22-6796

NO: 22_____

IN THE

Supreme Court of the United States

Marty Allen Owens,
Petitioner,

v

State of Oklahoma Et. Al.
Respondents,

On Petition for a Writ of Certiorari
To the Oklahoma Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

Marty Allen Owens, Pro Se'
N.F.C.C., DOC # 639940
1605 E. Main St.
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Question Presented

Did the McGirt v. Oklahoma, 140 S.Ct. 2452 (2020) decision, embrace, include within, annex to, the Major Crimes Act, 18 U.S.C. §1153(a), to the Territory of the State Of Oklahoma by leaving unlawful prosecutions in state courts in place?

Did the McGirt 140 S.Ct. 2452 (2020) decision apply the Major Crimes Act as to its "usual terms"? Making the decision a substantive rule of law.

Did the Courts of Justice violate petitioner's constitutional rights, by not establishing subject matter jurisdiction even though the trial court had the Cherokee Nation Tags, Title to the 2006 Toyota Tundra truck, and the Tribal Membership Cards, CDIB at the time of the crime? Is this conviction and sentence invalid under the law?

PARTIES TO THE PROCEEDINGS

Petitioner is Marty Allen Owens.

Respondents are the State of Oklahoma, by and through the Attorney General, John O'Conner, Kevin Buchanan, District Attorney in and for Washington County. Chief District Judge, Linda Thomas

RELATED PROCEEDINGS

State of Oklahoma v. Marty Allen Owens, CF-09-339 District Court

Direct Appeal in the OCCA 2011-847, denied 4 April, 2013

Post- Conviction proceeding 2020-1217, denied 1 November, 2021

28 USC § 2254 Habeas Corpus, Federal District Court, Northern District, Tulsa, Oklahoma, 22-CV-0192-GKF-CDL, denied 25 October, 2022

Certificate of Appealability, denied, Tenth Circuit, 21-5106, denied, 28 December, 2022

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JURISDICTION INVOKED PURSUANT TO 28 U.S.C. § 1257 (a).

PETITION FOR A WRIT OF CERTIORARI

Petitioner Marty Allen Owens respectfully petitions for a writ of certiorari to review the judgment of the District Court of Washington County, and The Affirmation Decided by the Oklahoma Court of Criminal Appeals, and the decisions of the Federal District Court, and The Tenth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals denial is unpublished. The opinion of the Federal District court § 2254 is published and is located on the Westlaw portal, 22-CV-1092-GKF-CDL, Fed Supp. 3d., 2022 WL 14678728, Tenth Cir. Court of Appeal, not reported in Fed, Rptr. 2022 WL 179721, 28 Dec. 2022, 21-5106.

JURISDICTION

The Court of Criminal Appeals denied the Post-Conviction on 1 April, 2021. The Federal district Court denied §2254 Habeas Corpus 25 October, 2022. Certificate of Appealability was denied by the Tenth Circuit 28, December, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Relevant provisions of 18 U.S.C. Code and Title 22 of the Oklahoma Statutes, are set forth in the appendix.

INTRODUCTION/ STATEMENT

In the McGirt 140 S.Ct. 2452, This Court held that the Federal Government must be held to its promise that certain lands reserved for the Native American Tribes would forever remain free from the State's or Territorial jurisdiction and would remain Indian country within the meaning of the Major Crimes Act. The Major Crimes Act, (MCA) defines that certain enumerated offenses in section §1153(a)

of Title 18 of the U.S. Code would be the exclusive jurisdiction of the federal government, and only the federal government may prosecute such crimes.

In the middle of many proceedings Oklahoma decided a case, Ex. rel. Matloff v. Wallace, PR-2021-366. That decision as established by the Oklahoma Court of Criminal Appeals, determined that McGirt is not retroactive to convictions that were final when McGirt was decided. However, the major crimes act as adopted by Congress in 1885 Acts of Mar. 3, which is codified as 18 U.S.C. 1153(a), would mean that the McGirt decision would constitute a substantive rule of law under the treaties and statutory laws adopted before the statehood of Oklahoma in 1907. See the Crow Dog case, see also United States v. Kagama, 118 U.S. 375, 382-83 (1886); United States v. John, 437, U.S. 634, 651 (1978); Negonsott v. Samuels, 507, U.S. 99, 102-03 (1993); McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164,168 (1973) (similar).

