THE STATE OF SOUTH CAROLINA
SUPREME COURT

APPEAL FROM HORRY COUNTY

John C. Hayes, Circuit Court Judge

RECEIVED

APR 14 2015

S.C. Supreme Court

Case No. 2014-002676

Justin Rayl #00349311, Petitioner,

v.

State of South Carolina, Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court should grant a Writ of Certiorari to review the circuit court's decision denying Appellant post-conviction relief, based on trial counsel failing to review all of the evidence in Appellant's case before trial, failing to follow through in obtaining all of the evidence in Appellant's case, using her father to help coerce Appellant into a guilty plea, coercing Appellant into a guilty plea, instructing Appellant on how to answer the judge during the guilty plea, and not giving Appellant his discovery before the trial.

STATEMENT OF THE FACTS

Justin Rayl (Appellant) pled guilty to infliction of great bodily injury upon a child on December 14, 2011 (App. 193, lines 6-15). A Post Conviction Relief hearing was held on October 27, 2014. The issues raised by Appellant included that counsel was ineffective in failing to review all of the evidence prior to trial, failing to provide discovery to Appellant, failing to effectively cross-examine the sole witness before the guilty plea, and coercing Appellant into a guilty plea. The Circuit Court subsequently denied relief on all grounds.

The trial for Appellant began on December 13, 2012. Before the trial began, Kia Wilson, trial counsel for Appellant, moved for a continuance (App. 88, lines 1-18). The grounds for the motion were based on 1) late reports Wilson said she had not received until the prior week from the solicitor (App. 88, lines 3-18); and 2) Wilson being unable to find the doctor that created the reports once she received them (App. 90, lines 19-22). The judge denied the motion to continue the trial after the solicitor stated Wilson had received the reports six months ago (App. 91, lines 1-5; p. 92, lines 24-25; p. 93, line 1, lines 9-17). In addition, the judge pointed out that Wilson could have requested the doctor's contact information from the solicitor and stated that the doctor would be made available to Wilson prior to the doctor's testimony (App. 92, line 6; p. 93, line 1).

During a Jackson v. Denno hearing, Wilson said that she did not have all of the discovery materials (App. 109, lines 10-16). She states, "This second interview, I don't know anything about this second interview" (App. 109, lines 10-11). Appellant was interviewed twice by the police, once on January 16 and another time on February 12. (App. 118, lines 15-20). Wilson claims to have received a transcript from the solicitor for

the January 16 interview, but says she knew nothing about the February 12 interview and did not receive a transcript of that interview.

While Wilson claims she did not receive all of the evidence in the case, (App. 109, lines 14-16) the solicitor replied that not only did the solicitor send transcripts for both interviews, but that Wilson met her at the Horry County Police Department to look through all of the interview tapes (App. 109, lines 18-23). Wilson at the PCR hearing admits that she met with the solicitor at the Horry County Police Department to review all of the evidence in the case, which included 6 audio tapes (App. 110, lines 4-24). Wilson said she did meet up with the evidence custodian and solicitor to review the tapes, but she did not recall reviewing the original tapes while there (App. 110, lines 14-20).

The solicitor went on to tell the judge that the detective's report clearly said he interviewed Appellant twice, once on January 16 and another time on February 12 (App. 118, lines 15-20). The solicitor also said that there had been an earlier hearing on both of the interviews (App. 109, lines 18-20). At the PCR hearing, Appellant also testified that Wilson was aware of both interviews he had with the police because it was mentioned in previous motion hearings as well as conversations with Wilson (App. 31, lines 23-25; p. 32, lines 1-4).

