No. 2007-TS-01308

IN THE SUPREME COURT OF MISSISSIPPI

GULF SOUTH PIPELINE COMPANY, LP

Appellant/Cross-Appellee

vs.

BLANCHE MARIE DOWNY PITRE

Appellee/Cross-Appellant

Appeal of the Jury Verdict and Judgment and Order on Post-Trial Motions of the County Court of Warren County, Special Court of Eminent Domain, Honorable John S. Price Jr. County Court Judge in Gulf South Pipeline Company, LP, v. Blanche Marie Downy Pitre, Cause No. 06, 0689-CO

SUPPLEMENTAL BRIEF PURSUANT TO MISS. R. APP. P. 17(h) BY THE APPELLANT/CROSS-APPELLEE GULF SOUTH PIPELINE COMPANY, LP

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case.

1) Gulf South Pipeline Company, LP, Plaintiff
2) Blanche Mari Downy Pitre, Defendant
3) Trey Bourn, Attorney for Appellant/Cross-Appellee
4) LeAnn W. Nealey, Attorney for Appellant/Cross-Appellee
5) Robert C. Galloway, Attorney for Appellant/Cross-Appellee
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13) W. Lee Watt, Counsel for Amici, Colonial Pipeline Company, Southern Natural Gas Company, Spectra Energy Corporation, Tennessee Gas Pipeline Company, and Transcontinental Gas Pipe Line Company, LLC.

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INTRODUCTION

This is an eminent domain case involving the Court's strict mandate that the trial court carefully evaluate expert appraisal testimony to ensure it meets both the relevancy and reliability requirements delineated in Miss. R. Evid. 702, and as further developed by *Daubert*,[1] *McLemore*,[2] and their progeny. Pitre's expert opined Gulf South's pipeline installation would damage the remaining land and improvements by $173,643.25 -- but he could cite no "facts or data" to support this opinion, or articulate any methodology upon which he relied in reaching this conclusion. Nevertheless, he was allowed to testify at trial. As such, neither the trial court, nor the Court of Appeals in affirming the trial court's decision, complied with this Court's mandate.

To briefly review the facts of this case, Gulf South Pipeline Company, LP ("Gulf South") sought to acquire by eminent domain a 5.59 acre right-of-way and temporary easement (not at issue here) for a 42-inch gas pipeline, parallel to an existing high-voltage power line easement, passing through 115 acres of property owned by Blanche Marie Downey Pitre in Warren County, Mississippi. Gulf South's appraisal expert, Brent Johnston, properly calculated the fair market value of the right-of-way sought as constituting $38,250. Based upon sound appraisal principles and specific facts articulated at trial, Johnston found no damages to the remainder of the property.

Once Gulf South proved its *prima facie* case, Pitre had the burden of proving any alleged decrease in the "after" value of the remainder. Pitre's appraisal expert, James Hamilton, opined on the "after" value of the remainder property; but wholly failed to meet the "reliability" requirement of Miss. R. Evid. 702. In particular, Hamilton's opinions were unsupported by any comparable land sales (i.e., sales of land with a pipeline installed); nor did Hamilton offer any

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[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

[2] *Miss. Transportation Comm'n v. McLemore*, 863 So. 2d 31 (Miss. 2003).

other valid basis for his opinions. His expert testimony should have been excluded under Miss. R. Evid. 702.

The Mississippi Court of Appeals affirmed the trial court's decision to allow Hamilton's testimony and to deny Gulf South's motion for a judgment notwithstanding the verdict in *Gulf South Pipeline Co., LP v. Pitre*, __ So. 3d __, 2009 WL 596007 (Miss. Ct. App., March 10, 2009) and denied Gulf South's motion for rehearing. By Order entered October 22, 2009, this Court granted Gulf South's petition for writ of certiorari. *See* Ex. "A". Gulf South timely files this supplemental brief as allowed by Miss. R. App. P. 17(h).

