

No. 79564-9

IN THE
SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

VIRGIL R. MONTGOMERY,
Petitioner.

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SUPPLEMENTAL BRIEF OF PETITIONER

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A. ASSIGNMENTS OF ERROR

Assignments of Error: The Assignments of Error are set forth at pages 1-2 of Appellant's Brief filed in Division Three (Appellant's Brief).

Issues: The issues before this Court are set forth at pages 1-2 of Mr. Montgomery's Petition for Review filed with this Court (Petition).

B. STATEMENT OF THE CASE

The Statement of the Case is set forth at pages 2-17 of the Petition and pages 4-23 of Appellant's Brief.

C. ARGUMENT

POINT I: THIS COURT SHOULD REVERSE MR. MONTGOMERY'S CONVICTION BECAUSE ADMISSION OF IMPERMISSIBLE OPINION TESTIMONY AS TO HIS GUILT WAS MANIFEST ERROR AND NOT HARMLESS BEYOND A REASONABLE DOUBT

a. Mr. Montgomery's Challenge to the Impermissible Opinion Testimony Is Manifest Constitutional Error That May Be Raised for the First Time on Appeal

Even though the challenged opinion testimony in this case was not objected to at trial, this Court can consider the matter. A claim of error may be raised for the first time on appeal when it invokes a "manifest error affecting a constitutional right." RAP

2.5(a)(3); State v. Walsh, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). In the context of witnesses' opinions as to the victims' credibility, this Court recently held that opinion testimony creates manifest constitutional error if it expresses a nearly explicit belief in an ultimate issue of fact:

"Manifest error" requires a nearly explicit statement by the witness that the witness believed the accusing victim. Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow.

State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007) (holding that the witnesses, police investigators and a doctor, did not directly comment on the credibility of the child victims). This view, the Court held, is consistent with its "precedent that it is improper for any witness to express a personal opinion on the defendant's guilt." Id. at 937, *citing*, State v. Garrison, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967); State v. Trombley, 132 Wn. 514, 518, 232 P. 326 (1925).

Although this case does not involve testimony as to the credibility of a witness, it nevertheless meets the "explicit or almost explicit witness statement on an ultimate issue of fact" requirement of Kirkman. Mr. Montgomery was charged with possession of ephedrine or pseudoephedrine with intent to manufacture methamphetamine. To establish this crime, the State had to prove that he 1) possessed ephedrine or pseudoephedrine and 2) intended to use the pseudoephedrine to manufacture methamphetamine. RCW 69.50.440. Mr. Montgomery admitted the possession. Thus, the only issue was intent.

Three witnesses explicitly stated their opinions as to Mr. Montgomery's criminal intent, meeting the Kirkman requirement. The two investigating detectives stated they believed Mr. Montgomery was buying pseudoephedrine with the intent to manufacture methamphetamine. Thus, the detectives actually declared their beliefs that both prongs of the relevant statute were satisfied, effectively declaring Mr. Montgomery guilty.

Specifically, one detective believed "very strongly" that Mr. Montgomery was guilty: "I felt very strongly that they were, in fact, buying ingredients to manufacture methamphetamine." RP at 40. A second detective expressed his similar belief slightly less directly when explaining the timing of the stop of Mr. Montgomery's vehicle: "It's always our hope that if the person buying these chemicals, *that are for what we believe to be methamphetamine production*, that we can take them back to the actual lab location." RP at 116 (emphasis added).

In addition, the third witness, the State's forensic chemist, stated his belief as to Mr. Montgomery's intent. The chemist explicitly stated he believed Mr. Montgomery possessed a criminal intent when he testified that the evidence, taken together, would "lead [him] toward [the conclusion that] this pseudoephedrine is possessed with intent." RP at 160. Accordingly, three witnesses in this case offered explicit or nearly explicit statements as to an ultimate issue of fact.

Plainly, this situation is somewhat different than the specific fact pattern addressed in Kirkman, which concerned opinions as to witness credibility, not guilt. However, this Court's holding, that an "explicit or almost explicit witness statement on an ultimate issue of fact" is manifest error, reaches broader fact patterns, including the instant one.

