

SUPREME COURT NO. \_\_\_\_\_  
COA NO. 74469-1-1

IN THE SUPREME COURT OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

DIANA MERRITT,

Petitioner.

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

The Honorable Jeffrey Ramsdell, Judge

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PETITION FOR REVIEW

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**A. IDENTITY OF PETITIONER**

Diana Merritt asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

**B. COURT OF APPEALS DECISION**

Merritt requests review of the published decision in State v. Diana Jolene Merritt, Court of Appeals No. 74469-1-I (slip op. filed August 21, 2017), attached as appendix A. The order publishing the opinion, entered September 18, 2017, is attached as appendix B.

**C. ISSUES PRESENTED FOR REVIEW**

1. Whether the information is insufficient to charge the crime of mortgage fraud because it does not, on its face, show the offenses were committed within the statute of limitations?

2. Whether the statute of limitations bars conviction because the information was not filed within five years of the commission of the offenses and the State did not alternatively prove it was filed within three years of actual discovery of the offenses, as it did not exercise due diligence in discovering the mortgage fraud?

3. Whether the evidence is insufficient to convict because the State did not prove Merritt's handling of the appraisals amounted to a knowing misrepresentation of a material fact under the mortgage fraud statute?



**D. STATEMENT OF THE CASE**

The State charged Doug White with 55 counts involving mortgage fraud and identity theft. CP 48-77. The original information charged Diana Merritt with five counts of second degree identity theft, alleging she committed these offenses with White. CP 1-3. By amended information, the State added four counts of identity theft and 11 counts of mortgage fraud against Merritt and White. CP 48-51, 68-77. White pleaded guilty to the charged offenses. 2RP<sup>1</sup> 101. Merritt's case proceeded to a bench trial. 2RP 3-4. Count 54 was dismissed on the State's motion. 2RP 89. The trial court acquitted Merritt of the identity theft counts because the State did not prove Merritt intended to commit a crime but found her guilty on the remaining mortgage fraud counts. CP 469-70; 1RP 33-40.

Before entry of written findings, substitute counsel argued the evidence was insufficient to convict Merritt of mortgage fraud, the State did not prove the offenses occurred within the statute of limitations, and the information was defective because it did not show the offenses were committed within the statute of limitations. CP 296-99, 314-427, 428-35, 438-50. The court rejected these arguments. 1RP 144-46, 160-61, 165-67.

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<sup>1</sup> The verbatim report of proceedings is referenced as follows: 1RP - five consecutively paginated volumes consisting of 8/18/15, 9/24/15, 10/30/15, 12/3/15, 1/22/16; 2RP - 8/19/15, 9/2/15, 9/8/15, 9/9/15, 9/10/15, 9/14/15, 9/15/15, 9/16/15, 9/17/15, 9/21/15; 3RP - 8/24/15.

Evidence produced at the bench trial showed the following. White and Merritt met in 2005 and developed a romantic relationship. 2RP 1023, 1026. At the time, Merritt worked as a loan originator. 2RP 1020, 1023. White told her that he was a real estate agent and appraiser, and held himself out as such. 2RP 1028.

In 2004, Reed, a licensed real estate appraiser, hired White as a trainee to perform appraisals for his company, Washington Appraisal Reviews Inc. 2RP 103, 139, 172. Reed used password-protected appraisal software, which generated an electronic signature on his written appraisal reports. 2RP 119, 128-30. After gaining experience, White wrote the reports. 2RP 142. After reviewing them, Reed signed these reports with his electronic signature. 2RP 142-43. Reed's contact information and business phone number were included in every report. 2RP 161. White took the appraiser licensing exam but failed. 2RP 166. Still, White did acceptable work. 2RP 147. He stopped working for Reed in June 2008. 2RP 139. In May 2010, Reed discovered that someone had submitted appraisals under Reed's name and license number without his knowledge, using the business name Washington Real Estate Services Inc. and a different business address and email. 2RP 168-72, 185.

Special Agent Bozena Schrank, of Housing & Urban Development's Office of Inspector General, met with Reed in July 2010.

2RP 760-61, 776, 781, 976. Reed gave Schrank the names of the only two people who had access to his appraisal software and password, Reed's former business partner and White. 2RP 783, 977. Schrank's investigation focused on White, but she made no effort to contact him. 2RP 977, 979-80. Instead she did Google and law enforcement database searches and obtained additional loan files submitted in Reed's name. 2RP 977-79, 789-92, 780. Schrank obtained White's address and phone number from the database. 2RP 797-99. Sometime before July 2011, Schrank had a "heart to heart" case strategy meeting with King County prosecutor David Seaver. 2RP 792-93. At some point, Schrank "Googled" White again and located his email addresses. 2RP 800.

In 2013, Schrank reviewed White's email and phone subscriber information as well as records from the Secretary of State Office regarding Washington Real Estate Services, Inc. 2RP 801-06. Schrank obtained copies of White's banking records in late 2013 or 2014, which showed several financial transactions between White and Merritt. 2RP 811-12. Schrank learned that Merritt had operated a mortgage brokerage business, Merit Home Finance, by looking up her name on the Northwest Multiple Listing Service, a registry for real estate professionals. 2RP 813-14. Schrank reviewed records from the Secretary of State Office regarding Merritt and Merit Home Finance, which listed her address as 3450

Eastlake Sammamish Parkway NE in Sammamish. 2RP 814-15; Ex. 2. Schrank subpoenaed and reviewed more loan files associated with Merritt. 2RP 814-15. White's driver's license, issued in March 2010, listed an address of 3450 Eastlake Sammamish Parkway. 2RP 808, 982-83. Schrank learned early in the investigation that Merritt was the owner of this property. 2RP 810.

