

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Appeal from Horry County Court of Common Pleas S.C. SUPREME COURT
The Honorable William H. Seals, Circuit Court Judge

Appellate Case No. 2018-000053

Robbie Lee Bufkin, Jr.,.....Petitioner,

v.

State of South Carolina,.....Respondent.

PETITION FOR WRIT OF CERTIORARI

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- A. WHETHER PLEA COUNSEL WAS INEFFECTIVE FOR THE FAILURE TO MOVE TO SUPPRESS EVIDENCE.....
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STATEMENT OF THE CASE

Petitioner was charged with trafficking cocaine between 10 and 28 grams (2016-GS-00176)¹ and trafficking cocaine between 28 and 100 grams (2016-GS-26-02357), respectively, in Horry County. App. p. 128-29, 132-33. Assistant Solicitor Joshua Holford prosecuted the case. Represented by Morgan Martin, Esquire (Morgan) and Mary Ashley Martin, Esquire (Mary Ashley), Petitioner entered a guilty plea to both trafficking charges before the Honorable Thomas W. Cooper on May 17, 2016. App. p. 127, 131. During sentencing, Assistant Solicitor Joshua Holford, recommended concurrent sentences of fifteen (15) to twenty (20) years. App. p. 109, ln. 5-7.² Petitioner received two concurrent sixteen (16) year sentences. No appeal was filed.

On October 4, 2016, Petitioner filed a post-conviction relief application (APCR) *pro se* raising the following grounds:

“(10)(a) Ineffective assistance of counsel

(11)(a) Counsel’s actions led to erroneous advice of plea

(10)(b) Involuntary guilty plea

(11)(b) Erroneous advice in sentencing

(10)(c) Denial of due process

(11)(c) Failed to investigate complete discovery.” App. p. 14-15.

The State, represented by Assistant Attorney General Johnny E. James, Jr., made its Return on August 3, 2017. App. p. 29-34. The State asserted that the grounds were without merit and requested an evidentiary hearing on the allegations of ineffective assistance of counsel and involuntary guilty plea. App. p. 34.

¹The indictment for trafficking cocaine between 28 and 100 grams (2016-GS-26-02357) was not presented to the grand jury.

²The State also dismissed a trafficking cocaine second, 10-28 grams charge (2016GS2600177) and trafficking cocaine 100-280 grams charge (2016GS2600084). Additionally, the following indictments were dismissed as *nolle prosequi*: unlawful possession of a firearm by a person convicted of a violent offense (2016GS2600185); possession of a stolen pistol (2016GS00186); murder (2015GS2601733).

Petitioner amended his APCR on August 9, 2017 with the following supplemental grounds:

(10)(a) Ineffective assistance of counsel pursuant to Strickland v. Washington due to retained counsel failure to adequately prepare, failing to properly inform Applicant by reviewing the State's discovery with him, and appearing at Applicant's plea hearing with no knowledge of Applicant's case.

(11)(a) Applicant wanted to go to trial, but did not want to risk trial with an unprepared attorney. Applicant's attorney's case load interfered with his duty to be a zealous advocate for Applicant, and consequently denied Applicant the opportunity to proceed to trial.

(10)(b) Applicant's counsel was also ineffective for failing to properly inform Applicant of the evidence against him by failing to review the State's discovery with him,

(11)(b) Because counsel did not review the State's discovery with him, Applicant did not know there was a suppression issue. Had Applicant know about the suppression issue, he would not have pled guilty and instead would have gone to trial.

(10)(c) Applicant's guilty plea was involuntary because Applicant wished to go to trial but decided to plead guilty when he realized counsel knew nothing of his case, relying instead on his younger daughter to prepare Applicant's case and allowing his other cases to interfere with Applicant's.

(11)(c) Applicant had expressed his desire to go to trial to counsel, but when counsel appeared at the plea hearing unprepared, Applicant entered a guilty plea to avoid having to try an unprepared case.

(10)(d) Denial of due process because Applicant was denied a continuance, by which he could have attempted to remedy his counsel's mistakes instead of having to plead guilty.

(10)(e) Ineffective assistance of counsel pursuant to Strickland v. Washington due to counsel failing to challenge the unlawful search and seizure of Applicant's possessions by moving for a suppression hearing.

App. p. 22-23. An evidentiary hearing was held on September 19, 2017 before the Honorable William H. Seals. William G. Yarborough III represented Petitioner at the hearing. Petitioner was present for the hearing and testified. App. p. 67-88. Petitioner's plea attorneys, Morgan Martin and Mary Ashley Martin were also present and testified. App. p. 37-55, 56-66, 90-93. Petitioner also called his mother Vanetta Lee Bufkin to testify. App. p. 89-90 At the conclusion of the hearing, Judge Seals took the matter under advisement. App. p. 59, ln. 15-16. The APCR was later denied on December 19, 2017. This appeal follows.

