

NO. 79364-1-1

No. 98094-2

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

In re Dependency of

A.M.-S., et. al.,

Minor Children.

BRIEF OF RESPONDENT

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I. INTRODUCTION

In a dependency proceeding, the court directed the father to participate in a psychological evaluation and domestic violence assessment. Pursuant to statute, the court ordered that no information given at those examinations could be used in any criminal proceedings concerning abuse or neglect of the children. The father requested, however, that he also be granted immunity against *derivative* use. This request for immunity extended to anything that he might say during the evaluations, even if it was not self-incriminatory.

This court has held that protective orders in dependency cases should be limited to self-incriminatory information. The father's request for broader immunity was therefore properly denied.

Moreover, this court should re-examine its previous dicta suggesting that trial courts have authority to grant derivative use immunity. The governing statute is limited to *use* immunity. Courts have generally recognized that they lack authority to grant immunity absent statutory authorization. The contrary dicta rests on nothing

more substantial than the mis-reading of a Washington Supreme Court decision.

II. ISSUES

(1) In a dependency proceeding, the court required the father to participate in evaluations. The court did not require him to answer questions that could be self-incriminatory. The court ordered that information obtain obtained during the evaluations could not be used against him in any criminal proceedings relating to abuse or neglect of the children. Was the court also required to grant immunity against derivative use of any of the father's statements, including statements that were not self-incriminatory?

(2) Do courts have inherent authority to grant derivative use immunity in dependency proceedings, in the face of a statute that authorizes only use immunity?

III. STATEMENT OF THE CASE

On May 18, 2018, the Department of Social and Health Services filed a dependency petition. The petition alleged that on May 15, two children had been placed into protective custody due to large bruises and marks on their thighs. The children reported that these bruises were from being "whooped" by their father with a belt. CP 485. At a family team decision making meeting on May 18,

the father said "that the last time that he hit the children with a belt was bad, and he hurt them more than what was intended." CP 491.

On May 21, the court entered an agreed shelter care order. CP 455. The two children, as well as their two siblings, were ordered to remain in shelter care. CP 460. Services for the father were "reserved." CP 462.

On August 14, the father stipulated to a dependency order. The children were ordered placed with a relative or suitable person. CP 381. The court ordered a "psychological evaluation with a parenting component" for the father. Other services were again "reserved." CP 385.

On September 5, the father filed a "Notice of Issues for Initial Review Hearing." In it, he requested "an order granting use and derivative use immunity for statements made by the father, and information given, in the performance of services in the course of this dependency case." The Notice stated that "there were allegations of physical abuse claimed in the Dependency petition and there is a pending law enforcement investigation." CP 363. No further information was provided concerning the nature of the allegations or the kinds of questions that could be incriminatory.

The court addressed this request at a hearing on September 20. The Prosecutor participated at this hearing. The court expressed reluctance to grant blanket immunity:

Most of the cases I've seen there's an attorney in the room who advises the client during the evaluation. That's how it goes down. So it's not a blanket. It's never – and (inaudible) specified there's never been a blanket Decker immunity. You're talking more of a protective order and – that has sort of a Fifth Amendment ring to it, but it's not necessary complete immunity. The motion you brought was for complete Decker immunity. That may not be the motion you should be bringing.

CP 156.

The father argued that the State would not be prejudiced by a grant of immunity. CP 163. The court rejected that suggestion:

I don't necessarily think you can really make that statement that they're not prejudiced. It could be – very well be as [the prosecutor] is saying, that the client – your client acted in such a way as to totally taint the evidence such that a subsequent defense attorney couldn't do anything with it

CP 164. The court also pointed out that the father was free to participate in the evaluation and refuse to answer incriminatory questions. CP 166. The court concluded by requesting additional briefing on the issue of immunity. CP 173-74. It entered a dispositional order providing that services for the father were "reserved." CP 335.

The hearing resumed on October 22. In a lengthy oral opinion, the court denied the request for derivative use immunity. CP 200-09. The court pointed out that no one had "asked me what questions we would limit the parents from saying, so the usual bill of particulars that I might have addressed in creating a protective order was not before me." CP 204. The court stated that pursuant to statute it would grant a motion precluding the use of information in criminal proceedings. CP 209.