Indeed, this Court has long considered statements of belief in the defendant's guilt inherently improper. In Kirkman, the Court specifically ensured that its holding was consistent with its "precedent that it is improper for any witness to express a personal opinion on the defendant's guilt." Kirkman, 159 Wn.2d 918, 937. Garrison, cited by the Court in Kirkman, provides a direct parallel to the instant case.

In Garrison, the Court upheld the trial court's decision to exclude the testimony of the proprietor of a tavern that had been burgled. That case, like the instant one, was apparently a one-issue case: There was no question of the existence of a burglary, the only issue was the identity of the perpetrator. The

defendant had wanted the proprietor to testify as to whether he believed the defendant had participated in the burglary. The Court held such testimony was properly excluded as it amounted to an opinion as to the defendant's guilt:

The proprietor of the tavern was in no better position than any other person who investigated the crime to give such an opinion. The question literally asked the witness to express an opinion on whether or not the appellant was guilty of the crime charged. Obviously this question was solely for the jury and was not the proper subject of either lay or expert opinion.

Garrison, 71 Wn.2d 312, 315; cf. State v. Mason, 160 Wn.2d 910, 932, 162 P.3d 396 (2007) (holding testimony regarding a doctor's issuance of a presumptive death certificate was not improper when such testimony did not amount to an opinion that defendant was guilty of murder; whether missing victim had died was merely one contested issue in case).

Similarly, the police officers and forensic chemist in this case were in no better position than anyone else to express an opinion as to Mr. Montgomery's intent. Their opinions as to such intent

were the same as an opinion as to identity of the perpetrator would have been in Garrison - an opinion as to guilt or innocence. While Garrison did not address what constitutes manifest error, it is representative of the Court's separation of opinions as to guilt from other, potentially permissible types of opinion testimony.

Indeed, an opinion as to guilt may be inherently more problematic than the general situation addressed in Kirkman, which concerned an opinion as to victim credibility. While an opinion as to guilt leaves no open questions, it may be possible for a witness to vouch for the credibility of the accuser but still leave open issues of, for example, identity or intent. Thus, cases such as this one, where an opinion directly comments on the defendant's guilt, might warrant more lenient treatment for a finding of manifest error than was required in Kirkman. In any event, this case meets the Kirkman test for manifest error as it contains an "explicit or almost explicit witness statement on an ultimate issue of fact" and Mr. Montgomery may

challenge the opinion testimony for the first time on appeal.

b. Admission of the Impermissible Opinion Testimony Was Not Harmless Beyond a Reasonable Doubt, Requiring Reversal

This Court should reverse Mr. Montgomery's conviction as admission of the impermissible opinion testimony was not harmless beyond a reasonable doubt. To determine whether constitutional error is harmless, Washington has used the "overwhelming untainted evidence" test since 1985. Under this test, if the untainted, admitted evidence is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless. State v. Lord, 161 Wn.2d 276, 295, 165 P.3d 1251 (2007); State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). However, Mr. Montgomery argues that given U.S. Supreme Court jurisprudence, the appropriate test for reviewing claims of federal constitutional error is the "contribution" test, under which an appellate court looks at the tainted evidence to determine if that evidence could have contributed to the fact finder's determination of guilt. If so,

reversal is required. See, e.g., Sullivan v. Louisiana, 508 U.S. 275, 279-80, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (rejecting the "overwhelming untainted evidence" test in favor of the "contribution" test). Under either test, the error here was not harmless.

Applying the overwhelming untainted evidence test, the untainted evidence in this case was insufficient to convict Mr. Montgomery. As noted, the only issue in this case was Mr. Montgomery's intent. Without the opinion testimony, the evidence as to Mr. Montgomery's intent consisted solely of his purchasing, in the company of a companion who made similar purchases, entirely legal products. The State used both the items purchased and the manner in which they were purchased to attempt to prove guilt.

