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No. 44654-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Howard Shale,

Appellant.

Jefferson County Superior Court

Cause No. 12-1-00194-0

The Honorable Judge Keith Harper

Appellant's Supplemental Reply Brief

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ARGUMENT

WASHINGTON DOES NOT HAVE CIVIL REGULATORY AUTHORITY OVER THE QUINALT RESERVATION AND THUS DOES NOT HAVE JURISDICTION OVER SEX OFFENDER REGISTRATION.

- A. The Washington legislature has not assumed jurisdiction over sex offender registration on the Quinalt reservation; Respondent's implicit concession on this point requires reversal.

Washington State's authority over reservation lands "derives from a federal delegation of jurisdiction." *State v. Clark*, 178 Wn.2d 19, 24, 308 P.3d 590 (2013) (citing PL 280¹). PL 280 allows states to assume jurisdiction over certain civil matters.² By statute, the legislature "accepted only a limited portion of the jurisdiction offered by Congress." *Clark*, 178 Wn. 2d at 24.

Sex offender registration is a civil regulatory matter rather than a punitive criminal matter. *Smith v. Doe*, 538 U.S. 84, 105, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003) (addressing *ex post facto* challenge); *State v. Ward*, 123 Wn.2d 488, 496-507, 869 P.2d 1062 (1994) (same). Pursuant to PL 280, the Washington legislature adopted jurisdiction over eight specific areas of civil law in Indian country. RCW 37.12.010. The

¹ Pub.L. No. 83-280, 67 Stat. 588 (1953).

² PL 280 does not allow states to assume civil *regulatory* jurisdiction. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207-08, 107 S.Ct. 1083, 1087, 94 L.Ed.2d 244 (1987) *superseded on other grounds as recognized by Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2027 (2014).

legislature did not include sex offender registration in the list of civil jurisdiction assumed under PL 280.³ RCW 37.12.010.

Respondent does not address this argument. *See* State's Response to Appellant's Supplemental Brief *generally*. Respondent's failure to offer argument can be treated as a concession. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009). Accordingly, Mr. Shale's conviction must be reversed and the charge dismissed with prejudice for want of trial court jurisdiction. *State v. Pink*, 144 Wn. App. 945, 185 P.3d 634 (2008).

B. Mr. Shale may raise the trial court's lack of jurisdiction for the first time on appeal.

Lack of trial court jurisdiction can be raised for the first time on appeal by either party or *sua sponte* by the court of appeals. RAP 2.5(a)(1)⁴; *Woodfield Neighborhood Homeowner's Ass'n v. Graziano*, 154 Wn. App. 1, 3, 225 P.3d 246 (2009).

The superior court does not have subject matter jurisdiction over state assertions of authority that infringe a tribe's right to self-government.

³ As argued in detail below and in Mr. Shale's supplemental brief, PL 280 does not grant states civil *regulatory* jurisdiction over Indian Country. Thus, even if the state had purported to assume jurisdiction over sex offender registration, such an action would be improper.

⁴ The state relies on the manifest error standard at RAP 2.5(a)(3) to argue that the court should not review Mr. Shale's jurisdictional claim because all of the necessary facts are not in the record. State's Response to Appellant's Supplemental Brief, pp. 4-8. But the court does not need to find manifest error to review a jurisdictional issue for the first time on appeal. RAP 2.5(a)(1). Additionally, as outlined below, all of the facts necessary to decide Mr. Shale's claim are in the record on appeal.

Maxa v. Yakima Petroleum, Inc., 83 Wn. App. 763, 769, 924 P.2d 372 (1996); *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005) (reviewing dismissal for lack of subject matter jurisdiction when tribe asserted sovereign immunity).

C. Respondent's argument relies on matters irrelevant to the question of civil regulatory authority over the Quinault reservation.

