime.

CP 54; WPIC 10.02. Blockman likewise agreed to this instruction. RP 599-607.

E. The Jury Convicted Blockman of Multiple Domestic Violence Related Felonies and the Court of Appeals Affirmed

The jury convicted Blockman of second-degree assault, unlawful imprisonment, and felony harassment. CP 65-66. The jury also found via special verdicts that Blockman and Mandera were members of the "same family or household." *Id*. at 67-68, 70. The Court of Appeals affirmed, holding that "Blockman's GR 37 argument is waived" because he raised "a different argument on appeal than he raised at the trial court." *State v. Blockman*, No. 54242-1-II, 2022 WL 1154717, at *1, 4 (Wash. Ct. App. Apr. 19, 2022) (unpublished). The Court reasoned that, at trial, Blockman argued that juror 9 was a member of a racial or ethnic minority and thus, the prosecutor's reason for excluding

juror 9 was invalid. *Id*. at *4. But on appeal, Blockman argued that GR 37 "does not require the peremptory exclusion of a juror to be based on race or ethnicity." *Id*.

The Court also denied Blockman's argument that his counsel was ineffective for declining to object to admission of the victim's medical records, for two reasons. First, a hearsay objection would not have impacted the admissibility of the medical records because they fell within an exception for statements made for medical treatment or diagnosis. *Id*. at *5. Second, Blockman could not establish actual prejudice. *Id*. Because the medical records were not the sole evidence of strangulation, there was no plausible assertion that admission of the medical records impacted the outcome of his case. *Id.*

Finally, because Blockman agreed to the trial court's jury instruction defining "threat," the Court declined to reach Blockman's argument that the First Amendment imposes a requirement that the speaker subjectively intended to convey a threat. *Id*. at *7. In concluding that Blockman failed to establish

actual prejudice from the instruction, the Court noted that instead, Washington courts use an objective, reasonable person standard in assessing whether a statement is a true threat. *Id*.

IV. ARGUMENT

A. The Courts Have Consistently Applied GR 37 to Prohibit Peremptory Strikes Exercised for Reasons of Racial Bias—Not to Forbid All Peremptory Strikes

It is well-settled that if a party makes a peremptory strike in a manner indicative of potential racial bias, the strike must be denied if an objective observer could view race or ethnicity as a factor. *E.g.*, *State v. Jefferson*, 192 Wn.2d 225, 429 P.3d 467 (2018); GR 37. The trial court tightly adhered to this standard in reaching its decision and the lower courts have consistently applied this rule. *See*, *e.g.*, *State v. Listoe*, 15 Wn. App. 2d 308, 475 P.3d 532 (2020). To overcome this consistent case law, Blockman has raised a new issue on appeal. He is now asking that GR 37 be expanded to forbid *all* peremptory challenges. The Court should deny review of this new issue, and require that any proposed amendments to GR 37 be vetted by the Bar and the

public in a rule-making proceeding, rather than through litigation.

1. The trial court properly applied GR 37 to deny Blockman's objection to a peremptory challenge

The trial court properly applied well-settled law to deny Blockman's objection to the peremptory challenge of juror 9. Recognizing that he cannot prevail under GR 37, Blockman instead proposes expanding GR 37 to include all peremptory challenges, and not only those plausibly based on race or ethnicity. In addition to being a new issue on appeal, Blockman's proposed expansion of GR 37 is untethered from the case law addressing racial bias in jury selection.

Prior to GR 37, Washington courts adhered to the constitutional test set forth in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed. 2d 69 (1986), to evaluate whether a peremptory challenge was racially motivated. *Jefferson*, 192 Wn.2d at 229. Under *Batson*, the challenging party must make a prima facie case giving rise to an inference that the challenge was exercised for a discriminatory purpose. *Batson*, 476 U.S. at 94.

Next, the party exercising the peremptory challenge must provide a race-neutral justification. *Id*. at 97. Finally, the court must consider whether the party contesting the peremptory challenge has demonstrated purposeful discrimination. *Id*. at 98.

