IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0382

STATE OF WEST VIRGINIA,

Respondent,

v.

MICHAEL PAUL CONN,

Petitioner.

RESPONDENT'S BRIEF

Circuit Court of Cabell County
Case No. 14-F-512

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CERTIFIED QUESTION

> Is [Petitioner's] 1998 conviction for "Attempt to Commit an Assault [D]uring the Commission of a Felony," under W. Va. Code 61-2-10, which was found by the [c]ircuit [c]ourt to be a sexually motivated crime against a minor, a qualifying offense under the West Virginia Sex Offender Registration Act, W. Va. Code 15-2-1 *et seq.*, which would require [Petitioner] to become a registered sex offender for life?

STATEMENT OF THE CASE

Petitioner was indicted (Cabell County case number 98-F-39) on January 12, 1998, on four counts of sexual assault in the third degree. J.A. 1-2. The victim in the case was a then 13-year-old girl, and Petitioner was 22 years old. J.A. 1-2, 84-85. Of particular interest in this case is Count IV, which charged

> [t]hat on or about the 20th day of August, 1997, in the county of Cabell, State of West Virginia, [Petitioner] committed the offense of "3rd DEGREE SEXUAL ASSAULT" by unlawfully and feloniously engaging in sexual intercourse with [T.E.], a female person, less than sixteen (16) years of age, to wit: thirteen (13) years old, when the said [Petitioner] was more than sixteen (16) years of age and more than four (4) years older than the said [victim], against the peace and dignity of the State.

J. A. 2. The indictment was dismissed, however, on motion of the State by order entered October 3, 1998.[1] J.A. 3.

Petitioner was subsequently charged by information (Cabell County case number 98-F-161) dated August 28, 1998, with one count of attempt to commit a felony. J.A. 4. Specifically, the information referred to an offense date of August 20, 1997—the same date referenced in Count IV of the previous indictment. J.A. 4. The same day the information was filed, Petitioner entered

[1] The order reflects that the indictment was dismissed "for reasons assigned on the record," J.A. 3, but the Joint Appendix does not include the transcript of the hearing on the motion because it was not germane to the issue here. Nonetheless, it would appear that the indictment was actually dismissed on August 28, 1998, as part of a plea agreement. J.A. 18.

a guilty plea to attempt to commit a felony. J.A. 5-7. The State proffered the following to support the plea:

> The evidence of the State would be that on or about August the 20th, 1997, that [Petitioner] did actually have intercourse with a juvenile, [T.E.], who was under the age of sixteen and less – and more than four years difference between their ages, and [Petitioner] being twenty-two, I believe, at the time.

J.A. 84-85. Petitioner was sentenced to not less than one nor more than three years in prison, to be served consecutively to a sentence Petitioner was then serving in case number 97-F-174. J.A. 7. He was not required to register as a sex offender. J.A. 41.

In the meantime, the Legislature passed the Sex Offender Registration Act—West Virginia Code § 15-12-1 *et seq.*—effective June 1999. The registration requirements for sex offenders as found in § 15-2C-2 (1931) were amended and re-enacted as § 15-12-2 in 2000. That amendment extended the registration requirement to perpetrators convicted of attempted offenses as well. W. Va. Code § 15-12-2(b) (2000). The amendment was both retroactive and prospective. W. Va. Code § 15-12-2(a) (2000). Petitioner was thereafter made to register as a sex offender. J.A. 22.

Subsequently, on December 4, 2003, Petitioner filed a petition for writ of habeas corpus (Cabell County case number 03-C-1067), alleging (1) unlawfully induced guilty plea, (2) ineffective assistance of counsel, (3) "false declamation of character," and (4) "violation of my constitutional rights." J.A. 10-15. It would appear from the record that the petition was summarily dismissed and, on appeal, this Court remanded the matter for further findings of fact regarding whether Petitioner's crime was sexually motivated for the purpose of the requirement that he register as a sex offender. J.A. 17-18. To that end, a hearing was held on May 19, 2006. J.A. 16. At that time, the State represented that in entering his guilty plea to attempt to commit a felony, Petitioner "understood that there would be evidence at trial that the underlying offense was of a sexual nature." J.A. 20. Petitioner did not refute that the State would have introduced such

evidence; he merely pointed out that he entered an *Alford/Kennedy* plea, "maintain[ing] his innocence." J.A. 20. In fact, Petitioner agreed that the State "made a proffer" at the plea hearing. J.A. 22. Petitioner argued, though, that "he never had the chance to confront witnesses or see evidence or anything." J.A. 22. The State pointed out, "[T]hat's true in any guilty plea." J.A. 22.