Schrank obtained a search warrant for the Sammamish home because Merit Home Finance was listed at that address, Merritt and White resided there, and business records were expected to be located there. 2RP 815-16. On June 11, 2014, federal and state agents searched the residence. 2RP 490. The search uncovered additional loan files with appraisals bearing Reed's name and electronic signature that were not performed by Reed and email exchanges in which Merritt asked White to perform appraisals for her clients. 2RP 842-43, 897-912, 963-64; Ex. 15.

Lenders use the appraisal to assess whether a loan should be given. 2RP 705. Laura Keil, a loan officer, testified that mortgage brokers review the appraisal before submitting the loan package. 2RP 865. If fraud is uncovered, the lender would look to purchase the loan back. 2RP 869-70. Reed explained the lender uses the appraisal to determine the loan amount to give to the borrower. 2RP 137. The appraisal also serves to ensure the borrower is not overpaying for the house. 2RP 137.

Merritt testified that she trusted White and believed he was a licensed appraiser. 2RP 1036-37, 1042, 1078. Her understanding was that White and Reed were business partners, with Reed acting as the managing appraiser or administrator. 2RP 1032, 1042. White told her that he was working with Reed under two business names: Washington Appraisal Reviews and Washington Real Estate Services 2RP 1059. She believed White and Reed co-owned these businesses. 2RP 1060, 1091. Merritt understood Reed's electronic signature was on the appraisal reports generated by White because Reed was the administrator and the signature was embedded in the appraisal software. 2RP 1032, 1042-43. She thought this was a standard business practice. 2RP 1032, 1042-43.

On appeal, Merritt argued the information was defective in failing to show the offenses were committed within the statute of limitations, the State failed to prove the offenses were committed within the limitations period, and the evidence was insufficient to convict. Brief at 1-2, 24-68; Reply Brief at 1-11. The Court of Appeals affirmed. Slip op. at 1.

**E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

- 1. THE COURT OF APPEALS DECISION CONFLICTS WITH AUTHORITY ESTABLISHING THE CHARGING DOCUMENT MUST ALLEGE FACTS SHOWING THE OFFENSES WERE COMMITTED WITHIN THE STATUTE OF LIMITATIONS.**

This case presents the question of whether the information needs to show the offenses were charged within the statute of limitations period. The Court of Appeals answered this question in the negative, opining compliance with the statute of limitations is not an essential element of the crime that the State needs to prove. Slip op. at 8-9.

The Court of Appeals, however, ignored the statute that expressly requires the information to show the charged offenses were committed within the time limited by law. RCW 10.37.050(5) provides "The indictment or information is sufficient if it can be understood therefrom-- . . . That the crime was committed at some time previous to the finding of the indictment or filing of the information, and within the time limited by law for the commencement of an action therefor."

The Court of Appeals ignored cases that recognize the requirement. For over 100 years, the rule has been that the information must show on its face "that the right to prosecute for the crime charged is not barred by the statute of limitations." State v. Osborne, 39 Wash. 548, 551, 81 P. 1096 (1905); cf. State v. Bixby, 27 Wn.2d 144, 153-54, 177 P.2d 689 (1947) (information sufficient where it charged date within statute of limitations under RCW 10.37.050(5)). The information must contain "a plain, concise and definite written statement of the essential facts constituting the offense charged." State v. Cozza, 71 Wn. App. 252, 255, 858 P.2d 270

(1993) (quoting CrR 2.1(b)). "An information is sufficient if *inter alia* it imparts that the crime was committed before the information was filed and within the statute of limitation." Id. at 255. "An indictment or information which indicates that the offense is barred by the statute of limitations fails to state a public offense." State v. Glover, 25 Wn. App. 58, 61-62, 604 P.2d 1015 (1979) (citing People v. Hawkins, 34 Ill. App.3d 556, 340 N.E.2d 223 (Ill. App. Ct. 1975)), abrogated on other grounds by State v. Peltier, 181 Wn.2d 290, 332 P.3d 457 (2014).

The statute of limitations for mortgage fraud is found at RCW 19.144.090(2), which provides "No information may be returned more than (a) five years after the violation, or (b) three years after the actual discovery of the violation, whichever date of limitation is later." The dates alleged in the information for the commission of the crimes are not within five years of the filing of the information. The amended information adding the mortgage fraud counts was filed on February 20, 2015 and the earliest fraud count alleged has a June 12, 2008 to August 6, 2008 offense period. CP 48, 70-77. Nor does the information allege any facts regarding when the violation was discovered. The information therefore fails to state a mortgage fraud offense for which Merritt can be convicted. Glover, 25 Wn. App. at 61-62. The information in Merritt's case is insufficient because it does not impart "that the crime was

committed before the information was filed and within the statute of limitation." Cozza, 71 Wn. App. at 255.

The Court of Appeals missed the mark in stating "Merritt has not cited any case from any jurisdiction holding that the information must state the applicable statute of limitations." Slip op. at 8. The relevant question is whether the information shows compliance with the statute of limitations on its face. The statute and cited authority establishes it must.

The Court of Appeals stated "Merritt's counsel conceded that he was not aware of any case where the State introduced a copy of the information as an exhibit or otherwise presented evidence informing the jury when the State filed the information. A jury would need this information to find that the State timely charged a defendant." Slip op. at 8. This contention does not address whether the information is defective. The sufficiency of the information is a question of law for the court, not a question of fact for the jury. See State v. Williams, 162 Wn.2d 177, 182, 170 P.3d 30 (2007) (sufficiency of information is reviewed de novo).<sup>2</sup>

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<sup>2</sup> Still, the Court of Appeals' suggestion that the statute of limitations is not an element of the State's case because juries cannot decide the issue is baseless. "Whether the statute of limitations bars a suit is a legal question, but the jury must decide the underlying factual questions unless the facts are susceptible of but one reasonable interpretation." Goodman v. Goodman, 128 Wn.2d 366, 373, 907 P.2d 290 (1995). The Court of Appeals in other cases contemplates the jury is capable of deciding factual issues relating to the statute of limitations in criminal cases. See State v.



