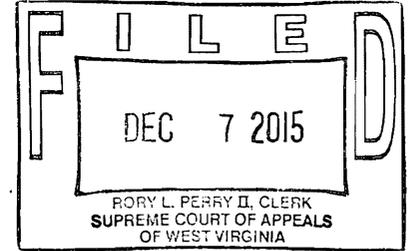


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
DOCKET No. 15-0876



**CHIP MELTON DAVIDOW**

**Petitioner**

v.

**STATE OF WEST VIRGINIA,**

**Respondent**

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**Petitioner's Brief**

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**TABLE OF CONTENTS**

ASSIGNMENTS OF ERROR.....2

STATEMENT OF THE CASE.....2

SUMMARY OF ARGUMENT .....10

STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....11

STANDARD OF REVIEW .....11

ARGUMENT.....11

    1. An acqutee is entitled to be placed in the least restrictive environment necessary to manage his or her condition. ....11

    2. The Circuit Court failed to make findings and a determination as to whether Highland Hospital is the least restrictive environment available under § 27-6A-4(e). ....13

    3. The Circuit Court abused its discretion by refusing to transfer Mr. Davidow from Highland Hospital, which is a more restrictive environment than is necessary to manage his condition. ....13

*a. Belmont Wild Acres, not Highland Hospital, is the least restrictive environment available to manage Chip Davidow’s condition. ....13*

*b. The Circuit Court placed undue weight on the nature of the underlying crime and the testimony of Georgia Bradstreet, and failed to adequately consider Mr. Davidow’s twenty-year history of non-violence. ....15*

CONCLUSION .....17

## TABLE OF AUTHORITIES

### Cases

<i>Foucha v. Louisiana</i> , 504 U.S. 71 (1992) .....	12
<i>Jones v. United States</i> , 463 U.S. 354 (1983) .....	12, 16
<i>State v. Catlett</i> , 207 W. Va. 740, 536 S.E.2d 721 (1999) .....	12
<i>State v. Robertson</i> , 230 W. Va. 548 (2013) .....	8, 11
<i>State v. Smith</i> , 198 W. Va. 702, 482 S.E.2d 687 (1996) .....	12

### Statutes

W. Va. Code § 27-6A-4.....	3, 7
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## ASSIGNMENTS OF ERROR

1. The Circuit Court erred by refusing to transfer Mr. Davidow to Belmont Wild Acres in Massachusetts, where he lived peacefully for nearly twenty years and which is the least restrictive environment available to manage his condition.
2. The Circuit Court erred by denying Mr. Davidow's Motion for an Order Directing Transfer to a Less Restrictive Placement without determining whether his current placement is the least restrictive alternative available under West Virginia Code § 27-6A-4(e).

## STATEMENT OF THE CASE

After living peacefully for nearly twenty years in a less restrictive setting, Chip Melton Davidow is now confined to a locked ward at Highland Hospital. The change in Mr. Davidow's position is through no fault of his own and is not due to any change in his condition; his previous facility simply closed, and the Circuit Court refused to allow him to relocate to a similar facility.

In June 1994, Mr. Davidow was arrested for first-degree murder in Raleigh County, West Virginia. It quickly became clear that, at the time of the crime, Mr. Davidow was delusional and in the throes of paranoid schizophrenia. As a condition of his bond, Mr. Davidow was confined to Bournemouth Hospital in Brookline, Massachusetts. (App. 50-51.) Later, the Court, with the agreement of the State, held that Mr. Davidow was not guilty by reason of mental illness.<sup>1</sup>

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<sup>1</sup> (App. 14-16.) The Court found that Mr. Davidow was "not criminally competent at the time of the alleged" crime and therefore was not criminally responsi-

On August 23, 1995, Mr. Davidow was transferred by Agreed Order from Bournemouth Hospital to Wild Acre Inn in Lexington, Massachusetts, to receive further psychiatric care. (App. 13.) He remained at Wild Acre Inn, receiving care at his own expense, for nearly twenty years. There, he advanced through the facility's stepdown procedures until he resided in a group home located on the Wild Acre grounds that allowed him the freedom to become involved in the community, make friends, and participate in therapeutic programs tied to his avocation (music), specifically, the music group Tunefoolery.<sup>2</sup> During this time, he received treatment from William Kantar, MD, the psychiatrist with whom he has treated since 1995, and always maintained a strict medication regimen as prescribed and overseen by Dr. Kantar.