The judge at trial asked Wilson if she had been provided with the February 12 interview (App. 118, lines 4-5), but Wilson replied that the tapes were in poor quality and that she did not have that interview on a tape or a transcript (App. 118, lines 6-14). Wilson also testified to this issue at the PCR hearing. There, Wilson said that both she and Appellant tried to listen to the tapes together, but the tapes were inaudible (App. 47, lines 15-21). Wilson said the tapes were so low and of poor quality that she could not

hear anything (App. 52, lines 7-10). She went on to say that her boss said the State was going to transcribe them, so she could get their copy of the tapes (App. 47, lines 18-21). Wilson said there were two or three tapes (App. 52, lines 14-15), but went on to say that she only received a transcript (App. 47, line 22). At the PCR hearing, when asked if there were possible errors in the transcript, considering she could barely hear the tapes, Wilson responded with "I would assume so." (App. 50, lines 22-25). She went on to say that she could only speculate, but, had she gone to trial, she would have hoped for errors and would have argued that." (App. 50, line 25; p. 51, lines 1-4).

The solicitor during the trial said the transcript of the February 12 interview was handed over on October 3, 2011 (App. 119, lines 18-22). At that time, the judge told the solicitor to give Wilson a copy of the transcript from the February 12 interview to look over that night before the detective gave testimony to the interview (App. 121, lines 3-12). The next day, Appellant pled guilty to infliction of great bodily injury upon a child (App. 193, line 6-15). At the PCR hearing, Wilson said she believed that not having the February 12 transcript did prejudice Appellant (App. 55, line 25; p. 56, line 2).

At the PCR hearing, Appellant, Wilson, and Appellant's mother, Laura Teal, testified that Wilson's father, Ralph Wilson, Sr., talked to Appellant after they received the February 12 transcript and before he entered his guilty plea. Appellant testified that Wilson's father met with him and his family the day he entered his guilty plea. Appellant said Wilson introduced her father, an attorney, and then Wilson's father explained to Appellant and his family that Kia Wilson had done everything she could (App. 34, lines 20-25; p. 35, line 1). Wilson's father told Appellant that he was going to prison for 30 years if he kept trying and that he had to "give up" (App. 35, lines 1-3).

Wilson testified that her father did talk to Appellant before his guilty plea, her father did not know the facts of the case (App. 68, lines 16-18), did not talk to any of the witnesses (App. 68, lines 21-23), did not investigate the case (App. 69, lines 5-7), and did not review the medical records (App. 69, lines 7-8). Teal, Appellant's mother, testified that Wilson's father talked to them before the guilty plea and said "there was basically nothing else that she [Wilson] could do and that Justin should take the plea, that that was his only option, and if he did not take the plea, that Judge Cottingham most likely would give him 30 years if found guilty, and he would be found guilty" (App. 78, lines 18-25).

After receiving the February 12 transcript, Appellant pled guilty. Appellant testified at the PCR hearing that Wilson told him that she could not properly defend him and that he had to take the deal or he would go to prison for 30 years (App. 35, lines 18-20). Wilson testified that "if he continued to trial, he was going to be convicted, which means time, more time than he would have gotten on a plea" (App. 68, lines 8-10). More importantly, Wilson said Appellant "was wanting to fight the entire time." (App. 77, lines 5-6). She said, "[W]hen we talked that morning, he was still saying that he wanted a trial" (App. 77, lines 7-8). She then went on to testify that after that, she told Appellant "that that was going to be basically a dead end" (App. 77, lines 8-10).

Appellant also testified that Wilson told him to answer the judge exactly the way the judge wanted to be answered because if he did not, the judge would throw out the plea deal and Appellant would get 30 years in prison (App. 36, lines 2-7; p. 43, lines 3-5). At the PCR hearing, Wilson said, "I know for a fact, like a lot of judges, Judge Cottingham would not have accepted any plea where the person hesitates or hemming or hawing. Those might have been the exact words I used…." (App. 76, lines 8-13).

Appellant also testified at the PCR hearing that he did not receive the discovery in his case until after he pled guilty, even though he had asked for it several times before that (App. 32, lines, 12-20). He testified that had he been able to review his discovery before the trial, he would not have pled guilty (App. 33, lines 12-14). The reason for this was the contents of the February 12 transcript. Appellant testified that there were errors throughout the State's transcript from the February 12 interview. (App. 33, lines 17-20).