This Court built on *Batson*. It created a bright-line rule that a prima facie showing is per se established whenever a peremptory challenge is exercised to dismiss the only potential juror who is part of a "racially cognizable group." *City of Seattle v. Erickson*, 188 Wn.2d 721, 734, 398 P.3d 1124 (2017). And in *Jefferson*, the Court reframed the third *Batson* step to require trial courts to consider "whether an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge," dispensing with *Batson*'s requirement of purposeful discrimination. *Jefferson*, 192 Wn.2d at 229-30.

In response to *Batson*'s deficiencies, this Court engaged the legal community and the public in the promulgation of GR 37 for the express purpose of "eliminat[ing] the unfair exclusion of potential jurors based on race or ethnicity." GR 37(a). It now

constitutes step three of the *Batson* analysis, requiring trial courts to disallow the use of peremptory challenges if an objective observer could view race as a potential factor in the use of the challenge *after* the challenging party establishes a prima facie showing giving rise to an inference that the challenge was exercised for a discriminatory purpose. *Jefferson*, 192 Wn.2d at 229-30 ("[i]f a *Batson* challenge to a peremptory strike of a juror proceeds to [the] third step of *Batson*'s three-part inquiry, then the trial court must ask whether an objective observer could view race or ethnicity as a factor in the use of the peremptory strike.") Thus, GR 37 does not dispense with the first two steps of the *Batson* inquiry. *Jefferson*, 192 Wn.2d at 229-30. Rather, the first two steps are prerequisites for reaching the third step of the test, now codified as GR 37.

Applying this test to the peremptory challenge of juror 9, the trial court properly concluded that Blockman did not establish a prima facie case giving rise to an inference of racial discrimination. As Blockman stated, even he questioned whether

juror 9 was a member of a cognizable racial or ethnic group. RP at 182. The trial court stated that it was "taken aback" by Blockman's objection under GR 37 because the juror was "not perceptively [a person of color]." *Id*. at 181. Regardless, the trial court dutifully scrutinized whether the challenge to juror 9 could be perceived as racially motivated by bringing juror 9 into court for individual questioning. After asking questions of juror 9, the court allowed the parties an opportunity to make a record of their observations. Blockman declined to do so, stating that "ultimately, it's up to what the Court's conclusions [regarding the race or ethnicity of juror 9] are." RP at 205.

The trial court expressly found that "an objective observer could not view race or ethnicity as a factor" in the State's peremptory challenge "because there's nothing noteworthy about the race or ethnicity of this person." RP at 206-07. Thus, the court tightly adhered to the settled three-part test and correctly resolved it at the first step of the inquiry, finding that

Blockman failed to establish a prima facie case giving rise to an inference of racial bias.

2. The trial court's ruling comports with the decisions of this Court and all three divisions of the Court of Appeals

The trial court's determination that Blockman failed to make a prima facie case giving rise to an inference of racial bias tightly adhered to the decisions of this Court and all three divisions of the Court of Appeals. The lower courts have consistently applied this Court's established three-part *Batson* test. There is no conflict of authority warranting review.

The lower courts have consistently held that GR 37 codified the third step of this Court's test in *Jefferson*. For example, in *Listoe*, Division Two of the Court of Appeals extensively discussed the three-part *Batson* test and this Court's modification of "the third step of the *Batson* test," now enshrined in GR 37. *Listoe*, 15 Wn. App. 2d at 319-321. Similarly, Division One likewise applied the three-part test, stating that the "first step in the GR 37 process is for a party or the court to raise the issue

of improper bias on the basis of race or ethnicity … [next], the party exercising the peremptory challenge must provide a race-neutral justification … [and] [t]he third step of the GR 37 analysis is to evaluate the justification given for the peremptory challenge." *State v. Lahman*, 17 Wn. App. 2d 925, 935-36, 488 P.3d 881 (2021). And Division Three recently noted that *Batson* created a "three-step" test and GR 37 "expands the third step of the *Batson* test … the court must decide whether 'an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge.'" *State v. Brown*, 21 Wn. App. 2d 541, 551-52, 506 P.3d 1258 (2022) (citing GR 37(e)); *see also State v. McCrea*, No. 37416-5-III, 2021 WL 1550839, at *3 (Wash. Ct. App. Apr. 20, 2021) (unpublished). Thus, all three divisions of the Court of Appeals have relied on the established three-part test to evaluate claims of improper peremptory challenges based on racial bias, making clarification from this Court wholly unnecessary.