Mr. Davidow's years at Wild Acre Inn were quiet and successful. Dr. Kantar described his time at the facility:

- There have been no instances of noncompliance or violation of the law since Mr. Davidow has been in Massachusetts ....
- Mr. Davidow has always been cooperative, and has always followed the program laid out for him, including medication management.

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ble. This judgment is the historical equivalent of a verdict of not guilty by reason of mental illness. W. Va. Code § 27-6A-4.

<sup>2</sup> See [www.tunefoolery.org](http://www.tunefoolery.org) (explaining that Tunefoolery consists of "musicians in mental health recovery committed to personal and artistic growth. Through our musical performances, we share empowerment and healing.").

- [Mr. Davidow] has cooperated with staff, abided by the rules and regulations, and has proven to be trustworthy.
- [Mr. Davidow] has not been problematic, ever, at either Bournemouth Hospital or Wild Acre Inns.
- [Mr. Davidow] has coped with ... issues appropriately and has not regressed. He has managed difficulties and inconveniences with reasonable and acceptable behavior, showing a capacity to understand a situation, delay gratification, and place the matter in perspective.

(App. 138-140.)

In 1999, Mr. Davidow's mother died, and the Court permitted him to travel under supervision to Washington D.C. for her funeral. He did so without incident. (App. 17-18.). Fifteen years then elapsed without significant court involvement.<sup>3</sup>

In 2014, after living peacefully in Massachusetts for nearly twenty years, Mr. Davidow learned that the Wild Acre Inn Lexington Program was closing. On his own initiative and in compliance with the Court's 1995 order, Mr. Davidow notified the Circuit Court of Raleigh County of the impending closure and

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<sup>3</sup> The record contains an Order for Transport and Commitment to William Sharpe Hospital, dated May 24, 2000. There is no evidence that Wild Acre Inns, Mr. Davidow, or Mr. Davidow's attorney were ever served with or provided a copy of this Order. (App. 3 n.4.) Mr. Davidow first became aware of it when it was produced by the State after he had been returned to West Virginia in 2014, nearly fourteen years later. Even the State has admitted that it obtained a copy of the Order from Sharpe Hospital, and that no copy was contained in the prosecutor's files. (App. 277: 12-20 ("Also, we received from Sharpe Hospital after all this happened, the - - a copy of the attested order, which was not - - I don't believe maintained in the prosecutor's files . . . It seemed to have disappeared.")). Because there is no indication Mr. Davidow received a copy of the Order or knew of its existence, it should not affect the analysis of his Motion for Transfer.

requested that he be allowed to relocate to the Belmont Wild Acre program. (App. 25-70.) The Belmont Wild Acre Program is very similar to the Lexington Wild Acre Inn program, with more intensive psychiatric treatment and a slightly longer walk from the residence to the facility. The Circuit Court held an emergency status hearing in August 2014 regarding the impending closure and Mr. Davidow's relocation request. The Circuit Court ordered that Mr. Davidow be kept under "round-the-clock direct supervision by a qualified and responsible mental health staff member until further Order of the Court." (App. 96.)

On September 8, 2014, Mr. Davidow underwent a risk assessment by retained forensic psychiatrist David Rosmarin, MD, who presumed that Mr. Davidow would be moving from his placement in the Lexington Wild Acre Inn program to the Belmont Wild Acre program. Dr. Rosmarin found as follows:

- "Mr. Davidow is avid about continuing his medication ..."
- "... there have been no episodes of threats to anyone, fantasies of violence, self-harm, or substance abuse."
- "The most important observations and reports are that Mr. Davidow has been absolutely non-psychotic, non-substance abusing, and—because he [has] insight into his illness and need for treatment—fully compliant with treatment and staff."
- "He has had no relapse of either a mood disorder or psychotic disorder since recovering from his psychosis related to the killing."
- "He has been rather a model patient ..."