A charging document is constitutionally defective if it fails to include all "essential elements" of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); Hamling v. United States, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); U.S. Const. Amend. VI; Wash. Const. Art. I, § 22. The Court of Appeals, however, held compliance with the statute of limitations is not an essential element that needs to be proven by the State. That position conflicts with a series of appellate decisions that recognize reversal is required when the State fails to prove the offense was committed within the statute of limitations. State v. Dash, 163 Wn. App. 63, 69-71, 259 P.3d 319 (2011) (reversing where State failed to prove offenses committed within limitations period), abrogated on other grounds by State v. Peltier, 181 Wn.2d 290, 332 P.3d 457 (2014); State v. Mermis, 105 Wn. App. 738, 741, 752, 20 P.3d 1044 (2001) (reversing where unclear whether jury found defendant committed theft by an alternative means on a date outside the statute of limitations);

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Mermis, 105 Wn. App. 738, 746, 752, 20 P.3d 1044 (2001) ("Whether a criminal impulse continues into the statute of limitations period is a question of fact for the jury"). Other jurisdictions recognize juries decide statute of limitations issues in criminal cases where material facts are in dispute and the issue cannot be decided by the court as a matter of law. See, e.g., People v. Zamora, 18 Cal. 3d 538, 562, 565, 557 P.2d 75, 134 Cal. Rptr. 784 (Cal. 1976); State v. Tuzman, 145 Ga. App. 481, 482-83, 243 S.E.2d 675 (Ga. Ct. App. 1978), abrogated on other grounds by State v. Outen, 289 Ga. 579, 714 S.E.2d 581 (Ga. 2011); People v. Lutter, 42 N.E.3d 843, 847 (Ill. App. Ct.), appeal denied, 42 N.E.3d 373 (Ill. 2015).

State v. Mehrabian, 175 Wn. App. 678, 696, 308 P.3d 660, review denied, 178 Wn.2d 1022, 312 P.3d 650 (2013) ("If the to-convict instruction permits the jury to convict the defendant based solely on acts committed beyond the statutory limitation period, reversal is required.").

The State bears the burden of proving it charged the defendant within the applicable limitations period. State v. Reeder, 181 Wn. App. 897, 921, 330 P.3d 786 (2014), aff'd, 184 Wn.2d 805, 365 P.3d 1243 (2015). Essential elements are those that the prosecution must prove to sustain a conviction. Williams, 162 Wn.2d at 183. A conviction cannot be sustained if the statute of limitations expired before the State filed the information. In re Pers. Restraint of Swagerty, 186 Wn.2d 801, 808, 383 P.3d 454 (2016).

If statute of limitations compliance is not an essential element of the State's case, as held by the Court of Appeals, then what is it? In State v. Peltier, 181 Wn.2d 290, 297, 332 P.3d 457 (2014), this Court held criminal charges are beyond the statutory authority of the court when they are outside the statute of limitations. "[T]he statute of limitations bars prosecution of charges commenced after the period prescribed in the statute." In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 355, 5 P.3d 1240 (2000). Absent express waiver, "once the statute of limitations expires for a crime, the State lacks the authority to charge a defendant."

Swagerty, 186 Wn.2d at 808. Even if compliance with the statute of limitations is not an essential element, it is at the very least a factual predicate necessary to sustain a conviction. Where the information fails to include a necessary fact, the remedy is reversal. State v. Franks, 105 Wn. App. 950, 958-60, 22 P.3d 269 (2001) (information defective in failing to include the necessary fact of the identity of the defendant as the person charged). Review is warranted under RAP 13.4(b)(1) and (2) because the Court of Appeals conflicts with case law showing compliance with the statute of limitations is a necessary predicate to sustaining a conviction that must be shown on the face of the information.

**2. HOW TO ASSESS THE STATUTE OF LIMITATIONS FOR MORTGAGE FRAUD IS AN ISSUE OF FIRST IMPRESSION THAT PRESENTS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE.**

This case presents an issue of first impression: does the statute of limitations for mortgage fraud incorporate the discovery rule? If it does, then the State failed to prove the charges were filed within the statute of limitations. The investigation was allowed to lapse and linger for years for no good reason. The State's discovery of Merritt's involvement in mortgage fraud could have been discovered through a diligent investigation much earlier than June 2014, when law enforcement executed the search warrant on the residence.

For most criminal offenses, the statute of limitations begins to run from the date of the commission of the offense. RCW 9A.04.080. As noted, there is a special statute of limitations for mortgage fraud: "No information may be returned more than (a) five years after the violation, or (b) three years after the actual discovery of the violation, whichever date of limitation is later." RCW 19.144.090(2). For the charges to be timely in Merritt's case, they must have been filed within three years of "actual discovery" of the violation.

With no analysis of legislative intent, the Court of Appeals held the statute "requires an actual awareness that the loss occurred by virtue of the defendant's criminal act." Slip op. at 9. According to the Court of Appeals, the State did not acquire actual knowledge about Merritt's involvement in the charged crimes until the investigation team executed the 2014 warrant on her home, at which point the three-year limitations period began to run. Slip op. at 10.

The Court of Appeals failed to confront Merritt's argument that the charges were not filed within the statute of limitations under the "discovery rule," wherein "actual knowledge of fraud will be inferred for purposes of the statute if the aggrieved party, by the exercise of due diligence, could have discovered it." Shepard v. Holmes, 185 Wn. App. 730, 739-40, 345 P.3d 786 (2014).

The mortgage fraud statute does not define the phrase "actual discovery" and there is no case law interpreting its statute of limitations. By comparison, the statute of limitations for general fraud provides that an action for relief is "not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." RCW 4.16.080(4). As mortgage fraud is a species of general fraud, it makes sense to construe the former in light of the latter. See Spokane Cty. Health Dist. v. Brockett, 120 Wn.2d 140, 150, 839 P.2d 324 (1992) ("Similar interpretation should result where the language and subject matter of two statutes are similar.").

