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Division II
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NO. 50964-4-II

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

STATE OF WASHINGTON

Respondent,

vs.

NOEL WICHMAN,

Appellant.

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

- A. Was counsel prejudicially ineffective in failing to move to suppress evidence seized as a result of a consensual search?
- B. Whether the prosecutor presented a balanced explanation of the jurors' obligations in reaching a decision of guilt or innocence?
- C. Whether the failure to object to a balanced explanation of the jurors' obligations in reaching a decision of guilt or innocence constitutes ineffective assistance of counsel?
- D. Whether the prosecutor bolstered the State's case by referencing how the officers knew Defendant, and whether Defense Counsel committed ineffective assistance of counsel by failing to object to issues that went to identification of Defendant.?
- E. Where the jury had serious questions about the issue of accomplice liability and the errors and misconduct all affected the jurors' ability to fairly and impartially decide the case, does the cumulative effect of the errors support reversal?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On March 14, 2017, the State charged Defendant with possession of methamphetamine with intent to manufacture or deliver. CP 1-2. The State later amended the Information to add criminal trespass in the first degree in addition to the drug charge. CP 14-15. A jury trial commenced June 12, 2017. RP 22. The jury returned a verdict of guilty on both counts. CP 191. This appeal followed.

B. FACTS

Charlene Pinks lives in rural Jefferson County, Washington on the Coyle Road. RP 101-103. It is an area where people come to relax and “enjoy the beauty of The End of the World.” RP 101-103. She has a neighbor, Ron Ford, who has a residence at 400 Hazel Point Road, Quilcene, Washington. RP 102-104.

March 12, 2017, at mid-day, Ms. Pinks noticed her dog’s barking change. RP 105. Ms. Pinks went outside to investigate. RP 105 -106. She noticed a male voice and a female voice. *Id.* Ms. Pinks had not seen Mr. Ford in the preceding month. RP 106. She tried to determine who was present; whether it was Mr. Ford or somebody who wasn’t supposed to be there. *Id.* She then called 911. *Id.*

After calling 911 Ms. Pinks testified she could not see anything but could hear the sound of something breaking. She heard two people talking in a normal conversational voice and ultimately saw a man and a woman. RP 107 - 108. “They were circling the house.” RP 108. They walked around to the front of the house facing Ms. Pinks, and up along the side of the house. RP 108. When asked about whether their tones reflected someone screaming or in panic, Ms. Pinks said “no.” *Id.* Ms. Pinks went back inside her house and told her husband she just called 911. *Id.* Police contacted Ms. Pinks later that evening and Dispatch called her. *Id.* An officer approached Ms. Pinks and confirmed he was at the right location.

RP. 108 -109. Ms. Pinks described the female as having a ponytail, red hair, wearing a pink shirt with a navy blue sweatshirt. RP 110. Defendant had reddish hair per Deputy Newman. RP 185.

Law enforcement arrived. RP 125. They saw a car parked by Mr. Ford's home. RP 128. The car was registered to Defendant. *Id.* Officers were not able to see any sign of forced entry. RP 130. Prior to entry officers knocked on the door and yelled Sheriff's Office. RP 131. Officers made entry into the home and began a building search. *Id.* During the search deputies continued to announce their presence. RP 132.

Deputy Avery located two people in a closet. *Id.* He yelled at them, "It's the Sheriff's Office, I see you. Come out, with your hands up." *Id.* Defendant and a male subject, later identified as Shane Vandervort, came out. RP 132 – 133.

Deputy Brandon Przygocki placed Defendant in handcuffs following a brief pat down for weapons. RP 133. He found a pair of gloves and a wrench in one of her pockets. RP 133, 171.

Deputy Adam Newman spoke to Defendant and read her her constitutional rights. RP 134. Defendant stated she was running from her husband and that was why she was in the house. RP 135. However, a former neighbor with whom Defendant visited briefly that day, testified Defendant did not seem scared. RP 218. Defendant explained her failure to present herself when Sheriff's Deputies called out by saying Mr.

