

FILED
SUPREME COURT
STATE OF WASHINGTON
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CLERK

NO. 95814-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH JAMES GILBERT,

Appellant.

SECOND SUPPLEMENTAL BRIEF OF RESPONDENT

DAVID R. QUESNEL
Klickitat County Prosecuting Attorney

JENNIFER PAIGE JOSEPH
Special Deputy Prosecuting Attorney
Attorneys for Respondent

Klickitat County Prosecuting Attorney
206 S Columbus Ave, Rm. 106
Goldendale, Washington 99620
(509) 773-5838

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A. INTRODUCTION

By letter dated December 3, 2018, this Court directed the parties to file supplemental briefs to clarify which sentence Gilbert is currently serving and address the applicability of RCW 9.94A.730 to his sentence. As more fully explained below, Gilbert is currently serving his sentence for first degree murder and may petition for release under RCW 9.94A.730 once he has served no less than twenty years on that count.

B. ADDITIONAL PERTINENT FACTS

The Indeterminate Sentence Review Board (ISRB) held a hearing related to Gilbert's aggravated murder sentence on March 20, 2018. Appendix at 1. In its decision dated April 13, 2018, it found Gilbert "releasable from Count II Aggravated Murder in the First Degree to consecutive Count I Murder in the First Degree ... effective September 19, 2017." Id. According to the ISRB, this means "Gilbert may petition the Board [for release] after he has served 20 years on the Count I Murder in the First Degree, as per ESSB 5064 (early release consideration) that Legislature passed in 2014." Id. ESSB 5064 is the legislation that, among other things, created the early release provisions of RCW 9.94A.730.

C. ARGUMENT

1. GILBERT IS CURRENTLY SERVING THE SENTENCE FOR HIS FIRST-DEGREE MURDER OF ROBERT GRESHAM.

Gilbert was convicted of two counts of first degree murder, as well as other crimes, and ordered to serve the two murder sentences consecutively. State v. Gilbert, 3 Wn. App. 2d 1007, 2018 WL 1611833 at *1 (Wash. Ct. App. April 3, 2018) (hereafter, “Gilbert II”); CP 88. Count I pertained to the premeditated first-degree murder of Robert Gresham; count II pertained to the aggravated first-degree murder of Loren Evans. Id. The Department of Corrections (DOC) considered Gilbert to be serving the aggravated murder sentence first.¹ Appendix at 1.

In April 2018, the ISRB found Gilbert “releasable” from his aggravated murder sentence to begin serving his first-degree murder sentence, “effective September 19, 2017.” Appendix at 1. The ISRB did not find that Gilbert was releasable to the community; only that “it is appropriate to move Mr. Gilbert from the Aggravated Murder in the First Degree to the Murder in the First Degree.” Appendix at 6. In making that

¹ It appears that the sequencing of individual consecutive terms is a matter of DOC discretion; the State is unaware of any statute or regulation that limits or guides this discretion, except that “parole and discharge shall be governed by the laws applicable to the sentence imposed by the court.” RCW 72.02.240.

determination, the ISRB contemplated that Gilbert would remain in total confinement for at least 20 more years. Appendix at 8 (noting that the “next action” is that “Gilbert may petition the board after he has served 20 years on the Count I Murder in the First Degree.”). The ISRB made no finding about whether “it is more likely than not that [Gilbert] will commit new criminal law violations if released” under RCW 10.94.030(3)(f).

Based on the ISRB decision, it appears that Gilbert is currently serving the concurrent sentences imposed for first-degree murder of Mr. Gresham, first-degree robbery, first-degree burglary, first-degree theft, and second-degree assault.

2. GILBERT MAY PETITION FOR RELEASE AFTER HE HAS SERVED AT LEAST TWENTY YEARS OF TOTAL CONFINEMENT FOR COUNT I, FIRST DEGREE MURDER.

RCW 9.94A.730 does not address how it applies when a juvenile is convicted of aggravated murder in addition to crimes that are not specifically excluded from operation of the statute. But the Legislature’s intent to treat aggravated murder as a different type of crime is evident in its plain language and in related statutes. Considering the statutory scheme as a whole, it is clear that Gilbert must serve at least twenty years on the 280-month sentence imposed for crimes other than aggravated murder before he may petition for release under RCW 9.94A.730. Since

Gilbert began serving his current sentence “effective September 19, 2017,” the earliest he may petition for release under this provision is 2037. He will be 60 years old. Gilbert II, at *10 (Fearing, J., dissenting).