REASONS FOR GULF SOUTH'S MISS. R. APP. P. 17(h) SUPPLEMENTAL BRIEF

In assessing whether Pitre's expert, Hamilton, should have been allowed to testify, the Court of Appeals made the following comment about Gulf South's expert, Johnston:

> Like Hamilton, Johnston was not able to provide any comparable sales for property that had sold with an installed pipeline on it. Regardless, Gulf South argues that Johnston's testimony was properly admitted, but without any comparables, Hamilton's testimony should have been excluded because the burden of proof was different for Pitre than Gulf South.

Pitre, 2009 WL 596007, *2. But Gulf South did not, and never has, advocated a different burden of proof under Rule 702 for assessing the admissibility of expert testimony.[3] The standard for

[3] The "burden of proof" issue Gulf South actually raises on appeal is that the trial court impermissibly based its decision to allow **Hamilton** to testify on the fact that **Johnston's** opinion -- no damage to the remainder -- was not based on comparable sales of land with a pipeline installed. Tr. 266-68. This holding, also followed by the Court of Appeals, ignores long-standing Mississippi law in which the Court recognizes that in a partial taking, the condemnor may determine there is no damage to the remainder, and may base its valuation on the fair market value of the land actually taken. *Green Acres Mem. Park v. Miss. Highway Comm'n,* 153 So. 2d 286, 289-90 (Miss. 1963); *Morris v. Miss. Highway Comm'n*, 129 So. 2d 367, 370-71 (Miss. 1961); *see also Carlton v. Miss. Transp. Comm'n,* 749 So. 2d 170, 176 (Miss. Ct. App. 1999). Thus Gulf South met its burden of proving its prima facie case through Johnston's testimony showing (a) the fair market value of the land taken and (b) substantiating his determination of no damage to the remainder. The burden then shifts to Pitre -- the landowner -- to prove any alleged damages to the remainder by the methods prescribed in Miss. R. Evid. 702. *See Bishop v. Miss. Transp. Comm'n,* 734 So. 2d 218, 221 (Miss. 1999); *Ellis v. Miss. Highway Comm'n,* 487 So. 2d 1339, 1342 (Miss. 1986). In affirming the trial court's ruling, the Court of Appeals overlooked the *Morris/Green Acres* line of cases applicable here.

assessing both Hamilton's and Johnston's expert testimony is the same: Both experts were required to meet Rule 702's requirements.

What differs is that Johnston's expert testimony met these requirements in proving Gulf South's prima facie case showing "the value of the property taken." *See Martin v. Miss. Transp. Comm'n,* 953 So. 2d 1163, 1166 (Miss. Ct. App. 2007). Indeed, Pitre did not challenge at trial or raise on appeal the issue of the admissibility of Johnston's testimony.

Hamilton's testimony, on the other hand, was insufficient under Rule 702 to prove the "greater compensation" that Pitre felt was her due. *See Bishop v. Miss. Transp. Comm'n,* 734 So. 2d 218, 221 (Miss. 1999); *Ellis v. Miss. Highway Comm'n,* 487 So. 2d 1339, 1342 (Miss. 1986).[4] Because Hamilton's testimony did not meet Rule 702's requirements, it should have been excluded at trial. The trial court erred in failing to do so. In affirming the trial court's decision, the Court of Appeals misapprehended and misapplied the principles applicable in determining the admissibility of expert testimony under Miss. R. Evid. 702 and the Mississippi Supreme Court cases applying Rule 702. Gulf South files its Miss. R. App. P. 17(h) supplemental brief to explore the requirements of Miss. R. Evid. 702, showing (i) how the testimony of its expert, Johnston, meets these requirements; and (ii) how the testimony of Pitre's expert, Hamilton, is unsupported by the requisite "sufficient facts or data" and how that testimony fails to meet the "reliability" requirements of Rule 702.

ARGUMENT AND AUTHORITIES

A. Mississippi's Standard for Admissibility of Expert Testimony.

In *Miss. Transportation Comm'n v. McLemore,* 863 So. 2d 31 (Miss. 2003), this Court adopted the May 29, 2003 amendment to Miss. R. Evid. 702, which provides:

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[4] As the *Ellis* court held: "After a prima facie case has been made out by the condemnor, then, if the landowner expects to receive more compensation than that shown, he must go forward with the evidence showing such damage." 487 So. 2d at 1342.