STANDARD OF REVIEW

In order to establish a claim of ineffective assistance of counsel, a PCR applicant who pleads guilty based on trial counsel's advice must show: (1) that counsel was ineffective and (2) that but for trial counsel's errors, the applicant would have insisted on going to trial. Dalton v. State, 654 S.E.2d 870, 873 (2007) citing Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). The rule as to guilty pleas is 'the accuracy and truth' of a prisoner's denial of any threats inducing his plea of guilty, given during an examination on the record at his sentencing...will be considered 'conclusively' established by that proceeding unless he offers...a valid reason why he should be permitted to depart from the apparent truth of his earlier statement." Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976). In order to satisfy the prejudice prong, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial." Stalk v. State, 681 S.E.2d 592, 594 (S.C. 2009).

This Court has held that it gives great deference to the PCR court's findings of fact and conclusions of law. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). Thus, on review, a PCR judge's findings will be upheld if there is any evidence of probative value sufficient to support them. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). If no probative evidence exists to support the findings, this Court will reverse. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000). Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

ARGUMENT

Wilson was ineffective for failing to review all of the evidence in Appellant's case, failing to follow through in obtaining all of the evidence in Appellant's case, using her father to help coerce Appellant into a guilty plea, coercing Appellant into a guilty plea, instructing Appellant on how to answer the judge during the guilty plea, and not giving Appellant his discovery before the trial.

Wilson was ineffective in failing to prepare for Appellant's trial in that she did not review the discovery in his case, did not provide the discovery to Appellant, failed to get all of the discovery from the State, and ultimately coerced Appellant into a guilty plea with the assistance of her father, Ralph Wilson, Sr. But for these errors, Appellant would have proceeded to trial and would not have entered a guilty plea.

In Kolle v. State, Kolle pled guilty after his attorney's motion to suppress evidence that was seized pursuant to a search warrant was denied. Kolle v. State, 690 S.E.2d, 73, 76 (S.C. 2010). Kolle filed a PCR application stating he did not receive all of the discovery materials in his case and that plea counsel was ineffective for not giving him his discovery materials. Id. At the PCR hearing, trial counsel for Kolle said he had limited discovery material but that he believed Kolle's charge was improper, which is what led him to move to suppress the drug evidence. Id. at 77. Kolle testified that his attorney could have suppressed the drugs had his attorney investigated the case and pointed out discrepancies in the call logs, incident reports, and the search warrant. Id. Kolle testified that "he felt under duress to accept the plea because plea counsel was not prepared for trial. Id. Lastly, Kolle testified at the PCR hearing that he admitted guilt

and "expressed satisfaction with plea counsel's representation because he lacked the necessary information to raise any challenge during the plea proceeding. Id.

The PCR judge in Kolle ordered a new trial and held "that plea counsel's lack of preparation satisfied the standard of deficiency under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). The Supreme Court of South Carolina affirmed the PCR judge's order for a new trial. In their decision, the Court said "plea counsel was deficient in failing to procure pertinent discovery materials...." Id. at 79. They also said that "if plea counsel truly believed that suppression issue was meritorious, he could have advised Kolle to proceed to trial and, if convicted, challenge the denial of the suppression motion on direct appeal." Id. at 80.

Here, on the first day of trial, Wilson moved for a continuance based on not having medical reports, not having a doctor, and not having spoken to one of the state's doctors that was going to testify. The reports that Wilson claimed she did not have, the solicitor said she had turned over six months ago. Wilson claimed she could not find the state's doctor; however, as the judge said, she easily could have gotten the contact information from the solicitor. She had months to also get an independent doctor of her choosing to review the medical records. Like Kolle, Appellant felt under duress to accept the plea since his trial attorney was ineffective in not being prepared for trial.

Furthermore, during a pretrial hearing, Wilson admitted that she did not even know how many times Appellant was interviewed by the police. She claimed there was a Brady violation as to the transcript of the second police interview with Appellant. She said she knew nothing about the February 12 interview and that, although she went with the solicitor to meet with the evidence custodian, she did not review the original

interview tapes even though she states her copies of those tapes were inaudible. Wilson was ineffective for not reviewing these tapes when given the opportunity, if she knew her copies of the interview tapes were inaudible.