Vandervort had warrants and did not want to be arrested. *Id.* She denied removing anything from the house. RP 135 – 136.

Deputies asked if Defendant would give consent to search her vehicle. RP 136. She gave consent. *Id.* On cross-examination, Deputy Przygocki said he used his *Ferrier* card to advise Defendant she could refuse the search, restrict or limit it, and she could stop the search at any time. RP 173 – 174. That included the search of a bag in her car. RP 174. A portion of that colloquy with defense counsel: “Okay. So she – you told her that she could have stopped the search at any time? That’s correct. Okay. Including when you went into a bag in her car? Yes.” *Id.* at 173 – 174.

Officers located a black backpack that was on top of a black pouch/case in the back seat. *Id.* On opening the black case, deputies saw a substance they identified as methamphetamine. RP 138. Deputies then stopped the search, secured the vehicle and took it to the Sheriff’s Office impound lot for a further search. RP 138 – 141.

Also located in the car were: A digital scale with residue and some chunks on it that appeared to be methamphetamine (RP 157); two small zip lock style bags, one with light residue and one with a large chunk with a crystalline substance in it, (RP 148, 158); 2.23 grams of methamphetamine (total)(RP 237); a large amount of cash, about \$300 (RP 150, 163); four winning scratch tickets, \$11.00 worth (RP 150, 154,

163); a check (RP 150, 163); a woman's purse with Defendant's Washington driver's license (RP 146 - 147); a total of six phones (one on Defendant's person (RP 247), three in the backpack (*Id.*), one in the center console of the car (*Id.*), and one in the woman's purse that contained Defendant's driver's license (RP 247 – 248);

Deputy Przygocki testified that he saw small zip lock bags frequently in his work used to transport or contain illicit substances. RP 149. He also testified scratch tickets might be used as cash with a person's drug dealer. RP 155.

Sgt. Brett Anglin (then Detective Anglin) testified he primarily operated as a drug detective for the past eight years. RP 226. He testified the amount of methamphetamine in question, 2.23 grams, was more than one would see with a typical drug user. RP 231, 237. Usually those persons only have small amounts of drugs on them e.g., .1, .2, or .3 grams. *Id.* He also testified he would typically find pipes or hypodermic syringes with users. RP 232. However, in this case sheriff's deputies did not find any drug paraphernalia used to smoke or inject the drugs. RP 235 – 236. This could indicate the owner of the drugs in question was not a user. *Id.*

Sgt. Anglin testified that based on what he saw with the scale, the amount of money, and the drugs, it was all consistent with the sale of

controlled substances. RP 233. He also based this opinion on the fact that a typical low-level user would have spent all their money on drugs, nor would they have a scale on them. He noted it would be very unusual for a user to have much cash on them. RP 234. Sgt. Anglin testified on cross-examination that suspected drug dealers carry multiple cell phones to try to conceal their communications. RP 240.

Defendant elected to take the witness stand. RP 297. With respect to the search of her vehicle, and its contents, Defendant admitted she consented to the search. RP 307. She indicated she had no concerns about what would be found in the car because she said she did not have anything to hide. *Id.* She admitted she understood she could tell the deputies to stop the search at any point and she did not stop them. RP 308.

With respect to her entry into the home, Defendant testified she had a drink at Bettina McMaster's home. RP 301. While there, she allegedly received a text message from her husband that caused her concern for her safety. *Id.* Although Defendant and her husband lived in Shelton, she thought he might be near, in the Quilcene area. RP 302. She said because she had been drinking, Mr. Vandervort drove when they left the McMaster's residence. RP 303. Instead of going to a friend's house, Mr. Vandervort, for reasons she said she did not know, decided to go to the Ford residence. RP 304. They then went inside the house. *Id.*

Defendant heard law enforcement yelling. RP 306. She did not come out because Mr. Vandervort said he had warrants for his arrest and was afraid he would go back to prison. *Id.* She then elbowed Mr. Vandervort and tried pushing her way out of the cupboard at which time law enforcement discovered her. *Id.*