A. THE FEDERAL GOVERNMENT'S PROMISE TO THE CHEROKEE

Native American Tribes retain their sovereignty unless and until congress ordains otherwise. See Worcester v. Georgia, 6 Pet. 515, 561,8 L.Ed 483 (1832). Worcester is one of this courts foundation rules for over 200 years. The court stood firm on the promise made to Native Americans and the Tribes, by Congress, that Cherokee's would forever be free from interference by State authorities.

In Worcester only the federal government possessed the power to manage relations with the tribe. The court refused to sanction Georgia's intention of a power grab, the court explained that the state's assertion of jurisdiction over Cherokee Nation was "void", because of the constitution. Worcester, 6 Pet. At 542, 561-562. Georgia also purported to extend its criminal laws to Cherokee lands, like Oklahoma today. See S. Breyer, the Cherokee Indians and the Supreme Court, 87, The Georgia Historical Q. 408, 416-418 (2003) (Breyer).

In the Treaty of New Echota with the Cherokee in 1836, the United States promised the Cherokee that they would enjoy a new home in the west where they could "establish a government of their choice." Treaty with the Cherokee Preamble, Dec. 29, 1835, 7 Stat. 478. Acknowledging the tribes past "difficulties"... under the jurisdiction and the laws of the State government's. The Treaty also pledged that the tribe would remain forever free from "state sovereignty" ibid. see Art. 5, Id. at 481. These promises constituted an "indemnity", guaranteed by the Faith of the Nation, that the United States and the Indian [would be] the sole parties with power on the new western reservation's like the Cherokee's, H. Rep. No. 474, at 18 (emphasis added in the original).

In 1885, dissatisfied with how the Sioux tribe responded to the murder of a tribal member, congress adopted the Major Crimes Act (MCA). See R. Anderson, S. Krakoff, and B. Berger, American Indian Law, Cases and Commentary 90-96 (4th ed. 2008), (Anderson). There congress directed that moving forward, only the

federal government, not the tribe could prosecute certain serious offenses by tribal members on tribal lands. See 18 U.S.C. §1153(a). Even with the developments of adding states to the union the promise remains the same. The promise that states could play no role in the prosecution of crimes by or against Native Americans. There are only a handful of states who invoked the Public Law 280 or the 18 U.S.C. 1162, all of which Oklahoma has not. See McGirt, 140 S. Ct. 2452, id. at 2478. As a result the MCA applies to Oklahoma as to its "usual terms", only the federal government, not the states may prosecute Indians for major crimes committed in the Indian country.

In 1906, congress reaffirmed the promise to the Cherokee in Oklahoma. As a condition of it's admission to the union, congress required Oklahoma to "declare that [it] would forever disclaim all right and title in or to, all lands lying within [the states] limits owned or held by any Indian, Tribe, or Nation," 34 Stat. 270. Congress provided that tribal lands would remain subject to the disposal and control of the United States, nothing in the new Oklahoma Constitution shall construe to limit or effect the authority of the government of the United States. Shortly after Oklahoma adopted a state constitution consistent with congress's instruction. Art. 1§3, see also Clinton 91. The honorable Kelly Haney, 22 Okla. Op. Atty. Gen. No: 90-32, 72 1991 WL 567868, *1 (Mar.1 1991) (Haney), states that nor has Oklahoma sought or obtained tribal consent to exercise jurisdiction. Thus the state of Oklahoma has remained in congress's words a state "not having jurisdiction" over criminal offenses committed by or against Indians in areas of Indian country

situated within its borders. 25 U.S.C. 1321(a). For years Oklahoma courts asserted the power to hear criminal cases involving Native Americans on lands allotted to and owned by tribal members despite the contrary commands of the Oklahoma Enabling Act and the states own constitution. (Petitioner believes this to be a state created impediment forcing crimes in state court and thwarting the process to relief as law and justice require. See Oklahoma Art VII§ 7). In 1991, after defeats in the state court and federal courts, see Haney, 1991 WL 567868 *1-*3; see also State v. Klindt, 782, P.2d 401, 404, (Okla. Crim. App. 1989); Ross v. Neff, 905 F.2d 1349, 1353 (CA 10 1990). However Oklahoma continued to prosecute crimes by or against Native Americans within tribal reservations. The state claiming sometime in the past congress disestablished those reservations.

