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January 14, 2016

South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**RECEIVED**

JAN 19 2016

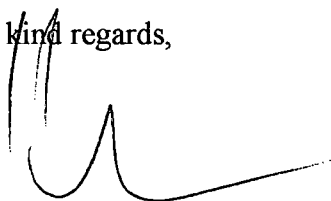
In RE: Tyson T. Watt #00352812 vs. State of South Carolina  
Case #: 2012-CP-37-1082

**S.C. SUPREME COURT**

Dear Sir/Madam:

Please find enclosed herewith the original and one (1) copy of the Appellant's Notice of Appeal in connection with the foregoing matter which I ask that you file for record, returning the clocked copy to my office. I also enclose a copy of the Order of Dismissal and the original Proof of Service on Walt Whitmire, Office of the Attorney General. Please use the enclosed self-addressed envelope to return the clocked copy to my office.

With kind regards,



Hugh W. Welborn

HWW/sba

cc: Office of the Appellate Defense  
Office of the Attorney General  
SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
APPEAL FROM ANDERSON COUNTY  
COURT OF COMMON PLEAS  
HONORABLE EDGAR W. DICKSON

2012-CP-37-1082

TYSON T. WATT, #352812

APPELLANT,

vs

STATE OF SOUTH CAROLINA,

RESPONDENT.

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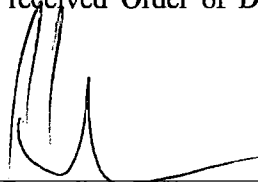
S.C. SUPREME COURT

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**NOTICE OF APPEAL**

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Tyson T. Watt, #352812 appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Edgar W. Dickson, Circuit Court Judge on July 28, 2014, and Order of Dismissal Granting Appeal Pursuant to White v. State issued on December 7, 2015, and filed on January 11, 2016. The Appellant received Order of Dismissal Granting Appeal Pursuant to White v. State on January 14, 2016.



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Attorney for Tyson T. Watt, #352812

Other Counsel of Record:  
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Post Office Box 11549  
Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
APPEAL FROM ANDERSON COUNTY  
COURT OF COMMON PLEAS  
HONORABLE EDGAR W. DICKSON

2012-CP-37-1082

TYSON T. WATT, #352812

APPELLANT,

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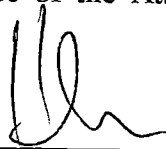
S.C. SUPREME COURT

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**PROOF OF SERVICE**

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I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail postage prepaid on January 14, 2016, addressed to its attorney of record Walt Whitmire, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549



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Attorney for Tyson T. Watt, #352812

Anderson, South Carolina

January 14, 2016

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF OCONEE )  
 )  
 Tyson T. Watt, )  
 S.C.D.C. No. 352812, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 FOR THE TENTH JUDICIAL CIRCUIT  
 C.A. No. 2012-CP-37-1082  
 ORDER OF DISMISSAL GRANTING  
 APPEAL PURSUANT TO WHITE V. STATE

FILED OCONEE, SC  
 BEVERLY H. WHITFIELD  
 CLERK OF COURT  
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This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed December 20, 2012. Respondent made its Return on or about January 6, 2014. An evidentiary hearing into the matter was convened on July 28, 2014 at the Oconee County Courthouse. Applicant was present and was represented by Hugh W. Welborn, Esquire. Respondent was represented by Walt Whitmire, Esquire, of the South Carolina Attorney General's Office.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's father, Harold Watt, and trial counsel, Scott D. Robinson, Esquire, also testified. This Court had before it a copy of the guilty plea transcript, the records of the Oconee County Clerk of Court regarding the subject guilty plea, Applicant's records from the South Carolina Department of Corrections, and the pleadings. The Court finds as follows:

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Oconee County Clerk of Court. Applicant was indicted at the September 2011 term of the Oconee County Grand Jury for attempted murder and possession of

a weapon during the commission of a violent crime (2011-GS-37-0815). He was represented by Scott D. Robinson, Esquire. On October 15, 2012, Applicant proceeded to trial before the Honorable R. Lawton McIntosh and a jury. On October 16, 2012, Applicant entered a guilty plea to the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN); and as indicted for violation of the firearms provision. Judge McIntosh sentenced him to confinement for a period of twenty (20) years imprisonment for ABHAN, provided that the balance be suspended upon the service of fifteen (15) years imprisonment and five (5) years probation. Judge McIntosh also sentence Applicant to five (5) years imprisonment on the weapons charge, to be served concurrently. Applicant did not appeal his conviction or sentence.

