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NO. 37267-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

J.C.M.-O.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY,
JUVENILE DIVISION

The Honorable Ruth E. Reukauf, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to fully and meaningfully consider the requisite factors informing the mitigating factors of youth when sentencing appellant.

2. Appellant received ineffective assistance of counsel at sentencing.

Issues Pertaining to Assignments of Error

1. Appellant was a 16-year-old juvenile at the time of offense and had no prior felony convictions. In sentencing appellant to a standard range sentence of 129 to 260 weeks, the trial court noted, “it’s a range that I have to impose by law[.]” RP 171. Is resentencing required, where despite the absence of a request for an exceptional mitigated sentence, the trial court did not meaningfully consider appellant’s individual circumstances and determine whether his youth at the time he committed the offense diminished his culpability?

2. Did defense counsel provide ineffective assistance by failing to request an exceptional mitigated sentence and failing to cite to relevant state and federal authority that

required the trial court to meaningfully consider the requisite mitigating factors of youth when sentencing appellant?

B. STATEMENT OF THE CASE

In the early morning hours of July 9, 2019, 14-year-old J.L.-H. messaged a friend named “C”¹ about selling a cellphone. RP² 80-82, 97-98. “C” agreed to drive his mother’s car to J.L.-H.’s house to look at the cellphone. When “C” arrived at the house at around 2:00 a.m., J.L.-H. was surprised to see two other people in the car with “C.” RP 82-85, 99-101. J.L.-H. had never seen the other two boys before, but “C” referred to one of them as “J”. RP 83, 100-01.

J.L.-H. showed “C” the cellphone and demonstrated that it worked properly. In response “J” said he would retrieve the money from the car. RP 85-86, 99. When “J” returned however, he demanded all of J.L.-H.’s possessions. When J.L.-H. refused, “J” pointed a gun at J.L.-H.’s face. RP 86-87. J.L.-H. observed a bullet in the chamber and felt scared. RP 87-88. He gave “J” his

¹ Pursuant to RAP 3.4, GR 15(c), and GR 31, appellant refers to the names provided using only initials or the first letter of the respective name.

² This brief refers to the consecutively paginated transcripts of December 16 and 17, 2019 as “RP”.

phone, belt, pants, sweatshirt, shoes, and money. RP 88-89, 104. “J” then punched J.L.-H. in his face, breaking his braces. RP 24, 46, 89, 93-95. “J” told J.L.-H. not to snitch or he would kill him. RP 90.

Rather than going back inside his house, J.L.-H. ran to his grandparents’ house five blocks away. RP 90-91. His grandparents called police when J.L.-H. explained that he had been robbed at gunpoint. RP 107.

J.L.-H. told police the boys names were “C”, “J” and “R”. RP 30-32, 46-47, 57. Police knew “C’s” name from prior encounters and learned the car at issue was registered to his mother. RP 57-58, 64, 74. Police did indeed find the car at “C’s” mother’s house. RP 32, 48, 58-59. Inside was a sweatshirt matching the description of the one belonging to J.L.-H. RP 32-33, 35, 49, 59-60, 64, 66-67, 74, 91-93. No fingerprints or DNA were collected from the car. RP 49, 75. Nothing else in the car connected “J” or “R” to the incident. RP 50, 61, 74.

Police were unable to identify “R” and “J” through the police database. “C” acknowledged his involvement in the

robbery but refused to identify whether anyone else was also involved in the incident. RP 71, 74.

The next day, J.L.-H.'s father searched for "J" and "R" on Facebook. RP 111-12. He showed J.L.-H. the pictures, which contained the boys' names, and asked J.L.-H. if he could identify them. RP 112-13, 115, 120. Although J.L.-H. had never seen the pictures before, he was able to identify "R" and "J" as appellant J.C.M.-O. RP 95-96, 102-03, 105. J.L.-H.'s father also sent the pictures to police. RP 114-15.

J.C.M.-O. denied knowing "C" or J.L.-H. He also denied accompanying "C" to J.L.-H.'s house. RP 137, 141. J.C.M.-O. denied ever having carried a gun, much less, having pointed one at J.L.-H. RP 137-38, 141.

Based on this evidence, J.C.M.-O. was charged with one count of first degree robbery. The prosecution further alleged the crime was committed with a firearm. CP 6-7. Similar charges against "R" were dismissed. RP 4. Following a bench trial, the trial court found J.C.M.-O. guilty of first degree robbery but concluded there was insufficient evidence to support the firearm enhancement. RP 121-32, 134, 154-59, 162, 165-66; CP 26-34.