When the relevant facts are undisputed, state jurisdiction over Indian Country is decided as a matter of law. *State v. Boyd*, 109 Wn. App. 244, 250, 34 P.3d 912 (2001). Here, the relevant facts are undisputed. Respondent seeks to muddy the waters by claiming that certain *irrelevant* facts are at issue.

1. The state lacked civil regulatory authority over both fee and trust land within the reservation.

The state does not have civil regulatory authority over any land within the Quinault reservation, regardless of its fee or trust status. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n. 5, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987); 18 U.S.C. § 1151. Still, the state argues that the court should not review Mr. Shale's jurisdictional claim

because he did not demonstrate at trial that he lived on trust property.

State's Response to Appellant's Supplemental Brief, p. 3.⁵

The trust status of Mr. Shale's home is not relevant to whether the state had civil regulatory jurisdiction. All parties agreed that his home was on the Quinault reservation. CP 8-12, 16. The state lacks civil regulatory authority over the entire reservation. *Id.*

Additionally, the state may not, for the first time on appeal, argue that the accused failed to prove a jurisdictional fact that the parties presumed to be true at the hearing. *Boyd* 109 Wn. App. at 250-51. Here, the parties presumed that the state would have lacked jurisdiction to prosecute Mr. Shale if he had been a registered member of the Quinault tribe.⁶ See CP 8-12. The state *does* have criminal jurisdiction over

⁵ The state relies on *L.J.M.* to argue that it is Mr. Shale's burden to prove that his home was on trust land (rather than fee land) within the Quinault reservation. State's Response to Appellant's Supplemental Brief, p. 3 (*citing State v. L.J.M.*, 129 Wn.2d 386, 918 P.2d 898 (1996)). But *L.J.M.* is about criminal jurisdiction, not civil regulatory authority. The fee or trust status of a property is not relevant to the state's power to regulate within a reservation. *Cabazon*, 480 U.S. at 207 n. 5; 18 U.S.C. § 1151.

Additionally, in *L.J.M.*, the state presented testimony that the defendant's home was on fee land, not subject to tribal and federal jurisdiction. *L.J.M.*, 129 Wn.2d at 390-91. Under those circumstances, the accused's failure to present any evidence that his residence was actually on trust land within the reservation defeated his claim that the state lacked jurisdiction. *Id.* at 395-96. In this case, the parties assumed that the state would lack jurisdiction over Mr. Shale if he had been a registered member of the Quinault tribe. See CP 8-12. In other words, the parties agreed that the offense took place on trust land. Respondent cannot now argue otherwise, for the first time on review.

⁶ The argument at the hearing was regarding the state's criminal jurisdiction to charge Mr. Shale. The state has criminal jurisdiction over Indian Country except over Indians on land "held in trust by the United States or subject to a restriction against alienation imposed by the United States." RCW 37.12.010. In other words, state criminal jurisdiction extends only to crimes committed on fee land.

Quinault tribal members for crimes committed on fee land. RCW 37.12.010. This establishes the parties' implicit agreement that Mr. Shale's home was not on fee property.

The state cannot base its jurisdictional argument on facts presumed true in the trial court. *Boyd*, 109 Wn. App. at 250-51. Respondent's argument fails.

2. The state lacks civil regulatory authority over the Quinault reservation regardless of the tribe's compliance with SORNA, Mr. Shale's compliance with the tribal code, or factors wholly unrelated to the crime charged and the evidence submitted.

The state's other arguments regarding the completeness of the record are also without merit. Specifically, Respondent argues that Mr. Shale failed to demonstrate (1) that the Quinault tribal code is in compliance with SORNA, (2) that Mr. Shale timely registered with the tribal registry, and (3) that Mr. Shale did not work or study outside of the reservation. State's Response to Appellant's Supplemental Brief, pp. 5-8. But none of that information is necessary to decide whether the state had authority to require Mr. Shale to register as a sex offender while living on the Quinault reservation.