- “I think he is at low risk for foreseeable future violence.”

(App. 141-148.)

The Circuit Court held a hearing and then, on September 12, 2014, ordered Mr. Davidow to return to West Virginia for placement at William R. Sharpe Hospital under round-the-clock supervision. (App. 23-24.) In doing so, the court made no findings of fact as to Mr. Davidow’s risk to the community and did not determine whether Sharpe Hospital was the least restrictive alternative for him.

Shortly after his arrival at Sharpe Hospital, Mr. Davidow was given a Dangerousness Risk Assessment by Dr. Kari-Beth Law. (App. 149-155.). Dr. Law, a state-approved dangerousness assessment provider, adopted Dr. Rosmarin’s findings and utilized them in her own report. (*Id.*; App. 102-105.). Dr. Law did not disagree with Dr. Rosmarin’s evaluation or risk assessment, and did not find that Mr. Davidow’s risk factors were any more severe or significant than those identified by Dr. Rosmarin. Dr. Law noted that “Mr. Davidow previously tolerated much larger freedoms without any documented difficulties” and recommended that he be advanced to the next privilege level. (App. 154-155.)

On November 3, 2014, Mr. Davidow was transferred from Sharpe Hospital to Highland Hospital. (App. 106-107.). The Highland facility, like Sharpe, is a secure locked unit. *Id.* Mr. Davidow is subject to full-time GPS tracking and significant supervision. At Highland, Mr. Davidow is confined entirely to a locked

ward, with the exception of a brief sojourn in a small fenced yard once a day, weather permitting.

In March 2014, Dr. Timothy Saar performed a forensic evaluation of Mr. Davidow pursuant to West Virginia Code § 27-6A-4. Dr. Saar is a state-approved provider of dangerousness assessments. (App. 102-105.) Dr. Saar's evaluation was the most thorough yet performed of Mr. Davidow, and included significant mental health testing in the form of at least six different standardized tests plus interviews of Mr. Davidow and conversations with his current treaters. (App. 156-165.) Dr. Saar's assessment and recommendation were clear:

Mr. Davidow presents a low risk to the community and for future violence. This opinion is similar to that of Dr. Rosmarin, MD from Newton, Massachusetts. ***The ideal setting would be for Mr. Davidow to be allowed to reside at the Belmont House program. It is a program similar to his previous level of care with many of the same staff and psychiatrist.*** These are mental health professional with a long history with this client and are very familiar with his personality style and his needs. Regarding possible placements in West Virginia, ***the reality is that West Virginia is a state with a paucity of resources for this population.*** The majority of programs are designated as MR/DD Waiver Programs that are designed for the mentally retarded and developmentally delayed adults, which Mr. Davidow is none of these. The reality is that Mr. Davidow has lived many years in an independent living facility without incident and has been compliant with all their rules and regulations.

(App. 156-165).

In light of these evaluations, Mr. Davidow requested that the Circuit Court transfer him, at his own expense, to the Belmont Wild Acre Program, which was

prepared to accept him.<sup>4</sup> (App. 109-110). The proposed treatment plan at Belmont Wild Acre, which would allow him to continue treatment with Dr. Kantar, included daily mental status assessments, medication administration by staff members, twice monthly psychiatric assessments, twice monthly meetings with a clinical consultant, six hours per week of life skills support, weekly case management meetings, and a twenty-four-hour on-call clinician. (App. 111-114.) This program, as Dr. Kantar, Dr. Rosmarin, and Dr. Saar have all opined, would constitute a setting that would ensure the safety of the public and manage Mr. Davidow appropriately.