RCW 9.94A.730 provides, in pertinent part, as follows:

Notwithstanding any other provision of this chapter, any person convicted of one or more crimes committed prior to the person’s eighteenth birthday may petition the indeterminate sentence review board for early release *after serving* no less than twenty years of total confinement, provided the person has not been convicted for any crime committed subsequent to the person’s eighteenth birthday, the person has not committed a disqualifying serious infraction as defined by the department in the twelve months prior to filing the petition for early release, and the current sentence was not imposed under RCW 10.95.030 or 9.94A.507.

While the statute generally affords relief to juveniles serving lengthy sentences, the Legislature made several significant exceptions. An offender who commits a serious infraction may not petition for release for twelve months. If an offender is convicted of “any” crime after age 18, the statute precludes relief altogether. And, as relevant here, the statute simply does not apply when “the current sentence” was imposed for aggravated murder under RCW 10.94.030.

Before the ISRB released Gilbert from his aggravated murder sentence, he was not eligible for release under RCW 9.94A.730 because his “current sentence” was “imposed under RCW 10.95.030.” Now that

Gilbert’s “current sentence” is for crimes other than aggravated murder, he is no longer exempt from the operation of RCW 9.94A.730(1). But that does not mean that he may petition for release now. Rather, Gilbert may petition for release under RCW 9.94A.730 “after serving no less than twenty years of total confinement” for his non-aggravated murder crimes.

“[T]here is no doubt that aggravated first degree murder is the most serious criminal offense.” State v. Bassett, ___ Wn.2d ___, 428 P.3d 343, 354 (2018). The Legislature has clearly recognized this by treating the crime differently from other crimes. For example, aggravated murder provisions are codified in a wholly separate section of the code from other forms of murder. It is the only crime for which the Legislature has authorized the death penalty.² It is the only crime for which the Legislature authorized life without parole for juveniles.³ The Legislature also recognized the unique nature of aggravated murder by specifically excluding sentences imposed for that crime from the early release provisions of RCW 9.94A.730(1).

While individuals who committed aggravated first degree murders may still obtain early release under RCW 10.95.030, they must serve a

² This Court recently held the death penalty unconstitutional as applied in Washington. State v. Gregory, ___ Wn.2d ___, 427 P.3d 621 (2018).

³ This Court recently held that life sentences violate the state constitution as applied to juveniles. Bassett, 428 P.3d at 355.

longer period in total confinement before they are eligible. People who commit aggravated murder when they are under 16 must serve 25 years in total confinement before they may petition the ISRB for release; those who commit aggravated murder as 16- or 17-year-olds may petition for release only after a minimum term of 25 years or more. RCW 10.95.030(3)(a).

It is significant that a juvenile convicted of lesser crimes may petition for release at least five years sooner than a juvenile convicted of aggravated first degree murder. Beyond demonstrating the Legislature's intent to treat aggravated murder differently, it shows that when a person is convicted of both aggravated murder and other crimes, the aggravated murder sentence(s) must be completed before RCW 9.94A.730's early release provisions are applicable. Since RCW 9.94A.730 permits release after twenty years, but every person convicted of aggravated murder has a mandatory minimum sentence at least five years longer than that, it is simply not possible for someone currently serving an aggravated murder sentence to obtain relief under RCW 9.94A.730.

Nor is it reasonable to read the statute to allow a person serving sentences for both aggravated murder and other crimes to petition for release under RCW 9.94A.730 as soon as he completes the sentence imposed under RCW 10.95.030. First, interpreting the statute that way is

entirely inconsistent with the Legislature's intent to treat aggravated murder differently by excluding it from operation of the statute. Second, interpreting the statute to allow someone who has completed his or her sentence for aggravated murder to immediately petition for release on the consecutive sentences under RCW 9.94A.730 would unlawfully convert consecutive sentences into concurrent ones.