First, whether tribal law complies with SORNA is irrelevant to the state's authority, as long as the tribe timely elected to enact a SORNA-compliant sex offender registry. *See* 42 U.S.C. § 16927(a)(2)(B). Once

the tribe has made the election, the state does not have jurisdiction unless the U.S. Attorney General affirmatively determines that the tribe is not in substantial compliance. 42 U.S.C. § 16927(a)(2)(C). Notably, the U.S. Attorney General has found that the Quinault tribe *is* in compliance with SORNA. *SORNA Substantial Implementation Review: Quinault Indian Nation*, February 2013.⁷

Second, whether Mr. Shale actually followed the tribe's sex offender registration requirements is, likewise, irrelevant to whether the state has jurisdiction. If Mr. Shale failed to register with the tribe as required, he can be prosecuted by either the tribal or the federal government. He may not be prosecuted by the state. His compliance or noncompliance with the tribal code does not give the state regulatory authority over the reservation. *Cabazon*, 480 U.S. at 207.

Finally, the state did not charge Mr. Shale with failing to register as someone who works or studies off of the reservation. CP 1-2. The stipulated police reports for the trial, likewise, only recount that he lived on the reservation and had not registered with the county. Supp CP (stipulated police reports).⁸ The state cannot now ask this court to affirm the conviction based on allegations that were neither charged nor proved

⁷ Available at: <http://ojp.gov/smart/pdfs/sorna/QuinaultIndianNation.pdf>.

in the trial court.⁹ Respondent's argument is an attempt to circumvent the state's lack of civil regulatory authority over the reservation, by claiming (for the first time on appeal) that the crime happened elsewhere. The state cannot make this claim at this late stage in the proceedings.¹⁰

D. The information necessary to adjudicate Mr. Shale's argument regarding civil regulatory jurisdiction is either in the record or otherwise subject to judicial consideration.

The Sex Offender Registration and Notification Act (SORNA) is a federal law. 42 U.S.C. §16911 *et seq.* Washington courts may take judicial notice of federal statutes. RCW 5.24.010. Furthermore, the Court of Appeals "may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information." RCW 5.24.020.

SORNA grants Indian tribes exclusive jurisdiction over the registration of sex offenders within their territory if they elect to create a tribal registry. 42 U.S.C. § 16927(a). Federal Department of Justice (DOJ) documents indicate that the Quinault Nation timely elected to

⁸ Mr. Shale moved to designate the stipulated police reports as supplemental clerk's papers on September 26, 2014.

⁹ Furthermore, if the state wished to prosecute Mr. Shale for such violations, the prosecution would bear the burden of proving beyond a reasonable doubt that he worked or attended school off the reservation. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

implement SORNA. *See Tribal Resolutions Pursuant to the Adam Walsh Child Protection and Safety Act of 2006*.¹¹ Accordingly, the Quinault tribe has exclusive authority over sex offender registration on the Quinault reservation. Jurisdiction has not defaulted to the state under SORNA's stop-gap provision. 42 U.S.C. § 16927(a).¹²

Nonetheless, Respondent argues that this court cannot consider these purely legal issues because they were not developed as facts in the trial court. But the document indicating that the Quinault nation timely elected to implement SORNA is available directly from the DOJ. *See* <http://ojp.gov/smart/indiancountry.htm>. A federal document available

¹⁰ Furthermore, if the state elects to proceed on this theory, Mr. Shale's conviction must be reversed and the case dismissed with prejudice because the record contains insufficient evidence to support a conviction on the basis the state now alleges.

¹¹ Available at: http://ojp.gov/smart/pdfs/tribal_govt_elections.pdf.