### **Allegations**

In his application for post-conviction relief, Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel, specifically:
  - a. "Failure to object to jury instruction that 'the defendant is not present may not be considered against the defendant in any matter whatsoever.'"
  - b. "Failure to object to the Court's erroneous jury instructions, the defendant's trial in his absence."
  - c. "Failure to object to Jackson v. Denno hearing."
  - d. "Failure to include the South Carolina Constitution, Article 1, Section 10, along with the U.S. Const. amend. IV in the suppression of evidence motion."
  - e. Failure to move for a continuance since Counsel had never talked to Applicant.
  - f. "Failure to object to Solicitor's closing argument that violated the 'Golden Rule.'"
  - g. "Failure to object to Solicitor discussing prior bad acts in closing argument."
  - h. "Failure to object to Judge telling jury that if he makes an error of law, there is another time and place for that to be corrected."

### **Summary of Evidence and Testimony Presented at the PCR Hearing**

At the PCR evidentiary hearing, Applicant testified as to why he believed counsel was ineffective. Applicant informed this Court that he had wanted a trial, and that counsel had forced him to enter a guilty plea. In addition, Applicant stated that prior to his guilty plea he had been on house arrest with GPS monitoring for approximately one and a half years, and that counsel was ineffective for failing to request that time be credited against his sentence with the South Carolina Department of Corrections. Applicant testified that counsel did not attend his preliminary hearing. Applicant also stated that counsel never challenged the testimony of the state's informant, and also told defense witnesses not to get on the stand.

Applicant's father, Harold Watt, testified that after retaining counsel, it took two weeks before he visited Applicant in Oconee County. Mr. Watt said he would have to track counsel down and show up at his office to speak with him. Mr. Watts stated he believes counsel could have done something more on Applicant's behalf. He noted counsel was hired before the preliminary hearing but did not attend. Mr. Watts testified counsel told him he would investigate the case himself. However, counsel later told him Applicant's family would need to hire a private investigator. Mr. Watts said nothing from the investigator was ever used at trial.

Counsel testified to the effect that he had over thirteen years of experience practicing law in the upstate. He said he was retained roughly six to eight months prior to the hearing. Counsel stated the case was very simple: Applicant shot a person who had been harassing him and his family. He explained that there were only three people present at the time of the incident – Applicant, the victim, and a witness whose testimony was not beneficial to Applicant. Counsel testified that he used an investigator that he had experience working with. He also noted that Applicant was out of jail during the time leading up to the guilty plea, and that he and his father

came whenever they wanted to meet with him. This occurred several times.

Counsel stated that Applicant originally wanted to go to trial. However, when the state offered a plea deal with a lesser included offense, Applicant changed his mind and decided to enter a plea. Counsel said he did not coerce Applicant, and that the plea was Applicant's idea. Moreover, Applicant wanted to plead guilty even after the judge initially rejected his guilty plea.

Counsel testified that he was prepared to try the case. He said the witnesses were present for the trial, and that his strategy was to discredit the victim and state's witness while pointing out that the victim had been harassing Applicant and his family. Counsel stated that the case boiled down to who the jury believed. Regarding sentencing, counsel said a sentence of three (3) years imprisonment and seven (7) years probation would have been "impossible."

Counsel testified that Applicant pled guilty, and that he did not think there were grounds for an appeal. As a result, Counsel did not advise Applicant of his right to appeal.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and the legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2015), this Court makes the following findings of fact based upon all of the probative evidence presented.

#### **Ineffective Assistance of Counsel**

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). Where

ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to a guilty plea, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

#### **Failure to Request Applicant receive credit for Time Spent on House Arrest**

This Court finds Applicant's allegation that counsel was ineffective for failing to request he receive credit for time served on house arrest is without merit. No attorney is required to

anticipate or discover changes in the law or facts which did not exist at the time of trial. See Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992) (finding counsel not ineffective for failing to use a defense that would not receive acceptance until several years after the trial).

It is true that as of June 7, 2013, South Carolina law allows a person who is convicted of a crime to receive credit for time spent under monitored house arrest. S.C. Code § 24-13-40 (2013). However, prior to that date, such time spent did not qualify as credit toward a sentence. See S.C. Code § 24-13-40 (2012). Applicant pled guilty on October 16, 2012 – well before the legislature changed the statute. At that time, a request by counsel for credit for time spent on monitored house arrest would not have been supported by law. This Court refuses to impose upon counsel a duty of clairvoyance, particularly where counsel was otherwise entirely competent.<sup>1</sup> Accordingly, this allegation is without merit.<sup>2</sup>

#### **Failure to Attend Preliminary Hearing**

Applicant has failed to meet his burden to prove counsel was ineffective in failing to attend the preliminary hearing. A preliminary hearing is held to determine whether sufficient evidence exists to warrant a defendant's detention and trial. SCRCrimP Rule 2(a). However, there is no constitutional right to a preliminary hearing. State v. McClure, 277 S.C. 432, 289 S.E.2d 158 (1982); State v. Keenan, 278 S.C. 361, 296 S.E.2d 676 (1982). Moreover, an indictment itself constitutes a finding of probable cause and thus avoids the need for a preliminary hearing. McClure at 434, 289 S.E.2d at 160.