In McGirt v. Oklahoma, this court rejected the argument in the case involving the Muscogee (Creek) tribe. 591 U.S. ____, ____, 140 S.Ct. 2452, 207 L. Ed. 2d 985 (2000) (slip op. at 1). It was explained that congress never disestablished the Creek Reservation. Following the ruling in McGirt Oklahoma courts recognized that what held true for the Creek also held true for the Cherokee. See Spears v. State, 2021 Ok. Cr. 7 pp. 11-14, 485 P.3d 873, 876-877. Nor was the U.S. Supreme Court willing to usurp congress' authority and disestablish that reservation by lawless act of judicial fiat. See Id. at __, 140 S.Ct. at (slip op at. 42). Only the federal and tribal authorities were lawfully entitled to try crimes by or against Native Americans within the reservation. The state lacked authority to try offenses by or against tribal members. The ruling in State v. Victor Castro Huerta 2022 WL 2334307as decided

June 29, 2022, the Supreme Court usurped the plenary power of Congress and allowed Oklahoma concurrent jurisdiction with the federal government to try crimes by non-Native Americans against Native Americans in Indian country. That decision was an act unattached to any colorable legal authority and is unconstitutional.

Tribal sovereignty means that the criminal laws of the states "can have no force" on tribal members within the tribal boundaries unless and until Congress clearly ordains otherwise. Worcester 6, Pet. At 561; see also Wilson v. Girard, 354 U.S. 524, 529, 77 S.Ct. 1409, 1 L.Ed. 2d 1544 (1957) (per curiam) (a sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders"); see also Schooner Exchange v. McFadden, 7 Cranch 116, 136, 11, U.S. 116, 3 Led. 287 (1835 ed.), Denezpi v. United States, 596 US ___, ___, (2022) (slip op at. 6) internal quotation marks omitted; Michigan v. Bay Mills Indian Community, 572, 788-789, 134 S.Ct. 2024, 188 L.Ed. 1071 (2014). Throughout our history "the basic policy of Worcester that tribes are separate sovereigns has remained." Williams v. Lee, 358 U.S. at 219, 79 S.Ct. 269. "By treaties and statutes", the court has said, the right of the Cherokee's [Nation] to exist as an autonomous body, subject always to the paramount authority of the United States, has been recognized, Talton v. Mayes, 163 U.S. 376-380, 16 S.Ct. 986, 41 L.Ed. 196 (1896). In Harjo v. Kleppe, 420 F. Supp. 1110, 1121 (D Dc. 1976) (federal courts had pre-statehood jurisdiction); see Simms v. Simms, 175 U.S. 162,168, 20 S. Ct. 58, 44 L.Ed. 115 (1899).

McGirt only confirmed what the state knew all along, that it never had jurisdiction despite claiming misunderstanding of the law. Oklahoma conceded the point in asking this court to usurp Congress' authority and to disestablish these reservation. See Tr. Of Oral. Arg.; in McGirt 591 U.S. at ___, ___, 140 S, Ct. at (slip op, at 37-38).

In McGirt the court expressly acknowledged that cases involving crimes by or against tribal members within the reservation boundaries would have to be transferred from state to tribal or federal courts or authorities, 591 US at (slip op. at 36-42). The court anticipated, too that this process would require a period of re-adjustment. All of this is necessary all because Oklahoma had a long overreached Its authority, on tribal reservations and defied legally binding congressional promises. See Ibid. Even in the Castro Huerta cases the Supreme Court decision left undisturbed the ancient rule that states cannot prosecute crime by Native Americans on tribal lands without clear congressional authorization, because it touches the heart of tribal self-government.

