BRITISH COLUMBIA REVIEW BOARD

IN THE MATTER OF PART XX.1 (Mental Disorder) OF THE CRIMINAL CODE R.S.C. 1985 c. C-46, as amended S.C. 2005 c. 22

REASONS FOR DISPOSITION
IN THE MATTER OF

V.E.O
A YOUNG PERSON

HELD AT: Maples Adolescent Treatment Centre
Burnaby, BC
April 26, 2007

REASONS RELEASED: June 5, 2007

BEFORE:

CHAIRPERSON:	A. Kang (for Majority)
MEMBERS:	Dr. H. Parfitt, psychiatrist
	B. Walter (Dissenting)

APPEARANCES:

ACCUSED/PATIENT:	V.E.O
ACCUSED/PATIENT COUNSEL:	S. Rauch
HOSPITAL/CLINIC:	K. LeReverend Dr. E. Murphy
ATTORNEY GENERAL:	L. Hillaby

***Publication of information identifying the young person or any minor victim or witness is prohibited pursuant to s.110 of the Youth Criminal Justice Act.**

[1] CHAIRPERSON: On April 26, 2007 the British Columbia Review Board conducted a first hearing pursuant to s. 672.47(1) of the Criminal Code in the matter of V.O.E., a young person. At the conclusion of the hearing the Board reserved its' decision.

[2] V.O.E is charged with a number of index offences. The index offences involve some 17 charges. The offences occurred in Surrey and Vancouver. On March 13th, 2007 the Vancouver Provincial Court rendered a verdict of unfit to stand trial with respect to all index offences.

[3] Briefly, with respect to the Surrey charges there are three substantive Informations and the remaining charges are breaches of undertakings. With respect to the March 22nd, 2006 substantive charge it involves an assault on a police officer, assault with a weapon, assault causing bodily harm and uttering threats. The facts with respect to this Information are as follows. The accused had called 9-1-1 and claimed that there was a stabbing taking place near a school. The accused claimed that a Sarah Trochie was stabbing her boyfriend, and that she had also been stabbed by Ms. Trochie. Police arrived and tried to speak to the accused. The accused denied making the phone call. She also refused to put down spray cans that she was holding in her hands. The accused lunged at the police officer, striking the officer in the head. The accused fled and was pursued. The accused was tasered on two separate occasions, and ultimately apprehended. During her arrest she threatened to kill and struck out at one of the officers. That officer's injuries consisted of three stitches to the head, a contusion to the head, and also a small cut to her hand.

[4] The circumstances relating to the October 26th, 2006 charge of public mischief, are as follows. The accused allegedly called 9-1-1. She had claimed that a stabbing had occurred. The accused had convinced a bystander to also call 9-1-1 to report the stabbing. The police attended and determined that there was no stabbing. The accused was apprehended. She was agitated and abusive on arrest.

[5] The third offence was one of public mischief. On that date, the accused had attended a liquor store and told an employee that a stabbing might occur behind the liquor store. The accused then left. The employee reported the assertion made to him by the accused. Police attended at the liquor store. Police reviewed video tape evidence, and determined that the accused had made a false claim to the employee. The accused was charged with public mischief.

[6] The ten remaining Informations arising out of Surrey deal with charges of breaches of court conditions from April 2006 to January 2007. Many of these incidents also involved circumstances where the accused had called police or convinced others to call police for the purposes of making false reports. The Crown did not lay public mischief charges, but rather dealt with the matter by way of breach charges.

[7] There are three separate Vancouver offences. The first offence occurred on September 27th of 2006 when the accused assaulted a staff member at Randall House, her Group Home. The staff member's hair was pulled and the victim was repeatedly kicked. The staff member ultimately had to lock herself in a room until police attended.

[8] The second index offence arising in Vancouver was on January 13th of 2007. The accused was arrested for leaving her residence at Randall House. During arrest she was resistive, belligerent and spat on an officer. She was charged with assault of a police officer.

[9] On February 7th, 2007, V.O.E. was charged with assault of a police officer. On that occasion, the police had attended the Randall House group home at the request of staff. The accused had allegedly punched a staff member in the face and was asking for a knife. During their second attendance police apprehended and detained the accused. On arrest the accused was asked to remove her outer clothing. She punched the detaining officer in the face.