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<sup>1</sup> Interestingly enough, Counsel did take the extra step of requesting Applicant's sentence be lowered *in consideration of his time spent on house arrest* – effectively asking for the relief Applicant wanted. (Tr. p. 103). It is entirely possible that the presiding judge took this request into account when determining Applicant's sentence. See State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) (In determining what sentence to impose, “a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come.”).

<sup>2</sup> This Court takes no position on whether this section applies retroactively. Such a question raises no issue that can be addressed on post-conviction relief, and is more appropriately addressed administratively.

Records from the Oconee County Clerk of Court indicate that Applicant was indicted by the Oconee County Grand Jury on September 5, 2011. Accordingly, whether or not counsel was deficient in failing to attend Applicant's preliminary hearing, there was no prejudice where the Grand Jury returned an indictment on those charges.

**Failure to Present Witnesses or Cross-Examine State's Witnesses**

Applicant further alleged counsel was deficient in that he "told defense witnesses not to get on the stand," and agreed not to challenge the informant on the witness stand. This Court finds Applicant's testimony in this regard to be not credible, and finds counsel's testimony is credible. Counsel testified that his strategy was to discredit the victim and his friend – the only witnesses to the shooting other than Applicant – and to show that the victim had been harassing Applicant and his family. Counsel testified that Applicant's witnesses were present for the trial. However, this Court notes that Applicant pled guilty before had a realistic chance to implement that strategy. Applicant also acknowledged in open court that by pleading guilty he was waiving his right to present his own witnesses or cross-examine the state's witnesses. (Tr. p. 89-90). Accordingly, this Court find Applicant has not met his burden and this allegation must be dismissed.

**Advice Concerning Sentencing Range**

This Court further finds Applicant has failed to show his guilty plea was induced by counsel's ineffective assistance in that he was told he would receive a sentence of only three years imprisonment and seven years probation. Such an assertion is clearly not credible. Conversely, counsel's response that such a sentence would have been impossible is credible and supported by the record. Accordingly, this Court finds Applicant has present no credible evidence in support of a deficiency finding against counsel in this regard.

Applicant has also failed to show prejudice. Even if counsel gave erroneous advice as to the sentence Applicant would receive if he pled guilty, such advice was cured by information conveyed during the plea hearing.

Statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007). When considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997).

The record reflects that the plea judge engaged in a thorough plea colloquy with Applicant prior to accepting his guilty plea. The plea judge informed Applicant that the sentence for ABHAN was up to twenty (20) years imprisonment, and the sentence for the weapons offense was five (5) years. (Tr. p. 50).<sup>3</sup> The judge confirmed with Applicant that there were no recommendations or negotiations from the Solicitor's office. Id. Counsel also indicated to the plea judge that he had explained to Applicant the sentences he could receive on each charge. (Tr. p. 97). Because Applicant has failed to present any credible evidence of deficiency with regard to this allegation, and because the trial court's accurate conveyance of the potential range of sentences cured any such deficiency, this allegation is denied and dismissed.

#### **After-Discovered Evidence**

Concerning Applicant's claim of after-discovered evidence, this Court finds Applicant has not present any evidence that would lead it to believe he is entitled to relief. Under S.C.

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<sup>3</sup> Due to Applicant's responses to parts of the colloquy, the plea judge initially rejected his plea and set the case for trial to start the following morning. (Tr. p. 67). At that time, Applicant again indicated that he would prefer to proceed with the same guilty plea. (Tr. p. 86-87).

Code § 17-27-45(c), a newly-discovered evidence claim can be timely raised within one year of actual discovery or within one year of when, by the exercise of due diligence, such evidence could have been ascertained. When an applicant seeks relief on the basis of newly discovered evidence following a guilty plea, relief is appropriate only when the applicant presents evidence showing that (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea and (2) the newly discovered evidence is of such weight and quality that, under the facts and circumstances of that particular case, the "interest of justice" requires the applicant's guilty plea be vacated. Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014).