Appellant should be granted a new trial based on trial counsel not being prepared for trial. In Stalk v. State, the Court declined to grant a new trial based on the attorney not being prepared for trial. Stalk, 681 S.E.2d 592, 594 (S.C. 2009). There, the defendant's prejudice claim was that "his attorney was so unprepared that Stalk felt coerced into pleading guilty." Id. The Court said that to show prejudice the defendant "was required to prove more than the fact of counsel's inattentiveness, which is the 'deficiency.'" A defendant's assertion that he would not have pled guilty and would have gone to trial is not enough to grant a new trial where it is based solely on the attorney not being prepared for trial.

Here, unlike Stalk, Appellant's assertion that he would not have pled guilty is not the only evidence of prejudice. Appellant did testify that he would not have pled guilty had Wilson been prepared for trial, but there was more that affected his guilty plea.

First, the issue of Wilson not having the second transcript from the police interview prejudiced Appellant. Wilson was ineffective for not reviewing her file, not having the February 12 transcript to review with Appellant, and for not reviewing the original interview tapes when she went to the Horry County Police Department. Trial counsel coerced Appellant into a guilty plea because of the February 12 transcript. However, if she had the transcript before trial, she could have reviewed it for errors and should have, if her tapes were inaudible. In addition, Appellant testified that there were errors throughout the transcript. In the middle of trial, Wilson made a decision to coerce

Appellant into a plea based on a transcript that to her knowledge was transcribed from an inaudible tape recording.

Second, Wilson's reasons for requesting a continuance resulted in prejudice to Appellant. Not only did Wilson claim that she did not know about the February 12 interview, she also requested a continuance claiming that she had just received new medical reports – reports that the solicitor testified had been given to Wilson six months prior to the trial. In addition, Wilson claimed that she had not had a chance to talk to the state's doctor who prepared a report the prior week. Wilson said during the trial that she could not find the doctor, but, as the judge said, she had all of the prior week to contact the solicitor for the doctor's contact information, and the doctor would be made available to her prior to the doctor's testimony. This further prejudiced Appellant in that Wilson failed to consult an independent doctor and failed to interview the state's doctor.

Third, not only was she unprepared for trial as in Stalk, but Wilson coerced Appellant into a guilty plea. She told him that it was a dead end, and she had her father assist in coercing Appellant's guilty plea. Wilson testified at trial that her father did not review the case, did not interview any witnesses, and did not know the case at all. However, she brought him in during the trial to assist in coercing Appellant's guilty plea. That day, Wilson's father told Appellant that Wilson did everything she could and that his only option was to plead guilty to 10 years or he would be convicted and sentenced to prison for 30 years. This prejudiced Appellant in that he felt he had no option but to plead guilty or be abandoned by his counsel who was additionally and obviously unprepared for trial - his own trial counsel and her father, an experienced and respected

attorney in the community, were telling him that he must plead guilty or be sentenced to thirty years.

Although Appellant did testify at the plea hearing that he was satisfied with his attorney and that he was guilty of the crime, he is entitled to a new trial. In Edmonds v. Lewis, the petitioner said "his appointed counsel told him that he had better plead guilty if he wanted counsel to represent him leaving him with the impression that 'if he did not plead guilty that (he) would be left alone and without any aid from counsel or anyone.'" Edmonds, 546 F.2d 566, 567 (4th Cir. 1976). The petitioner was examined by the judge under oath and said he was guilty of the crimes against him and understood he could go forward with a jury trial." Id.

There, quoting Crawford v. United States, the Court said that a prisoner's denial of threats during examination on the record during the plea hearing will be conclusive "unless he offers a valid reason why he should be permitted to depart from the apparent truth of his earlier statements." Id. at 568 quoting Crawford v. United States, 519 F.2d 347, 350 (4th Cir. 1975). There, the Court said the petitioner's reasons for asking the Court to disregard his sworn statements were insufficient to grant a new trial. Id. The Court went on to say that, "Petitioner does not allege that his attorney instructed him to answer the trial court's inquiries falsely nor does he claim his attorney made a threat intended to induce him to perjure himself." Id. Because there was not an allegation that anyone instructed the petitioner to answer the judge falsely, the Court dismissed the petitioner's request for an evidentiary hearing. Id. at 568-569.