The statute of limitations for fraud, RCW 4.16.080(4), "effectively codifies the discovery rule as the basis on which a claim for fraud or misrepresentation accrues." Shepard, 185 Wn. App. at 739. The discovery rule "has been applied by Washington courts to claims where 'injured parties do not, or cannot, know they have been injured.'" Id. (quoting In re Estates of Hibbard, 118 Wn.2d 737, 744-45, 826 P.2d 690 (1992)). Fraud is a classic example of this phenomenon. The phrase used in the statute of limitations for fraud — "discovery by the aggrieved party of the facts constituting the fraud" — conveys the same meaning as the phrase "actual discovery" used in the mortgage fraud statute.

The discovery rule is rooted in common law. Funkhouser v. Wilson, 89 Wn. App. 644, 666, 950 P.2d 501 (1998), aff'd in part and remanded sub nom. C.J.C. v. Corp. of Catholic Bishop of Yakima, 138 Wn.2d 699, 985 P.2d 262 (1999). "The legislature is presumed to know the law in the area in which it is legislating, and statutes will not be construed in derogation of common law absent express legislative intent to change the law." State v. Torres, 151 Wn. App. 378, 385, 212 P.3d 573 (2009). In enacting the statute of limitations for mortgage fraud, the legislature did not clearly signal it was to be interpreted in derogation of the common law discovery rule. This provision should be interpreted to mean actual knowledge of mortgage fraud will be inferred where the exercise of due diligence could have discovered it.

Under the Court of Appeals' interpretation, the running of the statutes of limitations is controlled by the whim of the government investigator. "The policy behind statutes of limitations is to protect defendants from unfair decisions caused by stale evidence and to encourage law enforcement officials to promptly investigate crimes." State v. N.S., 98 Wn. App. 910, 912-13, 991 P.2d 133 (2000), abrogated on other grounds by State v. Peltier, 181 Wn.2d 290, 332 P.3d 457 (2014). The statute of limitations is the defendant's primary protection against oppressive delay. State v. Boseck, 45 Wn. App. 62, 66, 723 P.2d 1182

(1986). For such reasons, "criminal limitations statutes are 'to be liberally interpreted in favor of repose.'" Toussie v. United States, 397 U.S. 112, 115, 90 S. Ct. 858, 25 L. Ed. 2d 156 (1970) (quoting United States v. Scharton, 285 U.S. 518, 522, 52 S. Ct. 416, 76 L. Ed. 917 (1932)).

Consistent with the rule of lenity, the discovery rule should be applied to start the statute of limitations running where the government could have, through the exercise of diligence typical of law enforcement authorities, discovered the violation. See People v. Zamora, 18 Cal. 3d 538, 561-62, 557 P.2d 75, 134 Cal. Rptr. 784 (Cal. 1976) (discovery rule incorporating reasonable diligence requirement applied in criminal case involving grand theft); United States v. Gomez, 38 F.3d 1031, 1037-38 (8th Cir. 1994) (applying discovery rule to criminal charge). The Court of Appeals' interpretation conflicts with the reason for having a statute of limitations for criminal offenses and leads to absurd consequences. Courts "avoid a literal reading of a statute if it would result in unlikely, absurd, or strained consequences." State v. Elgin, 118 Wn.2d 551, 555, 825 P.2d 314 (1992). It would be a curious statute of limitations that allowed the government to dictate with impunity when it runs out.

The State pointed out in its motion to publish the decision that there is no other criminal case that determines what constitutes "actual discovery" for purposes of the mortgage fraud statute of limitations. See

Motion to Publish at 3. Review is warranted under RAP 13.4(b)(4) because this case presents an issue of substantial public interest.

**3. WHAT KIND OF CONDUCT IS CRIMINALIZED UNDER THE MORTGAGE FRAUD STATUTE PRESENTS AN ISSUE OF FIRST IMPRESSION THAT SHOULD BE DECIDED BY THE SUPREME COURT.**

The State also pointed out in its motion to publish that this is the first appellate decision addressing the mortgage fraud statute. See Motion to Publish at 3. It is the first to hold that a facially valid residential real estate appraisal is a material aspect of the lending process. Id. at 3-4. According to the State, this decision is of general public interest and is of particular interest to those in the residential mortgage lending industry. Id. at 4-5. Merritt agrees. Review is warranted because this case presents a significant question of constitutional law under RAP 13.4(b)(3) and is of substantial public importance under RAP 13.4(b)(4).

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the



crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Merritt was convicted of violating RCW 19.144.080(1)(a)(i), (1)(a)(ii), (1)(b), (1)(c), and (1)(d). CP 469. Criminal liability does not attach unless the State proves the defendant "knowingly violates RCW 19.144.080." RCW 19.144.090(1). RCW 19.144.080 provides:

(1) It is unlawful for any person in connection with the mortgage lending process to directly or indirectly:

(a)(i) Employ any scheme, device, or artifice to defraud or materially mislead any borrower during the lending process; (ii) defraud or materially mislead any lender, defraud or materially mislead any person, or engage in any unfair or deceptive practice toward any person related to the mortgage lending process; . . .

(b) Knowingly make any misstatement, misrepresentation, or omission related to the mortgage lending process knowing that it may be relied on by a mortgage lender, borrower, or any other party related to the mortgage lending process;

(c) Use or facilitate the use of any misstatement, misrepresentation, or omission, knowing the same to contain a misstatement, misrepresentation, or omission, related to the mortgage lending process with the intention that it be relied on by a mortgage lender, borrower, or any other party related to the mortgage lending process;

(d) Receive any proceeds or anything of value in connection with a residential mortgage closing that such person knew resulted from a violation of subsection (1), (2), or (3) of this section [(a), (b), or (c) of this subsection]

The Court of Appeals determined "a facially valid appraisal is a material aspect of the lending process" because "the appraisal document is essential to obtaining funds for a loan or refinance and the appraisal must

be done by a licensed appraiser." Slip op. at 14. It found sufficient evidence because Merritt submitted appraisals with Reed's signature and license certification when she knew that White had performed the appraisals. Id. at 15-16. "The mortgage lenders relied on the fact that the appraisals were performed by a licensed appraiser to determine whether to fund a particular transaction and the amount to fund." Id. at 16.