The trial court sentenced J.C.M.-O. to a standard range sentence of 129 to 260 weeks in a juvenile detention facility. CP 11-18; RP 171.

J.C.M.-O. timely appeals. CP 20.

C. ARGUMENT

1. THE COURT ERRED IN FAILING TO FULLY AND MEANINGFULLY CONSIDER THE MITIGATING FACTOR OF YOUTH WHEN SENTENCING J.C.M.-O.

The court sentenced J.C.M.-O., who has no prior felony history, to between 2.5- and 5-years confinement for a crime committed when he was 16 years old, concluding that, “It’s a range that I have to impose by law and there is no reason not to impose that range[.] RP 167, 171; CP 11-18. Although defense counsel did not request an exceptional mitigated sentence, the trial court’s failure to address required mitigating factors of youth when sentencing J.C.M.-O. necessitates remand for resentencing.

- a. Youth is a mitigating factor that can support an exceptional sentence downward.

“[C]hildren are different.” State v. Houston-Sconiers, 188 Wn.2d 1, 8, 391 P.3d 409 (2017) (quoting Miller v. Alabama, 567

U.S. 460, 481, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)). “That difference has constitutional ramifications: ‘An offender’s age is relevant to the Eighth Amendment, and [so] criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.” Id. at 8 (quoting Graham v. Florida, 560 U.S. 48, 76, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), citing U.S. Const. amend. VIII). This is consistent with the purposes of the Juvenile Justice Act which aims to “[p]rovide for punishment commensurate with the age, crime, and criminal history of the juvenile offender.” RCW 13.40.010(2)(d).

Before imposing a juvenile disposition, the trial court is required to consider on the record any aggravating or mitigating factors presented. RCW 13.40.150(3)(h); State v. M.L., 114 Wn. App. 358, 363, 57 P.3d 644 (2002). In State v. O’Dell, 183 Wn.2d 680, 688-89, 358 P.3d 359 (2015), the Supreme Court held youth is a mitigating circumstance that can support an exceptional sentence below the sentencing guidelines under the Sentencing Reform Act (SRA). The Supreme Court reaffirmed the holding in Houston-Sconiers, 188 Wn.2d at 24. Thus, where the sentencing court finds that a defendant’s youth and immaturity contributed

to his offense, the court may reduce the sentence on that basis. State v. Ronquillo, 190 Wn. App. 765, 780-83, 361 P.3d 779 (2015).

Houston-Sconiers and O'Dell relied on U.S. Supreme Court decisions that identified three general differences between adults and juveniles. Houston-Sconiers, 188 Wn.2d at 18-20, n.4; O'Dell, 183 Wn.2d at 691-93.

First, juveniles more often display “[a] lack of maturity and an underdeveloped sense of responsibility,” often resulting in “impetuous and ill-considered actions and decisions.” Roper v. Simmons, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (quoting Johnson v. Texas, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)). This susceptibility means that their “irresponsible conduct is not as morally reprehensible as that of an adult.” Roper, 543 U.S. at 570 (quoting Thompson v. Oklahoma, 487 U.S. 815, 835, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988)).

Second, juveniles “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.” Roper, 543 U.S. at 569. This “vulnerability and

comparative lack of control over their immediate surroundings” give juveniles “a greater claim than adults to be forgiven for failing to escape negative influences.” Id. at 570.

Third, “the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles . . . less fixed.” Id. Thus, “it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.” Id. at 570.

Developments in psychology and neuroscience showed “fundamental differences between juvenile and adult minds’ — for example, in ‘parts of the brain involved in behavior control.’” Miller, 567 U.S. at 471-72 (quoting Graham, 560 U.S. at 68). These differences lessened a juvenile’s moral culpability, Roper, 543 U.S. at 571, and enhanced the prospect of reformation, Miller, 567 U.S. at 472.

The scientific studies underlying Miller, Roper, and Graham established a “clear connection between youth and decreased moral culpability for criminal conduct.” O’Dell, 183 Wn.2d at 695. They “reveal fundamental differences between adolescent and mature brains in the areas of risk and

consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure.” Id. at 692 (footnote citations omitted). “Until full neurological maturity, young people in general have less ability to control their emotions, clearly identify consequences, and make reasoned decisions than they will when they enter their late twenties and beyond.” Id. at 693 (quoting amicus with approval).

- b. The court committed reversible error by failing to address factors that must be considered in sentencing juveniles.

