No. 17-7688

IN THE SUPREME COURT OF THE UNITED STATES

RONNIE BOWLING **PETITIONER**

v.

RANDY WHITE, WARDEN **RESPONDENT**

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respectfully Submitted,

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QUESTIONS PRESENTED

Ronnie Bowling petitions for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit which affirmed the District Court's dismissal of his petition for writ of habeas corpus on the basis he was no longer "in custody" on a Kentucky conviction for attempted murder. Although Bowling sets forth six "questions presented" in his petition, the Sixth Circuit granted Bowling a certificate of appealability on only the following specific questions:

I. Whether Bowling was "in custody" under 28 U.S.C. § 2254(a) when he filed his petition for writ of habeas corpus in 2012?

II. Whether the second exception in *Lackawanna County District Attorney v. Coss*, 532 U.S. 394, 405-406 (2001), applies to this case?

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The opinion of the Sixth Circuit is not reported in the Federal Reporter, but may be found at *Bowling v. White*, 694 Fed.Appx. 1008 (6th Cir. 2017), and is attached to the petition at Appendix A. The unreported memorandum opinion of the District Court dismissing Bowling's habeas petition is unreported is attached to the petition at Appendix C. The opinion of the Kentucky Supreme Court answering the District Court's certified question is reported at *Bowling v. White*, 480 S.W.3d 911 (Ky. 2015).

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). The petition was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are adequately set forth in the certiorari petition.

STATEMENT OF THE CASE

As an initial and important point, this petition does not involve a "capital case." While Bowling is subject to two death sentences from the Laurel Circuit Court and is currently on Kentucky's death row, those convictions and sentences are not at issue in this matter. Bowling's Laurel County convictions and sentences have been fully upheld by the Kentucky state courts, and the United States District Court for the Eastern District of Kentucky has denied in full his petitions for writ of habeas corpus. *Bowling v. Haeberlin*, 03-28-ART, 2012 WL 4498647 (E.D. Ky. Sept. 28, 2012). That matter is now pending before the Sixth Circuit. *Bowling v. White*, 12-6301 and 12-6403. To the contrary, this petition pertains to Bowling's separate conviction for attempted murder in Rockcastle County, Kentucky for which he was sentenced to twenty-years in prison.

On April 28, 1989, the Rockcastle County Grand Jury returned an indictment against Bowling charging him with criminal attempt to commit murder by shooting at Ricky Keith Smith with intent to kill him, which was committed on or about February 25, 1989. Bowling was convicted and sentenced to twenty-years in prison. On direct appeal, the Kentucky Supreme Court, in a "Not To Be Published" opinion, summarized the facts underlying Bowling's conviction as follows:

> At approximately 5:55 a.m., on February 25, 1989, Appellant drove into the Gulf service station on U.S. Highway 25 in Rockcastle County and asked James Smith, the victim's father, for directions to Jackson County. James Smith recalled that Appellant was wearing a green army fatigue jacket and blue jeans and that his car had one headlight that was not working. Appellant left James Smith's service station and drove in the

direction of Ricky Smith's Sunoco service station, which was also on U.S. Highway 25.

Ricky Smith testified that shortly after 6:00 a.m., on the morning of February 25, 1989, Appellant came into his service station inquiring about a job. He identified himself as "Ronnie" and was driving a Ford Fairmont which had only one working headlight. Appellant was wearing a green army fatigue jacket and blue jeans. He asked Ricky Smith if he worked the service station by himself, and Smith replied that only one person worked during a shift. Appellant turned as if to leave, but spun around, drew a pistol, and began firing at Smith. Smith was able to jump behind the door-facing and down behind a metal desk. He fired three shots in return, injuring Appellant in the head and hand. Smith was not injured.

Appellant ran out of the service station, followed by Smith, who unsuccessfully attempted to shoot out the front tire of Appellant's vehicle. Smith then called the Kentucky State Police, who pursued Appellant from a point about thirteen miles from the service station to Appellant's home, a distance of approximately thirty-two miles. The driver of the lead pursuit vehicle, Trooper Alan Lewis, saw Appellant throw two objects from his vehicle, which were later discovered to be a pair of gloves. At one point during the chase, Lewis lost sight of Appellant's vehicle. It was in this general area that Trooper Dallas Belile subsequently found a .38 caliber Smith & Wesson revolver near the side of the road.