"[I]n South Carolina, a guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013) (*citing* Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal defendant's right to contest the validity of such a plea is usually, but not definitely, foreclosed. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (2007). Further, "a defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." Brady v. U.S., 397 U.S. 742, 757 (1970).

In Jamison, the South Carolina Supreme Court noted it would be a "rare case" where the interests of justice require the vacation of a knowing and voluntary guilty plea involving an admission of guilt and a waiver of trial. 165 S.E.2d at 130. Applicant has not shown that the purported new evidence meets *any* of the requirements for after-discovered evidence. This claim boils down to an allegation that there was no evidence of Applicant's guilt, and that Applicant

only discovered this lack of evidence after he pled guilty. This allegation is firmly negated, however, by the plea judge's finding that there was a substantial factual basis for the guilty plea, (Tr. p. 107), as well as Applicant's own admission in open court that he was, in fact, guilty of the offense he was charged with. (Tr. p. 96). Moreover, Applicant has not persuaded this court that such evidence could not, by the exercise of due diligence, have been discovered before trial. As a result, this Court finds Applicant has failed to meet his burden, and that this allegation must be denied and dismissed.

### Appeal

This Court finds Applicant did not knowingly and intelligently waive his right to a direct appeal. Counsel must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure required by Anders v. California, 386 U.S. 738 (1967). Id. Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State. See Rule 243(i)(1), SCACR; Davis v. State, 288 S.C. 290, 291 n.1, 342 S.E.2d 60, 60 n.1 (1986) ("Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the applicant must petition this Court for a White v. State review.").

In the present case, Applicant testified that Counsel never informed him of the right to appeal his guilty plea. Counsel testified that Applicant pled guilty, and that he did not think there were any grounds for an appeal or appealable issues. This Court concludes that it does not appear Applicant knowingly and intelligently waived his right to appeal; therefore, he is entitled

to a belated appeal. As such, the Court finds Applicant did not knowingly and voluntarily waive his appellate rights and is entitled to an appeal from his conviction. Applicant's lack of an appeal can be remedied pursuant to White v. State.

**CONCLUSION**

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations. Counsel was not deficient in any manner, nor was Applicant prejudiced by counsel's representation. Therefore, this application for PCR must be denied and dismissed with prejudice. This Court, however, concludes Applicant is entitled to review of direct appeal issues from the conviction pursuant to White v. State.

**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief be denied and dismissed with prejudice;
2. Within thirty (30) days of service of this Order, counsel for Applicant must file a notice of appeal to secure the appropriate review of Applicant's conviction. Counsel and Applicant are directed to Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986), and Rule 243(i), SCACR, for the appropriate procedure for securing appellate review; and
3. That Applicant be remanded to the custody of Respondent.

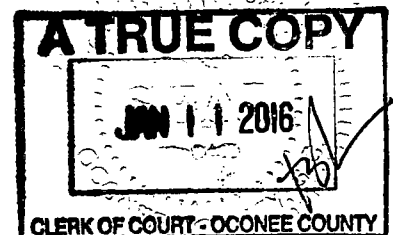
AND IT IS SO ORDERED this 7<sup>th</sup> day of December, 2015.

FILED O'CONNOR, SC.  
BEVERLY H. WHITFIELD  
CLERK OF COURT  
2016 JAN 11 PM 3 19



EDGAR W. DICKSON  
Presiding Judge  
Tenth Judicial Circuit

Orangelmy, South Carolina



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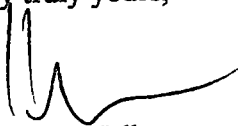
South Carolina Office of Appellate Defense  
P. O. Box 11589  
Columbia, South Carolina 29211-1589

In RE: Tyson T. Watt #00352812 vs. State of South Carolina  
Case #: 2012-CP-37-1082

Dear Sir or Madam:

In connection with the foregoing matter, please be advised that I was the Court Appointed Attorney and enclose herewith a copy of my appointment. I also enclose copies of all documents you requested for filing a copy of the Appellant's Notice of Appeal in this matter together with a copy of the Order and Proof of Service. I ask that your office assume representation of this indigent Applicant.

Very truly yours,

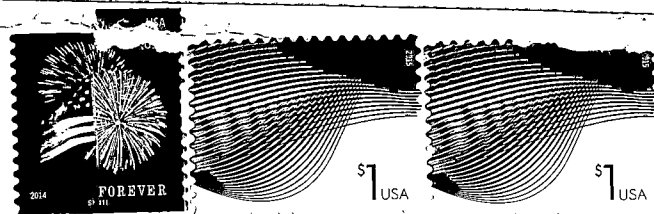


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HWW/sba  
Enclosures

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