STATEMENT OF FACTS

The two charges ultimately arose from a search and seizure conducted by officers of the DEU at the Sea Mist hotel on October 22, 2014. App. p. 110. Law enforcement officers arranged a controlled buy for approximately an ounce of cocaine with a confidential informant (CI) around 7:30 a.m. App. p. 110. The CI's body camera was alleged to have shown Petitioner and Raquel Lewis, ultimately Petitioner's codefendant, present at the scene. App. p. 110, ln. 24-25; 111, ln. 1-3. The cocaine purchased was later alleged to weigh 25.19 grams, giving rise to the trafficking cocaine 10 and 28 grams charge (2016-GS-00176). App. p. 111, ln. 7-8. Not long after the controlled buy, law enforcement executed a search warrant upon officers' "realiz[ation] there was a large amount of cocaine in the room." App. p. 111, ln. 10-12. The officers had knocked three times, and upon "hearing movement", they "ended up busting through the door." App. p. 111, ln. 13-15. The officers found 16.32 grams of cocaine, which is the basis for the second indictment that was dismissed for trafficking cocaine 10 to 28 grams (2016GS2600177). App. p. 111, ln. 17-19; p. 135. Officers also believed that a bag of cocaine found on the side of a pool at the hotel the following day had been hidden there by Petitioner while the officers were knocking. App. p. 111, ln. 20-23. That charge was also dismissed. App. p. 135.

The trafficking cocaine between 28 and 100 grams charge (2016-GS-26-02357) and the murder and weapon charges originate in the controlled buy. App. p. 112. Officers had obtained an arrest warrant for Petitioner for the murder of Saquan Green, believing that Petitioner had hired an individual named Kevin Bryant to kill Green. App. p. 112, ln. 1-4. Officers believed that because Green was seen on the CI's body cam video, Petitioner must have believed that he was the CI and thus believed that Petitioner must have had him killed over it. App. p. 112, ln. 5-8. A warrant for Petitioner's arrest for murder was issued and served upon Petitioner in an apartment

in Myrtle Beach, where he had been visiting on March 27, 2015. App. p. 112. A search of the apartment was executed without a warrant, during which narcotics were found that gave rise to the 28 and 100 grams trafficking cocaine charge (2016-GS-26-02357). After Petitioner had been arrested but was still present at the scene during the search, law enforcement applied for a search warrant based upon the murder arrest. Upon obtaining the search warrant, law enforcement officers seized a pistol, leading to the to the unlawful possession of a pistol by a felon charge (2016-GS-26-185) and the possession of a stolen pistol charge (2016-GS-26-186). App. p. 141-145. At the plea hearing, Morgan stated, “I can’t overstate to you the fact that they have no evidence, whatsoever, linking him to the murder.” App. p. 115. Plea counsel³ did not move to suppress the evidence from the search. Every charge from March 27, 2015 was dismissed but for the 28 and 100 grams trafficking cocaine charge (2016-GS-26-02357).

³ “Plea counsel” referring to both Morgan and Mary Ashley collectively.

STANDARD OF REVIEW

The applicant has the burden of proving the allegations of the PCR petition. *Bannister v. State*, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998). Upon review, if no probative evidence exists to support the findings, this Court will reverse. *Pierce v. State*, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000) (citing *Holland v. State*, 322 S.C. 111, 470 S.E.2d 378 (1996)); *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The Court will also defer to the PCR court's findings on matters of credibility. *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). In contrast, questions of law are reviewed de novo. *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008).

ARGUMENT

The grounds raised in the instant application for post-conviction relief all relate to plea counsel's errors that rendered Petitioner's guilty plea not knowingly, intelligently, or voluntarily entered. But for these errors, Petitioner would not have pled guilty and instead would have proceeded to trial. Thus, each of the grounds raised are analyzed under this overarching issue.

I. THE PCR COURT ERRED IN CONCLUDING THAT PETITIONER'S GUILTY PLEA WAS NOT KNOWINGLY OR VOLUNTARILY ENTERED AND THERE IS INSUFFICIENT EVIDENCE OF PROBATIVE VALUE IN THE RECORD TO SUPPORT THE FINDINGS OF THE PCR COURT.