Appellant's version of the incident was that he went to Ricky Smith's service station to inquire about a job, but that Smith lost his temper and began shooting at him. Appellant then fled to his car and drove home, not stopping for the police, because he was panicked by his loss of blood. He denied firing any shots at Smith or throwing anything out of his car during the police pursuit.

At the time of his trial, Appellant was on death row as a result of two Laurel County murder convictions which occurred in connection with service station robberies in Pulaski County. *Bowling v. Commonwealth*, 942 S.W.2d 293 (Ky.1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 451, 139 L.Ed.2d 387 (1997). A fellow death-row inmate, Robert Foley, *see Foley v. Commonwealth*, 953 S.W.2d 924 (Ky.1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 1375, 140 L.Ed.2d 522 (1988) and *Foley v.*

> *Commonwealth*, 942 S.W.2d 876 (Ky. 1997), [*cert. denied*] ___ U.S. ___, 118 S.Ct. 234, 139 L.Ed.2d 165 (1997), testified for the defense that he and David Gross were driving toward Richmond to purchase alcohol when they observed a number of police officers. Gross decided to get rid of his .38 caliber Smith & Wesson and threw the gun out of the vehicle in the area where Trooper Belile found the Smith & Wesson supposedly discarded by Appellant. Gross was deceased at the time of trial.

Bowling v. Commonwealth, 96-SC-442-MR (Ky. Oct. 15, 1998) ("*Bowling I*").

Following the denial of his direct appeal, Bowling, through counsel, filed a Motion for New Trial pursuant to Kentucky Rule of Criminal Procedure (RCr) 10.02 & RCr 10.06, or, alternatively, a Motion for Relief from Final Judgment Pursuant to Kentucky Rule of Civil Procedure (CR) 60.02. That motion was denied by the Rockcastle Circuit Court by order entered on March 31, 2000, and amended order entered on April 17, 2000. Bowling, through counsel, filed a Motion to Alter Amend or Vacate Judgment Pursuant to CR 59.05 on April 10, 2000.

While his CR 59.05 motion was pending, Bowling, through counsel, filed his first RCr 11.42 motion in the Rockcastle Circuit Court on January 22, 2002. He then filed, through counsel, a 127 page "corrected" RCr 11.42 motion on February 5, 2002, which contained 377 pages of attachments. Bowling, through counsel, filed additional motions to amend the RCr 11.42 motion on May 3, 2002, and September 23, 2002. After the filing of various responses and replies, the Rockcastle Circuit Court entered an order denying Bowling's RCr 11.42 motion without an evidentiary hearing on June 16, 2003.

Bowling, through counsel, filed a motion pursuant to CR 59.05 asking the trial court to reconsider the denial of his RCr 11.42 motion which was denied, and Bowling,

through counsel, filed a notice of appeal with the Kentucky Court of Appeals on November 3, 2003. Bowling, through counsel, filed his brief with the Kentucky Court of Appeals on September 10, 2004. The Commonwealth's brief was filed with the court on February 18, 2005, and, on November 23, 2005, the Kentucky Court of Appeals rendered an opinion affirming the denial of RCr 11.42 relief. *Bowling v. Commonwealth*, 2003-CA-002339-MR, 2005 WL 3116032 (Ky. App. Nov. 23, 2005) ("*Bowling II*"). The Kentucky Supreme Court denied discretionary review of the Court of Appeals' opinion on December 13, 2006, and this Court denied Bowling's petition for writ of *certiorari* on October 1, 2007. *Bowling v. Kentucky*, 552 U.S. 845 (2007).

Following the denial of his petition for writ of *certiorari* on the claims raised in the RCr 11.42 motion, Bowling returned to Rockcastle Circuit Court and filed a motion, through counsel, on October 29, 2007, to revive the April 10, 2000 CR 59.05 motion. The circuit court conducted a hearing on the motion, and an order denying the motion was entered on February 8, 2010.