[10] The accused has no criminal record. She has had significant contact with Vancouver, Coquitlam, Burnaby, Langley, Campbell River and Surrey police authorities. In the report to crown counsel found at tab 28 of the disposition materials, Cst. Tooker's report indicates that the accused has had some 300 contacts with police agencies since 2003.

[11] The accused is fifteen years old, and has an IQ below 55, which places her at a moderately retarded range of intellectual functioning. Psychological testing has revealed that her mental functioning is at approximately the age of a six-year-old. Psychiatric assessment by Dr. Quan in October of 2005, provided the following diagnosis: AXIS I, reactive attachment disorder (disinhibited type); AXIS II, moderate intellectual disability (IQ below 0.1 percentile for her age; mental functioning approximately six years of age); AXIS III, no diagnosis (Veronica has a heart murmur, which is being investigated. ECG is normal but other tests are pending.)

[12] The accused has previously been before the Board on two separate occasions. On October 24th, 2005 the Board found that the accused was fit to stand trial, and she was returned to court to deal with index offences which had occurred in August of 2005. On July 31st, 2006 the accused appeared before the Board on additional index offences. On that date, the Board made a finding of fitness and the accused was returned to court for offences which had occurred in April of 2006.

[13] In preparation for the present hearing the Board received a report from Dr. Murphy of Youth Forensic Psychiatric Services. In her report Dr. Murphy indicated that she had met the accused on April 10th of 2007. During that meeting the accused had made it clear that she did not want to be interviewed, and refused to answer most questions. The interview ended after approximately 15 minutes. Dr. Murphy indicates that the accused did not understand the nature of the current charges. Dr. Murphy further indicated that the accused did not understand how the charges related to her and that her understanding of the court process was rudimentary at best. In Dr. Murphy's opinion the accused was unfit to stand trial.

[14] The documentary evidence was supplemented by the testimony from Dr. Murphy, and to a limited extent the accused. Dr. Murphy was questioned extensively regarding her assessment of fitness to stand trial. Dr. Murphy indicated that her opinion was based on the historical psychiatric assessments, as well as her short interview of the accused. Dr. Murphy indicated that she relied on the determinations that the accused is of a limited IQ, and has a limited understanding of complex proceedings. It was Dr. Murphy's opinion that the accused would not be able to understand the court proceedings in any depth.

[15] Dr. Murphy indicated that the accused, given her limited IQ, may remain permanently unfit, because an individual's IQ does not change much over time. Although a person's understanding of the legal system can be "tweaked" through education, she thought that the accused, despite environmental supports, may remain permanently unfit. Dr. Murphy was asked why she reached this conclusion when previous treating psychiatrists had previously agreed that the accused was fit to stand trial. Dr. Murphy responded that her assessment was based on the accused's current level of functioning and understanding of matters relating to fitness.

[16] The panel noted that the interview was very short. We put minimum weight on Dr. Murphy's opinion with respect to the assessment of fitness. There was neither

adequate rapport, nor time within that interview for us to rely on its findings of that interview.

[17] At the outset of the hearing the accused was able to communicate to counsel who she wanted present for the hearing. During the hearing she went on to advise her counsel that she no longer wished to have either her mother or her Ministry social worker, Ms. Reid, present. When asked why she made that request, the accused was unable to elaborate. She was clearly handicapped in her ability to explain the nature of the charges she is facing. She was able to explain the role of crown counsel as well as her own counsel. However, she was not able to explain the role of a judge.

[18] V.O.E. wanted the charges dropped because she felt that she was doing better. She also indicated that she wants to stay at Randall House. When questioned by her own counsel, she indicated that she does not think she is fit because "she does not understand what is going on." V.O.E. said that she has too many problems to deal with and, as such, she has a difficulty with understanding things. She does not think that she is ready to deal with her court matters, or that she would understand the happenings of a trial.

[19] In closing, the Director, represented by Ms. LeReverend, recommended that the accused be found unfit to stand trial and that she be placed on a conditional discharge under the direction and supervision of Forensics. This would give the treatment team the time to marshal the resources necessary to provide an appropriate level of care in the community in the future. Ms. LeReverend urged us to rely on the previous assessment of Dr. Constance as he had also concluded that the accused is unfit to stand trial.