The longstanding test for determining the validity of a guilty plea is “whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366 (1985) (quoting *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)). “[W]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences”. *Gustine v. State*, 325 S.C. 123, 127–28, 480 S.E.2d 444, 446 (1997). “[A] defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case.” *Gibson v. State*, 334 S.C. 515514 S.E.2d 320 (1999).

In this case, Petitioner guilty plea was not knowingly or voluntarily entered because of various errors by plea counsel. Petitioner would not have pled guilty and instead would have proceeded to trial had plea counsel adequately investigated and pursued a meritorious suppression issue from the March 27, 2015 search, or adequately discussed discovery with Petitioner and other circumstances surrounding his case and plea.

Petitioner's plea counsel's performance was prejudicial and deficient, in violation of Petitioner's right to the effective assistance of counsel guaranteed by the Sixth Amendment of the U.S. Constitution and Article I, Section 14 of the South Carolina State Constitution. The PCR Court erred in dismissing the application for post-conviction relief because there is insufficient evidence of probative value in the record to support its findings. Petitioner thus urges this Honorable Court to reverse the PCR Court's Order of Dismissal, vacate his conviction and sentence, and remand for a new trial.

A. INEFFECTIVE ASSISTANCE OF COUNSEL FOR THE FAILURE TO MOVE TO SUPPRESS EVIDENCE.

The Fourth Amendment and its near identical counterpart in the South Carolina Constitution forbid unreasonable searches and seizures. U.S. Const. amend. IV; S.C. Const. art. 1, § 10. A warrantless search is *per se* unreasonable unless it falls under an exception to the warrant requirement and is based upon probable cause. *See e.g., State v. Frielburger*, 366 S.C. 125, 620 S.E.2d 737 (2005). Evidence shall be suppressed if seized as a result of police misconduct in violation of the Fourth Amendment. *Weeks v. United States*, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961); *State v. Adams*, 409 S.C. 641, 763 S.E.2d 341 (2014). *See generally State v. Gamble*, 405 S.C. 409, 747 S.E.2d 784 (2013). The exclusionary rule applies not only to the direct product of police illegality (the "primary" illegality), but also to secondary evidence, what has been deemed "fruit of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407 (1963); *see also Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 268 (1939); *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159 (2006).

In light of the great protection provided by the Fourth Amendment and its counterpart in the South Carolina State Constitution, counsel has an obligation—both constitutionally and

ethically—as a defendant’s zealous advocate to investigate any potential search or seizure issues that would support a suppression motion. *See e.g., Kolle v. State*, 386 S.C. 578, 690 S.E.2d 73(2010), *abrogated for standard of review issue by Small v. State*, -- S.E.2d --, 810 S.E.2d 836(2018) WL 736339 (2018); *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (holding that criminal defense attorneys have a duty to undertake a reasonable investigation which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts for potential challenges to evidence).

Here, in denying relief on this ground, the PCR Court reasoned that “Morgan testified that he perceived no valid challenges for the warrants or the search” and found credence in Morgan’s testimony that “making motions and pursuing pre-trial hearings thereupon can poison plea negotiations.” App. p. 8. The PCR Court found further support for Morgan’s reasoning not to move to suppress evidence in Mary Ashley’s testimony that “that there was no possibility of successfully suppressing drugs tossed out of the hotel room window and recovered from a landing below. Mary Ashley echoed Morgan’s concern that going forward with pre-trial motions presents the risk that plea offers are withdrawn.” App. p. 8.

There is insufficient probative evidence in the record to support this finding and denying relief. Despite plea counsel testimony that suppression motions have a tendency to spoil plea bargains, plea counsel had previously moved to suppress evidence seized as a result of the October 2014 arrest and search. App. p. 98. Thus, the fear of poisoning a potential plea agreement cannot serve as a substantiated reason for not attempting to suppress evidence seized as a result of the March 27, 2015 search. Further, in finding that counsel adequately investigated possible suppression issues and found that a suppression motion would be unsuccessful, the PCR Court relied upon counsels’ testimony largely pertaining to the October 2014 search. The little