On direct examination Defendant testified the check, referenced previously, by Bettina McMaster, was supposed to be for Mr. Vandervort. RP 300. Defendant testified Mr. Vandervort and Ms. McMaster had some kind of deal going on; *Id.* “She [McMaster] purchased meth from him.” *Id.*

The following is a dialogue between the prosecutor and Defendant:

- Q All right. So you're prompted to go to Tina's for what reason? You need money? Or you just want to make friends? Have a drink? What are you doing going over there?
- A Well, Shane had mentioned that he needed to make some money. He did not tell me prior to any of this that he had drugs with him. He said he needed to sell some methamphetamines. Well, everybody knows – It's known, Tina likes to party, okay? So I was like, all right, we can go over to this person's house.
- Q All right. So you essentially made the connection for Mr. Vandervort, who was the seller, with the potential –
- A I told him – no.
- Q With the purchase? Or Ms. McMaster?
- A I'm not – no, no. He said – what he said to me – and I said I might know somebody. So I took him over there and he talked to her. I had nothing to do with it after that.
- Q Okay. Okay. But before this he would have had no way to know to go there, without you telling him, correct?
- A Yes.

Q Okay. And so did you just walk over there on a hunch that she'd want to buy some drugs?

A No. We drove over there.

Q Okay. And did you – did you make any arrangements beforehand? Or just show up and thought maybe this will work out?

A I don't know what I was thinking. I was hoping it might have worked out.

...

Q Okay. So in the – so all you did was connect him with Ms. McMaster so he could sell her drugs?

A I guess if it's – that's how you're going to put it.

...

Q So in the middle of this stressful situation you take a break to take Shane to Bettina's do you guys go – you guys go inside, right?

A Yes.

Q And is she there with Myra Tornensis, another one of the neighbors?

A No. Not that I believe so.

Q Okay. Was there anybody else there?

A No.

Q And –

A Her husband might have been outside, actually.

Q Okay. But he was not in the house?

A No.

Q And so where'd you guys go? In the living room?

A We were in the living room, yeah.

Q Okay. So the three of you were together? Yes or no?

A Yes.

Q Okay. And that's when he does what you're saying is some drug deal with –

A I told her that she – he had something he wanted to talk to her about, and I excused myself outside.

RP 321 – 324.

III. ARGUMENT

A. Defense Counsel was not prejudicially ineffective in failing to move to suppress evidence seized as a result of a consensual search.

BRIEF OF RESPONDENT

State of Washington v. Noel Wichman, No. 50964-4-II

To establish ineffective assistance of counsel, Ms. Wichman must establish her trial attorney's performance was deficient and the deficiency prejudiced her. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). Deficiency means that counsel's performance fell below an objective standard of reasonableness following review of all the circumstances. *State v. McFarland*, 127 Wn.2d 322, 334 – 335, 899 P.2d 1251 (1995). A defendant is prejudiced if: but for the deficiency, the result of the proceeding would have been different. *Id.* Reviewing courts will presume counsel's representation was effective. *Id.*

Where evidence or facts do not exist in the trial record presented to the appellate court (as is the case at bar), a defendant should avail themselves of a personal restraint petition. *Id.* However, this Court determined that where trial counsel's alleged constitutional error resulted from the failure of counsel to bring a motion to suppress, a defendant may address the issue on appeal if the record is adequately developed such that the reviewing court can clearly determine whether the motion to suppress would have likely been granted or denied. *State v. Contreras*, 92 Wn. App. 307, 313 - 314, 966 P.2d 915 (1998),

In the instant case, the record is adequate for this Court to determine Defendant's Counsel was *not* ineffective. That is, he did not need to file a motion to suppress. The record is equally adequate for this

Court to determine that even if Defendant's Counsel had filed a motion to suppress as suggested in Appellant's Brief, she would not have prevailed.

Defendant asserts her counsel should have filed a motion to suppress the contraband and other items seized from her car as "officers exceeded the scope of the consent" and violated her Art. I, § 7 rights.

Appellant's Brief, P. 1. She is incorrect.