The circuit court responded, "And he is required to register now how – is it lifetime registration?" J.A. 22 (emphasis added). Petitioner replied, "I believe so, Your Honor." J.A. 22 (emphasis added). Nonetheless, Petitioner went on to argue that he was only "charged with those [third degree sexual assaults]. Those were never proved." J.A. 27. The circuit court reasoned, though, "He pled guilty to attempt to commit a felony and there would have to be – there would have to be a felony out there, and the only ones he was charged with were all sexual charges." J.A. 28.

The circuit court went on to find that, based on the 2000 change in statute,

> [h]e is just required to register as a sexual offender, even though under his plea, because it is – *the underlying charge was sexual in nature* and he made no objection to the representations for the counsel for the State.

J.A. 35 (emphasis added). In response, Petitioner acknowledged, "Well, I think the Court probably – the Supreme Court might agree with everything you say except we still don't know what the facts are." J.A. 35. The circuit court replied, "The facts are as set forth by the prosecutor in the – at the time of the plea. There was no – the defendant didn't scream and holler and say, 'No, I don't want to do that. I'm not going to – I am not going to contest that.'" J.A. 36. The circuit court explained that even though he entered a guilty plea, Petitioner could still have objected to the State's proffer; he did not. J.A. 36. The circuit court then advised Petitioner, "I think [you] should appeal this – I think you should appeal this to the Supreme Court so we can get a ruling on this, but I think it's proper." J.A. 36.

In its subsequent order, the circuit court found that when Petitioner entered his *Alford/Kennedy* plea to the information on August 28, 1998, "the Assistant Prosecuting Attorney placed on the record at the request of the [c]ourt that the evidence of this crime would be that the Petitioner had sexual intercourse with a juvenile, *the same thirteen year old juvenile as alleged to be the victim in Indictment No. 98-F-39*." J.A. 41 (emphasis added). Accordingly, the circuit court found that the "underlying attempted offense was a sexual offense." J.A. 41. The circuit court ordered that Petitioner must register as a sex offender and dismissed the habeas corpus petition. J.A. 41-42.

On December 2, 2014, Petitioner was indicted in Cabell County case number 14-F-512 on six counts of failure to register as a sex offender or provide notice of registration changes. J.A. 43-44. He entered an *Alford/Kennedy* plea to Counts I and II of the indictment on January 9, 2018. J.A. 45. The circuit court specifically found that Petitioner understood and waived all of his rights to trial by entering the plea. J.A. 45-46, 48-49. Petitioner was sentenced to two consecutive terms of not less than one nor more than five years in prison. J.A. 46, 49. The circuit court denied Petitioner's motion for reconsideration of sentence on March 2, 2018. J.A. 51.

Petitioner filed a "Petition for Writ of Error *Coram Nobis* and Motion in Arrest of Judgment and for Dismissal of the Indictment" on March 7, 2021. J.A. 54-68. In it, Petitioner averred that the State Police mistakenly believed him to be a lifetime registrant when his conviction only qualified him as a ten-year registrant because it was not a "qualifying offense" or a "sexually violent offense," and he was not determined to be a "sexually violent predator." J.A. 56-57. Petitioner argued that he was released on parole in 2001, thus beginning his ten-year registration period; so, his registration requirement expired prior to the 2013 failures to register alleged in his 2014 indictment. J.A. 57. The petition noted that Petitioner served two years in prison before

being released to parole. J.A. 58. Petitioner alleged: (1) defective indictment, (2) involuntary plea, and (3) ineffective assistance of counsel. J.A. 60-61.