The Court of Appeals' analysis is flawed because the trial court, as trier of fact, did not find Merritt knew White was an unlicensed appraiser. IRP 33, 35-36, 146. This means the State did not prove Merritt knowingly used an appraisal report that was done by an unlicensed appraiser. In light of the court's finding, the evidence at most shows Merritt knew White did the appraisal, not Reed. Because there is no evidence the appraisals contained any inaccurate information regarding the assessed value of the properties at issue, the mere fact that the appraisals inaccurately represent the identity of the person who did them does not rise to the level of a material term affecting the lending process.

"A material fact is one that not only influences and affects the transaction, but also goes to its very essence and substance." 16A Wash. Prac., Tort Law And Practice § 19:3 (4th ed.). Stated another way, "[a] 'material fact' is one 'to which a reasonable [person] would attach importance in determining his or her choice of action in the transaction in

question." Guarino v. Interactive Objects, Inc., 122 Wn. App. 95, 114, 86 P.3d 1175 (2004) (quoting Aspelund v. Olerich, 56 Wn. App. 477, 481-82, 784 P.2d 179 (1990)). The identity of the person who did the appraisal, or who signs an appraisal report, is not among the listed material terms of a mortgage loan under RCW 19.144.020(2) and WAC 208-600-200(4). The purpose of the appraisal is to provide an accurate assessment of home value. 2RP 137, 865. The identity of the person who performs the appraisal does not affect that purpose. No evidence was presented that anyone involved in the lending process attached significance to the appraiser's identity. Misrepresentation of the appraiser's identity is not a material fact relied on by anyone in this case. The evidence is insufficient to convict because Merritt did not violate the statute.

**F. CONCLUSION**

For the reasons stated, Merritt requests that this Court grant review.

DATED this 14<sup>th</sup> day of October 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

  
CASEY GRANNIS

WSBA No. 37301

Office ID No. 91051

Attorneys for Petitioner

# APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 DIANA JOLINE MERRITT, )  
 )  
 Appellant. )

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No. 74469-1-I  
DIVISION ONE  
UNPUBLISHED OPINION  
FILED: August 21, 2017

2017 AUG 21 AM 9:30

FILED  
COURT OF APPEALS DIV. I  
STATE OF WASHINGTON

LEACH, J. — Diana Merritt appeals her conviction of several counts of mortgage fraud. She contends these convictions should be set aside for three reasons. First, she claims that the statute of limitations is an essential element of each offense that the State failed to include in the information. Second, she contends that the State charged these crimes after the statute of limitations for them had expired. Third, she challenges the sufficiency of the evidence to support the convictions.

The statute of limitations is not an essential element of a crime. Because the State filed the amended information within three years of its actual discovery of Merritt's wrongdoing, the statute of limitations does not bar her prosecution. And because sufficient evidence supports her conviction, we affirm the judgment and sentence.

Background

The State initially charged Diana Merritt with 5 counts of second degree identity theft, alleging she committed these offenses with Douglas White. The State later filed an amended information that charged 9 counts of second degree identity theft and 11 counts of mortgage fraud. White pleaded guilty to the 55 counts of fraud and identity theft as charged in the amended information. Merritt waived her right to a jury and proceeded to a bench trial.

At the State's request, the court dismissed count 54. By oral ruling, the trial court acquitted Merritt on the second degree identity theft charges and found her guilty on the remaining 10 counts of mortgage fraud.

Before the court entered findings of fact and conclusions of law, Merritt obtained new counsel who asked the court to reconsider its mortgage fraud decision. Counsel argued that the evidence did not support a finding that Merritt knew White was unlicensed and, further, that the State failed to prove the alleged crimes occurred within the statute of limitations.

The court denied the reconsideration request. The court entered findings of fact and conclusions of law finding Merritt guilty on all counts of mortgage fraud. The court sentenced Merritt to 90 days in jail. Merritt timely appeals.

Substantive Facts

In 2004, Tom Reed, a licensed real estate appraiser, hired White as a trainee to perform appraisals for his company, Washington Appraisal Reviews Inc. White took the appraiser licensing exam twice during his time at Washington Appraisal. He failed each time. During the economic downturn, Reed laid off his employees, including White. In 2010, after White left, Reed discovered that someone was using his name and license number for appraisals that he had not performed.

Reed did not know that White performed appraisals doing business as Washington Real Estate Services Inc. He used Reed's electronic signature and license number on appraisal reports he submitted to clients and others. White met Merritt in 2005 and later moved in with her and became engaged.

Special Agent Bozena Schrank, of Housing & Urban Development's Office of Inspector General, met with Reed in July of 2010. Reed gave her the names of the only two people who had access to his appraisal software and his password, White and another person.

Schrank's initial investigation focused on White. Schrank obtained copies of White's banking records in late 2013 or 2014. These showed several financial transactions between White and Merritt. Schrank learned that Merritt had operated a mortgage brokerage business, Merit Home Finance. After reviewing

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several loan files processed through Merit, Schrank obtained a search warrant for the Sammamish home shared by White and Merritt.

A search of this home uncovered additional loan files with appraisals bearing Reed's name and electronic signature that were not performed by Reed. A forensic search of White's and Merritt's computers revealed numerous e-mail exchanges in which Merritt asked White to perform appraisals for her clients.