In general, a party cannot appeal a sentence within the standard range. State v. Brown, 145 Wn. App. 62, 77, 184 P.3d 1284 (2008); see also RCW 9.94A.585(1). The rationale is that a trial court that imposes a sentence within the range set by the legislature cannot, as a matter of law, abuse its discretion as to sentence length. Brown, 145 Wn. App. at 78. A juvenile offender disposition is reviewable in the same manner as a criminal sentence. RCW 13.04.033(1).

But a criminal defendant is permitted to appeal a standard range sentence if the sentencing court failed to follow a required procedure. M.L., 114 Wn. App. at 361 (citing State v.

Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993)). This includes when a trial court has refused to exercise its discretion or relies on an impermissible basis for its refusal to impose an exceptional sentence downward. State v. McFarland, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017).

An erroneous sentence imposed without due consideration of a relevant and authorized mitigating factor constitutes a “fundamental defect” resulting in a miscarriage of justice. McFarland, 189 Wn.2d at 58 (citing In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 332, 166 P.3d 677 (2007)). As such, even where a defendant fails to request an exceptional sentence pursuant to an authorized mitigating factor, resentencing may be appropriate where the sentencing court was never asked to exercise its discretion in that regard. McFarland, 189 Wn.2d at 55-58. Justice requires that such a case be remanded for resentencing if the record indicates “that it was a possibility” the sentencing court would have imposed a mitigated sentence had it recognized its discretion to do so. Id. at 58 (citing Mulholland, 161 Wn.2d at 334).

Here, the court, erred in failing to make a full, meaningful inquiry into whether J.C.M.-O.'s youth justified an exceptional sentence downward. It erred in failing to consider requisite factors in determining whether an exceptional sentence based on youth was appropriate. Indeed, the juvenile court appeared not to recognize that it even had discretion to depart from a standard range sentence, stating, "It's a range that I have to impose by law and there is no reason not to impose that range of 129 to 260 weeks." RP 171.

"[S]entencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not." Houston-Sconiers, 188 Wn.2d at 21. But the exercise of that discretion is not unbridled. It is structured. Relying on Miller, Houston-Sconiers provided "guidance" to courts on "how to use" their discretion in sentencing juveniles. Id. at 23. The Court emphasized that the sentencing court *must consider* certain factors. Id.

“[I]n exercising full discretion in juvenile sentencing, the court must consider mitigating circumstances related to the defendant's youth—including age and its ‘hallmark features,’ such as the juvenile’s ‘immaturity, impetuosity, and failure to appreciate risks and consequences.’” Id. (quoting Miller, 567 U.S. at 477). “It must also consider factors like the nature of the juvenile’s surrounding environment and family circumstances, the extent of the juvenile’s participation in the crime, and ‘the way familial and peer pressures may have affected him [or her].’” Id. (quoting Miller, 567 U.S. at 477). “And it must consider how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated.” Id.

In other words, when tasked with sentencing a juvenile, the court “must conduct a meaningful, individualized inquiry” into whether the defendant’s youth should mitigate his or her sentence. State v. Solis-Diaz, 194 Wn. App. 129, 132, 376 P.3d 458 (2016), rev’d on other grounds, 187 Wn.2d 535, 387 P.3d 703 (2017). The court must thus take into account “the observations underlying Miller, Graham, Roper, and O’Dell that generally

show among juveniles a reduced sense of responsibility, increased impetuosity, increased susceptibility to outside pressures, including peer pressure, and a greater claim to forgiveness and time for amendment of life.” Solis-Diaz, 194 Wn. App. at 140.

In short, “a sentencer [must] follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.” State v. Bassett, 198 Wn. App. 714, 725, 394 P.3d 430 (2017) (quoting Miller, 567 U.S. at 483), aff’d, 192 Wn.2d 67, 428 P.3d 343 (2018). And that process requires consideration of the factors set forth in Houston-Sconiers and Miller, Bassett, 198 Wn. App. at 725.

J.C.M.-O. anticipates the prosecution will argue that the Miller, Graham, Roper, and O’Dell line of cases are not applicable because they involved the sentencing of juvenile defendants in adult court under the SRA. Such an argument should be rejected. Those cases cannot be read that narrowly. The applicability of that line of cases was not contingent on a juvenile being sentenced in adult court. Rather, as the Supreme Court held in Houston-Sconiers, “In accordance with Miller, we

hold that sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of *any* juvenile defendant[.]” 188 Wn.2d at 21 (emphasis added).