The State responded that the underlying felony—third degree sexual assault—of Petitioner's attempt to commit a felony *is* a qualifying offense for lifetime registration. J.A. 78. The State further argued that because the victim of that sexual assault was a minor, Petitioner was required to register for life. J.A. 78.

On May 12, 2021, the Circuit Court of Cabell County, West Virginia, certified the following question to this Court:

> Is [Petitioner's] 1998 conviction for "Attempt to Commit an Assault [D]uring the Commission of a Felony," under W. Va. Code 61-2-10, which was found by the [c]ircuit [c]ourt to be a sexually motivated crime against a minor, a qualifying offense under the West Virginia Sex Offender Registration Act, W. Va. Code 15-2-1 *et seq.*, which would require [Petitioner] to become a registered sex offender for life?
>
> Circuit Court's Answer: _____.

SUMMARY OF ARGUMENT

The circuit court has certified a single question to this Court. The circuit court, however, failed to answer that question. Thus, the certified question has not been properly presented to this Court. Should this Court determine to proceed in deciding the matter nonetheless, it should answer the question in the affirmative. The Legislative intent and the language of the Sex Offender Registration Act are clear and unambiguous: in order to further the compelling interest of protecting the public from sex offenders, a conviction for attempt to commit a felony—which felony is a qualifying offense pursuant to West Virginia Code § 15-12-2(b)—against a minor requires lifetime registration for the offender.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is set for Rule 20 oral argument before this Court during the January 2022 term of Court. This case is not suitable for memorandum decision.

ARGUMENT

A. Standard of Review.

The standard of review for this certified questions case is *de novo*. Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 172, 475 S.E.2d 172, 172 (1996) ("The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.").

B. The order of certification is not properly before this Court inasmuch as the circuit court did not answer the certified question.

Certified question procedures, being in derogation of the common law, are to be strictly construed. Syl Pt. 1, *State v. Brown*, 159 W. Va. 438, 223 S.E.2d 193 (1976). Thus, the requirements of any statutory authority for certified questions must be closely complied with before this Court may exercise jurisdiction over a certified question. In the instant case, the certified questions procedures set forth in the West Virginia Code and the Rules of Appellate Procedure were not met.

West Virginia Code § 58-5-2 allows for the certification of questions of law to this Court:

> Any question of law, including, but not limited to, questions arising upon the sufficiency of a summons or return of service, upon a challenge of the sufficiency of a pleading or the venue of the circuit court, upon the sufficiency of a motion for summary judgment where such motion is denied, or a motion for judgment on the pleadings, upon the jurisdiction of the circuit court of a person or subject matter, or upon failure to join an indispensable party, may, in the discretion of the circuit court in which it arises, be certified by it to the Supreme Court of Appeals for its decision, and further proceedings in the case stayed until such question shall have been decided and the decision thereof certified back. The procedure for processing questions certified pursuant to this section shall be governed by rules of appellate procedure promulgated by the Supreme Court of Appeals.

Rule 17(a)(1) of the West Virginia Rules of Appellate Procedure requires that the certification order from the circuit court

> contain a concise statement of each question of law, *the answer to each question of law by the circuit court* or administrative tribunal, a notation of the extent to which the action is stayed pending resolution of the certified questions, and a directive to the parties to prepare a joint appendix of the record sufficient to permit review of the certified questions.

In the instant case, however, the circuit court failed to answer the certified question. "In a case certified to this Court pursuant to the provisions of Code, 58–5–2, this Court will consider and decide only such questions as are certifiable under the provisions of the statute *and only such questions within that category as have been decided by the circuit court* and certified by it to this Court." Syl. Pt. 1, *Bd. of Ed. of Kanawha Cty. v. Shafer*, 147 W. Va. 15, 124 S.E.2d 334 (1962) (emphasis added). Accordingly, this Court lacks the authority to answer the certified question and should remand the certification order to the circuit court for an answer by the lower court as mandated by § 58-5-2 and Rule 17(a)(1).