Mr. Davidow therefore filed a Motion with the Circuit Court seeking an Order Directing Transfer to a Less Restrictive Placement. (App. 71-135.) In the Motion, Mr. Davidow asked the Court to transfer him to Belmont Wild Acres. The State did not file a response to the Motion. At the hearing on the Motion, however, the State submitted a compilation of documents<sup>5</sup> and provided the testimony of Georgia Bradstreet, statewide forensic coordinator for the State of West Virginia. (App. 253-317.) Ms. Bradstreet took her current position in 2009 and therefore had

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<sup>4</sup> *State v. Robertson*, 230 W. Va. 548, 555 (2013) establishes that an out-of-state placement may be appropriate where it is the least restrictive alternative to manage the acquittee's condition.

<sup>5</sup> The compilation, marked Exhibit 1, contained the May 2000 Transfer Order that apparently was never sent to Belmont Wild Acres, Mr. Davidow, or his counsel (see *supra*, note 3); forensic evaluations from 1994; and two letters to the circuit clerk from DHHR in 1994 (App. 234-250).

not been involved with Mr. Davidow's case when he was transferred to Massachusetts in 1995. (App. 285:2-6.) Ms. Bradstreet stated that she had reviewed Mr. Davidow's evaluations from 1994, prior to his transfer, but had not read the more recent opinions and reports of Dr. Saar and Mr. Davidow's treating physicians. (App. 285:7-14, App. 298:17-App. 299:12.) Ms. Bradstreet also had not reviewed either Mr. Davidow's prior treatment plan or the proposed treatment plan for him at Belmont Wild Acres. (App. 293:22, App. 295:1.) Despite her complete lack of knowledge about Mr. Davidow's current condition, Ms. Bradstreet testified that appropriate treatment could be provided for him in West Virginia. (App. 288:15-19, App. 290:16-17.)

Following the hearing, the Court denied Mr. Davidow's Motion, noting that "[t]o allow acquitees to designate their own placements is a highly questionable practice, very much akin to letting the tail wag the dog." (App. 1-12.) The Court expressed concern about the nature of the crime for which Mr. Davidow was found not responsible, and explained that it was "simply unwilling to assume further risk in this case by reinstating this acquittee to the unrestricted lifestyle that he enjoyed in Massachusetts." (*Id.*) The Order made no conclusion as to whether either Belmont Wild Acres or Mr. Davidow's current placement is the least restrictive environment available to manage his condition.

## SUMMARY OF ARGUMENT

After living successfully for twenty years without incident at Wild Acre Inn, Mr. Davidow is now confined to a locked ward at Highland Hospital. This change was not caused by anything Mr. Davidow did or failed to do, or by any change in his mental condition, but by the mere fact that—through no fault of his own—Wild Acre Inn closed, and the Circuit Court refused to allow him to relocate to a similar facility.

All of the evidence demonstrates that Mr. Davidow's time at Wild Acre Inn was vastly successful. During his time there, he exhibited no signs of violence and religiously adhered to his medication regimen. His treating physicians universally have reported that he was a model patient and he was expected to do well at Belmont Wild Acres. Despite these facts, he was ordered by the Circuit Court to return to West Virginia where he was placed first at Sharpe and now at Highland Hospital.

As Mr. Davidow's twenty-year successful residency in Massachusetts shows, Highland Hospital is not the least restrictive environment available to manage his condition. *See* W. Va. Code § 27-6A-4(e). The Circuit Court erred in refusing to order Mr. Davidow transferred from Highland Hospital, and further erred by failing to make a determination as to whether this placement is the least restrictive alternative. For these reasons, Mr. Davidow respectfully requests that

this Court reverse the Circuit Court's denial of his Motion, and order him transferred from Highland Hospital and to the Belmont Wild Acre program, at his own expense.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioners respectfully request oral argument under Rules 19 and 20 of the West Virginia Rules of Appellate Procedure. None of the criteria set forth in Rule 18(a) preclude oral argument in this appeal.

### **STANDARD OF REVIEW**

A circuit court's findings of fact and conclusion of law are reviewed under a two-prong standard. The final order and ultimate disposition are reviewed for abuse of discretion. Underlying factual findings are reviewed for clear error. Questions of law are reviewed *de novo*. *State v. Robertson*, 230 W. Va. 548, 555, 741 S.E.2d 106, 113 (2013) (quoting Syl. Pt. 2, *Walker v. W. Va. Ethics Commission*, 201 W. Va. 108, 492 S.E. 2d 167 (1997)).