At trial, Merritt describe her duties as a loan originator. They included collecting appraisals and other documentation for a loan officer to use to decide whether to make a loan. Merritt knew that the documents submitted to loan officers to support a loan included copies of Tom Reed's certified appraiser license. Merritt also knew that White performed the appraisals. She had accompanied White to at least two homes where he performed the appraisals that were later submitted under Tom Reed's electronic signature. Merritt testified that she believed White's assertion that Reed was the managing partner and his signature was embedded in the software. She knew that White, not Reed, owned Washington Real Estate Services. She testified that she reviewed documents for White.

Merritt further testified that she always assumed that White prepared the reports, even though Reed's signature was on them. She recognized the



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discrepancies on invoices that did not match the company names of Reed and White.

Laura Kiel, employed by Mortgage Broker Services as a loan officer, mortgage loan specialist, and on its board of directors, testified about industry practices. She has worked in the mortgage industry since 1992. Kiel testified that it was standard practice to have a copy of the appraiser's license as an appendix to any submitted appraisal. The appraisal document is essential to obtaining a loan for property. A fraudulent appraisal places a transaction at risk for the loan being recalled.

Merritt timely appeals the trial court's findings of facts and conclusions of law.

#### Analysis

Through counsel, Merritt asserts three reasons why her convictions should be vacated. First, she claims that the State failed to include in the information an alleged essential element of each crime, the statute of limitations. Second, she contends that the statute of limitations bars the convictions. Third, she challenges the sufficiency of the evidence to support her conviction. Finally, Merritt filed a statement of additional grounds for review, none of which have any merit.

Information

Merritt contends that the amended information was defective because it failed to state an essential element of the crime: that the crime took place within the statute of limitations. Defendants have the right to be fully informed of the nature of accusations against them so that they may prepare an adequate defense.<sup>1</sup> Both the state and federal constitutions require that the charging document state a criminal offense.<sup>2</sup> All the essential elements of a crime must be included in the charging document.<sup>3</sup> Omitting an essential element from the charging document violates a defendant's due process right to be fully informed of the charges.<sup>4</sup>

The amended information set forth the particular facts of each incident involved in the commission of the crime. Each count listed the time frame within which Merritt aided borrowers in obtaining residential mortgage loans by

directly or indirectly: (1)(a) knowingly employ any scheme, device, or artifice to defraud or materially mislead a borrower, to-wit: [borrower's name], during the lending process; and (b) knowingly defraud or knowingly materially mislead a lender, or any person, to-wit: [borrower's name], in the lending process, or knowingly engage in any unfair or deceptive practice toward any person, to-wit: [borrower's name], in the lending process; and (c) knowingly obtain property by fraud or material misrepresentation in the lending process; and (2) knowingly make any misstatement, misrepresentation, or omission during the mortgage lending

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<sup>1</sup> State v. Leach, 113 Wn.2d 679, 695, 782 P.2d 552 (1989).

<sup>2</sup> Leach, 113 Wn.2d at 695.

<sup>3</sup> State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991).

<sup>4</sup> Leach, 113 Wn.2d at 690.

process knowing that it might be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process, to-wit: [borrower's name]; and (3) knowingly use or facilitate the use of any misstatement, misrepresentation, or omission, knowing the same to contain a misstatement, misrepresentation, or omission, during the mortgage lending process with the intention that it be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process, to-wit: [borrower' name]; and (4) knowingly receive any proceeds or anything of value in connection with a residential mortgage closing that the defendant knew resulted from a violation of RCW 19.144.080;

Contrary to RCW 19.144.080 and 19.144.090, and against the peace and dignity of the State of Washington,

And further do allege the crime was a major economic offense or series of offenses, so identified by consideration of the following: multiple incidents per victim, monetary loss substantially greater than typical for the offense, occurred over a long period of time, and the defendants used their position of trust to facilitate the commission of the current offense, under the authority of RCW 9.94A.535(3)(d).

RCW 19.144.080 defines certain prohibited practices in the mortgage lending process. RCW 19.144.090(2) states that "[n]o information may be returned more than (a) five years after the violation, or (b) three years after the actual discovery of the violation, whichever date of limitation is later." The five-year statute of limitations begins to run only when all the elements of the crime have been completed.<sup>5</sup> The three-year statute begins to run only when the State has actually discovered that a defendant has committed the completed crime.

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<sup>5</sup> Toussie v. United States, 397 U.S. 112, 115, 90 S. Ct. 858, 25 L. Ed. 2d 156 (1970) (quoting Pendergast v. United States, 317 U.S. 412, 418, 63 S. Ct. 268, 87 L. Ed. 368 (1943)).

Merritt claims that State v. Naillieux<sup>6</sup> and State v. Kjorskik<sup>7</sup> establish that the statute of limitations is an element of every crime. We disagree. In Naillieux, the information cited the current statute but stated some elements from a previous statute while also omitting some in the current statute. The court held that the State's citation to a current statute did not inform the defendant of the actual missing elements of the crime with which he was charged.<sup>8</sup> In Kjorskik, the information excluded a court-imposed essential element of the crime. The court again found that the information did not adequately inform the defendant, stating that the "defendant should not have to search for the rules or regulations they are accused of violating."<sup>9</sup> In Naillieux and Kjorskik, the State failed to allege an element of the charged crime, but in neither case was that element the statute of limitations. Thus, they do not support Merritt's position.

Merritt has not cited any case from any jurisdiction holding that the information must state the applicable statute of limitations. At oral argument Merritt's counsel conceded that he was not aware of any case where the State introduced a copy of the information as an exhibit or otherwise presented evidence informing the jury when the State filed the information. A jury would need this information to find that the State timely charged a defendant. We have

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<sup>6</sup> 158 Wn. App. 630, 241 P.3d 1280 (2010).

<sup>7</sup> 117 Wn.2d 93, 812 P.2d 86 (1991).

<sup>8</sup> Naillieux, 158 Wn. App. at 645.

<sup>9</sup> Kjorsvik, 117 Wn.2d at 101.

also reviewed the pattern elements instructions for various crimes. None lists the statute of limitations as an element. The statute of limitations is not an essential element of the crime.