¹² Respondent notes that the Quinault tribe did not substantially implement SORNA until 2012. *See* Appendices to State's Response to Appellant's Supplemental Brief. This is irrelevant, because the tribe *elected* to create a tribal sex offender registry within the required year. SORNA differentiates between election and implementation. *See* 42 U.S.C. § 16927(a)(2)(B), (C). DOJ guidance clarifies that once a tribe has elected to create its own sex offender registry, jurisdiction only defaults to the state if the Attorney General determines that the tribe has failed to substantially implement SORNA's requirements and is unlikely to be able to do so in a reasonable amount of time. *SORNA: Tribal Election, Delegation to the State, and Right of Access*, available at http://ojp.gov/smart/tribal_election.htm; *See also United States v. Begay*, 622 F.3d 1187, 1191 (9th Cir. 2010) (clarifying that a period of years exists between when a tribe elects to implement SORNA and when it actually reaches substantial compliance). Respondent does not point to any indication that the Attorney General has made such a determination regarding the Quinault Nation. *See* State's Response to Appellant's Supplemental Brief *generally*. In fact, DOJ has found that the Quinault tribe has substantially implemented SORNA. *SORNA Substantial Implementation Review: Quinault Indian Nation*, February 2013 (available at: <http://ojp.gov/smart/pdfs/sorna/QuinaultIndianNation.pdf>).

through a federal website is a “proper” manner for the court to “inform itself” of federal law, pursuant to RCW 5.24.020.

Respondent also claims that the document would not be admissible as evidence. State’s Response to Appellant’s Supplemental Brief, pp. 6-7. But Mr. Shale does not offer it as evidence. It is federal authority establishing – as a matter of law – that the Quinault tribe timely elected to implement SORNA.

- E. SORNA unequivocally grants the Quinault tribe exclusive authority over sex offender registration on the Quinault reservation.

DOJ guidance on SORNA clarifies that “tribes are responsible for [sex offender] registration functions on land subject to their law enforcement jurisdiction...” *SORNA: Clarification of Registration Jurisdictional Issues*.¹³ Similarly, the state is responsible for registration functions on land subject to state law enforcement jurisdiction. *Id.*

A sex offender may be required to register with the state as well as the tribe if s/he works or studies off of the reservation. *Id.* Alternatively, “a sex offender may also reside, be employed or go to school exclusively in a tribal jurisdiction. If so, the offender must register only with the tribal jurisdiction.” *Id.*

¹³ Available at: http://smart.gov/tribal_jurisdiction.htm.

There is no allegation in this case that Mr. Shale worked or studied off the Quinault reservation. CP 1-2; Supp CP (stipulated police reports). Still, Respondent argues that he was required to register with both the tribe and the state.¹⁴ State's Response to Appellant's Supplemental Brief, pp. 9-10 (citing *SORNA: Clarification of Registration Jurisdictional Issues*¹⁵).

The state misrepresents the content of the DOJ guidance upon which it relies. As outlined above, the *Clarification* document establishes that a sex offender living on a reservation would only be required to register with the state if s/he worked or went to school off-reservation. *SORNA: Clarification of Registration Jurisdictional Issues*.

Respondent's reliance on *Begay* is also misplaced. State's Response to Appellant's Supplemental Brief, pp. 9-10 (citing *United States v. Begay*, 622 F.3d 1187 (9th Cir. 2010) *abrogation recognized by United States v. DeJarnette*, 741 F.3d 971 (9th Cir. 2013)). *Begay* held that two offenders violated *federal* law by failing to register with the state of Arizona when they were living on the Navajo reservation. *Begay*, 622 F.3d at 1196. This *federal* law violation arose from the fact that the

¹⁴ Respondent also argues that Mr. Shale did not inform the Jefferson County Sheriff when he moved from his previous in-county address to the Quinault reservation. State's Response to Appellant's Supplemental Brief, pp. 12-13. But the state's evidence at the stipulated trial explicitly states that Mr. Shale has never been registered in Jefferson County. Supp CP (stipulated police reports). His last registered address was in Seattle. The state has not presented any evidence indicating that Mr. Shale ever lived off-reservation in the county or had a duty to advise the county sheriff when he moved to the reservation.

Navajo Nation did not have a tribal sex offender registry at the time. *Id.* at 1994.