Bowling, through counsel, appealed the circuit court's decision to the Kentucky Court of Appeals. In its first argument in response to Bowling's appeal, the Commonwealth asserted the case was moot because Bowling had already served a total of "22 years 3 months and 13 days" in prison on all of the charges from Laurel and Rockcastle Counties thereby serving all of the twenty-year sentence he received on the Rockcastle County conviction. "Thus, in the event that the sentences from Laurel Circuit Court were ever vacated, [Bowling] would be entitled to immediate

release because he has more than served the 20-year sentence imposed in the present case."

On January 13, 2012, the Kentucky Court of Appeals rendered a unanimous opinion affirming the trial court's denial of Bowling's motions for a new trial pursuant to CR 60.02 and RCr 10.02 and 10.06. *Bowling v. Commonwealth*, 2010-CA-000490-MR, 2012 WL 95425 (Ky. App. Jan. 13, 2012) ("*Bowling III*"). In response to the Commonwealth's argument that the matter was moot, the Court of Appeals declined to address the issue "because [it] ha[d] determined that Bowling's motion for relief was not proper under either RCr 10.02 or CR 60.02," but the court specifically noted "that Bowling has served the twenty years' imprisonment to which he was sentenced." Bowling, through counsel, sought discretionary review by the Kentucky Supreme Court which was denied on August 15, 2002.

On September 4, 2012, Bowling filed, *pro se*, a petition for writ of habeas corpus in the United States District Court for the Eastern District of Kentucky. In his answer to the petition, the warden asserted the District Court lacked jurisdiction to consider the petition because Bowling was not "in custody" under the Rockcastle County conviction or sentence at the time he filed the petition.

On January 6, 2014, Magistrate Judge Ingram rendered a recommended disposition in this matter concluding Bowling's Rockcastle County sentence was to be served concurrently to his Laurel County sentences because the judgment did not state otherwise, and that "despite being imposed after the Laurel Circuit Court's judgment, the twenty-year sentence Bowling challenges in this case started on

February 25, 1989, and had therefore long-since expired before Bowling filed his section 2254 petition on September 4, 2012." *Bowling v. White*, 12-cv-189; 2014 WL 1883714 (E.D.Ky. Jan. 6, 2014); Pet. App. E, 10-11.

In two separate orders, District Judge Thapar considered the Magistrate Judge's recommendation. In the first order, Judge Thapar adopted the magistrate judge's recommended disposition that Bowling's Rockcastle County sentence was required to run concurrently to the Laurel County sentences pursuant to KRS 532.110 because the Rockcastle judgment "was silent as to whether the sentence was to run concurrently or consecutively." Pet. App. F.

In the Memorandum Opinion & Order, on the question of whether Bowling was still serving the Rockcastle sentence when he filed the petition for writ of habeas corpus, Judge Thapar determined Kentucky law was unclear and certified two questions to the Kentucky Supreme Court: a) "Whether *Bard* [*v. Commonwealth*, 359 S.W.3d 1 (Ky. 2012)], controls this case, so that the Department of Corrections lacked the authority to correct the sentencing court's failure to award jail-time credit; and, b) Whether factually Bowling's Rockcastle sentence has expired." *Bowling v. White,* 12-cv-189, 2014 WL 1883732 (E.D.Ky. April 29, 2014); Pet. App G.

The Kentucky Supreme Court accepted certification of the first question only, and, answered it in an opinion rendered September 24, 2015. *Bowling v. White*, 480 S.W.3d 911 (Ky. 2015) ("*Bowling IV*") Pet. App. H. In its opinion, the Kentucky Supreme Court stated that, under KRS 532.120(3), the Rockcastle Circuit Court "should have given Bowling credit for the time he had served between his arrest and

initial conviction." 480 S.W.3d at 913. The court went on to hold the Kentucky Department of "Corrections has the power (indeed, the responsibility) to credit '[t]ime spent in custody" toward the inmate's sentence," and that "included in this power is a limited authority to correct mistakes in failing to award jail-time credit or in awarding too little jail-time credit." *Id.* at 917. The Kentucky Supreme Court then concluded as follows:

> The simple fact is that Bowling was entitled, as a matter of law, to the custody credit that he now wishes to decline. Though defendants can take advantage of mistakes in their favor, as did the defendant in *Bard*, they cannot decline correction of a mistake simply because the correction would not be in their favor.