In *State v. Witherrite*, 184 Wn. App. 859, 860, 339 P.3d 992 (2014), a deputy sheriff stopped Ms. Witherrite for a traffic violation. He sought permission to search her vehicle, which was granted after having advised her she could stop or limit the scope of the search. *Id.* The deputy did not tell Ms. Witherrite she had the right to refuse consent to the search. *Id.*

The search turned up methamphetamine and other contraband. *Id.* Ms. Witherrite filed a motion to suppress based on the failure of the officer to advise of her *Ferrier*¹ rights. The trial court denied her motion. *Id.* On appeal Ms. Witherrite asked the Court to extend *Ferrier* to vehicle searches. *Id.* at 861. The Court declined to extend *Ferrier* from home searches to vehicle searches stating referencing homes as the most deserving of the heightened protections contemplated by *Ferrier*. *Id.* at 864.

¹*State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

In *dicta* the *Witherrite* Court stated: “While it is undoubtedly best practice to give the full *Ferrier* warnings before any consent search in order to foreclose arguments such as this one, nothing in our constitution requires those warnings other than in the ‘knock and talk’ situation.” *Id.*

In the underlying case the investigating officers not only obtained consent from Defendant to search her car and its contents, to include her purse, they did so utilizing the enhanced protections contemplated by *Ferrier* even though not required. As stated above, Deputy Przygocki said he used his *Ferrier* card to advise Defendant she could refuse the search, restrict or limit it, and she could stop the search at any time. RP 173 – 174. That included the search of a bag in her car. RP 174. On cross-examination: “you told her that she could have stopped the search at any time? That’s correct. Okay. Including when you went into a bag in her car? Yes.” *Id.* Defendant also admitted to understanding her rights to refuse the search or stop it. RP 307 – 308.

Under this fact pattern it is highly improbable the Trial Court would have ruled in Defendant’s favor on a motion to suppress the search of her vehicle. As such, Defendant cannot establish her counsel was deficient and that she was prejudiced in any manner by any failure to file a motion to suppress as contemplated by Defendant in her appeal.

B. The prosecutor presented a balanced explanation of the jurors' obligations in reaching a decision of guilt or innocence.

Defendant's complaints center around the very brief rebuttal closing argument given by the prosecutor. The prosecutor began her rebuttal closing argument with this series of statements:

The defense attorney doesn't have to ask one question in this case. He can sit there the whole trial and not ask a single question. They have absolutely no burden at all. They don't have to call a witness. They don't have to present an exhibit. The burden is on the state to prove beyond a reasonable doubt that the defendant committed these crimes. RP 406.

Later the prosecutor told the jury they were supposed to weigh and consider all of the evidence, and all the testimony. RP 407. From that information she told the jury they were supposed to decide if they had reasonable doubt or if they were satisfied the State met its burden beyond a reasonable doubt. *Id.*

The prosecutor did state that the case was like one big puzzle but not in a manner that trivialized the State's burden. *Id.* Instead, what she told the jury is that they had heard bits and pieces of evidence from various people and *it was up to them*, the jury, to decide if the pieces of information were important or not important for them in reaching their decision. *Id.* "That's going to be up to you." *Id.*

She told the jury the State had all these elements to prove but it was up to the jury to decide what evidence to believe, or not, and what was an important detail to them, or not. *Id.*

Despite that, Defendant complains that the prosecutor told the jury part of their job was to figure out what happened in the case. However, Defendant mischaracterizes or takes the statement out of context. What the prosecutor told the jury was that they needed to determine the facts and then apply those facts to the law as the judge gives it to them. RP 409. This is a correct statement of the law. WPIC 1.02.

The prosecutor returned to the puzzle analogy briefly and again, without minimizing or trivializing the State's burden, she effectively said that with or without all the pieces the jury gets to decide what evidence is important to them - or not. RP 411. And the evidence they have - or do not have - does not necessarily preclude them from making a decision. *Id.* She wrapped up the two paragraphs on the topic by saying, "You compare and consider just the evidence that you have." *Id.* at 412. This is entirely consistent with Burden of Proof/Reasonable Doubt WPIC 4.01.