3. The requested blanket ban on peremptory challenges would be a seismic change best addressed through rulemaking

In his direct appeal, Blockman did not challenge the trial court's findings or ruling. *Blockman*, 2022 WL 1154717, at *4. Instead, he raised a new contention that GR 37 should be expanded to all peremptory challenges, not just those based on race or ethnicity. *Id*. Because this was not the basis for the objection made at the trial court, the Court of Appeals properly declined to consider the new issue on appeal. *See id*. Like the Court of Appeals, this Court should decline to accept review to consider an issue Blockman did not argue to the trial court. In addition to depriving the trial court of the opportunity to address the issue in the first instance, the new issue effectively seeks a sweeping amendment of GR 37 to create a blanket ban on peremptory strikes. *See* Pet. for Rev. at 12-13. The Court should deny the petition and require that Blockman pursue any desired change to the rules through a request for rule-making.

The Court has firmly indicated that the litigation process should not be used to bypass normal rule-making procedures as it deprives the Court of the benefits of multiple, valuable perspectives. *In re Pers. Restraint of Carlstad*, 150 Wn.2d 583, 592 n.4, 80 P.3d 587 (2003). "'Foisting [a] rule upon courts and parties by judicial fiat could lead to unforeseen consequences.'" *In re Det. Of McHatton*, 197 Wn.2d 565, 572-73, 485 P.3d 322 (2021) (quoting *Carlstad*, 150 Wn.2d at 592 n.4).

The value of public comment is demonstrated by the rule-making process undertaken with GR 37, which allowed the Court the benefit of hearing from an array of interested participants, including the defense bar, State, interested advocacy groups, and the bench.[1] The Court should decline Blockman's invitation to create a new watershed rule without engaging members of the community through the rule-making process.

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[1] *See* Comments for GR 37 – Jury Selection, https://www.courts.wa.gov/court_rules/?fa=court_rules.commentDisplay&ruleId=537 (last visited Jul. 12, 2022).

B. The Court Has Consistently Rejected Claims of Ineffective Assistance Where Multiple Sources of Evidence Support the Jury Verdict

As the Court of Appeals correctly indicated, Blockman's ineffective assistance claim is foreclosed by longstanding state and federal case law. The courts have consistently held that to prevail on an ineffective assistance claim, the challenging party must show both that (1) defense counsel's representation was deficient and that (2) the deficient representation prejudiced the defendant. *E.g.*, *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Estes*, 188 Wn.2d 450, 457-58, 395 P.3d 1045 (2017). Reviewing courts strongly presume that counsel's performance was effective. *Estes*, 188 Wn.2d at 458. Prejudice exists if there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Estes*, 188 Wn.2d at 458. Absence of either requirement defeats a claim that counsel was ineffective. *Strickland*, 466 U.S. at 697.

As an initial matter, even assuming that defense counsel had objected to admission of the medical records, the objection likely would have been overruled. Blockman conceded on direct appeal that the medical records were admissible as business records, but contended that the line in Lemoine's notes indicating "[s]tatus post assault with choking" constituted inadmissible hearsay. *Blockman*, 2022 WL 1154717, at *5. But as the Court of Appeals correctly noted, the statement was written by either Lemoine or the radiologist as part of their notes during Mandera's visit and therefore, the statement would fall under ER 803(a)(4)'s exception for statements made for medical diagnosis and treatment. *See id*. Thus, the Court of Appeals properly concluded that Blockman failed to show that the outcome of the trial would have been different but for defense counsel's decision to not object to admission of Mandera's medical records.