Here, like Edmonds, Appellant testified that Wilson told him she could not properly defend him if he went forward with a trial; but, unlike Edmonds, Wilson also

instructed Appellant as to how to answer the judge. Like Edmonds, Wilson told Appellant she could not properly defend him if he were to go to trial. In addition, Wilson brought in her father, who was unfamiliar with the case, and who told Appellant and his family that Wilson had done everything she could and that he should "give up." Wilson testified that she told Appellant he would have been convicted at trial and a trial was a "dead end." With those statements, Appellant felt he was being denied counsel and that he had no choice.

Unlike Edmonds, Wilson went further to instruct Appellant on how to answer the judge's questions. Appellant testified that Wilson told him that she was not going to tell him to lie, but that he should answer the judge how he wanted to be answered. She went on to tell him that if he did not answer the way the judge wanted to be answered, the judge would make him go forward with a trial, Appellant would be convicted, and he would get 30 years in prison. Wilson said at the PCR hearing, "I know for a fact, like a lot of judges, Judge Cottingham would not have accepted any plea where the person hesitates or hemming or hawing. Those might have been the exact words I used…." Here, as the Court said in Edmonds, Appellant has not only given reasons why he should be permitted to depart from his earlier statements during the guilty plea, he has also shown the exact situation the Edmonds court describes that would grant him a new trial in that his attorney instructed him on how to answer the judge.

Wilson was also ineffective for failing to review the original interview tapes. In Hyman v. State, the Court affirmed the PCR court's dismissal of the petitioner's application when defense counsel failed to disclose a videotape to her client. Hyman v. State, 397 S.C. 35, 39 (2012). The petitioner claimed ineffective assistance of counsel

because there was a videotape recording of the drug transaction that he was unable to review prior to his guilty plea. Id. As part of the plea agreement, defense counsel worked out an agreement in that the solicitor would reduce the distribution charge on the condition that the petitioner not view the videotape. Id. The reason for this is the solicitor wanted to protect a confidential informant. Id. There, trial counsel for the petitioner testified that she watched the videotape, and it "clearly" showed the petitioner in the drug transaction. Id. at 41.

In Hyman, the Court said the solicitor complied with Rule 5 of the South Carolina Rules of Criminal Procedure by allowing defense counsel to view the videotape. Id. at 47-48. There, they said the solicitor not only allowed the defense counsel to view the videotape, but they went further to make still photographs from the video for the petitioner to view. Id. at 47.

Unlike Hyman, where the attorney did view the videotape, here Wilson did not listen to the interview tapes. Wilson said she had several audio tapes and that they were of such poor and low quality that she could not make out what was on them. She said she sat down with Appellant while they listened to them together. Instead of requesting better audio tapes, she assumed the solicitor would transcribe all of them and send it to her. In addition, she further assumed that one transcript covered multiple audio tapes that she could not hear.

Wilson was given an opportunity to listen to the original tapes. Wilson testified at the PCR hearing that the solicitor did invite her down to the Horry County Police Department to go over the evidence with the evidence custodian. Wilson admitted that she went but said she did not remember reviewing the original tapes. Unlike Hyman,

where the attorney reviewed all of the evidence and just did not share the videotape with the defendant, here, Wilson did not review the evidence with her client but furthermore failed to listen to the audio tapes herself.

Not listening to the original tapes or following through to obtain transcripts of the audio tapes was prejudicial to Appellant. Had Wilson listened to the tapes and followed through with obtaining a transcript, she could have challenged any errors in Appellant's statement to the police. Appellant testified that the transcript was filled with errors. However, he was not given much time to review this or the original tapes with his attorney because he was given the transcript the day of his trial. Wilson testified that since she could barely hear the tapes, it was possible that there were errors when transcribing the tape. She went on to say that had they gone to trial, she would have argued that at trial. Wilson was ineffective in not listening to the original interview tapes when she knew her copies were inaudible, and this prejudiced Appellant as Wilson received a transcript filled with errors on the day of trial - which led her to coerce Appellant into a guilty plea.