She next segued to a statement that the jury should "[U]se your common sense and your reason." *Id.* The State would argue this is fully consistent with the "fully, fairly, and carefully considering all of the evidence or lack of evidence" of WPIC 4.01 as well.

The deputy prosecutor then parroted the language of WPIC 4.01 about reasonable doubt and reminded the jury “the presumption of innocence exists until it has been overcome by the evidence beyond a reasonable doubt.” RP 412. That statement was followed a few moments later by a reminder that if one *reasonable* interpretation or explanation of the evidence, such as a piece of circumstantial evidence, points to innocence, the jury should adopt that as their reasoning. *Id.* at 413.

In no way did the prosecutor attempt to reduce the State’s burden. She merely stated the jury had to have a reason for their doubt. She did not attempt to have them “fill in the blank” with a statement of what basis they found reasonable doubt. The gist of the prosecutor’s argument was that the jury needed to be careful with how it evaluated the evidence or lack of evidence.

This is not *State v. Johnson*, 158 Wn. App. 677, 243 P.3d 936 (2010), where the prosecutor improperly told the jury they did not have to have all the puzzle pieces to come up with an image of Tacoma with Mt. Rainier in the background. That they could fill in the gaps with their minds eye, and presumably due so in the trial to reach a guilty verdict.

In the case at bar the prosecutor simply said the case was like a puzzle with lots of “bits and pieces from different people.” RP 407. The jury could decide some of the pieces were important or perhaps not important but that would be up to the jury. *Id.*

The second statement made by the prosecutor at RP 411 about the butterfly is a little closer to *Johnson* but again she stated it was up to the jury to decide that which was important and that which was not ... and a gap in evidence did not mean they could not make a decision. *Id.* This is a correct statement of the law per WPIC 4.01 – the jury may make their decision based on the evidence *or lack of evidence* before it. Importantly, she did not tell the jury what direction the decision could go. She did not pursue the argument that the jury could fill in the gap and reach a guilty verdict. Instead, she wrapped up that paragraph by reminding the jury that they must “compare and consider just the evidence that you have.” RP 412.

Just as this is not a *State v. Johnson* case, it is also not a *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012), case. In *Emery* one of the issues focused on the prosecutor’s improper fill-in-the-blank statement at closing argument. *Emery* at 174 Wn.2d, 741, 759. The problem with the fill-in-the-blank argument is that “it improperly implies that the jury must be able to articulate its reasonable doubt by filling in the blank. This suggestion is inappropriate because the State bears the burden of proving its case beyond a reasonable doubt, and the defendant bears no burden.” *Id.* at 760.

The prosecutor in *Emery* stated at closing: “[I]n order for you to find the defendant not guilty, you have to ask yourselves or you'd have to

say, quote, I doubt the defendant is guilty, and my reason is blank. A doubt for which a reason exists. If you think that you have a doubt, you must fill in that blank.” *Id.* at 750 – 751.

In the present case the prosecutor did not tell the jury they had to articulate their doubt, just that it had to exist. It could not be a mere whim, urge, or fancy. It had to have more substance to it. But what it was or might be, was solely up to the jury. “So there must be a reason for the doubt, not just a wonder or a possibility.” RP 412.

WPIC 4.01 provides in part: “A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.” In other words, the prosecutor’s statement was squarely within and supported by the language of WPIC 4.01.

C. The failure to object to a balanced explanation of the jurors’ obligations in reaching a decision of guilt or innocence does not constitute ineffective assistance of counsel.

As stated previously, to establish ineffective assistance of counsel, a defendant must prove their counsel’s performance was deficient and the deficiency prejudiced their case. *Strickland* at 466 U.S. 668, 687.

Here Defendant cannot establish her counsel was ineffective. The prosecutor did not make improper arguments as outlined above. As such, there was nothing for Defense Counsel to object to.

D. The prosecutor did not bolster the State’s case by referencing how the officers knew Defendant, nor did Defense Counsel commit ineffective assistance of counsel by failing to object to issues that went to identification of Defendant.