Even if such an objection would have been sustained, there is no basis for Blockman's assertion that it would have impacted the jury's verdict. This is so because, contrary to Blockman's

assertion, the medical records were not the sole evidence of strangulation. *See* RP 356-61, 390. As the Court of Appeals correctly explained, the State presented provided ample evidence of strangulation including "Mandera's own testimony, other portions of the medical records and Lemoine's testimony." *See Blockman*, 2022 WL 1154717, at *5. Mandera testified that Blockman put a hand around her neck and threatened to kill her. RP at 390. She could not breathe and lost consciousness. *Id*. In addition, Lemoine testified that she observed bruising and swelling on Mandera's neck during her medical examination. *Id*. at 356-61. Given these other sources of evidence, Blockman could not establish that an objection would have altered the outcome of the trial.

Because of the layers of evidence that Blockman overlooks on appeal, he is unable to show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *See Estes*, 188 Wn.2d at 458. The Court of Appeals properly dispensed with Blockman's

ineffective claim under long standing precedent. This Court should decline review.

C. The Court Has Repeatedly Held That an Objective, Reasonable Person Test Is Applied to Determine a True Threat—Not Subjective Intent

The Court of Appeals properly applied this Court's decisions establishing the test for determination of a true threat. Blockman incorrectly asserts that the First Amendment requires "the prosecution to prove Mr. Blockman *intended* to convey a true threat." Pet. for Rev. at 26 (emphasis added). But this exact argument has been twice rejected by this Court. It is well established in Washington that courts employ an objective, reasonable person test to determine a true threat. *E.g.*, *State v. Williams*, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001); *see also State v. Trey M.*, 186 Wn.2d 884, 893, 383 P.3d 474 (2016). Furthermore, this Court has concluded that the First Amendment does not impose a subjective intent requirement. *Trey M.*, 186 Wn.2d at 899-900.

This Court has held that the prosecution is not required to prove whether a speaker intended to convey a true threat. *Williams*, 197 Wn.2d at 207-08; *see also Trey M.*, 186 Wn.2d at 899-900. Washington courts employ an objective, reasonable person test to determine what constitutes a true threat. *Williams*, 144 Wn.2d at 207-08. This Court was previously asked to overrule the objective test, but the Court expressly reaffirmed it. *Trey M.*, 186 Wn.2d at 908. In so doing, the Court rejected the very same argument that Blockman makes now—namely, that *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536, 155 L.Ed. 2d 535 (2003), required the Court to apply a subjective intent standard under the First Amendment. *See Trey M.*, 186 Wn.2d at 891; *see also* Pet. for Rev. at 26-27. The Court noted that the "intent to intimidate" element in *Black* was a statutory[2]

[2] In *Black*, the Court interpreted a Virginia statute prohibiting "cross burning with 'an intent to intimidate a person of group of persons.'" *Black*, 538 U.S. at 347. Thus, the "intent to intimidate" element was a state statutory requirement and not a constitutional requirement.

requirement and "nothing in *Black* imposes in all cases an 'intent to intimidate' requirement in order to avoid a First Amendment violation." *Trey M.*, 186 Wn.2d at 899-900.

Because Blockman's reasoning has been firmly rejected by the Court, review is unwarranted. He has failed to make the requisite showing that *Trey M.* is both incorrect and harmful. *See*, *e.g.*, *State v. Barber*, 170 Wn.2d 854, 863, 248 P.3d 494 (2011) (courts may reverse an established rule of law only upon a showing that the rule is incorrect and harmful). This Court should decline to review this well settled constitutional rule.

V. CONCLUSION

For the foregoing reasons, the State respectfully asks the Court to deny Blockman's petition for review.

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RESPECTFULLY SUBMITTED this 18th day of August, 2022.

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8/18/2022	*s/ Kimberly Hale*
Date	Signature

PIERCE COUNTY PROSECUTING ATTORNEY

August 18, 2022 - 12:09 PM

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