In Matter of Gronquist, this Court recently considered how a release date is calculated for a person serving consecutive sentences for felony sex offenses. ___ Wn.2d ___, 429 P.3d 804 (2018). Gronquist was sentenced to three consecutive, 114-month terms of total confinement. Id. at 806. He claimed that his sentence had already expired because he began serving each consecutive sentence during the period of earned release time (ERT) associated with the prior sentence. Id. at 807. This was different than DOC's practice, which was to "toll" ERT when the defendant reached his early release date on his first sentence, start the next consecutive term, then toll the ERT associated with the second sentence on the early release date for that term, then start the third term, and so on, until all that was left to serve on all sentences was ERT. Id. at 806-07. This Court rejected Gronquist's argument, in part because allowing him to begin serving the second term during the ERT associated with the first

term would improperly convert his consecutive sentences—which must be served “one at a time”—into concurrent ones:

[T]he overlap in Gronquist’s proposed sentence structure necessarily means that parts of each of his terms would be served concurrently; that is, he would receive credit for two terms of confinement at the same time. This is prohibited by Gronquist’s judgment and sentence, which clearly requires each 114-month term to be served consecutively, that is, one at a time. DOC must follow this requirement because it “ha[s] no authority to either correct or ignore the final judgment and sentence.” Dress v. Dep’t of Corr., 168 Wn. App. 319, 329, 279 P.3d 875 (2012).

429 P.3d at 811. “Because the sentence structure Gronquist advocates for is inconsistent with his judgment and sentence and the SRA, DOC’s refusal to apply it is lawful.” Id. at 812.

Similarly, interpreting RCW 9.94A.730(1) to allow Gilbert to petition for release on his non-aggravated murder crimes as soon as he has completed the 25-year minimum term for aggravated murder would necessarily mean that Gilbert would receive credit for two terms of confinement at the same time. As in Gronquist, this is prohibited by Gilbert’s judgment and sentence, which clearly requires each murder sentence to be served consecutively. CP 88.

Further, the plain language of RCW 10.95.030 suggests the Legislature intended that aggravated murder should always be punished separately from other crimes, even other aggravated murders. RCW

10.95.030(1) provides for a sentence of life imprisonment when an adult is convicted of “*the crime*” of aggravated murder. Subsection (3) of the statute applies when a juvenile is convicted of “*the crime* of aggravated first degree murder for *an offense ...*” RCW 10.95.030(3)(a)(i), (ii). In contrast, the Legislature referred to “one or more crimes” when establishing early release measures for those who are not convicted of aggravated murder. RCW 9.94A.730(1). The singular form of the nouns “the crime” and “an offense” in RCW 10.95.030 strongly supports the view that the Legislature intended that a person serve a separate sentence for each aggravated murder. To interpret RCW 9.94A.730(1) to allow a person convicted of aggravated murder and other crimes to petition for release as soon as he completes his aggravated murder sentence is inconsistent with the Legislature’s intent because it means he served no separate sentence for that crime and instead served only one concurrent sentence for all of the crimes.

D. CONCLUSION

Gilbert was convicted of murdering two men, and many other crimes. The sentencing court ordered him to serve separate sentences for the two murders. He has served the first sentence, for the aggravated murder of Loren Evans. He is now serving the second sentence, for the premeditated murder of Robert Gresham. Under the plain language of

RCW 9.94A.730 and related statutes, he must serve twenty years of that sentence before he is eligible to petition for early release. Any other interpretation of that statute would improperly convert court-ordered sequential sentences into concurrent ones and subvert the Legislature's clear intent that aggravated murder sentences be served separately.

DATED this 14th day of December, 2018.

Respectfully submitted,

DAVID R. QUESNEL
Klickitat County Prosecuting Attorney

By:

A handwritten signature in cursive script, reading "Jennifer P. Joseph", written over a horizontal line.