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Id. at 39 ("[T]his Court today adopts the federal standards and applies our amended Rule 702 for assessing the reliability and admissibility of expert testimony."); *see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). The *McLemore* Court emphasized the trial court's gate keeping responsibility under Rule 702 -- that it ensure that proposed expert testimony "both rests on a reliable foundation and is relevant to the task at hand." *McLemore*, 863 So. 2d at 39. Elaborating, this Court explained that the party offering expert testimony has the burden of proving "that the expert has based his testimony on the methods and procedures of science, not merely his subjective beliefs or unsupported speculation." *Id.* at 36.

In particular, regardless of an expert's qualifications, Rule 702 requires that an expert's opinions be "based upon sufficient facts or data." The expert's proposed testimony must also be "reliable." *See* Miss. R. Evid. 702(2) and (3). That is, the expert's testimony must be "the product of reliable principles and methods. . . reliably [applied] to the facts of the case." *Id.*

As detailed below, the expert testimony of Gulf South's expert, Johnston, meets these requirements in all respects. Pitre's expert, Hamilton, however, could cite no "facts or data" supporting his opinions regarding the diminution in the "after" value of the remainder; nor could he articulate any methodology -- much less any "reliable principles and methods" -- to support his estimated diminution percentages.

B. Gulf South Proved its Prima Facie Case of the Value of the Property Condemned Through the Testimony of its Expert, Brent Johnston.

In a partial taking, as here, the condemnor (Gulf South) may base its valuation on the fair market value of the land actually taken. *See Green Acres Mem. Park v. Miss. Highway Comm'n,*

153 So. 2d 286, 289-90 (Miss. 1963); *Morris v. Miss. Highway Comm'n*, 129 So. 2d 367, 370-71 (Miss. 1961); *see also Carlton v. Miss. Transp. Comm'n*, 749 So. 2d 170, 176 (Miss. Ct. App. 1999); *see* pp. 2 and note 3, *supra*.

In compliance with its burden of proof to "establish a prima facie case of the value of the property taken" (*see, e.g., Martin,* 953 So. 2d at 1166), and pursuant to Miss. Code Ann. § 11-27-7, Gulf South's appraiser, Johnston, testified that the difference in the fair market value of Mrs. Pitre's property before and after taking the easement was $38,250 ($955,000 minus $916,750). Tr. 326, 336. Applying standard appraisal practices (Tr. 327), Johnston calculated the $38,250 amount by multiplying the 5.59 acres for the permanent easement by the fair market value of the land, which he determined, through comparable sales, to be $6,000 per acre (Tr. at 327), equaling $33,540, plus $4710 for temporary easements. Tr. 325-32.

As allowed by *Green Acres* and *Morris*, and in accordance with Rule 702, Johnston assigned no damage to the remainder. Relevant to the Rule 702 analysis, Johnston supported his opinion with "sufficient facts [and] data" by explaining that he found no damage to the remainder (i) due to the great distance from the pipeline to the house and shop (Tr. 335-36); and (ii) because the property was already severed by a 200 ft. wide power line easement. Tr. 333-35. Thus, he explained, to the extent any damage to the remainder existed, such damage had already occurred when the power line was constructed across the property. The pipeline easement at issue is parallel and adjacent to the existing power line and Johnston concluded that the pipeline caused no additional severance or other damage to the remainder of the property. *Id.*

Johnston properly acquired comparable sales in making his fair market before-taking value determination (Tr. 311), "a methodology that easily meets the *Daubert* factors" under Mississippi law. *Tunica County v. Matthews,* 926 So. 2d 209, 214-15 (Miss. 2006); *see Adcock v. Mississippi Transp. Com'n,* 981 So. 2d 942, 947-48 (Miss. 2008); *Rebelwood, Ltd. v. Hinds*