C. In the event this Court determines to proceed with a decision on the certified question, it should answer the certified question in the affirmative because the Sex Offender Registration Act clearly delineates that an attempt to commit one of the enumerated "qualifying offenses" requires lifetime registration as a sex offender.

The Sex Offender Registration Act ("the Act") provides that "[a]ny person who has been convicted of an offense *or an attempted offense*" enumerated in the Act shall be made to register as a sex offender. W. Va. Code § 15-12-2(b) (emphasis added). The Act specifies that if a registrant "has been convicted . . . of a qualifying offense as referred to in this article, involving a minor or a person believed or perceived by the registrant to be a minor," he or she shall register for life. W. Va. Code § 15-12-4(a)(2)(E). There is no dispute that the victim in the instant matter was a minor child of just thirteen years. J.A. 20, 84-85. Nor does Petitioner contest that he must register as a sex offender based on the circuit court's finding of sexual motivation alone. Pet'r's

Br. 7. Petitioner argues, rather, that his conviction for attempt to commit a felony[2] is not one of the Act's enumerated offenses which would necessitate lifetime registration and that a finding that his crime was sexually motivated alone is not sufficient to sustain an order of lifetime registration. Pet'r's Br. 5, 7. While Petitioner is adamant that "the plain language of the Act" clearly does not provide for his lifetime registration as a sex offender, his argument is not supported by the language of the statute or existing legal precedent.

To be sure, attempt to commit a felony as proscribed by West Virginia Code § 61-2-10, to which Petitioner pled guilty, is not one of the qualifying offenses specified in the Act. Those include:

> (1) § 61-8A-1 *et seq.* of this code;
>
> (2) § 61-8B-1 *et seq.* of this code, including the provisions of former § 61-8B-6 of this code, relating to the offense of sexual assault of a spouse, which was repealed by an act of the Legislature during the 2000 legislative session;
>
> (3) § 61-8C-1 *et seq.* of this code;
>
> (4) § 61-8D-5 and § 61-8D-6 of this code;
>
> (5) § 61-2-14(a) of this code;
>
> (6) § 61-8-6, § 61-8-7, § 61-8-12, and § 61-8-13 of this code;
>
> (7) § 61-3C-14b of this code, as it relates to violations of those provisions of chapter 61 listed in this subsection; or
>
> (8) § 61-14-2, § 61-14-5, and § 61-14-6 of this code: *Provided,* That as to § 61-14-2 of this code only those violations involving human trafficking for purposes of sexual servitude require registration pursuant to this subdivision.

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[2] Petitioner's brief represents that he was convicted of "(attempted) assault during the commission of a felony, encoded at W. Va. Code § 61-2-10." In reality, the record makes clear that the information to which Petitioner pled guilty charged "attempt to commit a felony," pursuant § 61-11-8. J.A. 4. Likewise, the plea and sentencing order indicates that Petitioner pled guilty "to the felony offense of 'ATTEMPT TO COMMIT A FELONY,' a provable offense as contained in Information No. 98-F-161. J.A. 5. Accordingly, he was adjudged "guilty of Attempt to Commit a Felony." J.A. 7.

W. Va. Code § 15-12-2(b). This Court has recognized, however, that the statutory offense of attempt to commit a felony does not exist in a vacuum. "As one commentator has noted, 'The crime of attempt does not exist in the abstract but rather exists *only in relation to other offenses*[.] W. LaFave & A. Scott, Handbook on Criminal Law 49 (1972).'" *State v. Starkey*, 161 W. Va. 517, 522 n.2, 244 S.E.2d 219, 223 n.2 (1978), *overruled on other grounds by State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995); *see also State v. James F.*, No. 15-0194, 2016 WL 2905508, at *3 (W. Va. Supreme Court, May 18, 2016) (memorandum decision) ("[T]he [attempt] statute establishes the punishment for attempting, unsuccessfully, to commit some crime specified elsewhere in the code[.]"). Quoting *Starkey*, the Fourth Circuit has recognized the same: "[W]e note a unique complexity of general attempt statutes: they do not set forth a standalone crime." *United States v. Dozier*, 848 F.3d 180, 185 (4th Cir. 2017); *see also United States v. Collins*, 808 F. App'x 131, 136 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 1080 (2021) ("Though we have held that 'both the inchoate crime and the underlying offense are subject to [the] categorical approach,' [ ] we have also recognized that general attempt statutes do not set forth standalone crimes [ ] and 'must be considered in relation to the object crime[.]'" (internal citations omitted)).