Begay does not apply when a tribe enacts a SORNA-compliant sex-offender registry.¹⁶ If a tribe elects to implement SORNA and its implementation complies with SORNA, the state has no authority to impose a registration duty. *John*, 233 Ariz. 57, 61.^{17, 18} Respondent errs by relying on *Begay*, which is irrelevant to state jurisdiction.

¹⁵ Available at: ojp.gov/smart/tribal_jurisdiction.htm.

¹⁶ As noted by the Arizona Court of Appeals, *Begay* is irrelevant to whether a person living on a reservation is required by *state law* to register with the state sex offender registry, or whether such a person could be prosecuted in state court of failing to do so. *State v. John*, 233 Ariz. 57, 61, 308 P.3d 1208 (Ariz. Ct. App. 2013). Instead, SORNA “unambiguously dictates the circumstances under which the state may impose registration requirements upon tribal members on tribal land.” *Id.* at 60. Those circumstances are limited to situations in which the tribe either does not elect to implement SORNA, the tribe expressly delegates that authority to the state, or the Attorney General finds that the tribe failed to substantially implement SORNA. *Id.*

¹⁷ Additionally, the Arizona court held that: “the state sex offender registration system is a regulatory scheme and presumptively does not apply to tribal members on tribal land.” *Id.* at 60-61; *State v. Atcity*, 2009-NMCA-086, 146 N.M. 781, 215 P.3d 90 (2009) (Because “the State’s regulatory authority does not reach into Indian country to impose a duty [to register as a sex offender], failure to comply with the duty cannot be a crime”).

¹⁸ Respondent attempts to differentiate *John* by pointing out that Arizona is not a PL 280 state. State’s Response to Appellant’s Supplemental Brief, p. 11 n. 16. As argued below and in Mr. Shale’s supplemental brief, however, PL 280 does not grant states civil regulatory authority over Indian country. *Cabazon Band of Mission Indians*, 480 U.S. at 207-08 *superseded on other grounds as recognized by Bay Mills*, 134 S.Ct. at 2027. A state’s PL 280 status is irrelevant to whether a state has the authority to require people living on an Indian reservation to register as a sex offender.

- F. PL 280 did not grant states civil *regulatory* authority over Indian Country, and thus did not empower Washington to require sex offender registration on the Quinault reservation.

Although PL 280 permitted states to assume some aspects of civil jurisdiction in Indian Country, state governments have no civil *regulatory* authority over Indian Country. *Cabazon*, 480 U.S. at 207-08, 107 S.Ct. 1083, 1087, 94 L.Ed.2d 244 (1987) *superseded on other grounds as recognized by Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2027 (2014). Indian Country includes all land within the boundaries of a reservation. *Id.* at 207 n. 5 (*citing* 18 U.S.C. § 1151).

A state law is regulatory (rather than prohibitory) if it places constraints on otherwise legal conduct. *Cabazon*, 480 U.S. at 209. The U.S. and Washington Supreme Courts have both held that sex offender registration requirements are civil regulations. *Doe*, 538 U.S. at 105; *Ward*, 123 Wn.2d at 496-507. Still, Respondent argues that the state has authority over sex offender registration in Indian Country because it is prohibitory in nature, not regulatory. State's Response to Appellant's Supplemental Brief, pp. 14-15 (*citing United States v. Dotson*, 615 F.3d 1162, 1168 (9th Cir. 2010)).

This is incorrect. Sex offenders are not prohibited from residing on the reservation. Accordingly, sex offender registration requirements

are regulatory, not prohibitory. *Cabazon*, 480 U.S. at 209; *see also Smith*, 538 U.S. at 105; *Ward*, 123 Wn.2d at 496-507.