B. OKLAHOMA PRACTICE

5 Okla. Practice § 3:2, An Oklahoma Appellate Court must satisfy itself whether the issue is raised or even waived by the parties. The question of jurisdiction is primary and fundamental in every case. It may neither be waived by the parties nor overlooked by the court. The Supreme Court is duty bound to determine for itself

whether jurisdiction to review a case has been invoked. See Meek v. Williams, 441, P.2d. 420, 1968. Ok. 74. Supreme Court of Oklahoma. See Also

In. Re: M. B., 145 P.3d. 1040, 2006 Ok. 63 (2006). Further the court is required to inquire sua sponte into not only its jurisdiction but also into that of the court from which the case came. Basically anytime a court determines that it lacks jurisdiction the only thing to do is dismiss. See also Stanley v. LeMire, 334, Mont. Supreme Court (moreover courts including this court has an obligation to determine whether subject-matter-jurisdiction exist, even in the absence of a challenging party. Also in Oklahoma questions of jurisdiction may be raised at any time either in trial court or on appeal, even in the absence of an inquiry by the litigants. However, H.B. 3383, has been adopted in 2022 under the Post-Conviction Procedure Act. limiting, the time the seek relief for challenges to Subject- Matter -Jurisdiction. This was not the practice in Oklahoma Courts for decades. See Oklahoma Practice 6 §25-104-106, and §25-124.

C. FUNDAMENTAL FAIRNESS IS THE CENTRAL CONCERN IN HABEAS CORPUS

Federal Habeas Manual, Brian R. Means Chapter 13 relief and remedies from unlawful prosecutions §13:10, states that absence of jurisdiction- A petitioner in custody from a judgment issued by a court that lacked jurisdiction over him is entitled to an unconditional writ. Solem v. Bartlett, 465 U.S. 463, 466,104, S.Ct. 1161, 79, L.Ed. 2d 443 (1984) (granting unconditional writ where Colorado State

Court lacked jurisdiction to try defendant because his crimes were committed in on "Indian country". See also Farron Robert Deerleader v. Scott Crow DOC Director, opinion and order 20- CV-0172-JED-CDL (for the granting of writ due to jurisdiction lacking in the state court of Oklahoma. See also Cobell v. Cobell, 503, F.2d 790, 795 (9th Cir. 1974) (upholding grant of unconditional writ of habeas corpus where tribal court lacked jurisdiction to determine custody of children. 28 U.S.C. §2255 also provides relief.

In Coleman v. Thompson, 501 U.S. 722, 111, S.Ct. 2546 (1991) Justice Blackmun and the dissenting opinion," Coleman's right to a criminal proceeding free from constitutional defect or his interest in finding a forum for his constitutional challenge to his conviction and sentence of death, nor does the majority even allude to the "important need for uniformity in federal law." id. at 1040, 103 S.Ct. at 3476, Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469, 77 L.Ed 2d 1201 (1983). Which justified this courts adoption of the plain statement rule in the first place. Rather displaying obvious exasperation with the breadth of the substantive federal habeas doctrine and the expansive protection afforded by the fourteenth amendments guarantee of fundamental fairness in state court proceedings, the court today continues to crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims. Because I believe that the court is creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights, I dissent."

D. STATEMENT OF THE CASE

On August 23, 2009 petitioner was arrested in Bartlesville, Oklahoma, County of Washington on the following: Ct. I. Assault With Intent to Kill, 21 O.S. 652 (a) firearm , Ct. II. Assault With Intent to Kill, 21 O.S. 652 (c), Ct. III. Burglary I, 21 O.S. 1431. Washington County is located within the boundaries of the Cherokee Nation Reservation. Petitioner is a registered member of the Cherokee Tribe, since 1992. Trial by jury was conducted in June 13-16, 2011. Direct Appeal was affirmed by the Oklahoma Court of Criminal Appeals, 4 April, 2013. Following this appeal petitioner's family hired an attorney for the Post-conviction, which attorney's conduct lead to nothing being filed timely to the court before the 1 year limitation time to file under § 2244 finality rules. Petitioner challenged the issue in federal district court as to the Holland v. Florida, 560 U.S. 631, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010). Petitioner filed a Post-conviction Relief, 5 November, 2020. The Oklahoma Court of Criminal Appeals affirmed the District Courts denial 1 April, 2022. Later that same month petitioner file the immediate 28 U.S.C §2254 in the Federal District Court of the Northern District, Tulsa Oklahoma. Habeas Corpus was denied in that court 25 October, 2022. COA was sought in the Tenth Circuit to no avail. That filing was denied on 28 December, 2022.