On November 8, the court entered a dependency review order. As services for the father, the court ordered "psychological evaluation with a parenting component" and "domestic violence assessment." CP 246. The order contained the following provision:

Pursuant to RCW 26.44.053, no information given at any examinations of the parents may be used against the parents in subsequent criminal proceedings against the parents concerning the alleged abuse or neglect of the children.

CP 249.

On November 27, the court entered an "Order Denying Father's and Mother's Motions for Use and Derivative Use Immunity." CP 231-37. The order contained, however, the same provision barring use of information in subsequent criminal proceedings. The order also barred the Department from providing

copies of the evaluations to the Prosecutor or discussing them with the Prosecutor. CP 237.

The court file indicates that the father completed the domestic violence assessment on December 11. At that time, he was "in the process of completing a psychological evaluation with a parenting component." CP 56. At a hearing on March 5, 2019, the court determined that the father was "in compliance." CP 40. On April 3, the court determined that the father was "making progress" and was entitled to liberalized visitation. CP 18.

IV. ARGUMENT

A. IN A DEPENDENCY PROCEEDING, THE COURT IS NOT REQUIRED TO GRANT IMMUNITY AGAINST DERIVATIVE USE OF NON-INCRIMINATORY STATEMENTS.

In his brief, the father suggests that the trial court refused to grant derivative use immunity under any circumstances. In fact, the court said: "According to the case law, the granting of Decker immunity is to be done on a case-by-case basis and is to be very stringently construed." CP 232, finding 4;¹ citing State v. Decker, 68 Wn. App. 246, 842 P.2d 500 (1992). At the hearing, the court expressed its unwillingness to grant "blanket Decker immunity." CP

¹ This "finding of fact" is actually a conclusion of law and should be reviewed as such. See Robel v. Roundup Corp., 148 Wn.2d 35, 43, 59 P.3d 611 (2002).

156. It was willing to grant a protective order, but it had not been given any information that would allow it do so. CP 204.

To evaluate the trial court's decision, it is necessary to review basic principles of immunity. A person has, of course, a right not to "be compelled in any criminal case to be a witness against himself." U.S. Const., amend. 5; see Wash. Const., art. 1, § 9 (right not to "be compelled in any criminal case to give evidence against himself.") This privilege must be raised to specific questions.

There is no blanket Fifth Amendment right to refuse to answer questions based on an assertion that any and all questions might tend to be incriminatory. The privilege must be claimed as to each question and the matter submitted to the court for its determination as to the validity of each claim.

Eastham v. Arndt, 28 Wn. App. 524, 532, 624 P.2d 1159, 1165 (1981).

A witness can, however, be compelled to testify to incriminatory facts. For such an order to be valid, the witness must be given immunity that is "coextensive with the scope of the privilege against self-incrimination." At a minimum, such immunity must preclude use and derivative use of the compelled testimony. Kastigar v. United States, 406 U.S. 441, 452, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972).

A person is compelled to testify if he is “threatened with serious penalties if the evidence is not produced.” Ordering a parent to participate in a dependency evaluation does not have this effect, if the parents remain free to refuse to answer self-incriminatory questions. Compulsion only exists if “a penalty would follow directly and more or less automatically from the refusal to answer questions.” Absent evidence of a “concrete, imminent threat,” there is no “compulsion.” In re Dependency of J.R.U.-S., 126 Wn. App. 786, 794-95 ¶¶ 14-16, 110 P.3d 773 (2005).

Although a court-ordered evaluation does not constitute “compulsion,” it may create a “real and substantial danger of incrimination.” Id. at 799 ¶ 25. To protect the parent’s rights, the court has discretion to allow their counsel to attend the evaluations. Id. at 801 ¶ 28. In the present case, the trial court expressly noted that legal counsel could be available for the evaluations. CP 204-05.