The question presented in this case is very similar to that presented in *State v. Scott*, No. 17-0526, 2018 WL 4944409, at *2 (W. Va. Supreme Court, Oct. 12, 2018) (memorandum decision). In *Scott*, this Court was tasked with deciding whether a person convicted of attempt to commit a felony could be made to serve extended supervised release when attempt to a commit a felony is not one of the enumerated offenses in West Virginia Code § 62-12-26 subject to extended supervision. *Id.* at *2. This Court noted, though, that "[t]he so-called 'crime of attempt' is defined by the underlying substantive crime." *Id.* The Court concluded, "Although the attempt statute under which petitioner was convicted is not specifically enumerated, the substance of his

conviction is inextricably linked to one of the crimes contained in the supervision statute. Therefore, petitioner is subject to the extended supervision statute and the requirements therein." *Id.* at *3; *see also James F.*, 2016 WL 2905508, at *4 ("Because the petitioner's conviction and punishment under [the attempt statute] required that he commit the exact same conduct as that proscribed by West Virginia Code § 61–8D–5(a), i.e., attempted sexual contact with his child, and because an attempt crime is inextricably linked to the offense that was attempted, we have little trouble in concluding that the petitioner must be subject to extended supervision.").

Here, the underlying offense to which Petitioner's conviction of attempt to commit a felony is inextricably intertwined is third degree sexual assault, which is proscribed by West Virginia Code § 61-8B-5[3] and which is a qualifying offense for lifetime registration under §§ 15-12-2(b)(2) and 15-12-4. The State's proffer at Petitioner's guilty plea hearing made clear that, had the matter gone to trial, the State would have produced evidence that

> on or about August the 20th, 1997, that [Petitioner] did actually have intercourse with a juvenile, [T.E.], who was under the age of sixteen and less – and more than four years difference between their ages, and [Petitioner] being twenty-two, I believe, at the time.

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[3] Pursuant to West Virginia Code § 61-8B-5:

> (a) A person is guilty of sexual assault in the third degree when:
>
> > (1) The person engages in sexual intercourse or sexual intrusion with another person who is mentally defective or mentally incapacitated; or
> >
> > (2) The person, being sixteen years old or more, engages in sexual intercourse or sexual intrusion with another person who is less than sixteen years old and who is at least four years younger than the defendant and is not married to the defendant.
>
> (b) Any person violating the provisions of this section is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility not less than one year nor more than five years, or fined not more than ten thousand dollars and imprisoned in a state correctional facility not less than one year nor more than five years.

J.A. 84-85. That proffer is nearly identical to the allegations in Count IV of the original indictment in 98-F-39 charging third degree sexual assault:

> That on or about the 20th day of August, 1997, in the county of Cabell, State of West Virginia, [Petitioner] committed the offense of "3rd DEGREE SEXUAL ASSAULT" by unlawfully and feloniously engaging in sexual intercourse with [the victim], a female person, less than sixteen (16) years of age, to wit: thirteen (13) years old, when the said [Petitioner] was more than sixteen (16) years of age and more than four (4) years older than the said [victim], against the peace and dignity of the State.

J. A. 2. Indeed, Petitioner does not refute that the felony underlying his conviction for attempt to commit a felony was third degree sexual assault. Rather, he argues that the language of the statute is clear and unambiguous and should be applied as written: that only those people convicted of one of the enumerated qualifying offenses themselves must register for life. Pet'r's Br. 7.