The court here did not “fully and meaningfully” consider J.C.M.-O.’s “individual circumstances and determine whether his youth at the time he committed the offenses diminished his capacity and culpability.” Solis-Diaz, 194 Wn. App. at 141. The court did not comply with the standard for exercising discretion set forth in Houston-Sconiers, Solis-Diaz and Bassett.

The court was alerted to the fact that J.C.M.-O. had no prior felony convictions and that the robbery conviction was “a significant bump up from his previous crimes.” RP 167. Yet, the trial court said nothing about J.C.M.-O.’s impulsivity, impetuosity, or whether he “fail[ed] to appreciate risks and consequences.” Houston-Sconiers, 188 Wn.2d at 23 (quoting Miller, 567 U.S. at 477).

Another factor is “the extent of the juvenile’s participation in the crime.” Id. (quoting Miller, 567 U.S. at 477). The court found the evidence sufficient beyond a reasonable doubt to convict J.C.M.-O. of the robbery. CP 26-34; RP 121-32, 134, 154-

56, 159. But the court did not otherwise address J.C.M.-O.'s "immaturity" in any meaningful sense. Houston-Sconiers, 188 Wn.2d at 23 (quoting Miller, 567 U.S. at 477). Indeed, the only indication the court was even cognizant of J.C.M.-O.'s immaturity was the comment the judge made *after* she had already imposed the sentence – "I think you are – a very capable young man. But you've got to make some different choices." RP 172.

The court completely failed to address "the nature of the juvenile's surrounding environment and family circumstances" and "the way familial and peer pressures may have affected him." Id. (quoting Miller, 567 U.S. at 477). For example, the court did not address the fact that two other juveniles were also alleged to be involved in the robbery, or how that fact may have made J.C.M.-O. susceptible to peer pressure.

The court also completely failed to consider "any factors suggesting that the child might be successfully rehabilitated." Houston-Sconiers, 188 Wn.2d at 23. In sentencing J.C.M.-O. the court made no mention of his prospects for rehabilitation.

In rendering its sentencing decision, the court failed to address all the requisite factors. It failed to comply with the controlling standard for exercising its discretion by failing to fully and meaningfully consider the diminished culpability of youth. This Court should therefore remand for a resentencing hearing.

c. On remand, a different judge should resentence J.C.M.-O.

Due process requires not only that there be an absence of actual bias, but that justice must satisfy the appearance of justice. State v. Madry, 8 Wn. App. 61, 62, 504 P.2d 1156 (1972); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. “Next in importance to rendering a righteous judgment, is that it be accomplished in such a manner that no reasonable question as to impartiality or fairness can be raised.” State v. Romano, 34 Wn. App. 567, 569, 662 P.2d 406 (1983).

Under the appearance of fairness standard, remand to a different judge is appropriate where facts in the record show “the judge’s impartiality might reasonably be questioned.” State v. Solis-Diaz, 187 Wn.2d 535, 540, 387 P.3d 703 (2017). A party

may thus seek reassignment for the first time on appeal where the trial judge “will exercise discretion on remand regarding the very issue that triggered the appeal and has already been exposed to prohibited information, expressed an opinion as to the merits, or otherwise prejudged the issue.” Id. (quoting State v. McEnroe, 181 Wn.2d 375, 387, 333 P.3d 402 (2014)).

The discretionary nature of a trial court’s decision heightens appearance of fairness concerns. When the trial court’s decision is reviewed for abuse of discretion instead of de novo, there is a greater risk of prejudice. Tatham v. Rogers, 170 Wn. App. 76, 104-06, 283 P.3d 583 (2012). Conversely, “even where a trial judge has expressed a strong opinion as to the matter appealed, reassignment is generally *not* available as an appellate remedy if the appellate court’s decision effectively limits the trial court’s discretion on remand.” McEnroe, 181 Wn.2d at 387.

Reassignment to a different judge on remand is required here to preserve the appearance of fairness.

2. IN THE ALTERNATIVE, DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO REQUEST AN EXCEPTIONAL SENTENCE DOWNWARD OR CITING TO RELEVANT AUTHORITY THAT REQUIRED THE COURT TO CONSIDER YOUTH AS A MITIGATING FACTOR.

In the alternative, defense counsel provided ineffective assistance at sentencing by inexplicably failing to cite to relevant state and federal authority that would have supported an exceptional sentence downward and alerted the trial court to the requirement that it meaningfully consider the mitigating factors of youth when sentencing J.C.M.-O. Remand is required for this reason as well.