The prosecutor asked Deputy Przygocki what Defendant said to him upon contact with her. RP 135. Deputy Przygocki testified in part, that Defendant had mentioned she was running from her husband and Defendant’s husband had allegedly told Defendant to “watch out.” *Id.* It was in that context, the alleged domestic violence aspect of the case that was part of the necessity defense, the prosecutor then asked Deputy Przygocki how long he had known Defendant and whether he knew her husband. *Id.* He said he had known of her for about eight years. *Id.* The next question was whether Deputy Przygocki knew Defendant’s husband. *Id.* He responded that he knew of him. *Id.* When asked if he had been in contact with Defendant’s husband in the last year in Jefferson County, Deputy Przygocki indicated he did not believe so. This line of unchallenged questioning was designed to address whether Defendant’s husband was possibly in the area.

The prosecutor subsequently asked Deputy Newman about the arrest of Defendant. Following Defendant being brought from the house Deputy Newman and the prosecutor had the following colloquy:

- Q And then where did you go with her?
A Just right into the front yard.
Q And what happened next?
A I advised her of her Miranda warnings, and --
Q And do you do that from a form or by memory?
A Do it from a form.
Q Okay. Do you have that card with you today?
A Yes, I do.
Q Okay. And could you take it out? Now at this point was she already handcuffed?
A Yes, she was.
Q Okay. And you had met her before that day?
A Yes, I have.
Q Okay. And keep the card out.
A Okay.
Q Do you have it?
A Yeah.
Q Okay. And can you just read them as you read them to her?
A [proceeds to read *Miranda*² rights].

RP 190 – 191.

Later, the prosecutor asked then Det. Anglin if he knew Defendant and if so, for how long. He indicated that he had known her for about 18 years and had come in contact with her from time to time. RP 227. There were no questions about the nature of the context of the contact, e.g. whether it was drug related or otherwise.

² *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966).

“The general common-law rule is that the proponent may not bolster the witness's credibility before any attempted impeachment.” *State v. Bourgeois*, 133 Wn.2d 389, 400 – 401, 945 P.2d 1120 (1997).

The State is unsure how these brief discussions (out of 95+ pages of testimony) about how long Deputies Przygocki and Newman, and Det. Anglin, had known Defendant bolsters any witness' credibility or undermines Defendant's credibility. If anything, they were simply the *res gestae* of the case – perhaps not particularly relevant, but certainly not designed to bolster or undermine credibility of any witness.

E. The cumulative error doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial.

The cumulative error doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

As stated throughout this brief, the State does not believe the State or Trial Court committed any error. Even if it did, such error was harmless as Defendant effectively confessed she was at a minimum, an accomplice to the possession with intent to deliver charge.

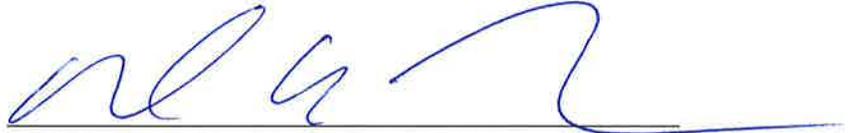
Q: “So all you did was connect him with Ms. McMaster so he could sell her drugs?” RP 322.

A: “I guess if it's – that's how you're going to put it.” RP 323.

IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

Respectfully submitted this 18th day of October, 2018.



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Attorney for Respondent

PROOF OF SERVICE

I, Laura Mikelson, declare that on this date:

I filed the State's BRIEF OF RESPONDENT electronically with the Court of Appeals, Division II, through the Court's online filing system. I delivered an electronic version of the brief, using the Court's filing portal, to:

Kathryn A. Russell Selk, WSBA #23879
KARSdroit@gmail.com

I declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct. Dated this 18th day of October, 2018, and signed at Port Townsend, Washington.



Laura Mikelson
Senior Legal Assistant

JEFFERSON COUNTY PROSECUTING ATTORNEY'S OFFICE

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