Respondent agrees that the language of the statute is clear and unambiguous. Respondent disagrees, though, that the intent of the Legislature is confined to that list of qualifying offenses. Indeed, the Legislature laid out its intent in the opening sections of the Act:

> (a) It is the intent of this article to assist law-enforcement agencies' efforts *to protect the public from sex offenders* by requiring sex offenders to register with the state police detachment in the county where he or she shall reside and by making certain information about sex offenders available to the public as provided in this article. It is not the intent of the Legislature that the information be used to inflict retribution or additional punishment on any person convicted of any offense requiring registration under this article. This article is intended to be regulatory in nature and not penal.
>
> (b) The Legislature finds and declares that *there is a compelling and necessary public interest that the public have information concerning persons convicted of sexual offenses in order to allow members of the public to adequately protect themselves and their children from these persons.*
>
> (c) The Legislature also finds and declares that persons required to register as sex offenders pursuant to this article have a reduced expectation of privacy because of the state's interest in public safety.

W. Va. Code § 15-12-1a (emphasis added). The only way to effectuate that intent is to read § 15-12-4 *in pari materia* with § 15-12-2(b) in its entirety and not just in the context of the list of qualifying offenses contained therein.

In that case, the clear and unambiguous language of § 15-12-2(b) is that "[a]ny person who has been convicted of an offense *or an attempted offense*," including third degree sexual assault, shall register as a sex offender. (Emphasis added.) The duration of that registration is prescribed by § 15-2-4, which finds that any person who "has been convicted . . . of a qualifying offense as referred to in this article, involving a minor or a person believed or perceived by the registrant to be a minor" shall register for life. W. Va. Code § 15-12-4 (a)(2)(E). When read together, those two code sections make clear that the Legislature intended for any person who commits or *attempts* to commit a qualifying offense against a minor child must register as a sex offender for the rest of his or her life.

Interestingly, Petitioner acknowledges that "the Legislature specifically included language in W. Va. Code § 15-12-2(b) which deems all convictions of an 'attempt' to commit a qualifying offense as qualifying offenses themselves." Pet'r's Br. 8. Again, "attempt to commit a felony" is not a standalone offense. *Starkey*, 161 W. Va. at 522 n.2, 244 S.E.2d at 223 n.2. The substance of Petitioner's conviction for attempt to commit a felony is "inextricably linked" to one of the qualifying offenses contained in the Act. *Scott*, 2018 WL 4944409, at *3. Necessarily, then, one must fill-in-the-blank, so to speak, and recognize that Petitioner's conviction was for attempt to commit third degree sexual assault. Accordingly, Petitioner must acknowledge that his conviction is a qualifying offense.

The balance of Petitioner's argument is a choppy sea of red herrings, tangling the line in circular arguments about Respondent's reasoning and harpooning State Police regulations which

are not at issue before this Court. Pet'r's Br. 9. He ends with this observation: "For the reasons described in this brief, there is no statutory authority for the lifetime registrations of individuals who have a finding of sexual motivation, because, by definition, such individuals have not been convicted of a qualifying offense." Pet'r's Br. 9. But as Respondent has demonstrated, Petitioner is a lifetime registrant because he *was* convicted of a qualifying offense—attempt to commit sexual assault in the third degree—not because his crime was found to be sexually motivated.

Therefore, this Court should answer the certified question in the affirmative. The language of the Sex Offender Registration Act makes clear that conviction of an attempt to commit a qualifying offense against a minor child requires that the offender register as a sex offender for the rest of his or her life. W. Va. Code § 15-12-2(b) and § 15-12-4. The record establishes that the felony which Petitioner attempted to commit was sexual assault in the third degree, J.A. 84-85, which is a qualifying offense. W. Va. Code § 15-12-2(b). Thus, the Legislature's intent that the necessary and compelling interest of protecting the public from sex offenders has been ensured by the circuit court's order that Petitioner—who, at the age of 22, had sex with a 13-year-old child, J.A. 84-85—register as a sex offender for the rest of his life.

CONCLUSION

For the foregoing reasons, this Court should answer the certified question in the affirmative.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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v.

MICHAEL PAUL CONN,

Petitioner.

CERTIFICATE OF SERVICE

I, Lara K. Bissett, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, December 13, 2021, and addressed as follows:

Jeremy B. Cooper, Esq.
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Lara K Bissett

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