E. ISSUE IN CONTROVERSY ARGUMENT

The petitioner has exhausted all available state court remedies to correct the errors of that court. See O'Sullivan v. Beorckel, 526 U.S. 838, 119, S. Ct. 1728 (1999).

Petitioner presented the state court with the tribal Membership Card, CDIB in the filing. The court stipulated that the petitioner is in fact Native American at the time of the crime and that the crimes were committed on the Cherokee Nation Reservation. In the courts response they wanted to stay proceeding pending the outcome of the Bosse PCD-2019-124. This however went on for nearly a year resulting in that case being removed from the U.S. Supreme Court docket. The Oklahoma court made its stipulation in March of 2021. By that time Oklahoma put the Matloff v. Wallace, PC-2021-366 in place claiming that McGirt was not to be applied retroactively. What is of significance is that at the time of the arrest the local police authority took the wallet of the defendant containing the Tribal Membership Card, CDIB, The PC Affidavit 2009-476, reflects the 2006 Toyota Tundra that had the license plate VO2-841 Cherokee Nation. In the states Discovery Evidence there was a Title to the truck registered to the Cherokee Nation and photo evidence depicting the truck tag. Also in the record is the police narratives stating the same information as provided. The jury in the case was never put on notice of the jurisdictional issue. However the charging instructions contained the tag numbers in the jury instructions. No sign of the Tribal Membership Cards or the CDIB.

The petitioner believes the State of Oklahoma has violated clearly established federal law, as described in the §2254(A) rules. The information of the Cherokee Indian Status was in the hands of the state government the whole time and jurisdiction was suppressed by the state prosecutor. See Brady v. Maryland, 373.

U.S. 83, 83 S.Ct. 1194 (1963); Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed. 2d 490, 63 USLW4303 (1995). U.S. v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 481.87 L.Ed. 2d. In these cases it concerns the suppression of favorable evidence to a defendant. If this evidence would have been presented to a trial jury the case would have but weighed in a different light or put in a different light.

This caused prejudice to the defendant in this case. And violates due process. Amendment 5, 14 of the U.S. Const.

A. PROCEDURAL DEFAULTS

The 1-year limitation time to file, §2254 Rules explains that satisfaction of §2254 removes the AEDPA prohibition on the issuance of a "writ" and requires [a Federal Habeas Court] to review de novo the petitioner's claim. See Milton v. Miller, 744 F. 3d. 660, 670-71 (10th Cir. 2014). See Williams v. Taylor, 529, U.S. 362, 412 (2000) If clearly established federal law governs the federal claim presented in the state courts decision is contrary to the law if the decision "applies a rule that contradicts the governing law set forth in [the] Supreme Court cases. See Murphy I, 875, F3d. at 914; Greene v. Fisher, 565 U.S.34, 38, 132 S.Ct. 38, 181 L.Ed. 2d 336 (2011) the reasoning in Cullen v. Pinholster, focused on what the state court knew and did. See also, Lockyer v. Andrade, 538, U.S. 63, 123, S.Ct. 1166 (2003).

B. FEDERAL RULES OF DISCOVERY

In the Rule 8 Hearings for §2254 Habeas Corpus, Advisory Committee Notes, 1976 Adoption, pg. 2 law clerks are normally tasked with examining post-conviction application to assist in the summarizing the content for the Federal District Judges.