Statute of Limitations

The State added the mortgage fraud counts by amended information filed February 20, 2015. The counts all involve mortgage fraud acts that occurred between June 12, 2008, and June 10, 2009. RCW 19.144.090(2) states that “[n]o information may be returned more than (a) five years after the violation, or (b) three years after the actual discovery of the violation, whichever date of limitation is later.” The charged incidents all occurred more than five years before the State filed the amended information. But the statute allows the State to file an information within three years after actual discovery of a violation. It requires an actual awareness that the loss occurred by virtue of the defendant’s criminal act.

Merritt claims that the State discovered the fraud charged in these counts when Tom Reed contacted the police in 2010 about someone illegally using his electronic signature on an appraisal. But the victim of that appraisal was not a victim listed in the challenged mortgage fraud counts. In July of 2010, Reed met with an investigator from the Department of Housing and Urban Development and provided her with a copy of a property appraisal performed for Stay in Home

Mortgage. In 2012, Reed supplied the investigator with another incident of misuse of his credentials. An investigation over the course of the next several years revealed many additional incidents of fraud and eventually led to the discovery of Merritt's participation in these activities. Here the testimony of the investigator indicated she did not become aware of Merritt's possible involvement until late 2013 or early 2014 when they discovered the banking records showing multiple transactions between White and Merritt.

Nothing in the record shows that the State had actual knowledge of the charged incidents more than three years before it charged Merritt with them. A complaint about one incident by a potential victim of a crime that an investigation later shows involved a continuing course of criminal conduct with many incidents does not provide the State with actual knowledge of each incident. The State's actual discovery of an incident starts the statute of limitations for that incident. In 2010 a suspicion existed that White had committed a crime. The subsequent investigation focused on White's identify thefts. Only when the investigation team executed the 2014 warrant did the State acquire actual knowledge about Merritt's involvement in the charged crimes. Only then did the State's three-year period to file begin.

Sufficient Evidence

To decide whether sufficient evidence supports a conviction, this court asks whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.<sup>10</sup> An appellate court limits its review in a bench trial to determining whether substantial evidence supports the trial court's findings of fact and, if so, whether those findings support its conclusions of law.<sup>11</sup> Substantial evidence is that which is sufficient to persuade a rational person of the truth of the asserted premise.<sup>12</sup> Unchallenged findings are verities on appeal.<sup>13</sup> This court reviews challenges to a trial court's conclusions of law de novo.<sup>14</sup>

An insufficiency claim admits the truth of the State's evidence and all inferences that reasonably can be drawn from it.<sup>15</sup> The court "defers to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence."<sup>16</sup>

Merritt challenges several of the findings of fact.

Finding C states,

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<sup>10</sup> State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

<sup>11</sup> State v. Homan, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014).

<sup>12</sup> Homan, 181 Wn.2d at 106.

<sup>13</sup> Homan, 181 Wn.2d at 106.

<sup>14</sup> Homan, 181 Wn.2d at 106.

<sup>15</sup> Salinas, 119 Wn.2d at 201.

<sup>16</sup> Homan, 181 Wn.2d at 106.

Between September 7, 2008 and October 6, 2008, Andaras Darazs applied for and obtained a residential mortgage through Defendant Diana Merritt's mortgage brokerage company, Merit Home Finance. Merritt was the loan originator and ordered the appraisal from the co-defendant, Douglas White. The appraisal report provided to Merritt by White (Ex.174) stated that it was prepared by Tom Reed, a licensed certified residential appraiser and contained his electronic signature. Merritt provided the appraisal report to the lender as the basis for the value of the residential property. Darazs did not know that the appraisal report submitted to the lender by Merritt was not in fact prepared by Reed, but rather by White. At the closing of the loan, Merritt received payment for brokering the mortgage in the form of an origination fee.

The court found several of the borrowers "did not know that the appraisal report submitted to the lender by Merritt was not in fact prepared by Reed, but rather by White." She challenges finding C as it relates to borrower Andaras Darazs. Merritt claims that because Darazs could not recall or remember who did the appraisal, the evidence was insufficient.

But Darazs testified that he refinanced or purchased his place through Merritt, who was "a friend of a friend." He knew White was Merritt's boyfriend. He initially hired him as his real estate agent but changed to someone else. Darazs testified that that was the extent of his relationship with White. He identified exhibit 172 as his loan application for the property which describes its purchase as the reason for the loan. Darazs testified that Merritt helped him finance the property through Merit Home Finance. Darazs verified exhibit 174 as the appraisal for his property. He further testified that the document contained Reed's signature as the appraiser for that property. Although Darazs could not



specifically recall reviewing the appraisal report, he did identify his home in the report and that the report contained Reed's name as the appraiser. Exhibit 174, along with Darazs's testimony, is substantial evidence supporting the trial court finding.

Merritt next challenges finding L which states,

As to each count, Merritt knew that the respective appraisal listed Tom Reed as the appraiser and bore his electronic signature. Merritt also knew that Reed did not do the appraisals; in fact, she hired Douglas White, the co-defendant, to do them. There is no indication anywhere on the appraisal reports that White was involved in the preparation of the appraisal or the report, irrespective of whether White had a certified residential appraiser license.

(Emphasis added.) Merritt claims that because the reports listed White's company, Washington Real Estate Services Inc., as the business and included White's e-mail and phone number, this was sufficient to find that White was involved in the preparation of the appraisal. However, the reports contained Tom Reed's signature above any address and company name. The cover sheet of each appraisal contained Tom Reed's name without a company name. Tom Reed's signature appears on a letter transmitting the appraisal report that contained Merit Home Finance's address in Redmond. White's name does not appear anywhere in those appraisal documents. Substantial evidence supports the court's finding.

Finally, Merritt challenges findings N and O.