In J.R.U.-S., this court suggested that in future cases, “superior courts could issue protective orders granting derivative use immunity.” Id. at 801 ¶ 27. (The validity of this suggestion is discussed below.) The court did not, however, say that such immunity needed to be granted on a blanket basis. Rather, this

court has recognized the need to craft protective orders narrowly. In re Dependency of Q.L.M., 105 Wn. App. 532, 20 P.3d 465 (2001).

In Q.L.M., a dependency court ordered a juvenile to participate in sexually aggressive youth evaluations. After the evaluations were completed, the court enjoined DSHS from providing them to the prosecutor. This court held that the injunction was improperly broad, because “it covers all information resulting from counseling or treatment whether it relates to a criminal offense or not.” Id. at 544. The same is true of the order sought in the present case. The father sought immunity as to *anything* said during evaluations — not merely statements that would be self-incriminatory.

Here, the trial court adopted alternatives to a blanket grant of derivative use immunity. It provided *use* immunity for the parent’s statements. CP 249. It barred DSHS from discussing the evaluations with the prosecutor or providing the prosecutor copies. CP 237. It allowed the parents to have counsel present at the evaluations. CP 204-05. The court was also willing to take further measures, such as barring the evaluator from asking specific questions. CP 170-71.

The court believed that the protections it granted were adequate: that the parents could “meaningfully engage in treatment without ever having to incriminate themselves.” CP 161. This belief has proved correct. Notwithstanding the lack of derivative use immunity, the father has complied with the court’s order to obtain evaluations. CP 40. If there are any further evaluation or treatment requirements, the court can grant appropriate protective orders.

The father sought immunity that went far beyond anything necessary to protect his right against self-incrimination. As the trial court recognized, such a grant of immunity could seriously impair the State’s ability to prosecute him. CP 164. Instead, the court crafted a narrower protective order, which has allowed the father to participate fully in court-ordered evaluation. That action by the trial court was proper.

B. COURTS ARE NOT EMPOWERED TO GRANT IMMUNITY ABSENT STATUTORY AUTHORIZATION.

1. Granting Immunity Is A Function That Requires The Exercise Of Prosecutorial Discretion.

The above discussion is adequate to resolve this case. For the future guidance of trial courts, however, this court may wish to consider a broader issue: can courts in dependency proceedings grant derivative use immunity at all?

As this court has recognized, the normal rule is that granting immunity is a prosecutorial executive function. Q.L.M., 105 Wn. App. at 544. In criminal proceedings, this courts has consistently held that trial courts lack inherent authority to grant immunity. State v. Matson, 22 Wn. App. 114, 119-21, 587 P.2d 540 (1978); State v. Carlisle, 73 Wn. App. 678, 681-82, 871 P.2d 174 (1994). Every federal Circuit Court that has considered the issue has reached the same conclusion. United States v. Quinn, 728 F.3d 243, 251 (3rd Cir. 2013) (citing cases from 11 other circuits). The Third Circuit explained the reasons for this rule when it overruled a contrary decision:

Often the decision to grant or deny immunity impinges on the Government's broad discretion as to whom to prosecute. In any later prosecution, the Government bears a heavy burden because it must prove that its evidence against the immunized witness has not been obtained as a result of his immunized testimony. In some cases, the Government may have already assembled the evidence it needs, or it can "sterilize" the immunized testimony by isolating those investigating or prosecuting the witness from any incriminating information provided through his testimony. But if these precautions are unsuccessful or unavailable, a court's granting immunity to a witness to secure another's criminal conviction may prevent the Government from ever prosecuting the witness for his own criminal behavior.

Courts are not in the best position to decide these prosecutorial tradeoffs. Such factors as the strength

of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Giving judges the power to immunize witnesses would carry the courts into policy assessments which are the traditional domain of the Executive Branch. As Congress has given the power to immunize a witness solely to the Executive Branch, it is not a power courts can exercise.

Id. at 253-54 (citations omitted).

The same is true in the present context. As discussed below, a grant of derivative use immunity in dependency cases can interfere with or even prevent prosecution. Courts are not in a suitable position to balance the competing interests and decide whether this interference is warranted.