JENNIFER P. JOSEPH, WSBA# 35042
Special Deputy Prosecuting Attorney
Attorneys for Respondent

APPENDIX A



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS
INDETERMINATE SENTENCE REVIEW BOARD
P.O. BOX 40907, OLYMPIA, WA 98504-0907

DECISION AND REASONS

NAME: Gilbert, Jeremiah
DOC #: 709551
FACILITY: Coyote Ridge Corrections Center
TYPE OF HEARING: AMJUVBRD Release Hearing
HEARING DATE: March 20, 2018
PANEL MEMBERS: KR & LRG
FINAL DECISION DATE: April 13, 2018

This matter came before Kecia Rongen and Lori Ramsdell-Gilkey, who are members of the Indeterminate Sentence Review Board (ISRB or the Board) on the above date for a release hearing in accordance with the provisions of RCW 10.95.030. Mr. Gilbert appeared in person. Testimony was provided by Department of Corrections (DOC) Classification Counselor (CC) Jeremy Westphal, and Mr. Gilbert.

BOARD DECISION:

This was a deferred decision following a full Board discussion. Based on the requirements of RCW 10.95.030 the Board finds Mr. Gilbert releasable from Count II Aggravated Murder in the First Degree to consecutive Count I Murder in the First Degree both Klickitat Cause #92-1-00108-1, effective September 19, 2017.

NEXT ACTION:

Mr. Gilbert may petition the Board after he has served 20 years on the Count I Murder in the First Degree, as per ESSB 5064 (early release consideration) that Legislature passed in 2014.

JURISDICTION:

Jeremiah Gilbert is under the jurisdiction of the Board on a June 7, 1993 conviction of Count II, Aggravated Murder in the First Degree in Klickitat County under Cause # 92-1-00108-1. His time start is June 10, 1993. He was originally sentenced to a term of Life without Parole on this Count. On September 21, 2015 he was resentenced to a minimum term of 25 years and a maximum term of Life. He has served approximately 24 years and 8 months plus 263 days of jail time credit.

Under this same Cause Mr. Gilbert was also sentenced for Count I, Murder in the First Degree. He was sentenced to a term of 280 months from an SRA range of 240-320 months with a maximum term of Life. This time is consecutive to Count II and concurrent with all other counts. Count III, Assault in the Second Degree, sentenced to a concurrent 73.5 months from an SRA range of 63-84 months with a max of 10 years. Count IV, Burglary in the First Degree, sentenced to a concurrent 119.5 months from an SRA range of 87-116 and a maximum term of Life. In addition, a special finding of Use of a Deadly Weapon was made regarding this count. Count V, Theft in the First Degree, sentenced to 16 months from an SRA range of 14-18 months and a maximum term of 10 years. Count VI, Robbery in the First Degree, sentenced to 174 months from an SRA range of 129-171 months and a maximum term of Life. In addition, a special finding of Use of a Deadly Weapon was made regarding this count. Counts III, IV V and VI have all expired.

NATURE OF INDEX OFFENSE(S):

In September of 1992, Jeremiah Gilbert, (age 15) and his friend/co-defendant (age 16) ran away from their homes in King County and subsequently committed numerous offenses in Klickitat County. They had two guns with them when they hitchhiked to the area of Centerville, in Eastern Washington. They managed to steal a tractor and drove it to an area where they believed there were some cabins they might be able to get into. They entered at least one of the cabins by shooting the lock off the door.

When they left that area they came across an empty Ford Bronco on the side of the road and tried to hotwire it. The owner was nearby and shouted at them. Jeremiah Gilbert fired a rifle several times at that man who managed to run into a bushy canyon area and avoid being shot. Then another man was seen approaching the boys on a motorcycle. Jeremiah Gilbert fired a shot and hit this man in the chest. He fell to the ground screaming and Mr. Gilbert walked up to his prone body and shot him twice more, killing him.

Jeremiah Gilbert returned to trying to hotwire the Bronco and within a couple of minutes a third man came driving down this same road in a small pickup truck. Jeremiah Gilbert picked up the rifle yet again and fired, sending a bullet through the windshield and hitting this victim in the head killing him. The victim fell to the side and his truck rolled into the Bronco. Jeremiah Gilbert and his co-defendant then removed this victim's body from the vehicle, stole the victim's wallet, then placed their belongings in the truck and drove off.

After driving around the area for a while then abandoning the small pickup truck in a ditch the two young men began walking and went their separate ways. The co-defendant contacted law enforcement to turn himself in and Jeremiah Gilbert was apprehended nearby shortly thereafter.