[20] Mr. Hillaby, supported the Director's position. Although the accused is intellectually compromised, she has previously been found fit to stand trial. He indicated that the accused’s chaotic environment has negatively affected her fitness. He indicated that in the current circumstances the accused is unfit, and that a further period of stabilization is required.

[21] Ms. Rauch, indicated that she is confident that she can receive instructions from her client, however she indicated that she agreed that the accused is currently unfit to stand trial.

[22] We are required to determine if in our opinion, the accused is presently fit to stand trial. We are guided by the definition in s. 2 of the Criminal Code. Broadly speaking the accused needs to be able to understand the nature and object of the legal

proceedings, the possible consequences, and needs to be able to instruct counsel. Although during the course of the hearing it was clear that the accused was communicating and instructing counsel, the majority of the panel is not satisfied that the accused has an understanding of the nature or object of the proceedings or the consequences of the proceedings. As such, we conclude that the accused is unfit to stand trial.

[23] With respect to disposition, we accept the submissions of all parties that a conditional discharge is appropriate in the current circumstances. We are satisfied that the accused can be safely monitored on a conditional discharge. The conditions of that conditional discharge are as follows:

> 1. THAT she be subject to the joint direction and supervision of the Directors of the Maples Adolescent Treatment Centre ("the Maples") and of Youth Forensic Psychiatric Services ("the Directors");
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> 2. THAT she reside in a supervised place in the Province of British Columbia approved by the Directors and that she comply with the rules of such residence;
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> 3. THAT as required by the Directors, she attend and report to the Youth Forensic Psychiatric Outpatient Clinic nearest her place of residence, or at any other place, for purposes of assessment, counselling, assisting her with regard to any treatment, promoting her reintegration into society, or monitoring her compliance with this order;
>
> 4. THAT she go to and remain at the Maples or the inpatient assessment unit in Burnaby where the Directors are of the opinion the accused's mental condition requires assessment as she may be a danger to herself or others;
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> 5. THAT she not acquire, possess or use any firearm, explosive or offensive weapon;
>
> 6. THAT in accordance with s. 672.5(8) of the Criminal Code, the Review Board determines that the interests of justice require that counsel be assigned to represent the accused at her next hearing;
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> 7. THAT she keep the peace and be of good behaviour; and
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> 8. THAT she present herself before the Review Board when required.

Majority reasons by A. Kang with Dr. Parfitt concurring.

DISSENTING REASONS OF B. WALTER

INTRODUCTION

[24] I have had the opportunity to review the reasons for decision in this matter of the majority panel members, Ms. Kang and Dr. Parfitt. I indicated to my colleagues that I respectfully disagree with the majority opinion that Ms. V.O.E. is currently unfit to stand trial and my reasoning in dissent follows.

VERDICT NUMBER ONE AND DISPOSTION

[25] On August 31, 2005 V.O.E. was charged with mischief by falsely reporting the commission of an offence contrary to s. 140(1)(c) of the Criminal Code. The offence as described involved no violence.

[26] She was assessed with respect to her fitness to stand trial by Dr. Constance. In summary Dr. Constance documented:

- a long history of family difficulties dating from 1995;
- a historic lack of cooperation in terms of interventions and psychological testing by V.O.E.'s mother;
- a school history of illiteracy, oppositional and defiant behaviour, mood swings and violent behaviour including physical and property damage;
- that V.O.E. functions at an IQ level below 55 or at the moderately mentally retarded range; at the cognitive and emotional level of a five- or six-year-old;
- that V.O.E. was not psychotic or mood disordered: Exhibit 1(ii).

[27] As to fitness to stand trial Dr. Constance concluded that V.O.E.'s ability to "meaningfully participate in court proceedings is significantly limited," and that:

> "V has an extremely rudimentary understanding of court proceedings and court personnel. She clearly indicates that she would not be able to meaningfully participate in court proceedings, therefore on the balance of probabilities from a psychiatric perspective she is unfit to stand trial at this time": Exhibit 1(ii), p. 8 (emphasis added).