County, 544 So. 2d 1356, 1360-61 (Miss. 1989); *Miss. Highway Comm'n v. Franklin County Timber Co.,* 488 So. 2d 782, 785 (Miss. 1986). Because Johnston determined there was **no** damage to the remainder, Johnston is not required to provide comparable sales proving the negative that no damage existed. *Green Acres, 1*53 So. 2d at 289-90; *Morris,* 129 So. 2d at 370-71. In reaching his "no damages to remainder" determination, Johnston inspected the property four times during his appraisal process (*see* Tr. 301, 308-09), and, as shown above, considered all relevant attributes of the subject property in reaching his opinions. Thus his methodology was sound and in accordance with Rule 702's mandate.

C. Pitre Failed to Meet Her Burden of Proof Because The Testimony of Her Expert, Hamilton, Was Inadmissible Under Miss. R. Evid. 702.

The burden of proof then shifted to the landowner -- Pitre -- to prove the "greater compensation" she claimed was her due. *See Bishop,*734 So. 2d at 221; *Ellis,* 487 So. 2d at 1342. Pitre had the burden of showing, through competent, supportable, expert testimony, that the "after" value of her property had been reduced. Pitre relied on the testimony of her expert, James Hamilton, to support her claimed damages; but Hamilton's opinions and testimony on the "after" value of the remainder wholly failed to meet Miss. R. Evid. 702 requirements.[5]

The Court of Appeals began its analysis by citing to Hamilton's years of experience and other qualifications, accepting his testimony that "since it was impossible to use a formula to calculate the damage to the property, [his] appraisal was based on his opinion, which was formulated from his education and years of experience." *Pitre,* 2009 WL 596007, *3. Thus the Court of Appeals essentially excused Hamilton from undergoing Rule 702 scrutiny in light of

[5] It is because Hamilton's opinion was that the pipeline did, in fact, damage the remainder, that he was Rule 702-bound to support his opinions by comparable sales of land with pipeline installed or other "facts or data" supporting his conclusions. Thus it was error for the trial court to base its decision to allow Hamilton to testify on the fact that Johnston had no comparable sales of land with an installed pipeline, an error perpetuated by the Court of Appeals' reliance on this same information in declining to fully scrutinize Hamilton's expert testimony under Rule 702's standards.

"his education and years of experience." *Id.* But solid qualifications are not enough. *See Townsend v. Doosan Infracore American Corp.*, 3 So. 3d 150, 156 (Miss. Ct. App. 2009) (Holding that while the court did not dispute the expert's qualifications, "our issue here is that his methods failed to reflect such specialized training."); *see also Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991-92 (5th Cir. 1997).

Rule 702 requires that an expert's opinions be "based upon sufficient facts or data." Speculative opinions will not suffice. *See Dedeaux Utility Co., Inc. v. City of Gulfport*, 938 So. 2d 838, 843 (Miss. 2006) (reversing admission of land appraiser's testimony where appraisal of water and sewer utility was based on data from Public Service Commission which did not consider value of contributed property: "[The expert's] testimony was not based on sufficient facts and data and was therefore unreliable. . . [and] the trial court erred in admitting that testimony.").[6]

As shown in Gulf South's prior briefing, as well as the briefs of Amici, Hamilton's opinions are based on nothing but speculation. He cited **no** "facts or data" to support his opinion that Pitre's land would decline in value by 15 percent, Pitre's house would decline in value by 20 percent, and her shop would decline in value by 30 percent due to the pipeline installation. R. at 277; Tr. 461 & 468-69.[7] Hamilton, in fact, repeatedly acknowledged at trial (i) that he had no