PRIOR CRIMINAL CONDUCT:

Jeremiah Gilbert's juvenile history consists of convictions on January 7, 1992 for Criminal Trespass First Degree and Malicious Mischief Third Degree. He was placed on six months of community supervision and was discharged from probation on July 17, 1992.

Jeremiah Gilbert had a history of being a runaway and was placed on runaway status several times. He last ran away the month before the index offense and was basically homeless during that time.

HISTORY/COMMENTS:

This was Mr. Gilbert's second hearing with the Board. He was afforded a new hearing based on the fact that he did not have a chance to review his file material prior to his hearing on January 24, 2018 and it was not clarified with him the choices the Board had since he falls under both juvenile board statutes, 10.95.030 and 9.94A.730. Mr. Gilbert acknowledged having an opportunity to review his file material prior to the hearing today. In addition he indicates he understands the Board choices which are to have him remain serving on the Aggravated Murder in the First Degree and add time to his minimum term or to transfer him to his consecutive cause for Murder in the First Degree. He will then have 20 years to serve before he can petition the Board for release. Mr. Gilbert indicated that he has spoken to Nick Allen from Columbia Legal Services and that the previous Decision and Reasons was hand delivered to some members in the legislature. He also indicated that he has an active appeal regarding his sentence structure.

Mr. Gilbert was optimistic in today's hearing and hopes that a court will change his sentence structure so that he will have an opportunity to be released sooner than 20 years.

Testimony provided during his first hearing on January 24, 2018: Classification Counselor Westphal testified that he is familiar with Mr. Gilbert stating he'd served his initial period of confinement at Greenhill until he transferred to the DOC in 1995 after he turned 18. CC Westphal provided several very positive emails from staff who have worked with Mr. Gilbert on different projects. He has incurred a total of 36 serious infractions while in the DOC. His last violent infraction was in 2006 when he assaulted a staff person. There is no description in the record to indicate the seriousness of this assault but it does indicate Mr. Gilbert lost 100 days of good time and received 30 days in segregation. His last serious infraction was in May of 2017. It was reported he had entered another inmate's cell and helped hold him while another inmate assaulted him. There was no evidence he helped with an assault but he was found guilty of being **Out of Bounds**. Mr. Gilbert told the Board that he had gone into another inmate's cell to talk to him and convince him he needed to quit acting up in the dayroom. He stated that he thought the

other inmate would listen to him. The other inmate instead hit Mr. Gilbert and Mr. Gilbert hit him back. CC Westphal stated Mr. Gilbert is typically respectful and easy going.

Mr. Gilbert has completed the following programming/activities: GED, Hobby Shop, Inside/Outside Dads, MRT, Stress-Anger Management, Release Readiness, Dog Program, Family Friendly Events, Victim Awareness, Customer Service Certification, Redemption, Re-entry Life skills, Roots of Success, First Aid, Chemical Dependency, Focusing on Freedom, Clallam Bay Improvement Team, and Bears Behind Bars amongst others.

Mr. Gilbert stated he is no longer a “thug” or involved with any gang activity. He has distanced himself from that life inside and worked on improving himself and preparing for release one day.

Regarding the offenses; Mr. Gilbert stated he was running the streets as a teen, not getting along with his father and he and his friend decided to run away. His friend stole some guns from the family home before they left. He acknowledged the offenses occurred much like described in report, that he doesn’t actually remember everything but has read the reports over the years.

He stated he did not intend to shoot the first man but when he pointed the gun at him it went off. Seeing that the man was seriously injured and bleeding, he decided to “put him out of his misery” and shot him again. Pretty quickly a truck came towards them and Jeremiah Gilbert fired towards that truck intending to scare the man off but it went through the windshield and killed him. He took this man’s wallet and they left in the truck. Shortly thereafter he was apprehended.

Mr. Gilbert stated he is sorry for his actions and knows that nothing can fix what happened. He understands he has negatively impacted a good number of people to include the victims and their families as well as his own family. He stated that he knows saying he is sorry is not enough. All he can do is do the best he can every day.