Id.

Following the rendition of the Kentucky Supreme Court's opinion on the certified question, Judge Thapar entered an order dismissing Bowling's petition for writ of habeas corpus due to lack of jurisdiction because Bowling was no longer "in custody" on the Rockcastle Circuit Court judgment when the petition was filed in September 2012. *Bowling v. White*, 12-cv-189, 2015 WL 13389610 (E.D.Ky. Nov. 2, 2015); Pet. App. C. Further, Judge Thapar reinstated the recommended disposition of the Magistrate Judge – with the exception of the certificate of appealability analysis – and adopted it as the Court's opinion.

Bowling then petitioned the Sixth Circuit for a certificate of appealability on a multitude of claims. The court granted a certificate but only as to the following question: "whether Bowling was "in custody" under § 2254(a) at the time he filed his habeas petition in 2012, including whether the second exception under *Lackawanna*

County District Attorney v. Coss, 532 U.S. 394, 405-06, 121 S.Ct. 1567, 149 L.Ed.2d 608 (2001), applies to this case." *Bowling v. White*, 694 Fed.Appx 1008, 1010 (6th Cir. 2017) ("*Bowling V")*; Pet. Appx. A2.

In affirming the District Court's dismissal of Bowling's habeas petition, the Sixth Circuit concluded, first, Bowling's twenty-year sentence began when he was arrested in 1989. Pet. App. A5-A9. Second, the "merger" of that sentence because it ran concurrently with the death sentences imposed in Laurel County pursuant to KRS 532.120(1) had "no effect on whether Bowling was 'in custody' within the meaning of § 2254" because the statute was an administrative mechanism for calculating the maximum total time a person serving multiple sentences could be incarcerated. Pet. App. A9-A13. Third, the Sixth Circuit concluded the second exception fashioned by a plurality of this Court in *Lackawanna County*, *supra*, was inapplicable because the Rockcastle conviction had no effect on his earlier Laurel County convictions and death sentences. Pet. App. A13-A15.

On July 12, 2017, the Sixth Circuit denied Bowling's petition for rehearing *en banc*.

REASONS FOR DENYING THE WRIT

I.

THE PETITION SEEKS NOTHING BUT ERROR CORRECTION IN ARGUING THE COURTS BELOW MISINTERPRETED KENTUCKY LAW IN DETERMINING BOWLING WAS NOT IN CUSTODY FOR PURPOSES OF § 2254 WHEN THE PETITION WAS FILED

In his petition, Bowling continues to argue the Sixth Circuit and the District Court erred in their interpretation of Kentucky law when they concluded Bowling was entitled to credit for his pre-conviction custody time on the Rockcastle conviction. As such, he seeks nothing more from this Court than error correction. As such, the petition should be denied.

In its opinion, the Sixth Circuit properly concluded that Bowling was entitled to custody credit on the Rockcastle conviction dating back to his arrest on February 25, 1989, pursuant to KRS § 532.120(3), and the Rockcastle Circuit Court had erred by not awarding such credit. In so holding, the Sixth Circuit correctly concluded that Bowling's reliance on Kentucky Department of Corrections' policies was misplaced because the policies relied upon were "inconsistent with Kentucky statutory law and [were] thus void." *Bowling V*, 694 Fed. Appx. at 1013 citing KRS § 13A.120(2)(i) and *Franklin v. Nat. Res. & Envtl. Prot. Cabinet*, 799 S.W.2d 1, 3 (Ky. 1990).

This decision is entirely consistent with the Kentucky Supreme Court's understanding of KRS § 532.120(3) as espoused in *Bowling IV*. In that opinion, answering the District Court's certified question, the Kentucky Supreme Court explicitly stated the Rockcastle Circuit Court judgment "should have given Bowling

credit for the time he had served between his arrest and initial conviction." *Bowling IV*, 480 S.W.3d at 913. Plainly, the Kentucky Supreme Court has settled the question that Bowling is entitled to pre-trial custody credit on the Rockcastle conviction. The Sixth Circuit properly deferred to that court's determination of the laws of its state, and this Court should not grant review on an issue of settled state law.