Mr. Montgomery purchased two boxes of Target-brand cold medicine and one box of Sudafed-24. In addition, he purchased a gallon of acetone, a large bottle of hydrogen peroxide and several boxes of matches. His shopping companion, Ms. Biby, shopping independently,

purchased four boxes of cold medicine, matches and denatured alcohol. RP at 32-34, 37-38, 81, 112-13, 118. Taken together, the two possessed between 149 and 173 tablets. Cf. RP at 137 (149 tablets) & RP at 157-58 (173). In the car were found the items the officers observed the two purchase, five additional boxes of matches, nine store receipts dated that day and a crack pipe belonging to the owner of the car, a relative of Ms. Biby's, under the passenger seat. RP at 44-45. The State did not attempt to connect the crack pipe to either Mr. Montgomery or his companion.

These items, taken together, may raise suspicions. While all have innocent purposes, the items can also be ingredients in methamphetamine manufacturing. RP at 144-47. At the same time, there is nothing about the items purchased to unequivocally distinguish these purchases from innocent purchases. To support a conviction, the defendant's intent "must logically follow as a matter of probability from the evidence." State v. McPherson, 111 Wn. App. 747, 759 46 P.3d 284

(2002). This is not the case here, where the line dividing guilt and innocence was never crossed.

For example, Mr. Montgomery and his companion did not possess an unusually large quantity of cold tablets. Cf. State v. Missier, 140 Wn. App. 181, 165 P.3d 381 (2007) (upholding conviction when defendant possessed over 30 boxes of pseudoephedrine, plus 64 lithium batteries). Similarly, none of the tablets had been removed from its packaging or crushed. Cf. State v. Moles, 130 Wn. App. 461, 123 P.3d 132 (2005) (intent proven when defendant possessed, *inter alia*, almost 440 assorted loose cold pills); see also McPherson, 111 Wn. App. 747 (in context of charge of manufacturing methamphetamine, charge proven by, *inter alia*, a plastic baggie containing ground-up pseudoephedrine). No inculcating statements were made. Cf. State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006) (defendant's statement that he was giving cold tablets to a third party to make methamphetamine contributed to sufficiency of the evidence of intent to manufacture). No evidence of methamphetamine manufacture or use was

discovered. Cf. Moles, 130 Wn. App. 461 (coffee filter with methamphetamine residue contributed to sufficiency).

A review of the prior decisions reveals that every case finding intent to manufacture methamphetamine based on possession of ephedrine or pseudoephedrine contains at least one "red flag": Each contains a clear signal sharply distinguishing the defendants' possession from innocent possession, whether it is a filter containing methamphetamine residue, a statement that the cold tablets were to be used in manufacturing methamphetamine, or the sheer quantity possessed.

Because most of the items used in methamphetamine manufacturing are purchased innocently every day, it is these red flags that protect the innocent purchasers of precursors from being caught in the nets trapping the guilty. Without the safeguard of clear evidence of illicit purpose, the maxim *caveat emptor* would be imbued with new meaning. Notably, it is the red flag that is missing in this case.

Here, considering their purchases jointly, Mr. Montgomery and his companion purchased seven boxes of cold tablets. They also purchased one gallon of acetone, one bottle of hydrogen peroxide, several boxes of matches and denatured alcohol. While all these items can be used to manufacture methamphetamine, they also have legal purposes in the quantities purchased and thus should not be considered red flags. Further, in methamphetamine manufacturing, these liquids last for more than one batch of illegal drugs while it is the cold tablets that get used up. RP at 55-57. Accordingly, it is the quantity of cold tablets that generally provides an indication of intended methamphetamine manufacturing. Here, when Mr. Montgomery and his companion visited at least five stores selling cold medicine and only bought seven boxes, the quantity purchased, even when combined with the liquids purchased, does not indicate a criminal content.

Nor does the crack pipe recovered provide the requisite red flag. The pipe was recovered from

underneath the passenger's seat of the vehicle the two were using. The car, which Mr. Montgomery was driving, belonged to a relative of Ms. Biby. The pipe was never connected to either Mr. Montgomery or Ms. Biby, nor was the residue it contained ever identified. See RP at 45-46, 60-61, 92. Indeed, in its questioning, the State suggested that the pipe "could have easily been that relative's." RP at 46. Moreover, Mr. Montgomery's undisputed testimony was that he had never seen the pipe until it was produced in court. RP at 183-84. Under these circumstances, when the pipe was connected to neither Mr. Montgomery nor Ms. Biby, it cannot be used to establish Mr. Montgomery's guilt.