[28] On the basis of this expert opinion V.O.E. was first found unfit to stand trial on September 21, 2005 and detained at MATC pending disposition by the B.C. Review Board (BCRB): Exhibit 1(iii).

[29] V.O.E. was admitted to Crossroads (MATC) on September 23, 2005. Helpfully this program considers part of its mandate to, in an ongoing way, attend to a youth's legal needs and issues including preparing her for and explaining the court and Review Board processes and ensuring legal representation. In a report prior to V.O.E.'s first BCRB appearance social worker Raderecht comments, *inter alia*, that in discussing her Review Board hearing "V's main concern over the issue of having legal representation has been:

1. that she not have the same lawyer as one of her peers;

2. that the lawyer be female; and

3. that the lawyer visit her and spend time with her": Exhibit 1(iv), p. 3.

[30] By October 17, 2006 Ms. Raderecht reported that:

> "...she demonstrated that she could describe the roles of the lawyer, Crown and judge. V also related the implications of a guilty and not guilty verdict. She also showed that she understood that if she is found fit at the Review Board she might be able to go home": Exhibit I(iv).

[31] Ms. Raderecht however also expressed the following reservations at V.O.E.'s cognition:

> "V's intelligence level is very low. Her language is simplistic and concrete and she rarely indicates any references to time and place. V can write her first and second name but there is no other indication that she can read or write. She cannot recite her home phone number although staff have found that she may be able to dial it on a telephone keypad. She cannot attend to a television program for any length of time. The only sedentary activity that V will participate in is arts and crafts. She enjoys painting, colouring and drawing. She has also met with school teachers on the unit several times and done some work with them. Maples school staff report that she can attend for a maximum of ten minutes at a time. They are in the process of trying to develop a very modified program for V focusing on necessary life skills such as basic word recognition or strategies for keeping track of small amounts of money": Exhibit 1(iv).

[32] In Exhibit 1(v) Dr. Quan confirmed an earlier assessment of December 2004 which placed V.O.E. in the moderate intellectual disability range and also confirmed her progressively worsening behavioural difficulties. She showed no signs of any psychotic or affective disorder. Although V.O.E. initially resisted discussions relating to fitness to stand trial with increasing trust and patient and appropriate persistence by supportive staff she was able to demonstrate a "rudimentary childish understanding of the roles of court personnel and the court process" : Exhibit 1(v), p. 6

[33] In his report Dr. Quan provides a verbatim record of an October 17, 2005 interview relating to the issue of fitness to stand trial. In addition to the simpler aspects of the court process, Dr. Quan concluded that V.O.E. also "seems able to advise her counsel meaningfully," and that thus she appears fit to stand trial.

[34] V.O.E. appeared before the BCRB on October 24, 2005. The panel reviewed the evidence, including that of the accused, in great detail. In analyzing the evidence it properly characterized the matter of fitness to stand trial as a legal concept and

elaborated on the key aspects of the definition found in s. 2 of the Criminal Code: Exhibit 1(vi), para. 20.

[35] The Board concluded:

> "after considering the disposition information, evidence at the hearing and submissions that the accused does have the capacity to understand the nature of the proceedings she will be facing. She has said that she understands the possible consequences and although she takes a more serious view of what might happen to her than is likely to be the case, nevertheless she understands that consequences may flow from the process. We had the opportunity in the hearing today to observe her over the course of several hours. We were impressed by her ability to persevere through the process. After an initial setback she was able to speak in a clear voice and her answers were responsive for the most part to the questions asked and they were given in a relatively timely fashion. There were very few pauses where she seemed in any way befuddled. Consequently we are of the view that the accused is able to conduct a defence or instruct counsel to do so and we have found her fit to stand trial": Exhibit 1(vi) para. 21.

[36] As an expert tribunal it is of course trite to observe that the Review Board is entitled to considerable deference on this matter.