A 1-year clerkship does not afford law clerks the time or experience in handling such applications. If experienced law clerks are not capable of handling post-conviction applications in 1-year, it would not seem feasible to hold an unskilled layman in the law to a higher standard than that of federal law clerks. This would be contrary to the procedural rules of the AEDPA 1- year limitation time to file for inmates. The AEDPA could be unconstitutional, and allows for the suspension of the Habeas Corpus to the unskilled filer of habeas corpus applications in both state and federal.

C. INADEQUATE STATE LAW GROUNDS

Because Matloff v. Wallace is not firmly established it cannot be used to retroactively deny habeas corpus review. Peoples v. Campbell, 377. F3d. 1208, 1235 (11th Cir. 2004). Federal District Court erred in invoking procedural default that the state court of criminal appeals had declined to follow.

James v. Kentucky, 466, U.S. 341, 348-49, 104 s. Ct. 1830, 1835, 80 2Ed. 2d 346, (1984), we held that only a "firmly established and regularly followed state practice may be interposed by a state to prevent subsequent review by this court on a federal

constitutional claim; Clayton v. Gibson, 199, F.3d 1162, 1171 (10th Cir, 1999). (stating that default did not bar federal review because the state procedural rule was adopted after the default supposedly occurred and could not have been firmly established). The petitioner states that the Matloff v. Wallace case was ruled on in the middle of the proceedings in post-conviction. This is completely contrary to the laws in place at the time of the McGirt decision.

Because in Oklahoma subject-matter-jurisdiction can be raised at any time on direct appeal or collateral attack. This makes Matloff v. Wallace, not regularly practiced law in this State. The Federal District Court knew it was not regularly practice law to deny review of habeas corpus and should not have allowed it to deny de novo review of the constitutional claims petitioner raised.

In the words of Chief Justice Roberts, the court raised the possibility that "well-known state and federal limitations on post-conviction review in criminal proceedings," might impose "significant procedural obstacles" to relief ... id. at 2478 n. 5 (noting state rule that claims not raised on direct appeal are waived on collateral attack); but see id 2501 at n. 9 (Roberts dissenting); (Under Oklahoma law, it appears that there may be little bar to state habeas relief because "issue of subject-matter-jurisdiction are never waived an can therefore be raised on collateral appeal." Quoting Murphy v. Royal, 875, F. 3d.896, 907 n. 5 (10th Cir. 2017). affirmed sub nom. Sharp v. Murphy, 140 S. Ct. 2412 (2012). But the court did not embrace any such defenses, instead concluding that "the magnitude of a legal

wrong is no reason to perpetuate it." Id. at 2480, Dire warnings are just that and not a license for us to disregard the law." Id. at 2481.

REASONS FOR GRANTING

The Writ of Habeas Corpus was designed to protect the rights of a defendant who had been restrained of his liberty by order or decree of any illegal court," including a court who lacked jurisdiction to impose the conviction or punishment. 1 Williams Blackstone, Commentaries on the Laws of England 135 (1765). See

Also Ex Parte Lange, 85 U.S. 163 (1873), this court held that the defendant was entitled to the writ because the trial court lacked jurisdiction to impose his sentence; Ex Parte Wilson, 114, U.S. 417 (1885), the court held that defendant was entitled to habeas corpus because the trial court had exceeded its jurisdiction in trying, convicting and sentencing him.

Because the trial court did not apply the Solem v. Bartlett, 465 U.S. 463, 466, 104 S.Ct. (1984) case to the petitioner at the time of the crime having factual evidence to establish the status of Indian Tribal Membership the case should be reversed and set aside as invalid. Further because the court had the truck tagged with Cherokee license plates, and the truck title, and the memberships cards the case should be reversed and set aside also. Because this is a malfunction of the state court system the burden belongs to the state for failure to apply clearly established federal law to petitioner at the time of the crime. Because the petitioner was denied a full and fair hearing in the state court by the suppression of favorable evidence to the

accused, the Courts of Justice should correct this error to promote the integrity of the courts. Further because the 1-year limitation time to file under the court rules is burdensome to an unskilled laborer in the law, this requires consideration by the courts. As Justice Blackmun put it, the court is creating a Byzantine morass of arbitrary, unnecessary, unjustifiable impediments to the vindication of federal rights.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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