In sum, there is nothing that unequivocally distinguishes Mr. Montgomery's purchases from innocent purchases. Under these circumstances, the items Mr. Montgomery and his companion purchased are insufficient to establish his intent to manufacture methamphetamine.

In this regard, this Court should retain the fact-based nature of a sufficiency analysis and resist any short-hand "rule." Division One recently synthesized a

rule for determining sufficiency of the evidence to support intent to manufacture methamphetamine. In Missier, the court analyzed Moles, Brockob and State v. Whalen, 131 Wn. App. 58, 64, 126 P.3d 55 (2005) to conclude that the test for proof of intent is "pseudoephedrine possession plus." Missier, 140 Wn. App. 181, 189. In other words, if a defendant has been found to possess pseudoephedrine and "at least one additional factor, suggestive of intent," intent is established. Id. at 188.

But the traditional fact-based analysis cannot so easily be reduced to a formula. Indeed, in Missier the situation was more complex than mere "pseudoephedrine possession plus." There, in reviewing the trial court's grant of a motion to dismiss, the court found the defendant's possession of pseudoephedrine *plus* lithium batteries met the test and established intent.

But the quantities possessed in that case created the red flag absent in the instant case. In Missier, the defendant did not purchase a few boxes of pseudoephedrine. Instead, he had shoplifted 30 boxes

of cold tablets and more were found in his car.

Similarly, he did not possess a household-use quantity of lithium batteries, but instead had 64. Id. at 183.

Accordingly, while the simple rule "pseudoephedrine possession plus" would make a court's job easier, it does not comport with our constitutional framework.

For all these reasons, the items Mr. Montgomery and Ms. Biby purchased do not indicate a criminal intent.

Similarly, the manner in which Mr. Montgomery made his purchases, even when combined with the purchases themselves, do not provide the evidence that marks an intent to manufacture methamphetamine. Mr. Montgomery and his companion entered several different stores together but split up to do their shopping, chose their purchases apart from each other, and selected different check out lines. See RP at 34-40, 113-18. While the officers in this case believed such behavior to be inculcating, it is also perfectly consistent with innocence. Indeed, Mr. Montgomery and Ms. Biby entered and left stores together, with Mr. Montgomery even

waiting in the front of one store for his companion to finish. RP at 35. They went together to the cold medicine aisle in two of the stores. RP at 112-13, 117. Twice Mr. Montgomery pointed out a particular brand of cold medicine to Ms. Biby. RP at 33, 113, 117. These actions are not the behavior of people attempting to conceal a crime. Cf. Brockob, 159 Wn.2d at 340 (when defendant and companion together possessed four packages of cold tablets, Court assumed they purchased the tablets in concert to avoid violating the law limiting the number purchased and used this fact to help establish intent).

Indeed, if Mr. Montgomery and his companion were purchasing cold pills in concert to avoid the law limiting the number purchased and with the aim of making methamphetamine, they certainly made a hash of it. The pair went together into at least five separate stores that sold cold medicine (two Targets, a grocery store, K-Mart and Wal-Mart). Between them, they could have garnered 30 packages of cold medicine. That they only came up with seven supports the conclusion that

they were innocently shopping. Cf. Moles, 130 Wn. App. 461 (three individuals admitted buying cold tablets in concert; during a search of their vehicle police discovered eight empty blister packs, four packages of cold tablets, and close to 440 loose pills). For all these reasons, neither the actions of Mr. Montgomery and his companion nor the items they purchased support a conclusion that they intended to manufacture methamphetamine.

In sum, the untainted evidence in this case was insufficient to convict Mr. Montgomery. Accordingly, the erroneous admission of the opinion testimony was not harmless beyond a reasonable doubt and this Court should reverse his conviction.