While Bowling maintains he has not actually been given such credit by the Kentucky Department of Corrections, he has made no attempt to actually force the department to apply the Kentucky Supreme Court's decision in *Bowling IV* to his Rockcastle judgment. To the contrary, Bowling's incentive is to have the department not follow the Kentucky Supreme Court's *Bowling IV* decision because it would be fatal to his argument in this matter. The fact he seeks not to enforce a decision in his favor, however, does not mean he is entitled to ignore the decision and its effect on this matter. Simply put, under Kentucky law, Bowling was no longer "in custody" on the Rockcastle conviction when he filed his habeas petition in 2012, and this Court's review of that decision is not warranted.

The Sixth Circuit also properly concluded the fact Bowling's twenty-year sentence in this matter merged with his Laurel County death sentences because the sentences are being served concurrently under Kentucky law "has no effect on the § 2254 'in custody' determination." *Bowling V*, 694 Fed.Appx. at 1014. In this regard, the Sixth Circuit's decision is consistent with decisions of other federal courts that have considered such merged state sentences.

In *Maleng v. Cook*, 490 U.S. 488, 492 (1989), this Court stated "[w]hile we have very liberally construed the 'in custody' requirement for purposes of federal habeas, we have never extended it to the situation where a habeas petition suffers no present restraint from a conviction." Subsequently, in *Garlotte v. Fordice*, 515 U.S. 39, 46-47 (1995), the Court held that it viewed "consecutive sentences in the aggregate," and, therefore, a petitioner serving consecutive sentences could maintain a habeas petition even though the term of one sentence had expired because invalidation of the conviction "would advance the date of [the defendant's] eligibility for release." That is not the case, however, when a shorter sentence imposed concurrently with a longer one has expired.

As the Sixth Circuit aptly recognized, Kentucky's merger statute, KRS § 532.120(1) "was 'enacted to provide statutory guidance for the administrative task of calculating the maximum total time for which individuals may be incarcerated when serving multiple sentences[.]' " *Bowling V*, 694 Fed.Appx. at 1015. The Sixth Circuit then concluded that "[c]onstruing § 532.120(1) to extend federal *habeas* jurisdiction to situations where the prisoner no longer suffers restraint from the challenged conviction, as Bowling's interpretation does, "would read the 'in custody' requirement out of the statute." *Bowling* V, 694 Fed.Appx. at 1015 quoting *Maleng* v. Cook, 490 U.S. 488, 492 (1989).

Further, the Sixth Circuit noted Bowling's interpretation of KRS § 532.120(1) would contravene what this Court has noted as the "core purpose" of habeas review to shorten an unconstitutional incarceration. *Id*. at 1016. The Sixth Circuit,

therefore, joined the other federal courts that have considered such state merger statutes and held the merger of the twenty-year sentence with the death sentences did not extend the twenty-year sentence for purposes of determining custody under § 2254. *Id.* at 1016 citing *Hurdle v. Sheehan*, No. 13-cv-6837, 2016 WL 4773130, at *3-4 (S.D.N.Y. Sept. 12, 2016). *See also Sweet v. McNeil*, 345 Fed.Appx. 480, 482 (11th Cir. 2009); *Mays v. Dinwiddie*, 580 F.3d 1136. 1137 (10th Cir. 2009); *Clark v. Russell*, 1992 WL 259355, at *1 (6th Cir. 1992); *Mendiola v. Stephens*, No.14-cv-261 (RGM) (ASH), 2016 WL 1104854, at *3 (Feb. 23, 2016), adopted by 2016 WL 1090238 (S.D. Tex. Mar. 21, 2016); *Inman v. Landry*, No. 2:15-cv-243 (GZS), 2015 WL 8093864, at *2 (Oct. 22, 2015), adopted by 2015 WL 8125604 (D. Me. Dec. 7, 2015); *Mitchell v. Tanner*, No. Civ. 13–4918, 2014 WL 222071, at *2 (E.D.La. Jan. 21, 2014); *Frazier v. Giles*, 2012 WL 1090595, at *3 (Mar. 6, 2012) adopted by 2012 WL 1080868 (M.D. Ala. Mar. 30, 2012); *Freeman v. Pate*, No. 9:11-cv-01421 (DCN) (BM), 2011 WL 3420451, at *3 (July 19, 2011), adopted by 2011 WL 3420442 (D.S.C. Aug. 3, 2011); *Siarkiewicz v. McNeil*, No. 4:07-cv-383 (SPM) (MD), 2009 WL 399430, at *10 (Feb. 18, 2009), adopted by 2009 WL 903384 (N.D. Fla. Mar. 30, 2009); *Simpson v. Artuz*, 860 F. Supp. 156, 156-57 (S.D.N.Y. 1994).