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[6] *See also City of Jackson v. Spann,* 4 So. 3d 1029, 1039 (Miss. 2009) (testimony based upon expert's "mere 'guess' [held] insufficient to establish substantial, credible evidence to future damages award); *McElmore,* 863 So.2d 31 at 41 (an expert cannot testify to opinions which are "entirely speculative"); *Davis v. Christian Broth. Homes of Jackson, Mississippi, Inc.*, 957 So.2d 390, 409 (Miss. Ct. App. 2007) (affirming exclusion of "conclusory" affidavit of expert witness as not "based upon sufficient facts or data" and affirming summary judgment in defendants' favor); *Fresenius Medical Care and Continental Cas. Co. v. Woolfolk ex rel. Woolfolk,* 920 So. 2d 1024, 1032 (Miss. Ct. App. 2005) (reversing lower court decision where based on expert testimony premised on factual assumption unsubstantiated by any evidence in the record: "[I]f the premise upon which [the expert's] opinion was based is flawed, then it necessarily follows that the opinion is also flawed.").

[7] Hamilton testified that the property's "after" fair market value totaled $667,261 (R. at 277), equaling a $173,644 difference from his "before" fair market value totaling $840,905. R. at 276.

evidence to support his opinion that a pipeline would damage the defendant's property and (ii) that he had no comparable sales of land with a pipeline across it upon which he could properly base his "opinions" assigning his percentages of damages. *See* Tr. 461, 468-69.

The Court of Appeals, however, listed in its opinion "contributing" factors **it** apparently believed would support the admissibility of Hamilton's opinions.[8] But the Court of Appeals, on appellate review, is bound by the record in determining whether the grounds articulated by an expert are sufficient to withstand Rule 702 scrutiny. *See, e.g., Davis v. Christian Broth. Homes of Jackson, Mississippi, Inc.*, 957 So. 2d 390, 410 (Miss. Ct. App. 2007) ("*From our review of the record*, we cannot discern the "good grounds" upon which Commander Lewis based his opinions, and his opinions do not appear to be 'based upon sufficient facts or data.'" (quoting Miss. R. Evid. 702(1)) (emphasis added); *see also Ross v. State,* 16 So. 3d 47, 60 (Miss. Ct. App. 2009) ("In an appellate review, we limit our inquiry to those facts '"contained strictly in the record. . . . ."'). Here, **Hamilton** never testified that the factors cited by the Court of Appeals, or any other factor, supported his opinions. He had no comparable sales of land with pipelines installed; he had no supporting facts or data for his opinions. Hamilton failed the "sufficient facts or data" requirement of Rule 702(1).

Regarding Hamilton's methodology, Hamilton, like Johnston, used the comparable sales

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[8] The Court of Appeals noted that (i) "Pitre would have to get permission from Gulf South if she ever desired to build an access road to the north portion of her property;" (ii) "Pitre had done extensive erosion control work on the property which would be partially destroyed by the installation of the pipeline;" and (iii) "Pitre also lost the use of her land for growing timber over the pipeline." *Pitre*, 2009 WL 596007 at *3 (¶14). As Gulf South has explained in prior briefing, these factors would not, in any event, support a diminution in value of the remainder. Regarding factor (i), the easement for Gulf South's pipeline runs along a pre-existing high voltage power line which already severed Pitre's property. There was no additional damage caused by any severance of the property into two parcels from the pipeline. Tr. 333-35. As to factor (ii), Gulf South paid Pitre for the temporary use of the land on which the erosion control work would need to be redone (Tr. 328-32), and Gulf South was required to restore the property to its prior condition upon completion of construction. *See* Tr. 147-50; *see also* Tr. 471-74. Finally, factor (iii), Pitre's "lost" ability to grow timber on the pipeline easement area, fails to recognize that Pitre **already** received full compensation for that claim. There is nothing left to depreciate for Pitre's inability to grow timber "over the pipeline." *See, e.g.,* Tr. 371 ("[W]hen you appraise land at . . . $6,000 an acre, the trees come with it. That includes the trees.").

approach in reaching his "before" value of the subject property. Tr. 432-448. But, again, Hamilton used **no** comparable sales to support the "after" value he placed on Pitre's property once the pipeline installation occurred. As noted above, he estimated without support that Pitre's land would decline in value by 15 percent, Pitre's house would decline in value by 20 percent, and her shop would decline in value by 30 percent (Tr. 456); and calculated his diminished value amounts by applying these percentage estimates to his "before" values for Pitre's land, house and shop. Tr. 448-50.