In addition, under the contribution test, the error was also not harmless. When the two investigating officers and the forensic chemist all stated their beliefs that Mr. Montgomery possessed the pseudoephedrine with the intent to make methamphetamine, and the other evidence against him was equivocal at best, those opinions plainly contributed

to the guilty verdict in this case. Accordingly, this Court should reverse Mr. Montgomery's conviction.

Under either harmless-beyond-a-reasonable-doubt test, the admission of the opinion testimony in this case was not harmless and this Court should reverse Mr. Montgomery's conviction.

c. Division Three's Opinion on this Issue is contrary to both Garrison and Kirkman and Should be Reversed

Division Three filed its opinion before Kirkman was decided and so assumed, without discussion, that Mr. Montgomery could raise the issue of impermissible opinion testimony as manifest error. Further, it did not conduct a harmless error test as it found that no error had occurred. This conclusion is contrary to both Garrison and Kirkman and should not be permitted to stand.

The court began with the rules prohibiting opinions as to a defendant's guilt:

No witness may testify about "his opinion as to the guilt of the defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Permitting a witness to express such an opinion invades upon the proper province

of the jury. State v. Garrison, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967).

State v. Montgomery, unpublished decision of Division Three in this matter, attached as Appendix to Petition for Review (Decision), at 9. Next it distinguished the opinions expressed in this case as proper inferences from the evidence, citing ER 704 and Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993), and claiming that no direct comment on Mr. Montgomery's guilt were made in this case. Id. at 9-10. This conclusion cannot withstand scrutiny.

Here, the crime required proof of two elements, possession and intent. Both detectives gave their opinions that Mr. Montgomery purchased the pseudoephedrine (possession) with intent. One detective believed "very strongly" that this was true. If these opinions are not direct comments on guilt, it is difficult to imagine what might be, short of an outright declaration that a defendant is "guilty." The forensic chemist's opinion on intent, while not also a comment on possession, similarly was a direct comment on guilt when intent was the only disputed issue.

Accordingly, Division Three's opinion abrogates both the rule of Garrison holding opinions as to a defendant's guilt improper and the rule of Kirkman holding erroneous explicit or almost explicit witness statements on an ultimate issue of fact. For these reasons, this Court should reverse Division Three's decision in this case.

POINT II: THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. MONTGOMERY INTENDED TO MANUFACTURE METHAMPHETAMINE AND THIS COURT SHOULD REVERSE HIS CONVICTION

For his arguments on this point, Mr. Montgomery relies on his arguments in Point I(b) of this Supplemental Brief and the arguments contained at pages 12-16 of his Petition for Review filed with this Court.

POINT III: WHEN MR. MONTGOMERY DID NOT INDICATE ANY WITNESSES HAD PARTICULAR KNOWLEDGE OF HIS INNOCENCE AND, IN FACT, CALLED A WITNESS TO CORROBORATE HIS EXPLANATION OF EVENTS, THERE WAS NO MISSING WITNESS

There were no missing witnesses in this case. A missing witness determination requires that the missing witness be material, that the witness possess some particular knowledge to support a party's theory of the case. See, e.g., State v. Blair, 117 Wn.2d 479, 816

P.2d 718 (1991) (defendant claimed names on slips of paper denoted gambling debts, not notations from drug deals, thus the individuals' testimony would have been material to defense); State v. Davis, 133 Wn. App. 415, 138 P.3d 132 (2006) (defendant claimed he was at a restaurant where he talked to friends at the time of the crime, thus the witnesses at the restaurant were material to alibi defense).

Here, the State conceded that Mr. Montgomery's son was not a missing witness. Further, none of Mr. Montgomery's statements make either his grandson or landlord material, and thus, missing, witnesses. (The facts regarding this issue are set forth in detail in Appellant's Brief at 15-23.)

On direct examination, Mr. Montgomery testified that he lived with his son and grandson. He stated that he has an agreement with his landlord in which he "pays the space rent" and does repairs on the trailer. RP at 167; *cf.* Decision at 13 (finding Mr. Montgomery "asserted twice that he was replacing the tiles on the floor pursuant to an agreement with his landlord.").