Finding N states,

Based on her knowledge of the mortgage lending process, Merritt knew that the appraisals purportedly signed by Reed would be relied upon by the mortgage lender, the borrower and others in the lending process. By intentionally providing these invalid appraisals to others involved in the mortgage lending process, Merritt employed an artifice, scheme, or device to materially mislead borrowers and lenders alike, knowing full well that the lenders, borrowers and others would rely upon these misrepresentations.

Finding O states,

Merritt received monetary payment upon the closing of each of these loans with the knowledge that these residential mortgages had been obtained as a result of mortgage fraud, in violation of RCW 19.144.080(1)(a) and (b), (2), and (3) and RCW 19.144.090.

Substantial evidence supports both of the trial court's findings.

Anyone reading the appraisals would reasonably conclude that a licensed appraiser named Tom Reed completed them. Merritt knew that White did the appraisals as she hired him to do them. Without valid appraisals by a licensed appraiser, lenders would not have made the loans. As Keil's testimony points out, the appraisal document is essential to obtaining funds for a loan or refinance and the appraisal must be done by a licensed appraiser. Thus, a facially valid appraisal is a material aspect of the lending process. Merritt knew that Tom Reed's signature was on the appraisals and that he did not perform them. She received monetary compensation at the closing of each mortgage as a result of those appraisals.

Substantial evidence supports the findings of fact and they support the court's conclusions of law. Conclusion of law II states,

The following elements of the crimes charged have been proven by the State beyond a reasonable doubt:

On the date or dates specified for each count described in the Findings of Fact, in conjunction with making, brokering, obtaining, or modifying a residential mortgage the defendant directly or indirectly knowingly:

(1)(a) Employed any scheme, device or artifice to defraud or materially mislead any borrower during the lending process; (b) defrauded or materially misled any lender or person, or engaged in any unfair or deceptive practice toward any person in the lending process; and

(2) Made any misstatement, misrepresentation or omission during the mortgage lending process knowing that it may be relied upon by a mortgage lender, borrower or any other party to the mortgage process; and

(3) Used or facilitated the use of any misstatement, misrepresentation, or omission, knowing the same to contain a misstatement, misrepresentation, or omission, during the mortgage lending process with the intention that it be relied on by a mortgage lender, borrower or any other party to the mortgage lending process; and

(4) Received any proceeds or anything of value in connection with the residential mortgage closing that such person knew resulted from a violation of subsection (1), (2) or (3) of this section; and

(5) Any of these acts occurred in the State of Washington.

Merritt's claim that insufficient evidence supports this conclusion lacks merit. Evidence clearly showed that Merritt submitted copies of Reed's license to support the appraisals that were performed by White. She further submitted

those appraisals with Reed's electronic signature when she knew that White had performed the appraisals. The mortgage lenders relied on the fact that the appraisals were performed by a licensed appraiser to determine whether to fund a particular transaction and the amount to fund. Merritt testified that she was aware of the rules and regulations of a loan originator. Documents that did not contain a certified appraiser's license would be insufficient to obtain a loan. Merritt's company received over 57 percent of its income from loans based on appraisals that were performed by White but submitted under Reed's signature and license certifications.

Sufficient evidence supports the convictions.

Statement of Additional Grounds for Review

Merritt submitted a statement of additional grounds for review. There, she alleges some of the same issues that we have addressed in her direct appeal, namely, lack of sufficient evidence to support the convictions and that the convictions were barred by the statute of limitations.

Merritt identifies inconsistencies in the testimony and from them argues that substantial evidence does not support the trial judge's findings. We defer to the trier of fact on issues of conflicting testimony, witnesses' credibility, and the persuasiveness of the evidence.<sup>17</sup>

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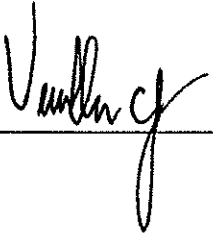
<sup>17</sup> State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

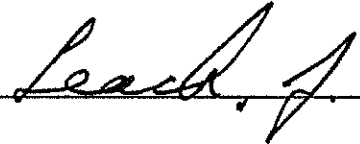
Finally, Merritt suggests that an improper relationship existed among the defense attorney, prosecutor, and judge because they all had known each other for a long period of time. She insinuates that she might not have chosen a bench trial had she been aware of these relationships. The record contains no evidence of any improper relationship. Merritt's conclusory allegations provide no basis for appellate review.<sup>18</sup>

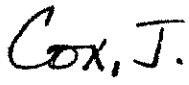
Conclusion

Because the statute of limitations is not an element of a crime, the statute of limitations does not bar Merritt's convictions, and substantial evidence supports those convictions, we affirm.

WE CONCUR:

  
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\_\_\_\_\_

  
\_\_\_\_\_

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<sup>18</sup> See RAP 10.10(c) (appellate court will not consider statement of additional grounds for review unless it informs the court of the nature and occurrence of alleged errors).

# APPENDIX B

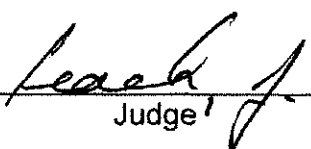
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 74469-1-I
	)	
Respondent,	)	ORDER GRANTING MOTION
	)	TO PUBLISH OPINION
v.	)	
	)	
DIANA JOLINE MERRITT,	)	
	)	
Appellant.	)	
_____	)	

The respondent, State of Washington, having filed a motion to publish opinion, and the appellant, Diana Joline Merritt, having filed a response in support of the motion, and the hearing panel having reconsidered its prior determination and finding that the opinion will be of precedential value; now, therefore, it is hereby:

ORDERED that the unpublished opinion filed August 21, 2017, shall be published and printed in the Washington Appellate Reports.

FOR THE COURT:

  
\_\_\_\_\_  
Judge

**NIELSEN, BROMAN & KOCH P.L.L.C.**

**October 18, 2017 - 2:33 PM**

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**Appellate Court Case Number:** 74469-1  
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**Superior Court Case Number:** 14-1-02955-8

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