2. In Light Of The Serious Problems Created By Derivative Use Immunity, This Court Should Respect The Legislature's Decision To Authorize Only Use Immunity In Dependency Proceedings.

In the context of dependency proceedings, there are particularly strong reasons for applying the normal rule against judicial grants of immunity. To begin with, the prosecutor is normally not involved in those proceedings. This creates two major problems. First, there will be usually be no one who can give the court a realistic appraisal of the problems that will be created by a grant of immunity. The Attorney General cannot perform that

function. As the Assistant Attorney General recognized in this case, the interests she represents are distinct from those of the Prosecutor. CP 296. Moreover, it appears that she did not understand the "heavy burden" placed on the prosecution by a grant of derivative use immunity. Rather, she told the court that a grant of immunity was "unlikely to materially impact the interests of the Prosecutor's office." CP 296.

Second, a grant of derivative use immunity requires steps by law enforcement authorities to protect its existing evidence. In any future proceeding, the prosecution will be required to prove that its evidence was not affected by anything derived from the immunized evidence. See State v. Bryant, 97 Wn. App. 479, 485, 983 P.2d 1181 (1999). For example, it may be necessary to record comprehensive statements from all witnesses or to ensure that investigators are not exposed to immunized testimony. Such steps will be impossible if the prosecutor is not informed of the immunity order until afterwards.

Compounding these problems is the nature of dependency proceedings. The other parent, the abused child, and his or her siblings will usually all be parties to the proceeding. This means that they all may have access to evaluations. But all of them are

also likely to be important witnesses in any future criminal proceeding.

When a witness has been exposed to immunized statements, his or her testimony must be examined "line-by-line and item-by item." The prosecution must show that "no use whatsoever was made of any of the immunized testimony." United States v. North, 910 F.2d 843, 872, modified on other grounds on rehearing, 920 F.2d 940 (D.C. Cir. 1990). Even if immunized testimony affects a witness's desire to cooperate, that could constitute derivative use of the testimony. See Bryant, 97 Wn.2d at 489-90. So the exposure of witnesses to immunized information may make it difficult or impossible to use those witness's testimony later.

The legislature has recognized the problem of potential self--incrimination in dependency proceedings. It has addressed that problem by providing for *use* immunity:

At any time prior to or during a hearing in [a dependency proceeding involving allegations of child abuse or neglect], the court may, on its own motion, or the motion of the guardian ad litem, or other parties, order the examination by a physician, psychologist, or psychiatrist, of any parent or child or other person having custody of the child at the time of the alleged child abuse or neglect, if the court finds such an examination is necessary to the proper

determination of the case... No information given at any such examination of the parent or any other person having custody of the child may be used against such person in any subsequent criminal proceedings against such person or custodian concerning the alleged abuse or neglect of the child.

RCW 26.44.053(2). This statute does not provide *derivative* use immunity. J.R.U.-S., 126 Wn. App. at 798 ¶ 21.

There are excellent reasons why the legislature may have chosen to limit the grant to *use* immunity. Such a grant creates far less impact on any future criminal proceedings. The prosecution need not prove that its witnesses were unaffected by exposure to the evaluations. It need merely refrain from using information given in the evaluation.

Such immunity is insufficient to *compel* a parent to make self-incriminatory statements. It does, however, provide substantial protection to a parent who *chooses* to participate fully in the evaluation. The legislature may have determined that in most cases, this is adequate to obtain the cooperation of parents who have a genuine commitment to change. The legislature balanced the need to protect children through two alternative mechanisms: effective dependency proceedings and effective prosecution of child abusers.

Indeed, it does not appear that the Washington Legislature has *ever* authorized derivative use immunity. All of the statutes and court rules dealing with immunity provide either transactional immunity or use immunity only. See, e.g., CrR 6.14 (transactional immunity in criminal proceedings); RCW 10.27.130 (transactional immunity in special inquiry proceedings); RCW 6.32.200 (use immunity in proceedings supplemental to execution). In granting derivative use immunity, a court is not acting in the face of legislative silence. Rather, it is acting in the face of a legislative decision to grant a more limited form of immunity.