Mr. Gilbert stated he enjoyed being able to participate in the Dog Training Program at Clallam Bay as well as participating in the Cultural Give Away Program where they sew clothes and quilts

and donate them to the needy. He had a steady girlfriend during this incarceration but recently put their engagement on hold as he is hoping for release and believes he needs to make it on his own in the community for a while. He understands there will be challenges upon release and hopes that prior to his actual release he will be able to work and earn some money to pay his own way. He has had good support from his family during this incarceration and has enjoyed EFV's with his parents. He's has been completely clean and sober since 2006. It's clear he has participated in many positive activities in prison and since 2006 has focused on being a better person and improving himself.

INFORMATION CONSIDERED:

In preparation for Mr. Gilbert's hearing and its decision in this case, the Board completed a review of his ISRB file. The Board considered all information contained in those files, including but not limited to: the most recent DOC facility plan; information regarding institutional behavior and programming; any letters of support and/or concerns sent to the Board; the Juvenile Court Administrator's Report on Decline of Jurisdiction completed prior to sentencing in 1992, the psychological evaluation prepared by Dr. Wentworth in 2017 and a report prepared by Dr. Roesch prior to the resentencing in 2015. The Board also considered the testimony of the witnesses listed above.

REASONS:

This was a deferred decision following a full Board discussion using a structured decision-making framework that takes into consideration; the statistical estimate of risk, criminal history, parole/release history, ability to control behavior, responsivity to programming, demonstrated offender change, release planning, discordant information, and other case specific factors.

Mr. Gilbert presented well and came across as sincere and forthright. At this time, the Board believes it is appropriate to move Mr. Gilbert from the Aggravated Murder in the First Degree to the Murder in the First Degree.

Mr. Gilbert should continue to engage in any offender change programming available to him as well as vocational opportunities that will eventually help with his re-entry into the community.

KR: ch

March 29, 2018

April 2, 2018

April 17, 2018

April 24, 2018

cc: Institution
Jeremiah Gilbert
File



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS
INDETERMINATE SENTENCE REVIEW BOARD
P.O. BOX 40907, OLYMPIA, WA 98504-0907

DATE: 3-29-18

TO: Full Board

FROM: KR & LRG (*Christine*)

RE: Gilbert, Jeremiah/*DOC# 709551*

Board Decision: Releasable from Ct. II Agg. Murder First Degree to CS Ct. I Murder First Degree both Klickitat Cause #92-1-00108-1, effective September 19, 2017.

Next action: Mr. Gilbert may petition the Board after he has served 20 years on the Count I Murder in the First Degree, as per ESSB 5064 (early release consideration) that Legislature passed in 2014.

Agree	Disagree
EB 4/10/18 LRG 4/13/18 KLR 4/13/18 JP 4/13/18	

Hunter, Christine M. (DOC)

From: Hunter, Christine M. (DOC)
Sent: Wednesday, April 25, 2018 9:01 AM
To: DOC DL CRCC Records; Villa, Daniel M. (DOC); Westphal, Jeremy K. (DOC); Turner, Jeremy J. (DOC); Bedford, Marjorie King Cty PA Office; Bell, Kari A. (DOC); Bezanson, Jacob E. (DOC); DOC EOSR; DOC MRP Coordinator; Gibson, Catherine R. (DOC); Lewallen, Sheila R. (DOC); Lopez, Albert (DOC); Miles, Julie M. (DOC); Riley, Robin L. (DOC); Roberts, Rhonda D. (DOC); Victim Services
Subject: D&R for GILBERT, Jeremiah 709551 (JUV)
Attachments: GILBERT, Jeremiah 709551 CRCC 3-20-18.docx
Importance: High

Attached is the final Decisions and Reasons from the above named individual's JUVBRD release hearing held 3-20-18.

Please make copies as needed. We will no longer be mailing a hard copy to the individual.

Classification Counselor/CUS/CPM: The Board requests that the assigned classification counselor or designee discuss the attached Decision and Reasons with the individual **as soon as possible** and provide him with copy of this decision at that time. The purpose of this is so the appropriate assessments and referrals can be made if necessary; also because this information is put into OMNI and will result in an automatic notification of any change to the ERD, available to the individual within 24 hours via the kiosk.

If there are any questions or problems please advise. Thank you for your assistance.

Christine Hunter - CRT
PO Box 40907, Olympia, WA 98504-0907
Phone: 360-407-2402/Fax:360-493-9287
MS:40907



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Superior Court Case Number: 92-1-00108-1

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