### **ARGUMENT**

- 1. An acquittee is entitled to be placed in the least restrictive environment necessary to manage his or her condition.**

A person not guilty by reason of mental illness is not convicted of a crime and does not serve a sentence. Instead, he remains under the trial court's jurisdiction until the maximum sentence available for the crime has expired, or until the court discharges him. W. Va. Code § 27-6A-4(e). This continuing

jurisdiction is to protect the public and the acquitee — not for punitive reasons. *Id.* Both this Court and the United States Supreme Court have been clear: “If someone is found not guilty by reason of mental illness, there is no conviction to warrant a punishment. . . .” Syl. Pt. 4, *State v. Smith*, 198 W. Va. 702, 482 S.E.2d 687 (1996); *see also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (“Here, the State has no such punitive interest. As [the defendant] was not convicted, he may not be punished.”); *Jones v. United States*, 463 U.S. 354, 373 n.4 (1983) (Brennan, J., dissenting) (“Punishing someone acquitted by reason of insanity would undoubtedly implicate important constitutional concerns.”)

While a trial court has “broad discretion to determine the appropriate disposition of those found not guilty by reason of insanity,” *State v. Catlett*, 207 W. Va. 740, 745, 536 S.E.2d 721, 726 (1999), that discretion is not unlimited. Due Process requires that the “nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.” *Jones v. United States*, 463 U.S. 354, 368 (1983) (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)). Thus, during the supervised period, West Virginia law requires that the acquitee be committed to the least restrictive environment available to manage his condition and ensure protection of the public. *See* W. Va. Code § 27-6A-4(e) (“The court shall commit the acquitee to a mental health facility designated by the

department that is *the least restrictive environment* to manage the acquitee and that will allow for the protection of the public”) (emphasis added).

2. **The Circuit Court failed to make findings and a determination as to whether Highland Hospital is the least restrictive environment available under § 27-6A-4(e).**

In this case, the Circuit Court erred as matter of law by denying Mr. Davidow’s motion for transfer without determining whether Highland Hospital is the least restrictive environment to manage his condition and ensure protection of the public. (App. 1-12.) The Court’s Order makes no findings on this question, and reaches no conclusion as to whether Mr. Davidow’s current placement is the appropriate one. Denying Mr. Davidow’s motion for transfer without determining whether his placement at Highland Hospital is the least restrictive environment is plain error under § 27-6A-4(e). The Court’s order should therefore be reversed.

3. **The Circuit Court abused its discretion by refusing to transfer Mr. Davidow from Highland Hospital, which is a more restrictive environment than is necessary to manage his condition.**

- a. Belmont Wild Acres, not Highland Hospital, is the least restrictive environment available to manage Chip Davidow’s condition.*

For nearly twenty years, Mr. Davidow resided successfully at Wild Acre Inn in Lexington, Massachusetts. His tenure there was peaceful and uneventful. He advanced through the facility’s step-down procedures, and eventually was permitted to reside in a group home on the grounds, to leave the facility

periodically, and to play classical and bass guitar in the music group Tunefoolery. Throughout this time, he carefully maintained his medication regimen and progressed in his treatment. (App. 138-140.) He had no run-ins with law enforcement, and was not involved in any type of violence. (*Id.*) His treating psychiatrist, Dr. Kantar, reported unequivocally that Mr. Davidow “has not been problematic, ever, at either Bournemouth Hospital or Wild Acre Inns.” (*Id.*)

Dr. Rosmarin, who conducted a risk assessment of Mr. Davidow in September 2014, agreed. He noted that Mr. Davidow is “avid about continuing his medication,” and “has been absolutely non-psychotic, non-substance abusing, and—because he [has] insight into his illness and need for treatment—fully compliant with treatment and staff.” (App. 141-148.) Thus, Dr. Rosmarin concluded that Mr. Davidow “has been rather a model patient,” and is “a low risk for foreseeable future violence.” (*Id.*)