3. The Only Authorization For Derivative Use Immunity Lies In Dicta.

Particularly in light of this legislative decision, this court should carefully examine the source of any authority to grant broader immunity. That “authority” stems from dicta in a single case: J.R.U.-S. There, the trial court authorized the parents to have counsel present during their evaluations. This court upheld the order as a proper mechanism for protecting the parents’ Fifth Amendment rights. J.R.U.-S., 126 Wn. App. at 799-800 ¶ 25. The court then went on to discuss other procedures that could be used:

The Department’s concerns can be alleviated in future cases without sacrificing parents’ Fifth Amendment

rights. The Legislature could broaden the statutory immunity to include derivative use immunity, or superior courts could issue protective orders granting derivative use immunity... Both solutions would make it unnecessary to have counsel present, thereby facilitating candid disclosures in evaluations

Id. at 800–01 ¶ 27 (footnotes omitted).

Because this portion of the opinion did not address any issue in the case, it constituted dicta.

The word ["dicta"] is generally used as an abbreviated form of *obiter dictum*, "a remark by the way;" that is, an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination; any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion.

State ex rel Lemon v. Langlie, 45 Wn.2d 82, 89, 273 P.2d 464 (1954).

In J.R.U.-S., this court was making a suggestion about what the legislature or trial courts might do in the future — which is dicta. Admittedly, the introduction to the J.R.U.-S. opinion said that "[w]e hold" that trial courts should enter immunity orders. J.R.U.-S. 126 Wn. App. at 790 ¶ 2. Calling something a "holding," however, does not make it one. Dicta is not binding authority. State v. Burch, 197 Wn. App. 382, 403 ¶ 46, 389 P.3d 685 (2016).

The first half of the J.R.U.-S. dicta — the suggestion to the legislature — was entirely appropriate. When this court perceives a flaw in a statute, it not only can but should urge the legislature to correct it. Cf. RCW 2.04.230 (Supreme Court judges to report “such defects and omissions in the laws as they may believe to exist.”) The second half — the suggestion to trial courts — is more questionable. Because it was merely dicta, this court should re-examine de novo the source of that suggestion.

4. The Dicta Authorizing Derivative Use Immunity Ultimately Rests On The Mis-Reading Of A Supreme Court Decision.

The chain of cases that led to the suggestion in J.R.U.-S. began with State v. Escoto, 108 Wn.2d 1, 735 P.2d 1310 (1987). There, the trial court considered a court-ordered evaluation in sentencing a juvenile offender. In a split opinion, the Supreme Court held that this was proper. No question of immunity was raised. The trial court had limited the scope of the evaluation, but it had not granted any immunity. Id. at 3 (trial court “stated that any evaluation would relate only to matters for which the juvenile had been found guilty”). The only “inherent” authority mentioned in Escoto is the authority to *order* an evaluation. Id. Escoto does not support any inherent authority to grant immunity.

The next case is Decker. That case involved a juvenile offense proceeding, not a dependency proceeding. The trial court had directed the juvenile to participate in a predisposition psychological evaluation, without counsel being present. In doing so, the court entered an order providing for use immunity.² Decker, 60 Wn. App. at 248. This court held that the trial court had “the inherent authority to issue this type of protective order.” Id. at 252. The only authority cited was Escoto — which said no such thing.

Decker was discussed in two subsequent dependency proceedings: Q.L.M. and J.R.U.-S. As mentioned above, Q.L.M. involved a protective order for a juvenile who had participated in a court-ordered evaluation.³ This court overturned the order as overly broad. The court had no occasion to consider the validity of a more narrowly crafted order. Q.L.M., 105 Wn. App. at 544-45.

The final case is J.R.U.-S. Again as discussed above, that case upheld the trial court’s order allowing the parents to have

² It does not appear that this order expressly provided for derivative use immunity. Decker, 68 Wn. App. 246 at 248 (trial court granted “use immunity”). The court in J.R.U.-S. nonetheless construed that order as including such immunity. J.R.U.-S., 16 Wn. App. at 799 ¶ 23.