The American Bar Association Standards Relating to the Defense Function in Section 5.2(a) says "Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include: (i) what pleas to enter….." ABA Standards Relating to the Defense Function § 5.2(a) (1971). Here, Wilson made the decision to plea, as evidenced by the statements she made to Appellant and by bringing in her father to assist in coercing Appellant. Appellant testified that

Wilson told him she did not have a defense for him, and Wilson testified that Appellant would have been convicted at trial and a trial was a "dead end."

In addition, Wilson brought her father, who was unfamiliar with Appellant's case, into the situation to coerce Appellant into a guilty plea. Appellant testified that Wilson's father told him and his family that Wilson had done everything she could, and that Appellant was going to prison for 30 years if he did not "give up." Appellant's mother testified that Wilson's father told them there was nothing more his trial counsel could do and that the plea was his only option.

Additionally, Appellant testified that Wilson coached him on how he should answer the judge's questions. Appellant testified that Wilson told him to answer the judge just how the judge wanted him to answer or otherwise the judge would not accept the plea and Appellant would receive thirty years in prison. Wilson testified at the PCR hearing that "I know for a fact, like a lot of judges, Judge Cottingham would not have accepted any plea where the person hesitates or hemming or hawing. Those might have been the exact words I used...."

This goes against the ABA standards when it comes to a guilty plea. The statements made by Wilson and her father coerced Appellant into pleading guilty. It was not his decision, but it turned into the attorney's decision. This prejudiced Appellant in that he said at the PCR hearing had he not had that meeting with his attorney and his attorney's father, he would not have pled guilty. This was further shown by Wilson's testimony at the PCR hearing where she said Appellant "was wanting to fight the entire time." She continued by saying, "[W]hen we talked that morning, he was still saying that he wanted a trial."

CONCLUSION

Wilson was ineffective when she failed to review all of the evidence in Appellant's case before trial, failed to follow through in obtaining all of the evidence in Appellant's case, used her father to help coerce Appellant into a guilty plea, coerced Appellant into a guilty plea, instructed Appellant on how to answer the judge during the guilty plea, and did not give Appellant his discovery before the trial. Had Appellant had a chance to review his discovery, go over the second transcript for errors since Wilson testified the tapes she heard were inaudible, and not been subjected to additional pressure from an attorney who was not even familiar with his case, he would not have pled guilty.

For the foregoing reasons, Appellant Justin Rayl respectfully asks this Court to grant his Petition for Writ of Certiorari and to ultimately grant a new trial based on ineffective assistance of counsel.

THE STATE OF SOUTH CAROLINA
SUPREME COURT

APPEAL FROM HORRY COUNTY

John C. Hayes, Circuit Court Judge

Case No. 2014-002676

Justin Rayl #00349311, Petitioner,

v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I certify that I have served the Petition for Writ of Certiorari to the following recipient by depositing a copy of it in the United States Mail, postage prepaid, on April 10, 2015, addressed to:

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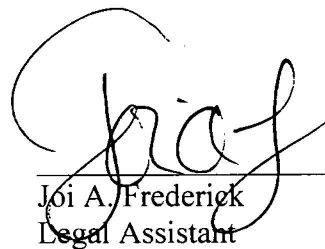

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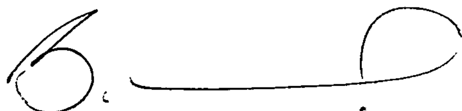
RE: Justin Rayl #00349311 v. State of South Carolina
Case No.: 2014-002676

Enclosed are 2 copies of the Appendix with one unbound copy and the original Petition for Writ of Certiorari with 6 bound copies.

Thank you for your assistance.



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Enclosures

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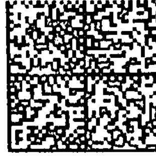

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