testimony regarding counsels' investigation into the March 27, 2015 search and making the decision not to file a suppression motion is of little probative value. Morgan had essentially concluded that because it had already been decided that this was going to be a plea—despite Petitioner's strong assertions to go to trial— suppression was not an issue: “Well, my take on it at the time was that we didn't have a valid motion to make in connection with suppression. *Now, had we actually gone to trial, probably would've done that.*” App. p. 42, ln. 4-6; p. 49, ln. 17-18. Mary Ashley testified to largely to the same, that they likely would have pursued suppression “if we ended up in a trial situation.” App. p. 60, 1-3. When asked whether Morgan had explored the possibility of suppressing the evidence with Petitioner, Morgan testified that he was sure he did. However, he explained that. “Now, I can't tell you as I sit here today that I talked with Mr. Bufkin about – exactly what we talked about. I know that certainly I consider that. Mary Ashley worked on this.” App. p 42, ln. 12-15. When asked about investigating or pursuing the issue that Petitioner was already detained at the jail when the magistrate signed the search warrant, Morgan testified “I cant sit here today and say that I recall discussing with him [Petitioner] the fact that he was already in custody when a search warrant was signed. But that don't surprise me....And maybe I made a mistake in not filing – for a search warrant.” App. p. 52, ln. 19-22; p. 53 ln. 3-4. Other questions to Morgan about the search and potential suppression issue were met with “because they had a warrant” without further explanation or evidence that there was an independent investigation by counsel. *See Porter v. State*, 368 S.C. 378, 629 S.E.2d 353 (2006) (finding counsel deficient for assuming that the information given to him in discovery was true despite the urging of the defendant to investigate further); *Walker v. State*, 397 S.C. 226, 723 S.E.2d 610 (Ct. App. 2012) (finding counsel deficient in failing to thoroughly and independently investigate a possible alibi witness, noting that counsel also did not provide a valid reason for

failing to do at the PCR hearing), *reversed on other grounds*, *Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014); *Council v. State*, 380 S.C. 159, 175, 670 S.E.2d 356, 364 (2008). Moreover, although Mary Ashley took considerable efforts to explore the suppression issue regarding the October 2014 search by actually visiting the scene, there is little if no indication there was any independent investigation specific to the March 27, 2015 search. Mary Ashley could also not recall whether she had even discussed with Petitioner the possibility of suppressing the evidence seized at March 27, 2015 search. App. p. 58, ln. 22-25; p. 59, ln. 1-6.

Here, plea counsel was ineffective for failing to move to suppress evidence from the March 27, 2015 search, or even explore the issue in the least. The evidence seized as a result of this search allowed the State to charge Petitioner with trafficking cocaine 28-100 grams, felon in possession of pistol, possession of a stolen pistol and murder. As Morgan stated at the plea hearing and testified at the PCR hearing, the State did not have probable cause to arrest Petitioner for the murder, and thus there were invalid grounds to search incident to arrest. App. p. 115; p. 40, ln. 7-8. *Compare this case to Walker*, 397 S.C. at 237, 723 S.E.2d at 616 (“There is no conception of sound judgment that will permit trial counsel to choose not to investigate the testimony of a witness *whom counsel has reason to believe* could provide an alibi.”) (italics added). The cocaine found as a result of the purported and invalid search incident to arrest would thus have likely been suppressed. The search warrant, which was based upon the evidence already seized at the time of Petitioner’s arrest, is secondary fruit of the poisonous tree, and evidence seized as a result of that warrant would have also likely been suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407 (1963); *see also Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 268 (1939); *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159 (2006). Additionally, although the potential for a pre-trial motion to poison a plea bargain is naturally a

matter of opinion that changes on a case-by-case basis, it is more reasonable to surmise that the State would have been more receptive to a more favorable plea agreement had the evidence from the March 27, 2015 search been suppressed. Petitioner would not have had four additional serious charges hanging over his head and consequently, the State would have had a less powerful bargaining position in negotiating a plea agreement for the October 2014 charges. *See generally, Kolle*, 386 S.C. at 587-589, 690 S.E.2d at 77-79.

Therefore, there is no evidence of probative value in the record to deny Petitioner's post-conviction relief application on this ground. Had plea counsel moved to suppress the evidence from the March 27, 2015 search, the evidence would have likely been suppressed because of the absence of probable cause. Petitioner thus would not have pled guilty and instead would have proceeded to trial.

B. INEFFECTIVE ASSISTANCE OF COUNSEL FOR THE FAILURE TO REVIEW DISCOVERY WITH PETITIONER AND INFORM HIM OF OTHER SIGNIFICANT IMPLICATIONS OF HIS GUILTY PLEA.

At the PCR hearing, Petitioner testified that he was not made fully aware of the charges or fully understood them or waiving presentment at the time of his plea. App. p. 68, ln. 7-9. Petitioner also had not reviewed the search warrant itself or most of his discovery until he was incarcerated. App. p. p. 69, 72. Of particular note to Petitioner, he was not made fully aware of the possible suppression issue regarding the March 27, 2015 and how the search warrant was not signed until he was already incarcerated. App. p. 75-76.