Finally, the Sixth Circuit properly concluded Bowling was not entitled to consideration of his habeas petition in this matter under the second exception set forth by a plurality of this Court in *Lackawanna County*. There, the defendant had been convicted of three misdemeanors in 1986 in Pennsylvania, and filed a petition for relief from the convictions in 1987 on the basis of alleged ineffective assistance of

counsel which was not ruled upon during the fourteen-year period between filing and the Supreme Court's 2001 opinion. 532 U.S. 394, 397-398. In 1990, the defendant was convicted of aggravated assault and the trial court, based at least in part on the 1986 convictions, gave the defendant a sentence of six to twelve years because his actions indicated he would "continue to break the law." *Id*. at 398-399.

The Court in *Lackawanna County* established an exception to the general rule from *Daniels v. United States*, 532 U.S. 374 (2001), for "petitions that challenge an enhanced sentence on the basis that the prior conviction used to enhance the sentence was obtained where there was a failure to appoint counsel in violation of the Sixth Amendment[.]" 532 U.S. at 404. A three-member plurality of the *Lackawanna County* Court then suggested there could be another exception to the general rule when "[f]or example, a state court may, without justification, refuse to rule on a constitutional claim that has been properly presented to it. ... Alternatively, after the time for direct or collateral review has expired, a defendant may obtain compelling evidence that he is actually innocent of the crime for which he was convicted, and which he could not have uncovered in a timely manner." 532 U.S. at 405. "In such situations, a habeas petition *directed at the enhanced sentence* may effectively be the first and only forum available *for review of the prior conviction*." 532 U.S. at 406 (emphasis added).

In this matter, the Sixth Circuit properly concluded the plurality exception in *Lackawanna County* could only be invoked if this petition "can be construed as challenging his 1992 Laurel County sentences, as enhanced by the allegedly invalid

Rockcastle conviction." *Bowling V*, 694 Fed.Appx. at 1016. Such a construction, however, would require dismissal of this petition as duplicative in light of the pending, separate § 2254 petition challenging the Laurel convictions. *Id.*

Most importantly, however, the Sixth Circuit properly recognized the Rockcastle conviction could not possibly have enhanced the Laurel convictions which had been imposed four years earlier. *Id.* at 1016-1017. Bowling continues to assert in his petition to this Court that evidence of the Rockcastle crime was introduced during the Laurel County trial, but continually fails to recognize such evidence was admissible in the Laurel case regardless of whether he was ever tried for the Rockcastle crime.

The facts regarding the Rockcastle crime was properly admitted into evidence in the Laurel County case pursuant to KRE 404(b). Those facts were admissible in the Laurel County case, regardless of whether Bowling was ever tried and convicted in Rockcastle County. Nothing in KRE 404(b) requires a conviction as a prerequisite to admission of evidence under the rule.

Further, the Kentucky Supreme Court affirmed the admission of the Rockcastle evidence in the Laurel case on direct appeal holding "[t]he evidence pertaining to [Bowling's] attempted murder of Rickey Smith at the Mt. Vernon Sunoco Service Station was sufficiently probative under KRE 404(b)." *Bowling v. Commonwealth*, 942 S.W.2d 293, 301 (Ky. 1997). The Sixth Circuit properly concluded "*Lackawanna County* cannot save [Bowling's petition]." *Bowling V*, 694 Fed.Appx. at 1017. This Court's review is not warranted.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be **DENIED.**

Respectfully Submitted,

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