³ Again, the trial court’s order did not expressly provide derivative use immunity, Q.L.M., 105 Wn. App. at 543 n. 24 (order reviewed by Court of Appeals prohibited “use for criminal investigation or prosecution”). J.R.U.-S. again construed the order as including such immunity. J.R.U.-S., 16 Wn. App. at 799 ¶ 24.

counsel present during their evaluations. J.R.U.-S., 126 Wn. App. at 799-800 ¶ 25. In dicta, this court suggested granting that trial courts could grant derivative use immunity instead. The only authority cited was Decker and Q.L.M., J.R.U.-S., 126 Wn. App. at 800-801 ¶ 27.

This review of case law shows that “inherent authority” to grant derivative use immunity derives from a mis-reading of Escoto. That misreading led to this court’s decision in Decker, which authorized trial courts to grant that kind of immunity in juvenile offense proceedings. Decker was cited in Q.L.M. in discussing a completely different issue. Those two cases, in turn, led to the dicta in J.R.U.-S., which imported derivative use immunity into dependency proceedings. At no point do any of these cases identify a valid basis for courts to override the legislature’s policy decisions.

5. Grants Of Immunity Lie Outside The Narrow Limits Of The Superior Court’s Inherent Authority.

Properly applied, the concept of “inherent authority” does not extend to grants of immunity.

The inherent power of the court is the power to protect itself; the power to administer justice whether any previous form of remedy had been granted or not; the power to promulgate rules for its practice; and the power to provide process where none exists.

In re Bruen, 102 Wash. 472, 476, 172 P. 1152 (1918).

For example, courts have an inherent contempt authority, “as a power necessary to the exercise of all others.” In re Dependency of A.K., 162 Wn.2d 632, 645 ¶ 15, 174 P.3d 11 (2007). Similarly, courts have inherent authority to control calendars, proceedings, and parties. State v. Gassman, 175 Wn.2d 208, 211 ¶ 4, 283 P.3d 1113, 1114 (2012). Exercise of that inherent authority is, however, limited to situations where statutory procedures are specifically found inadequate. A.K., 162 Wn.2d at 647 ¶ 19. For example, a court lacks the inherent authority to dismiss a case for want of prosecution, when the situation was covered by a court rule. Wallace v. Evans, 131 Wn.2d 572, 934 P.2d 662 (1997). Beyond the areas of contempt and the authority to control proceedings, claims of inherent authority have generally been rejected. See, e.g., State v. Pillatos, 159 Wn.2d 459, 469-70 ¶¶ 12-13, 150 P.3d 1130 (2007) (no inherent authority to empanel sentencing jury); State v. Masangkay, 121 Wn.2d 904, 91 P.3d 140 (2004) (no inherent authority to issue certificate of rehabilitation); State v. Gilkinson, 57 Wn. App. 861, 790 P.2d 1247, 1248 (1990) (no inherent authority to expunge criminal records).

Granting immunity lies outside the legitimate areas of inherent authority. See Matson, 22 Wn. App. at 119-21. Moreover,

even if there were some inherent power to grant immunity, it could only be exercised if the statutory immunity provision was specifically found to be inadequate in a particular case. See A.K., 162 Wn.2d at 647 ¶ 19. No such finding was made in the present case. To the contrary, the trial court believed that the statutory protections allowed the parents to “meaningfully engage in treatment without ever having to incriminate themselves.” CP 161. So the statutory grant of use immunity was adequate under the circumstances, there was no basis for the court to grant any broader immunity.

V. CONCLUSION

The order denying derivative use immunity should be affirmed.

Respectfully submitted on June 25⁻¹³, 2019.

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IN THE COURT OF APPEALS
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No. 79364-1-I

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The undersigned certifies that on the 20th day of June, 2019, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

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I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Washington Appellate Project; wapofficemail@washapp.org; tom@washapp.org; [Brice Timm@frontier.com](mailto:Brice_Timm@frontier.com); Kirsten.haugen@snoco.org; laurenD2@atq.wa.gov; evifax@atq.wa.gov

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 20th day of June, 2019, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
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SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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Superior Court Case Number: 18-7-00836-7

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