- a. J.C.M.-O. had the right to effective representation of counsel at sentencing.

The federal and state constitutions each guarantee the right to effective representation. U.S. CONST. amend. VI; CONST. art. 1, § 22. A defendant in criminal proceedings is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d

289 (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944 (1993).

A claim of ineffective assistance of counsel presents a mixed question of fact and law that this Court reviews de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

- b. Defense counsel's failure to cite to relevant authority on youthful offender sentencing fell below a minimum objective standard of performance.

Defense counsel's failure to cite to relevant case law on youthful offender sentencing fell below a minimum standard for reasonable attorney conduct.

"Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." State v. Kyлло, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing Strickland, 466 U.S. at 690-691). Trial counsel failed in that duty to J.C.M.-O.

In Kyлло, for example, the court found that counsel's proposal of defective pattern instructions was both unreasonable and prejudicial, considering that by the time of Kyлло's trial occurred, case law indicated the pattern instruction was flawed. Kyлло, 166 Wn.2d at 866.

As stated above, the relevant case law holds that youth and its attendant characteristics—including poor consequence assessment and judgment, impulsivity, and susceptibility to peer pressure—tend to mitigate culpability. This has been the law since at least 2015, when the Washington state Supreme Court decided O'Dell, 183 Wn.2d 680. Moreover, since 2017, trial courts have been required to consider certain factors when exercising discretion in sentencing juveniles. Houston-Sconiers, 188 Wn.2d at 23.

J.C.M.-O. who was 16-years-old at the time of the offense, had no prior felonies and a “fairly limited criminal history.” CP 11; RP 167. As defense counsel noted, the robbery at issue was “a significant bump up from his previous crimes.” RP 167. Unfortunately, the sentencing court appeared not to recognize the significance of J.C.M.-O.’s youth and lack of serious criminal history. This is likely because, not only did defense counsel fail to argue these factors supported an exceptional downward sentence, but conceded, “I don’t think there’s anyway we can argue that it should be anything but the standard range.” RP 167. Moreover, counsel also failed to cite to Houston-Sconiers,

O'Dell, or any of the science underlying the reasoning in those decisions, which would have alerted the trial court to its duty to consider J.C.M.-O's youth as a mitigating factor.

While counsel's performance is presumed reasonable, a defendant can rebut that presumption by showing that "there is no conceivable legitimate tactic explaining counsel's performance." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

There was no strategic reason for counsel to fail to request an exceptional downward sentence or to cite to relevant, highly persuasive case law, requiring the trial court to consider J.C.M.-O's youth and lack of prior serious criminal history as a basis for imposing a sentence outside the standard range. See State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) ("While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the [sentencing] court to consider such a sentence and to have the alternative actually considered."). Counsel's failure was objectively unreasonable.

- c. Had defense counsel cited relevant case law on youthful offender sentencing, the trial court was likely to have imposed a shorter term of incarceration.

To prevail on an ineffective assistance claim, an appellant must also show that, had defense counsel performed reasonably, the outcome would likely have been different. Benn, 120 Wn.2d at 663. In this case, that means J.C.M.-O. must show a possibility he would have received a shorter sentence. That standard is satisfied here.

The court's comments that the standard range was required "by law" and there was "no reason" to impose a different sentence, indicate that it failed to recognize that J.C.M.-O's youthfulness could serve as a mitigating basis for imposing a sentence outside the standard range. RP 171.

The court's reasoning suggests a lack of familiarity with Houston-Sconiers and O'Dell and related precedent. And, as stated, a trial court "must conduct a meaningful, individualized inquiry" into whether the defendant's youth should mitigate the sentence. Solis-Diaz, 194 Wn. App. at 132. Had defense counsel cited the appropriate authorities to the trial court, and the court

engaged in the required individualized inquiry, it is likely that J.C.M.-O. would have received a shorter sentence. Instead, the court did not have the benefit of a well-reasoned O'Dell-based argument that J.C.M.-O. was less culpable due to the characteristics of youth.

With the benefit of the O'Dell argument—available to, but ignored by, defense counsel—and the resulting individualized inquiry, the trial court might well have viewed the standard range sentence as excessive.

For this reason, as well, remand for resentencing is required.

D. CONCLUSION

For the reasons discussed above, this Court should remand J.C.M.-O.'s case for resentencing before a different judge.

DATED this 30th day of April, 2020.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'Jared B. Steed', written in a cursive style.

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