VERDICT NUMBER TWO AND DISPOSITION

[37] It is unclear from the disposition material what transpired once V.O.E. was returned to court in accordance with the Review Board's order, Exhibit . It would appear that the court ordered a further bail assessment relating to two charges of assault and uttering threats. Dr. Janke provided an assessment found at Exhibit 2(iii). On the basis of historic assessments and his own interviews with V.O.E. Dr. Janke concluded, *inter alia*:

> "It is my opinion that Ms. E's cognitive abilities fall far below those necessary to be fit to stand trial. I am aware that she has previously been at Crossroads and was trained to provide appropriate answers to questions with respect to fitness. As is clear from my current assessment of her this is information that does not form any permanent part of Ms. E's knowledge and did not lead to any understanding of what is necessary for a person to participate in the court process. It is my opinion that Ms. E is unfit to stand trial. She may be trained to provide appropriate responses but I do not believe that would constitute a true understanding of her situation and would not provide her with the ability to participate in an appropriate fashion in court proceedings": Exhibit 2(iii), p. 4.

[38] In April 2006 V.O.E. was further charged with two counts of assault of a peace officer (s. 270(2) Criminal Code); and making a false report (mischief, s. 140(1)(c) Criminal Code).

[39] Dr. Riar provided a further court ordered assessment at Exhibit 2(iv). He again found V.O.E. possessed of a rudimentary understanding leading him to opine;

> "In conclusion, although V shows some limited understanding about the court's proceedings, to my understanding they are very rudimentary and in my view the court should consider finding her unfit to stand trial and her further disposition should be referred to the Review Board of B.C. I tend to believe that V's intellectual capabilities are so limited that again she can be coached to say certain things but it will be very difficult for her to grasp the concepts to become fit to stand trial in the near future": Exhibit 2(iv), p. 3

[40] For some reason additional charges, which also proceeded in April of 2006, were apparently processed separately, including mischief, breach and assault peace officer. A further fitness assessment was performed by Dr. Stefanelli: Exhibit 2(v). Again, this assessor felt strongly that V.O.E. was "unable to understand either the nature or the object of the court proceedings and she clearly does not understand the possible consequences of a conviction": Exhibit 2(v), p. 5.

[41] On June 20, 2006 V.O.E. received a second verdict of unfit to stand trial and was released on an undertaking pending further appearance before the BCRB: Exhibit 2(vi). Once again she was admitted to and cared for at the Crossroads unit (MATC). On interviews for the specific purpose Dr. Quan was of the impression that V.O.E. was "marginally" fit to stand trial with a:

> "concrete, rudimentary pragmatic understanding... ": Exhibit 2(viii), p. 5

[42] V.O.E. again appeared before the BCRB on July 31, 2006. Once again it was the opinion of the tribunal:

> ”We were satisfied that Ms. V.O.E. was at the time of the hearing fit to stand trial. Our opinion was based in part on the documentary evidence but we gave greater weight to the testimony received at the hearing and our observations of Ms. V.O.E.. The capacity required of Ms. V.O.E. to communicate with her counsel is to be measured to some extent by the nature of the alleged offences. They are not complex from a factual or legal point of view. Ms. V.O.E. showed she can instruct counsel. She has been able to supply information relevant to the index offences to her counsel. In short, in our opinion she could participate in her court proceedings in a meaningful way": Exhibit 2(x), para. 22.

<u>CURRENT VERDICT</u>

[43] The charges underlying V.O.E.'s current verdict are described at . Dr. Stefanelli again opined that she was unfit to stand trial: Exhibit 19, p. 5. V.O.E.'s counsel sought an independent assessment from Dr. Koopman, a

psychologist. She highlighted that gaining this accused's trust over time would comprise an essential aspect of any treatment program for her. Dr. Koopman opined that her clearly rudimentary understanding of court processes "fluctuates" and that V.O.E. "may be able to instruct counsel specifically to something that has just happened"...but..."she would likely be unable to understand the implications of that instruction," and that therefore V.O.E. was unfit to stand trial.

[44] On March 16, 2007 V.O.E. received her current verdict of unfit to stand trial (Exhibit 26) and was again released UTA.

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[45] For her first hearing following her most recent verdict Dr. Murphy provided an assessment on behalf of Youth Forensic Psychiatric Services, the outpatient component of B.C.'s forensic organization for young persons.

[46] For her assessment Dr. Murphy consulted and reviewed the array of previous assessments that had been prepared with respect to this youth which have been referenced above: Exhibit 29. Of note, she does not cite Dr. Quan's previous inpatient assessments which arguably contain far more functional detail than was elicited by the cited court order assessments.