Furthermore, the authority cited by Respondent addresses a prohibition against the sale of liquor to minors. Such a prohibition is not regulatory. *Dotson*, 615 F.3d at 1168-69. Unlike sex offender registration, the law at issue in *Dotson* is “criminal and prohibitory.” *Id.* at 1169. Moreover, *Dotson* addresses assimilation of Washington law on an Air Force base, not state jurisdiction over Indian Country. *Id.*

For these reasons, the state’s reliance on *Dotson* is misplaced. Respondent does not point to any authority indicating that sex offender registration is anything other than regulatory. The court may presume that the state failed to locate any such authority after diligent search. *In re Griffin*, 181 Wn. App. 99, 107, 325 P.3d 322 (2014).

PL 280 did not grant states civil regulatory authority over Indian Country. Nonetheless, Respondent argues that SORNA did not strip the state of “of its pre-SORNA authority to prosecute Indians.” State’s Response to Appellant’s Supplemental Brief, pp. 11-12. Whether true or not, this contention is irrelevant. Because sex offender registration is regulatory, the state’s “authority to prosecute Indians” does not permit the state to require sex offender registration in Indian Country. *Cabazon*, 480 U.S. at 209

G. SORNA preempts state authority over sex offender registration on tribal land.

Traditional preemption analysis does not apply on tribal land.

Congressional intent to preempt state law is not the sole touchstone of preemption analysis in Indian Country, and preemption in Indian Country does not require an express congressional statement of intent. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983). This approach differs from the general question of whether federal law preempts state authority outside of Indian Country.¹⁹ *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980).

Despite this, the state erroneously relies on traditional preemption analysis. State's Response to Appellant's Supplemental Brief, p. 9 (*citing Spiteri v. Russo*, No. 12-CV-2780, 2013 U.S. Dist. Lexi 128379 at 155-156 (E.D.N.Y. Sep. 7, 2013)).

Even if the state had civil regulatory authority over the Quinault reservation, state sex-offender registration laws would be preempted by federal law. SORNA represents a broad exercise of federal power in the realm of sex offender registration on Indian reservations. Appellate courts

¹⁹ Furthermore, in the context of non-regulatory civil jurisdiction, where federal law has preempted state action, the tribal status of any persons involved is irrelevant. *Cabazon*, 480 U.S. at 216-17.

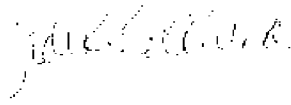
in Arizona and New Mexico have both held that SORNA preempts state regulation of sex offenders living in Indian Country. *John*, 233 Ariz. at 60-61; *Atticity*, 146 N.M. 781. Because SORNA preempts state authority over sex offender registration in Indian country, the state did not have the power to require Mr. Shale to register while he lived on the reservation. This is so regardless of whether he was a member of the Quinault tribe. *Cabazon*, 480 U.S. at 216-17.²⁰

CONCLUSION

For the reasons set forth above and in Mr. Shale's other briefing, the state did not have the authority to require him to register as a sex offender while he was living on the Quinault reservation. His failure to register conviction must be reversed.

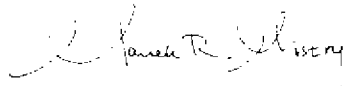
Respectfully submitted on October 1, 2014.

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²⁰ Respondent's reliance on cases addressing state taxation of non-member Indians is misplaced. State's Response to Appellant's Supplemental Brief, p. 13 (citing *Bercier v. KIGA*, 127 Wn. App. 809, 103 P.3d 232 (2004); review denied, 155 Wn.2d 1015 (2005); *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1172 (10th Cir. 2012)). The *Cabazon* court drew a clear distinction between cigarette taxes like those at issue in *Bercier* and *Pruitt* and broader civil regulations that infringe upon federal and tribal interests. *Cabazon*, 480 U.S. at 219.



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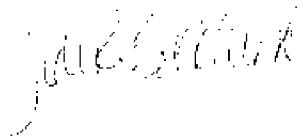
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I filed the Appellant's Supplemental Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 1, 2014.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

October 01, 2014 - 4:44 PM

Transmittal Letter

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Court of Appeals Case Number: 44654-5

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