Plea counsel was deficient for these errors and Petitioner would not have pled guilty had he fully reviewed the discovery and been informed of what a waiver of presentment means. To find a guilty plea is voluntarily and knowingly entered, the record must establish the defendant

had a full understanding of the consequences of his plea and the charges against him. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969); *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991). “When a defendant lacks knowledge of material evidence in the prosecution's possession, the waiver of constitutional rights cannot be deemed knowing and voluntary.” *Gibson*, 334 S.C. at 523, 514 S.E.2d at 324 (“a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case.”) (citations omitted). The defendant is entitled to make that decision with full awareness of favorable material evidence known to the government.” *Id.* at 524 (quoting *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir.1998)).

In denying relief on this ground, the PCR Court relied upon the following PCR hearing testimony: “Morgan testified that both he and Mary Ashley had several conversations with Applicant in preparation, explained to him the weakness of potential suppression motions, and that seeking a plea was the best course among bad options.” App. p. 10. The PCR Court further found that “counsels sought discovery, received it, reviewed it, applied due professional judgment, and explained their findings to Applicant.” App. p. 10. Although this Court will defer to the PCR Court's findings that hinge on credibility, *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010), there is no evidence of probative value in the record to support the PCR Court's findings.

At the PCR hearing, Morgan could not recall what he discussed with Petitioner during his visits while Petitioner was detained in jail for 14 months. App. p. 46, ln. 11-23. Morgan could also not remember whether he discussed issues pertaining to the search and search warrant for the March 27, 2015 search even after it was known that the State was likely to dismiss most of the charges stemming from that search. App. p. 48, ln. 15-20; p. 52, ln. 19-21. Morgan could

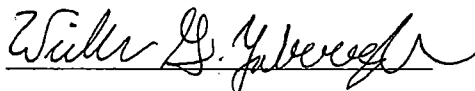
also not recall whether Petitioner had or had not been indicted on one or more of the charges or any other specifics. App. p. 53, ln. 5-9; p. 54, ln. 1-4. When asked if he had reviewed all the discovery with Petitioner, Morgan could not recall whether he or Mary Ashley did, recalling only that they both went to visit Petitioner various times and reviewed the discovery between themselves. App. p. 54, ln. 19-25; p. 55, ln. 1-15. Mary Ashley could not recall at the PCR hearing whether she discussed with Petitioner the possibility of challenging the March 27, 2015 search or the strength of the murder charge. App. p. 58, ln. 20-25. When asked why Petitioner “sat in jail for 14 months and that other case was never indicted”, Mary Ashley did not know why and could not recall anything pertaining to that. App. p. 65, ln. 10-14.

Therefore, there is no evidence of probative value in the record to deny Petitioner post-conviction relief application on this ground. Because plea counsel did not review discovery with Petitioner or explain other implications of case to him, his plea was not knowingly or voluntarily entered. But for plea counsels’ errors, Petitioner would not have pled guilty and instead would have proceeded to trial.

CONCLUSION

In light of the foregoing, this Court should reverse the PCR Court's Order of Dismissal, vacate Petitioner's conviction, and remand for a new trial.

RESPECTFULLY SUBMITTED THIS May 4, 2018.



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PROOF OF SERVICE


The undersigned hereby certifies that the Petition for Writ of Certiorari and Appendix has been mailed for filing to the Honorable Daniel E. Shearouse, Clerk of Court for the South Carolina Supreme Court, by depositing it in the United States mail, postage prepaid addressed to:

The Honorable Daniel E. Shearouse
Clerk of Court for the S.C. Supreme Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

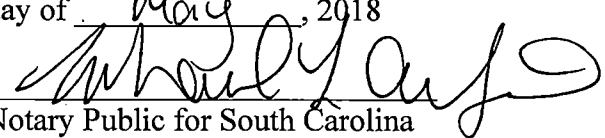
The undersigned further certifies that a true copy of same has been served upon the Respondent, represented by Assistant Attorney General, Johnny E. James, Jr., by depositing one (1) copy by United States mail, postage prepaid addressed to:

The Honorable Alan Wilson
S.C. Attorney General
Attn: Assistant A.G. Johnny E. James, Jr.
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This 4th day of May, 2018

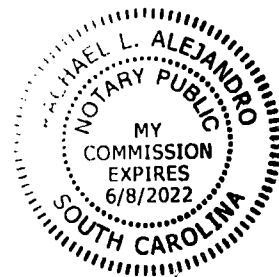


Zackary Beach
Administrative Assistant to William G. Yarborough III

Sworn to before me this 4th
day of May, 2018


Notary Public for South Carolina

My commission expires: 06-08-2022



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