Despite his success at Wild Acre Inn, Mr. Davidow is now being kept at Highland Hospital under starkly different conditions. He is contained in a secure locked unit, and cannot leave except for limited purposes, such as medical appointments, and only if accompanied by staff. He has no freedom of movement, and cannot play in his music group, participate in meaningful therapies based on his interests and abilities, or maintain relationships outside the facility. (App. 106-107 (explaining that the security at Highland is the same as that at Sharpe

Hospital). It is beyond dispute that Mr. Davidow's current environment is more restrictive than that of either Lexington Wild Acre Inn or Belmont Wild Acres. *Compare id.* (describing restrictions at Highland Hospital) *with* App. 11 n.9 (describing the freedoms Mr. Davidow earned at Wild Acre Inn). The State has not contended otherwise, nor could it.

*b. The Circuit Court placed undue weight on the nature of the underlying crime and the testimony of Georgia Bradstreet, and failed to adequately consider Mr. Davidow's twenty-year history of non-violence.*

In denying Mr. Davidow's Motion for Transfer, the Circuit Court placed undue weight on the circumstances of the underlying crime and testimony of Georgia Bradstreet and failed to adequately consider Mr. Davidow's nearly twenty-year history of progress and non-violence at Wild Acre Inn.

The Circuit Court's Order denying Mr. Davidow's motion relied largely on the testimony of Georgia Bradstreet, statewide forensic coordinator for the State of West Virginia, who testified that she believed appropriate treatment could be provided for Mr. Davidow in West Virginia, even as she admitted having no knowledge of the current evaluations conducted of Mr. Davidow. (App. 297-298.)

Specifically, Ms. Bradstreet admitted that she had only reviewed Mr. Davidow's evaluations from 1994, shortly after the crime occurred and prior to his transfer, and was not familiar with the contemporary opinions and reports of Dr. Saar and Mr. Davidow's treatment providers. (App. 285:7-14, App. 298:17-App.

299:12.) She also had not reviewed either Mr. Davidow's prior treatment plan or the proposed treatment plan for him at Belmont Wild Acres. (App. 293:22-App. 294:1.) The only assessment the State had conducted of Mr. Davidow was that done by Dr. Law at Sharpe Hospital, which demonstrated that he was compliant and that it was appropriate to provide him additional freedoms. (App. 149-155)

Ms. Bradstreet could therefore only present an outdated picture of Mr. Davidow, based on the circumstances of the underlying crime and his condition at the time of the offense. Her testimony did not account for his current condition, and was therefore largely irrelevant to the type of environment needed to manage that condition. *See Jones v. United States*, 463 U.S. 354, 369 (1983) (noting that "[t]here is simply no necessary correlation between severity of the offense and length of time necessary for recovery.") The Circuit Court therefore erred in relying on her testimony that adequate care could be provided for Mr. Davidow in West Virginia.

Mr. Davidow has done everything in his power to abide by the orders of the Circuit Court and to ensure that his mental illness is controlled. He has been long stabilized and is diligent in maintaining his treatment regimen. He has proven that he is capable of living in an environment like that of Belmont Wild Acres. The restrictions of Highland Hospital go well beyond what is necessary to manage Mr. Davidow's condition; his successful tenure at Wild Acre Inn proves that. The

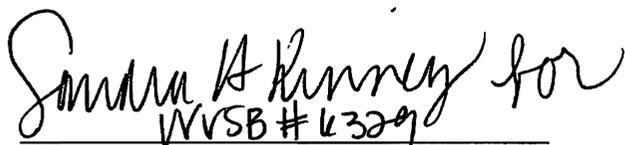
Circuit Court therefore erred in denying Mr. Davidow's Motion for Transfer to a Less Restrictive Environment.

### CONCLUSION

For the reasons set forth above, Mr. Davidow requests that the Court reverse the Circuit Court's Order Denying his Motion for Transfer.

Respectfully submitted,

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**Docket Number 15-0876**

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**Respondent**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on December 7, 2015, she served a true and correct copy of the foregoing **PETITIONER'S BRIEF** by sending the same in the U.S. Mail, first class, postage prepaid, upon the following:

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