[47] It was Dr. Murphy's evidence that on April 10, 2007 V.O.E. would only remain in an interview for 15 minutes. V.O.E. did not engage in any meaningful discussion with respect to the issues of fitness. She declined to answer most questions. The interchange could not be characterized as anything amounting to a structured forensic fitness interview. She engaged in stalling or deflective manoeuvres. It is clear that no rapport was established.

[48] Largely, then, on the basis of the past assessments reviewed Dr. Murphy opined that the accused is not only unfit to stand trial but indeed that she is likely permanently so as her intelligent level is not expected to change or improve over time. Dr. Murphy's evidence on the central issue before the Board was somewhat resigned. She acknowledged that she considered fitness to stand trial as a somewhat artificial concept or construct. I observed that both before and during Dr. Murphy's evidence V.O.E. appeared quite able to instruct her counsel with respect to whom she wished excluded from the hearing room. She also appeared

to understand the evidence she was hearing and responded thereto by providing comments to her counsel.

[49] Dr. Murphy's evidence in this matter consisting of a 15-minute off-topic exchange cannot in all fairness be accorded any weight whatsoever on the current matter of fitness to stand trial. Clearly, according to her own evidence, V.O.E. did not think that under her current unsettled circumstances she was ready to deal with her court proceedings.

DISCUSSION

[50] The present case is a further illustration of the unfortunately varying or inconsistent understandings about the notion of fitness to stand trial as amongst legal decision-makers and clinical assessors. *R. v Taylor,* (1992) 11 O.R. (3d) 323(CA), is frequently cited as most aptly descriptive of the test of fitness to stand trial. The court appreciated that the proper interpretation of s. 2 of the Criminal Code must incorporate an understanding of the fundamental purpose of the concept in criminal law that the test of fitness to stand trial is rooted in the notion that it is unfair to subject a person to a trial while that person's mental disorder prevents any basic understanding about the proceedings, the consequences or their ability to instruct counsel: *R. v. Whittle*, [1994] 2 SCR 914.

[51] The fitness test considers primarily capacity. Where baseline capacity exists other interests prevail including the accused's interest in a timely and final resolution of criminal charges. The fitness test as a snapshot "of capacity" in time is also quite distinct from the s. 16 test of mental disorder required to underpin a verdict of NCRMD. The prefatory words of s. 2 "unable on account of mental disorder..." do not equate with "unable under any circumstances" so as to exclude the provision of available learning assistance or supports including reasonable accommodation by the court in the conduct of the trial including opportunities to break up the proceedings and confer with counsel. Further, "unable" is not absolute but relative: context is important and relevant including the nature, circumstances and complexity of the charges.

[52] It is not required in order to be considered fit to stand trial that the accused possess sophisticated abstract analytical skills or even to act in his or her own best interests. I also take into account that counsel's opinions in terms of the

accused's ability to instruct are entitled to be considered: *R. v Steele*, [1991] 63 CCC (3d) 149.

[53] V.O.E. has in the recent past, and admittedly with extra effort and supports, been able to discharge the requirements of s. 2(a) and (b) of the Criminal Code; that is to communicate an understanding of the nature, object and possible consequences of proceedings against her. Her inadequate responses may mean that she is confused by her current circumstances (which are indeed confusing) and that she requires further supportive coaching such as she received at Crossroads. Present knowledge is not dispositive of the matter. Witnesses are frequently instructed prior to giving evidence.

[54] As to the criterion of inability to communicate with counsel under clause (c) of s. 2, this test is purely one of capacity...Taylor(supra). In the current case, as I have already observed and although the proceedings never reached the point of a discussion respecting the charges, V.O.E. appeared to have no difficulty in communicating her wishes to counsel or counsel in receiving them. It is my impression that V.O.E.'s behaviour, including her desire to truncate the hearing, had more to do with her wilful volition and her emotional state than with lack of capacity. Her demeanour was coherent and rational given her circumstances. I would, as those who have been in the best position to observe the accused longitudinally have in the past concluded, have found the accused marginally fit to stand trial. Editorially, I would also observe that this accused appears to have functioned better in the past under the caring, youth appropriate regime and structure provided by the Crossroads program.

Dissenting reasons by B. Walter

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