When Hamilton was asked on direct examination, "Would you tell us about your methodology in doing that [calculating the diminution in value]?" (Tr. 448), Hamilton never articulated any method or information he relied upon in determining his percentage estimates. *See* Tr. 448-56; 461; 468-69. Hamilton's only explanation for these estimates was that they are his "opinion:" "Just about everything that we do is the opinion of the appraiser. . . . [W]hen it . . . gets down to it, it's our opinion as to what the value is." Tr. 456. This testimony amounts to nothing more than Hamilton's "subjective beliefs or unsupported speculation," which, as this Court held in *McLemore*, does nothing to prove Hamilton "based his testimony on the methods and procedures of science," as required by Rule 702 and *Daubert/McLemore* standards. *McLemore,* 863 So. 2d at 36.

This circuitous testimony does not meet Rule 702's reliability requirements.[9] Rather, Rule 702's "reliability" requirement means that the proponent of evidence cannot simply elicit conclusory testimony from her expert (*McLemore*, 863 So. 2d at 36); but must show that "the expert has based his testimony on methods and procedures of science, not merely his subjective beliefs or unsupported speculation." *Id.* (reversing admission of expert testimony of land

[9] As Gulf South has noted in prior briefing, the Court of Appeals also noted in its Opinion that "Hamilton testified that his opinion was based on sufficient facts and data and was the product of reliable real estate appraisal principles and methods." *Pitre*, 2009 WL 596007 at *3 (¶13). But merely **agreeing** to these questions by Pitre's counsel -- as Hamilton did here (*see* Tr. 430) -- does not make it so.

appraisal, finding it "highly speculative," where appraiser randomly chose the distance necessary for a buffer zone area in assessing damages due to proposed interstate right-of-way; citing no verifiable basis for his theory); *see Watts v. Radiator Specialty Co.*, 990 So. 2d 143, 146-48 (Miss. 2008) (affirming exclusion of expert based on his reliance on case studies irrelevant to the case at hand); *Edmonds v. State,* 955 So. 2d 787, 791-92 (Miss. 2007) (holding that expert testimony should not have been admitted where the State failed to show that the testimony was based on reliable methods or procedures); *Townsend,* 3 So. 3d at 154 ("Talking off the cuff-deploying neither data nor analysis-is not an acceptable methodology." (internal citations omitted)).

Hamilton failed to meet Rule 702's reliability standards in this case. Moreover, "[b]ecause of the weight that is given to expert testimony, it is imperative that trial judges remain steadfast in their role as gatekeepers under the *Daubert* standard." *Watts,* 990 So. 2d at 147, citing *Edmonds,* 955 So. 2d at 792. The trial court did not do so here, and the Court of Appeals likewise declined to enforce this mandate. Thus, reversal of the Court of Appeals' decision affirming the trial court is required.

CONCLUSION

For the foregoing reasons, Gulf South respectfully requests this Court to reverse the decision of the Court of Appeals affirming the decision of the trial court denying Gulf South's Motion for Judgment Notwithstanding the Verdict. Gulf South further respectfully requests this Court to direct the trial court to enter a judgment that $38,250 be paid to the defendant as full and complete compensation for the taking of the pipeline easement.

THIS the 2nd day of November, 2009.

Respectfully submitted,

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BY: LeAnn W. Nealey
ONE OF ITS ATTORNEYS

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CERTIFICATE OF SERVICE

I, LeAnn W. Nealey, hereby certify I have this day caused a true and correct copy of the foregoing **SUPPLEMENTAL BRIEF PURSUANT TO MISS. R. APP. P. 17(h) BY THE APPELLANT/CROSS-APPELLEE GULF SOUTH PIPELINE COMPANY, LP**, to be delivered by United States mail, postage prepaid, to the following:

Honorable John H. Price Jr.
P.O. Box 351
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COUNTY COURT JUDGE,
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