Later, he explained that he bought the matches at issue for his wood heater and because his son smokes. RP at 173. He bought three boxes of cold medicine, two for himself and one for his son. RP at 177. He bought acetone to dissolve the glue under old linoleum he was removing from the trailer. RP at 179. Finally, he bought hydrogen peroxide to doctor an injured dog. RP at 182.

Mr. Montgomery never suggested his grandson or landlord could prove his innocent intent in some particular way. For example, he did not aver that he was working on the linoleum with his grandson or landlord, that his landlord had told him to replace the linoleum, or that either knew the reasons why he bought the items at issue. All he maintained was that he lived with his grandson and rented his trailer from a landlord; he did not indicate that these people had special knowledge of his innocence.

Instead, it was the State that attempted to make these individuals material to the case. On cross examination, the prosecutor first asked Mr. Montgomery

whether his son could corroborate his story, then turned to his grandson, asking if he knew about the dog, and the acetone and tiles. RP at 188-89. While Mr. Montgomery acknowledged that these individuals would be aware of the situations encompassed by his explanation, he never suggested that they were in some way uniquely situated to corroborate his position. Just because *someone* might corroborate an explanation does not make them a missing witness. Presumably some of Mr. Montgomery's neighbors could have corroborated parts of his theory of the case, yet the State did not make issue of them. Instead, the witness has to have been material to the case in a way that these individuals simply were not. Blair, 117 Wn.2d 479 (witness must be important; defendant put missing witnesses at issue by claiming names on slips of paper denoted gambling debts, not notations from drug deals).

Moreover, after the State created the missing witness issue, Mr. Montgomery did put on a witness to corroborate his testimony. He called his adult daughter, who had been attending the trial on his

behalf. She described the trailer where Mr. Montgomery lived; she was there when he was doctoring the injured dog; and she was familiar with her father's financial circumstances. RP at 195-97. Thus, she was in as good a position, if not better, to corroborate Mr. Montgomery's explanation than his 14-year-old grandson or landlord. Accordingly, when Mr. Montgomery proceeded to call a witness to corroborate his version of events, the absence of his grandson and landlord was even more immaterial. After all, a defendant is not required to call every witness who might corroborate every aspect of his defense, and to require him to do so would certainly be burden-shifting.

For all of these reasons, no witnesses were missing, the missing witness instruction was improperly given, the prosecutor's comments during closing argument regarding "missing" witnesses and Mr. Montgomery's failure to corroborate his testimony were inappropriate and prejudicial, and this Court should reverse Division Three's opinion. In addition, the missing witness instruction, combined with the State's

closing argument, impermissibly shifted the burden of proof to the Mr. Montgomery, requiring reversal.

* * * * *

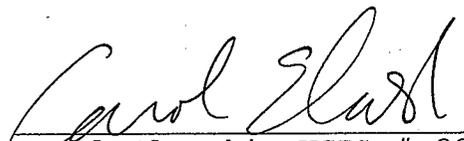
For his remaining arguments, Mr. Montgomery relies on the arguments contained within his Petition for Review and within Appellant's Brief.

D. CONCLUSION

For all of these reasons and the reasons set forth in Appellant's Brief and Petition for Review, Virgil R. Montgomery respectfully requests this Court to reverse his conviction and order his case dismissed or, in the alternative, to vacate and remand his sentence for resentencing in accordance with RCW 9.94A.650.

Dated this 29th day of November, 2007.

Respectfully submitted,


Carol Elewski, WSBA # 33647

CERTIFICATE OF SERVICE

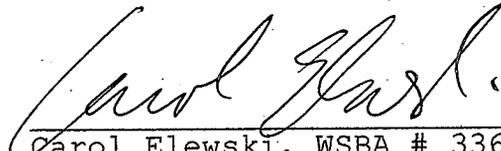
I certify that on this 29th day of November 2007,
I mailed the original and one copy of the attached
Supplemental Brief, postage prepaid, to:

Mr. Ronald R. Carpenter
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Temple of Justice
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and one copy of the attached brief to:

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